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## **Legal Responsibilities of a Unit and Sub-Unit Commander in Nepali Army**

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### **Abstract**

Command appointment in military is a great opportunity which comes with many challenging responsibilities. Among many responsibilities of the commander, legal responsibilities are one of the most imperative ones, which are closely related to the legality and authenticity of the command tasks as well. Operational effectiveness of a military unit and sub-unit to a great extent relied on its leader or the commander. To become a good commander, one must have highest level of moral character and sense of duty in him first and should establish him as a role model in the unit. In this article, major legal responsibilities of the military commander, while serving in the unit of the Nepali Army, have been highlighted and critically analyzed with more focus on judicial, managerial, financial and command responsibilities. For this, concerned legal framework and recent practices have been considered and concluded that the commanders play vital role in management and professional competencies of any military unit and sub-unit.

### **Keywords**

Commander, Legal responsibilities, Command Responsibility, Sources of Authority, Discipline, Effective Command

### **Introduction**

Command is the authority which an individual in the military service lawfully exercises over subordinates by virtue of rank or assignment (National Defense University, 2017). It is the legal authority that has been bestowed in an individual for the control and direction of the military unit or the force. It is a great opportunity and also a big responsibility where the commander has to ensure the lawful administration and operation of the commands and has to foster an environment of integrity, rule of law and adherence to military ethics and values. Action of his subordinates should remain within the bounds

of legality. When an officer is appointed as a commander, he needs to lead his troops or subordinates by setting his own example. Whatever he does in the unit should align with national laws, military rules, regulations, ethical standards and the international legal provisions. Usually all military operations during war or armed conflict are governed under the law of war which is a part of public international law. Commanders are also the custodian of justice within their units and to be in a position to give or maintain justice, he needs to have a highest level of moral character, discipline and sense of duty in him first.

General Norman Schwarzkopf of US Army, one of the famous military leaders having experience of serving as a coalition commander in Golf War against Baathist Iraq, appropriately expresses, *"the truth is that you always know the right thing to do. The tough part is doing it"* (Cornwell, 2012). Same thing applies when it is talked about the responsibilities. Most of the things commanders already know and would definitely have ample knowledge on it in due course of time. The challenging part is executing their responsibilities perfectly as a commander.

Commanders of a unit and sub-unit in military organizations must have ample knowledge on overall responsibilities of their armed forces. In Nepal's context, when we talk about the responsibilities of Nepali Army (NA), Article 267 of the Constitution of Nepal has the basic provisions on it. Under this provision, the main responsibility of NA is to safeguard Nepal's independence, sovereignty, territorial integrity, autonomy and national unity (The Constitution of Nepal, 2015). For this purpose, the president of Nepal, on the recommendation of National Security Council and pursuant to a decision of the Government of Nepal, council of ministers, declare the mobilization of Nepali Army in cases where a grave emergency arises in regard to the sovereignty or territorial integrity of Nepal or the security of any part thereof, by war, external aggression, armed rebellion or extreme economic disarray. Such declaration must be ratified by the house of representative within one month. This is the primary task for NA. And, under this Article, NA can also be mobilized for works relating to development constructions, disaster management and other tasks as per the federal law. Regarding other than the main tasks, currently NA is being deployed basically for the purposes as follows;

- Infrastructure development projects
- Disaster rescue and relief operations
- Security of national parks and wild life conservation areas
- VVIP security

- Election security
- Aid to civil authority

Aid to civil authority is regulated under the provisions of Local Administration Act 1971 and the legal provisions related to Nepali Army's mobilization, where the civil administration authority can seek for the assistance of Nepali Army to control the security situation resulted by riots, which is beyond the control of police administration only. This type of aid to civil authority should be exercised as the last resort. As a member of the district security committee, unit commander in concerning districts representing NA in the committee, must have adequate knowledge on scope and limitation of such aid.

The main objective of the study is to highlight, explain and critically analyze on the different aspects of legal responsibilities of the military unit and sub-unit commander in Nepali Army.

### **Methodology**

This study is based on doctrinal research method and explanatory approach has been followed to discuss on the issues that the topic demands. In this research, basically the provisions in different legal instruments beginning with the constitution of Nepal to the subject specific statutes, related international legal instruments, handbooks and some internet based information have been analyzed and explained which are directly or indirectly related to the exercise of command authority in the military unit or sub-unit in Nepali Army.

### **Scope of the Study**

Command appointment comes with legal authority and authority brings responsibility with it. Every activity in the unit must be within the broader legal framework of the institution and the nation. In this article, it has been attempted to briefly highlight and analyze on different aspects of legal responsibilities of unit and sub-unit commanders in Nepali Army based on legal sources of command authority and responsibilities which include the constitution of Nepal, army act and regulations, public procurement act and regulations, financial procedures act and regulations, international legal instruments like IHL which includes Geneva Convention and Hague Laws, Rome Statute of International Criminal Court and related professional handbooks.

## **Key Legal Responsibilities of a Military Unit and Sub-Unit Commander**

While highlighting and critically analyzing the legal responsibilities of a military unit and sub-unit commander, key legal responsibilities could be divided into four major headings as follows.

- Judicial Responsibilities
- Managerial Responsibilities
- Financial Responsibilities
- Command Responsibility

### **Judicial Responsibilities**

Judicial responsibilities basically cover investigation and adjudication related duties where the commander needs to be a good investigator as well as a good judge in the unit.

### **Investigation Related Responsibilities**

Commanders may need to investigate many issues in the unit which includes criminal investigation, investigation of serious incidents, death of a member of the unit which could be on duty, off duty or suicidal and the case of loss or damage of the unit property or equipment. Out of these investigations, criminal investigation and death investigations are more challenging. Sometimes commanders may need to get support from other investigative entity of the government, medical facilities and forensic labs as well. Commander is accountable for the overall outcome of any investigation under his unit. He needs to consider following points while doing investigation.

- Protection of the life and property and safety of persons should be given the first priority.
- There should be a proper collection and preservation of the evidence. Priority should be given to collect physical evidence and maintain chain of custody of the collected evidence. Only the confession of the defendant may not suffice in the court room to prove the guilt. If the proper chain of custody of the evidence is not maintained or if any doubt arises about the fabrication or tampering of the evidence such evidence will not be admissible in the court room. It should connect the court room with the crime scene.
- Can get support from other government agencies like police, forensic lab, medical facilities if required. In death cases or the cases of drugs abuse, it is very much essential.
- At the end of the investigation, proper documentation and report writing should be done as mentioned in Army Court Martial Regulations. If it is a criminal

investigation, the report should be sent to the prosecution authority for further process. Prosecution authority further channelizes it. If it's other type of investigation, it should be forwarded to the higher authority for the approval.

### **Adjudication Related Responsibilities**

Commander is also the judge in military unit. To be a good judge one must have a good knowledge on the basic principles and objectives of justice. Adjudicating the case as a head of the Summary Court Martial (SCM) and taking departmental action against the subordinates within the unit who have the rank of Sergeant or below is a crucial responsibility of a military unit commander. In the cases, where Junior Commissioned Officers (JCOs) or Officers are involved, SCM doesn't have the jurisdiction. Chief of the Army Staff decides on the recommendation of prosecution authority whether or not to convene the court martial against them. In Summary Court Martial, it is prosecution authority who decides the filing of the case in the court. When a unit commander is convening a SCM, imposing punishment of imprisonment is limited to 1 year if the court martial is convened by an officer with the rank of Lieutenant Colonel or above. It is limited to 6 months if the court martial is convened by an officer with the rank of Major or below (Nepali Army, 2006). As a judge of the SCM, the commander can impose any other punishments as provided under Army Act. For this, proper process and code of conduct should be followed. Likewise, in minor offences, unit commander can address such cases by taking departmental action also. Most of the process is same. Only the punishments are little lesser.

While adjudicating the case in the SCM or any other court martial where the commander is serving as a member of the court, he needs to adhere to the following code of conducts (Nepali Army, 2007).

- Maintain highest standard of moral character and discipline.
- Be away from any influence by the parties of the case.
- Act without getting pressure from the higher authorities or the colleagues or from anyone.
- Act without any biases, partiality or ego.
- Maintain confidentiality of the case.
- Justice should be delivered on the basis of proper evaluation of evidences, scenario, context, nature and gravity of the offence and conduct of the offender.
- Not to do any acts that might obstruct the judicial proceedings. Not to weaken the case by taking side to particular party with vested interest.
- Be present in proper attire (No. 3 uniform with Khadga).

- Not to make any negative remarks about the points raise by lawyers (including military lawyers) in the court.
- Equal and fair treatment to parties of the case.
- Not to hear the case if there is any issue of family relation, personal bias or conflict, financial transaction or any other issues which might lead to partiality or biasness with any party of the case.
- Not to get any gifts or favors from the parties of the case.
- Not to get bribe.
- Ensure all fair trial rights are guaranteed including presumption of innocence.
- Be away from the things that might hinder the hearing.
- Ensure that all the proceedings are in accordance with the law

Besides, the main objective of the military justice system is to maintain the good order and discipline in the force. Military law is not simply about forbidding anti-social behaviour by members of the armed forces. It is also about fostering certain values and standards. They may not, perhaps, be wholly unique to the military. Nonetheless, the value of trust, loyalty, teamwork and self-sacrifice are the ideological assumptions upon which military operations are conducted. They are what impel soldiers to undertake dangerous operations and where such values are slipping in any particular instance, military law will be a reminder of the 'moral component of fighting power' or, in simpler terms, of military effectiveness (Fidell et al., 2010). Any actions or behaviour that adversely affect or likely to impact on efficiency or operational effectiveness of the unit should be brought before the legal action.

### **Managerial Responsibilities**

Under managerial responsibility, the first thing the commander needs to do is to ensure operational readiness within legal and ethical boundaries. For this, he needs to conduct regular trainings and skill enhancement programs which includes all the professional trainings and the human rights and IHL or the law of war related trainings.

Basically the military operations are governed by the international law, Human rights treaties and IHL which includes Hague laws and Geneva Laws. Hague law deals with the means and method of war or the conduct of war while Geneva law deals with the protection of all those who don't get involve in war. Commander needs to ensure that every soldier under his command is aware on HR and IHL. Being a part of the government, it's one of the essential duties of the military organization to protect the human rights of the citizen as well.

Ensuring physical and mental fitness of the subordinates is another important managerial responsibility that a unit or sub-unit commander has. For this he needs to conduct routine exams, regular checkups and regular counseling.

Besides, he has to ensure that all the equipment and resources in the unit are well managed. For this, he has to ensure optimal use of military resources. Regular checkups should be done to ensure operational readiness. Preventative maintenance should be done to avoid equipment failure and the process to be enforced to strict adherence to the protocols as well.

Under managerial responsibility, another very important duty of a commander is to ensure discipline and good conduct among the men. For this, he has to follow certain preventive measures like promoting a culture of accountability and respect. He needs to conduct regular briefings on expected behaviour and legal boundaries. He must prevent corruptions and should observe and evaluate the conduct of personnel regularly. He needs to use reporting mechanisms to identify potential issues early to prevent misconduct and if violations occur, he needs to address it promptly and impartially. Disciplinary proceedings could be initiated whenever the commander finds it necessary. Likewise, career development of the subordinates is also one of the legal Responsibilities of the commander. Promotion/appointments/recommendation for the peacekeeping mission or trainings should be based on related legal provisions. Nepali Army has ample legal setup to address all these aspects which includes mainly the Army Act, Army Service Regulations and related Procedures/Directives issued under it. Commander can get the support from legal branch if there is any confusions or dilemma about the provisions.

There are three sets of Procedures/Directives under Army Service Regulation 2007. The first set is issued by Ministry of Defence (MoD) in consultation with NA under Rules 109 (1). Directives about the roles and responsibilities of military police and female soldiers fall under it. Second set is issued by NA with the permission from MoD, Rules 109 (2)

All directives related to administration or the management of NA falls under it. Currently National Defence Course Selection Procedures and the Peacekeeping Mission Selection Procedures are issued under this provision. And the third set is issued by Nepali Army itself regarding the prize, recommendation for the decorations, COAS commendation etc. under Rules 109 (3) and Rules 104Kha.

Likewise, NA also can issue procedures with the decision from the Principal Staff Officers (PSOs) regarding conduct and discipline, special criteria related to the management of NA under Rules 104kha. For the purpose of this provision, conduct and discipline includes, financial discipline, security of information, use of social media,

command compact, handover takeover notes, inappropriate relation with foreign nationals, ban on receiving gifts or donation, creating and spreading negative remarks against the government etc.

Another important managerial responsibility is Welfare. Commander needs to ensure that all welfare issues are well addressed. He should make sure that his troop is well aware of all the welfare schemes and facilities provided under laws. Proper leave management also falls under managerial responsibility.

Commander should also have a good knowledge on privileges and immunities provided by law and he needs to ensure that his soldiers are aware of it as well. Privileges and immunities that a soldier serving in NA gets are provided under chapter five of the Army Act.

Sec 22 is about the immunities on duty related jobs. Under this provision, no case shall be filed against a soldier on death or loss of property if he is discharging his duty on good faith. That duty covers all regular military duties including patrolling, sentry, flag march, internal security and self-defence. In certain scenario, soldiers get immunity from the arrest (Sec 23 of Army Act). Chairman or members of the court martial, JAG officer or the officer engaged in court proceedings, legal counsel, witness attending in accordance with summons issued by the court martial shall not be arrested on the order of any court or quasi-judicial authority at the time of entering into or returning from the court martial. In case of arrest, he should be released immediately on the request of the court martial. Army personnel engaged in military operation (in war) shall not be detained as per the judgment, decision or order of any court or quasi-judicial authority for a loan to be paid by him. It means when a soldier is in war, engaged in military operation and someone files a case against him about loan payment, no authority can arrest that soldier during that time. But he can be tried in civilian courts in other criminal offences as per the law. A soldier has another privilege under section 24 of the Army Act that except the court martial, no any court or quasi-judicial authority can freeze of forfeit arms, military supplies, vehicles, goods including salary, allowance of a military person, used in course of discharging duties. Under section 26, soldiers get priority in the cases in the civilian courts. It applies mainly to the civil law related cases, which are usually property, financial transactions, family relations related. If a soldier is a party in such case, he can file an application in the court to finalize the case within the period of his leave. For this no fee is required. And, the court also has a duty to notify if the case is not finalized within that period. Under section 27 of the Army Act, it has another important provision regarding the complaint of any suffering or injustice. Soldiers can bring grievances of suffering or injustice before the commander and if it is against the commander, he can

file the application in higher level of commander. Commander has legal responsibility to address such grievances. If he can't address from his level, he has to forward it to higher level of authority to address that. Chief of the Army Staff is the final authority in such cases. But the government of Nepal can review the decision if it deemed necessary. When we are talking about the immunities or privileges under Army Act, we need to understand that it will not affect the facilities provided by other prevailing laws of the nation.

Under managerial responsibility, Reward and Punishment is also one of the very important legal responsibilities of a military unit commander. To fulfill this duty, he should have a fair judgment to be away from the biasness or partiality related complaints.

### **Financial Responsibilities**

Financial Responsibilities is also one of the key legal responsibilities that a military officer has when he is serving as a commander. Under these responsibilities, the budgetary management comes first. It is mainly done at the central level of the institution. But there are certain roles in unit level as well. To assist the commander on it, he has a finance officer or JCOs in every unit sent from the Finance Administration Directorate. Every unit should have a well prepared plan for the yearly budget. All financial transactions should be under the legal provisions and it should be transparent. Commander also has duty to address financial errors if there is any. It is very sensitive that he might face serious consequences if something goes wrong. He has to ensure that the salary and allowances to his subordinates are paid in a timely manner. And, the unit needs to have proper auditing on time as per the process set in the law.

Public procurement is also a very crucial and sensitive financial and legal responsibility of a commander. He must have a well-organized yearly procurement plan. For this, he has to properly follow the public procurement related laws of the country. To discuss some important and noteworthy provisions of the procurement law of Nepal, procurement of 20 lakh rupees or more to be procured by public tender. Commander of the unit as a head of the public office has authority to finalize cost estimation and approving bidding process based on the amount. Cost estimation can be authorized by 2nd class officer up to 100 million rupees (Public Procurement Regulations, 2007). Substantially responsive bidder to be selected and can be approved by 2nd class officer up to 200 million rupees (Public Procurement Regulations, 2007). Commander needs to have a very fair bidding process and should regularly monitor and supervise entire procurement process. Transparency, Competition, Cost-effectiveness and Fairness are the basic things to be considered under Public Procurement Act 2007 (Public Procurement Regulations, 2007). As a government official, this is the responsibility of every unit commander to ensure the most economic use of government fund.

## **Command Responsibility**

Command Responsibility is little bit different than the other legal responsibilities of the commander. This is a very imperative provision in the law of war that a commander should be liable for the action done by his subordinates. When an officer is serving as a military unit commander, he needs to ensure that all members of the unit comply with the provisions of IHL. For this he needs to give adequate and proper trainings to them on the topics. Commander will be liable for the war crimes committed by his subordinates when he fails to impart knowledge of IHL to his troops and doesn't take necessary preventive measures or fails to take action when they violate the IHL. Under the provisions of Rome Statute of International Criminal Court, in addition to other grounds of criminal responsibility under the Statute for crimes within the jurisdiction of the Court, military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where;

- That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
- That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution (Rome Statute of International Criminal Court, 1998).

This is the exception of the principles of criminal liability which is otherwise always individual. In other criminal offence, one can't be made criminally liable for the act he hasn't committed or involve. This concept has been developed to make the commanders more responsible during the war, and he must follow that.

## **Discussions**

Command appointment in military comes with many crucial and challenging legal responsibilities. As it is highlighted in this research, legal responsibilities of the military unit and sub-unit commander in Nepali Army can be further divided into judicial, managerial, financial and command responsibilities for better and comfortable understanding. Judicial responsibilities basically include investigation and adjudication related responsibilities. Investigation is more related to professional techniques but adjudication needs judicial mind and conscience. As a custodian of justice in the unit, commander needs to have a deep sense of judgment and adequate knowledge on basic

principles, norms and values and practices in the justice. Most of commander's legal responsibilities fall under managerial responsibilities which are directly related to the operational effectiveness of the unit. Likewise, every financial transaction and expenditure in the unit and public procurement needs to be within the legal provisions ambit. And, when a military unit or sub-unit is involved in any war or armed conflict, commander needs to ensure that his troops understand the scope of the law of war or the IHL and needs to take legal action if they fail to be abided by it. Otherwise, the commander will also have criminal liability on war crimes for the act committed by his troops against the law of war. After going through the different aspects of the legal responsibilities of a military unit and sub-unit commander, it is found to be so crucial and noteworthy for such commanders to understand and act accordingly on all these aspects.

### **Conclusion**

To summarize, a command appointment in military is a great opportunity with big responsibilities. Commander's decision is so crucial that it not only impacts the operations but also the lives, privileges and morale of the subordinates, which eventually contributes to the overall managerial excellence and professional competencies of the unit. Maintenance of good order and discipline in the force without compromising basic legal norms is the challenging command task. Therefore, his every action needs to be in line with the broader legal framework and he should be accountable for the activities under his command for both the good things and bad things. Commander should also adhere to the basic legal rights of the soldiers under military law while bringing them to legal action when they violate the law or get involve in the conduct prejudicial to good order and discipline. The main objective of the legal actions of the commander should be focused on maintaining discipline, efficiency and operational effectiveness of the unit and to create the command climate conducive to accomplish the command task. During the war, the commanders are made liable for war crimes committed by his troops if he fails to impart knowledge of law of war or the IHL to his troops or fails to take legal action after finding them involved in war crimes. As Alexander the Great said, 'an army of sheep led by a lion is better than an army of lions led by a sheep', commander should be like a leader lion and his troops should see the image of the role model in their commander.

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