9 Courts in the constitution-making process

Paradoxes and justifications

Antonios Kouroutakis

9.1 Introduction

Without doubt, the constitution-making process is a highly political process. It is the expression of the sovereignty and the constituent power that is entrusted to special constituent assemblies and a variety of representative bodies.[1] Only the sovereign has the constituent power, which in theory is superior and predates the positive constitutional norms, which determine how the constituted power (legislative, executive, and judicial) is exercised.

As it is accurately remarked, 'the notion of *pouvoir constituant* is often associated with the unquestioned affirmation of unrestrained or even arbitrary processes of constitutional politics'.[2] Indeed, the orthodoxy among lawyers, philosophers, and political theorists was that the constitution-making process is unrestrained and arbitrary, with the exception of the imposed constitutions (also known as *constitutions octroyées*) such as the monarchical constitutions,[3] because in principle the constituent assembly preexists any other institution and in practice it has the unlimited and uncontrolled power to decide the process of the constitution drafting and the substance of the constitution. Furthermore, Jon Elster has argued

1 The concept of sovereignty is a dynamic concept, a concept that changed and evolved. Initially there was a tautology between the Sovereign and the institution with the 'ultimate coercive power of command'. For instance Bodin has remarked that 'There are none on earth, after God, greater than sovereign princes, whom God establishes as His lieutenants to command the rest of mankind'. See J. Bodin, *Six Books of the Commonwealth*, in M. J. Tooley (Ed.), Oxford, Basil Blackwell Oxford, 1995, p. 40. Then, it evolved to the idea of a power 'to found, to posit, to constitute' the legal order. See A. Kalyvas, 'Popular Sovereignty, Democracy, and the Constituent Power', *Constellations*, Vol. 12, No. 2, 2005, p. 223.

2 M. Patberg, 'Constituent Power: A Discourse-Theoretical Solution to the Conflict between Openness and Containment', *Constellations*, Vol. 24, No. 1, 2017, p. 51.

3 For more details about the imposed constitutions see R. Albert, X. Contiades and A. Fotiadou, *The Law and Legitimacy of Imposed Constitutions*, Routledge, 2018; Y. Hasebe, 'Imposed Constitutions (Constitutions Octroyées)', in R. Grote and others (Eds), *Max Planck Encyclopedia of Comparative Constitutional Law*, Oxford, Oxford University Publishing, 2017; N. Feldman, 'Imposed Constitutionalism', *Connecticut Law Review*, Vol. 37, No. 4, 2004–2005, p. 857; S. Chesterman, 'Imposed Constitutions, Imposed Constitutionalism, and Ownership', *Connecticut Law Review*, Vol. 37, No. 4, 2004–2005, p. 947.

that constituent power might be subject to constraints, but as it will be shown below, such constraints have relative force.[4]

However, during the last decades, court interventions, direct or indirect, have been recorded in the constitution-making process. Obviously, the presence of the courts and their interventions in the constitution-making process is seen as a limit and as a control on the constituent power. In particular, this chapter will examine the role of the judiciary in four constitutional orders, Colombia, South Africa, Honduras, and Nepal in the constitution-making process in 1991,[5] 1993,[6] 2009,[7] and 2011,[8] respectively.

The close examination of these cases will show the role of the judiciary in the constitution-making process under different circumstances. Methodologically, the analysis will compare and contrast the conditions that allowed the judiciary to intervene in the constitution-making process and will examine its impact. Hence, this chapter aims to highlight paradoxes but also to offer justifications, both formal and substantive, for the intervention of the courts in the constitutionalization of a new legal order.

This chapter argues that the existence of an interim constitution or a total revision of the existing constitution may grant direct authority to the court to intervene in the constitution-making process, for instance by controlling the constituent assembly, reviewing its acts and even certifying the final constitutional document. In addition, the courts' participation in the constitution-making process might be justified on substantive grounds such as natural law principles, common constitutional principles, or the so-called supra-constitutional principles that exist in every democratic society and pervade the general belief of the people.

The chapter is organized in the following way. The first part will revisit the concept of the constituent power in order to highlight the paradoxes from judicial intervention in the constitution-making process. In the second part, it will examine the formal justifications for the courts' intervention. In particular, it will focus on the case of South Africa, and it will show that the existence of an interim constitution may provide the positive law ground for the courts' intervention. Furthermore, the chapter will examine the theoretical framework of the total

4 See below, section 9.2.2.

5 Supreme Court, Case No. 138, May 24, 1990; available at www.teoriajuridicayconstitucion.com/app/download/13243974430/Sentencia++138+1990+de+la+CSJ.pdf?t=1485478996 [Accessed 20 April 2019].

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

7 Corte Suprema de Justicia, Comunicado Especial, June 30, 2009; and Comunicado del 20 de Julio, July 20, 2009; both available at www.poderjudicial.gob.hn [Accessed 20 April 20, 2019].

8 Bharatmani Jungam & others v Office of the President and others, [Supreme Court] Nov. 25, 2011, 68 ws 0014 (4) (Nepal); available at www.supremecourt.gov.np/web/assets/downloads/judgements/Constitution_Assembly_Case.pdf [Accessed 20 April 2019].

revision of the constitution and it will argue that such a process also offers formal justifications for the courts' intervention.

Finally, the last part will examine the cases of Nepal, Colombia, and Honduras. In Nepal the interim constitution did not recognize any formal justification for the participation of the judiciary in the constitution-making process, and likewise, in Colombia and in Honduras, when a total revision of the Constitution was initiated, the Constitution did not recognize a role for the judiciary. Nonetheless, in Nepal the Supreme Court played a constructive role on the constitution-making process. Regarding the cases of Colombia and Honduras, in the former case, the Supreme Court of Colombia allowed the total revision. In the latter case of Honduras, the Supreme Court blocked that process. By examining these two cases, the chapter will elaborate on the substantive grounds that permit the courts' intervention in such process, when formal justifications are absent.

9.2 The paradoxical role of the courts in the constitution-making process

9.2.1 Constituent power

The constitution-making process is a special and exceptional procedure. It is entrusted to a special body, the constituent assembly,[9] and such process, unlike the formation of the legislature, is not periodic. In most of the cases, the formation and the composition of the constituent assembly is not regulated in advance, but *ad hoc*. In principle, *a priori* regulation *de facto* limits procedurally the sovereignty of the constituent power.[10] Hence, it is a highly political process that requires wide and deep deliberation. Such power is exercised based on a pure political process. Such a process is pure because it is not constrained by the law, as it preexists the legal framework.[11]

9 However, in recent years a new type of constitution-making process occurred in Iceland, which was more open and transparent as the people participated in the process of the drafting of the new constitution with the support of new technology and social media. See H. Landemore, 'Inclusive Constitution-Making: The Icelandic Experiment', *The Journal of Political Philosophy*, Vol. 23, No. 2, 2015, p. 166; H. Fillmore-Patrick, 'The Iceland Experiment (2009–2013): A Participatory Approach to Constitutional Reform', *DPC Policy Note New Series*, Vol. 2, 2013; S. Suteu, 'Constitutional Conventions in the Digital Era: Lessons from Iceland and Ireland', *Boston College International and Comparative Law Review*, Vol. 38, No. 2, 2015, p. 251.

10 However, in the case of total revision of the constitution, such as the case of Spain, Argentina, and Bulgaria where the constitution-making process is regulated, the constituent assembly is regulated in advance. See below, (n 41).

11 Bruce Ackerman, highlights 'the arbitrary character of acts of constituent power,' which is distinct from his theory of constitutional politics and he explicitly disclaims because it implies that 'where the law ends … pure politics (begins)'. See B. Ackerman, *We the People II: Transformations*, Cambridge, MA: Harvard University Press, 1998, p. 11, p. 425.

Furthermore, the constituent power is also defined as primary power because the legislative, executive, and judicial power emanate, are defined by, and depend on the constituent power.[12] Sieyès has stated that

> the constituent power can do everything [in relationship to constitutional making]. It is not subordinated to a previous constitution. The nation that exercises the greatest, the most important of its powers, must be, while carrying this function, free from all constraints, from any form, except the one that it deems better to adopt.[13]

While the concept of sovereignty evolved, the core definition of sovereignty remains the same as it was first articulated by Bodin: 'sovereignty is that absolute and perpetual power.'[14] Having said that, the following part will examine the constraints on the constituent power.

9.2.2 Limits of the constituent power

In his seminal article 'Forces and Mechanisms in the Constitution-Making Process'[15] Jon Elster has examined the first Constitution of the US, the first Constitution of France, and the Basic Law of Germany. He has accurately remarked that upstream and downstream constraints exist in the constitution-making process.[16]

12 Locke has identified that the legislative power is supreme, but he clarified that at the same time such power is entrusted by the sovereign, and thus subordinate to the sovereign power which is the ultimate power: see J. Locke, The Second Treatise of Government: An Essay Concerning the True Original, Extent, and End of Civil Government, in J. Bennett (Ed.), 2017, Ch. 13, par. 149, 48. '[T]here can be only one supreme power, the legislative power, to which all the rest are and must be subordinate. But this is only a fiduciary [= 'entrusted'] power to act for certain ends, so that the people retain a supreme power to remove or alter the legislature when they find it acting contrary to the trust that had been placed in it. [The root of 'fiduciary' is the Latin fide = 'trust'.] All power that is given with trust for attaining a certain end is limited by that purpose; when the purpose is obviously neglected or opposed by the legislature, the trust is automatically forfeited and the power returns into the hands of those who gave it'.

13 E. J. Sieyès, Reconnaissance et exposition raisonnée des droits de l'homme et du citoyen, Bruxelles Chez F Hayez, rue de l'Escalier, 1792, p. 13 (in French).'Les pouvoirs compris dans l'établilfement public font tous fournis à des loix, à des réglés, à des formes , qu'ils ne font point les maîtres de changer. Comme ils n'ont pas pu se constituer eux-même , ils ne peuvent pas non plus changer leur constitution; de même ils ne peuvent rien sur la constitution les uns des autres. Le pouvoir constituant peut tout en ce genre. Il n'est point soumis d'avance à une constitution donnée. La Nation qui exerce alors le plus grand, le plus important de ses pouvoirs, doit être dans cette fonction, libre de toute contrainte, et de toute forme, autre que celle qu'il lui plaît d'adopter'.

14 See Bodin, 1995, p. 24.

15 J. Elster, 'Forces and Mechanisms in the Constitution-Making Process', *Duke Law Journal*, Vol. 45, No. 2, 1995, p. 364.

16 Ibid.

In particular, Elster categorizes the constraints into two broad categories: upstream and downstream. The upstream constraints are the 'constraints [that] are imposed on the assembly before it starts to deliberate', and the downstream 'constraints are created by the need for ratification of the document the assembly produces'.[17] Regarding the upstream constraints, Elster remarks that the constituent assemblies formed for the drafting of the US, French, and German constitutions were subject to some constraints because they were not self-created; for instance the first was formed by the Continental Congress in the United States in 1787, the French was formed by the King in France in 1789, and the German was formed by the Western Occupying Powers in Germany in 1949 respectively.[18] Hence such assemblies had some upstream constraints about their composition, the decision-making process, etc.

Furthermore, such constituent assemblies may have also downstream constraints which are the ratification process. For instance, Elster identifies that in the US paradigm, the Philadelphia Convention was bound about the ratification process which required unanimity from the states in federal policies or in the German paradigm there was the provision for a popular referendum to ratify the new constitution.[19]

However, such constraints were proven in practice as having relative force. For instance, in the US the constitutional convention adopted a completely new constitution while it has also defined a new ratification formula.[20] Likewise, in Germany, the constituent assembly drafted a constitution prescribing a more centralized federation while the ratification process did not take place with a referendum.[21]

That said, there is no reference to the courts as a constraint in the constitution-making process. In theory, it is paradoxical for the judiciary to have a role in the constitution-making process, as the judicial power is a constituted power, which emanates from the constituent power. In addition from a more pragmatic perspective, the judiciary cannot have a role because the formation of the courts always follows the drafting and/or promulgation of the constitution, and, therefore, courts cannot intervene in the constitution-making process.

Furthermore, and from an institutional perspective, the judiciary is a counter-majoritarian institution and compared to the popular branches, the legislature and the executive, has less political legitimacy to participate in a highly political process such as constitution-making.[22] Moreover, judges are not elected by the

17 Ibid., p. 373.
18 Elster, 1995, p. 364.
19 Ibid., p. 373.
20 For more details, see R. Albert, 'Four Unconstitutional Constitutions and their Democratic Foundations', *Cornell International Law Journal*, Vol. 50, No. 2, 2017, p. 169.
21 See Hasebe, 2017, pp. 28–30.
22 See G. Zhu and A. Kouroutakis, 'The Role of the Judiciary and the Supreme Court in the Constitution Making Process: The Case of Nepal', *Stanford International Law Journal*, Vol. 55, 2019, pp. 69–71.

people; in fact, judges are expected to be politically insulated. Thus, the institution has limited democratic legitimacy.

Having said that and given the political nature of the constitution-making process, it seems that it is paradoxical for an institution like the judiciary with limited democratic legitimacy to participate in the drafting of a constitution or even to act as a constraint in the process.

9.3 Formal and substantive justifications

While a number of paradoxes emerge regarding the role of the courts in the constitution-making process, in practice, courts have participated in the constitution-making process of a number of countries the recent years, namely in Colombia, South Africa, Honduras, and Nepal in the constitution-making process in 1991, 1993, 2009, and 2011, respectively.

The close examination of these cases will show the role of the judiciary in the constitutionmaking process under different circumstances. In particular, the existence of an interim constitution or a total revision of the existing constitution provides formal justification for the intervention of the judiciary in the constitution-making process. As will be shown below, the provisions of the interim constitution may grant direct authority to the court to intervene in the constitution-making process to control the constituent assembly, to review its acts, and even to certify the final constitutional document.

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

9.3.1 Formal justifications

As was mentioned previously, the existence of an interim constitution offers the conditions for the participation of the courts in the constitution-making process. This was the case in South Africa. In South Africa, an interim constitution was adopted in 1993 to officially end the apartheid period and to serve as transitional until the adoption of a new constitution.[23] Indeed the aim of the interim constitution was to define the framework for the adoption of a new and permanent constitution.[24]

23 About interim constitutions and sunset clauses in the constitution drafting, see A. Kouroutakis, *The Constitutional Value of Sunset Clauses*, Routledge, 2017, p. 163.

24 The preamble of the Constitution of the Republic of South Africa in 1993, prescribed that 'in order to secure the achievement of this goal, elected representatives of all the people of South Africa should be mandated to adopt a new Constitution in accordance with a solemn pact recorded as Constitutional Principle'. See Constitution of the Republic of South Africa, 1993, [Preamble].

Article 71 of the Interim Constitution entitled 'Constitutional Principles and Certification'[25] prescribes the principles and the procedure of the approval of the new and permanent constitution. In particular:

> (1) A new constitutional text shall– (a) comply with the Constitutional Principles contained in Schedule 4; and (b) be passed by the Constitutional Assembly in accordance with this Chapter. (2) The new constitutional text passed by the Constitutional Assembly, or any provision thereof, shall not be of any force and effect unless the Constitutional Court has certified that all the provisions of such text comply with the Constitutional Principles referred to in subsection (1) (a). (3) A decision of the Constitutional Court in terms of subsection (2) certifying that the provisions of the new constitutional text comply with the Constitutional Principles, shall be final and binding, and no court of law shall have jurisdiction to enquire into or pronounce upon the validity of such text or any provision thereof.

Hence, the drafters of the Constitution, the members of the constitutional assembly,[26] had upstream and downstream constraints based on the classification by Elster.[27] Upstream constraint was the compatibility of the text of the constitution with 34 principles that were included in Schedule 4 of the Interim Constitution.[28]

Accordingly, once the drafters of the Constitution finalized the text of the new constitution, which was approved by 86 per cent of the members of the constitutional assembly,[29] it was sent to the Court for certification. Before the Court, a number of objections were submitted opposing the certification of the new text of the Constitution by political parties and private members alike.[30] Interestingly, the Court set the interpretation principles based on which it would apply the constitutional principles prescribed in Schedule 4.[31] Furthermore, it acknowledged

25 Constitution of the Republic of South Africa, 1993, Article 71.
26 Constitution of the Republic of South Africa, 1993, Article 68.
27 See n. 18.
28 Among them, the drafters of the interim constitution included the principle of the democratic governance and the equality (I) the protection of fundamental rights; (II) the prohibition of discrimination; (III) the supremacy of the constitution; (IV) the principles of equity and substantive equality; (V) the principle of separation of powers and checks and balances; (VI) the independence and impartiality of the judiciary; (VII) the principle of representation; (VIII) of accountability in the administration; (IX) the protection of minority political parties; (XIV) the rigidity of the amendment process; (XV) the different levels of government; (XVI) the relationship between central and regional governments (XVIII). For more details see Constitution of the Republic of South Africa, 1993, Schedule 4.
29 Certification of the Constitution of the Republic of South Africa, 1996 (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996) [21].
30 Ibid., [24].
31 Certification of the Constitution of the Republic of South Africa, 1996 (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September

its limited jurisdiction in the internal processes followed by the constitutional assembly on the drafting of the new text of the constitution, the so-called *interna corporis* of the constitutional assembly.[32]

Eventually, the Constitutional Court ruled that several provisions of the text of the newly adopted Constitution did not comply with a number of constitutional principles of Schedule 4 of the interim Constitution.[33] In particular, the Constitutional Court found that the provision of Art. 23 of the new text was not compatible with the 'Right of Individual Employers to Bargain Collectively'.[34] Also, it found that a law, the Labour Relations Act 66 of 1995 which was excluded from constitutional review based on provision 241(1) of the new text was incompatible with the 34 principles.[35] In addition, it found that the failure of the drafters of the new constitution to entrench some provisions did not comply with the 34 principles.[36] Furthermore, it found that the offices of the Public Protector and Auditor regulated by provisions 182(1) and 188 of the new text respectively did not receive the safeguards expected by the 34 principles.[37] Finally, the Constitutional Court found that some specific regulations about the competence of the local government did not comply with the 34 constitutional principles.[38]

Regardless of the outcome of the case, the intervention of the Constitutional Court of South Africa was a mandatory process, proscribed in the ratification process.[39]

1996). '[33] In the light of the background described and in the context discussed above, the CPs have to be applied and interpreted along the following lines. [34] The CPs must be applied purposively and teleologically to give expression to the commitment "to create a new order" based on "a sovereign and democratic constitutional state" in which "all citizens" are "able to enjoy and exercise their fundamental rights and freedoms. [35] The CPs must therefore be interpreted in a manner which is conducive to that objective. Any interpretation of any CP which might impede the realisation of this objective must be avoided. [36] The CPs must not be interpreted with technical rigidity. They are broad constitutional strokes on the canvas of constitution making in the future. [37] All 34 CPs must be read holistically with an integrated approach. No CP must be read in isolation from the other CPs which give it meaning and context. [38] It accordingly follows that no CP should be interpreted in a manner which involves conflict with another. The lawmaker intended each of the CPs to live together with the others so as to give them life and form and nuance'.

32 Ibid., [28]. 'Nor do we have any power to comment upon the methodology adopted by the CA'.

33 For a complete list with the provisions of the new text that violated the 34 principles see Certification of the Constitution of the Republic of South Africa, 1996 (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996) [482].

34 Ibid., [69].

35 Ibid., [149].

36 Ibid., [152–156].

37 Ibid., [161–165]

38 Ibid., [301].

39 See Zhu and Kouroutakis, 2019, p. 69, 81. About the role of the Constitutional Court see also J. Sarkin, 'The Political Role of the South African Constitutional Court', *African Law Journal*, Vol. 114 S, 1997, p. 134.

Having said that, it is worth noting that the Constitutional Court itself tried to distinguish its role from the political process. In particular, it clarified the following:

> First and foremost it must be emphasized that the Court has a judicial and not a political mandate. Its function is clearly spelt out in IC 71(2): to certify whether all the provisions of the NT comply with the CPs. That is a judicial function, a legal exercise. Admittedly a constitution, by its very nature, deals with the extent, limitations and exercise of political power as also with the relationship between political entities and with the relationship between the state and persons. But this Court has no power, no mandate and no right to express any view on the political choices made by the CA in drafting the NT, save to the extent that such choices may be relevant either to compliance or non-compliance with the CPs. Subject to that qualification, the wisdom or otherwise of any provision of the NT is not this Court's business.[40]

Finally, besides the existence of an interim constitution, the role of the courts in the constitution-making process is justified when a total revision of the existing constitution is initiated. The total revision of the constitution may be a procedure explicitly regulated in the existing constitution, such as the case of Spain,[41] Argentina,[42] and Bulgaria.[43] The drafters of the Constitution may explicitly recognize a role for the judiciary in such process. However, as of today, there is no provision on total revision of the constitution that recognizes the role of the courts in the total revision process.

9.3.2 Substantive justifications

Having explored the formal justifications for the participation of the judiciary in the constitution-making process, this section will examine the substantive justifications. To begin with, the idea that unconstitutional constitutional norms

40 Certification of the Constitution of the Republic of South Africa, 1996 (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996) [27].

41 See for instance, the Constitution of Spain, 1978, Article 168: '1. If a total revision of the Constitution is proposed, or a partial revision thereof, affecting the Preliminary Title, Chapter Two, Section 1 of Title I, or Title II, the principle shall be approved by a two-thirds majority of the members of each House, and the Cortes shall immediately be dissolved. 2. The Houses elected must ratify the decision and proceed to examine the new Constitutional text, which must be approved by a two-thirds majority of the members of both Houses. 3. Once the amendment has been passed by the Cortes Generales, it shall be submitted to ratification by referendum'.

42 Likewise, see the Constitution of Argentina 1994, Article 30: 'The Constitution may be totally or partially amended. The necessity of reform must be declared by Congress with the vote of at least two-thirds of the members; but it shall not be carried out except by an Assembly summoned to that effect'.

43 See also the Constitution of the Republic of Bulgaria 1991, Article 158.

exist was first articulated by German courts after World War II. Judges expressed the idea that 'superior' constitutional norms exist based on natural law principles, which were superior compared to ordinary and positive law constitutional norms.[44]

Substantive justifications exist regardless of the existence or not of formal justifications. By default, the substantive justifications are abstract and theoretical. For instance, some general legal principles about what is fair and just preexist the constitutional documents, and are omnipresent.

As we have said elsewhere,

> such principles, which are not written and do not depend on the existence of a constitutional document, might be seen as natural law or as supra-constitutional principles. Such principles might be common features across countries that share common constitutional traditions, or they might be specific norms based on the constitutional history of each country. Such norms, in reality, create a general framework within which the constituent power is exercised and thus form limitations in the constitution-making process. Accordingly, if there is a violation of these norms, then the courts might intervene during the constitution-making process.[45]

In particular, in Nepal, the justification for the role of the court was not explicit, and based on the text of the interim constitution like the case of South Africa. More precisely, an interim constitution was adopted in 2007.[46] According to the interim constitution, the lifespan of the constituent assembly was limited into two years.[47] However, after two years, there was no final document. Thus, with an amendment to the interim constitution, the lifespan of the constitution assembly was extended, in total four times.[48]

When such extensions were challenged before the Supreme Court, it found that such extensions violated the principle of periodic elections, which was set out in the Preamble of the Interim Constitution.[49] In particular, it ruled that:

44 See G. Dietze, 'Unconstitutional Constitutional Norms', *Virginia Law Review*, Vol. 42, No. 1, 1957, p. 1, 3. 'It was soon claimed that the judges could not only review a statute for its constitutionality, but also the compatibility of constitutional norms with those "superior" constitutional norms that contained natural law. This gave rise to the problem of unconstitutional constitutional norms. Closely tied up with the compatibility of constitutional norms with natural law, that issue became one of the most fascinating juristic phenomena of recent years. It reflects the German jurists' farewell to a positivistic tradition in which most of them had been brought up'.

45 Zhu and Kouroutakis, 2019, p. 69, 81.

46 See Constitution (INTERIM) of Nepal, 2007.

47 See Constitution (INTERIM) of Nepal, 2007, Art 63–64.

48 International IDEA, 'Nepal's Constitution Progress: 2006–2015: Progress, Challenges, and Contributions of the International Community', 2015.

49 Bharatmani Jungam v Office of the President, Writ No. 68-ws-0014, at 4–5 (Nov. 25, 2011).

> In case the Constitution did not come into force within the stipulated time, there may ipso facto rise a political question about which the Preamble of the Constitution suggests that the only way out of the problem is to go into the periodic election. In such a situation the act of frequent extension of time limit about which the Article 64 of the Interim Constitution clearly specifies shall be ipso facto void in the eyes of law.[50]

The jurisdiction of the Supreme Court of Nepal was based on the ordinary jurisdiction of Art. 102 Clause 4 of the Interim Constitution of Nepal 2063 (2007), according to which the Supreme Court 'shall have the final authority to interpret [the interim] Constitution and the laws in force'.[51]

Furthermore, in the case of a total revision of the Constitution, in case there is no provision regulating the total revision, *a fortiori* there is no such provision about the role of the courts. Likewise, the jurisdiction of the courts might be justified on their ordinary jurisdiction. Such are the cases of Colombia and Honduras.

In fact, in Colombia in 1990, the National Commission proposed to hold a referendum in parallel to the elections of 11 March 1990 so as to form a constituent assembly to propose a new constitution.[52] Despite the fact that an official referendum did not take place, an unofficial one was organized and the result was an overwhelming support for a new constituent assembly. This led President Virgilio Barco to use his emergency powers in order to call for an official referendum along with the presidential elections of 27 May 1990. The use of presidential emergency powers was challenged before the Supreme Court which uphold this unconstitutional total revision of the constitution. Fox, Gallon-Giraldo, and Stetson argue that 'the Court considered that according to general principles of Colombian Constitutional Law, governance of the state derives from the people's will. Consequently, if the Colombian people decide to reform their constitution they are free to do so without restraint'.[53]

The justification for a total revision of the constitution was offered by Madison who stated on the unconstitutional adoption of the US Constitution in 1999 that

> [Citizens] must have reflected, that in all great changes of established governments, forms ought to give way to substance; that a rigid adherence in such cases to the former, would render nominal and nugatory the transcendent

50 Ibid., at 4.

51 Constitution (INTERIM) of Nepal, 2007, Article 102.

52 D. T. Fox Gustavo Gallon-Giraldo, and A. Stetson, 'Lessons of the Colombian Constitutional Reform of 1991', in Laurel E. Miller and Louis Aucoin (Eds), *Framing the State in Times of Transition – Case Studies in Constitution Making*, Washington DC, United States Institute of Peace Press Washington DC, 2010, p. 470.

53 Ibid., p. 471.

> and precious right of the people to abolish or alter their governments as to them shall seem most likely to affect their safety and happiness.[54]

Thus, the judiciary in Colombia has also intervened in the constitution-making process, as it approved the formation of a constituent assembly,[55] regardless of the fact that such a process contradicted the amendment process of the existing constitution.[56]

On the other hand, in Honduras, in 2009, when the President Manuel Zelaya attempted a total revision of the constitution, the Supreme Court similarly intervened but in order to block the process. The Supreme Court of Honduras[57] did not approve the total revision of the constitution through popular referendum, 'on the argument that [the President] had promoted presidential re-election, and had attempted to alter the unamendable provisions in the Constitution'.[58] Having said that, the Supreme Court of Honduras' intervention in the constitution-making process, which led to a constitutional crisis as the President was ousted from his position,[59] had a completely opposite effect from the deferential stance of the Supreme Court of Colombia.

9.4 Conclusions

This chapter has examined the role of the judiciary in the 'constitutionalization' process. It has examined the role of the courts in four legal orders, namely South

54 J. Madison, 'The Federalist No. 40', in Clinton Rossiter (Ed.), *The Federalist Papers*, New York, Modern Library, 1938, pp. 257–258. See also R. Albert, 'Four Unconstitutional Constitutions and their Democratic Foundations', *Cornell International Law Journal*, Vol. 50, No. 2, 2017, p. 169.

55 Supreme Court, Case No. 138, May 24, 1990; available at www.teoriajuridicayconstitucion.com/app/download/13243974430/Sentencia++138+1990+de+la+CSJ.pdf?t=1485478996 [Accessed 20 April 2019].

56 For details on the constitution-making process in Colombia during the early 1990s, see K. Merhof, 'Building a Bridge between Reality and the Constitution: The Establishment and Development of the Colombian Constitutional Court', *International Journal of Constitutional Law*, Vol. 13, 2015, p. 714, pp. 716–717.

57 Corte Suprema de Justicia, Comunicado Especial, June 30, 2009; and Comunicado del 20 de Julio, July 20, 2009; both available at www.poderjudicial.gob.hn [Accessed 20 April 2019].

58 L. Marsteintredet, 'The Honduran Supreme Court Renders Inapplicable Unamendable Constitutional Provisions', *International Journal of Constitutional Law Blog*, 2015, available at www.iconnectblog.com/2015/05/Marsteintredet-on-Honduras [Accessed 20 April 2019).

59 'An array of Honduran civil authorities – including all 15 members of the Supreme Court, the chief prosecutor, an overwhelming majority of Congress, and the new, *de facto* government insisted that his ouster was a lawful and constitutional action to defend Honduran democracy and the rule of law from a president who had defied both courts and Constitution, and who was maneuvering to amend the Constitution to allow him to run for a second term'. See D. Casse, 'Honduras: Coup d'Etat in Constitutional Clothing?', *American Society of International Law Insights*, Vol.13, No. 9, 2009, p. 9.

Africa, Nepal, Colombia, and Honduras. The examination of such cases reveals that the courts have participated in the constitution-making process under different circumstances.

Prima facie the role of the courts in the constitution-making process is paradoxical, as courts are purely legal institutions, while the constitution-making process is a highly political process. However, formal and substantive justifications explain their role. For instance, in case of a total revision of the constitution, or in case of an interim constitution, the role of the courts may be explicitly recognized. Such as the case of South Africa with the interim constitution of 1993.

However, in the absence of formal justifications, in the case of Nepal, Honduras, and Colombia, we have seen the courts have participated in the pro-cess either to spur or to block the constitution-making process. Such role is jus-tified on natural law or supra-constitutional principles that transcend the legal orders. However, the intervention of the Courts, due to their limited political legitimacy, needs to strike a balance between deference to the popular will and their role of safeguarding major constitutional principles.