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January 2011

# Judicial Independence at the Crossroads: Grappling with Ideology and History in the New Nepali Constitution

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## ABSTRACT

# JUDICIAL INDEPENDENCE AT THE CROSSROADS: GRAPPLING WITH IDEOLOGY AND HISTORY IN THE NEW NEPALI CONSTITUTION

David Pimentel

*Nepal is struggling to produce a new constitution, the blueprint for a new post-monarchic state, and major conflicts over the structure of the new judiciary have arisen. The rhetoric of the debate is deceiving, however. All sides argue for the same things, including judicial independence and accountability, but profound ideological differences vest those words with very different meanings for each party. Resolving these issues will require a mutual appreciation of the ideological differences and of the historical roots of the judiciary's problems. The path forward begins with recognition that the answer does not necessarily lie in "international best practices" or other one-size-fits-all solutions. Nepal's particular situation calls for a judiciary that, at least at this stage, emphasizes judicial accountability. As long as a culture of judicial corruption persists, too much emphasis on judicial independence could do more harm than good. Nonetheless, accountability mechanisms can and should be crafted to minimize the intrusions on judicial independence, particularly political interference. Finally, unless and until the Supreme Court can command respect as a trusted guardian of legal rights, its power of judicial review should be entrusted to a new Constitutional Court that is not beholden to any one of the three branches of government. Only by replacing the tried-and-failed (or at least tried-and-flawed) institutions the Maoists have rebelled against for so many years can Nepal hope forge some semblance of consensus on the terms of its new constitution, and chart a new future for the people of Nepal.*

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JUDICIAL INDEPENDENCE AT THE CROSSROADS:  
GRAPPLING WITH IDEOLOGY AND HISTORY IN THE  
NEW NEPALI CONSTITUTION

*David Pimentel\**

INTRODUCTION

Nepal is struggling to produce a new constitution, the blueprint for a new post-monarchic state. The political and ideological history of Nepal, including a checkered history with constitutionalism, complicates the picture, particularly as it applies to the structure of the new Nepali judiciary.

The rhetoric of the various parties appears very similar in terms of what they envision in the new constitution, but the conflicts beneath the rhetoric loom large. While there appears to be consensus among diverse political interests in Nepal that the new state will be secular, and that it will have some type of federal structure, the substantive agreement seems to end there.<sup>1</sup>

The rhetoric is deceiving, as ideology can vest the same words with different, even contradictory meanings. Consider the meaning of the word “democratic,” for example. The profound differences between West Germany and East Germany during the Cold War could not be effectively defined in terms of which country was democratic; indeed, it was the East German, socialist/communist state that called itself the “German

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\* Fulbright Scholar, University of Sarajevo, Bosnia and Herzegovina (2010-11); Associate Professor, Florida Coastal School of Law. Thanks to the American Bar Association Rule of Law Initiative, especially Dave Sadoff and Gopi Parajuli, for facilitating the July 2010 visit to Nepal and the meetings with key participants in the constitution-drafting process. Much of the content of this article, and the perspective reflected in it, came directly from the consultations I was able to engage in with a variety of important players, from all parts of the political spectrum, during that visit to Kathmandu. Thanks to the Open Society Institute for funding. The views expressed in this article are, however, entirely those of the author.

<sup>1</sup> Damakant Jayshi, *Parties at Odds, Peace at Risk*, INTER-PRESS SERVICE (Jan. 5, 2010) (“[T]he parties disagree on all major issues to be incorporated in the Constitution – preamble, fundamental rights, federal model, the number and nature of federal states and distribution of natural resources . . . .”) *available at* <http://ipsnews.net/news.asp?idnews=49886>.

Democratic Republic.”<sup>2</sup> Similarly, the rhetoric of the debate over the new judiciary in Nepal is consistent: everyone seems to want an “independent and accountable” judiciary. But there is no consensus on what these terms mean, or should mean, in Nepal today.

These concepts—independence and accountability—necessarily conflict with each other to some degree. But there is no one-size-fits-all balancing of these principles. Despite all the talk about “international best practices,” the appropriate balance between these competing priorities cannot be imported from elsewhere, but must be determined with respect to the culture, history, and ideologies at play. Those factors in Nepal, at this time, both historical and ideological, tip the scales in favor of accountability, at the expense of judicial independence. The challenge will be to find or create a judicial governance model that can heighten accountability while minimizing political or other interference with independent decision-making.

At the same time, competing definitions of “separation of powers” are pointing in opposite directions on the issue of judicial review. But reaching beyond the rhetoric gap, and understanding the history and ideologies that undergird the debate, it becomes clear that a new Constitutional Court, separate from the Supreme Court, is the best path forward. A new institution, a departure from the status quo, is important in the reinvention Nepali government.

If the parties can get beyond the rhetoric and appreciate each others’ ideological stance, and the checkered history of the Nepal’s courts, there is still room for a consensus. That compromise, one that creates new institutions, enhancing judicial accountability without doing too much violence to judicial independence, is essential, both for reaching agreement on the new constitution, and for a fair and effective Nepali judiciary.

## BACKGROUND

### *A. Experience with the 1990 Constitution*

Almost everything that is happening in Nepal politically is, at some level, a reaction to their experience with the Constitution adopted in 1990,

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<sup>2</sup> *Background Note: Germany*, U.S. Department of State, Bureau of European and Eurasian Affairs (March 12, 2010) (“The G.D.R. established the structures of a single-party, centralized, communist state.”) available at <http://www.state.gov/r/pa/ei/bgn/3997.htm>.

and the regime under it.<sup>3</sup> This is certainly true with respect to the drafting of the judiciary provisions of the new constitution.<sup>4</sup>

Although Nepal had flirted with constitutionalism for 40 years, the first true and meaningful constitution in Nepal came in 1990.<sup>5</sup> This established the constitutional monarchy, formally recognizing royal powers, and declaring Nepal a Hindu state.<sup>6</sup> Dissatisfaction with the 1990 constitution fostered the Maoist insurgency,<sup>7</sup> which mobilized the disenfranchised people under the Hindu caste system, among others, to resist the constitutional regime.<sup>8</sup> The Maoists became the critics of that regime and the champions of anyone aggrieved by it.<sup>9</sup>

Among the Maoists' complaints were problems with the Nepali judiciary.<sup>10</sup> With respect to the judiciary, the 1990 Constitution reflected, in large part, the prevailing international best practice of an independent

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<sup>3</sup> See generally United Nations Development Programme, *About this Publication*, Interim Constitution of Nepal 2007, ("Among the shortcomings of the [1990] Constitution in the eyes of many were the insistence that Nepal is a Hindu kingdom; the inclusion of many important economic and social rights as 'directive principles' only, which means they were not able to be used as the basis for legal claims; inadequate provisions for civilian control of the army; excessive power given to the King; and provisions that were not clear enough about the King's powers, thus making it possible for those powers to be abused."), available at <http://ccrinepal.org/files/downloads/37ddc770102c2dcf8b25892721729b5e.zip>.

<sup>4</sup> See Sagar Prasai, *Nepal's Constituent Assembly Gets New Lease, But Politics Go Back to Square One*, IN ASIA (The Asia Foundation, June 2, 2010) (identifying "judicial reform" as one of the issues "Maoists deeply care about"), available at <http://asiafoundation.org/in-asia/2010/06/02/nepals-constituent-assembly-gets-new-lease-but-politics-go-back-to-square-one/>.

<sup>5</sup> A short history of constitutionalism in Nepal is set forth in David Pimentel, *Constitutional Concepts for the Rule of Law: A Vision for the Post-Monarchy Judiciary in Nepal*, 8 WASH. U. GLOBAL STUD. L. REV. 283, 285-89 (2010).

<sup>6</sup> Andrea Matles Savada (ed.), *Nepal: Government and Politics*, in NEPAL AND BHUTAN: COUNTRY STUDIES (3d ed. 1993) available at [http://memory.loc.gov/cgi-bin/query/r?frd/cstdy:@field\(DOCID+np0101\)](http://memory.loc.gov/cgi-bin/query/r?frd/cstdy:@field(DOCID+np0101)).

<sup>7</sup> Alastair Lawson, *Who are Nepal's Maoist rebels?*, BBC News (June 6, 2005) ("The disillusionment of the Maoists with the Nepalese political system began after democracy was re-introduced in 1990.") available at <http://news.bbc.co.uk/2/hi/3573402.stm>.

<sup>8</sup> *Id.* ("[The Maoist rebels] have stayed consistent ... in their demand for an end to Nepal's constitutional monarchy. Another key grievance of the rebels was the resentment felt by lower caste people against the authority wielded by the higher castes.")

<sup>9</sup> *Id.* ("[A] substantial number of people in Nepal ... see the Maoists as the only genuine alternative to the old, repressive social order.")

<sup>10</sup> See, e.g., *Maoists wrath against Nepal Judiciary*, TELEGRAPH WEEKLY (March 26, 2009), available at [http://www.msn.telegraphnepal.com/news\\_det.php?news\\_id=5088&PHPSESSID=536317a3b995cd801770b54c342cc6ed](http://www.msn.telegraphnepal.com/news_det.php?news_id=5088&PHPSESSID=536317a3b995cd801770b54c342cc6ed).

judiciary, governed by a judicial council.<sup>11</sup> My previous article explains why that is still the best model—in terms of constitutional structure—for the Nepali judiciary.<sup>12</sup> But in practice, the Nepali judiciary under the 1990 Constitution was dysfunctional and corrupt, or at least widely perceived to be.<sup>13</sup> Against this historical backdrop, the advantages of an independent judiciary, and of an autonomous judicial council to govern it, are harder to defend.

### B. Political and Ideological Climate

The political revolution in Nepal that gives rise to the new constitution-making is a direct product of the Maoist insurgency and the 2006 settlement of its demands that brought an end to the monarchy.<sup>14</sup> Accordingly, the Maoists claim a right to sit at the table and dictate many of the terms of the new government, as established in the new constitution. And if the elections had delivered a clear Maoist majority, they would be doing precisely that.

The Maoists do not, however, enjoy an outright majority in the present legislature, the Constituent Assembly (CA), and do not, therefore, have the power to control the constitution-making process.<sup>15</sup> In fact, as of May 2009, the Maoists are no longer a part of the coalition government.<sup>16</sup> But because they have, by far, the largest bloc of any party in the CA, they remain a powerful political force.<sup>17</sup> The upshot is that compromises must be sought and reached with the Maoists and others, if the constitution-

<sup>11</sup> Constitution of the Kingdom of Nepal (1990), Art. 83.

<sup>12</sup> Pimentel, *Constitutional Concepts*, *supra*, note 5.

<sup>13</sup> *Nepal Country Profile: Judicial System*, Business Anti-Corruption Portal (“The judiciary is perceived to be among the most corrupt institutions in Nepal. According to Bertelsmann Foundation 2010, court officials are perceived as the main facilitators of corruption.”), available at <http://www.business-anti-corruption.com/country-profiles/south-asia/nepal/corruption-levels/judicial-system/> (citing the Bertelsman Transformation Index 2010 Nepal Country Report, at <http://www.bertelsmann-transformation-index.de/117.0.html?&L=1>).

<sup>14</sup> See BBC News, Timeline: Nepal, [http://news.bbc.co.uk/2/hi/south\\_asia/country\\_profiles/1166516.stm](http://news.bbc.co.uk/2/hi/south_asia/country_profiles/1166516.stm)

<sup>15</sup> Asia Foundation, *supra* note 4.

<sup>16</sup> *Id.* (“The Maoists are the largest party in the Constituent Assembly, but a 22-party coalition has managed to push them to the fringes of national politics.”)

<sup>17</sup> In the 2008 elections, the Maoists secured 229 of the 601 seats, almost exactly twice as many as the next largest bloc (Nepali Congress Party, with 115 seats), but far short of the majority they would need to control the Constituent Assembly outright. *Background Note: Nepal*, U.S. Department of State, Bureau of South and Central Asian Affairs (April 16, 2010) <http://www.state.gov/r/pa/ei/bgn/5283.htm>.

making process is to move forward.

Compromises will be difficult, however, given the ideological differences, and the mind-set of the Maoists. Because the Maoists fought, literally, for change in Nepal, anything that smacks of the status quo is entirely unacceptable to them,<sup>18</sup> and this includes the constitutional provisions for judicial structure.

While much of the constitution-drafting process appears to be mired in disagreements and political discord, the Maoists have already produced a draft constitution, presumably for discussion purposes.<sup>19</sup> Far from a polished document, it nonetheless sets forth unambiguously the policies and priorities of the Maoists for this new constitution.<sup>20</sup>

### C. Status of the Constitution Drafting Process

The status of the drafting process changes daily, of course. The Constituent Assembly (CA)—the legislature under the Interim Constitution—once formed in 2008, set a two-year deadline to complete the new constitution, by May 28, 2010.<sup>21</sup> Delays, largely due to the political difficulties detailed above, made it impossible to meet that deadline.<sup>22</sup> The CA voted, in the closing minutes of its existence, to extend its own life for another year, establishing a new May 2011 deadline to produce a new constitution. While some have questioned the authority of the CA to do this,<sup>23</sup> the practical necessity of it has calmed dissenting voices. If the

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<sup>18</sup> *For Democracy and Socialism in Nepal*, SOCIALIST UNITY (June 13, 2009) (Interview with Maoist student leader Manushi Bhattarai, in which she characterizes the other parties in Nepal as “status quo-ist” and highlights the challenge to fight the “status quo” forces), available at <http://www.socialistunity.com/?p=4213>.

<sup>19</sup> S. Chandrasekharan, *NEPAL: Draft Constitution of Maoists Unveiled*, South Asia Analysis Group (March 18, 2009), available at <http://www.southasiaanalysis.org/notes6/note502.html>.

<sup>20</sup> *Id.* (“While this document may not be the ultimate draft of the constitution, it reveals the mind and the intention of the Maoists of the type of configuration they are looking for in the new constitution.”)

<sup>21</sup> *NEPAL 28 May 2010 Due Date for Nepal Constitution to be finalized*, WORLD NEWS FORECAST (May 28, 2010) available at <http://www.newsahed.com/preview/2010/05/28/nepal-28-may-2010-due-date-for-nepal-constitution-to-be-finalized/index.php>

<sup>22</sup> *Id.* (“[T]he political deadlock has delayed the preparation of a new constitution.”) (citing Reuters).

<sup>23</sup> Indeed, it seems obvious that the CA had no such authority, as the Interim Constitution specifies a term of two years for the CA. Interim Constitution of Nepal, Art. 64. But the Interim Constitution doesn’t allow for new elections either.

government under the Interim Constitution had been allowed to expire, it would have left a vacuum of leadership and of legal authority; few wanted to see where that would lead.<sup>24</sup>

So there is a new deadline, and new hope for a Nepal's constitutional future. Under the leadership of Nilambar Acharya, chair of the Constitutional Committee (CC),<sup>25</sup> a roadmap and timetable were established for the drafting process. In addition to the CC which oversees the entire process, ten "thematic" committees were appointed from the membership of the CA, each with responsibility for certain subject matter in the new constitution. Each committee was charged to create a concept paper detailing the provisions that should be included in the constitution on that topic.

Most of these committees attempted to arrive at some kind of consensus, with limited success, and consequent delay.<sup>26</sup> The 43-member Committee on the Judicial System, in contrast, chose to take up-or-down votes on each proposed revision,<sup>27</sup> and was therefore able to complete its Report Preliminary Draft with the Concept Paper (hereafter "Concept Paper") very promptly, by the fall of 2009.<sup>28</sup>

The problem with the Committee on the Judicial System's approach, was that the end product does not reflect consensus, and engenders a great deal of opposition even from within the committee that produced it. Appended to the committee's Concept Paper, in fact, are seven separate dissenting opinions, six of them signed by a bloc of 19 committee members,

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<sup>24</sup> World News Forecast, *supra* note 21 ("There are fears that Prime Minister Madhav Kumar Nepal will declare a state of emergency if the Constituent Assembly fails to deliver it by the due date. An unmet deadline for a constitution acceptable to all parties could trigger another civil war, while increasing India's and China's tug-of-war for the Himalayan Kingdom.")

<sup>25</sup> *NC leader elected head of Nepal Constitution-drafting body*, ZEE NEWS (August 28, 2009) available at <http://www.zeenews.com/news559032.html>.

<sup>26</sup> As of May 28, 2010—the original deadline for completion of the constitution—"only three committees' draft papers ha[d] been passed unanimously." Constitutional Supplement, *Whither constitution writing?* NEPALI TIMES (May 28, 2010) available at <http://www.nepalitimes.com.np/issue/2010/05/28/ConstitutionSupplement/17125>.

<sup>27</sup> Interview with Mr. Kumar Regmi, Constitutional Lawyer, Kathmandu, July 18, 2010 (notes on file with the author). The Maoists' proposals prevailed in the Committee on the Justice System, for the most part, because the Madhesi party representatives chose to vote with the Maoists on most issues. *Id.*

<sup>28</sup> The Concept Paper itself is available at [http://www.ccd.org.np/new/resources/concept\\_paper\\_Judiciary\\_System\\_ENG.pdf](http://www.ccd.org.np/new/resources/concept_paper_Judiciary_System_ENG.pdf).

detailing their objections to the Concept Paper's recommendations.<sup>29</sup>

The various committee reports and concept papers are not the definitive word on each subject, however. They must go to the CC, which will draw from them, but not be bound by them in drafting the constitution itself. Indeed, the CC will *have* to make changes, as some of the concept papers directly conflict with each other. For example, the Report and Concept Paper of the Committee on State Restructuring specifically calls for the creation of a "Constitutional Court" to resolve questions of constitutional interpretation,<sup>30</sup> going so far as to specify the composition of that court,<sup>31</sup> although the Committee on the Judicial System's Concept Paper does not provide for the creation or existence of such a court.<sup>32</sup> Accordingly, the Reports need to be harmonized, and until that is done, the underlying issues remain very much open for negotiation and resolution in a process of ongoing dialogue. In the first instance, these issues will be considered by the powerful "Gaps and Overlaps Committee," already appointed for the purpose of reconciling inconsistencies like this one.<sup>33</sup> Whether there will be a Constitutional Court—separate from the Supreme Court—and what jurisdiction it may have, remain very much open questions.

#### COMPETING CONCEPTS FOR THE NEPALI JUDICIARY

##### A. *Ideology and the Role of the Judiciary*

While the Maoists represent the "left" in Nepal, their vision for the new constitution is far from the Marxist-Socialism of Chairman Mao, or of the Soviet-era Warsaw Pact nations:

Despite having an authoritarian outlook, the Maoists maintained a culture of debate within their party; key issues have been widely discussed and hotly contested. From the end of the 1990s, they have moved gradually toward a more moderate stance. They changed positions in acknowledging the 1990 democracy movement as a success (they had earlier characterised

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<sup>29</sup> The seventh dissenting opinion was signed by 18 committee members. Concept Paper, *id.*

<sup>30</sup> Restructuring of the State and Distribution of State Power Committee, Report on Concept Paper and Preliminary Draft, Section 11 Provision Regarding Resolution of Dispute Between Federal Units, Paragraphs (11) – (18), at 37-39, available at [http://www.ccd.org.np/new/resources/Concept\\_Paper\\_Restructuring\\_State\\_GTZ\\_ENG.pdf](http://www.ccd.org.np/new/resources/Concept_Paper_Restructuring_State_GTZ_ENG.pdf).

<sup>31</sup> *Id.*, paragraph (12) at 38.

<sup>32</sup> Concept Paper, *supra* note 28.

<sup>33</sup> See Constitution Building e-Bulletin, Centre for Constitutional Dialogue, paragraph 6 (May 1-31, 2010), referencing the role of the Gaps and Overlaps Committee, available at [http://ccd.org.np/new/index.php?newsletter\\_detail\\_id=16](http://ccd.org.np/new/index.php?newsletter_detail_id=16).

it as a “betrayal”), in abandoning the immediate goal of a Mao-style “new democracy” and, in November 2005, by aligning themselves with the mainstream parties in favour of multiparty democracy.<sup>34</sup>

On the right is the Nepali Congress Party, which was in control of the government for most of the period that the country was operating under the 1990 Constitution. The Unified Marxist-Leninists, popularly viewed as moderates, have been in the middle, as the third largest party,<sup>35</sup> but there are as many as twenty other parties operating in Nepal at present.<sup>36</sup>

So while the Maoists do not advocate the traditional and historical communist regime, their perspective and rhetoric are inevitably infused with Marxist ideology. This affects their perception of the role of the judiciary.

In common law regimes, it has historically been the judiciary that protects the people from the abuses of government.<sup>37</sup> We, from this Western point of view, see justice on the micro level. We aspire to justice for the individual in the individual case. Any attempt to subvert individual justice in pursuit of higher societal goals is roundly condemned as evil.

But from the Marxist point of view, it is not the courts that protect the people (individually) from government, but rather the government (the party) that protects the people (collectively) from exploitation by the capitalist. Government is not the threat to justice, to the rights of the people; government is the source of social justice, the protector of the people. From this perspective, there is no reason to expect the judicial branch to be independent of the political branches of government. Rather, the judicial branch is perceived as just another arm of the government, similarly committed to carrying out the government’s agenda.

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<sup>34</sup> International Crisis Group, Asia Report No. 132, *Nepal’s Maoists: Purists or Pragmatists?* (May 18, 2007), available at [http://www.reliefweb.int/rw/rwb.nsf/retrieveattachments?openagent&shortid=Y SAR-73BS6F&file=Full\\_Report.pdf](http://www.reliefweb.int/rw/rwb.nsf/retrieveattachments?openagent&shortid=Y SAR-73BS6F&file=Full_Report.pdf).

<sup>35</sup> See Kiran Chapagain and Jim Yardley, *Nepal’s Parliament Fails in 5th Try to Select Prime Minister*, NY TIMES (August 23, 2010) available at <http://www.nytimes.com/2010/08/24/world/asia/24nepal.html>.

<sup>36</sup> See Asia Foundation, *supra* note 4 (referencing a 22-party coalition in the CA, excluding the Maoists).

<sup>37</sup> JOHN HENRY MERRYMAN AND ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION* at 17 (3<sup>rd</sup> ed. 2007) (“In the United States and England . . . there was a . . . judicial tradition . . . in which judges had often been a progressive force on the side of the individual against the abuse of power by the ruler . . .”).

Indeed, this is precisely how the judicial branch was conceived in the Soviet Union and other communist-bloc nations. Dallin Oaks, former justice of the Utah Supreme Court, recounted this experience recently:

I have thought of how our system contrasts with that of the now defunct Soviet Union. During my years as president of BYU (1971–80), I hosted the chief justice of the Supreme Court of the Soviet Union, who was touring the United States in that Cold War period. In a private one-on-one discussion, I asked him how the Soviet system really worked in a highly visible criminal case, such as where a person was charged with an offense like treason or other crimes against the state. He explained that on those kinds of cases they had what they called “telephone justice.” Judges conducted the trial and heard the evidence and then went back to their chambers and had a phone call from a government or party official who told them how to decide the case.

I am grateful that, whatever difficulties we have in our system of justice — and there are many — we are still far away from what he called “telephone justice.” What stands between us and that corruption of the judicial system . . . is the independence of our state and federal judges.<sup>38</sup>

Of interest to the Westerner is the fact that the Chief Justice related the “telephone justice” system openly, and without apparent embarrassment. Most of us in the West would unhesitatingly join in Oaks’s assessment of that practice as a “corruption of the judicial system.”

But again, from the perspective of the Marxist, it is the Government or the Party that is the guardian of the people’s rights and interests. Who else should make the decision in sensitive cases? Entrusting such decisions to individual judges may well result in decisions that are in conflict with the best interests of the people overall.

In the post-communist state, “telephone justice” is still talked about.<sup>39</sup> Although it is generally decried in post-communist retrospect, it was accepted as a fact of life, perhaps even a necessary one, during the life of

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<sup>38</sup> Dallin H. Oaks, *Fundamentals of our Constitutions*, Constitution Day Speech, delivered September 17, 2010 in Salt Lake City, Utah, available at <http://newsroom.lds.org/ldsnewsroom/eng/news-releases-stories/-fundamentals-of-our-constitutions-elder-dallin-h-oaks>.

<sup>39</sup> Alena Ledeneva, *Behind the Façade: “Telephone Justice” in Putin’s Russia*, available at [http://se2.isn.ch/serviceengine/Files/ESDP/26627/ichaptersection\\_singledocument/036BC437-221A-4FC3-9EC3-E82BDECA7084/en/Chap\\_3\\_Ledeneva.pdf](http://se2.isn.ch/serviceengine/Files/ESDP/26627/ichaptersection_singledocument/036BC437-221A-4FC3-9EC3-E82BDECA7084/en/Chap_3_Ledeneva.pdf)

the communist regime. But the ideological divide redefines the terms. The Marxist will not allow the decision of an individual judge to frustrate the government's pursuit of the best interests of the people. The Western capitalist will not let the government's political agenda frustrate justice in an individual case.

The difference may be characterized as one over whom you trust. Judicial independence places enormous trust in judges, expecting them to do the right thing, to do justice, even when there are compelling political or personal reasons to do otherwise. Western society's embrace of judicial independence reflects our own distrust of government, even majoritarian government. It is our conviction that such governments will exploit and victimize unpopular minorities unless they are subjected to the "checks and balances" that come, in part, from an independent judiciary.

This idea is reflected in Alexis de Tocqueville's masterwork, *Democracy in America*, which recognizes the role of the judiciary in protecting the minority from the "tyranny of the majority."<sup>40</sup> This statement is definitional in the American ideology of the judiciary. It is the judiciary, the judges, because of their independence, who must be guardians of the rights and treatment of unpopular minorities.

In meetings with prominent Maoists involved in the constitution drafting process, it became clear that they have much greater trust in the government than in "independent" judges.<sup>41</sup> In this case, unlike in the Soviet era socialist governments, the trust is not a blind faith in the Communist Party. Whatever else may appear in the new Nepali constitution, it will certainly provide for a parliamentary system, where the government is a direct product of popular elections.<sup>42</sup> The Maoists trust the legislature more than

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<sup>40</sup> See generally ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, Ch. 15 (1835). The term "tyranny of the majority" was further popularized by John Stuart Mill, who used it in his essay "On Liberty" (1859).

<sup>41</sup> Interview with Mr. Ek Raj Bhandari, CA Member and Member of the Gaps and Overlaps Committee, Kathmandu, July 14, 2010 (notes on file with the author) (Mr. Bhandari gave an impassioned explanation of the Maoist perspective on judicial independence; he pitched it in terms of his confidence in the democratic process and advocated entrusting the judiciary to the people, making it accountable to the people, by placing it squarely under the power and control of those most responsive to the people: the elected legislature.) ; Interview with Mr. Khim Lal Devkota, CA Member and Member of the Committee on the Judicial System, Kathmandu, July 16, 2010 (notes on file with the author).

<sup>42</sup> See Asia Foundation, *supra* note 4 (noting that the Maoists have moderated their position, and support multiparty government now)

the judiciary because the legislature is accountable to the people.<sup>43</sup> Independent judges, unaccountable to anyone, simply cannot command that type of confidence<sup>44</sup>; indeed, in the Maoists' view, a judiciary that is independent of parliamentary control is inherently undemocratic and therefore not to be trusted.

Summarizing, and perhaps oversimplifying, Western ideology trusts judges to do the right thing, as long as the judges aren't pressured by political forces otherwise. Maoist ideology (at least in Nepal) assumes that the judges will do the wrong thing unless pressured by political forces to toe the line. These conflicting assumptions each call for a very different policy prescriptions for Nepal's judicial structure, and do not lend themselves to compromise solutions.

### B. *Judicial Independence v. Judicial Accountability*

Considerable attention has been paid to the tension between judicial independence and judicial accountability in the literature, specifically to "striking the balance" between these two competing policies.<sup>45</sup> The tension comes because (1) a fully independent judiciary is accountable to no one, and can render controversial or unpopular judgments without fear of repercussions, while (2) an accountable judiciary is answerable for its actions, and therefore can never be truly independent.<sup>46</sup>

As I have argued elsewhere,<sup>47</sup> however, there is no one-size-fits all balance to be struck between judicial independence and judicial accountability. And Nepal presents a compelling case-in-point.

Consider the two attributes we prize most in the context of judicial

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<sup>43</sup> Interview with Mr. Bhandari, *supra* note 41.

<sup>44</sup> Interview with Mr. Devkota, *supra* note 41 (Mr. Devkota argued that the judiciary must be accessible and transparent; citizens must feel like the judiciary belongs to them, that they want to support it and strengthen it because it gives them justice).

<sup>45</sup> Case Western Reserve Law Review in 2006 conducted a symposium entitled "Judicial Independence and Judicial Accountability: Searching for the Right Balance." The title of the symposium alone betrays the nearly axiomatic understanding that these two principles are in fundamental conflict, and that a balance must be struck between them. Symposium, *Judicial Independence and Judicial Accountability: Searching for the Right Balance*, 56 CASE W. RES. L. REV. 899 *et seq.* (2006).

<sup>46</sup> David Pimentel, *Reframing the Independence v. Accountability Debate: Defining Judicial Structure in Light of Judges' Courage and Integrity*, 57 CLEV. ST. L. REV. 1 (2009)

<sup>47</sup> *Id.*

independence and accountability: we want judges who demonstrate (1) *integrity* in terms of their recognition of their ethical obligations and inclination to uphold them, and (2) *courage* in terms of their ability to withstand outside pressure in rendering their decisions. Accountability (in terms of disciplinary mechanisms for miscreant judges) is important as a factor encouraging integrity; independence (in terms of structural protections for judges) is important to bolster their courage. But aside from structures to protect their independence or disciplinary regimes to hold them accountable for unethical behavior, every judge comes to the job with a personal endowment of both courage and integrity, an endowment that can be demonstrated by a unique point on the figure below:

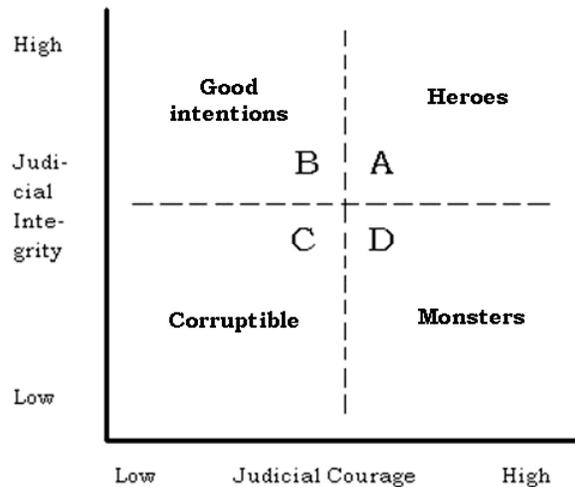


Fig. 1 – Plotting Judicial Courage and Integrity on a Graph

[I]n the Northeast quadrant (Quadrant A), we find the judges of the highest integrity and the highest courage. These are our “heroes.” In the Northwest quadrant (Quadrant B), we find judges who want to do the right thing, but are vulnerable to outside threats and pressures; their integrity is high, but their courage is lacking. Quadrant C, in the Southwest, includes the “corruptible” judges, whose integrity is dubious, and who, lacking courage, are susceptible to pressure. Here is where you might find judges who pander to the whims of the executive branch or even be in the pocket of the mob. They are not bent on pursuing their own corrupt agenda (see Quadrant D, *infra*) as they lack the courage for such an enterprise, but are manipulable, and may well end up doing the bidding of others. In the Southeast (Quadrant D) we find the scariest of all, the judges with low

integrity and ample courage; these are what Judge Noonan described as “Monsters” in his book on judicial ethics – judges who boldly pursue their own corrupt objectives.<sup>48</sup>

Using this model, we can see that strengthening structural protections for judicial independence may do more harm than good, if the judges are located in the bottom half of the graph. A judge who lacks integrity will only be emboldened in his corruption by a regime that immunizes him from outside pressures. Structural protections for judicial independence are helpful only if the judges already demonstrate a reasonable degree of integrity. The Western systems that “trust judges” assume this threshold level of integrity. The Maoist ideology does not.

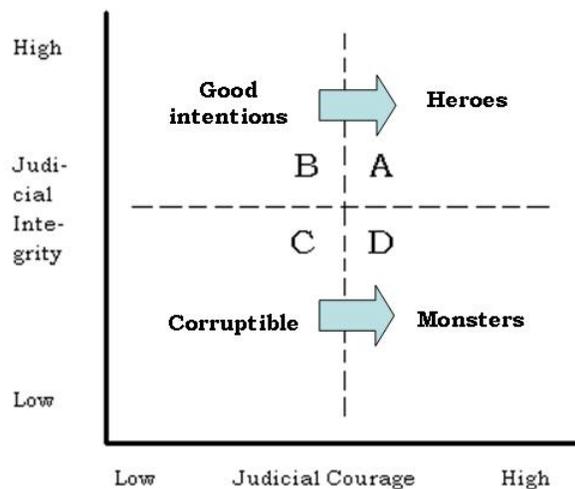


Fig. 2 – Impact of strengthened structural protections for judges<sup>49</sup>

### C. Historical Baggage in the Nepali Judiciary

Here is where history comes in to complement ideology as a critical and perhaps controlling factor in the future of the Nepali judiciary. The 1990 Constitution *did* afford the judges a high degree of independence, which independence was strengthened further by the fact that the disciplinary body, the judicial council, rarely, if ever, exercised its power to police the

<sup>48</sup> Pimentel, *Reframing the Debate*, *supra* note 46 at 27-28 (citing THE RESPONSIBLE JUDGE: READINGS IN JUDICIAL ETHICS 35-47 (JOHN T. NOONAN, JR. & KENNETH I. WINSTON eds., 1993)).

<sup>49</sup> Pimentel, *Reframing the Debate*, *supra* note 46 at 29-30.

judiciary.<sup>50</sup> The result was a judiciary that has earned the confidence of no one, a bench that distinguishes itself more by its corruption than anything else, at least according to popular perception.<sup>51</sup> The Western model of “trusting judges” failed to work; the general perception is that the judges proved to be unworthy of such trust.<sup>52</sup>

Little wonder, then, that the popular outcry in Nepal, and not just from Maoists, is for a judiciary that is *accountable*.<sup>53</sup> Judicial independence advocates cannot effectively argue that the Nepali people should trust its judges and accord them the independence to do the right thing. Trusting the judges too much, giving them too much independence, is widely perceived as one of the sources of the present problem.

#### THE RHETORICAL GAP

No one in the constitutional debate in Nepal at the moment is openly advocating against an independent judiciary. The rhetoric, at least, is consistent across the board that independence is desirable. The Concept Paper of the Committee on the Judicial System, contains 13 separate references to judicial independence, mostly justifying provisions on the grounds that judicial independence requires them:

- “The constitution has to provide functional independency to judges.”<sup>54</sup>
- “As the judicial independency is an essential condition for the fair

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<sup>50</sup> Interview with Mr. Devkota, *supra* note 41 (Mr. Devkota cited the failures of the Judicial Council which despite obvious corruption throughout the system, he said, has never removed a judge in 20 years. I have not attempted to verify the claim, but it is worth noting that this is the perception of a member of the CA and the Committee on the Judicial System.).

<sup>51</sup> See Nepal Biz News, *Nepal's judiciary is most corrupt: TI report*, (May 25, 2007) (“A country report on judicial corruption released . . . by Transparency International Nepal said Nepal's judiciary is one of the most corruption-affected sectors in the country. The Global Corruption Report 2007 prepared by senior advocate Krishna Prasad Bhandary on behalf of Transparency International (TI) said though corruption and irregularities are rife in Nepal's judiciary, initiatives are not being taken to curb such malpractices.”) (citing Transparency International, *Global Corruption Report* (2007)), available at <http://www.nepalbiznews.com/newsdata/Biz-News/judicial.html>.

<sup>52</sup> See generally, Sewanta Kattel, *Local Level Perception of Corruption: An Anthropological Inquiry*, 3 DHAULAGIRI JOURNAL OF SOCIOLOGY AND ANTHROPOLOGY (2009) (analyzing the sources of the public perception of public corruption, including judicial corruption).

<sup>53</sup> Interviews, *supra* note

<sup>54</sup> Concept Paper, *supra* note 28 at 15.

justice, the person who is dispensing justice should also be fair, competent, capable, impartial.”<sup>55</sup>

- “The meaning of the independence of judiciary refers not only to be free from intervention in the judicial process by any person, authority or bodies other than judiciary, but also free from influence of any level or office-bearer of and within the judiciary itself.”<sup>56</sup>
- “The judicial independency is an essential condition in order to carry out judicial proceeding according to law.”<sup>57</sup>

Despite these concessions on the importance of judicial independence, however, the Concept Paper itself entrusts the governance of the judiciary, including all appointments, oversight, discipline, and removal to a Special Committee of the Legislature (“Special Legislative Committee”).<sup>58</sup> This Special Committee is conceived as an 11-person body, chaired by the Deputy Speaker of the Legislature, and composed of the Minister for Law and Justice plus nine additional members of the legislature.<sup>59</sup> The rationale is set articulated in the Concept Paper, in terms of “democratiz[ing]” the courts:

The foundation of Democracy is the Civilian Supremacy. As the legislature is a representative body and also exercises the sovereignty of the people, the voice of people should only be reflected via this body. One of the major reasons behind the judiciary in the past that the people never realized ownership over it was lack of judiciary’s responsibility to the people. Therefore, it is necessary to democratize the judiciary according to the present context.<sup>60</sup>

As already noted, a substantial minority of the Committee on the Judicial System dissented from a Concept Paper in a variety of respects. One of those dissents, objecting to the power of the Special Legislative Committee, strongly invokes the concept of judicial independence:

[I]f judges are recommended by the legislature or any committee at the legislature, and approval or ratification of the appointment by the legislature on the recommendation, the judiciary becomes likely a body under the legislature. In a democratic system under the principle of separation of power, the power of the states is divided in which the

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<sup>55</sup> Concept Paper, *supra* note 28 at 16.

<sup>56</sup> Concept Paper, *supra* note 28 at 21, 32.

<sup>57</sup> Concept Paper, *supra* note 28 at 28.

<sup>58</sup> Concept Paper, *supra* note 28 at 39.

<sup>59</sup> Concept Paper, *supra* note 28 at 39.

<sup>60</sup> Concept Paper, *supra* note 28 at 39.

legislature makes laws, the executive implements the laws and the judiciary interprets the laws. Provided that, if the legislature holds the sole power of the State to form an organ of the state or holds power to supervise, control and monitor the state organs, the judiciary cannot be imagined as an independent and competent. Consequently, the country heads toward dictatorship and anarchism . . . . While writing a written Constitution, if the legislative is made more powerful than the Constitution itself, there is highly a chance of centralizing the power at the legislature, which we never have wished.<sup>61</sup>

The ideological divide becomes apparent in this debate, even though both sides are invoking principles of democracy, independence, and accountability. The predictions of doom in the dissenting opinion notwithstanding, the Maoists *do* appear to believe in some degree of parliamentary supremacy. Their answer would be that the check on the legislature's power, or abuse of its power, rests with the people who can always vote out any legislature that abuses the public trust. The Maoist would say that you cannot trust an unaccountable judiciary to play such a responsible role.

The Nepal Bar Association (NBA) has also staked out a strong position against the Concept Paper, publishing its own position paper on judiciary issues. It decries the Concept Paper's approach for its failure to "uphold the principle of independence of judiciary and the separation of powers which is one of the fundamental pillars of democracy."<sup>62</sup> The NBA position paper goes on to "emphasize[] that legislative interference (federal or provincial) with judicial appointments and dismissals is not acceptable."<sup>63</sup>

The President of the Nepal Bar Association (NBA) has expressed his confidence—based on conversations he has had with the highest level Maoist leaders—that even the Maoists share the NBA's commitment to an independent judiciary.<sup>64</sup> But the concrete proposals coming from the Maoists suggest otherwise, or that "judicial independence" to the Maoists means something very different from what it means to the NBA.

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<sup>61</sup> Concept Paper, *supra* note 28 at 77.

<sup>62</sup> The Judicial System under Nepal's New Constitution: Position Paper of the Nepal Bar Association (2010) at 11.

<sup>63</sup> *Id.*

<sup>64</sup> Interview with Mr. Prem Bahadur Khadka, NBA President, Kathmandu, July 13, 2010 (notes on file with the author)

## SEPARATION OF POWERS

Both the dissenting opinion and the NBA position paper make specific reference to the concept of separation of power, the latter identifying it as “one of the fundamental pillars of democracy.”<sup>65</sup> And while the Maoists will speak of independence and accountability, they do not speak of separation of powers, much less tout it as a “pillar of democracy.” The Maoist conception of “democracy” as illustrated in the Concept Paper, militates against separation of powers, and in favor of bringing the judiciary under the control of legislature, as a means of making it “democratiz[ing] the judiciary.”<sup>66</sup>

Although first raised in the discussion of the appointment of judges, the concept of separation of powers arises again in the context of constitutional interpretation. Who should have final authority to interpret the constitution? The issue is of sufficient controversy and import in Nepal at the moment that it deserves some mention here.

From the American perspective, this is an easy question. We entrust such issues to the Supreme Court, untroubled by the fact that by making interpretive judgments, the Court may actually be making law. In common law jurisdictions, the concept of judge-made law is neither novel nor threatening.<sup>67</sup> This follows from the traditional role of the judiciary in common law jurisdictions—reflected in the ideology articulated above—to protect the public from the government. Indeed, the power of the judiciary was invoked in common law England as a check on the power of the king.<sup>68</sup>

But the tradition of the civil law is profoundly different, where judges were expected to *apply* the law but not to do interpretation.<sup>69</sup> From this perspective, ambiguities in the law are to be referred to legislative bodies,

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<sup>65</sup> Concept Paper, *supra* note 28 at 77; NBA Position Paper, *supra* note 62 at 11.

<sup>66</sup> Concept Paper, *supra* note 28 at 39 (“As the legislature is a representative body and also exercises the sovereignty of the people, the voice of people should only be reflected via this body. . . . [I]t is necessary to democratize the judiciary according to the present context.”).

<sup>67</sup> Merryman et al., *supra* note 37 at 17 (“The fear of judicial lawmaking [in the United States and England] . . . did not exist. On the contrary, the power of the judges to shape the development of the common law was a familiar and welcome institution.”)

<sup>68</sup> *Id.* at 17.

<sup>69</sup> *Id.* at 30. (“The function of the judge would be limited to selecting the applicable provision of the code and giving it its obvious significance in the context of the case.”); *Id.* at 39 (“[Prussian] judges were forbidden to interpret the code.”)

not judiciaries, for clarification.<sup>70</sup> After all, such interpretation and clarification is inherently a legislative act.<sup>71</sup> This ideology was already established under Roman Law tradition, revitalized by the French revolutionaries, who did not see the judiciary as a champion of the rights of the people (like in England), but rather as a barrier and a threat to democratic governance.<sup>72</sup>

Because, under civil law tradition, it is inappropriate to entrust issues of interpretation, especially of the constitution, to the regular courts, civil law jurisdictions have developed separate institutions to do such interpretation.<sup>73</sup> Constitutional courts operate in many of these countries, entirely separate from a Supreme Court, to address issues of Constitutional interpretation, leaving the Supreme Court to function simply as the ultimate court of appeals, the court of last resort. Conceptually, these “Constitutional Courts,” despite their name, were not to be courts at all, in that they were not considered to be part of the judicial branch.<sup>74</sup> This is important because judicial review of legislative action, while a sacred element of common law jurisprudence since *Marbury v. Madison*,<sup>75</sup> like any act of judicial interpretation, would be considered a violation of separation of powers under the civil law tradition.

The Concept Paper and the Maoist’s draft both provide that issues of constitutional interpretation will be entrusted to the Special Legislative Committee, which is essentially a legislative body. The NBA, predictably, disagrees, invoking the principle of separation of powers:

The NBA holds the position that the judiciary, and, ultimately, the Supreme Court, should be the final body to interpret the law, including the constitution, as per the principle of the separation of powers and

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<sup>70</sup> *Id.* at 40 (“A new governmental organ was created by the legislature and give the power to quash incorrect interpretations by the courts . . . [The Tribunal of Cassation] was not a part of the judicial system, but rather a special instrument created by the legislature to protect legislative supremacy from judicial usurpation.”)

<sup>71</sup> *Id.* at 30 (“Experience with pre-revolutionary courts had made the French wary of judicial law-making disguised as interpretation of laws.”)

<sup>72</sup> *Id.* at 35-36.

<sup>73</sup> *Id.* at 37-38.

<sup>74</sup> *Id.* at 37-38. “[T]hese special [constitutional] courts, which are not a part of the ordinary judicial system and are not operated by members of the ordinary judiciary, were established in response to the civil law tradition that judges . . . cannot be given such power” to review statutes for constitutionality. In time, many of these institutions have acquired judicial character, particularly in jurisdictions that follow the Germanic civil law tradition, and in Latin American civil law tradition. *Id.* at 134-42.

<sup>75</sup> 5 U.S. (1 Cranch) 137 (1803).

independence of the judiciary. Accordingly, the NBA expresses grave concern with the provision of the JS Concept Paper with respect to the interpretation of constitution by a committee of the federal legislature.<sup>76</sup>

The NBA view, therefore, reflects the perspective and ideology of a common law jurisdiction, perhaps not surprising given the profound influence of India in the region, and the assistance and support the NBA has received in some of its work from Canadian sources.

But a lawyer from a civil law jurisdiction would likely conclude that entrusting constitutional interpretation to the Supreme Court would be the more serious violation of separation of powers. It is the legislature, after all, that decides what the law is; the courts, with judges operating as mere functionaries, are empowered only to apply it—ideally mechanically, to the extent that is possible—to individual cases.

The upshot is that there is nothing sacred about entrusting constitutional interpretation issues to the Supreme Court of Nepal. While the concept of constitutional supremacy (as opposed to legislative supremacy) is inconsistent with the Maoists' and Concept Paper's proposal for judicial affair to come under a legislative committee, there is nothing offensive to core principles of judicial independence in the creation of a separate constitutional court.<sup>77</sup> And there may be great advantages, particularly in its potential to attract consensus both from separation of powers advocates and those who find the "status quo" unacceptable.

#### WHERE TO FROM HERE? RECONCILING IT ALL

Whatever compromises are ultimately reached for the new Nepali judiciary, they must reflect the ideological and historical forces presently at play in Nepal. The largely independent judiciary of the past two decades utterly failed to win public confidence and trust; it was not sufficiently accountable. As a result, the new judiciary for Nepal must be more accountable, and therefore necessarily less independent, than in the past. The status quo is entirely unacceptable; serious changes will have to be made, and that will come largely with greater accountability measures.

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<sup>76</sup> NBA Position Paper, *supra* note 62 at 13.

<sup>77</sup> There are models for constitutional courts in other countries, most of which—and perhaps the best of which—place the court reasonably beyond the control of any one branch of government. The Indonesian Constitutional court, for example, is composed of nine justices put forward by the three branches of government: three by the President, three by the Supreme Court, and three by the legislature (the People's Representative Council).

Even the NBA position paper—the fiercest defense of judicial independence we have seen in the debate—speaks strongly about the importance of accountability:

In the survey conducted by the NBA the overwhelming majority of respondents opined that judiciary should be established as a corruption-free sector, and the code of conduct should be implemented strongly against judges. It is obvious that so as to maintain accountability of the judiciary, the effective implementation of codes of conduct and impeachment proceedings must be strictly enforced.<sup>78</sup>

That said, the accountability must not be to majoritarian forces. Even if the Maoists prefer to trust the people, and see themselves as the champions of the oppressed, Nepal has a long and ugly history of discrimination against unpopular and disenfranchised minorities.<sup>79</sup> The majority can be expected to protect the rights of the majority through legislative action, but someone must guarantee the rights of Nepal's minorities, including women, Dalits, religious minorities, and a host of other ethnic subgroups.

Normally, I would recommend that accountability be enforced by the judicial council, a position I articulated at some length in an earlier article about Nepal.<sup>80</sup> Seeing the failure of the previous judicial council to perform this role,<sup>81</sup> and the political imperative to avoid anything that appears to perpetuate the status quo,<sup>82</sup> I concede that a new institution should be created to assume this role. The ideological and historical forces at play in Nepal demand no less.

With apologies to the Maoists, however, this should *not* be a body of the legislature. A better approach would be for the new constitution create a Judicial Complaints Commission (JCC), within the judicial branch, that will thoroughly investigate charges of judicial misconduct and recommend disciplinary action, including removal of judges found to violate ethical standards. This JCC may be appointed with participation by political actors, but once appointed should remain one step removed from

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<sup>78</sup> *Id.* at 14.

<sup>79</sup> See, e.g., Press Release: Asian Human Rights Commission, *NEPAL: Implementation Of Anti-Discrimination Laws* (July 24, 2010) (giving an assessment of the failure to protect human rights of Dalits in Nepal), available at <http://www.scoop.co.nz/stories/WO1007/S00470/nepal-implementation-of-anti-discrimination-laws.htm>

<sup>80</sup> Pimentel, *Constitutional Concepts*, *supra* note 5 at 294-310.

<sup>81</sup> Interview with Mr. Devkota, *supra* note 41, and comment at note 50.

<sup>82</sup> See text *supra* at note 18.

majoritarian political forces.<sup>83</sup> Otherwise, it could be pressured to harass judges who render unpopular decisions protecting the rights of minorities or those whose politics or interests are at odds with the ruling party.

On the issue of constitutional interpretation, that too should be at least one step removed from the legislature, lest constitutional standards become subject to the whims of the majority party. Again, the judiciary's inability to muster public confidence in the past dictates in favor of a new institution to perform this role, *i.e.* a constitutional court, as articulated and argued above. A new institution like this, without a history of corruption or politicization, may be the best hope for sound constitutional administration in a new Nepal.

#### CONCLUSION

Nepal must come together in the coming months, finding common ground and consensus for the structure and character of their new government, reflected in the drafting of their new constitution. The debate over the structure and role of the judiciary is a divisive one, exacerbated by the fact that all sides seem to be using the same rhetoric to argue for very different approaches.

Reconciliation of this war of words and ideas, however, requires an appreciation of the historical and ideological origins of the conflict. Moreover, Nepal cannot merely adopt or import foreign models; they need their own institutions tailored to their own priorities, in light of their own culture, history, and ideological orientations. For Nepal, this means a judicial structure that strikes the balance between accountability on the one hand, and independence on the other, that decidedly favors the former. And most likely, it means new institutions: (1) a Judicial Complaints Commission to handle corruption, rather than reliance on a judicial council, and (2) a constitutional court, rather than continued reliance on the Supreme Court for constitutional interpretation. Only by replacing the tried-and-failed (or at least tried-and-flawed) institutions the Maoists have rebelled against for so many years can Nepal hope forge some semblance of consensus on the terms of its new constitution, and chart a new future for

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<sup>83</sup> There are various ways to insulate JCC members from political interference. One might be to select JCC members from the ranks of the judiciary, have them serve one term on the JCC, and then return to a secure post in the judiciary. They need not worry about pleasing the appointing authorities, since they can't be renewed anyway. They need not worry about using their influence to ingratiate themselves to future employers, since they have a secure post in the judiciary to return to in any case.

the people of Nepal.