

# Legal Issues Implicated by the Dalai Lama's Devolution of Power

*A briefing memorandum respectfully submitted to the Tibetan Government-in-Exile  
and participants in the May 2011 Tibetan National General Meeting*

*by*

Tibet Justice Center  
[www.tibetjustice.org](http://www.tibetjustice.org)  
May 2011



## **About Tibet Justice Center**

Tibet Justice Center – formerly the International Committee of Lawyers for Tibet – is a non governmental organization comprised of Tibetan and American lawyers, law professors, and advocates who for over twenty years have used legal action and education to advocate for human rights and self-determination for the Tibetan people.

Our ongoing mission includes collaborations with the Tibetan Government-in-Exile. We have conducted legislative and judicial trainings to help further the development of Tibetan democratic institutions and practices in exile. In 1997, we assisted in the rewrite of the Tibetan Charter for internal consistency and consistency with Indian law, and have contributed a range of reports, submissions to the United Nations, and other initiatives related to human rights, democracy, and governance.

## **Acknowledgements**

Tibet Justice Center wishes to thank US Tibet Committee and Students for a Free Tibet for their timely assistance in the production and distribution of this memorandum. We also wish to thank several anonymous reviewers and translators for their indispensable work.

## Executive Summary

- The Dalai Lama currently serves as both (1) head of *state* and (2) head of *government* of the Tibetan government-in-exile (TGIE), also known as the Central Tibetan Administration (CTA). While some governments combine the functions and powers of each in one person (e.g., the U.S. President), legally, they remain distinct and need not be vested in the same person (e.g., the British Queen and Prime Minister). These two roles should be distinguished for purposes of legally analyzing the Dalai Lama's imminent devolution of power.
- As head of *state*, the Dalai Lama symbolically represents the State of Tibet, which remains under foreign occupation. As head of *government*, the Dalai Lama exercises a host of executive powers on behalf of Tibet as the CTA's chief executive.
- Based on his public statements, the Dalai Lama wishes and intends to devolve his powers as head of *government*. This need not imply his resignation as head of *state*.
- Current information from the CTA's Charter Redrafting Committee does not make clear whether the Dalai Lama will remain Tibet's head of *state*. Additionally, the Committee's draft uses terminology that has no legal meaning, and proposes a specific type of spokesperson role for the Dalai Lama that may cause legal, procedural, and institutional problems now and in the future.
- To facilitate and preserve the legal status of the CTA as the continuation of the legitimate government of Tibet, Tibet Justice Center believes that it would be advisable for the Dalai Lama to remain Tibet's head of *state*. This role can be, and often is, purely symbolic or ceremonial in nature.
- The Dalai Lama's current powers as head of *government* will apparently be divided among the branches of the CTA. Tibet Justice Center believes that it would be advisable to distribute these powers so as to establish a system of constitutional checks and balances, an indispensable characteristic of modern democracies. Establishing such a system would enhance the legitimacy and esteem of the CTA in the eyes of the international community, ensuring its continuity as the only legitimate government of Tibet.
- Because of the potentially dramatic implications of the legal issues involved, Tibet Justice Center strongly recommends that the process of amending the Tibetan Charter to effectuate the Dalai Lama's devolution of power not be rushed. We are concerned that the currently announced schedule does not provide enough time for decision-makers to properly evaluate all factors. Rather, we recommend a timetable sufficient for a prudent, transparent, and democratic redrafting process. Haste is neither necessary nor advisable given the magnitude of the issues at stake.

## ***Legal Issues Implicated by the Dalai Lama's Devolution of Power***

This memorandum presents some of the chief legal considerations raised by His Holiness the Dalai Lama's intention to devolve his political power by means of amendments to the Charter of the Tibetans in Exile (the Charter). These amendments will affect the structure, organization, and efficacy of the Tibetan Government-in-Exile (TGIE), also known as the Central Tibetan Administration (CTA). They raise questions under both international and constitutional law. Tibet Justice Center therefore respectfully submits this memorandum in an effort to assist the CTA, the CTA's Charter Redrafting Committee, and other Tibetan decision-makers as they carry out the critical process of amending the Charter.

Factually, this memorandum relies on (1) the Dalai Lama's recent statements on his decision to devolve his political powers and (2) the information released to date by the Charter Redrafting Committee.

### **His Holiness's Two Current Roles: Head of State and Head of Government**

Any discussion of the devolution of the Dalai Lama's political powers must begin with a description of what those powers entail. Traditionally and currently, the Dalai Lama serves as both Tibet's head of *state* and head of *government*. Yet these roles should be legally distinguished. Many modern democracies separate the two roles and assign their respective powers to distinct persons and legal positions in government. In the process of redrafting the Charter, Tibetans must decide whether the two roles should be combined in a single governmental office or separated among two or more positions—and, if the latter, how the powers of each role (head of state and government, respectively) should be distributed.

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The draft preamble proposed by the Charter Redrafting Committee recognizes the dual role currently played by the Dalai Lama. It refers to him as the "head of the Tibetan nation [i.e., head of state] and as chief executive of the Tibetan administration [i.e., head of government]." While the Charter does not explicitly denominate the Dalai Lama as head of *state*, the totality of the document, including its preamble, clearly gives him this role. The Charter also currently provides that the Dalai Lama is head of *government*: under Article 19, he exercises ultimate executive authority.

Currently, as head of *government*, the Dalai Lama serves as the chief executive of the CTA, although the corresponding powers have increasingly been delegated to the Kalon Tripa. Those powers include, for example, approving bills passed by the Parliament-in-Exile, promulgating ordinances with the force of law, conferring honors, summoning or dissolving the Parliament-in-Exile, and authorizing referendums. The Dalai Lama also has the power to appoint certain officials, pursuant to Articles 63, 97, and 101.

As head of *state*, in contrast, the Dalai Lama represents the State of Tibet, which remains under foreign occupation. Unlike head of government, head of state need not be a political office with political power. Indeed, a head of state can be, and today often is, symbolic or ceremonial. For example, Queen Elizabeth II of England is the head of state of Canada.

Although Canada is governed by the Canadian Parliament under the leadership of the Prime Minister, Queen Elizabeth is the “personal symbol of allegiance, unity and authority for all Canadians.”

### **The Dalai Lama’s Call for “Devolution”: Devolution as Head of Government?**

All of the Dalai Lama’s statements publicly available in English indicate his desire to devolve his political authority as head of *government*. To the best of our knowledge, however, the Dalai Lama has not indicated a desire to step down as Tibet’s ceremonial head of *state*. This distinction has potentially serious legal consequences.

The Dalai Lama has consistently talked about “devolving” his political power, which suggests giving up his executive functions as head of *government*. For example, in the Dalai Lama’s March 10, 2011 statement, he declared, “Tibetans need a leader, elected freely by the Tibetan people, to whom I can devolve power.” In his March 14 speech to Parliament, he repeated his desire to “devolve [his] formal authority to . . . an elected leadership,” adding that he seeks to be “completely relieved of formal authority.” Then, on March 19, he stated, “What is happening is that Ganden Phodrang is relinquishing its political responsibilities.” (Ganden Phodrang refers to what became the traditional form of government in Tibet, which the Fifth Dalai Lama established in 1642 and which has been in continuous operation since then.)

Devolution refers to a downward delegation of power. But the delegator may retain his or her formal role. For example, a king might devolve certain powers to an elected parliament, transferring, in effect, his role as head of government to that parliament, but at the same time retaining his traditional role as head of state. Legally, for the king to give up his role as head of state as well, the constitutional structure would have to be altered to eliminate the concept of the king as head of state. In short, the devolution of political power by a former ruler need not, and ordinarily does not, mean that the ruler has given up his role as head of state.

### **The Charter Redrafting Committee’s Preliminary Draft: Unanswered Questions**

Based on the English translation of the preliminary draft issued by the Charter Drafting Committee on April 21, 2011, His Holiness the Dalai Lama will not remain head of government. But it is unclear whether he will remain head of state. At a minimum, the amended Charter should reflect the intention of the Dalai Lama and the Tibetan people in this regard.

The draft preamble clearly vests the Dalai Lama’s “powers and responsibilities” in the CTA’s elected leadership. “Powers” apparently refers to the political rights that the Dalai Lama currently has under the Charter. A basic tenet of legal interpretation holds that a text should not be read to render a word or phrase meaningless if that result can be avoided. The word “responsibilities” therefore presumably means something different from “powers.” “Responsibilities” most likely refers to the Dalai Lama’s duties under the Charter, for example, to appoint the Chief Justice Commissioner under Article 63, which uses the mandatory “shall” rather than the permissive “may.” In sum, the draft makes it

unmistakable that the Dalai Lama relinquishes both his rights and his obligations as head of the government of Tibet.

But draft Article 1 is far less clear on whether the Dalai Lama remains Tibet's head of state. It calls the Dalai Lama the "guardian and protector," the "supreme leader," and the "symbol of the Tibetan identity and unity." These phrases are ambiguous and lack any clear legal meaning. The phrase "supreme leader," for example, suggests significant substantive

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powers and therefore raises a series of unanswered questions about which substantive powers vest in the "supreme leader."

Quite apart from its ambiguity, Tibet Justice Center strongly recommends that the phrase "supreme leader" be dropped from the current draft. To the international community, "supreme leader" is associated with despots wielding absolute power, such as the Ayatollah Ali Khamenei of Iran and North Korean dictator Kim Jong-il. Given the phrase's association in the popular mind with autocratic, tyrannical government, it would be inadvisable in the extreme for the Dalai Lama to be referred to as the "supreme leader" of Tibet.

Furthermore, unless there is a strategic reason for leaving ambiguous the Dalai Lama's status as the head of state, we recommend that the amended Charter make clear whether he will retain his traditional ceremonial role as head of state. For example, the constitution of Sweden states plainly: "The King or Queen who occupies the throne of Sweden in accordance with the Act of Succession shall be the Head of State." If there is a similar intention with respect to the Dalai Lama, it is advisable to eliminate any questions and uncertainties.

### **The Charter Redrafting Committee's Preliminary Draft: A Problematic Proposed Role**

Draft Article 1 goes on to say that the Dalai Lama has three powers:

- to "provide advice and encouragement" to the Tibetan people,
- to "provide guidance" to the government, and
- to be an international spokesperson "on behalf of the Tibetan people."

The first two roles conform to those of a head of state. For example, a constitutional monarch such as Queen Elizabeth II, who exercises no substantive power, nonetheless may provide non-binding advice and guidance to the elected government of the United Kingdom. The third role, however, may well be legally problematic now and in the future.

If the Charter vests the Dalai Lama with the *constitutional* right to speak internationally on behalf of the State of Tibet, then it vests him with a power that conventionally belongs to a head of government, not a symbolic head of state. Under international law precedents, providing a right in the Charter for the Dalai Lama to speak "on behalf of the Tibetan people" might be understood as investing him with the right to bind the State of Tibet and

the Tibetan government. This would be in tension with the legal power of the Kalon Tripa as head of government.

Tibet Justice Center recognizes the motivation for this provision; that is, to ensure that the Fourteenth Dalai Lama can continue dialogue with China and other foreign powers. But it is neither legally necessary nor advisable to enshrine this power in the Charter. The CTA is always free to appoint agents, including the Fourteenth Dalai Lama, to act as legal representatives of the CTA in foreign affairs — and this power can include “carte blanche” diplomatic authority to enter into agreements on behalf of Tibet.

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Furthermore, it should be appreciated that any power vested in the Dalai Lama by the Charter will one day be exercised by the Fifteenth Dalai Lama, whose identity, of course, is not yet known. Such constitutional powers might even be claimed by an illegitimate Fifteenth Dalai Lama selected by Beijing. This is a complication perhaps best avoided at the outset. Tibet Justice Center therefore recommends that the Fourteenth Dalai Lama’s power to represent the CTA internationally be based on an appointment pursuant to the political authority of the head of government rather than enshrined in the Charter.

### **International Law Considerations: Preserving the Central Tibetan Administration’s Legitimacy as Government-in-Exile**

One of the most important legal aspects of the Dalai Lama’s devolution of power is to preserve the legitimacy and authority of the CTA as the only true government of Tibet. The CTA is not simply the administration of roughly 150,000 Tibetan exiles; it is the historical and legal “continuation of the government of independent Tibet.”<sup>1</sup> Any constitutional redrafting of the Charter should avoid jeopardizing the CTA’s valid claim to be the “continuation” of the legitimate government of the State of Tibet.

The concept of a government-in-exile is not new to international law. More than half a century ago, the United States Court of Appeals explained that under international law, “when a territory is overrun by its enemies . . . the government in exile . . . is the only agency representing the country with which a foreign government can deal.” *Delany v. Moraitis*, 136 F.2d 129 (4th Cir. 1943).

Yet the status of a government-in-exile in international law depends on several factors, including, under contemporary international law, its legitimacy as the genuine democratic representative of the people whom it governs. Great care must be taken to ensure that the legal legitimacy of the CTA remains unvarnished by the changes made to the Charter. Among other things, this means that the CTA would be well-advised to retain its status as the continuation of the legitimate government of the State of Tibet, which remains under foreign occupation. Complications might otherwise develop.

One legal scholar noted, for example, that when the government of the Netherlands

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<sup>1</sup> Please see the CTA’s website at <http://www.tibet.net/en/index.php?id=14>.

relocated to London during World War II, some questioned whether this body was, legally, a continuation of the legitimate Dutch government. In an absolute monarchy, a king alone can establish a government-in-exile because he holds all legislative, executive, and judicial power. The Dutch constitution, in contrast, divided executive and legislative power between the king (in London) and the States-General (divided between London and the Netherlands). Because the Dutch government-in-exile did not represent the totality of the Dutch government, there were legal complications in considering the Dutch government-in-exile as the sole legitimate representative of the Netherlands.<sup>2</sup>

It is also important to recall that, “a ‘government’ is not a legal person but that it is the (executive) organ of the legal person called ‘State’.”<sup>3</sup> Essentially, the government is the organ of the state with the plenary and exclusive competence in international law to represent that state.

What does this mean in the context of the CTA’s role as the government-in-exile of Tibet? Tibet, as a State, has legal personality under international law. The CTA exercises that personality on behalf of the State of Tibet. The CTA, in other words, is the organ

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representing the State of Tibet, and so the link between the CTA and the State of Tibet should be preserved to the greatest extent possible.

To date, the CTA has maintained a clear continuity with the pre-1959 legitimate government of Tibet. When the Dalai Lama escaped to India in 1959, he declared: “Wherever I am, accompanied by my government, the Tibetan people recognize us as the Government of Tibet.” Despite changes including democratization, the essential structure of the Tibetan government remains unchanged: the Dalai Lama sits at the apex of the government, as successive Dalai Lamas have done since the Fifth Dalai Lama in 1642. The Tibetan government-in-exile is therefore the clear legal continuation of the pre-1959 Tibetan government.

But it is an open legal question how much a government-in-exile can change while still preserving continuity sufficient to maintain its legal legitimacy. International law is unsettled on this point. Consequently, it would be advisable to preserve the structure of the Tibetan government-in-exile, with the Dalai Lama at the apex as head of state, even though the elected leadership may soon exercise all real political power. (Indeed, the transition to a democracy strengthens the CTA’s legitimacy in conformity with contemporary legal norms on the right of all peoples to democratic governance.) Conversely, doing away with the Dalai Lama’s role as head of state would not help, and might harm, the CTA’s claim to be the continuation of the legitimate government of Tibet.

Moreover, maintaining the Dalai Lama’s role as head of state is fully consistent with accepted principles of modern democracy. There is no legal obstacle to a structure akin to constitutional monarchy. Such a structure is described below.

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<sup>2</sup> See B. Landheer, *The Legal Status of the Netherlands*, 41 *Michigan Law Review* 644-64 (1943).

<sup>3</sup> S. Talmon, *Recognition of Governments in International Law – With Particular Reference to Governments in Exile*, 199 (Oxford University Press, 2001).

## **Balancing a Traditional Government with Modern Democracy: “Constitutional *Ganden Phodrang*”?**

Under a system that some commentators have described as “Constitutional *Ganden Phodrang*,” a system comparable to constitutional monarchy, the CTA could be further democratized while retaining its fundamental legal structure. Historically, the concept of a constitutional monarchy has been the result of an evolution from rule by a monarch to rule by democratically elected institutions of governance. Since it was an evolution, there is continuity of government, and indeed the formal structure of the government – with the monarch as head of state – remains legally unchanged, despite the eventual evolution to full democracy. The classic example of constitutional monarchy is the United Kingdom, whose head of state is currently Queen Elizabeth II but whose head of government is currently Prime Minister David Cameron.

Under “Constitutional *Ganden Phodrang*,” the ceremonial head of state would be the Dalai Lama (or a Regent if a Dalai Lama is a minor or has not been identified). The Dalai Lama would explicitly be removed from a political role, similar to the expectation that Queen Elizabeth II does not exercise political power. The Dalai Lama would therefore be freed of all political responsibilities related to governing, as he desires. The same would apply for the future Fifteenth Dalai Lama.

*One option: “Constitutional  
Ganden Phodrang”*

At the same time, the Dalai Lama could symbolically continue to represent the Tibetan people and nation, as he has for centuries, and all official acts and legislation could be done in his name (just as the official acts and laws in the United Kingdom refer to the Queen). The Tibetan government would still be referred to as the government “of His Holiness the Dalai Lama,” even though, similar to the United Kingdom, real political power would be exercised by the CTA’s elected leadership within a framework of democratic institutions and checks and balances.

Beyond the Dalai Lama’s symbolic role, there are other powers that he might be given in a “Constitutional *Ganden Phodrang*.” Some constitutional monarchies, such as Sweden, give the King essentially no executive powers at all. By contrast, the British model makes the Queen the theoretical chief executive officer; for example the Queen plays a formal role in the issuance of legislation, even though the actual political power lies with Parliament.

Many constitutional monarchs also play a role as the country’s chief diplomatic officer; this role includes receiving the credentials of foreign ambassadors and engaging in formal correspondence with other heads of state. Lastly, many constitutional monarchs retain the right to grant titles and honors.

### **Constitutional Law Considerations: Suggestions on Checks and Balances**

Whether or not the Dalai Lama remains head of state, his current powers as head of government appear set to be devolved to the elected leadership. In proposing on April 11 that these powers be “divided among the elected leadership,” the Charter Redrafting Committee appears to be supporting a system of checks and balances. Tibet Justice Center believes that this is advisable, because it conforms to the emerging right to democratic

governance under contemporary international law, and therefore bolsters the CTA's international legitimacy. We present below some suggestions on how such a constitutional system might be designed.

Checks and balances are an important part of a functioning democracy. According to U.S. President James Madison (in office 1809-1817), the principal drafter of the U.S. Constitution, "the structure of the government must furnish the proper checks and balances between the different departments" to prevent too much power from accumulating in any single branch of the government – the definition, in Madison's view, of tyranny.

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Under a system of checks and balances applicable to the CTA, there are a number of options. For example, the Kalon Tripa will likely be able to veto legislation by refusing to sign a bill, as the Dalai Lama can currently do. But Parliament might be given the power to override the Kalon Tripa's veto by a two-thirds (2/3) vote (there is no current right to override the Dalai Lama's veto), just as the U.S. Congress may override a presidential veto under the U.S. Constitution.

Additionally, Parliament could be given a new right of oversight over the Kashag (Cabinet), including the power to form investigative committees and to compel testimony from administration officials. This is a power that the U.S. Congress (the legislature), as in many democracies, exercises over the executive branch. It is a power that has often been of critical importance in ensuring transparency and accountability.

Parliament might retain its right to approve major appointments in the administration, as well as the power to set the government's budget. Additionally, Parliament might be given the power to impeach the Kalon Tripa, Justice Commissioner, or Election Commissioner for a set of well-defined serious crimes with a three-fourths (3/4) vote. This is a power that the U.S. Congress holds as a last resort.

Regarding the Judiciary, the Kalon Tripa would presumably appoint Justice Commissioners with the approval of Parliament. Once appointed, the Justice Commissioners might be given life tenure or another form of job security to ensure their independence, an important protection in many modern judicial systems.

Justice Commissioners might also be given the power to hear cases alleging that a piece of legislation is unconstitutional or that a government official violated a law or regulation. In the United States, the power of judicial review is an important check to ensure that the executive and legislature act constitutionally.

These are just a few of the possible ways that some of the Dalai Lama's current political powers could be redistributed to ensure an effective and durable system of checks and balances. We provide them as examples, and we hope they illustrate a few of the manifold legal issues at stake in effectuating the Dalai Lama's devolution of power to the branches of the CTA.

## The Importance of Careful Deliberation: Tibet Justice Center's View

This memorandum has presented selected legal considerations of implementing the Dalai Lama's devolution of political power. Because of the short timeline announced by the Parliament, Tibet Justice Center lacked sufficient time in which to conduct a comprehensive legal review or prepare a more comprehensive document. Moreover, without knowing the content of the final recommendations of the Charter Redrafting Committee, it is, of course, impossible to provide thorough legal commentary.

Our hope is to stress the importance of careful consideration of the legal issues involved in the Dalai Lama's devolution of power and to encourage a prudent, transparent, and well-considered amendment process. This process will affect the constitutional structure of the CTA and may affect the very legitimacy, real or perceived, of the CTA as the sole, true government of Tibet.

Given the critical nature of the issues, Tibet Justice Center respectfully suggests that these decisions should not be rushed. We are concerned that the currently announced schedule does not provide enough time for decision-makers to properly evaluate all factors. We believe that the Parliament's historic deliberations should be carefully conducted, with adequate legal research, full transparency, and widespread public consultation and participation.

Tibet Justice Center also believes that it would be prudent to leave the final decisions to the incoming Fifteenth Parliament session, whose newly elected members, by virtue of their recent election, will enjoy greater democratic legitimacy as popular representatives of the people of Tibet, both in exile and within the occupied State of Tibet. Moreover, the Fifteenth Parliament includes a significant number of experienced and returning representatives, addressing any concerns over continuity of the involved decision-makers and freshmen inexperience.

*These decisions should not be rushed. Tibet Justice Center is concerned that the current schedule does not provide enough time for decision-makers to properly evaluate all factors.*

It is therefore the recommendation of the Tibet Justice Center that this month's Tibetan people's meeting and special session of Parliament be used to *begin* the historic discussion and debate about amending the Charter of the Tibetans in Exile. We recommend that the final decision be postponed to allow the Parliament – and the entire Tibetan people – to fully consider the enormity of the decisions that are being undertaken, in order to reach the best decision possible.