

Nepal's Experience with Constitutional Bench in the Supreme Court as a Federal Dispute Resolution Mechanism: Problems and Perspectives

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1. Introduction: The Constitution of Nepal, 2015 which was drafted and adopted by the second-constituent assembly, after the failure of the first constituent assembly to adopt a constitutional text, effectively divided the State authority into three tiers of governments.² In the Constituent Assembly, there was a debate on the adoption of a judicial mechanism for the resolution of federal disputes. Ultimately, a constitutional bench was grafted onto the presently practiced Supreme Court as an arbiter on federal dispute *inter alia* some additional jurisdictions.³ It is expected to play a crucial role in interpreting and adjudicating constitutional matters, particularly those related to federal disputes. Thus, this specialized bench within the Supreme Court of Nepal is ultimately responsible for resolving disputes arising between different levels of government within the federal structure of Nepal.

It is not unexpected that there may be various challenges to convert the text and spirit of the constitution into living reality. Still, it is premature to evaluate the functioning of the constitutional provisions with a very short experience of eight years. However, some notable achievements clearly visible during this period are the effective implementation of establishing and institutionalizing the federal institutional structures through two general elections, peaceful transition of political power as well as effective exercise of judicial power through the constitutional bench of the Supreme Court in highly politically sensitive constitutional issues like the dissolution of House of Representatives. However, there are many challenges in respect of devolution of power to the decentralized levels of governance i.e., provincial and local levels. It has been argued that the Federal Government is not inclined to empower the devolution of power on the basis of constitution structure, it has been encroaching upon the authority of the provinces. On these bases some federal disputes are brought to the constitutional bench.

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² The Interim Constitution of 2006 through its first amendment in 2000 has formally declared Nepal as a federal State but it has neither divided the State authority between the different units of governments nor any mechanism for the resolution of such types of disputes. The Constitution has divided the Authority of State into Federal, Provincial and Local Level of Governments and divided the legislative authority accordingly. Lists.....

³ With certain exceptions the structure and authority of the Supreme Court under the 1990 constitution was incorporated into the Constitution of 2015.

This paper attempts to examine the constitutional and political reasons for the establishment of the constituent bench instead of a full-fledged constituent court. On the basis of the institutional development of the bench and its functioning an evaluation is made on the question whether it has been moving in the direction of fulfilling the expected role of strengthening the federalism through effectively and efficiently resolving constitutional and legal disputes between the federal units of the governance. However, the qualitative analysis of the jurisprudence developed by the bench during these four couple of years is beyond the scope of this paper.

- 2. Federalism and Judiciary:** In a federal country, it is natural to arise legal and constitutional disputes between the federal units. It is because their powers are defined and divided by the constitution and in practice these provisions may not be clear to all of the parties or sometimes those may not be able to accommodate the changing contexts. A neutral and apolitical institution for the resolution of such disputes is regarded as a *sine qua none* of the federal system. It is expected to grease the friction between the federal units for the smooth moving of the system as such. This role has been entrusted to the judiciary in a universal fashion. However, there are variations in practice on the nature and role of the judiciary.

In the classical model of federation like the USA a general Supreme Court is empowered as final arbiter on the common legal dispute, constitutional reviews as well as resolution of federal disputes. This practice is generally followed in countries influenced by the common law tradition of legal systems. On the other hand, the countries that follow the civil law tradition of the legal system have developed a practice of establishing a separate constitutional court, outside the regular court structure, as the final interpreter of the constitution as well including the resolution of federal disputes. However, this classification is not always true. The recently adopted constitution of South Africa which follows common law tradition has adopted the Constitutional Court. Japan has entrusted the authority of final interpretation of the constitution to the Supreme Court within the ordinary court system although it falls under common law tradition. Thus, the constitutional court is embedded with the civil law system and vice versa is not always true. In the context of Asian countries, the East-Asian sub-region has experienced the practice of constitutional court. The judiciary of the South-Asian region has actively

exercised the authority of judicial review through the Supreme Court within the regular structure of the courts.

Modern constitutional history of Nepal has been influenced by the British model of governance although common law as such is not followed in Nepal. Since the previous constitutions of Nepal have persistently followed unitary form of governance there was no question of need of an institution for the resolution legal and constitutional disputes of federal nature. However, 1990 onwards Nepali judiciary has independently and actively exercised the authority of judicial review of the administrative actions as well as legislation. The debate on the federal dispute resolution mechanism formally started after the first session of the first constituent assembly on 28 May 2008 declared Nepal as a federal republic replacing the long established unitary monarchical system. Ultimately, Nepal adopted a constitutional bench—not having experience in the other constitution of other jurisdictions—within the structure of the Supreme Court. The following paragraphs highlight the reasons for the adoption of this hybrid institution.

- 3. From Constitutional Court to the Constitutional Bench:** The background for the establishment of the constitutional bench which was not practiced elsewhere around the world is compromise of the political forces in the constitutional assembly and the leadership of the then judiciary. The first and second constituent assemblies have taken line for the adoption of constitutional court. The Restructuring of the State and Division of the State Power Committee of the first assembly had unanimously decided for the establishment of a constitutional court. It proposed a five-member court headed by the president. The Committee reasoned those constitutional and legal disputes between the Federal and Provincial units or between Provincial Units [of the State] are different from other ordinary legal disputes and it requires a distinct judicial process to dispose of such disputes. It further argues that handing over those disputes to the ordinary courts may not result in timely and efficient disposal because these courts have to decide disputes between persons in addition to federal disputes. The committee also proposed a limited jurisdiction of hearing and disposing of the to hear and dispose of constitutional and legal disputes

between the federal units. The committee believed such limited jurisdiction [of the constitutional court] leads to timely and efficient disposition of the cases.⁴

During the tenure of the second-constituent assembly, it was argued that there were substantial debates on whether there should be a constitutional court in Nepal and in the process for finalization of the draft of the constitution the constituent assembly was in the line for constitutional court. But the leadership of the judiciary persistently expressed its views against the introduction of constitutional court in Nepal.⁵ Albeit, Nepal Bar Association was in favor of this type of new institution.⁶ A political consensus was made between the main political parties for the establishment of a constitutional outside the Supreme Court but led by the Chief Justice of the Supreme Court and comprising four member judges—two from the senior most justices of the Supreme Court and two justices form outside of the Supreme Court—for a period of ten years.⁷ Interestingly, a writ petition was filed in the Supreme Court against this political consensus and a stay order was issued by the Supreme Court.⁸

The leadership of the judiciary became vocal to express their dissatisfaction with the political development towards the establishment of an independent constitutional court in Nepal. A special national conference of the judges was convened with special emphasis on the judicial system in the future constitution.⁹ The declaration adopted at the end of the Convention, *inter alia*, reads,

“The establishment of a Constitutional Court seems against the values of the constituent assembly: to decentralize the judiciary for the purpose of the enhancement of the access of justice of the people. On the basis of the constitutional history of Nepal and lack of experience of the judicial system [with a constitution

⁴ Conceptual Note and Draft Report, 2066 (Constituent Assembly, Restructuring of the State and Division of State Power Committee pp. XVII-XVIII, 53-54

⁵ SKB, Anandamohan Bhattarai, Unnecessary Burden अनावश्यक बोझ <https://nepalihimal.com/article/6950> Himal Khabar Patrika 18 Aug-1 Sept 2011

⁶ Recommendation no 2 of the resolution adopted on Special Constitutional Conference of Nepal Bar Association held on 15-17 Jestha 2071(BS).

⁷ Report of the Constituent Assembly Committee(n 4 above).

⁸ A Bench of Justice Girish Chandra Lal issued an interim order on 2072.03.04 in the case of Bijayakanta Karna vs. Office of the Prime Minister and Council of Ministers (o71-WO-0953).

⁹ The Second National Conference of the Judges was held in Kathmandu from 2071.08.1-03(B.S). Such Conferences are convened under the leadership and management of the Supreme Court.

court] an experiment with constitutional court does not seem suitable and practical. Thus, there is no need for [the establishment of] constitutional court. Instead, there should be a provision of a permanent constitutional bench within the Supreme Court itself...”¹⁰

The then Chief Justice expressed his dissatisfaction on the issue of hybrid constitutional court through an interview in a national newspaper.¹¹ In addition to this formal expression of the judge’s conference and chief justice, it is said that there were formal meetings between leaders of the main political parties and leadership of the judiciary. In this meeting serious attention was drawn by the judicial leadership in the area of the judicial system. Ultimately, during the last hours of the constituent assembly establishment of a constitutional bench in the Supreme Court was adopted as a mid-way solution¹² of the interest of the political parties to establish a constitutional court and the stand of the judiciary not to establish such a court at any cost.¹³

- 4. Jurisdiction of the Bench:** The structural arrangements of the constitutional provisions for granting jurisdiction to the bench are designed in an interesting framework. Article 133 (1) and (2) define and generally prescribe respectively the judicial review of legislation and judicial review of administrative action jurisdiction to the Supreme Court in general without any reference to the constitutional bench. But Article 137 (1) states in addition to the application made under Article 133(1), the bench shall have jurisdiction to hear and dispose of the cases of (i) dispute between Center and Province, Province and Province, Province and Local as well as Local and Local Level of Governments of the disputes of their authority¹⁴, and (ii) disputes relating to the election of federal and provincial parliament and disqualifications of the members of the federal parliament and provincial

¹⁰ The first part of the no 6 of the declaration. The second part gives grounds against the establishment of such court as it is (i) in does not fit with the judicial culture developed, (ii) do not fit in the regular judicial structure, (iii) creates dispute in the matter of jurisdiction [with regular courts], (iv) promotes the culture of postponement [Nepali word *multabi*], (v) creates uncertainty to follow the precedent, (vi) destroys all the experiences so far achieved, and (vii) creates unnecessary burden on the treasury.

¹¹ An interview with the then Chief Justice Kalyan Shrestha by Hari Bahadur Thapa and Ghanashyam Ojha in Kantipur Nepali daily on 7 Baisakh 2072.

¹² Shyam Kumar Bhattarai, Kanoon p 29.

¹³ तुफान नुयौपाने “असफल सैवैधानिक अदालत, अचित्यमै प्रश्न” हिमाल खबर २०७८ बैशाख ७ ।

¹⁴ Interestingly it does not mention disputes between Center and Local Government which may arise in the future and is of a federal nature.

parliaments. Thus, it can be said that the general judicial review of legislation jurisdiction has been assigned to the constitutional bench through the jurisdiction of the Supreme Court whereas the federal disputes and election and disqualification related disputes have been independently provided by Article 127 of the Constitution to the bench. In addition to these disputes, Article 137(2) jurisdiction of the Supreme Court authorizes the Chief Justice of the Supreme Court to allocate [transfer] any cases under consideration at the Supreme Court containing a serious issue of constitutional interpretation to the bench.

5. Practice and Problem in Functioning of the Bench:

a. Formation and Composition of the Bench: The Constitutional text generally prescribes a five-member constitutional bench headed by the chief justice. The four member judges are to be designated by the Chief Justice on the recommendation of the Judicial Council.¹⁵ There are no guidelines for assigning, the other justices of the Supreme Court, the role as the member of the constitutional bench. The constitutional text only states rules relating to the operation of the bench shall be as prescribed by the Supreme Court.¹⁶ After two months of the promulgation of the Constitution, the Full Court of the Supreme Court issued the Supreme Court (Operation of Constitutional Bench) Rules, 2072¹⁷ that facilitated the process of formation of the bench.

As the procedural rules for functioning of the bench were in place, for the first-time constitutional bench was constituted, within a week of the publication of the rules in Nepal Gazette, under the leadership of the Chief Justice Kalyan Shrestha.¹⁸ There are no reasons, on the record, given by the Judicial Council for the selection of those judges to assign additional roles. However, it seems that it took only the seniority criteria to the role since all of them were from the top of the seniority list in the Supreme Court. There may be sound reasons for this but the Council did not like to disclose them. But this tradition was broken by the Council itself within one month on the assignment of Justice Om Prakash Mishra after the retirement of

¹⁵ Section 137(1) of the Constitution of Nepal 2015.

¹⁶ Ibid Article 137(5).

¹⁷ Nepal Gazette, Part III, 2072.8.14 (BS).

¹⁸ Other members were JJ. Girish Chandra Lal, Sushila Karki, Baijanath Upadhaya and Sushila Karki and it was constituted on 2072.8.22.

Justice Lal bypassing Justice Dipak Raj Joshi from the seniority list.¹⁹ Thus, from the very beginning of its life there has not been clear standing in the Council on who and on what ground will be assigned to the bench. It seems that it is one of the main reasons for the absence of institutional development of the bench.

At the time for institutional development, it suffered a serious blow when it was indirectly forced by the Judicial Council to take one year holiday at its infancy of six months.²⁰ There were no records available on whether the Judicial Council failed to recommend the name of the judges for the bench due to internal problems or it did not take initiative for that purpose. However, it has been argued that the internal dimension of the then working bench was the reason for such lack of responsibility on the part of the Judicial Council. The bench was divided in the disposition of a case having a legal and constitutional issue of the validity of an order issued by the President to remove difficulties in the execution of the Interim Constitution of 2006. The then Chief Justice was in the minority in the bench and to be Chief Justice Sushila Karki sided with the minority. One commentator has argued that her siding with the minority opinion has caused serious impact on the bench leading to the moribund state of the bench for one year.²¹

In this deadlock situation, the idea of seeking the role of the judiciary itself in the process of formation of the bench was triggered through a writ petition in the Supreme Court, requesting to issue an order to the Judicial Council for designating the judges to the bench, when it was in limbo. The Supreme Court took a very active position in handing down a judgment within three months of the filing of the petition.²² The Court interpreted the constitutional provision that although there will be only four member judges in the bench the Council as per the constitutional provision is required to recommend more than four number of the judges to enable

¹⁹ But Justice Joshi was included in the bench afterwards.

²⁰ The then Chief Justice Kalyam Shrestha was retired on superannuation on 2073.1.1 (BS). The then Justice Sushila Karki was appointed the Chief Justice on 2073.3.27 and retired on superannuation on 2074.2.24.(BS). During her tenure no judges were recommended by the Judicial Council for assigning the role of the judges of the bench.

²¹ Shyam Kuman Bhattarai, although the commentor has not clearly stated, it can be inferred from his statement that the remaining judges of the bench were not happy with her side in the case and impliedly played role for manipulating the Judicial Council to take any initiative to assign judges vacant in the bench.

²² In the case of *Madhavkumar Basnet vs. President of the Judicial Council and Ors.* NKP 2074:4 decision no 9985 the show cause order was issued on 2073.10.25 and judgment was handed down on 2073.12.10.

the Chief Justice a level of discretion to assign them to the bench on case-to-case basis. Then it ordered the Judicial Council to recommend the name of the panel of member judges within 15 days. However, initially the Judicial Council openly ignored the order of the Court by recommending names of the judges for only two vacant sets of judges in the bench on 2075.05.14 and many more times afterwards till 2076.4.19. Only on the later date the Council recommended a greater number of judges and on the basis of the practice there are up to 12 number of panel judges recommended and the Chief Justices assigned four of them to hear a case.

After recommendation of a panel of judges for the constitutional bench by the Council a practice has been developed to assign four member judges on a case-to-case basis. And there is a practice of sitting on the constitutional bench once a week on Thursday.

The above discussed series of events in respect of the formation and functioning of the bench clearly shows there is serious institutional deficiency in the bench as an institution. First, the void in the constitutional and legal provisions in respect of designation of judges to the bench has created difficulties in the formation of the bench. Further, it seems that the Judicial Council did not take the responsibility of selecting the judges on the basis of their expertise and only relied on the seniority criteria as a safe measure. This practice has not only undermined the recognition of expertise but also restricted the opportunity of development of expertise within the Supreme Court. It is because the senior most judges have less chance of serving in the bench of their early retirement schemes which undermines the chance of developing expertise.²³

The second factor contributing institutional deficiency seems to be the legacy of the judiciary which was not in favor of the constitutional court and has accepted the bench as mid-way solution. But during these eight years the judiciary has practically undermined the existence of the bench as an institution. A common man does not understand why the Chief Justice who is the head of the Judicial Council fails to recommend judges for the bench for more than one year. This has devalued the

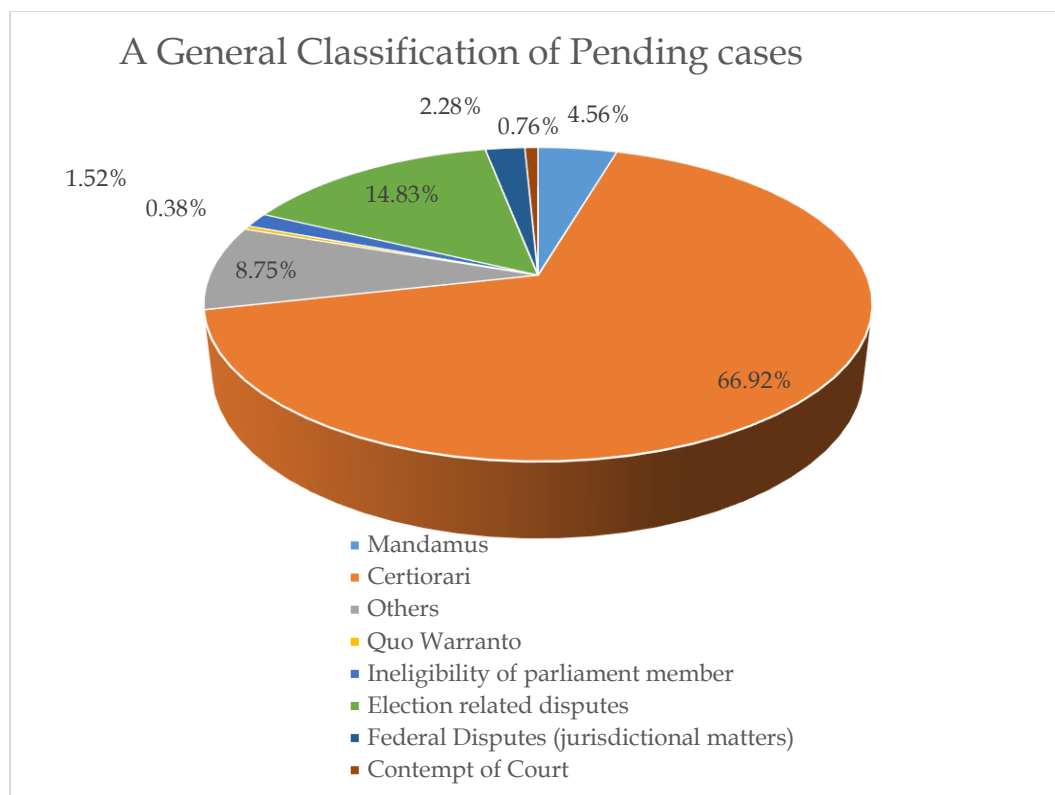
²³ An empirical study may be carried out about the average time served by the justices in the bench for further validation of this statement.

institution of the Chief justice itself. Similarly, the intervention of the Supreme Court through a writ petition for appointment of a large number of judges has also challenged the separate identity of the bench and tried to equate it with other benches of the Supreme Court. This judgment has not only undermined the bench but some argue that it has exceeded the authority and amended the constitution itself.²⁴ This has further been contributed through the allocation of limited time—twice a week—to given for the constitutional bench.

- b. Functional Analysis of the Bench:** A general classification²⁵ of the cases pending in the bench indicates that constitutional and legal disputes on the issue of the authority of the federal governments seems a very few amounting 2.28 only. Thus, it is clearly seen that the bench designed for the disposal of the federal-disputes has in reality overloaded with other disputes assigned to it. This will, ultimately, adversely contribute to the delayed disposal of all the cases including federal disputes.

²⁴ Shyam Kumar Bhatarai has argued that it has informally amended the constitution.

²⁵The classification done in the chart below is a very preliminary one made on the basis of the data provided by the case registration section for their own purpose. It needs further refinement after a thorough study of the casefiles on the record of the court. Since this paper is a work on progress, this process will be done in the course of its finalization.



The table below, the data of year-wise registration of cases²⁶ and their disposal rates—presents a very gloomy picture of the justice delivery process within the constitutional bench. Delayed disposal of the cases clearly seems a persistent problem in the bench. The highest rate of disposal is ...

Case Registration and Disposal of the Constitutional Bench²⁷

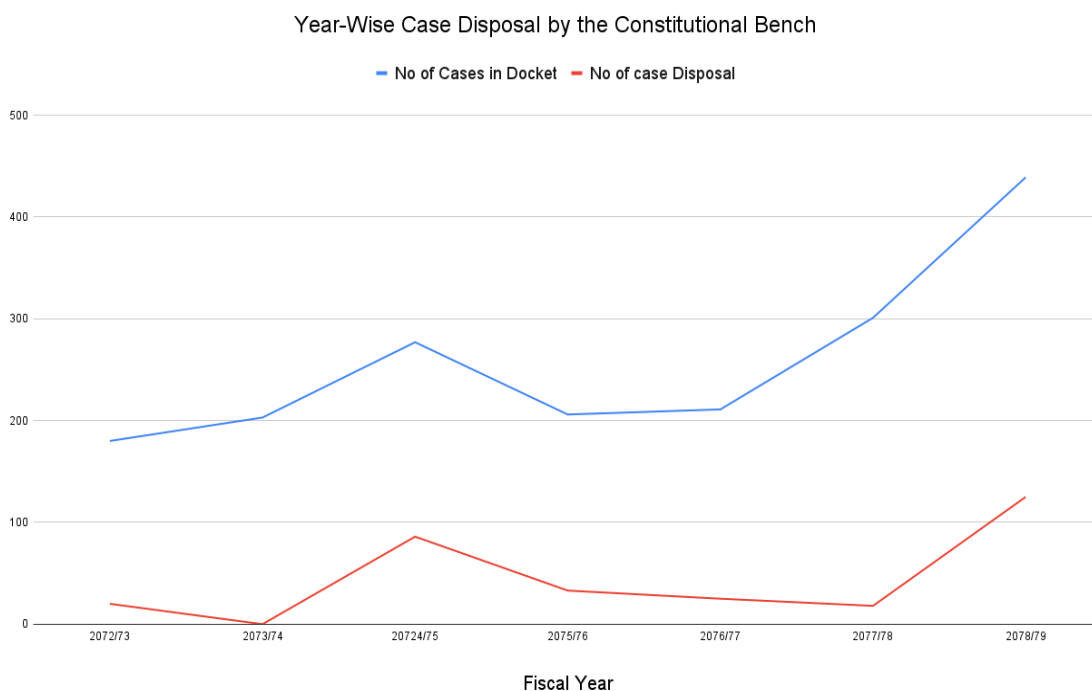
Fiscal Year	No of Cases in Docket	No of case Disposal	Disposal Percentage	Pending Cases
2072/73	180	20	11	160
2073/74	203	0	0	203
20724/75	277	86	31.04	191

²⁶ The case registered number of the F/Y 2072/73 includes the cases transferred to the bench that were pending in the special bench under the previous constitutional arrangements.

²⁷ Data of this table is drawn from the annual report of the Supreme Court.

2075/76	206	33	16.01	173
2076/77	211	25	11.84	186
2077/78	301	18	5.98	283
2078/79	439	125	28.47	314

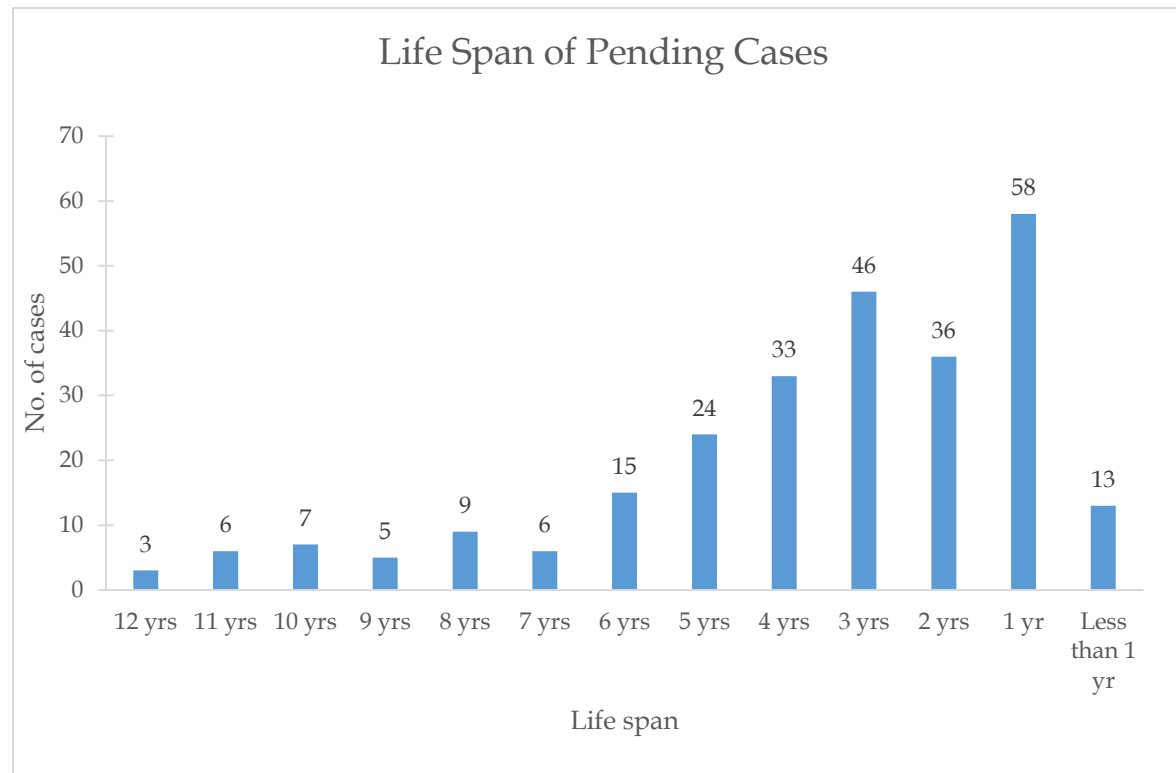
The flow of the case registration and disposal is presented in the following chart.



The Constitutional Bench has recently decided two house dissolution cases where it held two consecutive dissolutions of the House of Representative by the President on the recommendation of the Council of Ministers invalid.²⁸ But this practice is not new in the form of judicial review of administrative action. It has carried out the legacy of the authority of and practice of the Supreme Court under the 1990

²⁸ *Dev Prasad Gurung and Ors vs. Office of the President and Ors.* (077-WC-0037 order date 2077-1-11), *Sher Bahadur Deuba and Ors. vs. Office of the President and Ors.* NKP (CB)3:1 p 62.

Constitution.²⁹ Although there are some cases of timely disposal the overall picture of the life of the pending cases is very high. Some of the cases—transferred from the special bench—have been of 8-12 years old. Without overhauling of the working pattern of the bench those cases cannot be disposed of within a reasonable time.



One of the important jurisdictions of the constitutional bench is to decide the constitutional validity of legislation. This is the main jurisdiction of the constitutional court as such in most of the jurisdictions adopting such a court. In Nepal this jurisdiction was very effectively exercised, after the 1990 constitutional provision, clearly authorizing the Supreme Court to exercise this power.³⁰ The constitutional bench, under the new constitution, has been

²⁹There were four cases decided by the Supreme Court in the issue of House dissolution under the 1990 Constitution. But in the first case (Hari Prasad Nepal vs. Girija Prasad Koirala) the House dissolution was held constitutional and in the second case (Rabiraj Bhandari vs Manmohan Adhikari) it was held invalid. The third case was related to the advisory opinion to the King by the Crown on the issue of whether a special session of the House gets priority over the dissolution recommendation by the Prime minister. (Surya Bahadur Thapa). And in the fourth case (Sher Bahadur Deuba) House dissolution was held constitutional).

³⁰ Rishikesh Wagle, "Judicial Review of Legislation in Nepal: Retrospect and Prospect", Annual Survey of Nepalese Law (1, 2002) pp.000..

exercising this authority for the last eight years. Till date, five legislative provisions have been declared void by the bench. Still, a comparative study of the exercise of this jurisdiction—in number and substance—with the previous constitutional provision and practice will be useful for deeper understanding of the efficiency of the bench. An analytical study of the jurisprudence developed by the bench in deciding a legislative provision *ultra vires* will contribute *inter alia* for the development of a more robust jurisprudence in this area.

Legislative Provisions Declared *Ultra Vires* to the Constitution³¹

S. N.	Name of Case	Name of the Legal Provision held void	Date
1.	Madhav Prasad Chamlagai vs. Office of the Prime Minister and Council of Ministers and Ors.	Rule 3(2A) (C) of the Mountaineering Rules, 2059	2075.03.13 NKP (CB)2:1 p 206
2	Purushotam Prasad Banskota and Ors. vs. TU Senate (4 petitors)	Rule 54(4A)(4B) of the TU Teacher and Staff Service Rules,	2076.06.08
3	Lokendra Bahadur Oli vs. Provincial Parliament of Province No 2 and Ors.	Various provisions of the Remuneration and Benefits of the Officials and Members of the Local Level, 2075 (of Province No 2, 5, Gandaki and Far-Western)	2076.07.01 NKP (CB)2:1 p 89
4	Bishnu Prasad Ghimire vs. Commission for the Investigation of the Abuse of Authority	Rule 30 of The Commission for the Investigation of the Abuse of Authority Rules, 2059	2078.01.08 NKP (CB)3:1 p 39
5	Premlal Maharjan and Ors. vs. Federal Parliament and Ors.	Section 87(3) of the Labour Act, 2074 and Rule 82 of the Labour Rules, 2075	2079.10.11

³¹ This table is drawn from श्याम कुमार भट्टराई, “संवैधानिक इजलासको स्थापना र यसको प्रभावकारिताको प्रश्न” कानून (संयुक्ताङ्क १५७-१५८) पृ २७।

6. Is the Bench Arbitrating Federal Disputes? Since the politico-legal landscape of federalism is evolving in Nepal it is premature to make a full-fledged analysis of the constitutional bench in respect of its efficiency in arbitrating the federal disputes. However, the experience of about a decade gives a perception that present modes of functioning will not lead the bench to establish it as an efficient federal dispute resolution mechanism. Before making a preliminary conclusion in this respect, it should be beneficial to have a brief look at the cases pending before the Supreme Court filed by the Provincial Governments against the Federal Government are briefly discussed below. It should be noted at this point the bench has not handed-down its judgments in any of the federal disputes brought before it.

The first case challenging the authority of the Federal Government on the issue of forest management authority within its territory was filed by the Province No. 2. It is alleged, as per Schedule 6 of the Constitution, the authority to manage forest within the territory of a Province is vested within that Province. On that ground the provincial government challenged the decision of the Central Government to establish a Forest Management Authority and handover a forest management project (Sagarnath Forest Development Project) to the to be established authority under the control and management of the central government.³² In a preliminary hearing the bench found a *prima facie* case in favor of the province and issued an interim order. The case went for a full-fledged hearing and it was put on judgment reading. Written pleadings after the hearing also were submitted by the parties as per the instruction of the bench. However, the judgment was not handed-down within prescribed time and due to the retirement of the chief justice and other justices of the bench all the hearings were consequently turned into void. Thus, this case is waiting for a fresh hearing on the bench. In the second case the provincial government challenged the enactment of the Forest Act, 2076 as unconstitutional on the ground of legislative incompetency of the Federal Parliament on the basis of encroachment upon the authority

³² *Industry, Tourism, Forest and Environment Ministry of Province No. 2 vs Government of Nepal* 2076.4.16 (2076-WC-0001).

of the provincial government which is still pending in the court.³³ Another case is related to the authority to use underground water resources.³⁴ The petitioner has challenged the guidelines made by the Federal Government to underground water harvesting activities through its organs on the ground that province level such projects falls under the authority of the provenience as per the Schedule 6 of the Constitution.

Various provisions of the Federal, Provincial and Local Level (Coordination and Interrelation) Act, 2077 are challenged on the grounds *inter alia* encroaching upon the legislative competence of the province government. The main issue in this case is the restriction to the provincial governments for criminal investigation and prosecution of the offenses that fall under the legislative authority of the province.³⁵ The call for application made by the Federal Government for recruitment in the police cadre was challenged by the provincial government. The main claim of the applicant is that the police service is in the list of competencies of provinces as mentioned in no 1 of the Schedule 6 of the Constitution which will be blatantly violated through the recruitment of the police by the Federal Government. Thus, it has been asked by the court to stay the recruitment process as well as an order to the Federal Government for the hand-over of the police service to the respective provinces.³⁶ The decision of the Federal Government to manage (transfer) the civil servants who were sent to the provinces as per the Employee Adjustment (Samayojan) Act, 2075 were challenged on the grounds that neither the Constitution nor the Act allow the federal government to transfer the employee who are sent to the provinces.³⁷ It is claimed the decision to that effect undermines the autonomy of the provinces to manage the civil servants within its jurisdiction.

Some interesting facts emerge from a brief survey of these cases. First, Mahesh [formerly province no 2] Province is the solo petitioner in all disputes.³⁸ It is equally important that

³³ *Industry, Tourism, Forest and Environment Ministry of Province No. 2 vs Secretariat of the Federal Parliament and Ors.* 2076.8.2.

³⁴ *Physical Infrastructure Ministry of Province No. 2. vs Government of Nepal and Ors.* 2077.8. 18 (2077-CC0005)

³⁵ *Minister for Internal and Legal Affairs of Province No. 2 vs. Government of Nepal and Ors.* 2077.7.19

³⁶ *Minister for Internal and Legal Affairs of Province No. 2 vs. Government of Nepal and Ors.* 2077.7.19

³⁷ *Chief Minister of the Province No. 2 Lalbabu Yadav vs. Government of Nepal and Ors.* 2078.05.00

³⁸ Very recently, Bagmati Province Bagmati Province has filed an application for repeal of the Urban Area Public Transportation (Management) Authority Act. See, Binod Ghimire, "Federalism-related Disputes Pile up at Supreme Court <https://kathmandupost.com/national/2023/10/31/federalism-related-disputes-pile-up-at-supreme-court>.

the region of the province has a long tradition of seeking a federal system of governance in the country. And, another notable fact is that only in this province the government was led by other political forces than in the central government when these suits were filed. Thus, it is clear that the constitutional and legal to be determined by the court will have political ramifications.

Non-disposal of a single case having issue of the federal element for a period of four years has certainly casted a doubt on the legitimacy and efficiency of the bench. The fact that some handling of some sensitive cases in a timely fashion by the bench leads to an inference that the judiciary is reluctant to handle federal issues. Ultimately, the consequence of nonavailability of constitutionally mandated judicial remedies to the provincial government may lead them to seek extra-constitutional measures to resolve the disputes. That will have a severe blow not only to the judicial system of the country but to the newly adopted federal system as such. The recent ultimatum from Madhesh province and backed by other provinces to protest against the central government if their demands—mostly raised in those cases—are not resolved by the center within 30 days³⁹ signals that some extra-constitutional measures are being hatched. It is beyond the scope of this paper for the time being to investigate further on reasons behind the reluctance of the bench to handle such disputes.

- 7. Way Forward:** It may be said, on the basis of the above discussion, the constitutional bench of the Supreme Court has not only failed, during these eight years, to discharge its main responsibility: legal resolution of federal disputes but also not succeeded in building a minimum trust of the institution. An institution accepted half-heartly at the time of constitution building is neither wholly owned by political leadership nor the judicial practice. At this moment, it seems premature to recommend an overhauling of the system through constitutional amendment. Thus, some of the measures discussed below may pave the way for establishing this institution's identity through performance on the condition the relevant stakeholders are interested to make their efforts to these ends.

³⁹ Post Reporter, “All-party team form Madhesh memos Prime Minister on Provincial Powers,” <https://kathmandupost.com/national/2023/11/10/all-party-team-from-madhesh-memos-prime-minister-on-provincial-powers>; Binod Ghimire, “ Provinces Rise up against Kathmandu over denial of Powers”, <https://kathmandupost.com/national/2023/11/09/provinces-rise-up-against-kathmandu-over-denied-powers>

It seems that the given constitutional structure allows for the development of the constitutional bench as a full-fledged court within the Supreme Court itself. One of the ways to this direction is the daily functioning of the bench. As per the current state of caseload the bench will have enough business to conduct hearings. It may be argued that designating five-judges fully to the bench will have an adverse effect on the disposal of the overall caseload in the Court. However, this may be taken as an opportunity to increase the number of the judges in the Supreme Court as such.

For the purpose of the bench to establish it as a court the member judge of the bench should be made dedicated to the bench. The Chief Justice in consultation with the Judicial Council may exercise his authority to that effect. In effect, it will bifurcate the role of the Chief Justice himself. On one hand he will hold the position of the administrative chief of the Nepalese judiciary. On the other hand, as the judicial officer he will head the Constitutional Bench but not the other benches of the Supreme Court. In practice, it will not create any problem for smooth functioning of the apex judiciary. In the case of a need felt a deputy administrative head to the courts except the constitutional bench a provision of associate chief justice may be established through constitutional amendment or through other statutory provisions.

This arrangement will substantially contribute to the development of expertise within the Supreme Court in handling constitutional issues in general and federal disputes in particular. This will start from the time of appointment of the justices in the Supreme Court.