



REVIEW VIA THE WEB DISCUSSION FORUM - BACKGROUND AND GUIDE

The **overall aim of the review and validation process** is to promote ownership of the Handbook by APJRF members, and maximise the quality and relevance of the Handbook's content via a coordinated review and networking approach based on both remote and direct engagement strategies.

The **objectives of the review of first chapter drafts** are to:

- Provide chapter authors with objective feedback and constructive guidance on the *technical aspects* of their chapter contributions - to promote intellectual rigour and honesty throughout the Handbook's drafting.
- Promote *relevance* of the Handbook within the region by providing the APJRF's members with an opportunity to engage the Handbook's development.

Practical Guidelines in Providing Feedback:

1. **Scope of Drafts:** the development of chapter drafts is the culmination of a comprehensive consultation process with the APJRF's membership. Chapter topics and scope have been developed in consultation with the membership and approved by the member's representatives, the Project Board.

Contributions are still *drafts*, and consequently, they are largely unedited. Authors, however, should provide a comprehensive self-evaluation of why/why not the reform activities they are discussing were successful - and the implications of this.

2. **Scope of Comments:** comments provided should be informed by the 'Core Concepts Underpinning the Handbook.' These are based on the philosophy articulated in the Manila Declaration and the discussions at the APJRF round table meetings. They are, to:
 - Promote *standards of justice* established in international instruments.
 - Contribute to developing a *shared vision* across the region.
 - Empower and *enable reform actors* throughout the justice system.
 - Create a *practical tool* for exchanging learning and use by each other.
 - Describe our actual *experiences of common challenges*.
3. **Framework for Comments:** this has been developed to structure, and maximise the relevance of, the feedback received. It is intended as a *guide* for reviewers:
 - *Description* - is content clear, interesting and relevant for the reader?
 - *Communication* - are structure, format, writing style and words simple, concise, clear and compelling for the reader?
 - *Effectiveness* - does the content inform, provide insight, stimulate consideration to adapt and implement locally?
 - *Analysis of the Local Experience of What Works / Doesn't Work* - is there sufficient critical self-evaluation using (self-identified) criteria?
 - *Transformation of 'Know-how'* - are the 'Key Messages' relevant to others in region?
4. **Timing and Submission:** all comments on first drafts need to be submitted via the APJRF's on-line forum (<http://www.apjrf.com/discussion/>.) The forum will close at 5:00 pm, 14 March Australian eastern summer time (GMT +11 hours.)



Judicial Reform Handbook -

Draft Chapter 3: Ethics, Integrity and Judicial Accountability

TABLE OF CONTENTS

| | |
|---|-----------|
| Abbreviations and Acronyms | ii |
| Glossary | ii |
| The Philippine Experience | 1 |
| 1.0 Key Messages | 1 |
| 1.1 Introduction..... | 1 |
| 1.2 Codes of Judicial Conduct | 1 |
| 1.3 Transparency in Appointing Judges..... | 2 |
| 2.0 Description of Reform Experience - The Action Program for Judicial Reform, 2001-2006..... | 2 |
| 2.1 Problems/Challenges | 5 |
| 2.1.1 Judicial Appointments: High Vacancy; Transparency in the Selection of Judicial Officers | 5 |
| 2.1.2 Politics in Judicial Appointments | 5 |
| 2.1.3 Lack of Fiscal Autonomy in the Judiciary | 6 |
| 2.1.4 Filing of Frivolous Administrative Cases against Members of the Judiciary | 6 |
| 2.2 Actions Taken..... | 6 |
| 2.3 Outcomes | 8 |
| 3.0 Analysis/Evaluation of Experience..... | 9 |
| 3.1 Analyse Successes to Implementation and Why | 9 |
| 3.2 Analyse Difficulties /Constraints to Implementation and Why | 10 |
| 3.3 Key Questions and Know-how | 10 |
| The Nepal Experience..... | 13 |
| 1.0 Key Messages | 13 |
| 2.0 Description of Reform Experience..... | 15 |
| 2.1 Problems/Challenges | 15 |
| 2.2 Actions Taken..... | 18 |
| 2.3 Outcomes | 21 |



- 3.0 Analysis/Evaluation of Experience..... 22
 - 3.1 Analyse Successes to Implementation and Why 22
 - 3.2 Analyse Difficulties/Constraints to Implementation and Why 24
 - 3.3 Key Questions/Know-how 25

Annex

- A1.0 Country Context Background: PhilippinesA1-1
 - A1.1 Country ContextA1-1
 - A1.1.1 DemographicsA1-1
 - A1.1.2 Legal System.....A1-1
 - A1.2 Judiciary and the Courts.....A1-2
- A2.0 Country Context Background: NepalA1-4
 - A2.1 Country ContextA1-4
 - A2.2 Judiciary and the Courts.....A1-5



ABBREVIATIONS AND ACRONYMS

| | | |
|------|---|---|
| AC | - | Appellate Court |
| APJR | - | Action Program for Judicial Reform, 2001-2006 |
| CA | - | Court of Appeals |
| CIAA | - | Commission of Investigation of Abuse of Authority |
| CMC | - | Court Management Committee |
| CoC | - | Codes of Conduct |
| CTA | - | Court of Tax Appeals |
| DC | - | District Court |
| DOJ | - | Department of Justice |
| IC | - | Interim Constitution |
| IDR | - | Integrity Development Review |
| JBC | - | Judicial and Bar Council (Philippines) |
| JC | - | Judicial Council |
| JCA | - | Judicial Council Act |
| JCR | - | Judicial Council Regulation |
| JS | - | Judges Society |
| JSC | - | Judicial Service Commission |
| LGUs | - | Local Government Units |
| MCTC | - | Municipal Circuit Trial Courts |
| MCTC | - | Municipal Trial Courts in Cities |
| MeTC | - | Metropolitan Trial Courts |
| MTC | - | Municipal Trial Court |
| NCR | - | National Capital Region |
| NJA | - | National Judicial Academy |
| OCA | - | Office of the Court Administrator |
| PIC | - | Preliminary Inquiry Committee |
| PMO | - | Project Management Office |
| REPI | - | Review and Enhance of Performance and Integrity |
| RTC | - | Regional Trial Court |
| SC | - | Supreme Court of the Philippines |
| SC | - | Supreme Court |
| UNDP | - | United Nations Development Program |
| | - | |
| | - | |

GLOSSARY

| | | |
|---------------|---|-------------------|
| Pakikisama | - | fellowship |
| Sandiganbayan | - | Anti-Graft Court |
| Utang na loob | - | debt of gratitude |
| | - | |
| | - | |



ETHICS, INTEGRITY AND JUDICIAL ACCOUNTABILITY - THE PHILIPPINE EXPERIENCE

5 1.0 KEY MESSAGES

- Judges and members of the judiciary must be guided by a defined code of ethical standards and accordingly held accountable for violating the code.
- Transparency in judicial appointments protects the integrity of the judiciary by opening the exercise of the political power of appointment to public scrutiny.
- Judicial conduct complaint process should be streamlined to ensure that administrative cases are heard and decided fairly and expeditiously.

15 1.1 INTRODUCTION

Integrity is generally regarded as moral soundness, a complete or uncompromising adherence to ethical standards. However, a society's ethical standards of right or wrong conduct are influenced by many factors including time, culture, tradition, and even religion. They tend to be highly subjective and variable, depending on how the factors that influence them change. In a mixed society like the Philippines, diverse and sometimes even conflicting ethical standards are not uncommon. Therefore, it is important to set the baseline standard that should be generally applied and against which conduct should be measured.

Codes of conduct normally serve this purpose, and most professions committed to uphold integrity have one. In the Philippines, the legal profession has adopted a Code of Professional Responsibility for its members, in general, and a Code of Judicial Conduct for members of the bench. But having such code alone does not make the judiciary ethical per se. The judiciary can have integrity only when the members themselves embody integrity. Therefore, the challenges are to:

- have a code that is relevant and responsive to present realities and a strong basis for judicial accountability;
 - ensure that the right person is appointed to the bench; and
- implement a fair and balanced judicial complaint process to redress improper conduct of incumbent judges. This Chapter looks into the Philippine experience in facing these challenges.

1.2 CODES OF JUDICIAL CONDUCT

The Department of Justice (DOJ) issued on August 1, 1946 Administrative Order No. 162, which promulgated the canons of judicial ethics for the guidance and observance of all judges. This served as the first code of conduct for Filipino judges, who were then still under the DOJ's supervision. Following the transfer of the administrative supervision of judges to the Supreme Court under the 1987 Constitution, the Supreme Court adopted the Code of Judicial Conduct. The Code, which consists of five canons and implementing rules, took effect on October 20, 1989. On June 1, 2004, the Supreme Court adopted a New Code of Judicial Conduct for the Philippine Judiciary. The New



Code follows the Bangalore Code of Judicial Conduct, with certain amendments tailored to suit our distinct legal and judicial culture. [CJ Puno]

50

1.3 TRANSPARENCY IN APPOINTING JUDGES

The judiciary could be perceived as ethical and considered to embody integrity only when its members themselves demonstrate their integrity. Thus, as indicated in the UN Basic Principles on the Independence of the Judiciary, the quality of people appointed to the Judiciary is linked to the appointment process. The President appoints members of the judiciary in the Philippines. As the appointing power is by nature political, the appointment is likewise prone to political influence. The Constitution provides safeguards to shield the judiciary from political influence. It created a Judicial and Bar Council to screen and prepare a shortlist of applicants from whom the President should choose who to appoint to judicial positions. However, opening the entire process to public scrutiny discourages arbitrariness in the exercise of the President's appointing power and provides an opportunity for the public to be vigilant and initiate corrective measures, as necessary.

55

60

65

The recent case of *Kilosbayan and Bantay Katarungan Foundation v. The Executive Secretary and Sandiganbayan Justice Gregory S. Ong* [G.R. No. 177721, 3 July 2007] illustrates how transparency in appointing judges could be useful in protecting the integrity of the judiciary. Petitioner Kilosbayan, a civic/ non-governmental organisation, learned about the impending appointment of respondent Justice Ong. Contending that the respondent is not a naturalised Filipino as required under the Constitution, Kilosbayan brought suit to block the appointment. The Supreme Court ruled in favour of Kilosbayan.

70

75

This case made judicial history in the Philippines as the first case where the Supreme Court annulled a presidential appointment of one of its member. It is symbolic in many ways. It shows that the President's power to appoint members of the judiciary, although political in nature, is not without limit, and the judiciary, even at the highest level, is not without power to protect itself from the appointment of its members that do not conform to law.

80

2.0 DESCRIPTION OF REFORM EXPERIENCE - THE ACTION PROGRAM FOR JUDICIAL REFORM, 2001-2006

85

The 1987 Constitution vests the Supreme Court with the power of "administrative supervision over all courts and the personnel thereof".¹ This power includes, among others, identifying the need for reform and the corresponding reform measures in the judiciary.

90

Over the years, the Supreme Court noted that instances of corruption have been increasingly eroding the public confidence on the judiciary. The Supreme Court acknowledged the need for reform to complement its education and training programs. It undertook several studies and stakeholder consultations to assess the extent of changes

¹ 1987 Constitution, Art VIII, Sec. 6



95 needed. One of these projects, the Technical Assistance (TA) to the Philippine Judiciary on Justice and Development from the UN Development Programme, provided the basic data required for a comprehensive plan for reform. This resulted in the *Blueprint of Action for the Judiciary*, the basis of the Supreme Court's long-term reform plan.

100 Following the Blueprint and the vision and mission that former Chief Justice Hilario G. Davide, Jr. had espoused, the Supreme Court adopted the Action Program for Judicial Reform (APJR) in November 2001. The APJR is a concrete reform measure to establish a strong foundation for the long-term development of the judiciary. It aims to make the justice system work more efficiently and build trust and confidence in the judiciary. The program has 6 components under which over 100 concrete reform projects are being undertaken independently or with the assistance of development partners. To manage and coordinate the various projects under the APJR and provide overall policy direction, the SC created a Project Management Office² (PMO). The PMO was originally attached to the Office of the Chief Justice; it is now a regular office under the direct administrative and technical supervision of the Chief Justice.

115 The APJR's component on "Integrity Infrastructure Development" addresses ethics and integrity issues in the judiciary and judicial accountability. It aims to improve public trust and confidence in the justice system, lay down the institutional integrity foundation, reduce or eliminate graft and corruption in the Judiciary, and achieve and sustain efficiency and effectiveness in operations and impartiality in judicial processes. The Supreme Court undertakes several projects aimed to implement the objectives of this component. These projects include education program on the New Code of Conduct, the E-Payment system and an Integrity Development Review (IDR).

120 The Supreme Court through the Philippine Judicial Academy continues to conduct regular education programs on ethics and integrity. In 2006, the Court conducted 39 orientation seminars on the New Code of Judicial Conduct and the Code of Conduct for Court Personnel. A total of 11,846 justices, judges and court personnel were oriented on its provisions.

130 The Supreme Court also started implementing an E-payment system that facilitates payment of court docket fees online to lessen situations involving extended custody of money. The software necessary for the E-payment system has already been completed and pilot tested. It was launched in the Offices of the Clerk of Court in the RTC and MeTC of Quezon City and Makati City in May 2006.

135 The Supreme Court also ordered recently an IDR to establish and adopt a corruption prevention program in the Judiciary.³ The Supreme Court conceived the IDR in response to the need to assess comprehensively the perceived weaknesses and vulnerabilities of the judiciary, improve its performance and productivity, implement a change management program and communicate these efforts effectively.

140 The IDR is not another study or a one-shot activity; neither is it donor-driven nor consultant led. The IDR specifically aims to provide effective assessment tools and technique, review the administrative and financial systems in the judiciary, design and

² En Banc Resolution No. 01-7-09-SC, "Resolution Establishing the Program Management Office (PMO) for the Judicial Reform Program

³ Memorandum Order No. 46-2007



- install corruption reform measures and assist the Supreme Court in establishing an institutional set-up or process to effectively implement these measures after the comprehensive review. Through the IDR, the Supreme Court hopes to come up with a:
- 145 Through the IDR, the Supreme Court hopes to come up with:
- communication strategy to inform and engender support of the judiciary's stakeholders;
 - report on the Review and Enhance of Performance and Integrity (REPI);
 - proposed performance and integrity enhancement measures and a corresponding development and implementation plan for these;
 - strategy to sustain these initiatives and gains; and
 - guidebook for conducting REPIs.
- 150

Ethics and Integrity in Judicial Appointments

155 The Supreme Court continually considers means to improve the process of appointing judges in the Philippines to, among others, ensure that only those who observe the highest standards of ethics and integrity are appointed as judges following a procedure that is transparent and open to public scrutiny.

160 The 1987 Constitution created the Judicial and Bar Council [JBC] under the administrative supervision of the Supreme Court to screen and select prospective appointees to any judicial post and prepare an exclusive list of 3 nominees from which the President may choose who to appoint. The Constitution further excludes

165 appointment to the Judiciary from Presidential appointments that require the confirmation or consent of the Commission on Appointment of the Philippine Congress. The JBC is composed of the Chief Justice as *ex-officio* Chairperson; the Secretary of Justice and a representative of Congress as *ex-officio* members; a representative of the Integrated Bar of the Philippines, a professor of law a retired member of the Supreme

170 Court and a representative of the private sector as regular members. Although the President is still the one who appoints the regular members, the Constitution has fixed and staggered the term of the members and required that the Commission of Appointments consent to the President's appointment.

175 The JBC promulgated Rule No. JBC-009 entitled "Rules of the Judicial and Bar Council" prescribing certain guidelines and criteria intended to ascertain whether a prospective appointee to a judicial position meets the minimum required constitutional qualifications and possesses the essential attributes of "proven competence, integrity, probity and independence" that members of the judiciary must possess. The JBC further adopted

180 Rule No. JBC-10 entitled "Rule to Further Promote Public Awareness and Accessibility to the Proceedings of the Judicial and Bar Council". This rule conforms to the JBC's obligation to observe and maintain transparency in its proceedings. The JBC has thus devoted significant time and effort in conducting public interviews of all applicants for the vacant positions in the Supreme Court and the Court of Appeals.

Judicial Accountability and Discipline of Judges

185

190 The system of judicial accountability in the Philippines generally distinguishes between Justices of the Supreme Court and all other members of the judiciary. Supreme Court Justices on the one hand may only be held accountable through impeachment on grounds and following the procedure provided under the 1987 Constitution. On the other



195 hand, all other members of the judiciary who fail to meet the standards required in the performance of judicial functions may be held administratively liable pursuant to rules that the Supreme Court promulgates in the exercise of its constitutional power of administrative supervision over members of the judiciary. For instance, the Revised Rules of Court qualify cases that judges would be disqualified to hear and provide the procedure for disciplinary cases. [Rules 137 and 140]

200 From 1986 to 2005, a total of 1,327 RTC judges were penalised administratively in disciplinary cases against them. It is interesting to note, however, that this figure represent less than half of the total cases actually filed, and more than half were dismissed. From 1998 to 2005, an average of 58% of the cases filed against RTC judges were dismissed. The rate of dismissal was highest in 2003 at 83%, with about 95% of the total dismissed cases during the said period did not even reach the investigation stage.⁴ The dismissal rate is even higher in the collegiate courts. In 2005, 11 cases were filed against CA justices, and 1 against a Justice of the Sandiganbayan. All cases were dismissed.

210 **2.1 PROBLEMS/CHALLENGES**

2.1.1 Judicial Appointments: High Vacancy; Transparency in the Selection of Judicial Officers

215 Vacancies in the judiciary contribute significantly to the congestion of dockets. They overload incumbent judges and highlight even more the disparity between the workload of judges and their level of compensation. Overall vacancies in the judiciary remain high. The JBC finds it increasingly difficult to meet the constitutional requirement of nominating 3 qualified candidates for each vacant judge position, especially in far-flung areas. More lucrative practice in the commercial bar easily lures even serious applicants away from the judiciary.

220 Transparency in the selection process is not uniform. The present JBC rules prescribe public interviews only for the positions in the Supreme Court, Court of Appeals, Sandiganbayan and Ombudsman. It would therefore be a challenge for the Supreme Court to order public interviews of applicants for all judicial positions should be considered

2.1.2 Politics in Judicial Appointments

230 Politics poses a continuing threat to the independence and integrity of the judiciary. The cultural tradition in the Philippines of "*utang na loob*" or debt of gratitude also engenders the belief that one is perpetually indebted to whoever endorsed his or her appointment to public office. Since courts ultimately resolve political contests, some politicians exert means to influence the appointment of judges and justices, with a view to collecting back such "debt of gratitude" at a later, more opportune time.

235 Likewise, appointment of the regular members of the JBC is publicly perceived to be political. This political interference in the selection of regular members of the JBC extends to the selection and appointment of judicial officers. Administrative measures to depoliticise appointment in the JBC and insulate judicial appointments from partisan

⁴ ADB-TA No. 3693-PHI



240 politics should be adopted. Among others, regular members should not anymore be
245 eligible for re-appointment.

2.1.3 Lack of Fiscal Autonomy in the Judiciary

245 Although the Constitution gives the judiciary fiscal independence,⁵ the judiciary, in actual
practice, still depends on the political branches of government for its budget. Its budget
has shrunk from about 2 percent of the national budget in the early 90s to .84 percent in
the current year. In 2006 re-enacted national budget, the Supreme Court (SC) proposed
a PHP12.087 Billion budget but only PHP7.523 Billion was allocated. For 2007, the SC
250 proposed a PHP14.012 Billion budget, but Congress only approved PHP9.850 Billion
budget. This tragically translates into lack of decent halls of justice, poor court facilities,
low salaries, etc. According to Chief Justice Reynato Puno, "The Congress wants a
world class judiciary but they give us a third world budget."

2.1.4 Filing of Frivolous Administrative Cases against Members of the Judiciary

255 The high rate of dismissal of cases tends to show that most administrative cases filed
against members of the judiciary are frivolous. Filing of frivolous cases is an abuse of
judicial processes. It defeats the purpose of implementing a system of judicial
accountability and misuses the filing of a complaint as a means to harass judicial
officers. If a judicial conduct complaint process is to serve its purpose as a tool to
260 strengthen judicial accountability, then appropriate measures should be in place to
prevent misuse of the process.

Investigating these cases, or even just receiving and docketing those that do not reach
the investigation stage, unnecessarily depletes the already limited resources of the
265 judiciary. The investigation of every complaint, regardless of whether the case is
sufficient in form and substance, causes unnecessary delays, not only in the resolution
of the cases themselves, but more importantly the resolution of regular cases filed
before the courts. The Supreme Court should adopt remedial rules to address the
frivolous filing of administrative cases against judicial officers and strengthen the
270 confidentiality of disciplinary cases.

Regardless of the merit of these cases, being called to face an administrative charge in
itself already tends to adversely affect public perception of judges. Until they are
dismissed, mere pendency of cases would likely distract and adversely affect the
275 performance by judges and justices of judicial functions. Moreover, defending against an
administrative case entails additional expenses for judicial officers. For instance, Rule
140 as amended, does not provide specific rules for preventive suspension, which is
often without pay. To soften the economic impact on judges of these cases, the
Supreme Court should consider possible forms of assistance, or explore alternative
280 modes to resolve a complaint or grievance before it is filed as a full blown administrative
case.

2.2 ACTIONS TAKEN

285 2.2.1 Because of the 11-month duration of his term as head magistrate, Chief
Justice Artemio V. Panganiban chose to focus the Court's reform activities in 2006 on

⁵ Constitution, Art. VIII, sec. 3.



the **ACID** problems that plague the Judiciary, namely: limited **A**ccess to Justice; **C**orruption; **I**ncompetence; and **D**elay in the delivery of quality judgments. Similarly, upon his appointment as Chief Magistrate on December 7, 2006, Chief Justice Reynato S. Puno pledged his full support to continuing efforts in achieving a well-functioning
290 judicial system dedicated to upholding the Rule of Law to protect individual rights and provide redress from injustice under a system that ensures access, as well the impartial and speedy resolution of cases.

2.2.2 To address the 29.59% vacancy rate, the Judicial and Bar Council (JBC) agreed
295 to expand its functions by mounting an active search campaign to recruit qualified applicants to enable them to nominate the legal profession's best and brightest to judicial positions. The JBC also started publishing vacancies and names of applicants in two newspapers of general circulation and in a local newspaper where the vacancies exist
300 informs and encourages applications from the public, and any observation, feedback or information on the applicants. The JBC members have also travelled to designated cities in *Luzon*, *Visayas* and *Mindanao* to receive applications and to interview applicants. A JBC website linked to the Supreme Court's website provides information on JBC policies, rules and regulations pertaining to the search, screening and selection
305 processes and where application forms can be downloaded. It is likewise a means where vacancies are made to the public and where queries are answered through its e-mail box feature.

2.2.3 The Supreme Court has adopted a resolution to provide the JBC with increased
310 autonomy for administrative and financial management. Many local government units contribute resources to the lower courts located in their territory. Some local governments include annual contribution to local courts in their annual budgets, but most do not. These contributions come in many forms -- monthly and travel allowances given
315 personally to judges, cars for judges, office space, equipment and furniture, payment of charges for electricity, communication and other utilities, repair and maintenance of physical plants, office supplies and contractual personnel. These are acceptable stopgap measures for as long as they do not compromise the independence of the judiciary.

2.2.4 The low salary of judges was partly addressed by the doubling of judicial
320 compensation through the enactment of RA 9227 (2003). This law was enacted through the combined efforts of Senator Francis Pangilinan, who sits as a JBC member, and the advocacy of civil society groups, and members of the academe.

On 11 September 2001, the Supreme Court provided the procedure for the discipline of
325 judges of regular and special courts and Justices of the Court of Appeals and the Sandiganbayan. It amended Rule 140 and took effect on 1 October 2001. It provides, among others, that:

- Complaints must be verified and in writing, state clearly and concisely the acts and omissions constituting violations of standards of conduct prescribed for Judges by law, the Rules of Court, or the Code of Judicial Conduct.⁶
- The Supreme Court shall "refer the matter to the Office of the Court Administrator (OCA) for evaluation, report, and recommendation or assign the case for
330 investigation, report, and recommendation to a retired member of the Supreme Court, if the respondent is a Justice of the Court of Appeals and the

⁶ Supreme Court A.M. No. 01-08-01-SC, Section 1



- 335 Sandiganbayan, or to a Justice of the Court of Appeals, if the respondent is a Judge of a Regional Trial Court or of a special court of equivalent rank, or to a Judge of the Regional Trial Court if the respondent is a Judge of an inferior court.”⁷
- The Rules further classify charges as serious, less serious or light,⁸ and prescribes corresponding sanctions ranging from admonition to dismissal from service.⁹
- 340
- Although the Rules require confidentiality in these cases, they nonetheless require decisions or resolutions of the Court to be attached to the record of the respondent in the OCA.¹⁰

345 2.2.5 Although some measures that tend to compromise the independence of the judiciary are admittedly imbedded in the Constitution, the judiciary is not without opportunity to demonstrate its independence by way of some symbolic gesture of not standing down to pressure from other branches of government. Admittedly, these gestures do nothing more than symbolically assert independence without realizing any

350 tangible result. Instead, these gestures are expected to engender the respect and confidence of the public for the independence and commitment to integrity of the judiciary.

355 The Supreme Court’s National Consultative Summit on Extrajudicial Killings and Enforced Disappearances was one such symbolic gesture, in view of the failure of the executive or the legislative branch to address the problem. The Summit, among others, has resolved for the High Court to review its existing Rules and promulgate new ones to address the issues of extrajudicial killings and forced abductions. The SC approved a *Rule on the Writ of Amparo* which addresses the violations of the right to life, liberty and

360 security guaranteed by the International Bill of Rights and the Constitution. This writ is broader than its counterparts in other countries because it protects not only against actual violations but also against threats of violation of rights, and covers not only unlawful acts or omissions of public officials or employees but also of private individuals or entities. This writ has been the subject of dialogues between judges, lawyers and the

365 public in different parts of the country.

2.3 OUTCOMES

370 2.3.1 The JBC’s aggressive search for judicial candidates resulted in a decrease in the total number of vacancies in the judiciary. As of December 2006, the vacancy rate decreased to 25.2%, or 569 vacancies in the 2,258 judicial positions available, with an additional 176 pending appointments in Malacañang at the end of 2006. Had these appointments been acted on, the vacancy rate would have fallen even further to 393, or 17.4%.² More than just an improvement in the situation of overloaded incumbent

375 judges, this decline in the number of vacancies can be interpreted as improvement in the public perception of the judiciary. It appears that the judiciary is now becoming more attractive to practitioners, and this may be an early sign that the judiciary’s reform measures are getting positive results.

⁷ Supreme Court A.M. No. 01-08-01-SC, Section 3

⁸ Supreme Court A.M. No. 01-08-01-SC, Sections 7-9

⁹ Supreme Court A.M. No. 01-08-01-SC, Section 11

¹⁰ Supreme Court A.M. No. 01-08-01-SC, Section 12



380 2.3.2 The JBC's intensified efforts to improve transparency of the selection and
nomination process through publication of vacancies and short-listed candidates has
achieved positive results in protecting the integrity of the judiciary. The landmark case of
Kilosbayan is significant not only because it demonstrates how the judiciary can assert
385 its independence from the other branches of government and the far-reaching scope of
judicial power, it is also a concrete example of the benefits of transparency. *Kilosbayan*
shows that opening to public the process of selecting and nominating judges and
justices educates them about JBC rules and pertinent policies. It gives them the
opportunity to be vigilant and scrutinise the process and, as a result, minimise
arbitrariness in the exercise of the President's appointing power.

390 2.3.3 Rule 140 used to pertain to disciplinary cases against RTC judges only. The
latest amendment now clarifies the procedure for filing complaints against justices of the
Court of Appeals and Sandiganbayan. The Supreme Court now continues to penalise
under the amended Rules judges who fall short of the stringent standards provided
395 under the Rules and the New Code of Judicial Conduct. 101 lower court judges were
sanctioned administratively in 2005. Out of the cases dismissed that year, one proved to
be symbolic. The Supreme Court did not only cite the complaint for being baseless, it
also fined the complainant.¹¹ In 2006, the number of lower court judges who were
administratively penalised went down to 74.

400

3.0 ANALYSIS/EVALUATION OF EXPERIENCE

3.1 ANALYSE SUCCESSES TO IMPLEMENTATION AND WHY

405 3.1.1 Reforms to improve judicial appointments succeeded in making transparent the
appointment of judge and the regular members of the JBC. Transparency helps ensure
that only ethical persons with integrity and other qualifications required by law are
appointed by giving the public an opportunity to question abusive exercise of appointing
power. Transparency in the appointment process complemented the vigilance of the
petitioner in the landmark case of *Kilosbayan*.

410

415 3.1.2 It would be difficult to establish a conclusive correlation between the newly
clarified rules and the continued filing of frivolous administrative cases. For one, none of
the amendments introduced seem to directly address the issue. What seems to be clear
is that despite the amendment, the rate of filing of frivolous administrative cases against
judges remains significantly high.

420 3.1.3 The amendment of Rule 140 and the subsequent adoption of the New Code of
Judicial Conduct should be considered achievements in themselves. They demonstrate
the openness of the leadership in the judiciary to change, regardless of whether the
change was because of a prior mistake or oversight or an admission that the rules have
already become outdated and must be updated to conform to the realities of the present
time. Openness of the leadership to change made the reform possible. The Supreme
Court's exercise of its power of administrative supervision over the courts is largely
discretionary. It could have opted not to institute any change in the rules, and one would
425 be hard put to demonstrate arbitrariness in such exercise of discretion.

¹¹ AM No. MJT-05-1601, August 11, 2005



430 3.1.4 Successful implementation of some reform programs can be attributed, to a large extent, to the leadership in the judiciary. Unequivocal support from and direction given by the leadership therefore plays a vital role in driving these activities to actual implementation.

3.1.5 Continuity in pursuing these projects despite the change in leadership substantially contributes to long-term results.

435 3.1.6 Partnerships with other organisations are also very helpful. These are potential sources of funding or financing support for judicial reform projects.

3.2 ANALYSE DIFFICULTIES /CONSTRAINTS TO IMPLEMENTATION AND WHY

440 3.2.1 The complainant's interest to obtain redress through the administrative case he or she filed on the one hand, and the supposed right or interest of the judge to protect his or her reputation on the other hand appear to be contending rights that would be difficult to balance solely by amending procedural rules. Other alternatives to address the abuse of the judicial conduct complaint process should be considered.

445 3.2.2 Some of the problems identified, including the eligibility of regular members of the JBC for reappointment, inadequacy of provisions giving fiscal autonomy to the judiciary, among others, may be beyond the Supreme Courts power of administrative supervision. They may not be adequately addressed by reform initiatives undertaken in the exercise of that power. No significant change could be effected without the corresponding amendment of applicable laws. Therefore, any efforts at reform are subject to the time required and uncertainties inherent in the established process in the legislature for amending laws.

455 3.3 KEY QUESTIONS AND KNOW-HOW

460 3.3.1 **Does the Program Enjoy Support of the Leadership?** Was it conceptualised from a practical, management perspective? Ethics, integrity and judicial accountability are precisely the responsibility of the leadership. And owing to the hierarchical nature of the structure of the judiciary, no other office in the judiciary is in a better position to enforce these outcomes than the highest office that exercise administrative supervision over the rest. The on-going implementation of the APJR is made possible by the strong commitment starting with former Chief Justice Davide, followed by former Chief Justices Panganiban and now Chief Justice Puno. The commitment of leadership not only

465 inspires the stakeholders to appreciate the rationale behind the program, it also facilitates the use of the judiciary's resources for its implementation.

470 3.3.2 **Is the Reform Program Based on the Actual Needs and Current Situation of the Judiciary that the Leadership Genuinely Recognises to Exist?** Do training programs on ethics, integrity and accountability activities actually respond to the present needs of the judiciary? Genuine recognition of an actual need would be important to ensure continuity of the program despite subsequent change in leadership. Thus the APJR was not realised overnight. It was the product of various stakeholder consultations and studies and its recommended actions are backed by objective, verifiable data.



475

3.3.3 Is the Proposed Program Comprehensive and Professionally Designed?

Ethical problems in specific areas of the judiciary are actually not localised. They depend on the so many other external but interrelated factors that need to be addressed as well. Incidents of corruption may just be manifestations of the inadequacy of economic benefits for judges. Otherwise, individual reform initiatives would end up being merely isolated stopgap measures. Reform is a dynamic process that requires management more than legal or judicial expertise. The APJR was highly regarded because it was crafted with full recognition that actual implementation thereof would require more than legal expertise. Hence, the PMO, which was organised to coordinate the implementation of the various projects under the APJR, is complemented by experts in such areas of management as change process and communication.

480

485

3.3.4 Is the Magnitude of the Program Manageable, considering available Human and Physical Resources and Time Intended for its Implementation?

Reform initiatives on ethics, integrity and judicial accountability sometimes tend to be overly ambitious. Realistic and concrete targets should instead be set. Implementing the reform programs in stages over a realistic time frame should be considered a viable alternative.

490

495

3.3.5 As repeatedly mentioned, the integrity of the judiciary depends on the individual integrity of its members. It is therefore important to adopt a selection process that would best ensure that only the most qualified are included in the short-list of prospective members of the judiciary. This is particularly true in reform programs that aim to address, among others, issues of ethics and integrity. Ethics and integrity are values that cannot be learned later in life. One who has not personally imbibed ethics and integrity cannot be expected to do so despite the requirement to do so under any code of conduct.

500

3.3.6 Rule 140 of the Revised Rules of Court provide procedure for disciplining judges of regular and special courts and justices of the Court of Appeals and the Sandiganbayan. Further streamlining the judicial complaint and discipline system under Rule 140 of the Rules of Court should be considered, including:

505

- utilising bench-bar committees to make informal resolution of appropriate grievances and avert filing of a full blown disciplinary case; this would also promote dialogue between judges and lawyers and prevents minor grievance from escalating into full blown disciplinary cases;
- assigning *pro bono* lawyers for judges;
- Providing time limitation for the Supreme Court to render judgments on administrative cases against judges and that priority should be given to administrative matters pending against judges who are retiring or applying for promotion.

510

515

3.3.7 The New Code of Judicial Conduct and Rule 140 requires continuing studies to enhance judicial discipline and develop better procedures for judicial discipline cases; and formulating and implementing a records management system on complaints and administrative cases filed against all justices and judges. In addition, the judiciary should design and establish accessible complaint-desks to allow wider public access and serve as venue to receive information and/or evidence on corrupt practices of judges.

520

3.3.8 Apart from evaluating the qualifications of the applicants, the JBC looks into the applicants' track record and personal background by considering their educational



- 525 background, bar ratings, published books and papers, awards and employment records, length of service in the judiciary, quality of decisions (reversals and affirmations and speed in the disposition of cases, among others). However, gender and/or ethnicity are not considered yet in the selection of candidates.
- 530 3.3.9 Financial and/or logistical constraints have always been a challenge for the judiciary in effecting wider and more effective reform programs. Relying on the judiciary's annual budget alone is not sufficient.



ETHICS, INTEGRITY AND JUDICIAL ACCOUNTABILITY - THE NEPAL EXPERIENCE

535

1.0 KEY MESSAGES

540 Guarantee of separation of powers in the constitution is a key for the independence of
the judiciary. Independent process of appointment, guaranteed and fixed tenure, and
security of salary and benefits are the foundations of the independence of the judges.
Judicial ethics, integrity and accountability system are crucial factors for the
independence and impartiality of the judiciary in delivering justice and ensuring effective
545 protection of human rights. Ethics, integrity and accountability can play a vital role in
checking the unethical behaviour of the judges. Therefore, a carefully maintained
balance between the accountability system and independence of the judges is central
part of the independence of the judiciary in a democratic system. All constitutional or
other legal provisions and the accountability measures should be implemented in such a
way that the independence of the judges should not be undermined. *Bona fide* errors of
550 the judges should not be made a ground for action against a judge, and judges must be
given immunity from civil suits for monetary damage arising from their rulings.

555 Constitutional, legal provisions and institutional initiatives of a country must guarantee
ethics, integrity and the accountability system of judges while ensuring total
independence of the judiciary. Mere written provisions without actual implementation
measures, however, cannot maintain judicial accountability and deliver effective justice.

560 An action against a judge should only be taken on judicial and professional capacity,
under an appropriate procedure and in an expeditious and fair manner. Unless a judge
wants, for the integrity of the justice system, initial inquiry proceedings should be
confidential and should not be made public. The constitution of Nepal does not address
judicial ethics, but the Judicial Council Act does define its scope. This guarantees action
against judges only on professional and judicial capacity. However, process and fair
565 rules of accountability are not able to maintain the independence of judges, or the
impartiality and transparency of the Council. The Council appears to have taken
consciousness model followed by solid evidence for any action to a judge for not to force
the judge concerned to compromise independence to delivery the justice. The intention
of the Council seems to strike a balance between the accountability and independence
of the judges, but due to objective implementation of these ideas, the Council is criticized
570 as an ineffective body, unable to maintain ethics, integrity and accountability within the
judiciary.

575 An independent body to enforce judicial codes of conduct for judges, procedures to
ensure accountability and evaluation of implementation of codes and procedures are
important for independent, impartial and accountable judiciary. Suspension and removal
of judges should be made for reasons of incapacity or behaviour that renders judges
unable to discharge their duties. All action against judges should be determined in
accordance with established standards and judicial conduct. Similarly, decisions against
580 a judge must be subject to review, except in the case of impeachment.



585 The focus of accountability measures against judges should concentrate on how to
balance interference of 'other factors' in the name of accountability to the independence
of judiciary. Further, merely sticking at accountability without the carrot of training on
judging and ethics is an empty promise for an independent judiciary. Old, outdated and
archaic laws should be the centre of reform for fair and speedy disposal of the cases.
590 Quasi-judicial bodies which exercise judging at trial level carry a great value of justice at
the demand-side and thus must be subject to supervision of the formal judiciary and
subject to codes of conduct. In the context of Nepal, a bit training has been initiated by
the National Judicial Academy on ethics, integrity and accountability, but its impact is far
from reach. A self evaluation is being undertaken for structural reform, including the law,
regulation, staff and the management within the judiciary. Due to the lack of actual
implementation, however, the judiciary is still in limbo.

595 Composition of an independent body to take action against the judges is a vital one.
Presence of the judiciary and legal profession in such a body is crucial. The inclusion of
a lay person bringing a common person's perspectives on the behaviour of the judges
may bring a good result in maintaining the accountability of the judges. In Nepal, the size
of the Judicial Council is intentionally small, but representation is being shifted to
600 judiciary domination to externals and now a discussion is offering to have a lay person
within the Council. For the lack of being professional and effective, discussions are
taking place to keep the second in rank of the judiciary as a full timer and to make the
Council more independent, effective and professional.

605 Judicial reform with autonomy over appointment, promotion and transfer of its staff, and
developing codes and accountability systems can provides further guarantees to the
independence of the judiciary. Similarly, any reform measures within the judiciary should
focus on training judges and court staff particularly to make them aware of judicial ethics,
integrity and accountability. The judiciary is increasingly developing an independent staff
from the Executive. However, a clear thought and vision does not exist on how the
610 delegation of such power to the judiciary (given to the discriminatory appointments in the
temporary posts by the judges) would be managed and the rules of fair play protected
and not abused.

615 Corruption is a major impediment for public credibility over the judiciary. Checking
property status of the judges in a periodic manner, robust inquiry procedures and
prosecution against suspected judges is a way forward to check corruption. Hence, for a
prosecution strategy to be effective, must be proper coordination amongst the Supreme
Court, the Judicial Service Commission, the Judicial Council, the Office of the Attorney
General and the Commission for the Investigation of Abuse of Authority. Judicial Council
620 appears to have been afraid to take action, particularly in the role of the prosecution, on
the assumption that failure to successful prosecution may give chances to purify a
corrupt judge.

625 Well organised filing system followed by procedures, well-trained staff with proper
facilities, decentralised office structure with efficient resources, sufficient reading
materials on ethics and other related issues might be part of the infrastructure needed
for an independent body to appoint, transfer and maintain accountability of the judges.
Proper legal framework and sufficient budget is also equally important for such body.



630 Finally, to whom should a body that deals with the accountability of the judges be
accountable? A report of such body may be submitted to the Parliament and must be
made public for the consumption of the people in general and its service receivers. The
635 recent Nepali constitution makes the reporting of the Judicial Council part of the
Judiciary's reporting. This undermines the independence of the Council within the
Judiciary, and its ability to report directly to the Parliament. This not only puts the Council
in a shadow, but an open assessment of accountability of the Council would be
compromised. The Council used to publish heavily censored bulletins for the
consumption of legal community as the only measure to feed the information and to be
640 circulated to the limited audience. As a result people in general do know what the
Judicial Council is and what its functions are. This suggests a need for a transparent
reporting modality to the Parliament and to the public in general for the institutional
accountability.

2.0 DESCRIPTION OF REFORM EXPERIENCE

645 2.1 PROBLEMS/CHALLENGES

The independence, impartiality and accountability of the judiciary in Nepal, like many
other developing nations, remains critical and efforts are ongoing to consolidate
measures that provide impartiality and accountability in the judiciary.

650 Separation of power was only conceived in 1948 by the first constitution¹². Under the
first, second¹³ and third¹⁴ constitutions, judges of the Supreme Court could be removed
on grounds of proved bad conduct, incapacity to perform duties and for committing
serious offence or physical or mental incapacity. Parliament and the Judicial Committee
655 were involved as an accountability mechanism. Accountability of judges other than of
Supreme Court was delegated to the Supreme Court. However, the entire judicial
service was governed under the civil service, and hence under the direct control of the
Executive. It was only in the third constitution that an opportunity to defend allegations
was provided to a judge in the commission created for investigation. The fourth
660 constitution¹⁵ repeated the same process, but added on more grounds, *malafide* act, as
a ground of removal. A number of judges were dismissed by the Executive for being
involved in 'inappropriate activity' a vague terminology and beyond the judicial and
professional capacity, during the fourth constitution, resulting to severe encroachment to
the independence of the judges.

665 Historically, there was no any independent process of appointment of judges in the
Supreme Court or other subordinate courts. The grounds of removal were not defined in
any law and regulation. No independent body existed to receive complaint against a
judge as well as for inquiry, investigation and to recommend actions, such as, warning,
670 suspension, removal or prosecution. Neither there were set of judicial rules to govern
accountability process. Therefore, in the absence of clear rules of judicial ethics, integrity
and obvious accountability, the judges were unsecured due to which they failed to
deliver proper justice and to protect human rights of the people.

¹² The Government Act of Nepal, 1948

¹³ The Nepal Interim Government Act, 1951

¹⁴ The Constitution of the Kingdom of Nepal, 1959

¹⁵ The Constitution of Nepal, 1962



675 The fifth constitution of 1990 created democratic set up, with clear separation of power, and District, Appellate and Supreme Courts were provided constitutional status to strengthen independence of the judges and the judiciary. The Chief Justice and judges were subject to impeachment on the grounds of incompetence and misbehaviour or failure to discharge the duties of office in good faith¹⁶. An opportunity to defend before
680 the Inquiry Committee was guaranteed and scope of prosecution on corruption was opened. Any judge of the subordinate courts may be removed on the same grounds as of a Supreme Court judge and prosecuted by the Judicial Council. A judge with such allegation was provided an opportunity to defend, to meet internationally accepted principle, before recommendation of removal or prosecution. The Judicial Council was
685 authorised to form Inquiry Committee to submit a report with an opinion to the Council. However, despite of guaranteed international standard, clear time limit of inquiry and completion of investigation and disposal of allegation is not foreseen. The sixth constitution¹⁷ empowers the Council to have experts in the Inquiry Committee and a judge removed by the Council may be subject to prosecution by Commission of
690 Investigation of Abuse of Authority. Further it adds a new provision for confirmation hearing of Supreme Court judges from the Parliament, to double check the accountability of the judges.

In order to operationalise the constitutional provision, the Judicial Council Act was
695 promulgated under which a Regulation was also issued. The Act and the Regulation for the first time defined conditions of discipline and grounds of removal of a judge. In case of breach of any such grounds, depending on the situation, the Council could issue a warning, and if the concerned judge failed to improve the performance, activities and behaviour, legal action could be taken against such judge.

700 If a complaint or report against a judge is verified, a Preliminary Inquiry Committee may be established, to submit a report to the Council prior to constitution of an Inquiry Committee. In line with the international standard, the preliminary inquiry is undertaken confidentially. Where such a process is initiated the concerned judge will be provided an
705 opportunity to submit explanation on allegation by the Council, before any punishment is imposed against him/her. In case of failure to submit the explanation or where the explanation is found unsatisfactory, the Council forwards its recommendation to the Chief Justice. However, if the report or complaint is found baseless, the proceedings may be closed. During the time when the formal inquiry takes place the concerned judge
710 may be suspended until the Committee finished its work.

¹⁶ Article 87(7) of the Constitution of the Kingdom of Nepal, 1990. For Judicial Council refer Article 93. Under this Constitution, the Judicial Council comprises of Chief Justice as a President, Minister of Law and Justice, two senior most judges of the Supreme Court and jurist designated by the King. It used to recommend for the appointment of the Supreme Court, Appellate Court and District Court judges and their transfer and to take disciplinary action and removal of the judges. It is also used to provide a vague power to recommend and advise on the issues of judicial administration. Other function and rights of the Judicial Council shall be as prescribed by the Law and it can frame its own regulation and implement once it is approved by the King. The Judicial Council, based on the Judicial Administration Act, 1991, receives a report, along with an opinion, of surprise inspection of the superior courts. In case of inspection by the Supreme Court, the Judicial Council receives any information for any action or to file a case against a judge or any official, (Section 21 and 22). In the recent Interim Constitution, maintains all provisions of the Judicial Council, but a representative of the Prime Minister and Nepal Bar Association are added, replacing a designated representative of the King and a senior most judge of the Supreme Court, in the Council.

¹⁷ The Interim Constitution of Nepal, 2007



715 Any person may file a complaint against a judge to the Council. Once the complaint is received the Secretary needs to immediately approach the Council or the Chief Justice or designated member. If the Council deems necessary may decide to constitute a Preliminary Inquiry Committee. In relation to such complaint, the Secretary may take assistance of other organisations. In case of verified complainant, a notice of decision needs to be provided to the complainant. However, despite of clear international principle that a decision on accountability of lower courts judges should be subject to review, there exist no such provision on Judicial Council's regime. Hence, the judge
720 concerned, if decides to challenge the decision of the Council, bound to choose extraordinary jurisdiction of the Supreme Court.

725 The other means of maintaining judicial discipline is the periodic inspection of the work of a judge in his work place. The Chief Judge of an Appellate Court must submit an inspection report of a District Court judge to the Council. Such reports evaluate the work of a judge - either in the positive, or instigating action against them. The performance inspection report through inspection of the superior court, job description and performance report and evaluation of reversed decision would be counted as ground for
730 appointment of a judge to higher courts.

735 The Council, as mandated by the Act, shall have to maintain performance inspection report of the judges of the Supreme Court, Appellate and District Courts, including their service, performance and similar records of the officers of the Nepal Judicial Service and will only be accessible to the Council and Inquiry Committee. Further, the Council is empowered to monitor the implementation of the Codes of Conduct of the judges.

740 Despite the robust constitutional and legal provisions, there have been credible reports of corruption in the judiciary. Other criticisms to the judiciary are delay in proceedings, lack of public confidence, lack of implementation of codes of conduct and absence of codes of conduct to the court official. Lack of awareness on the judicial ethics and trainings to the judges is also observed as a problem. These impediments remain as challenges to achieve impartial, competent and accountable judiciary in Nepal.

745 Transparency International in 2007 reports corruption at all level of courts in Nepal. This attribution is linked to the Nepal Bar Association's allegation to the judiciary. Recently, despite Codes providing that a judges should not meet a party of the case, it is reported that a former Home Minister, against whom there was a corruption case pending in the Special Court, visited the Chief Justice at his official residence and consequently got acquittal. This created a hue and cry in the Bar and the public but the Chief Justice did
750 not refute the report and neither the Judicial Council nor the Parliament attempted to discuss the issue. This incident exposed that how the Supreme Court judges are immune from accountability. This on the other hand, might have given an impression to lower courts judges that such behaviour is acceptable.

755 Another view that comes especially from within the judiciary argues that rather than corruption there are other serious problems in the judiciary such as insufficient or old fashioned and complex laws and court procedures. Besides the judiciary is full of low level unskilled court staff which are ignorant to any modern case management skills. This causes fatigue to the demand side and thus judiciary is losing public confidence.
760 However, the Strategic Plan of the Judiciary indicates the problems, but there is no any



concrete attempt from any accessories of the judiciary to reform such laws and procedures or improve the management.

765 The Court Management Committee, overriding the jurisdiction of the Judicial Council, drafted codes of conduct, lacking international standards set by the *Bangalore Principles on Judicial Conducts*. This was approved at a conference of judges organised by the Judges Society. Judicial Council incorporated such Codes under its mandates through regulation, but no mechanism is framed for monitoring whether or not the Codes is abided. Neither the Codes is binding nor any link to punishment provided for its violation.
770 Judicial Council is revising the Codes, to meet the Bangalore Principles, and validations workshops have been completed, but as of now no attempt seems to have been made to establish monitoring mechanism.

775 Even though there are separate laws governing the service conditions of the judges, the court officials are still considered as government employees as they are recruited under the Civil Service Act. The Judicial Service Commission only promotes and recommends for departmental actions. The Strategic Plan of the Judiciary demands recruitment of court staff by the judiciary itself, but it does not state anything about their Codes. There have been increasing comments to merge discipline and accountability of the court staff,
780 along with their Codes to the Judicial Council.

785 Judicial education can play an important role in promoting accountability, but this needs to be supported with other measures such as incentives and structural reforms. Judicial education itself is new in the Nepali context, but ethics and codes of conduct are getting priority in trainings only recently. The National Judicial Academy from 2007 has started training to the judges, but it is yet to reach all the judges and court staff. The Judicial Council should have thought of using stick along with carrots to the judges. The court staff should have benefited from it. A major problem or the challenge therefore is the functioning of the Judicial Council, to implement the provision of the constitution, Judicial
790 Council Act and Regulation, to maintain the judicial discipline, uphold ethics and create a balance between the independence of the judges and their accountability. Any measures to meet the challenges of the judicial accountability could be robust codes of conduct or rules of judicial ethics, training on issues of ethics, codes of conduct and an objective, open and fair disciplinary process.
795

2.2 ACTIONS TAKEN

800 The problem of encroachment of judicial independence was an important issue in drafting the fifth constitution. As a result, the drafting committee reached a conclusion that an independent body for appointment, transfer and accountability of the judges should be established with majority of insiders of the judiciary, one outsider and a representative of the Government, in a small size. This body was named as Judicial Council. The composition of the Council was discussed further while drafting the sixth constitution whereupon a representative of the Nepal Bar Association was included as a
805 member while reducing a representative of the judiciary. In order to check corruption, the power to prosecute a judge following his/her removal from the office is provided to the Commission of Investigation of Abuse of Authority. This is a major achievement as the judiciary of Nepal is kept independent from the Executive, but at the same time the judges are made accountable.
810



815 The Judicial Council was established immediately after the promulgation of fifth
constitution. While its establishment, it had no legal framework, infrastructure, human
resources and professional experiences. A Bill was drafted and passed by the
Parliament. A Regulation was framed and approved. A system of maintaining records,
along with the date of birth and date of recruitment in the service of the sitting judges
and employees of the court staff are maintained. A system of regular exposure of the
property of the judges is in place. Inspection reports of the judges are maintained.
820 Recently, a judgment review system, where at least ten judgments of a judge will be
reviewed, is introduced in order to check the quality of judgements. Similarly, a system
of complaint receiving and processing, along with a Preliminary Inquiry Committee, prior
to the Inquiry Committee, is introduced and brought into practice. The Judicial Council
Act was amended and inspection report system is introduced. Historically for the first
time in the judicial history of Nepal, the grounds of discipline and removal of the judges
were defined. The codes of conduct were annexed under the mandate of the Judicial
825 Council. In the meantime, the Judicial Council recruited staff, introduced filing and
recording system, organised several interactions on the role of the Judicial Council and
published bulletins with the activities of the Council. The records maintains by the
Council are used for alleviating any judge to the higher courts and supplied to the Inquiry
Committee or to the Council to assist the findings of any allegation in a speediest
830 manner.

835 One of the major achievements of the Judicial Council was determination of the grounds
of incompetence, bad conducts/misbehaviour or failure to discharge the duties of office
in good faith. Despite its centralised organisation system, it received a number of
complaints or reports as allegations against the judges. As per the international
standards, any inquiry against a judge remains confidential in the Council. However, the
statistic of action taken by the Council are made public through bulletins. It is revealed
that action taken against the judges, in comparison to the number of complaints
received, is much lower. However, the Council suggests that such complaints were
840 closed when found baseless. The Council appears to be mindful that any excessive
exercise of accountability may affect the working efficiency and independence of the
judges and thus wanted to maintain a balance between the accountability and
independence.

845 The Council organised several interactions with the judges about its jurisdiction and
functioning. More importantly it also organised programs for quasi-judicial bodies on
judicial discipline and judging skills. It was good on the part of the Council to bring entire
quasi-judicial bodies under the fold of judicial discipline, but the codes of conduct are not
applicable to the judging authority of the quasi-judicial body. Recently, the Council is
850 involved in conducting interactions to improve the codes of conduct of judges and for its
effective implementation. A home work is reportedly taking place with the Judicial
Council and Ministry of Law and Justice to amend the Judicial Council Act and to
improve its Regulation.

855 Though the Judicial Council is empowered to take action only against the judges of the
Appellate and District Courts, bearing in mind its ultimate obligation to maintain judicial
discipline it decided to form an Inquiry Committee in an allegation of corruption by a
Division Bench of the Supreme Court. The Committee, after an uncontroversial inquiry,
came up with findings which corroborated allegations against the judges. However, the
860 Parliament failed to start impeachment process and thus the Chief Justice persuaded



865 the judges who had fallen into controversy to resign. In another case where similar allegation was levelled against a judge of the Supreme Court, an Inquiry Committee was established. Here also the Committee found that the allegations were substantiated. In the failure of impeachment process, the alleged judge was demoted to the lower court by the Chief Justice on the recommendation of the Council. These initiatives of the Judicial Council, despite question of its jurisdiction, were praised by the legal community, particularly the media.

870 There appears to be a number of complaints and reports of corruption against judges in the Council. Some of them were inquired and mostly followed by a warning to the judge concerned. Initially, the Judicial Council had power only to recommend for removal of a judge. However, after the first amendment to the Judicial Council Act, the Council was empowered to initiate prosecution against the judges in the respective courts on corruption charge. The Council in one of the complaints found corruption against a judge and filed a case in a court. The matter is *sub-judice*.

880 The Judicial Council has a mandate to recommend for judicial reform. However, it has not directly involved in such process, but reportedly is providing suggestions through institutional participation in different programs. The Strategic Plan of the Judiciary mentions about reform of old, outdated and archaic legal and procedural framework, but the Judicial Council is not offered for any such role to play. There has been an initiative of the Ministry of Law and Justice, in the support of the UNDP, to revise the penal code and procedure and the civil code and procedures where the Judicial Council is taking part to enhance the substantive and procedural framework of the law. If this initiative succeed and the laws are put in place courts will be able to launch speedy and fair proceedings. This will not only benefit to the demand side, but also help the Judicial Council to promote ethics, integrity and accountability in the judiciary.

890 The Judicial Council is empowered to monitor the codes of conduct of judges through amendment to its Regulation. The Council published the Codes and circulated to the judges and also promoted them in the different conferences held under the Judges Society. A delegation from the Supreme Court participated in framing *Bangalore Principles on Judicial Conducts* in 2002 and contributed to its development. In a long overhaul, the Council has decided to improve the Codes and prepared a draft. A review of the draft suggests that Bangalore Principles is generally abided, but link of violation of Codes with any punishment and implementation mechanism and process are not proposed. At the moment, the Council, after launching an awareness and validation process of the improved draft Codes through interactions with the judges in the different regions, has formed a Committee to finalise the Codes. Once the Council is able to finalise, along with its monitoring mechanism and process, it is expected that it will have greater impact to maintain the judicial ethics, integrity and accountability.

905 It is reported that one of the serious impediments of the judiciary is higher number of lower level staff. Even the officers are less familiar with technology. It hinders the capacity development opportunities such as the development of professional skills, ethics and codes. Behaviour of the court staff is equally important as that of a judge in the delivery of justice, and thus unlike in other countries such as the Philippines, codes of conduct of the court staff is lacking in Nepal. In a recent development, a client successfully recorded a series of conversations with an employee of the court while bargaining money to favour a case through different judges, including the Chief Justice



915 and published it. This incident contributed for a discussion to have codes of conduct of the court staff. The Supreme Court, in the notice of the Judicial Council has taken the issue seriously and investigating the case and simultaneously discussing for such Codes. On the other hand, the Supreme Court Bar Association carried out a research on the public faith of the judiciary, following the same incident and has reported different modalities of corruption in the judiciary and indicates the stake of the court employee is higher, but fails to recommend accountability measures and on the Codes of the court staff.

920 The Judicial Council Act through its first amendment incorporated details of judicial misconducts as prohibited acts for a judge. It defines competence or conduct of a judge, good faith to observe official duties and misconducts. A system of maintaining records of such activities, through receiving inspection reports from a superior judge is developed through the second amendment of the Act. The Judicial Council is involved to explain those defined grounds to the judges through interactions, a bit less systematic, but enough to raise awareness. The National Judicial Academy, in its drive to strengthen the judiciary has recently introduced a course on judicial ethics and integrity and reportedly taking it further in the coming years. Some course materials, with the support of the foreign experts, are developed by the Academy on ethics and integrity. Trainings on the ethics and integrity, if implemented jointly by the National Judicial Academy and the Judicial Council, will render greater impact to improve the judicial behaviour of the judges and to make them further accountable.

935 **2.3 OUTCOMES**

940 The Judicial Council in Nepal is struggling to produce outcomes in order to create accountability in the judiciary. According to the principle of separation of power and democratic principles of Government, as a part of the independent of judiciary, the Judicial Council has emerged as an independent institution, with set of procedures and secretariat, including maintaining judicial ethics, integrity and accountability. This in itself is a major outcome to be able to maintain independence of judges to take action on the basis of professional and judicial capacity. If there were no such mechanism, there could have been a number of arbitrary Executive actions against the judges, seriously encroaching independence of the judiciary.

945 According to the latest data, out of 113 complaints lodged in the Council, in the last year, against the judges, some 85 are suspended due to the lack of evidence and further 28 are being investigated. In the past, action against some 22 judges has been taken, resulting in either with removal or demotion. A number of warnings to judges are issued. 950 Three Supreme Court judges were found guilty of being engaged in inappropriate activities i.e. corruption by the Council, two of them resigned and one demoted. One of the District Court judges was prosecuted. Such information is circulated through the bulletin of the Judicial Council which is distributed to the sitting judges and to the legal community. This has created a space of the Council and a sort of feeling among judges 955 that they are accountable somewhere. Though the accountability of the judges has not increased dramatically, this is one of the achievements of the Judicial Council for the ethics, integrity and accountability in the judiciary.

960 The Judicial Council organised some interactions and workshops on the jurisdiction and functions of the Council with the judges. Quasi-judicial bodies were also sensitized with



965 the judging methods and skills. The National Judicial Academy has organised trainings on judicial ethics, integrity and accountability in collaboration with University of Queensland in 2007 and is continuing with the same. Such programs are not sufficient and well planned to bring the results, but are useful interventions to raise awareness on principle of justice, ethics, integrity and accountability.

970 The Judicial Council played a role to introduce the codes of conduct of the judges. Given to the insufficient coverage of the Bangalore Principles in the existing Codes, Council drafted new Codes and organised a series of validation workshops with the judges in the different Regions and has brought them in consolidated form through a conference of the Supreme Court judges and Chief Judges of the Appeal Courts. The Codes has covered different areas such as ethics, independence, integrity, impartiality, equality, competence and hard work and enforcement and accountability. The Council has referred different international and comparative Codes, but has relied mainly on the 975 *Bangalore Principles on Judicial Conducts*. Though the Codes is still in draft format, but if comes in force, it is an important outcome of the Judicial Council and if implemented with the spirit of drafting, may bring a major change on the judicial behaviour.

980 Importance of the Judicial Council is growing, however, the institutional capacity is yet to grow. In the meantime, the Council has maintained the records of academic qualifications, personal experiences and up dated property description records of the judges. Similarly, inspection reports of the inferior courts along with personal evaluation reports of the judges are maintained. Records of any action against the judges are also maintained along with the personal files. These documents are incredibly valuable for 985 the alleviation of a judge to the superior courts and for disciplinary action and other accountability measures. Such records appear to have been maintained manually, but are important outcomes of the Council for scientific information about the judges and the judiciary.

990 Judicial Council has published some bulletins and occasional materials as a collection of the papers presented during the interactions. These are valuable documents to explain the internal functioning and for the transparency of the Council. If continued, the publications are important outcome of the Council for the institutional transparency and public accountability. 995

3.0 ANALYSIS/EVALUATION OF EXPERIENCE

3.1 ANALYSE SUCCESSES TO IMPLEMENTATION AND WHY

1000 Visible success of the Judicial Council of Nepal is still awaited. However, initiation of debate regarding the independence of the judiciary and protection of judges from the Executive's arbitrary actions, and finding constitutional solutions through the creation of Judicial Council and inscribing qualification for appointment and accountability of the District, Appellate and Supreme Court judges in the Constitution is a success story. Mere constitutional structures, however, have not been able to create an entirely 1005 independent, impartial and accountable judiciary, but these have stopped further deterioration. However, after the adoption of the Strategic Plan of the Judiciary, creative self criticisms from within the judiciary and national and international pressure are emerging. If the judiciary would be able to have a visionary leadership, changes towards independent, impartial and accountable judiciary may emerge rapidly.



- 1010 Establishment of Secretariat with a full time secretary and some staff followed by the promulgation of the Judicial Council Act and its Regulation, defining the grounds of misconduct, maintenance of personal and work performance records of the judges, some trainings, interactions and publications are some examples to be noted of the
- 1015 Council. These works appear simple, but are guiding for any initiative on how such a body is to be established and should function. On the other hand, where such measures were/are completely absent, certainly advantageous.
- 1020 Inquiry system within the Council needs to be developed further. However, it has developed guide for any inquiry against a judge. In case of a complaint, either the secretary or a designated member of the Council evaluates the allegation and if found support of evidence, a preliminary inquiry will be established in a confidential manner and upon the recommendation of such inquiry, a full inquiry will be commissioned. Safeguards such as explanation in person or in writing from the judge concerned in
- 1025 person are used. Upon the completion of inquiry, depending on the seriousness of allegation and available evidence, actions such as warning, suspension, demotion, removal or prosecution may be taken. However, there exist no appeal to such decision, but a judge concerned may invoke writ jurisdiction of the Supreme Court. Generally, the judges who receive less than removal or prosecution does not move to the court and
- 1030 thus is bound to accept the decision without revision. The Judicial Council has positive lessons of fairness, but still marred with allegations of being sluggish and inconsistent.
- 1035 Bulletins of the Judicial Councils show the number of actions taken against the judges. A huge number of judges are inquired or asked to submit explanations on the allegations. This appears to have given a message of fear for accountability to the judges, but allegations of corruption are still widely reported. To merit the Council, its internal or external accountability process has created impact on the judges, but non-abidance by the senior judges frustrates junior ones and thus problem remains as it is. Nevertheless, the Judicial Council of Nepal is seen as damage control mechanism. If such a
- 1040 mechanism functions in a proper manner, an independent accountability process can be maintained.
- 1045 Composition of the Judicial Council is still being debated. Presence of a nominee of the Nepal Bar Association does not only have given legal professions' voice, but it is expected to strike a balance in the implementation of Codes and accountability of the legal profession and judges. It is increasingly being realised that mere focus on ethics, integrity and accountability of the judges does not work, but these aspects should be seen relatively. Further discussions are taking place to have representation of the Attorney-General, lay person and to have a fulltime President – second in rank - of the
- 1050 judiciary in order to make the Council professional and effective. Despite discussion and changes in the nature of the Council, small size and representativeness is a lesson to learn.
- 1055 Though the coordination of different organs of the judicial bodies yet to emerge, the synergy of the Judicial Council with the Nepal Judicial Service Commission, Supreme Court, National Judicial Academy and Judges Society appears to be noticeable. Co-organisation of programs, support and collaborations does exist, however, such efforts are more favourable to others and thus the Judicial Council need to strategies its



1060 beneficial position out of such activities to furtherance of ethics, integrity and accountability of the judges and the judiciary.

3.2 ANALYSE DIFFICULTIES/CONSTRAINTS TO IMPLEMENTATION AND WHY

1065 The Judicial Council of Nepal runs its offices with full of constraints. However, paramount constraint to the implementation appears to be professional capacity of the Judicial Council. Its composition with lack of full timer President or members with a specialist background and a fully functional secretariat are the greatest impediments. The Secretariat does not have a website, electronic files, staff, or financial resources. Further, there is no Strategic Plan for the Council to state its vision, mission and objectives. It holds an office in the annex of the Supreme Court and has not acted on having an infrastructure suitable to its nature of work such as to house sensitive information. Indeed the Judicial Council should be the data bank of the judicial information of various kinds, but even the detail profiles of the judges and person may be considered as judges are not properly maintained. Hence, a professional Secretariat with professional staff and full timer President and members are the most for any living and effective Judicial Council.

1080 Actions taken by the Judicial Council against a judge are found to be mostly based on professional and judicial capacity, but there appears to be lack of predictable process of Inquiry, as there is no fixed duration when an inquiry or investigation or decision completes. As a result, the judges concerned are forced to compromise with their independence. Similarly, it is revealed that an action taken to a judge in the same allegation is inconsistent to other judge and this is either due to the changes in the leadership of the Judicial Council or due to 'some other reasons'. This suggests that the Judicial Council is still not institutionalised as any decision should not be changed due to the changes in the leadership or due to 'any other reasons' of an organisation like the Council. The international standards which suggest having appropriate, expeditious and fair process of accountability is being compromised by the Judicial Council.

1090 The Judicial Council works in a consensus model i.e. all members of the Council must agree to reach any decision. This gives a chance to speculate that a sort of play ground is granted to weaken the jurisdiction of the Council. A person in a position to approach even a single member of the Council may jeopardize action against him or her. Further, open ended procedures for action and inconsistent application of the procedures are constraint for fair implementation of the Judicial Council. It appears that Judicial Council is still a mysterious organisation that believes in hiding information with an old mind set that any information revealed with the action against the judges is thought to reduce the efficiency and independence of the judges. It should have embraced the principle that more transparency would be the basis of accountability. Hence, the working modality including the transparency of the Judicial Council is a constraint to materialise its own strength.

1105 The other major constraint of the Judicial Council is the non-application of definition of the judicial misconducts. From the second amendment of the Judicial Council Act, the grounds of bad conducts, unethical behaviours and grounds for actions are defined. However, it is revealed that while taking actions, those grounds are rarely referred to on objective basis. In some cases, the allegations are one, but the actions taken for are other and punishment disproportionately lower than the offences. This has been labelled



- 1110 by the Bar Association as a kind of protectionism within the judiciary. This suggests that mere constitutional framework of independent Judicial Council or robust definitions of the grounds for actions and procedures may not be sufficient for ethics, integrity and accountability in the judiciary. Actually what matters is, how impartially and effectively grounds for actions and procedures get implemented.
- 1115 As a part of the constraint Judicial Council lacks effective inquiry system. The recent constitution adds a provision of specialist to be included in the inquiry. However, a special unit within the Judicial Council for the inquiry and investigation with autonomous function is needed. Presently, the staff of the Council, except the secretary, comes from the judicial service. They are transferred with short notice to other work. Thus in order to
- 1120 develop professional staff, the Council should have the power to hire staff for its service and to hire consultants or advisers to strengthen its professional capacity. The lack of having appropriate inquiry system supported by professional staff and objective investigation methods are the constraint for effective implementation of the mandates of the Judicial Council.
- 1125 The focus of the Judicial Council appears to be corruption control, but enhancing the knowledge on principles of justice, ethics, integrity and accountability through analysis of the judgments and orders, inconsistent/contradictory judgments of the lower courts and finding trends in the judgments are the areas to be touched upon by the Council. Some
- 1130 of the programs for dissemination of knowledge on principles of justice and ethics appear to be good. These programmes, however, are too few - far less than could be possible given the existing capacity of the Council. Failure to utilise the synergy with the National Judicial Academy on the implementation of ethics related training and enhancing its research capacity are some constraints to be noted. It should be the role
- 1135 of the Judicial Council to persuade other related institutions such as the National Judicial Service Commission, Office of the Attorney General, the Nepal Bar Association and the Nepal Police to effectively implement their Codes. This job requires an open minded Judicial Council to bring together all the relevant stakeholders to build a collective action, but as a constraint, the Judicial Council appears to be a newly established traditional
- 1140 institution and does not dare to take the challenges.

3.3 KEY QUESTIONS/KNOW-HOW

- 1145 This may be a premature to make any concrete recommendations out of the Judicial Council of Nepal. However, according to the best practices and emerging international principle, an independent body such as the Judicial Council of Nepal deems to be an ideal for the appointment and accountability of the judges. Analysing the effectiveness of the Council is one part, but adopting an independent body like this is the other, if not
- 1150 only for damage control mechanism from the long hands of the Executive, but also to maintain independent and accountable judiciary. What can be learnt from the Nepal's experience is to have an independent body like the Council in the Constitution, in a small size, with different representatives having the mandates on ethics, integrity and accountability is positive towards the independence of the judiciary and rule of law.
- 1155 The Judicial Council of Nepal does not appear much as a living institution. It remains as an institution running to fill the flash over the constitutional provision. However, it ensures basis of guarantee from the encroachment of the Executive's jurisdiction over the judges. Even the lower courts judges are protected from the Executive and thus can



1160 maintain independence while deciding the cases against their actions. Furthermore, the
Judicial Council ensures a guarantee that a judge would only be taken action in
professional and judicial capacity. It largely follows the rules of procedural fairness while
taking actions and also attempts to maintain a balance between the independence of the
judges and need of accountability. However, while coming to the impacts and results of
such mechanism and procedures, the experience of Nepal suggest that mere
1165 constitutional and legal provisions are not sufficient.

The Judicial Council is mandated for the maintenance of the ethics, integrity and
accountability of the judges. Its mandate is fairly broad as it can: prepare the codes of
conducts; and implement defined and robust grounds for discipline, misconduct and
1170 other actions, including removal and prosecution. It has been mandated to initiate
reforms suitable to promote the accountability of the judiciary, impart trainings to
enhance awareness and judging skills, and behaviours and to conduct research as
necessitated. However, it appears that the mandate of the Council and composition of
the leadership does not marry and thus its functions always remain like *ad hoc* resulting
1175 the organisation defunct. Thus, it suggests that along with such Council and broad
mandates, a doable leadership with full time, is a must for a successful accountability
institution.

1180 Mere adopting codes of conducts, laying rules for actions and implementation to some
extent is not sufficient. Any accountability measures must be supported by reform of the
old fashioned laws, procedures and human resources. A country like Nepal which
suffers from old and archive laws and procedures should also focus in the reform part to
enhance the legal system, management of the courts and cases. The leadership of the
judiciary must also create compatible situation for the play ground of the Judicial
1185 Council. The backlog of the cases with sluggish procedures with low skill human
resources and poor infrastructure facility breeds the scope of the corruption and swap up
the jurisdiction of the Council. It gives a lesson that the reform of the judiciary must be
holistic and must support the ethics, integrity and accountability part with equal focus.

1190 The staff of the courts consist integral part of the judiciary, but if they come from the
Executive branch of the government and follow the rules as prescribed by the Executive,
without proper judicial kind of accountability at par with the judges, troubles the Judicial
Council to maintain ethics and accountability. In Nepal if a court staff is indulge in
unethical activities, the Council does not have jurisdiction to look into the issues.

1195 Experiences shows that the Judiciary of Nepal has failed to take action to the seriously
suspected court staff and rather transferred them as an punishment to other court which
is physically disadvantageous. Hence what can be learnt from the experiences of Nepal
is that an institution for the accountability must have the jurisdiction over the court
officials.

1200 Management of the Judicial Council of Nepal still needs to be improved. However, as a
lesson to others its system of maintenance of personal performance records, inspection
records and records of the persons who may be appointed as a judge for access to the
Council for new appointment or for any accountability measure are important. Such
1205 basic information may be applied for other reform experiences of the judiciary. In respect
to the management, though the efficiency of the Judicial Council of Nepal may be
questioned, however, seeds of working modality such as how the complaint are
received, processed and inquiry are taken place may have the values of lessons for



1210 others reform experiences. Publication of the bulletin and its reporting methods to the judiciary may also be issues to be learnt.

1215 Despite of establishment of the Judicial Council and action taken by it to the judges, there are credible allegations that due to the corruption, the judiciary is loosing its public confidence. The donor community of Nepal who have supported for the judicial reform frustrates with its results. Except, the support for the Strategic Plan other supports are under critical investment of the donor community. For example, the donor community supported to the CIAA to enhance its capacity development for corruption investigation and filing cases against the government servant. The CIAA did file some good cases, but the Special Court, under the vertical control of the judiciary used such cases as syndicate of corruption as all the suspects are released. The Judicial Council and the leadership of the judiciary have known it or should have known it or are in a position to repress such activities, but leave that with free hands. On the other hands, the government suspects on the misuse of funds it provided to the judiciary for the construction of buildings and to purchase equipments to modernise the judiciary. The 1225 Judicial Council cannot look into allegations of misappropriation of such funds and the CIAA does not have jurisdiction over it and hence no checks and balances remain in place. When such activities are seen by fellow judges, it will certainly encourage corruption of others in the judiciary. Thus, either the Judicial Council should have the jurisdiction to look into the allegation of that kinds or any proper mechanism must be 1230 employed to look in to the allegations.

1235 Finally, an institution like the Judicial Council is a must for enhancement of the ethics, integrity and accountability of the judges. It should have the constitutional basis followed by the statute and regulation and a separate office. Such institution should be given function not only to use the stick of accountability, but the carrots of education, trainings and reform to the laws and procedures. The inquiry system should follow the international standards so that the alleged judges should not have to compromise with their independence while undergoing to the accountability process. Such institution must believe in transparency as a measure for the enhancement of the accountability. 1240 Furthermore, a fulltime leadership with a professional staff is a must to ensure that the institution is living and renders results. Mere taking actions against few judges does not produce results rather its impact must be seen in terms of compliance of the ethics, integrity and accountability and public confidence of the judiciary at the peoples level.



ANNEX ONE

1245

A1.0 COUNTRY CONTEXT BACKGROUND: PHILIPPINES

A1.1 COUNTRY CONTEXT

A1.1.1 Demographics

1250

The Philippines is an archipelago of over 7,100 islands with a land area of 115,600 square meters. It has a population of 85 million. 95% of the population are made up of various ethnolinguistic groups descended from migrants who arrived in successive waves to the archipelago from Taiwan and mixed with other sporadic migrations from southern China.

1255

Some 87 major dialects are spoken all over the islands. English and Filipino are the official languages, with English as the language of instruction in the courts and higher education. Christianity is the main religion in the archipelago, with Roman Catholicism making up the majority. A small but significant minority profess Islam, particularly in the southern Philippines.

1260

A1.1.2 Legal System

The Philippine legal system is aptly described as a blend of customary usage, Roman (civil law) and Anglo-American (common law) systems. Civil law governs the areas of family relations, property, succession, contract and criminal law, while statutes and principles of common law origin are evident in the areas constitutional law, procedure, corporation law, negotiable instruments, taxation, insurance, labour relations, banking and currency. In some parts of the islands in the south, Islamic law is observed.

1265

1270

This particular legal system is the result of the immigration of Muslim Malays in the fourteenth century and the subsequent colonisation of the islands by Spain and the United States.

1275

The main sources of Philippine law are the Constitution, statutes, treaties and conventions, and judicial decisions. The Constitution is the fundamental law of the land and as such, it is the authority of the highest order against which no other authority can prevail. Every official action, to be valid, must conform to the Constitution. On the other hand, statutes are intended to supply the details which the Constitution, because of its nature, does not provide. The statutes of the Philippines are numerous and varied in their contents. They provide rules and regulations that govern the conduct of the people in the face of ever-changing conditions.

1280

Having the same force of authority as legislative enactments are the treaties that the Philippines execute with other states. As a member of the family of nations, the Philippines is a signatory to and has concluded numerous treaties and conventions.

1285

Philippine law is also derived from cases decided by the courts, pursuant to the New Civil Code which provides that 'judicial decisions applying to or interpreting the laws or the Constitution shall form a part of the legal system of the Philippines'.^[2] Following the three-tier system of courts, decisions of the Supreme Court establish jurisprudence and are binding on all other courts.^[3] The decisions assume the same authority as the statutes to which they apply or interpret. Until authoritatively abandoned, these decisions necessarily become, to the extent that they are applicable, the criteria which must control the acts not only of

1290



those called upon to abide thereby but also of those duty-bound to enforce obedience thereto.[4]

1295 To a certain extent, customary law forms part of the Filipino legal heritage because the 1987
Constitution provides that ‘the State shall recognise, respect, and protect the rights of
indigenous cultural communities to preserve and develop their cultures, traditions and
institutions’.[5] This was true even as early as 1899 under the old Civil Code, which provided
1300 that ‘where no statute is exactly applicable to the point in controversy, the custom of the
place shall be applied, and in the absence thereof, the general principles of law’.[6] Although
this provision was discarded in the new Civil Code[7] which took effect in 1950, judges, in the
exercise of sound discretion, still apply the customs of the place or, in its default, the general
principles of law in the absence of any statute governing the point in controversy; otherwise
1305 the provision of the same Code which requires him to decide every case even where there is
no applicable statute would prove to be a veritable enigma.[8] The Civil Code also provides
that ‘customs which are contrary to law, public order or public policy shall not be
countenanced’, and ‘a custom must be proved as a fact according to the rules of evidence’.⁹
Thus, Philippine law takes cognisance of customs which may be considered as
supplementary sources of the law.

1310

A1.2 JUDICIARY AND THE COURTS

1315 The Constitution of the Philippines ordains that judicial power be vested in one Supreme
Court and such lower courts as may be established by law. [Section 1, Art. VIII, 1987
Constitution). The Judiciary Reorganisation Act of 1980 (Batas Pambansa Bilang 129), which
took effect on January 18, 1983 organised a three-tier justice system and defined the
organisation, jurisdictions, establishment and staffing of judges of the Court of Appeals,
Regional Trial Courts, Metropolitan Trial Courts, Municipal Trial Courts and Municipal Circuit
1320 Trial Courts. In 1994, Republic Act No. 7691 amended BP 129 and expanded the
jurisdictions and organisation of the lower courts. Republic Act No. 7902 (1994) expanded
the jurisdiction of the Court of Appeals, while Republic Act 8246 (1996) created additional
divisions in the Court of Appeals and increased the number of justices from fifty-one (51) to
sixty-nine (69). Three divisions now seat in Cebu and another three divisions in Cagayan de
1325 Oro.

1330 At the apex is the Supreme Court, a collegiate court composed of one Chief Justice and
fourteen Associate Justices. The Supreme Court is the final arbiter of any and all judicial
issues. When so deciding, the Court may sit *en banc* or in divisions of three, five or
seven members. Below the Supreme Court is another collegiate court, the Court of
Appeals. Composed of 1 Presiding Justice and 68 Associate Justices [Rep. Act No.
8246], the Court of Appeals is vested with jurisdiction over appeals from the decisions of
the Regional Trial Courts and certain quasi-judicial agencies, boards or commissions.
1335 The trial courts comprise the third-tier of the Philippine justice system. The trial courts are
geographically organised into Municipal, Metropolitan and Regional Trial Courts.

1340 A Municipal Trial Court (MTC) is established in municipalities all over the country. MTCs
that have jurisdiction over more than one municipality are called Municipal Circuit Trial
Courts [MCTC]. In the towns and cities in the Metropolitan Manila area, MTCs are called
Metropolitan Trial Courts (MeTC). In cities outside Metropolitan Manila, while those in
cities outside of the Metropolitan areas are called Municipal Trial Courts in Cities
(MCTC). Regional Trial Courts were established among the 13 regions in the Philippines



consisting of Regions I to XII and the National Capital Region (NCR). There are as many Regional Trial Courts in each region as the law mandates.

1345

In addition, Shari'a Courts were established in provinces in Mindanao where the Muslim Code on Personal Laws is enforced. Shari'a Courts have the same level as the trial courts. Shari'a District Courts are the counterpart of RTCs, while the Shari'a Circuit Courts are the equivalent of MCTCs. Presently, there are 5 Shari'a District Courts and 51 Shari'a Circuit Courts.

1350

There are also special courts presided by Justices. These are the Court of Tax Appeals (CTA) composed of a Presiding Judge and five Associate Justices [Rep. Act No. 9282], and the Sandiganbayan composed of a Presiding Justice and 14 Associate Justices [Rep. Act No. 8249]. The CTA is vested with the exclusive appellate jurisdiction over appeals from the decisions of the Commissioner of Internal Revenue and the Commissioner of Customs on certain specific issues, while the Sandiganbayan has exclusive jurisdiction over violations of the Anti-Graft and Corrupt Practices Act [Republic Act No. 3019], the Unexplained Wealth Act [Republic Act No. 1379] and other crimes or felonies committed by public officials and employees in relation to their office, including those employees in government-owned or controlled corporations.

1355

1360



A2.0 COUNTRY CONTEXT BACKGROUND: NEPAL

A2.1 COUNTRY CONTEXT

1365

Nepal, a small landlocked country in the Himalaya sandwiched between India and China. In the South, East and West, she is bordered by India and in the North by China. Today, Nepal is spread in five regions and 75 districts for the administrative purposes inhabited by 25.8 million people comprising some 100 ethnic groups. In the Human Development Report Nepal now ranks 142 out of the 177 countries, and in the human poverty index 84th among 108 developing countries. The general life expectancy is 62.2 years where 17.4 percent people do not survive past age 40.¹⁸

1370

1375

Nepal was unified into one Kingdom some 238 years back at the initiatives of the Kings of Gorkha, one of the small princely states in the middle mountains, who through series of military expeditions weaved more than 50 small principalities into one country. It was a time when British Empire was making massive inroads into the Indian subcontinent. The Britain effectively checked the Gorkhali drive for unification in the Himalayas through a protected war between 1814 and 1816 AD. In this war Nepal not only lost a huge area in the West, East and South, she was also by and large squeezed to the present size through the Treaty of Sagauli in 1816. While the treaty permanently ended the antagonism between the two expanding forces, it opened up a new kind of relation between them as well. Britain got a trusted ally in Nepal and the latter retained her independence throughout the former's rule in the Indian sub-continent when hundreds of Indian Maharajas (*Kings*) had succumbed to the British military might.¹⁹

1380

1385

1390

1395

During the most part of the 19th century and the first half of 20th century Nepal remained isolated from the external world. She began to open up only after overthrowing the feudal *Rana Rule* (1846-1950) through the First People's Movement in the 1950. She tried to install democratic rule within the country with constitutional monarchy and multiparty democracy and an independent system of justice but her owe did not end here. The King usurped the power and installed his direct rule in the 1960 after overthrowing a popularly elected government and banning all political parties. The Second People's Movement in 1989/1990 brought back democracy by compelling the King to accept his earlier agreed position of constitutional monarch, but this attempt also got maligned by the failure of governments to promptly deliver the goods to the people and growing Maoist insurgency in the country. For a short the interregnum Nepal again saw the direct rule of the King in 2005/06.

1400

1405

After the signing of the Comprehensive Peace Agreement (CPA) with the Maoist in Nov 2006 Nepal currently is in transition. The 238 years old institution of Monarchy is in question and the first meeting of the Constituent Assembly is set to decide the fate of the institution. In the meantime, [interim] Legislature-Parliament, [interim] Government and Interim Constitution are functioning in the foundation of the CPA and the presence of the United Nations Mission in Nepal to implement the mandates of arms and army management, monitor the election of the constituent assembly, human rights situation and assist the Government to implement the CPA. At present, Nepal is a unitary State,

¹⁸ See UNDP, Human Development Report, 2007/08

¹⁹ The recruitment of Gorkha soldiers began after the Indian Mutiny of 1857 during which Gorkali soldiers, siding with the British crushed the mutiny. For this assistance the British also obliged Nepal by returning a small portion of lost territory in Western Nepal which is even today euphemistically called *Nayamuluk* (*New Nepal*.)



1410 but a major political consensus has been reached to make the country federal one.²⁰ A series of agreements have been signed with forces crying for federalism and the Interim Constitution has been amended accordingly.

A2.2 JUDICIARY AND THE COURTS

1415 The Nepali judiciary today stands on the constitutional foundations laid down by the 1990 Constitution which is mostly replicated in the Interim Constitution. The judicial power of the State is exercised by the courts, tribunals and other judicial institutions of the country as per the Constitution, laws and '*recognised principles of justice*.'²¹ The expression '*recognised principles of justice*' keeps the potential of internalising values developed in international and comparative setting for evolving a competent system of justice in Nepal. 1420 Besides, the Treaty Act also accords a prestigious position to human rights norms which could be used to give further force to the rights recognised by the Constitution and the laws.

1425 The legal and judicial tradition of Nepal owe much to Hindu religious texts such as *Shrutis* and *Smritis*, and *Vyabharata* where religion and justice were blended in one and supposedly protected and administered by the Kings and his courtiers who applied the scripture based law even though minorities following other religions historically lived side by side with the Hindus. The first codified law of Nepal, the *Muluki Ain* (the national code) which is still a major law on civil and criminal matters, promulgated in 1854 AD during the 1430 early phase of the *Rana Rule*, bore strong imprints of the Hindu tradition.²² This law was amended several times to give it secular and equalitarian tone and temper. Besides, there are a host of other laws that govern the civil, criminal, family, social and economic matters.

1435 The attempts to establish an independent judiciary fructified in 1950 following the overthrow of the *Rana* oligarchy, Attempts were made to establish a democratic government that respected the separation of power. The movement of 1950 also began to transport external values into the Nepali legal system, primarily resulting in gradual internalisation of the common law due to Nepal's cultural and educational proximity with 1440 India. So much so that the first Chief Justice of the post 1950 *Pradhan Nyayalaya*, (Supreme Court) was an expatriate Nepali practicing law in India.²³ The Supreme Court began to establish and entrench the rule of law by issuing prerogative writs and also review legislations and play the role of guardian of the Constitution.²⁴ And since that time the system of justice has grown consistently and continuously, despite 1445 political upheavals in the succeeding several decades that experimented with several Constitutions.²⁵ This should however, by no means be understood that the judiciary is free from challenges.

²⁰ See Nepal Interim Constitution 2007 Art 138.

²¹ See Nepal Interim Constitution 2007 Art 100. The expression is of immense importance as it empowers the judiciary to internalise values recognised in international and comparative setting.

²² This is more visible in family law and other property related laws such as the trust law, financial transaction, and some criminal laws such as incest, bestiality, or killing of cows etc.

²³ At least eight Chief Justices after him were law graduates from India.

²⁴ See Ananda M Bhattarai, *The Judicial System of Nepal: An Overview In Fifty Years of the Supreme Court of Nepal* (published by the Supreme Court of Nepal on its Golden Jubilee), May 2005 at p 13,17.

²⁵ Nepal issued the first Constitution in 1948 during the last leg of Rana rule. An interim Government Act, a Constitutional text in nature was issued in 1950 and in 1950 a new Constitution was issued just to be withdrawn in 1960 and replaced in 1962. The 1990 Constitution lasted for 17 years and now Nepal has a new Interim Constitution issued in 2007.



1450 Today the Judiciary consists of a three tiered system comprising the Supreme Court, 16
appellate courts and 75 district courts in a hierarchical order. Besides, there are at least
1455 8 other tribunals and special courts to hear specific cases. The constitution of benches
hearing specific cases is a growing practice in the country. While there are juvenile
benches in district courts the government, on the advice of the Supreme Court,
envisages establishing commercial benches in the Appellate Courts to hear commercial
disputes.²⁶

1460 The Chief Justice is appointed by the Prime Minister on the recommendation of the
Constitutional Council while all other Judges are appointed by Chief Justice on the
recommendation of the Judicial Council and following a confirmation hearing at the
Legislature-Parliament.²⁷

1465 The Supreme Court is the final court of appeal. All the courts and judicial institutions
except the Constituent Assembly Court are subject to it. It has the final authority to
interpret the constitution and the laws in force.²⁸ The precedents established by the
Supreme Court are as good as the law.²⁹ The court is vested with extraordinary powers
to issue prerogative writs. It exercises the power of judicial review and also entertains
public interest petitions.³⁰

1470 Below the Supreme Court are the appellate courts geographically dispersed in different
regions of Nepal. As the name suggests, they are basically appellate courts which hear
appeal against the decision of the district courts and quasi-judicial institutions such as
the chief district officer, land revenue officer, forest officer, warden of the wildlife parks
and reserves etc. Besides, the appellate courts also issue writs such as *habeas corpus*,
1475 *mandamus* and *injunctions*.³¹ The district courts are general jurisdiction courts hearing
civil, criminal and family matters. The quasi-Judicial bodies, in a number of cases are the
trial courts, however, they do not directly fall under the control and supervision of the
judiciary.

1480 Currently, there are 256 judges, 314 officers and around 4000 para-legal staff
associated with the judiciary, around 238 government attorneys and around 11,000
practising lawyers in Nepal. All the judges are law graduates with practical experience
either in the Bar or the justice sector for a number of years but competence is affected by
poor quality of legal education.

1485 In a nutshell the Nepali justice system has evolved over time learning more from its own
experience than blindly following any model of justice. Today it is based on strong
constitutional foundation and has a right focus. The courts are independent from the
executive and also enjoy functional autonomy. The fact that the Constitution enshrines a
very bold and comprehensive framework of rights, also by virtue of Nepal's commitment

²⁶ At the moment the commercial benches will hear cases under the Companies Act 2006, Secured Transaction Act 2006, Insolvency Act 2006 and the Competition Act 2006, but the NJA is engaged in conducting multi-sectoral discussion to explore the possibility of increasing the jurisdiction of these benches both in the short and the long term.

²⁷ See Nepal Interim Constitution, Art 103,109, 155

²⁸ See id, Art 102

²⁹ Nepal Interim Constitution, Art 102

³⁰ Nepal Interim Constitution, Art 107, This provision was also there in Art 88 of the NEP CONST 1990.

³¹ Judicial Administration Act of Nepal S 8.



1490 to human rights, the judiciary now is a central institution for processing constitutional, legal and social disputes and ensuring abidance to the rule of law, human rights.

1495 Amicable settlement of disputes through court referred mediation is a newly prioritised agenda of the justice system today. All the courts now have internalised mediation as one of the mainstream strategy of dispute settlement. The medium of court business is Nepali. However, the effectiveness of the justice system is affected by a very narrow canvas of law procedural wrangles and low investment in the judiciary. Periodic review of the legal framework is yet to become a prioritised agenda of the Legislature or the Law Commission.