

*Those state organs exercising the power delegated by the sovereign people shall have no right to use the doctrine of necessity as a tool of defense for concealing their repeated omission of duty and long indecisiveness having direct impact on the fate of nation and her people.*

**Supreme Court, Special Bench**

**Rt. Hon'ble Chief Justice Khil Raj Regmi**

**Hon'ble Justice Damodar Prasad Sharma**

**Hon'ble Justice Ram Kumar Prasad Shah**

**Hon'ble Justice Kalyan Shrestha**

**Hon'ble Justice Prem Sharma**

Writ No. 68-ws-0014

**Subject:** Tenth Amendment to the Interim Constitution of Nepal 2063 be declared null and void.

**Petitioner:** Bharatmani Jungam, a resident of Kathmandu Metropolis Ward No. 34 of Kathmandu District & others.

**Vs**

**Respondents:** Office of the President & others

- **Where there is a clear specification of time limit, the action thereof must be done or completed within the time limit so specified. The time period stipulated in Article 64 of the Interim Constitution for the making of a Constitution through Constituent Assembly must not be taken as a formality or a show.**
- **While framing the Interim Constitution, its framer had a fine speculation on the necessity of time specification in order to cause the timely promulgation of it. If this truth is undermined and attempted to draw an archaic interpretation of the original spirit of Article 64 of the constitution to mean that the right to amend constitution includes also the right to extend time period again and again by pushing the task of promulgating into uncertainty constitution into uncertainty shall go against the mandate given by the people. It is also unreasonable through the view point of the constitutional jurisprudence to unusually extend its time period by the Constituent Assembly itself so as to create a limitless and uncertain situation.**

- It is in fact a legitimate expectation of people to be assured in the timely making of the constitution when the Constituent Assembly itself has announced the work plan and time schedule of bringing the constitution in order to satisfy the just expectations of the people. Any agency which is bestowed with a historical liability of making constitution is bound to respect such legitimate expectation of the people and become responsible to fulfill the pledges accordingly. If it fails to fulfill its responsibility within the time frame so prescribed and extends time limit again and again on its own accord this trend not only develops a situation of uncertainty and dilemma but also raises question in the legitimacy of its work. One of the key features of democratic rule is to provide also a government accountable to the people in such a rule, the pledges made before the people are required to be fulfilled. In the failure of which people shall have right to ask the reason why ? In this it will be wise to take and perceive the present writ petition as part of seeking the reply of that accountability.
- The respondent agencies are found reluctant and differed to fully capitalize the intent of the constitutional interpretations made in the decisions with clear expression and called for demonstrating their worthiness. Although both the earlier writs were vacated, however, there were made elaborative discussions on the legitimacy of the amendment of Article 64 and defined doctrine of necessity including the time limitations and are based on clear justification of the fact auxiliary to it. No serious attention was found paid on the reasoned proposition made by this court and the judicial viewpoints expressed in them. In such a situation, a conclusion derived only taking their vacation as threshold cannot be held as worthiness to claim that the frequent amendments in Article 64 is recognized and given validity.
- It is worthless to repeatedly mention that the only duty of CA is to make constitution. The mere echoing of such a gospel time and again will not help to reach a meaningful conclusion. It is equally unwise to neglect Article 64 and state that the tenure of the CA will be terminated only after the CA makes constitution and brings into operation. In fact, the intention of Article 82 is not to prolong the time period and make it uncertain by effecting frequent amendments in Article 64 nor such rationality of extending the CA term up to the unknown future will be logical.
- It is not a judicially manageable subject about whether to form a new CA in pursuant to Article 63 of the Interim Constitution, 2063 resorting on the fact that the making of constitution is not possible by the existing CA or give it continuity and ratify the commitment it may make for writing a constitution within a fixed time period by conducting referendum or think about other options available to the people to ensure their right of making a new constitution. Since it is purely a political issue, the solution thereof must be sought by the political level remaining within the boundary of constitutional framework, not going beyond it.

- There is likely to be created a situation of looming suspicion and doubt among Nepali people about whether the issues associated with democracy, peace , prosperity and the major economic and social changes also may fall into the crisis of overall problems to be furthered along with the continuation of transitional period . To free the people from such a fear, there is no option available to the court for now other than giving assurance of coming new constitution through the existing CA itself. This court is not also in favor of making an attitude of continuing such an agency forever as universal and option less which cannot fulfill its major responsibility of bringing a constitution till the uncertain future. Any agency or body created under the constitution by assigning certain duties and responsibilities will have also a fixed reasonable time limit and duration, the present Constituent Assembly also cannot be an exception to it.
- Any individual or institution liable to discharge the assigned duties and responsibilities when fails to do so by his incapacity or due to arising a situation beyond control is referred to as a circumstance beyond control. It is the very intent of the doctrine of necessity. If such a situation cannot be neglected or avoided and it compels to take a decision and if such a decision would not have been lawful even in a normal situation and the reasonableness and legality of occurrence of such a condition is when substantiated by the time and situation, the doctrine of necessity could be attracted. Provided that, the doctrine of necessity cannot be applied in concealing one's own fault, inaction and the problems created by one.
- It does not shove to any lively organization to take the doctrine of necessity as tool of defense for ones own miscreants. The constitution always hopes the positive response and liveliness on its and its components doings. The constitution is such a lively instrument which bears the capacity of operating the whole state mechanism actively and dynamically even when there are possibilities of arriving multifold of obstacles, a hardships and difficulties across the life of the nation. So a constitution does not imagine a situation of lifelessness of the state which impairs the whole process by considering the one and the same problem as the never ending one.
- The aspirations of Nepalese people to bring about a new constitution through the Constituent Assembly, the fund consumed by the state to date after the initiation of constitution making process and to secure the achievement CA has accomplished up to now in course of drafting the constitution are the most significant constitutional responsibilities to be carried out by this court. It is natural to expect that all possible efforts will be made to promulgate the constitution within the time period extended by the tenth amendment. In otherwise condition, it will be more appropriate and justifiable to provide the last opportunity to the present CA if it needed the additional time period in order for the completion of remaining works and bring about the constitution.

## Decision

**Khil Raj Regmi,C.J:** The facts in brief and the particulars of the order made on the present writ petition filed in this court pursuant to Article 32 and Article 107(1) and (2) of the Constitution seeking nullification of the truth amendment to the Interim Constitution of Nepal, 2063 made on 2068/5/14 since it is in contravention to the provisions enshrined in the constitution, is as follows:

Article 64 of the Interim Constitution of Nepal, 2063 has provided for the tenure of the Constituent Assembly. Except when the CA passed a resolution for its premature dissolution, the tenure of the CA will be of two years from the date of convening its first meeting. In regard to such provision, the Supreme Court has given opinion in writ No.0056 dated 2068/2/11. In this, it is argued that the term of the CA should be maximum of 2 years and in special circumstance, or when there exists an emergency period in the country, it may be extended not exceeding 6 months. From above proposition it is clear that the tenure of CA will be not more than 2 years and additional 6 months only in view of the doctrine of necessity. The respondents were obliged to take that decision into account as a guideline but in contrary they caused 3 months extension on 2068/2/14 unethically. We the petitioners had made complain against such act of the respondents through Writ No.0071. The opinions expressed in the earlier decisions were sustained also in this writ petition. In such a situation, a notification published in Nepal Gazette Vol.61, Supplementary Issue 21, dated 2068/5/14 so as to extend additional 3 months term of the CA. Since the tenth amendment to the constitution effected as per that notification is illegal and contrary to the law, we are here with this writ petition with a plea that such an act of the respondents be invalidated.

Until before the eighth and ninth amendments to the constitution, there was a clear provision that the tenure of the CA will be of 2 years. The writ petitions filed with this court in connection with those amendments were clearly outlined about the term of CA. At that time even if those amendments were not declared invalid, though were not recognized lawful as usual. In such a situation, again there effected the tenth amendment, therefore, such an act should be the subject of judicial review. Article 148 provides for the amendments to the constitution. While affecting the eighth, ninth and tenth amendments, the said Article are found ignored. Likewise, Article 64 provides for the manner about how to make changes in the term of CA is as prescribed under the same Article. 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 clearly specifies shall be ipso facto void in the eyes of law.

The trend of extending time period once and again in this way and the relative progress in relation to making the constitution is if not achieved within the time period so extended, such an act will hinder the making of constitution till the uncertain future. In that course, there has been the gross misuse also of the doctrine of necessity. The doctrine of necessity should not become the reason for making the Article 64

inoperative. If the representatives sent by the people failed to accomplish their mission within the prescribed time period and the expectations of the people were not met, the inherent right of people to select new and qualified representatives should be honored, and for this and in such a situation the election will be the only way out for receiving the fresh mandate. The mandate given by the people through election is only for 2 years which was speculated also by the maker of the Constitution. Therefore, no time period other than what the people decide could be extended.

Now therefore, the tenth amendment to the constitution is fully unconstitutional and illegal on the basis of the ground mentioned above and also on the basis of the opinion expressed by this court in the decision made upon Writ No.0056 and 0071. It is against also the spirit of the preamble and the Articles 2, 13, 32, 63, 64, 83, 85 and 148 and involves serious constitutional and legal issue of public right and interest. So it requires an order of prohibition, certiorari or any other order as it may deem appropriate to be issued in pursuant to Article 1, 32, 107(1) and (2) and be declared invalid the tenth amendment to the Interim Constitution of Nepal, 2067 published in Nepal Gazette part 61, Supplementary Issue V declared invalid from the very date of its commencement.

Moreover, an interim order also is hereby requested to be issued in the names of respondents Prime Minister and the speaker of the House prohibiting them to register any bill in the Parliament so as to cause any change or alteration in the wordings and phrases contained in Article 64 of the constitution until this writ petition is finally disposed of. The petitioner, in petition also requests to be given priority in the hearing since it involves a complex constitutional question and asks to have the date of hearing fixed.

The single bench of this court orders on 2068/6/5 requiring the respondents to submit their written reply in writing with explanation about how this situation arrived ? Why the orders as sought by the petitioner need not to be issued? If there exists any reason or ground for not issuing the order, submit a reply thereof in writing through the office of the Attorney General within 15 days of receiving this notice of the order. The respondents be sent also a copy of the writ petition each along with the notice and notify the matter thereof to the office of the Attorney General by fixing the date of 2068/7/1 so as to present the case for hearing. Similarly, inform Nepal Bar Association and the Supreme Court Bar Association for representation of 3 senior advocates or advocates each to assist the court (*amicus curie*). The earlier decisions made by this court in this connection also be accompanied with this case file. Write the concerned Bar Association to inform those legal practitioners desirous of submitting written plea prior to the date of hearing and let know to the concerned legal practitioners about the same.

The constitutional as well as the legal questions raised by the petitioners in this writ petition have already been answered by the full bench of the Supreme Court through the writ Nos. 066-ws-0057 and 067-ws- 0071 filed by these petitioners in regard to the eighth and the ninth amendments to Interim Constitution of Nepal. So there exists no reason and justification in filing the present writ petition again raising the same question challenging the act of extending the CA term for 3 years and 6 months by the tenth amendment. In paragraph 12 of the petition, the petitioners have made a claim that the Supreme Court has not given validity to the eighth and the ninth amendments. This fact is not supported by the order made by the Supreme Court. The court, in reference to

writ No. 0066-ws-0056 has reasoned the vacation of the writ on the ground that the time period extended by the eighth amendment has already been terminated whereas in reference to writ No.067-ws-0071, the court denies the claim on the ground of doctrine of necessity and thus legalized both the amendments on that ground. The claim of the writ petitioners therefore appears baseless and extravagant.

The concern shown seriously in writ petition about the need of timely bringing of the constitution as mandated by the people is praiseworthy. The CA had developed a work-schedule (time table) on 1st Marga, 2065 and commitment shown in completing the writing of constitution within the period stipulated in Article 64 and has been working accordingly. Despite such efforts, the mission could not be accomplished within the time frame which compelled for extending the time period up to 3 years. This is the ground reality witnessed by all concerned.

The task of writing constitution was in progress giving due vigil to the limitations fixed by the CA Rules and allowed by the time table. In that course of action, there formed 40 teams from among the total member of the law-makers and assigned to all the 240 constituents of the country to conduct opinion poll of the people through questionnaire for a period ranging from 2065/11/16 and 2065/12/9 which could be taken this as a historical achievement. All the subject committees and the constitution committee, working under their respective frame works for a period between 2066/2/9 and 2066/10/20 prepared the concept paper on the future constitution and a preliminary draft report thereof and, submitted to the CA and had held discussions over the report of each committee allocating to each paper a 30 hours deliberation. The CA gave nod to the report of the committee on natural resources, the economic right and revenue allocation, determination of the structure of the constitutional bodies and the protection of right of minority and marginalized community and has sent to the constitutional committee on 11th Magh, 2066, 19th Falgun and 21st Chaitra, respectively in order to prepare the first integrated draft. The task of preparing the first draft of the constitution had began from the month of Falgun 2066 by preparing a preliminary frame work of the future constitution enclosing with the preliminary draft of the committee received after their approval from the CA which was divided in 27 parts along with other collateral facts (basic elements) to be contained in the constitution together with the preamble and schedule. The said business is still in progress. Because of the collision of facts such as, duplication, contradiction, omission and to overcome the unresolved and disputing report of the various subjects committees, a 15-memberd concept paper and preliminary drafting report study committee was formed by the 29th meeting of CA held in 2066/2/13 to finalize those misgivings through consensus and to integrate them in one and give final shape. The said committee completed the study of report of all the subject committees and submitted the final report of the committee on 2067/6/14 to the chairman of the CA along with 210 questionnaires unable to be settled by it. In order to reach a political consensus over those unresolved questionnaires there held a meeting of all parliamentary party leaders representing in CA in the move of the chairman of CA and reached consensus on 132 unresolved issues, between 2067/6/19 and 2067/8/26.

This process of constitution making suffered many times from the incidents occurred outside the CA. Because of frequent government reshuffle and the failure of peace process to reach a meaningful conclusion in time as expected which has very close

relation with the making of the constitution caused obstruction in the writing of constitution, time and again. These are the reasons why the writing of constitution did not completed within the time period hoped by the people and thus needed extension of CA term. After making one year extension in CA term by the eighth amendment on 14<sup>th</sup> Jestha, 2067 and accomplish the mission within the time frame, it involved heavily in that job with necessary alternations in its work schedule for 11<sup>th</sup> time. Many issues resolved during this period and in 78 issues related with the report of the 7 committees and 78 issues related with state restructuring, the constitutional committee itself shall prepare the first draft by bringing consensus on its own. If no consensus reached on any issue, it shall be presented to the CA for decision. In this way, the reports of the 7 committees and report related with state restructuring have been forwarded to the constitutional committee on 2067/10/12 and 2067/12/3, respectively. This is the reality. The constitutional committee has formed a Dispute Resolution Sub-committee on 2067/11/13 consisting of the top leaders of the major parties to hold discussion and reach consensus on the unresolved issues and coming up to 2068/2/14, there has reached consensus on 53 issues out of 78 issues related with the 7 committees and only 25 issues were remained to be overcome. The other 78 issues related with restructuring were required to have obtained the opinion of the experts and reach conclusion about which the discussion was holding on .

In this manner, the CA has been successful in preparing the significant base for a demarcating constitution and the disputes also were relatively narrowing down. It was ready in preparing the first draft of the constitution by resolving the remaining issues so as to be completed after collecting the opinion and advice of the sovereign Nepali people. It was the most needed thing of the hour and so compelling to effect the 9<sup>th</sup> amendment to the Interim Constitution of Nepal, 2063 which the legislature- parliament by did extending the tenure of the CA by 3 months. Within the period of this extension there held the 9 consecutive meetings of the Dispute Resolution sub-committee under constitutional committee. These meetings reached consensus on 3 issues whereas the 78 issues related with state restructuring narrowed down to 25. Now there are only 47 issues left to be settled by the Dispute Resolution Sub-committee and then immediately the first draft of the constitution will come out and the tens of years of long awaited aspiration of Nepali people to make a constitution through representatives elected by themselves will be fulfilled. This being the main reason and ground of the doctrine of necessity, I, most respectfully request to this revered court that the Legislature-parliament has made the tenth amendments to the Interim Constitution of Nepal and extended the tenure of CA by 3 months. There is no apparent reason for not coming out the constitution. Now the constitutional committee has been working in preparing the draft of all the subject matters so far resolved and includes it in the frame of the first draft of the constitution.

There is no dispute on the fact that the main objective of the Interim Constitution of Nepal is to make a constitution through Constituent Assembly. It is clearly manifested by the facts mentioned in various paragraphs above that the CA is heavily, involved in this task. The Interim Constitution does not provide for the fresh election of the CA if the CA formed after the first election fails to bring about the constitution. It is compulsory to make amendment to the Interim Constitution of Nepal, 2063 also to form another

Constituent Assembly as complained of by the petitioners because for taking a fresh mandate there needs to held election for which the political powers existing in Legislature – parliament are required to be consented to add such provision in the constitution. It is a political issue whether or not to opt for such a risk and this should be concluded only through the political level. If there exists any possibility of political consensus - making the peace process reaching near to end into meaningful conclusion and standing on the achievements so far accomplished by the CA, there appears a clear ground for bringing about a democratic constitution. For this the political powers and Constituent Assembly also are found committed. Against such background, it is thought more relevant also to the political view point to make the constitution by this very CA. To forge political consensus towards reaching the nearly completing process to the conclusion will preserve the best interest of the people. The Legislature-parliament, while effecting tenth amendment to the Interim Constitution of Nepal, 2063, has fully respected the intent and spirit of the order made by this revered court on 2068/2/11 and 2068/5/11, respectively, and, the 3 months extension of the term of CA was motivated with the legitimate objective of performing the task of making constitution as per the mandate given by the people which is consonant also with the doctrine of the necessity. Hence, no order as sought in the petition seems necessary to be issued. The writ petition is requested to be quashed. These were the contents of the written reply submitted separately by the CA secretariat and the speaker of the Parliament, with similar version.

The petitioners in their petitions are unable to clearly mention the reason about how and by what action or the decision of the Office of the Prime Minister or the Council of Ministers have been unconstitutional. While making claim of judicial review of any action or decision referring it as unconstitutional, the reason thereof must explicitly be mentioned and require to furnish the proof and evidences with the petition to substantiate the claim. In the lack of such evidences, the mere claim will not deserve any value. The present writ petition lacks those requirements. Hence no order could be issued as demanded and the writ petition is requested to be quashed.

The Interim Constitution of Nepal, 2063 was adopted with the objective of making a new constitution through the Constituent Assembly and is also a provisional instrument for operating the state affairs during interim period until the new constitution comes into force. Since the Constituent Assembly is a basic structure within the Interim Constitution of Nepal, 2063, without Constituent Assembly we cannot just imagine the existence of Interim Constitution, 2063. Though Article 64 provides for the tenure of Constituent Assembly, in Article 82 there is a provision of ending the purpose of Constituent Assembly only from the date of commencement of the Constitution adopted by the Constituent Assembly. In addition to this, the provision contained in Article 64 cannot be taken as amendable since Article 148(1) provides for a condition according to which any bill concerning amendment or repletion of any bill concerning amendment or revelation of any Article of the constitution could be tabled in legislature- parliament. So the Article 64 of the constitution cannot be taken as independent, derive its individual meaning and interpret similarly. The provision contained in Article 64 is required to be interpreted putting together with the preamble, the basic structure as well as Article 82 and 148 of the constitution. Therefore, in order for respecting and safeguarding the right of Nepali

people of bringing their constitution by themselves through Constituent Assembly, the tenth amendment motion of the constitution registered in the legislature - parliament on behalf of the government of Nepal to cause amendment in the provision contained in Article 64 by giving special focus on the key essence and spirit of the preamble, Article 82 and 148 of the Interim Constitution of Nepal, 2063, which is passed by the two-third majority of the legislature- parliament and has already been brought into effect. Hence, no order as sought by the petitioner should be issued. Similarly, the claim that the decision made upon Writ No. 0056 and 0071 by this revered court has not given validity to the eighth and the ninth amendments in Article 64 also are not true. In addition to this, since the matter of bringing any amendments lies under the special jurisdiction of the constitution lies under the special jurisdiction of the legislature parliament, this revered court should not speak on such matters. Hence, the writ petition which appears irrational on the basis of the above reason and ground is requested to be quashed. These are the contents of the written reply submitted by the Office of the Prime Minister and the Council of Ministers and on behalf the prime minister himself.

In a circumstance when the task of writing the constitution is not completed, the tenth amendment to the Interim Constitution of Nepal, 2063 was brought by taking into account the inevitability of the said amendment. Although there has been made notable achievement in the writing of constitution by reaching consensus among the parties on many disputed issues raised in relation to the writing of constitution during the period extended in the motion of the ninth amendment bill of the Interim Constitution of Nepal, 2063, by this revered court through writ No.067-ws-0071, however, the peace process and the task of writing constitution has still to reach a meaningful conclusion. Since the ninth amendment to the Interim Constitution of Nepal, 2063 was made on the basis of the doctrine of necessity, and the writ petition was vacated on that ground, the argument raised against the validity of the (tenth amendment) in the Interim Constitution of Nepal, 2063, does not sound reasonable.

The Constituent Assembly is the only elected body representing the people in under the Interim Constitution of Nepal, 2063. So it's only responsibility is to write the future constitution of Nepal. The sovereign Nepali people, through the way of writing constitution, shall exercise their sovereign power of making their constitution on their own and the formation of such assembly in the life of the nation appears very rear. So the Constituent Assembly should be viewed differently to that of other elected bodies. The Interim Constitution of Nepal, 2063 has not seen the possibility of conducting the election of CA when desired. In this circumstance, there is no option available before CA, acting as legislature parliament, other than extending its term in order for fulfilling the expectations of the Nepalese people to make their future constitution, by completing the rest of the businesses. I would like to mention here the ultimate need of extending its working period by exercising the power of amending the constitution conferred to it by the constitution in an urging situation. Any action done or performed by any agency shall have to receive legitimacy on the ground of necessity. Necessity makes that lawful which otherwise would not be lawful (*Necessitates facit licitum quod alia non est licitum*). This is an established norm of jurisprudence. So, the extension of CA term is substantiated by reason and legitimate as well. The arguments put forth against its legitimacy do not

sound logical. This remained the content of the written reply submitted on behalf of the Ministry of Law and Justice.

The Interim Constitution of Nepal, 2063, Article 148(1) provides for condition in which any bill related to the amendment or rescind of any Article of the constitution could be submitted to the legislature parliament. Similarly, Sub- Article (2) states that any bill tabled under sub- Article (1) if approved by the two-third majority of the total members present, the bill shall be deemed to have been passed. This is one of the modes of amending the constitution. Article 165(1) (d) provides for the definition of a bill according to which bill means a draft document of a constitution or a statute tabled in legislature parliament or in Constituent Assembly. Article 87 clearly states that a bill passed by the legislature parliament shall become law after verification by the President. In this way, the Interim Constitution of Nepal, 2063 had a clear provision on the amendment of constitution, meaning of a bill and its verification criteria.

The Office of the President in its written reply mentions that since a request received in writing by the speaker of the legislature parliament to office through a letter dated 2068/5/31 with a request for the verification of the tenth amendment to the Interim Constitution of Nepal, 2063 and when the same was verified by the President of Nepal, no order as sought by the petitioner should be issued.

The present writ petition which is duly submitted before this bench seeking an order for the nullification of CA term extended by the tenth amendment states that since Article 64 of the Interim Constitution of Nepal, 2063 provides for the term of CA, the task of writing constitution had to be completed within that time period but demonstrated a tendency of only extending the time period again and again instead of writing constitution within the time period stipulated by the original constitution as well as the opinion expressed by the Special Bench of this Court upon writ No 066-ws-0056 and 067-ws-0071 filed in this court about eighth and ninth amendments offering clear guideline while making interpretation of the Article 64 relating to the CA term is ignored, now therefore, such action of the respondents should declare null and void. The respondents in their written reply argued that a notable progress has been made in the writing of constitution because many contentious issues have been resolved concerning the making of the constitution. During the hearing of the petition, the learned legal practitioners representing from both sides and the amicus curie putforth their respecting arguments, for and against. The lawyers representing from the petitioners:

Senior Advocate Devendra Lal Nepali:

The Article 64 has been interpreted by the court as a mandatory provision. The written reply has wrongly interpreted stating that the said decision favors the amendments of extending the CA term. The rule of law and constitutional supremacy would become meaningless if the unlawful activities were encouraged taking defense of the doctrine of necessity. The respondents are likely to extend the time period again. Now therefore, the writ of prohibition along with other necessary orders as it may require shall be necessary to be issued to stop those unlawful acts of the respondents.

Senior Advocate Sita Ram Adhikari

It is necessary to come clear interpretation from the Court for how many times the doctrine of necessity could be used. The court has already spoken of that the term of CA could not be protracted till the unknown future. It is contrary to the constitution continue time extension on the ground of doctrine of necessity in regard to matter for which the constitution itself clearly specifies. The doctrine of necessity does not allow acting unconstitutionally.

Senior Advocate Pavan Kumar Ojha:

The interpretation of the doctrine of necessity should be made so as to receive universal recognition. The CA has been failed to prove the rationale of time extension. The purpose for which the election of CA was done, the representatives of the people will be competent to exercise sovereign power until for a period prescribed for that purpose. Such a sovereign parliament cannot be remain forever, it remains only for a prescribed time period for the prescribed duty. The rule of law is equally applicable also in the case of CA. No one can act going beyond its limitations.

Advocate Ramji Bista:

Since the constitution clearly provides for the election and formation of CA, there is no constitutional hurdle to hold the fresh election. Where there is a clear provision in the constitution itself, the doctrine of necessity cannot be attracted.

Advocate Matrika Prasad Niraula:

For now, it will be more reasonable to ascertain the limitation of doctrine of necessity to what extent could be made flexible. The respondents have extended the term of CA by making amendment to the constitution; it is really treacherous act committed against the people. No one shall have right to underscore the original testament of the people. Such a frequent amendments to the constitution will render the democracy, human rights and adult franchise ineffective and valueless. So the writ as demanded by the petitioners should be issued.

Advocate Dr. Chandra Kanta Jha:

No notable achievements are found made within the extended time period. This could not be read as that it demonstrated its sufficient willingness in the job. Till date, it has not initiated producing even a single draft of the constitution. However, the issuance of writ may cause further complexity and uncertainty for managing the transitional period. So constitutional ambiguities should be ended by extending the time period to make the CA responsible to have its liability fulfilled, but the state treasury should not sustain further burden. This means no cost extension should be allowed.

Advocate Vijayaraj Shakya:

The doctrine of necessity has been the tool for extending the time period after the court gave its interpretation. The doctrine of necessity is not that subject matter which could be defined and used when needed. To prolong the transitional period gives birth of many problems. It has created a situation of exercising constitutional anarchy. So for the court, it has been inevitable to come with clear conscience to overcome such oddities and therefore, an order as requested should be issued.

Petitioner as well as Advocate Balkrishna Neupane:

The representatives of the people shall have no right to remain in office beyond the period authorized by the people by delegating their sovereign power. In a situation of clear time stipulation, it should not be meant as to remain continue after the termination of such period neither the people's representatives can extend the period exceeding more than what the people had given mandate. The preamble of the constitution has paved the way for a periodic election. So the law and constitution also had no objection if such a situation arises. In a circumstance, when the constitution could not be made within the stipulated time period, only the CA members will have their tenure terminated. It does not mean that the existence of Constituent Assembly also will be ended together. It can be reinstated by the fresh election. So it is requested to have an order issued as demanded.

Petitioner Bharatmani Jungam:

The people have scared their sovereignty and right to adult franchise by the act of the respondents. The preamble provides for a periodic election which signifies the possibility to arise such a situation. The intention of the respondents to further the CA term which has already been terminated, has impaired the sovereign power of the people. So the writ petition should be materialized.

**The Learned councilors representing the respondents:**

Attorney General Mukti Pradhan:

The petitioners are found to have demanded the end of CA instead of testing the constitutionality of the amendment to the constitution, which does not seem possible through the present writ petition. The writ petition is erroneous in itself. The CA is busy working in drafting the constitution and has narrowed many contentious issues relating to the making of the constitution. Since the peace process also is one of the most crucial parts of making the constitution and has been progressed more hopefully in the later days. So the writing of the constitution is likely to be completed soon. At a time when the nation as a whole is suffering from the transitional period, the court is essential to perceive sensitiveness of the situation. The relevancy of the doctrine of necessity still exists, so the writ petition should be dismissed.

Deputy A.G. Pushpa Raj Koirala:

The Interim Constitution of Nepal, 2063 does not provide for the unamendability of any Article which equally applies also in the case of Article 64. The preamble emphasizes on the fact that the constitution should be made only through the Constituent Assembly. So the task of making constitution is being focused. The court while issuing order should be taken into account the situation of voidness likely to appear if the term is not extended. If there is no CA, the country may face serious crisis of conflict. So the doctrine of necessity should be attracted in the existence of such a situation. Hence the writ petition should be quashed because there is no alternative arrangement of CA for now.

Joint Attorney Yuva Raj Subedi:

Our constitutional practice lacks the tradition of testing the legality of amendment to constitution. The present constitution also had no provision of testing legality of amendment to the constitution by the court. Now therefore, the judiciary should not interfere more frequently in the activities done or made in course of making the constitution. The writ petition should be quashed.

Joint Attorney General Kiran Poudel:

The most urgent need of the hour before the nation today is to make constitution through the Constituent Assembly hence; we must not hunt for other options. During the extended time period, many burning issues in relation to constitution making have been resolved through consensus reached among various parties and remarkable progress has been achieved in the making of constitution. The Interim Constitution is silent about the possibility of frequent election of CA; no order as demanded in the writ petition should be issued.

Joint A.G. Krishna Prasad Pokhrel:

The act of addition of time period of CA has been directed towards making the constitution. Since this constitution is the outcome of political consensus, it could be amended also through the political agreement. So the writ petition should be quashed.

Sub AG Dharma Raj Paudel:

To cause obstruction in the path of making of the constitution is to cause disturbance in the smooth functioning of the state and invite a situation of revolt. This is the reason why amendment provisions are mentioned in constitution. It is the basic structure of the constitution to bring about it through Constituent Assembly. So, while submitting the tenth amendment bill the government has clearly mention the reason and was spoken of about its rationality. In such a circumstance, there exists no chance for issuing any writ.

**The synopsis of the pleading of Amicus Curie represented from Nepal Bar and Supreme Court Bar Associations and other advocates:**

Senior Advocate Bipulendra Chakravarty (Amicus Curie):

Today, there is a growing a tendency of getting the solution of all the problems from the court and court alone. It is not possible in all circumstances and should not happen as such. There is no Article in the present constitution which could not be amended. However, the frequent addition of time period has made the prospect of coming a constitution more feeble. Now, the CA is necessary to demonstrate the ample chance of promulgating a constitution. So, more vigorous form of directive order has been necessary to be issued in the name of respondents and dismiss the writ petition.

Senior Advocate Kishor Kumar Adhikari:

The decisions of this court made earlier to this are self-explanatory and more clear. The matter related with the amendment of constitution is the outcome of an urging situation and the situation is that the recognition to the amendment has been granted on the ground of the doctrine of necessity. Though, no other option would become appropriate to haunt by CA in making the constitution, however the growing trend of extending the term time and again, anyway has to be discouraged. For this, it would be the best option for the court to know also the intent of the political parties represented in CA.

Advocate Sabita Baral:

If any order is issued as demanded by the petitioner, the blame of aborting the constitution would come upon the court. Since, there is no alternative of making constitution from other than CA, it could not be rendered in the verge of dissolution. The writ petition should be vacated on the basis of the doctrine of necessity.

Advocate Surendra Kumar Mahato:

Even though, the present constitution had no provision of judicial review in regard to the amendment to the constitution, nevertheless if such amendment is made so as to grow tyranny and squeezing of civil rights it may be the subject of judicial review. For now the court has two alternatives available. One, it is a political issue, so to order for the preparation of conducting fresh election to settle the disputed matter setting aside the issues resolved hereinbefore. If such a situation arises, it must be clearly spoken of describing all the pros and cons.

Advocate Megha Raj Poudel:

At the time of commencement of the constitution whether any formal announcements were made or not some basic characteristics certainly does carry or hold which could not be changed or altered through amendments. The principles of basic structure of the constitution also are based on the similar values. After the termination of tenure of the Constituent Assembly, the head of the state may issue an ordinance on the basis of doctrine of necessity and make legal arrangements for conducting fresh election. If such a situation arises, the fresh election may be conducted only for settling the unresolved issues by the CA itself giving nod to the issues already finalized.

Advocate Madhav Kumar Basnet:

The court while making interpretation of the constitution shall be necessary to ensure the continuation of the constitution. Since this provision contained in Article 166(2) of the constitution has constitutionalized the day to day politics. The interpretation of the existing constitution also should be made differently than those of the constitutions of other normal situation. The respondents in their written reply have made only claim that the efforts are underway in making the constitution and at a time when the time extension has been legalized, they are required to answer the progress so far made in

this regard and the time needed to complete the remaining business. It will be better to reach a decision only after seeking their commitment in these matters through the Office of the Attorney General.

The present writ petition which, is scheduled for today to pronounce the judgment, it has been necessary to give verdict about whether the orders as demanded by the writ petitioners should be issued or not after hearing the arguments of the learned legal practitioners representing from their respective parties and of the amicus curies as well as studying the contents of the writ petition and the written reply including the relevant constitutional and legal provisions.

While considering upon the decision to be reached, the writ petitioners are found claimed that the act of extending CA term for 3 months effecting tenth amendments to the provision relating to the tenure of CA contained in Article 64 of the Interim Constitution of Nepal, 2063 as well as the opinion expressed by this court in writ No.066-ws-0056 and 067-ws-0071 are in contravention to the constitution, hence such acts should be declared null and void. While observing the written reply of the respondents, their only logic is that many achievements have been made so far concerning the making of the constitution and there are some business yet to be finalized due to arising various circumstantial reason, the extension of the time period was necessitated by the legitimate objective and on the ground of doctrine of necessity.

While delivering verdict on a writ petition with writ No. 066-ws-0056, moved between Office of the Prime Minister and the Council of Ministers and advocate Balkrishna Neupane, in connection with the right amendments to the Interim Constitution of Nepal, 2063 involving similar issue of extending term of CA for a year, this court, giving interpretation of basic principles and structure of the constitution together with the interpretation and explanation of Article 64, 82 and 148, have expressed the clear view in relation to the scope of the doctrine of necessity and also about the possible optimum period up to when the term of CA could be extended. In like manner, the verdict has clearly put forth its judicial opinion that the issues involving the amendments to the constitution could become the subject of judicial review. This court concurs with those opinions so requires no further explanation. In the present writ petition, basically, the question remains to be settled only about the rationality, the necessity and the constitutionality of the tenth amendment to the Interim Constitution.

In earlier writ petitions filed in this court about extending the term of CA through amendment to the constitution have expressed clear opinion that if there exist unavoidable complexities in making the constitution and needed additional time period to overcome them despite making maximum effort concentrating on the job and arrived a urging situation and need to effect amendment to Article 64 of the constitution in accordance with the doctrine of necessity to extend the term of CA, the special focus shall be given to the time limit directed by the restrictive Clause of Article 64 and the amendments shall be considered expedient and appropriate, and if any attempt found made to have an unnecessary extension or give continuity to such situation it entangles the spirit of the Interim Constitution and shatters the dream of the sovereign people expressed through election.

Even in a critical situation of emergency period the maker of the constitution has envisioned that the term of CA should not be extended by 6 months. The same is also endorsed by the people through the election of CA. In such a circumstance, there is no dispute on the fact that the tenure of CA could not be extended till the unknown future.

Where there is a clear specification of time limit, the action thereof must be completed within the time limit so specified. The time period stipulated in Article 64 of the Interim Constitution for the making of a Constitution through Constituent Assembly must not be taken as a formality or a show.

*Bharatmani Junga*

While drafting the Interim Constitution, its maker had a fine speculation on the necessity of time specification in order to cause the timely promulgation of it. If this truth is undermined and attempted to draw an archaic interpretation of the original spirit of Article 64 of the constitution to mean that the right to amend constitution includes also the right to extend time period again and again by pushing the task of promulgating constitution into uncertainty till the unknown future would dishonor against the mandate given by the people. It is also unreasonable through the view point of the constitutional jurisprudence to unusually extend its time period by the Constituent Assembly itself so as to create a limitless and uncertain situation.

The meaning of writing a constitution through constituent Assembly is a practice in which the people delegate their constituent power to their representatives to make constitution within the given period which represents their feelings. They believe that the representatives elected by them will complete the task within the prescribed time. It is in fact a legitimate expectation of people to be assured in the timely making of the constitution when the Constituent Assembly itself has announced the work plan and time schedule of bringing the constitution in order to satisfy the just expectations of the people. Any agency which is bestowed with a historical liability of making constitution is bound to respect such legitimate expectation of the people and become responsible to fulfill the pledges accordingly. If it fails to fulfill its responsibility within the time frame so prescribed and extends time limit again and again on its own accord this trend not only develops a situation of uncertainty and dilemma but also raises question in the legitimacy of its work. One of the key features of democratic rule is to provide also a government accountable to the people. In such a rule, the pledges made before the people are required to be fulfilled. In the failure of which people shall have right to ask the reason why this has happened. In this it will be wise to take and perceive the present writ petition as part of seeking the reply of that accountability.

During, the period following the initiation of constitution making process through CA, though there has been prepared a work schedule, no sufficient readiness and desired concern demonstrated rather seemed reluctant to the assigned mission and appears as if that the making of such work schedule is no more than fulfilling a mere formality. During the period, how many contentious issues as basic elements of the constitution resolved and included in the draft? The time consumed for the purpose, achievements made so far and what are the tasks yet to be finalized and the approximation of reasonable time period needed therefore are not disclosed nor the people are informed about such developments. This bench even during the hearing had proposed the learned government lawyers to submit overall report about the progress so far made in

this regard. But it is argued that the court has no right to inquire into such matters. Even so, the concerned details came to receive in due course of time by the order of the court itself. After the study of those documents it came to reveal that during a period ranging from 2068/2/18 and 2068/4/15, various decisions were found reached by the constitutional committee and Dispute Resolution Sub-Committee. Also, the tenth amendment bill presented in course of hearing by the government lawyers reads the reason and purpose of the amendment reads: "the Article 64 of the constitution provides that the term of CA will remain for 2 years from the date of the first meeting of CA during which the constitution could not be enforced, however the notable progress has made reaching consensus among parties on many contentious issues during the extended time period, the peace process and constitution making has yet to reach conclusion, Article 82 provides that the tenure of CA terminates from the date of operation of the constitution after promulgating new constitution by CA. So the task of writing constitution should be done by this very CA and, since the remaining business could not be finished within the time frame given by the Article 64, now therefore, this amendment is forwarded with the objective of extending the term of CA." All these details do not suggest that the CA has been fully employing it in making of the constitution from the date of its formation to till date and there has holding intensive discussion on basic elements but despite such continuous efforts, the task of constitution writing has yet not been completed. Rather, it appears that the majority time has been consumed by the external factors than the key agenda that affected the writing of constitution. Similarly, it is found taken Article 82 as the basis of constitution amendment arguing that the CA tenure will be terminated after the new constitutions made by the CA comes into operation. In fact, it is not the intention of the constitution nor is the expectations of the people.

*Bharatmani Junga*

While observing the written reply of the respondents the Constituent Assembly found to have drawn the meaning that when the earlier both writ petitions challenging the previous amendments extending time period were vacated, those amendments got legitimacy. The respondent agencies are found less attentive and complacent to fully capitalize the intent of the constitutional interpretations made in the decisions having clear expression and called for attention demonstrating their worthiness. Although both the earlier writs were vacated, however, there were made elaborative discussions on the legitimacy of the amendment of Article 64 and defined doctrine of necessity including the time limitations and are based on clear justification of the fact auxiliary to it. No serious attention was found paid on the reasoned proposition made by this court and the judicial viewpoints expressed in them. In such a situation, a conclusion derived only taking their vacation as threshold cannot be held as worthiness to claim that the frequent amendments in Article 64 is recognized and given validity.

In the context of earlier petitions, the amendments were not declared void just taking into account the existing situation and work progress of the CA, though the time period stipulated in Article 64 was expired. To take those amendments as legitimate and use Article 64 to which this court has referred as unamendable and mandatory, time and again taking as right under Article 148, is against the interpretation and the decision made by this court. It contravenes also the provision made in Article 116.

Though the CA has developed schedule of work writing the constitution, however, it has been rendering it ineffective and void rather than demonstrating the desired willingness

and the same trend is continuing. Even while submitting written reply in this writ petition, it is found lamented that the 11<sup>th</sup> correction has been made in the work schedule and is still working more actively. This proves that the work schedule has been losing its credibility. It is worthless to repeatedly mention that the only duty of CA is to make constitution. The mere echoing of such a gospel time and again will not help to reach a meaningful conclusion. It is equally unwise to neglect Article 64 and state that the tenure of the CA will be determinate only after the CA makes constitution and enforces it. In fact, the intention of Article 82 is not the protraction of the time period and makes it uncertain by effecting frequent amendments in Article 64 nor it seems rational. For that, it is required to make believe that CA is fully motivated to its key responsibility of writing the constitution, which is substantiated also by the fact. If the CA is found intensifying discussion on the basic elements of the constitution, the people could be assured in the coming of a constitution. But in the written reply submitted on behalf of the chairman of CA and its secretariat had a mention that the external factors as frequent reshuffle in government and failure in reaching the peace process into a meaningful conclusion on time which has much striking relation with constitution making has hampered the progress. This does not suggest that CA is involving uninterruptedly in the constitution making and even so the writing of constitution is yet not completed. Their say is that the external factors are responsible in hampering the task of constitution writing within the period so extended. So, they would like ever to extend the term without giving the constitution writing agenda. This regretful situation is rotating like a vicious circle. So the time has come to translate the hope of people getting new constitution through CA into reality. This must be guaranteed by the Constituent Assembly. However, the CA itself does not seem both objectively and subjectively committed and retaining work progress, accordingly. The CA, learning from the past should end the trend of ever extending the tenure and has been compulsory to work out a more realistic work-schedule and find out a lasting solution of the problem.

While considering also upon the request of seeking an order of prohibition as well as other appropriate order, it is not a judicially manageable subject right at the about whether to form a new CA in pursuant to Article 63 of the Interim Constitution, 2063 resorting on the fact that the making of Constitution is not possible by the existing CA or give it continuity and ratify the commitment it may make for writing a constitution within a fixed time period by conducting referendum or, think about other options available to the people to ensure their right of making a new constitution. Since it is purely a political matter, the solution thereof must be sought by the political level remaining within the boundary of constitutional framework not going beyond it. The present CA, being an institution of the people's representatives, having mandate to give a constitution within the time period stipulated in the constitution, if fails from providing guaranty of fulfilling the prescribed duty within the stipulated time, it must be responsible also in opening the alternative way for making the new constitution. Until this comes to happen, no confidence will be built that there will not be a constitution nor disseminated this fact to the people.

Preamble of the constitution provides for multiparty democratic rule, civil liberty, fundamental right, human rights, adult franchise, periodic election, full press freedom, independent judiciary and the concept of rule of law and commitment towards

democratic norms and values. Those commitments are supported by the various provisions of the constitutions. In fact, these are the pillars of democracy. Though this has been taken as a historical occasion of making constitution by Nepali people on their own through Constituent Assembly, however, such a historical obligation would not be completed only by forming a Constituent Assembly. If the CA fails to perceive this pious responsibility and did not become active and accountable to the people, the Nepalese people will not have their aspirations fulfilled. Not only that, if the constitution did not come until for a long time, we all must be serious of the long term effect it may likely to have. Exigency of such a situation may naturally hinder the civil liberty, fundamental rights, human rights, adult franchise, periodic election, full press freedom, independent judiciary and the concept of rule of law as well as the pillars of democracy internalized by the interim constitution. There may arrive a situation of squeezing the rights of the Nepalese people day after day. There is likely to be created a situation of looming suspicious and doubt among Nepali people about whether the issues associated with democracy, peace, prosperity and the major economic and social changes may face the crisis of overall problems to be furthered altogether with the continuation of transitional period. To free the people from such a fear, there is no option available to the court for now other than giving assurance of coming new constitution through the existing CA itself. This court is not in favor also of making a view of continuing such an agency as universal and optionless which cannot fulfill its major responsibility of bringing constitution till the uncertain future. Any agency or body created under the constitution by assigning certain duties and responsibilities will have a fixed reasonable time limit and duration, the present constituent Assembly also cannot be exception to it.

The writ petitions filed against the act of extending the term of Constituent Assembly through the eighth and ninth amendments to the Interim Constitution were brought before this court pursuing that this court would give direction to the concerned agencies. So that they ensure of coming of a constitution. If we glanced through the light of the opinions delivered by this court in those writ petitions, it clearly comes to be sighted that those opinions provided ample opportunity and time to move forward by securing the contribution and achievements made by the state in course of making the constitution. Moreover, this court, with judicial self – restraint, has provided necessary guidelines by understanding the complexities of constitution writing taking into account also the possible obstacles likely to come across in such a serious and significant endeavours. However, instead of utilizing its maximum attention and time in constitution writing as those guidelines, its motivation found to have led the task of constitution writing towards uncertainty and indefinite future by posing oneself more as legislature parliament rather than CA and focused only on the making and remaking of the government could be taken as the further deterioration.

It is not the intent of the Interim Constitution to cause frequent amendments to the constitution and extend its term and establish it as a everlasting institution by putting priority only in the forming and dissolving the government in capacity of Legislature-parliament by showing oneself reluctant towards the key responsibility ignoring the task of making the constitution. The Article 64 of the constitution had no such speculation nor does the doctrine of necessity recognize this type of trend.

While looking through the perspectives of the claim made for the legalization of the tenth amendment on the ground of the doctrine of necessity as mentioned in the written reply and the pleas made by the attorney general and others during hearing any individual or institution liable to discharge his duties and responsibilities when fails to do so because of his incapacity or due to arising a situation beyond control could be referred as a circumstance beyond control. It is the very intent of the principle of necessity. If such a situation cannot be neglected or avoided and it compels to take a decision and if such a decision would not have been lawful even in a normal situation and the reasonableness and legality of occurrence of such a condition is when substantiated by the time and situation, the principles of necessity could be attracted. Provided that, the doctrine, of necessity cannot be applied for concealing one's own fault as complacency, inaction and the problems created by one.

As the necessity compels to take any decision, it also defends that is such necessity justifiable. The necessity is the law of the time and place. This means, that necessity makes the lawful which otherwise could not be lawful. This is a settled principle of jurisprudence. It does not shove to any lively organization to take the doctrine of necessity as a tool of defense for ones own miscreants. The constitution always hopes the positive response and liveliness on its own and its components doings. The constitution is such a lively instrument which bears the capacity of operating the whole state mechanism actively and dynamically even when there are possibilities of arriving multifold of obstacles hardships and difficulties across the life of the nation. So a constitution does not imagine a situation of lifelessness of the state which impairs the whole process by considering the one and the same problem as never ending one.

Even from the objectives and reasons mentioned while submitting the written reply or presenting the tenth amendment bill, the amendment does not is correspond the ground reality and the need of the hour but appears as a normal and noncompulsory process. In both the earlier petitions, there has been carried a elaborative discussion and expressed clear opinion that the doctrine of necessity is not a tool to be used time and again nor this bench has produced separate view. So it will be appropriate to get end of such an embarrassing situation of repeating the same issue again and again by the court and the CA to deviate from its right course ignoring key responsibility and the guidance of the court and the people always in a whirlwind of uncertainty of coming or not a constitution.

Now therefore, it will not be inappropriate to agree with the fact that the CA is only responsible agency to get the country free from an embarrassing and deteriorating situation by assessing the overall scenario as that of the spirit of the Interim Constitution and the deep concern of the people that the constitution should be made only through the CA, social make up of the country, the contribution made by state in order for making the contribution, the achievements so far made by the CA, the political consensus reached time and again among the political parties as well as the commitment shown towards the interim constitution by making the people assured and show that the constitution will be made within the stipulated time period or by building political consensus on other alternatives such as conducting election, referendum etc. So much so, the existing CA as such, has been unable to float a message that it is competent to make the constitution and free the country from deteriorating situation by the fact it has been passing a time period nearly double to that of a time period specified by the maker

of the constitution at the beginning due to the extension of time period through the eighth, ninth and tenth amendments to the constitution which looks parallel to a time period of a periodic election of a legislative organ in the normal situation if we evaluated the time period together with paying sincere vigil to the spirit of the restrictive clause of Article 64. Against such a background, it has been inevitable for this bench to accept the constitutional duty of directing the concerned agency taking into account the context of the opinion of the mass that the CA has been unable to demonstrate that it has understood its liability and shown desired promptness, readiness and the seriousness towards its historical obligation.

Now therefore, on the basis of the appraisal made above with consideration of the guidelines issued by this court in writ Nos. 066-ws-0056 and 067-ws-0071 relating to the eighth and the ninth amendments besides the responsibility entrusted by the Interim Constitution along with the time period stipulated in Article 64 as work mandate through the election of the Constituent Assembly, there is no room for dispute that the key responsibility of the present CA is to give a new constitution to Nepali people within the prescribed time period. Since the Article 64 of the constitution is special arrangement in itself, a clear vision has been reflected by this court also about its unamendable and mandatory character. Now, it will not be expedient to haphazardly turn into void the activities done or performed in course of writing constitution following the formation of the present Constituent Assembly, in the light of the present writ petition. However, this court had not issued writ on the basis of doctrine of necessity in earlier writ petitions field against the amendments to the constitution nevertheless was provided sufficient time period and opportunity in order for completing the task of writing constitution by this CA itself within the stipulated time period. It is not being witnessed that the CA has been focusing desired attention towards making of the constitution nor the constitution making agenda is getting priority inside the Constituent Assembly.

Hence, it has come to reveal that the legitimate expectation of people to make constitution through the Constituent Assembly and the judicial views expressed by this court has been found grossly violated, which also manifests a situation also of derailing the constitutionalism, rule of law and the people –oriented system of government. Even so, the aspirations of Nepalese people to bring about a new constitution through the constituent Assembly, the fund consumed by the state to date after the initiation of constitution making process and to secure the achievement CA has accomplished up to now in course of drafting the constitution are the most significant constitutional responsibilities carried out by this court. It is natural to expect that all possible efforts will be made to promulgate the constitution within the time period extended by the tenth amendment. In otherwise condition, it will be more appropriate and justifiable to provide the last opportunity to the present CA if it needed the additional time period in order for the completion of remaining works and bring about the constitution. Now therefore the Constituent Assembly shall ascertain the achievements made after the formation of present CA those yet to be finalized in relation to making the constitution and so as not exceed the duration stipulated by the restrictive Clause of Article 64 of the Interim Constitution of Nepal, 2063 and the time period likely to be actually needed for the last chance and complete the task of constitution making within the said period and , in case the writing of the constitution could not be completed within the given period, the tenure

of CA will be ipso-facto terminated thereafter. Hence, this (directive) order is issued in the name of respondents, the chairperson of the Constituent Assembly and the Government of Nepal, Office of Prime Minister and the Council of Ministers, to conduct or have conducted necessary activities and make required arrangement either for conducting referendum under Article 157 or for holding election of the fresh Constituent Assembly or any other arrangements as provided in the constitution.

The respondents are notified about this order through the office of Attorney General. The present writ petition is removed from the regular proceeding and the file of the case be handed over as per rule.

We concur with the above opinion.

Justice Damodar Prasad Sharma

Justice Ram Kumar Prasad Shah

Justice Kalyan Shrestha

Justice Prem Sharma.

Done on 9<sup>th</sup> Mangsir, 2068. (25<sup>th</sup> Nov. 2011)