The Nepali Security Sector:

An Almanac

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Preface

In May 2009, a platform of five like-minded states (Denmark, Finland, Norway, Switzerland and the UK) requested that the Geneva Centre for the Democratic Control of Armed Forces (DCAF), with the Nepal Peace Campaign (NPC) as its local partner, embarked on a comprehensive parliamentary capacity building programme which has the objective of assisting the Constituent Assembly and the Parliament of the Federal Republic of Nepal in their efforts to create a democratic republican constitution, to endow Nepal with the tools and instruments of an effective and efficient democratic parliament, and to create a sound basis for inter-parliamentary discourse with other democratic parliaments. Thus the programme supports both the peace process, the early steps towards a comprehensive parliamentary role in oversight issues, and stakeholder engagement with the security sector of Nepal.

At the beginning of a democratic transition process it may be best to inventorise what already exists. Non-democratic societies as a rule are not much interested in *transparency*. Thus the laws and policies regulating the security sector – if they exist – may not be universally known and accessible, and the same or similar may hold true for the rules of engagement for parliament and parliamentary committees with the security sector. The DCAF-NPC project thus not only comprises a comprehensive cooperation programme with parliament and the security sector, but also allows for the compilation and publication of highly pertinent documentations which will facilitate the work of policymakers and lawmakers in the near future.

These documentations are:

(1) a comprehensive collection of all security-sector relevant legislation in Nepali and English
(2) commentaries to the existing legislation by Nepali and international experts
(3) the first edition of an Almanac – initiated and edited by civilian experts - on the structure and orientation of the security sector in Nepal, again published in the English and Nepali, thus to contribute to transparency in the security sector, and greater civilian involvement in the analysis and documentation of security sector institutions and processes.

The two project partner organisations are delighted to present herewith as a second volume in the series the Almanac on security sector relevant institutions and processes of the Federal Republic of Nepal. We are proud to have found in Mr. Bishnu Sapkota a most diligent and capable editor who also most successfully

oversaw the work of the translators. Mr. Sapkota was fully aware of the challenges of the work he was going to undertake and mastered them with great skill and diligence.

Kathmandu and Geneva, Dashain 2009

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I. Introduction

Background and Summary

Bishnu Sapkota

The Nepali state has followed a tumultuous historical course in the last two decades. Opened with the People's Movement in 1990 that ended the 30-year autocratic Panchayat regime under the direct leadership of the monarchy and established a parliamentary democracy with a constitutional monarchy, the political course saw the biggest ever political change in 2008 – the election of the Constituent Assembly and the abolition of the monarchy. The peace process that started in 2006 brought an end to the 10 year old Maoist insurgency and the Constituent Assembly is now in the process of writing a new constitution that is expected to give the country a stable and prosperous democracy. While the political transformations in the process has shown signs of promise for state restructuring and stability, the floodgates it has opened have also created numerous new challenges that the country's leadership has had to handle with farsightedness and wisdom.

There still are certain key issues where the political consensus is yet to be built such as: what form of state administration (presidential, prime ministerial?) should Nepal have? What should the basis for division of the federal units be? Which form of electoral system should be adopted? While it is expected the Constituent Assembly will work on these issues and reach to a workable consensus by the May 28 deadline of 2010 for the promulgation of the new constitution, the subject of security sector reform is a cross-cutting and underlying theme deeply entrenched with the subjects of state restructuring, democratic stability and political processes. The objective of The Almanac on the Nepalese Security Sector is to contribute to the discourse on security sector reform that will have a far-reaching impact on Nepal's state restructuring and democratic process.

The political changes that have been taking place in Nepal have been extremely far-reaching. In a sense, the underlying motive of the changes is still to leave the old Nepal behind and enter a new era of nation building where everything has to be re-thought out, re-planned and re-implemented. This is the time that the country requires highest degree of imagination, creativity, courage and vision.

The Almanac brings together as authors a group of senior politicians across the major political parties, academics, journalists, human rights defenders and lawyers who have been speaking about, writing on and engaged in policy making in the area of security sector reform. The authors are not only contributors to the book but also are people who will continue to lead the discourse on the area and play a key role in policy making and decisions as the country progresses towards stability. The contributors from the political side are responsible and influential leaders within their respective parties, the journalists are chief editors of the major newspapers and

newsmagazines, the academics and human rights defenders are well-respected individuals who have been long-engaged in generating ideas in related areas and who will continue to influence the debate in one way or another. In this sense, the Almanac is a happy collection of authors representing the important spectrum of politics, civil society, academics and media.

The Almanac expects to contain all basic information about the security sector reform in Nepal, debates and controversies on certain sensitive issues, and an analysis and recommendation about what should be adopted by the state as long term security policies. The book expects to be a central reference material for the Constituent Assembly, Government and its agencies, political parties and policy makers as they work on the security sector reform in the coming years.

The objective of the book is to contribute to the security sector reform process by bringing together information, data and analysis that is required on all related areas like the military, police, intelligence and the overall role of government as the executive. It brings together perspectives not only from major political parties but also from the media, human rights and constitutional/legal areas. Every chapter of the respective area briefly dwells on the historical context, analysis of the current status and ways ahead, and every chapter attempts at providing all necessary basic information so that the concerned can easily refer to one book for information- the Almanac- while working on the important and sensitive area of the security sector.

As the Editor of the Almanac, I have had an enriching experience while working for the book. While it was not easy to bring together the senior politicians, constitutional/legal experts, academics, human rights defenders and journalists to contribute a chapter each on their assigned topic, the continued engagement with them in course of the challenging process of getting them all together finally was a reward on its own and a privilege. One saddest experience meanwhile was the sudden and untimely death of one of the contributors of the book Prof. S Habibullah after he completed his assignment and I would like to express heartfelt condolences to his family. I would like to thank all the authors for their invaluable contributions and the cooperation during the writing of the book. I express my gratitude to the Geneva Center for Democratic Control of Armed Forces (DCAF) and Kathmandu-based National Peace Campaign (NPC) for their cooperation and support while working as the Editor for the Almanac.

Now that we have the representative views, analyses and insights from the different quarters and sections that matter most while working on the security sector reform, the Almanac can be a significant starting and reference point for further discussions and debates on the area. I believe this publication will mark a crucial beginning for a holistic approach to security sector reform as the country continues to transition towards a stable and prosperous democracy.

Democratising the Security Sector in Nepal: Lessons Learned and Challenges Ahead

Shiva Hari Dahal

I. Introduction

Emerging democracies usually face a great dilemma while dealing with the matters of security in terms of their handling, management and oversight in accordance with the democratic norms, values and practices. The dilemma is even more acute in the society which is emerging from violence and transforming towards a peaceful democratic politics. This Chapter attempts to explore some of the ingredients of these dilemmas surrounding the question of handling of security sectors in the negotiation process in the context of Nepal, a country which is in transition from the history of violence to the process of democratisation. The Chapter also attempts to highlight the importance of security sector transformation (SST) as an inseparable agenda of democratisation, peace-building, institutional reform as well as a process of (re)gaining legitimacy, which is required for the political leaderships to remain in power.

The terms reform, restructuring, democratisation or management of security sectors are often used in the political discourses of Nepal, but they are unfortunately considered as politically biased concepts in their applied meanings. Therefore, I prefer the British term Security Sector Transformation (SST), which gives a similar meaning to security sector reform and is an emerging discipline in the domestic and international politics, but that has yet to define its primary goal – whether its efforts are targeted towards development or democracy and the SST discourse has yet to overcome the tension between the traditional paradigms of developments and democracy (Knight, 2009). Nevertheless, the process of democratisation is a pre-condition for reform and the lack of reform or transformation of the security sectors poses a greater challenge to the tasks of building democracy, peace and ensuring sustainable development (Bryden & Hanggi, 2005). The process of security sector transformation also focuses on delivery of justice and guaranteeing security to the people – in other words, this indicates the deeper notion of security that goes beyond the scope of State's security and is looked at as inseparable part of evolving agendas of human security (Hanggi, 2005). The process focuses on the efforts of democratising the activities of the security providers, civilian control and democratic oversight of them and emphasizes on the state's effectiveness in service delivery to its citizens. There exists a direct linkage between the process of security sector transformation and democratisation, in which protection and promotion of human rights is essential to attain the goal of democratic peace.

The traditional notion of security focuses on the relationship between the structures of the state and society. However, the emerging concept of security focuses on and

incorporates the perspective of social contract between the state and its citizens (Knight, 2009). It further focuses on the need to shift priority towards the relationships between the state and its citizens. The social contract means a framework to understand the relationships between the state and its citizens, and through this framework, citizens transfer their consent to and legitimize the state to govern them. The principles of social contracts are generally reflected in the constitution and governing laws. These principles have yet to be established in the context of Nepal, which is in the process of making a new constitution through the elected Constituent Assembly. In a democratic society, the legitimacy of the state and the power it exercises over the citizens are derived through democratic means and built upon the foundations of moral, social and political authority (Coicaud & Curtis, 2002). This hypothesis can be applied to the argument that democratic principles are inherent in the present discourse of SST, which brings the individual to the center of security paradigms and reflects human security as one of the fundamental goals of the transformation process. This Chapter explores the attempts made so far for security sector reform in the present context of Nepal and the concept of transformation is relatively new in the Nepalese academic and political arenas.

II. The Context

Nepal's political history is unique in the sense that the democratic and communist parties -- like Nepali Congress, Communist Party of Nepal (Unified Marxist Leninist) and Unified Communist Party of Nepal (Maoists) – have collaborated and forged alliance in the course of democratic movements. The joint collaboration and appeal made by these two juxtaposed political forces successfully led the people's movement in 1990 that overthrew King's party-less Panchayat system and re-established democracy in the country. The political reality in Nepal is also unique in the sense that it challenges the liberal theorists of international relations, who argue that the communist forces need to be marginalized in order to ensure democratic development in any country. Contrary to this hypothesis, an interim government was formed in Nepal in 1990, representing the members of both communist parties and the Nepali Congress, with the mandate of drafting a new constitution and holding elections to the parliament based on the principles of multi-party system. Thus, the role of communist forces has remained crucial in establishing democracy in the country. A new constitution was drafted by a Constitutional Commission in 1990 and promulgated within a year, despite numerous hindrances posed by the royal palace.

Democratic theorists suggest that presence of strong political institutions is required pre-condition for successful democratic transition (Bastian & Luckham, 2003; Dahl, 1998; Huntington, 2006; Mansfield & Snyder, 2005). Absence of national political institutions in an emerging democracy or when they are weak, the likelihood of state to go to war or violent conflict is higher (Mansfield & Snyder, 2005). This is true in the context of Nepal, since the country plunged into a violent conflict since February 1996, although the democratic system was re-established in 1990. The violence erupted because the process of democratisation

in Nepal has become a tragic failure, and the difficulties in the process have sprung from both historical and institutional factors (Ganguly & Shoup, 2005). Historically, the betrayal by the monarchy to abide by the agreements reached in 1950s blocked the process of democratisation, and had remained as a source of continued national strife and political uncertainties. Concerning institutional factors, the succeeding governments after 1990 miserably failed to bring changes in the security, bureaucratic and justice-delivery institutions. These factors have prevented popular participation in the nation-building process, reduced political competition and resulted into the inability of the state actors to address the increasing demands of the social forces.

When democratic transition is incomplete and political institutions are weak, the state increasingly fails to manage the rising power of the mass population (Migdal, 2001). In the context of Nepal, the ruling elites concentrated more on personal interests and engaged in power politics for their political survival (Pokhrel, Gautam, & Sharma, 2006). Rather than concentrating in building national institutions, including their own political parties required for democratic development, the ruling elites spent significant time in designing strategies to stay in power by any means. The ruling elites continued their historic competition over power; democracy was largely confined to the ritual of voting; and frequent changing of Prime Ministers demonstrate the example of feudal rivalry in the Nepalese politics that overrides the democratic politics in practices (Loocke & Philipson, 2002). The process of democratisation has remained incomplete in Nepal despite establishment of democratic governance. The political institutions established to guarantee basic rights and fundamental freedoms were paralyzed and increasingly politicized in Nepal. The impact was significantly visible in the judiciary, which increasingly failed to ensure that justice is delivered on time. After all, the substance of liberal democracy depends on the rule of law that was unfortunately diminished due to the deterioration in the court and police systems in the country (Uphoff, 2005).

Currently, the elected Constituent Assembly is drafting a new constitution in Nepal. Drafting a new constitution through a Constituent Assembly is regarded as process-oriented, which engages wider population and establishes people's ownership in the constitution. The process is considered as a means of power transfer from monarchy to the civilian authority represented in the parliament (Acharya, 2006). Tragically, the demand of Constituent Assembly had remained as an unfinished agenda in the political history of Nepal for the last six decades. Failure of the monarchy to abide by the promises and agreement reached in 1950 to hold election to Constituent Assembly has been one of the fundamental factors of the Maoists' armed uprising since February 1996. Following the King's royal-military coup in February 2005, the political parties of Nepal and the Communist Party of Nepal (Maoists) signed a 12-point Understanding in November 2006 that sparked the People's Movement II, which forced the King to step down in May 2007. The outcomes of the People's Movement II are reflected in the Comprehensive Peace Agreement (CPA), which formally suspended the armed conflict in Nepal and has opened the door for peace-building. The ruling elites in Kathmandu rhetorically use the word peace or peace-building;

however, a clear understanding or definition of peace-building is apparently lacking in their discourses.

III. Peace-Building

Peace-building, since its articulation by UN General Secretary Boutros Boutros-Ghali (1992) in his *An Agenda for Peace* in 1992, has drawn a wider range of attention in the international arenas and academic fields, and generated a number of tasks to be undertaken by national and international organizations. Boutros-Ghali's *An Agenda for Peace* is primarily concerned with the tasks to be undertaken and needs to be addressed once the wars or violent conflicts are over. Under this concept, peace-building is the task of taking care of post-war needs, which Cousens (2001, pp. 6-7) defines as a "deductive approach" to peace-building. This approach does not make any consideration to the peace-building works that may take place before a peace agreement is signed or in the lack of a formal peace process. However, the *Supplement to An Agenda for Peace* (1995) further expands the definition of peace incorporating the issues to be addressed before, during and after conflicts[1]. The concept of peace-building is further refined by Lederach's (1997, p. 20) and his definition of peace-building is more comprehensive, which articulates a wide range of activities to be undertaken before or after peace agreements are signed, and that "encompasses, generates, and sustains the full array of process, approaches and stages needed to transform conflict toward more sustainable, peaceful relationships."

Security institutions are political structures by definition, and they require restructuring in the context of Nepal as the country is in the processes of peace-building and federalisation. These institutions need to be redesigned so that they suit the new would-be federal structure of the country as well as to address the concerns for inclusion as raised by many identity groups in the country. Lederach (1997) emphasizes the importance to redesign political institutions as integral part of peace-building, which may require time of over 20 years. Effective political restructuring of the State as the process of post-conflict peace-building strategy can address the grievances of the parties in conflict as well as be a framework for preventing violence in the future (Bastian & Luckham, 2003). In addition, peace-building processes have to have a defined objective so that it can attain the goal of democracy building. The objectives, in the context of Nepal, have to be democratic peace, justice and equity and the country needs to develop effective state mechanisms to attain these objectives. The new mechanisms are expected to address the grievances of the people in general; the aspirations of the victims in the immediate, and can peacefully settle any political or social conflict that may arise in the future.

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[1] United Nations General Assembly, *Supplement to An Agenda for Peace*, Position Paper of the Secretary General on the Occasion of the Fiftieth Anniversary of the United Nations, UN Doc. A/50/60-S/1995/1 (3 January 1995).

The process of security sector transformation must deal with the legacies of violence (Bryden & Hanggi, 2005), including delivery of justice to the victims as a vital component of peace-building, is required for rebuilding fractured relationships, and the plight for justice needs to be looked at as an integral part of the initiatives on security sectors transformation. This is the process of reconciliation, which is critical to unite people in the deeply divided societies (Lederach, 1997). The process of reconciliation also ensures the transformation of protagonists' enemy images, which is a common phenomenon in a war-torn society, towards the realisation of need for co-existence. However, the process of reconciliation cannot be complete in the lack of justice to the victims of armed conflict. The armed forces in Nepal have committed a number of atrocities and human rights crimes against the civilians during the armed conflict, including the Nepal Government's attempt to suppress peaceful demonstration during the peaceful uprisings in the Tarai in the recent years. The perpetrators of human rights violation must be brought to trial in the competent court, preferably through commissioning a special court so that there can be independent, speedy and neutral proceedings over the cases. The process ensures justice to the victims on the one hand, while on the other, it ensures accountability of armed forces to the democratic values and principles of human rights. Once the armed forces are accountable to democratic system and human rights, scholars and practitioners generally assume that they may refrain from committing violence in the future.

A nation-state in transition from violence to democracy and peace has many challenging tasks to deal with. The issue of internal security is one of the challenging tasks in the post-conflict settings and attention has to be paid in establishing an effective and independent police force. It is the civilian police force that takes the charge of security in the transitional phase, but creating a neutral and credible police force is a challenging task (Kumar, 2001). In addition to civilian police forces, the policy makers need to pay attention to restructures a wide range of security providers, whose role is vital to ensure justice and security to the people. In the following section, I discuss the existing security structures or security providers in Nepal. Generally, the people of Nepal discuss about the Nepal Army, Nepal Police and the Armed Police Force as the main security providers. However, there are a number of institutions and structures providing direct or indirect security, which were established in the past. But, these security structures need reform to address people's concerns for inclusion, justice and security as well as to cope with the new unfolding political dynamics in the future.

IV. The Security Sectors

The broader definition of security sectors has yet to be introduced in the political discourse of Nepal. Generally it is understood that the security sectors mean the Nepal Army, Nepal Police and the Armed Police Force. Although reference is made to the National Intelligence Service, the importance of this institution is very minimal in the political circle. Hesitations to accept the CPN (Maoists)'s People's Liberation Army, private security companies and

different armed groups operation in the Tarai, mid-West and Eastern Hills as security providers are visible in the political discourses. These institutions, which were not considered as legitimate institutions by the ruling political leaderships in the different time phases, claim and assert themselves as security providers to the people. Certainly, the definition of security sectors goes beyond the general understanding of the political leaderships, the government, academics and concerned institutions and individuals in Nepal. Therefore, this Almanac attempts to highlight a wide range of institutions under the purview of security sectors' definition so that the policy makers in the country will pay substantial attention for the democratic control and mobilisation of the armed forces and security institutions.

I have discussed the concept of peace-building in the above sections. Peace-building, by definition, engages in transformation of a wider range of institutions, in addition to re-building broken relationships between the individuals. Security providing institutions are one of those political and bureaucratic systems established during the time of absolute monarchy in the history of Nepal or during the time of armed conflict. As examples from the countries hit by violence around the world suggest, the security providing institutions are heavily politicized during the armed conflict. These institutions are or need to be part of state's jurisdiction, which requires transformation and need to be considered as part of peace-building process so that the reformed political institutions are capable of sustaining democratic change in the country. The process of restructuring the security institutions has, indeed, begun in the context of Nepal. The political leaderships have signed many peace agreements and understanding that discuss the need and importance of transforming these institutions. In particular, the process has begun after the signing of Comprehensive Peace Agreement (CPA), promulgation of the Interim Constitution 2006 and the elections to the Constitution Assembly. Below, I have cited the relevant provisions from the peace agreements:

The Comprehensive Peace Agreement (CPA)[2]*:*

4.4. The Interim Cabinet shall constitute a Special Committee to carry out monitoring, adjustment and rehabilitation of the Maoist combatants.

4.7. The Council of Ministers shall control, mobilize and manage the Nepali Army in accordance with the new Military Act. The Interim Council of Ministers shall prepare and implement the detailed action plan for the democratisation of the Nepali Army on the basis of political consensus and the suggestions of the committee concerned of the Interim Legislature. This includes, among other things, right-sizing, democratic restructuring

[2] Translation available at: http://www.unmin.org.np/downloads/keydocs/2006-11-29-peace_accord-MOFA.pdf

reflecting the national and inclusive character and imparting training to the Nepali Army on the values of democracy and human rights.

4.8. Such functions as border security and security of the conservation areas, National Parks, banks, airports, powerhouses, telephone towers, central secretariat and the distinguished personalities hitherto being carried out by the Nepali Army shall continue.

The Interim Constitution, 2065/2006[3]*:*

144 (3). The President shall on the recommendation of the Council of Ministers, control, mobilize and manage the Nepal Army in accordance with the law. The Council of Ministers shall, with the consent of the political parties and by seeking the advice of the concerned committee of the Legislature-Parliament, formulate an extensive work plan for the democratisation of the Nepal Army and implement it[4].

144 (4). In the case of formulating and implementing the action plan pursuant to clause (3), determination of the appropriate number of the Nepal Army, its democratic structure and national and inclusive character shall be developed, and training shall be imparted to the army in accordance with the norms and values of democracy and human rights.

144 (4A). In order to make the Nepal Army national in character, the entry of citizens, including Madhesis, indigenous nationalities, Dalits, women and those from marginalized areas, shall be ensured through legal provisions on the principles of equality and inclusiveness[5].

146. Transitional provision for the combatants: The Council of Ministers shall form a special committee by the Council of Ministers representing all the major political parties in the Constituent Assembly to supervise, integrate and rehabilitate the combatants of the Maoist Army, and the functions, duties and powers of the committee shall be as determined by the Council of Ministers[6].

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3 Translation available at: http://www.unmin.org.np/downloads/keydocs/Interim.Constitution.Bilingual.UNDP.pdf

4 Translation of amendments available at: http://www.unmin.org.np/downloads/keydocs/2008-05-28-Interim.Constitution.Fourth.Amendment.ENG.pdf

5 Translation of amendments available at: http://www.unmin.org.np/downloads/keydocs/2008-07-15-Interim.Constitution.Fifth.Amendment.ENG.pdf

6 Translation of amendments available at: http://www.unmin.org.np/downloads/keydocs/2008-07-15-Interim.Constitution.Fifth.Amendment.ENG.pdf

The 8-Point Agreement with the United Democratic Madhesi Front:

5. Proportional, inclusive and group entry [*tr.* entry in the army as a group] of Madhesis and other communities shall be ensured in order to give the Nepal Army a national and inclusive character[7].

The above provisions in the various peace agreements have laid principles for change and recognized the need for institutional reform in the security sectors. However, even the principle foundations are limited to integration of armies and making the Nepal Army more inclusive. There is even greater need to acknowledging wider range of security providers in the country and understanding the need for their reform in the context of changed political system after the abolition of monarchy through voting by the first sitting of the Constitution Assembly. Despite laying foundation for structural reform of the security institutions through signing various peace agreements, the process of transformation lack detailed modalities for reform on the one hand, while on the other, the political leadership in the country do lack understanding over the importance of interactions between structures and agencies. Also, the terms used in the peace agreements are so vague that any reader can interpret the terms differently in order to match his/her vested interests. This is the political reality of today's Nepal and the political actors have diverse opinions on the security terms used in the various peace documents, which they have signed in the process of negotiations. However, in order to implement the peace agreements to ensure transformation or restructuring of the security providing institutions is only possible through a subtle interaction between the structures and agencies. Therefore, I refer to Gidden's (1986) Structuration Theory which explains and integrates structure and agency.

Gidden discusses that structures and agencies are not two separate constructs or concepts; rather they can be considered social action, which can be looked through from two different ways. Gidden's definition of structuration states that "the structuring of social relations across time and space, in virtue of the duality of structure" (Giddens, 1986, p. 376). The duality of structure means that structures are made of actors within it who perform social interactions and that process of interaction produce and reproduce social relationships, rules and resources. In the other sides, the very nature of social actions produces those structures. Structures, for Gidden, are set of transformative relations made through rules and resources, which are organized under social system, whereas Gidden's refers to agency as human action within the structures. In reference to Gidden's Structuration Theory, I briefly discuss in the following section exploring how the structures and agencies have interacted in the process of democratisation in Nepal and I suggest agendas for further negotiation for developing modalities of restructuring security institutions.

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[7] Translation available at: http://www.unmin.org.np/downloads/keydocs/2008-02-28-Agreement.SPA.Govt.UDMF.ENG.pdf

V. Bridging The Gap in Structural Reform

In the context of Nepal, the political actors have yet to acknowledge different types of security providers, understand the way they function, internalize their strength and weakness, and explore if new institutions are needed to balance the internal and external threats to the country. Nevertheless, there are existing structures, for example, the judiciary, military, police, the government, office of the President, political parties and so on. Also, there are human actors as 'agency' who lead or operate these institutions and formulate policies accordingly. However, what are lacking are the rules, laws and guiding principles that facilitate the subtle interactions between these structures and human agencies. No doubt, a constitution is the main law that ensures a framework for interactions between the state and society, and between the structures and agency. However, the constitution is in the process of making and the whole Nepalese society is in the course of redefining social contracts between the state and society. In the transitional phase, it is the peace agreement that fills the gap to mediate interactions between the agency (political actors) and structures (security sectors), which should lay down principles of civilian control over the armed forces, to be reflected in the new constitution and laws in the future.

Certainly, the armed forces are main institutions to provide security to the State and its citizens. Therefore, scholars of democracy have highlighted the need for bringing the armed forces under democratic control, through laws and practices, in order to ensure sustainability of democracy over the time. Dahl (1998), a renowned political scientist, suggests that security forces in the countries in transition to democracies have to be brought under civilian control for the sustainability of multi-party democracy. However, the ruling elites in Nepal after 1990 did not feel any necessity to bring the then Royal Nepal Army and other security mechanisms under civilian control. If the elected government had designed and implemented a plan for security sector reform, particularly focusing on the army, the traditional power of the monarchy would have been curtailed. As a result of the failure of the ruling elites to democratically control the armed forces, Pokhrel et al. (2006) argue that the Royal Nepal Army remained loyal to the King throughout the history, but not to the elected governments. Therefore, the structures of the Nepal Army needs to be restructured by bringing it into the control of civilian authority (Bhattarai, 1998). Equally important is the need for bringing the UCPN (Maoists)'s PLA under the democratic control, which should abide by the State's laws and regulations, once integration task is complete. The process of bringing the PLA under control has begun as agreed upon provisions in the Comprehensive Peace Agreement (CPA) and the Interim Constitution. As per the provision in the Interim Constitution, a Special Political Committee on Army Integration is formed and the Committee is working to complete the task of integration and rehabilitation.

The process of security sectors reform is meant to create democratic and inclusive political structures. Democratic political institutions ensure space and avenues for the social forces to discuss and negotiate agendas through dialogue, and to renegotiate social contract between people and state through peaceful means (Kahl, 2006). Transformation of

security sectors is a means of creating democratic institutions and is a part of larger peace process. It is a step-by-step process, controlled by civilians and locally owned, and the framework for which is normally defined by a cease-fire agreement. In addition, the process requires a holistic approach that involves military and technical aspects (leading from cease-fire agreement to the discharge of combatants), security (arms control and reduction of threats from the combatants), humanitarian (ensure livelihood and well-being of the former combatants) and socio-economic (cutting of the links of war economy and linking income generation schemes to the ex-combatants) aspects (Salomons, 2005). However, the peace agreements in Nepal neither have provisions for detailed strategies to guide the process of structural reform of the security sectors nor for integration of armies. Probably, the plan for security sectors transformation in Nepal requires a separate agreement, as an extension to the Comprehensive Peace Agreement (CPA), which details who will do what, how and when.

National security strategy, cease-fire agreement and/or comprehensive peace agreements are the prerequisites for a successful transformation process, which determines the role of armed forces, and time, phase and level of structural changes. The prerequisites are in place in Nepal, except the national security strategy. The parties have signed the Comprehensive Peace Agreement and promulgated the Interim Constitution; however the modalities of arms management and integration of armies are not sufficiently elaborated. In addition, the peace agreements do not envision importance for transformation of wider security structures. Therefore, a supplementary and detailed agreement on the issues of structural transformation of security providing institutions is necessary.

The supplementary agreement can define the concept of security, and its structures; negotiate what kind of national security policy or strategy the country may require, and lay down the strategy for restructuring the relevant institutions. The national security policy will have to define what kind of security forces, in terms of their size and relevancy, the country may require to deal with the internal and external threats. The supplementary agreement can also negotiate the agendas of integrating the armies as well as addressing the demands for inclusion in the security institutions. In essence, a supplementary agreement for security sectors transformation bridges the gap between the structures and agencies, since it offers a framework for interactions between the actors and systematically reflects negotiated security agendas. The parties in negotiation can include many actors including identity groups in Nepal, which have voiced the need for inclusion in the process of negotiation and nation-building as well as have desired for their representation in the state's institutions. The concerns of identity groups for inclusion and representations, if addressed well by the political leaderships, can further enhance legitimacy of the State.

VI. Concerns for Legitimacy

I conclude this Chapter suggesting that the restructuring or transformation of the security sectors is in the interest of the Government and benefit of the political parties of Nepal. I

suggest that the political parties, the government or the state could enhance their legitimacy by bringing structural change, including in the security sectors, because the process of change ensures participation, representations and inclusion of the identity groups in the state's institutions. After all, the objective of security sector transformation is to ensure security to the people as well as to the state and to enhance democratic governance (Bryden & Hanggi, 2005). Certainly, these are challenging tasks, because the issues of security are deeply dividing the Nepalese society in political and identity lines. Different political parties and identity groups have voiced the demand for restructuring of the state mechanisms, in particular those institutions that are mandated to provide security to the people, in order to ensure their inclusion, participation and representation in the system. If these demands remain unaddressed in the time of transition, these political institutions will lose trust in the eyes of political and social groups, because their presence is not there, which will result in the erosion of the legitimacy of the sate ultimately. This is the first type of challenge the country is currently facing. In the context of Government's denial to address the political demands of the groups, it is likely that the level of frustration increases, which may motivate the political groups to resort to violence to assert for their demands.

The second type of challenge to the legitimacy is reflected in the functioning of the Unified Communist Party of Nepal (Maoists), which currently is in the process of transforming itself into a democratic political party from a violent rebellion group. The party signed the Comprehensive Peace Agreement (CPA) in November 2006, contested the elections of Constituent Assembly in April 2007 and secured larger seats than other political parties, and formed the government accordingly. All these processes have granted legitimacy to this party. However, that is not enough. The party still holds the command over its People's Liberation Army (PLA) in practice, although the combatants of the UCPN (Maoists) are under the command of Special Political Committee on Army Integration as per of the provision of the Interim Constitution. As long as the people and the international community perceive the UCPN (Maoist) as an insurgent group, which happened when the party was leading the government until May 4th, 2009, the party will suffer through the crisis of legitimacy. In any democratic state, the dual armies cannot exist and a political party running a government but also commanding over its own army is against the principles of democratic norms and practices. Therefore, it is for the interests of the UCPN (Maoists) to negotiate the future of its PLA soon so that its image is further enhanced as a legitimate democratic party by the national actors and international community as well.

However, weak states like Nepal increasingly fail to address the internal and external challenges, because the state actors lack required mandate to make change in the society. The political and bureaucratic institutions become ineffective in the time of crisis and during transition period to support the sate actors. These complexities complicate the conflict dynamics and question the legitimacy of the political actors in power or those who are in opposition. The actors fail to deliver services to the people and keep up with the promises they have made before coming to power. The basic premises of their being in power become questionable and challenged. In order to address these challenges, the political

actors adopt different "dirty tricks" for their political survival which in turn further erodes legitimacy (Migdal, 2001). Nepal represents a saga of dirty tricks in the politics in the phase of democratic transition, which denies space for social forces and identity groups in the process of nation building. Similar shortcomings are also observed in the peace process that begun after the People's Movement II of April 2006. The peace process in Nepal is elite-centered or elite-driven, in which participation of common people in general and the identity group in particular was very minimal or not at all. Of course, the election of the Constituent Assembly was a significant event, which allowed the people to vote. However, a numerous identity groups claim that they are not represented in the Constituent Assembly, because they were still in the stage of forming their organizations until the elections. The shortcomings, therefore, reflect erosion of legitimacy of peace process to some extent.

Legitimacy of the State is also reflected in the functioning of the political leaderships, which need to be capable to maintain the belief system of the people that they are the appropriate institution for the society. The political leaderships have also the challenge to ensure ownership of identity groups on the new constitution on the one hand, while, on the other hand, they have the challenge to ensure the participation of identity groups in the on-going negotiation process over the issues of institutional reforms. After all, it is the political leaderships commonly known in the form of political parties that runs the state. In the contemporary world, the legitimacy of the democratic political system is judged on the ground of their success or failure to address the historical issues and agendas that divides the society, and on the strategies adopted for their resolution (Lipset, 1959). States in the democratic societies are run by the political parties upon their elections to the governments. Therefore, the structures, leaderships, functioning, programs, agendas and policies of the political parties, either in power or opposition, come under public scrutiny. Question of legitimacy of the political parties, therefore, becomes the challenge of the state's legitimacy and supremacy as well. Currently, the political parties in Nepal have immense challenge either to regain or retain their institutional legitimacy in the aftermath of armed conflict and people's movements.

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II. The Legislature

The Legislature-Parliament

Dinanath Sharma

1. Introduction

Although Nepal has 63-year long experience of parliamentary political struggle, the actual exercise of parliamentary politics amounts to barely 17 years (in between 1958-60, 1990-2002 and since 2007). If we regard the formation of Nepal Praja Parishad in 1936 as the earliest attempt in the struggle for parliamentary politics (Adhikari, 2001), the history of the Nepali people's struggle for parliamentary politics constitutes about 75 years. The Nepali Congress (NC), formed in 1946, formally adopted parliamentary system as a guiding principle for its policies.

The Communist Party of Nepal (CPN) founded in 1949 adopted the strategy of directing the parliamentary political system towards focusing on the interest of the working class people. Thus, the political system in Nepal was affected by the Westminster system left over by the British imperialism in the Indian subcontinent. However, the feudalistic totalitarian monarchical system and parliamentary system of governance could not co-exist in Nepal. Consequently, even the capitalist democracy could not grow and develop in Nepal- each time it became the victim of monarchical dictatorship.

It is indisputable that in the parliamentary process and politics in Nepal, democracy has remained rather fragile due to complex relations between the civilian administration and security sector. Sufficient discussions, studies and analyses have not been done on the dynamics of such relations. Viewed in this light of historical facts, the origins of Nepalese security structure and parliamentary politics are found to be rooted in divergent social and political thoughts and designed to fulfil differing objectives and needs. The Nepali state that took up its shape in Gorkha principality laid the foundation of the Nepal Army as the state security structure. Viewed from the changed world perspective and military techniques, that army was merely a gang of "musclemen". Similarly, if we evaluate the parliamentary exercise of 1958 from today's standpoint, it would appear like an exclusive club of elites.

Against this background, this paper seeks to analyse the theoretical and practical aspects of parliamentary control over the security sector and makes an attempt to clarify parliamentary strategies for security sector reforms in order to ensure overall security for individuals and society at large. I believe the opinions expressed here do not seek to compare the relevance of the values of established ideologies; instead they seek to offer greater concrete shape for democratic exercises in tune with the changing time, spirit and consciousness of the age. This paper argues that the parliament representing the explicit verdict of the people must

be empowered to examine the workings of every state organ and be able to create legitimate provisions for their functioning.

2. History of Parliamentary System in Nepal (1958, 1990, 2007)

The reawakening that spread among former colonies after World War II led to people's revolt for their national independence against imperialism. The defeat of Japan in the war laid the foundation of home rule across Asia.

The Nepalese people also fought their resolute struggle against a century old Rana oligarchy in Nepal. The joint armed and civilian resistance of 1951 brought the 104 year-long Rana rule to an end and paved the way for 'limited democracy'. The aspiration of the Nepalese people to frame their constitution for their own destiny was once again floundered. King Tribhuvan's declaration of February 1951 that a people-elected assembly on the basis of universal franchise would draw up a constitution and the country will be ruled under its provisions turned out to be an empty outburst inspired by emotions generated by the overthrow of the Rana regime because after that he made no effort to conduct the election for the promised assembly (Shaha, 2001).

Ironically, following the revolution, the political dominance of one family rule was transferred to one person's rule i.e. the monarchy, instead of it going to the people (Sharma & Panthi, 2006). This merely constituted the transfer of power from one family to another and it failed to make the Nepali people sovereign in their nation. The position of the Supreme Commander of the Army previously occupied by the Rana Prime Minister was transferred to the King after 1951. Between 1951 and 1958, the king consolidated a tight grip over the entire security apparatus bringing it under the direct political control of the palace, and developed the security sector as an organisation dedicated merely to protecting monarchy. To win their loyalty, high state offices and positions were offered to the king's personal security chiefs.

Nepal had to go through all these historical events precisely for a reason that there was a big contradiction between the inherent feudalistic totalitarian values prevalent in Nepal and the western parliamentary system of governance being introduced in the country. In effect, the British model of parliamentary democracy had become popular in India since the time of British colonial rule there. The objective, basis and foundation of that model were adopted in Nepal too for its democratic set up. The Nepalese political class directly influenced by Indian elites and its politically conscious groups even adopted Hindi terms in translation to explain and elaborate the basic principles, values and objectives of democracy for Nepal. Similarly, intellectual input for Marxism to fuel Nepal's left movement also entered Nepal via Hindi in India. It is clear that such pattern emerged because Nepal lacked direct contacts with the Western world (Rawal, 1991). How much trust the Nepalese political leadership of the previous generation had on the British model of democracy can be gauged from a simple example of the constitution drafting process of 1958. King Mahendra entrusted a British university law professor to prepare a draft

constitution and B. P. Koirala completely agreed to the move. He displayed so much faith that he believed a constitution drafted by a British expert cannot be undemocratic. Some have even asserted that because of his complete faith Koirala did not even consider it necessary to go through the draft. It was a great mistake in his part not to perceive the big gap between the prevalent values and parliamentary system of governance. Similarly, the political parties more particularly the Nepali Congress did not bother to evaluate the pitfalls the parliamentary democratic system of governance may have on the overall polity of Nepal.

On the other hand, the CPN continued advocating different strategies for alternatives to parliamentary politics and creating new relations between parliament and military structure from the position and opinions held by many others. However this issue could not become the subject of country-wide discussion because of the influence of feudalism, the weak stage of workers' and farmers' class movement, poor level of political consciousness of Nepali society as well as infiltration of the CPN by palace loyalists which nearly led to the dissolution of the party itself. As a result, there has been no critical and open formulation up to now regarding the relations between the security sector and parliamentary system. A study of historical facts would clearly reveal the broad outlines of current political crisis facing the country.

2.1 General Elections of 1958 and Parliamentary System

Before looking at the general elections and analyzing its results, a review of the Constitution of Nepal 1958 is necessary[1]. The Constitution had put in place the special initiatives for the government by the majority party in parliament, the opposition of the minority, parliamentary oversight on different organs of the government, approving the annual budget by parliament and full-fledged executive authority of the Prime Minister. Nevertheless, while judging from the perspective of civilian control over the security apparatus or making people sovereign on their own, this Consitution had many weaknesses. First of all, it changed the title Government of Nepal to His Majesty's Government of Nepal (HMG/N) providing constitutional cover for the king's power. Secondly, the Constitution vested all political powers of the state in the King. Third, all constitutional provisions concerning the state of emergency were placed under the discretion of the king. Fourth, no mention was made in the Constitution regarding parliamentary control over and monitoring of security sector, security budget, security strategies and work policies. In fact, due to the paucity of parliamentary check and control over security sector, particularly the military structure, army intervention took place in 1960 and even the 'limited democracy was abrogated' (Joshi & Rose, 2004).

On the basis of the above Constitution, Nepal made its meagre effort to advance parliamentary democratic system of governance in the country. The elections for the Parliament were also held in which the Nepali Congress party won the majority of seats.

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1 Constitution of Nepal 1958.

Nevertheless, contradictions between the western parliamentary political system and traditional feudal monarchical dictatorship could not allow the smooth development of democracy in Nepal. The subservient policy persistently adopted by the Nepali Congress party towards the Nepali monarchy further obstructed the functioning of capitalist democracy in the country. Thus, the parliamentary system introduced after the parliamentary elections held in 1958 thereby ignoring the aspirations of Nepalese people to elect the Constituent Assembly as per the provisions of the Delhi Agreement remained short-lived after King Mahendra introduced the party-less Panchayat system of governance with the aid of the Nepali army dismissing the democratically elected government.

2.2 Parliamentary Exercise in the 1990s

Viewed from universal principles and values of parliamentary system, the parliamentary experimentation of 1958 was only rudimentary in nature. In comparison, the parliamentary form adopted in 1990 was a bit stronger but it too failed to incorporate parliamentary control over security sector in the constitution.

As the guiding ideology continued to uphold the traditional parliamentary system as the best form of democracy, even the 1990 Constitution did not alter the provision of inherent sovereign power being vested in the king and it failed to change the royal grip on the military matters in order to bring the security issues under the purview of parliament. The Security Council as provided for in the constitution was not formalised into practice. During this period, the government focused on civil administration, foreign relations and police matters but ignored military security and wider military issues. Parliamentary committees too did not make any persistent efforts in political and legal fronts to bring the security sector within the control of Parliament. This created a condition that made Nepal's democracy an easy target to be attacked at any time. The irony of all this lies in the fact that the political parties in political leadership at that time – the NC and CPN-UML – did not feel the need for conducting comprehensive studies of the security sector and impose strategies to bring security issues under parliamentary control.

In Nepal, the practice of parliamentary system has remained confined to a narrow circle. Particularly it presented legal and constitutional hurdles to the supporters of republicanism. As a result the republicanists faced the prospect that there was no room for institutionalising politically inspired ideological forums in parliament and they were compelled to pursue non-parliamentary political movements. When the NC put forward constitutional monarchy, which should have been a matter of procedure and compromise, as its ideological underpinning, it was but natural that the leftists were disillusioned about parliamentary democracy. However, no matter how hard the NC tried to uphold the constitutional monarchy, the Nepalese monarchy never contemplated to adhere to constitutional democracy (Sharma, 2007).

2.3 People's Movement 2006 and Parliamentary System

The People's Movement of 2006 unleashed an upsurge of unprecedented political consciousness in Nepal. In this regard, a good deal of impact of the "People's War" conducted by the Maoists must be acknowledged. The "People's War" was able to arouse the rural populace, which had long remained neutral to politics, to join in political movement. The rural upsurge and capital-focused movement of 2006 despite its unspecified working direction achieved its success. This led to the reduction of royal privileges and transfer of state power to parliament and the government was entrusted with the task of implementing it. The declaration of the newly restored parliament in June 2006 confirmed this (Acharya, 2007). These results became possible as the strategy of the CPN-Maoist to include other parliamentary parties to strengthen new democratic values were carried out successfully.

In the transition period from the newly restored parliament to the Constituent Assembly (CA), Nepal has attained incredible achievements. Most fundamentally, the traditional approaches to explain political process have been replaced by new thinking. This has led to the broad political consensus to the effect that state and politics are shared concepts and citizens' responsibilities and rights remain integral concerns of the state. In this very phase of transition, the state has been declared a federal republic. Political parties, government and the CA are all actively engaged in giving a concrete shape to the federation. A broad framework of inclusive state has been put into use and the composite character of the CA displays unprecedented level of inclusiveness[2].

Despite all these remarkable achievements, a number of important basic agendas to strengthen democracy remain to be addressed. Previous parliament could not take up effective measures to bring security sector reforms and security affairs within the purview of parliamentary jurisdiction. Even though the drastic overhaul of the security sector might not have been feasible in the light of expected complication in security matters during the transitional phase, there would have been no real problem to conduct theoretical discussions and develop strategic thinking on this matter.

Basically, parliament is viewed as a law-making body. But parliament also bears the responsibility to formulate transparent laws regarding security sectors. It is parliament, which should have defined security strategy, procedures for security sector mobilisation and criteria and limits of comprehensive security. The tasks to be completed include: to analyse the objective security need of Nepali society and determine security mechanisms for the same, establish political guidelines to operationalise such mechanisms, formulate jurisdiction and operational process of each and every security apparatus and spell out basic ground rules regarding relations between security sector and the parliament. A study of relations between security mechanism existing in any given time and the parliament of the past era or the present time clearly reveals that there is hardly any

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[2] Lalbabu Yadav (2008). *Women's participation in the politics*. Paper presented on the workshop on Madhesi women. Kathmandu.

interaction between the security mechanism and the parliament and each side remains unaware about the needs and limitations of the other.

The non-transparent way of formulating security policy and laws as practiced during the monarchical regime was being followed in the parliamentary phase as well. As the parliament constitutes the supreme structure for the defence of democracy, it should focus its attention to ensure peace and security for all citizens. So the parliament has to work out security options to deal with different security challenges or threats that present themselves in society. It is indispensable that we must formulate beforehand the operational guidelines for national security forces, determine the size and structure of the security forces, define the functions and the role and processes and laws for different security bodies, and establish the procedures and causes that require a review of security policies. For this, the parliament can rely on its own security committee, special committee and panels of experts. Sadly, such processes are not applied in Nepal.

3. Military Structure, Security and Democracy

After the mass movement of 1951, a great change occurred in the military structure. Indian instructors and commanders began imparting training and instruction to the military personnel in the barracks. From the earliest phase of the Nepal Army to the present, Indian experts and instructors are providing training to Nepali army personnel. Therefore, the present Nepal Army is modelled on Indian style and pattern. Nepali rulers bowed before the foreign benefactors to protect their position of power at home but none bothered to formulate an independent security policy.

The King proclaimed the Constitution of the Kingdom of Nepal, 1958 drafted by a five-men drafting committee hand-picked by the King himself. The Article 55 provided for the state of emergency provision, which could be imposed at the discretion of the king. Thus, all the powers were concentrated in the hands of the king. Elections were held for the parliament. A government was formed thus. But democracy could not be defended. "His Majesty the King shall be the Supreme Commander of the Army and the exercise of this power shall be guided by the army rule", said one provision of the Constitution. Similarly, in another restrictive provision, the Constitution prohibited introduction to parliament of any bill or amendment concerning the Army Act without the prior approval of the King. This article said, "No bill or amendment proposal concerning the armed forces shall be tabled in any houses without the prior sanctioning from His Majesty the King". This was the hint from the Constitution to make the army loyal only to the King. This exonerated the army from being responsive and accountable to the people- elected government and democracy. [3] Thus, the Royal Army dedicated itself to enforcing Royal decrees and orders.

The Parliament had no constitutional authority even after the 1958 elections to exercise control and supervision and issue directives to the Army. Because the Army was

[3] Constitution of Nepal,1958.

not under the control of the civilian authority, in December 1960, a military coup was staged to depose the elected government, thereby, imposing the dictatorial Panchayat regime. From 1951 to 1960, there was no genuine democracy; it was only a sham democracy. All the communist forces had protested against the governments of those times (KC, 2000).

The experience of democratic exercise from 1951 to 1960 has clearly shown that merely conducting elections under the multi-party banner and forming an elected government does not lead to upholding of democracy. Who has the ultimate control over the state power remains the question of utmost importance. Putting the King above the Constitution and leaving all the authority over the Army in the hands of the King and propagating the talk of democracy cannot be anything other than an attempt to fool the people. The Royal Army did not function under the control of the civilian government. Civilian supremacy did not exist. Thus, the limited democracy was taken away using the crude force of the Army. The Army came to the forefront as an authoritarian force to remove the elected government form the office. In other words, King Mahendra, by persuading the Army to back up the 1960 coup made the Royal Army to fall to the level of a praetorian guard.

In 1990, the Nepali people through historic people's movement brought the Panchayat regime to an end. A new constitution was framed with the involvement of the NC and the CPN-UML among others. It was proclaimed to be the best among the constitutions in Nepal. However, on top of the Constitution of the Kingdom of Nepal 1990, before the Preamble, they put the Royal Eulogy as in the 1958 Constitution. The Constitution committed itself to strengthening constitutional monarchy and multi-party democracy and declared the allegiance of the political parties to upholding monarchy. Emphasising these unalterable provisions, the King had proclaimed the Constitution.

The 1990 Constitution also did not bring the Royal Nepal Army under the control of the civilian government and the Army remained as the protector of the Shaha dynasty. Thus, neither the government led by B.P. Koirala after 1958 nor the elected government of the NC after 1990 brought the Army under the civilian control. The 1990 Constitution too vested all the powers related to the Army in the hands of the King. Borrowing the exact words from the Panchayati constitution, it said, "His Majesty the King shall be the Supreme Commander of the Royal Nepal Army". The provision of the King appointing the army chief was also retained. Although the National Security Council (NSC) was formed under the Article 118 with Prime Minister as chair and the Defence Minister and Army Chief as members to oversee matters related to the Royal Nepal Army, this council carried out no function. Because the Constitution had provided that the Army would be directly accountable to the King, it did not become responsive either to the government or the parliament. The Nepalese people were given a lie by the propaganda that the Army was under the control of the elected government while the chain of command was handed over to the King.

4. Institutional Structure

4.1 Parliamentary Special Committee on Security

The Parliament should have a special committee to recommend parliamentary policies on security matters. If statutory provisions could be made to allow the parliamentary committee to call up the experts to the committee meeting or authorize the committee chair to seek consultation, the security issues could be handled more responsibly and in a transparent manner. While forming such special committee, members who are knowledgeable in military or security affairs, who have studied security issues, who have worked in security field or army before entering the parliament or who have received formal education in conflict studies or political science could be chosen to serve in the committee. Moreover, such a committee should be given wider jurisdiction. Expanded jurisdiction is important because security issues have close interconnection with fields related to various parliamentary committees that deal with resource management, right to property and social securities. Similarly, this special committee on security affairs must work jointly in close cooperation with foreign affairs committee and human rights committee.

4.2 Special Committee or Research Sub-committee

To secure parliamentary control in accordance with democratic methods and processes over security sector reforms or security sector, the parliament can create a special committee or form a sub-committee on security affairs in order to formulate new statutory or administrative criteria, and such mechanisms could facilitate parliamentary control, monitoring and evaluation of the entire security sector. When the special committee is required to arrange special provisions for security sector, it may recommend formulation of new laws, rules and regulations or strategies while acting within the parliamentary jurisdiction[4].

4.3 *Public Accounts Committee (PAC)*

The state is accountable to the people. It is the Parliament that determines whether the state has been accountable to the people or not. Because the PAC examines the expenses or the results obtained from the expenses of the state, the Parliament must be empowered to examine and evaluate the transparency of expenses incurred in security sector or security related expenses. This will also have the effect of making security sector accountable to the Parliament. PAC can recommend special authorisation to the Auditor General to maintain transparency regarding expenses related to security affairs.[5]

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4 Rambahadur Rawal, Nepal Weekly, Year 10, No. 2. July 2009.

5 Rules and procedures of the constituent assembly (legislature-parliament), 2008.

This can lead to reduction of corruption in security sector. This provides another good reason to bring security sector under the control of the Parliament.

4.4 State Affairs Committee (SAC)

Security structures should be brought within the purview of evaluation and scrutiny or SAC. Though SAC is empowered to scrutinize the activities of various ministries related to security concerns including the Prime Minister's Office and Cabinet Secretariat, Defence Ministry, and Home Ministry and to participate in policy formulation and motivating the government to be responsive to the people, it is necessary to further empower SAC with some fundamental and special measures to facilitate greater reforms in the security sector. Such special measures to expand the SAC jurisdiction should cover review of security policy implementation concerning general security situation, security of citizens and society, external relations and security as well as relations between security sector and the Parliament. However, it should be kept in mind that security operation and security force mobilisation to ensure overall security concerns fall under the rights of government decisions.

4.5 Auditing

The Department of Auditing has the jurisdiction to audit the revenue allocated to the security sector, expenses incurred in course of security operation and the property in care of the army organisation. Military materials, particularly weapons and ammunitions are not included within the purview of auditing inspections. Auditing of income and expenditure of security sector ensures transparency of security agencies. When problems are detected in course of auditing or the Auditor General's report raises doubts in the actuality of defence expenditures, such issues should be brought to the attention of the Parliament. This helps establish the accountability of the security sector to the Parliament.

5. Legislative Prerogatives and Security

It is the responsibility of the Parliament to develop legal formulations about the parliamentary control over the wider security sector. But, it is the security sector which exercises the primacy of rights in implementing security strategies to safeguard the state's constitutional system from threats emanating both internally and externally. Parliamentary control over the security sector does not mean that the latter would be forced to make public the security strategies designed to ensure the overall security. After all, the Parliament is the supreme political forum to formulate policies for each and every state entity. The Parliament exercises the rights as to whether to sanction the appropriation budget proposed by the government for the security sector. In some

countries, though, procurement and management of military materials are kept outside parliamentary control.

5.1 Budgeting Provision

The Government of Nepal sets aside budget appropriation for internal management of parliamentary affairs. It is from this amount that parliamentary budget committee distributes budget fund to the respective committees. Appropriation of such budget should be done in such a way that the committees become effective in their fields. If the parliamentary committees are rendered inactive for the lack of necessary budget, the Parliament cannot play an effective role in governing the state. In Nepal, limitation of budget for parliamentary committees has remained a major challenge.

5.2 Interaction Between Parliament and Security Sectors

Nepal is far behind in the use of dialogue and interaction. There is hardly any instance of dialogue and interaction between the Parliament and security sector. Parliamentarians are not aware of the pain, concerns and problems being experienced by the security sector and they also lack sufficient studies and knowledge regarding security sector reforms. It is natural that the personnel serving in security sector and politicians in the Parliament come from different background and are directed by divergent values. Because politics covers a wider spectrum of national life whereas security sector is focused on specific issue or professional concerns of a particular class, it is natural that their perspectives to look at the problems will be different. To bridge this lack of communication, parliamentary committees could organize frequent interaction in order to maintain coordinated relations and facilitate sharing of information and knowledge between parliamentarians and security officers.

6. Constitutional and Statutory Provisions

Legislature-Parliament formulates not only laws of the nation but also enjoys authority to oversee the implementation and monitoring of those laws. So far the aspects of implementation and monitoring appear weak and unclear. We can formulate necessary policy only after reassessing the existing constitutional and legal provisions. CA Regulations 2008 and CA (Legislature Parliament Working Procedures) Regulations 2008 (Article 117) provides for the Security Special Committee. Article 145 (5) of the Constitution also provides for, except at the time when there is natural calamity, the Security Special Committee in Legislature-Parliament to approve the decisions of the Council of Ministers of Nepal Government.

The Security Special Committee comprises of 81 members. The Speaker and the Deputy Speaker will be ex-officio chair and vice chair of the Committee. The other

members of the committee not exceeding 81 in number, according to the Article 145(1) of the Constitution, shall be those who are members of the NSC i.e. Prime Minister, Defence Minister, Home Minister and three other Ministers designated by the Prime Minister as well as the chair of SAC and members representing women, indigenous/ethnic, Madhes, dalit, backward region and other community from all political parties represented in the House shall be nominated to constitute proportional representation in the committee on the basis of those present in the meeting. The Regulations Article 117(2) also provides that in special circumstances, at the recommendation of working procedures consultative committee, the Speaker may make changes in the list of members of this committee.

Similarly, the jurisdiction of the SAC among the subject committees in the Legislature-Parliament covers the Prime Minister's and Cabinet Secretariat's Office, Defence Ministry, Home Ministry, Ministry of General Administration, Commission for Investigation on the Abuses of Authority, Public Service Commission and Election Commission. As per Article 110 of the Regulations, the committee may invite the relevant minister, staff of the ministry, army officers including the army chief, police personnel including the IGP and civil and security officials and ask for information, and issue directives for their action. However, there is no provision for what could be done against the minister or officials who ignore the directives of the committee. So in order to make the SAC effective, measures should be introduced to enable discussions in Legislature-Parliament about those who ignore the directives of SAC, to require clarifications before the legislature as punishment and to issue warning against them to make people's representative body effective.

According to Article 143(1) of the Constitution, within a month of the declaration of the state of emergency in Nepal, the Prime Minister will inform the General Secretary to seek a date of meeting of the Legislature-Parliament for ratifying the order and the Speaker shall fix the date and time of the meeting. When the Prime Minister submits the proposal before the Speaker explaining the reason for the imposition of the state of emergency, the Speaker shall fix the date for discussion. When the discussion is over and the Prime Minister or his representative replies on the discussion, the proposal is placed for decision and the division of votes shall be carried out to determine the decision. If the extension of emergency is required, the proposal should be forwarded by the Prime Minister to the General Secretary five days in advance and its approval must follow the same process as above.

The Legislature-Parliament is empowered by the Constitution and the laws to acquire information on national security matters, to formulate necessary policy thereon and to monitor conditions about those issues. However, the prevailing provisions are not sufficient. There is a need for drastic overhauling on security in tune with the changing time and context. So far no new security policy has been set in place. It was felt that the army, which was organised, directed and controlled for the protection of feudal monarchy, has to be reorganised and democratised. Reflecting this, Article 144(3) of the Constitution

says: "The Council of Ministers after obtaining political consensus and recommendations of the concerned committee of the Legislature-Parliament shall formulate a detailed plan for action for democratisation of the Nepal Army and implement it. Subsection (4) of the Article says:

> while implementing the plan of action as per (3) above, the suitable number of Nepal Army, its democratic structure, its national and inclusive character shall be identified and the army training will be conducted according to the values of democracy and human rights.

These constitutional provisions clearly state for the complete structural transformation of the Nepal Army, reshaping its character to human rights values and complete democratisation, developing military structure that is capable to ensure security against internal and external factors.

Article 145 provides for the creation of National Security Council (NSC). The NSC is created to recommend to the Council of Ministers on mobilisation and operation of the Nepal Army. The NSC is chaired by the Prime Minister and the members include Home Minister, Defence Minister and three other ministers designated by the Prime Minister. The Defence Secretary shall act as Member-Secretary and in his/her absence the person designated by the Prime Minister shall act as Member Secretary. As per the Constitution,

> The decision of the Government of Nepal, the Council of Ministers to mobilise the army shall be presented to the special committee designated by Legislature-Parliament within one month for its approval.

Article 144 of the Interim Constitution 2006 provides for the Nepal Army. Subsection (1) states, "There shall be one organisation of Nepal Army" and subsection (2) clearly specifies that the Chief of Army Staff shall be appointed by the President at the recommendation of the Council of Ministers. Article 3 clearly states, "The control, mobilisation and management shall be done by President in accordance with the law at the recommendation of the Council of Ministers." In principle, this constitutional provision makes it clear that the Nepal Army is entirely under the civilian supervision.

The Interim Constitution 2006 is the fundamental law of the land following the overthrow of the feudal monarchy in Nepal. Article 164 provides that all the prevailing laws shall remain in force and states that "All the laws in force when the constitution was proclaimed will remain in effect until they are abrogated or amended." However, a restrictive provision also says the laws at variance with the Constitution "shall be automatically null and void after three months to the extent they are inconsistent with the Constitution." The Constitution also specifies that all the agencies under the civilian government must undergo democratic transformation in conformity with the values, ideals and spirit of the political transformation.

However, major political parties of Nepal concede that the traditional character of the Nepal Army has not been democratic. The Interim Constitution formulated with the consensus among the leading parties of the Nepalese democratic movement is the fundamental law of the land. It has identified the reorganisation and democratisation of the army as the inevitable challenge facing the country. In August 2006, the House of Representatives passed the revised Army Act 2006 replacing the Army Act 1959. The Preamble of this Act says,

> In the light of the fact that as a consequence of the historic people's movement the sovereignty of Nepal vests in the people and the people remain the source of the state power, in order to make the Nepal Army accountable to the Nepali people it has been desirable to make timely revision and consolidation in the law concerning establishment, management, control, use and mobilisation of the Nepal Army, the House of Representatives has adopted this law in the first year of the declaration of the House of Representatives 2006.

The Interim Constitution was proclaimed in January 2006. Various aspects stipulated in the Army Act adopted before the Interim Constitution contravened with the Constitution which was passed by the parliamentary parties under the prevailing circumstances before the peace talks were concluded. The Interim Constitution itself was proclaimed after the successful conclusion of the peace talks and signing of the Peace Accord. The Army Act 2006 does not wholly reflect the spirit and ideals of the Constitution. Article 164 of the Constitution stipulates that any law in contravention of the Constitution will become null and void automatically after three months.

Internal control and supervision of the security agencies take place in accordance with the law. The laws are enforced as the legislative acts adopted by the Parliament. It is the Parliament that approves budget for security agencies and conducts discussion on security policy proposed by the Government. The key body to enforce civilian control over the security forces is also the Legislature-Parliament. The laws and regulations, policies and decisions made here play the key role. It is indispensable to maintain civilian control over the security forces. Security agencies must be accountable to the people through elected representatives. Special stress must be given to political control over the security forces. The UNDP Report 2005 also stressed on the civilian control over the security forces. Without civilian control over the security forces, they become inclined to engage their activities secretly. This leads to the dereliction of duty. The budget allocated to them will not be spent as per the people's wishes which will breed corruption. Hence, the Legislature-Parliament must become alert and capable to deal with such problems. A scientific legislation is essential to ensure people's control, supervision and monitoring over the armed forces. A constitutional mechanism must be created for democratic civilian control and supervision of the armed forces through people's representatives.

7. Political System and Security

Security system is a crucial area of the state. The state must bear the responsibility of ensuring the external and internal security of the country keeping the best interest of the nation at heart. For this, every nation devises its security system in tune with the prevailing political system, population and geographical conditions. To safeguard the nation against the external threat national security policy and national army are created with clear guidelines for the army's formation, mobilisation, training and provision of material resources. For internal security, provisions are made for civilian police, armed police force, border security force etc. as necessary.

In countries with democratic systems of governance, all the above security forces are under the civilian government. Constitutional and legal provisions require them to work under the direction, control and supervision of the government. With the major political changes in the country, qualitative change must occur in the conventional structure of the armed forces. New political order is reflected in the basic law of the land. As all the state structures undergo timely changes with the radical transformation of political, economic and social structures, new changes and developments are inevitable in the security policy, judicial system, constitutional bodies and state commissions.

We are in the transitional phase of political transformation. We are going to institutionalise the competitive multi-party federal democratic republic with Nepali characteristics and unique features in the twenty-first century. The new political system we are going to formulate must be able to remove all kinds of distortions and anomalies that have appeared in the process of democratic progression. It is indispensable that for a country, which is multi-ethnic, multi-lingual, multi-cultural and full of geographical diversity, the rights and liberties of the people of all classes, caste and ethnic groups, regions and genders must be safeguarded.

8. Strengths and Weaknesses of Legislature-Parliament

The Constitution Assembly is also fulfilling the role of the Parliament. As a constitutional and sovereign legislature directly elected by the people, it has full authority to formulate every kind of political policy. Despite such authority, if we are able to assess its strengths and weaknesses, it could give us clear directives regarding the role parliament should play in security sector reforms and further strengthening its effectiveness.

8.1 Strengths

Elected Institution: As a directly elected body, the parliament represents the people. Parliamentarians work in the House or CA on behalf of the people and convey the people's expectation to the state. It has full authority to enforce restructuring of the state. Its greatest strength is that it represents the people.

Legislative Body: This is the statutory body to formulate the laws. No laws can be made or enforced without its consent. The decision of this institution empowered to examine, approve or reject every policy of the state will provide the stamp of legitimacy for Nepalese democracy and security sector reforms program and plan.

Inclusive of Identity and Ethnicity: Parliament/CA is constituted on the basis of the principle of identity and inclusiveness and most ethnic groups have representation in the House. Though these representatives speak for their respective parties politically, they also represent their ethnic group, culture, custom and civilisation. Thus, Parliament is empowered to take decision and enforce it.

8.2 Weaknesses

Hung Parliament: Its biggest weakness is that no single party has got the required majority to form a government on its own. Because government depends on coalition, divergent stands and values of the coalition partners make the government weak and unstable. This marks out a big weakness of the parliament.

Outcome of the Mixed Electoral System: The present form of the parliament is the outcome of the mixed electoral system. In a society with weak culture of coalition and opposition politics, the parliament with no party having a majority to form the government can lead to instability. Mixed electoral system brought about this situation.

New Faces in Parliament, MPs without Experience: Many new faces have entered into parliament and because of their lack of experiences they are not able to make distinct impact on the work of the Parliament. They also lack understanding about party works as well as MP's individual rights. MPs too have not been able to transform their values to party works. This has led to questioning about the capability of the MPs and misgiving about their legitimate role.

*Frequent Disruptions in Parliament***:** The practice of disrupting parliament even on simple matters that could be solved with discussion among the parties and suspension of parliamentary proceeding like road strikes on simple issues has become a big weakness. Unless this is corrected, not only security sector reforms but also other political decisions will be affected. This has the danger of parliament losing its legitimacy in the long-run.

No End to the Dual Role: There has been delay in work performance as the House has to play the role of parliament and CA. Because both the roles are of political nature and the parties have to do their political calculation of loss and gains, parliament is being disrupted and the work of constitution making is not picking momentum. To prevent this, the CA should have been divided into two parts -- as parliament and CA.

9. Need of National Security Policy

National security is a crucial aspect of any nation. National Security Policy is indispensable to secure the country against the external and internal threats. Formulation

of a new security policy is the challenging task facing the nation at present. Because the armed forces were not brought under the civilian control in South Asia except in India, institutional development of democracy and civilian supremacy could not take place in countries like Afghanistan, Bangladesh, Burma, Nepal and Pakistan.

In view of this fact, the primary task today is to enshrine the national security policy in the new constitution in Nepal. Under the security policy in the present context of Nepal, army integration and reorganisation have become critical issues. In Nepal, in the current transitional phase following the end of monarchy and the declaration of the federal democratic republic, historical experience has proven and confirmed that restructuring, democratisation and supervision of the army has to be organised in an urgent basis.

The Interim Constitution 2006 and the Comprehensive Peace Agreement require new security policy in order to effect army integration. Keeping in mind the historical bitter experiences like various palace massacres, court intrigues, political murders and sabotages of democracy during the different time phases in the history including the step taken by the first President of the Republic of Nepal, the following provisions need to be included in the forthcoming constitution regarding the security sector reforms:

1. Provide constitutional guarantee that the source of the state powers are people, people are the source of the constitution, people have the overall rights to grant legitimacy to the constitution and no institution, organisation or any armed or unarmed power shall be above the constitution.

2. Enshrine provisions in the constitution to ensure that parliament is the political forum to formulate legal frames for all the institutions of the state and it has authority to judge and monitor all sectors.

3. Formulate broad consensus and constitutional provision stating that security matters are the subject of state affairs instead of being the prerogative of one sector and the security policies of national interests are in the jurisdiction of parliament.

4. Provide constitutional guarantee that security sector lies within the purview of national laws and put security structures under the jurisdiction of civilian courts.

5. Provide constitutional guarantee for the formation of a Special Parliamentary Security Committee and mandatory participation of such committee in formulating security policy.

6. Develop constitutional and statutory provisions specifying legal and statutory responsibilities that security budgets are subject to parliamentary scrutiny, it must be operated from within the provisions of the state laws and it must follow all the accounting and auditing procedures.

7. Establish legal responsibility for Special Security Committee and security sector bodies to carry out interaction, discussion and consultation between parliament and security agencies.

8. Formulate constitutional and statutory provisions to implement laws passed by parliament regarding selection of security personnel, their promotion, demotion or transfer.

9. Establish principles and processes to be followed by parliament regarding the needs, the number, safety education and facilities of the security forces and create the legal formulation for the basis of relations of the security agencies with the government.

10. Provide a clear constitutional provision for civilian control and supervision of all matters through democratically elected representatives of the people in the light of the people being the source of the state powers and sovereign of the nation.

11. Provision of a Supervisory Committee in Parliament is indispensable in order to achieve overall democratic supervision of the security sector. This committee should be chaired by a member from the opposition with representatives from parties in parliament and a smaller sub-committee would be appropriate to supervise intelligence gathering and other sensitive subjects.

In addition to the above points, the following agendas need to be sorted out in the process of drafting the new constitution through the constituent assembly:

1. Integration of the People's Liberation Army (PLA) is another important aspect. It has become necessary to create a national security mechanism in order to promote national unity through integrating or re-integrating individuals from the PLA into various agencies based on their needs and wishes, utilising the experience, skills, training and capability of ex-servicemen on the basis of the principle of inclusiveness without affecting the standards of the security forces.

2. National security has a wider dimension of internal and external security. As state and the people form an integral part of the national security, other essential elements of this security are protection of national identity and territorial integrity, safeguarding of social, political, economic and cultural rights, promotion of rights and liberties of the citizen, security in the fields of science, technology, information, life style, national resources and environment. The formulation of national security policy must reflect all of these.

3. In view of the fact that the national security concept of Nepal up to now has been narrowly based in comparison to other countries, its formulation, policy elaboration and execution have to be widened and constitutional provision is deemed necessary for a number of sub-committees to enable direct control of the civilian government on security sector. Basically planning, security advisory and execution sub-committees would appear necessary.

4. Under the federal structure, there shall be a central police force for internal security and order. Separate police organisations would also be necessary at the autonomous regions and city-municipal levels. The control and mobilisation of the federal police would be done by the centre while the state and local police will operate under the provisions of their respective organisations.

5. Form a para-military force for the security of international borders. The centre will see the control and mobilisation of this agency. During the period of emergency, provisions may be made for its mobilisation under the army command. Also necessary is to form Armed Police Commission to facilitate service conditions, facilities and promotions.

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III. The Executive

The Role of the Head of State

Krishna Khanal

On 28 May 2008, at its first meeting, the newly elected Constituent Assembly (CA) of Nepal abolished the 240-year old Shah Monarchy and adopted a resolution officially declaring the country a 'Federal Republic'.[1] The last King of the Shah Dynasty, Gyanendra Shah, was given 15 days notice to vacate the Royal Palace. He, along with his wife Komal, quietly left the palace within the stipulated time. He was left with no option but to accede to the republican transformation of the country based on the popular mandate of the people as reflected in the CA elections. Despite suspicions, Nepal's transition to a republic was achieved in a very smooth and peaceful way.

The Fifth Amendment to the Interim Constitution (IC) inserted the provision for the President to be the head of state of the new Nepal republic. The Prime Minister is the executive head of the Government and the Council of Ministers under her/his leadership is responsible for day-to-day governance of the country. The institution of the presidency has yet to be finalised in the new constitution, which the CA is in the process of making. This paper seeks to analyse and explain the current state of the institution against the backdrop of the history and the debates taking place in the country regarding what role and functions should be accorded to it.

Legacies of the Past

Kathmandu has historically been coterminous with the rest of Nepal and a seat of power all through its history – ancient, medieval and modern. The recorded history of Nepal begins some two thousand years before. In the past, the King had been the head of state and exercised absolute power. Each ruling dynasty – *Lichchhabi*, *Malla* or *Shah*[2] – traced their origin to some form of divinity and used '*Deva*' at the end of their name to symbolise the divine inheritance. These leaders always claimed divine legitimacy to rule. The ruling monarch directly looked after law and order, justice, military affairs and finance.[3]

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1 Earlier, on 28 December 2007, the Interim Parliament, through the Third Amendment, had inserted a provision in the Interim Constitution that stated Nepal as a 'federal democratic republican state' to be implemented by the first meeting of CA (*The Kathmandu Post*, 29 December 2007).

2 The historians trace Nepal's history back to some five thousand years before, of which three thousand years were ruled by such dynasties as *Gopal, Mahishpal* and *Kirat*. But the evidence of recorded history begins with *Lichchhavi* dynasty which coincided with the beginning of Christian era and ruled the country to 879 AD, known as *Lichchhavi* period. *Malla* dynasty ruled after *Lichchhavi* and continued until the rise of Shah Dynasty in 1768 (Regmi, 1979).

3 Jagdish Chandra Regmi, *Nepalko Baidhanik Parampara* (Nepal's Legal Tradition), second edition, Kathmandu: Tanneri Publication, 2054 V.S., 1979.

The present Nepali state came to exist in the second half of the eighteenth century as a result of the amalgamation of tiny principalities through conquest, which were in different parts of the present Nepali territory including Kathmandu valley by King Prithvi Narayan Shah of Gorkha and his successors. Like earlier dynasties, the Shah Kings also exercised absolute authority to rule. Although some references to religious norms and values were made while delivering justice, nothing could prevent the *hukum* (the final voice) of the King, which was enforced without question.[4]

The King was both the head of state and the government and ruled the country by *hukum*. Sometimes when the King was minor or weak he used to delegate his authority to the Queen, Crown Prince or even the *Mukhtiyar* (Prime Minister) who could exercise *hukum* on his behalf. Even when Jung Bahadur claimed power in 1846 through the *Kot Massacre*, he had received the consent of the ruling monarch, King Rajendra Bikram Shah, to legitimise his regime. Later on in 1856, he received *sanad* (written order equivalent to *hukum*) authorising him and his family to rule the country indefinitely. As an instrument of authority put his fingerprints (called *Panjapatra*) and therewith handed the rule over to Jung Bahadur, which mandated his successors too. *Lal Mohor* (Red Seal) of the King was required to authenticate the sanctions behind any order or decision of the state. It symbolised the King's assent.

The Rana Prime Ministers always referred to *Panjapatra* whenever exercising the sovereign power. The preamble of the Rana Constitution, which was promulgated by Padma Shumser in 1948, stated that he had done so 'by virtue of the supreme authority vested through *Panjapatra*'.[5]

Nepal's experiment with democracy started in 1951 with the overthrow of the Rana Rule. The Interim Constitution of 1951 provided for the 'King-in-Council' system i.e., it was mandatory for the King to act at the recommendation of the Council of Ministers implying the same as British parliamentary norms that a 'King can do no wrong' (because whatever he has done was at the recommendation of the Council of Ministers). However, in January 1954 King Tribhuvan proclaimed that 'the supreme executive, judicial and legislative powers' of the state that were delegated to the Rana Prime Ministers in 1856 and revoked in 1951, were once again being vested in the King.[6] Henceforth, each of the succeeding monarchs asserted the 'inherent' rights of Shah Kings as handed down from their ancestry to govern the country.

In 1959, a new constitution was promulgated by King Mahendra who had succeeded to the throne in 1955 following the death of Tribhuvan. He did not want

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4 Bhuvan Lal Joshi and Leo E. Rose, *Democratic Innovations in Nepal*, Berkeley: University of California Press, 1966.

5 P. Neupane, *The Constitution and Constitutions of Nepal*, Kathmandu: Ratna Pustak Bhandar, 1969.

6 Devakota, *Nepalko Rajnitik Darpan, Part I*, Kathmandu: Dhruba Bahadur Devakota, second edition, 1979.

CA elections to take place because it would transfer sovereignty to the people and limit his power. Therefore, the new constitution was granted by him 'in exercise of sovereign powers and prerogatives' that the Shah Dynasty claimed 'to have been vested in them in accordance with the traditions and custom' of the country and which 'devolved on them from their forefathers'[7]. Although the constitution had given a wide range of prerogatives to the King, it provided for a parliamentary system of government with the Prime Minister as the executive head and the monarchy as constitutional head of the state. However, King Mahendra did not allow stabilising this constitutional order. Within eighteen months of its experiment on 15 December 1960, he took over all the powers himself and ended the experiment with parliamentary democracy. Political parties were banned and their leaders detained with no trial in the court.

Exactly two years after the Royal Takeover, King Mahendra granted another constitution which initiated a kind of 'guided system'. The sovereignty of country was vested in the King and all powers of the state – executive, legislative and judicial – were to emanate from him[8]. For thirty years, political parties were banned and the country was under the absolute monarchy.

In 1990, after the success of *Jana Andolan*, democracy was restored and the new constitution promulgated in 1990 once again introduced a parliamentary system of government. Unlike previously, this time the sovereignty was vested in the people. The King was the constitutional head of state and the Prime Minister, who was accountable to the parliament, had executive powers. Except as otherwise mentioned, all the powers carried in the name of the King were subject to be exercised only on the recommendation of the Council of Ministers.[9]

Nepal's second experiment with democracy and the constitutional monarchy did not work well. The monarchy did not reconcile with its limited power and wanted to prevail in politics and governance of the country. The political system established by the 1991 constitution confronted defiance from the monarchy and the Communist Party of Nepal (Maoist). The CPN (Maoist) launched an armed movement against the constitutional order and has aimed at establishing its own system modelled on the Maoist ideology since February 1996. In October 2002 King Gyanendra – who had succeeded to the throne after the Royal Massacre in June 2001 in which King Birendra, his elder brother, was killed, along with his family – sacked Prime Minister Sher Bahadur Deuba on the excuse of his inability to hold elections of the dissolved house of parliament on schedule and started ruling the country with his hand-picked people. The constitutional order of 1990 ultimately ceased to exist.

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7 Preamble of the *Constitution of the Kingdom of Nepal,* 1959.

8 Article 20 (2), the Constitution of Nepal, 1962.

9 Article 35 (2), *The Constitution of the Kingdom of Nepal 2047*, Kathmandu: Law Books Management Board, Ministry of Law, Justice and Parliamentary Affairs, 1990.

It was against this background that the parliamentary political parties were forced to shake hands with the CPN (Maoist) against royal authoritarianism, which paved the way for launching *Jana Andolan* II in order to establish democracy and pursue the peace process. After the success of *Jana Andolan* II in April 2006, the dissolved House of Representatives was restored to legitimate the business of the government and the political changes relating to the peaceful settlement of the 10-year Maoist insurgency. The monarchical absolutism was ended and peace dialogue with the Maoists resumed. After a series of peace talks, the government and the CPN (Maoist) signed the Comprehensive Peace Accord (CPA) in November 2006.

Dawn of the Republican Era

The success of *Jana Andolan* II had clearly signalled the end of monarchy and the beginning of a republican era in Nepal. However, it had to go through some processes to make the republican transition smooth and legitimate. Following the peace accord, the Interim Constitution (IC) was adopted, which opened the door for the Maoists to join the transitional political process. They were brought into the interim parliament and also into the interim government as a force to be reckoned with. The monarchy was denied any right to rule. All the functions relating to governance were vested with the Prime Minister. All the properties acquired by Gyanendra in the capacity of King (e.g., palaces, national parks, forests and heritage sites of historical and archaeological importance) were declared nationalized. The Constituent Assembly was vested with the authority to decide whether to retain or end the monarchy by its first meeting through a simple majority.

The article relating to the monarchy was amended three times to make sure that the monarchy had no chance to revive and the republican destiny further assured. The second amendment stated that the Interim Legislature-Parliament with a two-third majority may pass a resolution abolishing the monarchy if it found that the King created serious obstacles to CA elections. But the third amendment in December 2007 inserted a new provision that stated, 'Nepal shall be a federal democratic republican state'.[10] It was a sort of pre-established provision that the first meeting of the CA had no choice but to comply. The third amendment thus eliminated any scope for manipulation over CA members in favour of retaining the monarchy. The functions of the King as head of state were assigned to the Prime Minister until the republic was implemented.

CA elections were held in April 2008 in which the CPN (Maoist) emerged as the first largest party followed by the Nepali Congress, CPN (Unified Marxist Leninist) and the others. The elections resulted in a hung assembly since no party scored a majority of seats in the house of 601 members. The Interim Constitution (IC) provides for a government by consensus and if no consensus is reached among the parties, a

[10] 'House passes post-dated fate on federal republic', *The Kathmandu Post*, 29 December 2007.

government by majority is allowed as an alternative. There was no consensus among the parties. Puspa Kamal Dahal, aka 'Prachanda', the chairman of the CPN (Maoist) was elected as the Prime Minister with an overwhelming majority vote and he formed a coalition government comprising five political parties including CPN (UML), Madhesh Janadhikar Forum (MJF), Sadbhavana Party, CPN (United). The Nepali Congress chose to sit in the opposition.

The Institution of Presidency

As per the provision of the IC and the political understanding already reached among the political parties, the first meeting of the CA formally abolished the monarchy and implemented the 'Republic', amending the IC for the fifth time. It provided for the President to head the republic as head of state and for the Vice-President to perform the functions of the President if the office falls vacant until a new election takes place. The Interim Constitution stipulates the role and responsibilities of the president as follows:

> The President shall be the Head of the State and shall perform his/her duties in that capacity according to this Constitution and laws in force (Article 36A {2}).
> The main responsibility of the President shall be to protect and adhere to the Constitution (Article 36A {3}).

The CA constitutes the electorate for the president and vice-president. Any person qualified to be a member of the CA is eligible to contest for the posts. The candidate who receives the absolute majority of votes of the members present is declared elected. In a case where no candidate has received the majority, the second round of voting takes place between the two candidates who have received the most votes. Elections took place on 21 July 2008. Dr. Ram Baran Yadav of the Nepali Congress and Parmananda Jha of the MJF were elected as the President and Vice-President of the new republic, respectively. They can continue in office until the new constitution is promulgated by the CA. However, the CA can remove them through impeachment passed by the assembly with a two-third majority on the charge of gross violation of the constitution.

The President is the Supreme Commander of the Nepal Army (NA) and appoints the Commander-in-Chief on the recommendation of the Council of Ministers. The role of the President is very much procedural and ceremonial in nature because the constitution vests all executive powers to the Council of Ministers headed by the Prime Minister. Therefore, most of the actions carried out in his name depend on the recommendation of the Council of Ministers or similar other bodies as stipulated by the constitution. The President performs the following functions:

- Summons and postpones sessions of Parliament on the recommendation of the Prime Minister;
- Addresses the session of parliament presenting the annual policy and programmes of the Government;
- Certifies bills passed by the Parliament;
- Promulgates ordinances on the recommendation of the Council of Ministers when the Parliament is not in session;
- Appoints the Chief Justice of the Supreme Court on the recommendation of the Constitutional Council;
- Appoints the Chief Commissioner, Commissioners, Chairperson and members of such constitutional bodies like the Commission for the Investigation of Abuse of Authority, the Election Commission, the Public Service Commission, the National Human Rights Commission and the Auditor General on the recommendation of the Constitutional Council;
- Appoints the attorney general of Nepal on the recommendation of the Prime Minister;
- May declare a state of emergency and issue necessary orders to meet the exigencies thereof on the recommendation of the Council of Ministers;
- Shall control, mobilise and manage the NA in accordance with the law on the recommendation of the Council of Ministers;
- Appoints ambassadors and other emissaries on the recommendation of the Council of Ministers;
- Receives the credentials of the ambassadors from other countries accredited to Nepal;
- May grant pardon, suspend and reduce any sentence imposed by court or any other institution of a similar nature;
- Shall confer titles, honours or decorations on behalf of the state on the recommendation of the Council of Ministers;
- May issue orders on the recommendation of the Council of Ministers to remove difficulties that arise in the implementation of the constitution; and
- Attends religious and cultural events of national importance.

The President's Office

The government of Nepal has provided a secretariat for the Office of the President. The President's Office is housed at *Sital Niwas* where the Ministry of Foreign Affairs was previously located. It is also designated as the President's official residence.

The President's Office broadly consists of three wings – an official secretariat, a private secretariat and the advisors/experts. The official secretariat, for which the personnel come from the government civil service, is headed by a secretary as designated by the government of Nepal. It has three divisions, namely the

International Relations and Coordination Division, the Management Division and the Legal Division. Each division is headed by a joint secretary. These divisions are further divided into sections dealing with specific functions. For instance, the Management Division has two sections – Administration and Finance. Altogether there are four sections and each section is headed by a joint secretary. The government has approved 61 personnel for the official secretariat. They include one secretary, four joint secretaries, five under secretaries, six section officers, 20 subordinate non-officer staff, 15 vehicle drivers and 10 office assistants (see the annex for the organisation chart). Many of these positions have yet to be filled.

The private secretariat has 18 staff altogether, which include one secretary, two joint secretaries, two under secretaries, two section officers, and others as subordinate staff. The staff of the private secretariat may be recruited by the president and serve on his personal convenience.

The advisory wing consists of advisors appointed by the President. Normally they come from the professional community. The president can appoint up to five such advisors/experts. At present there are four advisors/experts. They include one for constitutional/legal matters, one for the press and communication, one for political/international affairs and one for economic affairs. The position of advisor for security affairs remains vacant.

The security of the president is looked after by the NA as per the decision of the Council of Ministers. It is managed by a secretariat cell and security personnel of the NA especially designed for the security of the president. The Nepal Police and Intelligence have also assigned their personnel to the president's office and the residence on their part. However, the security wing is not the part of the organigram of the President's Office.

The Budget

A total of Rs. 69,839,000.00 is allocated for the President's Office as its annual budget for the 2008/09 financial year. It includes the salary, allowances and administrative expenses of the president as well as other personnel. The budget allocation for the offices of the president for the 2008/09 financial year is as follows:

Budget Allocation for the President's Office for the 2008/09 Financial Year[11]

S.N.	Description	Allocated amount Rs. in '000
1	Salary and allowances	10,539.
2	Office operation and service expenses	18,400.
3	Service and production expenses	2,000.
4	Contingency expenses	7,200.
5	Capital Expenditure	31,700.
	Total	**69,839.**

The President has a monthly salary of Rs. 70,000.00 and is entitled to an additional Rs. 100,000.00 to meet other expenses, including personal hospitality. His travel related expenditure, such as the cost of using a helicopter, is not part of the budget which is directly paid by the government.

The Working of the President

As mentioned in the beginning, Nepal is now undergoing the process of constitution-making, which means everything – including the institution of the Presidency – is of an interim nature and changes may take place when the new constitution is promulgated. The nature and role of the institution of Presidency therefore depends on the overall structure of the system of government as well as the emerging political spectrum of the country.

There is no constitutionally specified process and mechanism that keeps the president informed of the government's policy and decisions. The cabinet secretariat, headed by the chief secretary, officially communicates to the President's Office about the decisions of the government. However, a ritual, like in the parliamentary system of government, is maintained where the Prime Minister calls the President and informs him about important government decisions. Until now, it has been the practice that the Prime Minister makes a courtesy call to the President and informs him if he has undertaken any foreign visits. Likewise, it has been considered that the government should inform the President before it presents its annual policy statement and the budget in the Parliament. But whenever there are important issues, it has been the practice that the Prime Minister makes a courtesy call to the president and keeps him informed.

[11] Government of Nepal/Ministry of Finance, *Line Item-wise Estimates of Expenditure for Financial Year 2008/09*, Kathmandu, 2008.

A source close to the President's Office says that several people and organisations make petitions to the president to remedy their problems. In the past, the people used to petition to the King and seek his intervention. As a legacy of this, even today people use the President's Office as a last resort to get justice. However, the President has no executive authority to address their grievances. An appropriate mechanism to refer these petitions to relevant agencies of the government for assessment is missing.

To begin with, the role of President Ram Baran Yadav – ever since his election to the post – remained non-controversial since he had nothing to decide on his own discretion. But controversy erupted when he reversed the government decision to sack General Rookmangad Katawal as the chief of the Nepal Army (NA) and appointed General Kul Bahadur Khadka as acting chief in his place on 3 May 2009, raising many questions for the future.

Over the past several months, the relationship between the government – led by the CPN (Maoist) (now the United Communist Party of Nepal UCPN (Maoist)[12]) and the Army, especially its chief, General Katawal – has been at odds on a number of issues such as the recruitment of NA personnel for vacant posts, the integration of Maoist combatants, extension of tenure for retired brigadiers, boycotting of the national games by the NA, etc. contrary to the instruction of the Defence Ministry. The government, especially the UCPN (Maoist) thought it as undermining the authority of the duly elected civilian government by the Army. It was against this background that the Maoist-led government decided to sack Katawal.

After the success of the *Jana Andolan* II there was no problem with the NA during the peace process and it abided by the terms of the CPA. Moreover, contrary to many speculations, the country witnessed a smooth transition to a republic and the NA reiterated its commitment to democracy and the verdict of the people. However, regarding the integration of the Maoist combatants into the NA, it has had reservations and feared that it would likely politicise the army. But it also stated that the army 'is open for all those who meet the eligibility criteria'.[13]

Soon after the Maoist-led government was formed in August 2008, the integration issue kicked off and political opinion differed. Defence Minister Ram Bahadur Thapa 'Badal' stated that the People's Liberation Army (PLA), implying the Maoist combatants, would be integrated into security forces within six months.[14] For the Maoists, without the integration of the PLA and reorganisation of the NA as the national army, the peace process would not take its logical end. The formation of the Special Committee for the 'supervision, adjustment and rehabilitation' of the Maoist

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12 After the CA elections, the CPN (Maoist) and Jana Morcha Nepal merged in January 2009 and the word 'United' was added before the name of the party. See: 'CPN-Maoist, Unity Centre unified', *The Rising Nepal*, 13 January 2009.

13 'Don't pull NA into controversy', *The Kathmandu Post*, 5 January 2009.

14 'Army Integration in Six Months', *The Rising Nepal*, 27 August 2008.

combatants was complete only in mid-January 2009, which has yet to complete its work. Integration of the PLA with the NA had been a point of contention for political parties too. It was not only the Nepali Congress, the then opposition party, but even the coalition parties in the government such as the CPN (UML), the MJFN and the Sadbhavana Party that were also against the integration.[15]

Differences between the Maoists and the Army Chief, Katawal, seemed to have deepened when the army continued its programme to recruit the vacant posts of the NA and extend the tenure of the retired generals despite the objection of the Defence Ministry, particularly the Defence Minister Ram Bahadur Thapa 'Badal'. The NA maintained that about two to four thousand vacancies occur every year in the army due to retirement by age, service, tenure, resignation, and the like. The army used to fill them through a regular process of recruitment but this has remained blocked and often contested ever since the Comprehensive Peace Accord (CPA) was signed by the state with the CPN (Maoist) in November 2006. The fifth clause of the CPA states, 'both parties will not make any further recruitment'.

After the signing of the CPA the Nepal Army, with the permission of the Defence Ministry, recruited personnel in May 2008. But the controversy arose to do the same a second time. The Defence Ministry had directed the army headquarters to stop recruitment. However, the army had accomplished the recruitment process on the grounds that it would adversely affect the organisation and morale of the army structure. The Supreme Court too had given the verdict to accomplish the process but not to recruit further.[16] Likewise, the NA wanted to extend the tenure of the retired eight generals and sought the permission of the ministry, which was declined. The retired generals filed a petition with the Supreme Court and the court decided in their favour. Without waiting for the Ministry's approval, the NA implemented the court's decision.

Similarly, the NA withdrew from the national sporting events when the Sports Council decided to give the PLA a backdoor entry to the events after the inauguration. The NA stated this was 'against the spirit of the games'.[17] The council had done so at the instruction of Prime Minister Dahal to allow the PLA to participate. This further deepened the polarisation between the army and the Maoists. Thus the issue of the army in general and Katawal in particular constituted a complex affair, dragging in state institutions as well as political parties. It was because of such events that the Maoists wanted Katawal to go.

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15 'No place for PLA in Nepal Army', *The Himalayan Times*, 26 September 2008; 'No integration of Maoist in national army', *The Kathmandu Post*, 27 September 2008; 'No group PLA induction', *The Kathmandu Post*, 29 September 2008.

16 '*Naya bhartilai senako patrachar* (Army's correspondence for new recruitment)', *Nagarik*, 6 July 2009.

17 'Army pulls out', *The Kathmandu Post*, 8 April 2009.

The controversy reached a climax on 20 April when the Maoist-led government asked general Katawal to furnish explanations within 24 hours regarding the recruitment of NA personnel, reappointment of eight retired brigadiers and the boycott of national games. There were a series of meetings between President Ram Baran Yadav and Prime Minister Puspa Kamal Dahal. President Yadav had advised him not to rush but to forge political consensus among the parties, particularly those in the government and the Nepali Congress, so as to defuse the crisis.[18] Although Prime Minister Dahal assured the government would take action and forge consensus among the political parties, he was firmly in favour of taking action against Katawal. He even publicly stated that Katawal would be 'sacked at any cost'.[19] Political parties, including the coalition partners, were polarized over the issues. The Maoist leaders made the dismissal of Katawal a matter of prestige relating to the principle of 'civilian supremacy' over the army. Katawal too met the president. Rumours of a coup and counter coup were floated.[20] There were attempts by the diplomatic community, particularly the Indian Ambassador Rakesh Sud, to pre-empt the dismissal of the army chief and held a series of meetings with Prime Minister Dahal persuading him not to dismiss Katawal.

On 3 May 2009 the Maoist-led cabinet finally decided to sack the army chief, General Rookmangad Katawal, and appointed General Kul Bahadur Khadka as the acting chief of the NA. The president was informed of the decision later on. When the cabinet took the decision, most of the coalition government partners were either absent or expressed their disagreement to it. Contrarily, they had asked the president to get involved. Moreover, eighteen political parties represented in the CA, including those in the government, had requested him in writing to intervene. Army chief Katawal also petitioned President Yadav, arguing he had been sacked contrary to the provisions of the constitution.

Against this background President Yadav, as the supreme commander of the Nepal Army and president of the country, presented a written letter to General Katawal asking him to continue in the job since he did not find his dismissal 'as per the constitutional and legal provisions'. The President's letter to the Army Chief, General Rukmangad Katawal, stated that he had done this in the context of his reminder to the Prime Minister to seek consensus and over the disagreement among the political parties as a result of sacking the army chief.[21] In a separate statement the next day, President Yadav said that he had acted against the government

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18 'President urges PM to consult', *The Kathmandu Post*, 27 April 2009.

19 Newspaper article in *The Rising Nepal*, 28 April 2009.

20 Jhandai Durghatana, 'Almost an Accident', *Kantipur*, 25 April 2009.

21 The Interim Constitution states, 'The President on the recommendation of the Council of Ministers shall appoint the Commander-in-Chief of Nepal Army' (Article 144 (2)). Clause 11 (3) of the Military Act, 2006 states that the government may remove the Commander-in-Chief if it is thought necessary and ask the most senior officer to work as acting chief. See: '*Rastrapati Sakriya* (President Active)', *Naya Patrika*, 4 May 2009.

decision because the government move did not have political consensus and was not supported by even the coalition partners. He also appealed to the people to cooperate in order to maintain national unity, peace and order.[22]

Prime Minister Puspa Kamal Dahal resigned on 4 May since his action to sack Katawal did not materialise and the coalition partner withdrew support to his government. He alleged the President's action was 'an unconstitutional step against the elected government'. He, however, stated that there was 'an urgent need to end the dual regime created through unconstitutional measures'. He said he was 'stepping down in a bid to safeguard democracy, nationalism and the peace process which had been endangered due to the conspiracy hatched by opposition parties and foreign forces'.[23]

The government led by Madhav Kumar Nepal, which is also a coalition consisting of several parties, had formally withdrawn the earlier government's decision to sack Katawal and appoint Khadka as the chief of the NA. However, the reconciliation with the UCPN (Maoist) is inevitable to take the peace process to a logical end and accomplish constitution-making.

Future Prospects

The Army Chief Dismissal episode may have serious implications for shaping the destination of the new and young republic. The UCPN (Maoist) has raised the issue of 'civilian supremacy' over the army being in jeopardy due to the president's action and is insisting on its rectification. Other parties, especially the Nepali Congress and the CPN (UML), defended the action of the President. The controversy may not be limited to the opposition and support of the President's action but is likely to influence the designing of the system of government that the CA is about to insert in the constitution.

It is likely that the UCPN (Maoist) may insist on an all-powerful executive president because that would provide no room for manipulation of the decision taken by the elected government. Whereas other parties, particularly the NC and UML, may see the added relevance of the president as nominal head to limit any authoritarian design by the head of the elected government. Therefore, arriving at a consensus among the parties on the future government system would more difficult while finalising the constitution.

Evolving the institution of presidency with a limited role in a parliamentary democracy is a challenging job. When it is linked with the army issue it becomes more complex and sensitive especially for the nascent republic. It provides scope for political misgivings. The current episode is a lesson-learning event. In the formative stage like this, we design and set the future political course. If there were two

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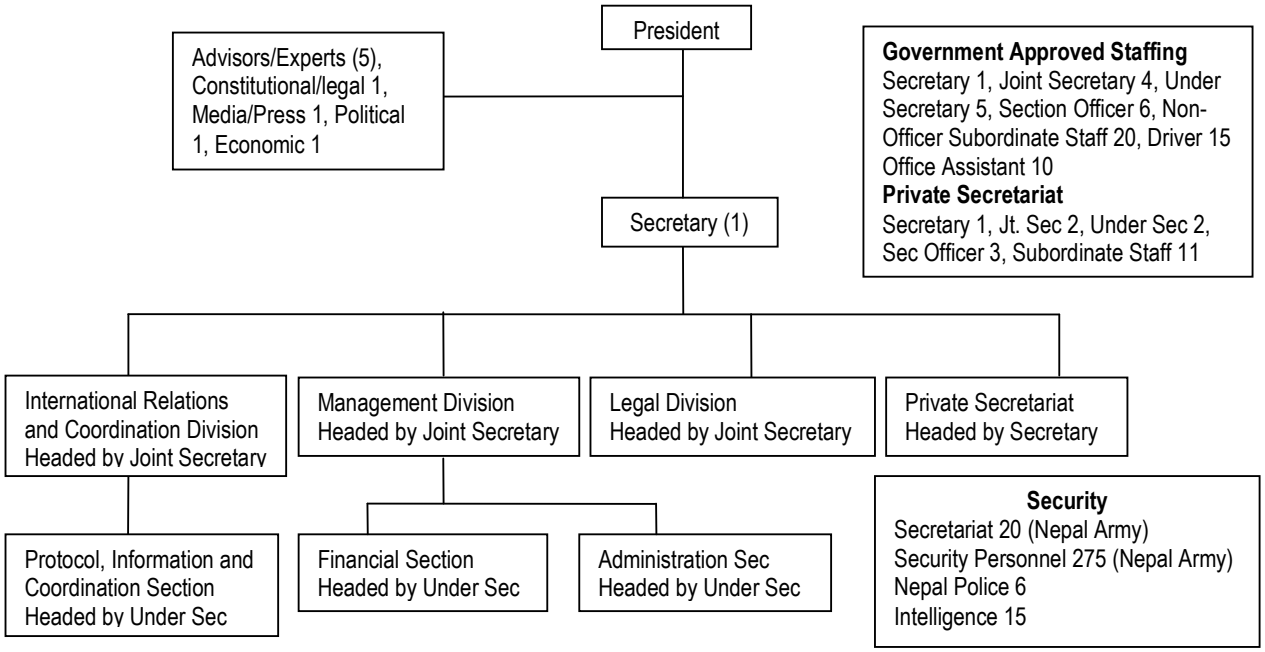
22 'President Defends Move', *Republica*, 5 May 2009.

23 Ibid.

institutions such as the President as head of state and the Prime Minister as head of the government, some mechanisms (e.g., legislative committee composed with proportional representation of the parties) could mediate and resolve the conflicting actions and rescue the head of state from partisan political interests and preferences.

Annex I: The Organisation Chart of the President's Office (as of June 2009) (source: President's Office as of June 2009)



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The Role of the Head of State Administration

Deepak Prakash Bhatta

Background

The 'Head of State' is a broad concept. In many contexts, it refers to a person and in some contexts it is understood as an office that carries out all the functions of a head of state. The administration of a head of state is thus very important. There are various forms of head of state like a King in monarchies, a president in republican states or other forms in federal states or commonwealths. The head of state has to perform his/her role and responsibilities within the limits of political rights by exercising the rights regulated and conferred by the constitution and laws of the respective country.

While talking about the achievements of the twentieth century, a nation is considered a by-product of states. In most countries, a head of state leads the country with authority.[36] In the words of De Gaulle, a head of state must be 'for the state reflecting dynamics of the state and as a symbol'.[37] His interpretation results from the period of constitution building in France. It is neither possible nor desirable to expect that in Nepal administrative structures will be invented that are entirely different from those used in other countries. Nepal is at the moment undergoing the transformation from a monarchy to a republic. Deliberations in the Constituent Assembly on the sort of political system, governing system and the structure of state and whether the head of state should be ceremonial or executive are ongoing. The provision of head of state alone does not always – in an emergency, in a period of transition or in the future – settle the matter as to what sort of political system is to remain.[38] Chiefly, in the world today, four types of head of state are in place:

(1) *Ceremonial head of state:* Wherein the role of the head of state is without executive power but the responsibility of leading the country lies in him/her.
(2) *Parliamentary system:* Under this system, the head of state exercises executive power but only as per the decision and in consultation with a Council of Ministers.
(3) *Presidential system:* Under this system, the head of state compliments the work of the head of government and all executive powers are entrusted to

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36 Ronald Dworkin, *TaKing Rights Seriously,* London: Duckworth, 1998, p. 30.
37 Alan R. Ball, *Modern Politics and Government,* London: MacMillan, 1988, p. 23.
38 Rajani Kothari, ed., *State and Nation Building: A Third World Perspective,* Bombay: Allied Publishers, 1976, p. 47.

him/her. One primary responsibility of a head of state is looking at the administration of the state. The head of state may have reached or remained in power by any method – either by an autocratic method, elections or on the basis of decent.[39]

(4) *Quasi-presidential or head of state system:* Under this system, executive power is shared between the head of state and the head of government.[40] It is also understood as the traditional model of a parliamentary system. In this system, rights are acquired by the head of state and head of government or by a cabinet on the basis of division of power. The head of government is accountable to the parliament. The 1990 Constitution of Nepal was built on this system, as was the Interim Constitution of 2007. In fact, the powers of the King and the president under the provisions of head of state are different and of a different nature.

Constitutional Provision of the Head of State in Nepal

Historically, the course of development of the head of state and the division of administrative functions occurred in four phases. First, with the rise of the Shah Dynasty, there was the provision of King as head of state. This system remained in place from 1768 to 1950. There while under the leadership of the King of the Shah Dynasty small principalities unified to become what is today known as the state of Nepal. After the rise of Jung Bahadur Rana in 1846, the Ranas retained executive powers even if the Ranas were only hereditary Prime Ministers. Second, even if there had been an endeavour to systematise the role of head of state after the establishment of democracy in 1950, it could not last long. During this period, the King remained the head of state. Third, from 1990 to 2007, even though the King remained head of state, his powers were limited constitutionally. The King remained the head of state endowed with the power to approve (or under special circumstances to disapprove) the recommendation of cabinet as the executive head of the government. Fourth, a provision was made to establish the president as the head of state, without executive powers as per the provisions made by the fourth amendment to the Interim Constitution of 2007.

The fourth amendment made to the 2007 Interim Constitution of Nepal made the president the head of state in Nepal. Under this amendment, the constitution established that the president of Nepal is a person elected on the basis of political understanding (Article 36 B (1)) or by securing a majority of the total number of the then members of the Constituent Assembly (Article 36 B (2)). The president shall be the head of state of the country and in that capacity will perform his/her functions in accordance with the constitution and the laws in force (Article 36A (2)). The main

[39] Robert McHenery, *The New Encyclopedia Britannica*, Chicago, Vol. 9, 1993, p. 684.
[40] Ibid.

duty of the president shall be to protect and abide by the constitution (Article 36A (3)).[41] Owing to these constitutional provisions, the President has to play the role of Head of State subject to limitations as prescribed by the Constitution and Laws. Likewise, the President of Nepal is considered a constitutional president. The amended Constitution has set forth the power, duties and functions of the President. Administrative functions of this office can also be interpreted in light of these powers, duties and functions.

Power, Duties and Functions of the President

- The Prime Minister has to tender his/her resignation to the president.
- The Prime Minister has to take an oath of office before the president.
- The president has to address the parliament.
- The president has to appoint the secretary general of the parliament.
- The president has to approve bills.
- The president has to issue ordinances.
- The president has to appoint chief justices on recommendation of the Constitutional Council.
- The chief justice has to tender his/her resignation to the president.
- The annual report of the Supreme Court, Commission for the Investigation of Abuse of Authority, Election Commission, Public Service Commission, Human Rights Commission and Auditor General are to be submitted to the president (to be submitted to the parliament through the Prime Minister) and the commissioner and chiefs of all these commissions are to be appointed by the president on recommendation of the Constitutional Council.
- The president can declare or revoke a state of emergency on the recommendation of the Council of Ministers.
- The president can act as the supreme commander of the Nepal Army.
- The president has to appoint Nepalese ambassadors and special emissaries for other countries on recommendation of the Council of Ministers.
- The president can grant pardon/amnesty on the recommendation of the Council of Ministers.
- The president can confer titles, honours and decorations on the recommendation of the Council of Ministers.[42]

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41 The Interim Constitution of Nepal 2007, Including Fifth Amendment (2009), Kathmandu: Bauddik Sansar Prakashan.

42 '*Aba Rastrapati ra Uparastrapati* (Now President and Vice-President)', *Kantipur Daily*, 29 May 2008, p. 1.

The position of the president of Nepal is not entirely a ceremonial one as argued by some because there is the provision for the president to be a constitutional president. It should thus be interpreted as a quasi-presidential system. After the constitutional monarchy was abolished, the provision for a constitutional president was made in the Interim Constitution of 2007.

Role of the President

The president of Nepal is not the one holding executive power to engage in administration of the country. Currently, the president has been given the responsibility of head of state and protector of Nepal. There is a provision made regarding the president as the supreme Commander-in-Chief of the Nepal Army, and s/he is responsible for the operation of the army on the recommendation of the Council of Ministers. The Constitution provides for the President to move forward to with decisive endeavour in order to find a way out of mistakes made in any decision process by the government, especially in cases where the government has taken a decision as per a political bias, i.e. if there is any mistaken decision taken by the government and the president thinks this is not as per constitution or it is a biased one, s/he can is returning the decision to the Cabinet to rethink. There is also a provision to make decisions subject to the constitution by acquiring information on subjects of national importance/interest by considering probable consequences that may be caused by these decisions.

The Office of the President – A New Institution

The power, function and duty of this office has not yet been interpreted completely, as it is a new institution set up after abolishment of the monarchical institution of the Shah Dynasty that existed for almost 240 years. Owing to the presidential institution and its administrative structure, there has been a host of incidents where some confusion was revealed. Dilemmas appear from time-to-time in relation to interpretations made by the institutions concerned and the political parties on difficulties/hurdles relating to jurisdiction that is not interpreted by law and provisions made by the constitution and laws regarding the relation between the President, legislature-parliament and the government.[43] There was much more confusion in the President's Office regarding its function on the basis of traditions, practices, and international experiences and relations with other institutions. The task of determining the relation of this institution with other entities/organs has been

[43] Based on a personal interview with Mr. Lalit Basnet, Principal Personal Secretary to the President, Ram Baran Yadav, on 12 June 2009 in Kathmandu.

conducted on the basis of experiences in India and Britain and traditions from the time of the monarchy.[44]

Functions and Duties of this Institution

Functions Relating to State Administration

The Office of the President has to conduct some functions relating to the state administration as prescribed by the constitution and laws, such as appointing the Prime Minister, receiving annual reports of the constitutional bodies, presenting the programme and policies of the government in the parliament, administering oaths and appointing officials of the constitutional bodies etc. The president has to engage actively in activities like the appointment of an ambassador and receiving credentials from foreign ambassadors to Nepal.

Law Making

Functions like approving bills passed by the parliament and issuing ordinances brought by the government at times when parliament is not in session, falls under the constitutional duty of the president. While conducting functions regarding bills and ordinances by the president, the Office of the President has to closely study whether the bill or the ordinance is in agreement with the constitution or not and whether it is in favour of the national interest or not. This occurs because the president is responsible for protecting the constitution and thus must give these functions the utmost attention.

Meeting, Memorandum and Invitation of Inauguration

As it is the first time a citizen from the general public has become the Head of State, it shall be taken as natural that people want to express their grievances and provide advice and suggestions to the president. Perhaps because the position/post of president is new to Nepal, most people wish to meet the president as well. In this way, most of the visits are from activists, leaders of political parties, the general public, heads of diplomatic bodies and national-international personalities.

People come before the president to complain against or in favour of the government in case of national problems, whether it be the Koshi flood or the priest of Pashupati Nath or the removal of the Chief of the Army in the recent past. As a result, tasks like fixing the order of priority to managing time become very important. It is natural for civil society representatives, journalists and human rights activists to give suggestions along with grievances to the president on the situation of the

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44 Ibid.

country. There exists the provision of forwarding matters to the Council of Ministers after considering the seriousness of grievances (verbal/in writing) received during meetings as well as informing the Prime Minister verbally about very serious and sensitive matters.

Some confusion exists as to how the President is to visit foreign dignitaries and whether to meet through the government or to meet directly and then inform the government only after the meeting. Visits are not suitable for the status of the President with certain types of foreigner dignitaries. Voices of dissatisfaction were heard as to such visits being against diplomatic norms and being unsuitable for the status of the President. It is quite a difficult task to decide whether or not to attend certain public programmes. As the president is a familiar public figure, there used to be big pressure to attend programmes from different social organisations. But now a system has been made to take decisions considering seriousness and importance of a concerned programme through a joint meeting of advisors, secretaries and the president's personal secretary.

Support Organs of the President

There are private and governmental organs that exist to assist the President. Within private assistance, there are posts created by the government for the purpose of assisting and providing advice to the president, appointed by his/her own discretion. This consists of a Personal Secretariat under the leadership of a personal secretary (special class officer) and four experts and advisors equivalent to the Minister of State. All matters relating to the appointment and tenure of the personal assistant is per the discretion of the president. This team is entirely for providing assistance to the president. Likewise, on behalf of government as per the governmental assistance, there are security agencies and prescribed officials for the Office of the President, including a secretary of the government.

Advisory Group

There have been four advisors and experts for providing necessary advice to the president, which consist of legal, press, political/diplomatic and economic advisors. Following the division of duty as shown in Annex 1, business has been conducted under the leadership of Secretary (Special Class) provided by the Nepal government. The secretariat assists in functions and duties of the president.

Relating to Constitutional and Legal Advice

Since the President has a role in law-making and constitutional appointments and is the protector of the constitution, the division of work of the secretariat is quite an

important task. The responsibility of this division is to verify the constitutionality of any subject that is recommended for authentication and to see whether a due constitutional process has been pursued therein or not. This division assists the President in taking decisions after observing all legal documents on the concerned subjects. There remains one joint secretary on behalf of the government of Nepal, under the supervision of a legal advisor of the president. This division should be very strong, effective and scholarly as the constitutional and legal function of the president is among its major functions. The following are the main functions for this division:[45]

- Preparation of written answers/responses and defence.
- Appointment of officials of constitutional bodies, oath taking and annual reports.
- In relation to the framing and amendment of laws.
- Granting pardon, honours and decorations.
- In relation to law, justice and constituent assembly.
- International law, treaties and other matters relating thereto.
- Authentication of bills and ordinances.

Record Management of all Employees of the Office

- Work performance evaluation of subordinate employees, study of leave approval, recommendations for training.
- Supervision and caretaking of subordinate employees.
- Financial management of the office.
- Caretaing and management of inventories.
- Management of physical resources necessary for various programs.
- Management of means of transportation of the office.

President's Functions Relating to Foreign Affairs

- Reviewing the credentials of foreign ambassadors.
- Management of meetings with foreign diplomats and other foreign dignitaries.
- Function relating to the correspondence on behalf of the president at the national and international level.
- Preparation of messages and greetings to be given by the president.
- Coordination of various programmes and necessary resources.

[45] Ibid.

Study and Analysis of Letters/Petitions Addressed to the President

- Management of the president's programme.
- Management of meetings to be conducted at the Office of the President.
- Monitoring and coordination relating to the implementation of orders/directions given by the president.

Security Management of the President

The government of Nepal has provided for the security of the president as follows:

- Along with the provision for the security of the President, there will be the provisions for the security of residence and secretariat of the President and special advisors and secretary of the President as well as administrative secretariat, security and ceremony secretariat.
- A total number of 275 army personnel will be deployed under the command of a brigadier general in various sections and sub-branches that remain under the Security and Ceremony Management Secretariat.
- There will be a colonel deployed as security and ceremony deputy chief/chief bodyguard.
- There will be 20 security personnel deployed for the work of the secretariat.
- Under this secretariat, there will be a security branch, bodyguard branch and ceremony and management branch. A lieutenant colonel will be the chief of each such branch.[46]

Security Branch

Under this branch there are the following units:

- Company (Gulma) of Nepal Army for the security of the residence of the president (150 in number)
- Special Security Force (50 in number)
- Section (Milap Patti) (11 in number)
- Bomb disposal team and sniffer dog team are to be delegated from other places as required

[46] Ex-Kings Car, 275 Security personnel to President, http:/www.nepalmountainnews.com/new.php/2008/2/22.htm/

Bodyguard Branch

Under the command of the colonel, this branch consists of a bodyguard security team (6 individuals) to provide security by remaining close to the President.

Ceremony and Management Branch

This branch manages various ceremonies as well as systematises the management of the army delegated to the residence of the President. There remains a total of 33 forces in the sub-branch (Upa-Sakha) and sections (Patti) under this branch.

- *Ceremony sub-branch:* The following units remain under this section:
    - Division honour guard (delegated from other places)
    - Necessary cavalry (delegated from Nepal Cavalry)
    - Section lancer (delegated from Nepal Cavalry)
    - Big band (deputed from the military band)
- *Management sub-branch:* The following sections remain under this sub-branch:
    - Transportation section (11 personnel)
    - Management section (11 personnel)
- *Training sub-branch:* This sub-branch manages the provision of training by recruiting necessary manpower.

As per the policy-wise decision and direction of the government, the strategy of ceremony and the security of the president are as follows: Nepal Police, Armed Police Force and National Investigation Department remain under the Nepal Army, which performs the prescribed function for the security of the President. The following functions lie under this:

Management and Standardisation of Security

For the total security of the president, it is very essential to adopt a reliable and faithful security system. Along with the construction of physical infrastructure relating thereto, it is essential for the administration to be alert regarding use of security instruments and systematic operation of all security organs prescribed by the government of Nepal. It is necessary to keep on making security instruments and infrastructures and providing timely training to develop the security management of the president successively, on par with the international standards regarding security management of VVIPs.

Security and Ceremony Management Secretariat

All coordination relating to security and ceremony management are conducted by this office.

President's Residence, Sheetal Niwas

The management of the operation of various security organs for the security of the residence of the president has been made as following:

- Aide-de-Camp (ADC):
  - To provide security by coordinating with all security bodies while remaining inside the office, residence and precincts of the president.
  - To arrange the provision of security checks by coordinating with the concerned secretaries of the Office of the President regarding visitors to the president.
  - To determine the security prior to the arrival of the president to the office, by security checking meeting rooms, offices and the office grounds every day.
- To check the work schedule of all security organs appointed for providing security to the Office of the President.
- To maintain coordination by holding meetings with commanders of all security bodies.
- To make necessary security arrangements by coordinating with all security bodies on transportation to a programme venue and the programme venue itself when the president is to attend any programme outside the Office of the President.
- To manage coordination with the concerned secretary and other civil officials of the Office of the President regarding programmes to be conducted inside the grounds of the Office of the President.
- To exchange information by making contact from time-to-time with the concerned officials of all the security agencies engaged in the security of the president.
- To manage the necessary security provisions in various programmes of the president conducted outside the Kathmandu valley in the country as well as abroad, by coordinating with officials of various security organs.
- To always keep the means of transportation of the president in sound condition.

Special Security Force

Functions to be conducted by the special security force are as follows:

- Security checks of all persons that come to visit the Office of the President are to be conducted at the main entrance. Except in cases where persons by direction are recommended as not necessary to perform security check.
- To inform the requested person while keeping the visitors in the control room.
- Restrict access to the Office of the President for persons not bearing permission from the office of the ADC and send them to the concerned persons office instead leaving bags, briefcases and other items in a secure place in the control room (to be assessed by the direction in the case of VIPs).
- Not to send armed persons (army, police, armed police force or concerned security personnel) toward the President's Office. In a situation where an armed person is to be sent to the President's Office, the person is only permitted to go after surrendering his/her weapons to the commander in the control room, which will be returned later on.
- Restrict persons not having an entry pass from the Security and Ceremony Management Secretariat from entering the president's office (to be considered by the direction in the case of foreign guests and VIPs).
- Security personnel posted outside the meeting hall on the first floor must restrict individuals without an entry pass from entering the meeting hall and going toward the Office of the President (to be considered by the direction in the case of foreign guests and VIPs).
- To assess, as per the direction of the office of ADC on information provided by security personnel, if officials (with or without uniform) of any security organ can visit the Office of the President.
- To consider, as per the direction of the office of the ADC, if additional security needs to be provided to the inner circle other than that of the recruited security company in the Office of the President.
- To arrange necessary security management by coordinating with all organs involved in security while remaining in the Office of the President or on the grounds.
- To report to the ADC by deploying necessary manpower in advance for ensuring the security of venues where the president is visiting.
- To maintain the security manpower, a platoon (Senamukh) (40 in number) from the Armed Police Force and one section of the Nepal Police will provide external security of the residence, places of public meetings and the entrance door of the Office of the President.

Nepal Police

As per the decision of the cabinet of the government of Nepal, details of approved recruitment and duties of the 15 security personnel delegated from the Nepal Police are provided as follows:

- To collect information associated with the security of the President's private residence, office, family and property.
- To protect and conduct surveillance of programme venues where the President is arriving and the main and alternative transportation routes to the venue; to coordinate with the officers delegated to security by receiving information relating thereto.
- To conduct surveillance of the guests/visitors arriving to visit the President.
- To coordinate with the Security Secretariat and Security Division of the Police Head Office regarding legal, formal, informal programmes of the president and the activities relating thereto.
- To arrange the traffic management while travelling to the place where the president is to appear.
- To arrange effective security management at the legal, formal and informal venue of ceremony where the president is to appear.
- To collect information relevant to the private and family life of the president and to provide the collected information to the Security Division of the Police Head Office and Security Secretariat for evaluation.
- To maintain a record of programmes to be conducted in the Office of the President.
- To inform the Security Division of the Police Head Office and Security Secretariat regarding any potentially unnatural incidents during any programme of the president.
- To maintain coordination with all relevant security agencies.

Armed Police Force

- To provide security at the outer circle of the grounds of the Office of the President.
- To restrict any undesired persons/group from approaching the area under its surveillance.
- To conduct surveillance of the area under its duty, day and night.
- To take control of the activities of suspicious persons/group.
- To promptly report suspicious objects seen to the main office, security company or Office of ADC.
- To maintain necessary coordination with other security agencies on duty.

- To act as directed/ordered, in the line of duty, in a situation where force is to be used to reduce the hazard/threat to the Office of the President.

National Investigation Department

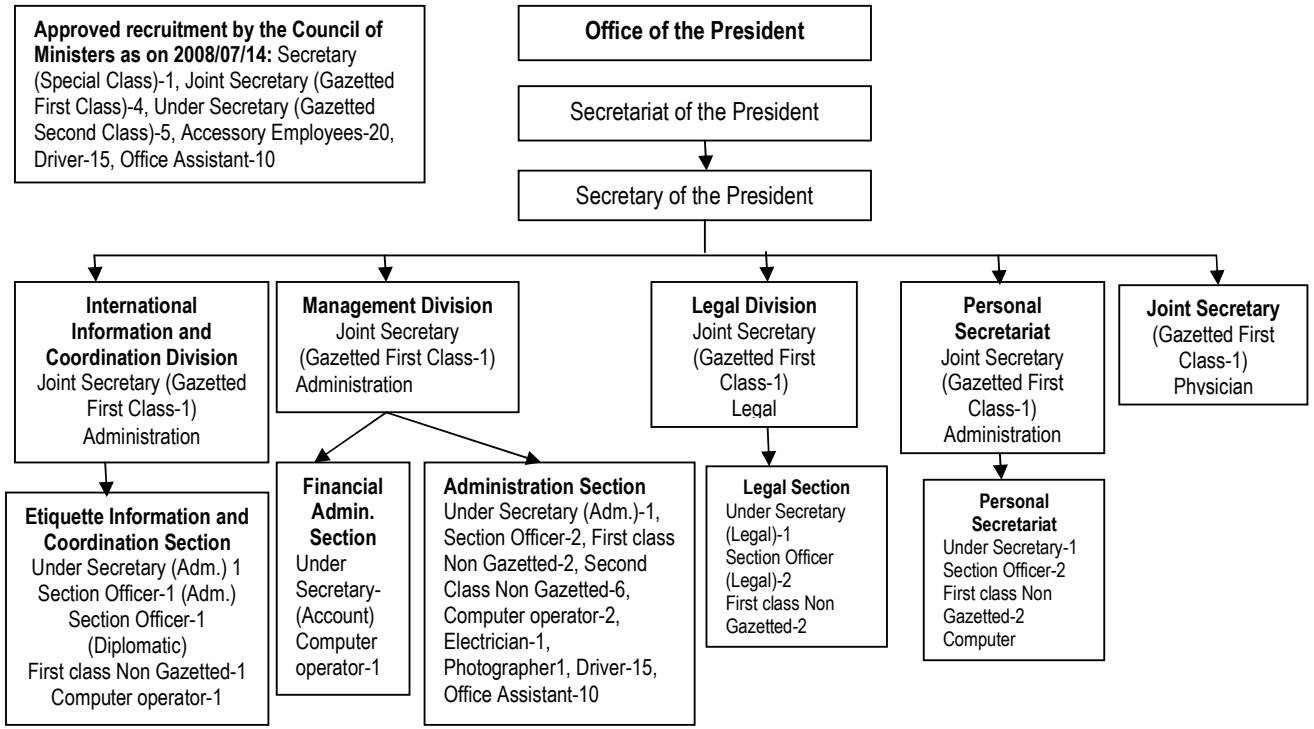
As per the decision of the government of Nepal, there remains a 15 member team of the National Investigation Department for providing security. This team consists of a chief investigating officer of first, second or third class gazetted level or equivalent, 3 officers, consisting of an assistant investigating officer and an investigating officer, and 12 others, appointed to the Office of the President. While considering the work, skills required and nature of their role, the personnel appointed are deployed at the very outer ring of security. Its functions and duties are as follows:

- Ensure the private security of the president, as well as security of his/her office and residence.
- Coordinate action to ensure the prestige and dignity of the president.
- Conduct surveillance and restrict the intrusion of unauthorized persons where formal and informal programmes of the president take place.
- Conduct surveillance of the road to be used for transportation to the venue of the programme of the president.
- Collect information in advance regarding the organizers of the programme to which the president is attending and to analyze the security situation in coordination role with the private and personal secretariat.
- To collect information and report on planned the programmes in protest or in favour of the President.
- To maintain records of the personnel appointed to the Office of the President by evaluating their moral standards, previous behaviour and their affiliations with different organisations/institutions.
- To maintain records of articles/writings mentioning the president and criticisms directed at the president.
- To make available information regarding security, if demanded by the Office of the President.

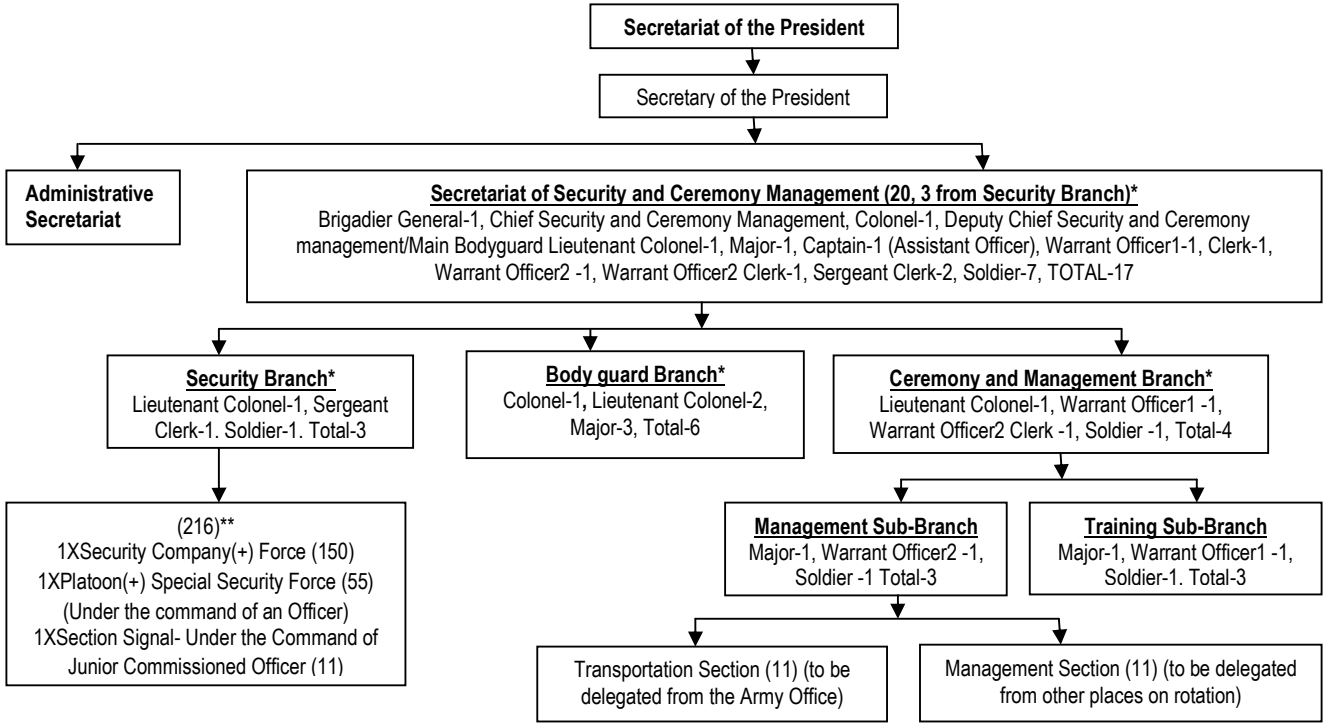
Personal Secretariat

This secretariat exists entirely to personally assist the president. All personnel are appointed at the discretion of the president and are accountable to him/her. Under the direction of the president, the secretariat assists him/her by coordinating with the president's administration.

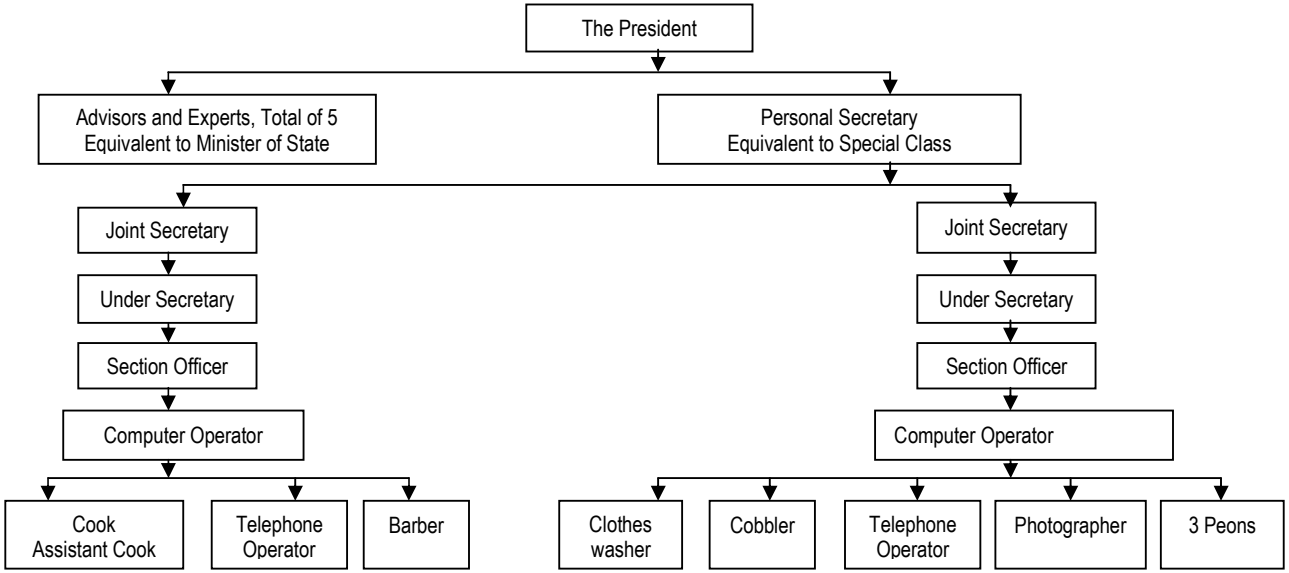
Annex 1: Organisational Structure of Employees of the Office of the President



Annex 2: Organisational structure of the security force recruited/appointed to the office of the President



Annex 3: Support Organs for the President



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The National Security Council: An Analysis

Surendra Pandey

Historical Background

The National Security Council was established first time in the history of the world in the United States of America in 1947. Subsequently, it was followed in the countries like China, Taiwan, Iran, Israel, India, Sri Lanka, Pakistan, North Korea, Romania, Russia, Turkey, Tajikistan, Georgia, Kazakhstan etc. In the United Kingdom, National Security Council was formed the last time in the month of March in 2008.[1] Each nation has seemed to have contemplated on its own political contexts, national concerns, and internal and external security policies while forming such Council.

With the end of World War II in 1945, the then Soviet Union and the United States of America stood as the major powers in the global politics. The United States of America felt challenging to extend its upshots all over the world due to escalating power of the then Soviet Union. As a result, the former President of the United States of America Harry S. Truman came to a conclusion that it was impossible to deal with the matter only through the diplomatic means of American Foreign Ministry.[1] President Truman upheld coordination and consensus among the bodies related to security forces such as water, land, air. For this purpose, he formed National Security Council in accordance with the law. President Truman also founded Central Intelligence Agency (CIA) by the same law. The objective of American National Security Council has been to advise and assist the President on matters related to national security and foreign policies.

The study of the procedures concerning the formation of National Security Council around the globe reveals they are formed either through constitutional or legal provision or from an executive decision.

In the context of Nepal, the concept of National Security Council was inaugurated only after the historical people's movement of 1990. As an attainment of the movement, the Interim Government was formed. The government was coalition from the leaders of Left Front (United Left Front of seven communist parties and organisations including the then Communist Party of Nepal- Marxist Leninist/CPN-ML, Nepali Congress and representatives of the King. At that time, the then King Birendra formed a Constitution Recommendation Commission from the members of three partners. Keeping in mind such political transformations, the Constitution Recommendation Commission paced ahead to the task of drafting a new constitution. In the 36th Meeting of the Commission, its members gave contrary

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1 Constituent Assembly, National Interests Protection Committee, Draft Report along with Concept Paper. P. 122

opinions on the name of Army.[2] In fact, Nepali Congress and representatives of the King had argued to continue the same name 'Royal Nepal Army,' whereas the representatives of the Left Front (Communists) had insisted to change the name 'Royal Nepal Army' into 'Nepal Army'.[3] The rationale behind changing the name of Royal Nepal Army, as the leftists argued was that the then Shah rulers had used the Royal Nepal Army to suppress democratic strength and its movement. As a result, Royal Nepal Army had been disdained as the force to restrain democratic strength and people's movement. With reference to such past activities and sometimes atrocities of the Army, the representatives of the Left Front floated the idea of operating the army under elected government and parliament, and sought to transfigure the name in order to avoid its further misuses.[4] But, the Commission with majority of its members decided to stick to the same name Royal Nepal Army. [5]

Consequently, the 36th meeting of the Commission finally held the name of the Army. The 44th meeting of the Commission had wide discussion on some serious issues including the modus operandi of the Army, and the overall management of its operation in the new constitutional monarchical multiparty democratic system.[6] In this context, it is equally important to understand that the then Chief of the Army Staff had invited the Chairperson of Constitution Recommendation Commission Bishwa Nath Upadhaya for a meeting at the office of Commission at Bhirkutimandap. But, the Chairperson, refusing the call for meeting at the office, met him in his residence at Gyaneshwor. In that meeting, the Chief of the Army Staff had asked to vest national sovereignty and Royal Nepal Army with His Majesty. He had also requested for the operation and use of the Army to be exercised from His Majesty. He had insisted National Security Council to be of eleven members, with the majority of Royal Nepal Army's officers as members.[7] However, the Chairperson of the Commission refused all pleas of the army chief. The Chairperson was of the opinion that governance system should be vested in the representatives of the people and the supreme power with the State.[8] The army chief rather argued not to control the Royal Nepal Army by the representatives of the people, and claimed doing so would be politicizing the Army. The Chairperson refused his argument. Afterward, the Chief of the Army Staff proposed to form the Council of seven members.[9] The Chairperson again did not agree with him. Later, the Commission made a decision and recommended for the formation of National Security Council consisting of five members: the Prime Minister, the Defence Minister, the Foreign Minister, Atirathi (second-in-command of

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2 Mukunda Regmi, *Constitutional Development and the Constitution of the Kingdom of Nepal 1990.* P. 414
3 Ibid.
4 Ibid.
5 Ibid.
6 Id. at 1361
7 Id. at 1359, 60
8 Id. at 1360
9 Ibid.

the army), and the Chief of the Army Staff.[10] In case the Prime Minister holds an office of Defence or Foreign Minister, the Prime Minister depending on the situation could designate any other Minister instead of Defence or Foreign Minister as a member of the Council; in case the office of both Defence and Foreign Minister is held by a single Minister, the Prime Minister shall designate another Minister; and, in case the Atirathi is unoccupied or is no more, His Majesty shall designate any other Army official as a member of the Council. Similarly, the Royal Nepal Army was recommended to be operated and mobilised from His Majesty as per the recommendation of National Security Council. Prior to this, Nepali Congress, CPN (ML), CPN (Marxist), CPN (Tulsi Lal Amatya), Nepal Sadbhawana Party, and various bodies of the Royal Nepal Army had submitted their recommendations on this issue to the Constitution Recommendation Commission.[11]

As such, it was recommended to form a national Security Council with the chairmanship of the Prime Minister, to mobilise the army of the nation under the same national Security Council, and to designate Chief of the Army Staff from His Majesty.[12] The then CPN (ML) had recommended making the army accountable not to a person or to an association, rather to the whole nation. It also recommended that the Nepal Army should be operated democratically; kept under the control of elected parliament. It also made the recommendation to form the supreme army commission by parliament for the operation of the army.[13] The CPN (Marxist) had recommended to alter the name of the Royal Army into the Nepal National Army, and to operate it under the Council of Ministers. Nepal Sadbhawana Party had insisted to establish a distinct battalion of the army so as to involve Madhesi communities in National Security.[14] Similarly, CPN (Tulsi Lal Amatya) had recommended for the operation of the army under the Security Council.[15] Whereas, Royal Nepal Army had put forward an idea of forming National Security Coordinating Committee to deliver opinions and recommendations upon His Majesty about the designation of Chief of the Army Staff.[16] The Coordinating Committee was recommended to be consisted of the Prime Minister as Chairperson, and the Defence Minister (the Foreign Minister as per the necessity), Atirathi , Chief of the Army Staff, Chief Army Secretary, Defence Secretary, Baladhikrit, as well B.U.N (member secretary) as members. Royal Nepal Army had also submitted a written recommendation to the Constitution Recommendation Commission about the sovereignty of Kingdom of Nepal which they argued to be vested in His Majesty, instead of securing it within the Nepalese people.[17] Besides this, some fifteen Generals of Royal Nepal Army met the then

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10 The Constitution of the Kingdom of Nepal (Draft and Explanatory Note), Constitution Recommendation Commission 1990, Part 20, Article 145, P. 81

11 Op.cit at 1361, 62

12 Id. at 1361

13 Ibid.

14 Id. at 1361

15 Id. at 1362

16 Id. at 1363

17 Ibid.

Interim Prime Minister Krishna Prasad Bhattarai and put their opinions of vesting the sovereignty of Nepal upon the King as did in the past.

The then Interim Council of Ministers had extensive discussion on the recommendations made by Constitution Recommendation Commission, and made some amendment to the report as well. In Article 118 of the Constitution of the Kingdom of Nepal, enforced on the recommendation and with the consent of the Council of Ministers from His Majesty, the title National Security Council was fixed by amending its earlier name.[18] The National Security Council consisted of the Prime Minister as the Chairperson, and the Defence Minister and Chief of the Army Staff as its members. His Majesty operated and used the Royal Nepal Army on the recommendation of the National Security Council. The establishment and management of the Royal Nepal Army, and other matters relating thereto were as determined by law. The Council had the power to regulate its working procedures on its own. And, it was also provided that His Majesty would appoint the Chief of the Army Staff on the recommendation of the Prime Minister.[19] Similarly, the approval of the budget for Royal Nepal Army was stated to be fixed by the Parliament.

Current Status of National Security Council

The dispute and discussion regarding the issue of Army which commenced at the time of drafting the Constitution of 1990 came to be relevant again in 2002. The then King Gyanendra in support of the Army removed the elected Prime Minister Sher Bahadur Deuba in the month of October, and began designating and removing the Prime Minister and other Ministers on his personal will and satisfaction. By 1st February 2005, he himself held the office of the Prime Minister and centralised the whole authority and government upon himself. A broad alliance of political parties and Nepalese people protested against the Royal takeover. The King tried his best, with the support of the army, to tread political and democratic movement. The people's movement sublimated itself into people's revolution by April 2006. Finally, King Gyanendra bowed down his steps, and reinstated the parliament on April 24, 2006. The meeting of reinstated parliament on May 18, 2006 decided to replace the name of Royal Nepal Army as "Nepal Army".[20]

The Interim Government formed by the mandates of the historical people's revolution declared a ceasefire, and commenced a process of dialogue with the Communist Party of Nepal-Maoist (CPN-Maoist). The government signed a Comprehensive Peace Agreement with the Maoist and proclaimed the Interim Constitution. Article 145 of the Interim Constitution has made the following provisions regarding National Security Council:[21]

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18 The Constitution of the Kingdom of Nepal 1990. Part 20, Article 118.

19 Ibid.

20 Historical Proclamation of the Reinstated Parliament May 18, 2007. $

21 Op.cit at Article 145, P. 64

- There shall be a National Security Council in order to make recommendations to the Council of Ministers on mobilisation, operation and use of the Nepal Army.
- The Chairperson of the Council shall be the Prime Minister, and the Defence Minister and the Home Minister shall be its members. In case the Prime Minister and the Defence Minister is the same person, the senior-most member of the Council of Ministers shall be a member of the Security Council.
- The National Security Council may, if considered necessary, invite other persons to the meeting of the Council. The Secretary of the Ministry of Defence shall work as the Secretary of the National Security Council, and, in his/her absence, the officer designated by the Prime Minister shall carry out such work.
- The National Security Council may regulate its own working procedures. Except in the case of natural calamities, the decision made by the Government of Nepal for the mobilisation of the army shall be presented to a special committee prescribed by the Legislature-Parliament within a month of the decision, and be approved accordingly.

In addition to these provisions, the fifth amendment of the Interim Constitution has provided that three ministers designated by the Prime Minister representing three different political parties from among the parties in the Council of Ministers shall be the members of the National Security Council.[22] While designating as such, if there are fewer than three political parties represented in the Council of Ministers, the Prime Minister could designate three of the representatives from fewer than three parties. Similarly, the task of forming lasting National Security Policy, in accordance to foreign policy and constitution of Nepal, is upheld on the National Security Council.

Procedure of National Security Council

Pursuant to sub-clause (6) of Article 145, Part 20 of the Interim Constitution of Nepal, there is the procedure of establishing an autonomous Secretariat of the National Security Council in order to operate the functions of the Council. A higher class officer of Nepal army would be its coordinator.[23] The officer would be solely responsible for the total tasks of the Secretariat, and for his/her designation, the Council of Ministers has to make decision and conduct as per the support and agreement of the National Security Council.[24] The Council is endowed with the tasks of mobilisation, operation and use of the Nepal Army. Besides these, the other functions, duties and powers of National Security Council are:[25]

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22 Ibid.
23 National Security Council, Procedure, 2006, P. 5
24 Ibid.
25 Id. at 7

(a) Prepare policy, plan and programme regarding the mobilisation, operation and use of the Nepal Army, and submit it to the Government of Nepal,

(b) Submit recommendations to the Government of Nepal regarding the number and organisational structure of the Nepal Army,

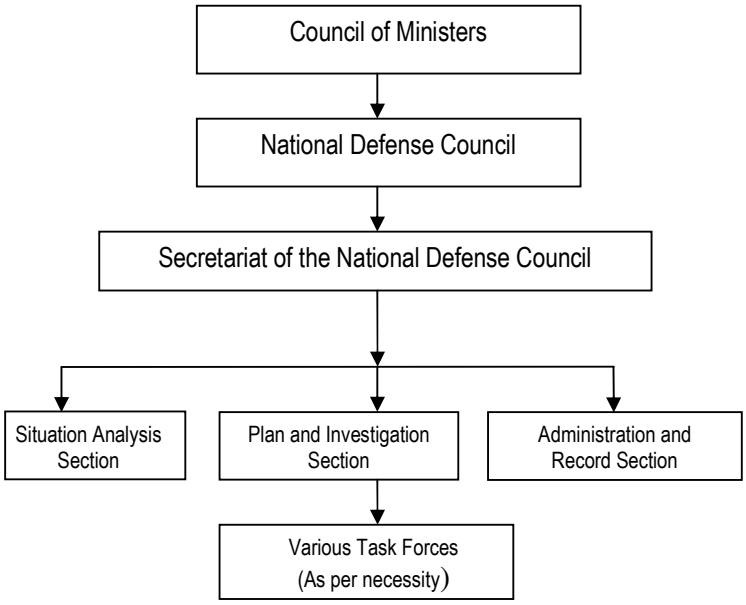
(c) Give recommendations as per the necessity to the Government of Nepal regarding the management of the Nepal Army,

(d) Submit recommendations as per the necessity to the Government of Nepal regarding arms and ammunition, and other artillery materials of the Nepal Army; and do other prescribed tasks.

The Secretary of the Ministry of Defence functions as the Secretary of the National Security Council. He conducts or causes to conduct the meeting of the National Security Council and implement or cause to implement the decisions. Similarly, the procedure regarding its meeting is as per the decision made by the Council. The Prime Minister has to chair the meeting of the Council, and in his/her absence, the minister designated by the Prime Minister as an acting Prime Minister has to carry out such work.[26]

The Council may call experts and other concerned persons in its meeting in some special cases as such when the Council of Ministers has asked for the opinions and recommendations, when it has to make some important decisions, and when it has to send them to the Government or in such serious cases. If the Council deems it necessary, it may invite other than the members of the Council, the Ministers, Chief Secretary, Secretary including Chiefs of other security forces and concerned experts, as invitees to the meeting of the Council for their opinions, recommendations and interactions. But, the opinions and recommendations of the invitees are not mandatory to the Council.[27] The organisational structure of the National Security Council secretariat is as below:

[26] Id. at 6
[27] Id. at 13



Budget of the Council

The budget authority required for the Secretariat of the National Security Council is delegated by the Government of Nepal. Task Operating Fund and Special Fund are distinctly formed to regulate the budget. The delegated amount from the authority is kept in the fund in accordance with the Regulations regarding financial administration; and is released through the office of audit controller. The amount received from the Government of Nepal is provisioned to be deposited in the bank designated by the office of audit controller in the account of the Secretariat. The account is operated by the coordinator or designated authority by the coordinator and audit officer of the Secretariat. The Secretariat, while expending the amount delegated by the Government, has to expend it under different expenditure titles as per the provisions provided by the Government of Nepal. In this way, the procedure regarding the expenditure of the National Security Council is implemented in accordance to the Regulations Regarding Financial Administration, 1999. The budget allocated by the Government of Nepal in various years is as below:

Budget of the National Security Council and Expenditure Description[28]:

(Rupees in Thousands)

Fiscal Year	Allocated budget	Net Expenditure
2061/62 B.S (2004/5)	15,208	16,465
2062/63 B.S (2005/6)	16,624	17,980
2063/64 B.S (2006/7)	18,324	15,435
2064/65 B.S (2007/8)	16,374	17,344
2065/66 B.S (2008/9)	17,387	16,500

Scope of National Security Council

Traditionally, National Security was argued to be something having only duties and responsibilities for Army and Police. But, the extensive scope of Security Council is understood now in a wider sense. Today, it includes sovereignty, national integrity, political, diplomatic, economic, social, army, and scientific as well as information, environment, good governance, development, human rights, and other various issues and areas. In fact, the national security can be guaranteed in true sense only by an effective and due process of management of all the above scopes. Viewed from this perspective, security is that thing which minimises emergencies and other problems that may come occur; and consequently, it provides a guarantee of cosy environment for the public in order to work with confidence for individual, community and for the overall welfare of the nation. In sum, security is the total of all important national issues of every country, and it is in itself a multidimensional subject.

The major issues that generally affect National Security include:

- Security of national existence and national sovereignty
- Security of social supervision and state management
- Security of citizen's rights and freedoms
- Financial security
- Informational security
- Ecological security
- Security of national resources
- Security of public citizens and their successors.

[28] Expenditure Description of the Fiscal Year form 2005/6 to 2008/9

New Constitution and the National Security Council

The Constituent Assembly formed on April 10, 2008 has been working to prepare a draft of new constitution. One of the thematic committees "National Interests Protection Committee" has already submitted its preliminary draft report to the Constituent Assembly, in which comprehensive recommendations regarding army, national security policy and national Security Council are mentioned.[29] The report, analysing the provisions regarding army and national Security Council in the Constitution of 1990 and in the current Interim Constitution, has drawn a conclusion with various important recommendations for the future. It has recommended to uniformity regarding the member of the Council through the repealing ambiguous provisions from the Interim Constitution and Army Act 2007; to make National Security Council active and effective in order to give suggestions in the matter of forming National Security policy; to involve the Chiefs of all four security organs Army, Police, Armed Police, and National Investigation as the advisors; to involve foreign, security and conflict experts as advisors and collect their valuable suggestions; and give special kind of responsibility to the experts by generating a special post of National Security Advisor. Similarly, it has recommended on getting Finance and Foreign ministers as the members in the total of present structure of the Council. In addition, the report has also recommended, as National Security encompasses political, economic, social, cultural, environmental, and overall security of the people, to include the Vice President of National Plan Commission as a member of the Council.[30]

Achievements, Weaknesses and Constraints

The main objectives of establishing National Security Council in Nepal was to generate democratic control over the Army, to operate it under the law made by the Parliament, and to leave it under the control and directions of the elected government. In this respect, formation of the National Security Council, establishment of its Secretariat, operation of both the National Security Council and the Nepal Army as per the budget passed by the parliament etc. can be measured as some of its achievements.

Besides these achievements, it had the following weaknesses and constraints:

- Even though Article 118 (3) of the Constitution of the Kingdom of Nepal 1990 maintained the establishment and management of the Army to be as determined by law, the Parliament could not make a law regarding Army till that Constitution was enforceable. As a result, the management and mobilisation of

[29] Constituent Assembly, National Interests Protection Committee, Draft Report along with Concept Paper 2009, P. 108

[30] Ibid.

the Army was conducted as per the Army Act of 1959, which sharply contrasts with the Constitution of 1990. On the other hand, the tasks, duties and rights of Chief of the Army Staff and Service Limitation Act 2026 remained enacted. Consequently, the legal system which maintained the Chief of the Army Staff to be loyal upon the King could not be amended.[31] As such, the constitutional vision of keeping the Army under elected parliament and the Government as provided in the Constitution of 1990 could not get fulfilled.

- In this regard, the then King Birendra had refused the recommendation of mobilizing the Army, when Maoists attacked on security force, made by the then Prime Minister Girija Prasad Koirala.[32]
- While the Constitution of 1990 upheld the provision of National Security Council, it could not encompass all security sectors, i.e. security forces other than the Army.
- The National Security Council could not draft national security policy for quite a long time.
- Though the Constitution of 1990 has upheld the provision of three members in the National Security Council including the Prime Minister, the Defence Minister and the Chief of the Army Staff; in reality, it remained only of two members because the Prime Minister held the office of the Defence Minister as well for long period. As a result, it could not function as a committee. On the other hand, the task of forming security policy could not befall calm due to placing of the Chief of the Army Staff, a public servant, into the committee of political nature. The Chief of the Army Staff was placed as the member of the Security Council against the vision of operating the Army under democratic control.
- Though it is considered as an achievement to the formation of Army Act in 2007 by the parliament, the pitfall again relied on different provisions regarding the member of the National Security Council and the designation of the Chief of the Army Staff in Article 145 of the Interim Constitution 2007 and Clause 6 of Army Act 2007.
- No amendment of the Act which contrasts with the Constitution, vagueness in the authority of the President and the Prime Minister in the issue of Army operation, and deteriorating to solve the converses between Constitution and Law are some other weaknesses. In the recent days, the growing dispute among the political parties of Nepal is also a part of this pitfall.

Conclusion

First: There should be uniformity in formation procedure of the National Security Council in both Constitution and Act so as to recommend the Government of Nepal regarding control, use and mobilisation of the Nepal Army. The ambiguity in

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31 Royal Nepal Army Act Rule and Order Collection, 2059 B.S, p. 43

32 Rukum.

Constitution and in Act has sometimes created controversy about decision making process and the role of army, such context should come to an end.

Second: In future, with a process of democratisation, professionalisation, and inclusion in the Nepal Army, the Army should have democratic control, i.e. the control of Parliament and Government. It should ultimately ensure the civilian supremacy.

Third: In the context of geopolitics of the country, the fundamentals of the federal structure in future have to be studied on the basis of internal conflict or ethnic and regional conflicts rather than external threats. The conflict may arise between provinces or between centre and province. It is also probable that some province may advocate for separation. So, it is important to think about such problems while forming national security policy. Besides these, it is equally important to implement comprehensive security of the National Security, i.e. national resources and ecological security, financial security, security of national identity and existence, security of social supervision etc.

Keeping in mind the above mentioned necessities, in future the National Security Council should comprise of the Prime Minister, the Defence Minister, the Home Minister, the Finance Minister and the Foreign Minister. In the Council, the chiefs of security organs and national security advisors should be invited and, the Council should obtain opinions and recommendations from other experts.

The Role of the Government

Sayed Mohammed Habibullah

Introduction

In any political system, the government functions on behalf of the state. The degree of democratic values and norms incorporated in security policies depends upon the ideology of the state and political system. This chapter exclusively describes significant roles of government in order to develop security policies, strengthen parliamentary control over security and scrutinise the relationship between the government and the security sectors. From a bird's eye view, this chapter attempts to explain current political transition and its consequences related to government and security sector reform. More prominently, it helps the reader understand the basic foundation of democratic control over the security sector in Nepal in accordance with the principle of democratic accountability.

The discussion on the role of the government requires a brief reference to political development in Nepal – at least since 1990, which marks a high level of political instability and frequent change in the government – and the current political dynamics in which the country is all set for writing a new constitution. Democracy in Nepal was re-established in 1990 following a peaceful movement that forced the King to compromise with the people. A new constitution was drafted in 1991 and elections to the parliament were subsequently held. However, none of the parliament until 2006 was able to complete its full term. Due to the contradiction within and between the ruling parties, mid-term polls had been called frequently and each and every government was short-lived. Meanwhile, the country was plagued by violent armed conflict beginning in February 1996, in the context of CPN-Maoists's people's war, and there was an eclipse in the Nepalese democracy when King Gyanendra resorted to a royal-military coup in February 2005.

Currently, the country is in transition to peace and democracy from violence and the King's authoritarian rule. Following the successful People's Movement II of 2006, the country is all set to write a new constitution through the Constituent Assembly. It is certainly important, but difficult, to discuss or sort out policy regarding the security sectors. It would have been possible after 1990, but the frequent changes in the government were a set-back in the process of defining national security strategy and beginning the process of security sector reform. In the course of discussing the security, this chapter takes into account the current political dynamics as well as failure of the democratically elected governments after 1990 to bring the armed forces under civilian control.

Government and Security

The Government is legitimatised to perform and practice state affairs, outline and execute national security practices, assure security to individuals and society and build the confidence of the public that they are safe.[1] The government is also responsible for formulating policies to defend against external threats. How a government formulates such security policies shows the degree of democratic participation and democratic values transplanted in these security policies.[2] In a democratic state, parliament is solely responsible for producing policies to be implemented in order to maintain law and order and adopt defence policies for national security. Most of the authoritarian states develop security policies in severe isolation that widens mistrust and doubt among the political actors. Within the context of internal political affairs, security sectors must not be used as an ideological instrument of states.[3] If this happens, internal intractable conflict is irrevocable and it becomes a permanent source of political instability and security crises, leading to a state of defunct internal administration.

Constitutions and national laws authorize government in determining the shape, size and operation methodology of the security institutions. Government is empowered with the laws adopted by the legislative authority to determine jurisdictions and procedures for the implementation of security policies. In accordance with constitutional provisions, the government is accountable to the House of Representatives (HoR), which also currently functions as the Constituent Assembly in relation to the security policies and their execution.[4] There are entirely different roles of the different security institutions to perform in maintaining law and order, countering unsocial and illegal activities[5] and defending national interests. Subsequent paragraphs deal with the operation of the different security organisations and their relationship with the state and line ministries.

National Security Policy

Despite the acute need of developing a national security policy, it is most tragic that Nepal still has not been able to form an institutional set up to formulate it. Except recently released security policy[6] for the operation of armed and civil police forces, the Government of Nepal has not developed any security policy for operation. In terms of the Nepal Army, the Nepal Army Act 2016 (1959) is still in execution[7] with

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1 C.B. Shrestha, *Police administration: collection of rules and regulations*, Kathmandu: Sampurna Publication Pvt. Ltd., 2007.

2 P. Fluri, *Parliamentary oversight of the security sector: principles, mechanisms and practices*, Geneva: Geneva Centre for the Democratic Control of Armed Forces, 2003.

3 CESOD, *Developing conflict solution strategies using the local people and their Ideas as Guidelines*, Kathmandu: CESOD, 2002.

4 Interim Constitution of Nepal, 2007.

5 Raol, R. B. Nepal Weekly, Year 9, Vol. 46., Kantiur Publications. Kathmandu.

6 Kantipur Daily, 2002 August 2 Issue, Kantipur Publications, Kathmandu, Nepal.

7 Nepal Army Act, 2016, Publisher: Nepal Law Book, Kathmandu.

nominal amendments made from time-to-time. There is a need to prepare new bills to manage and operate army institutions in line with the changed political system that has altered the power relationship in Nepalese society. Security experts are continuously expressing their concerns to take the initiative in formulating security policies, which definitely guides the state to operate armed forces for the protection of state and society.[8] The Security Council envisioned in the Constitution of 1990 was not brought into action to formulate security policy, which could decide on pressing security issues and changing loyalty of security organisations in the changed political context.

In general, the State Affairs Committee is a parliamentary body that decides security policy in the broader national interest. However, the committee has a very limited mandate. It is common that sometimes national security and individual freedom and liberty contradict each other in terms of protecting constitutional, economic, social and political rights. To ensure the security of individuals, a state needs a political policy of security arrangement. It also needs to deliver security services and protect individual interest. With broader perspectives of security sector reform and how it involves human security related to food, health and drinking water are challenging questions.[9] Without fulfilling the basic material and non-material needs of the public; the conditions for human security cannot be implemented and the general public remains unsatisfied. In such a threatening atmosphere caused by scarcity of various basic needs, it is usual that only security organisations cannot cope with the crises continuing in the state, which are fuelled by identity politics.

Within the context of a changing political environment, the state requires security policy that defines both state security as well as human security. Parliament as a legitimate body to formulate national policies in every field of state operation must be involved in developing a national security policy document. Mobilisation of security forces to cope with internal threats and peaceful protests made by various organisations and government-declared illegal armed forces seems contradictory for the political groups and parties. More prominently, mobilisation of a security force to deal with internal threats may raise a severe debate within a coalition because of different ideological points of view. Thus the state needs a common security policy document consensually outlined by the parliamentary committee.

The Council of Ministers has the ultimate authority[10] to develop, adopt and execute national security policy. Based on the principle of civilian command over the security sectors, government has a significant role to prepare a national security document. Of course, government is an apex authority to decide state activities and it can continue to put its priorities accordingly. Considering the absolute power of government to develop policy, we should not forget that the government is equipped with legitimacy through the parliament to do this task. However, before formally

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8 K.C. Gautam, 'Security sector reform in Nepal: the future of Nepal Army and integration of combatants', 2009.

9 J. Adhikari, *Food Crisis in Karnali: a Historical and Politico-Economic Perspective*, Kathmandu: Martin Chautari, 2008.

10 Interim Constitution of Nepal, 2007.

adopting a security policy document it must be scrutinised in the relevant parliamentary committees to attain legitimacy from wider political sectors.

In the immediate past, the conflict between the government and the president occurred due to the lapses of policy guidelines for managing security institutions.[11] Policy documents must incorporate the provision to hire and fire the leaders of particular security organisations, to define terms of office of chief of the security organisations and to clarify the relationship between line ministries. Security organisations protect national interests, constitutional systems and individual's rights. Besides these, security providers protect a country from external threats. If we look back in the history of Nepal, we find that the security policy was primarily envisioned to safeguard the interests of the Kings and their family. With the changes in the political system, it is most important to reform security policy in line with the changed political and social atmospheres so that security providers can best serve the interests of citizens.

Political Processes of Security Sector Reform

The very foundation of Nepal's security goes back to the days of the Chiefdom-state of Gorkha heir. Shepherd Chiefdom Drabya Shah founded Gorkha as a Chhetriya Kingdom and it was further consolidated and expanded by the late King Prithvi Narayan Shah. After annexing the adjoining principals to the Gorkha Kingdom and defeating the King of Kantipur, the role of the Gorkha Army increased significantly. After the death of Prithvi Narayan Shah, conflict erupted between the Queen Rajendralaxmi[12] and the royal regent Bahadur Shah leading to the killing of some royal courtiers, as well as Gorkha Army personnel, which resulted in the royal family's losing capacity to govern the state. The political context of that time was fertile for the rise of Junga Bahadur Rana. By assassinating all opposition leaders and military commanders, Jung Bahadur took the political authority of the state into his hands and established an oligarchy that lasted for 104 years starting 1847.

With the success of the joint action-plan of civil defiance and armed struggle, democracy was introduced in the orthodox and traditionally driven Nepalese society in 1950.[13] Despite establishing democracy in Nepal, the biggest mistake of the leaders of the time was the shifting of military power from the Rana regime to the monarchy led by the late King Tribhuwan.[14] The 8 years from 1951 to 1959 were characterised by difficult relations and setbacks in the consolidation of the newly established political system. Finally, elections were held in 1959 in which Nepali Congress won the majority of seats in the parliament. Despite a strong presence of Nepali Congress in the parliament, nothing was done in terms of shifting power from the monarchy and the Nepal Army to the civilian authority. King Mahendra dissolved

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11 Rawal, R.B, Vol. 39, Nepal Weekly, Kantipur Publications, 2009, Kathmandu.

12 R. Shah, *Modern Nepal: A Political History*, Delhi: Manohar Publications, 2001.

13 Joshi & Rose, 2004

14 S. Sharma and M. Panthi, *Loktantra apaharan ra avatarbn*, Kathmandu: Deepa Laxmi Acharya, 2006.

parliamentary democracy in 1961 and implemented an authoritarian political system called Panchayat. It was most ridiculous that the ideological foundations of the Panchayat were socialism, democracy and orthodox Hinduism with the monarchy as absolute power holder. The Panchayati system was dissolved in 1990 following a successful People's Movement I and the King agreed to share power with the political parties. It was believed that the Constitution of 1990, which was drafted by a Constitutional Commission formed by the cabinet, would change military authority vested to the King. The Constitution of 1990 again vested military power in the King. Based on the constitutional provisions, King Gyanendra took power on 1 February 2005.

Initiative Taken for Security Sector Reform

Though security sector reform is a challenging task for the government and parliament, the systematic approach of modernising the security conceptions and working modalities of the security providers has yet to be defined and adopted in order to consolidate democracy and ensure that people's freedoms and liberty are protected. Perhaps, the political parties and the government would have thought that the political change would gradually divert security institutions to cope with changed politics and governance. However, it looks like the government has a limited capacity to understand that every security institution has its own traditional culture and practices developed over a long period in history. Politicians can take the opportunity to shift the existing power relations of the security organisations by a parliamentary process, specifically by the adoption of a security policy. I do not intend to accuse any political party nor the government; rather, we did not see any substantial effort made by the government and parliament for security sector reform. Since the introduction of democracy in 1951 until today in 2009, none of the visible efforts have been made with the objective of changing loyalty of the army, understanding grievances, and recognising the need for modernisation of security institutions.

A favourable environment was available in 1951 and again in 1990 to transform the loyalty of military forces towards the democratic government, but those opportunities have passed. With the elected government having an absolute majority in the parliament, late B.P. Koirala had a chance to consolidate the relationship between parliament, the government and the armed forces. Because of having an absolute majority in the parliament, he was in the position to take initiatives through the sub-committee of the parliament. We should not forget that the security organisations and institutions in Nepal, which have served the interests of the monarchy for a long time, and which were orthodox and trained in terms of religious belief, were driven by the authoritarian mind-set politically. Therefore, this is a very critical aspect of transformation of the military attitude towards democratic practices and principles. The process for reform could begin in the parliament, which has legitimate authority to formulate laws and acts to manage the military.

The Constitution of 1990 conceptualised a need for a Security Council to deal with issues related to the Nepal Army and the government. In practice, it has not

proved that the council had been effective in designing security policy either for maintaining internal law and order or in defending against external threats. The question of civilian supremacy was also at the forefront when Prime Minister Girija Prasad Koirala tried to mobilise the military against the Maoist insurgents to rescue the abducted police personnel at Holeri. The event, nevertheless, can be considered an attempt of the people's representative to bring the-then Royal Nepal Army under the civilian control. Even after 1990, it has been shown that the military is out of civilian control.[15] However, Koirala had to resign from the post of Prime Minister after failing to bring the military under parliamentary control. No doubt, the Holeri episode is an example that is contradictory to the practices of parliamentary democracy and there exists few studies to analyze this particular event.

The feud among the major national political parties and its consequences has directly and indirectly encouraged the Nepal Army to violate civilian orders. In other words, the deepening contradictions among the political parties have helped the Royal Nepal Army and kept them in constant contact with the monarchy until the end of monarchy by the first sitting of the Constituent Assembly in 2008. This issue was never considered important to discussion within and outside of the then parliament after 1990. It was believed that the political parties would sharply react over this illegitimate effort of the military. Surprisingly, they remained quiet; none of the political parties even made public a press statement to oppose the military in this regard. Why had it happened then? How had the military dared to violate the order of civilian government? It is because the military was not feeling comfortable to adjust within a democratic framework. Thus, the political history of Nepal has shown an immediate need to develop a national security strategy defining the modalities for security management and operation.

Sources of Authority and Command

Civil supremacy is a philosophical stand that is the soul of any democracy. The president is the supreme authority of the country for which the government works and undertakes its duties and responsibilities. The executive Prime Minister works on behalf of the state in the name of the president. Execution of civil supremacy is undertaken differently in different countries' political systems. It can be established through major three processes: a directly elected executive president like in the United States, a directly elected Prime Minister and when a sovereign parliament elects the executive head. In Nepal, the third process is being applied. Government also represents the civilian supremacy implying, theoretically, that it implements civilian order through the state in accordance with the constitution, adopted laws and policies. Thus the Prime Minister carries out day-to-day business of the government in the name of the Nepalese public.[16] His functions are legitimized through the

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[15] S.D. Muni, 'Maoist insurgency in Nepal: the challenge and the response', Rupa & Co., in collaboration with the Observer Research Foundation, 2003.

[16] Interim Constitution of Nepal, 2007.

parliament and it judges if the Prime Minister has performed his responsibilities properly.

Extensive studies in political science, sociology and anthropology have applied pressure on states to redefine its functions and modality of public participation in policy planning and functioning of the parliament.[17] With the end of the USSR, the bi-polar world political order has collapsed. The immediate effect of the end of this bi-polar political world-order is a significant change in the ideological state. Instead of the political ideology, identity or cultural issues were brought into the political discourses. This is because the Commonwealth modelled political system is believed to have lost broader legitimacy to govern a diverse state and society. For instance, many countries in the world including Nepal are adopting a mixed electoral system to ensure the participation of identity groups in big political forums like parliament. In adopting a new security policy through the consent of parliament, governments must look to the social composition of a state. If this is overlooked, the desired objective can't be achieved and the funding for such processes will be in vain.

Certainly, the process of defining and establishing "civilian supremacy" is a political discourse and needs to be judged upon the political context of Nepal. However, the term has sparked a lot of debate, controversy and dilemmas in Nepalese politics, when the concern for "civilian supremacy" was assertively used by the UCPN (Maoist), which led the government until 4 May 2009, for a total period of 9 months. The government took action against the chief of the army on 3 May on the grounds that the chief of the army did not follow the orders of the civilian authority. The chief of the army was asked for clarification, and he submitted it, but the government was not satisfied with the clarification submitted. He was sacked and the government appointed a new chief, who was second in command of the army. The coalition partner expressed dissent in the cabinet and the main coalition partner, the CPN (UML), announced withdrawal from the government in opposition to this.

Meanwhile, the president of Nepal dismissed the order of the government and asked the ousted army chief, Mr. Katwal, to continue working in the same position. Before that, a delegation of political parties led by the Nepali Congress, including the CPN (UML), had asked the president to make a move. Inside the Nepali Army, the top brass reached a conclusion to support Mr. Katwal, who was ousted by the government, but restored to the same position by the president. The issues of controversy between the two institutions – the Office of President and the Office of the Prime Minister – are also discussed in other chapters of this almanac. This chapter refers to the episode briefly in order to show the likely political implications if the Nepal Army is touched by the elected government.

The Prime Minister resigned on 4 May 2009 on the grounds that the move of the president was unconstitutional and undermined the government's effort to establish civilian supremacy over the armed forces. The resignation letter also

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[17] K. Khanal, 'Restructuring and federalism in Nepal', paper presented at a seminar by the National Peace Campaign, Kathmandu, 2008.

mentions that the move of the president established dual power centres and therefore the Prime Minister wrote that he resigned to save republicanism, democracy and the peace process. This is the second significant event in which the elected Prime Minister of Nepal has had to resign while trying to interfere with the military. Certainly, the concerned institutions have made a number of constitutional and legal errors in the episode of sacking Mr. Katwal and then restoring him into the same position but discussion of these errors is out of the scope of this chapter.

Security Institutions

Military

Compared to other security institutions, the Nepal Army is the strongest organisation in relation to numbers and technology used. Preceding paragraphs have described the foundation and motive of the military institutions in a nut-shell. It is not necessary to clarify the objective of the security forces; the Nepal Army was founded to protect King and his kingdom. However, several times it has shown its impartiality in political cases. For instance, the army remained impartial during the proclamation of Nepal as a republic in 2008. Likewise, some elite analysts that support the military argue that it was not involved in the suppression of the 1990 civil unrest.

It is relevant to raise some questions in this analysis regarding the security sector and government. Government, with the consent of major national political parties should clarify what type of security is needed to defend against external threats, maintain law and order and cope with insurgent groups operating in various parts of the country. Is the military an instrument of a particular political ideology? Or should it be far from ideological partiality? To whom should the military be responsible and accountable? This is the right time to discuss and conclude afore-mentioned question because of the state of Nepal is actively engaged in building a new constitution to drive the future Nepal. The Constituent Assembly must realise the urgent need for security sector reform during and after constitution drafting. As a supreme instrument of the state, government has both the authority and responsibility to control the armed forces in accordance with adopted laws and regulations to foster democratic accountability.

Nepal has experienced that a democratic government remains isolated from the military. In its long historical relationship, it was usual that the army kept itself quite sensitive to the interests of the monarchy. It was used as an instrument to defend King and Kingdom. But, we should not forget that the democratic responsibility of the government was to redefine its logic, attitude and loyalty – at which the government failed. No doubt it was very difficult and required arduous efforts to effect change. Current contradictions occurring in the name of civil supremacy is a by-product of the actions of inefficient political leadership regarding security management and operations. The ideological foundation for the civil defiance of 2006 can be traced to civilian control over the military. Based on this, a policy document can be developed for further implementation.

Armed Police Force (APF)

To cope with the armed insurgency operated by the then Communist Party of Nepal (Maoist), the Armed Police Force was established. With more than 27,000 troops, this institution is located in various parts of the country to cope with the insurgency and criminal activities. It is used to support the Civil Police Force as required during unrest and to control illegal action of individuals and groups. The APF was founded to introduce an alternative armed force into the military because of the reluctance of the monarchy to use the Nepal Army under the civilian authority.[18] Some experts of security, war science and insurgency studies argue that APF was found more effective and active during the internal war. The Home Ministry, as a line ministry to the organisation, develops the operation policy, manages the institution and provides for the budget of the organisation. We do not find terms of reference regarding the operation of this organisation.

Civil Police Force (CPF)

The Civil Police Force was established in 1956 and is under the Home Ministry. During the democratic regime, this force was shamelessly misused for the benefit of particular political party and line ministers. Frequent changes in its leadership, its arbitrary use of force in coping with conflicts and the degree of involvement of its officials in corruption made this organisation close to defunct. For instance, the former chief of this organisation, Mr. Motilal Bohara, was arrested by the Commission on Abuse of Authority. Likewise, Khum Bahadur Khadka, former home affairs minister, was also arrested for the misuse of authority. During the coalition of the mid-90s, ministers' notoriety was printed as headlines of the newspapers and magazines. During the Panchayat regime until 1990, this organisation was used to suppress the cadres of opposition political parties. Thus the democratic forces always doubted its loyalty.

Intelligence Department

In the state, the Intelligence Department has important roles to communicate information relating to the security of the state, individuals and society to the authority. The Intelligence Department collects, analyzes and distributes information to the concerned authorities and institutions that help the government to pursue appropriate policies for broader benefits to the public. Another important role of the intelligent security service is to collect information for national defence and to protect the state from external threats. This department was dysfunctional due to the sharp political interference to recruit party cadres to it. Frequent changes in the leadership, corruption and weak orientation and training contributed to making this organisation ineffective and worthless.

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[18] Muni, 'Maoist insurgency…', 2003.

Coordination among Security Institutions

It is most important to know who actually coordinates security institutions in reality. The military performs its duty under the guidelines of the Defence Ministry and the APF and CPF undertake their responsibility under the order of the home affairs ministry. No interference is accepted from an irrelevant ministry in terms of the management and operation of these security sectors. According to the constitution the Prime Minister as the head of government has the supreme authority to coordinate the security organisations.

What are the major setbacks in terms of using security sector actors and deciding political agendas? What are the lapses found around the government activities to identify any real sense of working with them and the consequences? We sense that politicians have fallen into the trap of viewing day-to-day politics and governing a state as the same business but these are entirely different things. Day-to-day politics can be formed within a nominal legal foundation. In some cases it is beyond the limitation of expressing views and ideas and politicians can propose their agenda without considering the rules and regulations adopted by the state. In fact, ruling a state is such a responsibility that the authorised person must consider existing rules and regulations, commitments to the international community and accountability to the public and state.

Understanding day-to-day politics and ruling a state as the same business has become a continual dilemma for politicians, causing disarray in the operation of state policies.[19] The arbitrary appointment of staff to government bodies, the arbitrary hiring and firing of staff and the transfer of officials from one department to another occurs because politicians have not been able to differentiate day-to-day politics from governing the state. In order to carry out security policy, politicians must understand that ruling a state is not like handling their own political party. Otherwise, these politicians may not develop any political policy for reforming security institutions.

Security Expenditure and Outcomes

If we compare the security budget with that of developed western countries, it shows the lack of resources faced by the government of Nepal. Scant human resources in security sectors and the insufficient availability of equipment and hardware – such as vehicles, arms, communication instruments and technology – are the major constraints for maintaining law and order in the country. Even though the state is not able to increase its income, the government is increasing its annual budget to the ministries responsible for handling security institutions. The table below explicitly shows the annual budget is increasing, massively, for the Ministries of Defence and Home Affairs. It is worth noting that, despite increasing the budget, the security situation in the country seems even more critical and deteriorating.

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[19] NPC, *A study report on the federal system of Germany and Switzerland*, Kathmandu, 2008.

Table 1: Fiscal Budget to Ministry of Home Affairs and Defence

Fiscal year	2065/66 (2008/09)	2066/67 (2009/10)	% Increased
Ministry of Defence	11,388,620,000	15,597,302,000	36.6
Ministry of Home Affairs	14,101,228,000	16,423,009,000	16.45

Even in the capital city, Kathmandu, crime, illegal activities and child abduction have increased. Public security around the country is highly critical. The Tarai region is much more vulnerable due to the activities of armed groups, which threaten national and public security. The Nepal government has recently, in July-August 2009, introduced a special security plan targeting the mid-Hills and Tarai regions. A significant amount of money, around Rs 5 billion, is allocated for the special security strategy. However, the new security plan is likely to be counter-productive if implemented without addressing the root causes of violence in those particular regions.

Conclusion

In concluding my arguments, I have a few lines to clarify what I want to recommend to the politicians to carry out their responsibilities completely. If the Constituent Assembly really understands current issues, it needs to draft effective provisions on security in the new constitution. A document focusing on a broader concept of security can be prepared by the parliament and put forward to the cabinet for final improvement and approval. The government can organise various discussions in relation to shifting security operation patterns, changing the loyalty of security institutions and making them accountable to the civilian authorities through interactions, policy improvement, amending security laws and building relationships with political actors. We should not forget that the prime concern of the common public and individuals is their own security. If people feel threatened, it is possible that they will expect new political order as a viable way to provide security to their lives.

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State, Government and Security

Sarita Giri

Background

The term 'security' is related to the protection of life, liberty and property of citizens in a democratic state. Providing this security to citizens is the prime duty of any state and government. Meanwhile, the scope of national security is much broader than is usually understood. National security should be understood as the holistic security of any nation-state from internal as well as external threats. The issue of national security is extremely sensitive for any state and its citizens owing to the fact that it embraces the notion of threat perception from external sources. Yet most constitutions and public policy documents refrain from defining what constitutes national security in clear and precise terms. Consequently, the concept of national security gives ample scope to any government to define threats to national security and to take action in order to eliminate them. Almost all nation-states tackle affairs of national security with varying degrees of secrecy. The degree of secrecy adopted by a state depends upon the nature of the regime (whether it is democratic or not, for instance) and the threat perception of the ruling elite.[1]

The prevailing norms, principles and practices regarding national security have huge implications for the lives and liberty of citizens in South Asia. Most of the states in South Asia with limited territory were born during the decolonisation process of the sub-continent in the 19th and 20th centuries. Since then, these states have engaged in national integration and nation-building. Both democratic and coercive means have been used by these states for the purpose of national integration and nation-building. Therefore, any analysis of the roles, responsibilities and structure of Nepal's security sector should be approached from the vantage points of state security, nation-building, national integration and maintenance of law and order for a holistic understanding.

Coming after a long history of direct rule by monarchs with democratic interludes in between, a ten-year Maoist insurgency and numerous social movements and counter-movements, the notion and scope of the security sector in Nepal has become so wide and vague that it might allow almost anything to be perceived as a threat to national security. It is only now, since the country entered the era of writing a new constitution through the elected Constituent Assembly under the 2007 Interim Constitution, that the notion of the security sector has been taken

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[1] The ruling elites in authoritarian, communist or semi-democratic states enjoy more secrecy in security matters than those in democratic states.

seriously. Despite this, much remains to be discussed and defined in this area, including the role of the government administration, which this chapter is going to discuss.

National security has not been defined in any of the constitutions of Nepal so far. However, the website of the Nepal Army states that the army bears the task of defending national unity and national sovereignty.[2] Presently, the country is in transition and the 601-member Constituent Assembly, elected according to the Interim Constitution of 2007, is undertaking the task of restructuring the state as a democratic republic through writing a new constitution. Obviously, the concept of a 'new' Nepal was the central theme of the project of constitution-making, nation-building and national integration when Nepal became a republic.[3]

State, Security and Government Administration

Nepal, like any third world developing state, is not removed from the dilemmas and challenges posed by traditional as well as emerging security threats. Nationalism based on the attributes and symbols of a particular ethnic community – commonly known as the Khus or the Pahadi community, which is under the constant power and patronage of a hereditary monarchy – has marginalised numerous ethnic and national groups in the country over two and a half centuries. Since 1950, democracy has failed repeatedly in transforming the state due to the rule of an elite minority. This minority rule has thwarted the democratisation process even in democratic periods which, in turn, has hampered the evolution of an inclusive nation-state. Thus the present day nation-state of Nepal faces more challenges to its security from within than from outside. High ranking security officials justify the existence of security forces, including the army, and their security operations as required to save the nation from internal threats.[4]

A lack of political stability is a manifestation of the power struggle that, in the past, involved different political forces, including the King and the army, seeking power through different means even at the cost of democracy and constitutionalism. Failure in democratic and constitutional governance has resulted in a weakened role of the government administration regarding national security. In addition, the fact that the army had always remained accountable to the monarchy until the recent political change has rendered the role of the government much weaker than it should have been in a democracy.

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2 See the Nepal Army Website at: <http://www.nepalarmy.mil.np/index.php>.

3 Nepal was declared a republic through the fourth amendment. So far, six amendments have been made to the constitution since its promulgation.

4 High ranKing security officers have shared their viewpoint with the author on the condition of anonymity.

According to a recent research finding, Nepal is a failing state.[5] Ethnic and regional discontent is widespread. The government capacity to deliver services has constantly receded. A survey carried out by Interdisciplinary Analysts and Saferworld states that '[p]eople are less convinced of the state's capacity to provide security due to the absence of the proper government. The entire administrative machinery has become defunct as a consequence of which the government has been unable to deliver essential public services'.[6] The government has been incapable of providing even basic security regarding health services and the supply of food to disease-affected and food deficient districts.[7]

Though the Maoist guns are silent, different forms of conflict are still simmering. Almost three years after the Comprehensive Peace Agreement (CPA), Nepal continues to remain a killing field.[8] The regular increase in the security budget (see Table 1) of the state in a post-conflict situation has generated more mistrust, discontent and deprivation among the people, especially among marginalised and excluded communities. The security expenditure has enhanced social, political and territorial polarization in the post-Maoist conflict period.

In a poor country like Nepal, the inequity resulting from a steady rise in regular government expenditure on the military in relation to falling development expenditure has become a serious cause of concern and anxiety (see Table 2). [9] Nepal also has an inflated bureaucracy. The ever increasing rise in general expenditure in comparison to capital expenditure is a manifestation of that (see Table 3). Meanwhile, the government's constantly decreasing ability to spend the allocated development budget proves that the state's capacity to govern has been shrinking over the years (see Table 4).

The Security Apparatus

The security sector in Nepal – which basically includes the army, the police and the intelligence department – is perceived by many as the protector of the interests and values of the old state, which represented feudal, patriarchal, parochial and exclusionary institutions. Nevertheless, one should not forget that the

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5 A recent report by Foreign Policy and The Fund for Peace has ranked Nepal as the 25th most likely nation to become a failed state out of the 60 most vulnerable countries. See also: Dhruva Adhikari, 'Nepal beset by chaos and conjecture', *Nepalnews.com*.

6 Cited from The Himalayan Times, the daily English vernacular, July 17, 2009.

7 The death of over a hundred people in the far western and mid-western districts due to diarrhea and malnutrition from April to September 2009 is a case in point. Nearly 25 of 75 districts have been declared food deficit districts this year. The government has failed in ensuring the supply of food in many of those districts during the season of festivals this year.

8 INSEC Report, September 2009, Kathmandu.

9 Dhruba Kumar and Hari Sharma, 'Security Sector Reform in Nepal: Challenges and Opportunities', Friends for Peace, June 2005.

abovementioned agencies of the state have not allowed the state to break into fragments despite recurrent phases of political instability and regime changes. The agencies, in this way, have proved their tenacity and adaptability to a large extent. But these organisations have never been free from controversies and various kinds of 'push and pull'.

The security policies of the past emanated from the foundational principle of protecting a state with the monarchy at its centre. Earlier, the King was held as the symbol of national unity and national sovereignty, and security policies were dominated by the need to protect and preserve the monarchy and the interest and position of all those who had some kind of utility, affinity or kinship with the royalty. The entire bureaucratic and security structures have been made to evolve accordingly over a two and half centuries. This in itself is an explanation of the weak role of government in any sphere. Because of a particular type of ethos, attitude and value system, the security and bureaucratic apparatuses are found to be far less effective for democratic governance.

With the new security paradigm and government administration during the transition to democracy, Nepal is in a state of flux. The term democratisation is commonly understood as civilian control of the army in Nepal. However, the incumbent Prime Minister Mr. Madhav Kumar Nepal states, 'Democratisation of Army doesn't mean politicicing the institution, though… It means senior ranks should be transparent and accountable while juniors should be disciplined and responsible'.[10] Thus, it would be extremely difficult to grasp the issues surrounding security and its governmental administration merely in terms of static institutional and legal deficits. The emerging dynamics also need to be captured in order to understand the government's role in the changing Nepal with regard to security.

Bureaucracy in Nepal is known as the permanent government. Though changes in bureaucracy seem to be ongoing, the government's practices regarding security matters appear to be much the same as security organisations, their structures and their decision-making processes do not change quickly.[11] Thus this paper attempts to explain the current constitutional and structural arrangements of the security sector, along with its history and function and the implications for security, the democratic system and governmental administration.

Security issues have currently become of paramount significance in Nepal as security sector reform is one of the critical elements of the peace accord reached among the political parties, including the CPN (Maoists) and Madheshi Parties.[12] Integration, accommodation and rehabilitation of the Maoist combatants, national

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[10] Phanindra Dahal, 'PM vows to activate NSC', The Kathmandu Post, 16 September 2009.

[11] Security organisations are regarded as the most conservative organisations all over the world.

[12] The several agreements reached between the government and Madheshwadi parties at various stages emphasize the recruitment of Madheshis on a group basis.

inclusive structure of the Nepal Army and civilian control of the army constitute the major issues of security sector reform and the current peace process.

The Administration of the National Defence Council: Past and Present

Talking about the role of government in security matters, the key issue has been the relationship between the Nepal Army and the government. It has often been inferred that the army, even if it was so in theory, had never been under the control of the elected governments in the past. Regarding the mobilisation, control and management of the army and other security issues, the interim constitution provides for the National Defence Council (NDC), which is supposed to give advice to the government on security issues.[13]

Article 145 of the constitution deals in detail with the structure and role of the National Defence Council. Article 145 (1) stipulates that the council will consist of six ministers, including the Prime Minister, and the Prime Minister will be the Chairman of the Council. According to Article 145 (4), the secretary of the Ministry of Defence is entitled to work as the secretary of the NDC, and, in his/her absence, an officer designated by the Prime Minister should carry out this work.

The National Defence Council is a crucial organisation as it is perceived as an instrument of democratic oversight. Under the 1990 constitution, the council was not formed when the Armed Police Force and the Nepal Police were engaged in fighting against the Maoist insurgents. According to the records of the National Defence Council, the first meeting of the NDC took place in June 2001 when King Gyanendra had assumed the role of the monarch after the massacre of the former King (there is no record of the NDC meeting after that). At that time there was emergency rule in the country. Under the 1990 constitution, the Defence Council had only three members: the King, the Prime Minister and the chief of the Army. The King's direct rule could not eliminate the Maoist insurgency.

In 2006, when People's Movement II became successful and the parliament was restored, a new government headed by Girija Prasad Koirala was formed.[14] Though democratisation of the army was a significant component of the peace agreements, Prime Minister Koirala never made any attempt to form and activate the National Defence Council.

After the historic CA election, the Maoists emerged as the largest party. A coalition government headed by Pushpa Kamal Dahal 'Prachanda' was formed. But Prime Minister 'Prachanda' also did not activate the National Defence Council. The

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[13] The 1990 Constitution of Nepal also provided for a National Defence Council but it was never formed during the democratic rule.

[14] It was the same parliament which was dissolved by the King when the parliamentary parties were not ready to extend the state of emergency.

incumbent Prime Minister Madhav Kumar Nepal formed the NDC in September 2009 after he assumed office.[15]

Article 145 (1) of the interim constitution says in explicit terms that the responsibility of the NDC will be to make recommendations to the Council of Ministers on mobilisation, operation and use of the Nepal Army. Meanwhile, according to Army Act 2006 (6) (3), the National Defence Council should:

1. Prepare policy, planning and programmes for the mobilisation, operation and use of the army and recommend it to the government;
2. Advise the government about numbers and the organisational strength of the Nepal Army;
3. Advise the government on the management of the Nepal Army;
4. Advise the government about the management of arms and ammunition and other military equipment; and
5. Perform other works as ordered.[16]

According to the list, the scope of subjects for making recommendations to the government seems to be limited. The list of functions is heavily dominated by those affairs which are the responsibility of the army. Not surprisingly, in his first meeting with the officials of the NDC, Prime Minister Nepal offered 'praise for the Nepal Army for the role it played to end monarchy and usher in democracy'.[17] The list of functions does not acknowledge the role of the civilian Nepal Police and the Armed Police Force in maintaining security. Members of the Nepal Police, the Armed Police Force, the Nepal Army, the National Investigation Department and civil servants are staff of the secretariat of the NDC. The total number of NDC secretariat staff is 59 but there are 17 members of the secretariat of the National Defence Council altogether (see Chart 1).

According to information provided by the NDC, the job of the secretary of the council, who is also the secretary of the Ministry of Defence, is to set the agenda for meetings of the council; to prepare reports for the council according to prevailing law and submit them to the council; to implement the decisions of the council; to keep records of the decisions of the council and to coordinate with other offices as required.[18] However, the secretary of the Defence Ministry is reportedly not active in the affairs of the National Defence Council. One *Uparathi* (lieutenant general), two *Sahayak Rathi* (major generals) and two *Mahasenani* (colonels) are part of the

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15 The Defence minister, home minister and three members designated by the Prime Minister, representing three parties in the cabinet, are members of the NDC. Dahal, 'PM vows, 16 September 2009.

16 The information is derived from official documents provided by the secretariat of the NDC.

17 The Kathmandu Post, September 16, 2009.

18 The source is unpublished documents made available to the author by the NDC secretariat.

secretariat and, in practice, the entire secretariat is managed and administered by them. Thus the structure in place does not seem to be representative of civilians or conducive for the democratic management of security affairs. The secretariat of the National Defence Council is operating within the premises of Singh Durbar. [19]

The secretariat has three main branches: 1) the Situation Analysis Wing; 2) the Planning and Research Wing; and 3) the Administration and Record Wing. The first branch has 19 personnel, the Planning and Research Wing has 11 personnel and the Administrative and Record Wing has 12 personnel. Altogether, 59 personnel work in the secretariat. Out of this 59, nine officers are from the Nepal Army, six officers are from the Nepal Police, six are from the Armed Police Force and six are from the National Intelligence Department. Three are civil service officers and 29 personnel are office assistants and others.[20] The council has the capability of constituting other taskforces as needed.

According to officers working at the secretariat, the representatives of other security organisations continue to work in the secretariat in the same structural pattern which was established by the Unified Military Command led by the army. The Unified Military Command was structured during emergency rule to fight the Maoist insurgents and other security organisations were subordinated to the army's command.

The structural organisation of the secretariat is also much the same. Security experts say that '[t]he National Defence Council, which is constitutionally Military oriented and currently filled with security personnel, in reality has become a major impediment to policy making with a broader perspective. The NDC should be reconstituted with civilian experts to make its policy relevant'.[21]

Every week, meetings of the joint intelligence committee take place to analyse the important information of the week. The secretariat also submits reports to the chairperson of the NDC and the chief of other security forces. A situation centre works twenty four hours a day monitoring the subjects of national security.

Ministry of Defence

The Ministry of Defence functions as per the government's Business Allocation Rules 2006, with the objective of managing and operating national defence affairs. The ministry is responsible for maintaining internal as well as external security in order to safeguard national sovereignty, national unity and territorial integrity. The ministry is also responsible for protecting the lives and property of the people as per the decision of the government.

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19 Singh Durbar is located in the heart of Kathmandu and almost all government ministries, including the Office of the Prime Minister, are situated in Singh Durbar.

20 These figures are provided by the secretariat of the National Defence Council.

21 Kumar and Sharma, 'Security Sector…', June 2005.

The origin of the defence administration of modern Nepal dates back to the unification of Modern Nepal in 1768 A.D. From its foundation until the popular movement in 2006, the defence administration was directly overseen by the crown itself. Before the advent of the first democratic system in 1950, there was no division between the ministry and the army headquarters. The commander in chief and the senior commanding general together handled the whole range of defence administration, policy making and policy execution during the Rana rule.[22] For the first time in the history of Nepal, a separate agency by the name of Ministry was set up in the interim government headed by Prime Minister Mohan Shumsher in 1950 after the fall of the Rana Oligarchy. King Tribhuwan of the Shah Dynasty was restored to the throne on the success of the political revolution against the Ranas. The first defence ministry was quite simple and had only two branches: a general branch and a budget branch. The military secretariat was established by King Tribhuvan in the palace in 1954/55 and was the principal mechanism by which the King sought to keep the army under close control. [23]

Presently, the Ministry of Defence (MoD) is under the Prime Minister and, in principle, is accountable to the parliament. It is located in Singh Durbar. However, due to its past history and practices, the ministry is still viewed by many within the mainstream political parties as having 'remnants of feudalism' and being indirectly controlled by reactionary and regressive elements. In this context, the prime reason for intense political conflict on the issue of civilian control of the military is to establish the authority of the democratically elected government and parliament over the de facto power of the army afforded by weaponry and military competence.[24]

Unfortunately, ever since its formation, the MoD has never been able to assert its authority over the army and its bureaucrats are so frequently transferred that they cannot grasp the enormous complexity of handling such a sensitive ministry of the government. It appears that the Nepal Army has not been intent on modernising the MoD. For example, with the help of the British government, two of its competent officers were selected for an orientation programme in defence management two years ago but as soon as they returned, they were transferred to another ministry.[25]

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22 During the 104 years of Rana's rule, the army was completely controlled by the Ranas. The King was not allowed to have any power over the army.

23 Nepalese Army, 'State of Inclusiveness in Nepalese Army': <http://www.nepalarmy.mil.np/inclusiveness.php>.

24 There is a political deadlock and parliament remains blocked by the CPN-Maoists for near about last three months after 'Prachanda' resigned from the post of the Prime Minister on the issue of civilian control of the army.

25 Nischal Nath Pandey, 'Security Sector Reform and Peace Building in Nepal', (unpublished). Pandey writes in this paper that haphazard postings and transfers is a symptom of a deeper malaise prevalent in the Nepal Civil Service.

An expert group from the Security Sector Development Assistant Team from the UK had likewise prepared a wide-ranging study report for the government suggesting better infrastructure, improved communication and coordination, computerization, increase in staff positions and human resource development for the MoD. The British Ministry of Defence had allocated more than £140,000 for this purpose. However, according to Sridhar Pokharel, spokesman of the MoD, after 'two years of keeping the budget idle, the ministry ultimately decided to return the funds'.[26]

Currently, the MoD has a total of 38 personnel, including a secretary and two joint secretaries, and continues to be located in Singh Durbar. The ministry is seen as ineffective. 'In the current circumstances when the army headquarters and the civilian political leadership headed by the Maoists were at regular dispute over fresh recruitment by the army or retirement of some generals, the Defence Ministry bureaucracy should have acted as a bridge so as to ease tensions and subtly avoid confrontation from being poured into the media'.[27]

Accountability of the Army to the Parliament

Article 145 (5) of the Interim Constitution stipulates that '[e]xcept in the case of mobilisation of the Nepal Army because of natural calamities, the decision made by the Council of Ministers of the Government of Nepal for the mobilisation of the Army shall be presented to a special committee prescribed by the Legislature-Parliament within a month of the decision, and be approved accordingly'.[28]

This provision appears to be in accordance with the requirement of establishing civilian control over the issue of mobilization of the army. But it establishes only partial control. Such an arrangement was not there in the 1990 constitution but the provision does not make the government accountable to the full parliament. A committee formed by the parliament is very small in number and it does not allow for a full-fledged debate in the parliament on the serious issue of mobilisation of the army, which would affect the life and liberty of the entire population. And past experience shows that once emergency rule is imposed and the army is mobilised by government orders, the political parties are coerced to make decisions under pressure from the government and the army.[29]

The army can be mobilised by the orders of the president on the recommendation of the Council of Ministers in circumstances of war, external

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[26] Quoted from Nischal N. Pandey, 'Security Sector Reform and Peace Building in Nepal' Source as quoted: Funds return after MOD 's restructuring gets un -implemented', Kantipur, March 15, 2009).

[27] Ibid.

[28] Article 145 (5), Interim Constitution of Nepal, 2063.

[29] Example of how emergency was ratified under the 1990 constitution.

aggression, armed rebellion or economic disarray.[30] During an emergency, the government of Nepal has the authority to issue orders as are necessary to meet urgent needs. The orders so issued 'shall be operative with the same force and effect as law so long as the state of emergency is in operation'.[31] Thus, the government has sweeping powers during an emergency.

Furthermore, five of the six conditions required to enable the government to declare a state of emergency are the responsibilities of the Nepal Army under the 2006 Army Act.[32] Thus, in practice, emergency rule might not be much different from army rule. On the basis of the similarity between the list of responsibilities of the Nepal Army under the 2006 Army Act and the grounds specified for the declaration of an emergency, it could easily be understood that the army would be mobilised in an emergency.

The Nepal Army, National Defence Council and Security Policies

According to Article 144 of the Interim Constitution, the Nepal Army is a constitutional body and is responsible for the protection of national security. National security is not defined in the Interim Constitution, however, the constitution provides for the National Defence Council to advise the Council of Ministers on matters of national security and mobilisation and use of the Nepal Army.[33] The main purpose of the National Defence Council is to establish civilian control over the armed forces. The constitutional arrangement regarding the structure of the National Defence Council is different from what it was in the 1990 constitution. In the 1990 constitution, the National Defence Council – headed by the Prime Minister – consisted only of three persons amongst whom one was the commander in chief of the army. The job of the NDC was to advise His Majesty, the supreme commander in chief, on the operation and use of the army.[34] Likewise, the then NDC was not accountable to the Council of Ministers; the National Defence Council had the authority to regulate its working procedures on its own.[35] In the present Interim Constitution, the NDC plays an advisory role and the authority to control, mobilise and manage the Nepal Army is

30 Article 143 (1), Interim Constitution of Nepal, 2007.

31 Article 143 (6), Interim Constitution of Nepal, 2007.

32 Except in the case of economic disarray, the grounds for declaring an emergency are similar to the reasons for which the army can or should be mobilised.

33 Article 145 of the Interim Constitution-2063 stipulates that the National Defence Council, headed by the Prime Minister, will include the Defence minister, the home minister and three other ministers designated by the Prime Minister. It also says that in case the Prime Minister and the Defence minister is the same person, the most senior member of the Council of Ministers shall be a member of the National Defence Council.

34 Article 118, sub clause (2), 1990 constitution.

35 Article 118, sub clause (4), 1990 constitution.

vested in the Council of Ministers,[36] which is in turn accountable to the parliament. Thus the arrangement signifies progress in the direction of establishing civilian supremacy over the armed forces.

The NDC in the 1990 constitution was not intended to be an instrument for democratic oversight. Rather, it placed the army under the authority of the King who happened to be the supreme commander of the army.[37] In the 2007 constitution, the NDC is relatively broad-based and retains a civil in character as it includes more ministers and excludes the army chief and other representatives from the army. In principle, the NDC now seems to be more appropriate for democratic oversight. But the question remains: has the change in the structure brought positive changes in the functioning of the NDC and will it be able to have some autonomous role in the formulation of national security policy?

As of now, there has been no need to mobilise the army as the country is undergoing the peace process and both armies are confined to their barracks according to the peace agreements.[38] But what happens in the future very much depends upon the fate of the peace process, of which integration of Maoist combatants into the Nepal Army and constitution-making are the most crucial components.

Article 64 of the Interim Constitution, which deals with the term of the Constituent Assembly, is problematic as it hints that the process of constitution-writing might continue during a period of emergency. The first part of the article states that the CA should adopt the final resolution of the constitution within two years. But the conditional clause states: 'Provided that the term of the Constituent Assembly may be extended for up to six months by a resolution of the Constituent Assembly, in the event that the task of drafting the constitution is not completed due to the proclamation of a state of emergency in the country'.[39] Though the language of the article is not explicit enough to confirm that a state of emergency would be imposed and constitution-writing would continue in an oppressive environment, the conditional clause implies that.

Very recently, a non-governmental bill was registered in the Constituent Assembly for the amendment of Article 64, which proposes that constitution-making shall be automatically suspended during a state of emergency imposed according to the constitution.[40] The proposed amendment intends to separate the emergency

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36 Article 144 (3), Interim Constitution of Nepal, 2007.

37 Article 119, The Constitution of the Kingdom of Nepal, 1990, Law Books Management Board.

38 The Comprehensive Peace accord was concluded on November 21, 2006 between the government of Nepal and the Communist Party of Nepal (Maoist). The Agreement on Monitoring of The Management of Arms and Armies was concluded on December 8, 2006 and acknowledges two armies in the country.

39 Article 64, Interim Constitution of Nepal, 2007.

40 The non-governmental bill proposing the amendment of Article 64 of the constitution was registered by the author herself on September 20, 2009 in the Constituent Assembly.

period from the constitution-writing process. The Madhesis, Janajatis, dalit and women fear that an emergency can be imposed in the country to deprive the excluded and marginalised communities of their rights under the new constitution. The excluded communities also fear that political manoeuvring by the traditional elites would take place to foil the agenda of state restructuring on the principle of federalism. It is clear that a federal and inclusive Nepal would be against the interest of the minority elite, which has ruled the country for more than two centuries. The formulation of a special security policy by the present government is seized upon by many observers as a necessary step to prepare for emergency in the interest of the ruling elite and to thwart the process of writing a fair and inclusive constitution.

The Emerging Discourse on Security Sector Reform

The various facets of Nepal's national security were not previously discussed in public. The recurring failure of democracy since 1950, the Maoist's armed conflict, the historic Madhesh Movement and the peace agreements reached between the government and the Maoists, Madhesis and other excluded groups have brought into focus the need to establish civilian control over the army and its democratisation. The open challenge of a chief of the army to the authority of a democratically elected Prime Minister has added a sense of urgency to the aforementioned tasks.

At this juncture, the political parties seem to be wary of the fact that too huge an army would be inappropriate for the future of democracy as a real threat of external aggression from the neighbouring countries of China and India does not exist. Democracy in Nepal might meet a fate similar to that of Bangladesh due to the presence of a huge army. After the liberation of Bangladesh, '[t]here was no external threat perception to be concerned about, yet heavy Defence expenditure and a high state of readiness exacted a toll that was not easy to bear for such a country'.[41] The army in Bangladesh has often asserted its control on democratic politics, which has proved to be detrimental for the institutionalisation of democracy and development.

The former chief of the army in Nepal has repeatedly asked the government to increase the strength and capacities of the army while the country has been in the middle of the peace process. To many observers of the peace process, including the United Nations Mission in Nepal (UNMIN) and human rights activists, the proposal was against the peace agreement and the interim constitution.[42]

The interim constitution has called for formulating and implementing an action plan to determine the appropriate number of soldiers for the Nepal Army.[43]

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41 Dilaram Chowdhary in "Nation State and Security Studies", edited by Dipanker Banerjee, New Delhi.

42 Ian Martin, former Chief of UNMIN in Nepal, opposed the proposal of fresh recruitments in the army during the peace process as that would go against the peace agreements.

43 Article 144 (4), Interim Constitution of Nepal, 2007.

Likewise, the constitution also provides for a plan of action to be prepared by the Council of Ministers in consultation with the relevant Committees of the Legislature-Parliament for the democratisation of the armed forces and making them more inclusive.[44] However, the former chief of the army had opposed any major policy of inclusion in the army, which would change the traditional structure and ethos of the Nepal Army. According to him, such acts would amount to the politicisation of the army and he was completely opposed to the idea of integration of Maoist combatants into the army. The Nepali Congress and some other rightist parties also share this position.

Not surprisingly, the call of the former army chief has generated new controversies. Provisions in the interim constitution reveal the fact that the political forces in the post-monarchical phase are heavily preoccupied with the idea of bringing the army under civilian control and reorganising it to make it inclusive and of appropriate size.[45] However, the integration, rehabilitation and accommodation of Maoist combatants still remain contentious issues. UNDP's Resident Coordinator Robert Piper expressed his grievances openly that no progress has taken place so far in the direction of rehabilitating even the minors of the Maoist combatant camps. Thus the post-conflict situation is passing through a very complex and challenging phase.

The process of modernisation began in Nepal in 1950 when the rule of the Rana oligarchs collapsed and a coalition government, which included the monarchy, representatives of the Nepali Congress party and the Rana oligarchs, was formed.[46] But the continued failure of democracy since then, due to the intervention of the army, compels us to look into the history and the structure of the army.

Government and the Army in the Post-1990 Period

Girija Prasad Koirala, the first elected Prime Minister after 1990, was still not confident of the loyalty of the army towards the nascent democracy. He had hoped, however, that the army would become loyal to the democratic regime in due course as the institutionalisation of democracy progressed. Still, he did not make any substantial effort to democratise the army and bring it under constitutional rule. Instead, he chose a policy of passivity and indifference towards the army.

Under the leadership of the monarchy, the army generals defied the orders of the Prime Minister when he recommended the operation of the army against the

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44 Ibid.

45 The Madheshwadi parties in the CA assert that mere integration of the Maoist combatants in the army would not guarantee peace in the country. They have demanded group-based entry of the Madheshis in the Nepal army.

46 The Nepali Congress Party led by B.P. Koirala launched an armed struggle to overthrow the Rana oligarchs and establish democratic government in 1950.

Maoist insurgents in Holeri in 2001. Though the constitution provided for the NDC to take such a decision, the then Prime Minister had not succeeded in forming and activating it. A bewildered and frustrated Prime Minister resigned and in his resignation speech said that he would take the help of a foreign army to quell the armed insurgency.[47] Not surprisingly, the 12-point agreement reached in November 2005 between the Maoists and the Seven Party Alliance leaders includes a provision of taking the help of a foreign army, as per the need of the peace process.[48]

The army came into operation against the Maoists only when emergency rule was imposed under the leadership of King Gyanendra. Later on, the parliament was dissolved at the behest of the army.[49] The National Defence Council was then formed for the first time. The then Prime Minister Sher Bahadur Deuba was a member of it. However, the Prime Minister had no real power over the army. It was the top brass of the army and the King who exercised *de jure* powers. This became evident in the year 2005, when King Gyanendra suspended democracy, sacked the democratically elected Prime Minister and imposed his direct rule.

As history illustrates, the army of Nepal, on most critical or turbulent occasions, has played its role to undermine democracy and constitutionalism to affirm its own unique position and interests in Nepali politics. Instead of supporting the democratic leadership, the army under the King had manoeuvred to emphasize its image of the true defender and the last saviour of the national interest, national unity and national sovereignty.[50] The Nepal Army was formed in 1762 and the unification process of modern Nepal was completed in 1768. The army has been blamed for stifling democracy and curbing the freedom of people and the political parties at times. In fact, '[c]onstitutional democracy has failed to thrive in Nepal because of security forces meddling into politics prior to the year 2002'.[51]

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47 Then King Birendra was reportedly not in favor of mobilising the army against the Maoist insurgents. While his attitude was appreciated by many, including the Maoist leaders, others took it as an example of his vacillating attitude towards democracy. He was massacred with his entire family by his own son in a palace heavily guarded by nearly seven thousand army personnel.

48 The twelve point agreement was reached between the Seen Party Alliance and the NCP (Maoist) when King Gyanendra assumed all executive and legislative powers and imposed his rule in the country with the bacKing of the army.

49 Yash Ghai and Jill Cottrell, eds., *Creating the New Constitution: A guide for Nepali Citizens*, Sweden: International Institute for Democracy and Electoral Assistance (International IDEA), 2008.

50 Elites within the army support this notion on the basis of the fact that Kings of the Shah Dynasty founded the state of Nepal through military warfare and that the Nepal Army is as old an institution as the Shah Dynasty in the political history of Nepal.

51 Ghai and Cottrell, *Creating*. Op. cit., p. 236.

The Nepal Army in the Republic of Nepal

After reconvening the parliament following the success of the People's Movement II, the House of Representatives stripped the King of his traditional power base – the armed forces.[52] The Royal Nepal Army was rechristened as the Nepal Army[53] and the country was proclaimed to be a republic.[54] The army was now under the Council of Ministers, headed by the Prime Minister. However, the fresh conflict between the chief of the army and the Maoist Prime Minister revived old conflicts in the changed context. The Prime Minister decided to sack the chief on disciplinary grounds, reportedly in a bid to establish civilian supremacy. He, however, ultimately had to resign from his post.[55] His decision to sack the chief of the Army was reversed by the President on constitutional grounds.[56] Against the order of the Prime Minister, the President asked the Chief of the Army to continue in office until new orders came. The Prime Minister had to resign and a change in the government took place.[57]

The International Crisis Group report titled 'Nepal's Future: In Whose Hands' states, 'The army has adopted a more overt and assertive political role'.[58] The report further says, '[the army] not only survived the republican transition but has thrived as an unreformed and largely autonomous force. Helped by timorous political parties, it has retained its full strength and pressed for new lethal arms imports-in breach of the ceasefire'.[59] The recent conflict of the government with the army has raised serious questions about the possible and probable role of the NDC with regard to the control of the army.

Roles and Responsibility of the Army, Related Laws and the Administration

The Interim Constitution does not address the role and responsibility of the Nepal Army. However, Article 4 of the Army Act 2007 says that the Nepal Army shall defend independence, sovereignty, territorial integrity and national unity. According

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52 Ibid., p. 239.

53 The Constituent Assembly functioning as the Legislature-Parliament declared that the army would no longer be named the Royal Nepal Army.

54 This occurred in May 2007.

55 Former Prime Minister Prachanda sacked the Army Chief Katwal on 3 May 2009 and resigned on 4 May 2009.

56 A case is pending in the Supreme Court regarding the constitutionality of the president's move to reinstate the chief of the army that had been sacked by the cabinet.

57 However, the legislature-parliament has not functioned smoothly for the last three months as the Unified NCP (Maoist) has stalled the house, demanding a debate on a resolution regarding the validity of the president's act.

58 International Crisis Group, 'Nepal's Future: In Whose Hands', Asia Report No. 173, 13 August 2009.

59 The Kathmandu Post, August 14, 2009.

to the fourth amendment of the constitution, the authority to mobilise the army on the recommendation of the Council of Ministers is vested in the President, as per the law.[60] The Army Act 2007 deals in detail through specific provisions as to how the army would be mobilised.

For example, according to Article 5 of the Army Act, the Council of Ministers shall control, mobilise and manage the army on the recommendation of the National Defence Council. But, Article 144 (3) of the constitution stipulates that the President shall control, mobilize and manage the army on the recommendation of the Council of Ministers.[61] The Army Act is not yet amended as per the fourth amendment of the constitution. If the Army Act is not amended, as history shows, an alliance of powerful interests and the resulting balance of power would determine political development rather than the constitution or any law.[62] Thus the Army Act is in urgent need of amendment.

Moreover, a clear definition of the authority of the Council of Ministers and the President is crucial as Article 64 of the Interim Constitution states that in a state of emergency, the term of the Constituent Assembly may be extended for six months.[63] Imposition of emergency rule during the constitution-making process could prove to be disastrous for the peace process and constitution-making, and might end in reversing the entire peace process that began with the signing of the 12-point agreement.

According to normal practices, in case of conflict between constitutional law and an act, constitutional law should prevail following the principle of constitutional supremacy. However, in Nepal, when conflict erupted between the King and the Premier under the 1990 constitution, the act prevailed because the King and the army were on the side of the act. In the very recent conflict between Prime Minister Prachanda and the President, the side of the president and constitutional law prevailed because the Army has been on the president's side. Thus the power balance resulting from the position of the army determined the outcome of a political conflict.

The Home Ministry

As per the prevalent law, the Ministry of Home Affairs is responsible for maintaining law and order in the civilian sphere and is in charge of the police, armed police and the intelligence departments. Government of Nepal (Allocation of Functions) Rules, 1996 has outlined a list of the functions and responsibilities under the purview of the

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60 Article 144 (3), Interim Constitution of Nepal, 2007.

61 Article 144 (3) was amended in the fourth amendment of the Interim Constitution in May 2008.

62 The Army Act came into existence before the Interim Constitution was promulgated and the provisions of the Army Act 2007 are not in harmony with the Interim Constitution.

63 See the conditional clause of Article 64, Interim Constitution of Nepal, 2007.

Ministry of Home Affairs. The task for the Home Ministry is ostensibly enormous. However, the strength of the police force and the armed police force when combined is less than that of the Nepal Army. The present strength of the Nepal Police is nearly 56,000 whereas the Armed Police Force consists of nearly 20,800 personnel. The present strength of the Nepal Army is 96,000. This is a big anomaly for any democracy.

The Nepal Police

In view of the worsening security situation, the strength of the Nepal Police is said to be far less than what is necessary. They are overburdened and ill equipped.[64] Political interference and corruption is reportedly rampant in police administration, with even top ranking officials accused of corrupt practices.

According to a recent report by Transparency International, the nexus between the bureaucrats, the businessmen and the politicians is one of the main sources of corruption in Nepal. This has marred the growth of efficiency and professionalism in the police force. According to a police officer, the magnitude of political interference in the police department is such that even the chief of police lacks the power to appoint a police inspector of his choice to a lucrative place.[65] The order for such appointments comes from the political circle on the recommendation of political cadres.

Lower ranking police officials, who mostly work on the ground, do not get opportunities for trainings on human rights and capacity-building. Most of the opportunities, which come from abroad, reportedly are taken over by high ranking officials in the police department.

The Nepal Police and the Armed Police Force (APF) have asked the government to immediately increase their strength by 13,000 personnel. This demand is appropriate. But whether the number of civilian police or armed police will be increased is yet to be seen. It is very probable that the armed police force will get first priority for various reasons. But the common masses, especially people of Tarai, are sceptical about the real purpose of such a move at this juncture.[66] There is a widespread feeling that the enhanced strength of the police forces would be used to

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64 High ranking police officers shared this view with the author during conversation.

65 In this context, 'lucrative postings' means those postings which are attractive because of income from outside sources.

66 The Tarai people share deep-seated grievances towards the security forces as they are underrepresented in such forces. According to one study, only 800-900 of the Tarai people are in an army of nearly 98,000 personnel. The Tarai people are conspicuously absent in high ranKing positions. Therefore one of the demands of all Madheshi parties is for group entry of the Madheshis in the security forces. This demand was first raised in 1990 by the Nepal Sadbhawana Party.

capture the civilian space and to suppress the political discontent prevailing widely in the Tarai under a special security policy of the government.[67]

The Civilian Police and the Armed Police

Police personnel of all ranks also harbour grievances against the Armed Police Force. They feel that the Armed Police Force apparently takes the lead role in maintaining law and order, going beyond their mandate and sphere of authority. One police officer complained that the armed police tend to dominate them, even though they should only come into operation when the civilian police force is not able to regain control. A clear-cut division of authority and responsibilities between the civilian and paramilitary police force is needed.

The Armed Police Force

The Armed Police Force (APF) is a paramilitary force formed in October 2001 that came into operation in November 2001 to fight the Maoist insurgents. That was a time when intra-state conflict and ethnic uprising was rife in many parts of the world after the collapse of communism in the former USSR. The major reason for establishing the paramilitary force in Nepal was to deal with the internal armed insurgency waged by the Maoists as the Nepal Army was not helping and the civilian police was not able to control the insurgency. Observers allege that the Nepal Police, to a certain extent, 'facilitated' the spread of the insurgency due to pervasively callous actions and merciless killings of hundreds of innocent villagers in the name of 'eliminating the Maoists'.[68] The Nepal Police obviously lacked training and competence in tackling and controlling armed insurgency. Another equally important purpose of the government in forming the APF was to have an armed security unit under its control to tackle probable ethnic insurgency. [69]

Thus the official motto of the APF is 'to serve the country and its nationality, sovereignty and integrity, by maintaining peace and safe-guarding the fundamental rights of all the citizens of Nepal'.[70] According to Article 6 of the Armed Police Force

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67 The Tarai, or the plain land in the southern part of the country, is still simmering with discontent. There are many armed groups still active in the Tarai. According to a recent government report, the number of armed groups in the Tarai could be around 100. Some of them are break away groups of the Nepal Communist party (Maoist).

68 Nischal Nath Pandey, 'Security Sector Reform…', (unpublished paper).

69 Thus, one of the basic motives of the government was to establish a paramilitary force to control and suppress the possibilities of ethnic insurgency in the country in the post-cold war phase. In the initial draft of the Armed Police Force Act, the term ethnic insurgency was included but the government finally dropped the term under pressure from the Nepal Sadbhawana Party. The act was passed by the parliament only after that. Source, Nepal Sadbhawana Party, Kathmandu.

70 The Armed Police Force Act, 2002.

Act of 2001, mobilization of the Armed Police Force should take place under the following circumstances:

- Armed struggle in any party of the country
- Armed rebellion or separatist activities in any part of the country
- Terrorism
- Riots
- Natural disasters and outbreaks of an epidemic
- Rescue operations
- War
- Security of a public place
- Security of VIPs
- Any other job under the law
- Any job as ordered by government as per the law
- Security of the border
- Serious disturbances or crimes

Presently, the Armed Police Force is heavily mobilized in the Tarai and eastern part of Nepal.[71] Very recently, eight base camps were opened in nine hilly districts of eastern Nepal, each containing at least 60 armed personnel. News of protesting against such moves of the government is also frequently reported. Altogether there are 82 base camps that have been established in the eastern part of the country following the special security policy of the government.[72] In Tarai, most of the camps are situated along or near the southern border of the country and the camps were established long ago when underground groups were intensifying their armed activities in the Tarai. The highest numbers of base camps are situated in the districts of Siraha and Saptari.[73]

The National Investigation Department

The National Investigation Department (NID) is the government's main intelligence department related to the country's internal security and functions under the Home Ministry. Its head office is situated at Singh Durbar, the premises which host most government ministries including the Prime Minister's Office. The NID has about 1,500 agents over 75 districts and has a large number of spies.

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71 In these parts of Nepal, conflict is not yet over. People in these areas are pushing for autonomous states with rights to self determination. Many armed groups are active in these areas and security forces are intensifying their operations there.

72 Daily vernacular in Nepali, Annapurna Post, Page no 1, October 2, 2009.

73 Ibid.

Conclusion

Nepal is going through a transition and, as a country, has many lessons to learn. Any political transition provides an opportunity to the political community in a society to reflect and understand the mistakes of the past. Only a sincere effort at introspection can enable a society to realize its vision for the future after a phase of political upheaval. Nepal has only experienced semi-democracy so far. In the past, the highest institutions unaccountable to the people enjoyed unrestrained power and influenced politics by controlling the armed forces. In such a situation, constitutional law, related acts and the government were not of much use for safeguarding democracy and the security of the people. In addition, constitutional law inconsistent with the spirit of a constitution can push a country towards violence and instability.

The restructuring of security organisations and the formation of government administration on the basis of clear purposes and accountability, in the long run, can enable a state to have a security force that would encourage stability and strive to ensure security for both the state and its citizens. Only inclusive and representative state institutions can foster the evolution of a nation state in a country filled with diversity. To achieve peace and security for all, commitment to democratic processes is equally important as only legitimate processes and outcomes can create an environment in which people can live with differences. Institutions and processes together provide the best way for finding compromises and managing conflict though institutions.

Table 1: Nepal's Security Budget (1996-2005) – (Rs. in billion)

Fiscal Year	Army	Police
1996-97	2.58	2.36
1997-98	2.88	2.58
1998-99	3.35	2.99
1999-00	3.86	3.48
2000-01	3.89	5.27
2001-02	4.52	5.79
2002-03	7.23	6.3
2003-04	7.18	6.28
2004-05	8.0	6.75
2005-06	10.9	7.88

Source: Budget Documents, Ministry of finance

Table 2: Trends in Budgetary Allocation in Nepal – Regular expenditure

(in Rs. in thousand)

Fiscal year	Total expenditure	Regular Expenditure	Core sector Defence	Home/Police
1990/91	19,791,000	7,465,000	1,113,888	750,307
1995/96	51,647,800	22,821,500	2,193,900	1,935,200
1996/97	57,565,615	24,984,832	2,426,816	2,644,804
1997/98	57,707,293	27,693,948	2,619,691	2,092,704
1998/99	59,579,023*	31,047,691	3,030,343	3,346,137
1999/00	67,564,726	34,272,761	3,499,089	3,925,981
2000/01	91,621,335	43,512,746	3,816,488*	5,959,678 *+1,856,000**
2001/02	99,792,212	49,321,941	5,829,776*	7,528,693*
2002/03	96,124,796	57,445,121	7,494,805*	7,699,865*
2003/04	102,400,000	60,555,000	7,184,221	7,053,671
2004/05	111,689,900	67,608,431	8,000,257	6,749,834>

Source: Budget speeches, Kathmandu: Ministry of Finance, documents of the fiscal years indicated.

Table 3: Summary of Budgetary Allocation

(in Rs. in thousand)

S.N.	Year	Total Expenditure	Recurrent	Capital
1.	2009-10	285,930,000	160,632,361	106,284,793
2.	2008-9	236,015,897	128,516,510	91,310,086
3.	2007-8	168,995,600	98,172,491	23,659,279
4.	2006-7	143,912,300	83,767,861	44,976,412
5.	2005-6	126,885,100	75,850,033	37,233,854

Source: Budget Documents, Ministry of Finance

Table 4: Budget for Capital Expenditure

(in Rs. in thousand)

S.N.	Year	Budget Allocated	Budget spent
1.	2005-06	37,230,000	29,600,000
2.	2006-07	44,970,000	39,720,000
3.	2007-08	55,260,000	53,510,000
4.	2008-09	92,000,000	45,000,000

Source: National Planning Commission

IV. The Security Providers

The Nepalese Army

Narahari Acharya

Historical Background

The establishment of the current Nepal Army is supposed to have begun alongside the campaign for states' unification begun by the then King Prithivi Narayan Shah and with the formation of a unified Nepal two and half centuries ago. There is also a saying that the former King Prithivi Narayan Shah gave continuity to the army organisation, formed by the founder of Gorkha Sate and his ancestor Drabya Shah under the command of Bhagirath Pant in 1559. Prior to Prithivi Narayan Shah and until his regime, there were basically three types of units in the Gorkhali Army (also known as Tilanga): the Temporary Army (militia), the Emergency Army and the Special Army (for the security of crucial areas).

The Gorkhali Army possessed, up to that time, only traditional types of weapons like *khukuri*, spears, axes, swords, chisels, knives, shears, sickles and bows. The situation changed when Prithivi Narayan Shah brought modern arms like guns and gunpowder from his visit to Banaras (India) at the beginning of 1744.[1] Prithivi Narayan Shah not only brought modern types of arms but he also brought three Muslim connoisseurs who could make such arms. These connoisseurs established a small arms industry in Gorkha. Similarly, the Gorkhali Army defeated the Chief of the Army Staff Gurgin Khan of Nawab Meer Kashim, Bangal in 1762 and collected five hundred guns, two cannons and some bombs. After some years, the Gorkhali Army conquered the battalion of Kinlok, a captain of the British Army from Sindhuligadhi, in 1967.[2] Like the previous time, the Gorkhali Army seized modern arms and ammunition from the British. Using such modern warfare devices, the then Gorkhali Army had been able to stand more effectively than the armies of its contemporary competitive states. And, above all, it was operated and organized in a new manner forming several companies.

The powerful former Prime Minister Bhim Sen Thapa modified the structure of the Gorkhali Army further. He modified the traditional organisational structure and its modus operandi, and generated a rank structure, equal attire, modern training and barracks. He also formed a new arms and bomb industry.

After the rule of Prithivi Narayan Shah, the king (or regent, in case the king is an infant) operated the Nepal Army by keeping it under direct guidance and

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1 S. Sharma, T. Baidhya and T. Manandhar, *Military History of Nepal*, Kathmandu: Royal Nepal Headquarters, 1992.

2 B. Shrestha, *Nepal Army: A Brief Introduction*, Kathmandu: Nepal Army Headquarters, 2008.

control. This was changed only after the reign of the then Prime Minister Bhim Sen Thapa. The new culture of making the prime minister of Nepal an omnipotent commander in chief of the army commenced after the then Prime Minister Jang Bahadur Rana became both head of the government and head of the executive at once.[3] The change in system came along with the political transformation of 1950. But, the army again remained under the control of the king as the Shah Kings, just after the revolution of 1950, started practicing executive authority of the state. Even the first elected government formed by the election of the parliament as per the constitution of 1959 could not change this provision. The army authorities, under the order of the king, arrested the then elected Prime Minister Biseshwor Prasad Koirala for his different opinion against the king. As a consequence, the Nepal Army remained under the direct control of the king in both principle and practice for more than thirty years.

The constitution of 1990 also could not bring adequate changes to the system of the king's absolute control upon the army. But, the reinstated parliament, through the extensive people's movement, launched the new Army Act (2006). The act transferred the authority of the king on the issue of the army to the prime minister in both legitimate and practical aspects. It indicates that the Nepal Army, from the date of its establishment, has always been under the body which possesses the clear executive authority. Similarly, its name has also been changed over time. At first, King Prithvi Narayan Shah had named the army 'Tilanga', which was changed to 'Gorkhali Army' after the conquest of Nuwakot. Chandra Samsher named it 'Nepal Army' and King Mahendra the 'Royal Army'. After the second amendment (1975) of the then Panchayeti constitution during the reign of King Birendra, it was renamed the 'Royal Nepal Army'. The constitution of 1990 could not bring any fundamental changes to it but the reinstated parliament finally named it 'Nepal Army'.

Organisational Structure

The political transformation of 1950 not only abolished the despotic Rana regime and established a constitutional democracy but also changed the system of control, mobilisation and management of the Nepal Army. The Nepal Army was massively restructured in 1955, in which many old brigades and companies were abolished. The People's Liberation Army formed by the Nepali Congress in 1950 was partially managed and integrated into the Nepal Army under Raachha Dal and later into the Nepal Police. However, the integration and management of the People's Liberation Army was not just nor on an equal basis.[4] But, this transformation could not bring the army under the control and management of the representatives of the people. The

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3 Sharma, Baidhya and Manandhar, *Military History*…, 1992.

4 Sharma, Baidhya and Manandhar, *Military History*…, 1992; S. Tamang, *People's Liberation Army: An Unwritten History*, Kathmandu: Ekata Prakashan, 2006.

transformation of 1950 came to resemble a restoration of the Shah regime exactly as King Tribhuvan, after some years' bewilderment, had declared himself not only the head of state but also an omnipotent head of the executive in 1953.

Later, King Mahendra, claiming to follow the constitutional monarchy system of Britain, turned the government of Nepal into 'His Majesty's Government' and named the Nepal Army the 'Royal Army'.[5] Discarding the necessity of conducting the first sitting of the elected parliament formed by the first parliamentarian election held in 1958, the then King Mahendra launched the Army Act 1959 before the sitting. In fact, the Nepal Army (Royal Army or Royal Nepal Army) had been controlled, mobilised and managed under the organisational structure provided by this act, no matter what political and constitutional changes had been brought in the last fifty years. In this convention, the reinstated parliament replaced the Army Act 1959 with the new Army Act 2006. The new act has provisioned the army to be controlled, mobilised and managed under the representatives of the people.

Current Constitutional and Legal Provisions

After the election of the Constituent Assembly in 2008, the first sitting of the Constituent Assembly declared the Kingdom of Nepal the Federal Democratic Republic of Nepal on 28th May 2008, while also performing some new amendments to the constitution of 2007. Under the provision regarding the formation of the army pursuant to Article 144 of the amended constitution, the President of the Republic of Nepal is designated as supreme Commander in Chief of the Nepal Army.[6] Similarly, it is also provided that the president shall appoint the chief of the army staff on the recommendation of the Council of Ministers.

In the same article of the interim constitution, it is clearly provisioned that the Council of Ministers shall control, mobilise and manage the Nepal Army in accordance with the law. The Council of Ministers shall, with the consent of the political parties and by seeking the advice of the concerned committee of the Legislature-Parliament, formulate an extensive work plan for the democratisation of the Nepal Army and implement it. The constitution has also influenced the contents and implementation of the action plan. It is constitutionally guaranteed that the appropriate number of soldiers in the Nepal Army, its democratic structure and national and inclusive character shall be developed and training shall be provided to the army in accordance with the norms and values of democracy and human rights. In addition, to respond to the various voices that arose from different regions and communities, and the mandate of the people's movement, there is a clear constitutional provision to give the Nepal Army a national character and make it inclusive; enlisting the Madhesi, indigenous ethnic groups, Dalits, women, and

5 Sharma, Baidhya and Manandhar, *Military History*…, 1992.

6 Interim Constitution of Nepal, 2007.

people from backward regions into the armed forces on the basis of the principles of equality and inclusiveness shall be ensured by law. And, it is provided that other matters pertaining to the Nepal Army shall be as provided for in the law.

Along with the abovementioned provisions, the Interim Constitution of Nepal, 2007 has also guaranteed other provisions regarding the Army. The National Security Council, established pursuant Article 145, makes recommendations to the Council of Ministers on the mobilisation, operation and use of the Nepal Army. The Council is formed under the chairmanship of the prime minister and all its other members are ministers. In addition to the defence and home ministers, three ministers designated by the prime minister representing three different political parties from among the parties in the Council of Ministers shall be members of the National Security Council. In case the prime minister and the defence minister is the same person, the senior-most member of the Council of Ministers shall be a member of the Security Council. It shows that there can be a minimum of three members to a maximum of six members in the National Security Council. Even though not mentioned directly, this kind of flexibility must have been set foreseeing the possibility of a one party government.

In fact, the provisions regarding the National Security Council provided under the constitution of 1990 were kept in a new modified form in the Constitution of 2007. In the past, the king did not want to delegate the authority of recommendations to the Council of Ministers on the subject of control, mobilisation and management of the army. But, it was also not appropriate to delegate the authority to the constitutional king for the mobilisation and operation of the army. In this context, the provision of forming the National Security Council under the chairmanship of the prime minister was put forward. Though it was under the leadership of the Prime Minister, it had a different structure than that of the Council of Ministers, as the defence minister and the Chief of the Army staff both were its members. In fact, this constitutional provision was an agreement made between the king and the then major political parties.

Nonetheless, the lawmakers of the Constitution of 1990 had showed a route of implementing this provision under the control of representatives of the people for the benefit of the public, if a political leader or the Prime Minister shows his/her will-power to operate the army even without the consensus of the king. Yet, from the very beginning, this condition could not exist in practice. Mr. G.P. Koirala, who became prime minister time and again, appointed Mr. Mahesh Acharya as Minister of Defence after the general elections in 1998 for a short time. However, Mr. Koirala did not want to separate the Defence Ministry from the Office of the Prime Minister. This trend indicates that the psychology of the Rana and Panchayat regimes is still dominant, suggesting that the elected institutions desire to keep the military under the command of the Prime Minister. Consequently, after 1999, the efforts made by

former Prime Minister Girija Prasad Koirala to make the Security Council an active body was hindered by the then King Birendra.

The Interim Constitution of Nepal, 2007, has endowed the National Security Council with no such concrete roles other than making recommendations to the Council of Ministers (and then the Council of Ministers does make the final recommendation to the president). Before the designation of the post of the President, the Prime Minister or the Council of Ministers had final authority to mobilise and operate the army. Later, it was changed that the President, on the recommendations of the Council of Ministers, would operate and mobilise the army. But, because it has brought no change in the role and structure of the army, the current constitutional provision regarding the National Security Council does seem nothing more than an abstract of the Council of Ministers.[7]

Current Structure and Size of the Army

The current organisational structure of the Nepal Army was formed in accordance with the provisions determined by the Interim Constitution of Nepal 2007, the Army Act 2006 and its regulations. This institution is organized and operated as per the executive guidance of the chief of the army staff under the defence minister of the government of Nepal. The Chief of Army Staff (COAS) is responsible for looking after the routine affairs of the army. There are two lieutenant generals, the Chief of the General Staff (CGS) and the Chief of Staff (COS), who are directly responsible to the COAS. According to an official source of the Nepal Army, the total number of personnel in the Nepal Army is around 92,000.[8] But, according to an International Crisis Group report, the actual number of army personnel is around 96,000. Thus it is hard to declare the exact size of the army due to some regular fluctuations in its numbers.

Army headquarters is its main centre. The principal staff officers (PSOs), the Research and Development Directorate, the Defence Ordnance Productions Directorate and the Office of the Director General of Development and Construction are directly responsible to the COAS. In addition to the PSOs, Combat Support and Army Secretariat Department, there are seven thematic departments established to support the COAS. There are also four general directorates and thirteen directorates. All these bodies related to administration, thematic management and construction remain under army headquarters.

The Nepalese Army is primarily composed of combat divisions. At present there are six combat divisions, one in each of the five development regions and one in Kathmandu valley. A major general commands a combat division and a brigadier

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7 D. Kumar, 'Democratic control of security forces' in R. Bhattarai and R. Cave (eds.), *Changing Security Dynamics in Nepal*, Kathmandu: Nepal Institute for Policy Studies and Saferworld, 2009.

8 Shrestha, *Nepal Army*…, 2008.

general commands a combat brigade. Each combat division contains combat brigades, combat support units and combat service support units. Each combat division/brigade is responsible for a particular area and is augmented with necessary combat support and combat service support elements. Depending upon the geographical region of the country, each combat brigade may have two to three infantry battalions and up to six or more independent infantry companies. According to the army authorities, the battalions and companies are established in the district as per the special strategy's necessity, population and geographical area. In this way, it seems that the army barracks are managed in accordance with the current political structure of the nation. The old zonal structure, though removed from political levels since 1990, still exists in the security sector. Not only is the combat division of the army zonal but zonal police also exist.

A comparative discussion is also going on regarding the current size of the Nepal Army. It is known that the number of personnel in the Nepal Army was approximately 46,000 for nearly a decade before the people's movement of 1990. But this number increased almost more than double during a decade long armed conflict, reaching 96,000 personnel. The number of personnel in the Nepal Army seems to have dramatically increased after the emergency period (2002) and, especially, after the royal takeover during the active regime of the king (after October 2002). During this period, the Armed Police Force, with an intention of making its size 25,000, was also formed. After the active regime of the king, however, the state seems to have been more interested in increasing the number of the army, ending the growth in the number of armed police.

Nepal has been identified as one of the most army-centred nations of the region, not only after the ceasefire but also after three years of the peace agreement. Only Pakistan has a higher population-army ratio than Nepal. India's permanent army's ratio is three times less than that of Nepal and the ratio of Bangladesh is one time less, according to the report of the International Crisis Group:

Nepal Army = 95,753	Population = 29,500,000	0.32 per cent
Indian Army = 1,100,000	Population = 1,015,000,000	0.10 per cent
Bangladeshi Army = 250,000	Population = 15,000,000	0.17 per cent
Pakistani Army = 650,000	Population = 172,000,000	0.38 per cent

Relation of the Army with Other Constitutional Bodies

The Interim Constitution of Nepal, 2007 has provisioned linking the Nepal Army primarily with three kinds of organisations, under civil control. The army, which was loyal to the king in practice (until April 2006), turned out to be accountable to the prime minister, the Council of Ministers, parliament, and parliamentarian committees after the parliament made a proclamation on 18 May 2006. This transformation

seems to have been accepted with no major reservations by both the Royal Nepal Army of the past and the Nepal Army of the present. This understanding of the army, which eliminated several speculations and doubts, has been positively received by almost all the people.

But, the relationship between the Nepal Army and it is the-then COAS and the Government formed after the Constituent Assembly election under the prime minister-ship of the Chairperson of CPN (Maoist) Pushpa Kamal Dahal 'Prachanda' was not good. The rivalry between the army and the Maoists had risen in the past, especially during emergency rule and the direct regime of the king. No efforts made in the past to maintain comfortable relations between both parties (the Nepal Army and the Maoists) could function meaningfully in the case of COAS confrontation.

Even though the Interim Constitution has provisioned that the President is the Supreme Commander in Chief of the Nepal Army, he is not directly related to it in practice. The constitutional route for the army to set up the relation with the president is ultimately through the prime minister. The Army Act 2006, drafted before the proclamation of the republic and the formation of the President in the Constitution, has asserted lots of things under the responsibility of the Prime Minister and the Council of Ministers. It has still not been appropriately amended in the Constitution. It was due to this incomprehensible provision that the initiatives taken by both the President and the Prime Minister became controversial, which caused political disharmony. It is thus a necessity, not only for today but for the future as well, to be clear on the role of the parliament when disputes between the prime minister and the president regarding the army arise. It is also not clear what type of constitution, including the governmental structure, the Constituent Assembly shall draft. Regardless, lawmakers must learn a lesson from these disputes. The army must maintain its relations with the legislature and executive in either form of governmental structures. The constitutional provision should be clear regarding the separation of executive authority in the president and the Prime Minister.

Operation and Controlling Bodies

According to current constitutional provisions, some four organisations are directly involved in the operation and control of the Nepal Army. The Interim Constitution has provisioned a National Security Council in order to provide recommendations to the Council of Ministers on mobilisation, operation and use of the Nepal Army. This is the Council which consists of only ministers as its members under the presidency of the Prime Minister. There is also the Defence Ministry, which implements the decisions of the Council of Ministers and can directly work with the army. In this way, the Defence Ministry also controls and directs the army. In the hierarchy, the Council of Ministers is above the Defence Ministry and the National Security Council. The constitution of 1990 provisioned the National Security Council as an alternative body

of the Council of Ministers. This was because the recommendations of the Security Council would go directly to the king. But, according to current provisions, the Security Council makes recommendations to the Council of Ministers. Then, the Council of Ministers makes recommendations to the President.

A parliamentarian committee from the side of the parliament does control and oversee all these bodies in its own way. Pursuant to current parliamentarian regulation, the authority to observe the army lies with the state management committee. It can directly call the army authorities in its committee, as it can to the Defence Ministry and the Council of Ministers. The parliamentarian committee can observe and control the decisions made by any authorities. But, the committee cannot directly interfere with the operation of the army. The operation and mobilisation of the army are basically the responsibilities of the executive bodies. So, the major responsibility of the parliamentarian committee is to perform observation and provide direction. But for this, however, it requires higher thematic ability and skill. Otherwise, the observation and direction cannot be effective and goal-oriented.

Annual Expenditure and Management

The expenditure of the Defence Ministry is more than five percent of the total budget of Nepal. The previous year it was 5.20 percent and is 5.45 percent in the year 2009-10. The comparative status of the budget of some public related ministries or principal bodies of the government of Nepal is as below:[9]

Ministry or Body	2065-66 B.S (2008/09) in percent	2066-67 B.S (2009/10) in percent
Ministry of Education	16.56	16.30
Ministry of Health and Population	6.33	6.23
Home Ministry	5.28	5.74
Defence Ministry	5.20	5.45
Ministry of Water Resource (Energy and Irrigation)	2.52	2.94
Ministry of Agriculture and Cooperatives	2.44	2.75

The table shows that the budget allocation for the Defence Ministry is nearly as high as that of the Home Ministry and the Ministry of Health. But, some connoisseurs do say that the total expenditure on army is not included or shown in the budget delegated. The Nepalese are also feeling odd for the fact that the budget of Ministry of Health, which has to look after the health of all people and manage the hospitals and health posts of the country, is nearly one percent less than the budget of the Defence Ministry. Its budget is around the total annual budget of the Home Ministry,

[9] Report of the Finance Ministry on estimated expenditures, 2008/09. Available at: <www.mof.gov.np>.

which has to mobilise 82,000 civil and armed police, manage whole district administration offices and the national investigation department as well.

From the total allocated budget to the Defence Ministry, some 92-95 percent of the budget is expended on its regular tasks and only 5-8 percent is relegated for the skill enhancement of the army and to buy modern equipment. Some army authorities have reservations on such minimum allocations of the budget in the areas of skill enhancement and collecting modern equipment.[10] Because the number of army personnel has expanded more than double in the last decade, the annual budget of the army has also increased. Therefore, management and balance of expenditures can be convenient when the programs of minimising the current size of the army and enhancing their skills are simultaneously conducted.

Strengths and Weaknesses

The Nepal Army is the oldest national organisation established after the formation of Nepal. At first, it was operated under the control and direction of the king and the king's representatives. In spite of being plagued with internal clashes and intrigue of the royal family, it has always been controlled under the command of the executive authority. It was also operated under the king's representative, envoy or by the Prime Minister in cases when the Shah Kings were weak or infants.

The Nepal Army had a magnificent history and a dignified international character before the Sugauli Treaty in 1816. It has a glorious history of meritoriously fighting with the British and Chinese armies, and of victory over Bhot (Tibet of today). After the Sugauli Treaty in 1816, the Nepal Army did not have to fight for national borders and sovereignty after the third Nepal-Tibet war in 1855-56 during the reign of Janga Bahadur Rana.[11] As a result, the politicians started misusing and manipulating the army in their political and internal clashes. Almost all Rana prime ministers after Janga Bahadur Rana have misused and exploited the army using it as a personal army. The condition was not improved till the people's movement of 1950. But, the Ranas fell under control of the Shah Kings after 1950 and then the army was used as the king desired. The army assault to early democratic practices and system under the direction of the then King Mahendra was an instance of how the army was directly operated by the King.[12] The incident polluted the character of the Nepal Army making it very weak and controversial. For the last five years, it was also used against a decade long (1996-2006) Maoist insurgency in Nepal. Using the national army in internal matters of the state is an awkward task in itself but the role it performed in managing the armed rebellions in the peaceful dialogue is equally crucial. On the other hand, the Nepal Army was also indicted for severe human rights

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10 Shrestha, *Nepal Army*…, 2008.

11 Sharma, Baidhya and Manandhar, *Military History*…, 1992.

12 S. Adhimari, *History of Nepal's Democratic Movement*, New Delhi: Nirala Publication, 1998.

violations during the armed conflict.[13] Therefore, the pros and cons of the army have to be judged on the basis of this background. We must examine its strengths and weaknesses, and both positive and negative aspects.

The major duty of the army around the globe is to protect national sovereignty, geographical autonomy and regional integrity. But, in the context of Nepal, there are not any such direct situations to fight against foreign enemies. That is why the roles and responsibilities of the army should be evaluated in terms of its strength and skill in other applied areas. The Nepal Army has been contributing in areas other than the security sector, contributing to infrastructure development, a wildlife reservation centre, participation in the United Nation's peace mission and assistance to the victims of calamities.[14] Among these, the role of the army in providing assistance to the victims of humanitarian and natural calamities has been the most effective one and is widely appreciated. Similarly, its role in conserving wildlife reservations and participating in United Nations peace missions is equally praiseworthy.

The management of the Nepal Army is frequently blamed for some serious issues. Especially, it is blamed for discriminatory behaviour of higher ranking authorities, and injustice and exploitation in distributing resources provided by the state. So, it is necessary to have a fair investigation into and then the elimination of biased terms of selection for peace missions in the United Nations, and excessive corruption and irregularities in the use of money deducted from the peacekeeping mission participants. Otherwise, the image of the national army shall become much worse.

In fact, the activities conducted by the Nepal Army to date are regarded as one-sided from a practical and results-oriented point of view. It is also true that the inclusiveness of the communities and regions as per their populations in the army is not practical or possible. The Brahmin community, which has higher involvement in almost all bodies of the state than its percentage of the population, has less involvement than the ratio of its population in the army; the Brahmins are also rarely seen in the higher ranks of the army. Conversely, the involvement of the Thakuri community is four times higher than the ratio of its population.[15] The involvement of Kshetri and ethnic groups in the army is respectively 40% and 35%. This is also due to traditional community interests of the particular region. For instance, on the basis of the percentage of the population, five times more people are involved in the army from Gorkha while the involvement of the people of Kathmandu in the army is 25% less in ratio to its number of the population. It is three times more in ratio to its number of the population from Bhaktapur. Dalit (the so-called untouchable)

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13 J. Basnet, *258 Dark Days*, Kathmandu: Advocacy Forum and Asian Human Rights Commission, 2007.

14 Shrestha, *Nepal Army*…, 2008.

15 Ibid.

communities also have, in comparison to other sectors, respectable involvement in the army. Dalit's representation in the army is nearly seven percent (6.65%) of the total.[16]

From the view point of community involvement in the army structure, the most deprived region or community is Tarai-Madhes (Madhesi-Terai/plains dwellers). From this community, there were altogether 5,497 people in the army until 2007, which is six percent of the total. Among them, 4,163 people are Tharu-Chaudharis.[17] The ratio of Madhesi people's involvement in the army in relation to the population is very low. Similarly, there were altogether only 1,105 women in the army until 2007, which is nearly one percent of the total, with most of them in technical and official posts of the army. The government of Nepal passed a new law regarding representation in 2008. It envisioned the equal participation of communities and regions which are weak and marginalised. The national character of the army and its inclusive nature can be proved only if such pitfalls and imbalances are eradicated. But, no one from the Brahmin community has become the chief of army staff until today. It is also true that there cannot be proportional representations in the military of all communities or regions in all countries. Nevertheless, the possibility should be explored of balancing representation in institutions of national importance.

Re-structuring and Direction of Transformation

The subject of restructuring the state has been an issue of discussion in Nepal for some years. At first, it looked like an ideological and personal political agenda. But the political parties slowly incorporated this issue in their political agendas.[18] During the preparation of the extensive people's movement (2006), the political parties started discussing the issue and they drew its primary sketch in their election proclamation during the Constituent Assembly election. The issue of restructuring the state has been more important since the Constituent Assembly formed different thematic committees and started its wide discussion. But, some of the committees directly related with state restructuring issues are not able to promote the tasks as required. It forecasts several ambiguities and disputes existing among the political parties regarding the contents of state restructuring. Among such important themes, one is an issue of national security and the army.

Before the collapse of the USSR, national security primarily meant issues related to the army. But there has come a drastic change, especially after 1990, in the dimensions of national security and the perspectives of the people. Today, it does not only mean the defence of the army. There are some issues omitted, some

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16 Shrestha, *Nepal Army*…, 2008.

17 Ibid.

18 N. Acharya, *Democratisation of state: democratic state structures for Nepal*, Kathmandu: Samwatsar Publications, 2005.

issued amended and still some added. Therefore, while restructuring the army structure in the context of Nepal, it is compulsory to notice the shared assumptions of transformation occurring in the world. In this modern world, the role of the army is not limited at standing at the border and fighting with other countries. After the collapse of the USSR, among some 103 small or large-scale wars happened in the two decades after the cold war; 97 wars were held not among the countries but within the country itself.[19] If we just consider south Asian countries, almost all countries are suffering from some kind of internal conflict at the present.

In this way, there are several threats to national security that the army cannot fight directly.[20] Nepal will remain politically unstable until the formation of the new constitution and a regular election is held. This problem will be more severe due to existing economic inequality in the country. Besides this, the energy crisis has been a vital challenge to the world but it can be more disastrous for Nepal. In the context of changing to a federal structure, Nepal may face a big threat in the use and distribution of natural resources. The racial and regional issues attached to this do not seem to get managed easily. Our international border is open from three sides. Such an open international border is both a prospect and a challenge to Nepal. International crimes and situations that promote terrorism, like the production and use of small arms and the movement of drugs, are significantly increasing in Nepal. The refugee problem, including population growth and internal migration, are sure to increase environmental degradation. Due to this problem, Nepal has already suffered time and again from natural and manmade disasters. Foreign interference is not only a regular emergency, it is equally a regular predicament for a country which is economically frail and politically unstable.

In such a situation, religious radicalism is also surfacing. So, only if we perceive such an expanded scope of national security, shall it be possible to incorporate national security policy in the new constitution and consequently to eliminate or restructure the potential responsibilities of the army.

New Constitutional Provisions

Nepal is politically preparing to transfer from a unitary to a federal state structure. But, federalism is obviously not only a political question; it is related to several economic and technical issues. The future constitutional structure and other structures of the army do depend on some important questions: While restructuring the state in the future, how many provinces shall be there? How shall the government be structured?

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19 R. Bhattarai and R. Cave, *Changing Security Dynamics in Nepal*, Kathmandu: Nepal Institute for Policy Studies and Saferworld, 2009.

20 Ibid.

It has been confirmed whether the Nepal Army will be under federal or central responsibility. But questions like how shall provinces be structured and how many such provinces shall there be affect the formation of the command and control structure. It is necessary to restructure the army's existing combat divisions, battalions and companies. Therefore, while restructuring the state, it is important to sincerely examine and review all kinds of threats that might threaten national security. Keeping these and several other technical things in mind, the Interim Constitution of Nepal in 2007 might have identified a requirement of forming a National Commission, including the connoisseurs from various themes for the restructuring of the nation. Unfortunately, the commission has not formed yet. But the Committee for State Restructuring Committee and Sharing the State Authorities has reached the final stage of presenting its primary draft on the same contents. While the commission has not formed, we must sincerely scrutinize the thematic committee relating to the army.

Democratic Control and Management

A debate on the democratisation of the Nepal Army occurred before and after the extensive people's movement (2063 B.S). This issue has also been mentioned in the comprehensive peace agreement between the government of Nepal and the CPN (Maoist). As a result, the Interim Constitution of Nepal, 2007 has provisioned:

- The formulation of an extensive work plan for the democratisation of the Nepal Army and its implementation.
- The determination of the appropriate number of personnel in the Nepal Army, its democratic structure and national and inclusive character shall be communicated to the army in accordance with the norms and values of democracy and human rights.

But it has not been widely discussed how the army shall be democratised. Additionally, most of the people who demand democratisation of the army have no competence on the subject. In actual fact, according to this author, democratisation of the army means to keep the army under direct control of the democratic body formed by representatives of the people and to operate the army and its internal management on the basis of democratic norms and values.

As per the provisions provided by the interim constitution, the Council of Ministers has the executive responsibility to control, mobilise and manage the army. Similarly, the Council of Ministers, on the recommendation of the National Security Council, has authority over the mobilisation, operation and use of the army. The Defence Ministry, which remains under the control of the Council of Ministers, has to submit proposals to the Council of Ministers while making decisions on new issues,

and implement the decisions made by the Council of Ministers or the president on the recommendation of the Council of Ministers. The parliament and the parliamentarian committee have the responsibility of making the laws on the army and monitoring them. Such existing constitutional provisions show that the army is controlled under democratic bodies. Even after the Constituent Assembly drafts a new constitution, these provisions should exist. The efficiency of controlling a democratic army relies on the determination, tireless effort and strength of the authorities that they show to democratic norms and values.

The preliminary draft on national security and the Nepal Army presented by a thematic committee of the Constituent Assembly has provided some changes on the structure of the National Security Council and its responsibilities.[21] There has not been any vital change in other aspects of existing provisions. But, there shall be an additional argument in the Constituent Assembly regarding the reduction of the number of army personnel, its future structure and role. Similarly, democratisation of internal management in the army is an equally important issue from a practical perspective. To achieve this goal, following indications should be sincerely fulfilled and effectively implemented:

- Assertion of just and transparent procedures for appointments to all posts and for promotions;
- Enduring and clear provisions for the selection criteria for special missions such as United peacekeeping missions;
- Clarity of financial management and an effective auditing system;
- Administrative body with expertise; and
- Provision of regular parliamentary monitoring to ensure democratic control and civilian supremacy.

Review of Structure, Numbers and Roles

The security sector reformation has been an issue of discussion for some years in Nepal. Under current conditions when the scope of the Security Council is expanding, it cannot be said that the issue of security sector reformation is limited only to the army or security forces. In fact, it is related to all the organisations and sectors which operate, mobilise, control and monitor the security sector. Some of the Nepalese security connoisseurs do argue that this provision, developed after the collapse of the USSR and the democratic transformation in Eastern Europe, is not

[21] Draft concept paper presented by the National Interests Protection Committee of the Constituent Assembly of Nepal, 2009.

matured enough.[22] But, as the Constituent Assembly is going to draft a new constitution along with the overall restructuring of Nepal, it is appropriate to extend the issue of security sector reformation in our own initiatives related to the issue.

Policymakers should give priority to the following tasks while restructuring the security sector and drafting the new constitution:

- **Assertion of appropriate numbers:** The total number of personnel in the Nepal Army is nearly 100,000. The constitution might have provisioned the size of the army as its number increased almost more than double during the previous decade. Thus the work plan, in discerning the number of pensioned army personnel, should be made in order to fix the size of the army to 50,000 within a specific time period. To do so, of the total number of pensioners or vacant post created each year, only 50 percent should be refilled. Imagining that the admitted number is 100 per cent, and admit in inclusively following the legal provision for ethnic representation. Use the money collected from the reduction of the number of personnel for quality enhancement of the army for five years.

- **National Security Council:** Once the new constitution finalises the form of system of governance, it is likely that there will be changes in the structure and responsibility of the National Security Council. There has to be change in its main responsibility, whatever the conditions. The National Security Council should have the responsibility of designing a national security policy considering the changing regional and world situation. Therefore, non-military security experts should be engaged in the National Security Council.

- **Formation of a National Army Commission:** Form a National Army Commission for new recruitment and recommendations for promotion in the army.

- **Transformation in Para-military Force:** Transform the Armed Police into a Para-military force under the Defence Ministry, and assert its number to 30,000. Its role has to be defined along with the definition of responsibilities.

- **Integration and Management of Maoist Combatants:** A special committee shall prepare a decree regarding the integration of Maoist combatants in the appropriate body of the security forces, and management in other sectors as per the process and basis described in the Interim Constitution of Nepal, 2007, the

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[22] K.B. Bhandari, 'The role of the international community in security sectors in Nepal' in R. Bhattarai and R. Cave (eds.), *Changing Security Dynamics in Nepal*, Kathmandu: Nepal Institute for Policy Studies and Saferworld, 2009.

Comprehensive Peace Agreement, and the Agreement on Monitoring of the Management of the Arms and Armies witnessed by the United Nations.

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The People's Liberation Army (PLA)

Ameet Dhakal

1. Brief History

The People's Liberation Army (PLA), the armed wing of the Unified Communist Party of Nepal (Maoist), was officially formed only in 2001. However, it has much older origins. When the Maoist Party felt that the parliamentary politics was not working, especially after the dissolution of the first parliament in 1994, it made up its mind to quit mainstream politics and started to form various groups to prepare ground work for the People's War. The party formed three different groups—combatant group, security group and volunteer group—in 1994, which is the origin of the PLA. These groups were initially formed with a few dozen cadres of the party and their first weapons comprised of two .303 rifles that Maoists' Chairman Prachanda bought in Manang in 1989. These rifles were the weapons used by Khampas during the Khamapa Uprising against China in the 1960s. The central committee meeting of the Maoist party held in 1996 decided to form Guerrilla Squads. The year also coincides with the formal announcement of the People's War. In 1997, the first Guerrilla Platoon was formed and in 1999 it was upgraded into a Company, and finally it took a shape of a Battalion in 2000.

The first national gathering of the Maoist combatants held in 2001 announced the formation of People's Liberation Army with Maoist chairman Prachanda as its Supreme Commander. Within four years after the formation of the PLA it had formed seven divisions spread across the country.

1.1 PLA's offensive against police, army

The PLA played a central role in the decade long 'People's War' by successfully raiding far-flung police posts, attacking army barracks and pushing the state into the defensive. It is hard to imagine the success of the People's War without the PLA.

a. *Against Police*

The PLA made its first raid against a police post in Holleri, Rolpa on February 12, 1996. At that time the PLA was in rudimentary form. It neither had a large-scale military formation, arms and ammunition nor military trainings. At that time of scarcity, even a single rifle was regarded as a significant weapon (Pasang, 2008). The Holleri attack was not successful one in the sense that it failed to capture the police post nor did it succeed in seizing any weapons, it nonetheless provided the PLA its first

historical opening of military actions. It also heralded a beginning of the armed insurgency that would last for a decade and take the lives of over 13,000 Nepalis. In the successive years, PLA attacked almost all major police post stationed in hilly and remote areas, captured the policemen, seized arms and ammunition. It eventually forced the state to relocate many police posts, apparently creating security vacuum in rural Nepal. As the PLA successfully attacked more and more police posts if became confident of its capability and skills. Within four years since the Holleri raid, the PLA launched a massive attack at the district headquarters of Dolpa, Dunai. It vanquished the government security forces, set fire to the government offices, looted the bank and set the prisoners free after breaking into the district jail. It also created a political commotion at the centre: the Home Minister, the home secretary and police chief of the western region resigned. By 2000, the police post across the country became vulnerable to the Maoist attacks and at the centre the political consensus grew along the line that the police alone could not take on the growing strength of the PLA, thus creating grounds for the mobilisation of the army.

b. *Against the Army*

PLA's first attack on the army came in 2001. The Maoist party had sat for dialogue with the Sher Bahadur Deuba-led government for three rounds, without much progress. The mainstream parties argue that the dialogue was just a time-buying tactic of the Maoists while they prepared themselves for a full-blown war with the army to capture the state. The Maoists, however, argue that since the government took the talks as a sign of their weakness and did not make any concessions on the dialogue table, they had no option but to go for a war. Whatever the reason, the PLA launched its first-ever attack against the then Royal Nepal Army by raiding an army barrack in Ghorahi, the district headquarters of Dang. By the time PLA was preparing for the Dang assault it had grown in size and strength. In the Dang attack the PLA used 11,000 combatants, including one full battalion, two temporary companies, and some of the district platoons (Pasang, 2008). In Ghorahi, the PLA first opened fire simultaneously at the CDO office, SP office and the DSP office. After capturing the CDO, SP and DSP office, they finally attacked the army barrack of Bhagbati Prasad Battalion and made them surrender. The Battalion had 250 army men out of which 14 were killed in the attack.

The Ghorahi raid provided the PLA with a huge boost since it seized huge amount of arms and ammunition from the barrack. Altogether, the PLA took about six trucks of arms, ammunition and other logistics, including 50,000 rounds of bullets (Pasang, 2008).

The same day another group of PLA combatants also attacked an army barrack in Putali Bazaar of Syangja district. Next big attack on the army took place in the district headquarters of Accham district, Mangalsen. The PLA had received

setbacks on earlier two relatively modest attacks at Kapurkot and Ratamata so it wanted to avenge these. On Feb 16, 2002, over 900 PLA commanders attacked police district headquarters and army barrack in Mangalsen, killing 52 army men and 95 police personnel.

By 2002, there was a sort of strategic stalemate between the PLA and then Royal Nepal Army with either side unable to clench a decisive victory.

2. Organization

When the verification process first began in 2007, a total of 32,250 PLA combatants were registered with the United Nations Mission in Nepal (UNMIN). However, when the UNMIN completed its verification process in December 2007, only 19,602 persons, including 3846 women, were verified as legitimate PLA combatants (www.unmin.org.np). According to UNMIN, 8640 combatants did not show up for verification interview and hence were automatically disqualified. The verification process further disqualified 2973 combatants as minors and 1035 as ones who joined the PLA after the cut-off date of May 25, 2006.

The discharging process of the disqualified combatants is yet to formally begin so both the qualified and disqualified combatants remain in Seven PLA Divisions in seven major cantonment sites and surrounding 21 satellite cantonments. The breakdown of the combatants in seven major cantonment sites, the names of the division and leadership are given below.

a. *First Division*: The PLA First Division is based in main cantonment site in Chulachli, Ilam district and in surrounding three satellite camps. It has a total strength of 1933 combatants under the leadership of Division Commander Yam Bahadur Adhikari alias Pratiksha.

b. *Second Division*: The PLA Second Division is based in main cantonment site in Dhudhauli, Sindhuli district and in surrounding three satellite camps. It has a total strength of 1632 combatants under the leadership of Division Commander Suka Bahadur Roka alias Sarad.

c. *Third Division*: The PLA Third Division is based in main cantonment site in Shaktikhor, Chitwan district and in surrounding three satellite camps. It has a total strength of 3951 combatants under the leadership of Division Commander Dhan Bahadur Maski alias Rajesh.

d. *Fourth Division*: The PLA Fourth Division is based in main cantonment site Jhyaltungdada, Nawalparasi and in surrounding three satellite camps. It has a

total strength of 3077 combatants under the leadership of Division Commander, Tej Bahadur Oli alias Pratik.

e. *Fifth Division*: The PLA Fifth Division is based in main cantonment site in Dahaban, Rolpa and in surrounding three satellite camps. It has a total strength of 2442 combatants under the leadership of Division Commander Kali Bahadur Kham alias Bibidh.

f. *Sixth Division:* The PLA Sixth Division is based in main cantonment site in Dasarathpur, Surkhet, and in surrounding three satellite camps. It has a total strength of 3100 combatants under the leadership of Division Commander, Mahendra Bahadur Shahi alias Prajjwal.

g. *Seventh Division*: The PLA Seventh Division is based in main cantonment site in Talbandi, Kailali and in surrounding three satellite camps. It has a total strength of 3327 combatants under the leadership of Division Commander, Santa Darai alias Parvana[1].

2.1 Organizational hierarchy

The PLA has Maoist Chairman Prachanda as its Supreme Commander. However, since being elected as the Constituent Assembly member in April 2008 Prachanda does not actively lead the PLA. Under Prachanda, there are four deputy commanders in the PLA—Nanda Kishore Pun alias Pasang, Barsha Man Pun alias Ananta, Janardan Sharma alias Prabhakar and Chandra Prasad Khanal alias Baldev. Since their election to the Constituent Assembly, Ananta and Prabhakar also do not play an active role in the PLA. So Pasang currently leads the PLA as its chief. Under the PLA's current organizational set up, below the Supreme Commander and deputy commanders is a General Staff, which comprises seven Division Commanders. The basic unit of PLA is called a Section, which comprises of 7-13 combatants. Four Sections make up a Platoon and four Platoons make up a Company. Similarly, four Companies make up a Battalion and four Battalion make up a Brigade and finally four Brigades make up one Division.

[1] Since Parvana is currently managing security of Maoist Chairman Prachanda in Kathmandu another PLA Commander has assumed the responsibility of Division Commander of the Seventh Division as its acting chief.

3. Interaction with other institutions

The PLA, as an armed outfit of the Maoist party that remained outlawed in Nepal for so long and also featured on the terrorist list of the United States of America, did not have many contacts or interaction with the outside world, except with some discrete separatist and insurgent groups in the region. Its contacts/interaction with other institutions can be divided into mainly three categories.

3.1 Interactions with PWG of India

During the preparation for the 'People's War' the PLA had an extensive contacts and interactions with one of the Maoist organizations in India, People's War Group (PWG), which was engaged in its own armed insurgency mainly in the Indian state of Andra Pradesh. PLA's current chief Nanada Kishore Pun and another Maoist commander Mahendra Shrestha, who died during the war, went to Andra Pradesh and had training on guerilla warfare for several months. The trainers from the PWG also came to Nepal and trained PLA fighters in the initial days. And the sharing of experience and learning continued with PWG for a long time[2].

3.2 Interactions with Nepal Army and UN arms monitors

The Nepal Government and CPN (Maoist) signed an Agreement on Monitoring of Management of Arms and Armies (AMMAA) on December 8, 2006, which paved way for formal interaction of the PLA with the UN arms monitoring officials and the Nepal Army. The Security Council resolution 1740 provided UNMIN that it shall assist the parties through a Joint Monitoring Coordination Committee (JMCC) in implementing their commitment agreed in the AMMAA. Subsequently, the JMCC was constituted under the chairmanship of UNMIN's General, Jan Erik Williamson, and with Deputy Commander of PLA Nanda Kishore Pun and Brigadier General of Nepal Army Shiva Ram Pradhan as vice chairpersons. The JMCC also had six more members in it—two each from UNMIN, Nepal Army and PLA. It is in the JMCC that the PLA had extensive interactions with the Nepal Army and UNMIN arms monitors. The JMCC had three main functions (UNMIN, 2007):

a. To assist the parties to implement AMMAA.

b. To serve as a dispute resolution mechanism—to resolve all disputes and military or operational difficulties, complaints, questions or problems regarding implementation of the AMMAA.

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[2] Interview with Barsha Man Pun "Ananta," Maoist PLA Deputy Commander ".

c. To assist in confidence building— the JMCC works to gain the trust and confidence of the parties and promote the overall goals of the AMMAA among the people of Nepal.

The PLA also has regular interactions with UNMIN's arms monitors, 186 of whom are based in each of the seven cantonment sites. The PLA top leadership also had at least three important rounds of discussions with the Nepal Army generals before the signing of the Comprehensive Peace Agreement on November 21, 2006. With the approval of the government, then PLA Supreme Commander Prachanda, PLA Deputy Commander Barsha Man Pun and senior Maoist leader Babu Ram Bhattarai held three rounds of discussions with a team of senior army officials led by Major General Amar Pant (Ananta, 2009).

3.3 Interactions with foreign military

The PLA has also had some discrete interactions with foreign armies. For instance, PLA chief Nanada Kishore Pun visited Germany in July under the initiation of German cooperation agency, GTZ, and met senior German Military Officials and listened to their experience of merger of the two armies of former East and West Germany after the unifications of the two countries. Many top ranking army officials visiting Nepal from China and India have also often met with the PLA top leadership and held interactions.

4. Budget

The PLA does not have an income of its own but it gets money from the government/donors for salary, basic needs support (mainly food allowance) and for various projects in the cantonment sites.

a. *Salary and basic need support*

Each of the combatants in the cantonments was initially given a monthly salary of Rs 3,000 and food allowance of Rs. 60 per day, which is Rs 18,00 per month (US $ 1 is equivalent to rupees/Rs. 75 approximately). The salary was later on revised to Rs 5,000 in August 2008. At the same time the food allowance was also revised and a multiple rate was introduced for the first time-- the PLA combatants in the more remote hilly regions are now given a daily food allowance of Rs 110, while their counterparts in less remote areas get Rs 72 per day. This dual allowance rate was introduced keeping in mind the cost of foods in different parts of the country. And this is also in line with the general practice in the Nepal Army and Nepal Police.

Though all the combatants received monthly salary and allowance till December 2007 when UNMIN completed its verification, the disqualified combatants and minors have been stripped of the salary and food allowance since then. Of the 32,250 total combatants registered in the cantonments, 8640 didn't show up for verification interview and hence they were automatically disqualified. The verification team further disqualified 4,008 combatants under the ground of either joining the PLA after the cut-off date of May 25, 2006 or for being minors.

The Government of Nepal has so far spent 1.85 billion rupees in salary and basic need allowance to the PLA combatants through Nepal Peace Trust Fund and additional 460 million rupees through former Maoist leader, Krishna Bahadur Mahara as of 15 May, 2009 (Ministry Report, 2009). In the initial phases, the cabinet had released the salary and basic need allowance to Minister Mahara directly.

b. Budget for other projects

Besides the salary and basic need allowance the government has also spent millions of rupees in the cantonments in various projects and infrastructure buildings. The projects, along with their costs, are listed in the box below.

S.N.	Short Project Title	Money spent as of 15, May, 2009 (In Millions)
1.	Temporary Housing	106.00
2.	Drinking Water	37.98
3.	Electricity	35
4.	Causeway	40
5.	Physical Infrastructure	60.79
6.	Telephone	0.50
7.	Access Road	309.51
8.	Temporary Cantonment Infrastructure	144.44

5. Strength and Weaknesses

As any organization would have, the PLA also has its share of strengths and weaknesses. This paper first discusses its strengths and then its weaknesses.

5.1 Strengths

a. Political consciousness

Unlike a typical military organization, the PLA has its political dimension. The very organization was formed for a political cause and many of its combatants joined the

PLA not just for a job per say, as often happens in any state armed forces. For many of them, the inspiration to join the army came from a dream to change the society for better. Because of this political orientation, the PLA remains a politically-conscious entity. There are other two key reasons as to why the PLA has remained not only politically conscious but also up-to-date on many political developments. During the ten year long "People's War" the Maoists party routinely swapped many of its cadres and leaders between the political wing and the armed wing of the party that provided many PLA combatants a continuous exposure on political issues. The party leadership also routinely conducts political trainings and even the high level leaders are engaged in interactions with the PLA combatants.

b. Motivation

Political consciousness often brings commitment and motivation. Since the combatants joined the PLA for a mission and are driven by a higher political purpose, they often remain committed to that purpose. Because of this reason they have the capacity to face the hardship and adversity and still remain highly motivated.

c. Cohesion

The political consciousness and high degree of motivation often bring in another positive trait to the PLA: internal cohesion. The PLA combatants are a group of fighters who collectively dreamt of changing the society for better and also collectively promised to give their life for the cause. When a group submits to a higher cause that automatically obscures the individual identities in the group and to a larger extent it also dilutes their individual interests and aspirations, giving a much needed cohesion to the group. Since the overwhelming majority of the PLA combatants come from a similar class background it also helps in strengthening the cohesion since they have similar life experience and similar dreams about their individual lives and social changes.

d. Inclusiveness

The PLA is also perhaps one of the most inclusive organizations in Nepal. It has drawn combatants from almost all the ethnic groups, from different parts of the country and it is also more inclusive in terms of gender. The PLA's 19.6 percent of combatants are women. Since ethnic and gender exclusion is one of the major political discourses in contemporary Nepal, inclusiveness in itself is a great strength.

e. Guerilla warfare experience

One of the major strengths of the PLA is its experience and expertise in the guerilla warfare. The PLA, which started as a ragtag group became a formidable force that virtually swept the police from far-flung police posts and even confronted the army giving them a good run for their money, became highly competent at waging guerilla warfare. The PLA perhaps knows the geography and topography of Nepal more than anyone else and is a highly mobile force. Should there be any kind of armed insurgency in the future the PLA would be the best suited force to take on them because of its experience and expertise. The PLA can also share its experience and train the Nepal Army in the areas of guerilla warfare.

5.2 Weakness

a. *Training and exposure*

The PLA lacks adequate training and exposure that a professional army requires. It may be good in guerilla warfare but its capability in a modern warfare is still unknown, if not doubtful. Even its top commanders do not have sufficient trainings and experience. For instance, its former supreme commander Puspha Kamal Dahal comes from a teaching background and so does its present chief Nanada Kishore Pun alias Pasang. The PLA's top leadership hardly had any training abroad and whatever experience, knowledge and skills they have, seems to have been acquired through battle experience.

b. *Arms, ammunition and equipments*

The PLA also lacks in modern arms and ammunitions. When the PLA registered its combatants and weapons in the UNMIN-monitored cantonments, not all of its combatants had a personal weapon. Though it registered 32,250 combatants only 3475 weapons were registered (www.unmin.org.np). The PLA fought most of its initial battles against the police with the help of improvised, home-made weapons. As they started to capture more police posts their stock of weapons also grew rapidly. They fought most of their early battles with improvised weapons, World War-I vintage, .303 rifles, and gunpowder. Later on, they seized some automatic rifles and modern weapons from the Nepal Army but they did not have a good stock of ammunition for them.

c. *Lack of proper accommodation and nutrition*

The PLA combatants live in a miserable condition in the seven major cantonment sites and the surrounding satellite camps. The cantonments lack basic amenities of a military barrack and the food they eat is also not good enough for a combatant. Since the government provides Rs 60 a day[3] for food per combatant there are questions as to whether at this modest budget one can actually feed a hardcore combatant. Moreover, since the UNMIN completed its verification in December 2007, the government no longer provides salary and food allowance to 4008 disqualified combatants residing in the cantonments. So the rest of the qualified combatants feed this disqualified lot from their food allowance.

d. *Disenchantment and disillusionment*

There is also a lot of disenchantment and disillusionment in the camp. The PLA combatants joined the armed insurgency hoping to change the society through armed insurgency. When they joined the PLA they were told that they were going to defeat the Nepal Army, capture the Nepali State and impose communist rule. But nothing of that sort happened. Instead, the Maoists were forced to make a compromise with the very political parties they once sought to destroy. Many of the PLA combatants see this as an abandonment of the revolution for which they had devoted and sacrificed their lives. There is also a great disenchantment and cynicism among the PLA combatants about the lifestyle of the Maoist leaders and cadres who are in Kathmandu and are seen to be living a life of great comfort. The danger for any group that is motivated by a higher political purpose is that once the individuals in the group begin to doubt in that very purpose the group begins to rapidly weaken and even unravel. The fact that many of the combatants have deserted the cantonments and some of them have joined different rebel outfits is an indication of the problems confronting the PLA.

6. Integration of the PLA

Integration of the PLA combatants is one of the key and also the most contentious issues of the peace process. Article 4.4 of the Comprehensive Peace Agreement (CPA, 2006) says, "The interim council of ministers shall constitute a special committee to supervise, integrate and rehabilitate the Maoist combatants." Since the CPA does not exclusively say whether such integration will happen in the Nepali Army, it has been interpreted to suit the interest of the interpreter. For instance, some hard-line army generals have opposed any kind of integration of the PLA combatants

[3] Since last August the food allowance has been increased to Rs 72 and Rs 110 depending upon the cantonment sites to match the local food prices.

into the Nepali Army arguing that the CPA does not specifically call for such integration. Some hardliners in the Maoists also have taken an extreme position arguing that all the PLA combatants should be integrated into the Nepal Army. Such extreme positions also prevail in sections of the mainstream political parties. Even Nepali Congress President and former Prime Minister Girija Prasad Koirala publicly opposed integration of Maoist combatants into the Nepali Army recently. Talking to the reporters in his hometown, Biratnagar, Koirala said, "There is no mention of integrating Maoist combatants into the Nepali Army anywhere in the peace agreement. They will be rehabilitated in the society after they mend their ways (Republica, June 20, 2009). However, despite these differences and public posturing some progresses have been made regarding integration/rehabilitation of the PLA fighters.

6.1 *Reconstitution of the Special Committee*

The government has reconstituted the Special Committee to Monitor, Integrate and Rehabilitate the Maoist Combatants as provisioned in the Article 4.2 of the Comprehensive Peace Agreement under the leadership of Prime Minister Madhav Kumar Nepal (Republica, July 14, 2009). The newly reconstituted committee has two representatives each from the ruling CPN (UML), Nepali Congress, the UCPN (Maoist). The eight-member committee also has one representative each from the ruling Madhesi Janadhikar Forum (MJF) and Terai Madhes Loktantrik Party (TMLP). This is a good progress given that there was a great deal of uncertainty about the integration process after the resignation of the Maoist Chairman Pushpa Kamal Dahal as the Prime Minister. The past efforts to reconstitute the committee had gone in vein as the Maoists demanded that the committee be reconstituted either under the leadership of their chairman or they be given at least fifty percent representation in the committee. The Maoists finally relented and agreed to reconstitute it with senior Maoist leaders Ram Bahadur Thapa and Barsha Man Pun as their representatives.

6.2 *Beginning of the discharge process*

Another progress in the integration/rehabilitation of the PLA combatants has been the beginning of the process of discharging of the disqualified PLA combatants and minors from the cantonments. Though the tripartite agreements between Nepal Government, UN and the Maoists (Agreement on the Monitoring of Management of Arms and Armies, Dec 8, 2006) said the disqualified combatants and minors would be immediately discharged from the cantonments after the verification process, the discharging process failed to begin even 20 months after the verification process was completed in December 2007.

However, following intense behind-the-scene negotiations, the government and the Maoists have agreed to begin the discharging process. Accordingly, a team led by joint secretary at the Ministry of Peace and Reconstruction, Bishnu Nepal, and Maoist commanders and officials of the UN agencies as the members of the team, started the process from the fourth division Maoist cantonment at Hattikhor in Nawalparasi. Though there were some initial resistances by the disqualified combatants, the process is expected to progress ahead. Based on the negotiations with the Maoists and the UN agencies the government is offering different options to the disqualified combatants and minors for their rehabilitation.

6.3 Integration/Rehabilitation of the qualified combatants

Though there seems to be a general agreement on the issue of discharging the disqualified combatants and minors from the UN monitored cantonments, the issue of integration/rehabilitation of the qualified combatants is still a tricky one. And it is not just limited to how many numbers of PLA combatants will be integrated into the Nepali Army and other security agencies and how many of them will be rehabilitated back in the society. It's rather linked to a larger issue of State Security Reform (SSR), right-sizing of the Nepal Army, democratization of the army, and promoting professionalism and accountability in it. The security bodies addressed in SSR do not only include the national military, but also other security agencies such as the civilian police, armed forces, law enforcement agencies, intelligence, justice and law enforcement institutions, legislative bodies and oversight mechanism, and non-statuary security forces (Budhathoki, 2009).

Article 4.7 of the Comprehensive Peace Agreement (CPA) has clearly stated the need for democratization of the Nepal Army and bringing it to the right size. The Council of Ministers shall control, mobilize and manage the Nepali Army as per the new Military Act. The Interim Council of Ministers shall prepare and implement the detailed action plan of democratization of the Nepali Army by taking suggestions from the concerned committee of the Interim Parliament. This shall include tasks such as determining the right number of the Nepali Army, preparing the democratic structure reflecting the national and inclusive character and training them as per the democratic principles and values of the human rights (CPA, 2006). So when the government talks about integration/rehabilitation of the PLA it should also fulfill its duty under the interim constitution (since CPA is a part of the interim constitution) to reorganize and reorient the Nepali Army in accordance to the democratic aspiration of the Nepali people. One of the way forwards would be to form a separate National Defense Council to look into the issue of right sizing the Nepal Army, its democratic transformation, promoting transparency and accountability and decide on the larger question of the role of Nepal Army in the future and the entire gamut of SSR. The cabinet's Special Committee to Monitor, Rehabilitate and Integrate the Maoist

Combatants, in the meantime, should lay out a plan for integration/rehabilitation of the PLA combatants. Below are some options for integration/rehabilitations.

a. Integration in the army

Even if the CPA does not categorically state that some of the PLA combatants will be integrated into the national army the fact that it indeed talks about the integration clearly hints at such a possibility. Senior political leaders in private admit that there was an understanding that a few thousands PLA combatants would be taken into the national army. At this point, both the arguments that there should be no integration of the PLA in the national army and that all the qualified PLA combatants should be integrated into the national army are extremist views and they could be counterproductive to the peace process in general and to the integration/rehabilitation process in particular. As 'monitoring, rehabilitation and integration' are explicitly agreed to in the CPA and the interim constitution, creative ways must be found for some degree of 'integration' in a manner that would actually help to strengthen the Nepal Army and other security forces to enhance their inclusiveness, professionalism and modernisation (Gautam, 2009). What is the right number for integration of the PLA into the national army is a question that should be decided taking into account a number of key issues, such as, what is the future role of the army? What are our future security needs? And what would be the total size of the national army? One of the most reasonable things to do would be to reduce the size of the national army to the pre-war level or even slightly smaller than that. If the current size of the national army is too big and there is also a need to integrate some PLA combatants into it, the first question we should try to address is what percentage of Nepal Army should be sent home through attractive retirement schemes and what percentage of PLA combatants should be rehabilitated back into the society? If 60 percent of the Nepal Army personnel were given retirement and 60 percent of the PLA combatants were rehabilitated back into the society, we will then be left with a manageable number of Nepal Army personnel and PLA combatants to reconstitute a permanent national army and other security agencies. If retirement and rehabilitation takes place at this scale, we will be left with about 37,000-38,000 Nepal army personnel and about 7840 PLA combatants.

Of the 7840 PLA combatants half of them (close to 4,000) can easily be integrated into the Nepal Army and the other half can be accommodated into other security agencies. While absorbing PLA combatants into the national army and security agencies priority should be given to women combatants and combatants from those ethnic groups which are underrepresented in Nepal's security agencies. It will have two advantages: First, as per Security Council Resolution 1325, the UN is actively encouraging the deployment of more women in peace keeping operations. So having more women in the national army will increase UN's intake from Nepal in

its peace keeping operations. Second, it will increase the inclusiveness of the national army and security agencies.

b. Integration in other security agencies

About 3,800 PLA combatants can easily be absorbed in Nepal Police, Armed Police Force and other security agencies. The ratio of police personnel to population is said to be low in Nepal when compared to other countries, which is also said to be affecting efficiency in maintaining law and order. So integrating PLA combatants into Nepal police after sanitizing their political biases should actually be a welcome move.

c. *Community service*

Community service is another area in which we can mobilise the PLA combatants. Since many of them have a high degree of political awareness and they actually joined the PLA to effect a positive change in the society rather than just for the sake of fighting a war, they might be willing to go back to the society and work for community service to raise people's awareness on critical issues like health, education and social discriminations. The outbreak of diarrhoea and cholera epidemic in Jajarkot, Rukum and surrounding districts in July 2009, which claimed lives of more than 200 people, shows that there is still a dire need of social campaigns on basic health and education issues. The outbreak of the epidemic clearly tells us that people are still not aware of the value of boiling water before they drink it or washing hands before they eat. And they are still not aware or convinced on the need to re-hydrate their body when they suffer from diarrhoea. So there is a great need of community workers, who are willing to go to the far-flung villages to raise awareness. If they wish, some of the former PLA combatants can be mobilised in this noble cause.

d. *Foreign Jobs*

Given a choice some of the PLA combatants might actually want to go for jobs abroad. Since about 500 Nepalis, on average, leave the country everyday for foreign employment the government can bear all the cost for such jobs and send the willing PLA combatants to a foreign land where they not only earn money but also acquire skills, develop positive attitude towards work and come back to society with knowledge, skill and capital to start something their own.

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The Nepal Police and the Armed Police Force

Govinda Thapa

Introduction

The sense of fear and instinct of survival unite people into groups. Thus they formed indigenous security systems in the ancient times. In those days, safety and security rules were an integral part of one's religion. The religious customs and rites controlled human behaviour. Those were the laws and rules. The development of modern day security organisations are the cumulative manifestation of this long and continuous evolutionary process.

The mindset of policing in South Asia has been largely influenced by the very old to modern day mission and policing strategy. In those days the purpose of having strong military and police forces was different than today. Today, the perspectives of security have changed the mandate, style, shape and size of the security organisations. The operational ability of security organisations has been modified. For effective policing of crime and maintenance of law and order in the country, there are key and essential security organisations, amongst others the Nepal Police (NP) and Armed Police Force (APF).

The Rise of the Rana Regime and Security System

After *Kot Parva*, Jang Bahadur became the Army General and Prime Minister, he started policing system by issuing 12 directives (Sawal). During his period, he divided Nepal in 9 regions and 69 units along with the establishment of police Chowki and Thana headed by Lieutenants including other ranks (Hawaldar, Aamaldhar, Kotwal, Munsi, Nausinda and Sipahi). He further established Militia (provisional army) in 1874 in hilly region of Nepal. He started Chaukidari System in Banke and Bardiya in 1860.

In 1908-09 Chandra Shaumsher started joint border security system with British India to control trans-national crime. He issued first *Police Sawal* (Directives) in 1914. He established first police Goswara in Birganj. In 1919, he also established Central Police Goswara in Kathmandu valley under the command of Army General with few police officers under his command. In 1928, he further established police Goswara in other parts of the Tarai Districts.

In 1938, Prime Minister Juddha Shamsher appointed a Director General to look after the departments of foreign affairs and industry including the policing system in the

valley and the Tarai (Madesh). Later, in 1946, Prime Minister Padma Shamsher established the Superintendent Police Office in valley and other parts of the country.

Historical Background of the Modern Nepal Police

Although no authentic records are available, it is understood that there used to be some agencies to carry out almost the same types of responsibilities now borne by the police in the periods of Kirants, Lichhvis and Mallas in ancient Nepal. Before Nepal's unification in the early eighteenth century, Nepal was divided into small principalities named as "Baisi" and "Chaubisi," and other three states named Makwanpur, Chaudandi and Bijaypur, eastern part of Nepal. During this period there were separate and different types of security systems in each state.

One of the roles of the King Prithvi Narayan Shah (18th century) was to protect the unified states and provide justice in the country. The Military was used to achieve these objectives. In addition, he divided Nepal into 12 administrative parts to maintain peace and security. He appointed the post of Katuwal in hilly region to perform policing as well as mediating and information-sharing roles (both at the local and central levels). Following which some other officials were endowed with similar responsibilities:

- *Umarau* was also posted to check the entry points and provide security.
- *Faujdhar* was appointed in Terai (Madhesh) districts for the maintenance of peace and security and collecting revenues. Until 1728, Faujdhars were the district administrators in Saptari and Mahotari.
- *Naike, Mahan or Mainya*: They were appointed as a night security guards in Valley and Pasupati Temple area by King Prithavi Narayan's son Ran Bahadur Shan in 1742.
- *Dware*: They were appointed in valley and in some parts of hilly districts to maintain peace and security including the hearing of minor cases.

After the unification of Nepal, the responsibilities of maintaining law and order, arresting criminals and preventing unlawful activities were carried out by the Army. Having come to the power, Prime Minister Jung Bahadur formed militias in different districts under Badahakim (civilian chiefs) to strengthen his power and position. These Badahakims were entrusted to maintain law and order in the districts and collect the reports and present them to the authority. The Army was used by the Badahakims for the tasks which the police do today.

Later in 1942, the organisational structure of police was revised and finalised and their objectives were made clear and Sawal (rules) were enforced to fix the duties and responsibilities of the police. Different types of forms and registers were developed to make the assignments clear and help execute them promptly and to

keep the full records of the office. As per the *Sawals*, police personnel were trained and some officers were also sent to India for training. Due to some jurisdiction of authority, the relationship between the Badahakims and Police Goshwara resulted in confusion and complications.

Ram Dal (Army) was deployed in 1938 for traffic control in Kathmandu valley (during that time there were only 10 vehicles in Kathmandu) and intelligence gathering to support the Rana regime. After the advent of democracy in 1951, the Mukti Sena (Freedom Fighter) which had taken part in the freedom movement against Rana regime was converted into Rakshya Dal (Defence Force). This force was also entrusted with the police duties.

The abolition of 104 years of the Rana Regime after the Delhi Agreement in 1951 between King, the Ranas and Nepali Congress Party encouraged many members of the Rakshya Dal/Mukti Sena (Freedom Fighters) to join Nepal Police and home guard of Nepalese Army in 1951. The police turned into the 'melting pot' of different 'security forces'. After the integration, some of them inducted in the Nepal Police were dissatisfied and launched a revolution against the government. They captured arsenals, radio-station, communication assets and the airport. This situation created political turmoil in Kathmandu. Finally, in 1952 the leader of that revolt, Dr. K. I. Singh, escaped to China along with his 37 followers to seek asylum.[1]

Senior Army Officer, Toran Shamsher Rana was appointed as the first Inspector General of Nepal Police in 1951.

It was a transition period and law and order situation was not normal. Looting, killing and other crimes were an increasing trend. Taking this background into account, King Mahendra, constituted the Police Commission to recommend appropriate solutions.

According to the recommendation of Buch Commission, King Mahendra enacted the Police Act in 1955. Most of the provisions of this Act were similar to the Indian Police Act 1861. This Act empowered the government to restructure of all Police Units of Nepal and to appoint police officers on the recommendation of screening committee. Hence, forerunners of Nepal police comprise the members from Nepalese Army, Rakshya Dal/Mukti Sena, civilian and police officers. Civil-servants with their ranks were continued in police until 1965.

The formal establishment of Nepal police was validated by the Nepal Police Act 1956 with the following preamble:

> *Nepal bhar muluk ko prahari force ko punargathan garna ra yeslai apradh rokne ra patta lagaune suyogya sadhan banai shanti ra byabstha kayam rakhna awashyak dekhiekole"* (Having deemed it necessary to reorganise the State Police and to develop it to be a capable instrument to preventing

[1] Baidhya, Manandhar & Bajracharya, 2052 (1995), p. 103.

and investigating crimes and maintain law and order.) *(Unofficial Translations)*

Organisation of the Nepal Police

The Nepal Police is directly under the Ministry of Home Affairs. The police force is accountable to the Ministry, not to the people. The Ministry is the regulatory body; the courts, parliament and human rights commission are oversight bodies. The police Headquarters is the central administrative body to command and control the police force. Inspector General (IG) is the commander of the Nepal Police. Under this office, there are five Departments. Each of these Departments is headed by Additional Inspector General (AIG). These Departments are:

1. Administration Department
2. Operations Department
3. Crime Investigation Department
4. Technical Services Department
5. National Police Academy

At the field level, there are five Regional Police Offices in the five regions of the country. These Regional Offices are commanded by a Deputy Inspector General (DIG). The Kathmandu Valley Metropolitan Police is headed by one Assistant Inspector General (AIG). These offices are located at:

1. Eastern Regional Office, Biratnagar
2. Central Regional Office, Hetauda
3. Western Regional Office, Pokhara
4. Mid-western Regional Office, Nepalgunj
5. Far-western Regional Office, Dipayal
6. Kathmandu Valley Metropolitan Police, Kathmandu

Under each of these Regional Offices, there are two to three Zonal Offices. The total numbers of Zonal Offices are fourteen. The Senior Superintendent of Police (SSP) is the commander of the Zonal Office. These are located at:

<u>Eastern Regional Office, Biratnagar</u>

1. Mechi Zone Office, Jhapa
2. Koshi Zone office, Dharan
3. Sagarmatha Zone Office, Rajbiraj

Central Regional Office, Hetauda

4. Janakpur Zone Office, Janakpur
5. Bagmati Zonal Office, Kathmandu
6. Narayani Zone Office, Birgunj

Western Regional Office, Pokhara

7. Lumbini Zone Office, Bhairahawa
8. Gandaki Zone Office, Pokhara
9. Dhaulagiri Zonal Office, Baglung

Mid-western Regional Office, Nepalgunj

10. Karnali Zonal Office, Jumla
11. Bheri Zonal Office, Nepalgunj
12. Rapti Zonal Office, Dang

Far-western Regional Office, Dipayal

13. Seti Zonal Office, Dhangari
14. Mahakai Zonal Office, Mahendranagar

Kathmandu Valley Metropolitan Police, Kathmandu

Under these Zonal offices, there are seventy five District Offices. These offices are commanded by Superintendent (SP) or Deputy Superintendent of Police (DSP) depending on the size, population, crime rate and political sensitivity of the district. Under each of these District Offices, there are several Metro Circle Police Offices, Ward/Area Police Office and Police Chowki (Station). See Appendix 1.

Police Strength

The total number of police personnel is 56,069.

Rank	No
IGP	1
AIGP	7
DIG	23
SSP	56
SP	106
DSP	304
INSP	1,075
SI	2,838
ASI	5,407

HC	10,438
CONST	33,725
FOLLOWERS	1,963
BOYS	125
TOTAL	56,069

Source: Police headquarters website

The Role and Functions of the Police:

According to the Article 15 (1) of Police Act 1956, some of the important duties of the police are:

a. Execute legal orders and warrants;
b. Collect and disseminate information related to the disruption of public peace and law and order;
c. Control crime and protect people from unnecessary hassles;
d. Find out criminals and legally prosecute them;
e. Legally arrest persons with ample reasons for detention and arrest;
f. Be obedient to the existing laws;
g. Protect weak and helpless and take into safety those drunk and drugged;
h. Take immediate actions to the persons while in police custody;
i. Arrange food and shelter for detainees;
j. Behave properly during search and arrests;
k. Behave in a proper way with general public and behave with respect and politeness while dealing with women and children;
l. Attempt to protect from the loss of fire;
m. Attempt to protect people from accidents and security risks.

Other Articles 17, 18, and 19 of the Police Act 2012 entrust police with the duties and power to arrest persons involved in criminal activities without warrant; management of road traffic and management of public gathering and demonstrations respectively.

Administration Department

The Police Act has specified the provision of establishment of Administration Department at Police Headquarters with prime responsibility of effective and efficient administration of Nepal Police organisation. The responsibilities of the administration department are:

1. General administration
2 Records keeping
3. Financial administration
4. Education institutions

5. Sports and games

Operations Department

This department has been established to maintain peace and security by upholding rule of law. This is mainly responsible for the effective mobilisation of the available human resource for policing duties in order to maintain law and order. It takes care of:

1. VIP security
2. Vital installations security
3. Elections security
4. Rally, Demonstrations, Bandh (general strikes)
5. Mela (fair)
6. Special Police operations during major crisis- for example, riot, hostage taking, kidnapping, insurgency, disaster, dacoit act, armed group terrorism, etc.
7. Road traffic management
8. Motor and transport management

Traffic Police

After the importing of the first vehicle to Kathmandu in 1901, there has been a steady rise in the number of vehicles. To effectively manage the transportation system and control vehicular movement, traffic control measures were initially implemented through Ramdal in 1951. The Traffic Police which started operations with minimal human resources now has 1253 personnel presently assigned for traffic duties. However, only 1183 traffic police personnel are currently active in traffic management.

Crime Investigation Department

Crime Investigation Department looks into the prevention and control of criminal activities in the country. It has its field offices at each regional, zonal and district level. It supervises the crime branch of the districts. It also takes the major disputed criminal cases for the investigation. This department has formed different Bureaus, Sub-bureaus, and Cells, as required, to tackle the increasing number of crime effectively and efficiently. According to the work division chart of Crime Investigation Department, the whole work has been divided into two parts, the Crime Investigation Bureau, and the Crime Control Bureau

1. Crime Investigation Bureau

The main goal of this bureau is to devise polices and take initiatives for effective investigation of crime all over the country. It was established in 2005. The main objective of CIB is to perform central role in crime investigation as well as to make new policy directives and recommendations as required from the central level. It has some special branches to investigate the crime with collective effort by coordinating with each other. This bureau is further divided into two sections the Crime Investigation Division Central Police Forensic science Laboratory

A. Crime Investigation Division has five branches:

i. Special branch: This section supervises and monitors the serious types of crime all over the country as required by coordinating with central level.
ii. Prosecution section: This task of this unit is to coordinate with public prosecutor in support of the prosecution of crimes and direct recommendation as required.
iii. Crime Analysis Section: This section analyses the crimes which have occurred all over the country and make analytical report and recommend to the concerned police unit.
iv. Record Section: This section maintains the record of crime and criminals in the criminal activities throughout the country.
v. Plans and Policy Section: This section makes the plan for the job specification, professionalism and efficiency of the police personnel from top level to bottom of the police unit and recommend for the essential training.

B. Central Police Forensic Science Laboratory (CPFSL)

Keeping in view of the importance of forensic science in criminal investigations and increasing number of criminal incidences, the Government made a decision to upgrade the Forensic Section and establish Central Police Science Laboratory equipped with modern facilities and equipment under the Criminal Investigation Department of Nepal Police. Since then, the Laboratory has rendered the law enforcement agencies consistent quality and uncompromising professional services where analysts perform specialised examination on crucial exhibits and evidences that are collected at the scene of crime and is responsible for independent, objective and accurate examination of the evidences submitted by law enforcement agencies.

The Objectives of CPFSL

- To provide necessary service to the concerned by analyzing and testing the various evidences.
- Protection of human rights by providing quick analysis report of different physical evidences.
- To develop forensic laboratory with modern equipment and skilled manpower.
- Conduct training programmes regarding forensic science to create awareness among the different agencies involved in criminal justice system.
- Conduct research and development activities.
- Co-ordinate among different national and international organisations.

Facilities in Different Units of CPFSL

It has various units which conduct forensic examinations and analysis of several exhibits under three sections. They are as follows:

a. Physical section

i. Questioned Document: In its fullest meaning, any material that contains marks, symbol or sign partially visible, or invisible that may ultimately convey a meaning or message to someone. Pencil or ink writing, typewriting, or printing on paper are the more usual forms of document.
ii. Ballistics/Explosives Unit: In this unit, the firearms and firearms related physical evidences are examined. These evidence includes various firearms, cartridge cases, bullets, live and misfired cartridges, clothing of victims and deceased, burnt and partially burnt powder grains, wads, hand swabs, materials affected by projectiles and glass pane affected through shooting. In addition, this unit deals with the physical evidences related to explosives and explosive materials, live detonator, safety fuses, and debris collected from the scene of explosion
iii. iii. Physics unit: This unit conducts examination and makes comparison of footprint, tire tread impression, shoe impression superimposition of skull and photos of missing persons, erased chassis and engine numbers, tool marks, paints polymers and adhesives, piece of ropes and cords, glass fracture etc.

b. Chemistry / Narcotics Units

This unit deals with the analysis of narcotic drugs and psychotropic substances such as cannabis, opiates, cocaine, benzodiazepines, amphetamines, barbiturates and

precursor chemicals. In addition, the unit also analyzes the purity test such as adulteration in petrol, diesel, fertilizer, metals etc.

c. Fingerprint Unit

This unit has the role to develop and examine the chance print from the crime scene. It keeps and maintains records of criminals and suspects manually. All the examination is done manually.

2. Crime Control Bureau

The crime control bureau was established in 2004. The aim of the Bureau is to prevent from the occurrence of crime. Considering the present context of increasing rate of criminal activities, the bureau is responsible in policy formulation and developing mechanisms for preventing the occurrence of crime and creating a society free from fear. This bureau is also divided into divisions, which are as follows:

Interpol Section

Nepal became the 100th member of ICPO-Interpol in 1967. Since then, Nepal has been regularly attending the General Assemblies, Asian Regional Conferences and other important meetings /conferences. The National Central Bureau or Interpol Section of Nepal is situated within the premises of the Police Headquarters, Naxal, Kathmandu. The Inspector General of Police heads the National Central Bureau, which locally functions under the Crime Investigation Department (CID). A team of officers run the day to day work, with a Superintendent as the office in charge. With the availability of the communication facilities as I-24/7, FAX, ISTD, STD, Internet etc., the NCB is quite well organised to strengthen international police cooperation.

Women and Children Services Centres (WCSC)

There are more than two dozens of Women and Children Service Centres (popular as Mahila Cell) in the country. These centres have played pivotal role in the investigation of crimes against women and children.

Community Safety Division

This division looks after the activities of crime prevention through public awareness. There are more than hundred community and police partnership organisations in the country working for the prevention and control of crime in the societies.

Human Resource Department

Human Resources Department (HRD) was established on 29 April 2004 by the decision of Council of Ministers of Government of Nepal. The Human Resources Department was established with the objectives to develop skilled and professional police personnel and to manage the human resources in Nepal Police.

The main responsibilities of the HRD are:

1. To identify the training needs of police personnel and to develop appropriate training policy.
2. To nominate and recommend officers for national and international trainings, seminars and workshops.
3. To update the current training curricula and training materials for producing the skilled manpower in the organisation.
4. To suggest measures for implementation in the field of human resource management.

National Police Academy

National Police Academy (NPA) formerly known as Central Police Training Centre (CPTC) established on the onset with the police regulation of 1993. Central Police Training Centre (CPTC) was founded in 1956 and has its distinction as only an institute to train police force. Initially, the CPTC had remained engaged in training only the constable level within limited resources and training facilities.

The NPA is the apex body of all Nepal Police Training Institutions in the country. Its goal is to develop quality human resources for Nepal Police to achieve organisational and individual objectives with a strong commitment of service and responsibility to the people. The Academy is set to be the 'Centre for Excellence' and is committed to expand its resource base through tie-ups with similar institutions in and outside the country. The main objectives of NPA are:

1. To conduct foundation trainings (induction courses) by offering developmental opportunities to the senior police officers and technical police officers.
2. To prepare police instructors required for the entire police training system in Nepal Police and provide consultancy services.
3. To offer and undertake advanced training for senior police officers in the field of leadership, management and administration, proactive policing, community policing trainer's trainings, etc.

4. To extend prospective and substantive relationship with universities in the relevant subjects and to award academic degrees to the trainees.
5. To organise workshops/seminars/symposiums/conferences and short courses in policing issues.
6. To carry out quality research activities (required by Police Headquarters-PHQ) or to act as a research faculty (qualitative research on behalf of PHQ) regarding police profession to develop analytical capability.
7. To extend assistance and advice to police headquarters i.e. consultancy service rendered to PHQ in formulating training policies.

The NPA supervises the Regional Training Centres which are:

Eastern Regional Police Training Centres, Biratnagar
Central Region Police Training Centres, Chitwan
Western Region Police Training Centres, Butwal
Mid-western Region Police Training Centres, Nepalgunj
Far-western Regional Police Training Centres, Dipayal

Training in Nepal Police

The main trainings for police inside and outside the country are:

- Basic induction training—this training has now been affiliated to Tribhuvan University which offers Postgraduate Diploma in Police Science for Inspector level
- Crime investigation
- Crowd control
- Management Development Programme
- Traffic management
- Crisis/disaster management
- Community policing strategy
- Gender violence and policing
- Human rights and humanitarian laws
- Anti- Terrorist & Explosive Advance
- Defence and Strategic Studies Course
- Personnel security
- Vital installation security
- Critical Incident Management
- FBI Course
- Cyber Crime Investigation Course

The functions of Technical Support Department:

Technical Support Department

Technical Support Department was established in 2008 realizing the need of a distinct department bringing all the technical divisions under the direct supervision of Police Headquarters as a single management pyramid to develop and improve different services needed by the police department according to the policy governed by the organisation while developing the police as effective, qualified and updated force, keeping in tune with the changing time.

The following Directorate, Divisions and Sections are under Technical Support: Department:

1. Police Headquarters, Technical Directorate
2. Police Headquarters, Housing and Physical Planning Division
3. Police Headquarters, Communication Division
4. Police Headquarters, M.T. Division
5. Police Headquarters, Weapons Section
6. Police Headquarters, Computer Division
7. Police Headquarters, Technical Division

Police Accountability and Oversight Bodies

The Nepal Police is accountable to the Ministry of Home Affairs. There are several oversight bodies: Court, National Human Rights Commission, and Attorney General Office etc.

Reforming Nepal Police

The Nepal Police has a wide-ranging mandate, including public order, crime prevention and investigation, protection of life and property, intelligence and emergency relief.

Police reform sectors:

- Police Law – Police powers must be clearly articulated and overseen to ensure that police conduct fits within set boundaries. There is a need for a new Police Act and regulations.

Inclusive police organisation

- A police organisation must be representative of the people (this includes gender, religious and class representation, depending on the jurisdiction), and it serves to ensure trust and confidence from across the whole community.

- Training - Training directly influences organisational culture. Human rights and police professionalism must be at the core of the police training syllabus.

- Crime Investigation: Separation of Crime Investigation Department is not implemented into action. This department requires being autonomous and independent to recruit, train, and use manpower exclusively for the purpose of crime prevention and detection.

- Human rights standards – One of the key messages of the past police performances are that the protection of human rights are not central to policing practice. Despite an early resistance, officers often come to recognise that conforming to human rights standards can actually assist, rather than interfere with, effective policing.

- Community policing –The police must work closely with the public– not just with few to gather information for them, but to actually work in partnership to ensure public safety. This policing approach is yet to be owned by the whole police personnel.

Background and History of Armed Police Force (APF):

With the announcement of the "People's War" in 1996, the country fell into the grip of bloody armed conflict. The government felt the need to raise a new Para Military Force to neutralise it effectively. To answer this need, it formed a task force, with the then Home Secretary Khem Raj Regmi as convener, to carry out a feasibility study and recommend the formation of an Armed Police Force in Nepal. As per the recommendation made by the task force, the APF Ordinance was issued on 22 Jan 2001 and 12 April 2001 by the former King Gyanendra Bir Bikram Shah Deva. The APF Bill was passed by the 20th session of Parliament and granted royal accent by the King on 22 Aug 2001. This date marks the foundation of Armed Police Force in Nepal. The late Krishna Mohan Shrestha was the first Inspector General of APF. The objectives of establishing the APF, as enshrined in the APF Act were: "To maintain peace and stability in the country by protecting the people's freedom, lives and property."

The duties of Armed Police Force:

According to the Article 6 (1) of APF Act, the force can be mobilised for:

1. Armed conflict
2. Armed insurgency and separatist activities
3. Control terrorist activities
4. Riot control
5. Protection of VIP and vital installations
6. Rescue in disasters
7. Rescue a hostage in hostage taking, take actions during heinous and grievous criminal activities or during a grievous nature of disorder
8. Protection of Nepal's international border
9. Assist Nepal army in case of foreign aggression
10. Under the Article 24(2) of the Act, upon suspicion of involvement in any criminal activities, the APF officer may arrest any person and handover to local police.

APF Service Commission:

Article 11 of the Act has provisions for APF Service Commission for the purpose of recruiting and selection of manpower. The Commission is a five member body. The tenure of the members of the Commission is four years. The Commission comprises of:

- Chairperson of Nepal Public Service Commission or his representative (Chair)
- One special class official designated by Nepal Government (Member)
- Secretary, Ministry of Home (Member)
- Representative of Nepal Army (Special Class) (Member)
- IG of APF (Member Secretary)

Under the Article 28, the APF has provisions for the APF Special Court.

Organisation of the APF

Initially the APF was organised with the manpower from Nepal Police, the then Royal Nepal Army and new recruitments by the APF itself. The total strength of APF is 25780.

Rank	Number
IGP	1
AIGP	5

DIGP	10
SSP	22
SP	80
DSP	281
INSP	799
SSI	37
SI	1,147
ASI	1,544
SHC	2,165
HC	3,042
AHC	4,019
CONST	11,142
FOLLOWER	1,486
TOTAL	25,780

Source APF website

It has separate departments for the accomplishment of the functions. Each of these departments is headed by an Additional Inspector General:

1. Border Security Department: there are eighteen APF border Security Companies along the Indo-Nepal international border. These are: Jhapa, Morang, Sunsari, Saptari, Siraha, Mahottari, Dhanusha, Sarlahi,Rautahat, Bara, Parsa, Nawalparasi, Rupandehi, Kapilvastu, Banke, Bardiya, Kailali, and Kanchanpur.
2. Operation department: This department is responsible for the special police mobilisation in the country on special occasions like insurgency, armed mutiny, riot, disasters, etc.
3. Administration Department: This department looks after the general administration of the force.
4. Human Resource Department: AIG for Human Resource Development is responsible for training both home and abroad, recruitment, welfare, development of syllabi and United Nations Peace-Keeping operations.
5. National Police Academy: There are three training centres all over the country. These are APF Training College, Lamapatan, Tactical Training College, Bardaghat, Training Centre, Nowasta

Combat Brigades

The Armed Police Force is a paramilitary force organised as combat brigades. Each combat brigade is responsible for one of the five regions in the country. APF from its

origin has been given mandated tasks to work as a dynamic organisation in the sense that its jobs combine elements of the military and police works.

A combat brigade is commanded by a Deputy Inspector General (DIG) and comprises of infantry battalions and independent infantry companies. Depending upon the geographical region of the country each combat brigade may have three to five infantry battalions and up to four or more independent infantry companies. Senior Superintendents are the regional level commanders for training colleges located at five regions with status of Principal. An infantry battalion commanded by a Superintendent (SP) comprises of rifle companies, support company and an administrative company. Deputy Superintendents (DSP) command the companies and the Inspectors command platoons. Sub Inspectors (SIs) are the platoon second in command. A platoon consists of three sections and an Assistant Sub Inspector (ASI) commands each section.

The brigadier generals command all the Brigades. Each Brigade is responsible for the training, posting and promotion of the other ranks. Each brigade commander is also responsible to advise the IG on matters pertaining to his/her respective brigade and region. The APF has Regional Offices headed by a Brigadier. Each of these Brigades has three to five battalions under their command. There are twenty four Battalions in total. These Brigades are located at:

APF Valley Brigade Pasupatinath, Kathmandu
APF Eastern Region Brigae, Pakali
APF Middle Region Brigade, Pathalaiya
APF Western Region Brigade, Pokhara
APF Mid-Western Region Brigade, Surkhet
APF Far-Western Brigade, Baidhanath, Attariya

Training

APF personnel are provided training on different areas. Officers also take part in overseas training programme. Some of the domestic and overseas training and seminar programmes are:

- Hostage negotiation
- Surveillance detection
- Rural Border Patrol Operation
- Senior Crisis Management Course
- Explosives handling
- Special Weapon Technical Team
- Critical Incident Management Course
- Instructor training

- Aggregate Overhauling
- Commando
- Bomb Disposal
- Civilian Police Military - UN Peacekeeping Seminar
- Governments and Defence Seminar
- Civilian Police Senior Management Seminar

National Security Council (NSC)

As per the constitution of Nepal, the Nepal Army can be mobilised only on the orders of National Security Council (NSC). The NSC comprises of the Prime Minister, the Defence Minister, two nominated ministers, and the Chief of Army Staff (COAS). NSC secretariat directly advises the NSC on security matters. It consists of representatives from the Nepal Army, Armed Police Force, Nepal Police, and National Investigation Department. A DIG heads the APF contingent in the secretariat.

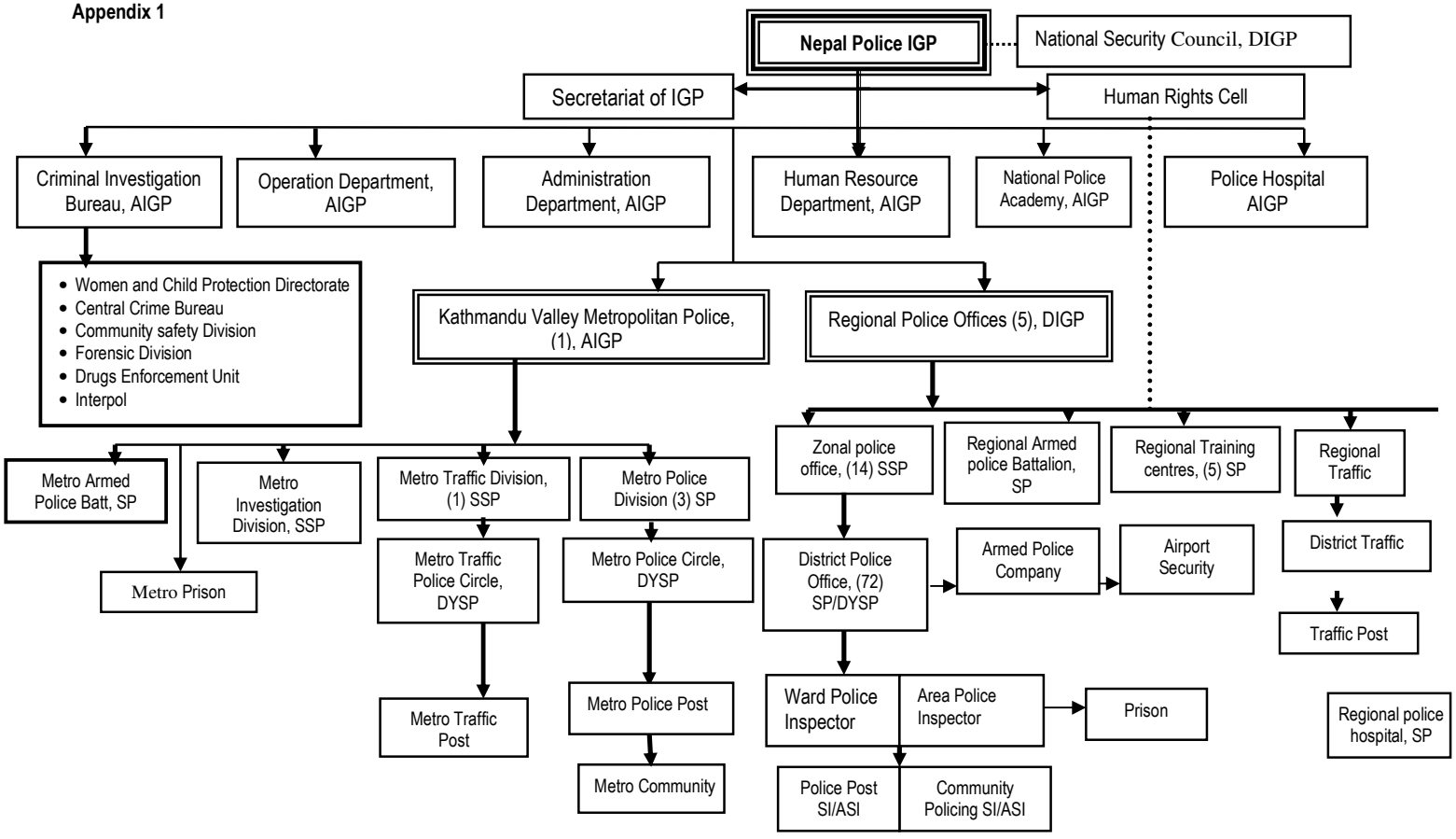
UN Peacekeeping Operations

After becoming a member of UN in 1955, Nepal has been fully committed to the objectives and principles of the august organisation and has made significant contributions, especially in the field of UN Peacekeeping for the noble cause of world peace. (For more information, please see the UN DPKO Missions page on the UN website).

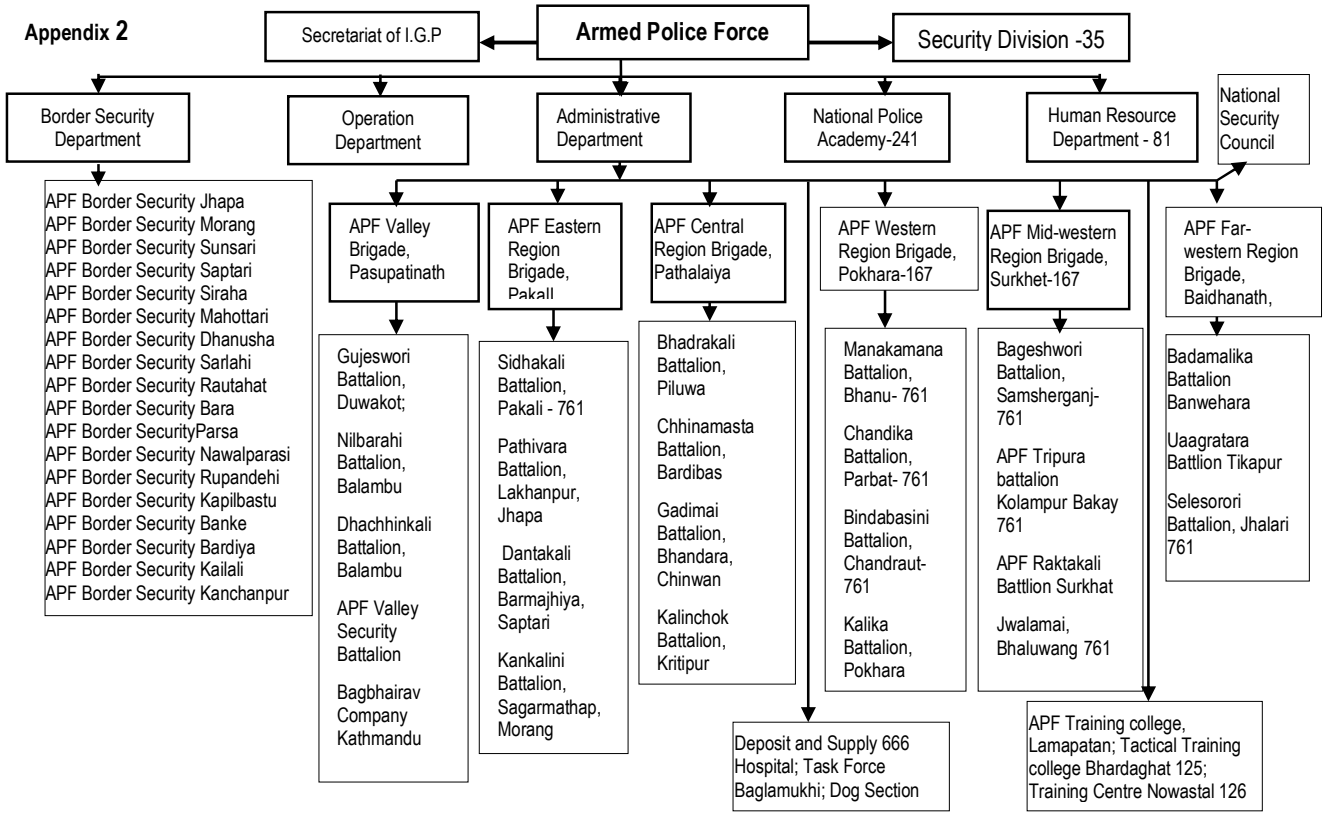
Women in APF

With a view of effective professional performance, the need for female role was felt considerably inevitably resulting in recruitment of women police in the APF. The first intake of women personnel was since 2003 with two junior non commissioned officers. To date, the organisation boasts with around 321 women police personnel of various ranks covering wings of medical, band, cultural group, sports and the infantry.

Appendix 1


Nepal Police IGP
National Security Council, DIGP
Secretariat of IGP
Human Rights Cell
Criminal Investigation Bureau, AIGP
Operation Department, AIGP
Administration Department, AIGP
Human Resource Department, AIGP
National Police Academy, AIGP
Police Hospital AIGP
Women and Child Protection Directorate
Central Crime Bureau
Community safety Division
Forensic Division
Drugs Enforcement Unit
Interpol
Kathmandu Valley Metropolitan Police, (1), AIGP
Regional Police Offices (5), DIGP
Metro Armed Police Batt, SP
Metro Investigation Division, SSP
Metro Traffic Division, (1) SSP
Metro Police Division (3) SP
Zonal police office, (14) SSP
Regional Armed police Battalion, SP
Regional Training centres, (5) SP
Regional Traffic
Metro Prison
Metro Traffic Police Circle, DYSP
Metro Police Circle, DYSP
District Police Office, (72) SP/DYSP
Armed Police Company
Airport Security
District Traffic
Traffic Post
Metro Traffic Post
Metro Police Post
Ward Police Inspector
Area Police Inspector
Prison
Regional police hospital, SP
Metro Community
Police Post SI/ASI
Community Policing SI/ASI

Appendix 2


Armed Police Force
Secretariat of I.G.P
Security Division -35
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Administrative Department
National Police Academy-241
Human Resource Department - 81
National Security Council
APF Border Security Jhapa
APF Border Security Morang
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APF Border Security Mahottari
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APF Border Security Sarlahi
APF Border Security Rautahat
APF Border Security Bara
APF Border SecurityParsa
APF Border Security Nawalparasi
APF Border Security Rupandehi
APF Border Security Kapilbastu
APF Border Security Banke
APF Border Security Bardiya
APF Border Security Kailali
APF Border Security Kanchanpur
APF Valley Brigade, Pasupatinath
APF Eastern Region Brigade, Pakali
APF Central Region Brigade, Pathalaiya
APF Western Region Brigade, Pokhara-167
APF Mid-western Region Brigade, Surkhet-167
APF Far-western Region Brigade, Baidhanath,
Gujeswori Battalion, Duwakot;
Nilbarahi Battalion, Balambu
Dhachhinkali Battalion, Balambu
APF Valley Security Battalion
Bagbhairav Company Kathmandu
Sidhakali Battalion, Pakali - 761
Pathivara Battalion, Lakhanpur, Jhapa
Dantakali Battalion, Barmajhiya, Saptari
Kankalini Battalion, Sagarmathap, Morang
Bhadrakali Battalion, Piluwa
Chhinamasta Battalion, Bardibas
Gadimai Battalion, Bhandara, Chinwan
Kalinchok Battalion, Kritipur
Manakamana Battalion, Bhanu- 761
Chandika Battalion, Parbat- 761
Bindabasini Battalion, Chandraut-761
Kalika Battalion, Pokhara
Bageshwori Battalion, Samsherganj-761
APF Tripura battalion Kolampur Bakay 761
APF Raktakali Battlion Surkhat
Jwalamai, Bhaluwang 761
Badamalika Battalion Banwehara
Uaagratara Battlion Tikapur
Selesorori Battalion, Jhalari 761
Deposit and Supply 666 Hospital; Task Force Baglamukhi; Dog Section
APF Training college, Lamapatan; Tactical Training college Bhardaghat 125; Training Centre Nowastal 126

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Border Security and Management

Laxmanlal Karna

Introduction

Border security means the legitimate control upon unauthorised and illegal endeavours that may arise at or around the state border due to political fluctuations or discrepancies in the internal security provision, as well as controlling lawful and unlawful trade, and the movement of illegal or unauthorised persons who may generate problems in internal security or lack the necessary authority to enter and reside in a territory.

A major issue of border security in Nepal is security threats that may arise at the border from neighbouring countries. Nepal is bordered to the north by the People's Republic of China, and to the south, east, and west by the Republic of India. But, there is a greater movement of the people around the borders with India to that of China. The border dispute between India and Nepal has often been a cause of tension between the two countries.

In border security, it is important to examine threats that may result from humanitarian, economic, social, political problems and false rumours. Such threats may swap within the neighbouring countries and also beyond it. But, this article, in the context of Nepal, primarily focuses on the risks at the border between two countries. Border security is a broad term; it encompasses individual entrance to the ingress of goods, entrance of information and magazines, social and political activities around the border, potential effects caused by such activities, study and investigation on methods to control them, and the implementation. In the world, some countries are found to have mobilized a special security force for border security and its management, whereas some other countries, for instance Nepal, have not formed and implemented any such special security force. Nonetheless, a national argument is going on about the necessity of forming a special security force in order to maintain border management, and to control crimes, illegitimate trades, illegal movement and terrorism that happen in the border.

Areas Pertaining to Border Security Threats

Control and examination upon more technical devices like chemical and biological substances, radiated matter, physical and metaphysical radiation mechanism, medicine, electrical wire phone, wireless phone, and electrical appliances[1] are comparatively more challenging.[2] Similarly, it is also a hard task, around the open border areas, to examine the

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1 D. N. Anderson & Thompson S. E., Wilhelm C.E, Wogman N.A. Available at: www.homelandsecurity.org

2 Available at: www.homelandsecurity.org.

movement of the people, entrance of the press, and identity of the tourist or immigrants established in another state. Border security can turn into a difficult task when information collection and its analysis cannot run properly due to lack of study and deficiency in investigation or resources. Therefore, management of human resources along with the mechanisms to examine these issues is very important for border security.

A Brief Introduction to Nepal

Nepal covers an area of 147,181 square kilometres. It is bordered to the north by China and to the south, east, and west by India. In a population of approximately 26 million in Nepal, there are nearly 200 thousands security personnel.Regarding the border security issue in the northern part with China, as it is an uninhabited land, there is very low movement of the individuals and goods. For the people of some specific area of the both countries, the border is left open including the mountain valleys with China from which there is easy trade with almost all the districts of northern Nepal. However, some Tibetans are found to have illegitimately entered in Nepal in order to make an access to the third countries using the route and available transportations in Nepal. Such activities have turned cold the long existed relationship between and Nepal and China.

In contrast, the movement of people is very open between Nepal and India. Having common cultural, religious, linguistic and geographical proximity for a very long time, Nepal has a special kind of relationship with India to its relations with other countries. It is also a fact that India and Indian leaders have had effective involvement in the democratic movements of Nepal compared to other countries. Similarly, Nepalese land and Nepalese leaders had performed a great role for the success of the Indian movement of independence. It clearly shows an intertwined relationship existing between Nepal and India. But, this intertwined relationship has not been threat- less due to the issue of border security between the two countries.

Relations between Nepal and India are intertwined into a single thread due to the open border, common cultural and linguistic identities. It has also unfolded the difficulties stemming from open border into both government and security force of the two countries. The parties involved in illegal works are also gaining the benefit of the open border.[3] The greater amount of trade business at the border has been underground, and the State has not been able to control such business. A dangerous trade crime of arms and ammunition is constantly growing up. It is not brought under control. Protesting against their own State, some groups are taking shelter in another State. These areas have been a severe threat for border security, especially between Nepal and India.

The people of both countries have freedom of movement, inhabitation and employment in the two countries. The 1950 Indo-Nepal Treaty of Peace and Friendship helped to maintain a special relationship between two countries. The treaty accepted that both of the countries are sovereign countries, and endowed with facilities of bilateral transit,

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3 Nepal Weekly, Kantipur Publication, Year 9, Vol.39, 17 May 2006

employment and trade from one country to another (Bhasin, 2005). In Nepalese political circles, the treaty is not only being criticized, rather it is as strongly debated for dismissal as it has contributed for border encroachment since the Panchayat regime (1960-90). There has been an urgent to call for a national argument to decide what should be amended or repealed from the treaty so as to reach a conclusion about the review and renovation of it.

The Kathmandu-based political parties are also producing a rallying slogan to close off the open border between Nepal and India, and to launch the system of passports between these two countries. But, the mere slogan cannot be productive for the nation without identifying the facts. Even though Nepal is an agricultural country, Nepalese farmers are bound to buy stuffs, commodities, seeds and other agrarian tools as required for agriculture from India. We are reliant on India even in martial relations, medicinal treatment and trade. Similarly, most of the foodstuffs imported in Nepal are imported from India. The living standards of the Nepalese people will be more troublesome if Nepal remains detached from the concept of open border without being self-reliant within the State itself.

No cheap nationalist slogan can make a nation affluent in this current era of globalisation. Nepal can also not achieve the benefits to be gained from the larger population if it always wears the mask of fear from the greater territory and population of India and China. Nepal must learn a lesson from India and China for industrialisation, and for the advancement of science and technology. And, it must extend Nepalese goods and access to service in their markets.

The border is a sensitive issue for any country. It should have proper management and regular monitoring. Nepal, being a landlocked country, should forward an absolute scheme relying on its actual facts. The State should form a security strategy based on public participation, inclusiveness and public honour at least for the sake of safeguarding national welfare. We should not forget the axiom that the territory of State is always protected by its own citizens living there. Nepal is not an exception to this axiom. Therefore, while moulding the border security issue, which is a special part of security sector reformation, the needs of the people permanently residing at or around the border should be considered. Otherwise, the border security shall be limited only to a slogan, creating conflict and warfare.

Border Security Provisions in Current Situation

There was no provision regarding international demarcation of Nepal's borderline in its previous constitutions of Government of Nepal Act 2004 and Interim Government Act 2007. It was also not provisioned in the Constitution of the Kingdom of Nepal 1958. In Article 43 (1) of the Constitution of Nepal 1958, however, it was provisioned that Nepal is an independent, indivisible and sovereign Hindu Kingdom. As such it was also retained about the border in the same Article that the territory of Nepal shall comprise the existing at the commencement of this Constitution, and such other territory as may be acquired after the

commencement of this Constitution.[4] This is the common way of describing the territory of the State in world's constitutions. There are various provisions of regulating borders of the States:

a) **Open Border System:** This system is found between Nepal and India, and America and Canada. There requires no formal paper for the transit between Nepal and India, but the transit between America and Canada is advanced with a requirement of identity card.

b) **Controlled Border System**: Under this system, the following approaches are implemented:
   i) Passport, visa, or identity card
   ii) Barbed wire in border line
   iii) It is also in international practice to look after the border by border security force or other military or paramilitary forces.

c) **Closed off Border System:** This system is found in several countries. Under this system, an absolute restriction on movement is made by constructing the wall. The Berlin Wall of Germany extended from north to south of Germany was an example of this. Such walls are also constructed between North and South Korea, and between Israel and Palestine. But, there is some change in the current situation.

The international borderline of Nepal and India is indicated by rivers and pillars. Nepal and India had signed a treaty to arrange proper management of the border between two countries. The treaty is known as Sugauli Treaty, 1759. In 1803 Banke, Bardiya, Kailali and Kanchanpur were named as new states were returned to Nepal. Border disputes between both countries are swelling due to the change in the route of the river, damage to the old pillars, shelters and the growth of farming in the resulting no man's land. It is necessary to draw a conclusion in order to solve such disputes permanently. For this, border pillars should be constructed in modern way by identifying old route of the rivers and actual habituation. There should be well-trained security force in high alert position[5] at the border to control inter-border crime, and maintain border security at large. It is preferred to involve the local youths in such security force as much as practicable.

The border relation between Nepal and China commenced after China gained control upon Tibet and declared its autonomous state in 1950. In 1910, China had proposed an annexation upon Nepal, which was directly rejected by Nepal (Manandhar, 1999). Nepal and China signed Treaty of Peace and Friendship in April 1960. Similarly, on October 5, 1961 the borderline between two countries was delimited and the border map was prepared. Fords, peaks, cliffs and rivers are used for the border delimitation. According to

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4 Constitution of Nepal 2019 and 2047, and Interim Constitution of Nepal 2063

5 Available at: www.homelandsecurity.orgwww.cbp.gov/xp/cgov/border_security

this, the borderline between these two countries was delimitated twice by border pillars, mountain peaks and mountain ranges in 1966 and 1979.

Residents within 30 km of border area of China are permitted for movement, and there has been agreement between two countries not to establish frontier military within 20 km of the area of both countries, and to set only police administrative personnel there.[6] But, there are also some problems that the Nepalese citizens are facing, especially in cattle farming in Nepali territory close to the border. Due to this problem, the people of Gorkha and Mugu are compelled to acquire both Nepali citizenship and identity document of China.

The border problem between two countries should have a permanent resolution in a scientific way, and should be monitored regularly. For this, some common rules of border demarcation should be followed. They are:

1) River line Boundary
2) Fixed Boundary
3) Fluid Boundary
4) Watershed Boundary
5) Thalweg Boundary
6) Actual Habitation Boundary

Therefore, the measurements should be formed on the basis of these facts, those measurements should be incorporated in the Constitution, and laws should be drafted as per the provisions determined by the Constitution. Then only can there be proper border management and regulation.

Current Status of Border Security

In the context of Nepal, border security means the potential security challenges that may arise out of frontiers with China and India. The issue of border security with China is less popular and less controversial than with India. It is because the territory connected with China is highly mountainous territory. Human inhabitation and easy entrance are very hard there. And, the human inhabitation is also not in the border touched territory of China. Some controversial decisions of the past; such as the anti-Indian feelings spread by the then King Mahendra for the existence of Panchayat Regime, and on the other hand being much dependent upon India for the stability of authority, have made Nepal-India diplomatic and border relation much more delicate. The following paragraphs will basically deal with some primary tasks that the Government of Nepal has to do for border security management between Nepal and India, and various approaches of regulating them.

It is customary to talk about the neighbouring countries while dealing with the issue of border security. Border security and border management are intertwined to each other. Before we make border security provision strong and effective, it is necessary to schedule its management system. In fact, border security cannot be effective unless there is proper

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6 Regmi, M. (2005). *Nepal China Relation*. China Study Center: Kathmandu.

border management between two countries. Therefore, Nepal must be concerned with border management while forming border security system with China and India. The authority of implementing the strategies of the State, law rests absolutely upon the Government only; whereas, border management is not possible by the law alone. Border management is bilateral, and reflects the shadow of foreign relations. Keeping in mind border management with both China and India, an effective strategy of border security for internal safety can be implemented.

Border security committee cannot be the scope of only boundary security mechanism. The light of political relationship existing between two countries defines the issue of border security as strong or weak. The fact cannot be avoided that the relation between two countries may get interrupted if border security is tried to be maintained unilaterally. Hence, there is a great meaning and significance of foreign relation regarding the issue of border security. While discussing about the Nepal-China border security issue, there comes the problem of Tibetans illegitimate movement and their protest against China. In fact, the democratic government cannot stop the fundamental right of Tibetan citizens residing at Tibetan Refugee Camp to protest. According to the international norms, political, cultural and social rights of the refugee must be guaranteed. But, no refugee can do any such activities that harm security provision and foreign relation of the State.

Border Security with India

The District Administration Office, District Police Office and district level Intelligence Department jointly fulfil the responsibility of Nepal's border security with India. The Nepal Army is not performing daily duty of border security, unlike the Armed Police and Civil Police. But, Nepal Army was used for Custom Security in 2004 (2061 B.S.).

These security forces are controlling the illegitimate trade that occurs at or around the border. The concerned District Administration Office, District Police Office and District level Intelligence Department are jointly providing security at the borders with both China and India. In this task, the armed police organisation of the same district is also helping as per the necessity. The District Administration Office coordinates in the security matters; whereas, for the control upon illegitimate trade, it is coordinated by the offices like the Revenue Office, Custom Office, and the Excise Duty Office under Ministry of Finance. The Ministry of Finance has in important role to control illegitimate trade at the border, because these offices are run under this Ministry. But, it is the Nepal Police which is primarily behaving with border security, conflict and disputes that may arise at the border, and with border security threats.

The affair of border security between Nepal and India does depend upon the deep relationship existing between these two countries. The matters like the rivers flowing from Nepal, the dams made on them by India (with pros and cons resulting from the dams), and the Nepalese response to them are also the important issues of Nepal-India relations and border security.

It is axiomatic that there are common psychological and sensational basis on religious, cultural and social foundation between the Nepalese and Indians. The livelihood of the people around the border depends much upon the border trade. And, it cannot be avoided that India has done significant contributions in development, education, and structural advancement of Nepal. Besides all these facts, Nepal-India border is severely affected by illegitimate and criminal endeavours. To get rid of this and to manage the Nepal-India border safely, the first necessity has been to establish pleasant relationship between Nepal and India. Such relationship should be based on the common virtues of peace and democracy of both countries. (Subedi, 2005)

Border Security between Nepal and China

The fluctuating political situation of Tibet and other countries relation with it are some contributing factors regarding the issue of border security between Nepal and China. On the one hand, the western world is affiliated with economic and social advancement of China, on the other hand, some westerners are also against the Tibet policy of China. In fact, the Western world is concerned much with Tibetan affairs.[7] Nepal is maintaining its foreign and border relation with China, situating between a rock and a hard place of the western world's growing significance in Tibetan affairs and China's increasing comment against the growing interest of Westerners. The number of expatriated Tibetans entering into Nepal is increasing day by day. Among the Tibetans who enter in such a way, most of them do desire of USA or European nations. And, the western world's interest on Tibetans' affairs is, therefore, growing high.[8] Hence, protesting Tibetans for independent Tibet from Nepal and China's serious worries upon it are some challenging issues regarding the relationship and border security management between two countries. China has already shown its dissent during the recent pilgrimage by Nepalese law makers.[9]

The main issue of Nepal-China border security is attached with the Tibetans who unofficially enter into Nepal. Sometimes, it is also published that illegal arms are passed into Nepal from the route of China. There are such issues which can be controlled by an active border security force. Even though the mountains of northern Nepal have helped secure the border between Nepal and India, the lower fords on the edge of the mountains have been used for cross-border movements and, it is also known that the illegitimate trade is conducted via these routes. Similarly, the subject of yak grazing has also been an issue of border disputes between Nepal and China.

Thus, the issue of border security should be defined as a major concern of State's political organ. The foreign relation of the border-touched countries must be pleasant for proper border management. For border management, it would also good to form a working committee involving the security mechanism of both countries. It helps to share the

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7 Nepal Weekly, Kantipur Publication, Year 9, Vol. 40, May 24, 2009

8 Santosh Acharya, Nepal Weekly, Kantipur Publication, Year 10, Vol. 2, Aug. 9, 2009

9 Nepal Weekly, Kantipur Publication, Year 9, Vo. 48, July 19, 2009

information in order to control illegitimate trade, illegitimate movement and criminal activities that occur in the border.

The issue of border management is related to political administration, security mechanisms and supervision of investigations. Similarly, the subjects like border trade, people's movement, export and import of the goods, and custom are the major concerns of border security management. The border security system of Nepal is traditional, roughly estimated and political appeal oriented. Nepal's border security system clearly seems to be weak if we comparatively study the 1200 km. borderline with China and 1600 km borderline with India with reference to current border security system and security mechanism of Nepal.

Special Privileges of People Residing at the Border

The Nepalese have gained the education of politics and socialisation mainly from India. Not only Nepalese students go for their studies to India, history also shows that Nepalese political leaders have been influenced from Indian political approaches and procedures (Jha, 1995). People residing at the border in-between two countries can suffer the consequences. Germany, Switzerland and France have developed a special advancement project in certain areas, and have followed new principle and practice on the use of the Rhine river's waters. Thousands of people have benefited from this project.[10] It has improved their relationship, and has added an impetus in both border management and border security. Nepalese residing at the border with China has got an access to the Chinese market, and are using the goods and services available there. But, it is also true that Nepalese are not gaining adequate benefits from the Chinese market due to linguistic, geographical and transportation difficulties. Chinese people residing at the border with Nepal are also gaining a lot of benefits from Nepalese markets. Chinese products are also passed into Nepal via the border markets. It is also visible that a larger quantity of trade is conducted through unofficial channel.

The access to border with India is easier than with China, and there are markets set in all three territories: east, west and south of the border of both countries. The Indian border is situated in the southern part of Nepal, where there is high density of population. And, there is a good transportation system available from Nepal's territory to the markets of India. This has made it easy for trade and free movement. It has become common to some of the Nepalese to use Indian cell phones, and some of the Indians to use Nepali cell phones; some of the Nepalese buy goods from Indian border markets, and some of the Indians use the Nepali border market to buy Chinese and Nepali products (Jha, 1995). The unofficial trade business between the people of two countries has been even effective due to custom facility in day to day domestic goods.

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[10] Sharwan Sharma, *Federal Government System of Germany and Switzerland,* a Study Visit Report of the National Peace Campaign (NPC), 2008, Kathmandu.

These were some achievements gained by the people residing at the border between the two countries. But, the people residing at the border are also suffer from security threats, crime and robbery. Residence on the border seems more of a danger than safety by the fact that there is very small sophisticated population residing in the villages near the border.[11] If we leave aside market traders, only the poor reside at the border. The border problem involves bribery of goods and services, illegitimate trade of arms and ammunition, cross-border criminal networks, the abuse of innocent persons residing at the border in such illegitimate trade, and the corruption by border administration and police.

Trade, Transit and Border Security

The border is the entry point of trade and transit. It is from the border that goods of one country move into another country by various means of transportation. Border trade is not only a facility to the people residing at the borders; it is also a big threat from the perspective of the security. Not only big professional forms and companies, even smaller trade company and individuals do engage in business. People even transit the border to buy goods for domestic purposes as well. Similarly, thousands of vehicles transit the border of a country and move to another country. There are several aspects of border insecurity intermingled with these activities. Border security has been more challenging due to the advancement in the technology. Electrical equipment, radiated products, biological substances, medicines, wild animals and their bones and skins, jeopardised plants, and woods and herbs made by such endangered plants etc. are transited across the border. Border security and control of the transit have not been effective due more to frail physical and technological equipment of the border security mechanism than of the criminal gangs who themselves conduct illegitimate trade. It is necessary to adopt the policy of mobilising a special security force to maintain border security.

Terrorism and Border Security

Terrorism has been a big threat to the world. The technologically advanced western countries and the countries like India and China having high density of population and larger security force are also suffering from the panic of terrorism. Terrorism is growing in borderless manner. The incident of September 11, 2001 has proved that terrorism is borderless, and is very strong from all perspectives of technology, information and resources. India is suffering much from the terrorist attack through its terrestrial border. Afghanistan is injured with internal terrorism and Iraq with suicide attacks. In the context of Nepal, it has been an open threat to maintain border security from the possible terrorism that may arise at border due to our feeble security system, weak technology and information mechanism, lack of infrastructures, limited budget, and insufficient manpower.

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[11] J. Pandey and Janak Nepal, Nepal Weekly, Year 9, Vo. 46, July 5, 2009.

False rumours, false information, social illness, political revenge and organized crimes are some other indicators of terrorism. When border security system cannot be active and effective to control upon such activities, the border may turn into a profound hazard. Sometimes, mass media also creates border tension through sensationalist reporting. Therefore, there must be physical infrastructures, skilled human resources, adequate budgets, and good training for the personnel in order to make the border security system effective. The issue of border security turns into an impossible task when intelligence service cannot be effectively dedicated.

Investigation Laws and Border Security

Investigation law is another important part of border security. Provision of border security and border security regulation should be conducted as determined by the investigation law. So, it is necessary to modify or amend the law as per the suggestions of border security experts. And, the investigation law should be conscripted for the advancement of border security force. As the investigation law includes the provision for the movement of the citizen of a country into another country, there should be a clear idea of maintaining the data of entry process, basis of entry, period of entry, residence of the person in the nation who enters, expenditure, source of expenditure, potential location where he/she could be found in the nation, address, phone number etc.

It is also good to intertwine border security system, investigation law and intelligence department to achieve the common goal. For this, legal provision is essential. Chinese passport is obligatory for the person to transit into Nepal from China, but regrettably there is no intelligence office in all the frontiers to pass into Nepal. Similarly, there is no investigation provision at the borders with India. In the world, the investigation authority controls the entrance of immigrants in accordance with investigation law of the State.[12] But, it is beneficial for both countries to keep the record at least of the persons who enter from a country to another.

Budget Allocation

The State allocates a total budget for the security sectors: Army, Police and Intelligence services via respective ministries. As there is no distinct border security force in Nepal, the border security system is operating under regular budget of District Administration Office, district level offices of Intelligence Department, and Armed Police Office.

Need for Border Security Force

Though the necessity of a border security force is needed in order to maintain border security, the government has as yet no formal mechanism for management of border

[12] Available at: www.ind.homeoffice.gov.uk

security force. But, the political parties have not even reached an agreement on establishing any form of force for border security management. Voices are also heard that a border security mechanism can be an appropriate provision for the management and tasking of the Maoist's army. But, a professional security mechanism shall be more credible than political cadres when we minutely examine the threats of border security system in Nepal in the next section.

Internal Political Stability and Border Security

Border security cannot be effective unless there is political stability. The instance of Nepal is enough to understand the fact that security administration of the State cannot be active if the political parties do not unite at least for country, state, constitutional provisions, economics and social prosperity. The issues related to security sensitivities should not be linked with political success or failure. The State cannot achieve stability unless the political parties perform comprehensive consent on democratic principles. The fundamental value for political stability rests upon the determination of all parties in the rules of political games. Security threats increase if we try to make the State more ideological. The State should be accessible to all the political parties, citizens and community groups.

Potential Conflict Management at Border

There are cultural and linguistic similarities among the people residing at the borders between Nepal and India. For instance, the people living in eastern hill of Nepal and Darjeeling of India do share various cultural and linguistic similarities, as it is the same with the people living in southern part of Nepal, Bihar of India and the Eastern Province State (Jha, 1995). The cultural and linguistic similarities have enhanced social relations in a 'borderless' manner in all these territories. In democracy, social relation cannot be limited just within geographical boundary. The people living in both sides of the border do have deep relation for ages, due to their similar caste, language, ethnicity and culture. Such pleasant relation is contributing in establishing harmonious society there. But, when there results conflict at the border due to any political, cultural or economic reason, it does not get limited only within the borders. And, the people of another side of the border may be affected by the conflict due to the same cultural, ethnic and linguistic sensitivity. In such situation, the problem negatively affects the relation of two countries, and it remains out of the control of local administration or border security force. Hence, conflicts rise at the border between two countries. And, when the geography determines the conflicts, it is equally dangerous to move into another country by crossing the border.

Natural Disasters and Border Security

A natural disaster in any country may affect other adjacent countries. For example, the flood in Saptakoshi affected India a lot, and took the life of hundreds of Indians. It is customary to establish an emergency management and movement of the people to provide relief for the people affected by natural calamities. In such situation, on the one hand there lies human sensitivity and on the other hand the State has to be careful with legal restrictions. In this way, border security becomes more challenging. In fact, natural disasters includes the issues like arson, flood, landslide, communicable diseases and earthquake etc. While forming border security strategies, the State should form a perfect mechanism, and policy regarding border security system during such calamities and disasters. It is also true that during natural calamities, the border security between Nepal and India will inevitably be more sensitive than that with China.

Border Security and Human Rights

Human rights are universal norms. A State shall have the responsibility of protecting human rights at every location where there is presence of the Government. Therefore, no provision of security is detached with human rights aspects. Border security must be guided by the fundamental norms of human rights. The issues like the legal movement around the border, relationship of the citizens of the border, implementation of international treaties on border, movement of similar cultural communities residing in both countries, respect and dignity of the persons who cross the border, their sex, ethnicity, religion, respect of language, profession, respect on faiths and believes etc. are also human rights.

Conclusion

Nepal's border security is an issue to be affected in terms of the foreign relationship with India and China. Though the border dispute with China is not realized on the surface, it is visibly realized between Nepal and India. And, the name of India has been constantly mingled in the internal political ups and downs of Nepal. As such, the national political parties are also accustomed with Indian supports and consent for the political transformation in Nepal. Many of the groups performing illegal endeavours in Nepal had been taking the shelter in Indian land since 1950 to 2006. The border security of Nepal has close affinities with its foreign relation existing with India. The border security policy must be implemented for the overall security of the State. The world is running ahead with technological advancements. The technologies are not only used for human welfare, they are also used by the terrorist groups for human destruction. To control such activities, border security should be active from all physical, moral, and professional points of view. The tendency of using the security mechanism for the benefit of political parties, for the benefit of the leaders of the parties and for the benefit of the concerned ministers has been

the most harmful practice in Nepal. Therefore, it is the primary duty upon the State to keep the State security mechanism above the limited boundaries of parties, and to give first priority to the welfare of the State.

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The National Intelligence Department (NID)

Kiran Nepal

Intelligence-gathering is a method adopted to identify possible threats and harm to the State. Information collected through intelligence-gathering determines the necessary steps any country should take to proceed with rules and preserve its integrity. Intelligence-gathering is antithetical to corruption, crime and terrorism. In some cases, the process of intelligence-gathering has to trample upon laws in order to ensure effective results. This might be the exact reason that some experts choose to define intelligence-gathering as a legal act carried out illegally.

In the Nepali context, the significance of espionage to counter drugs abuse, cross border crime and terrorism has been realised. As such, the intelligence-gathering module of the country is mainly focused on national security, terrorism, narcotics, economic embezzlement and thriving organised crime. National Investigation Department (NID) is the only institutional organ established for the purpose of intelligence-gathering. Besides, Crime Investigation Department of Nepal Police, Department of Military Intelligence (DMI) of Nepal Army and National Vigilance Centre are also carrying out the process of intelligence-gathering as per their respective working area.

During the Panchayat era (1960-90), a intelligence-gathering mechanism named RIB (Royal Intelligence Bureau) was also mobilised. It primarily acted as counter intelligence in order to provide more authentication to secret information when other intelligence-gathering agents working under the command of government were not so strong. Later, the Panchayat Policy and Research Centre, which was constituted under the leadership of the then crown prince at the initiation of the Palace to assess pro-Panchayat and anti-Panchayat political views, started to function like RIB. In India, RAW (Research and Analysis Wing) and IB (Intelligence Bureau) are placed under the command of PMO (Prime Minister Office) and Home Ministry respectively while CBI (Central Bureau of Investigation) acts as an independent intelligence-gathering agency. However, in Nepal, it is still undecided whether to place its intelligence-gathering mechanism under PMO or administrative umbrella. In the same vein, there is an utter absence of a National Security Advisor who acts as a bridge between Prime Minister and various security organs along with the intelligence-gathering mechanisms. Apart from the National Investigation Commission, which was developed institutionally to obtain secret information vital for the government, intelligence-gathering agents under Nepal Police and Nepal Army are, in general, being leveraged.

The Crime Investigation Department, Anti-Terrorism Cell and Special Taskforce are the intelligence-gathering agents operating under Nepal Police. The

intelligence-gathering mechanism belonging to the Crime Investigation Department is mainly zeroed in on security and criminal offences, while the Anti-Terrorism Cell is essentially focused on secretly monitoring terrorist activities. Likewise, the Special Taskforce, which is constituted relatively lately with a smaller size of human resource, is mobilised to tackle a slew of professional crimes like cyber crime along with betting in sports and other new forms of crime.

The Special Taskforce operates from "covered" office in civilian dress. The Intelligence Agency of Nepal Police is more concentrated towards investigating crimes. Whereas the same 'sneaking wing' of the Nepal Army (NA), which until sometime ago was more leaning towards loyally providing the veiled issues of political and strategic realms for the then Royal Palace for its well-being, is now confined to scrutinising the political perception towards it in the light of the burning issues of army integration. The concerned area of intelligence-gathering of a national army is, obviously, related to national security.

The National Army obtains secret information to make its government alert to thwart any probable assault against national security. Processes like sabotage, submission, espionage etc. all fall under the counter intelligence system of the army. The intelligence-gathering mechanism of any army institution even does not lag behind, even placing its agents in the troops of their foes to fulfil the National Army's purposes. If any army fails in discovering maliciously secret information for its nation, the arrangements like the Security Council as well as other military activities will be bereft of purpose. However, the intelligence of the NA, which previously was absolutely devoted towards the King, is also more focused around the Maoists and other political outfits. This mechanism should have been focused on combat intelligence, but the reality is quite different. The NA's intelligence-gathering unit has not moved beyond the narrow periphery of petty political issues. The course of the decade-long Maoist insurgency corroborates the fact that the NA severely lacks counter-intelligence capacities to nullify any attacks against it.

The NA is supposed to apply the DMI (Directorate of Military Intelligence) while in battle spaces. However, any army person with no extra skill and qualification can also work for DMI, which has been much hyped among the general public. Even senior officers of the NA admit that the DMI is their most neglected unit even within the Nepal Army itself. "Interestingly only those army officials who are on the verge of getting retired are deemed to be better to discharge at DMI", says Dilip Raymajhi, a retired Brigadier General who served as a chief of DMI. In a linear fashion, the National Vigilance Centre, which was established under the PMO to help check corruption, irregularity and inefficiency in government offices, has not been mobilised to the desired level. Even though the significance of establishing a separate intelligence-gathering unit to control financial indiscipline and other malpractices in agriculture (quarantine) and health sector has been realised in later days, no initiation has been taken so far in this regard. The only institution established solely

for the purpose of intelligence-gathering is National Investigation Department (NID), which is now not as robust as it was before. According to its former chiefs, during previous days, the reach of NID was extended up to the South Bloc, Foreign Ministry, India. They also argued that NID deployed its network in India not because of any animosity but with an aim to gauge the perception of Indian establishment towards Nepal.

The department has now depressingly turned into a "recruitment centre" by various coalition governments formed after the parliamentary elections held in 1994. As such, it now seems more inclined towards political intelligence-gathering rather than working as per its guidelines. There is a glaring lack of coordination and coherence among different intelligence-gathering agents conceptualised for the sake of security and integrity of the nation. "An effective collaboration between the three major intelligence-gathering organs-NID, Nepal Police and Nepal Army- has always been a distant dream", says Deviram Sharma, former chief of NID. It is pathetic to see a single person being mobilised for intelligence-gathering on widely varied issues (multiple intelligence). Likewise, there is a trend of various agents carrying out their operation to dig out the same subject. Experts believe that though the government may have received vertical information via various intelligence-gathering agents, the flow of horizontal secrets among themselves is utterly missing.

The process of negative intelligence to negate information collected by various factions against each other is also absent. The gargantuan plight the country had to undergo during the Maoist insurgency aptly attests to the ineffectiveness and hollowness of intelligence-gathering mechanism. Though NID, Nepal Police and Nepal Army had their separate intelligence sources during the insurgency, they were not found to be coordinating with each other for effective results. Experts are of the view that Nepal Police used to disseminate the secret information it received to chiefs of government whereas it was, not surprisingly, the Palace to whom the Nepal Army used to supply the findings of its intelligence-gathering.

Nepal's counter intelligence is also too feeble. This kind of intelligence activity can be both offensive and defensive. Through the application of Offensive Espionage, the situation when any ambassador can be sacked for the charge of intelligence-gathering is difficult, there has been no single attempt towards defensive one also. During the Panchayati regime (1960-90), the National Public Relation was established for the purpose of counter intelligence but it was later dismissed in interim period. The security apparatus can be mobilised strategically and cleverly only after being duly pre-informed. This will also help in sorting out the problem diplomatically. Intelligence should be robust if adequately solid information needs to be derived.

Institutional Development

The dawn of democracy in 1950 saw the constitution of government with Bishweshwor Prasad Koirala as its home minister in 1951. Central Intelligence Bureau, established in 1951, was the result of institutional development of intelligence-gathering, which was carried on for the well-being of the oligarchic Rana rulers. The strange fact is that the bureau was officially inactive till 1955. Neither any office for the bureau was established nor the required staff were appointed. With the reconstitution of Nepal Police in 1955, the responsibility of steering intelligence was handed over to it. In 1956, the government led by Prime Minister Tanka Prasad Acharya decided to constitute a separate Intelligence Department. However, the decision could not see the light of the day. The first democratic government formed after the general election of 1958 also failed to take a concrete step regarding the intelligence mechanism. It was only after King Mahendra staged a coup in 1960 that the intelligence mechanism got a distinct form. He forwarded the concept of Nepal Intelligence Department with a clear intention to ensure longevity to the absolute monarchy and Panchayati system.

The department took a concrete shape in 1963 after Dhundi Raj Sharma was appointed as first Inspector General of Police (IGP) of Nepal. The required human resource for the department was arranged from Nepal Army and Nepal Police. Till 1985, it was called Intelligence Department and after that the department was named Nepal Public Relations Head office. In September, 1989, the department was segregated into "A" and "B" section and two chiefs were appointed to look after each section. The team led by Bishnuraj Pant handled "A" section pertaining to political intelligence-gathering while the leadership of Prabhat Shumsher Rana looked after the "B" sector that is related to counter intelligence.

Later in April, the two sections were again merged after making certain amendment in the related act. It was named National Investigation Department after amending the concerned act in 1991. Nepal Public Relations Headquarters, which was formed after the amendment of Act of 1991, had five regional offices, 14 zone and 75 district offices under its control from 1989. From then onwards the headquarters was exposed and also heavily politicized. With this development, intelligence-gathering agents started to execute their responsibility in an open manner. They also took part in visits to the monarch and the chiefs of regional, zonal and district level offices acted as member secretary of security committees formed accordingly at those three levels. The respect and fame the intelligence-gathering officials enjoyed after being unveiled made them more exposed. The restoration of democracy in 1990 and subsequent politicisation of the intelligence-gathering mechanism promoted the negative trend of disclosing their identities among intelligence-gathering officials.

Working Areas

The intelligence authority, which was more leaned towards political intelligence-gathering since its inception, has the responsibility of acquiring and sending buried information regarding religious, racial and communal conflict, narcotics and corruption etc. to the concerned state organs. For this purpose, Public Relations officials under the command were also deployed in many districts in 1965. The Public Relations office of Home Ministry was the central coordinator in this regard. The said officials were entrusted with the responsibility of mobilising agents and covers in districts. The openly exposed staffs performed the tasks related to command, control, information analysis and operation. But those appointed under cover continue to be unknown. Only a few concerned persons are aware of the identity of these undercover spies. They are paid government employees who are allowed to work elsewhere as per the demand of situation. These staffers can also draw salary from two places at the same time. There is also a provision of such agents who are neither regular nor appointed. These agents receive remuneration from the concerned district, zonal and regional officers in line with the information they collect.

Laws, Rules and Regulations

Even though from beginning to 1986 a separate regulation was made for Nepal's intelligence mechanism, the major law regarding the same was the Nepal Police Act of 1955. A bomb blast in 1986 was instrumental in giving rationality to the long-felt need of operating the intelligence-gathering mechanism in an independent and professional fashion. Consequently, in August 1986, the Nepal Special Service Act was promulgated for the intelligence system of the country. However, the regulation, drafted after the introduction of this act, is still unpublished. When the court asks for it, the same is forwarded via the office of Attorney General. The act has been amended eleven times since 2006. The act and the regulation are divided into operational and administrative categories. Topics like Source, Formula and Cover are incorporated into operational categories while another determines the activities like promotion, demotion and recruitment etc.

The Home Minister oversees the administrative execution in accordance to the recommendation of a Board formed under the leadership of Home Secretary. The Board comprises of Chief of National Investigation Department apart from Joint Secretary of Security Department of Home Ministry as Member and Assistant Inspector General (AIG) (normally the most senior) selected by the department as Member Secretary. As per the latest arrangement, 50 percent of the total human resource requirement is fulfilled by open competition, 30 percent by internal promotion and the remaining 20 percent through external entry. Regulation is in place to conduct open competition and internal promotion. However, the provision of

external entry has been found to be extremely misused by political parties to serve their vested interest. If one were to believe experts, the intelligence-gathering network was also appallingly capitalised upon by Panchayati rulers to a greater degree. However even after the restoration of parliamentary politics, the then Home Minister Khum Bahadur Khadka was at the forefront in misusing the intelligence-gathering service after 1995 to the hilt.

It was Khadka who ventured into altering the long prevailed recruitment mode of intelligence mechanism. He introduced the provision of fulfilling 50 percent of the total staffers via internal promotion and the remaining 50 percent by external entry. Likewise, the age limit of those getting recruited was also extended to 35 years. That those at the helm of affairs even did not hesitate to unnecessarily increase the job positions in the intelligence mechanism with nepotistic intentions, actions which proved the magnitude of misuse of the appointments mechanism. In 1992, the age limit was extended up to 58 years and the tenure was lengthened. This resulted in the introduction of new retirement provision that enabled any retiree to get the pension, the amount of which is one level higher than his/her position. The spies, who, by nature, have to work hideously, are always vulnerable to being exposed. In a country which has been reeling under political instability since last one and half decade, the spies are appointed and deployed by boards with more than one member. This has only augmented the possibility of open expose of those involved in intelligence-gathering field.

The absence of provision that penalises those violating confidentiality has only made the situation more volatile. During the 1960-90 Panchayati era, the persons found to be involved in disregarding the secrecy were subject to capital punishment, life sentences and paying back compensation. However, the latest act has the provision of imprisonment up to 10 years maximum. Experts attribute the ineffectiveness and inefficiency of intelligence-gathering to the weak act and weak regulation. The extreme politicisation of the intelligence-gathering mechanism has also discouraged and disheartened capable spies.

Human Resources

The effectiveness of the intelligence-gathering mechanism of any country rests on the capacity of end operators. Spotting, tracking and training make an end operator successful in his mission. Sadly, there is a severe dearth of capable human resources in the Nepal's intelligence agencies. As there is no system of imparting necessary training to spies, there is not enough space to raise question over their loyalty and integrity. In 1965, some persons were directly recruited in intelligence system.

Nevertheless, the tradition of deriving required manpower for the intelligence-gathering from the police force has now been in continuous operation for a long time. In 1975, some 11 inspectors of Nepal Police were transferred to intelligence mechanism. Before that, apart from police personnel and migrant Nepali citizens, spies were also appointed from the People's Liberation Army of Nepali Congress (NC). The probability of capable and skilled persons joining the intelligence mechanism is very slim if no efforts are made to make the mechanism lucrative from the standpoint of job. The belief and confidence that the job of intelligence-gathering also holds a better career prospect are at its lowest. "It is nothing but the excessive politicisation that only 10 percent of the total personnel of intelligence-gathering mechanism are ethical and devoted", says Sharma, former chief of NID. As regulation is still not published, the intelligence-gathering mechanism has just become a place that reflects the worst form of nepotism and corruption.

The Budget

Intelligence authorities have to invest a great deal of energy and money to obtain vital secret information. For security, information is more important than army, police and weapons. And, the process of digging out vital information calls for a big investment. The volume of budget allocated for National Investigation Department had been less that the salary drawn by Chief District Officer (CDO) for a long time. The appallingly pathetic state of NID can well be gauged from the fact that its bosses used to visit the government chiefs with reports prepared by using obsolete typewriters during the mid-term of Maoist insurgency. At that time, many state mechanisms were already computerised. The then chief of NID Mr. Sharma recalls his situation back in April 2000 that he presented his paper prepared by using typewriter during a function attended by the then Prime Minister Girija Prasad Koirala, Deputy Prime Minister Ram Chandra Poudel, Finance Minister, Chief Secretary, Finance Secretary, Home Secretary and the chiefs of other three different security organs.

Except for the budget fixed in Red Book (budget allocation book) by Finance Ministry, there is virtually no other income source for NID. The committee formed under the same ministry decides the spending module of the budget earmarked for NID. During the tenure of PM Sher Bahadur Deuba, the budget allocated for the department was augmented to Rs 3 million while the budget earmarked for Nepal Police in that period stood at Rs 210 million. The central, regional and district offices of the department were operated from a mere Rs 3 million. "The increment of budget to this level resulted in the acceleration in information collection," says Mr. Sharma. Many expenses made for intelligence cannot be fully transparent. To prevent transparency in expenses, the government adopts the method of unaudited budget. But, Nepal lacks this sort of practice.

There is also a serious question whether the provision of unaudited budget will only further propel corrupt practices. The fact is that even the system of audited budgeting is encouraging many economic malpractices in the country. The collection of secret information falls under the working area of the Home Ministry and the excessive irregularities in the unaudited budget are palpable. The incidents of home ministers of various governments unwarrantedly distributing a large chunk of the budget to their near ones in the name of information collection have come into light many times. No extra budget has ever been allocated for the purpose of imparting training to personnel of intelligence mechanism. Only after 2001, officials involved in intelligence-gathering started to go to countries like the USA, the UK, India, Sri Lanka and South Korea for training on a regular basis. Before 2001, Nepali intelligence-gathering officials used to visit India sometimes to get training, which was zeroed in on "Islamic Fundamentalism".

In 2001, when Sher Bahadur Deuba assumed the post of Prime Minister, Rs. 700 thousand was allocated for the purpose of training. The budget earmarked for NID was increased to Rs 6 million in 2001/02 whereas in 2002/03 the same jumped to Rs 9 million. During 2005/06, the volume of the budget continued to stand at Rs 9 million. The department was allowed to spend 15 percent of the total budget outside the committee as chief. In the time of election, Rs 20 million was allocated for Nepal Police, Rs 100 million for Nepal Army and Rs 10 million for NID. However, the department spent just Rs 1.3 million by depositing the remaining 8.7 million as revenue.

Technological Development

The failure on the part of the state to contain a decade-long Maoist insurgency, Madhes agitation and increasing activities of Tibetan refugees in Nepali soil highlights the need of revolutionising the traditional intelligence mechanism of the country. The hi-tech systems like satellite intelligence, technical surveillance and open intelligence are not developed in Nepal. Till today, the intelligence system of the country is confined to human intelligence. After the formation of the government led by the Maoists, the system of automatic phone tapping was arranged as per the advice of the intelligence mechanism. Even though during the premiership of Deuba, US $41000 was invested with an aim to keep weapons monitored with GPS systems, it was not implemented. Intelligence filing is based on an old document-filing process, not a computerised one. Old files have to be opened to get information. It is hard to get data. The confidentiality of information in places like Finance, Home and Foreign Affairs Ministries is also very weak. "The system that deals with the questions like how long any secrecy should be maintained and what level of clearance should be given to any person through what information is still not in place", says Brigadier General (retd.) Dillip Raymajhi.

The country lacks a compartmentalisation system, which allows as much access to information as is needed. A folding system is also completely absent. There is also no "negative intelligence", a process of one intelligence agent carrying out intelligence-gathering on another intelligence agent. Given this fact, it is really hard to know whether the spies are working properly or not. The categorisation of information collected by spies as per the secrecy classification system is also something not practiced. Top secrets, secret, confidential and department news etc. are some of the forms of intelligence-gathering-collected information. This helps in determining whether somebody has leaked information or not. In other countries, there is a system that determines the level of clearance to be given to anyone. Not everybody can enjoy equal access to all information. The clearance of those spies with polygraphic tests is determined with its appointment and position. This system is yet to be developed in Nepal. Field Intelligence is supposed to come into operation instantly. Tactical Intelligence is carried out after proper planning.

Strategic intelligence, as the name suggests, is purely strategy related. We should perceive our intelligence mechanism in the light of national, regional and international contexts. There is a poor coordination with Indian intelligence. The intelligence-gathering official of the SP (superintendent of police) level stationed in Nepali embassy in New Delhi by acting as a consular official is Nepal's only intelligence representative in a foreign country.

In relation to other countries, Nepal's intelligence mechanism is, overall, too feeble. Intelligence is also about sharing information. But there must be clearance to decide as to what information can be shared with officials of what position. In Nepal, the level of awareness about intelligence is very low. In today's world, even human intelligence is not enough to get desirable outcome. Giving due priority to technical intelligence is also equally important. The state must keep the personal information of every citizen in order to consolidate its intelligence mechanisms. Information derived from citizenship certificates is not sufficient and useful for intelligence agencies. The importance of intelligence surveillance amongst citizens of the country as well as in foreign countries is simply mandatory. The surveillance should be carried out to get broad insight into various aspects like politics, economy, security, crime and religion. But the same is glaringly lacking in Nepal. Those involved in intelligence-gathering are also engaged in obtaining secret information about each other.

The act of intelligence-gathering also takes place between intelligence agencies. However, the same is visibly lacking in Nepal. Government is also lacking in the policy that makes it adopt the information collected by intelligence. Some 36 places where cantonments were built for Maoist fighters were known to be used by them as frontlines during their war days. Spies suggested to the government that cantonments were not constructed in these places. But the government overlooked this recommendation. One of the former chiefs of military intelligence says that the

cantonments sit on those fronts used by the Maoists while controlling highways. Still, the cantonments, which are bigger than army barracks, are strategic. In this context, he asks, "Under whose jurisdiction do these sensitively located cantonments fall?"

In fact, more than cantonments, the prime strength of the UCPN (Maoist) is now the Young Communist League (YCL). Police officials are unable to track the activities of YCL because they lack the required intelligence. The then government also did not take seriously the information collected by the intelligence regarding the probable challenges that might be created after the former rebels controlled state affairs. Rather, the political parties were more concerned with deploying intelligence agents to know whether they will win or not in Constituent Assembly election (held a year and a half ago). "The state is still trapped in the condition of defensive denial. The debate is well-known whether the Maoists return to the jungle or not. Moreover there is a mentality that India is instrumental in solving any problem" says one of the former chiefs of Nepal police. Any political party that comes into power expects the intelligence to work for it to get the secret information about its opponents. So much so that there was a time when intelligence-gathering about the parliamentary party of a ruling party became the task of the central intelligence. During the days of armed conflict the excessive rhetoric of political conspiracy at the central level inhibited the effective implementation of intelligence gathered. The political parties used to doubt that there was unholy alliance between the King and the Maoists; whereas the King speculated that the political factions and the Maoists were working together.

In fact, this tendency put a great deal of pressure on the intelligence mechanism and the major political actors were engrossed in justifying their doubts and speculations. According to experts, in many cases the countries intelligence units have faced problems due to similar reasons. Experts also ascribed the latest turbulence in Madhesh to the inactivity of Nepal's intelligence mechanism. There should have been proper tracking of every incident in Madhesh from the initial phase. But as that did not take place, the intelligence mechanism was in confusion regarding the upheavals in Madhesh.

Moreover, the communication module of the government is pathetically poor. It is the prime minister who has the first right to communicate the information. Home Ministry is the only bridge for that. During the Panchayati era, information was said to be with the monarch directly through the army secretariat but in multiparty system there was a big lacuna in sharing information. The system of carrying out communication between the prime minister and the home minister was developed. Not only the coalition government but the two camps of each party started to expect information. This has only created more confusion in the intelligence mechanism.

Political Interference

Even after the restoration of democracy in 1990 the democratic governments continued to rely on the same old intelligence of pre-1990 Panchayati style. The intelligence was mobilised for unwarranted political activities like horse-trading and dismantling government. It was extreme politicisation of intelligence department that no government formed after 1990 became able to keep track of the Maoist activities. That the Panchayati regime used the then intelligence mechanism in a relatively effective way to scrutinise the Nepali Congress activities proves that democratic parties treated the mechanism just as a self-serving institution after 1990.

The acceleration of wayward activities in Tarai/Madhesh can also be ascribed to this myopic tendency of political parties. During the Panchayati regime, the intelligence mechanism saw its institutional development. The regime adopted the English concept of security intelligence. The prime task of the Panchayati intelligence was focused on those against the monarchy and ensuring national security by doing intelligence-gathering for the sake of the despotic kingship and Panchayati system. The captains of the regime used to relate national security with the well-being of monarchy. So, it is not surprising that every detective performance of the Panchayati era had much to do with political purpose.

For this, the espionage mechanism was deployed under the leadership of zonal chiefs and chief district officers across the country. All information obtained from districts, zones and National Security Coordination Committee at the central level used to be assessed to send them to the palace. In order to collect all hidden information, the intelligence mechanism, based on human intelligence also known as single intelligence, was extended to Banaras and Delhi. Still, the module of country's intelligence-gathering mechanism is oriented on human intelligence. Similarly, even after the restoration of democracy there has been no positive change in the intelligence mechanism, which, during the Panchayati era, was engrossed in calculating secret information with the single objective of pleasing the palace.

If one were to believe experts, the then rulers of democratic Nepal went to the extent of displaying unwillingness even to listen to the finding that the Nepal police was not strong enough to tackle the growing influence of the Maoists. Political parties were inclined to hear what served their vested interest at the cost of sensitive issues related to national security. This resulted in the flow of information based on social speculation rather than tactical measures. Whatever the basic infrastructure created during the direct rule of monarch for intelligence-gathering mechanism went kaput after 1990. The leaders "obsessed with change" started to harbour thoughts about the intelligence-gathering mechanism, which worked solely for the monarchy, would not help the transformation of the country.

The mentality of those who ascended to power after 1990 was that the intelligence-gathering mechanism was virtually against them during the regime of

Panchayat. So they completely ignored the significance of the mechanism thinking there was no more threat against them. During his tenure, Home Minister Govind Raj Joshi not only ventured into looking at dissolving the central service department under the home ministry, but also announced that he would not shy away from dismantling the intelligence-gathering mechanism. During the tenure of Krishna Prasad Sitaula as home minister, the member secretary of the security committee of all levels that composed of NID officials was also sacked. At the same period, intelligence-gathering agents deployed in foreign countries to collect Maoist related information were also removed. This created obstacle in unearthing the covert activities of armed groups operating in Tarai.

Realisation of Necessity

According to experts, the political parties favoured the idea of doing intelligence-gathering with an intention to rule the country from their own political networks. The activities of central security committee, formed after 1990 under the leadership of home ministry, are far less satisfactory than that of National Security Coordination Committee of the Panchayati era. Undoubtedly, the democratic governments of different parties have turned the security committee into a recruitment centre. The Nepali Congress also has recruited 500 to 700 people associated to it in the intelligence-gathering mechanism.

It is said that necessity stems from crisis and then the search of solution starts. The need of intelligence was felt when the government led by Girija Prasad Koirala was in crisis. After it was indicated that the ineffectiveness of NID had much to do with its intense politicisation, the then PM Koirala in 2002 proposed to replace those political affiliated agents to Village Development Committees (VDC) secretaries. But the Public Service Commission denied this idea. Plan was also made to transfer 487 persons to Nepal Police but the latter rejected it. And, lastly, 92 persons were sent to Special Police and 60 were dispatched to police. Those persons having lower positions than that of inspectors were sent both voluntarily and involuntarily for retirement. Similarly, the persons below the age of 40 were appointed for police and those crossing this age limit were sent to Special Police. One former chief of NID says, "Those spies associated with Nepali Congress were committed towards democracy but they failed to collect information related to the Maoists." It is mandatory that intelligence-gathering should be focused on human security, national integrity and sovereignty. But, depressingly, Nepal is lacking in this. The major problem stifling the country's intelligence mechanism is the dearth of integration, processing, academic assessment and modernisation, say experts.

The main thrust of intelligence is processing and analysis, which must be pro-active to ensure the success of secretly collected information. The country's intelligence has become weak due to the lack of academic assessment of

information, which was collected during the conflict period. Even during the course of Maoist insurgency, information with military significance was collected. But such information was managed only in a tactical manner. Because of the lack of understanding of communist jargon, the country's intelligence mechanism was incapable of identifying the strategic significance of slogans such as that of "Great leap and revolution" used by the Maoists. The intelligence officers of Nepal remain bereft of necessary talent and dexterity to tackle the Maoist strategists in the light of Mao's Red Book and Lenin's October Revolution. Brigadier General (retd.) Dilip Rayamajhi says that the intelligence mechanism failed to deal with the Maoists as it was not able to process the information related to the insurgents. "Of course, attempts were made to use the Security Council for data analysis but it could not be implemented", Rayamajhi added. At a time when the Maoist insurgency was at its peak, there was some improvement in the modus operandi of the intelligence mechanism owing to the assistance lent by the UK. But it also failed to reap desirable results.

Ten Years of Violent Conflict

The intelligence mechanism was not in place to execute its duty at time when the communication networks were dismantled and the presence of the State in villages was in jeopardy. Moreover, as the intelligence mechanism was full with politically affiliated persons, it couldn't gather sufficient information during the conflict. It is also not a blurred fact that the Maoists were also active in engaging themselves in war of counter-intelligence in order to flow wrong information by hiding the real information. According to experts, not five per cent of those killed by the Maoists on the charge of intelligence-gathering were bona-fide state spies. As the Maoist started to kill individulas on the charge of intelligence-gathering, the real state spies begun to vanish. In their bid to make the intelligence system of the government defunct, the Maoist chased away the politically affiliated and socially recognised state spies. When the Maoist brutally murdered many spies, those working in cover lost courage to proceed with their duties in villages.

Even though the state spies were allowed to possess weapons for self-defence by the state during the conflict, they were not used as expected. As per the statistics of NID some hundred and fifty spies were killed by the Maoists. Among the total killed, only twenty-one were declared martyrs by the government. The names of others were not disclosed as they were undercover. Importantly, some spies who were working undercover with the group of Maoist fighters had been killed during the encounter with the security forces. In spite of the lack of adequate budget, modern technology and skilled human resources coupled with excessive political intervention, the Nepali intelligence mechanism is not as incapable as those people ruling the country at different times. The intelligence mechanism worked effectively to root out

Khampa revolt and to lengthen the ruling period of the party-less Panchayati system in the past.

It is not true that the intelligence mechanism did not receive any information at all during the armed conflict. Some concerned officials believe that as many attacks launched by the Maoists were predictable, the damages created by such assaults were not so severe in terms of intensity. The intelligence, which was, to a great extent, aware of military organisation of the Maoists, their intelligentsia and open front, could not develop its access to identify the location of Maoist leadership. After it was sensed that the Maoists were ready to launch assaults in Mustang, Manang and Myagdi districts, the security force and VDC were deployed there. And, subsequently, the former rebels aborted their bloody mission. It was nothing but the negligence that made the Maoist attacks in Dang, Gaam, Mangalsen and Sandhikharka successful. The related state organs failed in warding off these attacks which resulted in the enhancement of the Maoist's morale.

One higher official from intelligence claims that the then PM Sher Bahadur Deuba met with Krishnadhwaj Khadga and the then minister Mahesh Acharya met with a former Maoist leader Rabibdra Shrestha through a scribe affiliated to a national daily who was in the knowledge of national intelligence. According to experts, the voice of the Maoist chairman Puspa Kamal Dahal "Prachanda" was recorded in 2001 to identify him even though his image was still not found. The officer says, "The then governments proven failure lay in not cashing on such information which was available." The country's intelligence-gathering mechanism was fully cognisant of Ram Bahadur Thapa "Badal", who was considered to be the main strategist of the Maoist guerrilla warfare. However, the then government was unable to do anything in this regard. Recalling a past incident, former chief of NID Devi Ram Sharma says that when he showed the photo of Thapa to Mahesh Acharya, the later ironically suspected him. "I doubt whether you are also working for the Maoists," Acharya reportedly said to the official.

This amply proves that those at the helm of affairs do not possess necessary knowledge about the intelligence mechanism. The intelligence-gathering officials, who recovered the tape related to Prachanda taking action against Badal, also once followed Badal to India up to Chandrauta of Kapilvastu. But the police administration, which ridiculously needs order from "higher authority" to take action, retreated from arresting Badal. According to concerned experts, the intelligence-gathering unit of Nepal Police acquired success in framing the entire central mechanism of the Maoists in 1998. A team of Nepal Police had even followed the then politburo member of the Maoist Rabindra Shrestha when he was going to Gorakhpur, India via Sunauli border to attend the central meeting of the party. The team, in coordination with the Indian police belonging to Uttar Pradesh state of India, even moved ahead to track the house where the meeting was being held. However, their operation did not

bear any fruit due to the extreme trust shown by the then PM Koirala towards India. Recalling this event, a high level police officer said:

> Koirala was informed because the government chief should not be made unknown about the operation in its final phase. Believing that the operation will be a great success, Koirala even requested New Delhi to lend its support for the mission. But the very request saved the Maoists from being entrapped.

The operation, which took place when Narayan Dutt Tiwari was Chief Minister of Uttar Pradesh, was aborted after New Delhi heard about it. Indian police, which was coordinating with their Nepali counterparts, expressed their inability to support the mission at 1am. The Nepal Police was duly informed that a person named Ram Karki was working for the Maoists in Siliguri, India. The train in which senior Maoist leader Dr Baburam Bhattarai was travelling was tracked. Later it was interpreted that Bhattarai was not in that train. In this regard, an intelligence officer says, "In some cases, available information takes the form of devil's advocate."

There was no prediction about the loss the Maoist party could incur after the arrest of its certain leader. The incident of Prachanda taking action against his deputy Dr Bhattarai was leaked by the press. India took the step to reunite them. Maoist leaders Matrika Yadav and Suresh Ale Magar were arrested with the help of Indian intelligence and DMI.

What next?

The country's intelligence-gathering mechanism, which has been more mobilised by rulers to give continuity to their rule, is not perceived in a positive light in society. Nepal society loathes the terms related to activities such as intelligence-gathering. Moreover, no efforts have even been made to develop intelligence mechanism as a think-tank. The mechanism, which was primarily engaged in political intelligence-gathering from its conceptualisation, is still doing the same.

According to experts, the intelligence mechanism should prioritize five things. Firstly, it should be mobilised for shielding national security apart from expanding it to the Tarai region. It is also important for forging coordination between Nepal's intelligence-gathering mechanism and the same institution of India. The formation of a separate body to analyse the entire intelligence-gathering related information to pave the path towards National Intelligence Estimates is also the need of the hour. Intelligence is not forecast but it is all about tactics, operation and strategy. For this, National Security Council should be made active.

According to experts, if NID is not revamped it is sure to get completely paralysed. The biggest problem being faced by the department is the lack of capable

human resource. They predict that the leadership of NID will be floundering in a big morass within next years. The only way to bring efficiency and professionalism in the department is to recruit capable manpower in it. Until and unless the rampant interference of politics in every field is not stopped, the NID too will also not get a new lease of life.

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Non-Statutory Forces

Ajaya Bhadra Khanal

1. Description of the sector

Non-statutory forces are groups in Nepal that have major security implications, but whose involvement in security issues is not regulated by statute. One of the major problems in Nepal is the management of these non-statutory forces who frequently take the law into their own hands and are engaged in conflict. Many of these groups have links with political parties and groupings, as a result of which their management has become difficult. This section does not include groups that are purely criminal in nature. However, it includes groups that profess a political or social cause and a desire for justice, including spontaneously formed groups that rally around a common cause that has ramifications in the security sector.

The non-statutory forces act as security providers and struggle for justice on behalf of their members. They are differentiated from regular and statutory security providers like the Nepal Army, the Armed Police Force, Nepal Police and the Intelligence Department. These groups have the key features defined by Williams (2008); they all emerge as a response to shortcomings of the state and seek to compensate for those shortcomings.

The study tries to portray the current situation in Nepal, and has drawn largely from incidents reported in newspapers between January 1 and May 31, 2009; existing literature; and interviews of different people including current and former officials in the Nepal Police.

According to Williams (2008), non-state violent actors share certain characteristics despite their divergent forms, the overall challenge to national and international security is far greater than their sum, and this tendency, globally, is growing. Most of these non-state actors are fighting one another, as well as confronting state structures in order to bring them under their control. In doing so, many groups are directly or indirectly aided by political parties.

Most of the organizations classified under Non Statutory Forces came into existence after the 12-point understanding signed in New Delhi, India by the then Seven Party Alliance of political parties and the Communist Party of Nepal (Maoist). Only the groups active in the four month period are outlined in this study. The list and classification of these groups are drawn from this study.

The presence of Violent Non-Statutory Actors (VNSAs) is severely affecting governance, as 40 percent of Village Development Committees (VDCs) secretaries

have moved to district headquarters due to security threats from armed groups and criminal gangs, particularly in the eastern Tarai (Pokhrel, 2009).

2. Brief History

The Maoist People's War, which started in February 1996 and ended with a Comprehensive Peace Accord on November 21, 2006, created many processes and institutions that had a direct bearing on the country's security situation. Not only did the Maoists create institutions like the People's Liberation Army (and its later offshoot, the Young Communist League), but also promoted regional and ethnic groupings with their own autonomous security apparatuses.

The People's Movement in April 2006 ousted the King from power and restored multi-party democracy. However, in the immediate aftermath of the movement, the parties in power were unable to accommodate the demands of the Madhesis (people of Tarai origin), Janajatis (indigenous ethnic groups), Dalit (oppressed groups) and women. As a result, these groups continued their political struggles which also helped create space for the politics of smaller groups. This is evident from the dialogues the Peace Ministry carried out after its formation on April 1, 2007, particularly with the objective of facilitating the CA election, which was held on April 12, 2008 (MoPR, 2008).

Another trend was the emergence of smaller armed groups, particularly in the eastern hills of Nepal and the eastern Tarai. Although having strong links to political demands, these groups operate in the margins of politics and crime, and there is frequently an overlap between political motives and purely criminal motives. These groups have been able to continue their operations with impunity because of the weakness of the state apparatus, corruption and political interference (INSEC, 2009). Analysis of the incidents carried out by non-state actors reveals a strong nexus between crime and politics as well as the motivations for money, power and identity.

The government approved a new security policy on July 26, 2009, allowing greater use of force to control security related incidents. One of the three major focus areas is the control of non-state actors.

The government is adopting a multi-pronged strategy regarding the non-state actors. According to the policy, it will identify the purely criminal outfits from the groups directly or indirectly in dialogue with the government and use force to bring them within the scope of the law. The government will also increase coordination with the Indian security apparatus to control cross-border criminal activities.

3. Key Features

Organizational structure

There is no single structure for Non-Statutory Actors (NSAs) in Nepal. The more political groups have a hierarchical and centralised character. The smaller groups, particularly those in the Tarai and eastern Nepal, are highly centralised and revolve around one or two central figures. Other organizations like citizens groups and traders groups can be understood as hybrids of networks and hierarchies. This is particularly true for networks of ethnic groups, trade organizations and citizens groups, which are held together by a common cause, sometimes for a short period of time. The organizational structures of established political entities are more durable, but those of the smaller ones are not static. They adapt and change over time in response to community support, actions of the state, and opportunities and constraints in the environment.

Motivation and purpose

Larger politically inclined groups are motivated primarily by political power and control over resources (including financial, natural and state resources), but it is much more difficult to define the motivation and purpose of smaller groups. While many groups in the Tarai and the eastern hills are driven by resistance to the state, which is perceived as being dominated by Brahmins and Chhetris of the hills, they are also motivated by money. Control over land, other natural resources and political processes are some of the means through which they seek to achieve their goals.

However, many of the groups frequently cross over between political and criminal activities in order to achieve their goals. This has made it difficult for the state security mechanisms to classify which groups are political in nature and which groups are not. Police officials, however, believe that only a few groups are organised and possess weapons.

The primary motivations are money, power, desire for justice and identity. These motivations are closely inter-linked and need a more detailed study.

The role of violence.

Although the definition of VNSAs has violence at the core – violence is what distinguishes VNSAs from the NGOs and advocacy networks that are increasingly considered as part of global civil society–different organizations not only use different levels and forms of violence, but also use it for different purposes (Williams, 2008). Violence, in the case of Nepali NSAs, appears to serve multiple purposes. It is a means to create terror and extort resources; it is a means to construct a better recognised public image of the organizations, which can attract new members and change public attitude; it is also a means for the group leaders to promote an image of personal greatness. The greater the amount of violence, the greater the response from the state, hence the legitimacy of the organization, at least in the eyes of its

members. Many groups feel that they have to resort to violence in order to force the state apparatus to act on a certain issue, which otherwise would not happen.
In Nepal, these demands have ranged from reparation to accident victims, community forest fires, student issues, Tharuhat issues, flood-affected, landless squatters, freed bonded-labourers, and security for industry.

Funding and access to resources.

For major political parties, funding should be subservient to larger goals and no more than a means to an end. However, most of the fund-raising is taken as acquisition of wealth, which in itself becomes the central goal. For the major political parties and their affiliates, funding is connected to state expenditure, procurement and construction. Certain sections of the major political parties, and most of the smaller armed groups in the Tarai are also connected to the illicit economy at national, regional and global levels. For groups in eastern Nepal, funding is both a means to expand their organization and distribute wealth among individual members. Funds are collected from the public as forceful donations, from state expenditure, illegal taxes, appropriation of natural resources, linkages with local trade and businesses, extortion, and linkages with illicit economy.

The functions

The function that VNSAs fulfil for members and supporting constituencies can be one of the key criteria to define criminal activities from political activities. In the case of the major political parties and their affiliated organizations, there is a clear constituency and membership, and all activities are carried out in the name of those members and constituencies. This is especially true for the UCPN-Maoists and the YCL, which is seen as providing an alternative form of governance that can fulfil functions that are normally the prerogative of the state. Ethnicity-based organizations also purport to represent a certain ethnic group, and are driven by the desire to have a more central role in managing governance in their territory.

The inability of the state security forces to address public security concerns has led to people losing faith in the police, and to not report incidents for fear of reprisals. This was partly because, during the Maoist insurgency, police posts and community centres were often the targets for attack, and very few of them have been able to operate well outside Kathmandu (Thapa, 2008).

Despite the unwillingness of the people to go to the police for security, they still haven't lost faith in the ability of the police force to protect society against crime. In a survey carried out by the Interdisciplinary Analysts and Saferworld (2009) people thought the police were still the most effective security institution. About 70 per cent of the people said the police were at least moderately effective. However, Village Development Committees and municipalities are other institutions the people still believe in. According to the survey, "The people still put their trust in the state

security sector, even if they are sometimes critical of its overall capacity" (Interdisciplinary Analysts, 2009, p. 25). But non-state actors are also filling in the place of the state. There are still a lot of people (44 per cent) who believe that the Maoists and its Young Communist League cadres play a role in protecting society from crime.

Apart from the Maoists, other groups have not yet developed the capacity to fill the functional space left vacant by a weak central government. As a result, the key concerns of their constituencies and members are always addressed through negotiations with the centre. It is important to realise that the VNSAs draw their identity from their objective of filling functional spaces left vacant by the state.

4. Key VNSAs active in the first three months of 2009

Young Communist League/Maoists, Youth Force/UML and Nepali Congress

A majority of the incidents of violence is perpetrated by the YCL and the Maoists, however, the youth groups and members affiliated to the UML and the Nepali Congress are also involved in conflict and violence. In the first three months of 2009, the YCL/Maoists were involved in two instances of killings and six instances of abductions. The UML and the NC affiliated groups were involved in nine instances of violent clashes (INSEC, 2009). These groups have a wide public base, and the leadership structure is primarily centralised and hierarchical.

The primary cause is political competition, but conflict over natural and public resources is also common. These groups gain funds by influencing government procurement/contracts, appropriations of public and natural resources, donations from members and directly from the party.

Student Groups: ANNFSU, ANNFSU (Revolutionary) and NSU

The main student groups are affiliated to the three major political parties, and are primarily in conflict with each other. The conflict between the different student bodies, in addition to their political rivalry, is more directly connected to their effort to control admissions, government scholarships and make financial gains by influencing procurement and construction activities. Compared to their mother institutions, the student bodies are more networked and distributed.

Groups in Eastern Hills

These different groups, which have a primarily ethnic identity, are fighting with each other as well as with the state over who controls the taxation from local resources and transports plying the Mechi highway. Although many of them have an overtly political identity, many of them have been engaged in violent incidents. They use

khukri, lathi and homemade pistols. In addition to taxing road users, these different groups also raise tax/donations from individuals and groups using water, land and forest in the area. The issue is connected to series of workshops on ILO-169 and varied interpretations of the rights of the indigenous people. These groups, numbering more than six claims they are not raising tax, but are collecting "assistance". They also claim they are doing so to pressurize the government to implement ILO-169. Most of these groups have a handful of key leaders.

- imbuwan Krantikari Sangathan. Leader, Masikhang Thamsuhang, a splinter group from Limbuwan Rajya Parishad. District Chairman, Panchthar - Pelihang Thamsuhang.
- Limbuwan Rajya Parishad. Is affiliated to Sanghiya Loktantric Rastriya Manch (SLRM). Kumar Lingden is the chairman. SLRM also has a representation in the Constituent Assembly.
- Sanghiya Limbuwan Rajya Parishad. Chairman Sangjuhang Palungwa.
- Kirat Janbadi Workers Party
- Limbuwan Jana Parishad
- Limbuwan Swayamsevak Sangh. Affiliated to Parishad. Coordinator is Tumyahang Nembang. Central sub-commander Rajbhakta Yakthumba.
- Limbuwan Prantiya Parishad. K P Palungwa, in charge.
- Kirat Yakthung Chumlung.

Tarai

A recent research shows that perception of insecurity is the highest in the Tarai region. According to the report, over a third of people in the Tarai believe that the country is moving in the wrong direction, compared to only 22 percent of people in the hills, and nearly half of the people in the Tarai are concerned about being a victim of crime, about 14 percent more than in the hills (Interdisciplinary Analysts and Saferworld, 2009).

According to a report by International Alert and Friends for Peace (2008) youths in the eastern Tarai have raised expectations about their rights. However, their lack of knowledge and capacity in claiming their rights is exacerbating their grievances by making them feel impotent. The report emphasizes the need for development and government actors to address their concerns as well as empower them to address community issues, including security.

Incidents of bombing are most frequent around Birganj area. There were more than 30 explosions last year (2008-9). Police was not able to find out which groups were responsible, but several groups claimed responsibility. Many people injured in the bombings, which mostly took place in popular public places. Many of these armed groups avail weapons easily available in India. According to the police, these pistols are manufactured in towns close to the border. A pistol with a

mechanism to fire 9 rounds of bullets costs Rs. 45 thousand, while the cheapest ones are available for a few thousand rupees (Kantipur daily, May 10, 2009, p 5 Simabata Sana Hatiyar Bhitrindo).

Some of the key groups are as follows:

- Madhes Rastra Janatantrik Party (Krantikari)
- Janatantric Tarai Mukti Morcha (Pratik)
- Akhil Tarai Mukti Morcha (Goit)
- Janatantric Tarai Mukti Morcha (Prithvi group)
- Tarai Army
- Madhesi Mukti Tigers
- Tarai Tigers
- Janatantric Tarai Mukti Morcha (Jwala Singh group)
- Janatantric Tarai Mukti Morcha (Rajan). This group is also raising funds by forcefully collecting donations from the people. There were a few incidents when the irate locals retaliated by burning their vehicle and beating them.
- Janatantric Madhesh Mukti Tigers
- Samyukta Tharuhat Sangharsa Samiti. Its primary antagonist is the Samyukta Madhesi Morcha, comprising of different political forces espousing rights of the Madhesi people and group entry of Madhesis into the Nepal Army.
- Tharuhat Swayatta Rajya Parishad
- Tharu Kalyankari Sabha
- Madhesi Virus Killers (Jay Prakash Yadav, affiliated to Goit)

5. Inter-Relationships

The affiliates of mainstream political parties and their student wings have a complex relationship with the security agencies, political parties and identity groups. Their relationship with the government bodies is largely determined by who is in power. If they have support in the government, these politically affiliated groups can enjoy impunity, even for criminal offences. Their links with identity groups also varies widely. However, the UML affiliated groups have very little support in the Tarai. The Nepali Congress and the UML have greater amount of support among the Limbus in eastern Nepal, whereas the Maoists so far have received less support from the Limbus. Their support in eastern Tarai has been severely restricted by Madhes-based parties. The Maoists, however, have wider support in western Tarai and among other ethnicities in the hill areas.

The groups in eastern hills draw their identity from their ethnic background, and are largely independent of the major political parties, including the UCPN (Maoist). These groups, generally, differentiate themselves from the national parties

and exist to fill the void created by the inability of the mainstream parties to represent the region and the Kirant groups.

Violence, the case of these groupings, stems primarily from their effort to generate resources and expand influence in the region. There are three splinter groups of Limbuwan Rajya Parishad, each led by Masikhang Thamsuhang, Kumar Lingden, and Sangjuhang Palungwa. Since the state's security agencies are controlled by the mainstream parties, the groups in the east have an antagonistic relationship with the organs of the state. The Nepali Army, however, is not involved.

The situation in the Tarai is a little more complicated as there are more actors involved. The government has identified 109 armed groups in the 15 districts considered highly sensitive from the security perspective. The government has added five Tarai districts in western Nepal to the list, indicating a spread of organised violence in the country.

Most of the groups active in the eastern Tarai do not have a cordial relationship with the largest three national parties (NC, UML, UCPN). However, their relationship with the Madhes-based parties is flexible, as is their relationship with individuals within the bigger parties. Groups in the eastern Tarai are particularly wary of the CPN-UML; they say it is the party that least understands the Madhes.

However, the Tharuhat-based groupings appear to have cordial relationship with the Maoists and the other two largest political parties. They have also received indirect support from the security apparatus. The state appears to be clearly biased in favour of the Tharuhat as compared to the Madhesi groups.

Almost all of the groups in the Tarai have a clear ethnic agenda, and draw their identity from ethnicity. Groups in the Tarai, as a reaction to the government's security initiative, said they were joining forces to offer a stronger resistance. Madhesi Mukti Tigers, Madheshi Virus Killers, Tarai Samyukta Janakranti Party Nepal and JTMM (Rajan Mukti) group announced in Rajbiraj on July 30 2009 that they were joining hands. The groups also said they would reach out to other groups to work jointly (Kantipur daily, July 31, 2009). These groups say the government is not serious about finding a solution through talks, and requested the government to start a broader dialogue with Tarai outfits.

A new security dynamic in the Tarai is the presence of Communist Party of Nepal (Maoist), a breakaway Maoist faction led by Matrika Yadav. Informal sources indicate that the group is gathering strength, in terms of people, arms and resources. The group does not have a friendly relationship with the UCPN (Maoist) and is likely to create further violent conflict.

There were similar reactions from non-state actors in eastern Nepal. The Limbuwan groups, particularly the three splinter groups of Sanghiya Limbuwan Rajya Parishad have reacted strongly to the government's decision. They say they are political outfits, and the government's intention to crack down on them is unfortunate (Kantipur daily, August 03, 2009).

6. Analysis

Most of these non-statutory forces exist to fill the void created by absence of state mechanisms and procedures to mediate conflict and mete out justice. Most of the temporary networks and alliances resort to *bandas* (general strikes) to press their demands. In many cases, the state itself is part of the conflict. In these instances, the state is not impartial and objective in its function.

The presence of violent non-state actors questions the legitimacy of the state, because there is a general agreement that the greater the legitimacy of the state, the greater the element of consent in maintaining social solidarity (Holsti, 1996). The reason why the Nepali state lost legitimacy and has become weak is because the political elites have extracted national resources at the cost of the general masses, and political representation was never allowed to be inclusive (MoPR, 2008).

Nepal has developed what Williams (2008) calls functional holes: the state is unable to carry out normal functions of the modern state which offers opportunities for non-state actors to fill up that space. The two most significant features of the role of non-state actors are: the competition for political power which is directly correlated to control of national resources, and the failure of the state to mediate instances of social conflict and system contradiction thereby forcing the units involved in conflict to maximize their gain, often through violent means.

Watson and Crozier (2009) emphasize that both the SSR priorities and public security priorities need to be planned in tandem to improve the security situation, however, equal importance needs to be given to short term public security. The immediate priority according to them is to tackle wide public security concerns, including relationships with the police, and mitigating the risk of youth recruitment into militant and criminal gangs.

One of the major impacts on security situation is the culture of *bandas*, which are mostly organised in the guise of addressing issues of security, justice and human rights. In the first six months of 2009, some 513 *bandas* were called across Nepal: 69 by the UCPN-Maoist, 15 by the Nepali Congress, 17 by the CPN-UML, 175 by local citizen groups, 175 by the armed groups, 145 by transporters and 92 by traders (Pokhrel, 2009).

Cases of murder, violence and abductions were going down in the Tarai this year due to the government's two-pronged strategy: drawing the armed groups having deeper community penetration to the dialogue table and scaling up police operation. However, the rate of crime is increasing, and civil society workers claim that the security forces and political parties are still patronizing members of the criminal groups (Bastola, 2009).

7. Conclusion

According to the Interdisciplinary Analysts report (2009), there is a security vacuum at the local level; many people do not feel that the state is providing adequate security. This could be resolved through more effective community policing and through local peace mechanisms.

Past studies also emphasize the need to review existing border management policies and procedures. The open border with India, and the flow of weapons, ammunitions, cash and individuals across the border is encouraging criminal activities and violence. Given the current division between people of hill and Madhesi origin, the ethnic element should also be considered while deploying police personnel in the Tarai region. Any attempt to restore law and order in the region should adopt a multi-pronged strategy and should give more emphasis to community-based mechanisms supported by the state.

Neutral, speedy, and effective state mediation mechanisms are needed to deter the rise of self-help groups in the security sector. The state should develop policies and mechanisms to resolve disputes over land, natural resources, labour, consumer rights, road accidents, and violation of human rights. The state should be able to quickly intervene to resolve any dispute.

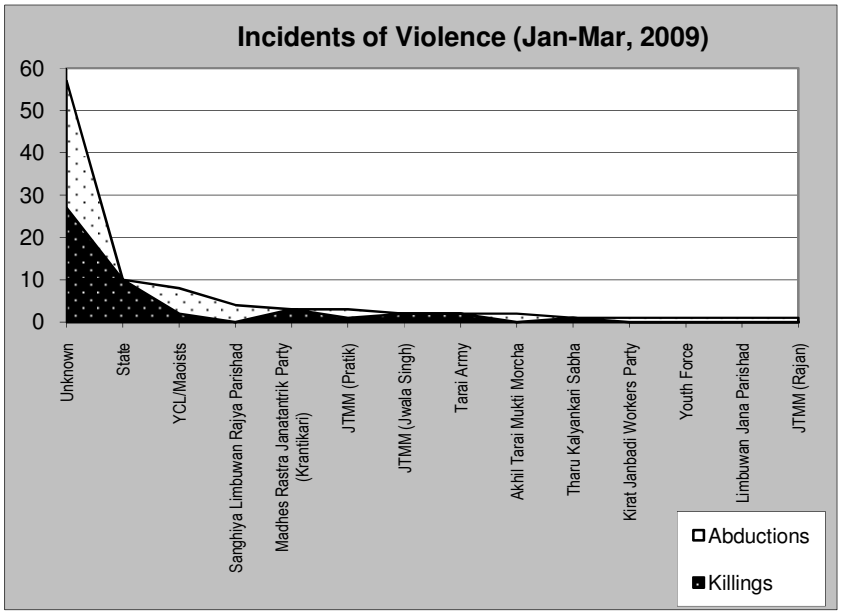
Many previous studies have emphasized the role of traditional security and justice mechanisms. Especially among communities like the Tharus, the Sherpas and the Limbus, the mechanisms for conflict resolution are built within. These mechanisms are less prevalent in cities with a large number of migrant population as well as in the Tarai.

International experience, particularly in Afghanistan and Iraq shows that security cannot be handled through a top-down approach that relies heavily on conventional policing strategies. Government's security efforts must go hand in hand with mechanisms to ensure justice. The government should also incorporate community dynamics in security strategies, particularly by taking into account the prevalent perceptions, identity politics, cultural practices, and vernacular modes of social organization.

Annex 1. Active Armed Groups (According to police classification)

1. Akhil Tarai Mukti Morcha (Goit)
2. Janatantric Tarai Mukti Morcha (Jwala Singh)
3. Madhes Mukti Tigers (Madhesi Tigers)
4. Madhesi Virus Killers Party (Affiliated to Goit)
5. Samyukta Janatantric Tarai Mukti Morcha (Pawan/Uddhav)
6. Kirat Janabadi Workers Party (Khadga Dewan, alias Nabin Kiranti)
7. GFP Ranavir Sena Nepal
8. Tarai Army (Mister John)
9. Federal Tamangsaling Autonomous State Council (Sanghiya Tamangsaling Swayatta Rajya Parishad, Som Bahadur Dong)
10. Nepal Defence Army-Sanjaynath (Baba Sanjaya)
11. Hindu Sena Nepal
12. Janatantrik Tarai Mukti Morcha (Rajan Mukti)
13. Madhesh Tarai Mukti Morcha
14. Tarai Alliance Group
15. Madhesh Niyantran Group
16. Tarai Rastriya Mukti Sena (Tarai Mukti Sena)
17. Janatantric Tarai Mukti Morcha (Ranavir Singh)
18. Rastriya Mukti Sena Nepal (Kiran Bhandari, Bigyan)
19. Tarai Liberation Commando
20. Nepali Rastriya Janabhawana Party
21. Madhesh Rastra Janatantric Party (Krantikari)
22. Mangolian Revenge Group
23. Tarai Janajagaran Sangharsasil Morcha (Communist Party)
24. Tarai Samyukta Janakranti Party
25. Bhisan Himali Bagh (Target)
26. Defence Nepal of Trishul Sena (Chandrakanta)
27. Liberation Tigers of Tarai Eelam
28. Janatantric Madhesh Mukti Tiger, Tarai
29. Nepal Pratirodh Samuha
30. Federal Limbuwan State Council (Kumar Lingden)
31. Federal Limbuwan State Council (Sanjjuhang Palungwa)
32. Federal Limbuwan State Council (Misekhang)
33. Khumbhuwan Democracy Forum
34. Pallo Kirant Limbuwan National Forum
35. Khumbuwan National Morcha

Annex 2 Incidents of Violence (Jan-Mar 2009)



Source: INSEC (2009)

Organization	Killings	Abduction
Total	0	0
Unknown	27	30
State	10	0
YCL/Maoists	2	6
Sanghiya Limbuwan Rajya Parishad	0	4
Madhes Rastra Janatantrik Party (Krantikari)	3	0
JTMM (Pratik)	1	2
JTMM (Jwala Singh)	2	0
Tarai Army	2	0
Akhil Tarai Mukti Morcha	0	2
Tharu Kalyankari Sabha	1	0
Kirat Janbadi Workers Party	0	1
Youth Force	0	1
Limbuwan Jana Parishad	0	1
JTMM (Rajan)	0	1

Annex 3 List of groups in dialogue with the government

The government held first phase of talks with the following groups:
1. Sanghiya Limbuwan Rajya Parishad
2. Madhesi Virus Killers
3. Samyukta Janatantric Tarai Mukti Morcha
4. Tarai Samyukta Janakranti Party
5. Janatantric Tarai Mukti Morcha (Rajan Mukti group)
6. Kirant Janabadi Workers Party
7. Liberation Tiger of Tamil Eelam
8. Madhesi Mukti Tigers

Annex 4

Government's list of security-sensitive districts

1. Morang
2. Sunsari
3. Saptari
4. Siraha
5. Dhanusa
6. Mahottari
7. Sarlahi
8. Rautahat
9. Bara
10. Parsa
11. Dang
12. Banke
13. Bardiya
14. Kailali
15. Kanchanpur

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Private Security Companies

Aayushma KC

I. Introduction

Historically, private security came into being after the Second World War. Post 1945 the world saw an era of unprecedented growth of industrialisation in the west. A lot of these industries needed physical protection and security. In the face of this phenomenon, it was more cost-effective to hire trained and seasoned warhorses as opposed to training freshmen to guard industries.[1] The acumen of the battlefield thus began to be sold as a commodity – a buyable and sellable item handled by the market forces of demand and supply. Further on, the end of Cold War meant that states were compelled to downsize their armed forces. This cutback of armed forces caused early retirement of many of war veterans. The retired veterans thus, organised private security companies in order to sell their fighting skills in an increasingly privatised marketplace. State, multinational corporations, INGOs, and private firms emerged as new clients in security market. This activity even crossed the traditional borders and changed into lucrative transnational business[2].Globally the redefinition of security strategies and the restructuring of armed forces by Western governments resulted in the elimination of non-core activities from the functions of many armed forces. These have increasingly been filled through various forms of alternative service delivery, in particular being outsourced to PSCs[3].

Gurkhas -- Nepalese fighters with a fearsome reputation — are known all over the world for their expertise in the battlefield. As a result, they have increasingly been hired by a lot of private security firms at least for the past 25 years or so. It has been reported that some star cruises have gone so far as to hire only Gurkhas to guard the deck as its ocean liners sail through the pirate-infested Malaccan waters. Malaysian government decided in 2007 that only Malay and Nepalese nationals would be hired in private security companies in Malaysia.[4]

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1 Thapa.K.B. Niji surakshya ko serofero. Modern Printing Press. Kathmandu, 2006, pp 5-6.

2 Christopher Spearin (2005), "Humanitarians and Mercenaries: Partners in Security Governance," In Elke Krahmann (ed.), *New Threats and New Actors in International Security*, NY: Palgrave Macmillan Press, Ch. 3, p. 45.

3 Commission on Global Governance, (1995). *Our Global Neighbourhood: The Report of the Commission on Global Governance*, Oxford: Oxford University Press, pp.77-134.
Online at: http://www.sovereignty.net/p/gov/gganalysis.htm;
See also http://www.dcaf.ch/_docs/op06_privatising-security.pdf

4 Conversation with security expert K.B. Thapa.

In 1990 Nepal underwent a political revolution that overthrew the autocratic monarchy and saw the restoration of parliamentary democracy, which led to the rewriting of the State Constitution of Nepal, 1990. The 1990s experienced relative urban prosperity, especially characterised by a dramatic boom in the banking, diplomatic missions, educational institutions and private industries that paved a way for the private security companies to find space to flourish. When the armed insurgency was declared in 1996, only four private security companies were registered in at the company registrar's office. As the conflict progressed, major industrial areas were repeatedly looted and extortions and kidnappings presented itself as a daily phenomenon. By the time the conflict peaked in 2001/2002, 197 private security companies were registered. By 2006 the number had reached 269.[5] Today there are nearly 700 different private security companies employing approximately 25000 people in Nepal. This marks 100% growth in two years' time.

States emerging from conflict harbour a growing sense of insecurity and it has led to the process of 'state militarisation' through the acquisition of a repressive capacity through legislative measures, such as the use of emergency powers, the anti-terrorist act, and curfew. Integral to this trend is the state's withdrawal of social welfare and representation of the people. As violence becomes more protracted there tends to be a shift in power towards military actors, creating a vicious cycle of militarisation, and further militarisation. State in conflict consciously shifts the attention from social to security sector.

However, there is a nationwide proof of the lack of security arrangements provided by the state and the rumours of the downsizing of the security forces also has to a certain extent helped in making private security companies a profitable investment. However, it should be noted that the concept of subcontracting security is more or less an elitist concept in Nepal. With a per capita income of $472 in 2009[6], almost 90% of the population cannot afford to hire private security guards.

II. Privatising Security as a Neo-Liberal Economic Agenda

Most private companies seem to run on the premise that Hood identifies as the New Public Management (NPM). It is an approach to the organisation and management of government advocating the use of market methods and private firms for the allocation of public goods and services. Competition in the public sector, hands-on professional management, and discipline and parsimony in resource use are some of

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5 Thapa.K.B.(2006) , Niji surakshya ko serofero, Modern Printing Press,Kathmandu,2062,p.p 22.

6 Floor Discussion on private security companies in Nepal at the National Seminar on National Interest, Security Policy and Civil-Military Relations in Nepal 25th April 2009 commenting on Dr. K.B Thapa's paper 'Bartaman awastha ma niji surakchya karmi haru ko bhumika'- the role of private security personnel at present times.

the 'doctrinal components' of the approach.[7] Globally, the gradual and systematic transition from traditional public administration to NPM since the late 1980s has given the approach the overarching qualities of a culture, a philosophy or a paradigm. Terminology and concepts associated with the approach, such as 'results oriented', 'entrepreneurship', and 'outsourcing', have therefore now become commonplace in discussions about and even within the private security sector in Nepal.

Within the political and social élite, family and kinship ties often serve as conduits and means for running patronage networks in terms of hiring PSCs for protection of places such as government hospitals. The crosscutting personal associations that often drive and thrust certain PSCs based on nepotism rather than free market demand and supply balance remains high. Among a certain section of the elites it is a matter of social status to hire a guard preferably from an international company.

III. Private Security Companies and the Laws

Richards and Smith note that as a concept, SSR is fundamentally also concerned with effective private provision of security demands that considerable legislative, regulatory and oversight safeguards be put in place and regularly reviewed. A system that demands accountability in this way should encourage the transparent operation of PSCs, reducing the opportunities for illegitimate or unethical activities. Without such provisions:[8]

- There may be no control over the quality of service PSCs provide;
- PSCs may weaken a state's monopoly over the use of force and hinder law enforcement;
- PSC's may only be accountable to weak regulators or shareholders as opposed to the electorate; and
- PSCs can serve as fronts for organised crime and can be misused against ethnic or political rivals in states with a history of ethnic conflict.

In this regard, Nepal has no laws, legislative or oversight mechanisms for the regulation of private security companies and thus has the potential for the entire malfunction that could have ramifications to the nascent peace building process.

At their inception, a private security company goes through three distinct legislative bodies. It is registered at the company registrar under the Ministry of Industries followed by permission to operate by the Home Ministry and then with the shift in the labour laws, whereby it has been stated that the minimum wages in the private security companies is Rs. 4600. Thus private security guards have increasingly been a part of trade unions and frequently go on strikes (discussed in

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7 Richards A & Smith H. in *Addressing the Role of Private Security Companies within Security Sector Reform Programmes* (2007), Saferworld, London.

8 Ibid.

detail below).Thus private security companies have ties with the Ministry of Labour. Furthermore, if any communicative devices are used by PSCs, they need to be permitted by the Ministry of Information and Communication.[9]

At the government level, PSCs are required to:

1) publish a public notice stating the kind of manpower it needs.
2) Before being deployed the manpower needs to be trained minimally or the untrained ones need to be trained (which does not have a universal standard).
3) As per the need, the activities of the PSC in question may be investigated by the police at any given time.
4) The number of private security personnel hired by the company has to be regularly updated to the police authorities.
5) There needs to be an arrangement made regarding the activities of the PSC.
6) The arms used by the PSC would have to be adequately licensed by the government and any misuse of it will be punishable like any other licence holder.
7) Should any communication device be used by this company, it will have to be permitted by the Ministry of Information and Communication.
8) The uniforms issued by the PSC should not look like the uniforms of the state security forces.
9) The taxation and the cost of hiring PSC personnel would be according to popular law.
10) The labour act would have to be adhered to by the company.
11) At the time of appointing a security guard a police report of the appointee would have to be presented.

The most important feature of this industry in Nepal is that it does not have any rules and regulations act that govern let alone monitor the private security companies functioning in Nepal. While there have been many instances of private security guard's involvement in large scale robberies, there have also been many instances of them being assaulted by a band of robbers.

PSCs are not licensed to obtain any firearms in their name. The exception is only the security guards working at the banks and financial institutions. The firearms are licensed in the name of the financial institution in question. The legitimacy bestowed upon them is solely on supposed moral grounds i.e. a background of working for the Government of Nepal as security personnel viz. the Nepal Police, Nepal Army or the Armed Police Force. In the face of these realities, PSCs are also

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9 (Nepali) Rajpatra dated 2055 shrawan 5th (July 1998) states " Shree panch ko sarkar audhyogik ain 2049 le diyeko adhikar prayog gari audhyogic prawardhan board ko sifaris ma dehai ka byabasaya haru ai dehaya bamogim ko udhyog ko bargikaran gareko chha"

found to complain that their ability to provide security has been hindered by their inability to acquire firearms.

The discourse among the intelligentsia outline mixed opinions towards these issues. Security experts unanimously stress that government should develop proper mechanism to streamline the private security companies. While certain sections of the intelligentsia argue that that both private and public security companies should work together. A larger group argue that the private security companies will virtually undermine the role of the state security should be discouraged in the country. Also reiterated are arguments for strong state security agencies not the private; it is only suitable for the corporate class. [10]

The literature on private security companies in Nepal is near to nil. This is also because the emergence and rapid growth of private security companies (PSCs) is a recent phenomenon in Nepal.

The perceptions of the public towards private security providers, as well as any possible further privatisation of public security services and the implications that it may have for SSR.

(1) The demand and supply factors that sustain the industry

Security Expert K.B. Thapa notes that 80 % of the Nepali population depends upon agriculture, nearly 10 % of the population works for communal and societal jobs. For Thapa, this is not a good sign for economic growth in Nepal. Private security is an area offering competitive advantage to Nepal. In 2007 the Malaysian government decided that they would only hire Nepali and Malay people in their private security sector. Similarly a the Nepalese have proven their valour as members of the Indian, British, Singapore and other security forces including the UN peacekeeping missions around the world. This goodwill is a highly marketable commodity to help Nepal forward in the global private security industry that is worth. [11]

Globally, the demand for PSCs is likely to increase. Demand may also come from developed countries like the British Government policy for example to outsource certain tasks that in earlier days would have been undertaken by the armed services. Some of this demand may come from states which cannot afford to keep large military establishments themselves. In this regard, it is notable for example that the United States has employed PMC to recruit and manage monitors in the Balkans. In this way PSCs could create a huge addition to the Nepali economy. The very same

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[10] Floor Discussion on private security companies in Nepal at the National Seminar on National Interest, Security Policy and Civil-Military Relations in Nepal 25th April 2009 commenting on Dr. K.B Thapa's paper 'Bartaman awastha ma niji surakchya karmi haru ko bhumika'- the role of private security personnel at present times.

[11] Thapa.K.B.(2006) , Niji surakshya ko serofero, Modern Printing Press, Kathmandu, 2005

reason accounts for the increasing numbers of people getting employment in PSCs. This appears to be a training ground for further training.

Governments employ PSCs to help them in a conflict – as the governments of Sierra Leone and Angola have done. Such cases are in practice rare and are likely to remain so; but we may well see an increase in private contracts for training or logistics.

The Security Context

Nepal is in transition. The probability of civil conflict is lowest both in established, well functioning democracies, and perfect autocracies. It is at some intermediate or transitory stage between autocracy and democracy that the risk of internal conflict is greatest.[12] The falling of the government led by Maoist leadership following decisions regarding the suspension of the COAS suggests that Nepali politics is still very militarised in nature. Also the state has not been able to disband armed organisations such as the Maoist Young Communist League (YCL).

The consequent emergence of violent conflict in the Tarai region by ethnic politics reflected that inclusive participation in the political process was still a disputed matter. Moreover it also indicates a strong tendency to take up arms if one is to be heard at all. As a result, the potential for communal violence throughout Nepal among marginalised caste, ethnic, linguistic and regional groups and communities remains high.

Any part of security sector requires to be non-partisan for it to function properly. Mounting ethnic politics, porous borders supplying arms amid mushrooming PSCs in this regard, increases the inclination of PSCs being used as facade for warlordism in the name of party politics. The sector could take on the role of creating warlords, loosely defined as

> *... the leader of an armed band, usually numbering up to several thousand fighters, who can hold territory locally and at the same time act financially and politically in the international system without interference from the nominal state in which he operates.* [13]

The efforts to codify laws pertaining to mercenarism within security are more futuristic in Nepal. In Africa, military commanders rule over commercial sites like Mbuji-Mayi and Kisangani (which are responsible for several hundred million dollars in diamond exports per year), and can extract profits through illicit enterprises in

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[12] Murshed S, (2001) *On the Economic origins of contemporary civil wars,* available at http://www.epseu.org/Documents/Scientific/cp-paper-murshed.pdf

[13] Murshed S, (2001) *On the Economic origins of contemporary civil wars,* available at http://www.epseu.org/Documents/Scientific/cp-paper-murshed.pdf

conjunction with quasi-legitimate governments or rebel factions. The state security apparatus being at the disposal of a selected few, smuggling of flora and fauna from the green belts of the Tarai region is rife. There is a strong possibility especially if the protection of these are contracted to the PSCs. Also, currently at the informal level a few PSCs are also known to push forth their agenda for obtaining contracts to guard the nascent hydropower projects.

PSCs when they are very loosely controlled by law, under extreme circumstances may show a strong propensity towards warlordism via trade unions accosting and terrorising civilians rather than protecting them. This trend of warlordism may also be reinforced through PSCs as private power bases of individuals that may be used to create mayhem.

The state security and the public

Ten years of violent conflict means that many people in Nepal now understand the provision of security to be the preserve of armies with guns. During the war years, the under-equipped police force gradually withdrew from areas of Maoist influence, leaving just under 600 out of nearly 2,000 police posts functioning at the cessation of conflict in November 2006. When the Nepal Police Force failed to contain the insurgency, the Armed Police Force (APF) was created as a paramilitary force with the basic roles of maintenance of law and order and containing insurgency cracking down terrorist activities.

Nepal's international relations with the neighbouring India and China have seen considerable shifts in the recent past. If we take Africa as an example, extraction of the resources of a country such as the DRC can provide rich pickings for others who, through the deployment of their armed forces, can control and exploit mining ventures that they would otherwise not be able to access. With respect to international interest in the Nepalese hydropower, as a failed state, Nepal can offer substantial opportunities to the neighbouring countries. Not only does the destabilised country serve as a source for personalised financial gain, but it also serves as a fake off-shore tax heaven. This may in turn lead to a boom in the PSC industry since it is the financial sector that uses this sector the most. For instance, the skeletal state structure in Kinshasa can issue export permits, for country of destination documents, bank accounts and tax records free from inspection. The stronger country's élite can therefore use the smokescreen of the neighbouring failed state's structure to legitimise illicit transactions. Hence, security commercialism leaves external resources under the control of the neighbouring country's patrimonial network.

(2) Current and Projected Scale of Private Security Companies

The trends suggest that currently it is still at a booming stage. On a monthly basis, the reported security company in Nepal G4S pays value added tax of approximately Rs. 4,500,000. The political parties have their respective armed factions freely combing the streets. Rampant unemployment in the cities suggests that cases of abduction, looting is still on the rise. Thus the perception of insecurity runs high. The projected estimation of the boom in this industry is high as well. The global financial crisis has increased unemployment in Nepal as people returning back to Nepal from all over the world is on the rise.

Significant in this regard is the teetering decisions at the policy level regarding the rehabilitation of the combatants of the armed insurgency. Since this sector does not have a universal mechanism for background checks for their employees, different political parties are known to repeatedly approach the private security companies asking them to employ their cadres.

IV. Institutional Relationships

Mainstream Anglo-Saxon theory and practice regarding civilian-military relations dictate a clear divergence between the military institution, the political arena and the economy. However, the apparent near global trend towards the rise of PSCs as opposed to the previous state's monopoly of providing security to its citizens is a sharp contradiction. The rise of the PSCs has to some extent replaced the traditional military perspective by a corporate outlook, making the military service an ideal training ground for later corporate employment. PSCs in Nepal are mostly started by personnel with a security force background. The increasingly commercial orientation within the state security forces has raised the tolerance of leadership towards a more corporatist disposition in terms of job prospects post retirement or even an early voluntary retirement.

At the official level the relationship is nominal at best whereas many informal relationships that cut across class and caste lines base PSCs on a personal network system rather than a professional body.

Should the state fail to reconcile law enforcement priorities with the aspirations of local communities, violent conflict may even be re-kindled through instances of malpractice or heightened perceptions of insecurity. There is a nominal institutional relationship between the Nepal Police and PSCs functioning in Nepal. These two areas are not well coordinated at all and often there is dearth of information exchange such that the police are unaware of the number of private security personnel involved in any given area. This lack of linkage undermines the possibility of these two entities to work towards crime prevention.

VI. Strength and Weakness

Private security guards are almost everywhere in the cities. If PSCs can be regulated and they co-ordinate well with the government institutions they can be a source of tremendous information and can help the police track down criminals and assist in larger law and order maintenance.

Diplomatic missions that hire the maximum number of private security guards hire international companies rather than domestically established PSCs that suggests multinational corporations to benefit from this industry and its boom in Nepal.

In developed countries, the private sector is becoming increasingly involved in military and security activity. States and international organisations are turning to the private sector as a cost effective way of procuring services which would once have been the exclusive preserve of the military. Whilst this security is expected to be consistent with national laws, international human rights standards and humanitarian law, human rights violations may occur during the protection of property and personnel.

Business houses and industries operating in emerging economies are often faced with significant security challenges. Such challenges regularly arise in countries like Nepal where the security forces, paramilitaries, and private security companies have a history of committing human rights violations.[14] This may be because the country is or has been embroiled in armed conflict, the security forces are corrupt and ill-disciplined, and there are significant governance gaps. In Nepal, private security companies are hired to supplement or fulfil security needs in environments because state resources are lacking or weak, but their actions are unregulated. Globally, there are numerous examples of companies being held legally accountable for the actions of private security guards, whether employed directly by the company or not.[15]In Nepal the lack of foresight to anticipate such phenomenon and problems from a virtual security sector that employs over 25000 employees, does seem to pass off as an ambitious idea.

Globally PSCs have been scrutinised for being a part of foreign policy manipulation tool. Despite the rhetoric about training and integrating a disciplined military into society, most governments in developing countries see an altered security sector as a way to control internal politics better. Changes in the security sector may mean that the potential for better management and application of violence to achieve political ends features first. Under these circumstances, expertise in any part of the security sector is quite divorced from democratisation, human rights, and free economic practices. Private security companies in Nepal lack an

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[14] See generally Security forces and Human rights http://human-rights.unglobalcompact.org/themes_dilemmas/security_forces_and_human_rights/

[15] See generally Security forces and Human rights http://human-rights.unglobalcompact.org/themes_dilemmas/security_forces_and_human_rights/

adequate and universal standard of training. Also there is inadequate communication of company policy to the public as well.

They are definitely underpaid and that has been supplemented by rise of employee unions that are notoriously politicised. While they do rightfully demand their rights, they often go on strikes that feed to the dilemma of them actually being considered as a countable actor in the security sector to provide security. Moreover it also raises questions about the reliability of the 'security' that customers effectively buy as a commodity from PSCs.

The main problem also seems to be that PSCs do not receive the same scrutiny as do government security forces. In this way they are free from any oversight mechanism that keeps this security system in place. This often leads to inadequate monitoring or consultation.

PSCs as a quasi-military organisation

With interpersonal connections that are often political, social and the patrons of PSCs as previous security personnel, PSCs can also be viewed as a quasi-military organisation that may protect the interests of a certain section of the politico-social elite.

In the literature on civil-military relations, armed forces are described as `the managers of organised violence'. Their defining institutional feature is the tremendous power at their disposal. This power can be used for legitimate purposes. But the power of the military can also be misused for illegitimate ends: to topple its own government; to suppress opposition to government; to kill and injure citizens.

Because armed forces constitute a potential threat to governments and citizens, they are subject to a range of controls in democratic countries. These controls are intended to ensure that the military does not undermine the political process, usurp the authority of government, abuse the rights of citizens, and exercise excessive force.

The controls include the following:[16]

1. **Executive control**. The military and the use of military force are subject to strict executive control, flowing from the head of state to cabinet to the minister of defence to the chief of the armed forces.
   Mercenaries are not subject to such control.
2. **Parliamentary control**. The executive itself is accountable and answerable to Parliament, which has powers of investigation, recommendation and oversight over the armed forces.
   Mercenaries are not subject to such control.

[16] Richards A & Smith H in *Addressing the Role of Private Security Companies within Security Sector Reform Programmes, (2007), Saferworld, London.*

3. **Public control**. Parliament in turn is accountable to the electorate. The electorate may vote to replace a government whose defence policy or armed forces lack popular support.
   Mercenaries are not subject to such control.
4. **Legal control**. The functions of the armed forces are determined and regulated by domestic law, chiefly the Constitution, the Defence Act and the Military Disciplinary Code. These instruments describe the circumstances in which force may be used; the manner in which force may be used; and the sanctions which apply if soldiers are guilty of misconduct.
   Mercenaries are not subject to such control.
5. **International control**. Armed forces are bound by international humanitarian law, chiefly the Geneva and Hague conventions and protocols. These treaties aim to curb the excesses of war, and to protect civilians in particular. Signatory states are expected to ensure that military personnel comply with international law, and to prosecute soldiers who violate its rules.
   Mercenaries are not subject to such control.
6. **Internal control**. In a democracy the orientation and values of the armed forces provide a form of internal self-restraint. Soldiers respect the primacy of civilian rule, human rights, rule of law and the principle of political non-partisanship. These values are inculcated and reinforced through education and training programmes; through the conduct and attitudes of officers; and through disciplinary action against personnel who are guilty of misconduct.

Mercenaries are not subject to such control.

VI. Conclusion and Recommendations

The presence of civilians accompanying the state security force has legal and ethical ramifications and could definitely raise troubling questions relating to issues of chain of command, authority, accountability, force protection, and, ultimately, security effectiveness. It is a provocative discussion about the growth of the privatized military industry and the reliance on civilians in the realm of security training, international security missions, and possibly with regards to alignment with the global trend of subcontracting peacekeeping operations in the future.

Besides that, there is a major communication and coordination gap between PSCs and Govt Security agencies that shakes the very basis of providing security to general people by creating a security vacuum. It may be argued that it furthers the security vacuum in Nepalese society. Mostly the security providers have no idea as to how many people are working. This also gives rise to secure pockets in select urban areas whereby, more and more security personnel are deployed in some areas and the rest of the areas are devoid of any security arrangement.

Nepal needs firstly to have a proper policy regarding the working of PSCs that rightly addresses the following and needs to be addressed by the laws of the land.

(1) The regulation regarding the use of force and arms used by personnel of PSC
(2) Transparency and responsibility of the PSCs should be adequately demarcated by law
(3) Ensuring PSC's are non-partisan including their staff, similar to the steps taken to make government security forces non-partisan
(4) There needs to be a proper and transparent record of the number of firearms that are being used for private security purposes
(5) The Law of contract between the PSCs, the clients and the private security guards need to be tripartite contract that is well understood at the time of hiring.
(6) Universal curriculum needs to be designed that is seriously followed by the PSCs in terms of training the guards. Also a proper mechanism needs to be developed for a thorough background check of the individuals hired by PSCs. Moreover a standardised system needs to be maintained.
(7) There needs to be a separate central body that keeps a detailed account of the activity of the personnel of the PSCs.

In Nepal, with great justification, that it has been forced to go to war with gangs because for years the police have virtually been unable to control crime due to political instability and inconsistency in the law and order maintenance system. In numbers PSCs are nearly accountable for 25,000 jobs in the country and the absence of any law that safeguards their interests and the interest of security as a whole is an awkward unattended question that demands immediate attention.

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See generally: security forces and human rights at http://human-rights.unglobalcompact.org/themes_dilemmas/security_forces_and_human_rights/

V. Security Related Actors

The Nepalese Judicial System

Bhimarjun Acharya

1. Genesis

The concept of the separation of powers, one of the principal doctrines of modern constitutionalism, may be summed up in the following propositions: (1) there are three intrinsically distinct functions of government, the legislative, the executive and the judicial; (2) these distinct functions ought to be exercised respectively by three separately manned departments of government; which (3) should be constitutionally equal and mutually independent; and finally, (4) a corollary doctrine as stated by John Locke that the legislature may not delegate its powers.[1] Following this concept, nearly all modern Constitutions, from the document written at Philadelphia in 1787 through the French Declaration of the Rights of Man and of the Citizen of August 1789, up to the Constitutions of new states of Africa and Asia, provide for the separate establishment of legislature, executive and judiciary. Nepal is no exception to this.

Established Court systems are found in all advanced political systems.[2] The very objective of adopting Court systems, among others, is to uphold the rule of law which ultimately helps to maintain the constitutional state[3] in a democratic framework of government. However, the functions of judiciary vary in different countries and legal systems.[4] In common law jurisdictions, courts interpret the constitution and laws. They also make precedents while interpreting those Constitution and laws. In civil law jurisdictions, Courts interpret the law, but are, at least in theory, prohibited

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1 Locke, *The Second Treaties on Civil Government,* as cited in *The Constitution of the United States of America: Analysis and Interpretation*, prepared by The Governmental Research Service Library of Congress, US Government Printing Office Washington (1973).

2 The principal work of the judiciary is the adjudication of controversies. The court must decide all questions of law; and, if the case is not before a jury, the court must also rule on the facts.

3 In the constitutional state, power is controlled because it is distributed among the organs of state or government departments in such a way that they are each subjected to reciprocal checks and forced to cooperate in the exercise of political power. However, the division of *functions, structures* and *powers* among the three major branches of state is not precise. There are also often doubts whether the principle of '*shared'* or '*separated powers'* is the essence of constitutionalism.

4 The identification of laws into particular families of legal system should not be made on the basis of similarity or dissimilarity of any particular legal rules. Two laws cannot be considered as belonging to the same family, even though they employ the same concepts and techniques, if they are founded on opposed philosophical, political or economic principles, and if they seek to achieve two entirely different types of society. (*See*, David and Brarely, *Major Legal Systems in the World Today,* Stevens and Sons London (1985), pp. 18-22.

from creating laws or precedents, and thus, do not issue rulings more general than the actual case to be judged. In practice, jurisprudence plays the same role as case law. In socialist law, the primary responsibility for interpreting the law belongs to the legislature.[5]

2. The Nepalese Judicial System

The history of judicial system[6] in Nepal can be studied on a two-fold basis: (1) the judicial system of traditional era, which includes: a) the Kirant period b) the Lichhchhavi period and c) the Medieval period (the Dynasty of Mallas and Shahs) and (2) the judicial system of the modern era, which primarily includes: (a) the judicial system in the Rana period (b) the judicial system from 1950 to 1990, and (c) the judicial system post 1990.

In the Kirant period, the society was governed by *Mundhum*, the greatest legend of Kirants[7] like *Vedas* to Hindus, which was considered to be a Constitution in the dynasty. As stipulated by *Mundhum,* it was the duty of King to deliver justice to the people. There was *Chumlung* (the House of Lords), somewhat like the judiciary of modern times. A convicted person was trailed before the *Chumlung* for declaring punishment. There was an open hearing system in the *Chumlung*. The finality of the case used to be tested by the King. The Kirant dynasty had evolved a judicial system of its own. The witness had to swear on God before testimonial was given. There were various Courts, namely, *Kuther, Suli, Lingwal, Mapchok Tribunals* and *Kar Bisti* to adjudicate various types of legal and religious disputes in the era[8].

The Lichhchhavi dynastic chronicles, supplemented by numerous stone inscriptions, are particularly full from AD 500 to 700; a powerful, unified kingdom also

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5 In Nepal, the UCPN (Maoist) have proposed the parliament model of interpreting laws for the new Constitution. However, accepting this proposal in the Constitution would be to destroying the essence of constitutional supremacy.

6 There are at least four choices for the development of any law or legal system. First, the system developed on the basis of existing customs or developed independently over a long period of time in the own history of a country; secondly, the system as developed by the contribution of scholars, jurists or developed from the process of codifying laws; thirdly, the system developed on the basis of court practices or having influenced from the decision or approach of the court rendered and taken in a particular cases or time; fourthly, the system developed on the basis of revolutionised their laws and institutions and breaking away from the past. Of these four categories of the development of law and legal system, the Nepalese legal system happened to belong to the first category. For details, see, Bhimarjun Acharya " Indigenizing the Nepalese Legal System: Cases for Debate", published in *Essays on Constitutional Law*, Vol. 34/35, Nepal Law Society, (2001).

7 Kirants were a Mongolian tribe, and it is believed by the historians that they originally migrated from some province of China to Nepal via Tibet. The Kirant dynasty ruled the ancient Nepal with cultured practices of life. *See also*, Dr. Jagadish Chandra Regmi, *Constitutional Tradition of Nepal* 15 (2060 third ed). Dr. Jagadish Chandra Regmi, *Judicial Custom of Nepal,* Tannari Publication, First Edition, Kathmandu Nepal (1979).

8 Justice Gajendra Keshari Banstola, "Our Ancestors", *Nayaydoot.* Vol.3. Year, 5, p.1.

emerged in Tibet during this period, and the Himalayan passes to the north of the valley were opened. In this period, the legal system was based on *Dharmashastra*, including religions, myths and realities. The rulers in the era had paid sufficient attention towards the development of well-managed justice system. There were different branches of judiciary, namely, the *Panchali*, the *Adhikaran*, the *Antarasan* and the *Parmasan*. The *Panchali* and the *Adhikaran* were the first instance Courts. They were like the trial Courts of today's Nepal. The *Antarason* and *Parmasan* were high level Courts formed in royal palace. The nature of these Courts was like a review Court.[9]

The middle period history of Nepal is usually considered coterminous with the rule of the Malla dynasty (10th–18th centuries) in Nepal Valley and surrounding areas. Although most of the Lichhchhavi kings were devout Hindus, they did not impose *Brahmanic* social codes or values on their non-Hindu subjects; the Mallas perceived their responsibilities differently, however, the great Malla ruler Jaya Sthiti (reigned c. 1382–95) introduced the first legal and social code strongly influenced by contemporary Hindu principles. In the Malla era, the Kingdom of Nepal was primarily divided into two provinces: the *Karnali Pradesh* and the *Gandak Pradesh*. The governing system was different in the provinces. Yet the common feature between the principalities system was the recognition of *Dharmasastra* as the main source of their laws. The Malla had established the Court system in accordance with the nature of cases. There were *kotiling Adalat* and *Itachapali Adalat*. The Jurisdiction of the former was confined to the civil cases and the latter to the criminal ones[10.] However, the King was final authority of executive, judicature and legislature branches. In the Shah period prior to 1853, the judicial system was very much nearest to the judicial system of continental legal system. The investigation of the criminal cases was made by the police personnel appointed by the Court. In fact, the Court system existed in the Malla era was given continuation in this era. At the time of Prithvi Narayan Shah's regime, the Court system was developed extending to outside the valley. A High Court was established in the valley. It was empowered to decide the preliminary cases of the territory of Kathmandu valley and to review the cases which were decided by the Court established outside the valley.

The judicial system in the Rana period was also closer to the continental legal system (also called as inquisitorial legal system). As it was the despotic rule, all executive, legislative and judicial powers were vested in *Shree Teen Maharaj* (the title given to the Prime Ministers of Rana families). The then Prime Minister Judha Shamsher wanted to show that he was not a despotic ruler, and in order to demonstrate this, he wanted to separate the function of the judiciary from the executive and legislature. In 1997, he established a Court called *Pradhan Nyayalaya*.

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9 Dr. Jagadish Chandra Regmi, *op. cit.*

10 Ibid.

It was an apex Court of the country. It was independent of the legislature and executive.

The history of the modern judiciary in Nepal starts since 1950, when a revolution overthrew the hereditary and despotic Rana Prime Ministerial system, a system in which the post of Prime Minister was passed from one member to another member within the same family. It was replaced by an interim constitutional regime meant to be a modern constitutional democracy. Different forms of judiciary have been in place during the last 58 years within the framework of Nepal's unitary state. Thus, one of the key subjects of national debate in modern Nepal is restructuring the judiciary – in particular, devolving judicial power to the autonomous provinces, according to the aspiration of the people of Nepal.

In this era, the Interim Government Act, 1950 was promulgated that recognised the Pradhan Nyayalaya as an apex Court of the land. Besides the Constitution, there was Pradhan Nyayalaya Act (1951) which made several provisions regarding Pradhan Nyayalaya. For the first time in the legal history of Nepal the Act empowered Pradhan Nyayalaya[11] the power of judicial review. By exercising this power, the full bench of the Pradhan Nyayalaya in *Bisheshwor Prasad Koirala v. Commissioner Magistrate* case declared the Section 1 (sa) of Commissioner Magistrate void as being contrary to the Section 30 of the Pradhan Nyayalaya Act.[12] Unfortunately in 1953, through a second amendment, the Late King Tribhuvan abrogated all power of Pradhan Nyayalaya to stay the order on writ petition and to declare the administrative and legislative actions null and void. He dismissed Section 30 of the Pradhan Nyayalaya Act that had empowered *Nyayalaya* (judiciary) the exclusive power of review.

After the passing away of Tribhuvan, due to political pressure, King Mahendra again restored the power of Pradhan Nyayalaya and revived the Section 30 in 1955. But, in 1956, he dismissed in total the Pradhan Nyayalaya Act and enacted the new Act called the Supreme Court Act. The Supreme Court Act, 1956 established the Supreme Court as a Court of Record.[13] The Act made a new hierarchy of Court, which included: Supreme Court, Appellate Court, and Amini Court. The Act established the Supreme Court as the highest judicial body, with powers and structure corresponding generally to those of the Supreme Court of India. Special circuit Courts were organised and sent into the districts to provide citizens easier access to the legal system. These Courts were empowered to audit public accounts, hear complaints of all kinds, make arrests, hold trials, and impose sentences. An important step toward a unified judicial system came in 1956 with the establishment, mostly in the Tarai, of a series of district Courts that heard civil and criminal cases. Appeals Courts were set up in Kathmandu.

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11 Section 30 of the Act.

12 2016 Nepal Law Report, p 123.

13 *See,* Supreme Court Act (2013).

Under the *Panchayat*[14] Constitution, the Court system was headed by the Supreme Court, composed of a chief justice, nine judges, and a small secretarial staff. Below the Supreme Court were fourteen zonal Courts, which, in turn, oversaw seventy-five district Courts throughout the country. All the lower Courts had both civil and criminal jurisdiction. Although the judiciary technically was independent, in practice the Courts never were assertive in challenging the King or his ministers.
The Constitution promulgated in 1990 reorganised the judiciary, reduced the King's judicial prerogatives, and made the system more responsive. Under the new system, the King appointed the chief justice of the Supreme Court and the other judges (no more than fourteen) of that Court on the recommendation of the Judicial Council. Below the Supreme Court, the Constitution established sixteen Appellate Courts and seventy five District Courts. The judges of the Appellate and District Courts also were appointed by the King on the recommendation of the Judicial Council. The Judicial Council, established in the wake of the pro-democracy movement and incorporated into the Constitution, monitored the Court system's performance and advised the King and his elected government on judicial matters and appointments. The Council membership consisted of the Chief Justice of the Supreme Court, the Minister of Justice, the two most senior judges of the Supreme Court, and a distinguished judicial scholar. All lower Court decisions, including acquittals, were subject to appeal. The Supreme Court was the Court of last resort, but the King retained the right to grant pardons and suspend, commute, or remit any sentence levied by any Court on the recommendation of Council of Ministers.

3. Constitutional Backup

3.1 Government of Nepal Act 1948

Government of Nepal Act, declared in 1948 by the then Rana Prime Minister Padma Shamsher, is considered as the first Constitution of Nepal.[15] It had, for the first time,

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[14] Party-less system introduced by the then King Mahendra.

[15] *Manab Naya Sastra*, the first written legal document of the country, was promulgated in the time of Jayesthiti Malla, the popular Malla king. It was a comprehensive codification of substantive and procedural rules based largely upon Hindu scriptures. Its publication marked a watershed in Nepali law because since the date to the present codified law has been the primary source of authoritative law in Nepal. The *Manab Naya Sastra* put an end to the era of indefiniteness and ambiguity caused by reliance upon the numerous Hindu scriptures that were taken as the authorities. Another landmark in the development of law in Nepal was the promulgation in 1853 during the rule of Prime Minister Jung Bahadur Rana of the Muluki Ain (General Code of Law of the Land). The Muluki Ain was a codification of all the laws of the land: civil, criminal, religious and customary, its promulgation accompanied by special enactment dealing with succession to the throne, state, affairs and the armed forces. It was an attempt, largely successful in its time, to provide a code comprehensive enough to run the national administration and govern the conduct of individuals. In 1963 a New Muluki Ain replaced the Muluki Ain.

inserted the list of fundamental rights into the Constitution which included:[16] right to personal liberty; right to freedom of expression; right to freedom of publication; right to freedom to form association or organisation; right to freedom of religion; right to complete equality in the eye of law; right to cheap and speedy justice; right to free compulsory elementary education; right to vote; and right to property.

There was provision of judiciary incorporated in the Act.[17] Cheap and speedy justice was expected. As stipulated by Article 53(A) of the Act, there was Pradhan Nayayalaya as the High Court of the country[18]. Article 55 of the Act had recognised the High Court as a Court of Record and had such jurisdiction, but the power and authority given to it or the administration of justice could be exercised as prescribed by the law[19]. The High Court was vested with the power to supervise overall Courts for the time being subject to its jurisdiction[20] The Act was, however, silent empowering the judiciary the power of judicial review. The Court was not independent; it was accountable to Ranas and could not go beyond the will of Ranas.[21]

3.2 Interim Government of Nepal Act 1951

The Government of Nepal Act 1948 did not exist for a long time because of the internal conflict among the Ranas, and was not enforced. As a result, on April 10, 1951 King Tribhuvan promulgated an interim Constitution known as the Interim Government of Nepal Act 1951, pending the framing of a democratic Constitution by a Constituent Assembly elected by the people. As the proposed Constituent Assembly was not elected, the Interim Constitution remained in force until 1959 when it was replaced by the Constitution of the Kingdom of Nepal, 1959.

This Constitution had a provision for the judiciary. The Pradhan Nyayalaya was given the status of Apex Court. The Constitution was, however, silent on the power of judicial review to the judiciary. Similarly the fundamental rights were incorporated under the provisions of the directive principles and policies of the state. They were merely directives to the Government in the Governance of the state. The violation of such rights could not be questioned in the Court of Law.

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16 Government of Nepal Act art. 4 (1948).

17 Ibid.

18 I*d.* art. 53 (a). "These shall be a high Court for Nepal (Pradhan Nyayalaya). The high Court shall consist of a Chief Justice and such other Judges, no exceeding twelve in number as High Highness may from time to time deem it necessary to appoint. Provided that High Highness may, on the recommendation of the chief justice, appoint to act as additional judges of the High Court for such period not exceeding two years as may be required, and the judges so appointed shall, while so acting, have all the powers of a Judge in the Court."

19 I*d.* art.55.

20 I*d.* art.56.

21 *See* I*d.* art.II.

The Pradhan Nyayalaya had displayed judicial creativity of a high order in this period. *Bed Krishna V. Secretary Udyog Banijya* case is a unique example of this kind, where the Court held that the doctrine of the rule of law was an essential part of the Constitution and the doctrine could be enforced only though the power of judicial review[22].

3.3 The Constitution of the Kingdom of Nepal 1959

The Constitution framed in 1959 introduced representative Government in Nepal for the first time. The general elections were held on 18th February, 1959 to elect the first parliament. The Constitution was regarded as the fundamental law of the state and all laws inconsistent with it would to the extent of such inconsistency be void under Article 1(1) of the Constitution[23].

Promulgated by the then King Mahendra with the exercise of royal (state) power and privileges inherent in the King, and with a desire to guaranteeing fundamental rights to the people (as was claimed and expressed by the King through preamble), this was the first Constitution to guarantee power of judicial review to the judiciary.[24] Similarly, the Constitution, for the first time in the history of Nepalese constitutional laws, guaranteed the right to remedy as a fundamental right of the people.[25] To this provision, the Court had power to issue necessary and appropriate orders and writs including the writs of habeas corpus, mandamus, certiorari, prohibition and quo-warranto for the enforcement of rights enunciated by the Constitution.

3.4 The Constitution of Nepal 1962

In 1960, late King Mahendra suspended the Constitution of the Kingdom of Nepal, 1959 dissolving the Parliament and promulgated a new Constitution, a Constitution based on non-Party system, the Constitution of Nepal, 1962. It was claimed that the Constitution, by virtue of state powers and privileges inherent in the King, was promulgated by the King.[26]

This Constitution was the fundamental law of the land and all laws inconsistent with it would be void[27]. The Court had very limited power under the Constitution. All executive, legislative and judicial powers were granted to the King. The Constitution had provision for the judiciary. However, the Court was not

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22 *Bed Krishna Shrestha v. Secretary Udyog Vanijya*, NLR 2016 at 234.
23 *See* The Constitution of The Kingdom of Nepal, art 1(1) (1959).
24 *See Id*. at preamble.
25 *See Id*. art. 9.
26 *See* The Constitution of Nepal, preamble (1962).
27 *See Id*. art. 1(1).

independent of the executive. Justices including the chief justice of the Supreme Court were appointed by His Majesty on his pleasure.[28]

The Supreme Court had extra-ordinary powers to issue necessary and appropriate orders and writs including the writs of habeas corpus, mandamus, certiorari, prohibition and quo-warranto for the enforcement of right conferred by the Constitution.[29]

3.5 The Constitution of the Kingdom of Nepal 1990

The Constitution of the Kingdom of Nepal, 1990, was the marked contrast to all the preceding Constitutions of Nepal. It was, as compared to other Constitutions, considered both as a democratic and liberal Constitution. It had assessed some basic structures in the preamble as the core values of Constitution. They included- parliamentary democracy, adult franchise, constitutional monarchy, independent judiciary and multi- party system. It also assessed the King bound to cabinet; the cabinet to parliament; the parliament to people; and the people all in all -sovereign.[30]

The Constitution outlined the framework and organisation of the political and social order that were believed to have suited to Nepal. It articulated the structure of government, procedures for selection and replacement of government officials, and distribution and limitations of their powers. In a unique provision, the Constitution provided for the existence of a Constitutional Council for making recommendations to the King on the appointment of officials to Constitutional Bodies. The Council consists of the Prime Minister as chairperson, the chief justice, the speaker of the House of Representatives, the chairman of the National Assembly, and the leader of the opposition in the House of Representatives as members.

3.6 The Interim Constitution of Nepal 2007

The Interim Constitution of Nepal, 2007 is a prevailing fundamental law of the country. Promulgated by the then House of Representatives and approved by the then Interim Legislature, the Interim Constitution of Nepal is the sixth Constitution of the country. The Constitution has, among others, guaranteed the rights such as- the right to live with dignity, rights regarding (criminal) justice, right against preventive detention, right against torture, right against exploitation, right against exile as the basic human security rights. The Constitution has established the republic and vests state authority in the Nepali people.

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28 *See Id*. art. 69.

29 *See Id*. art. 71.

30 Bhimarjun Acharya, *Constitutional Crisis in Nepal,* LIBERAL TIMES, The Friedrich- Naumann-Stiftung, Regional Office, South Asia, Delhi (2003).

The building of justice, of peace and of development is one of the ever-renewed aspirations that have been accompanying the saga of our people throughout their existence. This Constitution aims to bring such peace and development by re-structuring the state.

The Constitution guarantees for the judiciary such as, institutional and functional independence, the security of the tenure and so forth. Follow up to the 1990 Constitution, the Constitution has advanced the mechanism called Judicial Council to make recommendations and give advice concerning the appointment of, transfer of, disciplinary action against and dismissal of judges and other matters of the District Courts and Appellate Courts and the appointment of justices of the Supreme Court, and the mechanism called Constitutional Council to make recommendations for the appointment of the Chief Justice of the Supreme Court.

3.6.1 How the Judiciary Works under this Constitution

Currently, Nepal's judiciary operates within the framework of parliamentary democracy. All powers relating to justice are exercised by Courts and other judicial institutions in accordance with the Constitution, the laws and the recognised principles of justice. Judicial procedures are adversarial, largely based on common-law principles and lawyers play a key role in the process of judicial decision making.

The Constitution has stipulated a three-tier Court system, namely, the Supreme Court, the Appellate Court[31], and the District Court[32]. In addition to three-tier unitary judiciary in the country, there are several tribunals and specific types of Courts established by statutes. They are meant to hear special types of applications, claims and controversies. For example, there is one Administrative Court, one Special Court, two Public-Debts Courts, four Revenue Tribunals, one Military Court, one Labour Court and one Constituent Assembly Court.

The Constituent Assembly Court has been functioning since early this year. It deals exclusively with complaints regarding Constituent Assembly elections. Except for the Constituent Assembly Court, all these special Courts and tribunals are created and regulated under the terms of their enabling parliamentary statute. These statutes define the number, size and location of Courts, as well as their territorial and subject-matter jurisdiction. Where there are complicated questions of law, or issues of fundamental rights and constitutional interpretation, cases decided by these Courts

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31 The Appellate Court is a court of appellate jurisdiction. There are currently 16 appellate courts in the country. It has jurisdiction to hear appeals on decisions held by the district court. In addition, the appellate court has also writ and original jurisdictions.

32 The District Court is a court of first instance and there are District Courts in every seventy five districts of the country. Unlike in many other countries, the District Courts in Nepal are competent to hear both civil and criminal cases. The jurisdiction of a District Court is stated in general terms and except when otherwise provided for by specific laws. All cases within its territorial jurisdiction are to be tried by the District Courts as the court of first instance.

or tribunals may be referred to the Appellate Courts, or the Supreme Court, according to the terms of the enabling law.

The structure of Nepal's Court system is one of the simplest in the region. It is constitutionally defined in substance, and statutorily elaborated in detail. The unified and unitary judiciary makes it easy to administer and to ensure necessary quality control. All judges are appointed on the recommendation of the Judicial Council led by the Chief Justice who, in turn, is appointed and supervised by a high-profile Constitutional Body. A flourishing law profession, a legally qualified judicial bureaucracy and an independent judiciary complement each other. This does not mean that the present three-tier structure and the workings of the judiciary are not in need of reform. But, to effect change, it may not be necessary to start from a blank slate and create everything anew.

The judicial branch is led by the Supreme Court, the highest Court in the judicial hierarchy of the land. In this capacity, the Constitution confers upon the Supreme Court not only original and appellate jurisdiction, but also extraordinary constitutional jurisdiction. This includes the authority of the Supreme Court to hear petitions challenging the constitutionality of any law, and declare such law or any part of it void in order to ensure that *full*[33] justice is done. It can also, when convinced, respond to public-interest litigation involving constitutional and legal issues.[34] As the guardian of the Constitution, the Supreme Court has all the requisite powers and status that such responsibilities call for. All other Courts in the country - that is Appellate Courts, and District Courts - are subordinate Courts and are administered by the Supreme Court. The Supreme Court is a Court of Record. It may initiate proceedings and impose penalties in accordance with law for contempt of itself and of its subordinate Courts or judicial institutions. Except on the matters which fall under the jurisdiction of the Constituent Assembly Court, the Supreme Court has the

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[33] The Constitution uses the adjective 'full' with the term 'justice' (article 107.2).

[34] Article 107 has provisioned for jurisdiction of the Supreme Court : (1) Any Nepali citizen may file a petition in the Supreme Court to have any law or any part thereof declared void on the ground of inconsistency with this Constitution because it imposes an unreasonable restriction on the enjoyment of the fundamental rights conferred by this Constitution or on any other ground, and extra-ordinary power shall rest with the Supreme Court to declare that law as void either *ab initio* or from the date of its decision if it appears that the law in question is inconsistent with the Constitution. (2) The Supreme Court shall, for the enforcement of the fundamental rights conferred by this Constitution, for the enforcement of any other legal right for which no other remedy has been provided or for which the remedy even though provided appears to be inadequate or ineffective, or for the settlement of any Constitutional or legal question involved in any dispute of public interest or concern, have the extraordinary power to issue necessary and appropriate orders to enforce such rights or settle the dispute. For these purposes, the Supreme Court may, with a view to imparting full justice and providing the appropriate remedy, issue appropriate orders and writs including the writs of *habeas corpus*, *mandamus*, *certiorari*, prohibition and *quo warranto*. Provided that except on the ground of absence of jurisdiction, the Supreme Court shall not interfere, under this clause with the proceedings of the Legislature-Parliament concerning the violation of privileges and penalties imposed there to.

final power to interpret this Constitution and other prevailing laws. The Supreme Court, in addition to the Chief Justice of Nepal, consists of up to a maximum of fourteen other Judges. If at any time, the number of existing Judges becomes insufficient due to an increase in the number of cases in the Supreme Court, *ad hoc* Judges may be appointed for a fixed term. [35]

3.6.2 Judiciary-Security Agencies Relations

As Nepal's legal system has been largely influenced by the common law system, and it remains essentially a common law jurisdiction, the nation's judiciary has a central role in protecting and promoting the rights of the people. For this, as aforesaid, Article 107 of the Constitution gives exclusive powers to the Supreme Court to test the validity of any actions including the actions taken by security agencies of the country for the sake of enforcing basic rights enumerated in the law and constitution. Though article 107 of the Interim Constitution is similar to that of article 88 of the 1990 Constitution, there has been a significant shift in the power of Supreme Court in relation to the military issues. For example, the 1990 Constitution had maintained a 'proviso' to the exclusive jurisdiction of Supreme Court to test the validity of the decisions of the Military Court. The proviso read that:

> 'the Supreme Court shall not be deemed to have power under this clause (art. 88) to interfere with the proceedings and decisions of the Military Court except on the ground of absence of jurisdiction or on the ground that a proceeding has been initiated against, or punishment given to, a non-military person for an act other than an offence relating to the Army.'

Despite this proviso, The Supreme Court in *Iman Singh Gurung v. His Majesty's Government and Others*[36], after the advent of 1990 Constitution, declaring the clause (d) of Section (3)(1) of the Military Act, 1961 void from the date of decision, as being contrary to Article 11(1) of the Constitution held that the Constitution had restriction on the power of the Court in interfering the proceedings and decisions of the Military Court, however, it did not mean that the Military Court could do whatever it liked. The judiciary could scrutinize the action and decision taken even by the Military Court if such an action or decision was inconsistent with the Constitution. Another significance of the decision was that it clearly admitted that the right to move Supreme Court in accordance with Art. 88 was a fundamental right. Similarly, in *Manorath Giri v. Council of Ministers and Others*[37], the Supreme Court

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35 Article 102, ibid.

36 2049 Nepal Law Report, Supreme Court, p 710.

37 Verdict held on March 9, 2000.

once again asserted the jurisdiction over military person and tested the validity of action taken by Military Court under the 1990 Constitution.

Despite the 1990 Constitution and 2007 Constitution, the Nepal Army Act 2007 suffers from a number of serious flaws in relation to the civilian and military jurisdictions, which are, to some extent, contrary to the Constitution. Section 22 of the Act is one of the problematic provisions providing as it does blanket immunity from legal proceedings for members of Nepal Army for acts committed in good faith in the course of discharging duties. This provision rules out the exercise of civilian courts' jurisdiction.

Section 70 of the Act provides that army personnel cannot be tried in civilian courts if they have already tried by a court martial for the same offence. This reflects the principle of no double jeopardy. However, this provision could be invoked to prevent civilian court form exercising jurisdiction over serious crimes.

Section 66 of the Act provides that except in the event that a person under the jurisdiction of this Act commits offences mentioned in Section 38 to 65[38] and those offences are committed by a military personnel against a military personnel, if the person under the jurisdiction of this Act commits 'homicide' and 'rape' the cases which arise thereto fall under the jurisdiction of other courts. This provision does not comply with Article 107 of the Constitution. Thus, new arrangements are needed in this connection that except the offence related to military all other offences either committed by a military personnel against a military personnel, or by a military personnel against a civilian, must be tried in the civilian courts.

4. Some Crucial Issues

Improving the judicial competence along with its full independence of other branches of the state, namely, the legislature and the executive, is one of the key issues of re-structuring the judiciary in contemporary Nepal. There are certain ingredients of judicial independence and competence that need to be addressed while drafting the new Constitution. They include:

4.1 Independence

The UN Basic Principles on the Independence of the Judiciary lay out the requisite of independence in the first principle: "The independence of the judiciary shall be guaranteed by the state and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary." The principle of an independent judiciary derives from the basic principle of the rule of law, in particular the principle of separation of

[38] These Sections deal with offences related to enemies.

powers. And, the principle of separation of powers is an essential requirement of the proper administration of justice.

The notion of independence of judiciary includes both *institutional independence* and *individual independence*. The former pertains to the judiciary as an institution, independent of other branches of powers,[39] whereas, individual independence pertains to the freedom of individual judges from unwarranted interferences when they decide a particular case. Such independence does not mean that judge can decide cases according to their personal preferences.[40] The Interim Constitution of Nepal has to a large extent guaranteed the institutional independence on the part of judiciary. However, the questions are, time and again, being raised about the individual independence i.e. the functional independence of judges. Judges are threatened and pressured on the one hand and they are also blamed as being incompetent and unable to maintain their code of conduct. There are charges against judges for irregularities and corruptions.

4. 2. Impartiality

Independence requires that neither the judiciary nor the judges who compose it be subordinate to the other public powers. On the contrary, *impartiality* refers to the state of mind of a judge or tribunal towards a case and the parties to it.[41] Judicial independence is directly linked up with judicial impartiality. The impartiality of the judiciary is recognised as an important element in the administration of justice. It is recognised in International Covenant on Civil and Political Rights (ICCPR) and by Article 14 which establishes a right to fair and public hearing by a competent, independent and impartial tribunal established by law. The Human Rights Committee, the body in charge of monitoring state compliance with the Covenant, has unequivocally stated that the right to be tried by an independent and impartial tribunal "is an absolute right that may suffer no exception."[42]

In England, the Court had held that impartiality requires a judge not only to be impartial, but also to appear to be impartial.[43] Certain legal rules and Constitutional

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39 The notion of institutional independence is set out in the second sentence of Principle 1 of the UN Basic Principles, wherein the duty of all institutions to respect and observe that independence is guaranteed.

40 This notion of independence is set out in the Principle 2 of the UN Basic Principles.

41 The Human Rights Committee has stated that in the context of Article 14.1 of the ICCPR, "impartiality of the Court implies that judges must not harbor preconceptions about the matter put before them, and they must not act in ways that promote the interests of one of the parties."

42 Views adopted on 28 October 1992.

43 *McGonnell v. United Kingdom* (2000), 30 EHRR 241. cited in O. Hood Philips and Jackson, *Constitutional and Administrative Law,* Sweet and Maxwell, London (2001), p. 437.

conventions are clearly intended to facilitate the impartial administration of justice so far as that is possible.

The existence of independent and impartial is at the heart of judicial system of Nepal. That ultimately will help to guarantees basic rights of the people. The new Constitution, laws and policies of a country must ensure that the justice system is truly independent from other branches of the state and judges are impartial in their functions.

4. 3. Financial Autonomy

The judiciary needs adequate resources to discharge its functions appropriately. As one of the three branches of power, the judiciary receives its resources from the national budget, which, in turn, is usually determined by either the legislature or the executive. It is essential that those outlining and approving the state budget take the needs of the judiciary into consideration. Inadequate resources may render the judiciary vulnerable to corruption, which could result in a weakening of its independence and impartiality.[44]

Various international instruments recognize the need for the judiciary to receive sufficient funds. For example, Principle 7 of the UN Basic Principles establishes that "it is the duty of each Member state to provide adequate resources to enable the judiciary to properly perform its functions."

There are also trends where the Constitution itself has provisioned for the judicial budget. For example, the Constitution of Paraguay has provision about budgetary independence.[45] It says that the judicial branch will have its own budget. The National General Budget will allocate the judicial branch an amount that will not be lower than 3 percent of the central government's budget. The judicial branch budget will be approved by Congress and the Comptroller General will verify all its expenses and investments. The Constitution of Costa Rica is another example of providing provision for judicial budget in the constitutional text. First paragraph of Article 177 of the Constitution reads that the percentage to which Article 177 refers for the budget of the Judicial Branch shall be fixed in an amount equal to no less than three and one fourth percent for 1958; in an amount equal to no less than four percent for 1959 and in an amount equal to no less than one percent more for each of the subsequent years, until reaching the minimum six percent indicated.[46] In our context, out of total budget, only 0.6 percent budget is allocated for the judiciary. It

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44 See the *International Principles on the Independence and Accountability of Judges, lawyers and Prosecutors,* Practitioners Guide No. 1, International Commission of Jurists, p. 33.

45 Article 249 of the Constitution.

46 As added by Laws No. 2122 of May 22, 1975, No. 2345 of May 20, 1959 and No. 2738 of May 12, 1961, all of which have kept this text.

needs to be made timely and practical so that it can maintain financial autonomy of the judiciary.

4.4 Appointment

In order to guarantee the independence and impartially of the judiciary, international law requires States to appoint judges through strict selection criteria and in a transparent manner. Unless judges are appointed on the basis of their legal skills, the judiciary runs the risk of not complying with its core function: imparting justice independently and impartially. Therefore, clear selection criteria based on merit are an essential guarantee of independence.

There are two crucial issues related to the appointment of judges. The first is related to the criteria applied to the appointment, where international law stipulates clear guidelines. The second issue consists of the body, and the procedure within that body, in charge of appointing members of the judiciary. On this topic, international standards do not explicitly determine which body within a State has the power to appoint judges or the exact procedure to be followed. However, it is important to bear in mind that any appointment procedure must guarantee judicial independence, both institutional and individual, and impartiality, both objective and subjective. This requirement derives from the principles of separation of powers and of checks and balances, which constitute indispensable safeguards to this end.

In order to avoid appointments that would seriously undermine the independence and impartiality of the judiciary, international law specifically excludes selection criteria such as a person's political views, race or colour. These motives are irrelevant to the judicial function, the exception being the requirement for a person to be a national of the State concerned.

The UN Basic Principles establish that:

> Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.

In Nepal, the Judicial Council is an exclusive authority for dealing with appointment of judges. Headed by the Chief Justice of the Supreme Court, the other members in the Council are Minister for Justice, the senior most judge at the Supreme Court, a

person nominated by the President from among jurists, and the senior advocate or an advocate who has at least twenty years of experience and appointed by the chief justice on the recommendation of Nepal Bar Association.

The first three members including the Head of the Council are ex-officio members and the other two members are nominated on the recommendation of Prime Minister and Nepal Bar Association. The term of office of the members so nominated is four years and they may be removed from office on the same grounds and in the same manner as provided for the removal of judge of the Supreme Court. The Constitution nowhere requires nominated members to tender their resignations to any party leader or to any minister or be accountable to them. Any sort of pressure or request upon any member of the Council to work in the party or government line is a violation of the Constitution and an attack on Judicial Council, which is ultimately an attack on judiciary.

The Judicial Council is a unique provision advanced by the Interim Constitution of Nepal for making recommendations or giving advice concerning the appointment, transfer, disciplinary action and dismissal of judges and other matters relating to the judicial administration.[47] This is a special arrangement which is not generally found in other countries with a common law system where judges are normally appointed by the head of state acting on the advice and recommendation of the Council of Ministers. Why did the framers want such an arrangement in the Nepali Constitutions? The possible answer to this question is that they have wanted judiciary to be completely independent from other branches of the government, namely the executive and legislative so that the judiciary could provide a real check against the power of the executive, and the excesses of the executive. The composition of the Council, as a separate and independent mechanism, therefore, means that there is no chance for active roles on the part of government in the appointment of judges and there is no room for politicizing and interfering with judicial appointments. This is the very message of the Constitution to all rulers and

[47] The provisions for Judicial Council and Constitutional Council can be called as the innovations of Nepalese jurists who for the first time tried to incorporate the same in the 1990 Constitution of Nepal. Sri Lanka, maybe inspired by Nepali Constitutions, incorporated a similar provision in her Constitution in late 2000. Article 122 of the Constitution of Sri Lanka has a provision for Constitutional Council, which consist of the two vice-presidents, the prime minister; the leader of the main opposition in parliament; the leader of the House in Parliament; the member of the council of ministers in charge of the subject of Constitutional affairs; the chairman of the Chief Ministers' Conference; two retired judges of the Supreme Court or of the Court of Appeals established by the Constitution, or any other law, appointed by the president after ascertaining the views of the chief justice, and who serve for a period of three years. The Chair of the Constitutional Council is assumed, in rotation, by the two Vice-Presidents -- each Vice-President holds office as Chairperson for a period of six months at a time.

politicians.[48] So I would like to recommend to continue the provision even in the new Constitution.

4.5 Conditions of Tenure

One of the basic conditions for judges to retain their independence is that of security of tenure. Unless judges have a long-term security of tenure, they are susceptible to undue pressure from different quarters, mainly those in charge of renewing their tenure. This problem is particularly acute in countries where the executive plays a predominant role in the selection and appointment of judges. In such countries, judges may be subjected to, and succumb to, political pressure in order to have their terms renewed, thereby compromising their independence.

The international standards on the independence of the judiciary establish a number of requirements related to the conditions of service and tenure of judges. For example, the UN Basic Principles stipulate that States have the duty to guarantee the conditions of service and tenure in their legislation: "The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law". [49] When referring specifically to tenure, the Principles stipulate that "Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists".[50] While this provision does not unambiguously state that it is preferable for judges to be appointed for life (always subject to their ability to properly discharge their functions), tenure for life provides a safeguard for judicial independence.

Tenure for life is provided for in the Latimer House Guidelines, which clearly state that permanent appointments should be the norm. The Guidelines also recognize that certain countries will appoint judges for temporary posts. These appointments, however, must comply with the general conditions of tenure in order to safeguard their independence. [51] This is also the case with the Universal Charter of the Judge, which provides that "a judge must be appointed for life or for such other period and conditions, that the judicial independence is not endangered".

In our case, the President appoints the Chief Justice of the Supreme Court on the recommendation of the Constitutional Council, and the Chief Justice appoints other

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48 For more information of the Judicial Council you can read: Bhimarjun Acharya, *Attack on Judicial Council*, published on 2008-12-13 22:52:04 My Republica.

49 UN Basic Principles on the Independence of the judiciary, Principle 11, Principle 1.3. of the Council of Europe's Recommendation No. R (94 12) is identical.

50 Ibid., Principle 12

51 Latimer House Guideline II.1: "Judicial appointments should normally be permanent: whilst in some jurisdictions, contract appointments may be inevitable, such appointments should be subject to appropriate security of tenure".

Judges on the recommendation of the Judicial Council. The tenure of office of the Chief Justice is six years from the date of appointment. Any person who has worked as a Judge of the Supreme Court for at least three years is eligible for appointment as Chief Justice. Any person who has worked as a Judge of an Appellate Court or in any equivalent post of the judicial service for at least seven years, or has worked as a gazetted first class officer or above of the judicial service for at least twelve years, or has practiced law for at least fifteen years as a law graduate advocate or senior advocate, or a distinguished jurist who has worked for at least fifteen years in the judicial or legal field is eligible for appointment as a Judge of the Supreme Court. If the office of the Chief Justice becomes vacant, or the Chief Justice is unable to carry out the duties of his/her office due to illness or any other reason, or he/she cannot be present in office due to a leave of absence or his/her being outside of Nepal, the most senior Judge shall act as the Acting Chief Justice. The Chief Justice and other Judges of the Supreme Court shall hold offices until they attain the age of sixty five years. [52]

The Chief Justice of the Supreme Court and the permanent Judges of the Supreme Court who have worked a minimum for five years are entitled to pension after retirement from their service as provided in law. Except as otherwise provided for in the Constitution, the remuneration, leave, allowances, pension and other conditions of service of the Chief Justice and other Judges are regulated by the law. Notwithstanding anything contained above, the Chief Justice or Judges of the Supreme Court who has been removed from his/her office through impeachment, shall not be entitled to any gratuities and pensions. The remuneration, privileges and other conditions of service of the Chief Justice and other Judges of the Supreme Court, shall not be altered to their disadvantage. [53]

4.6 Accountability

While judicial independence forms an important guarantee, it also has the potential to act as a shield behind which judges have the opportunity to conceal possible unethical behaviour. [54] For this reason, judges must conduct themselves according to ethical guidelines. In order to provide judges with clear rules of conduct, several countries have approved codes of ethics to regulate judicial behaviour.[55] In some cases, judges have drafted these codes; in other cases, Governments have sought their input. In the international sphere, the Bangalore principles of Judicial Conduct

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52 Article 103, ibid.

53 Article 104, ibid.

54 For a discussion on corruption in the judiciary, see Richard J. Scott, "Towards an ethic to control judicial corruption", in Strengthening judicial independence, Eliminating judicial Corruption, CIJL Yearbook 2000, P.117.

55 See, for instance, the Code of Conduct for United States Judges and the Code of Ethics of the Peruvian Judiciary (Codigo de Etica del Ponder Judicial del Peru).

contain the set of values that should determine judicial behaviour. These values, which are reflected in most codes of conduct, are: independence, impartiality, integrity, propriety, equality, competence and diligence. Grounds for removal based on a judge's conduct will normally be based on these principles. It is worth distinguishing between judicial accountability for the discharge of professional functions, for which there are clear rules of conduct, and accountability for ordinary crimes judges may commit in their private capacity, for which the applicable rules are the same as for other individuals.

As a general rule, judges can only be removed for serious misconduct, disciplinary or criminal offence or incapacity that renders them unable to discharge their functions. This should only occur after the conduct of a fair procedure. Judges cannot be removed or punished for bona fide errors[56] or for disagreeing with a particular interpretation of the law. Furthermore, judges enjoy personal immunity from civil suits for monetary damages arising from their ruling. [57] States have a duty to establish clear grounds for removal and appropriate procedures to this end. The determination as to whether the particular behaviour or the ability of a judge constitutes a cause for removal must be taken by an independent and impartial body pursuant to a fair hearing.

The UN Basic Principles contain a number of provisions on the discipline and removal of judges. Principle 17 states that "a charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. Otherwise requested by the judge, Principle 18, which deals with the grounds for removal, spells out the permissible categories for removal:

"Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties".[58]

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[56] See the Concluding Observations of the Human Rights Committee on Viet Nam, UN document CCPR/CO/75/VNM, para. 10, where the committee expressed its concern at "the procedures for the selection of judges as well as their lack of security of tenure (appointments of only four years), combined with the possibility, provided by law, of taking disciplinary measures against judges because of errors in judicial decision. These circumstances expose judges to political pressure and jeopardize their independence and impartiality." (emphasis added).

[57] See Principle 16 of the UN Basic Principles on the Independence of the Judiciary, doc. Cit., which establishes that Without prejudice to any disciplinary procedure or to nay right of appeal or to compensation form the state, in accordance with national law, judges should enjoy personal immunity form civil suits for monetary damages for improper acts or omissions in the exercise of their judicial function". For other provisions with similar content, see operative paragraph 32 of the Beijing Principles and article 10 of the Universal Charter of the Judge.

[58] See also Principle 19 of the UN Basic Principles, which states that "All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct". Operative paragraph 27 of the Beijing Principles is identical.

Furthermore, the UN Basic Principle sanctions the obligation on passing legislation to enable judges to appeal disciplinary decisions. Principle 20 stipulates that "decisions in disciplinary, suspension or removal proceedings should be subject to an independent review." [59]

In our case, the Chief Justice or other Judges of the Supreme Court are deemed to have been relieved from their office in the following conditions: if the Chief Justice submits his/her resignation before the Council of Ministers and a Judge submits his/her resignation before the Chief Justice, if he/she attains the age of sixty five years, if an impeachment resolution is passed by the Legislature-Parliament, and if he/she dies.

A proposal of impeachment may be presented before the Legislature-Parliament against the Chief Justice or any other Judges on the ground that they are unable to perform their duties for the reasons of incompetence, misbehaviour, failure to discharge the duties of his/her office in good faith, physical or mental condition, and if by a two-thirds majority of the total number of its members existing for the time being passes the resolution, he/she shall *ipso facto* be relieved from his/her office. The Chief Justice or the Judge, against whom impeachment proceedings are being initiated pursuant to clause (2) above, shall not perform the duties of his/her office until the proceedings are final. [60]

5. Options for Change

Constitutional Court: The organ or organs that are empowered to judge the constitutionality of laws may be a nation's regular Courts or a specially created Constitutional Court. In the Nepali judicial system the regular Courts have been performing this function for the last half decade. In the course of adopting a new Constitution, we can think of some modifications in the judicial system that we have followed for the last couple of decades. One step in this regard will be to establish a special Constitutional Court outside of the regular judicial system. At least in the context of Nepal, maybe the desire of the Constituent Assembly to create a new high-ranking and prestigious organ upon which the power of control over government could be provided. It can be formed with the jurisdiction to decide on controversies concerning the constitutional legitimacy of laws and acts having the force of law; on controversies arising over constitutional assignments of powers within the state and province (if any); on issues of public importance and so others.[61]

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[59] Principle 20 excludes this requirement in specific cases, namely "decisions of the highest court and other of the legislature in impeachment or similar proceedings".

[60] Article 105, ibid.

[61] See also, Bhimarjun Acharya, *Making Constitution through Constituent Assembly,* Pairavi Prakashan, Putalisadak, Kathmandu (2006), p. 127.

There are number of examples where new Constitutions in the world have paid special attention to the creation of Constitutional Court outside regular courts. For instance, the Constitutional Court, the highest in South Africa on constitutional matters, was born of the country's first democratic Constitution in 1994. In an acclaimed new building at Constitution Hill, the 11 judges stand guard over the Constitution and protect everyone's human rights. In South Africa, the Constitutional Court makes the final decision whether an Act of Parliament, a Provincial Act or conduct of the president is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force. [62]

Composed of nine adjudicators qualified to be court judges, and appointed by the President, the Constitutional Court in South Korea, is competent to adjudicate the following matters: 1) The unconstitutionality of law upon the request of the courts; 2) Impeachment; 3) Dissolution of a political party; 4) Disputes about the jurisdictions between State agencies, between State agencies and local governments, and between local governments, and 5) Petitions relating to the Constitution as prescribed by law.[63] In Italy the Constitutional Court passes judgment on: controversies on the constitutional legitimacy of laws and enactments having the force of law issued by the State and the regions; conflicts arising from allocation of powers of the State and those allocated to State and regions, and between regions; accusations made against the President of the Republic, according to the provisions of the Constitution.[64]

Regular Courts: With regard to the hierarchies of the regular Courts, there are feasible options. A three-tier judiciary with the significant modification of existing structure is one option, with a Supreme Court at the top, the Provincial Court in each devolved territory/province and the Lower Courts with necessary divisions in the benches such as labour bench, family bench, civil bench, criminal bench, commercial bench etc. The Provincial Court would have appellate jurisdiction over the lower Courts and tribunals.

There have been principles established and lessons learned in the restructuring of many other smaller democracies, especially in budgeting, planning and personnel administration, integration and standardisation of the judiciary's information-management systems, judicial compensation and access to justice. These may be applicable in a wide variety of Court-reform contexts, whether to justify a Court's existence or its closure, or to accommodate political sensitivities. The Constituent Assembly must also be mindful of serious flaws in the current judicial system, that it is not accessible to most people in the countryside.

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62 The Constitution of South Africa 1997, art 167 (5).

63 The Constitution of South Korea 1948, art 111.

64 Article 134 of the Constitution.

Specialised Courts/Benches: There are some other areas of reforms. The Constitution of Nepal allows for the establishment of special types of Courts or tribunals only for the purpose of hearing special types of cases (but not for the purpose of special cases). Some specialised Courts have also already been established. In view of the varied and complex types of disputes caused by the modern trends, there is an increasing demand for the creation of special benches in accordance with the nature of those disputes for effective and speedy disposal even with the Apex Court.

Similarly, family Courts, juvenile Courts, consumer Courts, are some further instances of the specialised Courts which can be set up at least in the geographical regions where such cases are in growing numbers. These Courts would stand outside the regular and Constitutional Court.

Reform on the Procedural Law: Other major fault observed in the Nepali legal and judicial system has been attached with its characteristics of procedural based system. I prefer to call our judicial system as format based system. There are more formalities rather than pragmatism in the system. The faulty procedural system has been the major cause in delaying justice and affecting overall performance of judiciary. Let us hope that the new judiciary of Nepal will be realistic rather than mechanical, humanistic rather than formalistic and accessible rather than off-limits.

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Justice Systems in Security Organisations of Nepal

Hari Phuyal

1. Introduction

Justice systems emerged with the respective organisations of the security forces along with their establishment. However, military justice system was mainly influenced from the United Kingdom while drafting the Army Act in 1959. The Justice System in the Nepal Police was influenced from India while drafting the Police Act in 1955. After Nepal has ratified a number of international human rights instruments and the changes of the political system, the Army Act was repealed and has developed the military justice system in the same old framework ignoring Nepal's international human rights obligation and current comparative trends. The justice system in the Armed Police Force is mainly based on the Nepal Police and its experiences, but has not met the international standards.

Historically, military justice system maintained not only internal discipline of the organisation, but also had its political dimension and thus was completely separated from the regular justice system. Even recently offenses committed by civilian used to be heard by the courts martial and murder and rape cases were subject to the same provisions. The new Army Act improves the military justice system, but has some provisions which contradict with the Interim Constitution of Nepal and international human rights obligation.

This article explains composition, jurisdiction, investigation, procedures, hearing and other related issues of the justice systems within the organisations of Nepal Army, Nepal Police and Armed Police Force.

Finally, it highlights how the military justice system and the justice systems of the Nepal Police and the Armed Police Force lack independence, impartiality and competence as promised by the Interim Constitution and Nepal's International obligations.

2. Military Justice System

The military justice system is basically guided by the Army Act[1]. The Constitution of the Kingdom of Nepal, 1990, had a provision on military courts which had exempted reviewing their decisions from the Supreme Court.[2] However, that provision was

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1 Army Act, 2006

2 Article 88(2)(a) of the Constitution of the Kingdom of Nepal ,1990

repealed in the Interim Constitution[3] and as a result, the military justice system falls under the jurisdiction of the Supreme Court. The Army Act defines military courts as General Court Martial, Summary General Court Martial, District Court Martial, Summary Court Martial and Special Court Martial.[4]

2.1 Formation of Courts Martial

The General Court Martial comprises of one Lt. General, two Colonels or two Lt. Colonels and two Majors.[5] The Summary General Court Martial comprises of two Majors and one officer of the Nepal Army.[6] The District Court Martial comprises of three officers at least two having the post of commissioners for two years.[7] The Summary Court Martial comprises of an officer having command in the Unit.[8] The General Court Martial and the Summary Court Martial, subject to availability, should have at least an officer with a degree in law.[9]

2.2 Jurisdiction of Courts Martial

Any cases of murder and rape by military personnel are subject to the regular courts.[10] Cases of corruption, theft, torture and enforced disappearances are subject to jurisdiction of the Special Court Martial.[11] The General Court Martial and the Summary Court Martial shall have the jurisdiction to try and adjudicate offences committed by officers and non-commissioned ones.[12] The District Court Martial shall have the jurisdiction over non-officers who have committed offences with imprisonment up to two years.[13] The Summary Court Martial shall have the jurisdiction over both officers and non-officers who have committed offences with imprisonment up to one year or six months.[14] In case a dispute arises on the jurisdictions, the regular courts shall prevail.[15] If a person under the jurisdiction of the Army Act is tried by the court martial or subjected to departmental action, shall not be tried on the same offence. [16]

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3 See Chapter 12 of the Interim Constitution of Nepal, 2007
4 See Section 2(9) and 119 of the Army Act, 2006
5 Section 67(1)(a) of the Army Act, 2006
6 Section 67(1)(b) of the Army Act, 2006
7 Section 67(1)(c) of the Army Act, 2006
8 Section 67(1)(d) of the Army Act, 2006
9 Section 67(2) of the Army Act, 2006
10 Section 68 and 66 of the Army Act, 2006
11 See Section 62(1), (4) and Section 119(1) of the Army Act, 2006
12 See Section 68 (a), and (b) Section of the Army Act, 2006
13 See Section 68(b) of the Army Act, 2006
14 See Section 68(c) of the Army Act, 2006
15 See Section 69(1) of the Army Act, 2006
16 See Section 70 of the Army Act, 2006

2.3 Statute of Limitations

According to the Army Act, there is no statute of limitations on mutiny, desertion, loss or damage to government property, appointment by lying, escaping from custody, corruption, theft, torture and enforced disappearances. However, in other offences, the statute of limitations is fixed by three years.[17]

2.4 Convening of Courts Martial

The General Court Martial shall be convened by the Chief of the Army Staff or an officer authorised by him.[18] The Summary General Court Martial shall be convened by an officer authorised by the Chief of the Army Staff or commanding officer in case of the military operation or immediate senior officer to the commanding officer of the military operation.[19] The District Court Martial shall be convened by the officer authorised to convene the General Court Martial or an officer authorised by him.[20] And, the Summary Court Martial shall be convened by the commanding officer of department, formation or unit.[21]

All courts martial are *ad hoc* and are convened when necessary only. However, officers responsible to convene the courts martial shall have to convene within 30 days from the cause of convening such courts martial.[22]

2.5 Investigation of Cases under the Jurisdiction of Courts Martial

In cases of murder and rape committed by military personnel falling under the jurisdiction of the Army Act, the police shall conduct the criminal investigation. The commanding officer must hand over such person to the investigating authority.[23] Such person shall be suspended until the final decision of the court.[24] However, the organisation of Nepal Army may establish Court of Inquiry in such case and may take appropriate action against the suspect.[25] In order to investigate and file cases on corruption, theft, torture and disappearances to the Special Court Martial, there shall be a Committee, comprising of Deputy Attorney General, Chief of the Legal Section

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17 See Section 71 of the Army Act, 2006
18 See Section 73(1)(a) of the Army Act, 2006
19 Section 73(1)(b) of the Army Act, 2006
20 See Section 73(1)(c) of the Army Act, 2006
21 See Section 73(1)(d) of the Army Act, 2006
22 See Section 73(2) of the Army Act, 2006
23 See Section 66(1) and (2) of the Army Act, 2006
24 See Section 66(4) of the Army Act, 2006
25 See Section 66(4) of the Army Act, 2006

of the Ministry of Defence and a representative of the *Prad Viwak* (Department of Law) not below the rank of a Major.[26]

The investigation and prosecution in the General Court Martial, the Summary General Court Martial, the District Court Martial and the Summary Court Martial is guided by the Court Martial Regulation. The *Prad Viwak*, under the different departments investigates and prosecutes the cases.[27] Upon the complaints[28], the Chief of the Army Staff, on the recommendation of the *Prad Viwak*, may constitute Court of Inquiry as a foundation of action[29]. On the decision of the Court of Inquiry to file the case, the *Prad Viwak* recommends establishing the court martial along with the charge-sheet[30] and on the approval the officer of the *Prad Viwak* files the case against the suspect to the respective court martial[31].

The *Prad Viwak* of the Nepal Army is defined as a legal person to be present at hearing before a court martial.[32] Similarly, *Prad Viwak* involves in investigation,[33] adjudication,[34] appeal hearing [35]and examining of judgments of courts martial.[36] This *Prad Viwak* involves in investigation, prosecution, defence[37] of cases in all the courts martial except in Special Court Martial. Right to defence is only granted in the Special Courts Martial[38].

2.6 Military Detention

Any suspect or the accused of military offence may be detained in military detention facilities.[39] A superior officer may order to arrest such suspect.[40] A person, subject to regular courts may be detained in military detention facility by the order of such court until filing the case.[41] In the case of a fleeing suspect, the commanding officer may request to the Chief District Officer to arrest such person.[42] There is a provision of army police to arrest and detain the suspect and maintain discipline within the

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26 See, Section 66(2) of the Army Act, 2006
27 See, Section 68 of the Army Act, 2006
28 See Rule 3 of the Courts Martial Regulation, 2007
29 See Rule 4 and 5 of the Courts Martial Regulation, 2007
30 See Rule 10 of the Courts Martial Regulations, 2007
31 See Rule 11 of the Court Martial Regulation, 2007
32 See, Section 2(w) and 81 of the Army Act, 2006
33 See, Section 62(2) of the Army Act, 2006
34 See, Section 119(1) of the Army Act, 2006
35 See, Section 119(7) of the Army Act, 2006
36 See, Section 119(1)(2) of the Army Act, 2006
37 See Rule 21 of the Courts Martial Regulation, 2007
38 See Rule 32 of the Courts Martial Regulation, 2007
39 See, Section 74(1) of the Army Act, 2006
40 See, Section 74(2) of the Army Act, 2006
41 See, Section 74(4) of the Army Act, 2006
42 See, Section 76 of the Army Act, 2006

army.[43] The Government of Nepal may allocate any house or part of it as a military prison to detain any person convicted by the courts martial[44].

2.7 Procedure of Courts Martial

The courts martial may be established anywhere.[45] The proceedings of such courts martial remain closed on the issues of national security, public order and protection of the rights of victims.[46] The senior officer presides over the court martial.[47] An officer of the *Prad Viwak* may represent the suspect/accused on his/her request.[48] The suspect/accused may object to any member of the court martial.[49] The representative of *Prad Viwak* also takes oath along with the members of the court martial.[50] The decisions of the court martial are taken on majority basis. However, on the serious cases such as confiscation of entire property and life imprisonment, decision should be made by two-third majority. The representative of *Prad Viwak* may provide separate opinion on the decision.[51] The Commanding Officer or Chairperson of the Court Martial or *Prad Viwak* may issue summon to produce any evidence or document before the court martial and record statements of the suspect/accused.[52] The *Prad Viwak*, on behalf of the court martial, may record statements through sealed questionnaires.[53]

The court martial shall exercise power like regular courts while deciding cases and the Evidence Act shall be applicable to examine the evidence before any courts martial.[54] There are special procedures provided in the Army Act to handle the cases of mentally abnormal suspect/accused person.[55] In certain circumstances, the court martial may be suspended and dissolved if the member of the court martial or *Prad Viwak* is sick or impossible to continue the court martial in view of military necessity or discipline.[56] The decision may be examined by the *Prad Viwak* before forwarding it for execution.[57]

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43 See, Section 78 of the Army Act, 2006
44 See Section 136 of the Army Act, 2006
45 See, Section 79(1) of the Army Act, 2006
46 See, Section 79(2) of the Army Act, 2006
47 See, Section 80 of the Army Act, 2006
48 See, Section 81 of the Army Act, 2006
49 See, Section 82 of the Army Act, 2006
50 See, Section 83 of the Army Act, 2006
51 See, Section 84 of the Army Act, 2006
52 See, Section 86 of the Army Act, 2006
53 See, Section 87 of the Army Act, 2006
54 See, Section 88 to 92 of the Army Act, 2006
55 See, Section 92 to 96 of the Army Act, 2006
56 See, Section 99 of the Army Act, 2006
57 See, Section 100 of the Army Act, 2006

2.8 Offences and Penalties

The Army Act refers to military offences as mutiny, enemy related offences, other offences related to enemy, offences against military operation, desertion, escaping, assault and intimidation, defiance, embezzlement or lose or damage of government property, forgery or falsifying, opposition or obstruction or use of criminal force against superior, offences against property, cheating or coercion, desertion with arms, indiscipline, certification of incomplete documents, false statement or account, appointment by lying, escaping from custody, false allegation, absence, offences related to court martial, freezing salary illegally, irregular arrest or detention, corruption, theft, torture and disappearance, and miscellaneous offences.[58]

Upon committing the above mentioned offences, there may be punishments or penalties such as life imprisonment along with confiscation of entire property, confiscation of his/her part of ancestral property, imprisonment up to fourteen years, removal from service, demotion, freezing of promotion for five years, deduction of salary for three months, freezing of salary until the recovery of losses, freezing of salary increments up to two years, and warning.[59] The Army Act mentions battlefield punishments in case of any offences during military operations.[60] Furthermore, collective fine, after the court of inquiry, may be imposed upon the suspects in case of offence of collective nature such as loss of equipments of barracks.[61]

2.9 Departmental Actions

The Army Act has provisions of departmental actions which may take without establishing the courts martial.[62] There are different officers responsible to sanction departmental actions depending on the post of a person who commits offences amounting to such action.[63] The punishments vary from warning to detention up to 30 days in military detention facility.[64] However, any aggrieved person may request for the court martial against the departmental action.[65]

2.10 Approval of the Judgment and Appeal

The military justice system has provisions for the approval of decisions of General Court Martial, Summary Court Martial and District Court Martial by the authorised

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58 See, Section 38 to 63 of the Army Act, 2006
59 See, Section 101(1) of the Army Act, 2006
60 See Section 104 of the Army Act, 2006
61 See Section 107 of the Army Act, 2006
62 See Section 105(1) of the Army Act, 2006
63 See Section 105(1) (a) (b) (c) and (d) of the Army Act,2006
64 Ibid.
65 See Section 105(2) of the Army Act,2006

officers as prescribed in the Act.[66] Such approving officers may order to revise the decisions or orders of the courts martial on punishments if further/new evidence is produced. Then the courts martial may review the case by examining such evidence.[67]

The Army Act also regulates provisions on appeal. The Special Court Martial is responsible for hearing appeals from the General Court Martial and Summary Court Martial.[68] The Act restricts to appeal to the Supreme Court other than offences of corruption, theft, torture and disappearance.[69] Appeals from District and Summary Court Martial may be lodged only to the Chief of the Army Staff through the *Prad Viwak*.[70] For this purpose, the Chief of the Army Staff shall constitute an Appeal Hearing Committee comprising of a Brigadier General, a Colonel and a representative from the *Prad Viwak*.[71] However, despite of restriction on appeal to the Supreme Court, the aggrieved party may choose to take the case to the Supreme Court under the extra-ordinary jurisdiction through invoking writs.[72]

3. The Justice System of Armed Police Force

3.1 Composition of the Armed Police Special Court:

The Government of Nepal shall establish an Armed Police Special Court.[73] The Special Court comprises of three members under the chairpersonship of the Gazetted Special Class Officer from the Judicial Service Commission, one member from Armed Police with at least Deputy Inspector General and the other Joint Secretary from the Ministry of Home Affairs.[74]

3.2 Jurisdiction

The Special Court has the power to try, hear and adjudicate offences committed by any Armed Police personnel.[75] In case of any offence such as murder, rape or any other offences against the civilians by Armed Police Force personnel is subject to

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66 See Section 108, 109 and 110 of the Army Act, 2006
67 See Section 114 (1) and (2) of the Army Act, 2006
68 See Section 119(1) of the Army Act,2006
69 See Section 119 (3) and (4) of the Army Act, 2006
70 See Section 119(6) of the Army Act, 2006
71 See Section 105(7) of the Army Act, 2006
72 See Article 107(1) and (2) of the Interim Constitution, 2007
73 See Section 28(1) of the Armed Act, 2002
74 See Section 28(3) of the Armed Police Act, 2002
75 See Section 28(1) of the Armed Police Act, 2002

regular court, but invoking such jurisdiction does not prevent to take action within the organisation.[76] The Act does not specify statute of limitations to file the cases.

3.3 Investigation of Cases

The Armed Police Special Court is also authorised for the investigation. The Special Court shall record the statements of the accused.[77] The Armed Police Special Court may order any office or authority to produce written evidence within a specified date and the office or such authority should send it promptly as demanded.[78] The Special Court may summon to the witness for examination. In case of undue delay or heavy expenses or inconvenience, the court can order, through closed questionnaires, to the Chief District Officer for such examination.[79] The Special Court must adjudicate the case within 90 days after the submission of the evidence.[80]

3.4 Detention

The authority responsible for imposing departmental action, subject to conditions, may suspend the accused until the completion of investigation.[81] The suspect/accused may be arrested or detained in Armed Police Force custody by order of superior officers upon committing offences.[82] The Armed Police Special Court, after filing the case, may order the accused to be detained in any regular prisons.[83]

3.5 Offences and Penalties

The Armed Police Force Act refers offences such as staging mutiny/revolts, involving in activities threatening to sovereignty, unity and integrity of the country, selling arms and ammunitions and escaping with them, involving in terrorist activities and exchange of intelligence to unauthorised persons. Further offences such as making arrangements for a mutiny, committing hooliganism in public places, fleeing from duty in times of attacks and looting others' property are also referred in the Act. The offences as assaulting or using criminal force against superior officers, failing to report of a mutiny on due time, involving in activities threatening to functions of the government, and releasing the accused in custody to escape are also referred in the

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76 See Section 22 of the Armed Police Act, 2002
77 See Section 30(1) of the Armed Police Act, 2002
78 See Section 30(2) of the Armed Police Act, 2002
79 See Section 30(3) of the Armed Police Act, 2002
80 See Section 31 of the Armed Police Act, 2002
81 See rule 89(1) of the Armed Police Regulations, 2003
82 See Section 29(1) of the Armed Police Act, 2002
83 See Section 32 of the Armed Police Act, 2002

Act. The Act also mentions offences such as defying order, falsifying records/accts., involvement in political activities, missing arms and ammunitions, fleeing with Government's property, obtaining others' property under coercion, disregarding social and religious harmony, desertion, and resigning from service without permission.

The Act mentions punishments like life imprisonment along with confiscation of entire property, imprisonment from seven to twelve years, imprisonment from five years to seven years and imprisonment from three to five years depending on the nature and magnitude of offences. [84]

3.6 Departmental Actions

Any violations of the code of conducts[85] shall be subject to departmental actions.[86] On conditions if the armed police personnel were negligent in discharging their duties, undisciplined, incapable, not observing code of conducts and committing offences, departmental actions may be imposed and may be suspended[87] or dismissed from the service.[88] The accused may defend in course of proceedings and shall not be dismissed arbitrarily.[89]

Departmental actions should be subject to investigation by the authority responsible for imposing punishment.[90] For such actions, the Armed Police Force Regulations provide authority to investigating authority like a court to summon the suspect/accused to produce witness or written document and to record statements. The accused is provided the right to defend in the proceedings of the case. And, the investigating authority shall submit the report to the concerning authority with his opinion on the case.[91] Investigation may not be conducted on conditions if the accused absconded or convicted otherwise on criminal cases by other courts or on offence of normal case.[92]

3.7 Appeal

The aggrieved party may appeal to the Court of Appeal within 35 days of the decision

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84 See Section 27(1) (2) (3) and (4) of the Armed Police Act, 2002

85 See Section 24 (1) of the Armed Police Act, 2002 and Rule 64 to 84 of the Armed Police Regulations, 2003

86 See Section 19(1) of the Armed Police Act,2002 and Rule 84 to 87 of Armed Police Regulations, 2003

87 See Section 89 of the Armed Police Act, 2002

88 See Section 19(1) of the Armed Police Act, 2002

89 See Section 21 of the Armed Police Act, 2002

90 See Section 19(4) of the Armed Police Act, 2002

91 See Rule 92 (1) and (2) of the Armed Police Regulations, 2003

92 See Rule 93 of the Armed Police Regulations, 2003

of the Special Court.[93] An appeal against the decisions on the departmental actions may be lodged[94] to the senior officers, and to the Government of Nepal in case of such actions against the higher officers.[95]

4. Justice System in the Nepal Police

4.1 Composition of Courts:

Nepal Police has special courts and departmental actions as part of justice system within the organisation**.** The police special courts are constituted according to the posts of the persons who have committed offences as prescribed in the Police Act. Organisation of the police may have the Central Police Special Court for Superintendent of Police or senior to him/her, the Regional Police Special Court for Sub-inspector to Deputy Superintendent of the Police, the District Police Special Court for police Constable to Assistant-inspector[96] and the Special Police Court for serious offences. [97]

All the police courts are of *ad hoc* nature and are formed by the Ministry of Home Affairs, if necessary. Each of the courts comprises of three members under chairpersonship of an officer from the Judicial Service including one from police officer. However, Separate Special Police Court may be formed by the Government of Nepal in case of serious offences of organised nature by any police personnel.[98] These courts have the jurisdictions to try and adjudicate cases depending on the posts of police personnel.[99]

4.2 Statute of Limitations:

The statute of limitations to file the case is unclear. However, generally a case against the suspect must be filed within one year of committing offences mentioned in Chapter Six of the Act[100] and in certain circumstances depending on the notice to the government it could be eight months.[101]

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93 See Section 31 of the Armed Police Act, 2002
94 Section 19(5) of the Armed Police Force Act, 2002
95 See Rule 88 and Schedule 6 of the Armed Police Regulation, 2003
96 See Section 36(1) and (2) of the Police Act, 1955
97 Section 36 A of the Police Act, 1955
98 See Section 36(a) of the Police Act, 1955
99 See Section 36(1) of the Police Act,1955
100 Section 36C (2) of the Police Act, 1955
101 See Section 38(a) and (b) of the Police Act, 1955

4.3 Investigation and Procedure of Cases

The Police Special Courts are authorised to prescribe their own procedures.[102]

4.4 Detention

The Act is silent about the detention of the suspect, but on the order of the superior officer, any such suspect may be detained in the police custody or imprisoned in the regular prison.

4.5 Offences and Penalties

The Act mentions grave offences such as mutiny/revolts or attempts or failing to report immediately such activity to superiors, deviation from patriotism and duty, handing over any garrison/post/fort and arms and ammunitions, government's property and documents to the enemy, and intentionally spreading false terror in the post or in the public.[103] Other grave offences are stated as involving in activities threatening to the government and its functioning and to sovereignty, unity and integrity of the country, looting, abandoning the post/garrison/patrol/guard office during encounter by dacoit, smuggler, bad elements or rioters, selling arms and ammunitions, using criminal forces against superiors, leaving out post/garrison/guard/picket/group/patrol for looting, not promptly handling charge or not maintaining records/accts, causing damage to others' house or building , and showing cowardly manner in discharging duties.[104] Further, other offences as stated in the Act are negligently damaging or losing or destroying or misusing equipments, tools, dress, medals and decoration, cash and kinds, using criminal force against or assaulting persons who supplies ration or goods to the post, disobeying legal order, desertion, sleeping at sentry post or leaving duties with due exchange, leaving out guard/picket/post/patrol, resigning from service without permission or leaving to discharge duties, beating sentries, rejecting duty, releasing the arrested person to escape, pretending to be suffering from diseases and to be physically weak, reporting falsifying details or accounts under his command, involving in political activities, and troubling and threatening fellow persons or causing damage to their properties.[105]

Such offences are subject to punishments of life imprisonment or imprisonment of fourteen years or a fine of the amount equivalent to three years' salary or both, and imprisonment of ten years' or a fine of the amount equivalent to two years' salary or both and imprisonment up to five years' or a fine of the amount

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[102] Section 36C (1) of the Police Act, 1955
[103] See Section 33 (a) of the Police Act, 1955
[104] See Section 36 (b) of the Police Act,1955
[105] See Section 34 of the Police Act, 1955

equivalent to one year's salary or both, depending upon the nature and magnitude of offences respectively.

4.6 Departmental Actions

In case of negligence in duty or incapable or undisciplined or violation code of conduct[106] police personnel are liable to departmental actions.[107] The prescribed authority may impose punishments such as dismissal, removal from service, demotion to lower scale or rank or others including a fine of the amount equivalent to one month's salary, physical fatigue or detention up to 15 days or freezing of salary, and expulsion from special duty.[108] Gazette officers are dealt with by the Government of Nepal and others including junior officers by the Superintendent of Police or senior officers.[109] Conditions and penalties thereof are detailed in the Police Regulations.[110] Prior to departmental actions against the Gazette officers, the concerning authority or the officer should take permission from the Inspector General of the Police.[111] Charges must be stated very clearly in the charge-sheet against the suspect .The opportunity of defence will be provided. The accused may be suspended for not exceeding six months or may be detained for criminal case. During suspension, he/she is partially paid (i.e. one-fourth of the salary only) and later if the charge not proved or won the case, the remaining salary shall be paid back.[112]

Types of actions and the authorities responsible for imposing punishments and hearing appeals have been prescribed in the Police Regulations.[113] For example, relevant Sub–inspector or Assistant-Sub-inspector shall impose such punishments upon the police-peon as warning or physical fatigue or a fine for loss from his/her salary or detention up to 15 days and the relevant police Inspector shall hear his/her appeal. Likewise, the Inspector General of Police (IGP) has the power to warn and write bad report on the characters of the Assistant IGP and Deputy IGP and the Government of Nepal shall hear their appeals. Departmental actions may not be deemed blocked to sue a case in courts against the convicted under other prevailing laws of the country.[114]

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106 See Rule 68 to 83 of the Police Regulations, 2003
107 See Section 11, 11(a) and 9(4) of the Police Act, 1955
108 *Ibid*
109 See Section 9(3) of the Police Act, 1955
110 See Rule 84 to 88 of the Police Regulations, 2003
111 See Rule 89 of the Police Regulations, 2003
112 *Ibid*
113 See Rule 93 of the Police Regulations, 2003
114 See Section 10(a) of the Police Act, 1955

4.7 Appeals

The decisions of the Central Police Special Court and the Separate Special Police Court may be lodged to the Government of Nepal.[115] The decisions of the District and Regional police courts may be appealed to the superior police court within 35 days of the decision.[116]

Appeal of departmental actions may be lodged by the aggrieved party in written manner. Such person must produce evidence along with the decision or order through office in charge or the deciding authority within 35 days of the decision. The decision appealing authority shall be final.[117]

5. Analysis of the Justice Systems in Security Organisations

The preamble of the Interim Constitution expresses its commitment to the independence of the judiciary and rule of law. The Chapter of the Fundamental Rights has guaranteed a right to fair trial from competent court or judicial body[118].
The Constitution has explicitly mentioned that the courts and judicial bodies shall exercise judicial rights based on the basic principles of the judiciary[119]. Further, according to the constitution, the judiciary shall have to pursue the concept and values of the independence of the judiciary[120].

Nepal has ratified International Covenant on Civil and Political Rights[121]. Nepal Treaty Act provides superior status to the international treaties on the national laws[122]. Further, soft laws may also be considered as basic principles of the justice as is prescribed in the Interim Constitution[123]. These provisions opened up Nepal's international obligation on the basic principles of the independence of the judiciary. Hence, provisions of the Interim Constitution and Nepal's international obligation need to be respected by all mechanisms which adjudicate disputes. This suggests that justice systems within the organisations of the security forces are automatically subject to above-stated principles and their existing legal framework contradicts with the Interim Constitution and Nepal's International obligation.

The courts martial under the Army Act do not appear independent and impartial and their rules and procedures are not in line with the provisions of the Interim Constitution and International Covenant on Civil and Political Rights. Further,

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115 See Section 36 (b) of the Police Act, 1955
116 *Ibid*
117 See Section 11(2) of the Police Act and Rule 92 of the Police Regulations, 2003
118 Article 24(9) of the Interim Constitution, 2007
119 Article 110(1) of the Interim Constitution, 2007
120 Article 100 (2) of the Interim Constitution, 2007
121 See Article 14 of the International Covenant on Civil and Political Rights, 1966
122 Section 9(1) of the Nepal Treaty Act, 1990
123 Article 100(1) of the Interim Constitution, 2007

judges of the courts martial are not fixed with qualifications, skills, experiences and security of tenure as required. There is no guarantee that such judges enjoy independence from interferences within the military hierarchy. Furthermore, the *Prad Viwak*, the legal department of the Nepal Army is granted multiple responsibilities along with controlling power to the military justice system. The Army Act and Regulations explicitly prohibit defence lawyer and denies suspect's rights to obtain legal service at all stages of a criminal case.

The decisions of the court martial are reviewed and revised by military officers violating the integrity and competence of such courts. Globally, the military justice system has developed towards meeting the international standards[124] at the international and comparative level[125], but Nepal missed the opportunity to improve military justice system while promulgating the new Act. In this context, the military justice system adopted by the new Army Act in 2006 is often questioned[126] and challenged[127] in the judiciary for its failure to meet constitutional and international obligation.

The justice systems in Armed Police Force and Nepal Police suffer similar situations like that of the military justice system. Composition of the courts, selection of the judges, their qualifications and tenure, procedure and defence are found in contrast to the constitutional and international provisions to which Nepal is a party. Similar to the courts martial, the police courts are *ad hoc* and beyond the supervision of the regular courts.

The scope of the justice system in the security organisations is limited. Nepal appears to be progressive in adopting international human rights treaties and principles in the constitution, but their real application generally in security related laws and particularly in the justice system of security organisation is dismal. The study of the justice system of the Nepalese security organisation suggests that the Army Act, the Police Act and the Armed Police Force Act should be amended to meet the constitutional provisions and Nepal's international obligations and to follow the comparative developments around the world.

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124 See Draft Principles Governing the Administration of Justice through Military Tribunals, Adopted by the United Nations Sub-Commission on Human Rights and now under the consideration of the Human Rights Council, E/CN.4/2006/58.

125 After *Findlay vs. the UK*, the UK has changed military justice system substantially to meet its Regional and International human rights obligation on the independence of the judiciary.

126 See Comments on the Army Act, 2006, by International Commission of Jurists 2008.

127 See *Bhuban Niraula vs. the Government of Nepal*, running case in the Supreme Court to challenge the constitutionality of the Army Act.

Criminal Justice System in Nepal

Mandira Sharma

I. Introduction

Nepal's criminal justice system needs reform. From the police to the army to public prosecutors, the governmental institutions responsible for dispensing "justice" have been consistently accused of not being effective in protecting the rights of civilians. Flaws in the system have been identified by local and international organisations for many years, but very few legal or substantive changes have been made over the past decade. A long-awaited comprehensive penal code has not yet been enacted; and when it is, the law will have much to address.

The system suffers from broad structural and legal flaws. Its functioning is also significantly undermined by the illegal behaviour of governmental actors. Criminal justice in Nepal is pursued through an adversarial process through which, ostensibly, justice will be served by both the state and criminal defendants vigorously promoting their respective interests. In reality, poor, marginalized citizens are largely at the mercy of the state and often do not benefit from the protections they are entitled to by law.

On the other side of the spectrum, crimes committed by public officials almost always go unpunished. Members of the army who perpetrated gross abuses on civilians during the conflict period have thus far escaped justice despite the public exposition of their crimes. The army remains very powerful, and other governmental actors and institutions are loath to hold its members accountable for their crimes. Similarly, police officers are able to routinely inflict torture on detainees without any fear of prosecution. The politicisation of these crimes and the corresponding cycle of impunity continue to gravely undermine the legitimacy of the justice system as a whole.

This article outlines the functioning of the criminal justice system on a broad level, identifies particularly significant problems, and proposes solutions to these problems. Some of these reforms require changes in the letter of the law or the passage of new laws, while others recommend increased budgetary allocations or the creation of new governmental institutions. All of them will be necessary to eliminate the excesses and limitations of the system and form a stable foundation for the rule of law in Nepal.

II. Institutions in the Criminal Justice System

1. Police

The police are under the general supervision and control of the Ministry of Home Affairs. The cabinet appoints the inspector general of police. The police are subdivided into several forces such as the Nepal Public Police Force, Guard Police Force, Riot Police Force and Traffic Police Force. Criminal investigation is carried out by the Crime Investigation Department (CID) of the public police, which is headed by the assistant inspector general of police of the Nepal Public Police Force.

The Nepal Police employs its police officers across the five regions, 14 zones, and 75 districts of Nepal. Each Regional Police Office (RPO) is headed by a deputy inspector general, while the Zonal Police Offices are under the command of senior superintendents. District Police Offices (DPOs) are commanded by superintendents or deputy superintendents. DPOs have local units with a mandate to investigate criminal cases in their territory. They are the most common investigative bodies, but not all districts have separate CIDs. In contrast, RPOs are supervising and coordinating bodies that are not directly involved with investigations. They serve as the middlemen between district CIDs and the Central CID at Nepal Police Headquarters in serious cases.

The CID is divided into units according to the nature of crimes and in order to make the investigation system more efficient. They are: Crime Investigation Groups, National Level Dog Section, Narcotic Control Unit, Crime Investigation School, Crime Research Branch, Foreign Branch, Anti-Terrorist Branch and the Scientific Resources Coordination Branch. The Foreign Branch is divided into three sub-sections: Foreign Politics, Interpol, and Telex. The Anti-Terrorist Branch is divided into internal and external terrorist sections. The Scientific Resources Coordination Branch deals with criminal behaviour, fingerprinting, photography and forensic science. The Crime Research Branch includes the Central Women's Cell, Records Section, Research Section, Crime Investigation Information Section and White Collar Crime Section. Some of these branches, like the Women's Cell, were set up only in recent years. Such cells now exist in major cities, including Kathmandu, Biratnagar and Pokhara, but do not operate in most districts of Nepal.

2. Government Attorneys

The Office of the Attorney General in Kathmandu is the central and ultimate authority in the prosecution of crimes. There are also Appellate Prosecutor's Offices, whose attorneys work in the Appellate Courts, and District Prosecutor's Offices, whose attorneys are confined to the district courts. There are 16 Appellate Prosecutor's

Offices and 75 District Prosecutor's Offices to carry out the work of the Attorney General.

The prosecution of crimes is the Attorney General's constitutional responsibility. Article 135(2) of the Interim Constitution of Nepal 2007 states that the attorney general should represent the government in cases wherein the rights, interests, or concerns of the government are involved. The Article further states that the Attorney General has the power to make the final decision as to whether or not to initiate proceedings in any case on the behalf of Nepal's government in any court or other adjudicative forum. The Attorney General also acts as the chief legal advisor to the government and advises government officials in all matters regarding constitutional and legal affairs (State Cases Act, Section 17).

District Government Attorneys are responsible for the prosecution of standard criminal cases throughout Nepal. They have the discretion, under Section 17 of the State Cases Act, to decide whether to initiate proceedings in response to a charge sheet filed by police. They are also required to be present during interrogations conducted by police. Appellate Attorneys represent the state in cases where individuals have challenged an initial conviction in the district court, challenge acquittals of criminal defendants in the district courts.

3. The Judiciary

Part 10 of the Interim Constitution delineates the structure and responsibilities of the judiciary. Under the Constitution, the Supreme Court is the highest court, and its interpretation of the law is final and binding on all government bodies. The Chief Justice of the Court is appointed by the Prime Minister on the recommendation of the Constitutional Council. The Chief Justice then appoints the remaining judges in accordance with the recommendations of the Judicial Council. Unlike in some other countries, appointments to the Supreme Court are not for life; judges must mandatorily retire at the age of sixty-five.(Interim Constitution, Articles 102, 103, & 105).

Below the Supreme Court in the judicial hierarchy are the Appellate Courts and District Courts. Each district of Nepal has a District Court, which is empowered to hear both civil disputes and criminal cases. The District Courts are meant to be courts of first instance, and in most situations they are. However, a case that implicates a fundamental right prescribed by the Constitution can proceed directly to the Supreme Court. Parties to settled disputes in the District Courts can challenge the verdicts in the Appellate Courts. Judges may only be appointed to these courts by the Chief Justice of the Supreme Court on the recommendation of the Judicial Council (Interim Constitution, Articles 107 & 109).

Administrative officers of several government institutions also exercise judicial authority. Under the Forest Act, for example, District Forest Officers are permitted to sentence offenders to up to one year imprisonment (Forest Act, Section 65) Chief

District Officers are also empowered under other laws (such as the Arms & Ammunition Act and Public Offences Act) to impose significant criminal sentences. These cases proceed without the procedural protections afforded to criminal suspects in the regular courts. In some situations, the same administrative officer will direct the entire process, from investigation to sentencing.

III. Investigation and Pre-Trial Detention

1. Investigation

Article 24 of the Interim Constitution highlights specific fundamental rights relating to criminal justice. In accordance with international standards of criminal law, each person suspected or accused of a crime must be proven guilty beyond a reasonable doubt. Article 24(5) reinforces this principle, providing that "no person accused of any offence shall be assumed to be an offender until proven guilty." This procedural safeguard evinces the philosophy that wrongful conviction and incarceration is to be avoided at all costs. Unfortunately, the Nepalese police often investigate crimes and arrest suspects with the presumption that their targeted suspect is inevitably guilty. The law surrounding investigation and detention is not without faults, but it contains many sound provisions. The deep-seated attitudes and practices of the police (as well as the government's unwillingness to impose liability on officers for their violations) constitute the most pressing problems with this sector of the justice system.

Prior to the passage of the State Cases Act of 1964, investigation of criminal cases was the province of the judiciary. Influenced by the Anglo-American system of criminal justice, the royal government decided to reform its judiciary and eliminate judges' investigative responsibilities. This was an important development (further codified in the revised State Cases Act of 1992), as the current framework requires the judiciary to act as an independent arbiter of cases rather than as a force in investigating and prosecuting them. The police are therefore vested with the entire authority to investigate crimes and make arrests, while the Attorney General on the national level and district government attorneys on the local level have the discretion to initiate prosecutions.

One potential problem with such a strict division of powers is that prosecutors are actually prevented from having a meaningful role in investigations. The State Cases Act of 1992 eliminated monitoring and investigative responsibilities previously required of prosecutors. The resultant system is one which allows for unfettered discretion for police in investigations and renders detainees vulnerable to abuses. A

study of the penal system in 2000 recognised this flaw, and Advocacy Forum's recent data shows that the police often disregard the rights of criminal suspects (CVICT & PRI, 2002).

A criminal investigation is usually triggered by the filing of a First Information Report (FIR). Anyone with information about the commission of a crime may file a FIR (Section 3, State Cases Act). The police station that receives the report or is made aware of the commission of a crime in any other way then has a duty to fully investigate the claims (Section 7, State Cases Act). This duty, however, is often neglected, especially when a complaint is lodged against a government official. FIRs relating to the conflict period and accusing members of the army or police of misconduct (usually serious crimes like torture or murder) have been routinely disregarded. The State Cases Act of 1992 does allow complainants to approach higher authorities if their FIR is initially rejected; the unwillingness of police to investigate a particular complaint can ultimately be ruled upon by the Supreme Court (Section 3(5), State Cases Act). The Supreme Court has ordered the investigation of cases that were wilfully ignored by police for many years. However, the passage of time can be a significant barrier to effective evidence gathering. Requiring complainants to engage in a lengthy appeals process just to force the start of an investigation that will likely not be conducted in good-faith is not a satisfactory practice. But regardless of the legal procedures compelling police to initiate investigations, their unwillingness to look into certain cases is symptomatic of cronyism, culture of impunity and corruption as well as systemic flaws.

While gathering evidence, police are required by the State Cases Act to have probable cause before searching the person or property of a suspect (Section 10, State Cases Act). The law provides additional protections in that each search must have two citizen witnesses and the competent police official must document all items seized during the search. These laws are consistent with the demands of international law as well as the protection of each person's privacy and human rights. However, it is unclear to what extent the prescribed search and seizure procedures are actually followed by police and how they are held responsible for not observing these procedures.

Violations of legal protections of human rights also happen because police investigators lack the expertise and resources needed to conduct adequate inquiries into alleged crimes. Officers are often charged with investigating crimes although most of their experience is in keeping the peace. The investigative process is also hindered by a lack of technologies needed to gather sufficient evidence for a criminal prosecution. Without proper training and equipment, and an internal system of accountability, the police rely almost solely on confessions and the testimony of witnesses.

2. Pre-Trial Detention

On paper, the law regarding pre-trial detention is, with some exceptions, equitable and protective of detainees' human rights. Initially, each suspect must be informed of the grounds for his or her arrest as soon as possible after being placed in detention (Section 24(1), Interim Constitution). Further, each detainee must be produced before the court within 24 hours of arrest. As an additional protection, a government attorney must be present while the police take a suspect's statement (Section 9(1), State Cases Act). The fact that police are empowered to arrest criminal suspects without warrants may be a cause for concern, but this is a common practice in many countries and does not constitute a serious procedural problem assuming that these detainees are produced before the court within the mandated 24 hour period. Indeed, this provision is necessary to effectively prosecute sophisticated offenders who may destroy evidence or otherwise evade justice (CVICT & PRI, p. 57).

These laws, however, are of no consequence to the actual practices of police throughout Nepal. Altogether 95.5% of all detainees interviewed in a recent survey were not provided with a notice of arrest, while over 50% were not taken to court within the required timeframe (Coalition Against Torture, p. 83). It is also evident that a government attorney is not present during most interrogations and that the law mandating their presence does little to deter torture and other abuses. The almost unitary unwillingness to abide by these laws suggests a problem caused more by the composition and traditions of the police than by systematic flaws. The issue is that the police, rather than strictly adhering to their obligations and responsibilities under the law, continue to be permitted to ignore these duties with impunity.

The most serious implication of the noted breaches of the law regarding arrest and detention is that detainees are often subjected to torture, coercion, and other abuses. A survey conducted by Advocacy Forum over the past year in 19 districts of Nepal reveals that 19.5% of detainees were tortured over the past year (Coalition Against Torture, p. 82). While this figure is a marked improvement from the past (especially when compared to the widespread and unchecked violations that occurred during the conflict), it is unacceptable that almost one in every five detainees endures severe pain at the hands of the police. Torture is a grave problem in Nepal. Its practice results from a combination of the aforementioned ingrained traditions and a present lack of any substantive law criminalising torture. The issue is dealt with at length in a recent publication, "Criminalize Torture", and will be further considered in later sections of this report.

Unless the violations of the law governing pre-trial detention (production in court within 24 hours, provision of notice of arrest, presence of government attorney during interrogations) are punished by suspension, demotion, and/or imprisonment, adherence to these provisions continuously remain questionable. In addition, the

legal framework such as law to criminalize torture also needs to be enacted as a matter of priority.

3. Juveniles

Juveniles are vulnerable to the same mistreatment as adults, but to an even greater extent. 24.9% of juveniles interviewed over the past year were tortured while in custody, a percentage that is significantly higher than that for the overall population of detainees (Coalition Against Torture, p. 82). This information is distressing: the police seem to have little sensitivity to the mental and physical harm they consistently inflict on children. There are some laws which ostensibly protect juveniles, but their substance and inconsistent implementation leave much to be desired.

The government, in an attempt to satisfy its obligations under the Convention on the Rights of the Child (CRC), passed the Children's Act in 1992. The law creates many rights for juveniles, including some geared toward regulating the liability of children in the criminal justice system. For example, the minimum age for criminal responsibility is set at 10 years by Section 11(1) of the Act. As seems to be the case with many Nepalese laws, provisions of the Children's Act are systematically under-enforced. In particular, Section 42, which provides that juveniles detained before trial or imprisoned after a conviction will be held in juvenile reform homes, has not been implemented.

The standard of separate detention and imprisonment of juveniles was recently affirmed by the Supreme Court. In 2008, a case was brought challenging the removal of several juveniles from a correction home. The minors were placed, or at risk of being placed, in detention with adults. In its verdict, the Court ordered government agencies to improve the infrastructure and capacity of existing juvenile correction homes, mandated the creation of new homes in regions lacking them, and prohibited juveniles from being returned to police custody. These measures were affirmed in a subsequent Supreme Court decision made in March 2009, which again directed to government to create more correction homes. Presently, however, there is only one functional government-run juvenile reform home, and it is unclear to what extent these verdicts will be respected.

The continued detention of juveniles in facilities meant for adults presents grave human rights concerns. Children housed with adult offenders are vulnerable to rape and other abuse. Further, they are not provided with the special opportunities and resources necessary to give them a chance to become reintegrated into society. The international treaties binding Nepal (specifically the Child Rights Convention/CRC) mandate a more conscientious system to provide for the welfare of juveniles and the aforementioned verdicts of the Supreme Court are an important affirmation of this duty. However, children who come into conflict with the law are not currently afforded the legal rights guaranteed them by the CRC and Children's Act.

IV. Prosecution

1. Initiation of Criminal Proceedings

As noted, government attorneys currently play no role in criminal investigations. The police conduct investigations and present their findings to government attorneys with a recommendation of whether or not to proceed. Since prosecutors have no chance to participate in the information gathering of an investigation, they are forced to rely solely on the facts presented to them by the police. Given the well-documented tendencies of the police to disregard the laws binding them, it would be advisable to renew the role of government attorneys in overseeing investigations. This would also give them a more accurate idea, untainted by forced confessions or misrepresented evidence, of the merits of each case. It is important for different government institutions to check and balance one another's power in a transparent and well-functioning justice system.

Government attorneys have the final say in the decision of whether or not to initiate trial proceedings in a given case. But rather than using this authority to filter out cases with little merit, prosecutors tend to be little more than a rubber stamp of approval. In a recent study, the Centre for Legal Research and Resource Development (CeLRRd) found that government attorneys prosecuted from 94-96% of cases submitted to them over the course of a six year period (CeLRRd, p. 153). The data suggests that the attorneys rarely evaluate the evidence presented to them and instead automatically begin prosecutions as a knee jerk reaction to receiving a charge sheet from the police.

This problem seems to stem from a combination of poorly drafted laws and ineffectual government actors. Under the State Cases Act, public prosecutors are empowered to decide whether or not to file a case, but there is no provision prescribing any procedures to govern this important duty (Sections 17 & 18, State Cases Act). Prosecutors may be acting irresponsibly in failing to filter the cases presented to them, but they are not currently acting illegally. The almost complete absence of any pre-trial sorting of cases causes consistently low success rates for prosecutions. Conviction rates hovered around 60% during the years of the CeLRRd study, and it is unlikely that these numbers have improved in recent years (CeLRRd, p. 154). Although discretion is a necessary component of a prosecutor's job, guidelines must be created to aid the process of filtering out unsupportable cases before trial. It is encouraging that the judiciary seems less willing to accept the police officers' version of events, while at the same time very disturbing that so many meritless cases even reach trial. It is also significant that victims of crimes are so often frustrated in their pursuit of justice.

2. Trial

Process

Once a charge-sheet has been filed by the government attorney, a trial in the District Court can proceed. However, this is rarely a prompt process, because District Courts almost invariably have excessive caseloads. In most of the years in the past, about 50% of criminal cases filed are not adjudicated until the next year or beyond. This problem stems from a combination of insufficient physical capacity and a lack of procedural shortcuts such as plea bargains that would relieve overburdened courts.

After the charge-sheet is filed, a bail hearing is held. The sitting judge decides whether or not to grant bail depending on the nature and severity of the charges, and a number of subjective factors. For any offence which is punishable by more than a three-year sentence, bail will be refused provided that the evidence submitted with the charge-sheet provides grounds to reasonably establish the detainee's involvement in the crime. For lesser charges, bail may be offered at the discretion of the sitting judge. Typically bail will be granted with a bond of land, cash, or other property. In rare cases where the charges are not severe, bail may be offered without a bond. The amount of the bond often prevents average detainees, who either do not own property of sufficient value or are unable to appraise the value of the property they do own, from being released on bail. Additionally, detainees facing certain criminal charges (such as drug or black marketing related) are not entitled to bail.

Lengthy delays before trial and the inaccessibility of bail are symptomatic of the overall presumption of guilt that drives the criminal justice system. It is possible for a Nepalese citizen to be arrested without a warrant and without information about the charges against him, tortured and detained for days without being allowed to see a judge, and imprisoned for months or years without being convicted and without access to bail. The substantive law governing the pre-trial process needs many changes, and the significant legal protections that do exist are infrequently implemented in practice.

Once the bail hearing and any appeals to that process have concluded, the District Court hears the oral testimony of witnesses and confirms evidentiary exhibits. Unlike courts in many other countries, witnesses in Nepal are heard before, not during, the final hearing. These hearings are often greatly prolonged due to the prosecution's difficulty in producing witnesses. After this process, the final hearing, during which the prosecution and defence each make oral arguments before the court, occurs. Judges are the sole arbiters of guilt or innocence, and at the conclusion of the final hearing, they will also decide on a sentence if they have found the accused guilty.

There are very few formal regulations for sentencing. The judge is given almost unchecked discretion to decide the type of punishment and length of

imprisonment. In theory, the judge considers the aggravating or mitigating circumstances, and background and culpability of the convicted person when determining the sentence. However, since there are no specific guidelines, there is a great inconsistency from one court to the next. As such, severe punishments are frequently imposed for relatively minor crimes.

Evidence

Section 24 of the Interim Constitution affirms a number of important "Rights Regarding to Justice" within the Fundamental Rights chapter of that instrument. The rights enshrined include many of the detention-related protections already mentioned in the previous section. Additionally, Subsection 7 provides that "No person accused of any offence shall be compelled to be a witness against oneself." (Section 24(7), Interim Constitution). This is consistent with widely accepted international guidelines on criminal justice and is an essential safeguard of the rights of the accused. Unfortunately, coerced confessions remain commonly used in criminal proceedings throughout Nepal.

In one study, 67% of respondents (all of whom detainees who had charge-sheets filed against them by police) reported that they had been compelled to give evidence against themselves (CeLRRd, p. 195). While this figure is from several years ago, recent data reveals that torture and other cruel, inhuman, or degrading treatment are still frequently inflicted on detainees in efforts to "gather evidence" (Coalition Against Torture, p. 82). As government attorneys are rarely present during interrogations, there is little to prevent police from using physical and mental coercion to compel the confessions they seek.

Although forced self-incriminatory statements are ostensibly inadmissible in court proceedings under the Torture Compensation Act and Evidence Act, this prohibition begs the question: why, then, do the police continue to torture and humiliate detainees in efforts to coerce confessions? The only possible answer is that the "evidence" they get from this process is frequently used to establish suspects' guilt during trials. Thousands of interviews with detainees each year reveal that, at the initial remand stage, judges very rarely ask detainees whether their statements were freely given (AF Annual Report, 2008, p. 30). It is therefore likely that this insensitivity continues during trials, and that coerced evidence is commonly admitted in court and used to convict people.

3. Defence

As has been demonstrated, the principle of "innocent until proven guilty" is operative on paper but not in practice. Similarly, the right to legal counsel is guaranteed by law, but many defendants are prevented from accessing an attorney. The Constitution

provides that indigent people shall have access to free legal aid (Section 24(10), Interim Constitution). This right is ostensibly provided for by the Legal Aid Act of 1997. However, an effective infrastructure to guarantee legal counsel to all defendants in accordance with the law is not currently in place. Altogether 91% of respondents in CeLRRd's 2002 study who could not afford counsel were not given representation under the Legal Aid Act (CeLRRd, p. 218).

The Legal Aid Act was passed ten years before the Interim Constitution and does not fully protect the fundamental right to free counsel prescribed by the latter document. There are two significant aspects of the law which greatly restrict detainees' access to legal aid. Section 3(2) provides that either the Central or District Legal Aid Committee "shall be authorized to grant or deny legal aid to a particular person." (Section 3(2), Legal Aid Act). This broad discretion is utilized too often and is not consistent with the guarantees of the Constitution. Committees have decided to refuse legal aid to detainees accused of crimes such as human trafficking, sale of narcotics, and espionage (CeLRRd, p. 55). A system whereby the "right" to legal aid can be so easily revoked is unacceptable, especially in light of the tenuous investigative practices that lead to the charges in the first place.

Another provision of the Legal Aid Act also functions to prevent many detainees from receiving the representation they are guaranteed by the Constitution. Section 3(1) limits legal aid to those who have proven that their income falls below a certain threshold (Section 3(1), Legal Aid Act). This measure ends up preventing many defendants from getting a lawyer. In practice, detainees are often unable to compile documents necessary to prove their income while held in police offices or prisons. This is again indicative of the correlation between wealth and access to justice in the Nepalese system. The conundrum is that indigent defendants are often unable to get bail because of their limited assets, and then prevented from providing proof of their poverty due to their continued detention. The system conspires to condemn the poor without giving them a fair chance to defend themselves.

Even those detainees who can get lawyers aren't allowed access to representation when they need it most: during interrogation. Detainees are almost always denied a visit from a lawyer up until a charge-sheet is filed against them. This allows the police to have full dominion over detainees and use illegal methods to coerce the all-important confession. Nepalese citizens have a constitutional right against self-incrimination, but when detainees are unaware of this and lack the support of legal counsel, the right has little substantive effect.

Finally, the government simply hasn't set aside enough funds to pay lawyers for providing free legal aid. There is only one legal aid lawyer appointed for each district court, and other attorneys are hired very infrequently. Attorneys from the Nepal Bar and NGOs such as Advocacy Forum attempt to fill the gap by providing free legal services, but these individuals should not have to shoulder the constitutional responsibilities of the government. In the CeLRRd survey, this situation

resulted in over half of all detainees interviewed proceeding through the criminal justice system without ever having the opportunity to consult a lawyer (CeLRRd, p. 83).

4. Adjudication

Under the Civil Code of Nepal, a trial in a court of first instance must be completed within one year of the time of filing of the answer to a complaint (Number 14, Preliminary Chapter, Civil Code). However, this guarantee is often unfulfilled, as many cases are not adjudicated within a year of their filing. This was a problem before the conflict, and it has persisted to the present day. In 2002, a comprehensive study of the criminal justice system found that Nepal's courts were dangerously overburdened, with the accused waiting for lengthy periods before trial (CeLRRd, p. 83). As the conflict intensified in the following years, caseloads for courts in urban areas increased while caseloads for courts decreased in rural districts under the thrall of the CPN-M (ICJ, p. 19). Since the Comprehensive Peace Agreement, dockets have remained overloaded. In the period between July 2007 and July 2008, 55.5% of cases filed were not resolved in the same year (Annual Report of the Attorney General, p. 55).

One reason for this is that civil cases take up a substantial part of the docket; as a result, criminal defendants are often forced to endure long waits before trial. Another is the high percentage of frivolous or unfounded cases that go to trial as a result of government attorneys' unwillingness to exercise their discretion in initiating prosecutions. Finally, there are simply not enough courts or judges to handle the needs of the Nepalese population. A poor physical infrastructure compounds the problem. The executive and legislative branches naturally require and receive the vast majority of government funds, but the judiciary is still woefully under- funded.

Judges' impartiality and willingness to acquit those who have not been proven guilty beyond a reasonable doubt are the only checks on the otherwise inexorable progress of suspects toward prison. However, it is unclear whether the judiciary is competently fulfilling this vastly important responsibility. In the most recent report of the Attorney General's Office, 82% of cases adjudicated before District Courts and Chief District Officers (CDOs) resulted in convictions, a statistic which suggests that the standard of guilt beyond a reasonable doubt is not always honoured in the courts (Annual Report of the Attorney General, p. 55). This is clearly due to the manipulation of suspects by the police and the inability of government attorneys to exercise any discretion. The investigative capacity of the police is low, and they are often unable to produce compelling evidence even in cases where a suspect's guilty is likely. As so many unfounded prosecutions proceed to trial, judges are forced to sift through the quagmire and acquit many suspects.

5. Juveniles

The Children's Act allows for the creation of juvenile courts "as may be necessary." (Section 55(1), Children's Act). It is certainly necessary for child suspects to have the charges against them adjudicated by a court that is especially trained in the unique realities of juvenile justice. Unfortunately, juveniles accused of crimes in Nepal are not given this privilege. There are presently no separate juvenile courts in the country; apparently, the government has not deemed their creation necessary in the 17 years since the passage of the Children's Act.

Under Section 55(4) of the Children's Act, the absence of juvenile courts can be remedied by having juvenile benches operating in each district court. This provision is only followed to an extremely limited degree; most juvenile benches are just normal judges calling themselves a special bench to adhere to the letter of the law. Kathmandu District Court, where the bench employs a child psychologist and sociologist, is a notable exception. But only few districts have even made an effort to constitute a juvenile bench. In the remaining district courts, children are tried alongside adults.

V. Prisons

Prisons in Nepal, on the whole, are overcrowded, understaffed, and housed in decrepit buildings. Prisons in the Tarai and in urban areas are particularly burdened. A study by CVICT and PRI, during which representatives from the organisations visited several prisons, found a number of problems common to each facility. The main issues with Nepal's prisons seem to be insufficient housing for prisoners, ancient facilities, a lack of rehabilitative programs, the detention of juveniles and the mentally ill alongside competent adults, and the fact that prisoners themselves are often responsible for keeping order and inflicting punishments (CVICT and PRI, p. 19-33). Additionally, female prisoners often languish in the worst conditions of any prisoners.

Prisons such as Ghorahi, Bhimphedi, and Biratnagar were found by the study to be significantly overpopulated for their capacity. Health risks, such as open sewage systems, filthy toilets, and the incarceration of sick prisoners within the general population, were common (CVICT and PRI, p. 19-33). The government has not taken any significant steps to reform the prison system, and it is unlikely that the facilities at these prisons have improved in recent years. During the armed conflict, the situation was even worse due to the large amounts of political prisoners incarcerated.

Only minimal efforts have been made to educate or otherwise improve the position of prisoners. Some prisons contain a library and hold adult education classes, but these facilities are not widely used by the prisoners. Further, most

prisons lack work programs designed to teach their uneducated prisoners skills (CVICT and PRI, p. 19-33). Without mechanisms in place to teach and empower prisoners, repeat offenders will continue to re-populate the prisons and keep them overcrowded.

Various reports suggest that children are still held in prisons alongside adults. This practice is conducted in blatant disregard for the Children's Act, the provisions of which are discussed in preceding sections of this chapter. There are significant reasons why the law requires children to be incarcerated in separate facilities. Juveniles are vulnerable to physical and sexual abuse at the hands of older and stronger inmates, as are the mentally disabled. Additionally, there is a better chance that juveniles can be rehabilitated through education and a more nurturing approach. Programs specifically aimed to prepare child-offenders for their reintegration into society are, however, nonexistent in Nepalese prisons.

It is also significant to note that "trusted prisoners" are commonly used by the staff of prisons to maintain order and mete out punishments. This system speaks to the almost complete absence of effective protocols to govern the administration of prisons. It is also indicative of a grave lack of funds; that prison guards must outsource their work to the prisoners themselves means that there are not enough prison guards. This is a problem common to under-funded penal systems in countries all over the world.

In 2004-2005, the government decided to begin a program whereby convicted criminals could serve sentences of up to three years doing community service instead of spending the time behind bars. Provisions relating to this "open prison" system were codified in an amendment to the Prison Act. The implementation of these provisions of the Acts and Regulations related to the imposing community service in lieu of incarceration however remains a distance dream.

Thus, it is suggested that the prison system must be legally guaranteed a significantly larger percentage of the budget for improving the infra-structures of the prisons, provide education and other programs to prisoners and to have sufficient and well-trained staff in prison. Having prison service separate from the home would be another ways of avoiding international problems of prisons too.

VI. Impunity

The fact that public officials are immune from prosecution in Nepal has been well-publicized but remains a significant flaw in the criminal justice system today. Human rights organisations have been lobbying for the government to hold its own employees accountable for their crimes for many years now, but to no avail. The credibility of the government as a whole continues to be undermined by an almost complete absence of mechanisms for accountability and transparency.

The prevalence of torture inflicted by police during routine investigations is discussed earlier in this report. Police officers currently do not face criminal sanctions for the offence of torture, although it is considered a crime by the Interim Constitution (Article 26, Interim Constitution). The existing law on torture (the Torture Compensation Act of 1996) only allows for civil penalties, and it is rarely enforced. Advocacy Forum has had only 5 successful claims under that law, out of more than 70 cases filed (Coalition Against Torture, p. 39).

Similarly, the many serious crimes perpetrated by members of the Nepal Army (NA) during the conflict period remain unpunished. There is compelling evidence demonstrating that NA officers were responsible for extra-judicial killings, extreme torture, and lengthy incommunicado detention during the war, but none of the individuals responsible have faced criminal sanctions to date. These actors, like members of the police who continue to inflict torture without threat of punishment, are assured immunity due to the army's pervasive influence.

The police have justified their unwillingness to act on FIRs filed detailing extra-judicial killings, disappearances, and torture committed by members of the army by claiming that the cases are "political issues" and therefore outside their purview of authority (HRW & AF, p. 28). The families of victims of human rights abuses have been forced to appeal to CDOs, since police at all levels were unresponsive to their complaints in direction violation of the State Cases Act. As the cycle of impunity has been increasingly brought to light in recent years, resistance on the part of the police and army has only intensified. Political pressure, levied by the NA or CPN-M, has influenced police to threaten those pressing for the investigation of human rights violations (HRW & AF, p. 30-31). The situation is such that complainants are forced to apply to the Supreme Court for writs ordering the initiation of investigations; however, even these have been disregarded.

Article 33(s) of the Interim Constitution provides for the creation of a Truth and Reconciliation Commission, disappearance commission and so on to "investigate the facts regarding grave violations of human rights and crimes against humanity committed during the course of the conflict and create an atmosphere of reconciliation in the society", and to find out the truth about the whereabouts of the disappeared person. The creation and functioning of this institution will be of vital importance for the future of Nepalese society. Exposing the truth about human rights violations would signify the government's commitment to the rule of law and provide a measure of closure to individuals affected by past crimes. Unfortunately, this constitutional directive has not been followed to any significant extent.

Thus, the legislature must immediately draft and pass the aforementioned law criminalising torture and other cruel, inhuman, or degrading punishment. The law should contain a provision which guarantees that no one, regardless of their stature in the government or other position, shall be immune from prosecution. Further, the

law should retroactively apply to violations committed from 1991 (when Nepal ratified the Convention Against Torture) onwards.

Similarly, an independent investigative and prosecutorial unit must be established to deal with allegations of crimes committed by members of the government.

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NATIONAL HUMAN RIGHTS COMMISSION

Sushil Pyakurel

Background

A historical review of the development process of national human rights organisations shows that the second meeting of the United Nations Economic and Social Council in 1946 called upon the member states to think about the possibilities of constituting information network or human rights groups at the local level with a view to provide support to Global Human Rights Institutions. The historical review indicates the need of human rights organisations was felt even before the declaration of the Universal Declaration of Human Rights in 1948. In 1960, more was discussed and heard about encouraging active participation of such institution, creation of national level institution in view of the fact that such organization could play an important role in protecting and promoting human rights in member countries and emphasis was given in broadening the jurisdiction of such bodies. The 1960s and 1970s witnessed comprehensive discussion on the role of such organisations in effective implementation of universal human rights standards in each member state. In 1978, guidelines were prepared regarding functions and framework of national human rights institutions which were adopted by United Nations Human Rights Committee and General Assembly. Various resolutions adopted between 1986 and 1991 called upon the United Nations to play a motivating role to inspire member states to create national human rights organization with clearly defined role to promote and strengthen human rights institutions with a clear jurisdiction.[1]

Realising the need for an effective national level institution in member states in order to promote and strengthen human rights, a workshop-symposium of national human rights bodies was held in Paris from October 7-9, 1991 with a view to adopt guidelines on composition, organizational structure and jurisdiction of national human rights organisations. In 1993 this guideline was adopted as 48/134 Resolution of the United Nations General Assembly. This is known as the Paris Principles. The World Human Rights Conference held in 1993 called upon national human rights bodies and governments to create and strengthen such organisations.

National level human rights bodies established in various countries have proven by their work that such bodies can play important role in promoting and strengthening human rights. Some of the latest international human rights documents such as Optional Protocol of Convention Against Torture (OPCAT)[2] has encouraged national human rights bodies as

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1 National Human Rights Commission, *Five Years of NHRC*, (2006 May), Kathmandu. p. 8.

2 OPCAT was adopted on 18 December 2002 at 57th session of the General Assembly of the United Nation by resolution A\res\57\199 and entered into force on 25 June 2006.

the national preventive organization against torture[3]. That the UN Human Rights Council has been inviting national human rights bodies to its meeting adds significance that domestic human rights issues can acquire international dimension as well[4].

Along with the establishment of national level human rights bodies, discussions are being held for their capacity building as well as strengthening their effectiveness. In this regard, arious international measures are being followed to establish and strengthen national human rights bodies under the leadership of the UN and the Office of the High Commissioner on Human Rights (OHCHR).

Human Rights and Nepal's Commitment

Various measures are in force in Nepal relating to honouring, protecting and fulfilling human rights and fundamental freedoms. Until 1990, the movement to secure human rights in Nepal was mainly concentrated on securing political freedoms. Following the people's movement, the newly proclaimed Constitution of the Kingdom of Nepal 1990 guaranteed a number of human rights for the first time to the people of Nepal. The constitution enshrined the provision of multi-party parliamentary system of governance, fundamental rights of freedom and equality, freedom of expression, right against death penalty and torture along with ensuring judicial remedies against infringement of the fundamental rights. The constitution also made the provision that some of the basic human rights could not be suspended even under the state of emergency.

When the Constitution of Nepal 1990 included the basic principles of human rights in its preamble, this marked a higher level of Nepal's commitment to the ideals of human rights. Following the people's movement of 1990 Nepal has signed and formalised various conventions and international treaties including Convention on Civil and Political Rights 1966, Convention on Economic, Social and Cultural Rights 1966, Convention on All Kinds of Discrimination against Women 1979, Convention Against Torture 1984 and Convention on Child Rights 1989.

Following the People's Movement II 2006, Nepal has further signed and formalised the following international legal instruments: ILO Convention 169 which relates to the interests of the indigenous groups, Optional Protocol on Women's Convention, two Optional Protocols on Children's Rights (related to child pornography and child soldiers).

Until now Nepal is a party to 18 UN human rights conventions and treaties in addition to SAARC and ILO conventions. The Interim Constitution 2006 issued after the

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3 OPCAT recognizes that when establishing national preventive mechanisms, state parties shall give due consideration to the principles relating to the status of national institutions for the promotion and protection of human rights (Optional protocol to the convention against torture and other cruel, inhuman or degrading treatment or punishment, article 18 (source :http://www.ohchr.org).

4 National human rights organisations are given different nomenclature in different countries. Some call it Commission, some call it Institute, some call it Ombudsman, etc.

People's Movement II has recognised a number of economic and social rights as part of fundamental rights which marks a major achievement today. Thus Nepal's commitment to human rights has continued to attain new heights. Human rights organisations of Nepal have played a vital role in all these developments. They have been advocating for adoption of Rome Convention on International Criminal Court before national and international forums. Nepal is ahead of many SAARC countries in ratifying various international conventions, even though their implementation remains rather weak.

Nepal's Need for a National Human Rights Monitoring Mechanism and Its Inception

At the initiative of some concerned groups and organisations which had played a leading role during the people's movement of 1990, the then Upper House member of CPN (UML) Subash Nembwang moved a resolution before the National Assembly of the first parliament calling for the creation of Human Rights Commission. However, the motion was defeated during voting by 27 votes of the Nepali Congress (NC) against 16 votes of the CPN (UML).

Following this failure, human rights defenders under the leadership of late Prakash Kaphley intensified their efforts towards drafting Human Rights Act for the country. In 1994, the NC-led government dissolved the parliament and called for mid-term polls. The election was used by the human rights activists as a platform for advocating the creation of Human Rights Commission before the political parties. During the tenure of the government formed after the mid-term polls, the Law Reforms Commission prepared a draft for Human Rights Commission Act. In 1995, NC's Member of Parliament Mahesh Acharya tabled the Draft Act as a private member's bill in National Assembly which received parliamentary approval in 1996 and it became law after the royal stamp in early 1997[5].

The delay in the establishment of the Commission after the promulgation of Human Rights Commission Act 1997 created some concerns to the human rights community in the country. Human rights activists and organisations continued to make their demands and put pressure on the government for the creation of the Commission as per the provision in the law. Street agitation, sit-in and hunger strikes were organised to intensify the demand.

Similarly, various international human rights bodies/organisations and donor agencies asserted their pressure on the Government of Nepal for the creation of the Human Rights Commission. The non-governmental sector even resorted to waging a legal battle for the creation of a Human Rights Commission. In this regard, in response to a writ[6] petition with the then Prime Minister as one of the opponents, the Supreme Court issued an order for the creation of the National Human Rights Commission (NHRC) on July 13, 1999. However the government took initiative to form the Human Rights Commission only in June 2000. Thus compared to many other nations, Nepalese human rights activists have made special

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5 National Human Rights Commission, *Five Years of NHRC*, p.10.

6 A writ petition field on behalf of Janahit Sanrakshan Manch, *Bhojraj Airvs, the Prime Minister*, no.3336-1998, The Supreme Court of Nepal.

efforts and contributed immensely in the drafting of the law for the creation of national human rights body and its actual formation.

Formation of the Human Rights Commission

Human Rights Commission Act 1997

Because of the armed conflict initiated by the CPN (Maoist), a greater need was felt for a human rights mechanism in the country. In this background, on May 27, 2000, National Human Rights Commission (NHRC) was formed in Nepal. The Commission Act provides for *independent and autonomous* status for the Human Rights Commission. The Commission is to be chaired by a former chief justice or a former justice of the Supreme Court of Nepal, along with other four members. The officials of the Commission will be recommended by a three-member committee chaired by the Prime Minister with the Chief Justice and the leader of the opposition in the House of Representatives as other members.

Under the Section 9 of the Human Rights Commission Act 1997, the NHRC is mandated to receive petition on violation of human rights, to investigate and prosecute the violators of human rights, to recommend compensation to the victims, to conduct review on the current human rights situation, to suggest to government regarding the country's report to be sent as per the obligation under various human rights treaties and conventions to which Nepal is a party, to visit various prisons and detention centres and suggest reform measures to the government, to promote human rights education through various seminars and public interaction and to encourage programs being carried out by human rights groups/organisations. In addition, the NHRC is empowered to carry out any other activities it deems necessary for an effective protection and promotion of human rights.

The jurisdiction mandated to the NHRC has accepted the Paris Principles even though partially. The Act also specifies a few areas to be off limits for the jurisdiction, and one such area was matters covered under the Military Act. Because of this provision, the Commission had to face some difference of opinion/issues and some disputes regarding its working relation with the then Royal Nepal Army. The Commission had taken the stand that the alleged excesses and violation of human rights committed by army personnel could not be placed under the purview of the Military Act when the army personnel were mobilised during the armed conflict under the command of Chief District Officer under the unified security force provision.

Besides these, there were some other lacuna and short-comings in Human Rights Commission Act among which major points were lack of provision for obligatory implementation of the Commission's recommendation and absence of financial guarantee on the part of the government. In course of pursuing its role as defender under the Human Rights Commission Act, the Commission has endeavoured to expand its activities in order to enhance effective protection of human rights.

Even though the law did not specify it in course of investigation, the Commission made use of a specialist service in exhuming the corpse for forensic study (in places including Doramba)[7]. Similarly the Commission prepared a draft agreement on protection of human rights between the warring parties (Government and CPN-Maoist) and advocated for its signing by both sides – it drew the attention of the Maoists- who were waging the armed conflict- about their obligation to respect human rights and humanitarian laws;[8] it called upon the government to arrange medical treatment for injured who were admitted to Miteri Hospital[9]. All these efforts indicate the moves followed by NHRC to expand its activities. This certainly proves that NHRC was playing an active role in its early years of operation. This also can be viewed as an attempt by NHRC to carve out a role for itself at the time of conflict.

Interim Constitution and NHRC

The Interim Constitution of Nepal 2006 promulgated after the People's Movement II elevated the status of NHRC to the level of a constitutional body; even though its formation is regulated by the Human Rights Commission Act 1997. There are many reasons for elevating the NHRC to the level of a constitutional body. For one thing, protection and promotion of human rights was a matter of national priority, and for another, after the royal take over in 2005, a need was felt for a continuous enhancement of its authority. Because of its active involvement in seeking protection of people's rights during the conflict period, human rights organisations and political parties wished to accord it a constitutional body status. The Comprehensive Peace Agreement signed before the interim constitution stipulated the National Human Rights Commission to be part of the follow-up mechanism regarding human rights provision made in that agreement. Thus the conflicting parties have expressed positive appreciation about the past role of NHRC and envisioned its important role for the future.

According to the Interim Constitution 2006, the chair of the National Human Right Commission will be recommended from among former Chief Justices or Justices of the Supreme Court who have rendered distinguished services in protecting and strengthening human rights; or from among the distinguished persons who have remained active in the

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7 In Doramba of Ramechhap district, on August 16, 2003 the then Royal Nepal Army had massacred 19 persons accused of being CPN (Maoists). The corpses were buried nearby by the Maoists with the help of local people.

8 In November 2002, NHRC sent a letter to CPN-Maoist chairman Prachanda giving him the conclusions of follow-up studies in 35 districts and asking him to observe the seven points in their behavior: stop all kinds of abduction, killing and torture; desist from attacking and destroying civil and public utility structures; stop using child soldiers and landmines; observe the provisions of Geneva Convention; honor rights of access to food, education and health of people, honor right to life of individuals; and respect right to hold political belief of individuals.

9 Concerning Ranjan KC and Srijana Phuyal who were arrested for being Maoists, NHRC had written to the authorities in September 2000 to provide suitable medical treatment and not to transfer them to new location without prior approval of or information to NHRC.

field of social service and made important contribution in upholding and strengthening human rights and four members will be appointed from distinguished individuals who have remained active in protecting and strengthening human rights or social service.

Regarding the appointment of NHRC chair, the interim constitution has a bit relaxed the previous provision, which said only former chief justice/justice of the Supreme Court would have been eligible. According to the new provision, anyone with a long experience in human rights fields will be eligible for NHRC's chair. While appointing the chair and members of the NHRC, the provision also requires representation of women and other diverse social groups whereby ensuring inclusive character of the Commission to some extent. The constitution stipulates the tenure of the chair and members of NHRC to be six years from the date of appointment which provides sufficient time period for their work. In view of the growing call for NHRC to be stronger and more capable, the interim constitution has extended the jurisdiction of NHRC compared to the provisions under the Human Rights Commission Act 2006. For instance, the new provisions include:

- To recommend court proceeding according to the law if prosecution is deemed necessary against the violators of human rights,
- To recommend to the government of Nepal, with reasons, if Nepal needs to become a party to international human rights treaties or conventions; and follow up on the implementation status of the treaties and conventions to which Nepal is a signatory, and if their implementation has not taken place – recommended to the government for implementation,
- To bring to public notice the name of any official, individual or institution who fails to obey or implement recommendation or directive of NHRC concerning violation of human rights and document them as violator of human rights,
- Upon receipt of information on any person's human rights being violated and if immediate action is deemed necessary, enter any government office or other places without prior notice and carry out a rescue,
- Even though matters covered under the Military Act do not come under the jurisdiction of the National Human Rights Act, there will be no bar to proceeding with action concerning the violation of human rights or humanitarian laws.

While the interim constitution has expressed clear intention of further strengthening NHRC, making the laws and procedures of filing complaints, prosecuting the cases and fixing compensation on timely basis and in conformity with the spirit of the constitution so that NHRC could function smoothly has not been done as necessary. Both the government and NHRC have shown inaction in this regard which has impacted negatively in the effective role of NHRC.

Budgetary Allocation and Organizational Structure of NHRC

Government's Allocation of Budget

The law requires that as a constitutional body NHRC should get a necessary budget allocation from the Government of Nepal from its consolidated funds. The Human Rights Commission Act 1997 had prescribed no such obligatory provision on the part of the government. As such in its earlier days just after its establishment, the Commission had faced much difficulty in its operation.

For the first year the government had allocated only Rs. 5.6 million which had caused many constraints in the NHRC's work. Because of the scanty budgetary allocation, NHRC was forced to rely on its limited staff and same government personnel brought to work for it on deputation. With some increment over the years from Rs.5.6 million NHRC's budgetary share had gone up to Rs. 15 million by the end of the first term of NHRC. Currently there has been some increment in the government allocation to the budget received by NHRC. For instance, following NHRC's elevation as a constitutional body the budget allocated by the government for the first year stood at Rs. 5.6 million only.

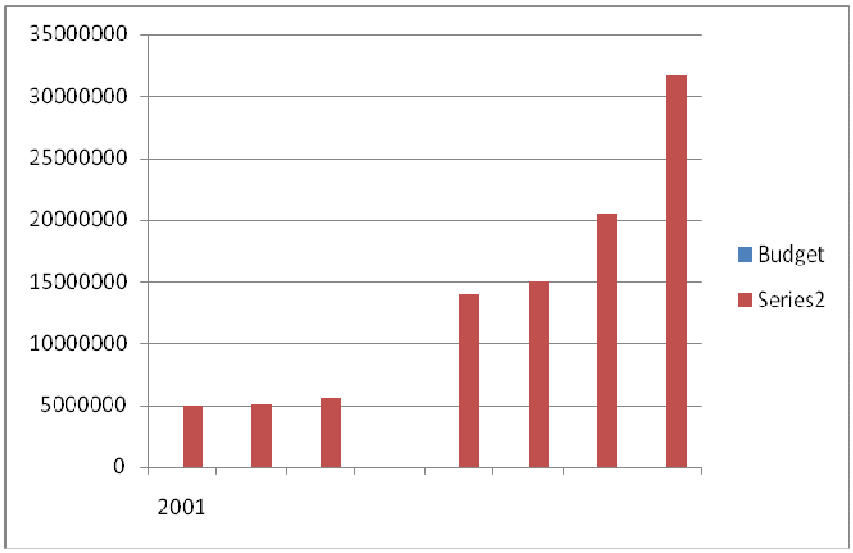
External Assistance

Due to the extremely low budgetary allocation made by the government to NHRC, its functioning had been gravely affected and as such, external assistance had been indispensable for NHRC's work. In this context in December 2001, NHRC and the UNDP signed a project document to facilitate capacity building at NHRC. During the second year of its inception, NHRC had launched capacity building project, torture and disability study project, human rights promotion for Dalits project, the state of human rights study project, addressing the conflict project, creation of national rapporteur's office against women's trafficking, among others, close to the heels of projects, some other projects conducted were – review of laws and implementation mechanisms related to treaty/conventions with support from Denmark, human rights outreach program with the support from European Union (EU) and expediting backlog cases with support from The Asia Foundation.

Of these projects, capacity building initiative was concluded in March 2009. This project proved very helpful in matters like purring and prosecuting the complaints filed before NHRC. The EU supported human rights outreach project resulted into the establishment of five regional and five district level contact offices of NHRC.

Except for a few years after its inception, one challenge before NHRC has been its inability to spend the budget allocated to it. For instance, of the total budget of Rs. 15 million allocated to it by Nepal Government during 2004/05, NHRC spent only Rs. 4.3 million, while of the budgetary receipt of Rs 20.4 million, for 2008/09 only Rs. 10.32 million was utilised. From the external source, the NHRC received a sum of Rs. 30.58 million of which only Rs. 20.71 million was utilised.

Budgetary support from Government and External sources:



Year	Amount
2001	5,000,000
2002	5,029,000
2003	5,535,000
2004	NA
2005	13,900,000
2006	15,000,000
2007	20,433,000
2008	31,708,596

This chart shows an increasing trend of dependence of NHRC on external budgetary support.

Organizational Structure

Initially the government appointed working team had proposed staff strength of 76 personnel and approval for necessary budget for NHRC. Later, in view of the paucity of budget made available, the staff number was scaled back to 46 personnel. As the scope of

NHRC function was expanding, and the government allocated less than expected budget, NHRC was forced to hire staff on contract under various projects supported through external assistance. Currently NHRC has prepared an organizational structure of 309 staff members and budgetary request has been made accordingly.

NHRC and Relations with Stakeholders

The Government

With the formation of NHRC, the government has displayed a mixed perspective and behaviour towards this institution. Some of these are reflected in the contradictory statements made about NHRC just after its inception[10], showing stringency in providing resources to NHRC[11], withholding timely release of information requested by NHRC. The most important aspect which shows government's apathy was the very limited response on the part of government regarding the recommendation of NHRC to provide compensation to the victims of human rights abuses and initiate prosecution against the perpetrators. However, the government representatives kept talking of providing required assistance to NHRC on formal occasions[12]. According to NHRC, of the 147 recommendations made to the government by NHRC from its inception till July 2007, only 16 were fully implemented and 20 received partial implementation. The remaining three recommendations have not been implemented[13] .This is an indication of the extent of support the government is willing to extend to NHRC. After NHRC was elevated to the constitutional body level, it has recommended 138 cases for action by the government of which two cases received partial responses while 131 cases remain unaddressed. Thus, even as NHRC has been elevated from an autonomous body to a constitutional body, the government attitude has not changed towards it. In addition, the indifference shown by the government to NHRC's proposals aimed at attending the culture of impunity only seems to provide further encouragement to impunity. For instance, the incidence below is an example:

> *NHRC received a complaint about the deaths of two prisoners in Banke jail shot by police personnel on January 15, 2000 and upon investigation*

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10 In August 2000, NHRC had written to the government to provide suitable medical treatment to Ranjan KC and Sirjana Phuyal who were arrested on accusation of being Maoists and not to transfer them to other location without prior approval of or information to NHRC. In response, the then home secretary had publicly made negative comments on NHRC. Among other things, he alleged NHRC was inclined to issuing writ orders.

11 For the first year as the government allocated a budget of only Rs. 5.6 million which severely affected the work of NHRC. Due to scanty funds, NHRC was forced to rely on its small staff members and seeking deputation of other government personnel.

12 Speaking at the Ninth Anniversary function of NHRC on May 27, 2009 Prime Minister Madhav Kumar Nepal observed, "let there be a situation where the name NHRC inspires a sense of awe in everyone" and called upon strengthening on NHRC.

13 NHRC, *Implementation status of NHRC Recommendations* (2009). p.6.

> *it determined that the case constituted a violation of human rights. NHRC then recommended the government to pay compensation to the family of the deceased of which 5.5 and 2.5 percent amounts should be recovered from the then chief district officer and police sub–inspector respectively. However the government wrote to NHRC stating that the entire amount was paid out from the government fund sparing the accused officials.*[14]

During the period of armed conflict, cordial relations could not be experienced between NHRC and security agencies. When the then Royal Nepal Army was mobilised to deal with the rebels, NHRC had to adopt more active posture to protect human rights. Various public comments emerged regarding the role of NHRC on reported excesses and violation of law on the part of the army. The army prevented NHRC team pursuing the reported case of illegal detention of individuals visiting the detention site stating that the team came to visit *without prior notice* and the NHRC had no mandate to enter military barracks. Similarly, as responsible government officials were not aware of the concept and jurisdiction of NHRC, it could not receive the support required for its function[15].

Though the interim constitution has elevated the status of NHRC to a constitutional body, the government remains indifferent to strengthen its effectiveness. Some increment has been made on the financial grant, but government officials still remain uninformed about the jurisdiction of NHRC. On its part, NHRC only seeks implementation of its recommendation sent to government for follow-up action. Perhaps such relation of tension with government remains as consistent.

The Judiciary

NHRC is mandated to investigate on all complaints except those cases already under consideration in a court of law. When NHRC is required to review and study sub-judice cases, under the provision of the Human Rights Act 1996 NHRC should obtain a court consent. However, the procedures to follow and what level of the court is to issue such leave is yet to be clarified. In cases where the parties who have petitioned to NHRC have also filed cases before the court for judicial remedies, the court awaits the finding of NHRC's investigation before giving final verdict. In a number of cases particularly concerning disappearances and habeas corpus writs, the Supreme Court has based its decisions on NHRC findings and awarded verdict in some cases in favour of the victims[16]. In the course

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14 Five Years of NHRC, p.98.

15 During conflict period, NHRC was alleged to be soft on Maoists. Even high level government officials entertained the notion that NHRC raised issues of human rights violation on the part of the government while maintained silence on the excesses committed by the Maoists.

16 NHRC received a complaint on the detention and disappearance of Krishna KC of Baglung by security forces in August 2003 while the security forces, in a reply to NHRC, denied his detention. But an NHRC investigation found out that Krishna KC was confined in an army barrack. NHCR then

of passing judgement on various writ petitions concerning protection of human rights before the Supreme Court, the court has issued directives to NHRC to offer various specialised engagements on the relevant cases. This shows the positive attitude of the court regarding specialised expertise of NHRC on matters of human rights issues.

Legislature-Parliament

The statutory provision of tabling the NHRC Annual reports before Legislature/Parliament would be expected to contribute to making NHRC more responsible and stronger. On the other hand, so far there has been no serious consideration and discussion in the floor of the House on the NHRC Annual Report. Since the inception of NHRC in 2000, NHRC has held interaction with parliamentary human rights committee and other parliamentarians, but the parliamentary committee has the least impact in implementing the recommendations of NHRC.

Civil Society and Human Rights Bodies

Civil society and human rights community of Nepal had played very important role in the course of formation of NHRC and cordial relations have prevailed between them after the inception of NHRC[17].NHRC has received support and assistance from diverse sections of civil society, NGOs and human rights organisations and NHRC has initiated collaboration works with them from time to time to preserve and strengthen human rights.

Even when NHRC was plagued with lack of resources, it had received support from human rights community and various professional organisations. During the armed conflict period, NHRC undertook joint monitoring with them and made public reports on human rights conditions. Similarly NHRC on its part also organised capacity building training to civil society and human rights bodies. Although such mutually beneficial relations had continued for some time, relations cooled down between NHRC and civil society and human rights organisations after the February 2005 take-over of state power by the King. When the terms of the office of NHRC officials ended in May 2005 and new office holders were appointed after amending the Act through an ordinance, the whole process was opposed by the human rights community and NHRC was boycotted by them. Even after the proclamation of the Interim Constitution NHRC remained without officials for a long time and the civil society had to step in with various moves to press on early appointment of NHRC officials.

This campaign was named 'Save NHRC' which played an important role in re-constituting NHRC. Following the restoration of democracy the NHRC officials quit their

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wrote to the government to press legal charges on Krishna KC and to bring his detention under legal purview without delay.

17 While NHRC Act called for encouraging human rights work of NGOs, the Interim Constitution going a step further has provided for joint work with civil society. This has created inter-dependent relations between NHRC and civil society.

posts which removed misgiving among the public towards NHRC but the cooperative work with human rights organization has not picked up momentum. Thus it has been observed that institutional and individual capability and orientation of NHRC determine its relations with civil society and human rights organisations.

UN and International Bodies

NHRC has received support from UN-OHCHR from its very inception. The role of UN-OHCHR has been commendable in enhancing capacity of NHRC. However, despite such ties, some misunderstanding cropped up occasionally between NHRC and OHCHR. After 2004, OHCHR entered Nepal with the largest mission office in the world to monitor human rights and from time to time debates have raged between NHRC and OHCHR office regarding their respective jurisdiction[18]. Even though a proposal was made to sign a memorandum of understanding to avoid duplicity of work and to enhance capability of NHRC, after about four years an *operational manual* has been signed.

NHRC has made no formal decision regarding the renewal of agreement over OHCHR presence in Nepal and its leadership is divided over the issue. Ever since NHRC acquired membership of the Asia Pacific Forum – a regional body of national human rights organisations -- it has played active role in programmes conducted by APF. It holds annual meeting to review human rights situation in the region and the eighth meeting was held in Kathmandu under the auspices of NHRC from February 16-18, 2003. By organizing this meeting NHRC was able to draw the attention of international community on issue of the human rights and violation of humanitarian law due to violent conflict that occurred in Nepal. Following this meeting, Nepal was elected chair of the APF for one year. Besides this, APF has provided assistance with staff exchange and training program.

NHRC has also maintained cordial relations with the International Co-ordination Committee (ICC) of the global body human rights organisations. At the time of its inception, NHRC was placed at the A division by ICC among human rights bodies in the world. But when the NHRC officials were appointed after amending the law through an ordinance, the independence of NHRC came under scrutiny and ICC then had decided to review the divisional status of NHRC. The decision to put NHRC on probation was taken in the light of the code that only institutions that fulfilled the Paris Principles would qualify for a division classification. In the end when the NHRC officials resigned, who were appointed under the

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[18] Following the political change of February 1, 2005, as human rights conditions worsened in the country and people's trust in NHRC perceptibly declined, OHCHR began its works in Nepal with sanction from the government as requested by human rights community. OHCHR is mandated to monitor and investigate human rights conditions in Nepal. On the other hand, NHRC formed after the provisions of the Interim Constitution in October 2007 is also conducting monitoring and investigation of human rights situation as per the constitution. NHRC officials have written to OHCHR from time to time particularly stressing that in the new circumstances human rights monitoring should be the sole responsibility of NHRC. Recently NHRC and OHCHR have signed a memo to resolve this dispute under which new investigations will be carried out by NHRC alone.

ordinance-sanctioned provisions and new officials were appointed according to the constitutional provisions, the former status of NHRC was restored by ICC.

Security Agencies

NHRC was formed before the Maoist's armed conflict entered the fifth year while the country was fast going down the road of killings, disappearances and destruction. As Maoists were intensifying their action and the security forces mobilised to suppress them were using illegal detention, fake encounters and forced disappearances, the major challenge before NHRC was to make the security forces work within the purview of the laws and to create conditions for the Maoists to remain with the provisions as prescribed under the Geneva Convention.

Before two months had elapsed after the formation of NHRC, when police had obstructed medical treatment of two suspected Maoists in hospital who were injured by police shooting, NHRC wrote to the government to make urgent arrangement for their treatment and not to transfer them elsewhere without consent of NHRC. In response the then Home Secretary publicly accused NHRC of putting itself at the level of the Supreme Court and only a court order would be force the government to act as NHRC requested. Similarly when two prisoners were shot dead in security guard firing in Nepalgunj prison in January 2000, NHRC investigation established the security officials – CDO and SSP – responsible for the killing and determined the compensation payment of Rs. 300,000 each for the family members of the deceased. NHRC also wrote 2.5 percent compensation amount to be collected from the CDO and SSP who were found responsible for the death. After repeated reminders from NHRC, the entire compensation amount was covered by the government. Expressing displeasure over the government action, NHRC stated such response constitutes disrespect for the NHRC decision and encourages the culture of impurity in the society. After this response of the government, the police have begun routinely to ignore even simple enquiries from NHRC.

In November 2001, the government imposed the state of emergency in the country and issued the Terrorist and Destructive Activity Control Ordinance under which all security forces came under army's control, leading to disappearances of civilians. The army, empowered to carry out any kinds of action on the basis of suspicion, unleashed widespread suppression in the name of controlling terrorism. Cases of army personnel detaining civilians and putting them in cells in the army's barracks increased rapidly. The army refused to honour the legal mandate for NHRC to visit detention centres without prior notice.

Even NHRC members were refused entry to army barracks. Responding to correspondence from NHRC, the army replied the entry was refused because the barracks were sensitive places. When the matter was raised before the prime minister, NHRC was advised to honour the rules of the army and not to engage in activities that lowers the morale of the army. Because of such attitude on the part of government, the army began

routinely to ignore the decisions of NHRC and on various occasions it even tried to obstruct the works of NHRC.

During the state of emergency period, when NHRC tried to organize and dispatch human rights monitoring teams under its leadership with participation of various human rights organisations, the government wrote to NHRC expressing the fear that such monitoring may bring false charges against security forces and might affect their morale; hence in the future security bodies must be informed about such monitoring work and they must be included in the monitoring team as well. However, NHRC resolutely rejected such suggestion as beginning of interference against the legal mandate.

Following the much talked about Doramba incident, relations between NHRC and security forces became very tense. NHRC had determined that in mid-August of 2003 the security forces had detained 19 suspected Maoists and subsequently murdered them. A team was dispatched to investigate the incident independently. Following the NHRC investigation, the army stated that the incident was not a case of murder after detention but they said individuals were killed in routine encounters. The army then raised questions about the credibility of NHRC investigation team while NHRC stressed that the army was bent on destroying the credibility of NHRC.

When the king seized power in February 2005, security forces went so far as to restrict the physical movement of NHRC members.

Even though NHRC had tense relations with the army during the second half of its tenure, NHRC maintained efforts to interact with senior army officials. Meanwhile, NHRC continued making efforts to put pressure on the army through international community to make army accountable and to respect human rights norms. In this effort of putting pressure, particularly effective role was played by UN OHCHR, Geneva and various international human rights organisations. As a result, some change was noticed in army's conduct.

Achievements of NHRC

After its inception on May 28, 2000, NHRC has accomplished a number of major achievements in course of its functions. Its credibility has been enhanced by the pioneering and active work performed during the conflict period, by the prestige it has earned at national and international levels and cordial relations it has been able to maintain with its stakeholders. The following are major works and achievements of NHRC in the fields of human rights protection, promotion and laws.

Protection of Human Rights

The Commission has since made the following development in its pursuit of protecting human rights:

- Of the total number of petitions regarding human rights violations, NHRC as an autonomous legal body has recommended action on 147 cases and as a constitutional body recommended action on 138 cases (until April 2008) of which implementation has taken place in a number of cases, though the extent remains limited.
- During the armed conflict period, especially when rural areas were in a state of lawlessness, and human rights conditions had deteriorated, NHRC carried out monitoring of human rights situations with the help of NGO organisations.
- During the armed conflict period, NHRC contributed to initiating peace process though work such as preparing a human rights agreement draft and putting pressure on the Government and Maoists to sign it, preparing a draft of ceasefire, code of conduct, repeatedly calling on the Government and rebel side to observe and honour human rights and humanitarian law.
- NHRC instituted high level committee and carried out investigation on incidents of grave violation of human rights and humanitarian laws during the period of armed conflict.
- Continuous monitoring of human rights conditions and efforts directed to lesson potential violation of human rights.
- As autonomous and specially empowered bodies like the Dalit Commission, Women's Commission, etc. have not been formed so far, NHRC has played the role of a specialised institution to safeguard their interests[19].
- NHRC has received various complaints related to extreme torture and threat to life to women accused of being witches; in such cases it has recommended compensation to the victims and called upon the government to adopt special legislation and conduct public awareness program;[20]
- NHRC also monitored the elections of the Constituent Assembly and published a public report thereon.

Promotion of Human Rights

The NHRC has played an active role towards promotion of human rights over the last years:

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[19] In order to provide justice for Dalit communities and women regarding cases of discrimination and violence against then, NHRC has recommended legal action against perpetrators and drawn the attention of authorities calling them to NHRC for discussion from time to time.

[20] NHRC recommendation concerning violence against women accused of being a witch at the community and individual level adds a new dimension in human rights protection. Generally, NHRC offers recommendation after investigation on violation of human rights from government side. But regarding women being victimized on the charge of being a witch and government showing inaction to protect them clearly constituted a clear case of excess about and violation of women's rights. Based on this interpretation, NHRC took such decision.

- NHRC has recommended Nepal government to incorporate human rights education in the school level curriculum in order to promote human rights concepts. Following this recommendation, the Nepal government has taken steps to gradually incorporate human rights contents in school level curriculum. Besides, school teachers are also being trained on human rights issues [21].
- NHRC has conducted training on human rights and humanitarian laws targeting different groups like Nepal Armed Police, Nepal Police, civil society and school teachers.
- NHRC has organised various human rights related programmes in association with civil society and human rights communities.
- NHRC published one of the first human rights research reports titled 'Human Rights in Nepal – A Status Report' in 2003 concerning laws and international conventions.
- Since its inception, NHRC has taken initiative in identifying ministries and providing theoretical and technical training to staff personnel regarding preparation of reports to be dispatched from Nepal as per the obligation of international treaties and conventions. Such training was also provided to human rights NGOs to facilitate alternative shadow reports.
- Upon receipt of the draft report of Nepal government to be dispatched to treaty depository office, NHRC has conducted wide ranging discussion time to time with civil society bodies on matters to be included in the country reports and giving suggestions to government concerning Convention Against Torture, Women's Rights Convention, Children's Rights Conventions, Convention against Racial discrimination and Convention an Economic, Social and Cultural Rights.
- NHRC reviewed various Nepal's legislative acts from the human rights perspective and recommended reforms to the government concerning those acts. Such suggestions were related to then prevalent Terrorists and Destructive Deeds (Control and Punishment) Act[22] and a few other laws. Though the NHRC suggestions were not taken up entirely, some suggestions have been incorporated.
- NHRC has recommended Nepal government to ratify the Rome Convention on International Criminal Court.
- NHRC carried out a study and published a report on recommendation of summit on children's rights and execution status of Nepal Supreme Court's judgments on children's issues.
- NHRC also offered necessary recommendations to government after studying the draft of human disappearances (crime and punishment) bill.

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[21] NHRC, *State of Implementation of NHRC Recommendations*, (2009). Kathmandu. p.14.

[22] This Act was promulgated with a view to suppress the violent armed struggle launched by the CPN (Maiost) has proved highly controversial. Various provisions of the Act including the power of security official to detain anyone up to one year purely on the basis of suspicion were against the human rights standards and values and human rights organization had criticized the Act.

However the ordinance issued by the government after it received NHRC recommendations did not incorporate them on priority basis.[23]

Role of NHRC during Conflict and Emergency Period

During the nearly decade-long armed conflict launched by the CPN (Maoist) in February 1996, many incidents of human rights violations and excesses occurred in many places. When the state of emergency was proclaimed for the whole country in November 2001, such incidents intensified in almost all districts.

The government subsequently enforced the Terrorist and Destructive Act Control Ordinance, banning CPN (Maoist) as a terrorist organization and mobilised security operation led by the then Royal Nepal Army. All fundamental rights enshrined in the constitution were suspended. Reward price was announced for the head of certain Maoist leaders. On the other hand, CPN (Maoist) also intensified its violent activities. As a result, violation and excessive abuse of human rights and humanitarian laws accelerated widely. The human rights situation in Nepal deteriorated seriously and the country was being pushed to anarchy and common people were forced to live in fear and terror. People fled their home villages and hundreds of thousands became internally displaced refugees[24].

In the absence of the necessary resources, NHRC found it extremely difficult to provide human rights protection. In this grave situation, NHRC sought to carry out human rights monitoring as a means to human rights protection and mobilization was supported from national and international human rights communities. The following are some of the major steps undertaken by NHRC during this period.

Pro-active Role

NHRC formed high level teams to investigate on extra-judicial killings in places like Doramba of Ramechhap and on the basis of its findings recommended legal proceedings against the accused and compensation to the victim's families. In course of investigation in Doramba, NHRC for the first time availed the services of specialist physicians to exhume the corpses and examine them for the report.

NHRC continuously advocated before the two sides of the conflict for them to sign on a human rights agreement in order to honour the rule of law, to prevent extra-judicial killing and disappearance among others so that basic human rights could be safeguarded. In this regard, the then Prime Minister Surya Bahadur Thapa had issued in April 2004 a 25-point charter to honour human rights and humanitarian laws. Point 24 of the charter expresses government's commitment to provide support to NHRC.

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[23] ibid , p.15.

[24] No definite figure is available as to how many people were displaced due to armed conflict. However various national and international bodies estimate that some 100,000 to 200,000 people were displaced by the conflict.

Continuous Monitoring in Rural and BadlyAffected Areas

While the armed conflict was in its peak period, NHRC teams visited most of the conflict-hit areas to monitor on-the-spot human rights conditions and issued various recommendations and reminders to both the government and the CPN (Maoists). As a result of continuous monitoring, certain incidents showed in declining trend and nature of atrocities showed some improvement.

Policy Intervention

When the government proclaimed a reward on the head of some CPN (Maoist) leaders in April 2001, NHRC took up this issue pointing out such move to be against the constitution and other laws and suggested to the government to correct its stand.

In the backdrop of the internal conflict raging at its peak and the government having introduced the state of emergency, NHRC cautioned the government to honour the Conventions on Civil and Political Rights and accorded priority to human rights monitoring.

NHRC also called upon both the government and Maoists to clearly identify important public places such as school, hospital, industrial sites, factories, places of worship, highway etc. as zone of peace.

Role in Peace Initiative

NHRC welcomed various ceasefire moves introduced from time to time and repeatedly called upon extending ceasefire to permanent peace, stating that 'instead of testing each other's muscle power, let us be serious to prove which side can make maximum contribution to peace building.'

Keeping in view the possible violation of human rights during ceasefire period, the government and the rebel side, CPN (Maoist), signed a code of conduct to be observed by both sides on January 19, 2003. The code of conduct contained 22 points and more than half of which were based on provisions suggested by NHRC[25] .

Initiative of Assistance from International Community

NHRC on different occasions advised and even pressed on the government to invite representatives of various UN Human Rights Groups visits to Nepal and monitor firsthand the conditions in the country[26].

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[25] Bipin Adhikari in Bipin Adhikari, ed. *Conflict, Human Rights and Peace Challenges Before Nepal, NHRC (2003)*, Kathmandu. pp. 48-49.

[26] So far representatives of various UN Human Rights Groups have visited Nepal at the initiative of NHRC. Visits of Manfred Novak, Special Rapporteur on Torture, Working Group Member on the Disappeared, Special Rapporteur on Women's Trafficking and others can be seen as having

HR Protection and Promotion

In the backdrop of security personnel re-arresting the persons from the court premises even when they were ordered to be released by the court, NHRC officials took initiative of being present at the court in order to provide protection to such persons and ensuring guarantee of legal remedies to people.

NHRC conducted training and orientation on HR and international humanitarian laws to senior officers of the then Royal Nepal Army, armed police and civil police in all development regions of the country. Similarly, trainings were organised at regional level to other organisations which have been active in human rights fields.

Challenges before NHRC

Government Attitude

The government's attitude to NHRC has remained a major challenge to its functioning – at the initial phase by showing a lack of civil power in the process of setting up NHRC, and once it was formed by not ensuring proper working condition which was tantamount to non-cooperation. The Government has been indifferent to strengthening NHRC. Even up to this point, senior Government officials are not clear about independence and autonomy of NHRC. Attempts to limit the jurisdiction of NHRC at various times on the part of Government include not providing adequate financial and material resources to NHRC in accordance with the Paris Principles, not initiating timely implementation of NHRC recommendations, make public pronouncement[27] that compromise independence and autonomy of NHRC. As such, the Government machinery is not seen as being positive to NHRC. Even though some positive signs have emerged regarding budgetary allocation, the respect of Government due to NHRC as constitutional body has not been seen at the expected level.

Financial Resource

Because NHRC was formed under the Human Rights Commission Act 1997, which was piloted in parliament as a private member's bill on behalf of the Government, it was not obligatory for the Government to provide economic resources. Hence, as limited amount was provided by the Government, NHRC was not able to work in full strength from its very

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special importance. Following the visit of the Working Group on Disappeared, a report identified Nepal as the country of the largest number of disappeared in the world.

[27] In a letter to NHRC the-then Home Ministry of HMG/N in April 2003, used such language that questions the functioning, fairness and dignity of NHRC stating: "By preparing one-sided report to spread the message of excessive behavior of security to ordinary people and international community, NHRC has worked to denigrate the image of security forces.

inception. When NHRC officials were appointed, there were no supporting staff and proper arrangement for office space. Five NHRC officials sharing one office room for their work indicates the Government's attitude to NHRC. NHRC gradually saw its financial condition improve, and after it attained the constitutional status Government has made some increment in its budget allocation. However, it was not sufficient to develop institutional capacity and to enhance morale of NHRC personnel. Currently, NHRC has received no external support. At a time when the UNDP project ended and the new project was to begin, a signature dispute [according to media reports] has erupted between NHRC, UNDP and OHCHR creating uncertainty about the new project.

Systematic personnel management has been another challenge before NHRC. In early days as it had no staff personnel of its own it relied on government personnel called in on deputation. When staff could not be hired to the extent of the approved number the work suffered; NHRC was forced to rely on project personnel. Because of lack of support from government to maintain high morale of its staff, trained and efficient staff could not be retained at NHRC for longer period of time. Even at present such problem has remained with NHRC. It has an approved plan of 309 staff personnel, but until the question of tenure term, motivation and morale of staff is addressed, the smooth functioning of NHRC will remain affected.

Royal Regime and Ordinance

As continuation of direct royal rule begun by the then King Gyanendra in October 2002, he took over the government command through a coup on February 1, 2005. This led to new turn in national politics and human situation further worsened in the country. NHRC saw division within itself about how to respond to the King's move. However immediately after royal take over and imposition of the state of emergency in February 2005, NHRC issued a statement cautioning the government that protection of human rights becomes the obligation of the state during a state of emergency and depending on the state of civil and political rights, the government must write to the UN Secretary General regarding the reasons that required imposition of the state of emergency and its duration. As the unfolding events made it impossible for NHRC to carry out its work, NHRC was forced to seek support from international community.

Following the royal take over, the term of office of NHRC officials was coming to an end in a few months time and in the condition where the parliament was dissolved, confusion prevailed about the appointment of new NHRC officials. While the human rights community called for continuation in office of NHRC officials, in the end the Act was amended through ordinance and new officials were appointed at NHRC. With this appointment, voices of criticism were raised stating that it was not in conformity to the international standards. As a result, civil society and international bodies expressed the view related to not extending support to NHRC. Regarding the appointment of new officials, UN-OHCHR sent in a study team to Nepal to assess whether the appointment was according to

the Paris Principles. The study team in its report stated that the appointment contravened the international standards. Thereupon ICC bracketed the status of NHRC under review. Thus amending the Act through ordinance and appointing officials in contravention of established norms did not help NHRC win the trust of human rights community. This caused further erosion in the efficacy of NHRC and in the end after the restoration of democracy the NHRC officials were forced to resign when impeachment proposal was being tabled in parliament for their removal.

Lack of Pro-Active Leadership

Effective functioning of NHRC requires more than legal and physical infrastructure. Its effectiveness depends on how its leadership chooses to act. If NHRC cannot give leadership in strengthening human rights, this institution cannot take the right direction. Although NHRC has attained the status of a constitutional body at present, the Nepalese public is not that satisfied regarding its leadership role in protecting and strengthening human rights. NHRC has not been able to function as per its constitutional mandate due to lack of proactive leadership and the divided mentality at NHRC.

10. Role of NHRC in the Transitional Period

Monitoring of CPA

The Comprehensive Peace Agreement (CPA) between the Government of Nepal and CPN (Maoist) in November 2006 formally ended the twelve-year old armed conflict. Among other things, CPA has also incorporated human rights provisions. CPA made provisions for human rights in a separate section on the basis of human rights agreement proposal prepared by NHRC during the conflict period.[28] Though NHRC officials were not present when the CPA was proclaimed, in honour of the role played by NHRC during the conflict period it was given the responsibility of monitoring the human rights provisions of the CPA.[29] However, effective monitoring of implementation of the CPA could not be undertaken.

Impunity and Compensation

Even after three years, long promised bodies such as the Commission on the Disappeared and Truth and Reconciliation Commission have not been formed. Meanwhile, no action has been initiated against security and civil officials who were accused of being engaged in human rights violations in the past and who have cases pending in NHRC. A number of Maoist activists with pending murder charges have been appointed at important state institutions. Even after the formal end of conflict, criminal cases against individuals are being

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28 Human rights provision in CPA.

29 Role of NHRC.

withdrawn from prosecutions. NHRC is not seen as trying to prevent government doing such things. Human rights organisations have pointed out that NHRC has not been able to effectively address the culture of impunity and violation of human rights perpetrated during the conflict period. Overall, it is widely held among human rights activists, who had raised its role to pro-active functioning during the conflict period and in transition period that NHRC's role has been merely reactive, and that it must change.

Conclusion

Among major areas of jurisdiction mandated to NHRC, human rights protection is one significant field of NHRC operation. This is especially important in post-conflict situations. This jurisdiction is further expanded by the Interim Constitution of Nepal. Expanded jurisdiction creates both opportunities and challenges. With wider mandate, people's expectations from the institution also become greater and if NHRC cannot bring itself up to the expected role it begins to lose its credibility. Because of the lack of implementation of NHRC recommendations, the failure of NHRC itself to exercise its power over its own jurisdiction,[30] and the inability to make state agencies responsive to NHRC, serious challenges have emerged to the performance of NHRC's human rights' protection mandate.

A review of NHRC activities from its inception to date reveals mixed results. Although expected results could not be achieved in early stage of NHRC because of its small staff, paucity of government assistance, and a lack of public awareness about NHRC, it has made remarkable achievements subsequently, such as comprehensive human rights monitoring during the armed conflict period, fruitful intervention in some grave incidents, its important role in sustaining peace process and expanding international relations.

An abundance of resources alone does not result in a successful outcome; it requires firm willpower. NHRC needs to evaluate and analyze its achievements and shortcoming objectively and rededicate itself to result-oriented task on the basis of a new strategic plan. In order to establish its effectiveness, credibility and justification NHRC must engage in formulating concrete strategy: (a) to ensure implementation of its recommendations; (b) to function as an umbrella organization of human rights community for transitional justice; (c) to exercise mandated authority to deal with culture of impunity; (d) to initiate steps for the creation of human rights friendly constitution; (e) to strengthen institutional capacity building; (f) to engage in result-oriented collaboration with civil society; and (g) human rights organization; to maintain high level moral of NHRC personnel and retain their services.

The NHRC is a novel kind of institution created for the protection and promotion of human rights. Some countries have given it formal legal status and others have elevated it to the level of constitutional body. The jurisdiction of national human rights bodies also

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[30] For example, NHRC is empowered to make public the names of violators of human rights but so far NHRC is not found capable to exercise this power. Similarly, NHRC has not been able to begin monitoring human rights issues covered by CPA.

differs from country to country. In the contemporary world, particularly in post-conflict societies, human rights commissions play important role in human rights protection and promotion and in effectively addressing past human rights abuses and culture of impunity. Moreover, such commissions can also play an important role in creating necessary mechanism for transitional justice. Within nine years of its existence in Nepal, NHRC has passed through the different phases. From a legal institution, it has been elevated to a constitutional body and NHRC has encountered interference from government, has opposed it and has also succumbed to it in different time phases. Thus, viewed in the light of both positive and negative experience of less than a decade, NHRC's main challenge for the future is to move ahead pro-actively.

V. Third Parties

Involvement of the Civil Society in the Security Sector: Transformation Debate in Nepal

Bishnu Raj Upreti

1. Description of the sector

The boundary of civil society (CS) is blurred and therefore operationalisation of concept is often selective, contextual and even contested both globally as well as in Nepal. In the literatures, the term civil society is very vaguely used to denote voluntary, non-profit, social actors and organisations (such as religious, non-governmental, social, professional, activists) engaged in achieving certain objectives in specific context and time frame within shared perspectives and worldviews (Dahal, 2001b; Shah, 2008; Bhattachan, 2003; Caparini and Cole 2008; Upreti, 2006). Therefore, it is a normative framework with varied composition and contentions (Shah, 2008).

Exploring the historical roots, Dev Raj Dahal (2001a) argues that the concept of civil society existed before 400 BC, which gradually developed over time with faith-based focus to create or preserve a social space beyond state laws. Dahal further argues, 'Shared values, interests, practice and commitments to collective actions tied these intermediary units. They acted through the citizens' collective will and confirmed to the essence of human freedom. The world of civil society was the world of freedom, predetermined neither by custom nor state laws'. This is a very wide and liberal explanation of civil society.

Defining civil society, Bhattachan (2003:34) states, "*Civil society comprises different types of groups such as economic, social, cultural, religious, educational, informational, interests and lobby groups; civil organisations, non-governmental organisations, and public trusts. In Nepal minorities themselves are part of the civil society…*"

Shah (2008:11) defines civil society as relatively small, self-selected group with ability of enjoying disproportionate voice in setting the tone and tenor of public discourse.

Discussing the various dimensions, Dahal (2001a) writes, 'Civil society is a multitude of autonomous human associations, identities, networks of movements forged for the sake of protecting themselves the arbitrary and the unjust decisions of the holders of power and wealth and promoting their rational self-interest'. However, others do not see civil society in the same way. Bishnu Sapkota writes, "*The 'civil*

society' we are talking about now in Nepal was artificially created by the media after the February 2005 coup by the then king. […] It was in this twilight zone of confusion that certain individuals, self-professed as civil society movement, became comfortable icons for the media to project as new saviours of democracy and civil liberties[1]".

Defining civil society, Caparini and Cole (2008:8) write, '*civil society generally refers to the sphere of voluntary collective actions by citizens that develop around shared interests, purpose and values. The term encompasses the way in which citizens associate in order to manage their lives, voice opinions, pursue interests, exchange information and mediate differences, creating relationships and social institutions which are as diverse as the people that establish them at local, national, regional and international levels. Trade unions, environmental groups, religious congregations, think tanks and grassroots ad indigenous people's movements are examples of civil society organisations'.*

In case of Nepal the boundary between civil society members and politicians and even civil servants is quite blurred. Politicians often present themselves as civil society members if they think it is beneficial to do so. Several of the past and present secretaries of the ministries are members of some of the NGOs (which is against the Act). Many NGOs are operated by the family members of high profile politicians or senior government officials or ex-officers of the government.

The above discussion indicates that CS is a fuzzy terminology with no precision and covers wide range of actors. In this paper, civil society includes human rights activists, journalists, business community, professionals (such as lawyers, engineers, doctors, teachers, etc.), independent researchers and scholars, expert practitioners, NGO staff, religious groups, academia, etc. engaged in the field of security issues.

The security sector is defined differently by different people in different contexts. The Organisation for Economic Cooperation and Development (OECD) defines security sector as those state institutions which have a formal mandate to ensure the safety of the state and its citizens against acts of violence and coercion (OECD, 2004; cited in Kumar and Sharma, 2005).

Security Sector Reform (SSR) is a process of transforming the organizations having legitimate authority to use or order the use of force such as police, army, paramilitary, local security units, intelligence and other legally defined arrangements (Greene, 2003; Upreti, 2003). Changing roles, responsibilities and actions of security actors in a changing context in consistent with democratic norms, values and principles of good governance are some of the basic elements of SSR (Upreti, 2008; Schnabel and Ehrhart, 2005). The fundamental principles of SSR are civilian control and parliamentary oversight of security apparatus, right sizing and modernization and

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[1] See the article written under the heading 'Hitting hard against intellectual racism' The Himalayan Times, Tuesday, 19 May 2009 (www.thehimalayantimes.com) for detail.

professionalisation of security forces, respecting rule of law, facilitating war to peace transition, within the broader national security policy (Upreti, 2009).

SSR addresses the shortcomings and weaknesses of security sector, provides new vision, ensures neutrality and demands honest commitments and impartiality from both civilian government and security professionals (Upreti, 2007). Appropriate trainings (both military and human rights, capacity building and technical competence), mainstreaming security issues into national development policy, delicate balance between confidentiality and transparency, strong co-ordination and operational mechanisms, relationship between military and civilian, building public awareness, strengthening constitutional and legal frameworks, periodic review of performance of security sector and strengthening of independent oversight mechanisms (e.g., public complaint bodies like human rights commission, auditor general, legislative and judicial bodies) are some of the important elements of SSR (OECD, 2004; Schnabel and Ehrhart, 2005; Upreti, 2009, 2008;2007; Willam *et al.,* 2002; Ebo, 2003).

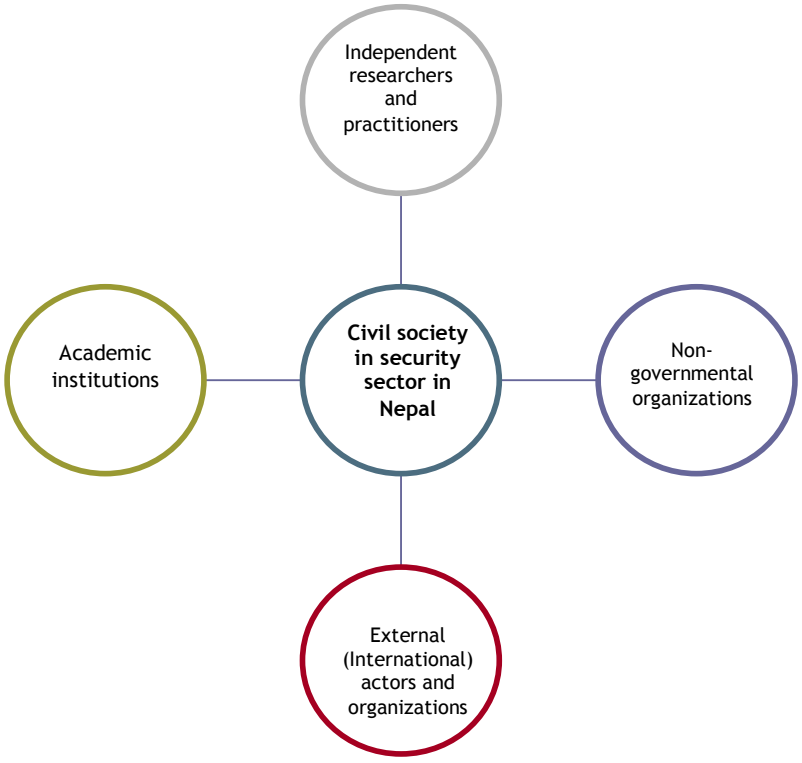

Figure 1: Major categories of civil society actors engaged in Nepal's SSR.

Nepal is in the crucial transition from 10 years of armed conflict to the ways of durable peace, stability and prosperity. Hence, achieving durable peace, stability and prosperity requires collective efforts and concerted actions from the government, political parties, civil societies and private sectors. It also requires right process, effective monitoring mechanism, sincere implementation of understandings and agreements, providing transitional justice, exercising rule of law, guaranteeing transitional security, proper execution of disarmament, demobilisation and reintegration, providing peace dividends and implementing reconstruction and appropriate restructuring of security sector. In this paper, I am briefly discussing the engagement of civil society, one of the many important actors, in security sector transformation issues.

The main objective of this paper is to present the state-of-the-art on engagement of civil society in the security sector transformation debate that will provide better understanding which will ultimately contribute in facilitating transformation of security sector in Nepal.

Some important questions in this context are: why engagement of civil society is important in SSR or how it can contribute democratic governance of this sector? What motivates civil society to engage in SSR and who supports them? What are the changes and opportunities for CS to engage in SSR debate? What are the enabling and constraining factors for CS involving in SSR? This paper attempts to answer these questions.

2. Brief history

Civil society initiative in Nepal was first started by Madhav Raj Joshi to fight against Rana regime by creating *Arya Samaj* (society of noble people) in 1909 with the aim of emancipation for the Nepalese people from superstition, social discrimination, child marriage and to promote social reform (Dahal, 2001b). In 1918, Tulsi Mehar, Amar Raj and Bakpati Raj made efforts to expand the A*rya Samaj*. In 1926, Sukra Raj Shastri and his colleagues established *Kamadhenu Charkha Pracharak Mahaguthi*. Later Prem Bahadur Kansakar and others established *Prajatantra Sangh* (Democratic Association). In 1947 students of Sanskrit School of Kathmandu started Jayatu Sanskritam movement against the Rana regime. Since then, different people have contributed, expanded and strengthened the existing or initiated new social movements in the past.

However, wider recognition and use of the term 'civil society' started in Nepal after the political change of 1990 (as an outcome of *Janaandolan* I) in the form of non-governmental organisations (NGOs). Before 1990, only few people close to the palace were able to operate NGOs. Social Services National Coordination Council (SSNCC), an apex body created to coordinate social services activities, was directly

controlled by the then queen as its chairperson. This notion became stronger since the armed conflict started and quite popular during the *Janaandolan* II (April 2006). During the time of Panchayat era, main roles of NGOs were to strengthen interests of palace and service delivery. At that time, military was directly controlled by the palace and discussion by civil society about reforming centrally controlled army was virtually impossible. Discussion about the army at civil society level was viewed or perceived by the palace as anti-monarchy or anti-nationalism. Only limited numbers of NGOs, often close to palace, were working in limited areas for service delivery or implementing activities to please the palace and related authorities.

The involvement of civil society in security sector is latest very recent phenomena in Nepal. It was extremely difficult to critically look at the performance of security providers during the time of the party-less Panchayat system. Though some discussion on the performance of police was started after the 1990s political change, the issues related to Nepal Army were not discussed even after the 1990s political change. During the time of armed conflict it became extremely difficult to discuss about the SSR and people discussing the SSR issues were viewed as anti-security forces. However, some researchers and scholars were engaged in writing on SSR issues[2] despite theses difficulties.

Formal debate on SSR was started after the signing of the Comprehensive Peace Agreement (CPA) in November 2006, which contains some provisions related to SSR. The clause 4.4 of the CPA clearly states the need of addressing the issues of CPN (M) combatants. It writes, "The *interim Cabinet shall form a special committee to carry out monitoring, integration and rehabilitation of the Maoist combatants*". Similarly, Clause 4.7 of the Section Four of the CPA has mentioned the democratization of Nepal army. It states, "*The cabinet would control, mobilize and manage the Nepali Army as per the new Military Act. The interim cabinet would prepare and implement the detailed action plan of democratization of the Nepali Army by taking suggestions from the concerned committee of the interim parliament. This includes works like determination of the right number of the Nepali Army, prepare the democratic structure reflecting the national and inclusive character, and train them on democratic principles and human rights values".*

Similarly, Article 144 (3 and 4) of the Interim Constitution has stated similar provisions. Hence, the new political context has clearly envisioned restructuring the existing army structures. However, neither the CPA nor the Interim Constitution is

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[2] Some of the examples are a) Upreti, B.R. (2003) Security Sector Reform: A Neglected Agenda. The Kathmandu Post, 9 May 2003; b) Kumar, D. (2004), "Emergency, Militarization and the Question of Democratic Recovery". Paper presented at the National Seminar on "Participatory Democracy in Nepal" organized by Nepal Centre for Contemporary Studies at Hotel Malla, Kathmandu, 2-3 January; c) Kumar, D. and Sharma, H. (2005), Security Sector Reform in Nepal: Challenges and Opportunities. Kathmandu: Friends for Peace.

able to visualize the comprehensive need of security sector restructuring which includes a holistic approach, i.e. developing national security policy (by complementing international relations, defence policy, and economic policy; establishing a supreme and powerful national security apparatus such as national security council), reforming intelligence, restructuring army, police and other security apparatus. Isolated effort of restructuring of one component of security sector alone cannot produce expected result and therefore need to opt for a holistic approach.

Until late 2007 from the date of signing of the CPA in November 2006, the environment and attitude of key state actors engaged in security sectors was flexible towards debating the need of SSR and its practical implementation. The Nepal Army itself had organised a first historical national seminar on 'Democratic Transition and Nepalese Army Reforms' in late 2007 at Army Headquarters inviting senior leaders of political parties, civil society, academics, representatives of diplomatic community and business sector. Major three themes were covered in the seminar viz. 1) Security Sector Transformation in the Changing Political Context: Special Reference to Nepalese Army; 2) Civil-military relations, and 3) Nepal army and human rights.. Since signing of the CPA, the trend of engagement of civil society in debating SSR has been increased. Some organizations, with the financial or technical supports from international community started some research and discussion on specific aspects of SSR such as police reform, civil military relations, human rights.

Dev Raj Dahal (2001a; 2001b) argues that 'the stronger the civil society, the more repressive it makes the state and the market to popular needs and aspirations. This is why democratic states are deeply rooted in the associational life of its citizens. This, accordingly, results in the decentralization and democratization of the state and corporate power while freeing the civil society from the hegemony of both'. The essence of engagement of civil society in SSR debates lies with these arguments.

3 Funding sources of civil society

Major sources of funding of civil society and particularly NGOs are external donors (bilateral, multilateral, INGOs, intergovernmental and private philanthropic agencies). Financial sources of academic institutions engaged in SSR are fees from students, grants from university commission or partial funding from external sources.

Box 1: DCAF study on civil society actors in defence and security affairs in post communist Europe concludes that functioning of CS has been hampered by lack interests of civil society actors and donors' policies (Caparini *et al*., 2006).

Obtaining and use of funds in non-governmental sector in Nepal is controversial and frequently questioned by media for its non-transparent mechanisms. Often, different criteria have been set for obtaining funds by civil society organisations, particularly NGOs from donors. The following table presents synthesis of formal and informal criteria used by donors to fund civil society:

Table 1: Generalised criteria of donors to provide financial sources to civil society

Formal general criteria for funding NGOs	Informal and most influential criteria
1. Transparency 2. Accountability 3. Reaching to targeted population 4. Effective and efficient use of fund 5. Not funding for any political, ethnic or religious agenda 6. to address discrimination and social exclusion 7. Core values or principles of funding agencies 8. Competencies and experiences 9. Other contextual criteria announced by donors with particular grand programme	1. Personal relations and network 2. Professional closeness 3. Ability of recipients to connect with power centres in host countries 4. Recommendations from close circles 5. Languages standard 6. Institutional base of training and education of applicants (e.g., preference to people trained in donor's country) 7. Influence of recipients in host country/society (network with power centres) 8. Ability to serve donors (information, contact facilitation with desired groups, etc)

Source: Compiled by author from different sources and personal observations for 29 years of professional career.

In principle and conceptually, CSOs have to be operated in transparent, effective and efficient way. Citing the Habermasian notion on "rationalization of life-world", Dev Raj Dahal argues, "through the power of people to imagine, reflect, organize, communicate and act voluntarily for public interests a robust civil society can develop only in the context of a liberal political culture and corresponding patterns of socialization, and on the basis of an integral private sphere; it can blossom only in an already rationalized life-world[3]". He emphasizes need for free from state-sanctioned politics to the shape new social ordering, public service and self-governance of society, which is not the case in Nepal despite the restoration of multiparty democracy in Nepal. In this context, voluntary working for public interests by NGOs is not realistic.

Again, like in representative democracy, few elites with various forms of power such as language (English), information, access, networks (Table 1), obtain resources from donors to run their NGOs. Right to information act has made provision of need of public agencies to make their sources and use of funding

[3] See Habermas 1997:371 for detail.

transparent. However, non-transparency of funding of NGOs is often becoming source of contention and wider coverage of media.

All NGOs are operation according to the Society Registration Act 2034 (1977) and Social Welfare Act 2049 (1993). They are controlling in nature and strongly criticised by NGO sector.

One of the main idealistic reasons of engagement of civil society in SSR is to develop local ownership, enhance legitimacy and sustainability of post-conflict reconstruction. This argument is amply reflected in the work of Marina Caparini (2005) which examines the role of civil society in security sector reconstruction in Bosnia and Herzegovina. Caparini (2005) had also examined role of donor agencies in supporting civil society in SSR in post-conflict states and concluded that donor community had focused only on short term and quick result types of activities but they need to go beyond short-term needs for civil society and address long-term concerns such as investment for developing a strong civil society to make them responsive and accountable to citizens.

So far, I did not find any evidence of budget provided from the official sources from the government of Nepal to CS to engage in SSR debate. Almost solely, the funding for CS is coming from donors either directly or through intermediary organizations such as INGO (e.g., Safer word, International Alert, The Asia Foundation) or inter-governmental organizations (e.g., DCAF, IIDA) or government created independent institutions (e.g., United States Institute for Peace) on the issues of SSR in Nepal.

4 Formal and informal interaction with other organisations

Formal and informal interactions of civil society active in SSR with external organisations are mainly shaped by financial support in the interest areas of the funding or intermediary agencies or inter-personal relations, connections or referral practices. After the formal ending of 10 years of armed conflict, several external actors (donors, INGOs, academic institutions, private security companies, etc.) shown their interests to support both technically and financially to the government and civil society for SSR. International Non Governmental Organisations became quite active (far ahead of the realisation of the need of SSR by the host government or even civil society) in obtaining fund from donors to work on SSR. Then they picked up some Non Governmental Organisations (NGOs) to implement the activities stated in the proposal funded by donors.

Experiences show that civil society organisations are dependent with external agencies for funding and even for knowledge base. SSR is being relatively a new area in Nepal with very little interests of social and political actors.

S.N.	CSOs active in SSR	Areas of CS engagement	External organisations supporting CS
1	Nepal Institute of Policy Studies (NIPS)	Research and documentation Policy dialogue	Saferworld/DFID
2	National Peace Campaign (NPC)	Research and documentation Policy dialogue Confidence building	5 bilateral donors via DCAF
3	Friends for Peace (FFP)	Research and policy dialogue Local security and justice	Norway and European Union (EU) via International Alert (IA)
4	IHRICON	Community level dialogue	Saferworld/DFID
5	Interdisciplinary Analysts (IDA)	Research and policy dialogue	Saferworld/DFID
6	Creative International Forum	Community level dialogue	EU
7	Nepalese Centre for Contemporary Studies	Scientific publications	-
8	Institute of South Asian Studies	Research and policy dialogue	US
9	School of Management/KU	Academic training on security management	
	HNRSC/Kathmandu University	Academic training on human security aspects	NCCR North-South/Swiss
10	Pacific Law Associates	Assessment of security laws	DCAF and ITJ
11	Conflict Study Centre	Analysis and documentation	
	-	Policing	USIP
12	Nepal Ex-Police Organisation and Saugat Legal Research Consultancy	Police and SSR	FES
13	Centre for Security and Justice Studies	SSR research and education	KUSUM/Kathmandu University and DCAF
14	UN system (UNMIN, UNICEF etc.) engaged in PLA verification, dealing with child soldiers, etc.		

Source: Compiled by author

Some INGOs and intergovernmental organisations are also directly working on some issues of SSR debate such as United States Institute of Peace has implemented series of debates and discussion on police reform. Similarly, International IDEA organised dialogue on SSR relating with the constitution making process.

It is not possible to list all the organisations who are indirectly engaged in different aspects related to security sector and therefore only known organisations to me and directly dealing with SSR are listed. Hence, this is by no means a complete list.

Based on my own research, Caparini (2005) concludes that 'post conflict civil society organizations often become dependent on external donor funding, reflect

donor agendas and priorities, and are not accountable to the social groups they purport to represent[4]'. Citing vivid examples from Bosnia and Herzegovina, Caparini (2005) highlights that INGOs and foreign aid agencies distributed huge amount of money to local NGOs without considering long term impacts and local NGOs responded opportunistically to the flow of abundant supply of donor money. The NGOs working there were focusing to please donors than working for the need of the country. One of the important lessons for civil society and donors supporting Nepal is to avoid mistakes CS made in Bosnia and Herzegovina.

5 Strengths and weaknesses or opportunities and challenges

Civil society engagement in important national issues is becoming increasingly popular in Nepal, be it in the case of 2005 royal coup or violation of human rights by the state and non-state actors. SSR is one of the very important national issues. So far not much attention is being paid by CS and therefore greater opportunities exist for CS to constructively engage in SSR debate in Nepal. SSR is being very complicated, complex and sensitive in nature there are several challenges for civil society. Some of them are:

- ✓ Credibility and impartiality: One of the main challenges is to maintain the credibility and neutrality. When civil society actors take specific components of SSR that might be favourable to one party and unfavourable to another, which ultimately brings negative perception and attitude of state or non-state actors and they start undermining the credibility and professional integrity. Occasionally, some civil society leaders work in line with interests of particular groups that create suspicions. Dealing with this situation is a major challenge to civil society.
- ✓ Maintaining professional integrity, social credibility and impartiality in one side and winning trust and confidence of security related actors in the other is a major challenge of civil society.
- ✓ Dealing with resistance form key actors: The unique characteristic of key political actors of Nepal is resistance to change and not ready to open for options. They are often being selective on the issues raised by civil society. They treat individual members of CS blatantly negatively if the issues raised are unfavourable for them. Dealing with such dilemma is one of the major challenges for civil society.
- ✓ Risks of being biased: CS is being a loosely connected wider network of people and often emerged from well connected network of power-resource-base, there is always danger of being biased to fulfil vested interests of connected power centres. Financial or personal benefits (earning power,

[4] See http://www.ssrnetwork.net/doc_library/document_detail.php?id=3469 for detail

prestige, recognitions, visibility, identity and economic gains) by engaging in CS movement is often open reality. When independent persons or groups engaged in vested interests that could greatly damage the credibility of civil society.

- ✓ Lack of competence: Security sector is complex, sensitive, and requires in-depth understanding and knowledge that requires specialisation (competency) and devotion. But the current civil society practices show that CS members are operating with very little understanding of SSR that ultimately ability of civil society. Consequently, government and security providers may be unwilling or selective or resistance with the issues rose by civil society actors. Lack of competence, biases or superficial understanding of CS on SSR is one of the major changes.
- ✓ Experiences of civil society engagement in SSR in various post-conflict countries show that CS functioning is weak, facing capacity deficiency and legitimacy and donor dependency, and perceived by the government as parallel forces and not accountable (Caparini, 2005; Upreti, 2009). Often NGOs were operating simply by adapting donor agenda but without proper understanding the need and interests of their constituencies that ultimately undermined their credibility.

6 Future role of civil society in SSR

Enormous potentials and opportunities for the engagement of CS in SSR exist in Nepal after the political changes of 2006-2008. So far potentials of CS in SSR are not or are under-utilised and largely negatively considered by the state. Some of the civil society actors have also understood their role as only to criticised government and security providers with very little understanding of the security sector. Hence, in future this perception has to be changed and potentials have to be utilised. The first condition of improvement of performance of CS engagement in security sector is to develop better understanding of principles, rules and procedures, and operational practices of security providers (army, armed police forces, civilian police, intelligence, private security providers, etc.) that help accomplishing constructive role. Though the level of CS engagement in security sector depends upon openness of state and security organisations and willingness of members of civil society, holistic understanding of CS on security sector is essential to enhance chances of success. Nepal is in post conflict situation and therefore security needs of the country are different than normal situation. Enabling sustainable peace and strengthening democracy and stability must be the prime focus in future.

Main objectives of involvement of CS in SSR in future are to contribute in:

a) strengthening democratic control of armed forces (accountability functions);

b) enhancing performance of security providers (enabling functions); and
c) smooth management of change for achieving stable peace, democracy and prosperity of Nepalese people (transformation function).

Role of CS in future have to focus mainly on:

- monitoring (watch-dog functions) of
  i. Security governance (transparency, accountability, efficiency and effectiveness, inclusiveness as well as preventing security structures from politicisations is equally important as internal governance)
  ii. Defence budget and procurement (requirement, production, transaction, acquisition, etc.)
  iii. Performance (intelligence, services, etc.)
  iv. Representation and inclusion
  v. Control of small arms and light weapons
  vi. Border security,
  vii. Human rights issues (in normal situation as well as at the time of State of Emergency)

Box 2: Though CS could play important role in SSR; we have to be aware of romanticisation. Role of CS actors in SSR and democratisation process in Zambia was very weak because of unwillingness of themselves and constraining institutional arrangements (Williams *et al.,* 2002).

- Research and analysis
- Promote civil-military relations
- Public awareness on security issues and training and education on specific security concerns,
- Supporting security providers to perform in an impartial ways and justice sensitive approach, institutional integrity and enhancing coherence
- Facilitating policy dialogues and debate on security issues
- Representing interests of local people and communities in policy process,
- Making knowledge base and information available,
- Controlling proliferation of small arms and lights weapons (Upreti and Nepali, 2006)
- Promoting transparency and accountability.

As Nepal is in the fundamental transformation process in all sectors (economic, political, social and security sectors), in future security sector has to cover both hard core security (protection of nation and people from enemies, protect from terrorism, helping people at the time of calamities and disaster, etc.) issues as well as soft security issues such as space security, information security, cyber security, livelihood

security, environmental security, energy security, etc,). In this context collaboration between security providers, civil society and security oversight agencies is extremely essential to achieve better results. However, this is not easy task. Nathan (2007) argues that security sector is less responsive and less people-centered than other sectors. Experiences from different parts of the world show that even if civil society is engaged in SSR, vulnerable groups do not benefit because of their lack of means to influence dynamics and security apparatus often ignore them (Nathan, 2007). Hence, ensuring participation of vulnerable groups and benefit from SSR to them should be priority in future that ensures local ownership.

The experiences of Bosnia and Herzegovina show that CS engagements in SSR in post-conflict countries were weak and especially challenging (Caparini, 2005).

7 Conclusions

So far, engagement of civil society in Nepal's security sector is weak, partial and therefore inadequate to positively contribute to democratise security sector, to make it accountable and to achieve durable peace, stability and democracy in the country.

CS work in security sector is still largely sporadic, superficial and insufficient. Hence more concrete contribution of civil society in SSR is essential. Based on the experiences of CS engagement in other important issues in Nepal, it can be expected that civil society could greatly contribute in SSR. But CS actors need to develop their interests, competency and continuity.

So far, CS engaged in SSR in Nepal is largely relying on the external resources (mainly financial and human resource) and therefore their activities are much influenced by donors and INGOs. It is crucially important for CS of Nepal to learn from the mistake made in other post conflict countries such as Bosnia and Herzegovina.

The role of CS should not be seen as to substitute or weaken the state but complement and strengthen the democratic governance of the state. As CS is not a homogenous entity, the diversity mush be respected but the diversity on their working procedures, level of understanding, should not create confusion and complications. A clear code of conduct may help to minimise potential risk of being used by donors or political parties or vested interest groups for their interests.

A common weakness observed among the donors supporting CS in SSR in post conflict countries was their unwillingness to differentiate between NGOs speaking donor language, serving donor interests and their methodology but detached from the local people. Committed NGOs with strong connection with local people and constituencies may not have necessarily equipped with desired language, knowledge and skills required to influence donors agencies. Hence donor

community supporting civil society engagement in Nepal's SSR need to learn form the mistake made in other post conflict countries.

Many of the organisations working in SSR issues are either directly engaged or collaborating with international organisations in terms of financial and technical resources, logistics supports or sharing and feedback.

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Media and Security Sector: Shifting Relations

Sudheer Sharma

For traditional Nepali media, the security sector has previously referred only to the civilian Nepali Police. But over time its definition has changed. Besides the civil police, another Armed Police Force (APF) has been created. Meanwhile, Nepalese Army and National Investigation Department have also relatively increased their public relations and media contacts. The Maoist Party's defence organ (the People's Liberation Army/PLA) that emerged as rebel power is now stationed in temporary cantonments under UN supervision which is maintaining steady contacts with the media. In Tarai region, various armed groups have come into existence with whom the media have no uniform contacts and access. Viewed in this way, Nepali media have developed multifarious relations with various security sector actors.

The Nepali media is playing an important watchdog role in making Nepali's security sector restrained and democratic. But the media's such new found role has been of very recent origin. For one thing, the history of Nepali professional media in true sense is not even two decades old. Only in recent years, Nepali media have grown in number and quality leading to its perceived impact. Nepal how has diverse media outlet such as dailies, weeklies, periodicals, FM radios, TVs and news portals of diverse range and size.

Nepali Media Scene

Nepali media has a history of about one century.[1] Before the revolution of multi-party democracy in 1990, the mainstream media comprised of a dozen or so weekly newspapers. The government publication house produced only two broadsheet dailies: the Gorkhapatra and The Rising Nepal. The launching of the Kantipur and The Kathmandu Post in 1992 in the private sector laid the foundation of professional journalism in Nepal. Due to better quality in production and editorial input, these two dailies soon captured the readership market vis-a-vis the government-owned papers.

Currently the largest selling daily the Kantipur is published from four cities. The other dailies include the Annapurna Post, The Himalayan Times, Naya Patrika, Nagarik, Republica, Nepal Samarcharpatra, Rajdhani, etc, Among the weeklies are Deshantar, Jana-Astha, Nepali Times, Saptahik, Chhalphal, Sanghu, Budhabar,

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[1] A monthly Sudhasagar was launched in 1898 and the daily Gorkhapatra began its publication three years later. See Devkota, G.B. (1994) *A History of Nepali Press newspapers*. Kathmandu: Sajha Publication.

Ghatana ra Bichar, Bimarsha, etc. Some prominent news magazines include Nepal, Himal which are noted for in-depth analysis and reporting.

According to the Nepal Press Council, a total of 2038 newspapers and magazines have been registered for publication of which only 514 are being published regularly.[2] Most of these are in Nepali language. English medium papers number only a few dozens. Some papers are published in Newari, Maithili and Hindi as well.[3] Besides some half a dozen TVs and about 200 FM radio stations comprise the Nepali media world.

The political change of 1990 contributed to both quantitative and qualitative growth of Nepali media. Some of the factors behind it are restoration of rule of law, arrival of new investors, growth in advertisement market; increasing readership and wider use of Nepali language etc.[4] The most important reason of all was the guarantee of press freedom afforded by the constitution of 1990.[5]

The Interim Constitution of Nepal 2006 has further widened the scope of press freedom. Section 12 guarantees the freedom of conscience and expression and section 15 provides for right to publication, broadcasting and printing.[6] In 2007 Right to Information Act was adopted to facilitate the public easy and un-hindered access to information of public interest held by public institutions which has naturally increased media access to information. However, the freedom available to Nepali media is still not beyond the restrictive clutches of security bodies, their pressure and occasionally of their legitimate requirements. In addition to this, examples abound of the press being restricted due to the ongoing presence of the armed rebel forces.

The Police and the Media

As mentioned at the outset, the Nepalese media have a long-standing interface with the Nepali police compared to other security bodies.[7] This relation evolved in the course of covering daily incidents concerning peace and security as well as police activities. Keeping in mind the importance of relations with media, the police news section at its headquarters and assigned officers as needed to coordinate with media

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2 Of the current newspapers 381 are weeklies, 89 dailies, 40 biweeklies, and 4 half- weeklies. www.presscouncilnepal.org/published papers.php

3 The Kathmandu- based Newari daily Sandhya Times is one such example.

4 Onta, P. (2002). Critiquing the media boom in *State of Nepal*. Dixit, K and Shastri Ramchandan (eds). Kathmandu; Himal Books.

5 *Constitution of the Kingdom of Nepal* 1990 section 12 (2) Guaranteed the freedom of though and expression and the section 13 provided for no prior censorship of any publication. Similarly it also stated publication license would be cancelled for publishing any article or news report.

6 *Interim Constitution* Section 15 provides a broad sweep of guarantees under four freedoms for publication, broadcasting- radio/TV, writing, expressing thought, and uninterrupted access to all media including electronic, telephone and print.

7 For official history of Nepal Police, see Vaidya, Tulsi Ram (1995) *A History of Nepal Police,* Kathmandu: Police Headquarters.

at local levels. The police organisation also offers basic media training to its officers from time to time to facilitate its personnel to understand working modalities of media and be able to respond to queries from working journalists. Moreover, the police department also carries out its own scheduled radio and TV programs.

When the Maoists launched the "People's War" in 1996 and the government mobilised police operation against it, the contact of the police with media further intensified. The police department began holding regular press briefings and assigned police officers to give details on police action against the Maoists. This procedure was followed from the centre to regional to district levels. At police headquarters, a senior officer was designated as spokesperson for the police organisation. As the conflict raged on, the Armed Police Force (AFP) was set up in 2000. The APF too came out with structure similar to the one followed by Nepal Police in its dealings with media organisation. But because of its para-military nature of security operation, APF could not maintain informal and close contacts with media as was done by Nepal Police. The intelligence bureau (National Investigation Department) by nature followed high security procedures in its functioning and as such remains a bit out of reach to media reporters. However, media reports are still pouring in about these institutions.

Actually it was only during the Maoist People's War period that Nepali media faced the challenge and opportunity to prove its strength and also it experienced targeted suppression. Until the sixth year after the outbreak of conflict, the state didn't declare the Maoists as terrorist organisation. The Nepali media too looked upon them as a rebel group and provided considerable space in their news coverage, comments and opinion and analysis columns. However, the government regarded such response as propagation of Maoist activities by media organisation. In 1999, the then home minister Ram Chandra Poudel accused the media of complicating the Maoist issue by their wide coverage. He told journalists, "this issue in not as complicated as it is made out to be. The more complicated you portray it, the more the police will be forced to check it".[8]

In 2002, the then minister of information and communication J. P. Gupta alleged that big media houses were making news reports on the Maoist direction.[9] A few days after that he further charged a few publications that developed during the parliamentary system have begun commenting on the failure of this system which makes things easier for Maoists. [10] This reflects the then government's attitude to media. This situation encouraged the police to deal with the media harshly.

A wide coverage of Maoist activities in media was viewed negatively by police from the very beginning. In the police's perception such coverage did not only affect police morale, it also meant journalists doing underground Maoist politics under

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8 Media behind complicating the Maoist issue: Upadhyay (2056 Ashwin 23) *Kantiur,* p.1.

9 ' Big newspapers carry news on Maoists' direction; (2000, August 1) *Kantipur* p. 1.

10 Newspapers turned antidemocratic: Minister of communication (2000 September) *Kantipur*, p. 1.

cover of journalism. Thus in course of police response dozens of journalists were detained, some were disappeared and some others were killed. Especially during Kilo Sero II operations of 1998-99, many journalists were victims of police suppression.

Police suppression against the press evoked sharpest reaction after police intervention in the Kantipur daily. The then editor Yubaraj Ghimire, managing director Kailash Sirohiya and director Binod Gyawali were arrested from their office over a material published in June 2001 charged under offence against state and punishment act. They were accused of treason on the basis of the contents of an article of Maoist leader Baburam Bhattarai published right after the palace massacre. Bhattarai in his article had alleged the massacre to be part of the plot of Indian and US intelligence agencies and dubbed the new King Gyanendra "an agent of Indian expansionist forces" calling upon the Nepali people not to accept him as the King". [11] That the paper did not share Bhattarai's view was explained in the editorial of the following day, but the *Kantipur* was targeted for giving space to Maoists standpoint.

Maoists' Fascination with Media

While reviewing relations between Nepalese security sector and media, some thought must be given about the Maoists who had conducted a decade long armed rebellion. In the early days like everybody else journalists too found Maoist movement unfamiliar and mystifying. For foreign media Maoist's People War in the 21st century was a completely baffling subject. Naturally this evoked priority interest in the media. A journalist close to the Maoists observes that the CPN-Maoist became probably the first pioneering communist party of the world to emphasize the media sector and attain remarkable success in using it.[12] This is corroborated by the fact that since the People's War got underway interviews and articles of Maoist leaders such as Prachanda and Baburam Bhattarai were widely carried out in regular media.[13] It seemed Bhattarai was largely in charge of refuting allegations of any kind against the Maoists through articles, comments and press statements.

As on the spot reporting about police brutalities during Kilo Sera operations were carried by media and it exerted tremendous pressure on government and from

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11 Bhattarai, Baburam, No Recognition to new Palace Killings (2001 June 7) *Kantipur* p. 6

12 Sapkota, Deepak (2009) *A Decade of Upheaval.* Kathmandu: Revolutionary Journalists Association.

13 Then Maoists had their own affiliated newspapers like *Janadesh, Jana-Ahwan, Janadisha* which were in open circulation until 2001. *Janadesh* was among the largest selling weeklies. But with the imposition of the state of emergency Maoist papers were closed down. Sensing that mainstream papers would not be as supportive as before, Maoist reorganisenised their propaganda mechanism. Multiple editions of *Janadesh* were published from various rural sites of India and Nepal; CPN.org and krishnasen.online websites were created under independent domains and from November 2003 five FM radios known as People's Republic of Nepal Radio were launched.

this the Maoists clearly understood the media impact. They began organising guided tour for journalists in their area and took care of creating positive impact through careful planning to woo the media to their side. They were successful in their effort. In early years of conflict, photos of gun-toting guerrillas were viewed as media "scoop" for reporters; for Maoists it proved free political propaganda.

When the Maoists declared formation of their first district people's government in Rukum in January 2000, some of journalists (including the author) were taken there under their guided tour. The contacts led the journalists' group to Banfikot of Rukum after a one day bus ride from Kathmandu and a three-day trek. The journalists were garlanded with red vermillion powder and having seated in the podium, the guerrillas even fired guns in formal salute. When after eight months, as journalists visited Rolpa villages for independent reporting, the guerrillas detained journalists for five days, with armed guards even for going to the toilet.

Actually Maoists wanted only positive highlights about them in media, but it did not always happen. Reporting on Maoists' attack carried by Nepali media helped gain publicity in favour of the Maoist people's war, but the pictures and details on massacre of police personnel also spread negative feeling about Maoists in general public. In April 2000, a photo of a young woman crying over her dead husband's corpse in Naumule of Dailekh touched raw nerves of people exposing cruel-violent mentality of Maoists and the pain brought about by the conflict.[14]

Maoists both made use of journalists and harassed them. They not only threatened, detained and beat journalists who wrote against them but also destroyed them physically. Gyanendra Khadka of Sindhupalchok and Dikendra Raj Thapa of Dailekh are well known examples. But the Maoists leadership responded quickly and apologised once the mistakes were brought to light. They tried to portray such incidents not to be part of their central policy, which were described as indiscipline on the part of the local activists. However, the Nepali media never got a hint of any action taken against those activists who committed the crimes.

Addressing the first convention of the 'People's Liberation Army' in August 2001 Maoist President Prachanda explained the importance of media in this way: "It is essential that all our comrades must be serious that every battle needs thousand publicity and confirmations'. Needless to say, media proved such a source which afforded thousand publicity to carry people's war from remote Rolpa and Rukum to people's mind. While ending his underground career in 2006, Prachanda heaped praise on media in Baluwatar in these words:

> Since the historic people's movement of 1990, our party believes the most vibrant of any sector in Nepal is the media sector. To the level of its vibrancy it is not that organised, there is much to

[14] Luintel, Gunaraj (2002). Maoists and Press: Relations of curiosity and Fear in Onta, Pratyoush et al (eds.) *Media Contents: various Analyses* (p. 42) Kathmandu, Martin Chautari.

> organise about. Among the people and parties who credit its growth and feed proud about it, we are the foremost. But it is not enough. It is urgent that it has to be completely liberated from Feudalism with definite philosophical ideals and visions. [15]

Before that on the eve of launching joint movement with seven parliamentary parties following the 12- point agreement, the Maoist leadership appeared before the mainstream media to highlight its ideas in a comprehensive way. In this regard, the first direct interview with Prachanda was published in the *Times of India*[16] and then similar interviews appeared in *Kantipur/The Kathmandu Post*, *The Hindu* and in BBC which helped carry their policies and views to common people with ease and effectively.

When the Maoists joined the government, the Maoist leader Krishna Bahadur Mahara became minister of communication. He expressed commitment to honour press freedom as people's fundamental right.[17] But incident of atrocities did not end. Journalists Birendra Sah was killed in Bara and media persons were attacked in other places. There has been no guarantee of press freedom from the side of the Maoists.

Early Relations with the Army

The latest security agency that came to establish relations with Nepali media is Nepalese Army. It came to regular media contact after being mobilised against the Maoist rebels in 2001. Before that this body was not much in external contact. Most army officials were used to prejudiced views about media and media personnel. Until the monarchy was in its place, Nepalese Army and political parties did not have cordial relations. The army also viewed media as direct or indirect front piece of party organisations.[18] Before 2001, when army mobilisation against the Maoists could not take place due to lack of cooperation from the palace despite government effort towards it, Nepalese media carried news and comments about it. This enraged the army very much. One general even wrote the following with an alias:

> It is a matter of sadness that certain news papers have thrown away all the ethical codes and dignity to pour out poisonous stories against the army. News reports are twisted and distorted. They are

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15 Maoist chairman PuspaKamal Dahal addressing a press conference in Baluwatar, For the full text of his address see, The future is ours (July 4, 2006) *Kantipur,* p.7

16 Pradhan, Keshav, (September 14, 2005) ' Revolution is not a commodity for export'. *The Times of India*,New Delhi, p.10

17 'Press Freedom to be honoured as fundamental rights' Minister Mahara (April 8, 2008) *Janadisha*,Kathmandu p. 1

18 Informal conversation with a senior army officer, June 2009, Kathmandu.

> indulging in sensationalism. Still the army remains quiet. Defence ministry remains silent. Then the question keeps rising, does not the army have its voice? One can gauge the serious hurt felt by the army caused by yellow journalism. Now the army must respond against these in every possible way.[19]

Army officers did not only view media as an extension of political parties, they also used to comment that like political parties media also acted as directed by foreign powers. This can be gauged from a news report carried out in an army mouth piece. This said that:

> the fourth estate which should be as responsible as the executive, legislature and judiciary has been infested with the agents of the external powers who are found using it as the fifth columnist.[20]

Of course the Army was not unaware of the theoretical notion of media's important role in military operations. It regards the media's cooperation indispensable in reaching out to public informing then about is activities even as maintaining operational confidentiality. Army officers understand that such a move is conducive to earn public support and trust and it is vital to garner international sympathy for a country like Nepal that remains so dependent on external aid.[21] The media perspective easily impacts international community because foreign observers depend on media reports for their information and journalists maintain close contacts with foreign diplomats.

Whatever relations the army had with the media before it was mobilised against the Maoists, it was conducted through its intelligence, Department of Military Intelligence (DMI). Publicly the DMI was referred to as Department of Military Information. Whenever the army needed to express its viewpoint it issued statement through DMI. Such a statement was issued in 1997 when newspapers carried the news story of three army intelligence officials arrested by the police outside the residence of former Chief Justice Vishwanath Uapdhyay. However the DMI statement merely said that:

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19 Shandilya, Bharat (1999 June). Does not army have its voice? *Bimarsha weekly Kathmandu* p.5

20 Gautam, Yubaraj (2007), National Security and Media Responsibility. *Sipahi* vol. 41 (42), Kathmandu. . p.25.

21 Karki, L. Col. Madhukar Singh (2008) Information Domination, *Sipahi* Vol. 41 (42). Kathmandu. . p. 58

> additional details cannot be given regarding the news reports in some media outlet that dwell on the arrest of intelligence officials by the police outside the residence of the former Chief Justice Vishwanath Upadhyay.[22]

If 'additional details' could not be given to media there was no point in issuing the clarification. However this was a uniquely opaque way of functioning of Nepal Army.

Those being stationed in barracks make the army work by nature a bit less public, in Nepal it was felt to be more opaque than necessary. Its information flow was based on purely military notion of a 'need to know' basis. It was guided by the political intentions of the palace that sought to keep the Army out of the reach of the government or the public and maintain monopolist control over it.[23] Having a clad as the long standing security shield of the palace, this force has remained far away from media access and academic debates.

For a long time news reports on military matters were carried only in weekly papers.[24] Newspapers did not create beat reporters to deal with military or defence matters. Even today documented materials on Nepal Army are very limited. The army headquarters mobilised a group of historians to prepare a detailed informative military history which was published in 1992. [25] Though meant to be an official history of Nepal Army, the book was not easily available to the public and remained confined among the army circle. A thousand page second part of this volume has also been prepared but for some technical reasons it has not been made public.[26]

Besides an army officer Prem Singh Basnyat, Ph D in military history, has written some books on Nepal Army with sanction from army headquarters.[27] Lately a

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22 A statement issued by Col. Gyan Jang Thapa on behalf of DMI, January 24,1997. Kathmandu.

23 During the monarchical period, central and monitoring of internal military matters was largely the job of chief military secretariat of the royal palace, which was abolished in 2006.

24 Of these the major source was *Jana-astha weekly* which carried many news stories on Napal army. In 1995 this weekly first reported the court martial proceeding against major general Yogendra Pratap Rana.

25 Sharma, Shiva Prasad, *et al* (eds.) *Military History of Nepal*. Kathmandu, Royal Nepal Army Headquarters

26 The army had prepared a plan to make public release of the book on Army day in March 2008 by president Ram Varan Yadav. But because the book had characterized Nepali Congress as 'terrorist' in the content of its armed struggle against the Panchayat regime. The president declined to release the book and it has remained humped ever since. See, Baral, Sitarm (February 26, 2008) President too Angry with the Army, *Jana-astha*, p. 1

27 For example, see: Basnyat, Prem Singh, ' Royal Nepal Army and Chiefs of Army Staff'; Basnyat, Laxmi and Basnyat Sarbochchaman Singh, 1996; ' New Paradigm in Global Security: Civil-Military Relations in Nepal', Bhrikuti Academic Publications 2004; ' Entry of Tibetan Refugees in Nepal and Khampa Rebellion'. Pragati Pustak Sadan 2008; some books on Nepal army are now out of print, eg. Somadhoj Bista, *A History of Royal Army.* Kathmandu 1963; Tek B. Khatri, *A History of Royal Nepal Army*. Kathmandu 1974

book written by an ex- Indian army General Ashok K Mehata has been critical of Nepal Army.[28]

Army in Public Role

Much negative comments appeared in newspapers regarding the lack of army mobilisation against the Maoists despite government's desire to do so in incidents like Dunai and Holeri during the height of the armed conflict. Still no formal response was forthcoming from the army. Occasionally, political contents used to be interspersed in speeches of the Army Chief at Army Staff College and other places. Otherwise, the Nepalese army had remained away from public view for many decades. Only the war-driven necessity after November 2001 to fight the war against the Maoists pushed this top-notch security agency to develop relations with the public.

The Army's public relations were so remote that Prajjwal Shamsher Rana, that the then the army Chief could not appear in a public interview.[29] A lack of published books on the Nepal army, journalists' access to the army establishment and various other factors were responsible for limited media coverage on military matters at the initial phase. Even retired military officers maintained reticence in speaking up about military matters. Only in December 2004, three years after action was launched against the Maoists did a retired Lt. General Sadip Bahadur Shah present a paper in an international conference on Nepal's internal conflict, the highlights of which were published in a news magazine.[30] Gradually military matters entered into public discussion and focus of media comments. Ex-military officials too have begun writing and speaking to media organisations.[31]

Against this background, the army too found it strategically important to develop close relations with the media. To wage a war against the Maoists, the army had developed an eight-point strategy for civil-military national campaign, one of which was 'securing continuous support and cooperation of the public media'.[32] For that an institutional structure was created within the army.

One military officer Deepak Gurung was acting informally as Army spokesman from the beginning of 2001, and with the start of the war in November he was officially designated to be the army spokesperson. The same year to facilitate media dealings a separate Department of Public Relations (DPR) was created in the

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28 Mehta, Ashok K. (2005) *The Royal Nepal Army: Meeting the Maoist Challenge*. New Delhi: Rupa and Company

29 Bijaya Kumar (2002 April 15-30) Bitter truth. *Nepal Fortnightly* p.15

30 Sadip Bahadur Shah (2004, January 2), A Rebellion with no future. *Samaya Weekly*

31 Ex-army officers writing on military matters include Keshav B. Bhandari, Dilip Rayamajhi, Rajendra Thapa, Diptaprakash Shah, Ranadhoj Limbu, Kumar Fudung, Karna B. Thapa.

32 A part of written briefing presented to visiting US assistant secretary of State Christina Rocca, December 2003. Source: http://cpnm.org/article.news/nepali/shahisena.htm

army headquarters. Contact with media which was done by DMI in the past now became the responsibility of DPR. The army spokesman used to call journalists to Tribhuvan Army Club based in the army headquarters regularly and in the meeting he provided progress report on military action and clarified the army's stand on other matters. Sometimes a representative of the Defence Ministry also attended the meeting. However once the army spokesperson began taking up active role, the spokesperson of the Defence Ministry- the institution which was supposed to exercise civilian control on the army- appeared to be without any role. From then on a sort of routine was followed whereby journalists began directly approaching army spokesperson instead of Defence Ministry spokesperson. It was also evident that on military matters journalists would get a quicker response from the Army headquarters rather than Defence Ministry.

In the post-conflict period also, only the spokesperson has the authority to make formal statement on behalf of the army. In addition, other two persons can express army's perspective to the public formally. One such official is the Chief of the Army Staff and the other is head of the legal department. Moreover, local commanders also speak to journalists with the provision of not revealing the source. This practice most often does not seem to go beyond the official perspective of the Army. It appears a broad framework is drawn up within the army organisation as to what to share with and what to shield from the media personnel. Extreme caution is the usual norm regarding documents and subject matters marked as 'restricted' officially.

DPR also coordinates the official website of the Nepal Army.[33] This unit operates under the watch of central spokesperson with officials who have basic knowledge or formal training in journalism. It has been a long-standing practice for the Army to send its officers to a press institute and other learning institutions to receive media related training. DPR has been conducting 'Basic Media Training' on its own in order to produce manpower with theoretical knowledge and practical skills in diverse media fields. DPR Chief, Brigadier General Ramindra Chhetri, says that 'because the media acts as a bridge to deepen relations between the army and the public, a new concept was adopted to conduct such training within the army itself '. [34]

The Maoists had used media resources extensively organising guided tour for media persons to their areas. The army, too, followed this strategy and succeeded on some occasions when it invited media persons for on–the-spot visit and projected the lost battles as victory on its side. For example, journalists were taken to Lisne and Gam of Rolpa and Pandaun of Kailali from where the news was circulated in such a way that even a defeat was shown as a victory won by the army. Moreover, the Army was successful to get positive coverage on its role both in print and electronic media by organising visits of journalists to Lebanon, Haiti, Burundi and a

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33 www.nepalarmy.mil.np

34 S.S.2 Basic media training completed (2009,June) *Sipahi Fortnightly*, p.5

few other foreign locations where Nepal Army personnel were deployed under UN Peace Mission.

The Pitfall of Emergency

Friendly media contacts with the Army could not sustain for long, especially during the state of emergency imposed on all over Nepal from November 2001, and Nepali media experienced deep sense of suffocation. The state of emergency was clamped down when Maoists deserted the talks with the government in November 2001 and carried out a massive attack on military barrack in Ghorahi, Dang which continued from November 2001 to August 2002.[35]

The state of emergency imposed for the first time in eleven years after the new constitution was proclaimed in 1990 not only brought the Army out of barracks but also produced stringent restriction on the media. Because the government had banned and declared the Maoist a terrorist organisation unrestricted reporting on their activities was disallowed. Publications close to the Maoists were suspended and the journalists working for them were jailed. Journalists were required to get most of the conflict related news to have confirmed from security sources or they had to carry out the news entirely as it was issued by the security bodies. The Maoists who were known as rebels earlier were now branded as 'terrorists'.

During the state of emergency at least seven sections or sub-sections of the constitution were suspended which included the provision of freedom of expression. The government also issued Terrorist and Destructive Act (Control and Punishment) ordinance. Public Security Act imposed at that time restricted freedom of expression of ordinary people and journalists. All these measures proved direct restriction on Nepali media.

In November 2001 the government issued a comprehensive directive to media regarding what materials could be published and what materials were restricted. The directives contained thirteen points describing which materials could be published and which materials could not be published during emergency and a special cell was created to minutely monitor their observation by the media. A notification was issued not to print any news of security action without it being verified by spokespersons of home and defence ministry or military officers.[36]

During the early phase of emergency, the mainstream media carried the news reports dispatched/directed by Army headquarters giving priority in their coverage. However the credibility of such reports remained clouded with suspicion. The army obviously sought to plant fabricated news under the propaganda warfare and

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[35] National-wide emergency was imposed during February 2004 to April 2005 when King Gyanendra has seized power.

[36] State of Press and Freedom of Expression: Nepal Report (2001). Kathmandu: *Center for Human Rights and Democracy*, p.23

Nepalese mainstream media too swallowed some of it. Because of the news reports based on army source and not verifying them with otherwise, Maoist leaders such as Badal, Pasang and Mahara were reported killed many times in the pages of newspapers.

Still military leadership was not satisfied with the working style of Nepalese media. The then army chief Prajjwal Shamsher Rana expressed his dissatisfaction in a written speech in this way:

> In spite of various difficulties and un-cooperation, even as all ranks of the Royal Nepal Army are engaged in life and death struggle against terrorism in the service of the nation and fellow countrymen, it is only natural that we would expect support in strengthening morale of the army by highlighting truth and facts. Even a small but misleading and wrong news report or comment could have negative impact on the trust and confidence of the Nepali people which has been earned after a long struggle. While the whole world opinion has stood up today against terrorism, let us all Nepalese become united to help Royal Nepalese Army to fulfil its grave responsibility in a fair and healthy atmosphere. I extend this heartfelt appeal to all the honourable journalist brothers to help us in this regard.[37]

During the conflict period apart from newspapers, security forces were more enraged towards FM radio stations. Because radio broadcasts overcame the barrier of literacy and delivery, it could be heard instantly by a large number of people and its effect was instantaneous, causing more of a headache to security forces. In 2003, the then Information and Communication Minister Kamal Thapa alleged that because of communication media Maoists' morale has received a big boost. He further said, 'especially in recent times, complaints have been heard that FM radios have been spreading propaganda… the media cannot be used for the service of terrorists'.[38] During this period at the urge of the army, Defence Ministry wrote a letter to Communication Ministry which issued suspension order for FM broadcasting by three dozen FM stations which had already received their licenses. On the other hand the army had initiated steps to launch its own 10 FM stations 'in order to prevent Maoist propaganda' which was dropped after the political change of 2006.[39]

The army had assessed that because it lacked easy access to media outlets which were vital to create public opinion, its hands were weak in psychological

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37 Address of COAS at Staff Training Convocation, April 2001, Kathmandu. p.7 & 8

38 Mass media Boosted Maoists' morale, march 2003*, Kantipur,* Kathmandu. p.1

39 RNA to run 10 mobile FM stations (2006, March 1) *The Kathmandu Post*, Kathmandu. p. 1

campaign.[40] To counter this army headquarters created 'Psychological Operation Unit'. In May-June 2003, this unit launched the first psychological operation code-named 'Peace, Security, Relief and Goodwill' Promotion Programme.' Under this initiative operation program for the east was named 'Exercise Consciousness; for the centre 'Exercise Manakamana' and for the west 'Exercise Goodwill'. In this campaign launched with military objective of 'civil-military cooperation various government and private sector institutions were also enlisted. Under this campaign they organised health camps during the day, presented cultural programs in the evening and distributed relief packets as well. Newspapers too provided extensive coverage on positive news about distribution of corrugated sheets for school roofing, cement for constructing temples, football for youth clubs, pen-pencils for school children, *saris* and blouses for women, noodles for young children and footwear for elderly people.

The next year (May 2004) 'Operation Mahakali' was staged in Rolpa and Rukum. To gain psychological impact on the general public programmes like heath camp and citizenship document distribution were held for some days. The commander of this campaign was Rookmangad Katuwal the Western Division Chief of the Army based in Nepalgunj who in a lengthy speech in Taksera before some 2000 people said, 'we came here not to destroy you, but to provide protection'. His campaign received a wide coverage in the media.[41]

The Army's psychological campaign unit also increased its propaganda fares on radio and TV. One of the senior army officers Col. Ramindra Chhetri was targeted by Maoists during the ceasefire in 2003, as was the chief of psychological campaign unit who was seriously injured by gunshot wounds.

The emergency period that began in November 2001 continued for nine months during which 176 journalists were arrested or abducted by the security forces. Among them was the senior-most Maoist affiliated journalist Krishna Sen [42] who got killed while in custody in June 2002. Among those detained were not just Maoist affiliated journalists, there were also independent or other political – party affiliated journalists. A France based organisation Reporters without Borders wrote in its report of March 26, 2002, 'it can be said without reservation that Nepal has become the largest prison house for journalists in the world'.[43]

Army in the Media House

When the then King Gyanendra took over power on February 1, 2005 a confrontation developed between the Army and Nepali media. The King had said in the 'Royal Proclamation:

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40 Conversation with a brigadier general of army headquarters, June 2009. Kathmandu

41 J. Pandey (2004, June 1) Army marches in Maoist turf, *Nepal,* p.16

42 Journalist Sen was also kept in detention for several months in 1999.

43 See: www. Rsf.fr/phps?id_article=902

> Free media are the means to raise consciousness in democracy. It plays special role in promoting national interest. To make system of governance and people's way of life imbued with democratic values and ideals media can make active contributions; this is our firm belief.[44]

But the regime's behaviour proved just the opposite. He mobilised security forces to brutally suppress the media. The Army was particularly pressed to strangle the professional media.

Even before the Royal Proclamation was made, military units descended on media houses to capture them. Army majors and captains superimposed themselves as super-editors over the incumbent editors. They made the final decision as to what would go and what would not go into the print. They took special care for seeing only the materials supportive to royal proclamation going to the print. For this uniformed officers and M16 gun toting armed units were deployed in media houses which was unprecedented in Nepal. Even during the Panchayat autocratic regime in place until 1990 army units were never directly employed to control the media: instead, administrative means were applied to enforce decisions.[45]

The undemocratic step of unleashing the Army to control media following ' February 1' dealt with a powerful blow to the institutional image of the army. Many analysts opined that:

> the Army is not merely confining itself to search operation against the Maoists, and by assuming the role of guest editor of newspapers, has been a party to uphold the coup to snatch away the people's right; all in the name of controlling terrorism.[46]

In the end, the censorship enforced with the direct presence of Army officials in the media houses could not last practically for more than a week. However various restrictive measures imposed by the state remained in force. It seemed the rulers seeking to impose their authoritarian rule took the widespread influence of private sector media as a serious threat before them.

During the six months following the February 1, 2005 action, Nepalese media faced unprecedented hold on its activities from the state which it had never

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44 From Royal Proclamation of King Gyanendra, February 2, 2004

45 After two years of the ongoing conflict secretary of federation of Nepalese Journalists Kishor Shrestha was detained by police on April 8 and handed over to the army. Action was initiated against him for printing the news story about ' secret report and military plan of action' against the Maoists. He was released shortly afterward but it was recorded as the first interference of the army against the press after the restoration of democracy in 1990. See, ' State of Press and Freedom of Expression: National Broadcasting Act and Libel Act.

46 Dhruva Kumar (2005- March 15-30) Army bogged down in its strategy. *Himal news magazine*.

witnessed since the restoration of democracy.[47] For six months, carrying only news materials about Maoists (who were declared terrorists) was banned. To enforce strict control on media certain laws concerning media were amended and new orders were issued through ordinance and state directives.[48] Such provisions were enforced through security forces.

In early February 2005 the Ministry of Information and Communication issued two notices in order to ban publication and broadcasting which prohibited:

> any publication and broadcasting that was against the spirit and objectives of the royal proclamation and 'printing and broadcasting of any interview, articles, news, opinion or personal observations that could encourage or support directly or indirectly terrorist and destructive as well as subversive activities.[49]

From February 3, 2005 onwards, the government ordered all FM stations all over the country not to carry any news and news analysis and limit their broadcasts to entertainment materials only. Security forces even attacked on and confiscated equipment from various radio stations including Kantipur FM.[50] The then Home Minister Kamal Thapa even labelled a grave accusation of foreign agencies having remote control over some media houses.[51] The security forces continued creating serious obstruction in the normal working process of media personnel.

Resistance

Journalists continued resisting the suppression of the security personnel – in all fronts, in the street and their respective media houses. Of course this was integral part of safeguarding their own professional interests. This would be possible only when democratic system was restored in the county. As such, a majority of journalists openly joined forces with the movement for restoration of democracy. Moreover, when security forces were found engaged in detention, beating and even

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47 Sudheer Sharma, ' Nepali media: Struggle for existence, a working paper presented at South Asian Free Media Association (SAFMA) Seminar, Hyderabad, India, February 11-13, 2005

48 Government issued an ordinance in 2005 to amend certain Nepal Acts in order to impose conrol on media. This ordinance had the effect of amending Radio Act, Press and Publication Act, Press Council Act.

49 Various such notices were repeatedly issued by ministry of communication and Kathmanud district administration during March- April 2004. See Ramesh Lekhak, *A Year of Royal Regime*. Kathmandu: Ganeshman Singh Study Academy, p.103-104

50 In November 2005, at 11.15 at night security force raided the Kantipur FM and seized equipment like encoder, satellite modem, digital audio receiver which was roundly condemned by all. See Raja Ram Gautam (November 2005), Target of Tyranny. *Nepal,* p.24

51 Speaking on discussion talk show of Kantipur TV, February 3,2005

killing of innocent citizens in the name of their being media persons, political workers and 'Maoist terrorists', the media world actively exposed their dark deeds.

Local army commanders, who thought themselves to be very powerful during the counter insurgency phase of operations, regarded themselves an even more higher authority during the period of direct royal rule. Even Army headquarters could not or did not wish to rein them in. Therefore many reports came to light about the abuses of army officers against journalists who used their pens against the excesses of security officer. Some were detained. Journalists were among those who were tortured in the notorious Bhairabnath battalion in Kathmandu, and one of them has published a heart rending memoirs of his experience.[52]

Newspapers making public the human rights abuses of the security personnel were not accepted as a normal process by army establishment. It also came to light that army spokesperson called a press conference and asked the newsmen to report news only after ascertaining the truth.[53] The journalists on their part kept on exposing the violation of human rights and other excesses of security personnel. This had the impact of positive coercion on security forces. For instance, it was journalists who brought to light the incidents of Bhairabnath Battalion which was later picked up as human rights issues by human rights organisations.

The army displayed the tendency like the Maoists not to concede at first any mistakes committed by any soldier at personal level without any association with their institution. When media, human rights groups and others continued pressing upon the charge, only then it would be conceded and there are examples of investigation being agreed upon in this way.

As cases of human rights abuse would attract the attention of international community, the army could not completely ignore reports on such abuses.

Of course in some cases journalists too failed to distinguish between individual soldiers and the army as an institution in their reporting. It was noticed for a long time that whenever an individual soldier did something wrong, media alleged the 'army did it' thus blaming the entire institution. Regarding this then army chief Pyar Jang Thapa once said that:

> the mistake of one individual cannot be blamed on the entire range of institutions. No one will be excused for their mistakes and every incident will

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52 Jitman Basent (2007) *258 Dark days*. Kathmandu: Advocacy Forum & Hong Kong: Asian Human Rights Commission. The book mentions dozens of détentes of Bhairbnath Battalion were killed secretly. UNOHCHR Nepal office too in its report stated the disappearance of 49 detenues from that place. See: Report of investigation into arbitrary detention, torture and disappearances at Maharajgunj barracks, Kathmandu in 2003-2004 (May 2006) OHCHR, Nepal.

53 Maoists have retreated: Army (2003 December) *Kantipur,*Kathmandu p. 1

> be investigated and the guilty will receive appropriate punishment and this process will continue.[54]

Besides criticizing the excesses of security forces, various professional and human rights organisations of Nepal and abroad as well as friendly nations had put incessant pressure on royal regime for restoration of press freedom. The Federation of Nepalese Journalists (FNJ) had played the lead role in this regard. Immediately following the royal takeover in 2005, the FNJ in a statement on February 1, the first day of the takeover, described the 'royal proclamation as a coup directed against democracy and civil liberties'. It further said, 'at such moments FNJ regards it as primary duty to carry out struggle for press freedom, democracy, judicious peace, and independence and human liberty'. Within two days after the statement was issued, FNJ general secretary Bishnu Nisthuri was taken into custody by the army at 10.30 pm and he was placed under arrest for a long time.

Despite the pressure, suppression and sentence imposed by the security force, the stringent restrictions on media gradually loosened. Such a change was brought about by the relentless struggle of journalists themselves than from anything else because taking big risk they defied state prohibitions and controls and continued expanding their written coverage. In the meantime when People's Movement II got underway in the spring of 2005 Nepali media occupied the forefront in the struggle against the authoritarian rule. The media continued playing the central role in exposing the excesses of the security forces against the public in this period. Media coverage of suppression scared the security forces to act defensively for fear of being brought under judicious investigation in post-conflict period. Even the army which was under the direct control of the palace was not prepared to decisively crush the People's movement. Following the suggestions forwarded by the senior army officers on April 23, 2006, the then army Chief Pyar Jung Thapa appraised the army's position to King Gyanendra and in the following two days a royal proclamation was made to restore the parliament.[55] Speaking to the American TV channel CNN the next day army chief Thapa defended the army position stating that the army had not played the role of oppressor against the People's Movement.[56]

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54 Sudheer Sharma (2003, December 15-30) what is cheaper than man? *Nepal Fortnightly*. Kathmandu. P. 21

55 Conversation with Senior army officer, army headquarters, April 2009

56 General Thapa in an interview with CNN's Sachindra Bindra (April 2006) said, ' Royal Nepal Army does not believe in displaying its muscle to its own people and crowd control is the job of the police'. See Nepali version of the interview, Everything acceptable for peace (April 15,2006), *Kantipur,* p.7

New Army Chief and Cosying up to Media

With the triumph of People's Movement, press freedom was formally restored. The old equation between the Nepali media and security forces came to a change. While during the direct royal rule security agencies had sought to control and censor the media, after the democratic restoration security agencies fell under media scrutiny. Broadsheet dailies too began carrying news and reports on inner goings on in the army. For example, the Kantipur daily made banner headline news about the ostentatious expenses in the marriage of army chief Pyar Jang Thapa's daughter (who was army medical corps captain).[57] Earlier such news items were carried only in the weeklies.

When General Thapa retired in August 2006, Rookmangad Katwal stepped in as the new Army Chief. It is under Katwal's tenure that army 'opened' more than ever before. Earlier it followed semi-underground working style. Army Chief Katwal's penchant for external contact and the changed political circumstances could not keep Nepali Army closed behind an opaque wall.

Soon after becoming the Chief of Army staff, Katwal announced the beginning of reform programmes in the Army in tune to the democratic changes through directorate of Public Relations taking place in Nepal. He issued photographs of himself dining in 'Jawan's (soldier) mess' which was given top billing by newspapers.[58] After some time the accounts of the Army welfare fund was made public. Because the operation of this fund with a total deposit of about Rs. 10 billion was not transparent, various questions and suspicions were raised about it for many years.[59] More importantly, a drastic amendment carried out on the Army Act had led the Nepal Army in a democratic direction. Civilian access was strengthened in operation, control and other matters related to the army.

However despite political changes and legal amendments the attitude of the army organisation to view the Nepali media could not change completely. Brigadier General of Western Division command Dilip Shamsher Rana said in a public function in Pokhara without any context that:

> we cannot deny the bitter truth that instead of supporting the government side, media world which constitutes the fourth estate is carrying the news knowingly and unknowingly benefiting the rebel side while in the absence of

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57 Kedar Ojha (may 12, 2006), Parties galore for five days*, Kantipur*, p.1.

58 See Khim Ghale, (October 27, 2006) Reform Process begins in the Army, *Kantipur,* p.1.

59 In November 2006, the Supreme Court had ordered the Army to make public the amount and other details of the Fund. See. More than 1 billion in deposit, November 2006, *Kantipur,*Kathmandu. . p.1.

> good governance, the country is passing through an unstable period economically and politically.[60]

The tendency of not accepting criticism regularly was also evident. When a few newspapers carried some news regarding the working style of Army Chief Rookmangad Katwal in 2007, the Army's Directorate of Public Relations issued the reaction in this way:

> ... that a few members of vested elements bent on securing their dark interests have planted baseless stories in various news media about Nepal Army seeking to draw its leadership in political controversies constitutes a foul design on their part and Nepal army resolutely condemns such moves.[61]

Army Chief Katwal appeared more concerned to expand relations with media than his predecessors. He asserted in a message on April 13, 2009 that in addition to democratic values and ideals they have accepted the ideals and press freedom on mind, in words and in deeds and will continue to do so forever.[62] This was probably the first time ever a Nepali army chief emphasised press freedom so much in his formal statement. He had chosen the occasion of Nepali New Year for this message. Katwal began the practice of issuing formal message of greetings on Nepali New Year and festivals like Dashain in which he also inserted political message. Nepali media gave good space to such gestures.

Katwal established a working style of going on inspection visits to barracks outside of Kathmandu every weekend; there he addressed the army soldiers and sometimes held short talks with local journalists. In addition, conscious efforts were also made to provide media with the speeches, comments and reaction he had given on other occasions to make them available to the public. Army Chief Katwal seemed to have a long standing interest in the media. He used to write to newspapers with an

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60 Newspapers carried reports on his speech. See, Dilip Shamsher Rana, (February 6, 2006) Nepal Army in New Context, *Kantipur,* Kathmandu. p.7. political circle expressed strong protest regarding many other controversial remarks made in the speech by brigadier general Rana. He was served with a notice asking for clarification and later he was prematurely retired.

61 Statement of Army Directorate of Public Relations, No 75, April 2007. Kathmandu.

62 'Message of chief of army staff to all army staff members on the occasion of the New Year 2066', April 13, 2009. Kathmandu. See: www.nepalarmy.mil.np/coas/coasspeech.php

alias of Ajay P. Nath.[63] He has also brought out two songs albums under the name of R. Katwal which contains lyrics on themes of love and nationalism.[64]

Army Chief Katwal heavily stressed on public relations. The level of informal contacts he cultivated among various sectors of Nepali society including journalists by inviting them at dinner in official residence of Shashi Bhavan, no other Army Chief had attempted earlier. Such a move went a long way in removing the general perception that 'army is a different entity.' It helped to extend access and influence on the pioneering sectors of society.

It is a mere coincidence that a grave dispute erupted between the government and army during Katwal's tenure. This brought the Nepali army in the thick of the public debate. The ministers in the Maoist-led government and leaders made public criticism of the Army Chief Katwal. Still, General Katwal told a parliamentary committee meeting that he could not say to the public what he wanted to say. He observed that:

> just for speaking, even an ordinary soldier can say one or two things easily. We have our voice to speak. We could have spoken. We also know where to make our statement but we choose not to speak. Because we are bound by the law.[65]

However as the debate intensified the army did not stay quiet.

As the report of government move to dismiss Army Chief Katwal came into light, the alleged countermove prepared by Katwal became public through news media. This was swiftly denied by the army spokesperson Ramindra Chhetri stating that 'Army (was) not for a coup'.[66] In addition on April 29, 2009 Army Chief Katwal appeared on TV flanked by two senior army generals Kul Bahadur Khadka and Chhatraman Singh Gurung with a joint message of unity. The statement asserted there was no difference of any kind and ill feeling among them.[67]

The dispute concerning the army went to the full public view when the government decided to dismiss Katwal from the position of Army Chief and appoint

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63 Dozens of articles of Katwal were published in the *Kathmandu Post, Spotlight* and others under the alias of Ajay P. Nath. See 'why third party mediation ?' (April 27,2004), ' Maoists demands and ground realities' (October 26, 2004), ' Maoists' strategies and tactics' (September 7,2004)- all carried by *The Kathmandu Post.* . One piece in *spotlight* was titled 'it is a deal with terrorism', (May 13,2005). Kathmandu.

64 Katwal is lyricist too (July 3, 2009), *Nagarik,* Kathmandu. p.12.

65 Army chief said, ' Army too can say what it has to say, we know where to say' (March 2008) *Naya Patrika.*Kathmandu. . Defense minister Ram Bahadur Thapa had said by ignoring government's directive on army recruitment army leadership had challenged civilian supremacy. See ' Army violates civilian supremacy (January 28,2008) *Kantipur*, Kathmandu. . p.1

66 Army coup baseless (April 1, 2009) *Kantipur*, Kathmandu. . p.1

67 Army Stands united (April 7,2009) *Kantipur*, Kathmandu. p.1

General Khadka as acting Army Chief. At that time the government had stated that the decision to remove Katwal was taken because he had not followed the government directives regarding fresh army recruitment, extension of tenure of eight army generals and the boycott of national sports competition by the Army. However, on the same day the President wrote a letter directing Katwal to continue working as the Chief of Army Staff. Consequently Katwal remained in his post while the government of the Prime Minister Pushpa Kamal Dahal which sought to remove the chief collapsed for want of political support. A combination of all these factors made the military matters even more relevant to mass media than in the period of conflict.

On the other hand General Khadka who was named acting Army Chief gave interviews to news media on his own in a break of established tradition.[68] He claimed he was forced to speak in his own self defence as the army Directorate of Public Relations ignored his requests to officially clarify public comments that were circulating about him.[69] His action created serious consternation at Army headquarters. On the charge of insubordination, court martial proceedings were contemplated by the army headquarters and a court martial board was also formed but Prime Minister Madhav Kumar Nepal prevailed to stop this proceeding as urged by the Maoists.[70]

This army chief episode proved an entirely novel subject for Nepali media and journalists did their best to dissect various aspects of it. This also proved an opportunity to understand and explain about the Nepal army to the public.

Conclusion

Following the people's movement II 20006, barring a few incidents, the relations of the Nepali media with the army, police and Maoist guerrillas have remained normal. In the meantime, how to deal with various armed groups emerging in the eastern and central Tarai has been a new challenge facing the Nepali journalists. Currently, there is no single organised group like the Maoists of the last years; dozens of armed groups are in operation. Of these, some have political platforms and some others are motivated by criminal intents. As such each group has to be treated differently. This often leads to tricky situation.

Besides this, management of Maoist guerrillas has been the subject of national priority since the signing of the Comprehensive Peace Agreement (CPA). As stated in CPA, though political consultation is taking place among political parties

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[68] See, Bishnu Subedi, ' I might have a role to prevent imminent confrontation' (May 15,2009) *Anapurna Post;* Krishnajwala Devkota, ' I'm army chief' (May 17,2009) *Naya Patrika*; Akanksha Shah, ' charges just character assassination' (June 10,2009) *Republica.* . Kathmandu etc.

[69] He stated this in a BBC Nepali service interview (July 8, 2009) speaking a few days after his retirement.

[70] Sudheer Sharma, New Face of government-army suspicion (July 4, 2009) *Kantipur,* Kathmandu. p.6

about rehabilitation and readjustment of the Maoist combatants, the main public discussion is taking place through media itself. Those with special interest on this issue like Maoists, army, political parties and others have made use of media to express their views to the public. Another point mentioned in the CPA was democratisation of the Nepali Army and this topic too has evoked quite a deal of coverage in the media.[71] However, these issues will require constructive suggestions, rather than superficial comments.

In the meantime, a positive development has taken place in the Nepali media scene in which a number of journalists have emerged with knowledge, experience and analytic skills in defence and security matters. News media houses, too, have created a defence beat for specific reporting. As a result, media coverage is getting strong on this field. Army officers too in the last eight years (from 2001) have acquired skills to act in a more media friendly way in their own field. In the past, whereas Army colonels and generals kept their distance from journalists, even to talk on casual subjects, now they are willing to talk at length though informally. Thus it can be said that relations between security sector and media have become more natural and closer than before.

Media has another responsibility as well. After the fall of monarchy, a lot of Army officers have felt their organisation has been 'orphaned'. Some of them even seem to have entertained the illusion that Nepal Army is an autonomous organisation rather than an organ of the state under the direct control of the government. A clear provision is made in the Constitution for civilian control over the army. However, 'the fourth estate' has to play the role of an independent motivator in order to make the army responsible, restrained and disciplined. This is especially important in the light of some reports and analysis that point out to the danger of rightist's extremism raising its head through the direct or indirect use of armed forces in this transitional phase of constitution making. If such polarisation moves ahead, some commentators argue the army may intervene in national politics.[72] Similarly, attempts might be a foot to polarise the extremists on the left through the use of Maoist guerrillas and pursue a strategy of capturing power. Communication media can play a vital role in creating public opinion to prevent any of such extremism.

Certainly as long as the country remains in a transitional state the relations between security sector and media will continue to be marked by ups and downs.

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[71] According to section 4.7 of the CPA signed between the government and the Maoists, detailed plan of action shall be prepared in order to democratize the Nepali army and its number, democratic structure, national and inclusive character shall be determined in the light of democratic and human rights principles and they will be trained accordingly.

[72] See Kanak Dixit (July 1-16, 2009), Maoists' move, President's Response in *Himal Newsmagazine*, p.40; Sudheer Sharma, (July 4, 2009) New face of government army suspicion, *Kantipur*, p. 6; C.K. Lal (July 16-30,2009) Spectre of military intervention, in *Himal Newsmagazine* p. 56; Akhilesh Upadhyay (July 7, 2009), Rightward shift, *The Kathmandu Post*, Kathmandu. p.7

Once political stability prevails in the real sense, such obstacles will be sorted out gradually.

Appendix 1: Journalists who lost lives during the conflict period[73]

Name	Affiliation	Date of place killed	*Perpetrator*
Kanchan Priyadarshi	RSS and others	April 2002, Sindhupalchok	State
Name	Affiliation	Date of place killed	Perpetrator
Kanchan Priyadarshi	RSS and others	April 2002, Sindhupalchok	State
Krishna Sen	Editor, Janadesh	June 2002, Kathmandu	State
D. Kaudiaya	Reporter, Janadesh	July,2002, Jhapa	State
Kamal AC	Reporter, Janadesh	October, 2002, Nuwakot	State
Kumar Ghimire	Reporter, Sindhuli based Jana-Samar weekly	October,2002, Sindhuli	State
Raj Kumar KC	Reporter, RSS	November 2002, Ramechhap	State
Nava Raj Sharma	Reporter, Kadam weekly, Jumla	June,2002 Kalikot	Maoists
Ambika Timsina	Editor, Janadesh	November 2002, Morang	Maoists
Gyanendra Khadka	Reporter, RSS	September, 2003, Sindhupalchok	Maoists
Binod Chaudhary	Reporter, Nepalgunj Express	September, 2003, kailali	State
Nagendra Pokhrel	Maoist Freelancer	November 2003	State
Gopal Giri	Former Journalist	December 2003, Birgunj	Maoists
Padma Raj Devkota	Maoist Freelancer	February 2003, Kalikot	State
Dikendra Raj Thapa	Reporter, Radio Nepal	August 2004, Dailekh	Maoists
Khagendra Shrestha	Editor, Dharan Today	March 2004, Dharan	Maoists
Jagat Prasad Joshi	Maoist Freelancer	October 2008, Kailali (displaced)	Unknown
Birendra Sah	Bara		Maoists
Dhana Bahadur Roka	Reporter, Radio Nepal	February 2002, Rolpa	Maoists
Kumar Ghimire	Reporter,Jana Prabhat weekly	October 2002 Ramechhap	State

Source: FNJ

[73] FNJ has published a book detailing the accounts of journalists killed during the conflict period. See Ghimire, S. *etal* (2007) *Pen under the Blasé of the Gum*. Kathmandu: FNJ.

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Mr. Bhimarjun Acharya is an advocate with the specialization in constitutional law. He received his PhD in constitution for his dissertation on 'the system of judicial review'. He holds an LL.M in constitutional law and has received a degree in a special human rights course from the International Academy in the Netherlands. He has published 13 books on constitution and human rights related issues, 15 reports and some 150 articles published in different national and international journals, magazines and newspapers. His major publications include: Fundamental Rights in the World Constitutions (2008), Constituent Assembly: Processes and Experiences (Nepali) (1st ed. 2006, 2nd ed. 2007 and 3rd ed. 2007); Making Constitution through Constituent Assembly (English) (2006); Select Acts of the Kingdom of Nepal (2003); A Hand Book of Constituent Assembly (1st ed. 2006, 2nd ed. 2007); Domestication Status of ICCPR in Nepal (English) (2007); Review of the Laws on Human Trafficking (Nepali) (2005).

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Mr. Acharya is a central leader of the Nepali Congress and a member of Constituent Assembly elected from a Kathmandu constituency. He was the spokesperson of the Nepali Congress and a Cabinet Minister in the past. He is known as an intellectual and thinker within his party and outside. He lives in Kathmandu. He has authored several books on topics of Nepali politics.

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Mr. Ajaya Bhadra Khanal, with over 19 years of experience in journalism, is currently the Editor of The Himalayan Times, which is the largest circulating English daily in Nepal. He started his career from the government-owned English daily, The Rising Nepal, as a sub-editor andwent on to work in Nepal Television and The Kathmandu Post. In 2000, he went to the United States to pursue graduate studies in cultural studies and psychological anthropology. He holds PhD (ABD) in Liberal Arts (Emory

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