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POLITICAL TRANSITION AND CONSTITUTION MAKING IN NEPAL: THE MILITARY DIMENSION

Abstract

Formally, Nepal is declared a republic. Nonetheless, sharp differences over the organizing ideology of state continue to persist. This is reflected in the continuing discourses between the radical Maoist and the moderate/conservative reformist political parties over the two crucial agenda of proposed merger of the guerrillas into Nepali Army and drafting a new constitution by the elected Constituent Assembly. Consequently, this has also led to almost irreconcilable differences on civilian supremacy and the democratic control of the armed forces that the framing of the new constitution should clearly determine in order to avoid the past blunders in civil-military relations.

1. INTRODUCTION

Transition is defined as a situation in which the process of change from one condition to another occurs. In political lexicon, it can be described as a period of change between authoritarianism and democracy. In the case of Nepal, political transition has endured since long as the country suffers from democratic deficit. Decades of democratic struggle has culminated into elections to constituent assembly after the success of *Jana Andolan II* in April 2006. Nonetheless, democracy remains elusive in the absence of the rule of law. Political agenda to be addressed have become more complicated and contentious with disputes unsettling the democratic process. The political upheaval with an unexpected fall of monarchy was surprising to many as monarchy, hitherto seen as a symbol of national unity and stability, was abolished without any semblance of resistance. This has ushered the process of establishing a federal democratic republican system of governance in the country. However, this concept of the organizing ideology of state has been energetically contended by the largest political party in government preferring to turn Nepal into a 'people's republic' – euphemism for establishing communism in the country.

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This is an instance of unsettling the course of democratic process. Another substantial example is the rise of the left leaning political forces in the process of democratization in Nepal. Although Ferenc Feher has long written an obituary to 'Marxism as Politics',¹ it has risen in Nepal like a phoenix from its ashes. Against all the odds of the collapse of communism at the global scale after the Leninist extinction in the erstwhile Soviet Union, the reappearance of Marx and Mao in the political mainstream of Nepal has led it to experience an unanticipated surge of the left, and unprecedented success of 'Marxism', as exemplified by 62 per cent of the Constituent Assembly (CA) composed of the left parties and the government dominated by the leftists. Notwithstanding the demystification of socialist model caused by its failure, Nepal is currently led by a 'revolutionary' communist party striving for liquidation of the capitalist system. Having launched a violent insurgency for over a decade against the parliamentary and constitutional monarchical system, the Communist Party of Nepal (Maoist), more known as CPN (Maoist), is determined to preserve the gains of insurgency in defence of socialist revolution. When one-party rule and system of governance is declining rapidly worldwide, the tendency towards one-party dictatorial system through the establishment of people's republic, that is, the ideal type communist system as an organizing ideology of state becoming momentous challenge is the third interesting facet of political transition in Nepal.

It is in this backdrop that an attempt is made below to probe into the process of political transition and constitution making in Nepal with a focus on the military dimension. The paper is divided into six sections. While the ongoing Introduction is section 1 of the paper, section 2 explores capricious process of political transition in Nepal. Section 3 analyses the complex linkages between the armed forces and the national constitution. Section 4 deals with the issues pertaining to the management of the security sector. Section 5 is focused on the delicate issue of the democratic control of armed forces. In the light of the discussions on the above issues, Section 6 deals with the challenges facing Nepal on the way of drafting a new constitution and presents an outlook for the future.

2. CAPRICIOUS TRANSITION

Political transition is not only anarchic, it has also become heinous. For example, with the disappearances and brutal killings of journalists like Prakash Thakuri, Birendra Sah, Jagat Prasad Joshi, and Uma Singh in the 'post-conflict' situation, and withdrawal of over 300 criminal cases by the government, including robbery, rape, and murder under the political pretext, the government has neglected the law to take its own course. When questioned by the apex court,

¹ Ferenc Feher, "Marxism as Politics: An Obituary," *Problems of Communism*, January-April 1992, pp.11-18.

the Home Minister has defended the government decision as being 'legitimate'.² Abductions, rape and killings were the common phenomenon of the year 2008 when 231 women were raped, 541 people killed, 729 cases of abductions occurred and 1,017 persons suffered injuries from different clashes. The Maoists, as the political party in power, and its militant organization – the Young Communist League (YCL) – had killed 12 people and abducted some 300 persons. The state had killed 50 persons under different pretext. Most of the acts of abduction and killing, however, occurred in some 20 districts of Tarai with the killings of 383 people and abduction of 477 persons in the past year.³

The prevalent impunity, thus, has led the situation to become more tumultuous and turbulent transpiring violence of different magnitudes. As a consequence, development activities have come to a halt. 90 per cent of the industries are forced to close as insecurity caused by some armed groups involved in violence and the Maoist affiliated trade union's *bandh* (shut down). Capital flights occurred due to the uncongenial investment environment.⁴ This worsening scenario with simmering violence is reflected in the remarks of the visiting UN High Commissioner for Human Rights at a press conference drawing parallel to the situation in Rwanda.⁵ Although interpreted as usual during transitional period when the state supposedly becomes obliterated with weakness because of pulls and pressures from different directions, the sharply deteriorating law and order situation is the obvious consequence of the protective nets provided by the political parties to their respective militant groups and the criminal elements.

The demise of authoritarianism, therefore, has not resulted into democratization in the liberal political sense. The project of democracy-building through a consensual decision and unison of purpose for democratic consolidation is undermined by the idiosyncratic pursuits of political leaderships. State restructuring remains only an idea after the collapse of monarchy. The task of institutionalizing a democratic order in the absence of any efforts towards peace building has largely consigned the assumption of state building simply to the rhetorical articulation of interests. Temptations towards reinvigorating dictatorship in different name, the bloody struggle against a centralized, personal, repressive and the absolutist regime of the king notwithstanding, have, however, become a powerful impetus for a 'revolutionary political party' currently in command of the government. The CPN (Maoist) has pontificated and pursued its official ideology of the mass party as the vanguard of revolution, establishing formidable social control through spreading threat and violent intimidation by the party's militant organization – the YCL – both for policing and control, trying to

² *Rajdhani Daily*, 14 February 2009.

³ See, INSEC, *Nepal: Human Rights Yearbook 2009*, Kathmandu: Informal Sector Service Centre, 2009.

⁴ *Kantipur Daily*, 21 February 2009.

⁵ "Pillay draws Nepal, Rwanda Parallel", *Kathmandu Post*, 23 March 2009.

influence media through coercion, and with schemes of monopolizing the armed forces.

Such a behavioural pattern is capped further by the authoritative statement of the democratically elected Prime Minister derecognizing the parliamentary system declaring, "We are not also in a situation to give continuity to the traditional form of parliamentary democracy",⁶ followed by the stern warning that the people would stage "a great revolution and capture the state power"⁷ in case of conspiracy to topple the Maoist-led government. The threat posed by the Prime Minister of the country representing a party that has yet to renounce violence has a chilling effect in its relationship with other political parties. These contradictory trends are moving the transitional politics towards a grey zone rather than to a definite democratic direction. Violence under any pretext can render the obvious mission to achieve an inclusive and stable democracy through a national constitutional order highly difficult or even impossible.

Political transition, therefore, is awfully short of consensus. Prior understanding that political parties had formed between them have been dented by the results of the Constituent Assembly (CA) Elections of 10 April 2008. This has been spoiled further by the presidential and prime ministerial elections and the horse trading during the formation of the coalition government. Thus far, the crucial task of the CA, drafting a new constitution by the elected representatives of the people, has yet to ascertain any serious consideration despite the formation of several constitution drafting committees. Initiatives towards drafting a constitution as a law of the land and genuine framework designing the federal structure of the state are at the inventory level. The committees' sessions are in full swing to gather expert opinions and feedback from the relevant government officials and civil society leaders. 12 to 19 committee members comprising a group has also planned to visit different districts in 40 teams to acquaint themselves with the public opinion related to several genuine issues concerning constitution making. Nonetheless, uncertainty continues to remain regarding whether constitution would ever be drafted.

Doubts have been raised when the influential Maoist leader and Finance Minister Baburam Bhattarai, in a two-part article, asserted that the constitution would be written on the Maoists' term. "Otherwise we will not allow even a single letter [of the constitution] to be written". Using the Nepali adage "Tigers and goats can't share the same well", Bhattarai concluded that the constitution cannot be a common or shared document: "it has to be what we want [it to be]". Accordingly, the constitution would be modelled on the objectives of the 'People's Republic', not the democratic republic adopted as the 'transitional tactics' by them. Further he wrote, "We contested the elections keeping our army and weapons intact, which is unique in itself.... We won the elections and we are

⁶ *Himalayan Times*, 12 November 2008.

⁷ "PM warns against bid to topple govt.", *Himalayan Times*, 14 January 2009.

now in the government. Still we have our own army [awaiting integration with the Nepali Army]". Dictating his final verdict, Bhattarai said, *a la* former US President George W. Bush after 9/11, all those who don't belong to the 'people's republic' camp belong to the other side.⁸ Prefabricated conditionality like this has complicated the whole thrust of constitution making process. Despite the common interest in drafting an all encompassing constitution to build a political order, the competing interest among the political parties to impose a particular agenda, especially by the Maoists, could derail the impetus for drafting constitution. This doubt has been reinforced by none other than the Prime Minister and the chairman of the Maoist party himself, when he directed his party cadres to be prepared to face any eventuality, including another revolution⁹ inviting a joint condemnation by the 28 Nepalese Congress (NC) members of the Constituent Assembly.¹⁰

Disingenuousness on commitments displayed by the Maoist leadership has already become a cause for widespread consternation among the political parties, inclusive of those in the coalition government – the Communist Party of Nepal (Unified Marxist Lemrist more known as CPN (UML) and the Modhesi Jana Adhikar Forum (MJF). Parliamentary sessions of the CA were disturbed and boycotts intermittently ensued. Debates in the legislative-parliament of the CA have resumed after a three week's hiatus on 7 January 2009 as a result of the NC's boycott under the pretext of not implementing the commitments of the Prime Minister to the House made on 11 November 2008 regarding its 9-point demands.¹¹ Soon after the debates were reopened, the parliamentary session was again adjourned that allowed the government to issue ordinances inviting further controversies.

Though protests and boycotts of the parliamentary sessions are the vibrant processes of intra-systemic opposition under democracy, this practice, if endured for long, could also be damaging to the democratic process. Nepali people had enjoyed democratic rights under a multiparty system, interludes of elections and press freedom sustained by a democratic constitution in the past. But the country never had a chance of drafting and making a constitution for itself freely without any constraints and its sole ownership. All the previous constitutions, including the 1990's democratic constitution were a gift either of the Rana Prime Minister

⁸ Baburam Bhattarai, "Ekkaishaun Shataptidiko Krantiko Karyadisha", *Naya Patrika*, 29 and 30 January 2009.

⁹ *Kantipur Daily*, 15 February 2009.

¹⁰ *Himalayan Times*, 15 February 2009.

¹¹ Of the crucial issues related to the 9-point demands are: (i) return of the seized properties to their rightful owners; (ii) dissolution of the YCL and withdrawal from the occupied private and public properties; and (iii) ending the dual security system to the Maoist leaders. See, "Sarkar Samachhya Kangreshko Maag", *Kantipur Daily*, 10 November 2008. The Prime Minister has read out the cabinet decision related to the NC's demands reiterating his commitment to honour it. See, *Himalayan Times*, 8 January 2009.

or the Kings of Nepal to the people. The Interim Constitution promulgated on 15 January 2007 is the first constitution ever drafted by the representatives of various political parties on its own and adopted as a consensual document. The political transition that continues is supposedly governed by the rules stipulated in the Interim Constitution, the adherence to which, however, has fallen to a political gambit.

Increasing acrimony between political parties could retard the constitution drafting within defined period. The Interim Constitution has stipulated a 2 years' time frame for the tenure of the CA from the date of the first meeting with 6 months of extension period provided the constitution making remains incomplete due to the declaration of emergency in the country (Article 64). Article 138 of the Interim Constitution 2007 has attested that the state would be progressively restructured making it inclusive and democratic by abolishing social discriminations and ending the centralized and unitary state system for which a high level commission would be established. All the political parties agreed on the necessity of political consensus until a new constitution is framed and adopted with ultimate decision on state restructuring made by the CA (clauses 1 to 3).

3. THE ARMED FORCES AND THE NATIONAL CONSTITUTION

One of the crucial ingredients to the task of state restructuring with constitution making is the democratic control of the security forces; their management, roles and functions within the parameters of the civil-military relations. The imperative of maintaining civil supremacy over the armed forces can no longer be ignored in view of the controversies ravaging civil-military relations apparently on 'recruitment' issue followed by the 'retirement row' of eight brigadiers with likely implications for the future. Political parties, even the major coalition partners in the government, are ironically siding with the armed forces rather than the Maoist leadership on these issues. Despite the exercise of some damage control measures, the controversies do not bode well for the future of civil-military relations.¹² On the board, the obvious task of 'managing, integrating and rehabilitating' the Maoist guerrillas spread out in the seven major cantonments and 21 respective satellites remain fundamental. Though Article 146

¹² The Ministry of Defence is put to the task by the Army Head Quarters with completion of recruitment of 2,884 persons for combatant and non-combatant duties in its vacant posts, which the former opposed as being the violation of the commitments made in the Comprehensive Peace Agreements of November 2006. The Defence Minister has taken extreme position on the issue, whereas the CoAS has refused to be budged. See, "Senama bharti roknai parcha," (The recruitment in the army must be stopped), *Kantipur Daily*, 10 February 2009; and "Don't drag NA into political row", *Himalayan Times*, 14 February 2009. On the retirement row, Prime Minister Prachanda has rejected the proposal of the former Prime Minister and the President of the Nepali Congress Party Girija Prasad Koirala for extending the three years term of brigadiers who retired on 16 March 2009. Article 17 of the Military Act 2006 has a provision for the extension of the three years term, which, however, is not mandatory.

of the Interim Constitution has clearly stipulated that the Cabinet would form a special committee determining its rights and duties for the 'management, integration and rehabilitation' of the Maoist guerrillas, two meetings held under the convenorship of the Prime Minister, so far, remain inconclusive. The case of the *samayojan* (integration) of the Maoist guerrillas with the Nepali Army has become a bone of contention between the CPN (Maoist) and other political parties that have dragged the issue.¹³ Against the recruitment drive of the Nepal Army, the Maoists have also begun recruiting the already disqualified guerrillas by the UNMIN heightening the controversy to the extent of the possibility of snapping the peace process. Presence of Maoist ex-combatants indefinitely, however, would certainly jinx the constitutional process.

Following the *Declaration of the House of Representatives-2063* (2006) of 18 May 2006, the Comprehensive Peace Agreement (CPA) signed between the Seven Party Alliance (SPA) government and the CPN (Maoist) in November 2006, and the subsequent 'Monitoring and Supervision of Arms and Armies' signed in December 2006, the Interim Constitution 2007 has broadly stipulated some provisions on the organization and management of the armed forces of Nepal in Articles 144 and 145. Similarly, under Articles 146 and 147, the Constitution has provisions on transitional management of the Maoist guerrillas, their integration and rehabilitation.¹⁴ The special committee under the convenorship of the prime minister would be responsible to look at this transitional provision because the constitution to be promulgated would neither be interim nor transitional. There is an urgency of settling this sensible issue before the promulgation of the new constitution providing the framework for federal republic and clearing a ground for the elections of a truly representative government. In case the 'management, *samayojan* and rehabilitation' issue of the Maoist guerrillas continues, it would certainly compromise the electoral process and promote political instability. A country cannot remain in the state of "one nation, two armies" for long.

This turgid background makes the future of constitution making with incipient provisions of regulating civil-military relations complicated. Previously, the concept of civilian control of the armed forces was envisioned under Article 118 of the erstwhile 1990 Constitution designating the National Defence Council (NDC). It was never institutionalized and, therefore, was rendered irrelevant in practice. The NDC, comprised of the Prime Minister, the Defence Minister, and the Chief of Army Staff (CoAS), was conceptualized on majority/minority basis to function as the decision making body. But in the absence of a working defence minister, it became void of any functional utility.

¹³ "Samayojanbare naya bibad", *Kantipur Daily*, 27 December 2008.

¹⁴ See, *Nepalko Antarim Sambidhan 2063* (Interim Constitution of Nepal 2063[2007]), (Kathmandu: Chandeshowari Prakashan, 2007), pp.50-51.

The king's discretionary power had overridden the 'use and operate' provision of the army under Article 118 (2) making the prime minister's recommendation non-mandatory. On the question of mobilizing the armed forces and the use of force, the discretionary power of the king remained omnipotent because the 1990 Constitution had neglected to resolve the provisions stipulated in the Military Act 1959 making the king the supreme commander in chief, and the subsequent 1969 Act on rights and duties of the CoAS making him responsible to the king, not the government. The post-1990 governments, in retrospect, had regrettably refrained from reforming or amending these uncongenial provisions anomalous to the parliamentary system under constitutional monarchy.

Another issue related to the civil-military relations with democratic control has been the parliamentary oversights. Notwithstanding the State Affairs and the Public Accounts Committees working in tandem during the 1991-2002 parliamentary periods, there were hardly any issue worth remembering on which investigation or inquiry was seriously held in the context of military affairs. The lapses in the parliamentary exercise of the oversight function were caused primarily by the tenuous political situation, inexperience of the legislatures as well as undermining by the government of significant role that parliament could play.

Though the 18 May 2006 declaration of the reinstated parliament stripping the monarchy of its inherent power is the exemplary case of the legislative power, it was surprisingly neglected again by the executive feat. The parliamentary declaration has, however, created a condition, for example, to make crucial changes in the organizational structure of the NDC to be renamed as the National Security Council (NSC) and restructure its composition. Unlike in the 1990 Constitution, Article 145 of the Interim Constitution 2007 has broadened the scope of the NSC membership comprising the Prime Minister, Defence Minister, and Home Minister, along with three other ministers nominated by the Prime Minister as its members. It has abolished the membership of CoAS, and stipulated a provision for invitees for consultation as per requirement. Besides the six cabinet members, the defence secretary would be the ex-officio secretary to the NSC. Presently, the secretariat is composed of 37 military personnel led by a Major-General, 6 members each from the Armed Police Force, Civil Police, and National Intelligence aided by 4 officials from the Civil Service.

The Council of Ministers, in accordance with the recommendation of the NSC, can control, use and mobilize the armed forces. The NSC as a constitutional organ is, thus, conceived as an apex institution for democratic control of the security sector, particularly the national armed forces.

Interestingly, the Interim Constitution 2007 is concerned less with the roles and functions of the armed forces than with the bureaucratic mode of the

appointment of CoAS along with controlling, mobilizing and managing the armed forces. There is a lapse in thinking on what are the armed forces of an impoverished country like Nepal for? While dealing with the primary objective of the armed forces, it is conceived simply necessary to defend and protect the sovereignty, the people and the territorial integrity of the state. This is the *raison d'être* for the existence of the armed forces. The question, however, is that is it the exact reason for which the armed forces were used in the past and the roles for which they are likely to be deployed in the future? The glaring discrepancy existing between the army's function of external defence and the use of force in aid of the government internally has not been clearly thought about. Nepali army had fought no external war in defending the state since 1816, but the army was used to topple elected and civilian governments twice in the recent past.

The army was used against the government and the democratic aspirations of the people projecting it as a threat to national integrity, therefore, national security even under the constitutional monarchy. The control, deployment and use of force are, thus, relational to the type and magnitude of threats at the perceptual level. Experience testifies that the threat is moreover internal rather than external. The use of army in Nepal is, thus, akin to domestic law enforcement agency rather than war fighting machinery. There is, therefore, the risk of the political use of the armed forces. Recognizing this reality, the priority of establishing civilian control over the armed forces requires adequate attention. This should also be considered as a primary task of constitution making process clearly defining the rationale, role and function of the national security forces – the armed forces in particular. The army's sensitivity for its particular role can obviously be traced in the recommendation document that the CoAS has submitted to the CA's Committee on Safeguarding National Interests with specific concern on the structure and function of the National Security Council.¹⁵

4. MANAGING SECURITY SECTOR

The management of Nepal's security sector in general and the armed forces in particular has remained a policy arena that has largely been closed to broader public and parliamentary scrutiny in the past. It is, now, an imperative that strategies designed to transform Nepali armed forces take stock of the very real obstacles which they may encounter in its initiation and management. With the abolition of monarchy the crucial hurdle against reforming the armed forces has gone. Besides this, three critical assumptions present in Nepal in varying degrees are: i. the establishment of effective processes and mechanisms of civil oversight

¹⁵ *Nepalko Rastriya Moolniti tatha Rastriya Surachhya niti*, 2065, (Document in relation to recommendation on national security policy submitted by the Chief of Army Staff (CoAS) of the Nepal Army to the Committee on Safeguarding National Interests of the Constituent Assembly at Singha Darbar, Kathmandu on 13 February 2009), pp.60-61.

over the national army; ii. the establishment of such mechanisms depends on the broader relationship between the executive and the legislature; and iii. as noted above, any undermined and emasculated parliamentary committees will serve no more than as a "rubber stamp" to endorse policy and budgetary initiatives emerging from the executive. The oversight role played by most legislatures, as pointed out above, was weak or even non-existent. It was partly the product of the monarchical control of the armed forces in a fragile democracy with very weak legislatures, and the undermining of the parliament by the executive authority as well.

Building oversight capacity within the parliament will require the reconfiguration of the relationship between the legislature and the executive, the building of capacity amongst parliamentarians responsible for security sector oversight, and the deliberate facilitation of an ongoing dialogue between the military top brass, parliamentarians and the executive. The prospects for building capacity amongst the executive sphere of oversight remains somewhat more favourable in government given the fact that both *de jure* and *de facto* political power tend to reside in the executive, as the political authority.

The Defence Ministry should also be refurbished with the appointment of a Defence Minister with portfolio authority. It can genuinely play an oversight role which can be greatly strengthened by the addition of new roles and responsibilities to the present Defence Ministry. In addition to retaining the responsibility for determining the numerical strength and oversight of budgetary allocation and expenditure within the armed forces, the Defence Ministry can also assume responsibility for the management of national defence policy processes and the defence procurement cycle – both of these being inherently political processes that would benefit from the involvement of civilian authority.

In case of Nepal, some crucial lapses have been observed as a result of a non-functioning Defence Ministry previously void of a Defence Minister. This situation has led to a glaring civil-military gap with the creation of a cultural, psychological and political barricade between the civilian and military leaderships. Previously the armed forces were virtually under the control of the Principal Military Secretariat of the Royal Palace. Institutional cooperation and coordination between the civilian and the military functions in the government were there in name only. This created a discernible gap in the inter-agency interactions and mutual relationship between the civilian government and the armed forces the repercussion of which remains the continuity in mistrust between the two. The fresh eruption of controversy over the 'recruitment' issue is the glaring example of the absence of inter-agency coordination and cooperation in the security sector and the absence of democratic control. The controversy apparently exposed the fact that the civilian leadership had no ultimate decision making power on defence policy, including personnel recruitment or perhaps weapons replenishment.

If continued without any satisfactory resolution, such a trend could lead to imperil the role of civilian leadership in time of conflict as was the case in the past. Many operational decisions have political ramifications once the armed forces are mobilized. It is, therefore, important for the civilian leadership to exercise close scrutiny over actions in the field in order to ensure that operations are consistent with the set objectives. The crucial challenge, in this regard, is to devise systems of accountability and oversight that incorporate the legitimate concerns of both the military and civilian leadership. The military operation should accord with the use of force prescribed under the international humanitarian law. This can be an effective measure to evolve a system of democratic control; the imperative of which is democratic governance and the rule of law. The legal mechanism can lead to evolve military code of non-interference in domestic politics, ideological neutrality, effective chain of command, and respect for the rights of military personnel with the adoption of a Military Act.

5. DEMOCRATIC CONTROL OF THE ARMED FORCES

What is the democratic control of the armed forces? What does it mean and why is it important? Democratic control of armed forces is a precondition for ensuring:

- the political supremacy of the democratically elected civilian authorities;
- safeguarding the rule of law, human rights, and enhancing human security;
- serving the interests of the people and enjoy popular support and legitimacy by the armed forces;
- making the policies and capabilities of the military congenial to the national objectives and commensurate with its resources; and
- maintaining surveillance over the possible misuse of the armed forces for political purposes.¹⁶

Much of the debate regarding the subordination of the armed forces to democratic control has focused on the centrality of ensuring appropriate 'civilian control' over the military institutions. This is a problematic and potentially divisive concept and needs to be explicated if any justice to the debate on civil-military relations in Nepal is to be done. The popularly used term 'civilian control', confuses the civilian content of many democratic institutions – legislature, judiciary and government, for example, – with the political principle of civil oversight of the armed forces. Civilian institutions headed by the elected leadership do not necessarily make for more effective and accountable

¹⁶ DCAF, "Democratic Control of Armed Forces", *DCAF Backgrounder*, (Geneva: Geneva Centre for the Democratic Control of Armed Forces, 2008). See also, Hans Born, "Democratic Control of Armed Forces: Relevance, Issues and Research Agenda", in Giuseppe Caforio, (ed.), *Handbook of the Sociology of the Military*, (New York: Kluwer Academic/Plenum Publishers, 2003), pp.159-160.

management and oversight of the activities of the armed forces. Nepal provides a compelling example of how civilian leaders and civilian institutions can, in various forms, mismanage the armed forces. The case of civilian leadership's complicity to the design of the armed forces between 2001 and 2004, for example, had led to military supremacy undermining the ideals of civilian supremacy. It was the weakness of the political leadership drawing the armies into political arena under the pretext of defending national security than making them responsible to protect the individual's security.

Likewise, the concept of Civil Supremacy entails four cardinal principles based on democratic ideals:

- *Separation of Power*: The separation of power between the civilian and military sphere of the government should be based on reciprocity of interests and mutual compliance. The armed forces should refrain from involvement in politics and the civil and political leaders should refrain from interfering in operational matters and the military chain of command. Their respective powers and responsibilities are defined in law and are predicated on the inviolability of the Principle of Civil Supremacy of a democratic constitution. The separation of power between the civilian and military establishment does not mean that the armed forces are just subordinates in implementing order of the government. They are equally eligible partners in participating, conceptualizing, contributing to the formulation of defence policy and decision-making in the aid of civilian administration.
- *Legitimacy*: The power and functions of the armed forces are determined by law, chiefly the Constitution and the Military Act. The military is obliged to operate within the bounds of these Acts and set parameters. Legality flows from credibility in observing the rules of the game. The fundamental of military service is that officers are only authorized to issue orders on the basis of the legitimate decisions made by their civilian masters, and soldiers are only obliged to obey them, within the framework of the domestic as well as international law. This reinforces operational legitimacy by making the armed forces responsible to civilian authority.
- *Accountability*: In a democracy, accountability rests with the elected civil authority. The accountability of the armed forces, given their mandate as the specialists of violence on behalf of the state assumes a more prominent role. Such a mandate given to the armed forces especially requires assurance that they perform their duties according to democratic dispensation in the public interest, and do not pursue their own agenda contrary to the national interest. This assurance is best provided through the provision of oversight mechanisms located within, primarily, the executive – such as the role of the Ministries and an Ombudsman system for example – and the legislature as reflected in the power of parliament and the oversight responsibilities of the parliamentary committees. In other words, upholding the 'vertical control' is

the crucial point. Indirect oversight or 'horizontal control' can also be maintained by the civil society, the media and the policy advocacy groups comprising NGOs.¹⁷

- *Transparency:* The availability of adequate provision of information on security and defence related matters to the public makes things transparent, above suspicion and unnecessarily contentious. Means of democratic control and oversight may be lost and rendered ineffectual in case if and when critical information required in policy formulation and decision making is denied and remains opaque. In case of Nepal, information on the armed forces had remained secret and sacred in the past. Again information become difficult to obtain when the military bureaucracy stamp them as 'top secret' or 'confidential' with red ink. Hence, there is a need of boundary making by drawing the line between 'need to know' and 'need-not to know' in the interests of national security. There should be a legal distinction between 'classified' and 'declassified' materials for public dissemination conforming to the legitimate rights of the people to know. This dilemma can be resolved in case the parliament determines the limits to openness through the passing of relevant legislation in practice – as the freedom of information act.

6. DRAFTING A NEW CONSTITUTION

The past experiences should be useful guide while drafting a new constitution by the members of the constitution drafting committees of the CA. The lessons from the past must not be negated. They could be a constructive guide even with their negative imprint on the past practices. For instance, the cases of discarding of various popular suggestions put forth by the people from different walks of life on secularism, ethnicism, gender and untouchability, demanding social inclusion, by the members of the then constitution drafting committee has resulted into disowning of the 1990 constitution by the majority of non-Hindus, *Janajatis* and deprived people. The post-1990 period had involved passionate and powerful mobilization and conflict around caste, ethnicity, gender, religion and even regional identity by the discontented groups that was packaged in an explosive capsule of violent insurgency affecting the current political transition. Consequently, widely acknowledged democratic constitution of 1990 was unceremoniously buried after the *Jana Andolan II* and replaced by the Interim Constitution 2007.

Similar was the case in relation to the armed forces. As pointed out above, the 1990 constitution has made the authority of the executive prime minister opaque vis-à-vis the constitutional monarch on the question of the 'use, operate

¹⁷ DCAF, *Parliamentary Oversight of the Security Sector*, (Geneva: Geneva Centre for the Democratic Control of Armed Forces, 2003). See also, Eekelen Van, "Democratic Control of Armed Forces: The National and International Parliamentary Dimension", *Occasional Paper*, (No. 2, DCAF, October 2002).

and mobilize' the armed forces leading to the misuse of power by the king to dearly cost democracy. While certain improvement on these lapses has been made in the formation of the NSC in the Interim Constitution, the risk of its likely misuse by the majority party under the domain of the six powerful cabinet ministers, including the prime minister, remains as the NSC has obviously turned out to become a subsidiary agency of the centralized authority represented by the executive prime minister.

Though the new constitution to be drafted, promulgated, and adopted by the people as the law of the land has yet to determine the type of the political system – presidential or Parliamentary system at the federal centre, the national armed forces should be placed directly under the executive authority. Irrespective of the executive mode of governance, the armed forces should be one and indivisible constituting the national army. The ownership of the establishment of national armed forces should be made by the Act of Parliament as provided by the Constitution. The Constitution should clearly stipulate the provisions for the establishment, organization, appointment, recruitment, training, service conditions and other related matters concerning the national armed forces. The Constitution should clearly state that no member of the national armed forces should be an office bearer of any political party or a member of political organization. As stipulated in the Interim constitution, the national armed forces shall be all inclusive, value neutral and modern organization comprising military professionals capable of and committed to executing its functions prescribed by the Constitution. Preferably, the new Constitution should make detail provisions on the national defence and security comprising the interests of federal state.

On the functional sphere, the national armed forces should function solely in the national interest by upholding the constitution in defence of the Republic and its citizenry, and exercise its power and function under the direction of the government of the federal republic. In pursuing the policy of defensive defence, the national armed forces shall honour completely the international law and treaty obligations of the republic and shall remain accountable to the parliament through the line agency of the government. The deployment and use of force by the government should cohere to the stipulations made in the NSC (145 [1] and [5]) of the Interim Constitution 2007. These provisions could also shape the visions for drafting related provisions in the new constitution.

Meanwhile, the Maoists have floated their draft constitution for open public debate on 2 March 2009.¹⁸ The thrust of the argument is for an executive president in a federal state based mostly on ethnicity, making of a national army by integrating the Maoist guerrillas into Nepal army, and provision of compulsory military training to the able-bodied citizens above 18 years of age in consideration of national security interests. This perspective of the Maoists,

¹⁸ See, *Ganatantra Nepalko Sambidhan 2067: Prarambhik Khaka*, (Kathmandu: Sambidhan Nirman Sujhav Samiti, Ekkrit Nekapa (Maobadi), Falgun 2065 (March 2009). Especially, Part-15.

though proposed, is variously interpreted by other political parties as conditional on which the Maoists would strike a bargain. It is particularly feared that the Maoists activists would try to influence the public opinion for the choice of the presidential system thereby making it easier to determine the case of the merger of the guerrillas with Nepal army and maintain obvious control on the question of 'operate and use' of the armed forces in the future. This could be detrimental to the broader national interests in the context of maintaining civilian supremacy through democratic control of the armed forces.

The armed forces are also mobilized and deployed in the case of national emergency declared by the executive. In such a situation, when fundamental and human rights of the people may be suspended, the army should be made more liable to comply with the public security sensitivities rather than giving them leverage for violating human rights under any pretext, as it was the case during the Maoist insurgency. National security should be contextualized under the rubric of human security as the core value. Territorial integrity of even a totally failed state like Somalia remains respected and recognized. But a failing state like Nepal is characterised by the 16 hours of regular power outages, drying ups of water taps, potholes in the streets, food insecurity, surging inflation, mounting unemployment and daylight murder, rape and kidnappings. Increasing fear of public insecurity has been matched by the situation of impunity. Threats have, therefore, become more ambiguous and complex. Originating from terrorism, organized crimes such as human trafficking and drug dealings, the perception and meaning of security have changed. Vulnerabilities related to terrorism and infectious diseases have become widespread particularly in countries like Nepal where resistant measures are fragile and inadequate. Public security is, thus, disrupted and peace becomes elusive. The common people look upon military to support stabilizing peace within the society and help avert public suffering than mobilizing itself against the phantom threats of external infringement or traditional defence. The need of a thorough defence review to comprehend the national situation and the military needs, therefore, is pertinent. Accordingly, the national security strategy can be determined by identifying the perilous threats. The Constitution to be promulgated in the future should carefully incorporate provisions through which public security could be protected and human dignity preserved.