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

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ABSTRACT

A new government has taken power in Nepal. Intent on replacing the monarchical Hindu state with a secular democracy, it has promised a new constitution. Although the Nepali government is currently operating under an Interim Constitution, 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. 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.

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I. INTRODUCTION

Nepal is in a state of transition.[1] A new government has taken power, intent on replacing the monarchical Hindu state with a secular democracy,[2] and has 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 the 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 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

1. *India Hopes for Democratic Transition, Political Consensus in Nepal*, UNITED NEWS OF INDIA, Apr. 5, 2009, http://hamrolagani.com/home.php?f=Media/NewsDetail&id=275&category=News.

2. *Id*.

3. *PM's Worry about Local Issues*, KANTIPUR REPORT, May 26, 2009, http://www.kantipur online.com/kolnews.php?&nid=196108 (Nepal's new Prime Minister Pushpa Kamal Dahal, 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 infra* note 34.

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

5. *See infra* note 49 and accompanying text.

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 have 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.

II. CONSTITUTIONAL HISTORY IN NEPAL

Nepali governance has a rich and complex history starting with the unification of Nepal in the mid-eighteenth century under Gurkha King Prithvi Narayan Shah.[6] By the mid-nineteenth century, the Ranas had seized power in the role of Prime Minister, a title which was passed down 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

The first law resembling a constitution in Nepal was the Government of Nepal Constitution Act of 1948, commissioned by liberal Prime Minister Padma Shamsher Rana.[8] However, the result was a constitution in

6. BBC News, Timeline: Nepal, http://news.bbc.co.uk/2/hi/south_asia/country_profiles/1166516.stm (last visited Oct. 14, 2009) [hereinafter BBC News Timeline].

7. Enayetur Rahim, *Nepal: Government and Politics*, *in* NEPAL AND BHUTAN: COUNTRY STUDIES 143, 146–47 (3d ed. 1993).

8. *Id.* at 147.

form more than in substance. It created a bicameral legislature, with the entire membership of one house and 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 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.[11] While this constitution created a putative legislative body, the Constituent Assembly's power was purely advisory, with the king retaining ultimate power.[12] Pressure for more democratic and representative government prompted King Mahendra to grant a new constitution in 1959.[13]

C. Royal Constitution of 1959

The Royal Constitution of 1959 created a multi-party parliamentary system modeled on those of Britain and India, but which retained enormous power in the king, including broad emergency powers to suspend both houses of parliament and the constitution itself.[14] When these powers were invoked by King Mahendra after party elections in 1960 to dissolve the government, the pre-1959 constitutional system was revived.[15]

D. Panchayat Constitution of 1962

King Mahendra issued a new constitution in 1962, abolishing all political parties, and drawing on the ancient *panchayat s*ystem for the structure of local and regional government.[16] While recognizing local councils, or *panchayat*, the 1962 Panchayat Constitution contained even stronger assertions of royal power than the previous constitutions.[17] Once

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9. *Id.*
10. *Id.*
11. *Id.* at 148.
12. *Id.* at 147–48.
13. *Id.* at 148.
14. *Id.* at 148–49.
15. *Id.* at 149.
16. *Id.*
17. *Id.*

again, the king retained unilateral power to suspend the constitution during emergencies, as well as the power to amend the constitution.[18] This amendment power was invoked periodically over the years in response to agitation for a more democratic government, which reached a head in 1990.[19]

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.[20] This constitution brought back a multi-party parliamentary system, and for the first time, granted elected officials genuine power independent of the king.[21] However, the 1990 Constitution left the door open to significant assertions of royal authority, including the invocation of emergency powers.[22]

By 1995, Maoist rebels were organizing in rural areas, protesting the monarchy, and calling for a "people's republic."[23] 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 and sent the army to fight the Maoist insurgency.[24] Attempts to negotiate a peace failed in 2003, and ultimately, in 2005 the King invoked emergency power and assumed full control of the government.[25]

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.[26] Shortly thereafter, a peace agreement was reached with the Maoists, and they were, in turn, invited to participate in an interim government.[27] The new government immediately moved to replace the 1990 Constitution. Plans were announced to draft

18. *Id.*
19. *Id.* at 150–52; BBC News Timeline, *supra* note 6.
20. BBC News Timeline, *supra* note 6.
21. Rahim, *supra* note 7, at 152.
22. *Id.* at 155.
23. BBC News Timeline, *supra* note 6.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*

and adopt an entirely new constitution—one that stripped the monarchy of power and created a federalist, secular state.[28] In the meantime, an Interim Constitution was adopted.[29] 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.[30] In early 2009, Marxist-Leninist leader, Madhav Kumar Nepal, was named to chair the CDC.[31] However, continuing political volatility in the new government has hindered progress on the new constitution.

In May 2009, the new Maoist Prime Minister, Pushpa Kamal Dahal, resigned his post after public protests over his dismissal of the army chief due to the chief's refusal to integrate Maoist rebels into the military.[32] A few weeks later, Madhav Kumar Nepal (then chair of the CDC) 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 the Maoist party to withdraw from the government.[33] Prime Minister Nepal, now representing a twenty-two-party coalition excluding the Maoists, has said that his government's goal is to write the new constitution and complete the country's peace process.[34] However, his successor as chair of the CDC, Nilambar Acharya, has described the drafting process as being

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28. AFP, *Nepal's Monarchy Abolished, Republic Declared*, May 28, 2008, http://afp.google.com/article/ALeqM5isOHNx5wqAzoR3Uc79spn-FzvERg ("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 . . . .").

29. INTERIM CONSTITUTION OF NEPAL 2063 (2007), *translation available at* http://www.worldstatesmen.org/Nepal_Interim_Constitution2007.pdf. The Constitution is also referred to by the Nepali year of enactment, 2063.

30. BBC News Timeline, *supra* note 6.

31. *Nepal Govt Partners Corner Maoists for Charter Draft Committee*, WEEKLY TELEGRAPH, Aug. 14, 2009, http://telegraphnepal.com/news_det.php?news_id=6038 [hereinafter *Nepal Govt Partners*].

32. BBC News Timeline, *supra* note 6.

33. *Id.*; *Nepal PM Says Sacking Army Chief by Maoist Was A Mistake*, UNITED NEWS OF INDIA, May 29, 2009, *available at* http://www.thefreelibrary.com/Nepal%20PM%20says%20sacking%20army%20chief%20by%20Maoist%20was%20a%20mistake.-a0200816092.

34. *Nepal PM Says No Foreign Hand in Maoist Govt's Downfall*, PRESS TRUST OF INDIA, May 27, 2009, *available at* http://65.182.162.202/story/53890.

in "cold storage,"[35] as controversy continues over the role Maoists may yet play in the process.[36]

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.[37] It is timely, therefore, to comment on what should be included in that constitution.

III. 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,[38] 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, which continued substantially even under the 1990 Constitution.[39] Moreover, there is a perception of widespread corruption in the judiciary, which the Nepali bar has been quick to condemn.[40]

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35. Interview by Myrepublica.com with Nilambar Acharya, Chairman, Constitutional Committee of the Constituent Assembly of Nepal, transcript available at Thira L. Bhusal & Post B. Basnet, *Constitution-Drafting in Cold Storage*, http://www.myrepublica.com/portal/index.php?action=news_details&news_id=11808 (Nov. 15, 2009).

36. *Nepal Govt Partners*, *supra* note 31.

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> Constituent Assembly (CA) Chairman Subash Chandra Nemwang on Thursday [February 4, 2010] said that the new constitution will be prepared within the stipulated deadline . . . . The CA chair, however, said that the political parties are still not really serious towards timely constitution drafting and urged them to focus more on this important task.

Constitution Writing to Commence from Today: CA Chair, NEPALNEWS.COM, Feb. 4, 2010, http://www.nepalnews.com/main/index.php/news-archive/2-political/3957-constitution-writing-to-commence-from-today-ca-chair.html.

38. *Freedom in the World 2008—Nepal*, FREEDOM HOUSE, July 2, 2008, http://www.unhcr.org/refworld/docid/487ca22e8.html ("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.").

39. Semanta Dahal, *Post Conflict Constitution Making in Nepal: Towards 'Inclusiveness' in Democracy* 18 (Nat'l Law Sch. of India Univ., Working Paper, 2008), *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 centralised government.").

40. Krisha Prasad Bhandari, *Formal Justice Too Costly in Nepal,* NEPAL MONITOR, May 25, 2007, http://www.nepalmonitor.com/2007/05/formal_justice_too_costly_in_nepal.html ("The active Nepal Bar Association frequently castigated the [Supreme] [C]ourt for its supine verdicts during the period of direct rule . . . ."); *NEPAL: SC Punishes the Messenger*, DAILY STAR, Sept. 27, 2008, 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 [Nepal Bar Association] decided to fight corruption in the judiciary . . . ."); Kathleen Hwang, *Human Rights in Decline in Asia*, UPI.COM, Jan. 18, 2006, http://www.upi.com/Business_News/Security-Industry/

At the same time, justice has been carried out on the local level in *panchayat* bodies, which is similarly problematic. Under the Panchayat Constitution, the court system was headed by the Supreme Court, followed by zonal courts, which oversaw numerous district courts throughout the country.[41] These courts were considered independent; however, they "never were assertive in challenging the king or his ministers."[42]

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.[43] These People's Courts have been controversial: on the one hand, they have been very effective in providing prompt and inexpensive means for the resolution of local disputes, particularly in remote and rural areas; on the other hand, they are not perceived as upholding the highest principles of justice.[44]

Weaknesses in the judiciary are not necessarily rooted in issues of constitutional structure, however. With this in mind, it is difficult to imagine that the problems plaguing 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 difficult 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.[45]

200601/18/Human-rights-in-decline-in-Asia/UPI-65161137606975/ ("'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.'" (quoting Mandira Sharma, director of the Advocacy Forum in Katmandu, Nepal)).

41. Douglas C. Makeig, *Nepal: National Security*, *in* NEPAL & BHUTAN, *supra* note 7, at 230.

42. *Id.*

43. Rekha Shrestha, *Eastern Nepal District Said Increasingly Turning to Maoist "People's Court"*, BBC NEWS, May 10, 2004 ("'About 75 per cent of the cases are being solved by the people's court.'" (quoting Prakash Shakya, advocate and member of the district bar association)).

44. *Nepal Govt Asks Maoists to Stop Extortion, Scrap Courts*, NEPAL HUMAN RIGHTS NEWS, July 2, 2006, http://www.nepalhumanrightsnews.com/news.asp?id=387 ("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.").

45. JANE STROMSETH, DAVID WIPPMAN & ROSA BROOKS, CAN MIGHT MAKE RIGHTS?: BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 11 (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. . . . [T]he 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

While the focus of this Article is on the constitutional provisions themselves, it would be naïve to presume that adoption of the right 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. The constitutional structure of the judiciary may well provide a foundation for future judicial development, 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 monarchical power and 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 ten-year period.[46] 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 imperfect,[47] it is timely to revisit its provisions relating to the judiciary in order to consider how to advise the CDC on what should be retained or rejected in Nepal's new constitution.

IV. 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

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law as complex as any other venture that relies on mobilizing multiple individuals in a common enterprise.

46. HIMALAYAN PEOPLE'S WAR: NEPAL'S MAOIST REBELLION 5 (Michael Hutt ed., 2004) (The Maoists' demands included "a secular state free of all discrimination and oppression with the monarchy stripped of its privileges.").

47. Interview with Jenik Radon, Attorney, Radon & Ishizumi and Adjunct Asst. Professor, Columbia University, School of International and Public Affairs, in Kathmandu, Nepal (Feb. 14, 2009).

to power coincided with the fall of the monarchy,[48] suggests that they want a judiciary accountable to the people.[49] This has prompted some discussion 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 many states of the Union.[50] The message to the Nepali CDC is this: do not 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;[51] they usually know little or nothing about the judicial candidates on the ballot. Typically, the best way to educate the public on its choices for judges is to allow the judicial candidates to run campaigns alerting voters to their choices and to the differences between the candidates.[52] Of course, contested judicial campaigns raise the specter of fundraising and all the corrupting influence that comes with campaign contributions.[53]

It is worth noting that the U.S. 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.[54] The campaign was successful, and the newly elected judge then cast the deciding vote to reverse a $50-million judgment against the campaign contributor.[55] The U.S. Supreme Court ruled that the newly elected justice should have recused himself from the case based, if nothing

48. As of May 2009, a new coalition government, excluding the Maoists, was formed. However, the Maoists still maintain the largest block of seats in the Constituent Assembly. *See supra* notes 28–30 and accompanying text.

49. Dahal, *supra* note 39, at 10 ("After the ousting of the monarch, there was a broad consensus reached between the parties and the Maoists on ultimate goals of society and state: sovereignty of the people . . . .").

50. *See* discussion accompanying notes 51–56 *infra.*

51. Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 54 (2003) ("[A]s much as 80% of the electorate is completely unfamiliar with its candidates for judicial office.") (footnote omitted).

52. *Id*. ("[O]ne might hypothesize that as more money is spent on advertising in judicial races, voter ignorance will diminish, but that too is far from clear.").

53. *Id*. at 55 ("Eighty percent . . . of the public thinks that campaign contributions buy influence with judges.").

54. Caperton v. A. T. Massey Coal Co., 129 S. Ct. 2252, 2257 (2009).

55. *Id.* at 2263–64.

else, on the problematic perceptions.[56] 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.

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.

V. 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.[57] 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.[58]

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 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.[59] 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 vested with power over the judiciary.[60] The concept of a council

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56. *Id*.

57. See *supra* Part I, for a summary of Nepali history; *see also* James Heitzman, *Nepal: Historical Setting*, *in* NEPAL AND BHUTAN, *supra* note 7, at 3–48.

58. 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.") (footnote omitted).

59. K.M. Mukta, *Judges Should Get Better Emoluments*, NEW NATION, Feb. 5, 2009, http://nation.ittefaq.com/issues/2009/02/05/news0460.htm. It is not clear yet whether this structural change has resulted in de facto separation, or in true institutional independence.

60. INTERIM CONSTITUTION OF NEPAL 2063 art. 113 (2007).

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."[61]

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 sixty percent of the world's judiciaries are governed by such councils, up from ten percent at the end of the 1970s.[62] Various international organizations have endorsed the concept 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—"[S]election should be carried out by an independent body, that include[s] substantial judicial representation."[63] "[J]udicial administration and disciplinary action should be carried out by independent bodies, that include substantial judicial representation."[64]
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> Beijing Principles—States that the body entrusted with the appointment of judges "should include representatives [of] the higher Judiciary and the independent legal profession as a means of ensuring that judicial competence, integrity and independence are maintained."[65]

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61. Nuno Garoupa & Tom Ginsburg, *Guarding the Guardians: Judicial Councils and Judicial Independence*, 57 AM. J. COMP. L. 103, 104 (2009).

62. *Id.* at 105.

63. Universal Charter of the Judge, art. 9 (1999), *available at* http://www.hjpc.ba/dc/pdf/THE%20UNIVERSAL%20CHARTER%20OF%20THE%20JUDGE.pdf. 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, Judicial Independence Minerva Research Group, International Dokumente, http://www.mpil.de/ww/de/pub/forschung/forschung_im_detail/projekte/minerva_richterl_unabh/intdocs.htm.

64. *Id.* art. 11.

65. Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, art. 15 (amended 1997), *available at* http://www.asianlii.org/asia/other/CCJAPRes/1995/1.html.

> 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

> Latimer House Guidelines (for Commonwealth Countries)—"[A]ppointments should be made by a judicial services commission (established by the Constitution or by statute) . . . ."[66]
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> 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."[67]
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> 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

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> 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.

David K. Malcolm, *Foreword* to Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region (amended 1997).

66. Latimer House Guidelines for the Commonwealth, art. 2 (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. . . .
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> . . . .
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> 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". . . .*
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> . . . .
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> *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. at 2.

67. Council Recommendation No. R(94) 12 of 13 Oct. 1994, principle I, § 2 (c) [hereinafter Council of Europe Recommendation], *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.

> judges elected by their peers following methods guaranteeing the widest representation of the judiciary."[68]
>
> 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 recruitment, decides the assignment of magistrates and organizes professional training."[69]

There is a similar theme in all of these declarations. In order for the judicial council to serve its principal purpose—to first and foremost safeguard judicial independence—the council itself must be removed from the executive's sphere of influence and 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," which is 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.[70]

The caution in the 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.

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68. European Charter on the Statute for Judges, art. 1.3 (1998) (drafted by the Council of Europe), *available at* http://www.coe.int/t/e/legal_affairs/legal_co-operation/legal_professionals/judges/instruments_and_documents/charte%20eng.pdf.

69. 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 calls for the creation of a "Supreme Council of Magistrates." Elements of a European Statute on the Judiciary, Palermo Declaration, § 3.1 (1993) (issued by the European Association of Magistrates for Democracy and Freedoms) [hereinafter Palermo Declaration], *available at* http://medel.bugiweb.com/usr/Palermo.pdf.

70. *Abstract* to VIOLAINE AUTHEMAN & SANDRA ELENA, GLOBAL BEST PRACTICES: JUDICIAL COUNCILS, LESSONS LEARNED FROM EUROPE AND LATIN AMERICA (Keith Henderson ed., 2004), *available at* http://www.ifes.org/publication/eae6b5d089d0b287174df2742875b515/WhitePaper_2_FINAL.pdf.

1. Present Provisions for the Judicial Council

The Interim Constitution calls for a Judicial Council ("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;
>
> a senior advocate, appointed by the Chief Justice on recommendation of the Nepal Bar Association; and
>
> another jurist appointed by the Prime Minister.[71]

It is not clear, however, to what degree these five are in a position to exert significant power in the appointment and 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 . . . ."[72] 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,[73] it could be inferred that she or he is powerless to act absent such recommendation. 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.

2. 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."[74] 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[75] and to vet candidates, while considering "*inter*

71. INTERIM CONSTITUTION OF NEPAL 2063 art. 113 (2007).
72. *Id.* art. 113, § 1.
73. *Id.* art. 103, § 1; art. 109, § 1.
74. *Id.* art. 109, § 1 (emphasis added).
75. *Id.* art. 109, § 4.

alia, qualification, capacity, experience, dedication and contribution to justice, reputation in public life, [and] high moral character" before making recommendations for appointment.[76]

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.

3. 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[77] and the power to "constitute a Committee of Inquiry" if detailed, expert investigation is required in a judicial misconduct matter.[78] 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, section 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.[79]

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, section 1.[80] This suggests that the Chief Justice's role in 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

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76. *Id*. art. 109, § 5.
77. *Id.* art. 113, § 4.
78. *Id.* art. 113, § 5. *See also id.* art. 109, § 10(c).

> The Judge of the Appellate Court and District Court who is facing charge [sic] 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.

79. *Id.* art. 109, § 10(c) (emphasis added).
80. Text accompanying *supra* note 72.

inconsistency between articles 109 and 113, leaving 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.

4. Role of the Judicial Council—Other Responsibilities

The Interim Constitution is clear that the Judicial Council must be "consulted" before judges are assigned to other tasks, such as "work concerning judicial inquiry or to legal or judicial investigation or research . . . ."[81] 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.[82] 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, section 1 states that the Judicial Council shall "make recommendations and give advice . . . concerning . . . other matters relating to judicial administration . . . ."[83] 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. 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

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81. *Id.* art. 110, § 1. The Chief Justice or Judges of the Supreme Court, as well as the Appellate and District Judges:

> shall not be . . . transferred to, 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 . . . a Judge of the Appellate Court and the District Court to work concerning judicial inquiry, or to any legal or judicial investigation or research, or to any other work of national concern.

Id.

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.*

82. 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.* art. 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 be threatened when judges fear retaliatory transfers to remote or undesirable locations in response to 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.

83. *Id.* art. 113, § 1.

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.

5. Strengthening the Judicial Council—Clear Delegation of Power

As noted above, it is unclear how much authority the Judicial Council has to take final action on its own; the Interim Constitution appears to reserve ultimate appointment and removal authority for the Chief Justice, who may receive advice, recommendations, and even decisions of the Judicial Council, but ultimately makes the appointment[84] or effects the removal personally.[85] 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 its 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.[86]

The new constitution should avoid vesting too much power in one person, a concern about which a post-monarchical society should be particularly sensitive. Ideally, therefore, 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, removals of judges, as well as other important administrative decisions

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84. *Id.* art. 109, § 1.

85. *Id.* art. 109, § 10(c).

86. AUTHEMAN & ELENA, *supra* note 70, at 7.

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

No role—Canada, Denmark

Purely advisory—Panama, Poland, Slovakia

Proposal of candidates for selection (non-binding)—Guatemala (lower court)

Proposal of candidates for selection (binding)—France (higher courts)

Proposal of candidates for ratification—El Salvador

Actual appointment—Bulgaria, Dominican Republic (Supreme Court).

Id.

over the judicial branch, e.g., adoption of budgets and promulgation of rules, would be executed over his or her signature anyway. However, 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.[87]

6. Strengthening the Judicial Council—Broadened and Diversified Membership

The other, more serious concern about the provisions for the Judicial Council arises because its membership consists of only five individuals, three of whom, including the chair, are directly appointed by the Prime Minister.[88] The other two are appointed by the Chief Justice,[89] 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.

7. 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 branch. 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,"[90] and the European Charter insists that "at least one half of those who sit are judges."[91] Echoing the same principle, the Universal Charter of the Judge provides that judicial councils should "include substantial judicial representation."[92]

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87. *Id. See* Garoupa & Ginsburg, *supra* note 61, at 113 (explaining how the 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").

88. INTERIM CONSTITUTION OF NEPAL 2063 art. 113 (2007). While three members are appointed by the Prime Minister, they may not all have been appointed by the *same* Prime Minister.

89. The Judicial Council members appointed by the Chief Justice include the senior-most Judge of the Supreme Court (named to that post by the Chief Justice, upon recommendation of the Judicial Council) and a senior advocate appointed "on the recommendation of the Nepal Bar Association." INTERIM CONSTITUTION OF NEPAL 2063 arts. 103 & 113(c) (2007).

90. Palermo Declaration, *supra* note 69, § 3.2.

91. European Charter on the Statute for Judges, *supra* note 68, art. 1.3.

92. Universal Charter of the Judge, *supra* note 63, art. 9.

Brazil typifies the trend—in 2004 it passed 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.[93] 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,[94] as are the Judicial Councils of the various circuits.[95]

8. Selection of Council Members by Their Fellow Judges

The issue of strict composition—to what degree the Council is dominated by judges—may not be as important as the issue of how the Judicial Council members are selected. The Council of Europe similarly calls for judicial council members to be "selected by the judiciary."[96] The district judges on the JCUS are also "chosen" by their fellow judges.[97] 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."[98]

The idea here is not so much to give the judges "representation" on the Judicial Council or to give these members a specific constituency to serve,

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93. Garoupa & Ginsburg, *supra* note 61, at 111 n.35.

94. 28 U.S.C. § 331 (2006).

> 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 . . . .

Id.

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.

95. 28 U.S.C. § 332(a)–(b) (2006). Circuit councils have some involvement in the selection and appointment of bankruptcy judges and are the primary actors in the judicial discipline system for federal judges. 28 U.S.C. §§ 353–354 (2006).

96. Council Recommendation No. R(94) 12, *supra* note 67, principle I, § 2(c).

97. 28 U.S.C. § 331 (2006) ("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 . . . .").

98. European Charter on the Statute for Judges, *supra* note 68, § 3.1; Palermo Declaration, *supra* note 69, § 3.2.

but to spread out 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 and ensure 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."[99] Interestingly enough, it does not mention the possibility of executive branch appointments,[100] perhaps prompted by the concern that judiciaries already suffer too much from executive branch influence.

9. Representation of Different Levels of Judges

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. Trial judges have also been known to complain that appellate judges are unaware and unsympathetic to the practical difficulties that trial judges encounter in their work.[101]

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. Even in those jurisdictions, however, there may be value in

99. Palermo Declaration, *supra* note 69, § 3.2.

100. *Id.*

101. 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 have virtually unlimited time to research the legal issue and the benefit of 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.

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) . . . ."[102] 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 influence coming from *within* the judiciary.[103]

On balance, there are compelling interests to be served by including trial judges on the Judicial Council. Making the representation of 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.[104] In the U.S. federal courts, the JCUS and Circuit Councils are composed of approximately half trial judges and half appellate judges, which gives trial courts significant representation, if not *proportional* representation.[105] 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.

10. 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,

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102. Garoupa & Ginsburg, *supra* note 61, at 107.

103. David M. O'Brien & Yasuo Ohkoshi, *Stifling Judicial Independence from Within: The Japanese Judiciary*, *in* JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY: CRITICAL PERSPECTIVES FROM AROUND THE WORLD 37 (Peter H. Russell & David M. O'Brien eds., 2001).

104. 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." Judicial Council of California, Questions and Answers, http://www.courtinfo.ca.gov/qna/qa7.htm (last visited July 3, 2009). A proportional representation scheme would require one Supreme Court Justice, fifteen appellate court judges, and 282 trial court judges. Even if proportionality were required for only the latter two categories, the council would consist of one appellate court judge, and nineteen 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.

105. 28 U.S.C. §§ 331, 332(a)–(b) (2006).

each of five provinces.[106] 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.[107] This would ensure that the Council will not be dominated by those close to the power structure in Kathmandu, and that problems and issues unique to one province or region would not be overlooked by a Council unaware and unacquainted with such problems.

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, and so forth. Generous, if not proportional, representation of trial court judges and judges from the different regions or provinces of Nepal would also help to diversify the Judicial Council and make it more responsive to the broad-ranging issues and needs throughout the judicial system.

11. 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.[108] It is worth noting that most of the international declarations and "best practices" speak of councils on which

106. The number and configuration of provinces within Nepal is an open question at present, but will likely to be established in the new constitution. *See* Constitution 2010 Supplement, *What the Geographers Say*, NEPALI TIMES, Apr. 17, 2009, at 7, *available at* http://www.nepalitimes.com.np/issue/2009/04/17/ConstitutionSupplement/15864/print. My suggestion that there may ultimately be five provincial authorities is mere speculation, reflecting the recommendations of Chandra Bahadur Shrestha, "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," *id.*, and Dr. Timalsena, "There should not be more than 5 provincial high courts," *infra* note 116, at 9.

107. 28 U.S.C. § 331 (2006).

108. Tony Mauro, *Judicial Salaries at Top of Court Administrator's Agenda*, LEGAL TIMES, Jan. 9, 2007, http://www.law.com/jsp/article.jsp?id=1168263429718.

judges form a "substantial" or even majority membership, but do not occupy *all* posts on the council.[109]

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 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."[110] While this is only one member, it presently constitutes twenty percent of the entire Judicial Council. If Council membership is expanded, broadened, and diversified, bar representation should be similarly expanded. Consistent with the discussion above, however, it should be made clear that the Chief Justice is not free to disregard recommendations and make his or her own selection.

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 selections from the others.[111] 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 fifteen, nine of whom are judges). For Nepal, though, this could be a problematic provision. On the one hand, prosecutors may bring valuable perspective to the issues of court function and operation that a Judicial Council must contend with. However, 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 selects judges, 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 corresponding seats are not reserved for defense counsel.

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109. *See, e.g.*, *supra* notes 90–93 and accompanying text.

110. INTERIM CONSTITUTION OF NEPAL art. 113, § 1(c) (2007).

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

12. Non-judge Membership on the Judicial Council—The Legal Academy

It is also advisable to include one or more representatives of academia 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 serve. Academics usually command a degree of respect in the legal community, and can contribute much to the principled administration of the judiciary. 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.

13. Non-judge Membership on the Judicial Council—Lay Persons

Again, Brazil's judicial council calls for "two laymen appointed by the legislature."[112] 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. 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 geographical proportionality, however, if the local government or judiciary of each of the five provinces were empowered to appoint a lay person to the judicial council.[113] Whether this idea has merit for Nepal depends on whether there are prominent, respected, trustworthy citizens available to fill those roles, and whether the provincial governments are likely to appoint individuals who could and would act independently of political pressures.

112. Garoupa & Ginsburg, *supra* note 61, at 111 n.35.
113. *See supra* note 106.

14. Judicial Council Best Practices—Summary

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

> Independence, transparency, and accountability—Judicial councils must be independent bodies and operate in a transparent and accountable manner.
>
> 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, a judicial council may become a pawn in the hands of the executive, legislative and/or powerful groups, thereby undermining judicial independence.
>
> Adequate resources—Judicial councils must be granted adequate human and financial resources.
>
> 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.
>
> Judicial membership—Judicial members of a 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.
>
> 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.
>
> Monitoring and reporting—The decision-making process of a 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.[114]

In keeping with these principles, some of which have been discussed in much more detail above, 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. 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 the judges in it. The specific measures set forth above, such as having a majority of the Council come from the judicial ranks, elected by their peers, are merely examples of how that membership by be broadened and insulated from executive influence. The specific reforms discussed here are mere possibilities, useful and meaningful only because they serve the larger purpose 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 the judiciary to secure adequate resources for the upcoming budget cycle.

This is difficult to control constitutionally, but it may be possible to include a minimum allocation for the judicial branch in the constitution.[115]

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114. AUTHEMAN & ELENA, *supra* note 70, at 16.

115. This type of minimum allocation is not unheard of in constitutions. The Indonesian Constitution requires that at least twenty percent of its annual budget be allocated to education. *See* Desy Nurhayati, *Govt to Raise Spending on Education Next Year*, JAKARTA POST, Aug. 14, 2008,

For example, the constitution could provide that three percent of the total national budget must be allocated to the judicial branch, to be used as directed by the Judicial Council. Dr. Ram Krishna Timalsena, Registrar of the Supreme Court of Nepal, has observed:

> Over the years the trend of fixing the judicial budget in the constitution is increasing [as a means to avoid] executive and legislative influence and domination [of] the judiciary. If we examine the world trend[,] two to six percent of [a given] national budget is allocated to the judiciary. Some . . . countries prescribe this [in the] national constitution itself.[116]

Timalsena recommends that the constitution specify a judicial budget of "at least two percent of the national budget,"[117] a modest recommendation prompted by pragmatic politics. Since the Nepali judiciary has been allocated between 0.5% and 0.6% of the national budget in recent years, suggesting anything more than two percent would be unrealistic, if not impolitic.[118]

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,"[119] the two percent minimum suggested by Timalsena may well do more harm than good, if it virtually guarantees an underfunded judiciary in the future.

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http://www.thejakartapost.com/news/2008/08/14/govt-raise-spending-education-next-year.html. In Latin America, at least, such provisions have ensured minimum funding levels to judiciaries as well. *See infra* note 119.

116. Ram Krishna Timalsena, Designing Judiciary in the Process of Constitution Making 10 (Feb. 14, 2009) (unpublished manuscript, on file with author).

117. *Id.*

118. E-mail from Ram Krishna Timalsena, Registrar of the Supreme Court of Nepal (June 18, 2009 3:33 CST) (on file with author).

119. Timalsena, *supra* note 116, at 10. The six percent figure comes from Costa Rica, where it is a constitutional minimum for funding the third branch of government. CONSTITUTION OF THE REPUBLIC OF COSTA RICA art. 177 (amended 2003) ("The budget shall allocate to the Judicial Branch an amount of no less than six percent (6%) of the ordinary income estimated for the fiscal year."); Timalsena, *supra* note 118, at 10. *See also* CONSTITUTION OF THE REPUBLIC OF PARAGUAY art. 249 (1992) ("The judicial branch will have its own budget. . . . [in] an amount that will not be lower than 3 percent of the central government's budget."); NEW CONSTITUTION OF THE BOLIVARAN REPUBLIC OF VENEZUELA, art. 254 (1999):

> The functional, financial and administrative autonomy of the Judicial Power is established. To this end, in the general budget of the State an annual variable entry will be assigned to the system of justice, for its effective functioning, which will not be less than two per cent of the national ordinary budget, [and] which cannot be reduced or modified without prior authorization of the National Assembly.

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 made 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 two and four 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.[120] 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. For example, the judiciary cannot entertain the question of whether the legislature's internal proceedings are "regular."[121]

The exception which is most troubling is the Emergency Power Article allowing rights under the Interim Constitution to be suspended.[122] Under this provision, the government can suspend rights to speech, assembly, association, press freedom, property, due process, information, privacy, and constitutional remedy.[123] 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.[124]

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

120. *See* BLACK'S LAW DICTIONARY 1448 (9th ed. 2009) ("Rule of Law . . . [t]he doctrine that every person is subject to the ordinary law within the jurisdiction . . . ."). All of 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, WIPPMAN & BROOKS, *supra* note 45, at 70.

121. INTERIM CONSTITUTION OF NEPAL art. 77, § 2(2007).

122. *Id.* art. 143, § 7.

123. These rights are found in articles 12, 15, 19, 24, 25, 27, 28 and 32 of the Interim Constitution of Nepal, but are not among the itemized list of rights specifically exempted from suspension in article 143, section 7.

124. *Id.* art. 143, § 8 (emphasis added).

protection of such rights and freedoms, courts are expected to be evermore vigilant in a time of emergency."[125]

While it may be appropriate to suspend certain rights temporarily in time of crisis or war,[126] the courts should certainly be gatekeepers to ensure that emergency powers are 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.[127]

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 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 1930s and 1940s were all fully constitutional, carried out as 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.[128]

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125. 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 branch 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.

126. Dominic McGoldrick, *The Interface Between Public Emergency Powers and International Law*, 2 INT'L J. 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.") (citations omitted).

127. 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 successfully 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.

128. Jessica Russ, Nazi Germany: A Substantive View of Rule of Law 6–7 (2009) (unpublished manuscript, on file with author) (citing Karl Dietrich Bracher, *The Technique of the National Socialist Seizere of Power*, *in* THE PATH TO DICTATORSHIP, 1918–1933, at 117–19 (1964)).

Hitler was able to wield power, initially through his role as chancellor, and subvert parliamentary rule through intra-constitutional means, thanks to article 48.[129] 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 ought to protect.

There is a history of such abuse in Nepal. In 1960 the monarchy seized control of the country, 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.[130] States of emergency were declared again in 2001 and 2005, the latter after the monarchy seized complete control of the country.[131] It is worth noting that these have not been temporary and limited suspensions of rights under the constitution, but complete usurpations of power by monarchs who dismissed 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 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.[132] 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.

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129. *Id.*
130. *See supra* Part I.
131. *Id.*
132. INTERIM CONSTITUTION OF NEPAL art. 143, §§ 2, 3 (2007).

Accordingly, article 143, section 2 of the Interim Constitution 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, section 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[133]

This listing, however, does not go far enough. Article 4 of the International Covenant on Civil and Political Rights ("ICCPR"), acceded to by Nepal in August 1991,[134] states specifically that emergency powers may be invoked in derogation of fundamental human rights only "to the

133. *Id.* art. 143, § 7.

134. Office of the United Nations High Commissioner for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties (as of 9 June 2004)*, *available at* http://cjei.org/publications.html (follow link entitled "NB List of countries and treaties ratified Ratification report (PDF)").

extent strictly required by the exigencies of the situation," adding that this does not include invidious discrimination or violation of other international obligations.[135] This language is decidedly stricter than that in the Interim Constitution, which allows "necessary orders to meet the exigencies."[136]

Moreover, there are other non-derogable rights under the ICCPR that should be included on this list, lest the constitution be in conflict with Nepal's treaty obligations under the ICCPR:[137]

> 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[138]

For example, the bar on ex post facto laws is non-derogable under the ICCPR articles 4 and 15,[139] and yet the Interim Constitution not only allows the suspension of those rights,[140] but deprives the judiciary of

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135. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), at 52, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR].

136. INTERIM CONSTITUTION OF NEPAL art. 143, § 6 (2007).

137. McGoldrick, *supra* note 126, at 386:

> [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.

Id. (citations omitted).

138. INTERIM CONSTITUTION OF NEPAL arts. 24, 25, 32 (2007).

139. ICCPR, *supra* note 135, arts. 4, 15.

140. INTERIM CONSTITUTION OF NEPAL art. 143, § 7 (2007). Suspension of this right granted under art. 24, § (4) is not prohibited. "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." *Id.*

jurisdiction to review the suspension of the same.[141] 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. The right to constitutional remedy should not be derogated simply because the executive has, rightly or wrongly, declared an emergency.[142] The rule of law requires that constitutional safeguards remain in place, and that emergency powers exceptions be justified according to law, on constitutional terms.[143]

D. Institutional Judicial Independence—Annual Reports

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

> the quantitative descriptions of the cases registered in the Supreme Court and other subordinate courts,
>
> the number of disposed and pending cases, out of the of [sic] cases registered as stated in sub-clause (a) above, and the reason for pending thereon,
>
> details of new precedents propounded by the Supreme Court,
>
> number of cases reviewed by the Supreme Court,
>
> description of the judicial comment made by the Supreme Court, if any, on the maters of competency regarding the conduct of judicial duty of judge [sic] of a court subordinate to it,

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141. *Id.* art. 143, § 8.

142. 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.

143. *See id.*

> amount of fines and penalties reimbursed,
>
> description on the implementation of a decision,
>
> the budget appropriated to the Supreme Court and subordinate courts, and statement of expenditures.[144]

Annual reports such as these are important for accountability; they ensure 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."[145] 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 ("CA")—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 budget was used, what was accomplished, and so on. 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."[146] 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 Reports require merely that the report be published in a public forum and that copies of the report be provided to both the legislature and executive. 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.

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144. INTERIM CONSTITUTION OF NEPAL art. 117, § 2 (2007).
145. *Id.* art. 117, § 1.
146. Palermo Declaration, *supra* note 69, § 3.4 (emphasis added).

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.[147] Anecdotal evidence suggests that the concept of life tenure is assumed and implemented in practice. 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.[148]

F. Decisional Judicial Independence—Judicial Compensation

Judicial salaries and compensation are important for a variety of reasons, as they are directly related to judicial independence and judicial integrity. There is already a prohibition on the receipt of *gratuities*, which is important in terms of maintaining integrity.[149] While the actual remuneration to be paid—in Nepali Rupees—will not be set in the constitution,[150] 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

147. The Constitution contains no provision establishing a specific term of office or a time limit on a judge's appointment.

148. In the United States, federal bankruptcy judges serve terms of fourteen years, so reappointment is likely to come up only once in a career; for most of that time, the judge need not worry about how his or her decisions may or may not please the appointing authority. 28 U.S.C. § 152(a)(1) (2006). Additionally, the appointment and reappointment of bankruptcy judges are done by Article III judges, who are already insulated from political pressures due to their own life-tenure. § 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 . . . .").

149. INTERIM CONSTITUTION OF NEPAL art. 104, § 3 (2007).

150. Establishing monetary amounts in a constitution is a poor approach to drafting such documents, as inflation quickly renders such values obsolete. For example, the Seventh Amendment to the U.S. Constitution which, in an effort to avoid the expense of jury empanelment for small claims, stated that the right to a jury in a civil trial is available only for legal claims amounting to more than twenty dollars. U.S. CONST. amend. VII.

conditions of service [of the judges] . . . shall not be altered to their disadvantage."[151] Such provisions are vital and should be retained.

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.[152] 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.[153] After all, they have to feed their families somehow.

Second, a substantial salary sends the public and the bar a 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 people 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.[154]

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 them in the past, in terms of ethics, responsibility, and productivity.[155]

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151. INTERIM CONSTITUTION OF NEPAL art. 104, § 4, art. 109, § 8 (2007).

152. *See* 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.).

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> 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.

DEMOCRACY INT'L, IFES, & DPK CONSULTING, MOLDOVA ANTI-CORRUPTION ASSESSMENT FINAL REPORT 6–7 (2006), http://www.ifes.org/publication/5442f82d638cca2a5453c6a801e95342/Moldova Anti-Corr.pdf.

154. *See* Pimentel, *supra* note 152, 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.").

155. *See id.* at 115 ("[T]he appointments [to these highly desirable posts] could be reserved for

The constitution itself may be able to guarantee a substantial salary for judges if it indexes the judicial salary in some manner. Just as a minimal level of funding for the judiciary as a whole can be ensured by making funding 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.[156] When Congressional salaries go up, judicial salaries do too.[157] If the salaries of Nepal's CA members are substantial, it may be appropriate for the constitution to specify that judicial salaries will match (or be indexed to) them. Thus as the CA regulates its own salaries, it 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.[158] The commission needs real power to be effective, though; little will be achieved if the commission's recommendations can be ignored.[159]

G. Decisional Judicial Independence—Removal

The Interim Constitution provides for removal of otherwise life-tenured judges based on voluntary resignation,[160] reaching the mandatory

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those who were above reproach, untainted by the more dubious aspects of the judiciary's history . . . .").

156. SHARON S. GRESSLE, CONG. RESEARCH SERV., JUDICIAL SALARY-SETTING POLICY (Mar. 25, 2003), http://www.congressproject.org/judicialsalaries.pdf (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.").

157. 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 to the taxpaying public when they run for re-election. That reluctance serves to keep judicial salaries from keeping pace with inflation.

> 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.

Mauro, *supra* note 108.

158. Mukta, *supra* note 59.

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

160. INTERIM CONSTITUTION OF NEPAL art. 105, § 1(a), art. 109, § 10(a) (2007).

retirement age,[161] death,[162] or misconduct.[163] This last provision is the one that deserves the most attention, as it applies to decisional judicial independence. Article 105 specifies that the Chief Justice and judges of the Supreme Court can be removed by impeachment, which is a resolution passed in the CA.[164] 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, incapa[city] to discharge the duties due to physical or mental condition, or deviation to justice."[165]

The concern here, of course, is whether the threat of removal will interfere with judges' exercise of decisional independence on the bench. Whoever has the power to remove can abuse that power, and judicial independence will suffer. For Supreme Court judges, 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 U.S. federal courts, where judges are removable only by formal impeachment proceedings.[166]

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

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161. *Id.* art. 105, § 1(b), art. 109, § 10(b) (specifying mandatory retirement at age sixty-five for Supreme Court Justices and at age sixty-three for all other judges, respectively).

162. *Id.* art. 105, § 1(d), art. 109, § 10(d).

163. *Id.* art. 105, § 1(c), art. 109, § 10(c).

164. *Id.* art. 105, § 1(c).

165. *Id.* art. 109, § 10(c). The cited passage continues:

> The Judge . . . who is facing charge [sic] . . . 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.

166. MARY VOLCANSEK, JUDICIAL IMPEACHMENT: NONE CALLED FOR JUSTICE 1 (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 1980s, 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 who 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. Nepal needs a Council it can trust to invoke removal authority only in cases of serious misconduct, and not based on dissatisfaction with the merits of a judge's decisions. At the same time, this constitutional provision should be amended to eliminate the phrase "deviation 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.[167] It, too, is a vague term which might be invoked on the basis of the merits of judicial decisions. Those who disagree with a 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."[168] 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 judges immunity from suit for official actions taken as a judge. A provision should be included that affords 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 potential attack from the authorities.[169]

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167. INTERIM CONSTITUTION OF NEPAL art. 109, § 10 (2007) ("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.").

168. IRAQ INTERIM CONSTITUTION art. 47 (2004), *available at* http://www.servat.unibe.ch/law/icl/iz00000_.html.

169. 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.[170]

VI. 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 is going to be effective in helping to 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.[171]

Oversight of the People's Courts may well be entrusted to judicial councils established at the provincial level, which would be empowered to conduct the selection and appointment process and handle 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."[172]

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 U.S. courts, ultimate administrative authority rests in the national Judicial Conference of the United States, but local authority, including authority over the appointment of U.S. Bankruptcy Judges and the

170. BLACK'S LAW DICTIONARY 818 (9th ed. 2009).
171. Part VI, *infra.*
172. Timalsena, *supra* note 116, at 9.

discipline of all federal judges, is localized in the each Circuit Court of Appeals and its separate "Circuit Council."[173]

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.

VII. 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.[174] 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.[175] 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.[176] As to the issue of corruption, the Bosnian reform removed all judges from their posts and

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173. *Supra* note 95, at 868.

174.

> The National Judicial Council must proceed with consummate care to maintain the delicate balance between independence and accountability. The concept of judicial independence will be drained of meaning and relevance if judges are corrupt. On no account should judicial independence operate to bar the National Judicial Council from investigating genuine and credible allegations of impropriety. Aggressive enforcement of judicial standards is necessary not only to ensure probity, but also to promote public confidence in the judicial process.

Okechukwu Oko, *Seeking Justice in Transitional Societies: An Analysis of the Problems and Failures of the Judiciary in Nigeria*, 31 BROOK. J. INT'L L. 9, 60 (2005) (citations omitted).

175. David Pimentel, *Reframing the Independence v. Accountability Debate: Defining Judicial Structure in Light of Judges' Courage and Integrity*, 57 CLEV. ST. L. REV. 1, 30–31 (2009) ("A judicial system full of monsters needs the power to 'clean house': to, at the very least, send a strong message that bad judges risk consequences if they continue to pursue a pattern of corruption."); *id.* at 31 n.97.

176. Pimentel, *supra* note 152, at 123–24.

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 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.[177]

If corruption in Nepal is as serious a problem 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

177. *Id.* at 113–14 (citations omitted).

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.

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 and everyone else know what standards they are held to. A good place to start is the Bangalore Principles, adopted by the United Nations in 2006 as universal standards of judicial conduct.[178]

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 miscreant judges. 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.[179]

VIII. 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

178. The Bangalore Principles of Judicial Conduct are annexed to U.N. Econ. & Soc. Council [ECOSOC], Res. 2006/23 (July 27, 2006), *available at* http://www.unodc.org/pdf/corruption/corruption_judicial_res_e.pdf. The resolution "[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.*

179. *See* David Pimentel, *The Reluctant Tattle-Tale: Closing the Gap in Federal Judicial Discipline*, 76 TENN. L. REV. 909 (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.

most critical of these are set forth in detail above and can be summarized under the following headings:

Institutional Independence

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.

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.

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 emergency powers; 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.

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

Life Tenure—Decisional judicial independence requires that judges enjoy some security in their positions; the new constitution should explicitly guarantee life tenure for judges.

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.

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.

Judicial immunity—The constitution must afford judges immunity from suit for official actions taken as a judge.

Other Rule of Law Priorities

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.

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.

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.