





The Security Sector Legislation
of the Federal Democratic Republic of Nepal:

Commentaries

Hari Phuyal and Marlene Urscheler (eds.)



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Equal thanks go to our editors, Mr. Hari Phuyal and Ms. Marlene Urscheler, and the international and Nepali experts, who in spite of heavy work-loads found time and inspiration for their contributions.

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Preface

In May 2009, a platform of five like-minded states (Denmark, Finland, Norway, Switzerland and the UK) entrusted the Geneva Centre for the Democratic Control of Armed Forces (DCAF) and the National Peace Campaign (NPC) as its local partner with an ambitious and comprehensive parliamentary capacity building programme which has the objective to assist the Constituent Assembly and the Parliament of the Federal Democratic Republic of Nepal in their efforts to create a democratic republican constitution, to endow itself 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 to support both the peace process and the early steps towards a comprehensive parliamentary work and engagement with the security sector of Nepal.

At the beginning of a democratic transition process it may be best to raise an inventory of 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 of 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 lawgivers and policymakers in the very 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 third volume in the series the Commentaries by national and international experts on the security sector relevant legislation of the Federal Democratic Republic of Nepal. We are proud to have found in Mr. Hari Phuyal, LL.M and Mrs. Marlene Urscheler, LL.M two most diligent and capable editors. The legal experts were given the choice to comment on those laws they felt competent about. The reader will therefore not find commentaries on all existing legislation.

Kathmandu and Geneva, Dashain 2009

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Introduction

Security Related Laws, Policy and Mechanisms in Nepal: An Overview

Hari Phuyal

Introduction

This paper attempts to explain security related laws, policy and mechanisms in Nepal. It gives an overview of the security forces operating in Nepal and in other security agencies in other jurisdictions. It also highlights the recruitment of security forces in different agencies.

Security Policy in Nepal

Nepal has the longest serving army in South Asia, which has claimed to be the 'symbol of national security' since her unification. However, a clear national security policy has not been developed yet. Including the Interim Constitution,¹ there are some laws² that refer to national security but the term 'national security' itself is not defined in the constitution or in any existing law. As a major breakthrough, the 1990 constitution introduced the concept of the National Defence Council³ as the security mechanism of the country but it was mobilised only in 2002 after the attack on the army barracks by the Maoist rebellion.⁴ Thus, the use and mobilization of the National Defence Council is mainly of an internal nature.

¹ Article 145 of the Interim Constitution of Nepal, 2007.

² For instance, Army Act, 2006.

³ Article 118 of the Constitution of the Kingdom of Nepal, 1990.

⁴ The Maoist guerrillas carried out their ever first attack in army barracks on 23 November 2001.

Further, it has not developed a national security policy for the internal or external security of Nepal.

No written security policy of the country exists. The Army Act and some of the laws refer to the word 'national security'.⁵ The Public Security Act prescribes three grounds for preventive detention: sovereignty, national integrity and law and order⁶ but none of these are defined in the laws. In the past, the government has used these grounds to detain people who raised their voice against the king and the system promoted by him. Freedom of opinion and of the press was repressed by direct and indirect involvement of the Nepal Army and other security forces, threatening national security.

There have not been any serious discussions on national security policy in Nepal. One of the committees of the Constituent Assembly is reportedly discussing national security policy but such discussion is limited to having national security language in the text of the new constitution. During the armed conflict, some discussions had taken place to adopt an Integrated National Security and Development Policy but these were mainly targeted to minimize Maoist activities. These discussions necessarily failed because of their political motives.

In the past, the Nepal Army enjoyed privilege from any criticism, except in few circumstances, as being the self-perceived guardian of Nepal's national security. Even now, criticizing the Nepal Army may be tantamount to threatening national security. This indicates that Nepal's understanding of national security is more military centric and other factors of national security have not yet been discussed.

The National Department of Investigation was established by an act⁷ but its regulations and functions are secret. However, it collects intelligence from all over the country. It is not clear whether it collects intelligence on law and order or any other intelligence which affects the national interest.

⁵ Section 79(2) of the Nepal Army Act, 2006, Rule 26 of the Court Martial Regulation, 2007.

⁶ Section 3 of the Public Security Act, 1989.

⁷ Nepal Special Service Act, 1985.

Many newspapers reported during the conflict that the performance of the Department of National Investigation was questionable and suffered from incompetence. The Nepal Army has a Department of Military Intelligence but its functions are largely unreported and remain secret. The Nepal Police has a Department of Crime Investigation, which mainly looks into individual or collective crimes and their patterns in the country. The Police Headquarters has a separate anti-terrorist wing mainly targeted to the Maoist rebellion established under a decision of the Police Headquarters. But, its understanding of national security is only threats posed by the Maoist rebellion in the given context. Therefore, a clear national security policy is still not reported and perhaps not developed in Nepal.

Structure of the Security Agencies and Security Mechanisms in Nepal



Some laws have provisions on national security mechanisms at the regional and district levels of the country. The Armed Police Act provides for a National Security Committee, headed by the home minister. Its members are senior representative of the Nepal Army, chief of the Nepal Police, chief of the Armed Police Force and chief of the Department of National Investigation.⁸ The committee mainly looks into the national security issues pertaining to law and order. The Local Administration Act lays

⁸ Section 7 of the Armed Police Act, 2003.

down the provisions for a Regional Security Committee, headed by the regional administrator and with a representative of the Nepal Army, the regional chief of the Nepal Police, the regional chief of the Armed Police Force and the regional chief of the Department of National Investigation.⁹ Similarly, a District Security Committee exists at the district level headed by the chief district officer. Its members are representatives of the Nepal Army, chief of the District Police, the local chief of the Armed Police Force, the chief of the Department of National Investigation and assistant chief district officer as a Member-Secretary.¹⁰ All the central, regional and district security mechanisms are instruments of the Ministry of Home Affairs where the home minister plays a key role in their function and mobilization.

Under the Interim Constitution,¹¹ the Comprehensive Peace Agreement¹² and the Agreement on Monitoring of the Management of Arms and Armies,¹³ there are some mechanisms¹⁴ established for the integration, monitoring and settlement of disputes between the Nepal Army and Maoist combatants. Although such mechanisms have limited scope in the context of national security policy, they may have a large effect on the integration and management of Maoist combatants and the Nepal Army.

⁹ Section 4c of the Local Administration Act, 1971.

¹⁰ Subsection (7) of Section 6 of the Local Administration Act, 1971.

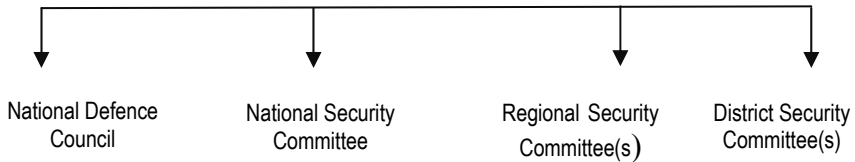
¹¹ Articles, 145, 146 and 147 of the Interim Constitution of Nepal, 2007.

¹² Article 4 of the Comprehensive Peace Agreement, 2006.

¹³ Article 4, 6, 6.1 of the Agreement on Monitoring of the Management of the Arms and Armies, 8 December 2006.

¹⁴ Such Mechanisms include the Council of Ministers, the Joint Monitoring Coordination Committee and Joint Monitoring Teams.

National Security Mechanisms



- ◆ The National Defence Council is constituted under Article 145 of the Interim Constitution, 2007 and Section 6 of the Army Act 2006.
- ◆ The National Security Committee is constituted under Section 7 of the Armed Police Act, 2003.
- ◆ Regional Security Committees are constituted under Section 4c of the Local Administration Act, 1971.
- ◆ District Security Committees are constituted under Subsection (7) of Section 6 of the Local Administration Act, 1971

National Security Mechanisms under the Constituent Assembly and Legislative-Parliament

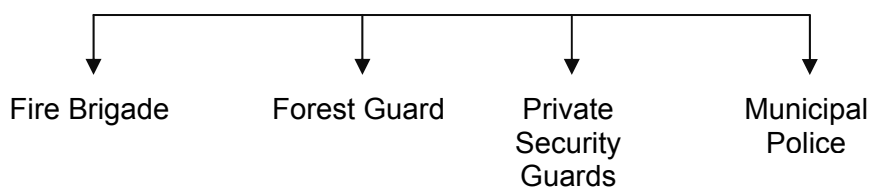
The regulation of the Constituent Assembly is undertaken by a committee,¹⁵ which partly dedicates its function to national security. There are some newspaper reports about discussions on national security but many issues have yet to be resolved. The regulation of the Legislative-Parliament has a separate special committee,¹⁶ which discusses mobilization of the Nepal

¹⁵ National Interest Preservation Committee, Committee No. 10, under rule 66 of the Constituent Assembly Rules, 2009.

¹⁶ Special Security Committee established under rule 116 of the Legislative-Parliament Regulation, 2009.

Army, and it is unclear whether or not this committee discusses national security. The State Affairs Committee¹⁷ of the Legislature Parliament also has a mandate to discuss issues of internal administration, including issues of the security agencies. However, the Legislative-Parliament shall be guided by the provisions of the Interim Constitution on the mobilization of the Nepal Army and for the 'democratization of the Nepal Army'¹⁸ 'in accordance with the norms and values of the democracy and human rights'.¹⁹

Other Security Agencies in Nepal



- ◆ The **Fire Brigade** was established in 1994 and is running in an ad hoc manner. It consists of both civilian and armed personnel who work in fire fighting and are governed by the Civil Service and under the Home Ministry. The recruitment process of personnel is decided by the ministry at the secretary level.
- ◆ There are 1,121 **Armed Forest Guards** responsible for the protection of Nepal's national forests.²⁰ The Ministry of Forest states that the legal basis of the recruitment of the forest guard is Section 70 of the Forest Act, but it

¹⁷ State Affairs Committee, Committee No. 6, under rule 110 of the Legislative-Parliament Regulation, 2009.

¹⁸ Article 144(3) of the Interim Constitution of Nepal, 2007.

¹⁹ Article 144(4) of the Interim Constitution of Nepal, 2007.

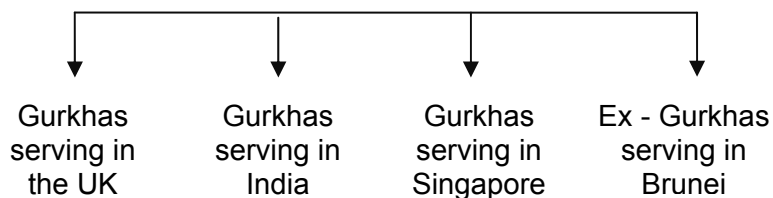
²⁰ For detail please see: http://www.dof.gov.np/who_is_who.htm (accessed 30.01.2009).

also states that there is no regulation to establish the guard and thus the Council of Ministers has taken a decision to establish their posts, numbers and mandate. However, the ministry is not able to provide a copy of this decision.

- ◆ **Private Security Guards** are delegated by private security companies established under the Companies Act, 2063 BS, and are regulated by the Regional Administration under the Local Administration Act, 2071. The regional police are responsible as designated by the Ministry of Home Affairs through an administrative decision.
- ◆ **Municipal Police** are recruited by decisions of the board of each respective municipality under the indirect authority provided by the Local Self Government Act and its Regulation.

Nepalis Working as Security Personnel in Other Jurisdictions

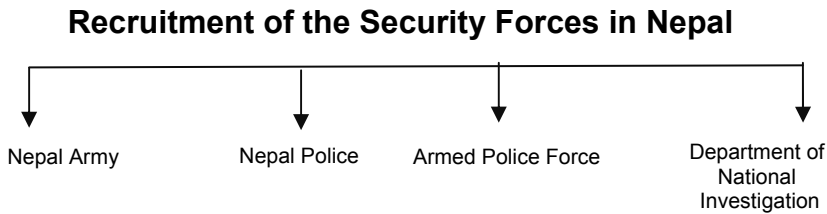
Nepalis Working as Security in Other Jurisdictions



The legal ground of Gurkhas serving the UK as Gurkha Soldiers, serving for India as Gurkha Regiments and Assam Rifles, serving for Singapore as Singapore Police (Gurkha Contingent) and Ex-Gurkhas serving for Brunei as Brunei Royal Security is a Tripartite Agreement after Partition to Retain Gurkha Services in the British and Indian Army, 1947.

Though India has been recruiting separately in its own process, the recruitment process regarding the Singapore Police has been carried out together with Gurkha soldiers serving the British Army. The Ex-Gurkhas Serving Brunei are also recruited on the background of British Soldiers that the candidate had served previously.

Recruitment in Security Agencies in Nepal



- ◆ The Nepal Army shall consult with the Public Service Commission in the recruitment process.²¹ The appointment and promotion of Nepal Army personnel is guided by the General Principle on Appointment and Promotion in the Post of Military Service, 2008.²²
- ◆ The recruitment of police is guided in Chapter 3 of Police Regulation, 1992.²³ The appointment and promotion of police shall be carried out in consultation with the Public Service Commission under Article 26(5) of the Interim Constitution, 2007.
- ◆ There is an Armed Police Service Commission under Section 11 of the Armed Police Force Act, 2003 for the appointment and promotion of armed police personnel.

²¹ Article 126 (5) of Interim Constitution of Nepal, 2007.

²² Available at (accessed 30.01.2009):
www.nepalarmy.mil.np/images/na_recruitment_policy.pdf

²³ Please refer to Rule 9-Rule 21.

- ◆ Service in the Department of National Investigation is secret. However, it falls under the jurisdiction of the Ministry of Home Affairs.

Conclusion

This brief note indicates that Nepal's security policy has yet to emerge and a clear security structure in the country still needs to be developed. It has been found that some of the security agencies such as the forest guard, the fire brigade, the municipal police and even private security companies do not have a legal basis for their establishment and operation. Furthermore, the recruitment process in some of the security agencies, including the Nepal Army, Nepal Police and others, still needs to be discussed. The Armed Police Force has a statutory commission for recruitment and this may be an example for other security agencies to meet the guidelines stated in Article 126(5) of the Interim Constitution.



**Part I:
International Experts'
Commentaries on the Nepali
Security Sector Legislation**



Commentary on the Interim Constitution of Nepal, 2063 (2007)

Ian Leigh

The Interim Constitution of Nepal was agreed following the November 2006 peace agreement that ended the country's civil war. The Interim Constitution replaces the former monarchy with a federal democratic republic. The elected Constituent Assembly (the legislature) is responsible for choosing the President (head of state). The Prime Minister is head of the Council of Ministers (executive cabinet). This Note concerns the constitutional provisions on emergency powers (Part 19 of the Interim Constitution) and the armed forces (Part 20).

Emergency Powers

The Interim Constitution (Art. 143) allows the Council of Ministers (the executive branch) to issue a Proclamation of Emergency to apply to all or part of the country if a 'grave emergency arises in regard to the sovereignty or integrity of Nepal or the security of any part thereof, whether by war, external aggression, armed rebellion or extreme economic disarray'. The Proclamation must be laid before the Constituent Assembly within one month for endorsement; if endorsed by a two-thirds' majority of legislators present, the Proclamation may extend for three months (and can be renewed up to a maximum period of six months in total). The Proclamation serves in effect as a gateway for the Council of Ministers to issue orders with the force of law for the duration of the state of emergency (Art. 146(6)).

The effect of Article 143(7) is that certain fundamental rights in Part 3 of the Constitution can be suspended during a state of emergency. These include: the rights of press and broadcasters (Art. 15), the right to property (Art. 19), rights on arrest and of fair trial (Art. 24), the right against preventative

detention (Art. 25), right to information (Art. 27) and the right to privacy (Art. 28). There is a right to apply to court for compensation (within a three month period from the termination of the state of emergency) for damage caused by the actions in bad faith or contravention of law by officials (Art. 143(9)).

Other fundamental freedoms protected under Part 3 of the Interim Constitution may not be suspended and this broadly accords with Nepal's treaty obligations under the United Nations International Covenant on Civil and Political Rights (Art. 4.2).¹ The other restrictions on derogations contained in that provision are noteworthy. All derogations are limited:

'to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin' (ICCPR Art. 4.1).

These safeguards have not been explicitly incorporated into Art. 143 of the Interim Constitution but will nevertheless constrain the use of emergency powers. Moreover, there is a procedural duty to notify the Secretary-General of the United Nations of any derogation from the rights protected by the Covenant and the reasons for it (ICCPR, Art. 4.3). More detailed procedural standards concerning emergency situations have been laid down by the UN Human Rights Committee in its General Comment 29² and by meetings of international jurists

¹ Under Art. 4.2 of the ICCPR, no derogation is permitted from the following rights: to life (Art. 6); not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (Art. 7); not to be held in slavery or servitude (Art. 8); not to be imprisoned for failure to perform a contractual obligation (Art. 11); not to be subject to retroactive penal measures (Art. 15); to recognition as a person before the law (Art. 16); to freedom of thought, conscience, and religion or belief (Art. 18).

² Human Rights Committee, "General Comment 29: States of Emergency (Article 4)", UN Doc. CCPR/C/21/Rev.1/Add.11(2001), <http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a4500>

(the Paris Minimum Standards of Human Rights Norms in a State of Emergency, agreed by the International Law Association³ and the Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights).⁴ These constitute 'soft law' but may be taken into account by international courts and tribunals.

The Role of the Armed Forces

The Interim Constitution, unlike constitutional provisions in a number of other countries, does not specify the tasks or powers of army forces.⁵ It does, however, firmly establish the principle of civilian control. The Council of Ministers is responsible both for appointing the Commander in Chief (Art. 144 (2)) and for controlling, mobilizing and managing the army (Art. 144 (3)).⁶ Any decision to mobilise the army (except for disaster relief) must be referred to the legislature within one month for approval (Art. 145(5). Art. 144 (3) also attempts to ensure a bi-partisan approach by requiring that the National Defence Council consults with the political parties and with the legislature before

[44f331/71eba4be3974b4f7c1256ae200517361/\\$FILE/G0144470.pdf](http://www.44f331/71eba4be3974b4f7c1256ae200517361/$FILE/G0144470.pdf)

³ Reprinted in *American Journal of International Law*, Vol. 79, 1985, p. 1072. The Paris Minimum Standards of Human Rights Norms in a State of Emergency state: "The constitution of every state shall define the procedure for declaring a State of Emergency; whenever the executive authority is competent to declare a state of emergency, such official declaration shall always be subject to confirmation by the legislature, within the shortest possible time." (para.1(b))

⁴ wwwserver.law.wits.ac.za/humanrts/instree/siracusaprinciples.html

⁵ The role is, however, specified in Army Act 2063 (2006), s. 4: 'for the protection and defense of the independence, sovereignty, territorial integrity and national unity of the state of Nepal.'

⁶ A dispute between the Prime Minister and the President over the power to dismiss the Chief of Army Staff led to the resignation of the former in May 2009: BBC News, 29 May 2009, 'Timeline: Nepal'. http://news.bbc.co.uk/1/hi/world/south_asia/1166516.stm

formulating a 'work plan' for the army. The Constitution stresses that the work plan shall develop the 'democratic structure and national and inclusive character' of the Army and provide for training 'in accordance with the norms and values of democracy and human rights' (Art. 144 (4)). In practice civilian direction of the army is exercised through the National Defence Council, chaired by the Prime Minister, the task of which is to advise the Council of Ministers on mobilization, operation and use of the army (Art. 145 (1)).⁷ Another key task of the Council of Ministers is to supervise the integration of the Maoist forces into the Nepalese Army in accordance with in the comprehensive peace accords (Art. 146).

⁷ Further detail is added by section 6(3) of the Army Act, 2063 (2006) which gives additional functions to the National Defence Council of submitting recommendations and advice regarding the number and organizational structure and management of army and regarding the management of arms, weapons and other military equipment.

Commentary on the Army Act, 2063 (2006)

Ian Leigh

This Note deals with the provisions in the Army Act concerning the Chief of Army Staff, recruitment, restrictions on rights of service personnel, military law and courts martial.

The Chief of Army Staff

The key function of the Chief of Army Staff is to 'manage the Nepalese Army subject to instructions given by the Nepal Government and existing laws' (s. 10 (1)). The Chief is responsible to the government, to whom he must give an annual report, and swears an oath of office before the Prime Minister. Emphasizing the political accountability of the appointment, the Chief does not enjoy security of tenure, but rather holds office at pleasure of the government, subject to a three year term and a retirement age of 61 (section 11).

Recruitment

The Nepalese army is non-conscripted and recruitment is limited to Nepalese citizens. However certain persons are debarred including anyone has been 'convicted of a criminal offence indicating him morally destitute', who has been debarred from government service following dismissal, and anyone convicted of a human rights violation (s. 13). New recruits take an oath of office (s. 16 and schedule 2). A distinctive feature of civilianization is the inclusion of civilian representatives from the Public Service Commission in selection of candidates for vacancies in the army (s. 12).

Restrictions on rights of service personnel

Certain rights of servicemen and women are restricted by the Act. Members of the armed forces may not become trade union members or organize or participate in union activities, take part in political demonstrations, deliver a speech or print posters or pamphlets (s. 19). Industrial action is not explicitly prohibited but probably falls within the bar on union activities. These restrictions also apply to civilians working under military command, by virtue of section 3. There is, however, no bar on *membership* of political parties, and assisting any 'religious, social, cultural and entertaining union, institution or organization' is permitted (s.19(2))

Some restrictions on the rights of individuals entering the armed forces are to be expected due to requirements of military life. According to international best practice servicemen and women are regarded as 'citizens in uniform' i.e. their normal rights as citizens are restricted strictly to the extent required for legitimate military concerns. Such legitimate military concerns include the need to preserve order and discipline in the military, protecting the political neutrality of the armed forces, maintaining operational effectiveness, protecting classified information, ensuring obedience to orders and maintaining the hierarchical structure of the military. The 'citizens in uniform' approach is the one taken by the world's largest regional security body -the Organisation for Security and Cooperation in Europe (to which some 57 states, including the USA and the Russian Federation, belong)- in its Code of Conduct on Politico-Military Aspects of Security 1994.¹

¹ For a comprehensive analysis of human rights in armed forces among OSCE participating states: I. Leigh and H. Born, *Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel*, (Organisation for Security and Cooperation in Europe, Office of Democratic Institutions and Human Rights, Warsaw, 2008). Available from at: <http://www.osce.org/item/30553.html>. For a detailed commentary on the Code of Conduct, see Victor-Yves Ghebali and Alexander Lambert, *The OSCE Code of Conduct on*

While the restrictions on the civil and political rights of service personnel in Nepal under the Army Act are not excessive by these standards, it is noticeable that a number of other best practice safeguards appear to be absent from the legislation.

Military Law and Courts Martial

The scope of the legal immunities to service personnel granted by section 22 is an important topic bearing in mind the history of alleged impunity for human rights violations of officials in Nepal. Immunity is given for 'any act in good faith, in the course of discharging his duties, resulting in the death of or loss suffered by any person'. This will cover civil and criminal liability, and it includes immunity from arrest by the civilian authorities while on military service (s. 23). The immunity extends to members of the reserve force while on active service or training or in transit (s. 25).

The corollary to immunity in the civil courts is that service personnel may be subject to trial by court martial for breaches of military law for offences. Under Chapter 7 and these encompass not merely offences relating to military discipline but also a number of actions affecting civilians and their property. In these cases the offence will be tried by a military rather than a civilian court (exceptions are made, however, for offences of homicide and rapes. 66(1) (a)).

Complaints procedures for use by officers and by other ranks are established by section 27. An officer has the right to complain to his commanding officer (or that officer's superior if it relates to him). A member of the other ranks has the right to complain at Brigade level. Failure to forward a complaint to a superior officer is disciplinary offence. There is a final right of appeal in both cases to the Chief of Army Staff. Making a false allegation is, however, a military offence under section 57. Unlike many countries the legislation in Nepal does not provide

for a fully independent process for dealing with military complaints, for example through a military ombudsman.

Chapter 7 defines a large number of military offences including: assisting an enemy (section 38); mutiny (s. 39); desertion (s. 42); assaulting a superior officer (s. 44); disobeying a lawful order (s. 45); loss, damage or theft of military property (sections 46 and 49); falsifying a report (s. 47); unauthorized absence (s. 58). Offences similar to these are found in military law the world over.

Military offences are tried by Court Martial. Minor offences can, however, also be dealt with by a superior officer through Departmental summary punishments (s. 105). There are four different types of Court Martial, varying in composition, jurisdiction and sentencing powers.

A General Court Martial, comprised of at least five officers², has full jurisdiction and sentencing powers (s. 67 (1) (a)). Where it is not practicable to convene a General Court Martial because of continuing military operations a Summary Court Martial, comprising three officers (including two officers of the rank of Major³), may be held instead (s. 73(1)(b)). In either case, whenever possible, one of the officers sitting should be a law graduate (s. 67(2)).

A District Court Martial, comprised of at least three officers⁴, has more limited powers: it may impose a maximum sentence of two years' imprisonment but does not have jurisdiction to try an officer or Junior Commissioned Officer (s. 68 (b)). A Summary Court Martial, comprising the commanding officer, can sentence to up to one year's imprisonment if convened by an officer of the rank of Lt. Colonel or more senior, or a maximum six months if convened by an officer of the rank below Lt. Colonel (s. 68 (c)).

² One Lieutenant General (Rathi), two Colonel (mahasenani) or Lieutenant Colonel (pramukh senanani) and two Majors (senani).

³ (s. 67 (1) (b)).

⁴ Officers who completed three years of the term of Commissioner. (s. 67 (1) (c)).

The decisions of a General Court Martial, a Summary General Court Martial and a District Court Martial are subject to approval. The approving officer may reduce any sentence imposed or order a re-hearing (sections 108-110, 113 and 114). Decisions of a Summary Court Martial take effect without approval unless the officer conducting the court martial is of less than 5 years seniority (s. 115). An appeal lies against any decision or final order rendered by a General Court Martial and Summary General Court Martial within 35 days to the Army Special Court Martial (s. 119). The Army Special Court Martial is chaired by an Army Judge of an Appellate Court nominated by the Nepal Government on the recommendation of the Judicial Council, and includes the Secretary of Ministry of Defence and the Chief of Prad Viwak.

Certain types of cases are, however, reserved for first instance trial by the Army Special Court Martial. Offences relating to offence of corruption, theft, torture and disappearance are subject to a special procedure for investigation and trial (s. 62). The Special Court Martial has jurisdiction over them (s. 119(1)) and investigation is by a committee of inquiry chaired by the Deputy Attorney General and including the Chief of the legal section of the Ministry of Defence.

Departmental summary punishments can be imposed by the commanding officer under s. 105 (according to rank) without the need for a Court Martial. In the case of an Officer or Junior Commissioned Officer the Chief of Division or the Brigadier or other officer assigned by the Chief of Army Staff can impose a reprimand, warning, freeze the officer's salary to recover losses, freeze promotion for up to two years or remove seniority of rank for up to one year. Similar penalties may be imposed on persons of the rank of Lt. Colonel or below and Non-Commissioned Officers by a Major- General. In the case of other ranks penalties can include detention for up to 30 days, additional guard duties, or loss of up to 14 days' pay. There is no full right of appeal. However, departmental action that is illegal or unjust or excessive may be reviewed by the senior commanding officer or by the government (s. 118).

In the event of a dispute over jurisdiction with the civilian courts the matter is to be remitted to the civil courts to determine (s. 69). There is a prohibition on double jeopardy (s. 70): accordingly, if the defendant has been tried for an alleged offence previously whether by a Court Martial or a civilian court, and whether convicted or acquitted he or she may not be tried again for the same offence in either forum.

A court martial is chaired by the most senior officer among the panel (s. 80). A representative of judge-advocate's office (Prad Niwak) must be present in order for the proceedings to be valid (s. 81(1)), except in the case of a Summary Court Martial. The defendant has choice of counsel from the Prad Niwak (s. 81(2)). Most questions before a Court Martial are determined by a majority vote, with a casting vote in favour of the chairman on procedural questions. However, a sentence of life imprisonment along with confiscation of the defendant's entire property requires a two-third's majority in the General court Martial and a unanimous vote in the Summary General Court Martial (s. 84). A widely-worded provision imports into the Court Martial process the usual rights of a defendant within a criminal investigation and trial (s. 84(4)).

Witnesses may be summoned either by the convening officer or the Prad Niwak (s. 86). Evidence is taken on oath (s. 86 (5)). Where the summoning of witnesses would cause delays and add costs or difficulties unnecessarily, an order may be given to the Prad Viwak allowing him to ask questions by way of sealed questionnaire (s. 87) and in this case the accused has the right to have questions included. The accused person's character and previous convictions may be considered (s. 91).

A Court Martial has the option of convicting of a lesser offence than that charged (s. 103) where there is insufficient evidence to prove the more serious offence. Section 101 specifies a wide range of sentencing options for a Court Martial (ranging from life imprisonment to giving a warning) and details the maximum penalties available on conviction by court martial for each military offence.

Commentary on the Court Martial Regulation, 2064 (2007)

Ian Leigh

These regulations deal with the investigation of offences, the decision to bring proceedings and the preliminary and trial stages of a court martial.

In general court martial procedures stand to be evaluated according to how effectively protect the independence of the process from interference by the chain of command and in the process how well they guarantee the accused a fair trial. Other jurisdictions tend to resort to two types of safeguards: the involvement of civilian judges (either as part of the court martial bench) or in an appellate capacity and measures to insulate the prosecution, defence and the court itself from pressure, such as formal separation of institutions.¹ By both measures the protection under the Nepalese procedures appears to be weak.

There is no provision for civilian involvement, either in the court martial or by way of appeal to civilian courts. This is regrettable since one of the benefits of civilian involvement is to ensure that the general law is being applied correctly and consistently in military cases. Instead, an officer from the Prad Niwak (judge-advocate) has responsibility for advising the court martial Chairperson on 'law and justice': reg. 16. Within a system in which the court martial officers are likely to be (considerably) superior in rank to Prad officer, firmer protections would be desirable.

The Prad Niwak plays multiple roles in the process. On the one hand it is responsible for forwarding alleged cases from military units to the Chief of Army Staff and advising any

¹ For a fuller discussion see: I. Leigh and H. Born, *Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel*, (Organisation for Security and Cooperation in Europe, Office of Democratic Institutions and Human Rights, Warsaw, 2008), ch. 22.

investigation (by the Court of Enquiry). The Prad Niwak advises on whether to prosecute (reg. 7(2)).² On the other hand, Prad officers advise the court martial and act as its administrative officers (reg. 16) and Prad officers from the Defence Section will represent the accused in the proceedings (reg. 21). The regulations stipulate, however, that the Chairperson and members of the court martial must not 'negatively influence' the defending Prad officer (reg. 21 (3)). Whether this provision is an adequate safeguard, particularly against unspoken threats to the defending officer's career, is doubtful. Moreover, the right for an accused person to appoint independent legal representation (at his own cost, presumably) applies only to a Special Court Martial (reg. 32). The Prad Niwak is responsible also for implementing any judgment of the court martial (reg. 42). The appearance of independence would improve if these various tasks were more clearly assigned to different offices.

² In Summary Court Martials the decision to prosecute is taken by the Prad Niwak itself: reg. 7(3).

Commentary on the Offence against State and Punishment Act, 2046 (1989)

Ian Leigh

This Act creates a number of offences relating to attacks on and threats to the Royal Family, on the government, on social peace, and on the territorial integrity of Nepal. Several of the offences are very vague in scope, carry severe punishments and have the potential to act as substantial limitations on freedom of expression in a way incompatible with a modern democratic state.

The offence of attacking the Royal Family involves coercion or restriction of movement or intimidation (or attempts to do so) and carries a maximum penalty of life imprisonment (section 2). Other acts against the royal family fall within the scope of treason under section 4: 'anything to create hatred, ill-feelings or disrespect' towards His Majesty or the Royal Family or 'stating unproved things' with reference to their activities. These provisions appear anomalous for two reasons. Firstly the normal application of the criminal law to protect *all* individuals from assault, kidnapping, intimidation and so on and, secondly, the abolition of the monarchy in Nepal.

The offence of subversion (s. 3.1) carries a penalty of life imprisonment. It involves committing or attempting 'anything to break law and order' 'with intent to jeopardize the sovereignty, integrity, or national unity of the Kingdom of Nepal'. A case of attempting to overthrow the government by violence will plainly fall within this provision. The vague expression 'anything to break law and order' is, however, also capable of applying very much more widely to less serious acts- for instance, to widespread politically motivated industrial action. Conspiracy with a foreign state or organized forces to jeopardize the sovereignty, integrity, or national unity of the Kingdom of Nepal is also an offence (s. 3. 3). Conspiring or inducing others or organizing persons, arms or

ammunitions to commit either of these offences carries a penalty of up to 10 years imprisonment (s. 3.4)

There is a related lesser offence of committing or attempting to commit 'disorder' 'with intent to rebel against His Majesty's Government by processing or using criminal force' (s. 3.2) carrying life imprisonment or sentence of up to 10 years. Once again the vagueness of some elements of the offence ('disorder' in particular) raises the concern that it could have a chilling effect on political protest.

The offence of sedition penalizes 'anything to create hatred, ill-feelings or disrespect on the basis of class, caste, religion, region or on another such grounds, likely to jeopardize the independence or sovereignty or integrity of the Kingdom of Nepal' (s. 4.2). The scope of this offence under s. 4.2 is very wide. While restrictions on 'hate speech' against racial, religious or other groups are increasingly found in modern states, the scope of the offence under s. 4.2 is considerably wider since it also includes anything likely to create ill-will or disrespect. Furthermore there is no requirement that violence be stirred up or be likely to be stirred up, as is often found by way of safeguard in comparable offences in other jurisdictions. Overall the wording of s. 4.2 is very restrictive of the right of freedom of expression.

Similarly it is an offence to do 'anything to create hatred, ill-feeling or disrespect towards His Majesty's Government by stating unproved things in reference to the activities of His Majesty's Government' (4. 3). Once again this is a broadly framed offence which is capable of capturing many of the normal activities of the political opposition. The effect of the explicit proviso for 'criticizing His Majesty's government' is unclear since the offence also includes doing anything to create ill-feeling and disrespect. The section would appear to put the onus on the defendant to establish that the free speech defence applies, rather than on the prosecution to show that it does not. Reference to 'unproved things' could clearly act as a substantial limitation on the media, by limiting the scope for journalistic fair

comment.¹ Critics of government will always be at disadvantage because of lack of access to information: this offence in effect penalizes that disadvantage by requiring *proof* of criticism that could lead to 'disrespect'.

Finally the Act contains the offence of subversion against friendly nations which punishes anyone committing or attempting or inducing others to commit rebellion against friendly nations by using arms from the territory of the Kingdom of Nepal (s. 5).

The scope of these offences has to be measured against Nepal's international human rights commitments. Article 19 of the International Covenant and Civil and Political rights states that:

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

In the case of the section 4 offences in particular it is arguable whether the potential restrictions on free speech are sufficiently certain in meaning to amount to legal restrictions or whether they go further than is necessary to protect the rights of others, national security or public order.

It is instructive to consider these offences with reference to the Johannesburg Principles on National Security, Freedom of

¹ Which in English law is a defence to a civil action for defamation; by way of comparison, without such a defence being available this Act imposes *criminal* liability.

Expression and Access to Information, Freedom of Expression and Access to Information - a set of internationally recognised standards drafted by a an expert committee in 1995.² The Johannesburg Principles state that legal restrictions on freedom of expression should be: 'accessible, unambiguous, drawn narrowly and with precision so as to enable individuals to foresee whether a particular action is unlawful' (Principle 1.1). A government wishing to uphold restriction should bear the burden of establishing: the expression or information at issue poses a *serious* threat, that the *least restrictive means* possible for protecting that interest and that it is compatible with democratic principles (Principle 1.3). Principle 2.b is worth quoting verbatim:

'....a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest.'

It is highly questionable, in view of their vagueness and over-breadth, whether several of the offences in the Offence Against State and Punishment Act 2046 (1989) satisfy these standards.

The Act applies not only in Nepal but also extra-territorially to Nepalese citizens overseas (s. 1. 1.2). It is likely, however,

² U.N. Doc. E/CN.4/1996/39 (1996). These Principles were adopted on 1 October 1995 by a group of experts in international law, national security, and human rights convened by ARTICLE 19, the International Centre Against Censorship, in collaboration with the Centre for Applied Legal Studies of the University of the Witwatersrand, in Johannesburg. <http://www1.umn.edu/humanrts/instreet/johannesburg.html#6>

that except in clear cases involving conspiracy to violence (i.e. terrorism) that a Nepalese citizen abroad would have good grounds to resist extradition for an offence under the Act in many cases, since these are plainly political offences that carry a clear risk that a person extradited may face political persecution.



Commentary on the Public Security Act, 2046 (1989)

Ian Leigh

This Act provides for two types of orders restricting individual liberty and freedom of movement that can be imposed by local officials (the Chief District Officer of an area).

A *preventive detention order* is an order for detention of a person in a specified place. While this could take the form of house arrest there is nothing in the Act to prevent detention at a police station, prison, army base or government building. The order can be made if there are 'reasonable and sufficient grounds to prevent a person immediately from committing specific activities likely to jeopardise the sovereignty, integrity, or public tranquillity and order of the Kingdom of Nepal' (s. 3.1).¹ The Chief District Officer can make a preventive detention order for period of up to 90 days. The order can be extended by the Ministry of Home Affairs to six months and on application the Advisory Committee established by the Act² to one year in total (s. 5). A preventive detention order can be challenged before the courts for bad faith (s. 12) but not otherwise (s. 11). Nevertheless, the Chief District Officer must inform the District Court of the making of the order within 24 hours (s. 4.2).

The combined effect of these provisions is curious and perhaps unintentionally anomalous. The District Court may hear a challenge based on bad faith either during detention or within 35 days of a person's release and may award compensation (bearing in mind various factors specified in s. 12A. 3).

¹ The provision in the Interim Constitution governing grounds for preventive detention is slightly narrower, referring to 'sufficient ground of existence of an immediate threat to the sovereignty and integrity or law and order situation of Nepal.' (Interim Constitution, s. 25.1) i.e. omitting reference to 'public tranquillity'.

² Chaired by a Supreme Court judge, with two other retired judges (s. 7).

Seemingly, however, the District Court has no power to quash the order or release the detainee if it finds in his favour. Moreover, since section 11 prevents 'any question' being raised in court about any order presumably a challenge to the making of the order on any ground, for example lack of *vires*, is barred. The compatibility of these provisions with the Interim Constitution is unclear. While the Interim Constitution excludes persons in preventive detention from rights of access to legal advice and of being brought before a court within 24 hours (Interim Constitution section 24. 3), the more general constitutional right to 'fair trial by a competent court or judicial authority' (s. 24. 9) is not excluded. There must therefore be a question as to whether the restrictions on legal proceedings under s. 11 of the Act are constitutional. In the event, however, that the government wishes to extend the order beyond six months' the Advisory Committee procedure will afford the detainee some opportunity to challenge the extension of the order (s. 8) , although the Act does not specify the procedural rights that the detainee has before the committee.³

The Public Security Act contains no detail on the conditions of detention or what rights if any the detained person is permitted, for example, to communicate with others, to respect for family life or to allow religious observance. In the absence of any legal restrictions the detained person presumably enjoys his other fundamental rights under Part 3 of the Interim Constitution, although it should be noted that some of these rights (such as freedom of expression) are subject to extensive constitutional limitations.

The second type of order provided for by the Act is an '*area confinement order*'. This order may prevent a person from residing in or entering any part of the country or confine their residence to

³ Under s. 8.2 the Advisory Committee is to take into account a report from the government and supporting reasons as well as a reply or explanation from the person held. The section does not give the detainee an explicit right to see the documents submitted by the government, although arguably entitlement to do is inherent in the right of fair trial

a particular area (s. 3.2). In this case the grounds for a Chief District Officer making the order are broader: 'reasonable and sufficient grounds to prevent a person from committing any activities likely to jeopardise wellbeing of ordinary people or amicable relation among diverse castes, tribes or communities' (s. 3.2). An area confinement order lasts for 30 days but may be extended by Ministry of Home Affairs to 90 days in total (s. 6). There is no process for challenging area confinement orders, notwithstanding their clear impact on freedom of movement: as previously discussed section 11 prevents 'any question' from being raised in court concerning them.



Commentary on the Legislation Relating to the Nepal Army and Human Rights

Ian Leigh

These documents are five directives from the Chief of Army Staff concerning implementation of international humanitarian law and international human rights law by the Nepalese armed forces. Together these directives make clear it is official policy to ensure that humanitarian law and international human rights law are respected and that, although human rights violations may have occurred during past counter-insurgency operations, that the perpetrators should not enjoy impunity.

The Chief of the Army Staff Human Rights Directives No.02-060 (12 March 2004) governs the arrest, search and treatment of detainees during security operations. It makes clear that commanders have responsibility for briefing their units on questions of humanitarian law and international human rights law and reporting violations. A further Chief of the Army Staff Human Rights Directive No.01-061 (10th January 2005) gives more specific advice on the treatment of detainees. It includes a duty 'Carry out prompt and detailed investigation of the cases related to the Human Rights violations' (Paragraph 2(n)).

It is internationally recognised as of crucial importance in modern disciplined armed forces that awareness of human rights be integrated into military training in order to instil a culture of respect for rights.¹ The directive of 22 February 2008 ('IHL and IHRL Integration Order for the Nepalese Army') makes specific provision for mainstreaming human rights in Doctrine, Education, Career training, Equipment and the Sanctions System. This accords with previous legal requirements in article 144 (4) under the interim Constitution and section 20(1) of the Army Act 2006.

¹ I. Leigh and H. Born, *Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel*, (Organisation for Security and Cooperation in Europe, Office of Democratic Institutions and Human Rights, Warsaw, 2008), Ch. 19.



Commentary on the Instruments Concerning Recruitment of Gurkhas in British and in Indian Army

Ian Leigh

These notes of agreement from 1947 between representatives of the British, Indian and Nepalese governments are the modern basis for one of the more colourful and unusual practices of the British armed forces- the presence of Nepalese nationals serving in the Gurkha regiment. Around 200,000 Gurkhas have served in the British army since 1914, with around 3500 currently serving.¹ The 1947 agreement was made on the occasion of Indian independence from the then British Empire. From 1815 until Indian independence Gurkhas served the Crown in the Indian Army. Since independence they have served in the Gurkha brigade in the British Army. The Gurkha brigade is not a distinct fighting unit, since Gurkhas are in fact integrated into many units. Rather it is an administrative division in effect, but it ensures that Gurkhas retain their own distinctive traditions and religious practices in the units of which they are part. The 1947 agreement provided for recruitment, freedom of movement through India, resettlement and payment of Gurkhas.

As is clear from the Agreement the rates of pay of Gurkhas was to be equivalent to the Indian pay code, subject to a special allowance to compensate for permanent service overseas due to high cost of living in comparison to Nepal for those serving the British government overseas. The differences between the pay and conditions of Gurkhas and British service personnel who they serve alongside have given rise to inevitable controversy in recent decades. Following an unsuccessful attempt to challenge the differences in pension

¹ BBC News, 18 March 2008
<http://news.bbc.co.uk/1/hi/uk/2786991.stm>

arrangement as discriminatory² there was a review of the conditions of service in 2005³ and pension rights were equalised in 2007. After further controversy in 2009 involving a high-profile campaign led by the Gurkha Justice Campaign with the actress Joanna Lumley, certain categories of retired Gurkhas were granted the right to settle in the UK.⁴

² *R (Purja and others) v. Ministry of Defence*, [2004] 1 WLR 289. Gurkhas were less favourably treated in the amount of pension that they received, as compared with other British army soldiers, but more favourably treated as to when it was payable (immediately after 15 years, whereas a British soldier was entitled to a deferred pension payable at the age of 60). In finding that there was no breach of Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms the Court of Appeal took into account the very different living conditions in the societies to which Gurkhas and other British soldiers would retire.

³ House of Lords, Debate, Publications & Records Section, British Parliament website, 11 January 2005, www.publications.parliament.uk/pa/ld200405/ldhansrd/vo050111/text/50111-47.htm

⁴ BBC News, 21 May 2009
http://news.bbc.co.uk/1/hi/uk_politics/8060607.stm

Commentary on the Armed Police Force Act, 2058 (2001) and the Armed Police Force Regulation, 2060 (2003)

Michael F. Noone¹

The term “armed police” implies a distinction between armed and unarmed police. This distinction is reflected in the three primary models of policing: the Anglo-Saxon model, the Continental model and the Colonial model.² The Anglo-Saxon model focuses primarily on crime, is community based and, in Great Britain, relies on unarmed police. The Continental Model, exemplified by the Spanish La Guardia Civil, the French Gendarmerie, and the Dutch Marechaussee, is centrally, rather than locally, controlled; its forces are armed, have traditionally been responsible for the maintenance of public order and carry out political and administrative duties as well. The Colonial model typically calls for a partially centralized force that is militarized, armed, and carries out administrative functions.

The Scottish philosopher David Hume (1711-1770) in his essay *Of National Character* claimed that “the same set of manners will follow a nation and adhere to them over the whole

¹ With thanks to Ms. Elisabeth W. Dallas, Public International Law and Policy Group, Colette Rausch, US Institute of Peace; Virginia Prugh, and Denver Fleming, Department of State; Nishchal Pandey, Center for South Asian Studies; Tyler Rauert, Near East South Asia Institute of Strategic Studies, and Steven Young, Columbus School of Law. They contributed research sources and ideas but did not review the text and are therefore not responsible for my observations and conclusions.

² R.I. Mawby, *Comparative Policing Issues: the British and American Experience in an International Perspective* (London: Unwin Heyman: 1990) and “Variations on a theme: the development of professional police in the British Isles and North America,” *Policing Across the World: Issues for the Twenty-first Century*, pp. 28-58(London, UCL Press (1999), R.I. Mawby ed.

globe as well and their same laws and languages. The Spanish, English, French and Dutch colonies are all distinguishable between these topics.”³ Legal provisions regarding the Nepalese Armed Police exemplify the saliency of Hume’s observations regarding the portability of national laws and manners although Nepal was never a European colonial possession. Modern Nepal under the House of Rana (1846-1950) “functioned as a landed aristocracy despite calling itself a constitutional monarchy. The Rana prime ministers maintained control by cultivating a strong relationship with the Army.”⁴ Compiled in 1854, the Muluki Ain, a combined Civil and Criminal Code derived primarily from Hindu texts, served as Nepal’s fundamental law after the monarchy was restored in 1950, and the *panchayat* (local governance) system was instituted in 1961 and then dismantled in 1992 after a new Constitution had been approved by the Monarch. The Muluki Ain was based on the premise that local authorities were responsible for the prevention and detection of criminal behaviour.⁵ There was no centralized police force until 2001 when the Government concluded that the deteriorating security environment called for the creation of an Armed Police Force. In doing so, they apparently looked to neighbouring India, a former British Colony, for their model. The Indian Armed Police Force has its origins in the Irish Colonial Model⁶ and, although subject

³ David Hume, *Essays, Moral, Political, and Literary* (Oxford University Press: 1963) p. 210.

⁴ Johanna Bond, “Nepal,” *Legal Systems of the World a Political, Social, and Cultural Encyclopedia*, Vol III, M-R (Herbert M. Kritzer ed.(Santa Barbara: ABC -Clio, 2000) p. 1109.

⁵ Law reform of the Muluki Ain, as of 2000, is summarized in section 1.3(E) of Dhruva Bar Singh Thapa’s “The Legal System of Nepal, *Modern Legal Systems Cyclopedia*, Vol. 9, K.R. Redden ed.(Buffalo: William S. Hein (2001) pp. 9.240.17-18.

⁶ G. Elison and, C. O’Reilly, “From Empire to Iraq and the ‘War on Terror’: The Transplantation and Commodification of the (Northern) Irish Policing Experience,” *Police Quarterly*, 11, 395-426 (2008); D.K. Das and A. Verna, “The armed police in the British colonial tradition: the Indian perspective,” *Policing: an*

to individual States' control, the Indian Central Government is the ultimate authority.⁷

The **Armed Police Act (2001)** and **Armed Police Regulation (2003)** reflect both the Irish Colonial Model and the circumstances which led to their creation. Chapter 2 of the Act refers to "mobilization" of the Armed Police. Mobilization has a military implication: to assemble and make ready for war. The term "mobilization" suggests that the Armed Police are a reserve, only to be called on in extraordinary circumstances when riot, rebellion, or natural disaster call for an extraordinary militarized response; section 6 of that Chapter lists those circumstances. In situations involving public disorder the (then) Royal Nepalese Army is designated by the statute (section 8) to exercise command and control of the Armed Police. Because the police are para military, the terms of service and procedures for punishment (Chapter 3) may resemble those established for the Army as does the lists of "Duties and Responsibilities" (Chapter 4) and of "Offences and Penalties" (Chapter 5). There are provisions for an Armed Police Special Court to try charges brought against members of the Armed Police. These provisions must be read in conjunction with Chapter 10, "Penalty and appeal" of the Armed Police Regulation (2003) which provides for summary punishment (i.e., without trial) for some offences.

Neither the disciplinary provisions in the Act (which provides for trials) nor the Regulation (which provides for summary punishment) meet all the requirements of generally agreed upon justice standards. For example:

Trial Provisions

Chapter 8 of the Armed Police Act, para.28 (3) is silent on the independence of those judging the merits of the complaint, as

International Journal of Police Strategies and Management, 21. No.2, pp. 354-367.

⁷ See, e.g., The State Armed Police Forces (Extension of Laws) Act, 1952, Act No.63 of 1952.

are the provisions in para 33 regarding the Appellate Court.⁸ Furthermore, there are no provisions for an independent prosecutor.⁹ Also provisions for defendants to have access to legal advice and representation of their choice are lacking.¹⁰ The trial procedures (para 30) are not explicit enough to ensure compliance with standards for a fair trial.¹¹ The list of “Offences for which punishment for [sic] imprisonment maybe imposed” includes at least two - speech spreading hostility (para. 27 (3) (c) and joining a political party (para. 27 (4) (c) which may be challenged on Human Rights grounds.¹²

Summary Punishment provisions:

The offences which would warrant “simple penalties” (para 84 A) are not listed.

Concluding comments on armed police act:

Perhaps the post Peace Agreement security environment will warrant a governmental decision to disband the Armed Police Force. If that is proposed it should be a matter for public consultation because political and criminal violence and thus, potentially, the need for a paramilitary force, remains high.¹³

⁸ See Chapter 21, “Discipline and Military Justice,” *Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel* (hereafter *Handbook*) (Warsaw OSCE/ODIHR 2008).

⁹ See Principles 11 and 12 of the 1990 U.N. *Guidelines on the Role of Prosecutors*.

¹⁰ Principles 17 and 18, 1990 *Body of Principles for the Protection of all Persons Under Any Form of Detention or Imprisonment*; Principles 7 and 8, 1990 *Basic Principles on the Role of Lawyers*.

¹¹ Article 14, *International Covenant on Civil and Political Rights*.

¹² See Chapter 8, *Handbook* note 8 *supra*.

¹³ “Threats to security include armed groups that have either splintered from the CPN-M or have organized in the name of retaining the monarchy, preserving Nepal as a Hindu kingdom, or in the name of protecting and promoting the rights of various ethnic groups.” Of particular concern has been the growing

If, after public consultation, the Government decides to retain the Force, I recommend that the legislative drafters examine the contemporary Irish Post Colonial Model: the Police Service of Northern Ireland (PSNI), established on November 4th 2001¹⁴ as a consequence of the Good Friday (1998) Peace Agreement. In January 2007, Sinn Fein, the last of the political parties involved in the Agreement to do so, accepted the Police Service. Both the process of restructuring the formerly militarized force and the statutory outcome offer lessons that may be useful to the Nepalese Government. The PSNI has a positive discrimination policy, as does the Nepalese Armed Police Force.¹⁵ Although it now follows the decentralized Anglo-Saxon model, the PSNI retains some paramilitary characteristics: unlike other British police they are routinely armed and wear flak jackets rather than stab vests. As part of the review process, I recommend “Nepal in Transition: Strengthening Security and the Rule of Law, Findings of Nepal Police- Civil Society Dialogue, Public Report 2007.”¹⁶

Madhesi movement in the Terai (lowlands). ...Other post-conflict crimes are on the rise including organized crime, burglary and theft, cross-border looting and banditry, smuggling and human trafficking, and gun crimes.” Karen Cochran-Budathoki and Colette Rausch, <http://www.usip.org/print/resources/nepal-transition-developing-security-and-rule-law-strate>.

¹⁴ Police (Northern Ireland) Act 2000 c.32.

¹⁵ Chapter 3, para 5 (3) Armed Police Regulation.

¹⁶ Available in hard copy from the U.S. Institute of Peace.



Commentary on the Arms and Ammunition Act, 2019 (1963) and Arms and Ammunition Regulation, 1972

Michael F. Noone¹

The present **Arms and Ammunition Act** became law in 1963; the latest version of its implementing regulations were promulgated in 1972. They clearly don't reflect the needs of the contemporary post-conflict Nepalese society where the control of surplus weapons and firearms must be part of DDR program: disarmament of former combatants, demobilization of armed groups, and their reintegration into society. As part of a DDR program, persons possessing arms, ammunition, explosives, and other weapons are not penalized for admitting possession and for handing it over; they are paid for doing so.

In conjunction with the DDR scheme, I suggest a complete revision of the statutory scheme and regulatory provision by incorporating provisions of the 2001 Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Crime, its *Legislative Guide*, and Articles 164-169.2 of the *Model Code for Post-Conflict Criminal Justice*,² - hereinafter The Model Code.

¹ With thanks to Ms. Elisabeth W. Dallas, Public International Law and Policy Group, Colette Rausch, US Institute of Peace; Virginia Prugh, and Denver Fleming, Department of State; Nishchal Pandey, Center for South Asian Studies; Tyler Rauert, Near East South Asia Institute of Strategic Studies, and Steven Young, Columbus School of Law. They contributed research sources and ideas but did not review the text and are therefore not responsible for my observations and conclusions.

² Vivienne O'Connor and Colette Rausch, editors (Washington D.C.: United States Institute of Peace, 2007), The Model Codes project was initiated by the Institute in 2001 in conjunction with the Irish Centre for Human Rights and in cooperation with the United

For example, definition by name, exemplified by the 1963 Nepalese Arms and Ammunition Act's definition of "arms and ammunition," has, under the UN protocol, its *Legislative Guide* and the *Model Code* been replaced by definitions which focus on characteristics:

Article 164.1 para 2 of the just mentioned Model Code suggests the following definitions:

'(a) firearm means any portable barrelled weapon that expels, is designed to expel, or may be readily converted to expel a shot, bullet, or projectile by the action of an explosive, excluding antique firearms or their replicas;

....

(c) ammunition means the complete round or its components, including cartridge cases, primers, propellant powder, bullets, or projectiles used in a firearm;³

Establishing the characteristics of the products to be regulated, the regulatory procedures and the penalties for violating those norms within the context of the ongoing DDR program is urgent.

Nations Office of the High Commissioner for Human Rights and the United Nations Office on Drugs and Crime. Nepalese participation included Subodh Pyakurel, Chairperson, Informal Sector Service Center, Geeta and Yubaraj Sangroula, Kathmandu School of Law, Upenda Aryal, Senior Superintendent, Shyam Khadka, Deputy Senior Superintendent, and Govind Thapa, Additional Inspector General (ret.), Nepal Police, Sushil Kumar Pant, former Attorney General, Sushil Pyakurel, Former Commissioner, National Human Rights Commission, and Shambhu Thapa, President, Nepal Bar Association. Hereinafter The Model Code.

³ The Model Code, Art 164.1 para 2.

Commentary on the Explosive Substance Act, 2018 (1961)

*Michael F. Noone*¹

The provisions of the present law suffer from the same disabilities I noted in the Arms and Ammunition Act and its implementing regulations: replacing definitions by example, with definitions which focus on characteristics. I therefore suggest that the “Explosive Substances” definition (para. 2) be replaced by the provisions of Article 166 of the Model Code (see Attachment 2). Para. 3 seems overbroad and unnecessary (see the Commentary on para. 2 (a)). Para. 4 is important and should be retained in some form (see Commentary on para. 1 of Model Code Article 167, Attachment 2). Para. 5 of the present Act is subject to the same criticism as paragraph 3 of the Act. Paragraph 6 would be unnecessary if the Nepalese Criminal Code contained provisions similar to the Model Code as included below:

Article 114: General Provisions on the Seizure of Objects and Documents

1. Under the conditions set out in the MCCP and in the applicable law, during a criminal investigation, the police are authorized to seize:

¹ With thanks to Ms. Elisabeth W. Dallas, Public International Law and Policy Group, Colette Rausch, US Institute of Peace; Virginia Prugh, and Denver Fleming, Department of State; Nishchal Pandey, Center for South Asian Studies; Tyler Rauert, Near East South Asia Institute of Strategic Studies, and Steven Young, Columbus School of Law. They contributed research sources and ideas but did not review the text and are therefore not responsible for my observations and conclusions.

- (a) objects or documents specified in a search warrant or an order issued by a competent judge;
 - (b) objects or documents with regard to which probable cause exists that they represent evidence of a criminal offence;
 - (c) objects or documents with regard to which probable cause exists that they were used in, acquired by, or came into existence through a criminal offence;
 - (d) objects that police have reason to believe are intended for use in an attack or to inflict injury upon a person;
 - (e) objects that police have reason to believe may endanger the general safety of the public or property; and
 - (f) objects that are subject to mandatory seizure or prohibited under the applicable law.
2. A record of all objects or documents seized during the criminal investigation must be made upon seizure. The record must include:
 - (a) a description, accompanied by a photograph, when possible, of the objects or documents seized;
 - (b) the date, time, and place of the seizure;
 - (c) the identity of the person from whom the objects or documents were seized;
 - (d) the identity of the authorized official who seized the objects or documents; and
 - (e) the reasons for seizure.
 3. The record of all objects or documents seized during the criminal investigation must be signed by the authorized official who seized the objects or documents.
 4. A copy of the record must be given to the person from whom the objects or documents were seized.
 5. The seized objects or documents must be taken immediately to the prosecutor, along with the written record as detailed under Paragraph 2.

6. The prosecutor must order that objects or documents wrongfully seized be returned to their owner immediately or, if return is not immediately feasible, that the objects or documents are placed in storage, in accordance with Article 101, until such time as they can be returned to their owner.
7. Seized objects must be properly managed so as to prevent loss of value or deterioration in physical condition.
8. Seized objects and documents must be returned to the person from whom they were seized or to the owner as soon as the reasons for their seizure in criminal proceedings cease to exist, unless otherwise provided for in the MCCP or in the applicable law.
9. A person whose property has been seized during a criminal investigation may appeal the seizure under Article 295.

Commentary

Article 114 underscores the importance of handling, storing, managing, and record keeping by the police with regard to seized objects and documents. In many post conflict states, poor records are kept of items seized. In addition, in some states, items may be lawfully seized but not returned to their rightful owner, as should be required by law. Moreover, objects or documents seized are often not properly dealt with; seized items should be placed in a bag, wrapped or sealed, and then tagged to identify the owner and the case. Providing for a comprehensive and systematic methodology for the management of seized objects and documents is important not only for protecting the property rights of victims but also for preventing incidences in which police officers take personal ownership or make personal use of seized objects. Proper management of seized items also facilitates the criminal investigation process and ensures that valuable pieces of evidence are not lost. Article 114 does not provide for such a system but instead sets out broad guidelines on dealing with

seized items. In addition to the provisions of the law on seizure of objects and documents, the police and the prosecution service should establish standard operating procedures on record keeping and managing seized objects.'

Paragraph 1: Paragraph 1 consolidates the powers provided for in the MCCP and MPPA authorizing the police to seize objects and documents.

Para. 7 would be unnecessary if Article 170 of the MCC were followed.

The provisions of paras 8 and 9 should be included in the Nepalese Road Traffic Act and legislative inquiry should be made as to the need, during such investigations, to displace the Chief District Officer's authority. Para. 10: reference should be made to the Commentary on Article 167.2 of the MCC. Paras. 11 and 14 are matters of legislative discretion.

Commentary on the Act of Some Public Offences and Penalties, 2027 (1970)

*Michael F. Noone*¹

This act was apparently intended to penalize actions which had not hitherto been prohibited.

The statute (paragraph 2) lists these offences, several of which (a) (b) (e) (f) (h) involve “hooliganism.” The term has no legal meaning in English and must be the translators’ effort to find an equivalent term to match some Nepali word. The term “hooligan” in English is now obsolescent but was used to describe a member of the lower social class engaged in disruptive behaviour, often noisy or violent. I will disregard the class implications of the term and assume that the Nepali term was intended to describe two types of behaviour criminalized in Anglo Saxon Law: “disturbance of the peace” (which focuses on the adverse affects on other members of the community) and “disorderly conduct” (which emphasizes on deviations from commonly accepted community norms).

Applying these criteria, I have the following observations:

(a) it is common practice for police to routinely charge, arrest, and sometimes detain individuals who, in the police judgement are interfering with public service. These charges, rarely tried, are intended to deter or inconvenience individuals

¹ With thanks to Ms. Elisabeth W. Dallas, Public International Law and Policy Group, Colette Rausch, US Institute of Peace; Virginia Prugh, and Denver Fleming, Department of State; Nishchal Pandey, Center for South Asian Studies; Tyler Rauert, Near East South Asia Institute of Strategic Studies, and Steven Young, Columbus School of Law. They contributed research sources and ideas but did not review the text and are therefore not responsible for my observations and conclusions.

whom the police believe unhelpful. Therefore use of this charge should be closely scrutinized.

(b) “hooliganism” in this context is clearly equivalent to disturbance of the peace. In this provision it is phrased conjunctively: “hooliganism and battery.” Need both be proven in order to establish guilt?

(e) this offence is apparently intended to criminalize all trespass to land and, as such, would be the equivalent of disorderly conduct. Need the behaviour on the land involve a disturbance of the peace? Need the prosecution show that the trespasser knew or should have known that he was on the land of another?

(f) In Anglo Saxon laws, minor damage to a chattel (movable property) or its removal would constitute a trespass and could constitute disorderly conduct. Need there be a disturbance of the peace? Need the prosecution establish knowledge? The phrase “or by other ways” is, in my view, unnecessary

(c) This provision is ambiguous, even if there is a general societal norm for obscenity: need the prosecutor establish that there was a disturbance of the peace? Or simply that the behaviour was capable of disturbing the peace?

(d) (g) (h) (i) Obviously intended to criminalize anti-social behaviour which had no serious adverse consequences for the victim or the community. Presumably there are, elsewhere in the Code, provisions for severe punishment when the obstruction of services, sexual molestation, intimidation, etc., have the potential for or did, in fact, have serious consequences.

Power to arrest: Presumably the provisions are intended to extend the powers of arrest, stipulated elsewhere, to these minor offences.

I recommend that consideration be given to the following general provisions of the Model Criminal Code:²

Article 170: Arrest without a Warrant

1. The police may arrest a person without a warrant where:
 - (a) he or she is found in the act of committing a criminal offence;
 - (b) the police are in hot pursuit of a person immediately after commission of a criminal offence;
 - (c) probable cause exists that a person has committed a criminal offence and that there is a likelihood that before a warrant could be obtained the suspect will flee or destroy, hide, taint, or falsify evidence of a criminal offence, or pressure, manipulate, or otherwise influence a witness, a victim, or an accomplice; or
 - (d) probable cause exists that a suspect has violated one of the restrictive measures imposed on him or her under Article 184.
2. Where the police arrest a person without a warrant, they must orally notify the prosecutor immediately.
3. In addition to the notification requirement contained in Paragraph 2, the police must also, without undue delay, submit a report of the arrest to the prosecutor. The report must detail the circumstances in which the arrest was made.
4. Where the prosecutor establishes that:
 - (a) he or she will not file a motion for detention; or
 - (b) he or she will not initiate or continue an investigation the prosecutor must order that the arrested person be released.
5. A person arrested without a warrant under Article 170 must be brought before the court promptly and no later than

² In the text which follows the authors' explanation of Code provisions is titled "Commentary". My observations are noted as "Comment."

seventy-two hours after arrest to determine the issue of detention under Article 175.

Article 171: Arrest under Warrant

1. Except as otherwise provided for in Article 170, a warrant is required for the arrest of a person.
2. The prosecutor may make an application for an arrest warrant where:
 - (a) probable cause exists that the person has committed a criminal offence; and
 - (b) reasonable grounds for detention under Article 177(2) exist.
3. The application for an arrest warrant must contain the following:
 - (a) the name of the suspect and any other identifying information, including the location of the suspect, if known;
 - (b) a summary of the facts that are alleged to constitute a criminal offence and a specific reference to the criminal offence for which the arrest of the suspect is sought, including a reference to the relevant legal provisions; and
 - (c) a request to the competent judge to issue an arrest warrant.
4. Where the requirements of Paragraph 2 are met, the competent judge may issue an arrest warrant.
5. The arrest warrant must contain the following:
 - (a) the name of the suspect and any other identifying information, including the location of the suspect, if known;
 - (b) a summary of the facts that are alleged to constitute a criminal offence and a specific reference to the criminal offence for which the arrest of the suspect is sought, including a reference to the relevant legal provisions;
 - (c) the authority authorized to execute the arrest warrant;
 - (d) the date of the arrest warrant; and
 - (e) the signature of the competent judge.

6. A person arrested under a warrant must be brought before the court promptly and no later than seventy-two hours after arrest to determine the issue of detention under Article 175.

Case Hearing Authority and Procedures

Comment: The Chief District Officer, not a judge, is presently given the power to adjudicate (determine guilt or innocence) such cases. I assume he is also responsible for the police (who made the arrest and probably brought the charge) in his District. Certainly he will be inclined to support his subordinates. The prior section of the statute gives him the authority to extend the statute of limitations for bringing such charges, and the subsequent section enables him to order pre trial detention for what would apparently be a minor offence.

The provisions do not provide for an independent determination of the case. With regard to pre-trial detention; I recommend the Model Code provisions:

Article 177: Grounds for Detention

1. Except as otherwise provided for in the MCCP or the applicable law, a warrant of the competent judge is necessary for the detention to be valid.
2. Detention may be ordered against an arrested person only where there is probable cause that:
 - (a) the suspect will flee to avoid criminal proceedings;
 - (b) the suspect will destroy, hide, taint, or falsify evidence of a criminal offence or pressure, manipulate, or otherwise influence a witness, a victim, or an accomplice;
 - (c) the suspect will commit a criminal offence, repeat a criminal offence, complete an attempted criminal offence, or commit a criminal offence that he or she has threatened, if released. In considering this ground, the seriousness of the criminal offence of which the person is suspected, the manner or circumstances in which it was committed, and the suspect's personal characteristics, past conduct, the environment and conditions in which

- he or she lives, and other personal circumstances must be taken into account to ascertain this risk; or
- (d) public safety may be endangered if the suspect remains free.

Commentary (by the Model Criminal Code's authors)

Paragraph 2: Detention is a measure of last resort. According to Principle 39 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, "except in special cases provided by law," a person is entitled to release pending trial subject to conditions that may be imposed in accordance with the law. Paragraph 2 provides a list of circumstances that would justify the detention of a suspect. In all cases, there must be probable cause (see Article 1[22] and its accompanying commentary for the definition of probable cause). The grounds set out in Paragraph 2 were arrived at after a survey of criminal legislation in states around the world and the conditions under which they sanction pre-trial detention.

These grounds have also been scrutinized by international human rights bodies. The first ground for pre-trial detention is found in Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In the case of *Yag̃ci and Sargin v. Turkey*, the European Court held that in determining the risk of flight, the court must look not only at the seriousness of the criminal offence but also at "a number of other relevant factors which may either confirm the existence of a danger of absconding or make it appear so slight that it cannot justify detention pending trial" (*Yag̃ci and Sargin v. Turkey*, application no. 16419/90;16426/90 [1995], ECHR 20 [June 8, 1995], paragraph 52). The ground for detention provided for in Paragraph 2(b) has been recognized by the European Court of Human Rights (see *Tomasi v. France*, application no. 12850/87 [1992], ECHR 53 [August 27, 1992], paragraphs 92–95), as has the risk of a person reoffending as set out in Paragraph 2(c) (see *Toth v. Austria*, application no. 11894/85 [1991], ECHR 72 [December 12, 1991], paragraphs 69–70). The final ground justifying pre-trial detention on the

basis of public safety is similar to the public order ground recognized by the European Court in *Tomasi v. France* (paragraph 91). The court found this ground to be an exceptional measure that can be employed only where there are concrete facts that the person's release would prejudice public order. Furthermore, the court held that continued detention is permissible only where the public order continues to be threatened.

Comment: Section (2) of the present statute provides that the Procedures in the Nepal Special Court Act 1974 will apply. I do not know what those procedures may be.

Penalties: A fine of up to 10,000 rupees is authorized. As is this is written, in August 2009, I believe that is the equivalent of 900 Euros which, I suspect, exceeds the annual income of most citizens and is imposed by an administrative (not a judicial) official. Perhaps the Nepal Special Court Act authorizes appeals of a punishment which the convicted person claims is excessive. Perhaps it also provides for sanctions when the fine is not paid. The statute does not set any criteria for referral to the Appellate Court when the Chief District Officer concludes that imprisonment not exceeding two years is appropriate after conviction of what would otherwise be considered a minor offence. These provisions may permit an abuse of the CDO's power.

Although the **State Cases Act (1992)** and **State Cases Regulation (1998)** contain provisions which relate to the Government in civil cases (Act; sections 25 and 29; Regulations sections 16-20), these provisions are not relevant to the security sector and will not, therefore, be discussed. The criminal justice procedures outline were written before the twelve year civil conflict and must be revised in light of present post conflict circumstances. Model Codes for Post-Conflict Criminal Justice, the *Model Code of Criminal Procedure* to which Nepalese contributed could be used as a template.



Commentary on the Prison Act, 2019 as amended by Prison Act 2063 and implemented by Prison Regulation 2061 (2020)

*Michael F. Noone*¹

These provisions warrant extended analysis by persons far more familiar than I with penology.² A comparison of the Nepalese provisions with the United Nations Standards and Norms in Crime Convention and Criminal Justice (www.undoc.org/undoc/en/justice-and-prison-reform/compendium.html) suggests:

¹ With thanks to Ms. Elisabeth W. Dallas, Public International Law and Policy Group, Colette Rausch, US Institute of Peace; Virginia Prugh, and Denver Fleming, Department of State; Nishchal Pandey, Center for South Asian Studies; Tyler Rauert, Near East South Asia Institute of Strategic Studies, and Steven Young, Columbus School of Law. They contributed research sources and ideas but did not review the text and are therefore not responsible for my observations and conclusions.

² For further reference please consider: In that regard I recommend “Overview of Penal System in Nepal” by Yubaraj Sangroula (www.ksl.edu.np/view_article.asp/ID=21) the section on detention and customary in “Fundamental Rights in the Interim Constitution of Nepal (www.law.usyd.edu.au/scil/pdf/2009/NepalManual_English.pdf) and the March 2009 Report of the United Nations Commissioner for Human Rights on the activities of her office in Nepal: “In May 2008, the Supreme Court ordered the Government to undertake reforms with regard to the prison system, including improving prison conditions and the situation of the children living with prisoners, as well as reforming policies on prison management and administration. The Government states that reform of the prison system is ongoing and subject to available resources.” (para. 44 A/HRC/10/53 3 March 2009)

- that the statute and regulations should explicitly provide that rules shall be applied impartially with due respect paid to an individual's religious beliefs and moral precepts of the group to which the prisoner belongs;
- that the present provisions seem to meet international standards for a Prison Register;
- that provisions providing for categorization of prisoners by sex, age, criminal record, the legal reason for their detention and the necessities of their treatment should be made more explicit, as should the consequences of the categorization, e.g., separate institutions or parts of institutions;
- explicit provision should be made for prisoner accommodations: standards for sleeping accommodations, work, sanitation, food, exercise and sport, and medical services;
- there should be explicit provisions regarding discipline and punishment;
- present provisions regarding instruments of restraint should be made more explicit in order to meet UN Standards, as should the following topics: information to and complaints by prisoners; contact with the outside world, books, religion, retention of prisoners' property, notification of death, illness, transfer, and other change in prisoner status, as well provision regarding the removal of prisoners from one place to another;
- there should be specific provisions establishing criteria for the appointment, compensation and evaluation, according to published standards of conduct, for prison personnel as well as provision for independent and regular inspection of penal institutions and services; and
- Rules and standards applicable to special categories - prisoners under sentence; insane or mentally abnormal prisoners; prisoners under arrest or awaiting trial; civil prisoners (by court order)- should be published.

Commentary on the Forest Act, 2049 (1993) and Forest Regulation, 2051 (1995)

Marlene Urscheler

In Nepal, contrary to many other countries, the officials in charge of managing the forest are endowed with far reaching powers in respect of use of force, investigation and punishment of offences under this act. They can use those powers in order to uphold the protection and safeguard of wildlife. They are so to speak the law enforcement officials in respect of this act and are complementing other security providers (e.g. police) in this specific area.

Hence, for example the forest officials have the right to use force 'if a person is suspected of attempting to commit any offence liable to punishment under this Act or if offence is being committed, any employee involved in the Forestry work or Police employee is empowered to take measures to prevent such offence from being committed and for this purpose he may take necessary actions using necessary force'.¹

Per se, there is not a prohibition in international to extend the use of force to other organs, not being part of the police force or armed forces of the country. If they are granted those powers they must be regarded as being part of the security sector, as all other law enforcement officials. Law enforcement officials are defined as police or military authorities or other members of State security forces who exercise police powers.² Being law enforcement officials they need to respect and fulfil the obligations coming with such competences.

¹ Forest Act, 1949, Chapter 12, Section 55.

² The code of Conduct for Law Enforcement Officials (Code of Conduct), adopted by General Assembly Resolution 34/169, 17 December 1979, Article 1(a) and (b).

Use of force

The Forest Act authorizes employee's 'deputed to the protection of the Forest to shoot the offender under the knee in case a situation occurs that any person obstructs within or outside the Forest Area to arrest the offender who is involved in the offences under this Act or any person assists the offender to make him escape even after his arrest and in the event without using the weapon his life is endangered in the course of apprehending the offender.

International obligations demand that this use of force by state officials is clearly limited – based on the right to life in the International Covenant on Civil and Political Rights (ICCPR)³. The international standards and principles concerning the use of force of state officials are set out in the Code of Conduct for Law Enforcement Officials (Code of Conduct) and the Basic Principles on the Use of Force of Firearms by Law Enforcement Officials (Basic Principles).⁴ Those instruments demand the respect of the principle of necessity and proportionality in all cases where force is used.

The *principle of necessity* implies that force is used only when strictly necessary and first non-violent means are used as far as possible. Hence, according to the Basic Principles law enforcement officials 'shall, as far as possible, apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result.'⁵ The *principle of proportionality* requires that law enforcement officials use force with restraint and only to the

³ International Covenant on Civil and Political Rights (ICCPR), Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, Art. 6.

⁴ Code of Conduct, op. cit.; and Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (Basic Principles), adopted by the Eighth United Nations Conference on the Prevention of Crime and the Treatment of Offenders, 7 September 1990.

⁵ Basic Principle, op. cit., §4.

minimum level of required achieving a specific aim. They have to minimise the damage and injury, respect and preserve human life.⁶

Additionally, firearms can only be used under very specific circumstances due important injury and/or death they are causing. Firearms can only be used a) 'in self-defence or defence of others against the imminent threat of death or serious injury'⁷; b) to prevent the perpetration of a particularly serious crime involving grave threat to life⁸; c) 'to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape.'⁹ In any event, intentional lethal use of firearms may only be made 'when strictly unavoidable in order to protect life.

Now, considering again section 56(1) as cited above in the light of the just mentioned principles. It can be observed that the principle of necessity is not enshrined in the clause, given that the law enforcement officials are not held by the clause to resort to the use of firearms only when there are no other means available and when absolutely necessary. Rather they are granted the right to open fire whenever any person obstructs the arrest or another person assists the offender to escape.¹⁰ This is also not in line with the principle of proportionality, requiring that force be used as a last resort only when all other non-violent means have failed. Finally, the additional safeguards for the use of firearms also seem to have been neglected in this clause. The grounds for resorting to the use of firearms are not restricted to the restricted to the grounds mentioned in the paragraph above (self-defence or imminent threat of death or serious injury of others; prevent serious crime involving grave threat to life, to enforce arrest or prevent escape).

⁶ Basic Principle, op. cit., §5(a). Code of Conduct, op. cit., Art. 3.

⁷ Basic Principle, op. cit., §9

⁸ Basic Principle, op. cit., § 9

⁹ Basic Principle, op. cit., § 9

¹⁰ Forest Act, 1949, Chapter 12, Section 56(1)

Fair trial

The law enforcement powers of the forest employees are not limited to the use of force and arrest but to the contrary it is also the forest office that is in charge of the detention, investigation and punishment of the offences committed under the Forest Act. So it states that 'the district forest officer shall hear and decide the cases under this Act with a fine up to Rupees ten thousand or with imprisonment up to one year or both.'¹¹

International instruments clearly set out that for the determination of criminal charges everyone must be entitled to a 'fair and public hearing by competent, independent and impartial tribunal established by law'.¹² The District Forest officer, in charge of the District Forest Office is an administrative official being part of the governmental administration. So the Forest Act defines the 'Forest Officer' as a gazetted technical employees of all classes deputed to the Department and its subordinate offices.¹³

The District Forest Office fails to qualify as an independent tribunal because the separation of power between the executive power and the judicial power is blurred. Due to the appointment by the executive without any judicial oversight there is ample scope for undue interference of the executive. The doctrine of the separation of judicial power is seen as an essential element of a fair

Furthermore, the tribunal would need to be public, according to ICCPR¹⁴, and no such provision is to be found in the Act under consideration. Similarly, the right of the offender to be 'informed promptly [...] of the nature and cause of the charge against him'¹⁵ is not included in the act.

Moreover, employees of the District Forest Office investigate the criminal offences committed under of the Forest

¹¹ Forest Act, 1949, Chapter 12, Section 65(1)

¹² ICCPR, op. cit., Art. 14.

¹³ Forest Act, 1949, Chapter 1, Section 2(c) (o)

¹⁴ ICCPR, op. cit., Art 14(1).

¹⁵ ICCPR, op. cit., Art. 14(3)(a).

Act.¹⁶ At the same time the District Forest Officer, their superior, is competent to hear and decide on the case, as described above. This set up of the system is not in accordance with international standards of fair trial. The investigating body and the adjudicating authority need to be clearly separated in order to ensure an independent and impartial judicial review of the investigation.

Judicial Review of the Detention – Habeas Corpus

The ICCPR states that ‘anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.’¹⁷ This is the so-called *habeas corpus* clause.

The Forest Act empowers any forest employee or any Police employee to arrest an individual without warrant, if this individual has committed or attempted to commit any offence punishable under the Forest Act and if there is a possibility that the individual might escape otherwise.¹⁸ It also provides a *habeas corpus* clause, as it obliges the arresting employee is obliged to produce the arrested individual before the adjudicating authority within 24 hours.¹⁹ The adjudicating authority in such cases is the District Forest Officer, as seen above. Here again, as mentioned above the independence of the judicial review not given as the adjudicating authority is also in charge of the investigation itself.

The human rights committee has ruled that the purpose of Article 9(4) of the ICCPR is to ensure that it is a court, which reviews detention, not merely any authority regulated by law. The authority must possess a degree of objectivity and independence in order to exercise adequate control over detention

¹⁶ Forest Act, op. cit., chapter 12, Section 60(1)

¹⁷ ICCPR, op. cit., Art. 9(4).

¹⁸ Forest Act, op. cit., Chapter 12, Section 59(1).

¹⁹ Forest Act, op. cit., Chapter 12, Section 59(2).

The District Forest Officer cannot be regarded as independent and objective institution. Therefore the judicial review of the detention is not adequate.

Commentary on the National Parks and Wildlife Conservation Act, 2029 (1973)

Marlene Urscheler

In many of the above-discussed aspects the National Parks and Wildlife Conservation Act is similar to the Forest Act – the rangers as the forest officer are provided with far reaching law enforcement competencies. Therefore, the comments stated above remain valid. There are, however, additional specific clauses that will be discussed below.

Use of force

The National Parks and Wildlife Conservation Act provides that in 'case any offender, or any of his accomplices resort to violence in an attempt to free him or resist his arrest or struggles after his arrest [...], or if circumstances arises when the offender tries to escape or his accomplices try to free him or in case the life of the person making the arrest appears to be in danger, or in case he has no alternative but to resort to the use of arms, he may open fire aiming, as far as possible, below the knee and if any person dies as a result of such firing, it shall not be deemed to be an offence.'¹

As discussed in detail in the commentary on the forest act, any use of force by law enforcement officials must respect the principle of necessity and proportionality. Contrary to such principles, the above-cited paragraph of the National Parks and Wildlife Conservation Act provides sweeping grounds to use force. In order to be in line with the principle of necessity the legal grounds for using force must be only restricted to circumstances where it is strictly necessary to use force and where non-violent are not available. Furthermore, the cited paragraph of the National Parks and Wildlife Conservation Act

¹ National Parks and Wildlife Conservation Act, 1973, Section 24(2).

does not require that the law enforcement officials to use the minimum level of force necessary in all situations - which is the basic essence of the principle of proportionality of use force.

Additionally, paragraph of the National Parks and Wildlife Conservation Act cited above concludes with guaranteeing that law enforcement officials will not bear any liability if someone dies or is injured by their use force. This provision of impunity becomes particularly sensitive give that the grounds to use force in the paragraph goes beyond to what is permissible by international standards. The clause of impunity also contrasts sharply with the Human Rights Committee's comment on the right to life under the ICCPR. The general comment of the Human Rights Committee explains that 'states parties should take measures [...] to prevent arbitrary killing by their own security forces. The deprivation of life by the authorities of the State is a matter of the utmost gravity. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities.'² Besides, the intentional lethal use of firearms may only be made 'when strictly unavoidable in order to protect life.'³

Moreover, in all instances where death was cause by a state organ there needs to be a thorough, effective and independent investigation into the circumstances of the death. If, and only if, this investigation determines that the law enforcement officials have acted in accordance with the rules and principles set out above and also in accordance with national law, the law enforcement officials causing death will not be charged.

When considering again the exemption from liability in section 24(2) of the National Parks and Wildlife Conservation Act it appears to be phrased in excessively broad terms and not in accordance with international standards.

² General Comment of the Human Rights Committee, No. 06: The right to life (art. 6 of the ICCPR), 30/04/82, §3.

³ Basic Principle, op. cit., § 9.

Fair trial

The Act under consideration states that ‘the prescribed court or official shall have the power to hear and dispose of cases under this Act.’⁴ Hence, the act leaves the possibility open that the cases can be heard by an official and not only by a court or tribunal. In fact, in many instances this official hearing and disposing of the cases is the chief ranger. This set up poses critical problems in respect of the right to a fair trial of the alleged offenders.

First and foremost, according to the ICCPR in determination of criminal charges ‘everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law’.⁵ The offences under the National Parks and Wildlife Conservation act are criminal in character, as they may be punished with up to fifteen years imprisonment.⁶ An official, who is appointed by the Government, cannot be regarded as an independent tribunal. Furthermore, the tribunal would need to be public, according to ICCPR⁷, and no such provision is to be found in the Act under consideration. Similarly, the right of the offender to be ‘informed promptly [...] of the nature and cause of the charge against him’⁸ is not included in the act.

The Act further explains that the investigations ‘of offences under this act shall be conducted by a ranger or an employee [...] connected with forest and wildlife management [...]. Upon completion of such investigations, he shall file the case before the adjudicating official in the name of national park office or reserve office.’⁹ In this case the supervisor of the investigative team (Chief Warden) will at the same time be the adjudicating official. Such a set up is contrary to the principles of fair trial –

⁴ National Parks and Wildlife Conservation Act, 1973, Section 31(1).

⁵ ICCPR, op. cit., Art 14(1).

⁶ National Parks and Wildlife Conservation Act, Section 26 (1).

⁷ ICCPR, op. cit., Art 14(1).

⁸ ICCPR, op. cit., Art. 14(3)(a).

⁹ National Parks and Wildlife Conservation Act, 1973, Section 30(1).

as a tribunal cannot be assumed to be independent when the supervisor of the investigating team is at the same time the judicial authority. Thus, there is no independent judicial review of the detention and punishment in such a system.

Judicial Review of the Detention - Habeas Corpus

‘In case there are reasonable grounds to believe that the offender under this Act is likely to escape, the authorized officer may arrest him without a warrant. The arrested person shall be produced before the adjudicating authority for legal action within 24 hours excluding the time required for travelling.’¹⁰

This clause is in line with the international standards requiring that anyone who is deprived of liberty by arrest or detention is entitled to take proceedings before a court, in order that that court can decide without delay on the lawfulness of the detention and order the release if found that the detention is not lawful.¹¹ However, here again, as discussed above the system falters when the adjudicating authority, as it is normally the case, is the chief warden himself. In such a case the investigative body and the judicial body are not separated clearly and therewith there is no independent judicial review possible.

¹⁰ National Parks and Wildlife Conservation Act, 1973, Section 24(1).

¹¹ ICCPR, op. cit., Art. 9(4).

Commentary on the Police Act, 2012 (1955)

Mindia Vashakmadze

Accountability

One of the goals to be accomplished by police legislation is to provide a structure and operations that would minimize the potential for political interference while holding the police service accountable.

The manner how the police officers are appointed, trained and promoted should reflect the police independence of the political interference and ensure its operational effectiveness. The police should remain accountable to the various levels (central and local) of government and to the public. There are mechanisms how to approach this task. For example, the policing boards, police ombudsman, external public complaint bodies, and the participation of civilians in these bodies may strengthen the police accountability and the public confidence in this institution. Many countries have sought to balance internal accountability mechanisms that exist within the police forces with some system of external, non-police (civilian) oversight. For example, independent public complaints boards would guarantee that police officials who violate human rights are brought to justice and victims receive reparations.

The issue of accountability seems to constitute one of the deficits of the system created by the Police Act of 1955.

In Nepal, the police officers obtain a certificate of appointment which is invalid after the termination of the service (para. 7). However, the Act does not set out clear certification criteria. It is not clear how the police employees are selected. The practice of appointments and promotions within the police should strengthen the operational independence of the police officer. Individual and institutional accountability mechanisms

should be created in order to ensure democratic and effective policing.¹

The Inspector General of the Police as well as high ranking police officers have disciplinary powers in Nepal. The law established a system of departmental punishments. There is a right to appeal. However, an appeal may be filed with the officer who has the power to award departmental punishment. How far can this be regarded as an independent review mechanism? There is no external body for public complaints that would be independent of police and will focus on police complaints.

An effective internal complaints mechanism is of crucial importance. The capacities of internal control bodies should be increased.² However, as a matter of principle, “disciplinary measures brought against police staff shall be subject to review by an independent body or a court”.³ Internal accountability mechanisms are often criticized because of their bias and

¹ “Democratic policing requires that the police are accountable for their actions to the law, the State and the whole public they serve. Key requirements for accountability are the maintenance of effective and efficient instruments of internal and external oversight, as well as transparency and the cultivation of a co-operative police- public partnership.” OSCE (2006), Guidebook on Democratic Policing by the Senior Police Adviser to the OSCE Secretary General (Vienna 2006); Good Practice in Building Police-Public Partnerships, 2008, http://www.osce.org/publications/spmu/2008/06/31851_1166_en.pdf

² For example, in Romania, the Directorate of Internal Inspection is the central operational unit directly subordinated to the General Inspector of Romanian Police, specialized in organizing and carrying out inspections, checking petitions, preventing and countering infringement of law within the personnel of the General Inspectorate of Romanian Police and subordinated units, and investigating offences committed by police servants. Available at http://www.politiaromana.ro/Engleza/corpul_de_control.htm.

³ European Code of Police Ethics.

dependence on the executive branch of government.⁴ Therefore, an external control is necessary.

In some countries, the complaints mechanism is attached to the respective agencies of the executive branch. In Russia, citizens can complain about police action by forwarding their complaints to the Prosecutor General's Office, Federal Security Services and the Department of Internal Security of the Ministry of the Interior. A law on citizens' complaints requires authorities to review and respond to complaints within a month, with an additional month allowed in complicated cases.

However, certain category of complaints should be investigated by an external *independent* body rather than by the police service itself. The main point is which authority should be dealt with citizens' complaints and how to measure its independence. In some countries, public complaints bodies have the power to investigate complaints themselves while others review those that have been investigated by the police.

In England and Wales, an Independent Police Complaints Commission⁵ has investigative powers. The primary role of investigating wrongdoings remains with the police. However, the police have an obligation to refer all very serious cases to the Commission, which can either investigate the case itself, or control the police's handling of it. For those not satisfied with the outcome of police's investigations, the Commission acts as an appellate mechanism.

Thus, the external control bodies should have effective investigative powers; in addition to that, oversight bodies need to be able to review patterns of police behaviour and the systemic functioning of internal discipline and complaints processing systems.

In many countries, there are no specialized agencies investigating complaints against the police, and the existing

⁴ See, for example, Amnesty International, „Unfinished Business: Police Accountability in Indonesia – Executive Summary“, June 2009.

⁵ See the homepage of the Commission at <http://www.ipcc.gov.uk/>.

oversight bodies such as Ombudsperson⁶ or National Human Rights Institutions have the power to do this. There are also specialist divisions within these bodies dedicated to dealing with the police.

As regards the judicial responsibility of police officers, the Nepal Police Act introduces harsh penalties for some of the (professional) offences committed by police officers. There are Police Special Courts. In case high ranking police officials commit an offence punishable under the Police Act, the Government may establish a separate police special court (36A). However, the legislation does not determine the institutional and procedural safeguards of their independence and impartiality.

The law does not specify further details regarding such courts. It is necessary to analyse the legislation on courts in Nepal in order to objectively assess the degree of independence of police special courts.

Police powers

The tasks of the police may be formulated at both local and national levels. The principle responsibility of the police should be to protect the public, to prevent and detect crime, to maintain order and to bring criminals to justice. The police should be able to work in partnership with other security institutions to deliver a more effective and transparent criminal justice system.

Not all issues can be resolved by legislative means – political direction and coordination may be necessary with respect to adapting the police tasks to the changing circumstances on the ground.

The Nepal Police have wide surveillance powers. In general, surveillance should only be conducted in connection with indictable offences under certain legally defined conditions. The police shall not be allowed to overstep these boundaries.

⁶ In some countries where a Police Board is set up under the Police Act, the Ombudsperson tends to refer complaints against the police to it.

According to the Police Act, one of the duties of the police is to trace out criminals and have them punished according to the law (paragraph 15 (1) d). As an accepted rule in a democratic society, it is not the primary function of police to *punish* criminals. The police should rather take appropriate measures to prevent and detect crimes. The crime prevention element needs to be strengthened. This approach may also reduce the necessity to use force.

Police powers include detention and questioning, interrogation, and other evidence-gathering powers. While protecting the public and individuals from criminal offences and maintaining the public order the police may use force. The law should specify rules on the use of force by the police – when, under what circumstances and to what extent the use of force (firearms) by police officers shall be admissible. International standards should serve as guidance when interpreting the police discretion to use force. Force should be admissible when absolutely necessary and proportionally, excessive force must be prohibited.⁷

⁷ According to article 3 of the UN Code of Conduct: „Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty“. The commentary explains this provision as follows:

(a) This provision emphasizes that the use of force by law enforcement officials should be exceptional; while it implies that law enforcement officials may be authorized to use force as is reasonably necessary under the circumstances for the prevention of crime or in effecting or assisting in the lawful arrest of offenders or suspected offenders, no force going beyond that may be used.

(b) National law ordinarily restricts the use of force by law enforcement officials in accordance with a principle of proportionality. It is to be understood that such national principles of proportionality are to be respected in the interpretation of this provision. In no case should this provision be interpreted to authorize the use of force which is disproportionate to the legitimate objective to be achieved.

(c) The use of firearms is considered an extreme measure. Every effort should be made to exclude the use of firearms, especially against children. In general, firearms should not be used except

Police in Nepal have an obligation to observe the standards set out in the international human rights treaties ratified by Nepal⁸ and other universally recognized human rights standards which form part of customary international law. In addition to that, domestic human rights norms must also be respected. Cases of the use of force shall be reported to the superiors, who should ensure that proper investigations of all such incidents are carried out.

In some countries, the respective police departments establish a special monitoring body that produces use of force reports for the purpose of improving policing. Such monitoring may contribute to a reduction of misconduct among police officers.

The Nepal Police Act guarantees a certain degree of individual accountability. According to the Act, a police officer must inform a senior officer when he learns of an offence. Police officers may request a warrant from a senior officer for certain offences; there are offences that do not require such a warrant (para. 17). The law establishes a police duty to maintain records on complaints, charges, offences, arrested persons etc (para. 22).

More transparency and consistency in the police activities could be achieved if such records also contain the name of the authorizing officer, the grounds on which the decision to make the police intervention was made, the name of the officer who effected such intervention, the date and time of the intervention, and any other information pertaining to the implementation of the intervention by the police.

when a suspected offender offers armed resistance or otherwise jeopardizes the lives of others and less extreme measures are not sufficient to restrain or apprehend the suspected offender. In every instance in which a firearm is discharged, a report should be made promptly to the competent authorities.

⁸ See the comments on the Nepal Treaty Act below.

Maintaining public security

Maintaining public security should not be associated with police's power to use force. The law enforcement agencies should apply non-violent preventive means before resorting to the use of force.⁹

Police officers can stop or disperse public meetings and procession under certain circumstances determined under paragraph 19. However, issuing permissions and restrictions regarding public gatherings are not the primary police task. The police may only implement legal provisions and certain lawful directives concerning the maintaining public safety. The police should not interfere with lawful and peaceful assemblies, otherwise than for the protection of persons participating in such an assembly or others.

The chapter on special arrangements for maintaining public peace and security contain provisions on the deployment of additional police forces to certain areas of the country. Since such police deployment may result in various limitations (or violations) of certain individual freedoms and guarantees, more clarity is necessary on how to effectively protect the interests and rights of the citizens in the areas where such deployments take place.

According to the Police Act, if a person suffers injury or his/her property is destroyed, he/she may submit an application to the Chief District Officer who may, with approval of the Government, institute necessary inquiry and take action if necessary (para. 30). Arguably, this procedure cannot be seen as independent of the police influence and can hardly guarantee an impartial and independent complaints procedure. It can be recommended that such cases are referred to an independent external civilian body which will have effective investigative powers.

⁹ UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (Principle 4, 5, 6 and 9)

Other police interventions

The law envisages police powers to arrest without warrant, but it does not refer to all legal safeguards that are applicable in this situation. More procedural guarantees should be included into the law in order to prevent an abuse of power by the police. The police shall inform persons deprived of their liberty of the reasons for the deprivation of liberty and of any charge against them, and of the procedures applicable to their case. These and other guarantees of fair trial that are applicable at different stages of the criminal proceedings should be included in the law. Persons deprived of their liberty shall have the right to notify a third party of their choice, to have access to legal assistance and to have a medical examination by a doctor.

The grounds for detention should be determined by the law and any deprivation of liberty should be subject to certain time-limits. There should be free legal advice to be provided to all suspects. Suspects shall be informed of their rights.

In some countries, there are codes of practice for detention, treatment and interrogation of persons by police officers that may set out basic standards.

Commentary on the Local Administration Act, 2028 (1971)

Mindia Vashakmadze

The police in a democratic society should have the power (and capacity) to work with local communities to deter and respond to serious crimes. Moreover, police accountability to locally elected representatives should be reinforced by the police legislation. These elements are not fully reflected in the Nepal Local Administration Act as will be shown below. In Nepal, the Regional Police Office is subordinated to the control of the Regional Administrator. According to the Nepal Local Administration Act, the Regional District Administrator is responsible for the maintenance of peace and order within the respective region, and accountable to the Government. The Administrator is dealing with border control issues and implements such control measures through the respective Chief District Officer. Increasing the effectiveness of the local administration regarding the control of criminal activities in border areas constitutes one of the prerogatives of the Administrator. However, the Local Administration Act does not specify the competencies of other agencies that may also be involved in border monitoring, and does not clarify how border control competences are distributed among different security agencies.

Regional Administrator is entitled to request the assistance of the armed forces. The circumstances under which such assistance may be legally requested are not specified. The people's representatives are not directly involved in the decision-making process.

There is a Regional Security Committee including Regional Administrator, Local Chief of the Royal Nepalese Army, Chief of Regional Police Office, Local Chief of the Armed Police, Chief of the Office of the National Investigation Department. The functions of the Regional Security Committee

are not specified. It is also unclear if and to what extent the Committee's work is subject to external (public) scrutiny.

At a lower level the Chief District Officer is responsible for maintaining peace, order and security in the district. Paragraph 6 further specifies the competences of the Officer. According to the law, for the purpose of maintaining peace and security in the district, the District Police Officer shall work under the direct control and guidance of the Chief District Officer. The Chief District Officer may request the assistance of the local or the nearest Armed Police Force or Royal Nepalese Army if necessary. If such assistance is requested the information thereof shall be sent to the Ministry of Home Affairs within twenty four hours.

The Chief District Officer has a wide range of other emergency powers. He can issue orders limiting the individual freedom – for example, by banning more than five persons from gathering at a specified place and time. The reasons and legal basis for such actions should be specified in the law in order to minimize the potential for abuse. Moreover, the Chief District Officer has the power to impose curfew if “it is believed that tranquillity will be disturbed in any area as a result of any agitation or hooliganism or riot.” This competence can be misused for political reasons and there is a need for a additional safeguards.

The Officer can also declare an area as “riot affected” in case it appears that “any procession, mob or organized group, with or without arms, is likely to engage in violent or destructive acts such as looting, setting fire to residences or shops, destroying public property in any area, and if it seems the normal police actions should not be able to prevent them”. The Officer can take several repressive measures including the use of arms. The law did not spell out to what extent such situations affect the enjoyment of basic guarantees in the riot-affected area.

There is a District Security Committee that includes Chief District Officer, Chief of local office of the Royal Nepalese Army, Chief of District Police Office, Chief of local office of the Armed Police Force, Chief of district Office of National Investigation Department. The law should determine the functions of the

Committee and include civilian representatives of the public in the composition of this body.

The Chief District Officer can impose sanctions – from fine to imprisonment (up to six months). The law does indicate that the Appellate Court may supervise the implementation of the competences of the Officer. Moreover, the Chief District Officer shall inquire as to whether district and area police offices and police posts are in proper condition or whether or not the police officers and employees have acted in accordance with the law. Thus he supervises the police actions and deals with management issues. However, it is not clear how the competences are distributed between the Chief District Officer and the local police office.

Thus the regional and local administrations have far-reaching powers. A stronger public scrutiny of the activities of local administration officials and enhancing the participation of the people's representatives and civil society in local administration seems to be necessary. The Act does not establish local policing boards that could play an important role in securing more accountability of police forces at the local administration level. The powers of such bodies may be advisory but still may have a positive impact on the functioning of local administration and the local police force.



Commentary on the Terrorist and Disruptive Activities Act, 2058 (2001) and the Terrorist and Disruptive Ordinance, 2061 (2006)

(both expired)

Mindia Vashakmadze

Definition of terrorism and disruptive acts

The definition of terrorism constitutes one of the crucial challenges facing many national legal orders. The notion of terrorism cannot be limited to mere violence; terrorist acts target innocent people and aim at ensuing the feeling of fear and panic within the public.¹ The 2006 Ordinance on terrorist and disruptive acts contains a definition of terrorism which refers to both above mentioned elements (section 3). It specifies the actions that must be qualified as terrorist and disruptive acts according to the law. However, the distinction between terrorist and disruptive acts is not clear.

¹ For example, according to the UK Terrorism Act 2000, “terrorism” means the use or threat of action where—
(a) the action falls within subsection (2),
(b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and
(c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.
(2) Action falls within this subsection if it—
(a) involves serious violence against a person,
(b) involves serious damage to property,
(c) endangers a person’s life, other than that of the person committing the action,
(d) creates a serious risk to the health or safety of the public or a section of the public, or
(e) is designed seriously to interfere with or seriously to disrupt an electronic system.

One of the important elements of terrorism offences is the intent of the offender to jeopardize or undermine the sovereignty, integrity or security or peace and order of the Kingdom of Nepal, or the safety of the property of Nepal or diplomatic missions located abroad. However, this definition is very “state-centred” and broad. For example, the UK Terrorism Act of 2000 specifies that the terrorist acts may be designed to influence not only the government but also to intimidate the public or a section of the public; further, such acts can be committed for the purpose of advancing a political, religious or ideological cause.

The legislation does not clearly differentiate between persons who have committed a terrorist act and those who are participating in the preparations, trainings etc. Terrorist acts and encouragement of terrorism, preparation of terrorist acts and training for terrorism constitute different offences to which different sanction apply.²

Preventive measures

The Ordinance establishes a system of preventive measures and determines the respective competences of the security officials. The law lists the possible situations where preventive measures may be undertaken (such a list cannot be exhaustive, however), but does not make clear as to whether an authorization by a court or any other competent authority shall be required in specific cases (for example, when the terrorist suspects are to be detained, or their detention should be extended). The act fails to reflect procedural guarantees applicable to terrorism suspects in police detention.

Preventive measures in counterterrorist activities often constitute the stage where most basic human rights and fair trial guarantees are violated. The counter-terrorist prerogatives of security forces should not be unlimited the law must set clear limits to them.

² See, for example, the UK Terrorism Act 2006, para. 5, available at http://www.opsi.gov.uk/acts/acts2006/pdf/ukpga_20060011_en.pdf

Introducing a special case of emergency?

According to the Ordinance, the Government can declare any area that is or might be affected by the terrorist and disruptive activities as a terror-affected area. Further, the individuals or organisations can be declared as terrorists by the Government. However, what is criterion for qualifying an individual as terrorist must be clarified in order to prevent the abuse of counter-terrorist powers by the Government. Moreover, qualifying a person as terrorist is not a primary governmental responsibility in a democratic society. Terrorism is a crime punishable under the domestic law, and only the courts shall have the power to declare an individual guilty in committing terrorism offences.

The law should clarify what are the legal consequences attached to the declaration of the respective an area as terror-affected.³ According to the Act, if there is an emergency in a certain area of Nepal, there is no need to declare this area (or part of it) as terror-affected. Thus, the law creates an additional regime of terrorism “emergency”. Parliamentary and judicial control over the implementation of counter-terrorist measures in terror-affected areas should be strengthened in order to limit the Government’s wide discretion.

Every internal modification of individual rights shall be approved by Parliament. The use of armed forces for counter-terrorist purposes should have its legal basis in the law. According to the Ordinance 2006, the military can be used in terror-affected areas. However, such measures are not subjected to parliamentary control. The role of parliament is not specified with respect to introducing and monitoring the counterterrorist legal regime which can be seen as one of the indicators of a weak parliamentary control over the use of special governmental measures against terrorism.

³ It states however that freedom of expression and assemblies are not in any way affected by introducing such a legal situation.

Preventive detention

The Ordinance of 2006 determines that security officials can issue an order to hold a person under preventive detention if there are reasonable grounds that he or she must be prevented from committing terrorist or disruptive acts (para. 9). The Government must be prevented from using this power to indefinitely detain security suspects. One of the reasons for serious human rights violations in the fight against terrorism may be a long-term preventive detention of security suspects based on vague criteria. Therefore, certain basic guarantees shall be applicable to each case of preventive detention of terrorism suspects.

The Human Rights Committee of the United Nations emphasized that “if so-called preventive detention is used, for reasons of public security, it must ... not be arbitrary, and must be based on grounds and procedures established by law ..., information of the reasons must be given ... and court control of the detention must be available ... as well as compensation in the case of a breach ... And if, in addition, criminal charges are brought in such cases, the full protection of article 9 (2) and (3), as well as article 14, must also be granted.”⁴

In Nepal, if the detention exceeds 6 months the security official shall obtain an approval of the Government (Ministry of Home Affairs). However, the Ordinance does not specify the role of judiciary in controlling the practice of preventive detentions. The courts, in accordance with international human rights standards, should play a central role in authorising and overseeing such detentions. The detainees shall be entitled to a judicial review of their detention.

According to the Ordinance, there must be reasonable grounds to detain a terrorism suspect. However, the definition

⁴ General Comment No. 08: Right to liberty and security of persons (Art. 9), para. 4. See also ICJ Memorandum on International Legal Framework on Administrative Detention and Counter-Terrorism, available at http://www.icj.org/IMG/pdf/Administrative_detent_78BDB.pdf.

of “reasonable grounds” in paragraph 9 (2) is quite broad. There is a danger that the suspicion alone becomes a (very low) threshold for an interference with the individual’s liberty.

The burden of proof should be on the government in cases of preventive detentions. Such detentions should serve the purpose to charge the suspect, or to gather evidence that would demonstrate that the suspect’s detention is necessary in order to prevent terrorist atrocities. After a certain time-limit the detainees should be either prosecuted or released.

Monitoring and Coordination

The Act establishes a monitoring committee where any person who has suffered from governmental counterterrorist activities can submit a petition. The Committee comprises of one retired judge nominated by the Government, a prosecutor and high ranking secretaries from Ministries of Defence, Home Affairs and Justice.

However, the independence and impartiality of the Committee may be put into question – can it be seen as fully independent of the executive branch of government when only the representatives of the Government or persons designated by the Government are decision-makers in the Committee? Additional procedural and institutional guarantees are necessary such as the inclusion of impartial experts and civilians in its composition in order to guarantee the agency’s independence and impartiality. In any case, this mechanism cannot substitute an effective judicial control.

Adjudication

The law specifies that a court constituted or designated by the Government shall have the power to try the cases relating to the offences under this Act. Such a court shall follow the procedures referred to in the Special Court Act, 2031 (1975). An appeal against a judgment of the court can be submitted to the Supreme Court. It is not clear whether this court forms a part of the ordinary judiciary and can be seen as independent

and impartial. The core elements of the right to a fair trial, including the independence of the courts, should be guaranteed even in times of public emergency.

Further, the Ordinance reverses the burden of proof requirement and puts into question the presumption of innocence which might be in contravention with basic individual guarantees: according to the Ordinance, if weapons are found with any person, he / she shall be required to produce evidence that such items are not meant for the purpose of conducting terrorist acts. Failure to produce such evidence would indicate that the individual shall be deemed to have committed offences under the Ordinance.

Commentary on the Nepal Treaty Act 2047 (1990)

Mindia Vashakmadze

According to the Treaty Act, a treaty constitutes an agreement concluded in writing between two or more states, or between a state and an inter-governmental organisation. The competences related to the conclusion of treaties are distributed between His Majesty, the Prime Minister and the Minister of Foreign Affairs. However, the conclusion of treaties is not a sole governmental responsibility. The Act contains provisions on parliamentary participation in this process. The Government submits a resolution to the House of Representatives on the conclusion of a treaty.

The resolution concerning the ratification, accession, acceptance or approval of any treaty must be passed by a majority of the members present in the House of Representatives. Paragraph 4, 4 specifies the category of treaties that cannot be ratified by the Government without parliamentary approval. Such treaties are relating to the establishment of any inter-governmental organization, or acquisition of membership of any such organization, or any treaty that conflicts with internal law. Parliamentary approval is also required when treaties envisaged in Article 156 of the Interim Constitution 2007 are ratified - the ratification of, accession to, acceptance of or approval of treaty or agreements on the following subjects shall be done by a two-thirds majority of the total number of members of the Parliament present in the House: (a) peace and friendship; (b) security and strategic alliance; (c) the boundaries of Nepal; and (d) natural resources and the distribution of their uses. Thus, the domestic law guarantees the participation of Parliament in the conclusion of international treaties that are of special importance.

As regards the suspension and termination of treaties, the Government has a wider discretion. The Parliament will not be

consulted in every case of treaty termination or suspension. However, there is a right to information - the Parliament shall be informed on international treaties concluded by the Government without parliamentary approval. In this case, the Parliament still is in a position to exert political pressure on the Government at an earlier stage of the treaty process and induce it to renegotiating the text of the treaty.

According to paragraph 9 of the Treaty Act, treaty provisions prevail over the norms of domestic law. Accordingly, if there are conflicts between these two sets of norms, treaty provisions shall apply.

There are special procedural norms in the 2007 Interim Constitution of Nepal that emphasize the significance of human rights treaties within the domestic legal order of Nepal. National Human Rights Commission can recommend to the Government of Nepal to become a party to any international human rights treaty, if it is required to do so, and to monitor the implementation of the international human rights treaties to which Nepal is a Party and if found not being implemented, forward recommendations to the Government of Nepal for effective implementation of such instruments.¹

¹ Article 132 (2) (g).

Commentary on the Provisions Concerning Private Security Guards

Mindia Vashakmadze

In Nepal, the Security Guard service has been provided by private sector. The former army and police personnel are heavily involved in this sector. However, there is no single normative act regulating the activities of private security companies.

It can be recommended that all the legal provisions are consolidated in a single normative act which may regulate the activities of the private security industry. An Act on private security guards could determine the competencies of the authorities with respect to the providers of private security services; identify and consolidate the existing standards applicable to the employees of private security companies; determine the licence requirements, the issues of responsibility etc. The legislation could also determine the activities that are prohibited without a licence, and introduce the requirement of registration.¹ In many countries, there are specific laws

¹ See the Australian Private Security Act 2004, at http://www.austlii.edu.au/au/legis/vic/consol_act/psa2004217/. See some examples: The Private Security Agencies Act 2005, India, available at http://www.ebc-india.com/downloads/private_security_agencies_etc_act_2005.pdf. See also the Private Security and Investigative Services Act 2005, available at http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_05p34_e.htm. Bill 88, Private Security Act, at <http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=5&file=2006C23A.PDF>; see also the Irish Private Security Services Act 2004, at http://www.psa.gov.ie/Website/psa/psa.nsf/the_private_security_services_act.pdf; Private Security Regulation Authority Act 1993, <http://www.moj.gov.jm/laws/subsidiary/Private%20Security%20Regulation%20Authority%20Act.pdf>.

regulating the private security industry – this approach may guarantee more transparency and facilitate the development of a consistent practice within the private security industry.

**Part II:
National Experts'
Commentaries on the Nepali
Security Sector Legislation**



Security Related Laws, Policies and Mechanisms in Nepal

Govinda Thapa

Traditionally, Nepal has been ruled by customs, religion, beliefs and decrees rather than by established written rules. Security has been treated as an isolated area of governance rather than as part of the national development mainstream. Security issues have not been on the agenda for debate for the commoners in Nepal. The subject of security has always been treated as taboo – a very secret and confidential domain, therefore, forbidden and restricted to the public – which is exemplified in the manner the Home Ministry's 'security reform task force' report has been treated recently. The military, and the police to some extent, had been the main actors of security policymaking as they had the monopoly of making and re-making security policies in the country. The government did not see the importance of people's participation and the masses were considered 'unfit' for the policymaking role; they were only to obey. They were more or less excluded, sidelined, neglected and abandoned. The requisite healthy relations between the security services, civil authority and civil society did not exist.

The development of a comprehensive national security policy has never been seriously thought through. There are no core national interests, values or standards, nor external and internal threats and risks recognized for the formulation of a national security policy framework. Therefore, there are no general guidelines for the security sector apparatus and mechanisms in the country. The ministries make laws and policies on an ad hoc basis and there are no mechanisms to control, streamline or integrate them. Therefore, there are gaps, duplications, contradictions and flaws in security laws and policies.

The ultimate result of neglect and exclusion of the people from the security policymaking process was that the definition

and the scope of security always remained dominated by the 'definitions' of security held by rulers, the military and the police. These security laws and policies could never identify, recognize and accommodate the common security concerns of people—like political, social, economic, religious, cultural and environmental concerns and basic rights to food, water, shelter, jobs and health services—as security issues. Laws and policies were more oriented to coerced enforcement rather than inviting partnership and generating a feeling of ownership amongst people. The end result was tension and the breaking of laws and policies, ultimately leading to the conflict between the rulers and the people.

There is a provision for a National Security Council that is headed by the prime minister. Under the secretariat of this body, there is a National Security Council Coordinating Committee (NSCCC). A major general of the Nepal Army is the joint convener of this committee. The Nepal Police, Armed Police Force and National Investigation Department send their representatives to this committee. No other organisations or civil society organisations have representation in this body. It analyzes the security situation of the country and recommends actions to the secretariat. Besides this, routine law and order is maintained by various levels of Security Committees in the country. At the central level there is the Central Security Committee headed by the home minister. The Security Committees at the regional and district levels are headed by regional administrators and a chief district officer (CDO), respectively. No other agencies and organizations or persons are invited to the meeting. The security agencies operate as per the separate acts and rules. During the insurgency period, a unified command structure was formed under the direction of the chief of army staff at Army Headquarters, which directed the counter-insurgency operations in the country.

Besides these, there are other types of security forces engaged in security functions. There are other security forces of government departments—for example, the Fire Brigade, the Forest Guard, Revenue and Customs Guards, and Municipalities Security Guards. The proprietary security guards

and security guards of private security companies are being deployed for general security purposes at various enterprises with different nomenclatures but these security forces are not properly directed, controlled and coordinated by the government. For example, bank guards are provided with arms but they lack specific legal provisions, knowledge and skills to use them at times of crisis. There are no proper systems of providing them with training and orientation on security functions. The private security companies supplying security manpower in and outside Nepal complain about the government's indifferent and lax attitude and behaviour.

In a democratic society, healthy relations ideally operate in a triangular relationship—security services, civil authority and civil society. This relationship further develops the partnership between them on the basis of shared responsibilities, mutual respect and knowledge. At the threshold of the constitution making process, it is high time that we advocate for a comprehensive national security framework. This should be done keeping in view the following rules:

1. It accommodates all aspects of security rather than just military and police;
2. It is democratic and under civil control;
3. It is based on the partnership approach; and
4. Parliament has the mandate to legislate, appropriate resources through national budgets, monitor the functions of the executive in general and monitor all expenditure of public funds.

Nepal has signed and is a party to several international conventions and treaties. It thus becomes the state's obligation to accommodate the enshrined standards into its national laws and policies. Nepal has yet to comply with these international standards.

The new constitution must accommodate the following views:

- Make the security policy accommodate other aspects of security rather than the military and police core security services.
- Recognize that a close relationship between national development and security is essential.
- Conduct institutional restructuring, including significant reforms to the national security system.
- Integrate, codify and rewrite national security laws and policies.
- Maintain the security sector, civil authority and civil society relationship.
- Ensure the accountability of the security services to the parliament.
- Invent a mechanism to make the most of under-utilized security expertise for the benefit of the country.

Overview of Security Sector-Related Laws

Bhimarjun Acharya

Introduction

Security-related laws are essentially aimed at the efficient and effective provision of state and human security within a fabric of democratic government. The various security actors are operated within a clear legal and institutional framework governing their roles, mandates and the hierarchy of authority between them, the legislature and the executive. The legal framework makes clear who has external and internal roles and how internal responsibilities are apportioned.

Though security-related legal measures and frameworks are equally applied in all states, the policies and objects of such measures may vary in established, new and transitional democracies. As Nepal has been passing through transitional democracy, the security-related laws in Nepal can be studied on that basis.

The complexities of the modern state and the fundamental shift in the concepts of security matters have expanded the scope of security-related laws. As a result, the concepts of security-related laws are now confined not only within the state security services/actors¹ but have also become an important subject for non-state actors and forces like civil society, armed groups etc. The exposition of the concept and in the use of security-related laws is the consequence of changes brought out in the concept of security services. For example, security services are nowadays classified as statutory and non-statutory security actors/providers.²

¹ The core security state actors include: the armed forces, police, paramilitary forces, intelligence security services, border security forces, customs security authorities, industrial security forces, local security units etc.

² The core statutory security forces may include: the armed forces, police, paramilitary forces, gendarmeries, presidential guards,

Legal Framework

In Nepal, security-related laws and related provisions can be studied on a threefold basis:³ first, the fundamental law and the related provisions; secondly, general law and the related provisions; and thirdly, specific laws and their related provisions. This classification is based on the division of the Nepali legal framework.⁴

Fundamental Law

The Interim Constitution of Nepal (2007) is the fundamental legal framework 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 guarantees, among others things, fundamental human security rights such as the right to live with dignity, rights regarding (criminal) justice, protection against preventive detention, torture, exploitation and exile. As the constitutions of other countries usually do in connection to security sector issues, this constitution clarifies who is head of the armed forces, i.e. the Nepal

intelligence and security services (both military and civilian), coast guards, border guards, customs authorities, reserve or local security units. Non-statutory security forces may include: liberation armies, guerrilla armies, private bodyguard units, private security companies, political party militias etc. (See also: *Understanding and Supporting Security Sector Reform*, Department for International Development (DFID) at <www.dfid.gov.uk>).

³ A legal framework consists of the legal measures and provisions thereof. In this sense, the study of a security-related legal framework shall include the review of legal measures and provisions related thereof.

⁴ Apart from the international instruments to which Nepal is a party, the Nepali legal framework is composed of three prime pillars: the fundamental law, the general law and the specific laws. The constitution is the fundamental law of the land; the Muluki Ain is general law and laws which are made in specific areas.

Army and its relationship with other components of the state, namely, the legislature and the executive.

The constitution has a separate provision regarding the army, one of the prominent security actors. According to the constitution, there shall be a Nepal Army and the president shall be the supreme commander of it.⁵ The president, on the recommendation of the Council of Ministers, shall control, mobilize and manage the Nepal Army in accordance with the law. The Council of Ministers shall, with the consent of political parties and by seeking the advice of the concerned Committee of the Legislature-Parliament, formulate an extensive work-plan for the democratization of the Nepal Army and implement it.⁶ The constitution says that other matters pertaining to the Nepal Army shall be as provided for in the law.⁷

The National Defence Council, consisting of the prime minister as chairperson and the defence and home ministers as members, makes recommendations to the Council of Ministers on mobilization, operation and use of the Nepal Army.⁸ The constitution has enshrined a transitional provision for the PLA combatants, requesting the Council of Ministers to form a special committee representing the major political parties in the Constituent Assembly to supervise, integrate and rehabilitate the combatants of the Maoist Army.⁹

The constitution also contains the Comprehensive Peace Agreement concluded between the Government of Nepal and the Communist Party of Nepal (Maoist) and the Agreement on the Monitoring of Management of Arms and Armies concluded on 8 December 2006.¹⁰

⁵ Article 144 of the Interim Constitution of Nepal, 2007.

⁶ Article 144(3), of the Interim Constitution of Nepal, 2007.

⁷ Article 144(5), of the Interim Constitution of Nepal, 2007. This marks a significant departure from the practice in former times when the king was able to exercise His prerogative in this regard.

⁸ Article 145, of the Interim Constitution of Nepal, 2007.

⁹ Article 146, of the Interim Constitution of Nepal, 2007.

¹⁰ See article 147, of the Interim Constitution of Nepal, 2007.

General Law

The Muluki Ain (Country Code) 2020 is the general law of the country. This was promulgated on 12 April 1963 and came into force on 15 August 1963. This law is recognized both as the civil and criminal code. In all matters on which separate laws have been enacted, action shall be taken as provided in these laws. In case no specific provision exists in these laws, action shall be taken in accordance with this code.¹¹ This general law includes the general rules of procedure to be followed by the courts and law enforcement agencies. The provisions are also related to civil liberties, such as the provisions on imprisonment, bail etc.

Of the several amendments to the code, the 11th amendment is significant in regard to the compliance of certain states obligations outlined in the major human rights instruments related to women's rights.

Specific Laws

Specific laws or legislation prescribe the specific responsibilities and functions of the different security actors. These include laws stipulating immunities enjoyed by the security forces. In some countries, customary law may also govern the activities of the security forces. In this regard, the issues to be addressed in national legislation may include:¹²

- The role of the legislature and audit agencies in scrutinizing security policy and spending.
- Specific mandates to avoid overlaps between police, paramilitary and gendarmerie-style organizations and the army.

¹¹ Muluki Ain, Preliminary Statement, No. 4.

¹² See also: Understanding and Supporting Security Sector Reform, Department for International Development (DFID): www.dfid.gov.uk.

- The internal security role of the military during both peace-time situations and states of civil emergency or natural disaster.
- The extent and nature of the military's non-security roles in public life.

In Nepal, in addition to fundamental law and general law, there are a number of specific laws. As these laws are dealing with specific sectors or subjects, they are called specific laws. The following laws are, depending on their nature, objects and scope, in one or another way related to security. They include:

1. The Commission for the Investigation of Abuse of Authority, 1991
2. The Immigration Act, 1992
3. The Essential Commodities Control (Powers) Act, 1961
4. The Essential Commodities Protection Act, 1955
5. The Essential Services Operation Act, 1957
6. The Prison Act, 1964
7. The Black Marketing and Some Other Social Offences and Punishment Act, 1975
8. Some Public (Offences and Punishment) Act, 1969
9. The Espionage Act, 1962
10. The Gambling Act, 1963
11. The Nepal Citizenship Act, 2007
12. The Nepal Special Service Act, 1985
13. The Evidence Act, 1974
14. The Police Act, 1955
15. The Ancient Monuments Protection Act, 1956
16. The Prevention of Corruption Act, 2002
17. The Human Rights Commission Act, 1997
18. The Human Trafficking Act, 2008
19. The Torture Related Compensation Act, 1996
20. The Crimes against State and Punishment Act, 1989
21. The Passport Act, 1967
22. The Narcotic Drugs (Control) Act, 1976
23. The Explosive Commodities Act, 1961
24. The Extradition Act, 1988

25. The State Cases Act, 1992
26. The Armed Police Act, 2001
27. The Public Security Act, 1989
28. The Army Act, 2007
29. The Association Registration Act, 1978
30. The Local Administration Act, 1971
31. The Arms and Ammunitions Act, 1963

The Nepal Government has framed specific rules in fulfilling the objectives of the abovementioned acts. The major rules in this regard include: the Commission for the Investigation of Abuse of Authority Rules, 1992; the Immigration Rules, 1995; the Prison Rules, 1964; the Citizenship Rules, 2007; the Police Rules, 1993; the Passport Rules, 2002; the State Cases Rules, 1999; the Armed Police Rules, 2003; and the Arms and Ammunitions Rules, 1971.

Conclusions

In post-conflict situations, conflict analysts are of the opinion that the role and scope of the security sector should be fundamentally restructured or redefined. For this, constitutional and legislation review processes are required to address a range of issues like: how national security should be defined and implemented; how to get the military out of internal security roles more appropriate to the civil police; the nature and level of public and parliamentary participation in the development of security policy; the status of international conventions and treaties to which the country is a party and which govern the conduct of the security sector, etc. Based on this analysis and the observation of security-related laws listed in the paper, the following issues may be pertinent for further discussion on the new constitution and for the legislation drafting process:

- Though there are specific laws regarding core security sectors like the Nepal Army, the Nepal police etc., specific legal measures are still lacking in the areas of other core security sectors such as vigilance security services, border security forces, customs security forces etc.

- There is a lack of legal measures in coordinating among the various core security sectors or services.
- There is a lack of legal measures coordinating the statutory security providers/sectors and non-statutory security actors.
- There is a lack of specific policies and legal measures to deal with the non-statutory security actors.
- There is a lack of integrated legal measures regarding the National Security Policy.



Issues to be Addressed by the New Security Policy of Nepal

Bishnu Raj Upreti

The Context

Nepal is in the crossroads of a fundamental transition. There is a possibility for long-term detrimental consequences if political decision makers fail to decide security issues based on long-term vision and national consensus. Nepal is in the critical transition from a monarchy to a republic, from a unitary to a federal state, from a religious to a secular nation, from an exclusionary to an inclusive state. All these transitional issues are new to Nepal and this country has no past experience with them. Therefore, a consensus-oriented approach of developing new security policy is a precondition for success.

On the other hand, Nepal is surrounded by the strategically important (in terms of security, economy and politics) giant neighbours India and China. Our economy, politics and security concerns are heavily influenced by these countries and South Asian security and political dynamism. Hence, our economic, security and international policies must be able to tackle new and emerging regional and global challenges through long-term vision and consensual politics. The existing security framework is not able to tackle emerging challenges.

The world is very much interconnected and interdependent in the 21st century and therefore Nepal cannot stay in isolation. Instability or security problems in one country could cause insecurity and tension in another. Furthermore, Nepal is geopolitically situated in a high risk zone of insecurity, sandwiched between emerging global and regional powers. Their strategic move to be global superpowers will definitely affect the security dynamics of Nepal. Nepal is fundamentally different than these countries in terms of its economic size and

growth, security strengths, technological advancement and demographic dynamics. Therefore our security policy has to be strongly integrated with international relations and economic policies to cope with this reality. The security policy must be effective, efficient and relevant, the international policy must be engaging and the political system must be democratic and inclusive for Nepal to be visible and respected in the global system. The review of the laws and regulations related to security by Mr. Hari Phuyal in this volume clearly demonstrates that they are not holistic enough or updated to tackle new security challenges. In the following section, I present some important elements of new security policy.

Some of the important issues to be covered by the new security policy of Nepal

The existing security orientations, theoretical perspectives, operational approaches, strategic understandings and legal frameworks are not adequate to tackle the complex and interrelated security challenges of the changing global and regional contexts.¹ Therefore, there is a need for fundamental transformation of the existing security systems in terms of management, laws and regulations, working styles and operational approaches and conceptual orientation. Nepal cannot address the emerging global, regional and national security challenges with the existing security arrangements, their capability, governance system, theoretical perspective and conceptual orientation. The existing security system of Nepal largely expects the police and army to ensure security, which is conceptually inadequate and operationally narrow.² Hence, the

¹ Upreti, B. R., *Nepal from War to Peace: Legacies of the past and Hopes for the Future*, New Delhi: Adroit Publishers, 2009; Kumar, D. and H. Sharma, *Security Sector Reform in Nepal: Challenges and Opportunities*. Kathmandu: Friends for Peace, 2005.

² Upreti, B. R., 'Security Sector Transformation in the Changing Political Context: Special Reference to Nepalese Army, [A conflict transformation and peace building perspective]'. A discussion paper presented at the Seminar on 'Democratic Transition and

following issues have to be an integral part of Nepal's new security policy to address emerging security challenges:

- (a) Basis for the new security policy: Sovereignty and national integrity of the nation, proactive engagement in international relations, strategic security orientation, national consensus and the analysis of external dynamics must be the basis for the new security policy.
- (b) Long-term vision: The new security policy has to consider the security dynamics for at least the coming 50 years in South Asia and the world. The new policy has to be prepared accordingly.
- (c) Often any independent nation faces two types of security challenges such as internal (domestic) and external ones. The new security policy must address both internal and external security challenges. Addressing conventional and non-conventional security challenges requires a holistic approach.
- (d) Areas to be covered by the new security policy: The new security policy has to define content, process, a regulatory framework and institutional arrangements capable of tackling both conventional and non-conventional security challenges.
 - Prepare to tackle the situation of regional instability and tension: There are high possibilities of regional instability because of the Indo-Pak tension, Sino-Indian ego, nuclear ambitions, civil wars and interstate tensions and their possible impacts in Nepal.
 - Define perspectives, approaches and operational strategies to tackle the internal conflicts, civil wars and interstate tensions in neighbouring countries and their potential effects in Nepal; even possible domestic conflicts and tensions within Nepal.

Nepalese Army Reforms' organized by Nepalese Army Command and Staff College, at Army Headquarters on 23-24 August 2007 at Kathmandu.

- The growing military expansion, competition on producing nuclear and other weapons of mass destruction (WMD) and retaliatory action could create enormous tension and insecurity in the region. Hence, the new security policy has to tackle this potential risk.
- Terrorism: Terrorism is emerging as a new global security challenge and South Asia is increasingly becoming one of its epicentres. Consequently, our country could suffer from it directly or indirectly. The open border with India and weak border security management could potentially be used by terrorist organisations and individuals to target India, as this country is already a frequent target. So far Nepal is not the target but terrorists could use it as a soft target to create horror and terror. Big public places and infrastructures could be the target. Hence, new security policy has to provide a framework for response strategies to tackle terrorism whereby security organisations are able to respond in a timely fashion.
- Organised crime: This is becoming one of the major perennial sources of insecurity all over the world. Polluting economic and business sectors through money laundering, acquisition of big companies and monopolisation, infiltration into the security, judiciary, bureaucracy and political parties and corruption, trafficking of arms, drugs and people are bitter realities across the world. Hence, the new security policy must be able to tackle these problems.
- Dealing with natural calamities and human induced disasters: New security policy has to provide a guiding framework for coping mechanisms and a response strategy to natural calamities such as earthquakes, large scale landslides, flooding and arsenic contamination, and preventive measures for human induced disasters such as potential radioactive contamination, chemical pollution, energy crises and systems failures and misuse or failure of telecommunication infrastructure. Similarly, insecurity

created by new and unpredictable phenomena such as HIV/Aids, bird flu, and SARS must also be dealt with. That requires a holistic understanding of the issues and a concerted effort to take action.

- Other non-conventional security issues: New security policy must also deal with non-conventional security threats caused by livelihood insecurity, environmental insecurity, energy crises, food insecurity, etc., which cannot be dealt with through a conventional security strategy. Hence, new policy has to adopt a 'human security approach' that deals with these issues. Similarly, future security policy has to deal with information security, space security (particularly missile, aeronautics) and border security.
- Sources of insecurity often linked with economic policy, political stability and power sharing, social harmony and diplomatic ability require a holistic security policy to tackle the security challenges posed by these issues.

Conclusions

Transformation of Nepal into a democratically governed, politically stable, environmentally friendly, economically prosperous, socially secure and just nation requires a holistic security policy. Nepal has great opportunities as well as big challenges for developing a holistic, people-centred security policy that covers both conventional and non-conventional issues. The dynamics and sources of security issues discussed above (section 2) and the legal review of the security laws amply demonstrate that our existing security policy is not enough and requires a fundamental shift in terms of conceptual orientation and basic understanding of security, institutional arrangements, regulatory frameworks and operational strategies and approaches. The new security policy has to provide strategic guidance for deciding on numbers of personnel (how many for which responsibility with which capability), types of security organisations (intelligence, land

force, air force and armed forces, artilleries, border guards, industrial security, space security, defence and home ministries, oversights bodies, strategic study centres and security think tanks, training centres, damage control units, etc.), and external security cooperation. Unlike the understanding of the establishment (the core decision makers), 'security' is not the domain of only the military and police: the new security policy must be owned by all Nepali people and developed by consensus.

List of Contributors

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