APPROACHING THE CONSTITUTION OF NEPAL THROUGH POSSIBLE INTERPRETIVE STRATEGIES

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ABSTRACT

The Constitution of Nepal epitomizes the struggle of the Nepali people for over seventy years to draw a democratic Constitution. It takes note of its own experiences and embodies, at least symbolically, great transitions that the country witnessed including the transition from monarchy to republicanism, Hindu state to secularism, and a unitary government to federalism. Understanding the Constitution and approaching it through a historical and interpretive angle is the overall objective of the paper. The paper begins by presenting a snapshot of the constitutional and judicial history of Nepal, followed by major highlights of the present Constitution, the position of the Supreme Court of Nepal and its responsibility to provide constitutional tutelage. In doing so, , it also sheds light upon the principles of constitutional adjudication it has followed so far. It then examines the basic assumptions of originalism, organic interpretation and transformative constitutionalism and discusses how the Court has employed these strategies. In the final part, the paper briefly outlines how each of these strategies could be employed to evolve a robust constitutional discourse in Nepal.

Keywords:

I. The Constitutional Saga

THE STRUGGLE of the Nepali people for democracy and constitutionalism is more than 70 years old. It has its genesis in the wind of liberation that blew in South Asia in the 1940s. Young and

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educated Nepali youth, some of whom had joined hands with their Indian colleagues in the freedom struggle of the 1940s, later started campaigning for democracy in Nepal. Even though the 104-year-old feudal rule of the Ranas ended in 1950, establishing a constitutional government remained a long and drawn-out saga. In seventy years, Nepal experimented with at least seven Constitutions, most of which were deficient from the perspective of constitutionalism.[1] An actual departure was made in 1990 when for the first time, the King acknowledged that the sovereignty and state authority were situated in and flowed from the people and agreed to be bound by the Constitution, which he issued in the people's name.[2] However, the woes of the people were far from over. Ensuing political instability and insurgency marred constitutional development for another fifteen years. An Interim Constitution, issued in 2007 after the end of conflict through the Comprehensive Peace Accord (CPA), heralded three transitions in the country: from monarchy to republicanism, from a state following Hinduism to secularism, and from unitary government structure to federalism.[3] The Constitution of Nepal adopted by the Constituent Assembly in 2015 epitomizes this struggle. It builds on the previous two constitutions and makes significant advancements to internalize emerging democratic values.

In retrospect, the constitutional saga reflects an intense exercise in taming power. Successive power holders had stifled the attempts by either making false promises or reserving sufficient space for themselves to undermine the Constitution. In 1950, King Tribhuvan (1906-1955) promised that the ultimate Constitution of democratic Nepal would be drafted by the Constituent Assembly but it never materialized during his lifetime nor during the time of his successors.[4] The Constitution of 1959 tried to bring the monarchy under the Constitution. Still, King Mahendra (1920-1972) was clever enough to keep space for himself[5] and later, in 1960, he used those constitutional provisions

[1] The first Constitution was promulgated by the Ranas themselves in 1948 to stymie the simmering popular movement. But once they were ousted by the first Peoples' Movement in 1950, the Interim Government Act was issued in 1951. The third constitution was issued in 1959, the fourth in 1962, and the fifth in 1990. This was followed by another Interim Constitution in 2007 and the current one in 2015.

[2] The Constitution of Nepal 1990, preamble.

[3] King Gyanendra continued as the monarch till the Constituent Assembly declared Nepal as a Republic on May 28, 2008.

[4] Gorkhapatra Daily, Feb. 19, 1951 in Bipin Adhikari et. al. (ed.) Commentary on the Nepalese Constitution, 22 (Kathmandu DeLF, 1998).

[5] The Constitution of Nepal 1959, art. 9, under which a law enacted in public good, if the same is mentioned in its preamble, cannot be questioned even if it trampled fundamental rights; art. 10 that provided for executive power allowed the King to act directly; art. 17 allowed temporary suspension of the cabinet; art. 42 allowing the King to withhold the Bill passed by the Parliament; art. 55 allowed the King to act in his discretion by declaring an emergency

to topple the very Constitution that he had issued. Nepal reeled under the authoritarian rule of the King for the next thirty years that not only disbanded the popularly elected government but also banned all political parties and dissolved the parliament formed under the Nepali Congress government.[6] The Second Mass Movement (1989-1990) strongly asserted that people were the source of sovereign power and state authority. King Birendra (1945-2001) reluctantly accepted this notion, and for the first time, the Constitution had the provision: "the State authority and sovereign powers shall, after the commencement of this Constitution, be exercised in accordance with the provisions of this Constitution".[7] Despite this, taming the monarchy was far from easy. After King Gyanendra[8] took over as the King, he yet again started to undermine the Constitution as his father Mahendra did.[9] Finally, when all efforts to limit the Monarchy failed, people overthrew the monarchy through the Third People's Movement (2006-2007).

The second dimension of the constitutional saga is the exercise and entrenchment of rights. The democratic struggle also implied the liberation of people from serfdom to citizenship. This could only be achieved by recognizing the rights to liberty, equality, and dignity. Even though most Constitutions recognized the basic rights of the people, those were either stifled by laws enacted in the name of serving "public good"[10] or lacked the mechanism for their full enforcement and realization. Only with the 1990 Constitution was the canvas of rights widened[11] by accepting the right to enforce fundamental rights as a fundamental right itself.[12] Building on the previous two,

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and even suspend the constitution; art. 56 allowed the King to suspend the House; and art. 64 allowed the King to act as the supreme commander of the Army, and no Bill relating to the armed forces could be introduced in the House without the King's prior consent; Alsosee Mara Malagodi, "Constitution Drafting as Cold War Realpolitik: Sir Ivor Jennings and Nepal's 1959 Constitution", in Harshan Kumarasingham (ed.), *Constitution-Making In Asia-Decolonisation and State Building in the Aftermath of The British Empire* 154-172 (London: Rutledge, 2016).

[6] The Constitution of Nepal 1962, art.11(2)(a) banning political parties and activities; art. 17 allowing enactment of law that could trample fundamental rights; arts. 20 and 24 vesting in the King and allowing him to exercise all executive, legislative, and judicial powers; art. 56 allowing the king to withhold or return the Bill passed by the National Panchayat; art. 82 giving the King unrestrained power to amend the Constitution; art. 83 declaring the King as Supreme Commander of the Army.

[7] The Constitution of Nepal 1990, preamble.

[8] Born on July 7, 1947.

[9] In the Royal massacre of June 1, 2001, King Birendra along with his entire family was killed, following which King Gyanendra was declared as the King of Nepal. He chose to rule arbitrarily by toppling the elected government and installing himself as head of the cabinet. His ambitions were thwarted by the people through the mass movement of 2005-06. He finally left the Royal Palace on June 11, 2008 ending the 260-years-old monarchy in Nepal.

[10] The Constitution of Nepal 1959, art. 8; The Constitution of Nepal 1962, art. 17(2).

[11] The Constitution of Nepal 1990, arts. 11-23.

[12] *Id.*, art. 23.

the current Constitution takes the issues of equality, liberty, social justice and inclusion seriously. It embodies the widest possible framework of rights that very few modern constitutions have.

The third important dimension of this development was the democratic government. Most of the governments from 1950 to 1990 were either unelected or even when elected were not accountable to the Parliament.[13] Nepal had the first general election in 1958, which elected the government with a two-third majority, but in less than two years, the government was toppled in a King-led coup and the Parliament was dissolved.[14] For the next thirty years, the government was run either by the King or by his men. Only after 1990, the multi-party parliamentary democracy was accepted as a basic structure of the Constitution.[15] As subsequent constitutions have built further on this principle, it is likely to stay.[16]

II. The New Constitutional Edifice

The new Constitution adopted by the Constituent Assembly in 2015 with nearly 90 percent of votes,[17] declared Nepal as an independent, indivisible, sovereign, secular, inclusive, democratic, socialism-oriented, federal democratic republican state.[18] Now, as "inclusion" is considered to be the signature tone of the new Constitution,[19] sincere attempts have been made to achieve this by treasuring rights and bringing marginalized groups in the political mainstream through federalism.[20]

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[13] The Constitution of Nepal 1962, art. 11(2)(a) banning political parties and activities which continued until 1990. The then Constitution and its amendments in the following years provided the King with an effective autocratic control over the local panchayats.

[14] The Parliament was dissolved by King Mahendra in the 1960 coup d'état; Sam Cowan, "A Worried Monarch" *The Record*, Jan. 14, 2020.

[15] The Constitution of Nepal 1990, Preamble: "And Whereas, it is expedient to promulgate and enforce this Constitution, made with the widest possible participation of the Nepalese people, to guarantee basic human rights to every citizen of Nepal; and also to consolidate Adult Franchise, the Parliamentary System of Government, Constitutional Monarchy and the System of Multi-Party Democracy by promoting amongst the people of Nepal the spirit of fraternity and the bond of unity on the basis of liberty and equality"; art. 112 of the Constitution lifted the ban on political parties allowing for the institution of a multi-party democracy as envisioned in the Preamble.

[16] The Constitution of Nepal 2015, art. 74.

[17] Hari Phuyal, "Nepal's New Constitution: 65 Years in the Making" The Diplomat, Sept. 18, 2015.

[18] The Constitution of Nepal 2015, art. 4.

[19] *Id.*, art. 4 declaring the state as an "inclusive state"; art. 6 declaring all the languages spoken in Nepal as national language; art. 18 providing reservations for the marginalized communities; art. 24 providing the right against untouchability and discrimination; and, art. 42 providing the rights of marginalized communities to participate in the state bodies on the basis of "proportional inclusion".

[20] *Id*., arts. 50, 84(2), 176(6); The National Assembly Election Act, 2075, s. 3; The House of Representatives Election Act, 2074, s. 28, sch. 1.

Nepal is now declared as a multi-ethnic, multi-lingual, multi-religious, and multi-cultural nation.[21] The Constitution aims to create ownership of all by stamping out discrimination made on the grounds of origin, race, caste, tribe, sex, physical condition, health condition, marital status, pregnancy, economic condition, language, region, ideology, or other similar grounds.[22] The Constitution even acknowledges the right of every community to get an education in their respective mother tongue by recognizing the right to impart and acquire education in one's mother tongue.[23] The right to use, preserve, and promote one's language, script, culture, cultural civilization, and heritage is protected along with the right provided to every religious denomination to protect its religious sites.[24]

A mixed model of the electoral system now adorns the Constitution, with the first-past-the-post and proportional representation ensuring the participation of minorities in the political mainstream.[25] It draws up a cluster of at least 18 marginalized groups including women, *Dalits*[26], *Madhesis*[27], Muslims, *Janajatis*[28](indigenous communities) and other minorities for protective legal measures in political representation, education, and employment. The Constitution further embodies inclusion at the community level and in the upper echelons by providing that the President and the Vice-President must be from different communities and gender.[29] Similarly, it mandates that either the Speaker or the Deputy-Speaker of the Federal and State Parliament should be a woman.[30] Also, at least 33 percent presence of women in Federal and State Parliament is

[21] *Id.*, art. 3.
[22] *Id.*, art. 18.
[23] *Id.*, art. 31(5).
[24] *Id.*, arts. 3, 4, 18, 26, 31, 32, 56, 252, 255, 262, 263, 264.
[25] *Id.*, art. 223(3).
[26] It is a general term used to indicate specific groups that were treated as untouchables in the caste-based division of the society in Nepal and India.
[27] It is a term given to the inhabitants of southern Nepal, more particularly to those whose ancestors have migrated from India.
[28] 'Janajatis' is a collective name given to the ethnic minorities such as *Tamangs*, *Gurungs*, *Sherpas*, *Magars*, *Rais*, *Limbus*, etc. said to represent some 33 % of the Nepali population.
[29] The Constitution of Nepal 2015, art. 70.
[30] The Constitution of Nepal, arts. 91(2), 182(2).

guaranteed.[31] In order to further institutionalize inclusion, a "National Inclusion Commission" is also proposed in the Constitution[32] to work out strategies and monitor the status of inclusion.

Another significant feature of the new constitutional edifice is the bold framework of fundamental rights that includes thirty-two rights comprising not only civil and political rights, but also economic, social, and cultural rights.[33] Many economic, social, and cultural rights such as the right to food, housing, education, environment, employment, social justice have been made justiciable.[34] Besides, the Constitution also protects vulnerable groups such as women,[35] children,[36] *Dalits*,[37] and the elderly people[38] and tries to ameliorate their situation through positive measures.[39]

Federalism is another imperative postulate[40] of the new Constitution. It restructures the state in the federal setup by embracing co-existence, cooperation, and coordination as overarching principles. While the residual power remains with the federation[41] a concept of self-rule[42] and shared rule[43] is devised among the federal legislature and legislative units of seven provinces and 753 local level units. There exists a Bi-cameral Parliament at the federal level.[44] However, the provincial and local parliaments[45] are unicameral.[46] The constitution draws a fairly elaborate list of federal, provincial, local, and concurrent legislative powers.[47]

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[31] *Id.*, arts. 84(8), 176(9); Further, art 223(3) of the Constitution requires that out of the five members of ward committee, two should be women.
[32] *Id.*, art. 258; Besides, a host of other commissions such as the Women Commission, *Dalit* Commission, Indigenous Commission, *Madhesi* Commission, *Tharu* Commission, *Muslim* Commission have found a place in the Constitution: See arts. 252-265.
[33] *Id*., Part 3.
[34] *Id*., art. 46.
[35] *Id*., arts. 18, 38, 252.
[36] Id., art. 39.
[37] Id., arts. 40, 255.
[38] Id., arts. 41.
[39] *Pradhosh Chhetri* v. *Prime Minister and Office of the Council of Ministers* (2061) 17 NKP 901; *Sambhu Prasad Sanjel* v. *Ministry of Cultural, Tourism and Civil Aviation* (2064) 9 NKP 1118.
[40] The Constitution creates a three-tiered federal structure with seven provinces and 753 local units of Municipalities and Rural Municipalities. Both the provinces and local units possess legislative powers. The Constitution of Nepal 2015, art. 56.
[41] The Constitution of Nepal 2015, art. 58.
[42] *Id.*, arts. 57(1), 57(2), 57(4).
[43] *Id.*, arts. 57(3), 57(5).
[44] *Id.*, art. 83.
[45] *Id.*, arts 222, 223.
[46] *Id.*, art. 175.
[47] *Id.*, sch. 5-9.

The fourth important dimension is the "dimension of justice", which is carved out in its widest possible amplitude and connotation. Along with the principle of fair trial[48] and restorative justice through compensation and rehabilitation of victims of crimes, other injustices, including environmental degradation,[49] now inhabits the Constitution. It also very specifically includes the right to social justice and social security as inalienable parts of the rights framework,[50] under which access to services, participation, development, empowerment, and security of the marginalized groups is sought. Yet another dimension of justice relates to justice to nature and those living on the bounty of nature. In order to ensure justice to nature, the Constitution uses the term "clean and healthy environment"[51] in the domain of rights, and in the process, recognizes the rights of the farmers. Farmers, thus, have the right to land for agricultural activities and are also guaranteed the freedom to select and protect local seeds along with agro species that have been used or pursued traditionally.[52]

The Constitution further guarantees every citizen the right against starvation and the right to food sovereignty.[53] The Constitution is informed of the principle of "environmentally sustainable development", internalizing principles such as ecological balance, inter-generational equity, precaution, prior-informed consent, and polluter pays principle in the development initiatives.[54] For a country in a post-conflict situation with a sensitive physical environment, justice in its widest possible manifestation and amplitude carries a lot of meaning for the sustainability of the Constitution and that of the nation.

[48] *Id.*, art. 20.
[49] *Id.*, arts. 21(2), 22(2), 23(3),24(5), 25(3), 29(5), 30(2), 39(10), 42(5), 43, 44(2).
[50] *Id.*, arts. 42, 43.
[51] *Id.*, art. 3.
[52] The Constitution of Nepal 2015, art. 42(4).
[53] The Constitution of Nepal 2015, arts. 30, 36, 42(4); The Right to Food and Food Sovereignty Act 2018, s. 2(e). "Food sovereignty" means the rights used or exercised by the farmers in the food production and distribution system to participate in the process of formulation of policy relating to food, to make choice of any occupation relating to food production or distribution system, to make choice of agricultural land, labor, seeds, technology, tools, to remain free from adverse impact of globalization or commercialization of agricultural business.
[54] *Id.* ,arts. 50(3), 51(f)(g).

III. The Judiciary

Although the new Constitution embraced federalism, the Judiciary in Nepal still possesses an integrated structure. A number of factors such as continuity of the judicial system, fairly adequate physical distribution of courts, devolution of power to the lower tiers, cost factors, and quite possibly, the satisfactory functioning of the existing system were under consideration here. The notion of an independent judiciary existed in Nepal since 1950, and since then, the Supreme Court has more or less functioned as a constitutional court. Since1990, the Court has been vested with the power of judicial review as well:[55] a function typically undertaken by constitutional courts wherever they exist. The new Constitution leaves the structural independence of the Supreme Court and its role as the custodian and the final arbiter of the Constitution undisturbed.[56] Today, the judiciary consists of courts and other judicial bodies headed by the Supreme Court.[57]

With regard to the jurisdiction, the Constitution of 2015 vests both the High Courts and the Supreme Court with the power to issue prerogative writs and entertain public interest petitions.[58] The power of judicial review is exclusively exercised by the Supreme Court, and more particularly, the constitutional bench within it.[59] A five-member constitutional bench headed by the Chief Justice works within the Supreme Court to hear judicial review petitions and petitions pertaining to federal and electoral disputes.[60] The Constitution also empowers the Chief Justice to transfer cases involving "serious issues of the interpretation of the Constitution" pending in the Supreme Court to the constitutional bench.[61] As federalism is a new experiment in Nepal and the division of power among the federal units is slightly convoluted, there exists a likelihood of an influx of many federal disputes in the days to come. It therefore calls for ingenuity, interpretive dynamism,

[55] The Constitution of Nepal 1990, art. 88.
[56] For a detailed discussion on the same, see Ananda M. Bhattarai, "Designing the System of Justice for Federal Nepal", 5 *NJA Law Journal* 115 (2011).
[57] The Judiciary consists of a three-tiered system including the Supreme Court, High Courts, and District Courts in the hierarchical order. Besides, judicial bodies could be formed at the local level; The Constitution of Nepal, art. 128.
[58] The Supreme Court functions in different split sessions called 'Benches'. At present, the session headed by a single judge is called 'Single Bench', a 'Division Bench' comprises two justices, while the Full Bench consists of three judges. An 'Extensive Full Bench' consists of five and more justices, and the 'Constitutional bench' consists of five justices. The Constitution of Nepal 2015, art. 137(1). The Judicial Council recommended the name of another 6 justices to the Constitutional Bench on August 2019.
[59] *Id.,* arts. 133, 144.
[60] *Id.,* art. 133(1), read with art 127(2).
[61] *Id.,* art. 137 (3).

and solidarity of all important stakeholders to further build the Constitution and bring about social transformation and prosperity in the country. It is believed that experiences of how the constitutional courts have functioned and shaped the constitutional jurisprudence would be instructive for making informed choices on constitutional matters in Nepal.

IV. Courts and Constitutional Interpretation

The Constitution clearly entrusts the "power relating to justice" with the courts and other judicial institutions. Courts and other judicial institutions are required to impart justice in accordance with the "constitution, other laws and the recognized principles of justice."[62] Here, the expression "recognized principles of justice" is extremely important. It allows the courts to look beyond domestic jurisdiction and take note of the principles of justice recognized in international and comparative law. While the Constitution very specifically mentions that "the Supreme Court shall have the final authority to interpret the Constitution and laws",[63] it also requires that "any order passed by the courts and judicial institutions while imparting justice [to] be abided by all".[64] This is a unique position created for the judiciary. It imposes a huge responsibility on the courts as custodian and final arbiter of the Constitution.

A concomitant responsibility vested in the court is the interpretation of the rights recognized by the Constitution. Rights are not just abstract proclamations enshrined in the Constitution; they are meant to be implemented to enrich human rights with the values of dignity, liberty, and equality. The creation of an "egalitarian society" as aspired by the Constitution could be possible only through the implementation of rights that respect "equality, prosperity and social justice."[65] It is therefore a bounden duty of all to deliver their best for the implementation of rights. Given that many rights demand financial and other resources, the government is expected to take the first lead through positive measures for the implementation of rights. The Constitution envisages a time-

[62] *Id.*, art. 126(1). Similar provisions existed in the earlier constitutions. For e.g., see The Constitution of Nepal 1990, art. 84 and The Interim Constitution of Nepal 2007, art. 100(1). Further in cl. (2) of the same art., the Interim Constitution also provided that "[t]he Judiciary of Nepal shall remain committed to this Constitution by pursuing the concepts, norms, and values of the independent judiciary and realizing the spirit of democracy and the people's movement."
[63] *Id.*, art. 128(2).
[64] *Id.*, art. 126(2).
[65] *Id.*, preamble.

bound action in this regard. It calls upon the state to make "legal provisions for the implementation of rights" within three years of the commencement of the Constitution.[66] Besides, periodic review and appraisal of the implementation of rights are also accommodated within the constitutional radar. At least in the case of rights of women and the *Dalit* community, the Constitution requires the government to make appraisal and review of the implementation of their rights and impacts thereof, "on the basis of human development index, concurrently with the National census to be held every ten years."[67] Human development indices are considered as neutral benchmarks for assessing the impact of enforcement of rights. Once the process starts, the same device can be replicated for undertaking a social audit of all the other rights. Reliance on human development indices can be a scientific strategy for the courts to examine caste discrimination and other historical injustices to assess the socioeconomic status of a particular community. Where the government falters, the Court could very much use its interpretive dynamism and issue appropriate orders that would resonate with constitutional duties and the obligations imposed on the state by international human rights instruments.

V. Constitutional Dynamism and Interpretive Devices

Broadly, Constitutional courts in the democratic world have undertaken at least three interpretive strategies: resorting to originalism, looking into the Constitution as an organic instrument and examining it, and exploring its transformative potential, along with their permutations and combinations.

Originalism is an approach to constitutional interpretation wherein the Constitution is interpreted in accordance with its original meaning.[68] The Constitution is attempted to be interpreted considering the meaning that was understood by its framers.[69] In that sense, the court would be guided by the intent of the framers of the Constitution even while adjudicating the disputes of the present day. Originalists believe in the concept of 'fidelity' to the text along with the intention of

[66] *Id.,* art. 47. The Parliament has already enacted various laws for the implementation of fundamental rights.
[67] *Id.,* art. 281.
[68] Kent Greenwalt, *Interpreting the Constitution* 97 (Oxford University Press, 2015).
[69] Paul Brest, "The Misconceived Quest for the Original Understanding", 60 *Boston University Law Review* 234 (1980).

the framers of the constitution. James Madison is often quoted to defend the originalist approach, as he put, *"*the Constitution was accepted and ratified by the nation. In that sense, it alone is the legitimate Constitution. And if that be not the guide in expounding it, there can be no security for a consistent and stable . . . exercise of its powers."[70]

Unlike the originalists who believe that the meaning of the text of the Constitution should remain static and the particular meaning should bind the constitutional actors, the proponents of living constitutionalism believe in the evolving nature of the meaning of the constitutional text.[71] The Constitution is taken as a living organism that breathes. It is believed that current social mores define the scope of constitutional rights.[72] According to this theory, society and its values change over time and so should the law. The adherent of living constitutionalism takes inference from Thomas Jefferson. In an 1816 letter, he wrote:[73]

> But I know also, that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy, as civilized society to remain ever under the regimen of their barbarous ancestors.

Howard LeeMcBain in his seminal work "The Living Constitution" uses a very interesting phraseology to explain the notion of living Constitution. He writes:[74]

> [a] word is the skin of an idea. As applied to the words of a living constitution the expression is peculiarly apt; for living skin is elastic, expansible, and is constantly being renewed. The constitution of the United States contains only about six thousand

[70] John O. Mcginnis and Michael B. Rappaport, *Originalism and the Good Constitution* 1 (Harvard University Press, 2013).
[71] Aharon Barak, *Purposive Interpretation in Law* 41 (Princeton University Press 2005).
[72] William H. Rehnquist, 'The Notion of a Living Constitution' 54 (1975–6) *Texas Law Review* 693; Aileen Kavanagh, 'The Idea of a Living Constitution' 16 (2003) *Canadian Journal of Law & Jurisprudence* 55–6; Bruce Ackerman, 'The Living Constitution' 120 (2006–7) *Harvard Law Review* 1737, 1742.
[73] Excerpted on Panel 4 of the Jefferson Memorial, *available at:* https://www.monticello.org/site/research-and-collections/quotations-jefferson-memorial#Panel_Four. (last visited on March 22, 2022).
[74] Howard Lee Mcbain, The Living Constitution 33 (The Macmillan Company, 1937).

> words; but millions of words have been written by the courts in elucidation of the ideas these few words encase.

Another influential formulation of organic interpretation was provided by Charles Reich in his 1963 article, "Mr. Justice Black and the Living Constitution". Reich's idea is captured by the following passage:[75]

> In a dynamic society the Bill of Rights must keep changing in its application or lose even its original meaning. There is no such thing as a constitutional provision with a static meaning. If it stays the same while other provisions of the Constitution change and society itself changes, the provision will atrophy. That, indeed, is what has happened to some of the safeguards of the Bill of Rights. A constitutional provision can maintain its integrity only by moving in the same direction and at the same rate as the rest of society. In constitutions, constancy requires change.

An equally powerful exposition of the living constitution comes from Woodrow Wilson, former president of the United States. Expounding the idea of living Constitution, Wilson wrote:[76]

> [l]iving political constitutions must be Darwinian in structure and in practice…Society is a living organism and must obey the laws of life, not of mechanics; it must develop. All that progressives ask or desire is permission - in an era when "development," "evolution," is the scientific word - to interpret the Constitution according to the Darwinian principle; all they ask is recognition of the fact that a nation is a living thing and not a machine.

Compared to the previous two interpretive approaches, expounding the Constitution in line with its transformative potential is of recent vintage. The term "transformative Constitution" is used to denote constitutional interpretation wherein the document is seen to have the potential to change or transform the society for the better.[77] Transformative constitutionalism became a notable approach in the jurisdictions that have had a history of racial and ethnic hierarchies and

[75] Charles A. Reich, "Mr. Justice Black and the Living Constitution", 76 *Harvard Law Review* 673 (1963).
[76] Woodrow Wilson, Constitutional Government in the United States 57 (Quid Pro LLC, 1908).
[77] Karl E Klare,"Legal Culture and Transformative Constitutionalism", 14 *South African Journal on Human Rights* 150 (1998).

discriminations, inequality, colonialism, *et cetera*.[78] The Constitutions in those jurisdictions were not merely a document to govern the state but were also a project to transform the society from its unfortunate past. Further, transformative understanding is also crucial to create a more equitable and just society in the future. For example, in South Africa's case, the desire to remedy apartheid-era historical wrongs played a part in embracing the idea of Transformational Constitutionalism. As opined by former Chief Justice of South Africa, Justice Pius Langa,[79] "This is a magnificent goal for a Constitution: to heal the wounds of the past and guide us to a better future. For me, this is the core idea of transformative constitutionalism: that we must change".

The term "transformative Constitution" was first used by Prof. Karl E. Klare in context of the South African Constitution where he wrote:[80]

> By transformative constitutionalism, I mean a long-term project of constitutional enactment, interpretation, and enforcement committed…to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.….I have in mind a transformation vast enough to be inadequately captured by the phrase 'reform,' but something short of or different from 'revolution' in any traditional sense of the word.

In a 2006 address, the South African High Court's Justice SM Mbenenge took note of this definition and further explained that:[81]

> [t]his definition makes judges, other functionaries and institutions role-players in transformative constitutionalism. Indeed, judges are custodians of constitutional values such as human dignity, equality and freedom, and bear the obligation to ensure that constitutional provisions are applied in ways that 'improve the quality of life of all citizens and free the potential of each person.

[78] *Ibid.*
[79] Justice Pius Langa, "Transformative Constitutionalism" 17 *Stellenbosch Law Review* 351 (2006).
[80] *Id.,* at 146-188. Karl E Klare, "Legal Culture and Transformative Constitutionalism", 14 *South African Journal on Human Rights* 146-188 (1998).
[81] Justice SM M benenge, *Transformative Constitutionalism: A Judicial Perspective from the Eastern Cape*, *available at*: http://www.saflii.org/za/journals/SPECJU/2018/13.pdf (last visited on March 23, 2022).

Each of these interpretive strategies has its advantages. For instance, in interpreting the horizontal or vertical divisions of power among the units of the states, or composition of institutions, or qualification of office bearers, originalism may come into play. Similarly, in the interpretation of rights, an organic interpretation that looks into overlapping or complementarities of different rights may be more useful. Likewise, when the Court is asked to signal future direction by looking at broad constitutional signposts, the transformative approach may be more pertinent. Also, where benchmark expressions such as "proportional inclusive principles, "ensuring social justice", establishing an "egalitarian society", or bringing about "socio-economic transformation" or similar expressions used in the current Constitution are to be deciphered, the transformational approach may come into play.

VI. Constitutional Adjudication and the Supreme Court of Nepal

In the last thirty years, the Supreme Court of Nepal has been an important locus of constitutional interpretation. The Court has interpreted provisions of the Constitutions, reviewed constitutionality of legislative enactments, handed down important decisions on numerous constitutionally significant cases such as appointment of ambassadors,[82] emolument and benefits of members of parliament,[83] signing and endorsement of treaties sharing national resources,[84] dissolution and reinstatement of the parliament,[85] the election of the Prime Minister,[86] extension of the tenure of Constituent Assembly,[87] declaration of emergency,[88] forceful removal of Prime Minister and subsequent prosecution by the special court[89], the disappearance of people during the conflict, seizing of property and creation of transitional justice mechanism[90] among others. Further, it has

[82] *Radheshyam Adhikari* v. *Prime Minister and Council of Ministers* (2048) 12 NKP 810.
[83] *Bharatmani Jangam* v. *Office of the President* (2068) 7 NKP 1257.
[84] *Balakrishana Neupane* v. *PM Girija Prasad Koirala* (2054) 1 NKP 77.
[85] *Shyam Kumar Khatri* v. *PM Sher Bahadur Deuba* 10(C) (2015-2067) SC Volume Relating to Constitutional Law, Part 1)242; *Hari Prasad Nepal* v. *PM Girija Prasad Koirala* (2052) NKP Golden Jubilee Special Issue 88; Special Reference by the King on Postponement of the Election of the House of Representatives slated for 27.07.2051 BS. (2051) 18 SC Bulletin Year 31; *Rabiraj Bhandari* v. *PM Manamohan Adhikari (2052)* NKP Golden Jubilee Special Issue 1.
[86] *Prabhu Krishna Koirala* v. *Parliament Secretariat* (2067) 7 NKP 1200.
[87] *Balakrishna Neupane* v. *Office of the President* (2068) 12 NKP 545.
[88] Bharatmani Jangam v. Office of the President (2068) 7 NKP 1257.
[89] *Sanjiv Parajuli* v. *Royal Special Court on Control of Corruption* (2062) 11 NKP 397.
[90] *Madhav Kumar Basnet* v. *Prime Minister and Cabinet Secretariat* (2070) 9 NKP 1101; *Rajendra Dhakal* v. *Ministry of Home Affairs* (2064) 2 NKP 100; *Liladhar Bhandari* v. *Prime Minister and Cabinet Secretariat* (2065) 8 NKP 485;

also interpreted a host of human rights-related cases on right to food,[91] education,[92] gender justice,[93] prison justice[94] etc. A detailed discussion on each of these issues however is not possible within the scope of this paper. In view of this, therefore, this section basically looks into three key areas: a) approach of the Supreme Court towards constitutional interpretation and judicial review; b) its approach, strategies and experiences on interpretation of rights; c) how it has handled epoch-making emblematic cases; and d) what has been its approach in employing interpretive devices discussed above.

a) Approach to Constitutional Interpretation and Judicial Review

By and large, the Nepali Supreme Court views the Constitution as a politico-legal document comprising both the political and legal components. However, over time it has drastically narrowed the scope and ambit of 'political question'. Increasingly, the court has held that just because any dispute comprises a political element, or that it pertains to the acts falling under the jurisdiction of the executive or the legislature or has acquired a political colour, the dispute does not become political ousting the jurisdiction of the Court. Essentially, the Court has taken the position that it cannot abandon its constitutional responsibility of resolving constitutional disputes for the reason that such dispute may be perceived or argued to have some element of political question, colour, or ramification.[95] The Supreme Court as the custodian of the Constitution does possess the obligation to protect it from the transient majority or other forces that may attempt to undermine it.

The Court however takes a very flexible and purposive approach to the interpretation of the Constitution and respects the jurisdiction of other coordinate branches of the state. It always works

Suman Adhikari v. *Prime Minister and Cabinet Secretariat* (2071) 12 NKP 2069; *Om Prakash Aryal* v. *National Human Rights Commission* (2070) 7 NKP 843; *Krishna Subedi* v. *Prime Minister and Cabinet Secretariat* (2067) 10 NKP 1694.

[91] *Bhupendra Bahadur Tamang Theeng* v. *Government of Nepal and Cabinet Secretariat* (2074) 9 NKP 1544.

[92] *Jitendra Yadav* v. *Government of Nepal, Ministry of Education, Science and Technology* (2076) 1 NKP 143.

[93] *Lily Thapa* v. *Office of the Prime Minister and Council of Ministers* (2062) 9 NKP 1054.

[94] *Advocate Ajay Shankar Jha* v. *Government of Nepal, Office of the Prime Minister and Cabinet Secretariat* (2074) 7 NKP 1246.

[95] *Rabiraj Bhandari* v. *PM Manamohan Adhikari* (2052) NKP 1.

on the presumption that the impugned action of the executive or the legislature is constitutional,[96] and requires those challenging the validity of the actions to discharge their burden of establishing the allegation.[97] Where there are two possibilities of interpretation, the Court always gives the interpretation that is in consonance with the Constitutional text and values ensuring its smooth working. The Court exercises caution to not enter into legislative wisdom; it does not amend any provision or play the role of legislative draftsman; it only looks into the compatibility of the legislation with the Constitution.[98] The Court is always mindful of the possible legislative vacuum due to the doctrine of *ultra vires*.[99] In a situation where the Court decides to declare the provision of legislation ultra vires, it takes the least harmful approach by adopting techniques such as prospective overruling, the doctrine of severability, among others. This being the general approach of the Supreme Court, in the last thirty years, it has reviewed over two dozen laws and declared a number of statutory provisions *ultra vires.*[100] In several other instances, the Court has played the

[96] *Sabin Shrestha* v. *Ministry of Law, Justice and Parliamentary Affairs* (2059) Publication on Decisions relating to Human Rights 252.
[97] *Gaja Bahadur Bam* v. *Prime Minister and Cabinet Secretariat* (2064) 6 NKP 714.
[98] *Rabindra Shrestha* v. *Ministry of Health* (2073) 2 NKP 183.
[99] *Prakashmani Sharma* v. *Cabinet Secretariat* (2067) 6 NKP 944.
[100] *Man Bahadur Biswakarma* v. *Ministry of Law and Parliamentary Affairs* (2049) 12 NKP 101 (Declaring explanation in s.10a of the chapter "Of Adal" in the Muluki Ain-National Code *ultra vires*); *Balakrishna Neupane* v. *Parliament Secretariat* (2050) 9 NKP 450 (Declaring expression used in s. 4(1) of the Labor Act 2048 *ultra vires*); *Basanta Bahadur Shrestha* v. *Cabinet Secretariat*, (2051) 8 NKP 609 (Declaring Rule 120(1) of the Education Rules 2049 *ultra vires*); *Balakrishna Neupane* v. *Cabinet Secretariat* (2051) 9 NKP 675 (declaring Clause (a) (b) (c). of Rule 3(4) of the Citizenship Rules 2049 *ultra vires*); *Chandrakanta Gyanwali* v. *Cabinet Secretariat* (2057) 6 NKP 519 (declaring Rule 21(1) of the Prison Rules 2020 *ultra vires*); *Bharatmani Jangam* v. *Parliament Secretariat* (2058) 9 NKP507 (declaring s. 25 of the Emolument and Benefit of the Members and Officials of the Parliament Act 2052 *ultra vires*); *Meera Dhungana* v. *Cabinet Secretariat* (2061) 4 NKP377 (Declaring s. 12 a "Of Succession" of the Muluki Ain *ultra vires*); *Davendra Aale* v. *Cabinet Secretariat* (2061) 9 NKP 1156 (declaring expressions s. 7 of the Children Act 2048 that allowed beating of children *ultra vires*); *Raju Chapagain* v. *Cabinet Secretariat and* (2065) 10 NKP 1180 (Declaring s. 6(3) of the chapter "Of Homicide" of the Muluki Ain *ultra vires*); *Madhav Kumar Basnet* v. *Cabinet Secretariat (*2066) 7 NKP 1070 (declaring s. 75 (1)(2)(3)(4)(5) of the Army Act 2063 *ultra vires*); *Kamalesh Dwivedi* v. *Cabinet Secretariat* (2064) 7 NKP 827 (Declaring s. 19(g) of the Members of Constituent Assembly Election Act 2064 *ultra vires*); *Rishiram Ghimire* v. *Cabinet Secretariat* (2065) 12 NKP 1414 (Declaring s.4(1) of the Crimes against the State and Punishment Act 2046 *ultra vires*); *Meera Dhungana* v. *Cabinet Secretariat* (2063) 8 NKP979 (Declaring s. 7 of "Of Women's Property" of the Muluki Ain *ultra vires*); *Lilamani Paudel* v. *Cabinet Secretariat* (2060) 5 NKP314 (declaring Rule 6(2) of the Legal Aid Rules 2055 *ultra vires*); *Binod Dhungel* v. *Cabinet Secretariat* (2063) 3 NKP 301 (Declaring Rule 8(f) of the National Media Rules 2052 *ultra vires*); *Achyut Prasad Kharel* v. *Cabinet Secretariat* (2066) 7 NKP1063 (Declaring Rule 5(2)(3) of Legal Professionals Council Service Rules 2055 *ultra vires*); *Achyut Prasad Kharel* v. *Cabinet Secretariat* (2066) 9 NKP1442 (Declaring Rule 4.1.2 of the Army Parachute Folders Rule 2046 *ultra vires*); *Lili Thapa* v. *Cabinet Secretariat* SC Volume on Constitutional Law Part 1 (2015-2062) Vol. 10b. at p. no. 354 (Declaring s. 2 of the chapter "Of Women's Property" of the Muluki Ain *ultra vires*); *Sanchita Neupane* v. *Cabinet Secretariat* (2068) 4 NKP551 (Declaring Rule 3.1.7(3) of the Cottage Industries Employees Service Rules 2055 *ultra vires*); *Shiva Chandra Paudel* v. *Cabinet Secretariat* (2068) 3 NKP357 (Declaring Annex 5 entry 5 a & b of the Contractors Rules 2056 *ultra vires*); *Narayan Jha* v. *Tribhuvan University* (2068) 2 NKP192 (Declaring Rule 6.3(8)(b) (f) and (zd) of the TU Teachers and Employees Service Rules 2050 *ultra vires*); *Sapana Pradhan Malla* v. *Ministry of Law and Justice* SC Volume on Constitutional Law Part 1 (2015-2062)

role of positive legislator and issued directives to enact laws or bring about change in the existing laws.[101]

b) Approach to Interpretation of Rights

Like the courts in other democratic countries, the Nepali judiciary accords high regard to fundamental rights and human rights. Even during the most trying times, the Supreme Court has endeavoured to defend the rights of the citizens. Its contribution in the field of equality and women's right,[102] juvenile justice,[103] prison justice,[104] personal liberty,[105] gender justice,[106] right to privacy,[107] and right to information[108] have been widely appreciated. A few clear trends have

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Vol. 10b. at p. no.180 (Declaring s. 7 of the chapter "Of Rape" of the Muluki Ain *ultra vires*); *Prakashmani Sharma* v. *PM and Cabinet Secretariat (*2064) 10 NKP1275 (Declaring s. 25(2)(c) of the Trust Corporation Act 2033 *ultra vires*); *Sudersan Subedi* v. *PM and Council of Ministers* (2066) 1 NKP 34 (Declaring expressions "by nailing and jailing" used in relation to person with mental disorders, used in s. 6 of the chapter "Of Treatment" of the Muluki Ain *ultra vires*)

[101] *Amber Raut* v. *Cabinet Secretariat* (2068) 7 NKP 1083 (asking the government to review laws that empowered the Chief District Officers to ensure fair trial and impartiality in hearing); *Prakashmani Sharma* v. *Cabinet Secretariat* (2067) 6 NKP 944 (stressing that the Court should take note of the possible legislative void that may be created due to judicial review).

[102] See for instance, *Sapana Pradhan Malla* v. *Ministry of Law and Justice* (right of a prostitute) in Human Rights Related Cases (Special Issue) (Kathmandu, Supreme Court 2002) at p. no.144; *Reena Bajracharya* v. *Cabinet Secretariat* (Air hostess' Case) in *Id.,* at p. no. 160; *Durga Sob* v. *Cabinet Secretariat* (Dalit's right) in *Id.* at p. no. 198; *Man Bahadur Biswakarma* v. *Ministry of Law and Justice* (Untouchability Case) in Supreme Court Judgment On Constitutional Issues (Narendra Pathak and Narendra Khanal, eds) (Kathmandu Pairavi Books, 2001) at p. 130; *Sapana Pradhan Malla* v. *Ministry of Law* (Women's right to Property) *Id.* at p. no. 325; *Benjamin Peter* v. *Ministry of Home Affairs* (Immigration case) in *Id.* at p. no. 340; *Meera Dhungana* v. *Ministry of Law* (Equality and Women's right to Property) in *Id.* p 388; *Sunilbabu Panta* v. *Govt of Nepal* (LBGTI's right to equality) 2 NJA L.J. 261(2008); *Suman Panta* v. *Ministry of Home Affairs,* (2074) 12 NKP 2083 (Right of same sex couples decision).

[103] *Ashish Adhikari (on behalf of Keshav Khadka)* v. *Ministry of home Affairs* (Custody of a juvenile) in SC Judgment on Constitutional Issues, at p.no. 552; *Tilottam Paudel* v. *Ministry of Home Affairs* (Children's right to form association) Human Rights Related Cases at p.no. 191; *Ashish Adhikari* v. *Dhunkuta District Court* (Custody of a juvenile) in *Id. at* 312; *Tarak Dhital (on behalf of Dheeraj K.C.)* v. *Chief District Officer, Kathmandu* (nailing and torture of a child) in *Id.*at 341; *Ashish Adhikari (on behalf of Babloo Godia)* v. *Banke District Court* (Custody of a juvenile) in *Id.*at 425; *Ashish Adhikari (on behalf of Pode Tamang)* v. *Sindhupalchowk District Court* (Custody of a juvenile) in *Id.* at 474.

[104] *Chandrakanta Gyanwali* v. *Cabinet Secretariat* (discrimination in prison) in Supreme Court Judgment on Constitutional Issues at 156. *Charles Gurmukh Sovaraj* v. *PM and Cabinet Secretariat*, (2074) 11 NKP2204 (Increasing subsistence money).

[105] *Meera Shrestha (on behalf of Bishnu Pukar Shrestha)* v. *Ministry of Home Affairs* (Preventive detention) in Human Rights Related Cases at p.no. 262; *Benoj Adhikari* v. *Ministry of Home Affairs* (preventive detention) in *Id.* at p no. 152; *Rohini Devkota (on behalf of Phanindra Devkota)* v. *Ministry of Home Affairs* (preventive detention) in *Id.* at p no. 404; *Shova Khanal* v. *Ministry of Home Affairs* (preventive detention) in *Id.* at 434; *Rajendra Dhakal* v. *Government of Nepal* (disappearance case), 1 NJA L. J. 301 (2007).

[106] *Meera Dhungana* v. *Ministry of Law* (Marital rape) in SC Judgment on Constitutional Issues at 129.

[107] *Annapurna Rana* v. *Kathmandu District Court* (Right to privacy) in *Id.* at 282.

[108] *Gopal Siwakoti* v. *Ministry of Finance* (Arun III case) in *Id.* at 425.

been witnessed in the judicial interpretation of rights. First among them is the organic or integrative approach to rights. In several cases, the Court has tried to see the linkage between various rights and stressed how violation of one particular right impinges on the realization of various other rights.[109] Where necessary, the Court has referred to international human rights instruments in interpreting fundamental rights including soft law instruments.[110] The Court has taken a bold approach to equality and non-discrimination to proscribe any exclusion, distinction or restriction which has the purpose or effect of nullification of rights and thus tried to stamp out discrimination being faced by various groups such as women,[111] *Dalits*[112] and persons with disabilities.[113] Furthermore, the Court has also departed from the traditional method of issuing a single writ of mandamus and leaving it to the government to comply with the order thereafter to a more dialogic and hands-on method for compliance of the court order through declarations and issue of guidelines, and appraisal of the compliance through continuing mandamus.[114]

c) Epoch-making Cases and the Supreme Court

While the PIL jurisdiction has brought the Supreme Court to the reach of a broad section of people, over time this has also turned the Court into a politico-constitutional battleground. In this section, I discuss a few important issues that have been considered epoch-making in the history of the Supreme Court.

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[109] *Liladhar Bhandari* v. *Government of Nepal, Office of Prime Minister and Council of Ministers*, (2065) 8 NKP 485 (Case relating to violation of property rights of the displacees due to conflict); *Prem Bahadur Khadka* v. *Government of Nepal, Prime Minister and Council of Ministers*, (2066) 2 NKP 261 (Case relating to the right to employment).

[110] *Rajendra Dhakal* v. *Government of Nepal* (Disappearance case), 1 *NJA L. J.* 301 (2007); *Sunil Babu Panta* v. *Government of Nepal* (LBGTI's right to equality) 2 *NJA L.J.* 261 (2008); *Dal Bahadur Dhami* v. *Prime Minister and Council of Ministers*, (2075) 4 NKP 759 (Right to health); *Bhupendra Thing Tamang* v. *Cabinet Secretariat* (2074) NKP 1544 (Right to food).

[111] *Prakashmani Sharma* v. *Government of Nepal, Office of the Prime Minister and Council of Ministers* (2065) 8 NKP 956 (Case relating to uterus prolapse); *Meera Dhungana* v. *Office of Prime Minister and Council of Ministers* (2063) 6 NKP Writ no. 01—063-00001 (RNA pension and gratuity).

[112] *Mohan Sasankar* v. *Ministry of Education and Culture* (2067) 5 NKP 848 (Right to study Sanskrit).

[113] *Prakashmani Sharma* v. *Office of the Prime Ministers and Council of Ministers* (2065) 2 NKP178.

[114] *Gopal Shivakoti* v. *Ministry of Finance* (2051) NKP 255 (Arun III case); *Sapana Pradhan Malla* v. *Government of Nepal*, Prime Minister and Council of Ministers (2063) Writ no. 3561 (Right to Privacy of HIV/AIDS victim); *Prakash Mani Sharma* v. *Ministry of Women, Children and Social Welfare* (2062) Writ no. 2822 (Sexual harassment of working women); *Bajuddin Minhya* v. *Government of Nepal, Prime Minister and the Council of Ministers* (2064) Writ no. WO-0338 (Destruction of crops by wild animals from Koshi Tappu Wildlife Reserve).

i) Mahakali Treaty Case[115]

Following the promulgation of the new Constitution in 1990 and a new government in place, the Prime Minister of Nepal went to India in December 1991 and made a broad understanding on the study of water resource projects. Heagreed on sharing the water and electricity generated from the river Mahakali– a river bordering India, and also provided some land for the construction of afflux bund in the Tanakpur barrage. The questions raised before the Court were: whether or not a citizen had the right to seek and get information about the contents of the agreement, whether or not the memorandum of understanding signed by the PM was in the nature of a treaty,[116] and if so, should it follow the process of ratification pursuant to article 126(2) of the 1990 Constitution.[117] Here, the Supreme Court answered in positive to both questions. However, as to the nature of the treaty and method of ratification, the Court observed that it is not the Court but Parliament which is the right organ to determine the same. Since the government was yet to take initiatives to get the treaty endorsed by the House, it was not proper to intervene in the matter, said the Court. Also taking note of the fact that the land for the dam had already been availed to India, the Court ordered the government to take needful action pursuant to art. 126(2) of the Constitution.

ii) Dissolution of House of Representatives[118]

After the promulgation of the 1990 Constitution, political instability, unfortunately, gained salience in the politics of Nepal due to intra-party and inter-party squabbles. However, instead of wisely handling the ensuing instability and finding solution within the House, successive Prime Ministers ventured to score short-term gains by recommending the King to dissolve the parliament.[119] As a result, the country jerked to an uncertain path due to series of dissolutions of

[115] *Balakrishna Neupane* v. *PM Girija Prasad Koirala* (2048) Writ no. 1851.
[116] *Balakrishana Neupane* v. *PM Girija Prasad Koirala* (2054) 1 NKP 77.
[117] Art. 126(2) requires a treaty that deals with natural resources or distribution of their uses to be ratified by a two-third majority of the members present in the joint sitting of the House.
[118] *Rabiraj Bhandari* v. *PM Manamohan Adhikari* (2052) NKP Golden Jubilee Issue 1 (the decision was given 8-3); This case comprised a cluster of petitions filed by politicians such as Chirinjivi Wagle, Sher Bahadur Deuba, Gajendra Narayan Singh, etc. For a comparative analysis, also see, Ananda M. Bhattarai and Vikram Raghavan, "Judicial Scrutiny of the Dissolution of Legislature", *LAW ASIA* 21-40 (1996-97).
[119] During the 1990s, only two governments faced the vote of no confidence: one in normal course (Deuba), and the other following reinstatement of the House by the Court (Manmohan). Also see, Surya Dhungelet al., *Commentary On the Constitution of Nepal* 289 (Delf Lawyer's Inc., 1998).

the House of Representatives: the first in July 1994, the second in June 1995, the third in January 1998, and the fourth in December 1998, fifth in January 1999, sixth in May 2002, seventh in December 2020 and eighth in May 2021.[120]. Petitions challenging constitutional competence of concerned Prime Ministers were filed at the Supreme Court more than once.[121] One of these cases was of *Rabi Raj Bhandari*, where the dissolution of the House by a minority government led by Mr. Manmohan Adhikari was in dispute.[122] Here, the issues raised were: whether or not the dissolution of the House was a political question; whether or not the House could be dissolved pursuant to article 53(4) when the session of the House under article 53(3) was already summoned;[123] whether or not a cabinet under article 42(1) [i.e., the coalition government of two or more parties] could be formed as an alternative to the government under article 42(2) [i.e., the

[120] *See*, Nepal Gazette of: 11.07.1994, 13.06.1995, 08.01.1998, 21.12.1998, 15.01.1999, 22.05.2002, 20.12.2020, 22.05.2022 Of these, the fourth (Dec 1998 and fifth dissolution (Jan. 1999) were not challenged in the Court.

[121] The first case on this point is *Hari Prasad Nepal* v. *PM Girija Prasad Koirala* (2052) NKP Golden Jubilee Special Issue 88; In this case the PM had recommended dissolution of the House on 10 July, 1994 when his annual policy document failed in the House of Representative because some 35 members from his own party abstained during the voting. Here, the majority of the court (7-3) declined to intervene on the grounds that the PM enjoyed the majority in the House. The case discussed here is the second one. The third case on the issue of dissolution came to the Supreme Court by way of constitutional referral under art. 88(5) of the 1990 Constitution (SC in NKP 2054 at p. no. 535 decision no 6446). The case related to the submission made to the King by the Prime Minister, Mr. Surya Bahadur Thapa, on January 8, 1998 for the dissolution of the House of Representative under art. 53(4) of the Constitution, and the submission made by 96 members of the House on the same day for summoning the special session of the House under art. 53(3). The Court by a majority (6-3) opined that since the constitution followed parliamentary democracy, the submission by the MP deserved precedence over the submission made by the PM. The fourth case on the point is *Shyam Kumar Khatri* v. *PM Sher Bahadur Deuba* (2059) Writ no. 2052/3580/3581/3584 (case published in Some Important Precedents established by the Supreme Court). This relates to the submission made by Prime Minister Sher Bahadur Deuba on May 22, 2002 to the King for the dissolution of the House of Representatives. The court here dismissed the petitions on the ground that it cannot go into the content or appropriateness or adequacy of the reasons stated in the submission made by the Prime Minister. The ruling is criticized for its convoluted interpretation of the constitution, and also for shying away to counter the ambitions of the then King Gyanendra. The fifth case is *Dev Prasad Gurung* v. *Office of the President* (2077) para. 3 ((unpublished, only summary issued) this is a dissolution by PM KP Sharma Oli) and the sixth case *Sher Bahadur Deuba* v. *PM KP Sharma Oli* (2078) Writ no. 077-WO-007112 (unpublished) para. 68. (This case also relates to dissolution by PM KP Sharma Oli).

[122] Mr. Adhikari had come to power under art. 42(2) of the Constitution after a snap poll in 1994 while a motion of no-confidence was being voted in the House, and instead of facing the House, he made a submission to the King for the dissolution of the House of Representatives, and consequently, the House was dissolved on 13 June 1995.

[123] The Constitution of Nepal 1990, art. 53 provides for **'**Summoning and Prorogation of Sessions and Dissolution of the House of Representatives', where it states: "*(1) His Majesty shall summon a session of parliament within one month after the elections to the House of Representatives are held. Thereafter, His Majesty shall summon other sessions from time to time in accordance with this Constitution. Provided that the interval between two consecutive sessions shall not be more than six months. (2) His Majesty may prorogue the session of both or either of the Houses of Parliament. (3) If, during the prorogation or recess of the House of Representatives, one-fourth of its members make a representation that it is appropriate to convene a session or meeting, His Majesty shall specify the date and time for such session or meeting, and the House of Representatives shall meet or commence its session on the date and time thus fixed. (4) His Majesty may dissolve the House of Representatives on the recommendation of the Prime Minister. His Majesty shall, when so dissolving the House of Representatives, specify a date, to be within six months, for new elections to the House of Representatives*."

minority government led by the largest party]; and whether or not the recommendation of the Prime Minister was *malafide*,[124] and consequently, whether or not the dissolution order should be set aside and the order sought by the petitioner should be issued.

In this case, the Supreme Court observed that the Constitution is both a political and legal document. According to the Court, if constitutional and legal questions are blended, the Court cannot forsake its responsibility by refusing to address those questions. The Court stressed that being the final arbiter[125] of the Constitution and the law of the land, it should take into notice the power vested with various constitutional organs, entities, and officials and examine whether or not the power exercised by them will prevent the abuse of power and protect the constitution. According to the Court, in the instant case, serious constitutional questions as to whether or not it would be constitutional to dissolve the House when a submission regarding no-confidence motion is already made and the House summoned; similarly, whether or not a coalition government led by the largest party can be ousted by a vote of no-confidence, and following this whether another government can be formed or this automatically leads to the dissolution of the House had arisen. In its view, the resolution of these questions was desirable for the correct implementation of the Constitution. As these questions would not be resolved by institutions other than the Court, it was its duty to resolve them and help the country chart the right constitutional path.

In view of the Court, article 53(3) of the Constitution of 1990[126] was a special provision enshrined to make the Parliament competent to keep a watch and control the functions of the government, which was not usually found in Constitutions of other countries with a parliamentary democracy, and so could not be allowed to be circumvented. The Court stressed that since a Special Session was already summoned and as the Session under article 53(3) was not the one to be called and prorogued at the wish of the Prime Minister, the Prime Minister cannot bypass it.

[124] As the discussions on other grounds were sufficient for the court to come to the conclusion, it did not examine this question.
[125] *Sarbagyar Ratna Tuladhar* v. *President, National Panchayat*, 1 (2035) 168.
[126] Art. 53(3) states: "*If during the prorogation or recess of the House of Representatives, one-fourth of its members make a representation that it is appropriate to convene a session or meeting, His Majesty shall specify the date and time for such session or meeting, and the House of Representatives shall meet or commence its session on the date and time thus fixed*."

Moreover, in the present dispute, since the special session had been called for the purpose of holding a discussion on the no-confidence motion against the cabinet, the constitutionality of the recommendation had become further questionable. The Court admitted that generally, it was not inappropriate to go to the people who are the final judge to seek a fresh mandate, but, it could be done only by following the due process. Since Parliamentary accountability was the foundation of democracy, the Court emphasized that the power of the Prime Minister to dissolve the House should not be exercised to bypass the House of Representatives and make the provision of articles 53(3) and 59(2) redundant, for such a practice would trample parliamentary democracy. The Court further observed that so long as there exists a possibility of an alternative government, the same should be explored from within the House. The dissolution of the House without exploring such possibilities would not fit with the established tradition and practice of parliamentary democracy. The Court, thus, declared the House of Representatives to be reinstated to the state in which it was before the dissolution.

Realizing that frequent dissolutions of Parliament did not facilitate smooth working of the 1990 Constitution, the Constituent Assembly while adopting the new Constitution in 2015 made flexible arrangements for the creation of government from within the House of Representatives (HOR). The current 2015 Constitution does not have provision similar to article 53(4) of the 1990 Constitution.[127] Instead, in article 85(1), it gives a five year tenure to the HOR 'except when dissolved earlier pursuant to the Constitution'. By that it refers to article 76(1)(2)(3) and (5) which deal with the appointment of the PM . It is only when the government cannot be formed under those provisions or the government thus formed fails to acquire the vote of confidence, door is open for dissolution of the HOR. However, despite this the HOR was dissolved twice in less than six months.[128] On both occasions the Supreme Court quashed the dissolution and reinstated the HOR. The Court held that, so long as there existed the possibility of an alternative government, it should be explored from within the House.

[127] Art. 53(4) stated: "His Majesty may dissolve the House of Representatives on the recommendation of the Prime Minister. His Majesty shall, when so dissolving the House of Representatives, specify a date, to be within six months, for new elections to the House of Representatives."
[128] The HOR was dissolved for the first time on Dec 20, 2021 and then on May 22, 2021.

Summarizing the constitutional design, *Dev Prasad Gurung*[129] poignantly observed: "This Constitution is not a replica of traditional parliamentary form of government, but is an instrument drawn after efforts made for a long time at the constituent assembly. The system of government, despite being a parliamentary form, is of special type refined by our own experience and informed by our own needs. This Constitution does not contain all the features of traditional parliamentary form of government." echoing the observations made in Dev Prasad Gurung the Court in Sher Bahadur Deuba[130] observed that the present constitution did not permit untimely demise of the prevailing HOR in the name of 'democratic process' or 'taking fresh mandate' as a way out to the prevailing problems concerning political coordination, understanding, good faith, tolerance, collegiality and collaboration. Except where no alternative government could be formed pursuant to article 76(5), the Constitution forbids dissolution of the HOR prior to the completion of its tenure for any reason or ground whatsoever. Going further, in this case the Court asked the President to appoint the petitioner as Prime Minister under Art 76(5) and open the door for taking vote of confidence in the reinstated HOR.

iii) Royal Takeover and the Royal Commission for Corruption Control[131]

This case relates to the action of the then King Gyanendra, who on February 1, 2005, assumed executive powers after deposing the government on alleged grounds of incompetence to maintain law and order and hold elections. On the very day that he assumed power, he also imposed a state of emergency. This was followed by the establishment of a Royal Commission for the Control of Corruption (hereinafter 'the RCCC') under emergency powers to investigate and try corruption cases. The RCCC under his order arrested Prime Minister Mr. Deuba and a few other politicians for their alleged involvement in corruption.

When the investigation was ongoing, the King withdrew the state of emergency on April 29 but gave continuity to the RCCC by invoking article 127 of the Constitution of the Kingdom of Nepal, 1990, a provision for removing difficulties while implementing the provisions of the

[129] *Dev Prasad Gurung* v. *Office of the President* Writ no 077-WC-0037(2077)(unpublished summary judgment) para.3.
[130] *Sher Bahadur Deuba* v. *PM KP Sharma Oli* (2078) Writ no. 077-WO-007112 (unpublished) para. 68.
[131] *Rajeev Parajuli* v. *Royal Commission on Corruption Control* 1 *NJA* LJ 247 (2007).

Constitution.[132] The actions of the King were challenged in the Supreme Court through batches of petitions under article 88 of the Constitution. The questions raised in this case were: where did the locus of sovereign power and state authority lie; whether or not the Court was competent to examine the justiciability of the King's action who enjoyed privilege and immunity under the Constitution; whether or not the acts performed were political in nature; and, whether or not the acts of constituting and continuing the RCCC were constitutionally valid?

While answering the above questions, the Supreme Court observed that both the Preamble and article 3 of the Constitution of 1990 clearly stated that sovereignty and state authority lay with the people. Therefore, it would be contrary to the Constitution to raise dispute about the state authority which according to the Court was clearly vested in the people. The Court further observed that the scope of the royal immunity[133] needed to be examined in light of articles 31 and 35(2) of the Constitution. Under article 27(3), the King promised to uphold and preserve the Constitution keeping in view the best interest of the people. It stressed that the best interest of the people would be served only when the King acted according to the Constitution. Since supremacy of the Constitution had been recognized, and the Court was vested with the power to interpret the Constitution under article 88, it could not refuse to examine questions regarding actions taken by the King that was allegedly in contravention of the constitutional provisions.

The Court further observed that since the formation of the RCCC needed to be decided on the basis of the provisions relating to the exercise of state authority as determined by the Constitution, it

[132] Art. 127 states: "Power to Remove Difficulties: If any difficulty arises in connection with the implementation of this Constitution, His Majesty may issue necessary Orders to remove such difficulty and such Orders shall be laid before Parliament."

[133] Art.31 reads, **"***Question not to be Raised in Courts**:** No question shall be raised in any court about any act performed by His Majesty. Provided that nothing in this Article shall be deemed to restrict any right under law to initiate proceedings against His Majesty's Government or any employee of His Majesty;* art. 35 *"Executive Power**:** (1) The executive power of the Kingdom of Nepal shall, pursuant to this Constitution and other laws, be vested in His Majesty and the Council of Ministers. (2) Except as otherwise expressly provided as to be exercised exclusively by His Majesty or at His discretion or on the recommendation of any institution or official, the powers of His Majesty under this Constitution shall be exercised upon the recommendation and advice and with the consent of the Council of Ministers. Such recommendation, advice and consent shall be submitted through the Prime Minister. (3) The responsibility of issuing general directives, controlling and regulating the administration of the Kingdom of Nepal shall, subject to this Constitution and other laws, lie in the Council of Ministers."*

was not proper to call such matter a 'political question'.[134] The Court invalidated the formation and continuity of the RCCC on two grounds. First, the RCCC was constituted by invoking emergency powers, hence, when the emergency was withdrawn, it should be construed that the exigencies for its creation also ceased to exist.[135] Second, under article 98(1) of the Constitution, a commission titled "Commission for the Investigation for the Abuse of Authority" to investigate cases relating to corruption and abuse of authority already existed.[136] Therefore, there was no reason for the formation of a separate RCCC. Importantly, it was observed that article 127 was not a substantive provision; its purpose was only to remove difficulty and make the implementation of other provisions possible. Therefore, it could not be invoked to give continuity to a body created by invoking the emergency provisions. The Court thus declared the order issued on April 29, 2005, intending to give continuity to the Royal Commission *'ultra vires'* as per article 88(1) of the Constitution.[137]

iv) Election of the Prime Minister[138]

The case refers to the situation which occurred following the resignation of the then Prime Minister, Mr. Madhav Nepal, on August 1, 2010, whereupon the 'Legislature-Parliament'[139] was required to elect a new Prime Minister from among the candidates. Initially, three candidates filed

[134] The Court said,*"[n]o dispute shall become political simply because it has been described as a political one. It is necessary to understand the nature or character of such a dispute in order to find out whether or not the subject matter of the dispute is political. The policy matters relating to the State and the system of governance not falling under the constitutional, legal, or judicial resolution standard as well as the political disputes which can be effectively resolved by the Executive, the Legislature or other organs instead of the Judiciary ought to be treated as political disputes."; Supra* note 85 at 288.

[135] According to the Court, *"when a particular act performed by activating some constitutional provision becomes void by virtue of another act performed in accordance with the provisions of the same Constitution, …something which has already become void cannot be given continuity…. Also, such an act causes an impediment to the course of constitutional evolution."; Id.,* at 291.

[136] The Court has observed that when a constitutional mechanism was already in place, it was proper and appropriate to follow the constitutional provision; otherwise, it would mean an encroachment on the Constitution. According to the Court, "any *act of directly or indirectly affecting or encroaching upon the functions, duties, or powers conferred on any constitutional organ, or the act of rendering a constitutional organ ineffective on any pretext whatsoever not only weakens the constitutional foundation but also disrupts it, and creates obstacles to Constitutionalism and constitutional development as well*." Since the RCCC was empowered to conduct both investigation and trial, the Court found it to be not "*in consonance with the objective and spirit of the Constitution*".

[137] The decision was handed down on February 13, 2006.

[138] *Prabhkrishna Koirala* v. *Legislature-Parliament* (2067) 7 NKP 1200.

[139] The Constituent Assembly was to act as legislature *mutatis mutandis*. The Interim Constitution uses the term "Legislature-Parliament" for the Parliament.

the nomination. However, the third candidate, Mr Jhalanath Khanal, withdrew his candidature before the voting, and despite tabling the motion for seven rounds, when the election did not produce any result, the second candidate, Mr. Pushpa Kamal Dahal, also withdrew his candidature on September 26, 2010. This created a situation where only one candidate, Mr. Ramchandra Paudel, was left in the fray. Normally, there could have been the following possibilities: (i) either the candidate should have been declared unopposed; or, (ii) the voters should have given him the majority; or, (iii) he should have withdrawn his candidature; or, (iv) his candidature should have been rejected. But none of these things happened in this case. Following the procedure laid down by Rule 7(8) of the Constituent Assembly (Legislature Parliament Business) Rule 2008, like in the earlier rounds, the Speaker continued to table the proposal for the decision of the House. Since another parliamentary rule allowed the members to remain "neutral", nobody could be elected even after eight rounds of elections. Amidst this, a case was filed by Advocate Prabhu Krishna Koirala, wherein the petitioner claimed that as the other candidates had withdrawn, and Mr. Paudel remained the only candidate in the race, the Speaker should have followed Rule 7(5) of the of the said Rule and elected him as unopposed candidate instead of continuing the process of tabling the proposal mentioned under Rule 7(8). So an order of mandamus was sought to be issued to the Speaker asking him to declare Mr. Paudel as the elected Prime Minister. Major issues in this case were: whether the matter fell under the special privilege of the House; whether or not it was a political question un-subject to judicial resolution, and therefore, whether an order of Mandamus could be validly issued by the Court as prayed by the petitioner.

In this case, the Supreme Court observed that the formation of a constitutional government was a matter of public importance and concern. According to the Court, organs like the executive, legislature, and the judiciary were created by the Constitution and their respective roles are delineated by the Constitution. It was their duty to take note of the spirit of the same and contribute in the operation of the constitutional process. According to the Court, from a constitutional standpoint, these institutions could be seen like human organs, which are important in their respective fields– when one organ fails, the other organ should bear certain additional pressure. To reproduce Court's exact words, it observed "*like human organs all the organs of the state*

should properly function for ensuring good governance. It was not only desirable but also mandatory for the organs of the state to play their respective roles properly."[140]

The court emphasized that the three organs– the legislature, the executive, and the judiciary were created by the Constitution, therefore, all were called upon to perform their duties respecting the supremacy of the Constitution. Since all the organs were vested with powers by the Constitution, they operated independently within their designated sphere bearing in mind the overall objective of the Constitution. "*It is the cooperation among the state organs rather than competition that is desired by the constitution*", the Court said. It stressed that in the countries having written Constitutions: [141]

> it is the duty of the judiciary to review whether other organs have properly exercised the powers vested in them by the constitution, whether or not they have encroached upon the right of other organs or violated the rights of the people. It is a practice and custom followed in many countries that abide by the principle of constitutionalism.

The Court further said that it was the bounden duty of the judiciary to protect the supremacy of the constitution as it is the fountain of powers of all the organs. "*It is not only the domain of the Court to interpret the Constitution but when there are varied interpretations, it is the duty of the Court to advance the final interpretation of the Constitution*",[142] the Court noted. In other words, the Court said that the authoritative interpretation of the Constitution was a judicial function; the function of other organs should be subjected to judicial interpretation. This was important because in the case of discord and conflict in the interpretation of the Constitution and in the absence of a final arbiter for the settlement of the meaning, the Constitution would die due to such chaos. "*In the same way as enactment of the Constitution is not a judicial function, its interpretation cannot be subjected to executive or legislative function*",*[143]* the Court convincingly emphasized.[144]

[140] *Prabhkrishna Koirala* v. *Legislature-Parliament* (2067) 7 NKP 1213.
[141] *Id.,* at 1213, para. 5.
[142] *Id.,* at 1213, para. 5.
[143] *Id.,* at 1213-1214.
[144] *Ibid.*

Lamenting the process taking place in the House,[145] the Court observed that the Constitution never contemplated such a situation. On the contrary, it envisaged a lively, active, and creative state mechanism and its organs. Therefore, it is the duty of the hour to remove the stalemate by playing a creative and progressive role. It further observed:[146]

> being an institution with the responsibility to protect the legal and fundamental rights of the people, to protect public interest and concerns and to ensure the supremacy of the Constitution, the bar of privilege would not stop it from giving a meaningful interpretation to the Constitution as contended by the Speaker.

If such a logic was accepted, this would allow the stalemate to continue and the Court would be rendered as a mute spectator in this very grave situation. According to the Court, even though "*the election of the Prime Minister was in the domain of the Legislature, but it was not an entirely internal matter of the Legislature; rather whether or not the election is legally held, can be a matter subject to judicial resolution*".[147] The Court further held that the election was not only a political process, but also a legal process, and *"the question of legitimacy cannot be bypassed by bringing the logic of political question".*[148] The Court held voting to be a political matter but treated election as an exercise that must follow legal process and standards.

Interpreting Rule 7 of the Constituent Assembly Rule 2008, the Court observed that *"whether there was only one proposal tabled or only one proposal left, it was the same from the point of view of the proposal".*[149] The Court provided that, "*To continue an electoral process where no one gets elected neither fits with the spirit of the election nor with the objective of the election*."[150] Finally, the court held that since the use of Rule 7(8) did not seem likely to produce any result, it

[145] Despite several rounds of elections, when the cabinet could not be formed, its impact is felt not only in the implementation of the constitutional system but also in the daily life of the people. The Court said, "*in such a situation if people are not allowed to raise their views in the court, then there would be no alternative than to helplessly wait for the dawning of legislative wisdom*". *Id.,* at 1217, para. 3.
[146] *Id.,* at 1213, para. 5.
[147] *Id.,* at 1210, para. 3.
[148] *Id.,* at 1219, para. 1.
[149] *Id.,* at 1222, para. 2.
[150] According to the Court, repetitively meaningless elections of several rounds, where nobody gets elected, where the voters cannot seek other alternatives, where the voters may stay neutral by not participating in the election, has created a situation where hope for the new constitution is withering and the country is pushed on the brink of dreadful transition. p. no. 1222, para. 6

was important that the Chair/Speaker used Rule 7 objectively pursuant to prevailing parliamentary customs. The Court declined to issue an order of mandamus as claimed by the petitioners.

It held that the Legislature was the rightful organ to elect the Prime Minister and it would not be proper for a coordinate branch to impose its decision or to give directives. The Court just issued an order drawing the attention of the Speaker/the Chair and of the Legislative Parliament and Constituent Assembly to review the use of Rule 7, and make arrangements to take the process of election of the Prime Minister to a logical conclusion. The Court in the subsequent petition[151] declared the expression "I don't vote" mentioned in Rule 41 of the Constituent Assembly (Legislature-Parliament Business) Rule 2008 *ultra vires* on the ground that it allowed the members to stay neutral which contravened with articles 38(2) and 55 of the Interim Constitution.

v) Extension of the Tenure of Constituent Assembly[152]

At least three decisions of the Supreme Court address the issue of the extension of tenure of the Constituent Assembly (CA). The spirit of the Comprehensive Peace Accord (CPA) signed between the government in power and the Maoists in 2006, which was later reflected in the Interim Constitution was to complete the peace process in six months of the election of the Constituent Assembly, and to complete the Constitution drafting in two years. It was in this light that the Interim Constitution of Nepal 2007 provided: *"unless otherwise dissolved earlier by a resolution passed by the Constituent Assembly, the term of the Constituent Assembly shall be two years from the date of its first meeting."*[153] This tenure could not be extended except in the situation of emergency.[154] However, due to the stalemate at the conclusion of the peace process, and also due

[151] *Chandrakanta Gyanwali* v. *Secretariat of Legislature-Parliament* (2067) Writ no. 2067-WS-0010. In this case, the petitioner claimed that since the lone candidate Mr. Ramchandra Paudel could not secure majority in the voting, his candidature should be annulled pursuant to Rule 22 of the Constituent Assembly (Legislature-Parliament Business) Rules, 2065. The court did not enter into this question stating that it was entirely in the domain of the Legislature-Parliament to conduct election, and it would not be appropriate for the Court to interfere in such matters.

[152] *Bharatmani Jangam and Balakrhshna Neupane* v. *Office of the President* (2011) 8 NKP 1270. ; Originally, this petition was also clustered with Writ no 066-WO-0050. Decision dated May 25, 2011 (referred to as Balakrishna Neupane I); *Balakrishna Neupane and Bharatmani Jangam* v. *Office of the President* Writ no.067-WS-0071, decision dated August 18, 2011 (referred to as Balakrishna Neupane II); *Bharatmani Jangam* v. *Office of the President* (2068) 8 NKP 1257.

[153] See, The Interim Constitution of Nepal 2007, art 64. Election of the Constituent Assembly was held on April 10, 2008 and the first meeting of the CA was held on May 28, 2008.

[154] *Id.,* proviso.

to wrangling on power-sharing among the leading parties, the drafting of the Constitution could not move smoothly. The parliament through successive amendments extended the term by another two years. It is in this context that petitions were filed in the Supreme Court challenging each amendment.

In *Balakrishna Neupane(1),*[155] the Court admitted that the drafting of the Constitution was a difficult task; it was not easy to evolve a common document from the parties holding different ideologies. In such a situation, despite making all efforts and focusing on drafting, if in case the time runs out, it may be appropriate and desirable to extend the tenure based on the doctrine of necessity. The Court hence took the view that if it was absolutely necessary to extend the tenure by taking note of the maximum limit mentioned in article 64 of the Interim Constitution.[156] However, the Court held that any such extension on the ground of the doctrine of necessity was subject to judicial review.[157] The Court also asked the CA to focus more on its main function, which is the drafting of the constitution and not on other ancillary matters. With these warnings, the Court declined to issue the order for the reason that any review of the extension on merit might adversely affect the work already done, which would be against the wish of the people to get the Constitution promulgated through the CA.

In *Balakrishna Neupane (II)*[158] the Supreme Court generally stuck to its earlier ruling, but warned the respondents that the people wanted a constitution and not the reasons for the failure of the CA to draft it. The Court said, "*[i]t is the duty of the CA to complete the task within the stipulated time, but the facts do not depict that an earnest effort was made on this front*."[159] However, given that

[155] *Balakrishna Neupane and Bharatmani Jangam* v. *Office of the President* (2068) Writ no. 066-WS-0056. Originally this petition was also clustered with Writ no. 066-WO-0050. This decision overruled the decision handed down in *Bijayaraj Shakya* v. *the President* (2067) Writ no. 066-WO-0050, where the court had held that the tenure of the CA would end only after the drafting of the Constitution was completed.
[156] Earlier to this, the Court had accepted the doctrine of necessity in *Binod Karki* v. *Ministry of Finance* (2062) 2 NKP 140.
[157] *Ibid.*
[158] *Bharatmani Jangam and Balakrhshna Neupane* v. *Office of the President* (2068) 8 NKP 1270. This case challenged the ninth amendment of the Constitution that challenged another extension of the Assembly by six months. Since the Supreme Court in *Balakrishna Neupane (1)* had held that the extension was judicially reviewable and also that it did not address the question of legality of extension of tenure directly, subsequent petitions raised these issues even more ferociously. In a way, this put the court in an awkward situation in the second case.
[159] *Ibid.*

some minimal progress was made during the extended period,[160] the Court took the extension by six months in a positive light and rejected the petition.

In the third case filed by *Bharatmani Jangam*,[161] reiterating its earlier stand, the Court observed that repeated extensions of tenure for the reason of failure to complete the work in time erodes the legitimacy of the CA itself. *"As accountable government is one of the features of democracy, the promises made to the people in such a system must be fulfilled. Otherwise the people have the right to seek answers",* the Court elaborated.[162] In the opinion of the Court, the CA did not take into consideration the provisions of Article 64, nor did it seriously consider the decision of the court given earlier while extending the tenure. "*The repeated extension should come to an end*" held the Court emphatically. It concluded that the CA was making a mockery of the principles of constitutionalism, rule of law, and system of representative government.

Yet, in view of the aspiration of the people to issue a Constitution through the CA, and the constitutional responsibility to safeguard the achievement made by the CA so far, and the investment made for the said purpose, it deemed appropriate and reasonable to give "one last opportunity" to the CA to complete the remaining work and finalize the Constitution. Thus, the Court issued an order to the government of Nepal, the CA, and the Council of Ministers to make an assessment of the work completed so far and also the remaining tasks. The court also asked to determine the time required for the completion of the remaining work, keeping in view the proviso to article 64 of the Interim Constitution. It also provided that the task must be completed within the period thus extended as after the extended period, the tenure of the CA would automatically come to an end. In case the work is not completed, CA was asked to make alternative arrangements within the period so extended such as holding of the referendum pursuant to article 157 or election of another CA pursuant to article 63, or other appropriate arrangements in consonance with the Constitution.

[160] This was claimed in the submission by the respondents corroborated by the government attorneys in their oral submissions.
[161] *Bharatmani Jangam* v. *Office of the President* (2068) 8 NKP 1270.
[162] *Ibid.*

d) Employing Interpretive Devices

Upon reflection, one finds that the Supreme Court of Nepal has employed all three interpretive devices mentioned earlier while making judicial pronouncements. As for instance, in the decisions on the dissolution of Parliament, or the Mahakali treaty case or the RCCC Case or the case concerning the extension of the tenure of the Constituent Assembly, the Court strictly interpreted the preamble and provisions of the Constitution as envisaged by the framers, without losing sight of its working. To a certain extent, originalism also seems to have come into play while narrowing down the scope of political question, delimitation of the constitutional boundary of coordinate branches, and also while exercising the power of *ultra vires*.

However, in the election of Prime Minister, as the deadlock was not contemplated by the framers, the Court tried to tackle the situation by giving contemporaneous interpretation of the Constitution and the Parliamentary Rule. The Supreme Court seemingly tried to look at the constitution as a living document and also unearth its transformative potential while trying to ensure a better life for the marginalized communities through interpretation and enforcement of rights. The transformative potential is also taken into view while playing the role of positive legislator and asking the government to enact laws to operationalize the Constitution. Though the Court has not been very expressive in its approach, all three strategies seem to have been employed by it in charting out its role as custodian of the Constitution.

VII. Constitutional Dynamism: Some Concluding Observations

The basic purpose of this paper was to approach the Nepali constitution through an interpretive lens. Given that the constitutional journey in Nepal has been long and gruelling, the exercise began by drawing a snapshot of the Constitution building in Nepal. This was followed by major highlights of the present Constitution including the position of the Supreme Court of Nepal. It examined how the Supreme Court took principles of constitutional adjudication and also examined its approach on interpretation of rights and other constitutionally significant cases. In order to give the reader a deeper understanding, a summary of a few epoch-making cases was also presented.

As the cases discussed above illustrate, during the last thirty years the Supreme Court of Nepal has been a locus of constitutional contestation. The Court tried its best to check regime control and uphold the principle of rule of law and constitutionalism through constitutional interpretation. Apparently, there is almost no chamber of the Constitution that the Supreme Court has not unlocked, thus giving a sense of the political question doctrine being heavily watered down in the constitutional dynamics of Nepal. The judicial pronouncements have often created ripples, but interestingly they are largely abided by other constitutional actors. Fragile though, the constitutional discourse has captured the collective wisdom and also taken a direction that needs to be consolidated. The Interpretive energy of the Court should therefore be invested to take note of its orientation and direction and provide constitutional tutelage to meet the common aspirations of the *Nepali* people.

The discussion and exemplifications above indicate that the current Constitution strives to usher socio-economic transformation, and environmentally sustainable development in Nepal. Building upon the earlier two constitutions- the Constitution of 1990 and 2007, the current Constitution intends to take Nepal on the path of prosperity and happiness by repairing all ills and misfortunes by ensuring "social justice" and "social security" for the people which are now recognized as enforceable rights of the people. In view of this it is incumbent upon the Court to properly understand the major signposts and tread the course ahead. Every Constitution evolves with time; and as time passes on, the need for adaptation to evolving values grows. It is, therefore, the role of the Supreme Court to move to greater heights taking note of the evolutionary dynamics. The Supreme Court of Nepal may take benefit from the principles of constitutional adjudication evolved in developed democracies and independent judicial culture evolved in South Asia, but shaping the constitutional discourse of Nepal by taking note of the local and global challenges entirely lies with it.

Finally, the principles of originalism, evolutionary dynamics, and transformative constitutionalism are not one versus the other principles. Each of them has its advantages and relevance. They are rather complementary to each other in interpreting the Constitution in its entirety, and are to be subsumed in the purposive interpretation that takes note of the past, moulds the present, but beckons the future. The interpretive dynamism requires being informed and enriched by

comparative and international human rights and constitutional jurisprudence. Only through such an approach the constitutional aspiration of establishing a society based on the principle of "equality, prosperity and justice" will be possible. This is perhaps the singular message of constitutional dynamism for a country that has been in existence for more than 250 years, and for a resilient society that despite the difficulties posed by geography, ecology and politics, expresses staunchest faith in democracy, rule of law, and human rights.