The Legal Framework of Security Sector Governance

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Introduction

Compared with other government departments the ministries of defence and foreign affairs have little legislation. Both should have their place defined in the constitution and both take a comprehensive look at the national interests of the country. Other departments are more inclined to look only at their own sector and are less open to the factors impacting on the interests of the nation as a whole. But their activities impact more directly on the interests and wellbeing of the individual citizen. Another difference lies in the exclusive role of the state in the domain of defence and in most countries also in the field of other security and police functions. The use of force is the monopoly of the state and the military are controlled by the central government. Police functions may be decentralised, certainly in a federal system, but their legislative framework should aim at being identical throughout the constituent parts in order to prevent unequal treatment of the citizens.

Defence is different from other government departments by its capacity to use force, by the personal risks incurred by its military employees and by the likelihood that it has to operate under exceptional circumstances. This requires a clear definition of competences and a hierarchical organisation with unity of command and a high degree of discipline among the soldiers. Therefore, legislation for the military pays much attention to conditions of labour, penal law and disciplinary authority of commanding officers. Defence policy suffers more than any other department from a presumed need for secrecy this is often exaggerated, but some aspects deserve to be kept secret, particularly concerning intelligence and during the conduct of operations. Nevertheless, in a democracy defence should follow as much as possible the normal procedures of legislation, transparency and

accountability which apply throughout the government. Exceptions should be clearly circumscribed. This also applies to the 'right of information' of Parliament and of the individual citizen, which should be guaranteed in legislation.

In describing the specific legal provisions governing the defence and security sector this paper distinguishes three levels of legislation: the Constitution, regular legislation and delegated legislation. We shall see that they are closely connected, but the manner in which these texts are drafted and approved is different.

The Constitutional Level

The first level is that of the Constitution. Not all countries have a written constitution. Britain is the most notorious exception and relies on jurisprudence and evolving common law, which gives the system great flexibility. Most other nations find it necessary to define the competences of the institutions of the state and the procedures for their conduct in a written document, which is more difficult to amend than ordinary legislation. The main function of the Constitution is to form a concrete basis for the stability of the country by providing a framework of 'checks and balances' which allows for effective government but avoids any element of the state acquiring primordial or even absolute power. Therefore, it should define the subjects which need to be regulated by law. Obviously much depends on the implementation. The Constitution of the Soviet Union looked fine on paper, but in effect amounted to dictatorship of the Politburo.

Constitutions vary greatly in length. The Constitution of the United States of America is the shortest with only seven articles (albeit with quite a few sections and clauses in the first two articles) and over the years 27 amendments, the first ten forming a 'bill of rights'. That of India is one of the longest with 396 pages, describing in great detail the functions of the Union and the States but, as we will see later in this paper, also many aspects affecting the lives of the citizens. At this moment it is well to remember that the longer the Constitution is, the more it will restrain normal legislation and result in legal battles over alleged constitutional violations. The drafters of a

constitution would do well to restrict their work to essential provisions and refrain from unnecessary detail.

There is much to be said in favour of a short constitution covering the essential principles of the structure of the state and leaving most matters of implementation to regular legislation. The political battle should not be over the constitution after it has been approved democratically. Then all political parties should respect the constitution as the common basis for their future work.

Much will depend on the character of the State. Is it unitary or federal? This is important for the nature of constitutional power. In a federal system, power rests with the States, which grant limited and 'enumerated' authority to the Union. In a unitary system the State determines how much power will be delegated to the provinces. In both cases defence clearly is a function of the federal/central government. Other characteristics result from questions like: is there a presidential or a cabinet system; does Parliament have one or two chambers and is the electoral system based on single member constituencies or on proportional representation?

In a fully parliamentary system the role of the Head of State is limited. He will act on the advice of the Council of Ministers/Cabinet and performs formal acts to symbolise the unity of the State. Even if he formally is the Commander in Chief he will act on advice of the Prime minister. Executive power rests with the Cabinet, which needs the assent of Parliament for its legislative proposals and the judiciary for disputes over the application of the laws. The authority of the Prime Minister may vary from being a *Primus inter Pares* (first among equals) who only chairs the Council of Ministers, to a more leading figure like the Federal Chancellor of Germany who has *"Richtlinienkompetenz"* (competence to issue directives to other ministers). In a two party system like in the United Kingdom, the Prime Minister also has great authority for he will be assured of a majority in Parliament as long as his party keeps supporting him. He frequently changes the composition of his Cabinet in order to reward good performance or to demote stragglers.

A presidential system also knows great variations. In the USA the president is had of the executive and commander in chief of the armed forces. His country is the clearest example of the separation of the Trias Politica, the

separation of the three powers – executive, legislative and judiciary – and an intricate system of 'checks and balances'. The president appoints the Secretaries heading the department, who testify before Congress on the proposed legislation, but cannot be censured by it.

In France the president has great authority over security and defence, which are regarded his 'reserved domain', where parliament has little influence except on the determination of the budget.

All these variations are consistent with democratic principles, provided the definition of competences is clear and the actual state of affairs corresponds with the constitutional description. We still see too many dictatorships where all power resides in one or a few politicians without any checks and balances on their conduct. Their parliament consists of their party faithful and only act as rubber stamps on anything that is proposed by the leadership.

A federal system usually has two chambers in parliament, one representing the people and the other the states. In a unitary system the second chamber can act as a chamber of revision which applies a last test of consistency and effectiveness to a law which might have been amended beyond recognition by the House of Representatives. If the chambers have identical competences, a conciliation procedure should be provided for in case of differing amendments. This regularly occurs in the USA. The Nepalese Constitution of 1990 also envisages the possibility of a 'Joint Committee' of both chambers.

Many countries have a Constitutional Court (or a Supreme Court with competence in constitutional matters) which has the authority to determine whether legislation is compatible with the provisions of the Constitution. In federal states like Germany and the USA the Constitutional Court and the Supreme Court respectively have great prestige and give verdicts of fundamental importance for the interpretation of the Constitution. The ensuing jurisprudence in itself becomes part of constitutional law. Other countries leave the constitutionality of laws to the judgement of Parliament, sometimes demanding a reinforced majority for adoption of bills with a semi-constitutional character. In itself the latter procedure seems quaint, for it does not constrain the lawmakers, but in an open democratic society

this has the advantage that there are no periods of uncertainty while the court considers a case.

In describing the functions of the state the constitution should include the defence of territorial integrity and political independence of the country. Regardless of the nature of the State – unitary or federal – defence and foreign affairs always are parts of the core competences of the central authority, although a militia might be organised at the level of the State, as is the case in the USA. The preamble of the Constitution of the *United States of America* includes insuring domestic tranquillity and providing for common defence. Among the enumerated powers the articles of the constitution include the authority to declare war, to raise and support armies, to provide and maintain a navy, to make rules for the government and regulation of the land and naval forces, to provide for calling forth the militia (i.e. a reserve force) to execute the laws of Union, to suppress insurrection and repel invasion. An interesting example of a check and balance is the provision that no appropriation of money for the army shall be for a longer term than two years.

Congress had the authority to declare war, but the President was granted the authority too 'engage in military conflicts'. Since the end of World War II hardly any state declares war any more and this is unlikely to change. In the first place because the system of the United Nations granted the monopoly for authorising the use of force to the UN Security Council (except in case of self-defence) but also because current conflicts are characterised by asymmetric warfare and 'war among the people'. Traditional warfare among states with clear frontlines seems a thing of the past. It remains necessary, however to provide a legal basis for the declaration of a 'state of siege' or of any other exceptional circumstances.

The constitution of the *Netherlands* was one of the first to include the duty of the government to promote the development of international law. It also stipulates that treaties and decisions of international organisations are binding for individuals as soon as they have been published. Moreover, national legislation will not be applied when it is not compatible with these treaties and decisions.

All Netherlands citizens able to do so are obliged to cooperate in maintaining the independence of the country and in defending its territory. It is possible to impose this duty upon non-nationals resident in the country

The purpose of the armed forces is defined as the protection of the interests of the State. The government exercises the supreme command over the armed forces. Military service needs to be regulated by law and the same applies to the conditions under which serious conscientious objections for military service will be recognised.

Regulations for the requisitioning of housing, transport and goods need to be determined by law and will include financial compensation.

The constitution of the 'sovereign socialist secular democratic' *Republic of India* starts with the definition of the Union and its territory, followed by parts on citizenship, fundamental rights, directive principles and fundamental duties. Its Article 51 includes the objective of the promotion of international peace and security. Following parts cover the Executive, Parliament, Judiciary, controller and auditor-general, the States, Union Territories, Panchayats, municipalities, scheduled and tribal areas, relations between the Union and the States, finance and property contracts, trade and internal commerce, services, tribunals, elections, special provisions for certain classes, official languages and emergency provisions. The Constitution contains an elegant formula for describing the relationship between the President and the ministers: the task of the Council of Ministers is to aid and advise the President, who shall … act in accordance with such advice. Another provision states that the ministers hold office during the pleasure of the President.

The *Constitution of Nepal* of 1990 followed a similar format. It made Nepal a constitutional monarchy after the ill-fated Panchayat Constitution of 1962, which gave a dominant position to the King over weak political institutions and was intolerant of multiparty elections. The new constitution was drafted by a Constitution Recommendation Committee consisting of representatives from the Nepali Congress Party, the United left Front and the Crown under the chairmanship of justice Upadhyay. All political parties were united in their commitment to a constitutional monarchy, to

multiparty democracy, the holding of elections on the basis of universal adult franchise, the establishment and operation of a bicameral legislature and to the sovereignty of the people. Executive action of the King was made subject to approval of the Council of Ministers. For the first time in Nepal an independent press was guaranteed as well as a right to information and a right to privacy. The Supreme Court got the power to pronounce over the validity of laws inconsistent with the Constitution. A major item of discussion was the way minorities should be treated. Finally it was agreed to include some safeguards but to stop short of providing any system of quotas or affirmative action.[1]

The Nepali Constitution also included sections on citizenship, fundamental rights, and directive principles and policies of the State. The latter included in Article 26 two final paragraphs:

(15) The foreign policy of Nepal shall be guided by the principles of the United Nations Charter, nonalignment, the Panchsheel, international law and the value of world peace.

(16) The State shall pursue a policy of making continuous efforts to institutionalise peace for Nepal through international recognition, by promoting cooperative and good relations in the economic, social and other spheres on the basis of equality with neighbouring and other countries of the world.

Panchsheel referred to the Five Principles of Peaceful Coexistence which were enumerated by prime ministers Nehru en Zhou En-lai in 1954 as an example for international relations, but severely tested by the border war between China and India in 1962. Nepal has concluded treaties of peace and friendship with both China and India and has established diplomatic relations with the other permanent members of the UN Security Council and many other countries.

Shortly before the third ministerial meeting of the Coordinating Bureau of Non-aligned Countries in Havana in March 1975, which explicitly called for the "creation of peace zones", King Birendra proclaimed during his

[1] Dhungel, Adhikari, Bhandari & Murgatroyd, Commentary on the Nepalese Constitution, Kathmandu, DeLF, September 1998, p. 37-9.

coronation on February 25 1975 his proposal that Nepal be declared a Zone of Peace. This proposal was endorsed by more than a hundred countries. Within Nepal, however, the prime minister of the day, B.P.Koirala, was not too happy with this initiative, which might belittle the ability of a country to pursue an active foreign policy. Therefore, the royal address of the incoming democratic government in 1991 stated that it would "consolidate the bonds of friendship and mutual trust with our neighbours, India and China. Nepal will continue the policy of deepening regional cooperation and understanding between the countries of South Asia". In conformity with this policy Nepal participates in the South Asian Association for Regional Cooperation (SAARC) and will not enter into a military alliance. Nor will it allow the establishment of any foreign military base on its soil. In reciprocity, other countries supporting this ideal are neither to enter into any military alliance nor to allow the establishment of any military base on their territory which might be directed against Nepal.[2]

The Nepali House of Representatives had a limited number of committees, dealing with Finance, Foreign Affairs and Human rights (also dealing with commerce, supply, tourism and civil aviation), State Affairs (looking after the Council of Ministers, defence, home affairs, general administration, abuse of authority, and the Public Service Commission; it submits an annual report on the efficiency of the administrative machinery of the government), and Natural Resources and Means.

The National Assembly of Nepal is a derivative of the British House of Lords and considered a 'House of Elders', with a minimum age of 35 years. It had 60 members, 10 appointed by the King, 35 elected by the House of Representatives and 15 from the Development regions. Every two years a third of the membership would be up for election. Given the small size there was no formal requirement for dividing the Assembly into committees. All business could be conducted in plenary, but nevertheless in 1991 a provision was included for committees on remote areas and on the important subject of delegated legislation[3].

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[2] Ibidem, p.223-4. Within this policy a protest later was lodged against Indian nuclear testing.

[3] *Ibidem*, p. 377-8.

The first Constitution of the *People's Republic of China* was promulgated in 1954. After two intervening versions enacted in 1975 and 1978, the current Constitution was promulgated in 1982. There were significant differences between each of these versions, and the 1982 Constitution has subsequently been amended several times. In addition, changing Constitutional conventions have led to significant changes in the structure of Chinese government in the absence of changes in the text of the Constitution.[4]

The 1982 document reflects Deng Xiaoping's determination to lay a lasting institutional foundation for domestic stability and modernization. The new Constitution provided a legal basis for the broad changes in China's social and economic institutions and significantly revises government structure. Much of it was modeled after the 1936 Constitution of the Soviet Union but there are some significant differences. For example, while the Soviet constitution contained an explicit right of secession, the Chinese constitution explicitly forbids secession. While the Soviet constitution formally created a federal system, the Chinese constitution formally creates a unitary multi-national state.

The 1982 State Constitution is a lengthy, hybrid document with 138 articles. Large sections were adapted directly from the 1978 constitution, but many of its changes went back to the 1954 constitution. Specifically, the new Constitution de-emphasizes class struggle and places top priority on development and on incorporating the contributions and interests of non-party groups that can play a central role in modernization.

Article 1 of the State Constitution describes China as "a socialist state under the people's democratic dictatorship" meaning that the system is based on an alliance of the working classes - in communist terminology, the workers and peasants - and is led by the Communist Party, the vanguard of the working class. Elsewhere, the Constitution provides for a renewed and vital role for the groups that make up that basic alliance—the CPPCC, democratic parties, and mass organizations. The 1982 Constitution expunged almost all of the rhetoric associated with the Cultural Revolution incorporated in the

[4] The following description of the constitutional developments in the PRC is taken from Wikepedia.

1978 version. In fact, the Constitution omitted all references to the Cultural Revolution and restated Mao Zedong's contributions in accordance with a major historical reassessment produced in June 1981 at the Sixth Plenum of the Eleventh Central Committee, the "Resolution on Some Historical Issues of the Party since the Founding of the People's Republic."

There also is emphasis throughout the 1982 State Constitution on socialist law as a regulator of political behavior. Unlike the Constitution of the Soviet Union, the text of the Constitution itself doesn't explicitly mention the Communist Party of China and there is an explicit statement in Article 5 that states that the Constitution and law are supreme over all organizations and individuals. Thus, the rights and obligations of citizens are set out in detail far exceeding that of the 1978 document. Probably because of the excesses that filled the years of the Cultural Revolution, the 1982 Constitution pays even greater attention to clarifying citizens' "fundamental rights and duties" than the 1954 constitution did, like the right to vote and to run for election begins at the age of eighteen except for those disenfranchised by law. The Constitution also guarantees the freedom of religious worship as well as the "freedom not to believe in any religion" and affirms that "religious bodies and religious affairs are not subject to any foreign domination."

Article 35 of the 1982 State Constitution proclaims that "citizens of the People's Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession, and of demonstration." In the 1978 constitution, these rights were guaranteed, but so were the right to strike and the "four big rights," often called the "four bigs": to speak out freely, air views fully, hold great debates, and write big-character posters. In February 1980, following the Democracy Wall period, the four "bigs" were abolished in response to a party decision ratified by the National People's Congress (NPC). The right to strike was also dropped from the 1982 Constitution. The widespread expression of the four big rights during the student protests of late 1986 elicited the regime's strong censure. The official response cited Article 53 of the 1982 Constitution, which states that citizens must abide by the law and observe labour discipline and public order. Besides being illegal, practicing the four big rights offered the possibility of straying into criticism of the Communist Party of China, which was in fact what appeared

in student wall posters. In a new era that strove for political stability and economic development, party leaders considered the four big rights politically destabilizing. Except for the officially recognized six democratic parties, Chinese citizens are prohibited from forming parties.

Among the political rights granted by the constitution, all Chinese citizens have rights to elect and be elected. However since direct election is confined to the village level, the electoral rights of the people are questioned by many critics. Other scholars argue that this is a form of the system of an 'electoral college'. According to the later promulgated election law, rural residents have only 1/4 of the voting power of townsmen. As Chinese citizens are categorized into rural resident and town resident, and the constitution has no stipulation of freedom of transference, those rural residents are restricted by the Hukou (registered permanent residence) and have less political, economic and educational rights. This problem has largely been addressed with various and ongoing reforms of Hukou in 2007.

The 1982 State Constitution is also more specific about the responsibilities and functions of offices and organs in the state structure. There are clear admonitions against familiar Chinese practices that the reformers have labeled abuses, such as concentrating power in the hands of a few leaders and permitting lifelong tenure in leadership positions. On the other hand, the constitution strongly oppose the western system of separation of powers by executive, legislature and judicial. It stipulates the NPC as the highest organ of state authority and power, under which the State Council, the Supreme People's Court, and the Supreme People's Procuratorate shall be elected and remain responsible.

In addition, the 1982 Constitution provides an extensive legal framework for liberalizing the economic policies of the 1980s. It allows the collective economic sector not owned by the state a broader role and provides for limited private economic activity. Members of the expanded rural collectives have the right "to farm private plots, engage in household sideline production, and raise privately owned livestock." The primary emphasis is given to expanding the national economy, which is to be accomplished by balancing centralized economic planning with supplementary regulation by the market.

Another key difference between the 1978 and 1982 state constitutions is the latter's approach to outside help for the modernization program. Whereas the 1978 constitution stressed "self-reliance" in modernization efforts, the 1982 document provides the constitutional basis for the considerable body of laws passed by the NPC in subsequent years permitting and encouraging extensive foreign participation in all aspects of the economy. In addition, the 1982 document reflects the more flexible and less ideological orientation of foreign policy since 1978. Such phrases as "proletarian internationalism" and "social imperialism" have been dropped.

The PRC Constitution was amended in 1988 and in 1993 and again on March 14, 2004when it included guarantees regarding private property ("legally obtained private property of the citizens shall not be violated,") and human rights ("the State respects and protects human rights.") This was argued by the government to be progress for Chinese democracy and a sign from the CCP that they recognized the need for change, because the booming Chinese economy had created a new class of rich and middle class, which wanted protection of their own property. Some critics observed, however, that there was no clear indication that the changes were leading to increased protection for Chinese citizens in terms of human rights or property rights. Chinese people continued to be arrested for trying to challenge government decisions (whether they are legal or not), even when using the law itself. The censure of the media was still in place, as can be seen by the closure of out-spoken publications, or re-staffing to remove editors and journalists who have annoyed officials.

The Constitution stipulates that the National People's Congress and its Standing Committee have the power to review whether laws or activities violate the constitution, but there is no special institutional arrangement for the enforcement of the constitution. Under the legal system of the People's Republic of China, courts do not have the general power of judicial review and cannot invalidate a statute on the grounds that it violates the constitution. Nonetheless, since 2002, there has been a special committee of the Standing Committee of the National People's Congress (NPCSC) which has reviewed laws and regulations for constitutionality. Although this committee has not yet explicitly ruled that a law or regulation is unconstitutional, in one case, after the subsequent media outcry over the death of Sun Zhigang, the State

Council was forced to rescind regulations allowing police to detain persons without residency permits after the NPCSC made it clear that it would rule such regulations to be unconstitutional if they were not withdrawn.

Civilian Control of the Military

In a democracy one of its essential characteristics is the primacy of civilian control over the military. Great Britain's Bill of Rights of 1689 already stipulated that raising or keeping a standing army in peacetime would be unlawful unless it is done with the consent of Parliament. Similarly Virginia's bill of Rights of 1776 stipulated that "…in all cases the military should be under strict subordination to and governed by the civil power". The implementation of this principle will be partly in the constitution itself, when the competences of the institutions of the state are defined, and partly in a Defence Act which provides the practical means of constitutional control and should be read in conjunction with the Constitution. The South African Defence Act of 1957 is an example of such elaboration and is outlined below:[5]

- Whilst executive command of the military will be vested in the officers of the National Defence Force, the chief executive officer will be appointed by the State President; and other subordinate military commanders will be appointed by the Minister responsible for defence.
- An officer is an individual commissioned as such by the State President or the Minister and holding an officer's appointment.
- The State President may confer and cancel permanent commissions whilst the Minister of Defence has like competence with regard to temporary commissions. As a general rule, the audi alteram partem (hear the other side) rule is statutorily required to be met in respect of cancellations.

[5] Commodore Dunstan Smart, The revision of South African Defence Legislation, African defence Review, No. 16, 1994

- Section 85 of the Defence Act empowers the Minister to dismiss defence force members. He is, however, obliged to do so should the State President so direct.
- Both the new Constitution and the Defence Act, 1957, empower the State President to employ the defence force on service. An innovation, however, is that wherever the defence force is employed for service in defence of the Republic, or in compliance with international obligations, or in the upholding of domestic law and order, Parliament will be empowered to terminate that service.
- The entire structure for the enforcement of discipline is - and will remain - the empowerment (by means of the State President's warrant) of the Chief of the National Defence Force to convene general courts martial and to further empower subordinate commanders to exercise like or lesser competences. The withdrawal of those powers would deprive commanders of lawful means of maintaining discipline.
- The Superior Courts of the Republic retain their usual powers to prohibit illegal action, to direct lawful conduct and to review decisions, as well as balance the interests of individuals and the military.
- The military courts have no jurisdiction to try persons for the offences of murder, treason, culpable homicide or rape committed within the Republic. All unnatural deaths which actually or are deemed to have occurred within the Republic must receive the scrutiny of the civil courts in terms of the Inquests Act.
- Whilst the employment of the military will be part of the immediate tasking of the Chief of the National Defence Force by the State President or, at times, the Minister on the latter's behalf, the role of the Defence Secretariat as a civilian body has constitutional significance. It will function primarily to ensure that the military budget is spent and accounted for in accordance with the purposes for which it was granted by Parliament. The money thus administered will determine the number of men, as well as the suitability and availability of the means at the disposal of the defence force.

The Level of Regular Legislation

In the preceding section we have seen that in the field of defence and security there is a close connection between provisions of the Constitution and regular legislation, often contained in a Defence Act as, for example, in South Africa, Australia and Singapore, but complimented by specific legislation and Executive Orders. Countries maintaining less modern legislation often have a series of separate Acts which then should be read together.

Just like a Constitution should only cover the essentials, regular legislation also should avoid becoming so unwieldy that only lawyers will be able to comprehend its implications and the general public looses interest. Laws should be clear and concise. Some procedural details may be left to executive orders[6] , but Parliament should be keen on following the process from legislation to implementation. Otherwise there is a risk of creeping abuse and unintended consequences. Most parliamentarians are so busy conceiving new laws that they neglect the follow-up and implementation of what has been printed in the statute books. Some authoritarian regimes of the past made wonderful laws, which were never implemented or applied. Moreover, in the new democracies there has been a tendency to write laws to cover all aspects of government policy and prescribing every detail, while experience shows that circumstances will always differ from the assumptions of the lawmakers. Therefore, legislation should focus on objectives, criteria and conditions of application. And, in addition, Parliament should have the authority to scrutinise policy. If it does not have that competence, there inevitably be a lack of trust in the government and parliamentarians will have a tendency to prescribe everything in a law.

In the field of defence and security a number of subjects should be regulated, following up the distribution of competences and tasks as laid out in the Constitution. These could be grouped in provisions dealing with

a) emergency powers
b) the legal position and conditions of service of defence and police personnel, distinguishing between volunteers, conscripts and reserve

[6] Different terms apply: Order in Council, Government Order or Decree, Rules.

personnel and including the framework of their remuneration during active service and entitlements to a pension

c) the procedure for establishing a defence budget and accountability for expenditure. This should follow as much as possible the provisions of the general Accountability Act applying to all government departments
d) human rights issues and the observance of the humanitarian law Conventions concluded in Geneva
e) a military penal code enumerating sanctions on offences and violation of disciplinary regulations
f) a complaint procedure leading up to an Inspector General or Ombudsman
g) the despatch of forces abroad under the auspices of the United Nations or other bilateral and multilateral arrangements. How international agreements and treaties will be concluded and ratified.

The South African Defence Act 42 of 2002 which entered into force on 23 May 2003 could serve as a model for a modern defence act. It contains the following chapters:

1. Introductory provisions
2. Department of Defence, subdivided in:
   - Composition of the Department
   - Establishment of Defence Secretariat
   - Functions of Secretary of Defence
   - Delegation of powers and assignment of duties by Secretary of Defence
   - Departmental investigations by the Secretary of Defence
   - Composition of the National Defence Force, services and structural components
   - Chief of Defence Force
   - Delegation of powers by Chief of Defence Force
   - Establishment of auxiliary service and conditions of service.
3. Employment and use of the Defence Force, including employment in cooperation with the Police Service, and powers and duties of members while being employed
4. Law enforcement powers of Defence Force at sea

5. Military Police, appointment and functions
6. Defence Intelligence, including definitions, cooperation with other intelligence services, counter-intelligence, determination of security classification of members and employees, Review Board, and competence of the Inspector-General to monitor the Intelligence Division
7. Council of Defence and other Councils Defence Staff Council and Reserve Force Council
8. Limitations on rights of members of Defence Force
9. Employment in Defence Force, including application, Regular and Reserve Force, commissioned officers, pay and entitlements, protection on active service, compensation in case of injury or disability, obligation to serve in time of war or state of emergency, termination of service, legal representation, procedures for redress of grievances, and religious observances
10. Training, including discipline and designation of areas for training
11. Exemptions from, and deferment of, training and service
12. Ceremonial decorations
13. General administration and support
14. State of National Defence (i.e. state of siege) and mobilisation
15. Cooperation with other forces
16. Board of inquiry
17. Offences and penalties
18. General, repeal and commencement of the law.

Emergency Powers

The constitution should attribute the competence to declare war and state of siege, but its implications may be stated in regular laws. In principle, the military should not be involved in civilian law enforcement, which should be left to the police. An excessive role of the armed forces could threaten the primacy of politics and slacken civilian control of the armed forces. It also could lead to a politicisation of the military. Moreover, the army usually is not trained for the police function, although its participation in peace support operation abroad often resembles what the police are doing at home. Yet, the internal security might deteriorate to the extent that the

assistance of the army becomes necessary to control the situation. Then it is of paramount importance that the constitution and the laws determine precisely how this involvement will be regulated and how the relationship between the civilian and military authorities should be.

Legislation should clarify under which circumstances the military might be involved in civilian law enforcement; what the nature, limits and duration of their involvement will be; which type of military units might participate; and who will sign the decree to declare a state of siege. Warrants must be issued by an authorised institution before the military will be allowed to search houses, arrest people or to open fire against mobs or insurgents.

Singapore has an elaborate Armed Forces Act which includes far-reaching articles on emergency powers, which the President may invoke "whenever he is of the opinion that it is necessary to do so for securing the public safety or the defence of Singapore". If he does so "it shall be lawful for any serviceman acting on the authority of the Armed Forces Council:

a) to enter, inspect, occupy, take possession of, evacuate, use, transfer, confiscate, repair or destroy any private or public property;
b) to order any person to do any work or render any service"

Yet, a footnote in the Act states that these powers currently are not applied.

The Armed Forces Council of Singapore consists of the Minister of Defence and any other minister assigned to assist him, the Permanent Secretary, the Chief of Defence Force and the Chiefs of Army, Air-force and Navy, and not more than 4 other members as the President may appoint if he concurs with the advice of the Prime Minister. No member will be revoked unless the President concurs with the advice of the Prime Minister.

Conditions of Service and Personnel Policy

Any army will have to determine some basic points of departure: 1) how many soldiers do we need; 2) what tasks do we want them to perform; and 3) how should we train and motivate them. On that basis personnel will be recruited, trained and allocated to the units. As defence is a matter of the long

haul the answers to these questions should also have a long-term validity. It is impossible to change the composition of the army and its equipment overnight. Yet, there is a certain contradiction between the requirement of continuity and the growing need of flexibility and mobility to cope with changing circumstances. For that reason the military establishment usually is a good example of "permanent education" which constantly brings its personnel up to date with new developments.

Defence is a relatively closed system, where its personnel follow a prescribed career- pattern from the lower ranks up and lateral intake is rare or non-existent. People can apply for a career as non-commissioned officer (with the possibility for the highly qualified to end their serve with the rank of officer) and as an officer. Soldiers are taken in with a contract for a limited period of years (say 6 years) and become eligible for non-commissioned officer training if they perform well. Some countries, like the UK, follow a system of promotion with the principle "Up or Out", which means that the contract of an officer will be terminated when he has not been promoted to the next rank within a certain period of time. It sounds rather harsh, but in practice leaves the individual sufficient time to look for other employment. Below the rank of colonel, appointments usually are a matter of choice and not subject to any promotion schedule, except for a possible provision that such officer needs a certain length of service in one rank before being promoted to the next level.

In such a closed system it is very important to a reliable prospect of a career pattern which is based on merit and not subject to manipulation. Promotions should pass through Board which acts without political influence. Only the most senior positions need the approval of the political authorities, usually the consent of the Council of Ministers after a proposal by the Minister of Defence.

The attribution of functions is determined top-down and people are grouped into categories of units (infantry, cavalry, communications etc.) at least during the earlier part of their career. The nature of their duties requires different provisions in comparison with civil servants. The risks they incur in operations put a high priority on medical services, indemnity for death and wounds, and benefits for veterans. In return the military have to accept the

rigidities of discipline, which limits their freedom of action and in some cases even their fundamental rights as a citizen. This will be elaborated further in the section on human rights. All these aspects need to be regulated, either in formal laws or in delegated legislation.

Personnel policy should establish pay scales and allowances and contain them in decrees or regulations. It should also include who is entitled to special care and benefits as a veteran, in addition to normal retirement and pension arrangements. Should the category of veterans be restricted to those military who have participated in actual operations and peace support missions, or should all military personnel qualify after retirement? In the past when many soldiers never engaged in actual defence this was a more serious problem than today when virtually all military see service in peace operations. The government would do well to organise a Veterans Day as a token of appreciation for services rendered. Equally, participation in any separate operation should be awarded with a medal to be worn on the uniform. The authority to award decorations should be established by law.

Human Rights

Military personnel should be aware of the basic rules of international law and human rights. This applies both to their own conduct and to the way they themselves should be treated. Internationally the use of force is allowed in self defence and in other cases only with a mandate of the UN Security Council. Interference in the internal affairs of another country is not allowed, but this prohibition is less absolute in cases of genocide or serious mistreatment of the population by their rulers. The Security Council has some flexibility in determining such situations a 'threat to peace and security'. Recently the UN has endorsed the concept of 'responsibility to protect', but this has not yet been made operational. On the other hand, the International Criminal Court has started work in The Hague and will deal with cases of genocide. In these cases neither a state nor its rulers or commanding officers no longer can hide behind the screen of national sovereignty.

In operations the military will have to observe the Geneva Conventions, which deal with the proportionality of the use of force, the avoidance of

casualties among the civilian population, the treatment of prisoners, and the conduct in occupied territory. These constraints are embodied in 'rules of engagement' which vary according to the situation and the mandate. By definition they are a compromise between the military need for effectiveness and the legal and political limitation on freedom of action in order to limit collateral damage and to avoid escalation of the conflict.

Conversely, the rights of the military are curtailed in varying degrees. In some democratic countries they are not allowed to become members of political parties. Generally they are not supposed to demonstrate in uniform.

Increasingly we see a tendency to allow military personnel to organise themselves in service organisations, a bit similar to trade unions in civilian society but more focused on practical arrangements than on wage bargaining. In the Netherlands these exist already for a hundred years and have worked well as a channel of communications between the soldiers and the personnel department of the ministry of defence. They do not meddle in operational matters. In some countries with a long military tradition such 'unionisation' still is anathema to the commanders used to hierarchical authority, but on the whole it seems to enhance motivation and trust among the soldiers.

A Conscript Army

Conscript armies have a double advantage. They provide a large number of reserve personnel which can be called up in case of need, and they play a sociological role in teaching discipline and bringing together young men of different societal background and ethnic and region origin. A disadvantage is the short time they actually serve, which is not enough to teach the new technologies involved in modern operations. In addition, conscription introduces an unfair element if not all eligible men are called up. In any case, there is a great practical difference in organising the armed forces. A conscript army becomes a massive training establishment which every few months churns out large numbers of recruits. A volunteer force trains professional soldiers better, but also keeps them for many years and profits more from their skills.

A country with a conscript army needs to develop a legal framework in which the position of the individual to be called up is carefully defined. For him military service means a serious limitation of his freedom, which will prevent him temporarily from pursuing a career, and which may result in death or bodily harm. Questions of pay will have to be clear as well as compensation for disability and medical care, also after his release. It is not necessary to include everything in a Conscription Act and details could be regulated in delegated legislation.

The Netherlands Conscription Act, which currently is not applied because of the transition to an all-volunteer army, but kept in reserve, distinguishes a sequence of events. First, men of 18 years of age will be called up for a physical examination to determine whether they are fit for military service. If so, they receive a call-up order for a given date at a particular military installation. Then they may apply for a deferment in order to complete their college studies or for an exemption on account of conscientious objections. In the latter case they may be called up for alternative services. The Act also stipulates the length of service which may vary if the conscript is inducted for officer or non-commissioned officer training. After his active service he will be a member of the reserve forces for a determined period, normally 15 years, during which he will be called up for a number of repeater training programmes. During this period he will remain a member of an organised battalion which continues to train together. Rates of pay are also determined.

The law on volunteer-soldiers demands that their position is defined by delegated legislation, which is contained in general rules and a decree to establish pay-scales. A separate Act deals with payments to former military personnel and medical care for injuries incurred while on active duty.

Penal Law and Disciplinary Sanctions

The military are subject to strict rules of conduct. Parts of them are subject to penal sanctions defined in the Military Penal Code, others to disciplinary measures defined in the law on military discipline. The Military Penal Code should describe the penal system; list the military offences, which are of a

criminal character like desertion, and the misdemeanours, which are of a less serious nature. It is complementary to the common civil code which applies to every citizen. But contrary to the civil code military law follows the flag and is applicable wherever the offender finds himself.

In the Netherlands a fundamental revision of the military offences limited them to acts which affected adversely the primary tasks of the armed forces. This applies to acts which directly and immediately affect adversely the readiness to actually execute an operation or exercise of any part of the armed forces. Military personnel stationed abroad are also punishable (by their superiors or Netherlands courts) for misdemeanours committed against the laws of the host country. The rationale for this extension is the duty of this personnel to respect the laws of the host country.

The conditions for the administrations of justice are regulated in the Law on Military Penal Procedure, which since 1991 constituted a departure from the old principle that the military themselves were entitled to determine whether committed acts should be punished as offences or as disciplinary violations. Since then offences are prosecuted by the civilian prosecutor and tried by the chamber of a regular civilian court which includes a military officer as one of the three judges. Appeal is possible as in civilian cases.

This is not universal international practice, but there is a tendency to limit the authority of the commanding officer in meting out punishment and to restrict his measures to violations of discipline only, although some countries still allow him to punish offences or to refer them to a Court Martial. In the Netherlands he is only authorised to give a reprimand, to impose limited fines, to order extra duty and to curtail the liberty of the culprit by restricting him to the barracks. The offender has the right to appeal to the next higher commander and subsequently to the chamber of the court dealing with military matters.

Ombudsman and Inspector General

A number of countries have the institution of Ombudsman, who investigates personal complaints of citizens against actions of the government or other public bodies. Some even have a special Ombudsman for the military. Others

attribute this function to the Inspector General for the Armed Forces, which has the disadvantage that he might be perceived as beholden to the military hierarchy. Usually senior general officers at the end of their career are chosen for this post which requires considerable social skills to ensure that each complaint is treated on its merits. A more serious objection is the wider task of the Inspector General, of which the complaint procedure only forms a small part. His primary duty is to report on the overall situation in the armed forces concerning operational readiness, training and organisation, the morale of the personnel and their working conditions. In addition, he is able to conduct inquiries (often at the request of the minister of defence, but not exclusively so), and in his Ombudsman function to mediate in cases of individual grievances.

The Inspector General should have immediate access to the Minister of Defence and be able to render advice on his own initiative, also without a ministerial request. He should have free access to all military installations, to all documents and be authorised to summon and hear defence personnel. The value of this institution lies in his ability to obtain a comprehensive view through regular visits to the units, to compare their levels of training and to acquaint himself with problems which might not have received sufficient attention through the line of command. His annual report should be submitted to Parliament.

Defence Budget

There should be a correlation between the tasks given to the armed forces and the financial means put at their disposal. The importance attached to defence has to be assessed in relation to other priorities of the government. That may cause heated debates in the Council of Ministers, especially when the security situation is stable and defence is regarded more as an insurance premium than as an instrument which has to be deployed immediately. Most countries settle for a compromise which sets a political aim of devoting a certain percentage of the Gross National Product to defence during the current legislature. In NATO this aim is 2% of the GNP, but many members fall short of this objective. Even more important for the performance of the armed forces is the percentage of the budget devoted to investment, for

this will determine their future operational capabilities. Most of the defence budget is taken up by the cost of personnel, but without equipment little can be done. Defence is a matter of the long haul. Equipment will have to last for many years and should be capable of "mid-life modernization" to adapt it to new technologies and to extend the period of its use. Multi-annual planning is necessary in order to determine cash-flows. Very seldom an important acquisition will have to be financed in a single year. Very often delays occur, so reserve projects will have to be ready to be advanced when financial means become available unexpectedly and a reshuffle is necessary.

All this will have to be squeezed into the budgetary process which is coordinated by the Ministry of Finance and terminates in a Budget Law. There should be either one law for the whole government or a set of laws for the different government departments. For ministries with large investment projects, like defence and roads and communications, the system of annual budgeting poses serious problems, because the commitment of money is for one year only but the contracts run over many years. The limitation to one year makes sense in terms of democratic accountability and the need for flexibility in coping with unexpected circumstances, for otherwise the government could freeze expenditure for many years to come.

Defence budgets should provide sufficient detail to show the objectives and concrete plans of the ministry. The degree of detail will depend on the general practice of presenting the budget. Some countries restrict budgets to lump sums, or only a few items of expenditure such as personnel, running costs and equipment. From the point of view of a democratic parliament, that is not acceptable. Most countries do better. Germany and the US have a line-by-line budget, which is scrutinised in lengthy meetings and hearings of the parliamentary commission for defence. In any case, Parliament should always ask for details about the planned and committed expenditures for the coming years, even if they are not yet part of the Budget Law. This is also necessary to be able to determine whether there is sufficient financial room to enter into new commitments. Even countries like Germany and Romania ran into difficulties when financial commitments for defence were outrunning expected means available. Moreover, investments in equipment always are accompanied with other expenditure in the areas of personnel and running costs and often also infrastructure. Another important planning

factor is the impact of inflation on budgetary planning, for it could greatly diminish the buying power of the money allocated. The explanatory note to the Budget Law should provide information on these planning assumptions. In several countries the government departments with large investment programs, like defence and infrastructure, get a (partial) compensation for inflation, because otherwise the real value of the money allocated to longer term procurement would diminish.

Accountability

Defence costs money. Money from the taxpayers who do not see the immediate value of this expenditure and have to be convinced that the money is well-spent. Most citizens accept the need of the State to be able to defend its territorial integrity and political independence, as long as there is a balance with other expenditures in the national budget. All government departments have to account for their spending, but the need for the defence department is even greater. It is a large employer who spends money in many activities to feed and lodge the armed forces, enters into agreements with suppliers of equipment and contractors of all specialisations. This requires careful scrutiny, both inside the Defence Ministry and from the outside by the national Audit Chamber.

Full accountability is not easy to achieve. There always is a tendency among the military to insist on secrecy, even if there is only limited need for it. In a democracy transparency is of the essence and defence should not be an exception. The most sensitive area is that of procurement, because even professional judgement can be swayed by selective information concerning weapon characteristics and operational requirements. Part of this problem can be solved by informing parliament of the various steps taken in a process of acquisition: first the requirement, then the various options of meeting it, then the contract negotiations with the suppliers and finally a reasoned choice of the best deal. This will probably not be included in a formal law, but be the subject of a convention between the Ministry of Defence and the Parliament. Ideally, a contract should not be concluded before it has received the green light from Parliament or its Defence Committee.

What should find a basis in law is the authority of the Audit Chamber to have access to all government departments and to control their books. The slogan "reveal, explain and justify" should apply to the relationship between government and Parliament, but also to the relations between the government departments and the Audit Chamber. That will be facilitated by a line-by-line budget which avoids lump sums for a bunch of expenditures and keeps any secret items to a minimum. Within the Ministry it requires an independent office which scrutinises large contracts in parallel with, but separate from, the procurement offices.

The Despatch of Forces Abroad

In principle, voluntary military personnel and conscripts are recruited for the defence of their homeland. Their despatch on missions abroad will require special provisions, certainly for the conscripts. Voluntary personnel may have clauses in their contract or conditions of service which allow the government to send them abroad. Alternatively, the units made available for peace support operations, often pursuant to resolutions by the UN Security Council, could be made up of volunteers. Special arrangements will have to be made for the working conditions of these forces, including special allowances paid either by their own country or by the UN Peacekeeping Office. These arrangements include the conclusion of a Status of Forces Agreement with the host country, regulating rights and duties of the personnel serving there, including judicial arrangements in case of offences and misdemeanours.

In failed states, where the peacekeeping force takes on the character of an occupation force, a reference to the 4th Geneva Convention of 1947 will be particularly relevant. In 1990 the UN developed a standard model for a Status of Forces Agreement.

Such despatch is a political act, which incurs responsibilities on the sending state and requires careful consideration and preparation. For that reason parliaments have become engaged increasingly in the decision and many countries have agreed to consult them before a final decision is taken. Factors to be taken into account vary according to the particular circumstances, but should include:

- The urgency of the situation
- The risks taken and the chances of success
- The duration of the operation
- The estimated costs
- The participation of other countries and the possibility of multilateral arrangements for logistical, medical and other support
- The need for the inclusion of particular constraints or 'caveats' on the operational use of the unit by the international force commander.

Such consultations do not result in formal legislation and usually find their basis in a parliamentary convention, sometimes embodied in a motion or rules of procedure. It would be useful, however, to develop a procedural model for giving consent, which could be used immediately when the need arises.

Delegated Legislation

The lawmaking process would be incomplete without proper scrutiny of subordinate legislation, such as rules and bylaws, decrees, orders and notices issued in exercise of the powers delegated by Parliament. Such scrutiny should establish whether these acts are within the limits of delegated authority and what steps have been taken by the government to carry out the assurances given in Parliament by members of the Council of Ministers. Examples are given below.

The British Statutory Instruments Act of 1946 provides a framework which ensures a common approach to the promulgation of delegated legislation. It lays down the means by which an instrument may come into effect, but the method adopted will depend on what is stipulated in particular enabling Act.

Firstly, the parent Act may provide that the Instrument be laid before parliament but that no parliamentary action is needed if nobody wants to put it on the agenda.

Secondly, the parent Act may provide that the Instrument is subject to the 'Negative Resolution Procedure', which means that it will take immediate

effect if there is no successful move in Parliament within 40 days to annul the instrument. This is done by a motion called "prayer" for annulment.

Thirdly, the enabling Act may stipulate that the Instrument will be laid before Parliament in draft form and will come into effect only if a prayer for annulment is not moved successfully.

Fourthly, an 'Affirmative Resolution Procedure', which requires formal approval by Parliament, either of the final text or the draft.[7]

In Nepal the Committee on Delegated Legislation and Governmental Assurances reports to the National Assembly and covers the following aspects in relation to each set of Rules:

- Whether it is in accordance with the general objectives of the Constitution or the Act pursuant to which it is made;
- whether it contains matters which should properly be included in the Act itself;
- whether it contains matters relating to the imposition or collection of any tax;
- whether it directly or indirectly bars the jurisdiction of the courts;
- whether it gives retrospective effect to any of the provisions in respect of which the Constitution or the Act does not expressly give any such powers;
- whether it involves expenditure from the Consolidated Fund or other government fund;
- whether it is confined to the limits of powers conferred to the Commission or the Act;
- whether any unjustifiable delay has been made in the publication and in laying before parliament any such rules; and
- whether any explanation is required for elucidation of the form or support of such rules.[8]

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[7] Taken from H. Barnett, *Constitutional and Administrative Law*, 1993, p. 380, quoted by Dhungel a.o., *op.cit.*, p. 380.
[8] Dhungel a.o., *Commentary, op.cit.*, p. 379.

Conclusion

At the beginning of this article it was remarked that defence had relatively little legislation. At the end we come to the conclusion that nevertheless there are many aspects which need to find their basis in law. Several are so fundamental that they need a place in the Constitution, but some of the current constitutions in the world contain an excess of detail. The Constitution should determine what subjects have to be further developed in ordinary legislation, which in turn may have recourse to delegated legislation which is easier to adapt to changing circumstances.

The role of the military is changing. As remarked earlier, what the military are doing abroad increasingly resembles what the police should be doing at home. Only the additional need for protection and the possible need for the use of hard power stabilising chaotic situations requires the presence of armed forces. But these forces should not only possess military skills but also be trained in cooperation with civilian authorities. Security sector reform has become a major objective of peace support operations and requires a new mindset of the military. The most interesting example of this switch is the US Quadrennial Defense Review 2010 of the US, which departs from the traditional focus on combat and takes a wider view of crisis management. It enhances the combination of hard – military – power and soft power which uses other instruments of exerting influence. Obviously this has a great impact on the composition and training of the military, which will see its way in doctrine and service manuals.

Equally, the link between internal and external security has become more pronounced, particularly by the emergence of international terrorism, but also by the inevitable advent of globalisation. Among the new threats our countries face, organised crime, drugs trade, trafficking in human beings and illegal immigration have gained in prominence. An increasing world's population will bring new pressures on public services in terms of the supply of food, water and energy, even without the prospect of climate change. Some of these developments may spill over into the domain of defence and security and our governments should be prepared to cope with them through enhanced cooperation between the civilian and military authorities. Contingency planning for calamities should be improved and establish

clearly who will decide on what in a crisis. Part of this will require formal legislation.

On the side of formal legislation much will also depend on the relationship between the government and parliament and the existence of constructive working relations. A government which practices transparency and accountability gains the trust of Parliament and reduces the parliamentary tendency to regulate everything by formal legislation. Developments of parliamentary 'conventions', like a procedure for giving consent to large procurement contracts or to the despatch of forces abroad, contribute much to constructive working relations. And if the government does not follow a policy of 'reveal, explain and justify', Parliament always has recourse to motions or amendments to the budget and, if worse come to worst, to a motion of no-confidence in an individual minister or in the entire government.