

ABSTRACT

CONSTITUTIONAL CONCEPTS FOR THE RULE OF LAW: A VISION FOR THE POST-MONARCHY JUDICIARY IN NEPAL

By David Pimentel

A new government has taken power in Nepal. Intent on replacing the monarchical Hindu state with a secular democracy, they have promised a new Constitution. Although they are operating under an Interim Constitution at the moment, it remains to be seen what the post-monarchy judiciary will look like. Those involved in the drafting should pay careful attention to how specific provisions for court governance will impact both institutional and decisional judicial independence. The Interim Constitution calls for a judicial council, but not a sufficiently independent one. The Interim Constitution also allows broad exercise of emergency powers, depriving the courts of jurisdiction over the legality or constitutionality of such exercises—a particularly disturbing flaw given the history of abuse of emergency powers in Nepal in the past. These, along with an array of other concerns that otherwise threaten to undermine the independence and effectiveness of the Third Branch of government in Nepal, can and should be corrected in the new Constitution. This article sets forth those concerns and suggests solutions for each. Nepal's prospects for the rule of law may depend on how well the new Constitution's drafters follow this punch-list of issues and principles as they establish the constitutional framework for the new Nepali judiciary.

Table of Contents

Abstract	1
Introduction	3
I. Constitutional History in Nepal	4
A. Nepal Constitution Act of 1948	4
B. Interim Constitution of 1951	5
C. Royal Constitution of 1959	5
D. Panchayat Constitution 1962	5
E. Constitution of 1990	6
F. Interim Constitution of 2007	6
G. Status of the new Constitution	7
II. Current state of the judiciary in Nepal	8
III. Judicial Elections—a Flawed Concept.....	10
IV. Constitutional safeguards for judicial independence, both institutional and decisional.....	12
A. Institutional judicial independence – the Judicial Council	12
1. Present provisions for the Judicial Council	15
2. Strengthening the Judicial Council—clear delegation of power	18
3. Strengthening the Judicial Council—broadened and diversified membership	19
4. Judicial Council Best Practices – Summary	26
B. Institutional judicial independence – Judiciary budgets	27
C. Institutional judicial independence – Emergency powers.....	29
1. Suggested Constitutional Provisions for Emergency Power— Right to Challenge the Exercise of Such Power before the Supreme Court.....	31
2. Amendments as to Specific Rights	32
D. Institutional judicial independence – Annual reports	34
E. Decisional judicial independence – Life Tenure	35
F. Decisional judicial independence – Judicial compensation.....	36
1. No diminution of salary	36
2. Adequate salaries	37
G. Decisional judicial independence – Removal	38
H. Decisional judicial independence – Judicial immunity.....	40
V. Access to Justice: Lower courts and Regional Structure	41
VI. Ethics and corruption in the courts	42
A. Vetting the current judges	42
B. Establishing accountability mechanisms.....	43
VII. Conclusion	44

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NEPAL

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INTRODUCTION

Nepal is in a state of transition.¹ As a new government has taken power, intent on replacing the monarchical Hindu state with a secular democracy,² and they have promised a new Constitution to effect these changes.³ What follows herein is a brief summary of the historical context for the initiative, particularly as it applies to the Nepali judiciary, and then an open letter to the Constitutional Drafting Committee (CDC) with general advice for judicial reform in Nepal.⁴

Against a backdrop of Nepal's political and constitutional history, including the content of the present Interim Constitution, there is particular concern for the independence of the Nepali judiciary. While the Maoists

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¹ *India hopes for democratic transition, political consensus in Nepal*, United News of India (April 5, 2009), available at LEXIS/NEXIS.

² *Id.*

³ *PM's worry about local issues*, KANTIPUR REPORT, <http://www.kantipuronline.com/kolnews.php?&nid=196108> (May 25, 2009) (last visited August 27, 2009) (Nepal's new prime minister, in his first meeting with the Secretaries of government "told them that the prime responsibility of this government was to draft a new constitution and bring the peace process to a logical end."); see also note 31 *infra*.

⁴ Jörg Luther and Domenico Francavilla, *Nepal's Constitutional Transition* at 2 (Working Paper No. 93, July 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1017642.

have called for a judiciary more “accountable to the people,” the related proposal for judicial elections is deeply flawed, and a poor avenue toward judicial independence.⁵ Instead, the Constitution must include a system of judicial governance (including judicial selection, promotion, discipline, and administration) that is distanced from the political forces that would otherwise corrupt it: a system founded upon an independent judicial council. Institutional independence will also require some new provisions dealing with judiciary budgets, emergency powers, and annual reporting from the Third Branch of government. Ensuring decisional independence, the freedom individual judges feel in rendering their judgments, will require other constitutional provisions dealing with life tenure, compensation, discipline and removal, and judicial immunity. Access to justice requires the retention of small courts in rural and remote areas, particularly given the efficient and responsive dispute resolution done there. These can be administered on a regional basis. Finally, the new system will require a thorough vetting of judges to root out existing corruption, as well as an effective accountability mechanism for policing the integrity of the system in the future.

There is great potential for Nepal’s future with respect to the rule of law, but establishing the proper Constitutional framework for the Nepali judiciary will be a necessary first step in realizing that potential. The recommendations herein are focused on creating that framework, and maximizing prospects for success in this endeavor.

I. CONSTITUTIONAL HISTORY IN NEPAL

Nepali governance has a rich and complex history starting with the unification of Nepal in the mid-18th century under Gorkha King Pithvi Narayan Shaha.⁶ By the mid-19th century, the Ranas had seized power in the role of Prime Minister, with the title of Prime Minister passed down hereditarily in the Rana family line. The Rana regime was authoritarian, with the Bharadari Sabha (or Assembly of Lords) functioning as no more than a consultative body that effectively rubber-stamped the rule of the Rana.⁷

A. *Nepal Constitution Act of 1948*

⁵ See note 44 *infra* and accompanying text.

⁶ *Id.*

⁷ *NEPAL: Government and Politic* at 2 (Library of Congress, Federal Research Division) available at <http://lcweb2.loc.gov/frd/cs/nptoc.html> (last checked May 27, 2009).

The first thing resembling a constitution in Nepal was the Government of Nepal Constitution Act of 1948, commissioned by liberal prime minister Padma Shamsheer Rana.⁸ However, the result was a constitution in form more than in substance. It created a bicameral legislature, with the entire membership of one house a majority of the other appointed by the prime minister, and with the prime minister retaining power to veto any legislatively adopted measure.⁹ This token gesture to constitutionalism lasted only a few months, until anti-Rana rebels joined to the monarchy to overthrow the Rana system.¹⁰

B. Interim Constitution of 1951

A new Interim Constitution was adopted in 1951, reasserting the king's executive, legislative, and judicial powers. While this constitution created a putative legislative body, the Constituent Assembly's power was purely advisory, with the king retaining ultimate power. Pressure for more democratic and representative government prompted King Birendra to grant a new constitution in 1959.¹¹

C. Royal Constitution of 1959

This "Royal Constitution of 1959" created a multi-party parliamentary system modeled on that of Britain and India, but retained enormous power in the king, including broad emergency powers to suspend both houses of Parliament, and to suspend the constitution itself.¹² These powers were invoked by King Mahendra, after party elections in 1960, to dissolve the government, and the pre-1959 constitutional system was revived.¹³

D. Panchayat Constitution 1962

King Mahendra issued a new constitution 1962, abolishing all political parties, and drawing on the ancient *panchayat* system for the structure of local and regional government.¹⁴ While recognizing local councils, or *panchayat*, the 1962 "Panchayat Constitution" contained even stronger assertions of royal power than the previous constitutions.¹⁵ Once again, the

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 3.

¹¹ *Id.*

¹² *Id.* at 4.

¹³ *Id.*

¹⁴ *Id.* at 5.

¹⁵ *Id.*

king retained unilateral power to suspend the constitution during emergencies, as well as power to amend the constitution. This amendment power was invoked periodically over the years, in response to agitation for more democratic government, which reached a head in 1990.¹⁶

E. Constitution of 1990

Pro-democracy protests, from both the right and the left, ultimately prompted the monarchy to make concessions in a new constitution in 1990.¹⁷ This constitution brought back a multi-party parliamentary system, and for the first time granted elected officials genuine power independent of the king.¹⁸ However, the 1990 Constitution left the door open to significant assertions of royal authority, including the invocation of emergency powers.¹⁹

By 1995, Maoist rebels were organizing in rural areas, protesting the monarchy and calling for a “people’s republic.”²⁰ The insurrection became increasingly violent over the next ten years, contributing to political instability in the elected government. In 2001, King Gyanendra declared a state of emergency, sending the army to fight the Maoist insurgency.²¹ Attempts to negotiate a peace failed in 2003, and ultimately, in 2005 the king invoked emergency power and assumed full control of government.²²

F. Interim Constitution of 2007

In April 2006, King Gyanendra, under intense political pressure, reinstated parliament, and the following month, the parliament voted unanimously to curtail royal power.²³ Shortly thereafter, a peace agreement was reached with the Maoists, and they were, in turn, invited to participate in an interim government.²⁴ The new government immediately moved to replace the 1990 Constitution. Plans were announced to draft and adopt an

¹⁶ *Id.* at 5-6; BBC News Timeline: Nepal available at http://news.bbc.co.uk/2/hi/south_asia/country_profiles/1166516.stm;

¹⁷ BBC News Timeline, *id.*

¹⁸ *NEPAL: Government and Politic*, *supra* note 7, at 6.

¹⁹ Country Profile: Nepal at 4 (Library of Congress, Federal Research Division) (November 2005) available at <http://memory.loc.gov/frd/cs/profiles/Nepal.pdf> (last visited August 24, 2009).

²⁰ BBC News Timeline, *supra* note 16.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

entirely new constitution—one that stripped the monarchy of power, and that created a federalist, secular state.²⁵ In the meantime, an Interim Constitution was adopted.²⁶ This document currently serves as the Constitution of Nepal, and apparently will continue to do so until a more permanent Constitution can be formed and approved.

G. Status of the new Constitution

While circumstances change on almost a daily basis, the new Constitution is still—at publication of this article—unbegun. Elections in 2008 produced a coalition government led by Maoists, with support from Marxist-Leninists.²⁷ In early 2009, Marxist-Leninist leader Madhav Kumar Nepal was named to chair the Constitutional drafting committee.²⁸ However, continuing political volatility in the new government has hindered progress on the new Constitution.

In May 2009, after controversy over his sacking of the army chief—over the chief’s refusal to integrate Maoist rebels into the military—prompted protests in the streets, the new Maoist Prime Minister resigned his post.²⁹ A few weeks later, Madhav Kumar Nepal (erstwhile chair of the Constitutional Drafting Committee) was named to succeed him. Prime Minister Nepal’s decision to back the Army chief’s refusal to integrate the rebels fractured the coalition and caused Maoist party to withdraw from the government.³⁰ Prime Minister Nepal, now representing a 22-party coalition that excludes the Maoists, has said his government’s goal is to write the new Constitution and complete the country’s peace process.³¹ However, he has not yet been replaced as chair of the Constitutional Drafting Committee, and controversy continues over the role Maoists may yet play in the

²⁵ AFP, *Nepal’s monarchy abolished, republic declared* (May 28, 2008) (“Nepal’s fiercely-republican Maoists, who fought for 10 years to remove the monarchy and create a secular republic, won the largest single bloc of seats in the assembly”) (last visited August 27, 2009).

²⁶ Interim Constitution of Nepal (2007) available at http://www.worldstatesmen.org/Nepal_Interim_Constitution2007.pdf (last visited July 13, 2009).

²⁷ BBC News Timeline, *supra* note 16.

²⁸ *Nepal Govt partners corner Maoists for Charter Draft Committee*, THE WEEKLY TELEGRAPH (August 14, 2009), http://telegraphnepal.com/news_det.php?news_id=6038 (last visited, August 15, 2009).

²⁹ BBC News Timeline, *supra* note 16.

³⁰ *Id.*; *PM says sacking army chief by Maoist was a mistake*, United News of India, May 29, 2009, available at LEXIS/NEXIS.

³¹ *Nepal PM says no foreign hand in Maoist govt’s downfall*, The Press Trust of India, May 27, 2009, available at LEXIS/NEXIS.

process.³²

While it remains to be seen when and how the drafting of the new Constitution for Nepal will take place, the country appears poised to move forward. It is timely, therefore, to comment on what should be included in that Constitution.

II. CURRENT STATE OF THE JUDICIARY IN NEPAL

The Nepali judiciary appears to have little to recommend it at present. Although there are some impressive examples of the Nepali Supreme Court asserting its independence,³³ this does not appear to be the norm for the judiciary as a whole. Indeed, the political history of Nepal depicts remarkable centralization of power in kings or prime ministers right up to the 1990 Constitution and even under that.³⁴ Moreover, there is a perception at least of widespread corruption in the judiciary, which the Nepali bar has been quick to condemn.³⁵

At the same time, justice has been carried out on the local level in panchayat bodies that have been problematic. Under the Panchayat

³² *Nepal Govt partners corner Maoists for Charter Draft Committee*, THE WEEKLY TELEGRAPH (August 14, 2009), http://telegraphnepal.com/news_det.php?news_id=6038 (last visited, August 15, 2009).

³³ Freedom House, *Freedom in the World 2008 - Nepal*, available at <http://www.unhcr.org/refworld/docid/487ca22e8.html> (last checked June 17, 2009) (“The Supreme Court is a generally conservative institution, and is largely independent of the new government. The court filed several petitions in 2006 appealing Parliament’s decision to revoke the monarchy’s powers.”).

³⁴ *Post Conflict Constitution Making in Nepal: Towards “Inclusiveness” in Democracy*, available at <http://ssrn.com/abstract=1300132> (The 1990 Constitution of Nepal acknowledged the country to be ‘multi-ethnic and multilingual’. Yet it described the state as indivisible and sovereign and created a highly centralized government).

³⁵ Krishna Prasad Bhandari, *Formal Justice Too Costly in Nepal*, NEPAL MONITOR, available at http://www.nepalmonitor.com/2007/05/formal_justice_too_costly_in_nepal.html (“The active [Nepal Bar Association](#) frequently castigated the [supreme] court for its supine verdicts during the period of direct rule.”) (last visited July 8, 2009); *NEPAL: SC Punishes the Messenger*, THE DAILY STAR, (September 27, 2008), available at <http://www.thedailystar.net/law/2008/09/04/corridor.htm> (“[T]he judicial system of Nepal . . . like all other sectors of Nepalese society, has a reputation of being corrupt Recently, the NBA decided to fight corruption in the judiciary”) (last visited July 8, 2009); *Human Rights in Decline in Asia*, UPI, (January 18, 2006) available at LEXIS/NEXIS. (“There has been a complete collapse of the rule of law. . . . The judiciary has been infiltrated by the pro-king faction, the Bar Association is warring with the courts, and the judges say the king’s order is the law”).

Constitution the court system was headed by the Supreme Court followed by zonal courts which oversaw numerous district courts throughout the country.³⁶ These courts were considered independent; however, they “never were assertive in challenging the king or his ministers.”³⁷ When the Maoists came to power, they established “People’s Courts” in the villages, to bring effective and efficient dispute resolution to those who may not have had meaningful access to justice in the past.³⁸ These People’s Courts have been controversial: they have been very effective in providing prompt and inexpensive means for the resolution of local disputes, in remote and rural areas in particular. On the other hand, they have not been perceived as upholding the highest principles of justice.³⁹

Weaknesses in the judiciary are not necessarily rooted in issues of Constitutional structure, however. And with this in mind, it is difficult to imagine that the problems that plague the Nepali judiciary can be fixed simply through drafting a new Constitution. The gap between the provisions of the law—the guarantees articulated in a Constitution—and the real-world functioning of a judicial system is a difficult one to bridge. The rule of law literature has lamented the fact that so many rule-of-law reform programs begin with Constitutional reform, when the Constitutional issues may be far removed from the most compelling rule-of-law priorities for a post-conflict society.⁴⁰

While the focus of this article is on the Constitutional provisions themselves, it would be naïve to presume that adoption of the right

³⁶ *NEPAL: Government and Politic* at 2 (Library of Congress, Federal Research Division) available at <http://lcweb2.loc.gov/frd/cs/nptoc.html> (last checked May 27, 2009).

³⁷ *Nepal: The Court System*, <http://www.country-data.com/cgi-bin/query/r-9185.html> (based on the Country Studies Series by Federal Research Division of the Library of Congress) (last visited July 2, 2009).

³⁸ Rekha Shrestha, *Eastern Nepal district said increasingly turning to Maoist "people's court,"* BBC Monitoring South Asia, May 10, 2004 available at LEXIS/NEXIS. (“About 75 per cent of cases are being solved at the people’s court”).

³⁹ *Nepal govt asks Maoists to stop extortion, scrap courts*, The Press Trust of India, July 2, 2006 available at LEXIS/NEXIS_ (“There have been reports that the Maoists are punishing people through their people's court not only in the remote areas under their control but also in the capital”).

⁴⁰ JANE STROMSETH, DAVID WIPPMAN, AND ROSA BROOKS, *CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS* 11 (Cambridge Univ. Press, 2006) (“The ‘building blocks’ for the rule of law might be said to be courts, police, prisons, legislatures, schools, the press, bar associations, and the like...the institutional building blocks on which the rule of law depends are themselves made up of human beings, with their own hopes, fears, and attitudes, and this makes creating the institutional aspects of the rule of law as complex as any other venture that relies on mobilizing multiple individuals in a common enterprise”).

Constitution will solve the judiciary's problems, much less establish the rule of law in Nepal. Nonetheless, ill-designed or ill-conceived Constitutional provisions can certainly hinder meaningful judicial reform. And the Constitutional structure of the judiciary may well provide a foundation for judicial development in the future, including the promise of an independent judiciary that can promote the rule of law.

The Interim Constitution now in effect is a reasonably sound starting point for discussion of the provisions of a new Constitution for Nepal. It is a vast improvement over the 1990 Constitution—which preserved (1) monarchical power and (2) the central role of Hindu religion in government. Those two provisions provided much of the basis for the Maoist rebellion that tore the country apart over a 10-year period.⁴¹ The Interim Constitution rejects those two principles and attempts to approximate the values and priorities that prevail in Nepali society and in the coalition government. Accordingly, it provides the best basis for commentary on what should be included in the new Constitution. This article will address those provisions that relate to the judiciary.

Of course, given the political exigencies associated with the adoption of an Interim Constitution, including extreme urgency to get it in place and all the compromises necessary to secure sufficient consensus, the resulting document is far from ideal. Without criticizing those involved in the drafting of the Interim Constitution—who would undoubtedly agree that it is imperfect⁴²—it is timely to revisit its provisions that relate to the judiciary, and consider, and to advise the CDC, what should be retained and what should be rejected in Nepal's new Constitution.

III. JUDICIAL ELECTIONS—A FLAWED CONCEPT

There is, of course, the classic tension between judicial independence, and judicial accountability. Recent rhetoric from the Maoists, whose rise to power coincided with the fall of the monarchy,⁴³ suggests that they want a judiciary “accountable to the people.”⁴⁴ This has prompted some discussion

⁴¹ MICHAEL HUTT (ED.), *HIMALAYAN PEOPLE'S WAR: NEPAL'S MAOIST REBELLION* at 5 (2004) (The Maoists' demands included “a secular state free of all discrimination and oppression with the monarchy stripped of its privileges.”)

⁴² Conversation with Mr. Janek Radon on February 14, 2009.

⁴³ As of May 2009, a new coalition government, excluding the Maoists, was formed. But the Maoists still maintain the largest bloc of seats in the Constituent Assembly. See *supra* notes 29-31 and accompanying text.

⁴⁴ *Post Conflict Constitution Making in Nepal: Towards “Inclusiveness” in Democracy*, available at <http://ssrn.com/abstract=1300132> (“After the ousting of the

of the idea of appointing judges by popular election in Nepal. The American experience with judicial elections, however, has not borne out the wisdom of that approach to judicial selection.

While rule of law reformers have been criticized in the past for attempting to *export* their own legal systems, Americans overwhelmingly recommend against any replication of their own systems of judicial election, in effect in so many states of the Union.⁴⁵ The message to the Nepali Constitutional Drafting Commission is this: don't resort to electing judges, as you will certainly come to regret any venture down this path.

As Professor Charles Geyh explains, one of the primary problems plaguing judicial elections is the ignorance of the voting public.⁴⁶ They usually know little or nothing about the judicial candidates who appear on the ballot. Typically, the best way to educate the public on their choices for judge would be to allow the judicial candidates to run campaigns that would alert the voter to their choices and to the differences between the candidates.⁴⁷ Of course, contested judicial campaigns raise the specter of fund-raising, and all the corrupting influence that comes with campaign contributions.⁴⁸

It is worth noting that the United States Supreme Court recently considered a ruling of the Supreme Court of West Virginia, after a litigant spent \$3 million in campaign contributions to get a more sympathetic justice onto that court.⁴⁹ The campaign was successful, and the newly-elected judge then cast the deciding vote to reverse a \$50 million judgment against the campaign contributor. The U.S. Supreme Court ruled that the newly-elected justice should have recused himself from the case based, if nothing else, on the problematic perceptions.⁵⁰ Nonetheless, it was a close (5-4) decision, which raises very serious concerns about the integrity of the judicial system when the judgeships themselves are subject to popular vote.

monarch, there was a broad consensus reached between the parties and the Maoists on ultimate goals of society and state: sovereignty of the people”).

⁴⁵ See discussion *infra*.

⁴⁶ Charles Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 54. (“as much as 80% of the electorate is completely unfamiliar with its candidates for judicial office.”)

⁴⁷ *Id.* at 54 (“One may hypothesize that as more money is spent on advertising in judicial races, voter ignorance will diminish, but that too is far from clear.”)

⁴⁸ *Id.* at 54 (“Eighty percent of the public thinks that campaign contributions buy influence with judges.”)

⁴⁹ *Caperton v. A.T. Massey Coal Co.*, ___ U.S. ___, 129 S.Ct. 2252 (2009).

⁵⁰ *Id.*

Fortunately, the Interim Constitution of Nepal does *not* call for judicial elections. But the suggestion has been made, and that alone is disturbing. The CDC should certainly reject that suggestion.

IV. CONSTITUTIONAL SAFEGUARDS FOR JUDICIAL INDEPENDENCE, BOTH INSTITUTIONAL AND DECISIONAL

There is no cognizable history or culture of judicial independence in Nepal, based on its judicial history.⁵¹ But to appreciate the structural basis for judicial independence, it is important to distinguish (1) *institutional* independence, which is the independence of the judicial branch as a whole from interference by the other branches of government, from (2) *decisional* independence, which is the freedom of the individual judge from improper influences in deciding her or his cases.⁵²

The key to institutional independence is the establishment of a governing body to oversee the judiciary—a body that is not under the control of the executive branch or, for that matter, the legislature. Separation of powers like this is a precursor to institutional independence. Bangladesh achieved this type of *de jure* separation of the judiciary from the executive with Constitutional amendments in late 2007.⁵³ Whether or not formal checks and balances are in place, the judiciary cannot be an independent branch of government unless it is governed by a body that stands on its own power.

A. Institutional judicial independence – the Judicial Council

The Interim Constitution of Nepal calls for the creation of a *judicial council* that is vested with power over the judiciary. The concept of a council to govern the judiciary is salutary. Indeed, the adoption of judicial councils to govern judicial systems has been characterized as “an international ‘best practice’ designed to help ensure judicial independence and external accountability.”⁵⁴

⁵¹ See *supra*, Section I, for a summary of Nepali history; see also *supra* note 36.

⁵² Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 386 (2006) (“[I]t is common to distinguish *decisional* independence from *institutional* and other components of judicial independence.”).

⁵³ K.M. Mukta, *Judges Should Get Better Emoluments*, THE NEW NATION (Feb. 5, 2009), available at nation.ittefaq.com/issues/2009/02/05/news0460.htm (last visited August 27, 2009). It is not clear yet whether this structural change has resulted in *de facto* separation, or in true institutional independence.

⁵⁴ Nuno Garoupa and Tom Ginsburg, *Guarding the Guardians: Judicial Councils and Judicial Independence*, 57 AM. J. COMP. L. 103 (2009)

The emerging consensus in favor of entrusting judicial governance to judicial councils is manifest in the widespread adoption of such institutions throughout the world. Presently an estimated 60% of the world's judiciaries are governed by such councils, up from 10% at the end of the 1970s.⁵⁵ Various international organizations have endorsed the concept as well in separate declarations, not always using the name "judicial council," but nonetheless declaring that judicial appointments and oversight should be done by an independent body composed mostly of judges:

- Universal Charter of the Judge – "selection . . . judicial administration and disciplinary action should be carried out by an independent body that includes substantial judicial representation."⁵⁶
- Beijing Principles – stating that the body entrusted with the appointment of judges "should include representatives the higher Judiciary and the independent legal profession as a means of ensuring that judicial competence, integrity and independence are maintained."⁵⁷

⁵⁵ Garoupa and Ginsburg, *supra* note 54, at 105.

⁵⁶ Universal Charter of the Judge, Articles 9 & 11 (1999) available at <http://www.hjpc.ba/dc/pdf/THE%20UNIVERSAL%20CHARTER%20OF%20THE%20JU DGE.pdf> (last visited July 3, 2009). The Charter has been approved by the member associations of the International Association of Judges and was unanimously approved by the delegates attending the meeting of the Central Council of the International Association of Judges in Taipei (Taiwan) on November 17, 1999. http://www.mpil.de/ww/de/pub/forschung/forschung_im_detail/projekte/minerva_richterl_unabh/intdocs.htm.

⁵⁷ Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, Article 15 (1997), available at <http://www.asianlii.org/asia/other/CCJAPRes/1995/1.html> (last visited July 3, 2009).

The Beijing Statement of Principles of the Independence of the Judiciary finds its origins in 1982 in a statement of principles formulated by the Law Association for Asia and the Pacific (LAWASIA) Human Rights Standing Committee and a small number of Chief Justices and other Judges at a meeting in Tokyo ("the Tokyo Principles"). The decision to formulate the current Statement was made at the 4th Conference of Chief Justices of Asia and the Pacific in Perth, Western Australia in 1991. . . . [A] first draft . . . was presented to the 5th Conference in Colombo, Sri Lanka, in 1993. In light of comments received at that conference and subsequently, and following further consideration at the conference in Beijing in August 1995, the Statement of Principles was adopted by the Chief Justices from 20 countries in the Asia Pacific. A revised version of the Statement . . . was adopted in its final form at the 7th Conference of the Chief Justices in Manila in August 1997. The Statement has now been signed and subscribed to by 32 countries in the Asia Pacific region.

Id. at Foreword.

- Latimer House Guidelines (for Commonwealth Countries) – “appointments should be made by a judicial services commission (established by the Constitution or by statute).”⁵⁸
- Council of Europe Recommendation – “The authority taking the decision on the selection and career of judges should be independent of the government and the administration. In order to safeguard its independence, rules should ensure that, for instance, its members are selected by the judiciary and that the authority decides itself on its procedural rules.”⁵⁹
- European Charter on the Statute for Judges – “In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary.”⁶⁰
- Palermo Declaration – “The Supreme Council of Magistrates is entrusted with the administration and discipline of the judiciary. It guarantees the independence of magistrates. It provides for

⁵⁸ Latimer House Guidelines for the Commonwealth, Article 1 (1998), *available at* <http://www.arablegalportal.org/criminal-laws/Images/CodeLink/32.pdf>.

A Joint Colloquium on “*Parliamentary Supremacy and Judicial Independence . . . towards a Commonwealth Model*” was held at Latimer House in the United Kingdom, from 15-19 June 1998. Over 60 participants attended representing 20 Commonwealth countries and 3 overseas territories. The following Guidelines for the Commonwealth are a result of deliberations during the Colloquium and subsequent discussions. The Guidelines were considered by Commonwealth Law Ministers in 1999 and were referred by them to Senior Officials who discussed the Guidelines at their meeting in London in November 2001. They “noted that the principles of good governance and judicial independence had been clearly endorsed by Commonwealth Heads of Government and welcomed the general thrust of the declaration of those principles in the Guidelines”. . . . The Guidelines were also considered by the Law Ministers and Attorney Generals of Small Commonwealth Jurisdictions Meeting in May 2000, where the Guidelines were welcomed as “reflecting valuable and fundamental concepts”.

Id.

⁵⁹ Recommendation No. R(94) 12 of the Committee of Ministers to Member States on the Independence, Efficiency, and Role of Judges (1994) (Council of Europe Recommendation), art. I.2. c. *available at* [http://www.coe.int/t/e/legal_affairs/legal_co-operation/administrative_law_and_justice/texts_&_documents/Conv_Rec_Res/Recommendation\(94\)12.asp](http://www.coe.int/t/e/legal_affairs/legal_co-operation/administrative_law_and_justice/texts_&_documents/Conv_Rec_Res/Recommendation(94)12.asp) (last visited July 3, 2009).

⁶⁰ European Charter on the Statute for Judges (1998), Art. 1.3 *available at* http://www.coe.int/t/e/legal_affairs/legal_co-operation/legal_professionals/judges/instruments_and_documents/charte%20eng.pdf (last visited July 3, 2009),

recruitment, decides the assignment of magistrates and organizes professional training.”⁶¹

There is a similar theme in all these declarations. In order for the judicial council to serve its principal purposes, first and foremost to safeguard judicial independence, the council itself must itself be removed from the executive’s sphere of influence, empowered to act on its own. But the mere existence of a judicial council is not enough; an ill-conceived judicial council may do more harm than good. In their paper *Global Best Practices: Judicial Councils*, one of the most important studies on the subject, Violaine Autheman and Sandra Elena concluded:

The Judicial Council, like the judiciary itself, is an important institution that should be structured and operate in a transparent, accountable manner [A]nother key finding of our research is that [judicial councils] may serve more as a barrier than as an avenue to judicial independence and accountability, particularly in countries where corruption is systemic or the judiciary is controlled by the executive.⁶²

The caution in this latter finding is particularly important for Nepal. The provisions of the Interim Constitution fail to provide an adequate buffer from executive influence. Accordingly, the Judicial Council, as presently constituted, is unlikely to further the goals of judicial independence and accountability, and may well serve as a barrier to the same.

1. Present provisions for the Judicial Council

The Interim Constitution calls for a Judicial Council composed of five members:

- The Chief Justice of the Supreme Court, as Chairperson
- The senior-most Judge of the Supreme Court
- The Minister of Justice

⁶¹ The Palermo Declaration is a draft additional protocol to the European Convention on Human Rights—articulating a model for the elements of a judiciary statute, which call for the creation of a “Supreme Council of Magistrates.” Elements of a European Statute on the Judiciary, Palermo Declaration, Section 3.1, issued by the European Magistrates for Democracy and Freedom (1993), available at <http://medel.bugiweb.com/usr/Palermo.pdf> (last visited July 3, 2009).

⁶² Violane Autheman and Sandra Elena, *Global Best Practices: Judicial Councils, Lessons Learned from Europe and Latin America*, IFES RULE OF LAW WHITE PAPER SERIES (April 2004), abstract, available at http://www.ifes.org/publication/eae6b5d089d0b287174df2742875b515/WhitePaper_2_FIN_AL.pdf (last visited July 3, 2009).

- A senior advocate, appointed by the Chief Justice on recommendation of the Nepal Bar Association
- Another “jurist” appointed by the Prime Minister.⁶³

It is not clear, however, to what degree these five are in a position to exert significant power in the appointment and in the oversight of judges. They are empowered to “make recommendations and give advice . . . concerning the appointment of, transfer of, disciplinary action against, and dismissal of Judges and other matters relating to judicial administration.”⁶⁴ But this phrasing is disturbingly weak, as “recommendations” and “advice” can presumably be ignored. On the other hand, when a Chief Justice is empowered to act “on recommendation” of the Judicial Council,⁶⁵ it could be inferred that she or he is powerless to act absent such recommendation. But the present provisions are too vague to ensure such interpretation; nothing in the Interim Constitution unambiguously establishes the power and authority of the Judicial Council over judiciary affairs as a *governing* body, not merely an *advisory* one.

Role of the Judicial Council – Appointment

The Judicial Council appears to play a significant role in the judicial appointment process, as the Chief Justice is empowered to appoint other Judges of the Supreme Court as well as judges of the Appellate Courts and District Courts “*on recommendation of the Judicial Council.*”⁶⁶ Indeed, it appears that the Judicial Council is responsible for administration of a “written and oral examination” to be used to identify qualified candidates for judicial appointment,⁶⁷ and for vetting candidates, considering “*inter alia*, qualification, capacity, experience, dedication and contribution to justice, reputation in public life, high moral character” before making recommendations for appointment.⁶⁸

This provision appropriately allocates responsibility for screening judicial candidates to the council. The “on recommendation of” language, however, raises questions about the council’s role in making the final selection and appointment.

⁶³ Interim Constitution, *supra* note 26, Article 113

⁶⁴ *Id.* at Article 113(1).

⁶⁵ *Id.* at Article 103(1) & 109(1) (emphasis added).

⁶⁶ *Id.*

⁶⁷ *Id.* at Article 109(4)

⁶⁸ *Id.*

Role of the Judicial Council – Discipline and Removal

The Interim Constitution also emphasizes the Judicial Council’s role in disciplinary proceedings, including the power to obtain case files related to complaints lodged against judges,⁶⁹ and the power to “constitute a Committee of Inquiry” if detailed, expert, investigation is required in a judicial misconduct matter.⁷⁰ This appears to be an expansive role, although there is nothing to suggest that the Council’s ultimate determination in a disciplinary matter will be anything more than a “recommendation” to the Chief Justice.

As for the most serious discipline—removal of judges—Article 109(10)(c) speaks more specifically, saying that a judge may be

removed by the Chief Justice in accordance with a *decision* of the Judicial Council for his/her removal for reasons of incompetence, misbehavior or failure to discharge the duties of his/her office in good faith, incapable to discharge the duties due to physical or mental condition, or deviation to justice.⁷¹

Of particular interest here is the use of the word “decision” to describe the Judicial Council’s determination, rather than mere “advice” or “recommendation” as provided in Article 113(1).⁷² This suggests that the Chief Justice’s role, carrying out council determinations (at least on the issue of removal), may be merely ministerial, rather than discretionary. But the ambiguity persists, particularly given the inconsistency between Articles 109 and 113, and that leaves the judiciary vulnerable. Unless the respective roles of the Chief Justice and the Judicial Council are clarified, there is potential for conflict and a corresponding constitutional crisis, if and when the Chief Justice chooses to disregard the “recommendations” or “decisions” of the Judicial Council.

Role of the Judicial Council – Other Responsibilities

The Interim Constitution is clear that the Judicial Council must be

⁶⁹ *Id.* at Article 113(4).

⁷⁰ *Id.* at Article 113(5). *See also* Article 109(10) (“The Judge of the Appellate Court and District Court who is facing charge pursuant to this sub-clause shall be given a reasonable opportunity to defend himself/herself; and for this purpose, the Judicial Council may constitute a ‘Committee of Inquiry’ for the purposes of recording the statement of the Judge, collecting evidence and submitting its findings thereof.”)

⁷¹ *Id.* at Article 109(10)(c) (emphasis added).

⁷² *Supra* note 64 and accompanying text.

“consulted” before judges are assigned to other tasks, such as “work concerning judicial inquiry or to legal or judicial investigation or research.”⁷³ This “consultation” language is the weakest of all, since it does not even call for a recommendation of the judicial council, and therefore suggests no legal, political, or moral obligation to heed the council’s views.

Transfers of judges from one court to another, in contrast, are done “on recommendation of” the Judicial Council.⁷⁴ This language suggests a larger role for the council in transfer decisions than in assignments to other tasks.

The catch-all provision in Article 113(1) states that the Judicial Council shall “make recommendations and give advice . . . concerning . . . other matters relating to judicial administration.”⁷⁵ Given the vagueness of this language, the Interim Constitution is not entirely clear what role the Judicial Council may play in the larger budget process. But a case can be made that the Judicial Council should be directly involved in budgeting: at the very least drawing up and submitting proposed budgets to the Ministry of Finance and the legislature. The Interim Constitution may permit the council to play such a role, but does not *require* the council to do so. Accordingly, the legislature and Ministry of Finance may well choose to reject any involvement from the judiciary in establishing budgets.

2. Strengthening the Judicial Council—clear delegation of power

As noted above, it unclear how much authority the Judicial Council has to take final action on its own; the Interim Constitution appear to reserve ultimate authority in the Chief Justice, who may receive advice, recommendations, and even decisions of the Judicial Council, but then, in

⁷³ *Id.* at Articles 106(1) and 110(1) (The Chief Justice or Judges of the Supreme Court, as well as the Appellate and District Judges “shall not be engaged in or deputed to any assignment except that in the post of a Judge. Provided that the Government of Nepal may, in consultation with the Judicial Council, depute the Chief Justice or a Judge of the Supreme Court to work concerning judicial inquiry or to legal or judicial investigation or research, for a specified period or to any other work of national concern.”) In the case of Appellate and District judges, the Chief Justice “in consultation with the Judicial Council” may depute them to these projects, including “election works.” *Id.* at Article 110(1).

⁷⁴ The Chief Justice also has power “*on the recommendation of the Judicial Council*” to transfer Appellate or District Judges from one court to another. *Id.* at Article 110(2) (emphasis added). It should be noted that such “transfers” are not mere housekeeping issues. The power to transfer can be abused, and judicial independence can well be threatened when judges fear being transferred to remote or undesirable locations, in retaliation for unpopular decisions they may render. If the transfer power can be used by political actors to intimidate or punish judges, judicial independence cannot be assured.

⁷⁵ *Id.* at Article 113(1).

the end, makes that appointment,⁷⁶ or effects the removal.⁷⁷ Autheman and Elena explain:

The real powers of a Judicial council may be limited by the legal weight accorded to its decisions. If it renders only advisory opinions, it may become powerless, and the deciding authority may choose to disregard the opinion. The responsibilities undertaken by the council with regard to the appointment process may vary from an advisory opinion or the elaboration of a list of potential candidates to a mandatory consultation or legally binding decisions.⁷⁸

The new Constitution should avoid vesting too much power in one person; a post-monarchical society needs to be particularly sensitive to that concern.

Ideally, these provisions should be redrafted to vest power directly in the Judicial Council. The Chief Justice is the chair of the Judicial Council, so all appointments, discipline, and removals of judges—as well as other important administrative decisions over the judicial branch (*e.g.* adoption of budgets and promulgation of rules)—would be done over his or her signature anyway. But the Constitution should make it clear that these are the actions of the entire body, and not of an individual who may or may not choose to follow the recommendations of the Judicial Council.⁷⁹

3. Strengthening the Judicial Council—broadened and diversified membership

The other, even more serious concern about the provisions for the Judicial Council comes from its membership: only five individuals, three of

⁷⁶ *Supra* note 65.

⁷⁷ *Id.* at Article 110(c).

⁷⁸ *Supra* note 62, at 7:

In the appointment of judges, Judicial Councils may have varying powers, ranging from no role at all to actual appointment powers:

1. **No role** – Canada, Denmark
2. **Purely advisory** – Panama, Poland, Slovakia
3. **Proposal of candidates for selection (non-binding)** – Guatemala (lower court)
4. **Proposal of candidates for selection (binding)** – France (higher courts)
5. **Proposal of candidates for ratification** – El Salvador
6. **Actual appointment** – Bulgaria, Dominican Republic (Supreme Court).

⁷⁹ See Garoupa and Ginsburg, *supra* note 54, at 113 (explaining how the very-highly-paid Chief Justice of Singapore wields enormous power over judicial appointments, and speculating that the Chief Justice may use this power to ensure that the bench is populated with judges “known for [their] docility in cases of great importance to the ruling party.”)

whom, including the chair, are directly appointed by the Prime Minister.⁸⁰ The other two are appointed by the Chief Justice,⁸¹ who is, in turn appointed by the Prime Minister. This affords the Prime Minister exceptional power to shape and influence the judiciary as a whole, offering poor safeguards for institutional independence.

Judges on the Council

If the Judicial Council is to function independently, its membership needs to be broader, and further removed from the influence of the executive. The international trend has been to populate judicial councils mostly with judges (or “magistrates”), who already enjoy some measure of independence. The Palermo Declaration, for example, calls for “[a]t least half of the . . . Council . . . [to be] composed of magistrates,”⁸² and the European Charter insists that “at least one half of those who sit are judges.”⁸³ Echoing the same principle, the Universal Charter of the Judge provides that the council should “include[] substantial judicial representation.”⁸⁴

Brazil typifies the trend, passing in 2004 a new constitutional amendment calling for a judicial council of fifteen: nine judges, two prosecutors, two lawyers, and two lay persons appointed by the legislature.⁸⁵ In the U.S. federal courts, the Judicial Conference of the United States (“JCUS”)—the governing council over the federal judiciary as a whole—is composed *entirely* of judges,⁸⁶ as are the Judicial Councils

⁸⁰ See *supra* note 63 and accompanying text. Of course, while all three are appointed by the Prime Minister, they may not all have been appointed by the *same* Prime Minister.

⁸¹ Of course, one of those two is appointed by the Chief Justice “on the recommendation of the Nepal Bar Association.” *Id.* at Article 113(c).

⁸² Palermo Declaration, *supra* note 61, at Sec. 3.2

⁸³ European Charter on the Statute for Judges, *supra* note 60.

⁸⁴ Universal Charter of the Judge, *supra* note 56.

⁸⁵ Garoupa and Ginsburg, *supra* note 54, at 111 & n. 35.

⁸⁶ 28 U.S.C. § 331 (“The Chief Justice of the United States shall summon annually the chief judge of each judicial circuit, the chief judge of the Court of International Trade, and a district judge from each judicial circuit to a conference at such time and place in the United States as he may designate. He shall preside at such conference which shall be known as the Judicial Conference of the United States. The district judge to be summoned from each judicial circuit shall be chosen by the circuit and district judges of the circuit and shall serve as a member of the Judicial Conference of the United States . . .”). The JCUS does not have any involvement in the appointment of judges, but is limited solely to administrative oversight of the judicial branch. In this sense it is different from the Judicial Councils of most states.

of the various circuits.⁸⁷

[S]election of Council Members by their Fellow Judges

The issue of strict composition—to what degree is the council dominated by judges?—may not be as important as the issue of how the council members are selected. The Council of Europe similarly calls for judicial council members to be “selected by the judiciary.”⁸⁸ The district judges on the JCUS are also “chosen” by their fellow judges.⁸⁹ Again, both the European Charter and the Palermo Declaration call for the judges on the council to be “elected by their peers,” with the latter declaring that such election should be “according to the rule of proportional representation.”⁹⁰

The idea here is not so much to give the judges “representation” on the Judicial Council, or to give these Council members a specific constituency to serve, but to spread further the appointment power, diluting the influence of any one actor (particularly a political actor, like the Prime Minister) over the judiciary as a whole. This approach will decentralize the appointment power, while ensuring that the persons appointed (and the persons making the appointments) are knowledgeable about the courts and invested in the integrity of the judiciary.

The Palermo Declaration, which apparently contemplates an all-judge council, allows for legislative selection of some of those judges, stating that although a majority of the council membership will be elected by their fellow judges, the council “comprises, besides, personalities appointed by parliament . . . appointed for a definite period of time.”⁹¹ Interestingly enough, it does not mention the possibility of executive branch appointments,⁹² perhaps prompted by the concern that judiciaries already suffer too much from executive branch influence.

Representation of Different Levels of Judges

⁸⁷ 28 U.S.C. § 332(a)-(b). Circuit councils have some involvement in the selection and appointment of bankruptcy judges and the primary actors in the judicial discipline system for federal judges. 28 U.S.C. §§ 353 & 354.

⁸⁸ Recommendation No. R(94), *supra* note 59.

⁸⁹ 28 U.S.C. § 331 (“The district judge to be summoned from each judicial circuit shall be chosen by the circuit and district judges of the circuit and shall serve as a member of the Judicial Conference of the United States . . .”).

⁹⁰ European Charter on the Statute for Judges, *supra* note 60; Palermo Declaration, note 61, *supra*, at Sec. 3.2

⁹¹ Palermo Declaration, *supra* note 61.

⁹² *Id.*

It is not entirely clear what the Palermo Declaration means by “proportional representation,” but its mention raises a couple of interesting possibilities. One is that there should be representation on the council of judges of different levels, including trial judges, appellate judges, and Supreme Court justices, *and* that there should be proportionately more trial court judges on the council corresponding to the greater proportion of trial court judges in the judicial system. The importance of including the trial judges’ perspective on the council should not be underestimated. Many of the most vexing problems a judiciary faces are in the trial courts—indeed this is where most citizens interact with the judicial system. And trial judges have been known to complain that appellate judges are unaware and unsympathetic to the practical difficulties that trial judges encounter in their work.⁹³

In civil law jurisdictions, however, appellate judges are almost always promoted from the ranks of trial judges, meaning anyone on the appellate court should retain memory and sympathy for the concerns of the trial courts. But even in those jurisdictions, there may be value in diversified judicial representation. A recent examination of judicial councils in such countries noted with approval that “[t]he power of high-ranking magistrates has been dramatically reduced . . . (as a consequence of junior-ranking judges being appointed to the judicial council)”⁹⁴ Concentrating power in a few high-ranking judges can have other adverse consequences for judicial independence when judges feel pressure to conform to a particular judicial philosophy shared by the highest-ranking judges. This has been cited as a difficulty in Japan, where institutional independence is strong, but the decisional independence of the individual judges suffers terribly from this influence coming from *within* the judiciary.⁹⁵

On balance, therefore, there are compelling interests to be served by including trial judges on the judicial council. Making the representation of

⁹³ The complaint often follows from appellate judges’ criticizing and overturning trial judge decisions—decisions that in the heat of trial had to be made almost instantaneously (*e.g.* to sustain or overrule an objection)—but which the appellate judges later from a safe distance, with the benefit of virtually unlimited time, ability to research the legal issue, and, of course, hindsight. In any case, the issues and concerns of a trial court are not likely to be well represented on a judicial council that includes only appellate judges.

⁹⁴ Garoupa and Ginsburg, *supra* note 54, at 107.

⁹⁵ David M. O’Brien and Yasuo Ohkoshi, *Stifling Judicial Independence from Within: The Japanese Judiciary*, in PETER H. RUSSELL AND DAVID M. O’BRIEN (ED.), *JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY: CRITICAL PERSPECTIVES FROM AROUND THE WORLD* at 37-61 (2001).

trial judges *proportional*, however, may tip the balance of power too far in favor of the trial judges, and may result in a judicial council that is too large.⁹⁶ In the United States federal courts, the JCUS and Circuit Councils are constituted with approximately half trial judges and half appellate judges, which gives trial courts significant representation, if not *proportional* representation.⁹⁷ Along similar lines, the Nepali Constitution should ensure that the judges on the judicial council include a significant complement of judges from courts of first instance.

Geographic Representation on the Judicial Council

The second possibility in the Palermo Declaration's language is that "proportional representation" may be geographical, so different regions or provinces may be represented on the judicial council in proportion to their respective number of judgeships. Given the distinct regions in Nepal, and the variety of ethnic groups within each of them, it may be advisable to require the judicial council to include a representative from, for example, each of five provinces.⁹⁸ This, again, finds parallel in the United States, where one trial court judge and one appellate judge from each of the regional circuits is appointed to the JCUS.⁹⁹ This would assure that the council would not be dominated by those close to the power structure in Kathmandu, and would ensure that problems and issues unique to one province or region would not be overlooked by a council unaware and unacquainted with such problems.

⁹⁶ Data on the number of judges in Nepal is not readily available, but in California, an area of comparable population (both are generally in the range of 30-35 million), there are 7 justices in the Supreme Court, 105 justices in the Courts of Appeal, and 1,972 judges in the trial courts. <http://www.courtinfo.ca.gov/qna/qa7.htm> (last visited July 3, 2009). A proportional representation scheme would require 1 Supreme Court Justice, 15 appellate court judges, and 282 trial court judges. Even if proportionality were required for only the latter two categories, the council would consist of 1 appellate court judge, and 19 trial court judges. The result would be a council that would be too large to function effectively and that, even if it could, would leave the legitimate interests of the appellate courts significantly under-represented.

⁹⁷ *Supra* notes 86 and 87.

⁹⁸ The number and configuration of provinces within Nepal is an open question at present, something to be established in the new constitution. See Constitutional Supplement, *What the Geographers Say*, NEPALI TIMES (April 17-23, 2009) available at www.nepalitimes.com.np/issue/2009/04/17/ConstitutionSupplement/15864/print. The suggestion here that there may ultimately be five provincial authorities is mere speculation, reflecting the recommendation Chandra Bahadur Shrestha, *id.* ("If we could make the existing five development regions the new provinces it will be easier to gauge the kind of resources available and integrate the regions properly.") and of Dr. Timalsena: "There should not be more than 5 provincial high courts." *Infra* note 108, at 9.

⁹⁹ *Supra* note 86.

With a judicial council dominated by judges and selected by their fellow judges, the council is well positioned to function as a truly independent branch of government. Council members will not “owe their seat” to anyone outside the judiciary, and any agenda of the judges who elected them is likely to include the fundamental interests of the judiciary, *e.g.* structural protections for judicial independence, adequate funding for the judiciary, caseload equalization, etc. Appropriate, if not proportional, representation of trial court judges and judges from the different regions/provinces of Nepal, would also help to diversify the council and make it more responsive to the broad-ranging issues and needs throughout the judicial system.

Non-judge Membership on the Judicial Council – Lawyers

Of course, one of the drawbacks to a judicial council dominated by judges is that the council’s priorities may focus too much on the comforts and emoluments of the judges themselves, with inadequate attention to the needs and interests of stakeholders outside the judiciary, including litigants. In the United States, for example, one of the top priorities for the JCUS, (an all-judge council) and consequently its administrative staff, has been increasing the pay of the judges.¹⁰⁰ It is worth noting that most of the international declarations and “best practices” speak of a council on which judges form a “substantial” or even majority membership, but do not occupy *all* posts on the council.¹⁰¹

So who else should serve on the Judicial Council? One of the most obvious appointments is that of a lawyer representing the bar. An all-judge council may not fully represent the interests of the bar or of the litigants in the system. The Interim Constitution already calls for one member of the bar: “A senior advocate, appointed by the Chief Justice on recommendation of the Nepal Bar Association.”¹⁰² And while this is only one member, it presently constitutes 20% of the entire Judicial Council. If the council membership is expanded, broadened, and diversified, the bar representation should be similar expanded. Consistent with the discussion above, however, it should be made clear that the Chief Justice is not free to disregard the recommendation(s) and make his or her own selection.

¹⁰⁰ Tony Mauro, *Judicial Salaries at Top of Court Administrator's Agenda*, LEGAL TIMES (January 9, 2007) available at <http://www.law.com/jsp/article.jsp?id=1168263429718> (last visited June 23, 2009).

¹⁰¹ See, *e.g.*, notes 82-85 and accompanying text.

¹⁰² *Supra* note 63.

In the spirit of broadening and diversifying the council, it may be worth looking beyond the Nepal Bar Association. If Nepal has more than one viable bar association, it may be appropriate to expand the Judicial Council to include a selection by the other(s).¹⁰³ This would expand membership, and appropriately dilute the Prime Minister's influence.

As noted above, Brazil has amended its constitution to create a judicial council featuring not only two "lawyers" but two "prosecutors" as well (on a council of 15, 9 of whom are judges). This could be a problematic provision for Nepal, however. On the one hand, prosecutors may bring valuable perspective to the issues of court function and operation that a Judicial Council must contend with. But two concerns cut the other way. First, to the extent that the prosecutors are part of the Ministry of Justice, an executive branch agency, this would only increase executive branch influence over the judiciary. Second, to the extent that the Judicial Council does judicial selection, the prosecutors may be "biased" in the selection of judges—opting for candidates they perceive to be pro-prosecution—which could skew the selection process, particularly if there are not two corresponding seats on the council reserved for defense counsel.

Non-judge Membership on the Judicial Council – The Legal Academy

It would also be advisable to include one or more representatives of the academy on the Judicial Council. The deans of the law schools in Nepal might be in a position to serve as members of the Judicial Council or to nominate others from their respective faculties to so serve. Academics usually command a degree of respect in the legal community, and can contribute much to the principled administration of the judiciary. And because academic freedom is a value highly prized in the educational establishment, we can expect the representatives of the academy to demonstrate and model independence in the performance of their duties. Most critically, their inclusion would help ensure that the Judicial Council did not function as a monolithic alter ego of the Prime Minister—the risk that the current regime bears—but, instead, as a deliberative body reflecting the diverse concerns of institutions and individuals involved with and affected by the judicial system.

Non-judge Membership on the Judicial Council – Lay Persons

¹⁰³ It may be possible to include, for example, the Kathmandu District Court Bar Association, <http://www.kathmandubar.org.np/> (last visited July 3, 2009), or Nepal's Supreme Court Bar Association, or perhaps others in nominating lawyers to serve on the Judicial Council.

Again, the Brazilian judicial council calls for “two lay persons appointed by the legislature.”¹⁰⁴ There is certainly potential to round out the Nepali Judicial Council’s membership with lay persons, but when the sole qualification is “lay person” it raises questions about who should be selected. And the legislature may not be the best authority to appoint such persons, particularly if we are trying to maintain institutional independence and separation of powers. This may be an avenue toward introducing and geographical proportionality, however, if the local government or judiciary of each of five provinces were empowered to appoint a lay person to the judicial council.¹⁰⁵ Whether this idea has merit for Nepal may depend on whether there are prominent, respected, trustworthy citizens available to fill that role, and whether the provincial governments are likely to appoint individuals who could and would act independently of political pressures.

4. Judicial Council Best Practices – Summary

Autheman and Elena distill seven key principles that should govern any judicial council:

1. Independent, transparent and accountable – Judicial Councils must be independent bodies and operate in a transparent and accountable manner.

2. Structure – The structure, powers and processes of Judicial Councils must be designed to safeguard and promote judicial independence. If adequate checks and balances are not in place, the Judicial Council may become a pawn in the hands of the executive, legislative and/or powerful groups, thereby undermining judicial independence.

3. Adequate resources – Judicial Councils must be granted adequate human and financial resources.

4. Composition – While the exact composition of Judicial Councils varies greatly from country to country and depends on existing obstacles to judicial independence, there is an emerging consensus among judges, legal scholars and practitioners that Judicial Councils should be composed of a majority of judges and that Councils with broad representation may function more fairly and independently.

5. Judicial membership – Judicial members of the Judicial Council should be elected by their peers rather than appointed by the legislature or executive. The selection process should be transparent and provide for civil society participation and oversight.

¹⁰⁴ Garoupa and Ginsburg, *supra* note 54, at 111 & n. 35

¹⁰⁵ *See supra* note 98.

6. Powers – Judicial Councils around the world have varying powers which range from judicial administration to decisions affecting the judicial career, but there is an emerging consensus that where they exist they should be responsible for the judicial selection process and contribute to the promotion, discipline and/or training of judges.

7. Monitoring and reporting – The decision-making process of the Judicial Council should be transparent and allow for civil society participation and oversight. Mechanisms to monitor Judicial Council operations must be put in place and effectively implemented.¹⁰⁶

In keeping with these principles, some of which have been discussed in much more detail *supra*, it is clear that there is no “one-size-fits-all” solution. There are a variety of ways to compose councils and to allocate authority and responsibility for court governance. But while there may be no one *right* way to compose a council, there are certainly *wrong* ways to do it. Compliance with the seven enumerated principles above is important to avoid such mistakes.

Indeed, one of the most glaring problems with Nepal’s Interim Constitution relates to its provisions for the powers and composition of the Judicial Council. The essential reforms needed in the new Constitution are (1) to empower the council, so it is not limited to giving advice and making recommendations, and (2) to broaden and diversify the council’s membership, distancing it from the influence of the Prime Minister, thereby affording a measure of independence to the third branch of government and to the judges in it. The specific measures set forth above—such as having a majority of council come from the judicial ranks, elected by their peers—are merely examples of how that membership may be broadened and insulated from executive influence. The specific reforms discussed here are mere possibilities, useful and meaningful only because they serve the larger purposes of promoting independence and accountability in the Nepali judiciary.

B. Institutional judicial independence – Judiciary budgets

Control over judiciary budgets carries with it a certain power over the judicial branch overall. In any country, and under any constitution, the judicial branch is beholden to the other branches of government for its budgetary allocation, and this, in turn, has the potential to adversely impact the independence of the third branch. Catering to the political priorities of the political branches of government could well become the only way for

¹⁰⁶ Autheman and Elena, *supra* note 62.

the judiciary to secure adequate resources for the upcoming budget cycle.

This is difficult to control constitutionally, but it may be possible to put in the Constitution a minimum allocation for the judicial branch.¹⁰⁷ For example, the Constitution could provide that three percent (3%) of the total national budget must be allocated to the judicial branch, to be used as directed by the judicial council. Dr. Ram Krishna Timalaena, Registrar of the Supreme Court of Nepal, has observed:

Over the years the trend of fixing the judicial budget in the constitution is increasing in view of the executive and legislative influence and domination to the judiciary. If we examine the world trend two to six percent of national budget is allocated to the judiciary. Some of the countries prescribe this by national constitution itself.¹⁰⁸

Timalaena recommends that the Constitution specify a judicial budget of “at least two percent of the national budget,”¹⁰⁹ a modest recommendation prompted by pragmatic politics. As the Nepali judiciary has been allocated between 0.5% and 0.6% of the national budget in recent years, suggesting anything more than 2% would be unrealistic, if not impolitic.¹¹⁰

A constitutional minimum could become a *de facto* maximum, however, as the legislature may be tempted to ignore the actual needs of the judiciary and merely allocate what the courts are entitled to under the Constitution. If the international norms are indeed “two to six percent,”¹¹¹ the two percent

¹⁰⁷ This type of minimum allocation is not unheard of in constitutions. The Indonesian Constitution requires that at least 20% of its annual budget be allocated to education. See Desi Nurhayati, *Government to Raise Spending on Education Next Year*, JAKARTA POST, (August 14, 2008) available at <http://www.embassyofindonesia.org/news/2008/08/news065.htm> (last checked June 7, 2009). In Latin America, at least, such provisions have ensured minimum funding levels to judiciaries as well. Note 111, *infra*.

¹⁰⁸ Ram Krishna Timalaena, *Designing Judiciary in the Process of Constitution Making* at 10 (unpublished manuscript, presented in Kathmandu on February 14, 2009, on file with the author).

¹⁰⁹ *Id.*

¹¹⁰ Email communication from Ram Krishna Timalaena, dated June 18, 2009 (on file with the author).

¹¹¹ Timalaena, *supra* note 108, at 10. The six percent figure comes from Costa Rica, where that is set as a Constitutional minimum for funding the third branch of government: “The budget shall allocate to the Judicial Branch an amount of no less than six percent of the ordinary income estimated for the fiscal year.” Article 177 of the Costa Rican Constitution; Email from Timalaena, *supra* note 110; see also Article 249 of the Paraguayan Constitution, which provides that “[t]he judicial branch will have its own budget . . . [in] an amount that will not be lower than 3 percent of the central government’s

minimum suggested by Timalseña may well do more harm than good, if it virtually guarantees an underfunded judiciary in the future. On balance, however, particularly given the historical underfunding of the judiciary in Nepal, a constitutional minimum funding level could serve effectively to protect institutional independence of the judiciary. While a closer inquiry should be done to determine the appropriate minimum to ensure the adequacy of that allocation, some such minimum should be formalized in the Constitution. It may also be helpful, rhetorically at least, for the Constitution to specify a maximum as well, *e.g.* to state that the budget for the judiciary should be “between 2 and 4 percent” of the total budget. This should help keep the constitutional minimum from becoming a *de facto* maximum.

C. Institutional judicial independence – Emergency powers

Consistent with rule of law principles, no one should be “above the law,” and the courts should have jurisdiction over legal issues.¹¹² There are a number of places where the Interim Constitution specifically states that the courts have no jurisdiction, and most of them are legitimate provisions where the exercise of judicial authority would undermine separation of powers: *e.g.* judiciary cannot entertain the question of whether the legislature’s internal proceedings are “regular.”¹¹³

The exception which is most troubling is Part 19 Emergency Power allowing rights under the Constitution to be suspended.¹¹⁴ Under this provision, the Government can suspend rights to speech, assembly, association,¹¹⁵ press freedom,¹¹⁶ property,¹¹⁷ due process,¹¹⁸ information,¹¹⁹

budget”; Article 254 of the Venezuelan Constitution, which provides “The Judicial Power is autonomous, and the operating, financial and administrative autonomy of the Supreme Tribunal of Justice is hereby established. To this end, in the national general budget a variable annual amount at least equivalent to 2% of the ordinary national budget shall be allocated to the justice system in order to enable it to function effectively . . .”).

¹¹² See BLACK’S LAW DICTIONARY (4th ed. 2008). (“Rule of Law: the doctrine that every person is subject to the ordinary law within the jurisdiction”). All the definitions of “rule of law” include some variant of this element – that the law applies equally to everyone (even the king or ruler). See STROMSETH, *supra* note 40, at 70.

¹¹³ Interim Constitution, *supra* note 26, at Article 77(2).

¹¹⁴ *Id.* at Article 143(7).

¹¹⁵ *Id.* at Article 12.

¹¹⁶ *Id.* at Article 15.

¹¹⁷ *Id.* at Article 19.

¹¹⁸ *Id.* at Articles 24-25.

¹¹⁹ *Id.* at Article 27.

privacy,¹²⁰ and constitutional remedy.¹²¹ It also provides that “*no petition may be made in any court of law*, nor any question be raised for the enforcement of the fundamental rights conferred by” these Articles.¹²²

To deprive the courts entirely of jurisdiction over the suspension of such rights could seriously undermine judicial power at the very time it is needed most.

Courts are seen as the bulwarks that safeguard rights and freedoms against encroachment by the state. As exigencies tend to test the protection of such rights and freedoms, courts are expected to be evermore vigilant in a time of emergency.¹²³

While it may be appropriate to suspend certain rights temporarily in time of crisis or war,¹²⁴ the courts should certainly be gatekeepers to ensure that this Emergency Power is not abused. The legitimacy of the Proclamation or Order relating to the state of emergency, and the attendant suspension of rights should not be placed beyond the scope of judicial review.¹²⁵

The downside of emergency powers is significant, as the constitutional protections of basic human rights may be illusory if it is too easy to suspend

¹²⁰ *Id.* at Article 28.

¹²¹ *Id.* at Article 32.

¹²² *Id.* at Article 143(8) (emphasis added).

¹²³ Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?* 112 YALE L. J. 1011, 1034 (2003). Gross complains that courts are too deferential to the executive in times of war, and that their check on executive power is therefore inadequate. The Nepali Interim Constitution, however, goes even further. By depriving the courts of jurisdiction as to certain rights, it ensures that there will be *no check at all* on the executive’s exercise of emergency power to suspend such rights.

¹²⁴ Dominic McGoldrick, *The Interface Between Public Emergency Powers and International Law*, 2 INT’L J. OF CONST. L. 380, 385 (2004) (“[T]here can be emergency situations in which derogation from . . . rights can be justified. In terms of historical experience and international practice, this is a realistic view.”)

¹²⁵ Professor Dyzenhaus argues that the judiciary is under an obligation to impose rule of law on matters of national security unless the legislature explicitly tells the judiciary, in its formal declaration of a state of emergency, “that [the legislature] wants government to govern outside of the rule of law.” David Dyzenhaus, *Intimations of Legality Amid The Clash Of Arms*, 2 INT’L J. CONST. L. 244, 268 (2004). Dyzenhaus bases this exception to judicial obligation on the realization that “the rule of law will require the cooperation of all three branches of government” and judges must assume that the other two branches are, in fact, cooperating. *Id.* He goes on to point out that while an executive may successful act against the law, “for judges to validate such . . . actions would be for them to confuse power with authority.” *Id.* In other words, judges have an important role to play in evaluating the legality of exercises of emergency power.

them. It is worth noting that the Nazis' rise to power in Germany, and the horrific abuses of human rights that occurred there in the 1930's and 1940's, were all fully constitutional, carried out under exercises of emergency power:

The [Weimar] Constitution's main weakness was Article 48, which gave the president power to take control of the *Reichstag* in the event of a national emergency and exercise the *Reichstag's* power Article 48 allowed the president to disband the *Reichstag*, appoint a chancellor without a majority approval of the *Reichstag*, and make presidential decrees in emergency situations.¹²⁶

Hitler was able to wield power, initially as chancellor, and subvert parliamentary rule through intra-constitutional means, thanks to Article 48.¹²⁷ The lesson here is that an emergency powers provision can open the door to serious abuse of power, and subversion of the very rights the constitution should be protecting.

And there is a history of such abuse in Nepal, as the monarchy seized control of the country in 1960, dissolving the parliamentary government and setting aside the constitution that created it in an exercise of emergency power. The effect of that state of emergency continued for thirty years, before a new constitution restoring a multi-party parliamentary system was drawn up in 1990.¹²⁸ States of emergency were declared again in 2001 and 2005, the latter with the monarchy's seizing complete control of the country.¹²⁹ It is worth noting that these have not been temporary and limited suspensions of rights under the constitution, but complete usurpation of power by monarchs who were dismissing out of hand the reality as well as the concept of constitutional government. Having been stung by such abuse of emergency powers in the past, Nepal should be especially wary of leaving that back door open in its new Constitution.

1. Suggested Constitutional Provisions for Emergency Power—Right to Challenge the Exercise of Such Power before the Supreme Court

The new Constitution needs to preserve the power of the judiciary to review the constitutionality of exercises of emergency power, as a check on

¹²⁶ Jessica Russ, *Nazi Germany: A Substantive View of Rule of Law*, pp. 6-7 (unpublished manuscript, Spring 2009, on file with the author) (citing THEODORE ESCHENBURG, ET AL. THE PATH TO DICTATORSHIP, 1919-1933, 117-19 (1966)).

¹²⁷ *Id.*

¹²⁸ *See supra* Sections I.C. and I.E.

¹²⁹ *Id.*

the abuse of such power. At present, the only check on that power is in the legislative branch, which must approve it within one month if it is to continue for the maximum, renewable, three-month period.¹³⁰ A significant amount of damage can be done during that first month—arguably too long a period to begin with—even if the legislature does not ultimately approve the Order or Proclamation. Moreover, the legislature is not the best branch of government to check the executive in this area, particularly because, in a parliamentary system, the executive branch is reflective of parliamentary majorities. Only an independent judicial branch can serve to protect the rights of unpopular minorities—political or otherwise—against an abuse of emergency powers.

Accordingly, Article 143(2) should be amended to allow a challenge to a particular exercise of emergency power, in an expedited proceeding before the Supreme Court. Consistent with this addition, the present Article 143(8), which deprives the courts of jurisdiction over exercises of emergency power, should be stricken.

2. Amendments as to Specific Rights

The Interim Constitution appropriately specifies certain rights that are not subject to derogation in an exercise of emergency power, including:

- Article 13 – Right to Equality
- Article 14 – Right Against Untouchability and Racial Discrimination
- Article 16 – Right Regarding Environment and Health
- Article 17 – Education and Cultural Right
- Article 18 – Right Regarding Employment and Social Security
- Article 20 – Right of Woman
- Article 21 – Right to Social Justice
- Article 22 – Right of Child
- Article 23 – Right to Religion
- Article 26 – Right Against Torture
- Article 29 – Right Against Exploitation
- Article 30 – Right Regarding Labour
- Article 31 – Right Against Exile.¹³¹

But this listing does not go far enough. Article 4 of the International Covenant on Civil and Political Rights (ICCPR)—accessed by Nepal in

¹³⁰ Interim Constitution, *supra* note 26, at Article 143(2)-(3).

¹³¹ *Id.* at Article 143(7).

August 1991¹³²—states specifically that emergency powers may be invoked in derogation of fundamental human rights only “to the extent strictly required by the exigencies of the situation,” adding that this does not include invidious discrimination or violation of other international obligations.¹³³ This language is decidedly stricter than that in the Interim Constitution, which allows “necessary orders to meet the exigencies.”¹³⁴

Moreover, there are other rights, non-derogable rights under the ICCPR, that should be included on this list, lest the Constitution be in conflict with the Nepal’s treaty obligations under the ICCPR¹³⁵:

Article 24 – Rights Regarding to Justice [sic], including

- procedural due process (subsections (1) & (8))
- right to counsel (subsections (2) & (10))
- speedy trial (subsection (3))
- right against ex post facto application of laws (subsection (4))
- presumption of innocence (subsection (5))
- double jeopardy (subsection (6))
- self-incrimination (subsection (7))
- fair trial (subsection (9))

Article 25 – Right Against Preventive Detention

Article 32 – Right to Constitutional Remedy

For example, the bar on *ex post facto* laws is non-derogable under the ICCPR Articles 4 and 15,¹³⁶ and yet the Interim Constitution not only allows the suspension of those rights,¹³⁷ but deprives the judiciary of

¹³² Office of the United Nations High Commissioner for Human Rights: Status of the Ratifications of the Principal Human Rights Treaties (as of 9 June 2004), available at <http://www.unhchr.ch/pdf/report.pdf>.

¹³³ International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976, Article 4.

¹³⁴ Interim Constitution, *supra* note 26, at Article 143(6).

¹³⁵ McGoldrick, *supra* note 124, at 385-86 (“[T]here is a general principle of international law that a state cannot rely on its constitution, constitutional order, or other internal law as justification for its failure to perform a treaty. . . . The options for a state with a constitutional incompatibility are (1) not to become a party to the treaty or (2) to enter a reservation if that is legally possible, or (3) to change the constitution.” (citations omitted)).

¹³⁶ Interim Constitution, *supra* note 2663, at Articles 4 and 15.

¹³⁷ *Id.* at Article 24(4) (“No person shall be punished for an act which was not punishable by law when the act was committed, nor shall any person be subjected to a punishment greater than that prescribed by the law in force at the time of the commission of the offence.”).

jurisdiction to review the suspension of the same.¹³⁸ While Preventive Detention may be one of the primary tools in restoring order during a state of emergency, there seems to be little justification for denying those detained a right to challenge such detention in the courts. And the right to Constitutional remedy should not be derogated simply because the executive has—rightly or wrongly—declared an emergency.¹³⁹ The rule of law requires that Constitutional safeguards remain in place, and that emergency powers exceptions be justified according to law, on constitutional terms.¹⁴⁰

D. Institutional judicial independence – Annual reports

The Interim Constitution calls for the Supreme Court to submit annual reports including:

- a) the quantitative descriptions of the cases registered in the Supreme Court and other subordinate courts,
- b) the number of disposed and pending cases, out of the of cases registered as stated in sub-clause (a)above, and the reason for pending thereon,
- c) details of new precedents propounded by the Supreme Court,
- d) number of cases reviewed by the Supreme Court,
- e) description of the judicial comment made by the Supreme Court, if any, on the matters of competency regarding the conduct of judicial duty of judge of a court subordinate to it,
- f) amount of fines and penalties reimbursed,
- g) description on the implementation of a decision,
- h) the budget appropriated to the Supreme Court and

¹³⁸ *Id.* at Article 143(7).

¹³⁹ The Editors, *Emergency Powers and Constitutionalism*, 2 INT'L J. CONST. L. 207, 208-09 (2004):

“The consensus [i]s that courts should try to protect citizens’ rights, chiefly by assuming that government was operating according to the usual standards and forcing those accountable to alter the rules explicitly, if need be. In other words, although courts might be powerless to avoid abuses during times of emergency, and even if it is inappropriate for the judiciary to stunt the governmental power essential to resolving an emergency, courts still should do their utmost to ensure that recourse to emergency powers itself is granted in a democratically legitimate manner [E]ven if democratic government must yield to an emergency, actors ought to take care to preserve the formal structure that makes it appear as though democratic constitutionalism is operating. While such an appearance might be only “formal,” it retains value nonetheless. By treating emergency powers as pursuant to democratic government, and not in opposition to it, all actors remain clear that the appropriate norm is constitutionalism.”

¹⁴⁰ *Id.*

subordinate courts, and statement of expenditures.¹⁴¹

An annual report such as this is important for accountability; it ensures that courts take seriously their responsibilities and account for the work they have done over the year.

The problem with this reporting requirement in the Interim Constitution is that it requires the report to go “to the Prime Minister”; the Prime Minister, in turn “submit[s] such reports before the Legislature-Parliament.”¹⁴² While it is largely symbolic, this provision does serious violence to the concepts of judicial independence and accountability. While the Constitution should require the judiciary to publish its annual report—ensuring transparency in general—the requirement in the Interim Constitution to submit the report to the Prime Minister suggests that the judiciary is directly answerable or accountable to the Prime Minister. A truly independent judiciary would not be.

A more defensible approach would be to have the judiciary report to the legislature—in this case the Constituent Assembly—because it is the CA after all that appropriates the judiciary’s budget. It is not unreasonable to expect a judiciary to account to the appropriating authority how last year’s appropriate was used, what was accomplished, etc. This is the reporting line established in the Palermo Declaration: “Each year the . . . Council . . . provides *Parliament* with a report on its activities and on the state of justice.”¹⁴³ Of course, notwithstanding funding mechanisms, the judicial branch is not subordinate to the legislature either.

Accordingly, the best approach is to have the constitutional provisions related to Annual Report require merely that the report be published in a public forum, and that copies of the report be provided to the Legislature and Executive both. In proper perspective, the judiciary’s accountability is to the public in general, and not to any other branch of government; the language of the Constitution should reflect that.

E. Decisional judicial independence – Life Tenure

Nothing in the Interim Constitution specifically calls for life tenure for judges—it is silent on the topic of the term of office. Anecdotal evidence suggests that the concept of life tenure is assumed and implemented in

¹⁴¹ Interim Constitution, *supra* note 2663, at Article 117(2).

¹⁴² *Id.* at Article 117(1).

¹⁴³ Palermo Declaration, *supra* note 61, at Section 3.4 (emphasis added).

practice.¹⁴⁴ Judicial independence requires that judges enjoy some security in their jobs and that they need not worry about possible dismissal or getting passed over for reappointment. Accordingly, the new Constitution should be more explicit in guaranteeing life tenure, or at least long terms of office.¹⁴⁵

F. Decisional judicial independence – Judicial compensation

Judicial salaries and compensation are important for a variety of reasons, as they are related directly to judicial independence and judicial integrity. There is already a prohibition on the receipt of *gratuities*, which is important in terms of maintaining integrity.¹⁴⁶ While the actual remuneration to be paid—in Nepali Rupees—will not be set in the Constitution,¹⁴⁷ there are a variety of guarantees that can and should be included in the new Constitution.

1. No diminution of salary

Judicial independence requires that judges be insulated from any diminution of salary while in office. Presumably the legislature will have power over budgets and, therefore, salaries, but power to reduce judicial salaries would carry with it power to intimidate the judiciary, doing violence to judicial independence. The Interim Constitution includes such a provision now, stating the “remuneration, privileges, and other conditions of service [of the judges] . . . shall not be altered to their disadvantage.”¹⁴⁸ Such provisions are vital and should be retained.

¹⁴⁴ Indeed, the constitution contains no provision establishing a specific term of office or a time limit on a judge’s appointment.

¹⁴⁵ In the United States, federal bankruptcy judges serve terms of 14 years, so reappointment is likely to come up only once in a career, and for most of that time, the judge need not worry about how her decisions may or may not please the appointing authority. 28 U.S.C. § 152(a)(1). Of course, it helps that appointment and reappointment of bankruptcy judges are done by Article III judges, who are already insulated from political pressures thanks to their own life-tenure. 28 U.S.C. § 152(a)(4) (“The United States court of appeals for the circuit within which such a territorial district court is located may appoint bankruptcy judges under this chapter . . .”).

¹⁴⁶ Interim Constitution, *supra* note 2663, at Article 104(3).

¹⁴⁷ Establishing monetary amounts in a Constitution is a poor approach to drafting such documents, as inflation quickly renders such values obsolete. *See, e.g.*, the Seventh Amendment to the U.S. Constitution which, in an effort to avoid the expense of jury empanelment for small claims that the right to a jury in a civil trial is available only for legal claims amounting to more than \$20.

¹⁴⁸ *Id.* at Articles 104(4) & 109(8).

2. Adequate salaries

There are compelling reasons that judicial salaries should be substantial. First, a well-paid judiciary will be far less vulnerable to bribery, kick-backs or other corruption.¹⁴⁹ In countries where judges and law enforcement officials have been paid poorly, not only is there a strong temptation to take bribes, there is likely to be far greater public acceptance of the fact that such officials *do* indulge in financial self-dealing.¹⁵⁰ After all, they have to feed their families somehow.

Second, a substantial salary sends the public and the bar and strong message that judgeships are desirable positions, worthy of trust and respect. This will strengthen the judiciary, as public perception of judges' will change as they consider the status that goes with the office of judge.

Third is the closely-related principle that a high judicial salary, and the social and professional respect that come with it, will attract more talented and competent individuals into these positions. When judgeships are well-paid and highly regarded, the best and the brightest legal minds will aspire to be judges, and the quality of the system will improve overall.¹⁵¹

Fourth, a high salary, particularly a dramatically increased salary, will signal a shift from the past. It will punctuate the message that far more will be expected of judges appointed under the new Constitution than has been expected of judges in the past, in terms of ethics, responsibility, and productivity.¹⁵²

¹⁴⁹See David Pimentel, *Restructuring the Courts: In Search of Basic Principles for the Judiciary of Post-war Bosnia and Herzegovina*, 9 CHI. J. INT'L L. 107, 114 (2008) (in Bosnia, salaries were increased three- to five-fold as a part of the judicial reform).

¹⁵⁰See, e.g., Moldova Anti-Corruption Assessment – Final Report (June 2006) at 6-7, <http://www.ifes.org/publication/5442f82d638cca2a5453c6a801e95342/MoldovaAnti-Corr.pdf> (“Interviewees participating in a study [in Moldova] in 2002 expressed the view that accepting nonofficial payments was just a matter of job compensation for public officials. Transparency International concluded that this may evidence public acceptance of the phenomenon of administrative corruption. (Transparency International, “Corruption and Access to the Judiciary,” 2002.) In the environment of a small country such as Moldova with a protracted history of corruption, such perceptions die hard.”).

¹⁵¹See Pimentel, *supra* note 149, at 115 (“These highly desirable posts [the new judgeships in the restructured courts of Bosnia and Herzegovina]—with greater powers, for the most part, and with a far higher salary—would attract the best and brightest of the Bosnian legal community.”).

¹⁵²See *id.* at 115 (“[T]he appointments [to these highly desirable posts] could be reserved for those who were above reproach, untainted by the more dubious aspects of the judiciary’s history”)

The Constitution itself may be able to guarantee a substantial salary for judges if it indexes the judicial salary in some manner. Just as we can ensure a minimal level of funding for judiciary as a whole by making it a percentage of overall budgets, we should be able to set an index for judicial salaries as well. For example, in the United States, it has been a longstanding practice (although not a constitutional requirement) to tie federal judicial salaries to Congressional salaries.¹⁵³ When Congressional salaries go up, judicial salaries do too.¹⁵⁴ If the salaries of Nepal's Constituent Assembly are substantial, it may be appropriate for the Constitution to specify that judicial salaries will match (or index to) those of CA members. Thus as the CA regulates their own salaries, they will automatically ensure that judicial salaries will keep pace.

Another approach may be for the Constitution to establish a separate judicial compensation commission, tasked with setting appropriate salaries for judicial officers. Such a commission has been established in Bangladesh and has made recommendations for enhancements of judicial compensation.¹⁵⁵ The commission needs real power to be effective, though; little will be achieved if the commission's recommendations can be ignored.¹⁵⁶

G. Decisional judicial independence – Removal

The Interim Constitution provides for removal of otherwise life-tenured judges based on voluntary resignation,¹⁵⁷ reaching the mandatory retirement

¹⁵³ Sharon S. Gressle, *Judicial Salary-Setting Policy*, CRS REPORT FOR CONGRESS (March 25, 2003) (referencing “the current rate linkages” and observing, “Currently, salaries of district court judges, Members of Congress, and Level II of the Executive Schedule are in parity.”) available at <http://www.congressproject.org/judicialsalaries.pdf>. (last visited June 23, 2009)

¹⁵⁴ This approach has been severely criticized by the federal judiciary, which believes that this provision keeps federal judicial salaries artificially low. Elected officials are reluctant to vote themselves a pay increase, as this makes them look bad with the taxpaying public when they run for re-election. That reluctance serves to keep judicial salaries from keeping pace with inflation. See *supra* note 100 (“Judges have long argued that when Congress does not even give them cost-of-living adjustments—none was given last year, or in several years during the 1990s—it is, in effect violating the salary-reduction provision of the Constitution. Real earnings of judges have declined by nearly 25 percent since 1969, [Chief Justice John] Roberts pointed out.”).

¹⁵⁵ *Judges Should Get Better Emoluments*, *supra* note 53.

¹⁵⁶ The Bangladeshi government, in fact, rejected the judicial pay commission's first recommendations. *Id.*

¹⁵⁷ Interim Constitution, *supra* note 26, at Articles 105(a) & 109(10)(a).

age,¹⁵⁸ death,¹⁵⁹ or misconduct.¹⁶⁰ This last provision is the one that deserves the most attention, as it applies to decisional judicial independence. Article 105 specifies that justices of the Supreme Court can be removed by impeachment, a resolution passed in the Legislature-Parliament.¹⁶¹ But other judges can be removed by the Chief Justice, following a “decision” by the Judicial Council: “for reasons of incompetence, misbehavior or failure to discharge the duties of his/her office in good faith, incapable to discharge the duties due to physical or mental condition, or deviation to justice.”¹⁶²

The concern here, of course, is whether the threat of removal will interfere with the judge’s exercise of decisional independence on the bench. Whoever has the power to remove can abuse that power to intimidate, and judicial independence will suffer. For Supreme Court Justices, there is some protection, because nothing short of legislative action will remove them. It is such a major undertaking, one presumes, that it would be undertaken rarely, and only in the most egregious cases. That has certainly been the pattern in the United States federal courts, where all judges are removable only by formal impeachment proceedings.¹⁶³

The provisions in the Interim Constitution for removing Appellate and District Court Judges appear to offer few protections. The grounds for removal are vague at best. “Deviation to justice” is a phrase of unknown meaning, but which could certainly be used to pursue a politically-motivated removal of a judge based solely on the merits of that judge’s

¹⁵⁸ *Id.* at Articles 105(b) & 109(10)(b) (specifying mandatory retirement at age 65 for Supreme Court Justices and at age 63 for all other judges, respectively).

¹⁵⁹ *Id.* at Articles 105(d) & 109(10)(d).

¹⁶⁰ *Id.* at Articles 105(c) & 109(10)(c).

¹⁶¹ *Id.* at Article 105(c).

¹⁶² *Id.* at Article 109(10)(c). The cited passage continues: “The Judge . . . who is facing charge . . . shall be given a reasonable opportunity to defend himself/herself; and for this purpose, the Judicial Council may constitute a ‘Committee of Inquiry’ for the purposes of recording the statement of the Judge, collecting evidence and submitting its findings thereof.” *Id.*

¹⁶³ MARY VOLCANSEK, JUDICIAL IMPEACHMENT: NONE CALLED FOR JUSTICE at 1 (Univ. of Ill. Press, 1993). (“Hundreds of impeachment resolutions have been introduced into the House of Representatives over the years, and some sixty or more were sufficiently serious that investigations were ordered. Before 1986, however, only thirteen actual impeachments were passed by the House and forwarded to the Senate for trial...The sparing use of impeachment and trial over two hundred years of American history changed in the 1980’s and three federal judges were impeached, tried, and removed in as many years. Those cases brought the total of the judges actually convicted to seven of the twelve that had been impeached. The rusty machinery for impeachment and trial was dusted off and streamlined to cope with the new flurry of charges against miscreant federal judges”).

decisions. Here is a prime example of why the Judicial Council must be constituted in a way that keeps it removed from political influence. We need a council we can trust to invoke removal authority only in cases of serious misconduct, and not based on dissatisfaction with the merits of the judge's decisions. At the same time, this constitutional provision should be amended to eliminate the phrase "deviations to justice" and define far more narrowly the permissible grounds for removal.

The newly-articulated grounds for removal should also avoid the term "incompetence," which appears in the Interim Constitution.¹⁶⁴ It too is a vague term that might be invoked on the basis of the merits of judicial decisions. Those who disagree with the judge's decisions might well condemn the judge as "incompetent" and begin removal proceedings. At the same time, a judge whose physical or mental health has rendered her incapable of performing the duties of office should be subject to removal. A more useful standard for removal might be something along the lines of the language in the Iraqi Interim Constitution: "No judge or member of the Higher Juridical Council may be removed unless he is convicted of a crime involving moral turpitude or corruption or suffers permanent incapacity."¹⁶⁵ The phrase "permanent incapacity" is far less vulnerable to abuse than the term "incompetence."

H. Decisional judicial independence – Judicial immunity

There does not appear to be any provision in the Interim Constitution affording the judges immunity from suit for official actions taken as a judge. A provision should be included that affords the judges this protection. This is important in order to promote an independent judiciary by relieving the judges of fear and undue influence:

An independent and fearless judiciary is essential to the protection of the rights of the citizen—a judiciary that is free from harassment and undue influence from all quarters. The judges are the true guardians of the law, and they are the defenders of the citizen's liberties against the potential attack from the authorities.¹⁶⁶

¹⁶⁴ Interim Constitution, *supra* note 26162, at Article 109(10) ("Judges . . . shall be removed . . . for reasons of incompetence, misbehavior or failure to discharge the duties of his/her office in good faith, incapable to discharge the duties due to physical or mental condition, or deviation to justice.")

¹⁶⁵ Iraq Interim Constitution, Art. 47, available at http://www.servat.unibe.ch/law/icl/iz00000_.html (last visited August 31, 2009).

¹⁶⁶ ABIMBOLA A. OLOWOFOYEKU, *SUING JUDGES: A STUDY OF JUDICIAL IMMUNITY* 2 (1993).

If we hope for an independent Nepali judiciary, it will be important to include a provision granting “immunity . . . from civil liability from the performance of judicial duties” in the new Constitution.¹⁶⁷

V. ACCESS TO JUSTICE: LOWER COURTS AND REGIONAL STRUCTURE

One of the most serious challenges for the rule of law is to bring it all the way to the people, to the person-on-the-street. Too often rule of law reform initiatives focus strictly on high-level initiatives, drafting constitutions or re-establishing Supreme Courts. The average person in her life has little or no contact with either a constitution or a Supreme Court. Accordingly, if the court system it going to be effective in helping establish the rule of law in Nepal, it must be established in a way that touches the lives of the citizens on the ground.

For this reason, it is recommended that the People’s Courts, or an institution akin to them, be retained in the new Constitution. The concept of low cost, quick result, easily accessible courts is important, lest citizens perceive the law as an empty vessel and despair at ever seeing justice, or worse, take the law into their own hands. To the extent that the People’s Courts have not adhered to acceptable and accepted standards of justice, that should be corrected through appellate review, as well as a vetting and removal process akin to that described below for Nepal’s District and Appellate Court judges.¹⁶⁸

Oversight of the People’s Courts may well be entrusted to Judicial Councils established at the Province level, who would be empowered to conduct the selection and appointment process, and handled any disciplinary proceedings against People’s Court judges. Dr. Timalsena, Registrar of the Supreme Court of Nepal, concurs that this type of decentralization makes sense, specifically advocating the creation of five separate provincial judicial councils: “Judges of the provincial district and local courts should be appointed by [a] provincial judicial council, headed by the chief justice of the concerned provincial high court.”¹⁶⁹

Although this idea did not originate in the United States, such a structure strongly reflects the structure of the U.S. federal courts. By statute in the United States courts, ultimate administrative authority rests in the

¹⁶⁷ BLACK’S LAW DICTIONARY 339 (3rd ed. 2006).

¹⁶⁸ Section VI. A. *infra*.

¹⁶⁹ Timalsena, *supra* note 108, at 9.

national Judicial Conference of the United States, but local authority, including authority over the appointment of United States Bankruptcy Judges and the discipline of all federal judges, is localized in the each Circuit Court of Appeals and its separate “Circuit Council.”¹⁷⁰

The upshot is that responsive and efficient adjudication at the lowest levels—providing access to justice even in rural and remote areas—can be the most vital aspect of establishing the rule of law. A system of regional administration may be the best way to effect that.

VI. ETHICS AND CORRUPTION IN THE COURTS

Not every concept for judicial reform or sound judicial structure need be canonized in the Constitution. Principles of operation and implementation can be every bit as important in ensuring that the judiciary can fulfill its appropriate function in Nepali society—as an independent branch of government implementing the rule of law.

A. *Vetting the current judges*

Corruption is cited repeatedly as one of the core problems plaguing the Nepali judiciary. Normally, a problem of corruption is an argument for *less* judicial independence, in the sense that accountability mechanisms must not be functioning effectively to prevent corruption.¹⁷¹ In a seriously corrupt environment, however, it may be desirable, or even necessary, to conduct a “clean sweep” of the judiciary, in order to remove corrupt individuals and corrupt influences from the judiciary.¹⁷² A time of Constitutional change, when the courts may be restructured anyway is the perfect time to conduct such a house-cleaning—as demonstrated by the success of such a reform in post-war Bosnia.¹⁷³ As to the issue of corruption, the Bosnian reform removed all judges from their posts and invited them to apply and compete for the judgeships in the newly restructured courts, a drastic measure that was nonetheless deemed necessary:

The need to vet judges was driven by the widely-perceived pattern of corruption and incompetence throughout the system, to which several

¹⁷⁰ *Supra* note 87.

¹⁷¹ Cite an article from Case Western Reserve symposium on “Striking the balance” between judicial independence and judicial accountability.

¹⁷² David Pimentel, *Re-framing the Independence v. Accountability Debate: Defining Judicial Structure in Light of Judges’ Courage and Integrity*, 59 CLEV. ST. L. REV. 1, ___ & note 97 (2009) (*quote passage here*).

¹⁷³ Pimentel, *supra* note 149, at 123-24.

factors contributed.

A threshold issue concerned judges' compensation, which was minimal considering the functions and responsibilities of the position. Judges were paid so little (the equivalent of a few hundred dollars a month) that they needed other sources of income merely to subsist. This, of course, created virtually irresistible incentives for judges to exploit their official position for financial advantage. Even legitimate business opportunities, pursued on the side, were prone to create conflicts of interest.

There were also concerns about the competence of judges, as it appeared that some had been appointed due to political connections, quite regardless of qualifications. It was perceived that some judges of marginal competence were appointed during the war as well, not necessarily out of corrupt favoritism, but simply because of the scarcity of competent candidates for appointment during the conflict.

Even the most qualified, competent, and ethical of the judges in the courts of Bosnia and Herzegovina—for they certainly were not all incompetent or corrupt—had been working for years in a system characterized by low expectations. The reform effort needed a completely new culture of high expectations for judges' conduct, performance, and industry: an independent judiciary that would be a cornerstone of the rule of law in post-war Bosnia and Herzegovina. A reappointment process, by which judges had to compete for newly created judgeships, would help turn the page of history, creating a new culture in the court system, inaugurating a new judiciary untainted by the flaws or failings of its predecessor.¹⁷⁴

If corruption is as serious a problem in Nepal as some say, such a dramatic transition may be a key element in establishing a judiciary independent enough to uphold the rule of law in Nepal. The Constitution itself need not include provisions for re-staffing the bench, but those implementing the Constitution should certainly consider this as a step in the implementation process.

B. Establishing accountability mechanisms

The best mechanism for ensuring integrity on the bench is careful screening in the judicial selection process. If we have judges we can trust, we can afford them great protections against interference. If we cannot trust our judges, we need a system that sacrifices some judicial independence to ensure that we can go after, and remove, the corrupt and incompetent on the bench.

¹⁷⁴ *Id.* at 113-14 (citations omitted).

Any system, however, requires a mechanism for policing misconduct. That starts with a better definition of judicial misconduct. While it is not an element of the Constitution, there should be a code of conduct for Nepali judges, so they know—and everyone else knows—what standards they are held to. A good place to start is the Bangalore Principles, adopted by the UN in 2006 as universal standards of judicial conduct.¹⁷⁵

In addition, there must be a mechanism for a person who observes unethical behavior by a judge to file a complaint, and bring it to the attention of the Judicial Council which, in turn, will be empowered to police the misconduct, and remove the miscreant judge. The Judicial Council should draw up the procedure in some detail and publicize its availability, both to ensure that it is a meaningful accountability measure, and that the procedure is not abused to intimidate judges in their decision-making.¹⁷⁶

VII. CONCLUSION

Nepal is at a crossroads, and the pending constitutional revision will set the stage for its future. To help the judiciary to play a proper and productive role in bringing peace, justice, and the rule of law to Nepal, however, certain provisions must be included in the new Constitution. The most critical of these are set forth in detail above and can be summarized under the following headings:

Institutional independence

1. Judicial council—judicial appointments, administration and oversight should be handled by an independent body composed mostly, but not entirely, of judges; an ill-conceived judicial council may do more harm than good.

¹⁷⁵ The Bangalore Principles are annexed to Economic and Social Council Resolution (ECOSOC) 2006/23, July 27, 2006 available at http://www.unodc.org/pdf/corruption/corruption_judicial_res_e.pdf (last checked June 7, 2009). It “[i]nvites Member States, consistent with their domestic legal systems, to encourage their judiciaries to take into consideration the Bangalore Principles ... when reviewing or developing rules with respect to the professional and ethical conduct of members of the judiciary.” *Id.*

¹⁷⁶ See David Pimentel, *The Reluctant Tattle-tale: Closing the Gap in Federal Judicial Discipline*, 76 TENN. L. REV. ____ (2009) (summarizing the judicial discipline procedure and critiquing the effectiveness of the complaint procedures). The particulars of that process, however, are not appropriate for inclusion in the constitution itself and, therefore, fall outside the scope of this article.

2. Judiciary budgets—the judicial branch is, unavoidably, beholden to the other branches for its budgetary allocation, potentially affecting the judiciary’s independence; accordingly the Constitution should guarantee minimum funding levels for the courts.
3. Emergency Powers—while it may be appropriate to suspend certain rights in time of crisis or war, the courts should be gatekeepers to ensure that the other branches do not abuse this emergency power; to deprive the courts entirely of jurisdiction over the suspension of rights would seriously undermine judicial power at the time the country needs it most.
4. Annual reports—as a matter of form, the judiciary’s annual report should not be made to any other branch of government, but published generally; the present provision creates the appearance that the courts are subservient, and answerable, to the Executive.

Decisional independence

5. Life Tenure—decisional judicial independence also requires that judges enjoy some security in their positions; the new Constitution should explicitly guarantee life tenure for judges.
6. Judicial compensation—to secure independence for judges, constitutional safeguards must insulate judges from reduction in salary; but more than that, the Constitution should include indexing provisions to ensure the adequacy of judicial salaries to begin with.
7. Judicial removal—the grounds for removal of a judge must be explicitly and narrowly drawn; vague standards for judicial discipline subject judges to politically-motivated removal proceedings.
8. Judicial immunity—the Constitution must afford judges immunity from suit for official actions taken as a judge.

Other Rule of Law priorities

9. Access to justice—whether or not the Maoists’ “People’s Courts” are retained in their present form, the Constitution must provide for responsive and efficient adjudication at the lowest levels—even in rural and remote areas; such access can be one of the most vital aspects of establishing the rule of law.
10. Vetting of judges—if corruption is as serious a problem in the Nepali courts as reported, such a dramatic transition to a new Constitution may be used to effect a renaissance of ethics and integrity in the judiciary; the Constitution itself need not include

provisions for vetting and re-staffing the bench, but these steps should be considered as part of the implementation process.

11. Judicial ethics and discipline—any system requires a mechanism for policing misconduct; this starts with a better articulation of minimum ethical standards; again this need not be spelled out in the Constitution, but the Constitution should call for a code of conduct to make clear to everyone the standards to which the judiciary is held, and how (or at least that) they will be enforced.

Special care should be taken in the pending Constitutional drafting process to follow these principles, if Nepal is to establish a judiciary that can function both accountably and independently. No constitutional provision can guarantee integrity in the judiciary, but flawed provisions can virtually guarantee its absence. The suggestions set forth above—most particularly with regard to the composition and powers of the judicial council—are drawn from the collective experience of judiciaries around the world. They reflect internationally-recognized “best practices.” The Nepali CDC would do well to learn from these practices, and follow such principles, in promoting an effective and independent judiciary. While these provisions may not be sufficient conditions, they may well be necessary conditions for achieving the rule of law in Nepal.