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OBJECTIVES

The Law and Society Trust Fortnightly Review keeps the wider Law and Society community informed about the activities of the Trust, and about important events and legal personalities associated with the Trust. Our publication is aimed at raising public awareness on all issues concerning the legal rights of citizens, and at gaining wider recognition of law as society's instrument for peaceful change.

In this issue we focus on Anti-Discrimination Law and the 1994 General Elections in Nepal. In the first piece Dharmananda and Williams discuss some approaches to the broad question of equality of opportunity, including the use of conciliation in resolving discrimination disputes. They use as their base some of the jurisprudence and practice that has emerged in Australia. In the second article Tej Thapa analyses the recent Nepali elections. She looks at some of the factors which precipitated the elections and constitutional crisis which followed. The formation of the new government is also examined.

EQUAL OPPORTUNITY

NEPAL ELECTIONS

IN THIS ISSUE

Anti-Discrimination Legislation : Law and Practice*

V. Dharmananda and J. Williams

> ... the right to equality of opportunity is but one of the basic human rights ... the essence of equality of opportunity is that each person should have the right to develop his or her capacities to the utmost, free of restrictions arising from stereotyped assumptions which are based on the person's status and which are irrelevant to his or her actual abilities (Justice Mathews, New South Wales Supreme Court).

Anti-discrimination legislation is designed to promote equality of opportunity. The underlying philosophy of such legislation comprises an explicit acceptance that some people or groups are disadvantaged on the basis of characteristics such as sex, race or impairment, and is encapsulated in legislation such as the Canadian Human Rights Act (1985), the United Kingdom's Sex Discrimination Act (1975), and the Australian Sex Discrimination Act (1986) and Racial Discrimination Act (1975).

What I propose to do in this paper is to briefly delineate the general schema of anti-discrimination legislation. The Western Australian Equal Opportunity Act (WAEOA) (1984) is used as the legislative model, and all references to legislative provision are from this Act. Second, the characteristics of the conciliation model which has evolved during the past decade are discussed. Then the shortcomings and merits of both the Act and the processes of investigation and conciliation are considered. Finally, the impact of recent decisions of the Tribunal in achieving the statutory objects of the Act are analysed.

SCHEMA OF ANTI-DISCRIMINATION LEGISLATION

Discrimination, both direct and indirect, is only unlawful when it occurs on a ground and in an area of public life specified by the Act.

The grounds enumerated in anti-discrimination legislation are immutable such as sex, race or age; or voluntary such as political and religious conviction; and those which are environmentally determined such as family responsibilities or nationality.

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* Paper presented at a seminar held at the International Centre for Ethnic Studies on 3 January 1995

The arena in which such legislation operates can be characterised as the public sphere which comprises employment, education, the provision of goods, services and facilities, accommodation and access to places and vehicles.

Under the Acts a complaint of unlawful discrimination must encompass both a ground, such as sex or race, and an area such as employment or education. The following case study is an example of discrimination on the ground of sexuality in the area of provision of services which meets the requirements of the South Australia Act.

> *Julie was referred by her doctor to a specialist for medical examination. During the course of this procedure, the specialist asked her a range of questions which seemed unrelated to the examination, mostly about her marital status and contact with sexually transmittable diseases. When Julie informed the specialist that she was a lesbian, he asked her to 'educate' him about the manner in which lesbian women engage in sexual activity. Julie was offended by these questions and left before the examination was completed.*
>
> *The specialist claimed that although his speciality had no direct connection with sexual behaviour, it was necessary for him to question his patients about their medical history and sexual practices to establish a comprehensive overview of their social environment and general health. He admitted that his questions regarding Julie's lesbian behaviour were inappropriate and could have been both offensive and discriminatory. The complaint was conciliated when Julie accepted a settlement under which the specialist apologised to her, waived his consultation fee, and paid her compensation of $200 for injured feelings* (South Australia Commissioner for Equal Opportunity 1992/93:43).

However, such a complaint does not fall within the provisions of the Western Australia Act which does not include sexuality as a ground of discrimination.

As was noted earlier, both direct and indirect discrimination are covered by the provisions. Direct discrimination is defined to mean less favourable treatment than another person, in same or similar circumstances, and is illustrated in the next example.

> *A young Aboriginal woman, Marie lodged a complaint alleging race discrimination in the area of goods, services and facilities after a series of incidents occurred when she shopped at a large supermarket/variety store in a regional area.*
>
> *The complainant stated that on the first occasion she was browsing in the store with her sister and a friend when they noticed they were being followed and their*

movements watched by a female employee. The complainant and her companions felt by the actions of the employee that there was an inference they were going to steal.

One of the complainant's companions approached the store manager and complained. The store manager told the group that if they were not happy in the store "they could go elsewhere".

When Marie visited the store a week later a different female employee was standing at the entrance and told the complainant, in a loud voice and attracting the attention of other shoppers, "not to shop at the store anymore". The complainant said she felt humiliated at being spoken to like this and again there was an inference that because she was Aboriginal, she intended stealing from the store (Western Australian Commissioner for Equal Opportunity 1993/94).

Indirect or systematic discrimination is where there is a rule, criterion or policy which appears neutral, but which in practice disadvantages a group for reasons associated with factors such as their sex or family responsibilities.

Ted was employed by a manufacturing Company, and lodged a complaint of indirect discrimination on the ground of his family responsibilities when he was informed by his employer that he was required to change his working hours to include working on a rotating shift basis.

By way of background to the complaint, Ted advised that when he had commenced employment with the respondent, more than ten years previously, he was a single man with no dependents. At that time Ted had signed an agreement to work any shifts required to meet production needs. Subsequently, Ted had married and had two children. The complaint's wife had part-time employment at times when he was home from work (on permanent day shift) and able to care for their children.

Ted alleged that a substantially higher proportion of persons without or with different family responsibilities than his were able to comply with the requirement to work rotating shifts. He further alleged that it was not reasonable, given the size and structure of the respondent organisation, that his needs be met (Western Australian Commissioner of Equal Opportunity 1993/94).

Moreover, all such legislation in Australia contains exceptions which allow discrimination. For example, the establishment of educational institutions for religious purposes (section 73); the provision of benefits, families or services by voluntary bodies (section 71); and acts done under statutory authority (section 69).

In addition, some of the Acts provide that special measures which seek to improve the status of a particular group are not unlawful. In Western Australia it is not unlawful to state that a characteristic such as sex or race is a genuine occupational qualification in particular circumstances. For example, in theatrical productions employers can advertise for a female actor to play a female role.

At this juncture I would like to state that under the Western Australia Act three separate agencies were established to administer the Act, with each agency responsible for different functions. These are the Commissioner for Equal Opportunity, the Director of Equal Opportunity in Public Employment and the Equal Opportunity Tribunal.

The powers and functions of the Commissioner for Equal Opportunity are stipulated in Part VII of the Act. Briefly, the Commissioner is required under section 84 to investigate each complaint lodged by individuals who allege unlawful discrimination. The Commissioner is required also to investigate complaints lodged by a trade union on behalf of a member or members. Under section 80 of the Act, the Commissioner is empowered to acquire and disseminate information on matters relating to the elimination of discrimination, and conduct investigations, research and inquiries relating to discrimination.

The Director of Equal Opportunity in Public Employment works with public authorities to promote equal employment opportunity in the Western Australian public sector, and evaluates the effectiveness of programs and processes designed to achieve equal employment opportunity.

The Equal Opportunity Tribunal is established under Part VIII of the Act. The Tribunal may endeavour to resolve by conciliation a complaint that has been referred for inquiry. The Tribunal has the same powers and protection as a Royal Commission. If a complaint is found to be substantiated, the Tribunal may award damages not exceeding $40,000 by way of compensation to the complainant.

THE MEANING OF CONCILIATION

The Commonwealth Government and all Australian States except Tasmania, have enacted human rights and anti-discrimination laws. The Equal Opportunity Act, in Western Australia like many of its counterparts in other jurisdictions does not stipulate what is meant by either conciliation or investigation. Definitions of conciliation range from viewing it as a more directive form of mediation where a third party attempts to invent a solution to the dispute, to instances where the third party is a facilitator of negotiation between the two parties, but has no authority to propose new solutions (Senate Standing Committee on Legal and Constitutional Affairs 1991: 11-13).

At the same time, conciliation has been characterised by authors such as Hilory Astor and Christine Chinkin in their analysis of dispute resolution mechanisms in Australia, as a process where attempts at the resolution of the dispute are affected by legislative provisions, such as those contained in the Equal Opportunity Act (1992: 61-64). Nicholas Hasluck, the President of the Equal Opportunity Tribunal in Western Australia has defined conciliation to be the "process of settling conflicts by bringing disputing parties together to reach a voluntary and mutually satisfactory agreement" (1994: 11).

Within the framework of the legislation, conciliation is seen as a:

> *process of settling disputes concerning discrimination where a third party oversees the dialogue between the two parties, but does not impose an agreement and acts as an advocate for the principles of equal opportunity. Conciliation is a means of providing an avenue whereby parties to a dispute may resolve matters on a without prejudice basis, and in a non-adversarial framework* (Report of the Steering Committee into processes under the Western Australian Equal Opportunity Act 1984 1994: 4).

Characteristics of the conciliation model

Since the inception of anti-discrimination legislation in Australia, various procedures and processes for handling complaints have evolved. The model is informed by powers conferred upon the Commissioner by the Act, and by judicial decisions made by Equal Opportunity Tribunals, Supreme Courts and the Federal Court.

Characteristics of the model that have evolved in Western Australia and in other jurisdictions include the following:

- To advise the respondent of the specific details of the complaint, and to seek a response to the allegations.

- The complainant owns the complaint at all times, and many withdraw the complaint at any stage during the process.

- The officer endeavouring to reach agreement does not represent the views of either party, but seeks to foster understanding of the principles of equal opportunity.

- The Commissioner and Commission officers are bound by the requirement of confidentiality and cannot divulge any detail concerning a complaint to a third person.

- Confidentiality is frequently part of the agreement made between the complainant and respondent (Western Australian Commissioner for Equal Opportunity 1993/94: 25-26).

It is noted that elements of the model are the subject of some debate, and are discussed in the Final Report of the Scrutiny of Acts and Regulations Committee (1993) and the Report of the Steering Committee into processes under the Western Australia Equal Opportunity Act (1994). It has been argued, for instance, that the "aggrieved person has more rights than the discriminator" because the Commissioner accepts a complaint which appears to have substance and is within jurisdiction (Report of the Steering Committee 1994:45). It has been posited, also, that a conflict of interest exists as conciliation officers are required to perform the dual role of investigation and conciliation. Detained discussion of these issues is, however, beyond the scope of this paper.

Processes of investigation and conciliation

From a broad perspective, the processes of investigation and conciliation comprise some or all of the following elements:

- Under anti-discrimination legislation individuals who are aggrieved by an allegedly unlawful act of discrimination may lodge a complaint in writing to the Commissioner (section 83 of the WAEOA).

- The Commissioner is required to investigate each complaint (section 84), and determine in the first instance whether the matters raised constitute a complaint of unlawful discrimination within the ambit of the Act.

- Where, on the face of it, the complaint has substance, the Commissioner informs the respondent of the allegations and seeks a response.

- After receipt of the respondent's reply, discussions, further investigations and attempts at conciliation commence. At this stage, any one of five outcomes are possible. These are described in the next section.

- A conciliation conference may be convened in an attempt to resolve the matter. The WA Act provides that complainants and respondents may be represented during conferences only with the express permission of the Commissioner.

I wish to emphasise that for the purposes of analysis and clarity, a linear model of time has been used to characterise the processes of investigation and conciliation. These processes can be more accurately described as one of interchange and dialogue, wherein at the conclusion of one stage, the matter does not necessarily proceed to the next. Neither does conciliation only commence when investigation has been completed. At any time, after the complaint has been lodged, either of the two parties may attempt to resolve the matter.

Outcomes of a complaint

A complaint is resolved when any one of the following outcomes is reached:

- The complainant and respondent conciliate the complaint.
- Where the complaint appears to have substance, and attempts to conciliate were unsuccessful, the Commissioner refers the complaint to the Equal Opportunity Tribunal for inquiry (section 93).
- The complainant withdraws the complaint (section 83 A(1)).
- The complaint is considered to have lapsed (section 83 A(2)).
- Or the Commissioner dismisses the complaint because it is considered to be frivolous, vexatious, misconceived, lacking in substance or relating to a matter which is not unlawful by reason of a provision of the Act (section 89). Where the Commissioner has dismissed the complaint, the complainant may require that the matter be referred to the Tribunal.

Analysis of complaints by outcomes show that approximately a fifth are conciliated; a similar proportion lapse; and less than 5% are referred to the Tribunal, are declined or outside jurisdiction.

The extent to which complaints are conciliated in comparison with those referred to the Tribunal indicates the degree to which the complaint handling model is seen to be an effective means of resolving complaints of unlawful discrimination.

EQUIVOCATIONS

As was foreshowed earlier, social commentators, feminists and legal practitioners have criticised aspects of both anti-discrimination legislation and the processes of investigation and conciliation during the past decade.

These observations are evaluated in light of criteria generally used to ascertain the effectiveness of dispute resolution mechanisms. The United States' Ad Hoc Panel on Dispute Resolution and Public Policy in its comprehensive review of dispute resolution mechanisms developed criteria against which the conciliation model may be evaluated. Major criteria are that dispute resolution mechanisms:

- must be accessible to disputants;
- must protect the rights of disputants;
- should be efficient in terms of time and cost;
- should assure finality of decision;
- must be credible;
- should give expression to the community's sense of justice (Ad Hoc Panel: 1983)

With respect to the first criterion, it is questionable whether the means of redress provided in the Act are accessible to all potential disputants.

Analysis of complaints by ground received by the Commissioner show that almost half (48%) the complaints pertain to the grounds of sex, sexual harassment, marital status and pregnancy (Commissioner for Equal Opportunity 1993/94: 27). Conversely, complaints of race discrimination constitute less than a fifth (16%) of all complaints.

In the socio-political climate of contemporary Australia, further to the findings of The Toomelah Inquiry, The Racist Violence Enquiry and the Report of Royal Commission into Deaths in Custody it is acknowledged, albeit to varying degrees, that discrimination experienced by Aboriginal people in public life, particularly in relation to the provision of goods and services is substantial. However, the reality of this is not reflected in proportions of race discrimination complaints lodged with the Commissioner.

At this juncture, I pause to add that while reference is made to the data published by the Western Australian Commissioner, statistics from anti-discrimination agencies in other Australian jurisdiction show a similar pattern. Trends in the proportion of complaints lodged by Aboriginal people are not, therefore, specific to the WA Commission.

Low rates of complaints from Aboriginals and other groups may be attributable to the requirement that the complaint be made in writing. A general mistrust of government agencies and limited understanding of the Act, and the means of redress provided by it may be contributing factors.

One of the assumptions made by anti-discrimination legislation is that individuals who experience discrimination are able to both adequately perceive it as such and report their experiences to the relevant agency. The validity of this assumption has been challenged by Kirsten Bumler, among others in a study which comprised of semi-structured interviews (1987), and is illustrated by the following example:

> *A Pakistani woman rents an apartment from the landlord who lives on the premises. Subsequently, she overhears comments made about the cooking smells which emanate from her flat. The comments grow more insistent and personal over time.*
>
> *When she discusses the matter with a friend, and it is suggested that she lodge a complaint of racial harassment, her response is "but it's not racist, he rented the flat to me".*

The second criterion refers to the protection of the rights of disputants, and this raises issues such as the relative parity between disputants in terms of resources and knowledge. It has been argued that:

> *in a world where power differentials and inequality are real, with real detriments, counselling, mediation and conciliation serve the interests of the powerful to the detriment of the powerless* (Scutt 1986: 203).

That power differentials exist between complainants and respondents and that this necessarily affects the agency's treatment of complainants has been accepted by the courts.

For example, in *Matthews v Sheedy & Ors* (1993) it was argued before the Federal Court of Australia that the Human Rights and Equal Opportunity Commission had edited the complainant's correspondence to significantly alter the intent and impact of the complaint, and to disguise the existence of certain facts. It was noted that the complaint was a three page hand-written letter. Some months later the complainant signed another piece of correspondence, which was typed at the Human Rights and Equal Opportunity Commission. The second letter substantially incorporated the contents of the first correspondence, but also included additional information.

In its decision, the Federal Court stated that a comparison of the two documents showed there was no disguising of facts. While matters referred to by the complainant in the hand-written letter were not referred to in the typed letter, scrutiny of the documents indicated that there was no change in either the intent and impact of either statement. The Federal Court held that:

If there are matters of further complaint which come to light resulting in a further letter of complaint, that further letter can be sent. If there are irrelevancies in any communication by a complainant to the Commission, they can be omitted from any communication with any party to a matter requiring investigation, it being made plain that such omissions have been made (CCH, 1993, 92-504).

Moreover, in *O'Callaghan v Loder & Anor.* (1984) the NSW Equal Opportunity Tribunal accepted that the complainant may have difficulty formulating a complaint of discrimination. The Tribunal held that:

To amount to a complaint within the provisions of the Act, the written document ... must therefore allege the commission by the other person or persons of a contravention of the Act. The complaint must identify that contravention but it need not allege the relevant facts with the particularity of an indictment or of a pleading. Some account must be taken of the fact that the complainant is a lay person who may have some difficulty in articulating such a complaint (CCH, 1984, 92-022).

However, while the processes of investigation and conciliation indeed the purpose of such legislation, is to remedy such power imbalances, this is only tackled on the basis of one to one complaints. Matters of discrimination which affect a group of people are "privatised" to the extent that these are not openly discussed in the public arena (Thornton 1990). The use of confidentiality with respect to conciliated complaints mean that individual respondents may continue to discriminate.

This assessment is qualified by two observations. First, many complainants, particularly those who allege sexual harassment in the workplace are unlikely to lodge a complaint without assurance of confidentiality. Second, while the respondent may retain a degree of anonymity, the organisation may modify or change practices which were found to be or it accepted as being discriminatory. In *Kemp v the Ministry of Education*, for example, subsequent to the Tribunal's findings, the Ministry introduced new policies. The Tribunal found that the use of seniority as a criterion for promotion indirectly discriminated against women whose employment continuity was broken by child bearing and rearing.

Moreover, any consideration of the extent to which power differentials between parties are addressed by the conciliation model must take account of the provision of legal assistance by the Commissioner.

The Western Australian Equal Opportunity Act is one of the few in Australia which provides that the Commissioner must if requested provide the complainant with assistance to present their case to the Tribunal (section 93(2)). For the most part such assistance has consisted

of a legal officer who has represented the complainant. Although the Commissioner provides assistance, her jurisdiction in the complaint ceases once it has been referred to the Tribunal, and she is not a party to the proceedings.

Examination of complaints referred to the Tribunal show that complainants frequently do not have the means to pay for legal representation. In *Lyons v Godley*, a 17 year old in her first job was sexually harassed by a sole employer, and she was subsequently dismissed for lodging a complaint of discrimination. In *Elliot v Peorlon Holdings*, tribal Aboriginal women complained against a publican for differences in charges for alcohol to Aboriginal people. In other instances, respondents' legal representatives have raised significant legal challenges. In *City of Perth & Others v DL & Others*, a non-profit organisation for persons affected by and infected with the HIV+VIRUS claimed that the City of Perth's refusal of planning permission for a "drop in centre for people who were HIV+" was discriminatory on the ground of impairment in the provision of services. In this matter the Tribunal's jurisdiction was challenged, and the matter appealed to the Supreme Court where the complaint was upheld.

Finally, I would like to consider decisions of the Tribunal which show that the Tribunal is beginning to consider matters such as sex discrimination in pubs and pornographic material in the workplace. Although the Tribunal is empowered to conduct hearings in private, it rarely does. Public hearings can facilitate discussions and lead, if not to changes in attitudes, then, to changes in practice.

In *Smith & Mitchell v Sandalwood Motel*, the complainants Shirley Smith and Josie Mitchell were singing with a male keyboard player at a public bar. The behaviour of the patrons and the barmaid deteriorated, and the complainants found the atmosphere threatening. When they drew the attention of their employer to their concerns, he was abrupt, dismissive and made no attempt to speak to the patrons involved. Instead, he told the complainants to do their job or pack their bags. The Tribunal found that the employer treated their complaints with "brutal indifference", and required them to work in a hostile work environment because of their sex. The difficulties faced by female musicians were largely ignored by managers of hotels until this decision.

The second decision to which I refer is that of *Horne & McIntosh v Press Clough Engineering Joint Venture & Metals and Engineering Workers Union*. Heather Horne and Gail McIntosh worked as trade assistants where their duties consisted of cleaning the supervisor's hut, the union officials' hut, and the crib huts where the blue-collar workforce took their tea and lunch break. The crib huts were decorated by the men with "girlie" posters depicting women with bare breasts and occasionally fully nude.

A few months after they had commenced work, a poster appeared in the supervisor's hut showing a nude woman with her genitals exposed. The complainants spoke to the senior supervisor about the poster, and in response a pair of panties were drawn over the genital area. Two months later, a dozen pornographic posters depicting female genitals were displayed in one of the crib huts. The complainants approached the worker whom they believed to be responsible, and when no response was forthcoming, informed the union site organiser of the situation and of their intention to remove the posters.

The removal of the posters led to an immediate backlash. The union organiser advised the women not to push the issue, and stated that if the men took industrial action there would be little support or sympathy for the women.

The complainants were then subject to innuendoes and intimidating behaviour. "Girlie" posters on the site increased, and they were taunted by offensive and obscene graffiti concerning them which was displayed on the walls of the toilets.

Their complaints of sex discrimination and victimisation against both their union and the employer were upheld by the Tribunal.

Both matters tackle, perhaps covertly, stereotypical assumptions about male and female servility. For instance, it was assumed that female musicians, like bar attendants are "fair game". Decisions such as these question notions concerning what jobs are appropriate for women, and the treatment of women who work in particular jobs. In both situations, myths concerning male sexuality rendered their behaviour as "normal". While these broader issues were not raised in either decision, these issues were repeatedly raised in media reports and letters to the editor in local and national newspapers.

Here the provision of legal assistance by the Commissioner was pivotal. Without such assistance, the complainants may not have pursued their complaint.

Future directions

Modern legislatures have expanded the number and variety of disciplinary bodies, systems of court annexed mediation, and processes of mediation and arbitration. Conciliation and referral of matters to the Tribunal are situated within this range of dispute resolution mechanisms. Their effectiveness continues to be the subject of debate.

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GENERAL ELECTIONS: NEPAL 1994

Tej Thapa

BACKGROUND

Thirty-two members of the ruling Nepali Congress Party, in a remarkable show of will and independence, cast decisive votes against their own party in a perfunctory vote of thanks in Parliament in June, 1994. This marked the public acknowledgement of a private feud that had been rumored to have been brewing for months within the party. The Bidrohi Congress (literally, opposition Congress), as the thirty-two came to be known, announced further that they could not accept the then Prime Minister, Girija Prasad Koirala, as party leader, and vowed to vote against the party in all further votes unless he stepped down. Koirala obliged, but not without taking his revenge. Instead of resigning and allowing Parliament to vote in another Prime Minister, Koirala asked the King to dissolve Parliament and to call for elections within the constitutionally mandated period of six months.

A constitutional crisis followed: did the King have to dissolve Parliament or could he ask Parliament to vote in another Prime Minister and Cabinet? If Parliament was dissolved, did he then have to appoint as caretaker government the existing government, or did he have to ask Parliament to convene a neutral caretaker government? The bravely named Communist Party of Nepal United Marxist Leninists (CPN-UML, or even more succinctly, UML) called for a new caretaker government which would be more likely to lead the country into fair and free elections. Public sympathy was on the side of this position. The Congress Party at that time was riddled with charges of corruption greater than those levelled against prior regimes. In addition, the Congress Party was accurately perceived as pro-Indian and exaggeratedly perceived as Indian at that time.[1]

Caretaker governments do not represent the ideal or permanent solution to the problem of conducting fair and free elections. Nonetheless, at a minimum, a neutral caretaker government would ensure a greater likelihood than not of neutral administration, police,

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[1] The Congress Party made a critical mistake in not camouflaging its links to India. It must be conceded that UML took advantage of the Tanakpur dam affair to recast the Congress Party as betrayers of Nepali sovereignty to India. However, the fact that UML has been adept at maligning the Congress Party should not detract from the weak-minded manhandling of Tanakpur by the Congress Party; neither should it detract from the outrageous decision by the Congress Party to allow Indian police officers to search a Nepali house in Kathmandu without a search warrant and without accompaniment by Nepali police officers. These two events, with or without UML malignment, discredited the Congress Party in the eyes of the intensely national minded Nepalis, who tend towards paranoia on the issue of sovereignty in any event.

security forces and the Election Commission. Given the pre-election climate in Nepal, and the lack of credibility of the Congress Party at that time, the decision to not convene a neutral caretaker government to lead the country into elections is difficult to understand. Despite many UML initiated *bandhs*[2], including multiple day *bandhs*, as well as well-attended public rallies and marches calling for an impartial caretaker government to be established, the King (apparently in consultation with constitutional experts) announced that Parliament was dissolved, and that the Congress Party government, under the guiding hand of Koirala, would lead the country into its second general elections since 1990.[3] He also announced that elections would be held in November, scarcely over four months away, on one of the most auspicious days for Nepali Hindus.[4]

The climate leading into the election was thus highly charged. The Bidrohi Congress, stranded and threatened now by the sudden call for elections, shook hands with Koirala and declared all prior misgivings forgotten. Koirala himself vowed not to run for a seat in Parliament, but then trucked in thousands of villagers who begged him to run. He promptly declared that he could not let these people down; he announced his candidacy, apparently against his own will. The farce fooled none, and increased public anxiety about the fairness of the elections. There was also a strong belief that Koirala had struck a deal with the King; the nature of the deal was not specified in the rumours that flew around. Rumour also had it that the King had managed to create a new political party called "Save the Nation", a patriotic and well-funded group which took as its principal political stance the need to save Nepal from India. Anti-Indian sentiment, combined with a frightening nationalism, played a very heavy hand in the campaign, which every political party exploited with complete disregard to the large groups of Nepali-Indians resident in Nepal.[5]

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2 A *bandh* is the equivalent of a *hartal* in Sri Lanka. A strategy adopted from India which has the effect of closing down the city or country as the case may be through threats of violence in the event of non-compliance. News of an impending *bandh* is spread through word of mouth; on the appointed day transport and business would come to a standstill.

3 The Supreme Court upheld the King's decision six weeks later, holding that the King had the discretion to decide either way. This holding of discretion retained by the King has created considerable anxiety since then.

4 The election as originally scheduled fell on a day requiring fasting and praying for devout Hindus. This would, as a matter of common sense, have discouraged many people from casting their votes because of the length of the walk for most people to the voting stations.

5 The anti-Indian sentiment in Nepal deserves some attention. The hatred against Indians is expressed crudely and without disguise, even among educated urban populations. While the fear of India has always been present, and probably always will be present in Nepal, the particular articulation of this fear today contains (although not necessarily) the seeds of communal violence against Indians in the near future.

There was wide consensus prior to the elections that UML would clear a majority of the seats in Parliament. The BBC had, in an uncharacteristically unguarded statement, declared that UML would receive 115 seats in Parliament, twelve more than required to form a government. UML's campaign, with the help of the bright red sun which was its campaign symbol, was well-crafted. It proactively deflated fears associated with its communist identity. Banners proclaimed that UML believed in freedom of religion, and would not hinder the exercise of the right to worship any god of any denomination. Its link with China was stressed only to distance itself from India; at the same time UML leaders repeatedly voiced their belief in the need for a free market and the need to encourage foreign investments. Perhaps the only truly communist stance they took was on land reform, pledging a 75%-25% distribution to tillers.[6] The principal factor in their favour was their untarnished image, although no one doubted that power was all it would take to tarnish them. An aesthetic factor, maybe induced by the imagination, helped sustain this untarnished image: UML leaders and workers, it was said, looked gaunt and starved. The implication is clear: this is not the look of those who have been fed on bribes.[7]

ELECTIONS

The results of the elections were in one sense, therefore, not surprising. The UML won and was asked by the King to form the next government. The surprise came in the fact that they won only 88 seats, not enough to form a majority; Congress took 83 seats and RPP came in with 20 seats. Charges of election rigging, certainly in the South Asian context, are ubiquitous; nonetheless, the charge must be made that the Congress Party, revealing its desperation and arrogance, used every possible tactic to win as many seats as possible.[8] Areas where the Congress Party won registered 85%-95% voter turn-outs, as opposed to the 60% national average (which average is, in turn skewed upwards by such figures).[9] In Kathmandu, where all seven seats were swept by UML and where polling was considered by and large fair, voter turn-out was registered as between 47%-56%, depending on the voting booth, and even this figure is considered unnaturally high by observers. Areas where

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6 Congress and the Rastriya Prajatantra Party had both pledged land reform also, but on a 50%-50% distribution basis.

7 An interesting debate, meanwhile, was being stirred by the Rastriya Prajatantra Party (RPP), which fortunately never gathered the sought after momentum. The UML and the Congress Party leadership is almost without exception Brahmin. The RPP, on the other hand, is almost without exception Kshaitriya. The Congress Party and UML, it was urged, represented nothing more than a sinister attempt by Brahmins to dominate Kshaitriyas.

8 Congress was estimated to win, optimistically, 50 seats prior to the election.

9 One must concede that all parties engaged in a certain amount of election rigging and booth capturing. The international group of observers noted that in one case involving the Majdoor Kisan Party, the ballots had been stuffed the night before with the consent of the voters.

the Congress Party stood no chance, due to historical, social and ethnic reasons, unbelievably went to the Congress Party.[10]

The Election Commissioner's local offices, in numerous instances, refused to accept non-Congress Party petitions for re-polling -- refused to accept, that is, a letter signed by other parties which would generate no necessary obligation on the part of the Election Commission but which letter was procedurally required, as an initial matter, to subsequently register protest with the national office of the Election Commission. Moreover, election procedures require each party's representatives, at the appointed hour, to seal the ballot box as testimony to their acceptance of fair polling at the booth, or to abandon the booth in public protest. In the absence of the seals from all parties represented at that booth, the Election Commission is mandated to conclude that there is dispute as to the fairness of the polling at that booth. Hundreds of party representatives at their booths abandoned their stations in protest at the blatant unfairness of the polling; they were not present to seal the ballot boxes. Nonetheless, the Election Commission accepted the ballot boxes, claiming unbelievably that party representatives abandoned the stations because their party was losing at that particular booth. Whether that charge is true or not -- and one must conclude that, at least in some instances, it was not true -- the Election Commission was delivering pronouncements completely in contravention of the procedures it was mandated to follow.

Reports of police and army complicity in booth capturing and election related violence were rampant. The army, by law, is not allowed to intervene unless specifically requested to do so by the police. The police, on the other hand, chose to see no evil and hear no evil, either because they themselves had been threatened or because they had been bought. Due to the shortage of trained police officers to guard all the booths, most police officers who manned the stations had been hired at short notice from villages neighbouring the polling stations. Such people, living as they do within the same group of villages as the voters or party workers, are much more susceptible to emotional or physical blackmail than those who have no connections to the area.

The Election Commission, additionally, appeared disorganised and uninterested in actively fulfilling its mandate. The Commission had a great deal of trouble finding people to represent it at the polling stations. The fear of violence was so pronounced that the Commission took out a life insurance policy on each of the representatives sent to the polling stations. Beyond this gesture, however, the Commission took no measures to ensure the

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[10] One example of this is Mustang, an isolated, semi-autonomous region near the border with Tibet, which has traditionally been a monarchist stronghold. The only other party which could compete with the RPP in this area was UML, and even then as a distant second. Even Congress Party members were shocked when the results announcing Congress victory in Mustang were broadcast.

safety and independence of its representatives once they were stationed at the polling booths. The Commission should bear the responsibility of extending protection to its workers, even if it can realistically do very little if its workers are threatened. Without at least an appearance of concern on the part of the Commission towards those assigned to help fulfill its mandate, there is very little incentive for the representatives to risk their lives for the sake of abstract notions such as fair elections.

Additionally, the Election Commission announced that no unauthorised vehicles were allowed to operate on election day itself. Each candidate was allowed to operate one vehicle, and only the candidate himself could be present in the vehicle. The purpose of this restriction was ostensibly to prohibit the transportation of persons from one district to fraudulently cast their votes in another district, or to prevent party workers from mobilising themselves in large groups to capture booths or intimidate voters. The problem with this restriction lay in its implementation. Roads are few and far between in Nepal; most polling stations are well-removed from easy road access. In the event of violence or polling malpractice, not only did voters or party representatives have to trek down to the roads, but once on the roads they still had to walk to the nearest Election Commission office. This often involved a delay of several hours. This was especially burdensome in the case of those who were injured. The Election Commission did not have the foresight to station vehicles at appropriate road points which could then transport persons to and fro for legitimate purposes. Nor did it have the foresight to provide or arrange for radio transmittals of messages to expedite the process of intervention in problematic polling stations.

The presence of the Election Commission was barely evident on election day. Perhaps the apathy exhibited by the Commission derives from the limited scope of its powers. The Commission is not, for example, empowered to take action against any party or individual for polling malpractice. It cannot, that is to say, even levy a fine upon a determination of wrongdoing. The Election Commission office itself argues that, because the elections were called much sooner than anticipated, they had not had time to draft election laws based upon reforms suggested by prior experience. The Commissioners are disbanded soon after elections, and there is no organisational structure which remains to consider substantive changes which should be made to the election laws. This amounts, at most, to a partial explanation.[11] It does not explain why no effort was made by the Election Commission to institute a better system of voter registration and voter identification. This had been a pronounced problem in the last general elections, and one which has been a problem region-

[11] The Chief Election Commissioner (CEC), who is a political appointee, revealed himself to be particularly immune to concerns about free and fair polling. He kept a very low profile, both during and after the elections, and generally did very little to inspire confidence in his judgement. The importance of appointing as CEC someone who immediately commands respect and authority from all sources cannot be stressed adequately.

wide. At the polling booths, voters were simply asked their names and their fathers' names.[12] A familiar argument against requiring identity cards is that the issuance of identity cards is cumbersome, especially given the geographical and economic conditions in Nepal, and that identity cards, in themselves, do not guarantee free and fair polling. But the fact that issuing identity cards is cumbersome is hardly excuse enough; if the Election Commission is unwilling to require the production of identity cards at polling booths, then it must assume the burden of devising an alternative which would ensure that one person gets to cast one vote. Additionally, the experience of some Indian states, as well as other countries, suggests that identity cards can go a long way towards combatting fraudulent voting.

The reactions of various groups to the overt rigging and booth capturing by the Congress Party was interesting. The UML, betraying an arrogant confidence, did not register any public protest for a few days. The leadership apparently determined that, despite the rigging, they would win with a solid majority; they were also worried that if they protested, Congress would retaliate by calling for repolling in UML constituencies in order to subvert the results. The UML protested only when the vote counting revealed that the extent of the rigging by Congress was so great that Congress stood a good chance of forming the next government. They lodged a suit against the Election Commission and against the Congress Party, and threatened to take violently to the streets if Congress actually won.[13] This unprincipled approach damaged their credibility considerably.

Another interesting reaction came from middle-class Kathmandu, which basically refused to believe that any untoward behaviour had occurred during the polling.[14] The press, following UML's lead, had not reported on election related violence. When the international team of observers released their report -- which categorically stated that there had been numerous incidents and recommended repolling in many constituencies -- the headlines in the Kathmandu dailies claimed that the international observers had found the elections to be fair and free. Perhaps this lack of publicity accounted for Kathmandu's refusal to believe that there had been any rigging during the elections. More distressing than this denial, however, was the malaise and ennui exhibited by Kathmandu, which appeared particularly stark given the concern in other urban centres and towns.

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[12] The only other precaution taken by the polling agents was to rub some dye onto the finger nail of the voter, which was easily wiped or scraped off. Groups of voters came armed with onions or Coca Cola which are reputed to be the most effective means of removing the dye.

[13] The American Embassy, following this announcement by UML, advised American citizens to be prepared to leave the country immediately if UML did not form the government.

[14] It should be added that many people in Kathmandu expressed great surprise that UML won -- despite the fact that all seven seats in Kathmandu went to the UML.

THE NEW GOVERNMENT

It must be assumed, therefore, that popular support for UML was much greater than the 88 seats they secured suggests. Voters by and large wanted UML to form a strong majority government, and the fact that UML could not do so has led to a debilitating voter fatigue and cynicism. Voters, in their own wisdom, agreed that UML would probably not be different from Congress once power had been tasted, but there was a strong desire to give UML a chance. A discouraging statement repeatedly made by voters after election day, when a UML victory was no longer guaranteed due to rigging, was that politics had been better under the Panchayati system.

Two weeks after the elections, UML formed a minority government, knowing that within a month it had to survive a vote of confidence in Parliament.[15] The Congress Party and RPP both pledged to give UML the vote of confidence, for the simple reason that no one wanted to face the prospect of another election so soon. They also, however, at the first sitting of Parliament, delivered a stern message to UML by voting in, as Speaker of the House, a member of the Congress Party. The message was clear: RPP, with its twenty votes, will join Congress to oust UML when it senses that the time is ripe.

One of the striking aspects of the government formed by UML was the remarkable absence of women and minorities from its Cabinet. The UML had been the only major political party to actively advocate on behalf of women's rights during the campaign, taking as one of its principal foci the issue of a woman's right to inherit paternal property. In addition, two of the most prominent women in politics in Nepal were from UML, both of whom secured seats in Parliament during these elections. The absence of either of these two women from the Cabinet was noticeable. While their exclusion from the Cabinet in itself does not necessarily signify a lack of honest commitment to women's issues on the part of UML, the public perception generated by their exclusion has been detrimental to the UML.

Foreign papers meanwhile proclaimed the victory of UML as though a dinosaur had been resurrected from pure fossil. The Indian press were perhaps the only ones to read the signs accurately. This was not the beginning of Chairman Mao's long march, but social reform along the lines of Jyoti Basu peppered with strong international pressure (noticeably in the form of the World Bank and the IMF) to conform to changing market conditions. The UML government went to great lengths early in its tenure to assure foreign investors and donor agencies of its commitment to a market economy.

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[15] UML did, in fact, survive the vote of confidence at the end of December.

How long the UML government will last depends a great deal on the co-operation it receives from the other, basically hostile, parties. At this point, there appears to be an implicit understanding between the various parties that instability of government is in the interest of no one. In the last few weeks, a growing dissension within the ranks of UML has threatened the organisation and structure of the UML leadership; how it copes with internal party politics, more than any other factor, may determine, as it did with Congress, the length of its tenure. Both the Congress Party and the RPP are engaged in serious efforts at self-redefinition, the former trying to distance itself from the fiasco of the past year, and the latter from its historical and potentially fatal connection to the Panchayati system and to the monarchy. As soon as either party determines its resurrection to be complete, the UML government will surely fall, over some other perfunctory vote.

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