

## **QUESTION OF HUMAN RIGHTS AND STATE OF EMERGENCY FROM ELECTORAL PERSPECTIVE\***

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*“Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. .... The will of the people shall be the basis of the authority of government. This "Will" shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or equivalent free voting procedures.”*

### **Article 21 Universal Declaration of Human Rights**

#### **Issues**

Every citizen has a right to take part in the government of his country and free and fair election is one of the means of participation in governance. This is one of the most important components of the Universal Declaration of Human Rights. Will the people of the Kingdom of Nepal be able to enjoy this basic human right in the coming general election? Will the security situation and Maoist movement stand in between the people and their right to choose their government? Will the emergency provisions enforced during the election time if it at all announced in the near future? Will the government use the emergency powers for the protection of the citizens right to freely choose their government or misuse the emergency power to hijack the verdict of the people? How far the Election Commission will be capable of giving free and fair election to the people of Nepal? What is the level of its achievement and accountability? Is it in a position to give a free and fair election? These are some of the questions which will be intricately intertwined in the coming election process.

#### **Preconditions of a Free and Fair Election**

Right to free and fair election is a basic human right in democratic society. When we talk of free and fair election, it has to be viewed in the context of rights and duties of following actors:

- the right of the voters,
- freedom of the candidates in the election,
- the independence and capacity of the Election Commission, and
- the commitment and the sincerity of the government.

The right of the voters	Citizens must have security of life and liberty Citizens must have freedom of opinion and expression Citizen must have freedom to organization and association Citizen must have freedom of movement Citizen must have freedom to assemble peaceably and without arms
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	Citizen must have right to information
Freedom of the election candidates	A candidate must have right to criticize the government policies and programs including sensitive issues related to Maoist insurgency, emergency and army mobilization. A candidate must have right to freely publish and propagate his programs and policies to the voters. A candidate must have right to organize peaceful rally, mass meeting and public speeches. A candidate must be free from fear of persecution by state authority for participating in election
Role and responsibility of the Election Commission	It must be independent and autonomous in decision making process. It must be equipped with necessary manpower, equipments and financial resources for conduct of election It must be neutral in its approach but strict on enforcement of code of conduct and election laws.
Role and responsibility of the government	It must provide adequate and equal security to the voters, candidates and election officers. It must not try to influence the decision of the government by any misuse of the governmental power and resources. It must ensure basic minimum rights of the citizens and candidates.

General election provides an opportunity for evaluation of the government performance. This obviously requires basic minimum human rights. Right to information, freedom to criticize the government, freedom of press, freedom to assemble peaceably, freedom of movement and lastly right to life and personal liberty are the basic minimum for the political legitimacy of a general election. In the absence of these preconditions the very legitimacy of general election might be in question.

### **Past General Elections and the Lessons Learned**

There have been three general elections in Nepal after the promulgation of the Constitution of the Kingdom of Nepal 2047 B.S.<sup>2</sup> on 9<sup>th</sup> November 1990. The first general election under the new constitution was held on May 12<sup>th</sup> 1991, the second general election on November 15<sup>th</sup> 1994 and the third general election was held in two phases, first on 3<sup>rd</sup> and second on 17<sup>th</sup> May.<sup>3</sup> The country is at the cross road and is not in a position to take a decision on the fourth general election which remains due since last two years after the dissolution of the parliament by the then Prime Minister Sher Bahadur Deuba.

#### The First General Election

The first general election was held after about six months of promulgation of the new constitution. This was the first general election based on *multi-party system, universal*

<sup>2</sup> Nepal Calendar Year (B.S. stands for Bikram Sambat, the calendar year started by the King Bikramaditya/ Nepali calendar year started 57 years ahead of Gregorian Calendar )

<sup>3</sup> There have also been two local elections all over the nation in 1992 (2049 B.S.) under Congress Government and in 1997 (2054 B.S.) under the RPP (Rashtriya Prajantantra Party) UML (United Marxist Leninist) coalition government.

*adult franchise* and *one man one vote system* after about thirty years of Partyless Panchayat Rule.<sup>4</sup> On Sunday the 12<sup>th</sup> of May, over 11 million people of Nepal went to polls to elect 205 members of House of Representatives (the lower House of the Parliament). This was the biggest democratic exercise conducted at the people's level in the History of Nepal. Mistakes at the management and field level were observed during the conduct of election as this was the first encounter of the Election Commission with multi-party election after about 32 years. These lapses however did not discourage the election process. On the whole the election was a big success. The lesson learned from this general election was that the success of the election depended much on the cooperation of the people and the parties.

There was a lot of enthusiasm at the electorate and candidate level and a national mood to make the newly established multi-party democracy successful was quite obvious. Altogether 7391 polling centers and 6330 polling sub-centers were constituted to allow over 11 million voters<sup>5</sup> to exercise their franchise of 205 members of House of Representatives out of 1345 candidates in 75 districts. In this election Nepali Congress Party was returned with absolute majority in the election and a majority government headed by Girija Prasad Koirala was formed.

#### The Second General Election

The Second General Election was held on November 15<sup>th</sup> 1994 after about three and half years of first general election, nearly 18 months before the due date. This general election was a midterm election. It was necessitated by the early dissolution of the parliament by His Majesty the King on the recommendation of the then Prime Minister Girija Prasad Koirala. Normally the general election is scheduled after every five years of its term. The situation for dissolution of parliament arose due to inner party conflicts in Nepali Congress.

Altogether 7412 polling centers were constituted to allow over 12 million voters<sup>6</sup> to choose 205 members of House of Representatives out of 1442 candidates in 75 districts. The election was successfully held with minor disturbances here and there. On the whole election was peaceful and the management had definitely improved. Much of the lapses seen in the general election in 1991 had been addressed. There were however plenty of issues to be addressed to make the election more effective.

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<sup>4</sup> Before that the general election based on multi-party system had been held for the first time in Nepal in 1959 (2015 B.S.) when the voting strength was just over four million. The multi-party democracy however could not last long and it was soon replaced by Partyless Panchayat System. Partyless Panchayat System, which continued for 30 years, imposed ban on all forms of political organizations and activities. For a long time in its life span, Partyless Panchayat System held indirect elections to constitute National Legislature and the Government. The King remained the source of all the powers and the government accountable to the King as well. It was only towards the later part of the Partyless Panchayat Rule that the direct election for National Legislature (called Rashtriya Panchayat) was held. The election then was held on personal basis and there was no competition of political parties and their programs. In 1990 the system was overthrown and a new constitution based on multi-party democracy and west minister model of governance was restored once again.

<sup>5</sup> 1,11,42,638 voters to be exact.

<sup>6</sup> 1,22,96,219 voters to be exact.

The election result however produced a hung parliament with no single party having a clear majority. The Communist Party of Nepal United Marxist Leninist (CPN UML) won the greatest number of seats but short of majority in parliament. An effort was made to form a coalition government. The coalition government could not be formed. Hence a Minority Government of the CPN UML with Manmohan Adhikari as the PM was sworn in.

### The Third General Election

The third general election was held in two phases on 3 and 17 May 1999. This election again was held before the completion of the full term of the parliament. This time the election was held after 4 years 5 months and 21 days of second general election, nearly 6 months 9 days before the due date. Before the dissolution of the parliament and announcement of the midterm poll, the country passed through a very bad phase of political instability, corruption and popular dissatisfaction over the governmental non-performance. All these developments had led to strengthening of ultra-leftist Maoist movement and their violent rebellion against the establishment.

There was a mixed performance of every successive government and the horse trading of Members of Parliament for toppling and forming a new government had become an order of the day. The accountability of the leaders towards their constituency and the country was at the lowest. By the time the third general election was called every type of constitutionally allowed government had been experimented. Majority government, coalition government and minority government had been tried. Dissident and defection politics had become major feature in national politics. There were splits in major national political parties in the power game. People's faith in elected government had never been so low in the history of multi-party democracy. Four coalition governments had been tried in a short period of three years time with dismal performance from every one of them. People's frustration was reaching its climax.

On January 15<sup>th</sup> 1999 the King dissolved the parliament and called for the general election. The dissolution of parliament was called by the coalition government led by the then Prime Minister Girija Prasad Koirala. The election was conducted by the coalition government participated by Nepali Congress, CPN UML and Nepal Sadbhawana Party. The election was therefore a result of consensus between coalition of political parties representing majority in the parliament. Soon after this the Maoist issued a call for boycott of general election. Maoist launched a campaign of intimidation of UML and NC Candidates in the Maoist hotspots culminating in the murder of UML candidate for Rukum 2 constituency.

There was a complete hopelessness of the success of this general election. Democracy days seemed numbered. People had become passive and allergic to the political parties and leaders. Even voters' turn out was expected to be extremely low. The second issue was the security. People even questioned the possibility of holding election at all. The security of candidates and voters was getting out of hand. The Election Commission finally decided to hold the general election in two phases to address the security

concerns. The first phase of the general election was held on 3 May and second phase was held on 17 May. The counting of the votes began soon after the second phase of the general election was over.

Despite of the security concerns, there was a significant increase in the number of the candidates contesting 205 seats in 1999. Altogether 2200 candidates filed nominations for election. For the first time voter identity cards were issued in all but one constituency of Kathmandu Valley. Altogether 6821 polling centers were constituted to allow over 13 million voters<sup>7</sup> to exercise their franchise of 205 members of House of Representatives out of 1605 candidates in 75 districts.

Voters in 93 constituencies across 36 districts including the Maoist affected districts went to the polls in the first phase of voting on May 3<sup>rd</sup>. The remaining voters in 112 constituencies across 39 districts voted on May 17<sup>th</sup>. The counting of votes began immediately after second phase polling closed. Although many local and international observers reported that the elections were "by and large peaceful" a number of violent incidents did occur. The government claimed the conduct of election as a victory for democracy despite of Maoist threat. The over all voter turn out was around the level of 1991 and 1994 general election and in Kathmandu valley it even exceeded 86%. In 1991 general election the voter turn out percentage was 65.15, in 1994 general election it was 62.01 and in the third general election the voter turnout was 65.79 percent. It was only in Maoist affected districts that the turn out was low and in some cases it was less than 10% of the total voters of that constituency.

The election result went in favor of Nepali Congress winning 110 seats out of 205 seats. The CPN UML emerged as the second largest party with 69 seats in parliament. The worst sufferers were CPN (ML) and RPP (Chand) the splinter parties of CPN (UML) and RPP. These parties failed to secure a single seat in the parliament. In the election the people rejected many previous legislators tainted by corruption charges. Nearly 60% of the MPs elected consisted of new candidates. On the whole the election proved that the people did not loose faith in the system despite of their bitter experiences with leaders in government and opposition.

The third general election will be remembered for two of its special characteristics. Firstly the election was held in phases for the first time. Secondly the election government consisted of a coalition from all the major national parties.

#### **Fourth General Election and Emergency**

The fourth general election was announced and called on Kartik 27<sup>th</sup>. This was necessitated once again due to inner party conflict in Nepali Congress. The parliament was dissolved by the Prime Minister Sher Bahadur Deuba when ruling party decided not to support the government proposal for extension of emergency. Nepal has already been under internal emergency for last nine months. At the present the emergency has come to an end by virtue of passage of time. Re-imposition of emergency in near future however

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<sup>7</sup> 1,35,18,839 voters to be exact.

cannot be ruled out. The legal implication of re-imposition of emergency would be reactivation and strict enforcement of Anti-terrorist Act and Suspension of civil and political right of the citizens. Can the general election be validly held while the emergency is in force? This issue came up in the recent dissolution case, *Shyam Kumar Khatri vs. Prime Minister Shree Bahadur Deuba*.<sup>8</sup> The court ruled that the constitution does not prohibit the general election during the emergency. Citing some Indian precedents, the court ruled that in India, general elections were held during the emergency in 1962, 1971 and 1977<sup>9</sup>. However the court specifically made it a point to mention that the suspension of some of the basic minimum rights for free and fair elections were lifted at that time. This has to be understood in our context to mean that the election during the emergency may be held but the government must take care to lift the suspension of some of the basic civil and political rights before and during the election under Article 115 (8)<sup>10</sup>. The rights which constitute basic minimum for free and fair election include right to life and personal liberty [Art. 12 (1)], freedom of speech and expression [Art. 12 (a)], freedom to assemble peaceably and without arms [Art. 12 (b)], freedom to move throughout the kingdom [Art. 12 (d)], press and publication right [Art 13 (1)], right to information (Art.16), and right to constitutional remedies for non suspended rights under Art. 23. Imposition of emergency *per se* does not rob the legitimacy of general election. What is needed to see is whether the basic minimum rights for free and fair election were ensured or not. Much will certainly depend on the motive and conduct of the government. It is the duty of the government to provide security to the voters for exercise of their franchise. There might even be pressure on the government to impose emergency to provide security to the voters from possible attack by Maoists.<sup>11</sup>

The contested issues in the coming general election itself might be very acts of imposition of emergency, dissolution of parliament, re-imposition of emergency, mobilization of army and handling of the peace negotiations with the Maoists. The candidates, media and the voters must have freedom to raise the issues and make a

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<sup>8</sup> Decision date: 2059 B.S. *Shrawan 21<sup>st</sup>*.

<sup>9</sup> In 1962 the general election for Lok Sabha was held when the external emergency existed due to Chinese aggression. In 1971 election was held when external emergency was clamped due to Indo Pak war. In 1977 general election was held when internal emergency was clamped due to Janata Dal movement for freedom.

<sup>10</sup> Article 19 (8)

His Majesty may, at the time of making a Proclamation or Order of a State of Emergency pursuant to clause (i), suspend sub-clause (a),(b),(d) and (e) of clause (ii) of Article 12, clause (i) of Article 13 and Articles 15, 16, 17, 22 and 23 of this Constitution for as long as the proclamation is in operation:

Provided that the right to the remedy of *Habeas Corpus* under Article 23 shall not be suspended.

Art 115 (9) In circumstances where His Majesty has suspended any Article of this Constitution pursuant to clause (8), no petition may lie, nor question be raised in any court for the enforcement of the fundamental right conferred by such Article.

<sup>11</sup> See Article 4 of the International Convention on Civil and Political Rights (ICCPR) for international standard for scope of derogation of civil and political rights during emergency.

critical evaluation. This will certainly require government to ensure certain basic minimum fundamental rights during the election time.

There is a rumor that the government is determined to hold the general election if the peace negotiation does not lead to a compromise acceptable to palace and the government. It is also in the air that the government is planning to recommend the Election Commission for five to ten phase elections. If this happens, the election might go for months. In such situation the government may even think of imposing partial emergency in phase wise and lifting suspension of basic minimum fundamental rights or even emergency in conformity with phase wise general election for each region and retaining the same for other parts.

### **Maoist Problem, Army Mobilization, Emergency and Anti-terrorist Act**

Maoist problem has loomed large in Nepal since last six to seven years. It reached its pinnacle when they dared to organize public rally in Lalitpur and Sankhu immediately followed by the seizure of Daang Valley and looting of arms from army barrack in Daang. This followed the imposition of emergency and mobilization of army. Over four thousand casualties and several confrontations mark the emergency period. Army may not have achieved its goal of disarming Maoist and bringing peace in the country, but they have certainly contained the growing threat of Maoist seize of Kathmandu valley and ultimately His Majesty's Government.

General election without active cooperation of Royal Nepal Army will be impossible. Army has participated in the previous general elections but then their role was very different from the one they would play this time. In this general election, the army may be called upon to carry out violent operations to flush out Maoists from the regions where elections would be held phase wise. The army may even be called to provide safety security to not only voters and ballot boxes but also the candidates and election officials. The active involvement of army in election will be a necessary evil for Nepal. It will be evil because they might not be in effective control of civil authority and at the same time it will be necessary because without it the election will be impossible.

Army mobilization without emergency and suspension of the fundamental rights would be difficult in the long run simply because protection of fundamental rights and military action cannot go together. Firstly, in the absence of emergency declaration, the country will be presumed to be no more in armed rebellion so as to threaten its sovereignty and integrity. Secondly, this will also mean that the leaders at the political level feel that the situation is not emergent and therefore no justification for army mobilization. Army mobilization in election with all the powers to take action would require the decision at the political level. The decision at the political level that the situation is grave enough to declare emergency and the fact that the country is in deep trouble due to terrorist activities alone would justify army mobilization. In the absence of such decision at the political level, the army may not have any option but to return back to their barracks and leave the country to its leaders alone. The contrary would be violation of law, constitution and ultimately political revolution by the use of force.

The best option however would be to bring the Maoist in to the mainstream by enabling them to participate in the general election. This however looks a distant goal at present. The citizens' right to choose their own government, as said before, is one of the basic human rights. The chances of violation of this human right by Maoist on the one hand and the government side on the other hand cannot be ruled out. Maoist may violate human right by terrorizing voters and violence against the election candidates. Likewise the government may violate the human rights of the voters by denying equal and fair security cover for the voters and access to polling booths.

### **Election Government and Fair Election<sup>12</sup>**

In the past political parties have expressed their reservations on the conduct of election by a caretaker single party or coalition government. They have raised question marks on its intensions and capacity to conduct free and fair election. These questions raise the issues of legitimacy of general election also to certain extent as there is a high possibility of general election taking place under the cover of internal emergency and army mobilization. To avoid the possibility of such allegations being made by political parties, the Prime Minister may prefer to call remaining other four parties<sup>13</sup> to join the government for the purpose of conducting general election if it is held in the near future. Formation of all party government at the time of general election by itself may not be panacea for all the problems of free and fair election but it will certainly close the door for any kind of allegations and counter allegations on conduct of general election.

### **Role and Responsibility of The Election Commission**

Free and fair election provides the basis for creation of democratic and accountable government. In order to ensure free and fair election in Nepal the constitution creates an independent Election Commission. Election Commission is constitutionally mandated to conduct, control and monitor the elections to governmental bodies. Election Commission nevertheless has to heavily depend on His Majesty's Government for all kinds of support including finance, security and manpower.

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<sup>12</sup> CPN (UML) believes that the ruling party has a tendency to misuse its power, resources, bureaucracy and security forces for its candidates' benefit. In order to stop this the constitution and laws have to be changed to establish the system of *interim election government* represented by all the major parties. It believes that the persons representing in such government must not be the candidates in the election. Nepali Congress does not share the idea of CPN (UML) on the issue of constituting *interim election government* for conduct of general election. It believes that the problem can be solved by making the Election Commission more powerful and autonomous. The role of the government should be limited to supporting the Election Commission. In Bangladesh the constitution provides for creation of election government headed by the Chief Justice as a Chief Advisor and his cabinet consisting of non-political independent persons.

<sup>13</sup> The four parties which refused to joint the Deuba Government are Nepali Congress (Girija), Nepal Majdur and Kisan Party, Sadbhawana Party (Anandi Devi) and Nepal Communist Party, United Front.

There has been no major complaint against impartiality of the Election Commission. It has been able to conduct the general elections and local elections despite of many odd situations the country is passing through. The elections held so far remain unchallenged in terms of its legitimacy and overall impartiality. Much of the complaint however centers around the role played by the ministers, government officials and security personnel deputed in election duties. Complaints also center around the lack of physical facilities in election process and lack of discipline in political party workers. The problem basically centers around the actors in the election process.

The stakeholders and actors in the election process need to be educated, trained, controlled and encouraged to be well behaved. This is the challenge which the Election Commission face today. Realizing the need, the Election Commission seems to have given emphasis on strengthening in four areas. They are as follows:

1. Preparation of manuals and information materials for voter education, training of the polling officers and the staff in election duty.
2. Extension of Election Commission field offices to slowly takeover the election responsibility of HMG staff.
3. Creation of true voter list and introduction of voter ID cards.
4. Creation of strong legal framework including code of conduct for effective control of delinquent activities in the election process.

It started from a scratch and has gone a long way in creating well developed system for free and fair election. The good beginning and the sustained effort of election commission to improve its service delivery has not been duly rewarded by the poor performance of the successive governments. Bad governance of democratically elected government has led to political turmoil and conflicts in society. It has further reduced the scope for election commission to prove its service delivery capacity.

In the representative democracy election is the means by which political parties obtain the mandate to rule. Thus it is important that the election in Nepal be secured from all those who want to hijack the verdict of the people in their favor by the use of money and muscle power. It will be certainly naïve to expect the Election Commission alone to change the whole process in to a flawless system. It requires the commitment from the government, opposition leaders and members of the civil society and ultimately by the people.

The progress has definitely been made and its impact is being felt slowly despite of odd situation created by Maoists. The voter list has been improved, ID card is being introduced (though there are lot of complications), election campaign discipline is improving, detailing of election laws has taken place, training and orientation have been conducted, manuals and information materials have been prepared and last but not least the people are much more informed and educated than it used to be. Nepal has a collection of thousands of people trained and experienced in conducting election at the national and local level. They would remain the assets for Nepalese democracy.

The process of reform is a continuing process and we certainly have a hope for future. Free and fair election is the only means to secure the right of the people to give verdict against the government, opposition and the leaders. With the expansion of road and communication network and increase in literacy and education of the voters in general, the impact of the reform programs would be felt more and more in future. As of now Nepal seem to pass through the critical phase of instability, turmoil and conflict situation. The single biggest challenge before the Election Commission remains the Maoist problem. To hold the general election without Maoist cooperation would be a daunting task. The election could be at the heavy cost of human lives if there is no peaceful agreement prior to general election.

This kind of conflict situation has been attributed to lack of accountable and transparent behavior of those who fought and won the election. This calls for even stronger support to the reform programs in Nepalese election. The ultimate solution lies in ensuring free and fair election and thereby building peoples' confidence and faith on democracy. There cannot be alternative to democracy and there cannot be democracy without free and fair election. For the last eleven years of democratic exercises many positive and negative trends have been seen in Nepal. They may be briefly summarized as follows.<sup>14</sup>

#### POSITIVE TRENDS IN ELECTION PROCESS

1. Voters have shown their disapproval of the parties harping on caste, community and regional issues. This is an indicator of increasing voter awareness and maturity.
2. The number of parties participating in the general election in 1991 was 20, 1994 was 24 and 1999 was 39. The percentage of votes polled by the new parties was negligible. This shows that the people of Nepal is voting only those parties who can make a difference in governance.
3. The total votes polled by major national parties have progressively increased. In 1991 it was 86.6 %, in 1994 it was 85.7 % and in 1999 it was 89.9 %.

#### <sup>14</sup> SOME FACTS OF GENERAL ELECTION IN NEPAL

Item	1991 General Election	1994 General Election	1999 General Election
Number of Polling Booths	8225	7412	6821
Number of voters	1,11,42,638	1,22,96,219	1,35,18,839
Number of women voters	5,271,847	6,106,180	*
Percentage of total votes cast	65.15	62.01%	65.79
Percentage of invalid votes	4.42	3.16	2.8
Percentage of votes cast by independent candidates	4.2	6.2	2.8
Number of re-poll	54	86	101
Number of candidates	1345	1442	2238
Number of women candidates	80	86	142
No. Women elected candidates	7	7	12
No of independent elected candidates	5	7	0

4. The election result seems to head towards two party system in Nepal.
5. The voting is much more on the basis of performance of the party rather than personality of the candidates.
6. The percentage of votes polled by independent candidates have fallen from 6.2 in 1994 to 2.8 in 1999. Not a single independent candidate could win the election in 1999.
7. The number of women candidates contesting the election in both general and local election is slowly increasing. Even the number of women candidates who have won the election has been slowly rising over the last eleven years. Number of women candidates in general election has been 80 for 1991, 86 for 1994 and 142 for 1998 general election. Out of them the number of women candidates who succeeded in getting elected to the parliament were 7 in 1991, 7 in 1994 and 12 in 1998 general elections.<sup>15</sup>
8. Many of the professional politicians but known to be corrupt lost the election.
9. Voter list is improved and identity cards introduced in most of the urban and tarai constituencies. Vote ID has been introduced in 105 constituencies and there are still 100 constituencies to be covered by the voter ID system.<sup>16</sup>
10. Training of polling officers has resulted in to increase in their efficiency and confidence.<sup>17</sup>
11. Enforcement of code of conduct is improving. Vulgar display of money power has gone down considerably.
12. Percentage of invalid votes have considerably gone down. It was 4.42 in 1991 general election, 3.16 in 1994 and 2.8 in 1998 general election.

### NEGATIVE TRENDS IN ELECTION PROCESS

1. The voters favor candidates who address constituency issue. Their preference for the candidates contributing in national legislation and policy debate is not seen.
2. Misuse of government officials and security staff to ensure the election of the ruling party candidates in local election is on the increase.
3. Election process is going out of security control of the Election Commission due to Maoist problem.
4. Number of polling booths is decreasing every general election
5. Use of criminal elements in election process is increasing.
6. Violence in election campaign and polling process is increasing.

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<sup>15</sup> Article 114 of the constitution requires recognized national political parties to field at least 5% of their total candidates to be women. The Local Government (Election Procedure) Act 2048 B.S. reserves one out of 4 seats in each ward at the municipal and village level election

<sup>16</sup> On a trial basis voter ID was introduced for the first time in three constituencies the year 1996-97 (2053-54 B.S.) and later it was added to 10 more constituencies as a part of five phase plan in the year 1997-98 (2054-2055 B.S.). Voter ID was introduced in 41 constituencies in the year 1998-99 (2055-2056 B.S.) as a second phase and voter ID was further extended to 51 constituencies in the year 1999-2000 (2056-57 B.S.) as a third phase. After that the voter ID plan has not been implemented due to lack of budget release from HMG. There are still 100 constituencies to be covered by voter ID program.

<sup>17</sup> Conclusion based on interview of the polling officers selected on the basis of random sampling.

7. Use of force to ensure uncontested election of a candidate in local election is on the increase.

Perhaps one of the major concern of the day is the possibility of reduction of polling centers to unusually small numbers located in district headquarters and major urban centers due to security reasons. This would mean denying access to the voters to exercise their voting right. This would also mean denial of basic human right of a citizen.

The review of the data reveals that the number of polling centers fixed for each successive general election is decreasing. In 1991 general election the total number of the polling centers was fixed at 8225 in 1994 it was 7421 and in 1999 it was fixed at 6821. The total number of polling centers fixed for first local election in 1992 was 5068 and for second local election in 1997 was 64,456.

The progressive reduction in the number of polling centers for the general election might give an impression that the access of the voters to the polling booth is becoming increasingly difficult. In the first general election the polling booths were fixed on short notice and many shortcomings were encountered in the general election. In the second general election the polling centers were revised on the basis of the experiences gained from the 1991 general election. In 1994 general election, a number of excess polling centers were merged and the number was reduced to make it optimum. In 1999 however the number of polling centers was drastically cut down to meet the challenges of Maoist security threats. A larger number of security staffs had to be deployed for the safety of candidates and polling booths and hence the number of polling booths came down sharply. In 1991 the Election Commission recruited temporary security staff to supplement the regular police force. This practice had to be abandoned due to serious complaints from all the parties regarding their conduct and lack of discipline.

Polling center must not be too far from the voters as weather condition, and difficult geographical conditions add to the problem of easy access. The long distance polling center provides an opportunity to rumormongers to spread planned misinformation of election violence to scare the voters from going to polling booth.

### **Can Article 127 be an Escape Clause**

What if the general election fails to take place in the near future as announced? Will article 127 provide an opportunity to revive the dissolved parliament and save the country from impending constitutional crisis? These were some of the questions which rocked the news in the town. Article 127 provides that "If any difficulty arises in connection with the implementation of this constitution, His Majesty may issue necessary orders to remove such difficulty and such orders shall be laid before Parliament." The meaning of this provision was explicated by Supreme Court in *Re Dasdhunga Investigation Commission*.<sup>18</sup> The court in that case opined that the provision is not meant for doing something which can otherwise be done through the exercise of legislative power of parliament. The court also made it clear that the provision was made to solve the

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<sup>18</sup> Supreme Court Judgement on Constitutional Issues, 2047-57, Vol. 1

unforeseen problem of constitutional vacuum or deadlock arising due to failure to constitute a constitutional organ or a failure to function a constitutional body. This problem however must be one that could not be addressed by any other constitutional or legal means.

The analysis of the above court ruling gives an impression as if the parliament may be revived in the event of the failure to hold general election in time. It may look possible but I find it impractical and illogical. Firstly, Article 127 in any case has to be read in conjunction with Article 35 (2). This makes the extraordinary power of the king really the power of the King in Council of ministers. Even if the parliament has to be revived, it will require the advice and consent of the council of ministers headed by Prime Minister. The power under Article 127 cannot be the personal discretionary power of the King as that would be against the principle of constitutional monarchy. The rule of constitutional monarchy require the existing cabinet to take the political responsibility for the acts carried out in the name of the King. This mandates the advice and consent of the Council of Ministers.<sup>19</sup> It looked preposterous to expect the government that recommended for dissolution to advice the King to revive the Parliament. And it was difficult to digest the point that a parliament whose identity has been constitutionally brought to an end can at all be revived. The Article 127 enables His Majesty the King to remove obstacle by creating an alternative arrangement or institution but he cannot certainly revive the institution he has formally put to burial.

The constitution has been derailed by the misinterpretation and misapplication of the Article 127. There is a *de facto* suspension of the provisions dealing with executive power and legislative power. The only way out to bring the constitutional system back to track could be no other than hold free and fair general election. A free and fair election would give constitutional legitimacy to elected government despite of the fact that the government that conducts fourth general election is unconstitutional and illegitimate. Legitimacy of the newly constituted parliament would emanate from the mandate of the people.

So in conclusion I conclude by saying that Nepal will have no option but to go for a general election however painstaking it may be if incase there is no peaceful settlement of conflict. The general election may not solve the problem of Maoist insurgency but it will certainly bring back constitution and democracy back to its track.

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<sup>19</sup> See *Radheshyam Adhikari vs. Council of Ministers, HMG*

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