THE ROLE OF THE JUDICIARY AND THE SUPREME COURT IN THE CONSTITUTION-MAKING PROCESS: THE CASE OF NEPAL

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This article examines the role of the judiciary in Nepal after the adoption of the new Constitution and examines its position via the lenses both of the separation of powers and the rule of law. By comparing the present Constitution with the previous constitutional documents of Nepal, it seems that the constitutional drafters on the one hand aimed to enhance the institutional independence of the Supreme Court, the head of the judiciary, but on the other hand, they limited its jurisdiction pertaining to the interna corporis and to the constitutionality review of constitutional amendments.

Furthermore, this article argues that the judiciary does not simply represent one power in the separation of powers system and does not simply hold the role of the gatekeeper of the rule of law. More importantly, as it was shown in the Nepalese case, the judiciary, precisely the Supreme Court, can play a very proactive and creative role in the constitution-making process. Hence, this article offers justifications, both formal and substantive, for the intervention of the Supreme Court in the constitutionalization of the new legal order. This article argues that the existence of an interim constitution may grant direct or indirect authority to the court to intervene in the constitution-making process, for instance by controlling the constituent assembly, reviewing its acts and even certifying the final constitutional document. In addition, the courts' participation in the constitution-making process might be justified on substantive grounds, such as natural law principles, common constitutional

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principles, or the so-called supra-constitutional principles that exist in every democratic society and are pervaded in the general belief of the people.

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I. INTRODUCTION

On November 21, 2006, the Comprehensive Peace Accord (CPA), which was signed between the Government of Nepal and the Unified Communist Party of Nepal, terminated the Nepalese decade-long civil war that started in 1996. This accord also marked a fundamental constitutional change as it paved the way for the republican form of the polity. However, the road to a new constitutional order was not a straightforward process; a long transitional period intervened, with the adoption of an Interim Constitution, while a number of deadlines were not met, leading to a constitutional crisis.[1]

The new Constitution of Nepal, which was adopted in September 2015, was the key element of both the CPA of November 2006 and the Interim Constitution of 2007, signaling the fresh start for a new constitutional order.[2] The 2015 Constitution of Nepal is a very long document, and contains thirty-five Parts, 308 Articles, and nine Schedules. Part 11, entitled 'Judiciary', regulates the judicial branch and it dedicates thirty-one Articles, while Part 12 is dedicated to the attorney general with five Articles. In addition, relevant provisions are scattered throughout the whole document; for instance, Article 300 regulates a number of transitional arrangements with regard to the judiciary.[3]

Interestingly, a decision of the Supreme Court of Nepal in 2011 played a key role and spurred the adoption of the new Constitution.[4] Furthermore, the Supreme

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1 CONST. (INTERIM) OF NEPAL, 2007.

2 *Comprehensive Peace Accord*, signed between Nepal Government and the Communist Party of Nepal (Maoist) on Nov. 21, 2006, art. 3(2).

3 CONST. OF NEPAL, 2015, art. 300.

4 *Bharatmani Jungam & others v. Office of the President & others* [Supreme Court] Nov. 25, 2011, Writ No. 68-ws-0014, 4–5 (Nepal) at http://www.supremecourt.gov.np/web/assets/downloads/judgements/Constitution_Assembly_Case.pdf (last date visited, July 20, 2018).

Court had also made a remarkable intervention, which was also seen as controversial, issuing an interim order against the implementation of the 16-Point Agreement.[5] Without doubt, such key decisions elevated the Supreme Court as a quasi-player in the constitution-making process. At the same time, they have demonstrated the inherent tension that exists in the institution of the judiciary between judicial activism and judicial restraint.

This article will proceed as follows. First, it will discuss the role of the courts in the separation of powers system, and it will discuss the particular configuration of the separation of powers system in Nepal in relation to the Supreme Court. Second, it will analyze the significance of the rule of law in the Nepalese constitutional order, and the role of the courts as guardian to the rule of law, examining the configurations in the Constitution of Nepal to safeguard the independence and the impartiality of the Supreme Court. Thirdly, it will analyze the role of the Supreme Court in the constitution-making process. Focused on the experience of Nepal, and referring to the precedent of South Africa, it will elaborate on the justifications, formal and substantive, for a court to participate in the constitution-making process.

II. SEPARATION OF POWERS AND THE SUPREME COURT OF NEPAL

A. The Role of the Judiciary Within the Separation Power's Model of Nepal

The judiciary system of Nepal has, at the top of the hierarchical pyramid, a Supreme Court with the final power to interpret the Constitution.[6] But the structure of the constitutional jurisdiction is based on a diffuse model of constitutional review[7] This model, which is opposed to the concentrated model of constitutional review, signals that the Supreme Court does not have the exclusive power to interpret the Constitution, as lower courts also have the power to interpret the Constitution and decide on the constitutionalilty of laws. However, the Supreme Court has the final word on the interpretation of the Constitution and it sets the legal precedent that lower courts must follow.[8] At the same time, the Supreme Court exercises supervisory role over the inferior courts.[9]

Article 133 of the 2015 Constitution of Nepal, entitled "Jurisdiction of the Supreme Court," provides the scope of the review of this Court, which includes the federal review of subnational legislation, the constitutional interpretations and the

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[5] "Four parties defend 16-point agreement," *The Himalayan Times*, June 20, 2015; Akhilesh Tripathi, "Court vs. Constituent Assembly," *New Business Age*, June 17, 2015.

[6] CONST. OF NEPAL, 2015, art. 128, cl. 2. Article 127 of the Constitution of Nepal describes in detail the structure of the judiciary and it recognizes in Clause 1 a three-tier structure: Supreme Court, High Court, and District Court. *See* CONST. OF NEPAL, 2015, art. 127, cl. 1. In addition, in paragraph 2 there is a provision for the establishment or extra courts if considered necessary, such as bodies for alternatives dispute resolution or judicial bodies to adjudicate cases at the local level. *See* CONST. OF NEPAL, 2015, art. 127, cl. 2.

[7] For more details on the different models of constitutional review, *see* MAURO CAPPELLETTI, *THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE* (1989). In particular about how the diffuse judicial review work, *see also* Ori Aronson, *The Democratic Case for Diffuse Judicial Review in Israel, in* ISRAELI CONSTITUTIONAL LAW IN THE MAKING 121 (Gideon Sapir et al. eds., 2013).

[8] CONST. OF NEPAL, 2015, art. 128, cl. 4.

[9] CONST. OF NEPAL, 2015, art. 128, cl. 3.

constitutionality of the legislation, and the review of appeals of decisions that have been initiated and executed by the High Court.[10] In particular, Clause provides that:

> Any Nepali citizen may file a petition in the Supreme Court to have any law or any part thereof declared void on the ground of inconsistency with this Constitution because it imposes an unreasonable restriction on the enjoyment of the fundamental rights conferred by this Constitution or on any other ground, or any law formulated by the Provincial Assembly is inconsistent with the law formulated by Federal Parliament or any law formulated by Municipal Assembly or Village Assembly is inconsistent with the law formulated by Federal Parliament or Provincial Assembly, and extra-ordinary power shall rest with the Supreme Court to declare that law void either ab initio or from the date of its decision if it appears that the law in question is inconsistent.[11]

However, the jurisdiction of the judiciary regarding constitutional review is not unlimited. Article 133 Clause 4 Proviso explicitly limits the jurisdiction of the Supreme Court to interfere with the internal affairs of the Federal Parliament to review the proceedings and decisions of the Federal Parliament concerning violation of its privileges and any penalties imposed.[12] It is unclear, though, whether the courts can intervene if they find error in jurisdiction or excess of jurisdiction.[13]

B. The Distinctive Characteristic of the Supreme Court

In theory, the main difference between a supreme court and a constitutional court is the concentrated or diffuse control of the constitutionality of acts of the legislature. In countries like the United States with a supreme court at the top of the judicial pyramid, every court has the power of constitutional review. However, the Supreme Court has the final verdict on the interpretation and sets the precedent.[14] On the other hand, in countries with a constitutional court, the so-called "Kelsenian" Model, only the Constitutional Court has jurisdiction on constitutional law matters.[15] However, reading provision 133 in the Constitution of Nepal, a paradox emerges pertaining to the jurisdiction of the Supreme Court. Despite the fact that a Supreme Court is established in Nepal with the jurisdiction of hearing appeal cases from the High Courts, in reality it has elements of a constitutional court.[16]

This paradox is explained by the constitutional history of Nepal. The drafters of the new Constitution took into account the quite successful institutional

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[10] CONST. OF NEPAL, 2015, art. 133.

[11] CONST. OF NEPAL, 2015, art. 133, cl. 1.

[12] CONST. OF NEPAL, 2015, art. 133, cl. 3

[13] Likewise, in the U.K., where courts do not have the power to review the *interna corporis*, in *Annisminic* case, the House of Lords showed reluctance to accept provisions aiming to exclude their jurisdiction in judicial review. *See Anisminic Ltd v. Foreign Compensation Commission* [1968] UKHL 6 [13].

[14] *See* Lech Garlicki, *Constitutional Courts Versus Supreme Courts*, 5 INT'L J. CONST. L. 44, 46 (2007).

[15] *Id.*

[16] CONST. OF NEPAL, 2015, art. 133, cls. 4–5.

role of the preexisting Supreme Court, which was first established by the Supreme Court Act of 1956 under the Interim Constitution of 1951.[17] Thus, path dependence can explain why the drafters would not experiment and introduce a constitutional court that would function along with a supreme administrative court or a supreme private law court.[18]

However, the drafters of the new Constitution have introduced an innovation that could set the paradigm for future constitution-making. In particular, Article 137, entitled, "Formation of the Constitutional Bench," introduces a constitutional court within the Supreme Court comprised of the Chief Justice and four other Justices appointed by the Chief Justice on the recommendation of the Judicial Council.[19] According to Clause 2, the jurisdiction of the Constitutional Bench would be "related to disputes over the jurisdiction between the Federation and Province, among Provinces, between a Province and local level and among the local levels [of government]"[20] and "related to disputes concerning the election of members of the Federal Parliament or Provincial Assembly, and ineligibility of the member of the Federal Parliament or Provincial Assembly."[21]

The original proposal by the State Restructuring Committee to adopt a Constitutional Court along with the Supreme Court was among the points agreed upon in the 16-Point Agreement among the major political parties before the adoption of the final constitutional document.[22] However, fears about possible conflicts between the Supreme Court and the Constitutional Court on their status and jurisdictions have led to the innovative option of the Constitutional Bench within the Supreme Court.[23]

Apart from the introduction of the Constitutional Bench, the framers of the Constitution carried forward most of the provisions on the judiciary from the 2007 Interim Constitution as well as Nepal's previous constitutions. This is a sign of continuity, which is essential for political and democratic stability.

Having said that, it is noteworthy that the scope of the jurisdiction of the Supreme Court was altered. In particular, the drafters of the new Constitution have removed from the jurisdiction of the Supreme Court the extraordinary counter-majoritarian powers of the Constitution of 1990. According to Article 116, Clause 1 of the 1990 Constitution, the Court could review constitutional amendments on the basis that they were contrary to the spirit, i.e., the basic features, of the Preambleof the Constitution.[24] However, under the new Constitution the Supreme Court of Nepal

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[17] *See generally* Richard Stith, *Unconstitutional Constitutional Amendments: The Extraordinary Power of Nepal's Supreme Court*, 11 AM. U. J. INT'L L. & POL'Y 47 (1996) (discussing the nature and the authority of the Supreme Court of Nepal after the adoption of the Constitution of 1990).

[18] *See* DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (1990) (discussing details of path dependence and how it affects institutions).

[19] CONST. OF NEPAL, 2015, art. 137, cl. 1.

[20] *Id.* art. 137, cl. 2(a).

[21] *Id.* art. 137, cl. 2(b).

[22] Agreement between four major parties in the Constituent Assembly on June 8, 2015 [13] available at http://www.satp.org/satporgtp/countries/nepal/document/papers/16-point_Agreement.htm (last date visited Feb. 12, 2019) [hereinafter Constituent Assembly Agreement].

[23] *See* Mohan Lal Acharya, *Constitution-making Process in Nepal: An Assessment and Lessons for the Future*, *in* 1 PARTICIPATORY CONSTITUTION MAKING IN NEPAL: ISSUES OF PROCESS AND SUBSTANCE 43, 71 (Budhi Karki & Rohan Edrisinha eds., 2014).

[24] CONST. OF NEPAL, 1990, art. 116, cl. 1.; *see also* Stith, *supra* note 17, at 48.

no longer has the power to intervene in the amendment process and review the constitutionality of amendments to the Constitution.

III. SAFEGUARDS FOR THE INDEPENDENCE OF THE JUDICIARY

A. Rule of Law in the Constitution of Nepal

Regardless of the form of the separation of powers or the balance of powers between the legislative and the executive branches of the government, both branches are the majoritarian expression of the society and the democratic institutions. In these institutions, the holders of the office are elected by popular vote and are the representatives of the people and society, channeling the views of the majority into the making of policy and law.

On the other hand, the judiciary is the guardian of the rule of law and a de facto link between democracy and the rule of law. In the Constitution of Nepal, the concept of the rule of law is mentioned four times, once in the Preamble and in three Articles,[25] and is included as part of the "Directive Principles."[26] These multiple references to the rule of law in the Constitution mark the gravity of the principle within the constitutional order and, indirectly, the importance of the judiciary as the guardian of the rule of law. However, the text of the Constitution does not offer instructions about how the principle of the rule of law is defined.

B. Safeguards to the Rule of Law: The Independence of the Judiciary

The autonomy of institutions exercising conferred law-making power from the British Parliament in the early twenthieth century was an issue addressed by the Donoughmore Committee, the subversion of the Weimar Constitution, and more recently the Watergate political scandal that occurred in the United States in the 1970s.

Challenges to the achievements of the rule of law are not a narrative of the past. Prima facie, the courts are entrusted with the role of safeguarding the rule of law. With judicial review, courts treat cases against the abuse of administrative actions which contradict primary legislation, and with constitutional review they treat cases when law makers adopt primary legislation that contradicts the constitution. Nevertheless, judicial review at its core depends heavily on what is called judicial independence.[27] If the judiciary is not shielded with constitutional guarantees regarding the selection and removal of the judges, tenure, and overall conditions of service and benefits, then the judiciary is vulnerable to political and external pressures that would jeopardize the protection of the rule of law. Bingham, who has outlined eight important aspects of the rule of law, included among them the

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[25] CONST. OF NEPAL, 2015, arts. 50, cl. 1, 51, cl. 2(b), and 56, cl. 6.

[26] *Id.* art. 50, cl. 1.

[27] *See generally* James Melton & Tom Ginsburg, *Does De Jure Judicial Independence Really Matter? A Reevaluation of Explanations for Judicial Independence*, 2 J. L. & CTS. 187 (2014) (providing additional information about judicial independence).

independence of the judiciary and stressed that judicial and other adjudicative procedures must be fair and independent.[28]

The independence of the judiciary was one of the central concerns of the drafters of the new Constitution of Nepal. Within the 16-Point Agreement, which was reached among the major political parties and spurred the finalization of the draft constitution, Point 11 stated that "an independent, impartial and efficient judicial system will be formed as per the concept of independent judiciary."[29]

Accordingly, the Preamble of the Constitution of Nepal has a very specific reference to the nature of the judicial system and its interaction with other state organs. In particular, it states that the people of Nepal "express[] commitment to create the bases of socialism by adopting democratic norms and values, including [among others] an independent, impartial and competent judiciary, and the concept of rule of law."[30]

In addition, the Constitution of Nepal includes a number of institutional guarantees to protect the independence of the Supreme Court. To begin with, the appointment and the selection of judges is of paramount importance for their impartiality and personal independence from political influences. The selection of the Chief Justice and of the Justices of the Supreme Court is regulated by Article 129, Clause 2, which states that the "President shall appoint a Chief Justice on the recommendation of Constitutional Council and Justices of the Supreme Court on the recommendation of Judicial Council."[31] Therefore, both the Chief Justice and the Justices of the Supreme Court are appointed by the Head of the State and the leader of the executive branch, indicating the indirect political legitimacy of the members of the Supreme Court. [32]

However the Chief Justice is recommended by the Constitutional Council, which is a special body "for making recommendations in accordance with this Constitution for appointment of Chief Justice, the chief and officials of constitutional bodes."[33] The Constitutional Council consists of both high ranking political and judicial officials, in particular, the Prime Minister (as the Chairperson), the Chief Justice, the Speaker of the House of Representatives, the Chairperson of the National Assembly, the Leader from the Opposition Party in the House of Representatives, and the Deputy Speaker of the House of Representatives.[34] The composition of the Constitutional Council, which represents the political spectrum (including both the governing and opposition parties) undoubtedly shows the gravity of each recommendation. As for the appointment of the Chief Justice, political actors with higher status are included in the appointment process.

On the other hand, the Justices of the Supreme Court are appointed by the Judicial Council which makes "recommendations and give[s] advice in accordance with this Constitution concerning the appointment of, transfer of, disciplinary action against, dismissal of Judges, and other matters relating to judicial administration."[35]

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[28] *See* TOM BINGHAM, THE RULE OF LAW (2011).

[29] Constituent Assembly Agreement, *supra* note 22.

[30] CONST. OF NEPAL, 2015, pmbl.

[31] *Id.* art. 129, cl. 2.

[32] *Id.* art. 61.

[33] *Id.* art. 284, cl. 1.

[34] *Id.* art. 284, cl. 2.

[35] CONST. OF NEPAL, 2015, art. 153, cl. 1.

The Judicial Council, which includes as members the Chief Justice (as the Chairman), the Federal Minister for Law and Justice, a senior-most Justice of the Supreme Court, a legal expert nominated by the President on the recommendation of the Prime Minister, and a senior advocate to be appointed by the President on the recommendation of the Nepal Bar Association,[36] indicate again a combination of legal and political views, though its members are of lower stature compared to the Constitutional Council.

This distinction between the appointment of the Chief Justice and the other Supreme Court Justices relies on the idea that the Chief Justice is responsible for several constitutional duties regarding the organization of the courts and the administration of the judiciary. In particular, the Chief Justice appoints, on the recommendation of the Judicial Council,[37] the Chief Judge and Judges of the High Court and the Judges of the District Courts.[38]

Furthermore, the impartiality and independence of judges is guaranteed by the constitutional protection of their salary and benefits, which cannot be altered by the political branches of the government.[39] Article 130 Clause 4 provides that "the remuneration and other conditions of service of the Chief Justice and other judges of the Supreme Court shall not be altered to their disadvantage."[40]

However, this safeguard is not absolute. The following sections clarify that the protection for judges of their remuneration and of other benefits "shall not apply in case of a declaration of a state of emergency due to severe economic breakdown."[41] While protection of judges' salaries shields the judiciary from external pressures and guarantees the delivery of unpopular decisions for the executive and the legislature, the mandatory retirement age for the Chief Justice and the Justices of the Supreme Court at the age of 65 as it is prescribed in Article 131 Section (b)[42] leaves room for indirect political pressure. Melton and Ginsburg argue that judicial independence is enhanced only if it is for the life of the judge.[43] To put it differently, the foreseeable vacancy of the position of the Chief Justice or of several seats in the Supreme Court due to the retirement age provision might create a competition among the judges on who is going to be the favorite to the legislative and executive branches to be appointed for the replacement, thus affecting their impartiality. However, the appointment process via the Constitutional Council and the Judicial Council, which are composed by different political actors, might minimize the risk derived from the mandatory retirement age.[44]

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[36] *Id.* art. 153, cl. 2.

[37] *Id.* art. 140, cl. 1.

[38] *Id.* art. 149, cl. 1.

[39] *See* CONST. OF NEPAL, 2015, art. 130. Likewise, Articles 141 and 149 provide similar protection for the condition of service and the benefits of chief judge and judges of the high court and of the judges of district courts, respectively.

[40] *Id.* art. 130, cl. 4.

[41] *Id.* art. 130, cl. 4. Likewise, Articles 141(3) and 149(5) provide the very similar exception for the chief judge and judges of the high court and of the judges of district courts, respectively.

[42] *Id.* art. 131.

[43] James Melton & Tom Ginsburg, *Does De Jure Judicial Independence Really Matter? A Reevaluation of Explanations for Judicial Independence* (Coase-Sandor Institute for Law & Economics Working Paper No. 612, 2014) at 187, 195.

[44] *Id.* at 187. *See also id.* at 196 (arguing that "appointment processes that involve a judicial council or two or more actors [enhance] judicial independence.").

Furthermore, the independence of the judiciary can be further shielded if the members of the court are not under constant threat of being removed from office. In Article 101,[45] the Constitution of Nepal sets the conditions for the impeachment of the Chief Justice and the Justices of the Supreme Court. Importantly, this Article sets a high threshold for successful impeachment. It requires a proposal of a one-fourth majority of the total number of the members of the House of Representatives based on specific grounds of serious violation of the Constitution and law, such as incompetence, misbehavior or failure to discharge the office's duties in good faith, or an inability to discharge the duties because of a physical or mental impairment.[46] On the top of that, the motion must pass by a two-thirds majority of the total number of the members of a joint session of both Houses of Federal Parliament.[47]

In addition, judicial independence is also shielded from external forces by Article 132, which sets a number of limitations that allow judges to focus on their task.[48] In particular "the Chief Justice or Judge of the Supreme Court shall not be engaged in or deputed to any other assignment except that of a Judge" with the exception of judicial inquiries.[49]

It seems that the drafters of the new Constitution have vested the judiciary with the necessary constitutional safeguards for both the institutional and the personal independence of the judges. Such safeguards are necessary for the court system and analogous to the attributed power.

IV. THE SUPREME COURT OF NEPAL IN THE CONSTITUTION-MAKING PROCESS

A. Courts as a Constraint in the Constitution-Making Process

Having presented the institutional role of the courts pertaining to the principles of separation of powers and the rule of law, we have also seen, first, how the Constitution's drafters have managed to keep the configuration of the Supreme Court with the features of a constitutional court by creating a Constitutional Bench inside the court, and, second, how the drafters have managed to safeguard the independence of the court in order to limit political pressure that might endanger the rule of law in Nepal.

However, what makes the Supreme Court of Nepal a distinct is undoubtedly the role of the Court in the constitution-making process. Jon Elster in his seminal article "Forces and Mechanisms in the Constitution-Making Process" identified internal and external constraints on the constituent assemblies on how new constitutions are made.[50] In particular, Elster categorizes the constraints into two broad categories: upstream and downstream. The upstream constraints he identifies

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45 CONST. OF NEPAL, 2015, art. 101.

46 *Id.* art. 101, cl. 2.

47 *Id.*

48 *Id.* art. 132.

49 *Id.* art. 132, cl. 1. Likewise, Articles 143 and 150, respectively, contain similar provisions directed to chief judges and judges of the high court and of district courts.

50 Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L.J. 364, 373–76 (1995).

are the "constraints [that] are imposed on the assembly before it starts to deliberate," and the downstream "constraints are created by the need for ratification of the document the assembly produces."[51] Regarding the upstream constraints, Elster acknowledges that constituent assemblies are rarely self-created, and provides the examples of the Continental Congress in the United States in 1787, the King in France in 1789, and the Western Occupying Powers in Germany in 1949. Regarding the downstream constraints, Elster identifies the ratification from the states in federal polities such as the United States or the need for a popular referendum, for instance.

However, in his analysis there is no reference to the courts as constraint in the constitution-making process.[52] Elster was right not to refer to the courts, the main reason being the formation of the courts always follows the drafting (and/or promulgation) of the constitution, and, therefore courts cannot intervene in the constitution-making process. Thus, until recently the role of the courts was identified only in the amendment process and an increasing amount of literature discusses the case for unconstitutional constitutional amendments.[53]

This article highlights the potential role of the courts in the constitution-making process in Nepal based on the experience of South Africa. In Nepal, there did not exist a clearly worded constitutional provision that granted to the judiciary the authority to monitor and exmine the outcome of the constitution-making process, contrary to South Africa.[54] That said, the Interim Constitution provided for a Constituent Assembly to be elected elected, with the aim of drafting a new constitution within two years of the date on which its first meeting was held.[55] Hence, the Interim Constitution was, in effect, subject to a two-year sunset clause.[56] Before the expiration of the sunset clause, the Constituent Assembly passed a constitutional amendment, according to Article 148 of the Interim Constitution, prolonging the duration of its term for another year and consequently prolonging the lifespan of the Constitutional Assembly.[57] In total, the Interim Constitution was extended four times,[58] and on May 28, 2012 the term of the Constituent Assembly expired without finalizing the constitution due to lack of consensus between the major political parties.

The Tenth Amendment that prolonged the lifespan of the Constituent Assembly and consequently the Interim Constitution was challenged before the Supreme Court. The Supreme Court found that such extensions violated the principle

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51 *Id.* at 373.

52 *Id.* at 373–374.

53 *See, e.g.*, YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS (2017); Richard Albert, *Nonconstitutional Amendments*, 22 CAN. J.L. JURIS. 5 (2009); Aharon Barak, *Unconstitutional Constitutional Amendments*, 44 ISR. L. REV. 321 (2011).

54 CONST. OF THE REPUBLIC OF S. AFR., 1993, Act 200, § 71.

55 *See* CONST. (INTERIM) OF NEPAL, 2007, arts. 63–64.

56 *See* ANTONIOS KOUROUTAKIS, THE CONSTITUTIONAL VALUE OF SUNSET CLAUSES 163 (2017) (concerning sunset clauses and constitutional design).

57 CONST. (INTERIM) OF NEPAL, 2007, amend. VIII (2067) ("64. Term of Constituent Assembly: Unless dissolved earlier pursuant to a resolution passed by the Constituent Assembly, the term of the Constituent Assembly shall be three years after the date on which the first meeting of the Constituent Assembly is held.").

58 INTERNATIONAL IDEA, NEPAL'S CONSTITUTION PROCESS: 2006-2015: PROGRESS, CHALLENGES, AND CONTRIBUTIONS OF THE INTERNATIONAL COMMUNITY 10 (2015).

of periodic elections, which was set out in the Preamble of the Interim Constitution.[59] In particular, it ruled that:

> In case the Constitution did not come into force within the stipulated time, there may *ipso facto* rise a political question about which the Preamble of the Constitution suggests that the only way out of the problem is to go into the periodic election. In such a situation the act of frequent extension of time limit about which the Article 64 of the Interim Constitution clearly specifies shall be *ipso facto* void in the eyes of law.[60]

The decision of the Supreme Court of Nepal played a key role and spurred the political process for the adoption of a new constitution. After one year of uncertainty, the political parties got the President to amend the Interim Constitution in the name of 'removal of difficulties' through an unusual political decision. This move enabled the Chief Justice to head the government and facilitate the election of the Second Constituent Assembly that eventually managed to draft the new Constitution of Nepal. The judiciary intervened in the political process of the constitution-making in order to enable the nation to get out of a deadlock where political disagreements were blocking the drafting of the new Constitution.

A new government was formed under the chairmanship of the Chief Justice of the Supreme Court to prepare for elections for the Second Constituent Assembly.[61] Eventually a 16-Point Agreement was reached among the major political parties that resolved the contentious issues and led to a new constitution.[62] However, the Supreme Court had also contoversially intervened,[63] by issuing an interim order against the implementation of the 16-Point Agreement.[64]

Regardless of the Supreme Court's interim order, the new Constitution of Nepal was eventually adopted. This time the intervention of the court in the constitution-making process was not very constructive, as it aimed to block a political agreement which *ex post facto* was proven catalytic for the final approval of the draft constitution. Likely due to the interim nature of the decision, the political system bypassed that decision, and proceeded with the constitution-making process.

Such constitutional interventions in the constitution-making process by the Supreme Court are not unique. In September 1996, the Constitutional Court of South Africa, after a thorough analysis of the text of the proposed draft constitution, ruled that the proposed text did not follow all of the 34 Constitutional Principles contained

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[59] Bharatmani Jungam v. Office of the President, Writ No. 68-ws-0014, at 4-5 (2011). For more details about the political implications, *see* Yubaraj Sangroula, *Non-Extension or Non-Amendement? The Supreme Court's Originalist Approach to Interpreting the Tenure of the Constituent Assembly, in* PARTICIPATORY CONSTITUTION MAKING IN NEPAL - UNDP IN NEPAL 107 (Budhi Karki & Rohan Edrisinha eds., 2014). Actually, the Supreme Court had allowed amendments of Aticle 64 of the Interim Constitution to stretch the life of the Constituent Assembly retrospectively beyond the prescribed two years period under the 'doctrine of nessecity,' while putting limits on the power of the Legislative-Parliament to further extend life for more than two years.

[60] *Bharatmani Jungam*, Writ No. 68-ws-0014, at 4.

[61] INTERNATIONAL IDEA, supra note 58, at 1.

[62] Constituent Assembly Agreement, *supra* note 22.

[63] *Four parties defend 16-point agreement*, THE HIMALAYAN TIMES, June 20, 2015.

[64] Akhilesh Tripathi, *Court Vs Constituent Assembly*, NEW BUSINESS AGE, June 17, 2015.

in Schedule 4 of the Constitution of the Republic of South Africa Act 200 of 1993.[65] Thus, the Court was unable to certify the proposed draft. Furthermore, in Colombia in 1991, the Supreme Court had also intervened in the constitution-making process, as it approved the formation of a constituent assembly,[66] disregardig the fact that such a process contradicted the amendment process of the existing constitution.[67]

Unlike the case of Nepal, where the Supreme Court intervened due to a challenge brought by private parties, the intervention by the Constitutional Court of South Africa was a mandatory process, proscribed in the ratification process agreed to during the multi-party negotiating process and enshrined in the Article 71, Clause 3 of the Interim Constitution, which was entitled "Constitutional Principles and Certification."[68]

That said, the following parts will elaborate the formal and substantive justification that allow the elevation of the courts as quasi-constitution-makers. In particular, it will first analyze the formal or positive law justifications based on the text of an interim constitution and on institutional justifications. Second, it will analyze the substantive justifications based on the constitutional history, and the fundamental and diachronic supra-constitutional norms that pervade in each legal order.

B. *Formal and Substantive Justifications*

In principle, constitution-making is a political process that requires a special body, a constituent assembly with a high degree of representation, and a special mandate, the "pouvoir constitutionnel" or "pouvoir constituent," to argue, debate and draft the constitutional document.[69] That said, the intervention of the judiciary, which as an institution has less democratic legitimacy in the constitution-making process, raises eyebrows.

Compared to the popular branches, the legislature and the executive, the judiciary does not express the views of the majority; on the contrary, it is a counter-

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[65] Certification of the Constitution of the Republic of South Africa, 1996 (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (Sept. 6, 1996).

[66] Corte Suprema de Justicia [C.S.J.] [Supreme Court] Sala. Plena. octubre 9, 1990, M.P.: Hernando Gomez Otálora, Fabio Morón Diaz, Expediente No. 2214 (351-E) (Colom.).

[67] *See* Katrin Merhof, *Building a bridge between reality and the constitution: The establishment and development of the Colombian Constitutional Court*, 13 INT'L J. CONST. LAW 714, 716-717 (2015) (detailing the constitution-making process in Colombia during the early 90s).

[68] CONST. OF THE REPUBLIC OF S. AFR., 1993, Act 200, § 71 states:

(1) A new constitutional text shall:

(a) comply with the Constitutional Principles contained in Schedule 4; and
(b) be passed by the Constitutional Assembly in accordance with this Chapter.

(2) The new constitutional text passed by the Constitutional Assembly, or any provision thereof, shall not be of any force and effect unless the Constitutional Court has certified that all the provisions of such text comply with the Constitutional Principles referred to in Subsection (1)(a).

(3) A decision of the Constitutional Court in terms of Subsection (2) certifying that the provisions of the new constitutional text comply with the Constitutional Principles, shall be final and binding, and no court of law shall have jurisdiction to enquire into or pronounce upon the validity of such text or any provision thereof.

[69] *See* David Dyzenhaus, *The Politics of the Question of Constituent Power*, *in* THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM 129 (Martin Loughlin & Neil Walker eds., 2007) (detailing constituent power).

majoritarian institution. Judges are not elected by the people; in fact, judges are expected to be politically insulated. Thus, the institution has limited democratic legitimacy. In other words, it is a paradox for the courts to have a say and intervene in the constitution-making process. However, this article argues that such judicial intervention in the constitution-making process can be justified on two grounds: formal and substantive.

To begin with the formal justifications, in theory the role of the courts may be imposed on the constituent assembly. This was not the case in Nepal, but was the case of South Africa, as the Court's power to certify the final draft of the constitution in the ratification process was agreed by the multi-party negotiating process. This provision was explicitly mentioned in the text of the Interim Constitution of South Africa. Thus, the role of the judiciary is directly recognized in the law-making process.

Conversely, in the case of Nepal, the role of the judiciary in the constitution-making process was not directly recognized by the text of the Interim Constitution. The jurisdiction of the Supreme Court was triggered indirectly by a private petition. While the Court did not reference its jurisdiction in the body of the decision, its jurisdiction was based on the ordinary jurisdiction of Article 102, Clause 4 according to which the Supreme Court "shall have the final authority to interpret [the Interim] Constitution and the laws in force."[70]

From an institutional perspective, the constitution-making process is also a legal process, which is mainly the drafting of a legal document, a constitution. As a result, the institution of the judiciary might offer useful guidance on the drafting, which might lead to the avoidance of foreseeable conflicts between constitutional provisions and ambiguities. *A fortiori*, this is of paramount importance in a newly-formed constituent assembly lacking experience when a well-functioning judicial system already exists in the country.

As a result, the common element and precondition was the existence of an interim constitution for both the constitutional orders of Nepal[71] and South Africa.[72] Interim constitutions set out procedural or substantive limitations regarding the adoption of the permanent constitution, and thus directly authorize the court to participate in the constitution-making process. Both the South African and Nepalese Interim Consitutions provided this authorization, though indirectly so in the case of Nepal. Thus, the role of the court in the constitution-making process is based on positive law justifications and on the judicial authority to interpret the interim constitution.

On the other hand, the substantive justifications for the role of the judiciary in the constitution-making process are more abstract and theoretical. In every constitutional order, it can be argued that some general principles about what is fair and just are omnipresent and transcend the legal order. Such principles, which are not written and do not depend on the existence of a constitutional document, might

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70 CONST. (INTERIM) OF NEPAL, 2007, art. 102, cl. 4.

71 *See id.*

72 *See* CONST. OF THE REPUBLIC OF S. AFR., 1993, Act 200.

be seen as natural law[73] or as supra-constitutional principles.[74] Such principles might be common features across countries that share common constitutional traditions, or they might be specific norms based on the constitutional history of each country.

Such norms, in reality, create a general framework within which the constituent power is exercised and thus form limitations in the constitution-making process. Accordingly, if there is a violation of these norms, then the courts might intervene during the constitution-making process.

What we learn from the cases above is that the role of the judiciary in the constitution-making process might be very catalytic and constructive in the "constitutionalization" process. However, courts, due to their limited political legitimacy, need to strike a balance with their interventions, aiming on the one hand to spur the constitutional process, and on the other hand, to respect the deliberative and time-consuming process of constitution-making.

V. CONCLUSION

This article has examined the role of the judiciary in Nepal after the adoption of the new 2015 Constitution of Nepal, and has examined its position via the lenses of both the separation of powers and rule of law. By comparing the present Constitution with the previous constitutional documents of Nepal, it seems that the constitutional drafters on the one hand aimed to enhance the institutional independence of the Supreme Court, the head of the judiciary, but on the other hand limited its jurisdiction pertaining to the *interna corporis* and the constitutionality of constitutional amendments.

Furthermore, this article has argued that the judiciary does not simply represent one power under the separation of powers system, and does not simply hold the role of the gatekeeper of the rule of law. It was shown that the judiciary actually played a very creative role in the constitution-making process in Nepal.

This article offered justifications, both formal and substantive, for the intervention of the judiciary in the constitutionalization of the new legal order. In particular, and taking into account the case of South Africa, this article has argued that the existence of an interim constitution may grant direct or indirect authority to the court to intervene in the constitution-making process by controlling the constituent assembly, reviewing its acts, and even certifying the final constitutional document.

In addition, the courts' participation in the constitution-making process might be also justified on substantive grounds, such as natural law principles, common constitutional principles or the so-called supra-constitutional principles that exist in every democratic society and are pervasive in the general belief of the people.

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[73] *See* MARTIN LOUGHLIN, FOUNDATIONS OF PUBLIC LAW 66 (2010) (concerning different conceptions of natural law and how it was evolved). For more details about natural law, *see* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 18 (2nd ed. 2011).

[74] *See* Louis Favoreu, *Souveraineté et supraconstitutionnalité*, *in* POUVOIRS, no. 67, 1993, at 71; *see also* Serge Arné, *Existe-t-il des normes supra-constitutionnelles?*, *in* REVUE DU DROIT PUBLIC, 1993, at 460 (discussing the existence of supraconstitutional norms, indicating norms of higher hierarchical status than ordinary constitutional norms).

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