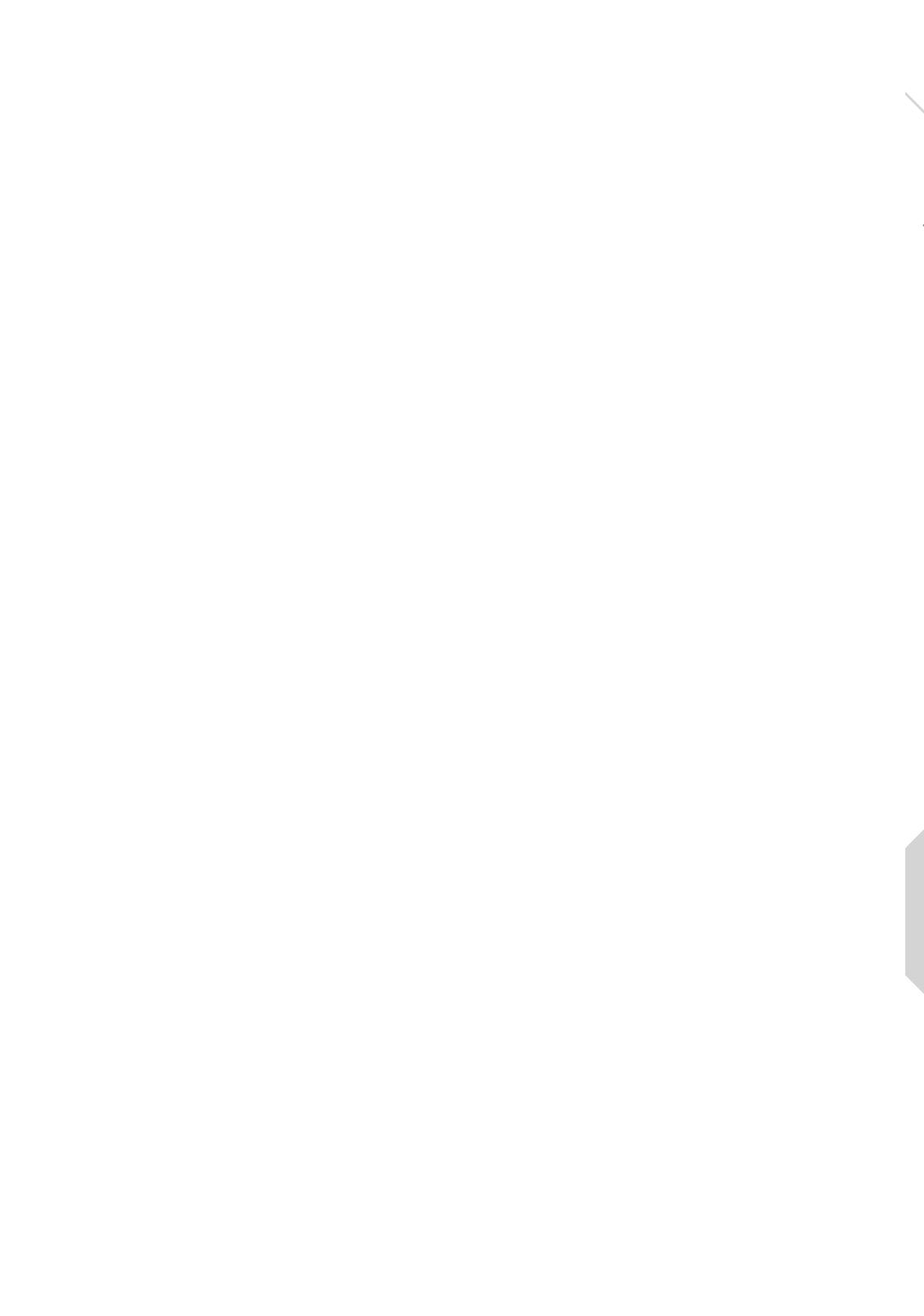
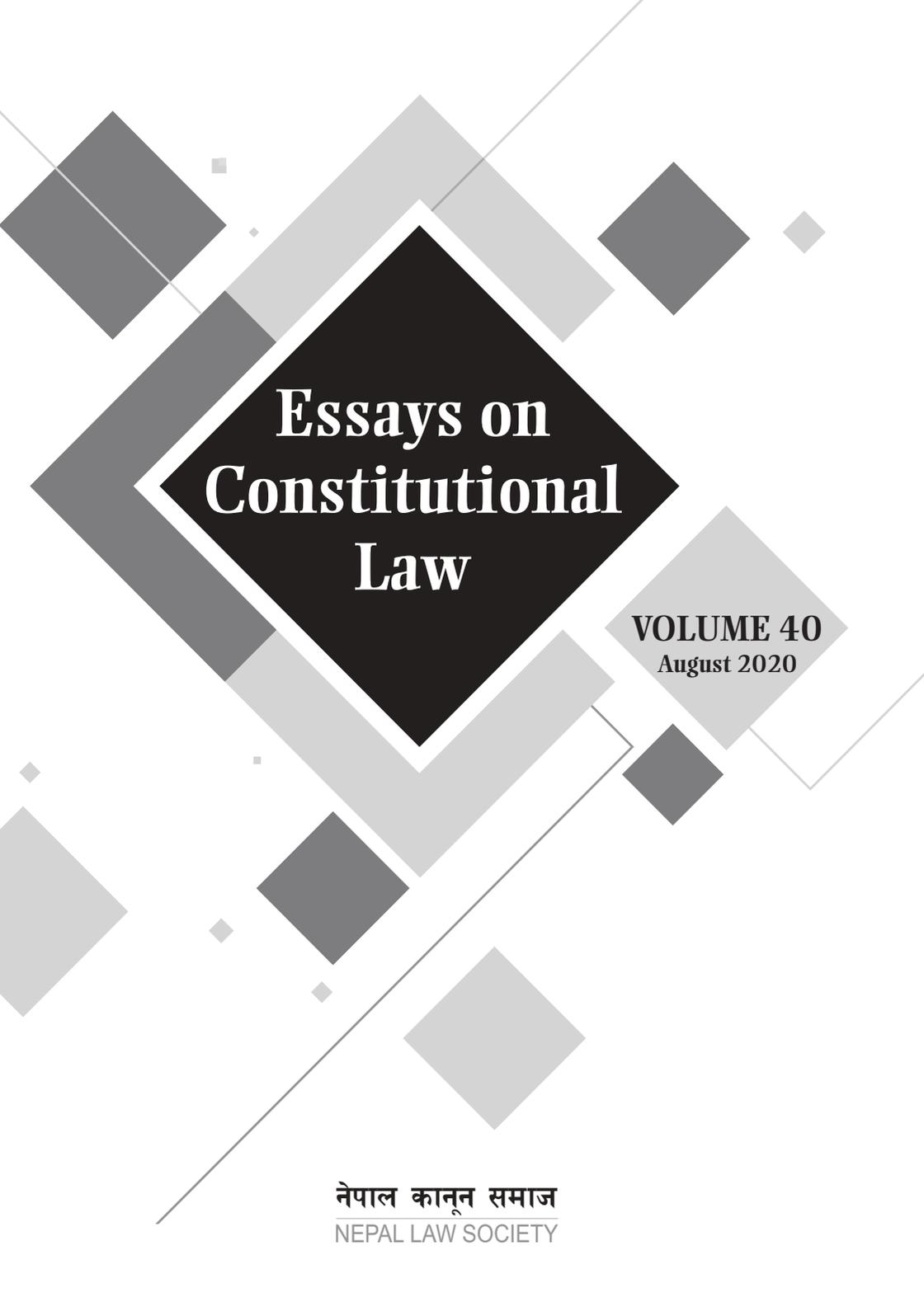


# Essays on Constitutional Law

VOLUME 40  
August 2020

नेपाल कानून समाज  
NEPAL LAW SOCIETY





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## Publisher's Note

We are happy to return with Volume 40 of the *Essays on Constitutional Law*. The Nepal Law Society (NLS) has long been publishing booklet on series of *Essays on Constitutional Law* regularly since 1990. The leading luminaries of the Nepalese legal fraternity originally envisaged the *Essays on Constitutional Law* for the purpose of intellectual exercise through analysis, reviews and intensive assessment of the prevailing constitution. However, after 2001 there was a long gap, which could be filled only last year with Volume 39, which covered important legal issues such as a critical review of constitutional, legal and judicial decisions with a special focus on fundamental rights, judicial independence, the law-making process, federalism, international practices, and aspirations of citizens. Continuing the mission of this publication's founders, the NLS has produced this latest 40<sup>th</sup> edition.

Now is a crucial period for Nepal's politico-constitutional development. Having transformed the country from a unitary monarchical system into a federal republican system, the Constitution of Nepal, 2015 has taken a big stride. Various aspects of the Constitution require constant examination and analysis. Since the promulgation of the Constitution, Nepal has undergone many changes during this tumultuous period. Following the elections of all three tiers of Government, citizens expected a calmer phase in political scenario and a progressive constitutional development.

However, Nepal's constitutional transition still continues to be belated due to the lengthy period of formulating scores of laws that are necessary to operationalize the provisions in the Constitution. Issues such as the implementation of federalism are still prevalent, and debates among citizens continue. The 12 constitutionally-prescribed bodies are not yet fully operational. The executive draws ire for not properly implementing judicial decisions and human rights recommendations. Citizens are looking forward to the full implementation of the fundamental rights they have been promised in the 2015 Constitution. Amid these challenges, Nepal and the entire world faces the ravages of a global, coronavirus pandemic. Nepal's entire state machinery is currently focused on dealing with the pandemic. The Constitution has enshrined

the right to health as fundamental right of citizens, which will have a bearing on how the State responds to the pandemic. However, that will be an issue for another time.

This current volume includes seven different articles on seven topical issues: They include a recollection on how the two Constituent Assemblies reached a consensus on key points in constitutional discord and the bearings they are likely to have in the days ahead. Likewise, there is a critical analysis of the rights of the peoples with disability as enshrined in the Constitution and the subsequent laws. The issue of citizenship in the Constitution has been one of the most debated. One of the articles examines the provisions on citizenship from a gender perspective. Aspirations of social justice are reviewed in another article. There is also an article on constitutional overview of the right to inclusion and participation in state structures. Two articles separately deal with federalism and its consequent issues. All articles are written by well-known legal practitioners.

We are thankful to the entire team for its hard work in bringing this publication to fruition, even during these difficult times. We look forward to receiving comments from all our readers on these topics, so that we may continue to engage in constructive debates and arguments. Constitutions are always works in progress. With the passage of time and lessons learnt from practice, one can always find room for improvement. Let us continue in this journey of constitution building and democratic consolidation.

August 2020

Publication Committee

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# The Disability Rights under Constitution of Nepal and the Role of the Judiciary in Nepal: A Note

— Dr. Ananda M Bhattarai<sup>1</sup>

“

*People with disabilities are vulnerable because of the many barriers we face: attitudinal, physical, and financial. Addressing these barriers is within the reach and we have a moral duty to do so. . . But, most importantly, addressing these barriers will unlock the potential of so many people with so much to contribute to the world. Governments everywhere can no longer overlook the hundreds of millions of people with disabilities who are denied access to health, rehabilitation, support, education, and employment- and never get the chance to shine. Disability need not be an obstacle to success. I have had motor neuron disease for practically all my adult life. Yet, it has not prevented me from having a prominent career in astrophysics and a happy family life.”*

— Stephen Hawking

”

## 1. Introduction

Persons with disabilities represent both a sizable and diverse population in Nepal. The National Census conducted in 2011 recorded the percentage of persons with disabilities at 1.94. However, the Federation of the Disabled in Nepal disagrees with this figure. According to the Federation, the population of

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<sup>1</sup> Justice, Supreme Court of Nepal

persons with disabilities is around three million, accounting for 10 percent of the total population. This figure, nevertheless, is still below the global average of 15 percent.<sup>2</sup> However, given factors such as the difficult mountainous terrain, a general lack of awareness, modicum of medical facilities available in the rural areas, prevalence of natural and man-made disasters, such as landslides, floods and earthquakes, war and the drawn-out insurgency, and road accidents that cumulatively contribute to the prevalence of disability, chances are that even the Federation's figure is an underestimate.<sup>3</sup>

Given this scenario, in this essay, the author provides insights into the history, the legal framework, the institutional measures, and the role of the judiciary in addressing the challenges faced by persons with disabilities, along with the possible way forward.

## 2. History

Nepal began to work on the issue of disability in an organized manner from 1963 and enacted the Disabled Person Protection and Welfare Act (DPPW Act) in 1982. Even though the Act was charity-oriented, it nevertheless declared that no one could be discriminated against on the grounds of disabilities and that persons with disabilities should not be denied entry in educational, training or cultural organizations or programs.<sup>4</sup> The Act also recognized the right of persons with disabilities to live with dignity, participate in political life and engage in gainful employment. It entitled persons with disabilities with free education. The Act provides for the establishing of special institutions for training such persons.<sup>5</sup> It called upon the government to take appropriate measures to prevent disability in the Nepali population, eradicate factors that may give rise to disabilities and provide training to such persons to help them lead a gainful life. The Act also required that enterprises hiring more than 25 persons should reserve at least 5 percent of jobs for persons with disabilities.<sup>6</sup> According to the Act, the family, however, held the primary responsibility for caring for the disabled.

2 <https://www.worldbank.org/en/topic/disability>.

3 According to a recent study conducted by University of the West of England, Bristol and Washington University, USA, in 2017, approximately 3,400 people (between the age of 15-49) died in road accidents, while 3,100 died due to HIV/AIDS, tuberculosis, and malaria. The same study reveals that 45 percent of the total injury is caused by road accidents, 18 percent by falls, and 14 percent by suicide. It further states that of 1,00,000 persons, 56.31 succumb to the injuries they get. More men (76%) compared to women die due to this. See [nagariknews.nagariknetwork.com](http://nagariknews.nagariknetwork.com) Jan 12, 2020. need title of article and exact resource.

4 Disabled Protection and Welfare Act 1882 S5.

5 Id S 6.

5 Id S 7-8.

Besides the DPPW Act, a few other laws that were enacted in the 1990s, namely, the Education Act 1992, the Children Act 1992, and the Local Self-Government Act 1999, which partially addressed the issue of disability. A significant development in this respect is the ratification of the Convention on the Rights of Persons with Disabilities (CRPD) 2006 and the Optional Protocol in 2010. Under the provisions of the Nepal Treaty Act 1991, international treaties to which Nepal is a party are considered as legitimate as the laws of Nepal and have an overriding effect over other laws. Now, with the promulgation of the new Constitution in 2015 and the new Act on disability in 2017, Nepal has firmly taken a right-based approach regarding persons with disabilities.

### 3. The Constitution of Nepal 2015

The Constitution, promulgated by the Constituent Assembly of Nepal in 2015, unveiled a representative democracy based on the principle of “inclusion and social justice” for the first time in Nepal. This is manifested in many provisions as well as the overall framework of the document. The Constitution has very clearly proscribed discrimination on the grounds of “physical condition” and “disability.” This is a landmark achievement of organizations advocating for the rights, including the human rights, of disabled persons. The Constitution has also allowed positive discrimination in favor of socially or culturally marginalized people, including, among others, “gender and sexual minorities,” “persons with disabilities” and “incapacitated or helpless persons.”<sup>7</sup> The Constitution has also guaranteed to “citizens with disabilities” and “economically indigent citizens” the right to receive free higher education. It has further provided that “visually impaired citizens shall have the right to get free education through braille script and the citizens with hearing or speaking impairment, to get free education through sign language.”<sup>8</sup> Similarly, the Constitution has specifically guaranteed children with disabilities positive treatment and protection from the State.<sup>9</sup> The orientation of the Constitution towards social justice and inclusion has been further vindicated because of the guarantee of the right of citizens to “live with dignity and honor along with their diverse identity, and have equal access to public services and families”<sup>10</sup> and the right to social security.<sup>11</sup> As the State has already enacted the necessary legislations for effective the operationalization of these rights within three years of the promulgation of the Constitution, as was

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7 Constitution of Nepal 2015 Article 18 (2)(3)

8 Id Art 31 (3)(4)

9 Id Art 39(9)

10 Id Art 42(3)

11 Id Art 43

mandated, there are further possibilities for the actual realization of disabled persons' rights in their truest sense.

#### **4. The Rights of the Persons with Disabilities Act 2017**

This Act was adopted by the Parliament to fulfill the State obligation set out in the Constitution and the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). The objectives of the Act, as stated in its preamble, is to “respect civil, political, economic, social and cultural rights” of persons with disabilities, to do “away with discrimination against persons with disabilities[,] to ensure the environment that enables persons with disabilities to earn self-reliant and respectful living” and to empower them to ensure their “participation in the process of policymaking, and development.” The Act defines persons with disabilities to include “person who has long-term physical, mental, intellectual or sensory disability or functional impairments or existing barriers that may hinder his or her full and effective participation in the social life on an equal basis with others.” The most important rights inscribed in the Act is the right to equality and non-discrimination. Echoing the UNCRPD, the Act provides a very wide definition of discrimination and includes “distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field, and this term also includes denial of reasonable accommodation.”<sup>12</sup> The law proscribes discrimination of persons with disability “in making enrolment in an educational institute, in lending loans by a bank or financial institution, with or without security, or doing other financial transaction or in selecting any employment or in providing any service, facility provided publicly whether for fee or reward.” As significant discrimination occurs within the family, the Act prevents family members or guardians of persons with disabilities from discriminating “against a person with disability in the maintenance, care, provision of foods, distribution of property or any other acts.” The Act also provides that such persons shall not be discriminated from “using or entering into any building or place that is open for use or entry by the general public” and warns that “no additional terms or liability shall be imposed in this respect” based on their disability.

The Act recognizes a host of rights, such as the right to community life, the right to protection, the right to political participation, the right to participation

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<sup>12</sup> Rights of the Persons with Disability Act 2017 S.8.

in policymaking, the right to form unions, the right to participate in cultural life, the right to access to services, facilities and justice, the right to social security, the right to information and the right to movement. Because women and children face multiple forms of discrimination, the Act extends special protective measures for them. Prominent among the rights protected are the rights to choose residence, obtain assistive materials and community assistance, protection against any kind violence or inhuman treatment, security in times of emergency, participation in election and cast vote, participate in making decisions that affect them, access information in an assistive format, free higher education and scholarship, skill development, employment and assistance in self-employment.

The Act calls upon the government to create provisions for free health services and therapies, such as “speech therapy and occupational therapy,” for persons with disabilities and to remove the barriers in their treatment. The government is also called upon to create provisions for the rehabilitation of persons with disabilities, where necessary, and this would include treatment service, useful skill-oriented and vocational training, assistive materials, medicines, regular consultancy service, educational and financial programs. For this purpose, the government is called upon to create a rehabilitation fund. The government is also required to “provide the treatment of the persons with mental or psycho-social disabilities in such community hospitals or health centers as chosen by them or any member of their families or their guardians” and provide “free medicines and consultancy service required for the persons with mental or psycho-social disabilities.” Notably, the Act enjoins the government against imprisoning persons with mental or psycho-social disabilities in the name of treatment.<sup>13</sup> Providing loans to persons with disabilities at concessional terms in agriculture or self-employed business or entrepreneurship, a 50 percent concession in public transport, tax exemptions and concessions are other welcome measures of the Act. In a nutshell, the Act operationalizes the constitutional provisions and provisions of the UNCRPD.

## **5. Role of the Judiciary**

In line with legislative development, and sometimes even ahead of such efforts by other branches, the higher judiciary has proactively taken steps to empower persons with disabilities by upholding their rights under the Constitution and the international instruments. Here are a few representative cases in which the

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<sup>13</sup> Id chapters 3-8

Supreme Court has progressively decided on the issues relating to disability rights.

1. **Sudarshan Subedi and Others v PM and Cabinet Secretariat and Others:**<sup>14</sup> The petition was filed by two persons with disabilities who had enrolled in different colleges as students. They were allegedly charged fees and were also denied course materials in braille. They claimed that such a treatment was against both the provisions of the Constitution of 1990, which provided that special provisions could be made in case of persons with physical disabilities, and the provisions of the Disabled Persons Protection and Welfare Act 1982 (DPPW Act), which provided for the right to equality and the right to education.<sup>15</sup> The petitioners sought a relief proscribing all educational institutions from charging any fee to persons with disabilities and returning fees that were already charged. They also requested the Court to issue an order for providing course materials in braille to all the persons with visual impairment.

In this case, the Supreme Court took cognizance of Art 11(3) of the 1990 Constitution, which allowed special legal measures to be made for marginalized people, including persons with disabilities, and Art 26(9), which required the State to adopt appropriate policy measures for such persons in matters pertaining to education, health and social security. The Court also took note of the various provisions of the DPPW Act and observed that charging fees to persons with disabilities was against Section 6 of the DPPW Act that required the State to make provisions for education of persons with disabilities free of cost in public educational institutions. As the Court found that no such provisions were made, it issued a directive order to the respondents, calling them to enroll persons with vision, hearing and intellectual impairment free of costs and to not take any service charge in any public educational and skill-oriented institutions within the country.<sup>16</sup>

2. **Prakashmani Sharma and Others v PM and Cabinet Secretariat and Others:**<sup>17</sup> This case was filed by Pro-Public, a civil society organization, and two hearing-impaired persons who were allegedly denied opportunity for higher education. According to the petitioners, the infrastructures and resources created from elementary to the higher education were not conducive to hearing-impaired persons, whose number, they claimed, was

14 Collection of Decisions on Public Welfare SC (2015-2062) Vol. 8 p 171

15 Constitution of Nepal 1990 Art 11(3) and Disabled Persons Protection and Welfare Act 1982 S. 6 and 9.

16 In this case the court was silent on reading materials.

17 Nepal Kanoon Partika(henceforth, NKP) 2065 Decision No. 7931.

approximately 500,000. Therefore, they requested that an order be issued to respondents to develop special reading materials for hearing-impaired persons and that special educational institutions, including schools and colleges, be established throughout the country to impart education in sign language.

In this case, the Supreme Court, taking note of the United Nations Declaration on the Rights of Disabled Persons,<sup>18</sup> the Constitution of 1990 and different laws, observed that diversity was not a deficiency but a special feature of society. The Court further observed that the persons with disabilities are vested with the same rights as any other person and that they are entitled to enjoy the rights as any other person in similar terms to lead a dignified life. Such persons could not be discriminated against on the basis of naturally-endowed strengths or weaknesses. Quoting the UN Declaration that inscribed the right of the persons with disabilities,<sup>19</sup> the Court further observed that being able or disabled only signified the difference in terms of experience. Therefore, their experiences and challenges had to be differently addressed by arranging appropriate resources for creating a situation of equality. When infrastructures were created suitable only to one group, and unsuitable to the other groups, all persons cannot enjoy equal rights. Therefore, taking note of the different experiences of disabled persons, the State needed to create appropriate physical infrastructure to help them realize the rights to education, health and employment. This is not a special favor to them but a measure that treated them in equal footing, observed the Court. Given the cyclical relation between education, employment and gainful living, the violation of one right would affect the other and make quality life impossible. Education is a basic need of every person; it is necessary for freedom, employment and self-empowerment, the Court said. The Court therefore ordered the government to develop a work plan, identify schools and colleges where persons with hearing deficiency could be enrolled, develop reading materials in sign language and create provisions for training human resources that could impart education in sign language.

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18 UN Declaration on Rights of the Disabled Persons GA Res 3447(XXX) 9 Dec 1975 in Art 1 defined "Disabled Persons" as "any person unable to ensure by himself or herself, wholly or partly, the necessities of a normal individual and/or social life, as a result of deficiency, either congenital or not, in his or her physical or mental capabilities."

19 Id Art 6. Inscribed the right to "medical, psychological and functional treatment, including prosthetic and orthotic appliances, to medical and social rehabilitation, education, vocational training and rehabilitation, aid, counselling, placement services and other services which will enable them to develop their capabilities and skills to the maximum and will hasten the processes of their social integration or reintegration."

3. **Deepak Bhattarai v PM and Cabinet Secretariat and Others:**<sup>20</sup> This Case was filed on behalf of persons who were fully visually impaired and deprived of any formal education. By invoking Articles 13(3), 14, 18(2) and Art 33(D1) of the Interim Constitution 2006, the DPPW Act, various international human rights instruments and earlier decisions of the Court, the petitioners claimed that the government had not done anything to ameliorate the condition of visually-impaired persons. It neither had a work plan nor any substantive activities in place for implementing the right to free education by creating appropriate infrastructures for visually impaired persons.

In this case, the Court observed that the rights inscribed in the Constitution are not conceived just to be implemented at convenience, for such an approach would adversely affect the marginalized people, including visually-impaired persons. The State is obligated to create environments in which the people could enjoy rights. According to the Court, the State was obligated to reasonably categorize visually impaired persons and persons with other disabilities in different groups and work proactively to make special provisions for the most deprived sections among the marginalized persons. The Court issued the writ of mandamus against the government to conduct a special census of the visually-impaired persons, take special measures for their food, shelter and health. Further, the Court directed the establishment of educational institutions, along with availability of reading materials in braille. The Court emphasized that the government should work on training, information and integrated social security and appropriate infrastructure for the persons with disabilities. It also asked the government to improve and implement the Disabled Persons Work Plan 2004.

4. **Sudarshan Subedi and Others v PM and Cabinet Secretariat and Others:**<sup>21</sup> This petition was filed on behalf of persons with intellectual disability and extreme physical disability who needed special protection and assistance. The petitioners had claimed that despite the DPPW Rules 1994 (2051 BS) requiring the State to establish a special home for persons with such disabilities, no such house had been established thus far; the Rules by and large had remained unimplemented. The petitioners claimed that there were about 6,00,000 persons with intellectual disabilities in Nepal. Same was the number of people having extreme physical disability. However, except for some alms, nothing substantial was done for them. In the absence of protection, their life progressively worsened. In view of this, the petitioners

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20 NKP 2067 decision no 8602, at p. 679.

21 NKP 2068 Decision no 8833, at p. 830.

requested for an order to establish special protection homes for such people with separate blocks for male and female, ensuring accessibility and priority to such persons then living outside, suitable infrastructure for them, training and employment along with special financial package for their protection.

In this case, invoking the provisions of the Interim Constitution, The DPPW Act, the Local Self-Government Act 1999, and the UNCRPD 2006, the Supreme Court observed that persons with disabilities required special protection from the State prioritizing those who cannot care by themselves. One such measures was the public housing program. The Court lamented that no homes were established for the disabled despite the provisions of the DPPW Act. According to the Court, very basic and initial measures were taken to protect persons with disabilities. The Court noted that even the earlier decisions of the Court had not been implemented properly.<sup>22</sup> In view of this, the Court observed that the State was obligated to properly implement the laws as well as the policies of the state per the spirit of the Constitution. It is also the duty of the Court to issue only those orders which could be properly implemented, and carry along all the stakeholders of justice with it. A proper balance of judicial activism and judicial indifference would be the right approach, said the Court.

Taking stock of the limited resources that the State had, the Court issued orders viz., a) to award maintenance allowance from Rs 500 to 3,000 by making proper categorization of the persons with disabilities; b) to award maintenance allowance from Rs 3,000 to Rs 5,000, in case of those who are totally disabled or intellectually disabled who needed a caretaker and did not have any person to care for them; c) to appoint or assign an official as Social Welfare Officer in each district; d) to arrange for the payment of the allowance mentioned above within three months and appoint Social Welfare Officer within six months to bring out a new integrated law line with emerging knowledge and experience and also in line with the letter and spirit of the Constitution as well as UNCRPD, 2006; e) to categorize persons with disabilities by evolving relevant standard; commence establishment of safe home at least one every year in each district for persons for disabilities form next fiscal year by taking note of the number of such persons; enforce provisions of Act and Rules effectively; and appoint an officer to coordinate, monitor and oversee the work undertaken by the non-governmental sector and build up synergy in action.

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22 *BimalaKhadka v PM and Cabinet Secretariat*, NKP 2065 decision0748 and other cases.

5. **Kalpana Shakya and Others v PM and the Cabinet Secretariat and Others:**<sup>23</sup> The petition was filed on behalf of Federation of the Hearing Impaired Persons, who relied on various provisions of the Interim Constitution 2006 and the CRPD 2006 and challenged Section 47(e) of the Vehicle and Transport Management Act 1992 that made persons with hearing deficiency ineligible for obtaining license to drive vehicles. The petitioners claimed that they had approached the government for repealing the provision that discriminated against them, but to no avail. Therefore, they requested that the provision be declared ultra -vires.

In this case, the Supreme Court observed that people in society had different abilities. No two persons were similar. The State should not treat people in such a way that only the rich, educated and able-bodied persons enjoy most of the resources of the country. For this case, the Court considered Art 5 of the UNCRPD that provided for substantive equality and the comparative scenario, including in Japan, where persons with hearing deficiency were issued licenses from 2008<sup>24</sup>, the UK and members of European Union, and some of the states in the US.<sup>25</sup> Ultimately, the Court concluded that there was no scientific reason for not issuing licenses to persons with hearing impairment. And therefore, on the pretext of road safety, denying driving license to such person had no valid reasons. Generally speaking, requiring a standard of hearing and visual capacity should not be objectionable. But on such account, it is not necessary to keep such persons permanently outside the ambit of law. On the contrary, the Court emphasized that the efforts should be made to avail assistive facilities and gazettes to such persons. As every person is different in capacity, deficiency cannot be generalized. Driving license is a manifestation of the possession of minimum competence. Nature has given every person different abilities. Denying driving licenses to persons who had other capacities intact only on the ground of hearing deficiency is not justified. This said, the Court did not strike down the provision of the Act, but instead issued a directive order to the government to develop infrastructure so as to ensure that persons with hearing deficiency can also drive, and at the same time, improve the law so as to enable such persons to obtain driving licenses.

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23 NKP 2070 Decision Number 9839 at p 7 (special Bench)

24 The Road Traffic Law 2008 that came into operation on June 1. The Japanese law required a special mirror to be fixed in the vehicle to facilitate a better view of moving traffic, and a Hearing Impaired Person mark in the vehicle and thus restricting parallel driving or overtaking.

25 Motor Vehicle (Driving License) Regulation of 1999 of UK; Florida Driving License Handbook 2012, Minnesota Commercial Driver Use Manual; New Jersey Motor Vehicle Commission

6. **Rajendra Duwal v PM and Cabinet Secretariat and Others:**<sup>26</sup> This petition was filed on behalf of the visually impaired persons and their association. The petitioners challenged section 7(7) of the Civil Service Act 1992 that lumped all persons with deficiency into one group and cumulatively allotted 5 percent reservation in job in the reserve category. Accepting the claim, the Supreme Court issued a directive order in the name of the respondent to set standards based on which persons within the group could be reasonably classified into various sub-groups according to severity of disability. It was necessary for ensuring that the benefits are not reaped only by the creamy layer among the population of persons with disabilities.
7. **Raju Prasad Chapagain and Others v PM and Cabinet Secretariat and Others:**<sup>27</sup> This petition was filed on behalf of Pro-Public and public spirited lawyers; these parties challenged Section 6 of the Chapter “Of Treatment” of the *Muluki Ain* (National Code) that allowed persons with mental disabilities to be nailed and jailed in the name of treatment as well as Section 9(7) of the Local Government Act 1971 that allowed the Chief District Officer to arrest such person if they pose a danger to themselves or the public or required treatment. In such cases, the CDO could imprison such persons per section 6 of the aforementioned code for an unlimited period of time. The petitioners claimed that even section 16(2) of the DPPW Act allowed the imprisonment of persons with intellectual disability for treatment purpose or if they posed a threat to others. Similarly Sections 6(1), and 11 of the Jail Act allowed segregation, and where necessary, nailing and caging of prisoners on the ground of insanity. The petitioners claimed that all these provisions were discriminatory and against the dignity of persons with intellectual deficiency; hence, they should be declared ultra vires as per Art 88(1) of the 1990 Constitution, they argued. All such persons who have imprisoned should be transferred to a mental hospital or special treatment centers and treated for their disease, and special care homes should be established for such persons who did not have or were separated from their family or guardians.

In this case, the Supreme Court, observing that actions of persons with mental diseases, for the reason of not being able to distinguish right or wrong, were considered legally blameless; additionally, the laws that allowed their imprisonment could not be considered as just, fair and reasonable, the Court reasoned. It stressed that no person could inflict mental disease on himself.

26 NKP 2072 Decision number 9320, at p. 17.

27 NKP 2066 Decision Number 8053, at p. 445.

And as an infliction of such disease is not a crime, such persons could not be imprisoned. According to the Court, a welfare State was obligated to take care of its citizens from cradle to grave. It was required to make arrangement for free treatment of indigent persons and provide them with security. This being the state obligation, imprisonment of persons with mental disease was against the Constitution. Taking note of the provisions of the Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the General Assembly Resolution No 46/119 of the General Assembly and UNDRDP, the Court further observed that as member of the UN, Nepal could not do anything that would go against those principles and declarations.

According to the Court, persons who required mental health care were vested with the same rights as others; they would not forgo these rights for being affected by mental disease. Therefore, any action that would in effect penalize such persons would be considered discriminatory and hence against the Constitution and law. The Court stressed that even when involuntary seclusion is required, such persons should be treated in a humane manner, and in no case could they be imprisoned. The Court, therefore, declared the expression “by putting in jail and by nailing such persons” mentioned in Section of the National Code as well as section 16(2) of the DPPW Act, to the extent it allowed imprisonment of persons with mental disease, *ultra vires*. The Court also issued order against the respondents to undertake a study for collecting data regarding persons with mental disease, total beds in hospital and health institutions, the number of health workers to treat persons with mental disease and any work plan for their treatment and submit the report within nine months from the order. The Court also ordered shifting 39 persons who were languishing in the prison in Dhulikhel at the time of hearing to a hospital if possible, and if not, make special arrangements for their treatment.

## 6. Institutional Measures

The decision by the Supreme Court in the cases mentioned above and the national and international law on the issue has catapulted a shift in policy from considering persons with disabilities as passive recipients of charity and welfare to active participants in decision-making and agents of self-empowerment. This is also reflected in a number of policy and institutional measures taken by the concerned government sector.

First among such progressive measures is the adoption and classification of disability. Disability is now linked to “long-term physical, mental, intellectual or sensory disability or functional impairments or existing barriers that may hinder such persons to have full and effective participation in the social life on an equal basis with others.”<sup>28</sup> The Act has classified disability into ten categories:1) physical disability; 2) disability related to vision: blindness and low vision and total absence of sight; 3) disability relating to hearing: deaf and hard of hearing;4) deaf-blind;5) disability related to speech and voice; 6) mental or psycho-social disability;7) intellectual disability; 8) disability associated with hemophilia; 9) disability associated with autism; and 10) multiple disabilities.<sup>29</sup> Disability has been further classified as profound, severe, moderate and mild on the basis of severity.

According to government statistics, about 200,000 have so far received the disability identity card, which covers almost 40 percent of the total number of persons with disability. Among them, 37,285 have received a red card (complete disability), and 49,077 have received a blue card (severe disability). Another 66,839 have received yellow card (mild disability), and 46,289 have received a white card (general disability). The card makes the holders eligible for various government services such as education, health, employment, training, mobility, physical accessibility, rehabilitation, empowerment, social security and legal services. Currently, persons with disability<sup>30</sup> who have a red card receive Rs. 2000 (\$20) every month and those with blue receive Rs. 600 (\$6) as a social security allowance. Besides, there are scholarships in education ranging from 3,000 per month to Rs100 per month according to the severity of disability.<sup>31</sup> There are provisions for free treatment of persons with disabilities at government hospitals.

Community-based rehabilitation (CBR) has proven to be one of the areas where Nepal’s efforts are laudable. There is one CBR for each of the 77 districts under the direct control of the local communities and the Disabled Persons Organizations (DPOs). The program has been effective in terms of collecting necessary information and delivery of services.

There are more than 350 inclusive education classes and more than 35 special educational institutions across the country. There are 331 DPOs across the country advocating for the causes of persons with disabilities. At the national

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28 RPD Act 2017, at S 2(b).

29 Schedule, Act.

30 Government of Nepal, Ministry of Women, Children, and Senior Citizen (2018).

31 <https://www.nfdn.org.np/documents/disability-resources.html#Definition>(accessed Dec.30, 2019).

level, the National Federation of Disabled-Nepal (NFDN) represents these organizations.<sup>32</sup> The NFDN has been instrumental in lobbying for policy, legal and institutional measures. However, the DPOs are not uniformly distributed; a majority of them are concentrated in the central development regions.<sup>33</sup>

## 7. Challenges and Way Forward

The discussion made above sufficiently reveals that Nepal is sensitive to the rights and concerns of persons with disabilities. The country has discarded the traditional charity and medical approach and firmly embraced the social- and rights-based approach. This approach recognizes that inequality results not from individual impairment but due to the inability of society to eliminate barriers facing persons with disabilities. It recognizes the independence and autonomy of persons with disabilities and seeks to assist them to help themselves so that they can participate in society, in education, at the workplace, in political and cultural life, and defend their rights by accessing justice.<sup>34</sup>

The constitutional and legal landscape of Nepal on the issue is sufficiently robust. It by and large resonates with international laws and standards. The new legislation of 2017 regarding the rights of the persons with disabilities, firmly stamps out any discrimination, distinction or exclusion, which has the purpose or effect of nullification of rights of persons with disabilities. The Constitution and the law impose a duty on the State to protect, respect and empower such persons and create conditions whereby such persons could enjoy rights in equal terms.

The Nepali judiciary seems sufficiently sensitive to the hardship facing persons with disabilities. The decisions encapsulated above reveal that the Court is aware of the international legal framework on the issue. The Court has also declared many legal provisions *ultra vires*, meaning these provisions are found to be inconsistent with the Constitution and international legal provisions. Section 9(1) of the Nepal Treaty Act 1991 that accords international law an overriding force has been instrumental in helping the Court advance the rights-based discourse.

Despite this, however, a lot of work remains in ensuring that persons with disabilities are brought to the center of human rights discourse so that they

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<sup>32</sup> <https://www.nfdn.org.np/> (accessed Dec.30, 2019).

<sup>33</sup> See generally, NeerajPaudelet al. (2016), Disability in Nepal: Taking stock and forging way forward, available at [https://www.unicef.org/nepal/media/1011/file/Disability\\_20In\\_20Nepal.pdf](https://www.unicef.org/nepal/media/1011/file/Disability_20In_20Nepal.pdf) (accessed Dec 28, 2019).

<sup>34</sup> UNOHC, The Convention on the Rights of Persons with Disabilities, Training Guide, No 19, at pp. 9-10.

may enjoy right in equal terms. There is a lackadaisical approach in the implementation of court decisions. The full implementation of the Act is yet to be realized. With the exception of 5 percent reservation in government jobs, some financial support and the creation of educational institutions, substantial implementation is still seems to be lacking. Considering these circumstances, several issues come to the fore when considering a viable way forward

First among them is the information regarding the population of persons with disabilities. The last census conducted in 2011 revealed the population as 1.94 percent, which appears to be unrealistic. It fails to consider the international or national legal framework that sets out criteria for disability. In order to bring about overall improvement in the situation of disability, a census that takes note of the type and severity of disability, treatment and desirable interventions is a key. This could be done in collaboration with the local level governments.

Second, the provisions call for the development of a plan of action and the creation of appropriate institutional and budgetary measures. Only institutions with national reach that facilitate and empower persons with disabilities to enjoy rights with their de-facto participation in decision-making and implementation may bring about this change. According to the new constitutional arrangement, the local governments come to the forefront when it comes to the management of persons with disabilities and indigent persons. However, issues such as education, healthcare and employment and participation in the national life demand collaborated initiatives of all the three tiers of government.

Third, most of the institutions and DPOs are currently concentrated in urban areas, with a majority in the capital city of Kathmandu. Due to this, even awareness about the existing facilities is not properly disseminated among disabled persons or their families. This needs to change, and DPOs and government institutions should work together to remove physical and mental barriers that hinder the realization of rights. Electronic and social media could be useful in disseminating information about opportunities that may be availed to persons with disabilities.

Fourth, even though families have a primary role to play in assisting persons with disabilities to realize their rights, arrangements have yet to be put in place to support families that decide to take care of their family members with disabilities. Parents who hold some profession or employment in the organized sector are not given any concession, such as additional leaves or flexibility during working hours, to care for family members with disabilities. As the

family is the best institution to live in, it is imperative to support families with their members with disabilities. This said, parents and family members should also be encouraged to avoid overprotection that overlooks privacy or cripples the independence of persons with disabilities in making life choices. Killing with kindness should be rejected, and attitude of not letting one to be oneself should be shunned.

Fifth, with the advent of technology, the term disability has been constantly defined and redefined. Now, computer-assisted technology has heavily reduced the difficulty being faced by persons with various disabilities. Tremendous achievement has already been made to alleviate the difficulty persons with visual impairment face. Now, persons with such impairments are discharging important academic and professional responsibilities in par with others. Now, artificial limbs, braille, write scripts, computers, electronic wheelchairs and vehicles without drivers have helped to overcome barriers. Therefore, availing modern facilities that promote movement and learning and undertaking profession would help persons with disabilities improve the overall situation in the country.

Sixth, intersectionality among persons with disability is a serious issue. Non-discrimination between persons with disabilities, between persons with greater and lesser disabilities, diversity among such persons and the pathways for equality are important. Unless intersectionality is properly understood, the creamy layer among the persons with disabilities may reap all the benefits that trickles from state and societal action. The notion of reasonable accommodation should be employed to encourage equality in access, decision-making and realizing benefits.

Finally, rather than a condition, disability is a social construct resulting mostly from attitudinal and environmental barriers that hinder the participation of persons with disabilities on an equal basis with others. This needs to change. People are people first; they deserve equal treatment and respect. Therefore, the State and advocates for persons with disabilities should work to create an inclusive legal and institutional culture and supportive and humane environment. Greater awareness among stakeholders, accompanied by robust planning and plan of action, would help remove the barriers to accommodate and ameliorate the situation. This would, in turn, promote the enjoyment of the rights enshrined in the Constitution, laws and relevant international instruments. As of now, persons with disabilities are excluded by design in most of our physical and normative space. Having vision is worse than blindness,

as some say, we should work with a long-term vision so that persons with disabilities are considered as right-holders in society' sthinking and actions. The jurisprudence of diversity should be celebrated, and efforts should be made to unlock barriers and bring about change in society's thinking, law and social infrastructure.

# How was consensus reached on some key issues during the making of 2015 Constitution?

— Radheshyam Adhikari<sup>1</sup>

## 1. Introduction

Amid numerous stand-offs, the election for the Constituent Assembly (CA) was finally held in 2064 BS. The Communist Party of Nepal (Maoist) that evolved from the underground armed revolt became the single largest party. The Party received such substantial votes that writing of a constitution would not be possible without its consent. On the other hand, the Nepali Congress (NC) and the Communist Party of Nepal (UML) (CPN (UML)) – relegated to second and third places – could only just halt the constitution-writing process if both voted unitedly. The *Madhesi* parties that had emerged from the heat of the *Madhes* movement were also in agreement with the Maoists in many issues, including the restructuring of the State, the judiciary, proportional inclusion, and others.

The first CA had aimed to make the constitution within two years, but that time frame was impractical. As the parties were embroiled in making and unmaking governments rather than a constitution, they digressed from the main objective and landed in dirty politics. The time limit set by the Interim Constitution was extended numerous times. But there was no consensus on constitutional issues. An immature deal penned down just a few days before the completion of the fourth year of the CA at the Prime Minister's residence in Baluwatar had already failed to materialize by the time it reached Singha Durbar for necessary discussion. In the end, the first CA was dissolved due to its failure to produce a constitution.

However, the extensive discussions and conclusions over the four years in different committees were still useful. These materials served

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<sup>1</sup> Member of Parliament

as reference to the second CA. However, for various reasons, the second CA rejected some of the issues in which there had been unanimity during the first CA. The NC, which had been weak in the first CA, had emerged as the largest party in the second. With more than one-third of the votes, the NC, like the Maoists during the first CA, was similarly-situated, as a constitution could be made without its consent. The CPN (UML) stood in second place with a strong presence in the CA. The Maoists and the *Madhesi* parties were in weaker positions. Therefore, some of the issues that were not to the liking of the NC and the CPN (UML) during the first CA were revised.

Despite the changed context, constitution-making was not easy. Due to politicking among the parties, the second CA, too, was lumbering ahead. In April of 2015, Nepal was struck by a devastating earthquake resulting in a great loss of lives and properties. On the backdrop of national calamity, political parties were forced to be united to promulgate the Constitution. The earthquake came as blessing in disguise, so far as the constitution-making process was concerned. However, Nepal's southern neighbor, India, which had always played an active role in Nepalese politics, was dissatisfied. At the last moment, when the constitution-making process had been completed and a Constitution was about to be promulgated, the then Indian foreign secretary (the current External Affairs Minister) S. Jaishankar landed in Kathmandu as Delhi's special envoy to request for temporary halt in the promulgation of the Constitution, as *Madhesi* parties had objections to certain provisions in the Constitution. But, the Indian envoy was too late to intervene. There was no alternative in front of Nepalese leaders than to reject the request and promulgate the Constitution. Despite a few members boycotting the Constitution, the CA promulgated the Constitution. India merely "noted" the huge constitutional development happening in Nepal. Now, it is a matter of history that, subsequently, India imposed an undeclared blockade for nearly six months.

Against this background, this article attempts to recall how the political parties had reached consensus on some key constitutional issues during the making of this Constitution. The issues discussed are pluralism, citizenship, secularism, and language. Further research will be necessary on these issues as well as the issues of the separation of power between the different organs of the State as well as the constitutionally-established committees and bodies created to serve the needs of marginalized communities.

## 2. Pluralism

There were big differences among political parties on whether or not to include “pluralism” in the Preamble of the Constitution. The NC wanted to insert the terminology in the Preamble itself, whereas the Maoists considered it as an “ideology” based on liberal values and refused to accept the NC’s proposal. The CPN (UML), though in favor of pluralism, had not taken any position on this matter. At the end, it was decided that all the principles of pluralism would be imbibed in the Preamble of the Constitution without ever mentioning the term itself. Also, it was agreed that pluralism would be addressed in another appropriate part of Constitution.

Therefore, the Preamble includes the phrase “recognizing the multi-ethnic, multi-lingual, multi-religious, multi-cultural and diverse regional characteristics.” On a political note, it states: “Being committed to socialism based on democratic norms and values including the people’s competitive multiparty democratic system of governance, civil liberties, fundamental rights, human rights, adult franchise, periodic elections, full freedom of the press, and independent, impartial and competent judiciary and concept of the rule of law.” “Pluralism” is treated to mean a form of governance in the Constitution. Article 74 of the Constitution reads: “The form of government of Nepal shall be multi-party, competitive, federal, democratic, republican, parliamentary form of government based on pluralism.” This phrase, if viewed in the context of the Preamble, clarifies that the Constitution is based on pluralism.

It is necessary to educate the people about the exact meaning of pluralism. Pluralism is not merely a political jargon. It is connected to the way of life of a citizen of a nation. For example, in the political sphere, it presents an individual with the right to choose any political ideology and thus become affiliated with any one of the political parties. It also includes the right to remain aloof from any political affiliation. In the social sphere, pluralism relates to exercising the right to education and health. Parents and students in a pluralistic society are free to choose whether or not they want to join public or private education or health systems. Likewise, only pluralism allows a citizen to choose a desired religion. The right to religion and secularism falls under this category. Also, pluralism offers citizens the opportunity to choose in the cultural domain as well. In terms of economics, the Constitution of Nepal has adopted a three-pillar concept (i.e., public, private, and cooperative) to enhance its economy. Hence, even in the economic domain, the Constitution imbibes pluralism.

In short, although the word “pluralism” is absent in Preamble of the constitution, its inherent principles have been embraced and the active provision of Article 74 further clarifies its significance.

### 3. Citizenship

The issue of citizenship has always remained controversial in Nepal. The open border between Nepal and India, provisions of the The 1950 India-Nepal Treaty of Peace and Friendship and the political, economic, social, cultural, religious, and multifaceted relations between these two neighboring nations has always been a common platform for generating agreements as well as the cause for ensuing disagreements. Due to the open border, citizens of either countries may cross the border without any hassle. It is widely believed that Indian nationals of border areas acquire Nepali citizenships with undue influence. Therefore, how to deny citizenship to Indian national is an important concern in Nepal.

During the course of constitution-making, two points related to citizenship, one to marital naturalized citizenship and another to Non Resident Nepalese (NRN) citizenship, had become intractable. There were demands to replace the existing the marital naturalized citizenship system – in which a foreign woman married to a Nepalese citizen can immediately obtain naturalized citizenship if desired – with a system allowing the application of such citizenship only after a lead period of seven years. It was reasoned that a similar system is in place in other countries, including India. Secondly, there were also demands for equal treatment for foreign husbands of Nepalese women. In the end, the existing practice was given continuity and both new proposals were refused.

After 1990, the issue of citizenship had an added dimension. A huge segment of Nepal’s population has obtained passports. Over half the population has flown overseas and even migrated worldwide, outside of just India. The heightened mobility of Nepalese has been phenomenal. Hundreds of thousands of Nepalese have also obtained foreign citizenship. Still, they have strong a wish to maintain relations with Nepal. Hence, they demand dual citizenship. In reaction to their demands and lobbying by the Non Resident Nepalese Association, the chapter on citizenship in the Constitution includes provision allowing NRN citizenship. It states: “The non-residential citizenship of Nepal may be so granted to a person who has acquired the citizenship of a foreign country, has resided in a country other than a member state of the South Asian Association for Regional Cooperation, and who or whose father or mother, grandfather or grandmother was previously a citizen of Nepal by descent or birth but subsequently acquired

the citizenship of the foreign country that such person may enjoy economic, social and cultural rights in accordance with the Federal law.”

There were extensive discussions and deliberations on the necessity of this provision. A substantial portion of the CA argued that having chosen to obtain foreign citizenships, such Nepalese had lost their loyalty to Nepal. However, it was concluded that though, for various reasons, they had accepted foreign citizenship, the first generation of migrants would have great economic, social, and cultural attachment with Nepal and that allowing them to maintain their attachment would be beneficial to Nepal. Additionally, descendants of migrated Nepalese may want to stay connected to the roots of their parents, grandparents, and so on. Thus, for three generations of NRNs, it was agreed that citizenship would be issued.

As we are in the midst of formulating the federal law on citizenship, the same circumstances appear to be repeating. Whether in marital naturalized citizenship or non-residential citizenship, the restrictive propositions lead one to feel that conservative positions on citizenship becoming dominant. If the report on the citizenship bill currently in the House of Representatives is passed, it delivers the messages that the Parliament is bent on maintaining rigid provisions regarding citizenship.

#### **4. Secularism**

There was a big dispute on whether or not to declare Nepal a Hindu or a secular state during the constitution-making process. It is not appropriate in a democratic system for the state to protect or promote a particular religion and ignore other religions. Religion should be made a matter of individual choice, and the state must be neutral in the matter of religion. Hence, arguments in favor of secularism were strongly presented. However, in a country with a large majority of Hindus, there were equally strong demands to declare Nepal as a Hindu state. Furthermore, many believed that Nepal should not lose the unique identity as the only Hindu state in the world. In India, those raising the banner of Hinduism were in the dominant position, and it was no secret that the ruling powers in India wanted Nepal be declared a Hindu state in its Constitution.

Despite all these pressures, the CA accepted Nepal as a secular nation for the following reasons.

- a) A majority of the representatives in both the first and the second CA were in favor of secularism; most Dalits, *Adivasi Janajati*, Buddhists, Muslims,

and Christian favored secularism. Additionally, a large number of communists favored secularism, and even within the NC, the progressive bloc favored secularism.

- b) The Rastriya Prajatantra Party was in favor of the Hindu state but its presence was almost non-existent.
- c) The *Madhesi* parties took no position on this subject.

Hence, in the Constitution, matters related to religion were enshrined in two Articles. Article 4 (1), while defining the state of Nepal, stated: “Nepal is an independent, indivisible, sovereign, secular, inclusive, democratic, socialism-oriented, federal democratic republican state.” In the subsequent explanation, it was clarified that “[f]or the purposes of this Article, ‘secular’ means religious, cultural freedoms, including protection of religion, culture handed down from the time immemorial.” In Article 26 (1) under Fundamental Rights, it is stated: “Every person who has faith in religion shall have the freedom to profess, practice and protect his or her religion according to his or her conviction.” Article 26 (3) then goes on to state: “No person shall, in the exercise of the right conferred by this Article, do, or cause to be done, any act which may be contrary to public health, decency and morality or breach public peace, or convert another person from one religion to another or any act or conduct that may jeopardize other’s religion.”

When constitutional provisions on religion are viewed in totality, it implies that despite strong pressures to remain a “Hindu state,” Nepal settled for secularism due to the inherent structure of the then CA. Subsequently, attempts were made to blunt this declaration. There is no doubt that this matter had been resolved by adopting a middle-path.

## 5. Language

In a nation filled with such diversity, the issue of language certainly generated heated debates when the Constitution was being discussed. And it was determined that a substantial amount of time would be needed to resolve the matters concerning language. Eventually, it was decided that, for now, only some broad aspects would be included in the Constitution. The rest would be resolved by the to-be-formed Language Commission that would provide the recommendations on the matter.

In order to stress their attachment to the mother tongue, many minority members of the first CA spoke in their native languages. However, it was not understood by all other members. Gradually, they switched to speaking in Nepali (Devanagari script), so that others could understand them and hold a conversation.<sup>2</sup> Some members spoke in Hindi and that tendency continues till date.<sup>3</sup> Therefore, even though in the initial days of CA, members spoke in Newari, Tamang, Magar, Gurung, Bhojpuri, and Awadhi languages, among others, but the trend slowed down. Almost all members speak in Nepali these days. Supposedly, over 100 languages are spoken in Nepal, and they are all the languages and the heritage of Nepal. But protecting and promoting all these languages is a daunting task.

Despite these realities, the Preamble of the Constitution accepted a “multi-language” approach, and Article 3 states: “All the Nepalese people, with multiethnic, multilingual, multi-religious, multicultural characteristics and in geographical diversities, and having common aspirations and being united by a bond of allegiance to national independence, territorial integrity, national interest and prosperity of Nepal, collectively constitute the nation.” Article 6 states that all mother tongues spoken in Nepal are the languages of the nation. However, Article 7 (1) states that the Nepali language in Devanagari script shall be the official language of Nepal. Article 7 (2) further states: “A Province may, by a Province law, determine one or more than one languages of the nation spoken by a majority of people within the Province as its official language(s), in addition to the Nepali language.” Article 7 (3) provides for a Language Commission by stating that “[o]ther matters relating to language shall be as decided by the Government of Nepal, on recommendation of the Language Commission,” which is provided for by Article 287.

Similarly, Article 32 guarantees the right to language and culture. Article 31 (5) states: “Every Nepalese community residing in Nepal shall have the right to get education in its mother tongue and, for that purpose, to open and operate schools and educational institutes, in accordance with law.” In practice, due to the existing economic and managerial capacity, the enforcement of these constitutional and fundamental rights has been difficult. The federal government of Nepal still struggles to deliver textbooks in Nepali and English to students up to Grade 10. So, it will be very difficult to make textbooks available in other languages and arrange for the necessary teachers and learning facilities.

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2 Another reason why Nepali is continued to be spoken is due to lack of institutional capability of the Parliament Secretariat to keep record statements made in languages other than Nepali.

3 Although minimal, the use of Hindi continued because many understand the language.

Even though the issue of language was quite complex, the CA realized the sensitivity inherent to this issue. It not only identified all languages spoken in Nepal as a national language but also extended ownership over them. Although the possibility of providing preliminary education in one's native language in the present context in which the federal resources are limited is a different matter, no native speaker who speaks languages other than Nepali from any ethnicity or group in Nepal feels marginalized by the present constitution. With the increase in capacity over time, one may expect and believe in the enforcement of these constitutionally-guaranteed rights.

## **6. Conclusion**

It is not possible to include all the issues deliberated in the CA in this short write up. This write-up has evaluated some of the issues of pluralism, citizenship, secularism, and language in the constitution-making process. Even these issues will warrant further analysis and authenticity, as the article is based on the personal experiences of a CA member and a witness to the functioning of both the CAs. Moving forward, there is also a need to research how the CA reached consensus on the three organs of the state – the executive, the judiciary, and the legislature. Likewise, there is need to write about the constitutional commissions and bodies.

# An Analysis of the Constitutional Aspirations on Social Justice in Nepal

— Tek Tamata<sup>1</sup>

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*Political democracy cannot last unless there lies at the base of it social democracy. Liberty cannot be divorced from equality; equality cannot be divorced from liberty. Nor can liberty and equality be divorced from fraternity.*

Dr. Ambedkar

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## 1. Background

Social justice is the bedrock of democracy. Democracy cannot survive and flourish without the full realization of human rights. Human rights include all dimensions of life, from civil and political rights to socio-economic rights. They complement each other. Mere highlights of one cannot help human beings fully realize human rights. Hence, it is said that civil and political rights and economic, social, and cultural rights are two sides of the same coin. Socio-economic and cultural rights are more focused on advancing the lives of vulnerable segments of society by introducing several affirmative provisions and actions. The issue of social justice is associated with social equality and social rights, and these are dependent on economic equality and economic rights<sup>2</sup>. As the constitution is a manifesto that blends

1 Advocate, Mr. Tamata was the Gold Medalist of the LL.M, II batch of Tribhuvan University, Nepal.

2 Ahmad, S.W., & Ali, M. A. (2006). Social Justice and the Constitution of India. *The Indian Journal of Political Science*, 767-782.

the hopes and aspirations of the people, it must contain vision towards social justice. Democracy, as we know, is not only a form of government but also focuses on human rights and human dignity and, in turn, implies the rule of law, equality, liberty, and freedom from oppression, exploitation, and arbitrary interference. Democracy is not only political governance that enhances the people-centric approach of governance, but more than that, it focuses on human rights and human dignity implied by rule of law, equality, liberty, and freedom from exploitation. In other words, democracy is concerned with social-economic democracy. To ensure that the principle of equality is efficient, a system of special provisions for backward classes of society have been outlined in the Constitution<sup>3</sup>.

Social justice means the availability of equal social opportunities for the development of personality to all the people in society without any discrimination based on gender, caste, religion, or race. No one should be deprived of their rights, which are essential for social development, because of these differences and social conditions. Social justice can be made available only in a social system where the exploitation of person by person is absent and where the privileges of a few are not built upon the miseries of the many.

Moreover, the term social justice implies a political and cultural balance of the diverse interests in society. Indeed, democracy is a dynamic process that human societies have to attain, whereas social justice is an integral part of society. Social injustice cannot be tolerated for a long period and can damage society through revolts.<sup>4</sup> Therefore, the deprived population of society should be made capable of living with dignity. Social justice is a principle that lays down the foundation of a society based on equality, liberty, and fraternity.

With the realization of empowering people by introducing justice packages, the Constitution of Nepal, 2015 (Constitution) promulgated by the Constituent Assembly (CA) recognizes several economic, social, and cultural rights (ESCR), along with civil and political rights as the fundamental rights of all Nepalese. The Constitution includes a number of protection mechanisms to protect these rights. Unlike the Constitution of Nepal of 1990, the 2015 Constitution addresses several collective rights and rights of communities that are lagging due to systematic and structural deprivations and discriminations.

3 R. K. Singh (2016). *Status of Social Justice in India*. South Asia Journal. Available at <http://southasiajournal.net/status-of-social-justice-in-india/>.

4 Available at <https://madhavuniversity.edu.in/social-justice.html>.

5 The Constitution of the Kingdom of Nepal, 1990 was the outcome of the People's Movement and was focused more on political and civil rights than economic, social, and cultural rights. It was more oriented towards establishing political freedom than social justice.

The Preamble of the Constitution envision creating an equitable society by ending all forms of discriminations and oppressions created by the feudal, autocratic, centralized, and unitary system. Though the term “social justice” is not mentioned clearly in the Preamble, the establishment of the basis of socialism has been stated as a political commitment. More importantly, the Constitution embraces Nepal’s multi-caste, multi-lingual, multi-cultural and diverse geographical specificities by ending discriminations relating to class, caste, region, language, religion, and gender, including all forms of racial untouchability. It commits to protect and promote unity in diversity, social and cultural solidarity, tolerance, and harmonious attitudes. It further expresses the determination to create an egalitarian society based on the principles of proportional inclusion and participation and to ensure an equitable economy, prosperity and social justice; this leaves the State and other parties with significant work to foster and institutionalize social justice in Nepal.<sup>6</sup>

The centuries of entrenched practices of discrimination and exclusion of disadvantaged groups in Nepal, including of women, Dalits, indigenous and ethnic (Janajatis) peoples, and Madhesis, have triggered a demand to bring about greater inclusion and ensure greater justice through a human rights framework. Analysts argue that the conflict in Nepal was partly rooted in socio-economic and cultural inequalities resulting from the State’s failure to ensure and protect ESC rights. The denial of equal access to socio-economic opportunities and development directly contributed to the recent armed conflict.

This constitutional commitment to end all forms of discrimination and create an egalitarian society has a huge political meaning. It is the outcome of the Comprehensive Peace Accord (CPA),<sup>7</sup> which was the result of a political agreement reached between the Government and the then Communist Party of Nepal (Maoist) that had launched a decade-long armed conflict. It was also fueled by the People’s Movement II organized by all the political parties in Nepal. The CPA, which was the beginning of the peace and transformation process in Nepal, had envisioned to end all forms of feudalism and prepare and implement a minimum common program of socio-economic transformation based on mutual understanding and included ending feudal land ownership. The Accord encouraged to formulate policies of scientific land reforms and to adopt policies to provide land and socio-economic security to backward groups, like

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6 Preamble of the Constitution of Nepal, 2015.

7 The Comprehensive Peace Accord (CPA) has pledged to progressively restructure the state by resolving prevailing problems related to class, ethnicity, regional, and gender differences.

landless, bonded laborers, tillers, Haruwa-charuwa,<sup>8</sup> and other marginalized and backward groups. The CPA was the first political document<sup>9</sup> that endorsed the ESCR as an important part of human rights and laid down the basis for the Interim Constitution to recognize these rights as the fundamental rights under Chapter Three<sup>10</sup>.

There are several rights recognized in the Constitution related to social justice and ESC rights. From defining the state or nation to defining the language itself, the Constitution appears very inclusive as well as responsive towards equality, dignity, and human rights. Likewise, the fundamental chapter of the Constitution encompasses all 31 rights, out of which around 50 percent are related to social justice and ESC rights. Notably, the Constitution states the right to social justice as one of the fundamental rights. Though the scope of these rights appear narrow and limited, they must be defined as ideal elements of the spirit of the Constitution. The legislation that will have to be subsequently formulated needs to define itself in a wider sense to include both social and economic justice.

## 2. Constitutional Schemes on Social Justice

The Constitution of 2015, for the first time ever in Nepal's history of constitutional and political development, was promulgated by the Constituent Assembly (CA). Political parties and freedom fighters in Nepal aspired for a constituent assembly, as the body of the people that would draft the Constitution. This long-awaited dream became a reality in 2015,<sup>11</sup> following the People's Movement-II. The Constitution's promulgation by the people's representatives in a participatory manner ensured the ownership of the people. Additionally, the CA was adequately inclusive (in terms of gender, caste, ethnicity, and minorities) and had fair representation. It also held a number of consultations to seek submissions from the people at large and coordinated with interest groups

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8 One of the forms of exploitation is bonded labor. Hilly Dalits are mainly forced to work without pay by so-called high caste/class people against their own household course and agricultural work.

9 All the constitutions before Interim Constitution considered economic, social, and cultural rights as non-justiciable rights and incorporated them under the directive principles and state policies.

10 The Interim Constitution of 2007 had, for the first time ever in the history of Nepal's constitutional development, recognized economic, social, and cultural rights as fundamental rights.

11 The then President of Nepal issued the new constitution a day after it was authenticated and endorsed by an overwhelming majority (or more than two-thirds) of the members of the Assembly. The Bill of the new constitution was also accepted with more than a two-third majority on September 16, 2015. Altogether, 507 CA members voted for the Bill, while 25 voted against it. Besides the CA chairman, a total of 532 CA members participated in the voting process. Only 57 out of total 598 sitting members (the CA had a strength of 601 members) boycotted the voting process. Likewise, 85 percent of the 89 percent members present in the CA supported the adoption of the new constitution.

working on different issues and agenda as relating to particular discriminations, exclusions and ethnicities. Let it be noted that there was serious criticism regarding limited opportunities offered to the people during the term of the CAII. Compared to the first CA, which received 549,763 written submissions in a 25-day nationwide public outreach, public participation was negligible during the term of the CA II, and there were no serious initiative to engage expert opinion or civil society<sup>12</sup>. Equally, there was no provision for caucuses during the CA – II, as it had prohibited the caucuses altogether. Additionally, the Constitutional process was suddenly accelerated following the earthquake of April 2015, which imposed constraints on participation and deliberation. First draft of the new constitution was submitted on June 28, 2015.

### 3. Overall Goals of the Constitution

The Constitution, through its preambular provisions, highlights social justice by acknowledging diverse social elements on one hand, and admitting the prevailing structural injustice against some of Nepalese communities on the other. The Preamble also commits to protect and promote unity in diversity, social and cultural solidarity, tolerance, and harmonious attitudes by expressing the determination to create an egalitarian society based on the principles of proportional inclusion and participation in order to ensure an equitable economy, prosperity, and social justice.

Besides the preambular provision, the preliminary chapter of the Constitution defines the state, nation, and languages in abroad and inclusive manner.<sup>13</sup> It is the first Constitution to exclude the phrase “Hindu state” from the definition of state and include the self-explanatory phrase “secular state.” Likewise, an “inclusive” democratic state is one more clear term covered under the definition.

The Constitution advances gender equality by recognizing mothers and fathers equally in requiring their identities in the process of granting citizenship to the eligible child. Under the eligibility criteria of citizenship, maternity is furthermore stated. One of the articles in the Constitution states that the person who is entitled to the citizenship of Nepal by descent may obtain the citizenship certificate from the name of his/her mother or father, along with his/her gender identity<sup>14</sup>. Hence, from the gender justice angle, this is one of the powerful provisions that respects the role of mothers.

12 K. Hachethu (2017). Legislating inclusion: Post-war constitution making in Nepal. *Two steps forward, one step back: the Nepal peace process*, Issue 26, *Accord*. 59-63.

13 Articles 3 and 6-7 under the first chapter of the Constitution of Nepal, 2015.

14 Article 12, the Constitution of Nepal, 2015.

#### 4. Guarantees of the Rights towards Social Justice

ESC rights are pertinent elements of social justice. They establish a favorable legal and policy environment for achieving progress and enabling citizens to petition their government. The Constitution appears positive in terms of endorsing social justice as a part of human rights. Under Chapter Three, the Constitution mentions broadly the right to life. Going beyond the traditional definition of the right to life as a physical one, it recognizes the right to live with dignity as a fundamental right<sup>15</sup>. In the absence of such an open and comprehensive approach of the right to life in the previous Constitution, the Judiciary had to speak out and issue directives with clear prescriptions to consider dignity as a part of the definition. Some human rights are instantly familiar to people: the right to freedom of expression, the right to life, the right to a fair trial, and the right to freedom from slavery<sup>16</sup>. However, issues such as poverty, discrimination, stigmatization, exploitation, exclusion, low payment, and inadequate housing are very rarely viewed as human rights issues; yet, that is exactly what they are. Besides, it requires addressing these issues to make sure that a person has the right to live with dignity. The key messages that the International Covenant on Economic, Social, and Cultural Rights (ICESCR) of 1966, to which Nepal is a State Party, focuses on the rights that are crucial to enable people to live with dignity. It evaluates working conditions, social security, adequate food, housing, health, and education.

Guaranteeing the right to remedy to all the citizens, the Constitution recognizes non-discrimination in the application of general laws on the grounds of origin, religion, race, caste, tribe, sex, physical conditions, disability, health condition, matrimonial status, pregnancy, economic condition, language, geographical region, ideology, or any other such grounds. It also mentions that there shall be no discrimination among the citizens on grounds of origin, religion, race, caste, tribe, sex, economic condition, language or geographical region, ideology, and such other matters. As an empowerment package for those who are far behind of mainstream development and are excluded due to defective social values, the Constitution envisions a protective provision by making special arrangements by law for the protection, empowerment, and advancement<sup>17</sup> of women, Dalits, indigenous peoples, and other vulnerable groups.

<sup>15</sup> Article 16, Constitution of Nepal, 2015.

<sup>16</sup> L.McGrego (2016). The right to live with dignity. *Equality and Human Rights Commission*.

<sup>17</sup> The people who are lagging behind socially and culturally include the *Madhesi, Tharus, Muslims*, oppressed class, backward communities, minorities, marginalized groups, peasants, laborers, youths, children, senior citizens, sexual minorities, persons with disability, pregnant, incapacitated and the helpless persons, and of the citizens who belong to backward regions and financially deprived citizens including the Khas Arya. Article 18 (3) of the Constitution.

In order to orient Nepali society towards ending caste-based discriminations and untouchability, the Constitution guarantees the following rights:

- ◆ right against any kind of untouchability or discrimination in any private or public place on grounds of caste, ethnicity, origin, community, occupation, or physical condition;
- ◆ right against the prevention from buying or selling an object or getting services or facilities in the process of production of such objects or in the distribution or delivery of services;
- ◆ right against any behavioral attitude to exhibit high or low status;
- ◆ right against any form of propagation of attitudes based on caste superiority and untouchability, or hatred and any forms of behavioral attitude that justifies social discrimination based on caste, ethnicity, or untouchability, or encouragement for; and
- ◆ right against racial discrimination in the workplace by indulging in untouchability; and have justice and compensation to the victim of such act.

Pursuing a two-fold approach to ending caste-based discriminations, the Constitution focuses punitive measures against discriminative practices and affirmative provisions for Dalits, who are structurally negated and excluded. Hence, there is a provision of the right to Dalit recognized as the fundamental rights in the Constitution and highlights the following rights:

- ◆ right to participate in all agencies of the state based on the principle of proportional inclusion through introducing special legal provision of empowerment, representation, and participation for employment in other area also including the public service;
- ◆ right to free education with scholarships for the students from the primary to higher level;
- ◆ right to health care and social security by introducing special arrangements;
- ◆ right to use, preserve and develop their traditional occupation, knowledge, skill and technology; and
- ◆ right to land to the landless and right to housing.

Regarding collective rights and gender equality in the Constitution, women are granted the following rights”

- ◆ right to lineage without any gender discriminations;
- ◆ right to safe motherhood and reproductive health;
- ◆ right against all forms of violence and oppressions against women and right to compensation;<sup>18</sup>
- ◆ right to access participation in all state structures and bodies based on the principle of proportional inclusion; and
- ◆ right to special opportunity in the spheres of education, health, employment, and social security.

The specific rights mentioned in the Constitution are concerned with the right to social justice, which comprises of different aspects. It includes:

- ◆ right to employment in the state structures based on the principle of inclusion for the poor and the vulnerable;<sup>19</sup>
- ◆ right to special opportunity and facilities in the areas of education, health, housing, employment, food and social security to citizens who are economically very poor and communities on the verge of extinction in order to ensure their protection, progress, empowerment, and development;
- ◆ right of persons with disability (PWD)<sup>20</sup>to equal access to social services; and
- ◆ right of peasants to access land for agricultural purposes and right to choose and preserve traditionally-adopted and used endemic seeds and agricultural species.

Along with right to social security, employment, and rights of senior citizens and children, the Constitution addresses the right to labour, which guarantees decent working environment in addition to the rights as given below:

- ◆ right to proper work practices;
- ◆ right to appropriate remuneration, facilities, and contribution-based social security; and

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<sup>18</sup> Violence in any form, like physical, mental, sexual or psychological or any other kind of violence against women, or any kind of oppression based on religious, social and cultural tradition, and other practices.

<sup>19</sup> Socially backward women, Dalits, Aadibasi, Janajati, Adibasi Janajati, Madhesi, Tharu, minority groups, persons with disability, marginalized groups, Muslim, backward classes, gender and sexually minority groups, youths, peasants, laborers, the oppressed and the citizens of backward regions, and economically poor Khas Arya.

<sup>20</sup> Persons with Disability

- ◆ right to form trade unions, participate in them, and organize collective bargaining.

Recognizing the secularity of the state as highlighted in its preamble, the Constitution ensures that all religious and cultural practices are respected, and communities are given opportunities to adopt and profess accordingly. These rights include:

- ◆ right to religious freedom to profess, practice, and preserve his or her religion according to his or her faith; and
- ◆ right to manage and protect its religious places and religious trusts based on one's denomination.

As the part of religious diversity, there is a right to language vis-a-vis culture ensured by the Constitution. It furthermore ensures:

- ◆ right to use their language;
- ◆ right to participate in the cultural life of its community; and
- ◆ right to preserve and promote its language, script, culture, cultural civilization, and heritage.

One of the innovations of this Constitution is the constitutional duties of the state as well as the individual. Though there does already exist a similar practice in the Constitution in the state obligations, having an embedded provisions in the name of proviso or exceptional provisions, the Constitution first time wishes to consider constitutional duties of an individual with a special focus. In this regard, Article 47 asks the government to enact laws in three years time from the promulgation of the Constitution. And Article 48 provides for a number of duties of the citizens, i.e. (a) protecting nationality, sovereignty, and integrity of Nepal by pledging allegiance to the nation, (b) abiding by the Constitution and law, (c) compulsorily enlist when the state needs the service, and (d) protecting and conserving public property.

## **5. Constitutional Roadmap to Social Justice**

In addition to the rights recognized as fundamental rights, the Constitution has spelled out a number of directives and state policies regarding social justice and ECS rights. The Directive Principles constitute a very comprehensive

social, economic, and political program for a modern and welfare state. These principles emphasize that the State should try to promote the people's welfare by providing them basic facilities like shelter, food, and clothing. Unlike fundamental rights, Directive Principles of State Policy (DPSP) are non-binding in nature, which means courts cannot enforce these Principles upon their violation. However, since it is an overall roadmap of the State, it imposes a moral obligation on the State authorities to implement them. The principles and policies have also stimulated supplementary discourse on the Constitutional protection of human rights in general and ESC rights in particular<sup>21</sup>.

One of the principles<sup>22</sup> of the Constitution is about strengthening a federal democratic republican system to ensure an atmosphere in which democratic rights are exercised by acknowledging that sovereignty, independence and integrity of the country are of utmost importance. This can only be achieved by protecting freedom, equality, property, and all citizens through rule of law, by (1) embracing the norms and values of fundamental rights and human rights, gender equality, proportional inclusion, participation, and social justice, and (2) maintaining a just system in all spheres of national life in order to establish a government system promoting public welfare.

Furthermore, the Constitution mentions building a civilized and egalitarian society by ending all forms of discrimination, oppression, and injustice based on religion, culture, cultural practices, customs, traditional practices, or on any other grounds and develop socio-cultural values based on national pride, democracy, public-orientation, the dignity of labor, entrepreneurship, discipline, dignity, and tolerance by respecting cultural diversity and maintaining communal harmony, solidarity, and amity.

There are several provisions concerned with state policies in the Constitution. Some are for ensuring transformative changes in people's lives. These cover all the key elements of social justice, including policies related to building a society based on harmonious social relations by developing a healthy and civilized culture; conducting studies, research, archaeological excavations, and dissemination of information about them for the protection, maintenance, and development of historical, archaeological, and cultural heritage; community development by promoting local participation through the promotion and mobilization of creativity of local communities in social, cultural, and charitable

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21 Available at [https://www.researchgate.net/publication/316596121\\_The\\_Potential\\_of\\_Directive\\_Principles\\_of\\_State\\_Policy\\_for\\_the\\_Judicial\\_Enforcement\\_of\\_Socio-Economic\\_Rights\\_A\\_Comparative\\_Study\\_of\\_Ethiopia\\_and\\_India\\_Berihun\\_Adugna\\_Gebeye](https://www.researchgate.net/publication/316596121_The_Potential_of_Directive_Principles_of_State_Policy_for_the_Judicial_Enforcement_of_Socio-Economic_Rights_A_Comparative_Study_of_Ethiopia_and_India_Berihun_Adugna_Gebeye).

22 Article 50 (1) of the Constitution of Nepal, 2015.

works; emphasizing the development of art, literature, and music that is in the form of national heritage; putting an end to all forms of discriminations and injustice in the name of religion, culture, tradition, practices, and rites; and preserving and developing language, texts, culture, literature, arts motion pictures, and property of different castes and communities on the basis of equity, while also maintaining the country's cultural diversity and pursuing the multi-language policy.

The Constitution elaborates directive principles into policies as well. One of the key policies is social justice and inclusion<sup>23</sup> to be adopted to achieve an overall Constitutional goal. Policies regarding social justice and inclusion include making appropriate arrangements of livelihoods by prioritizing employment for helpless single women; rehabilitation of *kamaiya* (bonded laborers), *kamlari*, *haruwa*, *charuwa*, *haliya*, the landless, and the squatters by identifying them and making arrangements of housing or providing small plot of land or house, employment, or arable land for their livelihoods; making special arrangements to ensure the rights of *Adivasi Janajatis* (indigenous ethnic groups) to lead a dignified life with their respective identities, ensuring their participation in decision-making processes that concern them, and preserving and maintaining the traditional knowledge, skill, experience, culture, and social practices of *Adivasi Janajatis* and local communities; making special arrangements for minority communities to exercise their social and cultural rights by maintaining their identity; and making special arrangements for the *Madhesi* community to have equal distribution of benefits of economic, social, and cultural opportunities and also for the protection, progress, empowerment, and development of the very poor and backward classes within the *Madhesi* community.

In addition, under the overall development policy, the Constitution mentions prioritizing poor citizens in the distribution of the fruits of development and making necessary arrangements for the general public to have a fair share of such fruits. It also mentions guaranteeing social security by ensuring the basic rights of all laborers in accordance with the concept of the dignity of labor, ending child labor and all forms of labor exploitation, and encouraging the participation of laborers in the management by creating a good industrial relationship between employers and employees under the policy regarding labour and employment. Under the politics and governance, the Constitution mentions protecting human rights by implementing international treaties, guaranteeing good governance by ensuring equal and easy access of people to services provided

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23 Article 51 states the state policies that need to be adopted by the Government of Nepal.

by the State, and making public administration clean, competent, impartial, transparent, accountable, and participatory.

Enhancing cultural diversity and social transformation, there is one more new policy regarding social and cultural transformation. It includes building a society based on harmonious social relations by developing a healthy and civilized culture; community development by promoting local participation through promotion and mobilization of the creativity of local communities in social, cultural, and charitable works; and ending to all forms of discrimination and injustice in the name of religion, culture, tradition, practices, and rites and preserving by developing language, texts, culture, literature, arts motion pictures, and property of different castes and communities based on equity, while also maintaining the country's cultural diversity.

Despite these positive Constitutional schemes, some theoretical and practical issues need to be examined for further analysis. Among them, few of the issues are related to the jurisprudential basis of the fundamental rights and few are related to the implementation itself. Despite Constitutional articulation, few of the laws have not yet been passed. Even if there are laws enacted, regulations have not yet passed for these schemes' full implementation, which has ultimately hindered the implementation of change.

## 6. Federalism and Social Justice

Division of power is the key element of federalism. Federalism has a two-fold objective: The first one is to localize the powers from the top to the bottom, and the second is to empower the poor and vulnerable to build the capacity for their political participation. The Constitution provisions a federal structure under Article 57 to protect Nepal's independence and to create an equitable society based on plurality and equality as well as inclusive representation. On top of it, the Constitution also envisages that special, protected, and autonomous regions may be created for socio-cultural protection or economic development in accordance with the federal law, which could be a significant step towards advancing social and cultural ethnicity<sup>24</sup>.

Equally, the Constitution also mentions human rights as a guiding principle of all the federal structures. All 761 governments<sup>25</sup> need to work together towards social justice and human rights. While creating laws, policies, and programs and implementing them as well, all the governments need to be mindful of

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24 Article 57 (5) of the Constitution of Nepal, 2015.

25 753 local governments, seven province governments and one federal government.

human rights and social justice. With the power given to the different tiers of government, the Constitution encourages them to be proactive in the introduction and implementation of the policies and programs on social justice.

In terms of political participation of the poor and marginalized, Article 267(3) provides for the inclusiveness of several target groups, including entry of women, Dalit, indigenous peoples, nationalities, *Khas Arya*, *Madhesi*, *Tharu*, backward class and region citizens into the Nepal Army based on the principles of equality and inclusion. The Constitution also speaks about proportional participation in the executive committees at various levels of the party to reflect the diversity of Nepal.

## **7. Protection Bodies under the Constitution**

The Constitution provides for several commissions with a special focus on several target groups. Article 252 provides for the National Women Commission, one of the functions and duties of which is “...to ensure that women are included in the mainstream of national development and to also ensure proportional participation in all organs of the State...” The National Dalit Commission under the Constitution is constituted for the uplifting of the Dalit community with several other functions to ensure inclusive participation in the state bodies.

Similarly, the National Inclusion Commission conducts several functions and duties, including study and research works for the protection of the rights and interests of the communities like the *Khas Arya*, PWD, senior citizens, laborers, peasants, minorities, marginalized communities, backward classes, people of Karnali, and the indigent class. The National Inclusion Commission also studies to ensure appropriate representation of the community, class and region in the organs of the State and to review the special provisions made for the representation of such community, class, and region. Other Constitutional Commissions proposed in the Constitution include the Indigenous Nationalities Commission, *Madhesi* Commission, *Tharu* Commission, and Muslim Commission to ensure the rights and representation of these groups that fall within the target groups under Article 42.

## **8. Overall Issues and Challenges in the Implementation:**

There are layers of issues that need to be critically assessed regarding the implementation of the Constitution. However, it is equally important to analyze the current provisions from different angles of Constitutionalism, including

social justice, and to continue the discourse that the Constitution is better internalized for the collective ownership on one hand, and other issues become more vibrant for necessary amendments in the days to come.

As mentioned earlier, the delivery of the Constitution should also be considered. The Constitution does not deliver by itself, as it requires laws, policies, resources, measures, mechanisms, and the honing of implementation strategies. The Constitution is just a skeleton, and all instruments are the muscles to beautify the Constitution and translate its aspirations into reality.

The Constitution itself envisages the oversight mechanisms of constitutional provisions as the constitutional bodies, and their full capacity to work as per the mandates given would be crucial to ensuring that the said schemes mentioned above are implemented. However, many critical issues have been raised from different stakeholders and require discussion.

## **9. Rights Inadequately Provisioned**

The Constitution has a few shortcomings in its provisions related to the ESC rights and social justice. The Constitution makes the rights conditional by requiring the laws. There are no constitutional quotas to include women in political decision-making, and possible quotas are left for legislation. Also, many of the provisions aimed to achieve improved social justice are now placed under directive principles – in a long list of things the State desires to achieve – rather than in the fundamental rights.

Additionally, another issue has to do with the right to non-discrimination and state preferences towards the continuation of traditional occupations. Under the rights of Dalits, the traditional occupations are to be continued, which seems problematic from the right to freedom point of view. Having such a provision as the state policy would be acceptable, but as a fundamental right, it does not look fair. Likewise, it must be understood that the issue of caste-based discrimination is caused by traditional occupations and working addition to descent. Additionally, while it is commendable that the rights against untouchability and discrimination based on caste-based discrimination include a provision for compensation in addition to imprisonment against the discriminations, this provision does not address adequate reparation, which is one of the obligations of the State.

The right to social justice is an important right to be included as a fundamental right; however, it should have been more comprehensive. The Constitution has

confined it within the purview of representation and participation. Until and unless the overall socio-economic status of vulnerable communities (including of *Dalits*) is improved, meaningful representation and participation will be critically threatened.

Another Constitutional issue is the list of beneficiaries of the affirmative provisions. There are 19 groups listed, and a few of them are not clearly included as the beneficiaries of such a package. Principally, the communities that are subject to structural discriminations due to State-induced laws and policies are to be recognized as the beneficiaries of such compensatory or protective provisions. These provisions are temporary in nature and have been developed for the time being in order to empower such communities to be mainstreamed. All other communities that are economically disadvantaged can be provisioned under State policies and programs. This will critically affect the implementation of this affirmative provisions and outcome.

The scope of the National Inclusion Commission seems dedicated to only particular groups, namely the *Khas* and *Arya*. Principally, the Commission should have been a mechanism to purely focus on broader aspects of inclusion, and all historically marginalized communities should have been its subjects.

## **10. Making Fundamental Rights Conditional**

Article 47 of the Constitution has made fundamental rights more conditional. The intention was to obligate the government in making necessary laws in a timely manner to implement the rights enshrined in the Constitution. However, this intention brought about restrictions on fundamental rights. It is not fair to make human rights conditional. It is against the basic principles of human rights.

Three years' deadline to create the laws for the enforcement and implementation of fundamental rights seems to be mechanically fulfilled. However, the laws were created without consultations or discussions at the parliamentary level. Furthermore, the key interlocutors for their implementation, the provinces and local governments, were not consulted at all.

Though the government argues that it have made 17 laws and introduced a number of amendments on different laws, numerous key issues, such as the issues of land, minority rights, rights of peasants, social justice, and affirmative provisions for disadvantaged communities, have not been vehemently worked out yet.

Although 16 Acts have been enacted (including act related to the right to employment, on PWD, consumer protection, land, children, victims of crime protection, social security, safe motherhood and reproductive rights, public health services, the right to housing, the right to food and food sovereignty, privacy, compulsory and free education, environment protection, anti-untouchability and caste discrimination prevention act, social security acts were enacted), the regulations are mostly not in place. Only one regulation on the law related to the right to employment has been enacted so far.

An adopted law-making process to enact the laws per the Constitution is another issue that needs to be analyzed. To meet the cutoff date, the laws were made in a hasty manner with very limited to no participation of stakeholders and concerned government authorities. None of the local and provincial governments, concerned Ministries and National Human Rights Commission (NHRC) including concerned CSOs had an opportunity to participate and appear to lack adequate ownership over these laws. Additionally, the government has to think of the awareness level of people at large on the laws related to fundamental rights, which requires disseminating the information through different means and measures.

## **11. Constitutional Bodies Made Conditional**

The Constitution, as discussed above, has come up with multiple commissions to address the thematic issues of human rights. Having a diverse mechanism of human rights protection and promotion, in particular the ECS rights, is an innovative idea. The Constitution outlines that those commissions are to be reviewed every ten years so as to analyze the lessons learned. However, the proposed timing is too short in this regard. Though the Constitutional aspiration might be bonafide in containing such a provision, this short timeframe is likely to create a lot of insecurity and threat among the commissions.

Another gap in the implementation regarding these commissions is that there are three important commissions that have not yet been established.<sup>26</sup> The commissions that are already in place are yet to be in full operation due to the lack of human resources and capacity. As the oversight bodies, they need to be provided adequate funding and support for smooth functioning. In this context, additionally, a limited timeline for review would not be beneficial.

The National Human Rights Commission, though it has a wide range of mandates in terms of monitoring, investigation and advisory role to ensure the

<sup>26</sup> National Dalit Commission, National Women's Commission, and National Madhesi Commission.

protection and promotion and respect of human rights, is yet to be vocal in responding to the issues of social justice. The Commission tends to be more active in monitoring the situation of civil and political rights-related issues, rather on economic, social, and cultural rights. The ESC rights require a more proactive approach through *suomoto* interventions. The Commission also requires independence in terms of its functional intervention. So far, the recommendations of the Commission have not been taken seriously. As stated above, other Commissions are not fully established, despite the need to start working on coordination and communication with all other like-minded commissions. Given that they have the mandates to look after long-standing human rights issues, they can contribute substantially,<sup>27</sup> and it can help to best use the resources.

## **12. Lack of Interface, Linkages and Overlapping**

There are a number of laws and provisions that contradict each other and do not correlate. For example, the laws related to land, education, and social security should have been complementary to the fundamental rights regarding Dalits. An integrated approach would be a welcome step to ensure that laws complement each other, but this is not only the case of laws. The same situation exists with all the diverse partners of the government. The complementarity has always been an issue. Given that social justice requires multi-sectoral intervention, unless and until there is an integrated and consolidated effort, it will be more than difficult to foster this agenda.

## **13. Lack of Integrated Law on Social Justice**

As the Constitution has clearly mentioned the rights of Dalit to be fundamental rights, a separate law is necessary to materialize these rights, including the right to participate in state machineries and schemes for the overall uplifting of Dalits, including their socio-economic and education status. There is neither an initiation nor a discourse to draft the law. Though there are a few provisions that tried to integrate these issues into other laws, they need a separate law given the gravity of the issue.

There is also a lack of integrated laws regarding social justice. It is true that social justice is to be considered as crosscutting. However, given the severity and gravity of this issue that few of the communities have been encountering,

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<sup>27</sup> T. Tamrakar (2018). Coordination among different commissions in Nepal, Issues and Challenges. *Sambhak*, National Human Rights Commission.

it needs to be given a specific focus. Meanwhile, a few laws (i.e. act to abolish untouchability and amendment to laws regarding caste-based discrimination) defines the discrimination against women during the menstruation as a form of untouchability, which derails the focus of the law and the Constitutional expectation.

#### **14. Adequate Resources and Dissemination of Awareness**

All the laws related to social justice should have been disseminated widely among concerned stakeholders. Law enforcement agencies, other government authorities, and the beneficiaries at large should have been informed and brought on board regarding provisions on social justice. However, this is not the case, and even the important interlocutors of law-making do not have an adequate understanding of the laws.

#### **15. Functioning of Federalism**

Though it would be too early to comment, in principle, federalism is the best way to decentralize political authority and disperse the powers to the people who are disadvantaged. It provides political participation to the people in the community. Although the focus of local bodies on infrastructural development is important, it needs to be defined in a packaged manner. The human development aspect must be considered while planning for the development package. The province and local governments should have the necessary measures and mechanisms to advance non-discrimination and social inclusion. As equal interlocutors of human rights as per the Constitution, they should also be vocal in initiating the necessary means and measures.

#### **16. Lack of Political Will**

Even though political participation is a fundamental right according to the Constitution, Nepal's political parties are not very committed. It seems that political parties are reluctant to ensure good representation in different level of political committees of all groups who are far behind. Interestingly, the new Constitution includes a provision on political parties, requiring them to be democratic with regular elections, at least once in five years, for leadership. Also, the executive committees at all levels of the party are instructed to "reflect the diversity of Nepal." Likewise, when the appointment of the Constitutional bodies and government are reviewed, it becomes clear that the governments are not

very active or responsive regarding social inclusion. The issue of representation has been made mechanical. In the name of representation, government bodies just tend to nominate their near and dear ones, and the person who are capable are overlooked.

## **17. Social and Structural Issues**

Notwithstanding the changes made in the Constitution, certain groups are still waiting for the positive impact of the Constitutional provisions mentioned above. Society still considers certain groups (i.e. Dalits and other marginalized groups) as the second-class human beings. Besides this, there are many ethnic and tribal communities with various languages, which demonstrate that Nepal is a country with ethnic diversities. With the diversity of social characteristics, Nepal always underwent unequal social practices. The reason behind it was the hierarchies of cultural power and subduction of ethnicity. Beyond the caste system, there have been many forms of discrimination, such as the exclusion of customs, deprivation of opportunities, bondage labor, and the prohibition in religion and cultural freedom, that impoverished marginalized groups and ethnic minorities. A deeply-rooted caste system in Nepali society, practiced for 400 years, has contributed to social discrimination and class division that have significantly affected economic and social enhancement opportunities. Some castes are oppressed and have been socially excluded.<sup>28</sup>

The forms of discrimination might have been different, but the core issue is the same. The cases of discrimination at even public places are still prevalent, and there is almost a social impunity. The perpetrators are not prosecuted as expected. There are even a few instances of discrimination committed by elected representatives in the local government. However, no action have been taken. Hate speeches are being made to continue discrimination that ultimately limits the target's self-confidence and hurts human dignity.

## **18. Way Forward (Takeaways)**

The law takes full shape if it delivers. A great Constitution does not make sense for the people unless and until it is implemented. Therefore, the full implementation of the Constitution is a must. The Government of Nepal must initiate a process to draft the regulations of the remaining laws enacted in relation to fundamental rights. Drafting those regulations in a participatory

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<sup>28</sup> Available at [https://www.nepalresearch.com/crisis\\_solution/papers/prajapati\\_2008\\_paper\\_o8.pdf](https://www.nepalresearch.com/crisis_solution/papers/prajapati_2008_paper_o8.pdf).

manner and establishing the necessary systems as required by the laws is recommended.

## **19. Reform of the Laws and Integrated Law on Social Justice**

As mentioned above, there is a need to initiate drafting a separate and specific law for Dalits in line with the Constitution. Also, several laws need reforms to make them fully aligned with the Constitution and international frameworks to which Nepal has been a State Party. As mentioned above, there are several regulations that have yet to be enacted. Likewise, the process must be participatory to ensure that the poor and vulnerable do have a saying the law-making process.

On top of that, an integrated law on social justice might be important to customize all the laws and enhance complementarity. As mentioned above, social justice is dispersed under different laws and regulations. However, there is still a lack of strong and comprehensive law as per the Constitutional spirit. Coordination has been a problem in the context of the Nepal government. Hence, an integrated approach needs to be adopted to make sure that all the benefits are provided to the beneficiaries.

## **20. Establishment of the Commission**

Besides the Constitution and the law reform, the Government of Nepal needs to be proactive and mindful of the independence of the Constitutional Commissions. There is already an issue regarding the Human Rights Commission Bill. The government tried to introduce a law aimed at scrutinizing the financial, functional and even structural independence of the Commission.<sup>29</sup> Likewise, the Government has only established three commissions while the three remaining ones (i.e., National Women's Commission, National Dalit Commission, and National Tharu Commission) have not been established so far. The National Inclusion Commission seems more focused on development mechanisms rather human rights.

As such, it is recommended that the government establish the commission as soon as possible in a transparent manner, and certain level of autonomy need to be ensured so that they can work in an effective manner. The government is responsible for providing the necessary support to ensure that these

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<sup>29</sup> As per the Paris Principles, which has set the fundamental basics (i.e. financial, structural, functional, and diversity) for the independence of the national human rights institutions.

Commissions work effectively. All the Commissions should consider their outreach strategy and work at the province and local levels. In addition to that, a massive overlapping jurisdictions are seen among these commissions. Such confusion need to be clarified through MoU or the legislation itself.

## **21. Proactive NHRIs**

The National Human Rights Commission (NHRC) as a human rights watchdog body should work openly and inclusively. Its coordination with other Commissions in this regard will be important to consolidate the diverse efforts of the other six Commissions. The joint framework and monitoring system can be important to make in this regard. The NHRC needs to develop coordination mechanisms with other Commissions to avoid overlapping. They can introduce a common strategy and set up a joint monitoring framework to consolidate the efforts for the sake of human rights. At the same time, the Commission should be proactive in receiving and handling complaints. So far, there are few complaints received on the issues of caste based discriminations. The NHRC should prioritize thematic issues and focus more on the long-standing issues of human rights. Therefore, Commissions should also start working with all other government agencies to ensure that ESC rights are well-respected and protected. The traditional approach of not directly working with the government will not be helpful in ensuring the implementation of these rights.

## **22. Advancing Access to Justice**

Several issues regarding the administration of justice and access to justice of women and vulnerable communities need to be addressed as well. Though legal aid has been recognized as a fundamental right in the new Constitution, the poor and vulnerable communities are still struggling with the lack of legal assistance and support for claiming their rights. The legal aid policy,<sup>30</sup> which has just been endorsed by the Government of Nepal, needs to be implemented by making necessary laws and regulations. Focusing more on the integrated approach of services for the needy and the poor, the policy appears very comprehensive in terms of redefining legal aid and its beneficiaries. The criminal justice systems need to be more proactive and resourceful in addressing the cases related to gender-based violence, caste-based discriminations, and stigmatizations. Special attention should be paid to vulnerable groups to enhance their access to justice. Nepalese police and prosecutors should be more responsive in addressing the

<sup>30</sup> The Nepal Government introduced integrated legal aid policy in January 2020. The policy defined legal aid in an inclusive manner and was more focused on social justice elements.

issues of discrimination. Since discrimination is already recognized as the state case, the police and prosecutors should not wait for the first information report, as they have been doing. Likewise, witness protection should also be taken as an important element to respond strongly to such cases.

### **23. Responsive Judicial Efforts**

The Supreme Court seems very positive in issuing directives and orders on the issues related to social justice and human rights.<sup>31</sup> The Court has already issued several mandamus orders in the name of government on non-discrimination, affirmative actions for political participation, and special arrangements and focuses for the poor and vulnerable, including Dalits and ethnic minorities. In response to the Social Actions Litigation as well, the Court is active on social justice and gender equality. Despite these positive steps, the implementation of those directives is incomplete and requires further work. The Court has not been able to push for implementation or hold government agencies accountable in this regard. Although making a positive decision makes a positive impact in terms of influencing the government, to have the desired outcomes the government needs to implement the decisions. The Access to Justice Commission, which is a good step forward by the Judiciary, must ensure that the poor and vulnerable communities are given the necessary support and preferences in delivering justice. Furthermore, one more important step that people, especially the poor and vulnerable, are expecting and eagerly looking forward to is the inclusive representation in the court system. In fact, an inclusive approach must be considered while appointing judges and restructuring internal systems and policies. Because of its important part in the state, the judiciary has a paramount role to ensure that the Constitution is implemented, and benefits are realized by the downtrodden.

### **24. Social Justice Focused Parliamentary Oversight**

The Parliament, as the elected body of the people, must play a critical role in addressing the issues of discrimination. The Parliament, as a parent agency and legitimate organization for the laws, must provide oversight over the implementation of laws on non-discrimination, affirmative action, and social justice. It is understandable that the Parliament cannot be involved in all issues. However, the Parliamentary Committees,<sup>32</sup> which are also called

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<sup>31</sup> The Supreme Court of Nepal issued dozens of directives and orders in the name of Government to make laws and policies and implement Nepal's international commitment to justice and human rights.

<sup>32</sup> Parliamentary Committees are defined as mini-Parliaments and can provide the necessary oversight to make government accountable and responsible.

mini-Parliaments, can contribute greatly to ensuring the rights of the people, especially of the vulnerable segments of Nepalese society. Parliamentary Committees have a two-fold role: to monitor the overall situation through the dedicated committees and provide oversight, and to make laws as well as ask the government to be more accountable in the implementation of the laws. Here, the prevalent social justice committee as well as a human rights committee in the Parliament is expected to play a critical role in monitoring the compliance of the human rights situation of the poor and vulnerable. These two bodies are not only obliged to oversee the implementation of national laws and policies but also international human rights frameworks and Sustainable Development Goals (SDGs). The SDGs<sup>33</sup> are grounded on the principles of human rights and the theory of “no one left behind,” which illustrates why a person or community who is left far behind needs to be in the focus.

## 25. Civic Engagement

Everything cannot be done alone by the government. Individuals and interest groups, including civil society organizations (CSOs), need to be proactive and committed to addressing the issues of social exclusion and promotion of social inclusion. CSOs can educate the people about the Constitutional provisions and hold government agencies accountable for the effective implementation of the Constitutional schemes as described above. For that, reasonable space for the CSOs need to be created by the government and the CSOs also need to be proactive to work with the government for the realization of just society.

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<sup>33</sup> There are 17 goals included in the Sustainable Development Goals, out of which Goal No. 5, 10, 16, and 17 are directly related to social justice.

# Barriers to Nation Building: Gendered Citizenship in the Constitution

— Indu Tuladhar<sup>1</sup>

## Abstract

*Feminist approaches to nation building have introduced gender as a relevant practical category and theoretical tool to analyze power dynamics, which is related to constructing basic gender inclusive factors of nation building. This understanding is important because feminist theory emphasizes the importance of thinking about the construction and socialization of gender in all political processes. The aim of this paper is to outline how the Constitution of Nepal plays a central role in the fundamental construction of manhood and womanhood on citizenship and its overall influence on the gendered notion of nation building in Nepal. One aspect of this is to analyze how women, for centuries, have been symbolized and their identity is defined as being structurally excluded from the nation-building process in Nepal through the Constitution, the supreme law of the country.*

## 1. Introduction

There is no precise definition of the term “nation” in the contemporary political and academic discourses. Consequently, there exist various schools of thought regarding the wide and comprehensive explanation of the concept of nation. For example, R. Utz highlights that the term nation is defined

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mainly from three schools of thought: nationalists, modernist and imaginit (R. Utz 2005). Being focused on the need of conceptual clarity, this paper explains nation from three different perspectives: sociological-anthropological, political, and legal-constitutional. However, it must be noted that these perspectives are interrelated and offer contextual complementarity to each other.

The sociological-anthropological perspective of a nation is a widespread concept that refers to a nation as a purely social collectivity. The members of such a social community feel a sense of common identity, history, language, ethnic or racial origin, a common economic lifestyle, a geographical location, and a political base. The sociological-anthropological concept of nation-building focuses on protecting shared history, promoting the right to culture and languages, and institutionalizing tribal and ethnic identity.

This perspective explains nation building as a process that leads to the formation of countries in which citizens feel a sufficient amount of commonality of interests, goals, and preferences, so that they do not wish to separate from each other (A. Alesina & B. Reich, 2014).

The political perspective of a nation is mostly centralized on the political dimension, which focuses on the power relations/dynamics under a sovereign state in order to unite the people within the territory. Thus, for this perspective, it is not always necessary to embrace all the characteristics of a nation, which the sociological-anthropological perspective embraces. In practice, this criterion and its characteristics are frequently present in different degrees of power relationships. It is comprehensible that a nation can exist without a distinct political identity and also without common linguistic, cultural, religious, or ethnic components as well (G. Evans & J. Newham, 1998). There are many examples of nations defined under the sociological perspective also persist together when citizens have enough shared values and preferences and can communicate with each other (A. Alesina & B. Reich, 2014). However, in many instances, this perspective may undermine the aspirations of ethnic groups and minorities.

Nation building in this context is widely considered an important element in the modernization and development of politics. In addition, in most circumstances, the process of constructing national identity also refers to the military power of the state. For example, in the United States, the process of nation building is frequently denoted to the use of armed force as a part of a broader effort to promote political transformation in a society emerging from conflict into one at peace with itself and its neighbors (J. Dobbins (et.al.), 2007).

The legal-constitutional perspective of a nation stands for a civic state, where the rules-based system or the rule of law work as the uniting factor. The notion of nation building from this perspective is focused on building civic identity by protecting individual and community autonomy, justice, institutionalization of the concept of equal citizens, and guaranteeing social security (S.Bhandari, 2014).

In the following paragraphs, this paper analyzes nation building in Nepal through the prisms of the legal-constitutional thought. This paper is divided into four sections. Following this introductory section, the second section discusses the basic idea and understanding of nation building in Nepal. Section three analyzes the legal-political contexts of nation building in Nepal and women's position in nation building. The final section concludes this paper.

## **2. Understanding Nation building in Nepal**

In Nepal's context, a prominent legal scholar, Surendra Bhandari, defined nation building as a political process that cannot be accomplished by a one-time intervention. It requires a continuous process, starting from the stage of acquiring sovereignty of the state to establishing constitutionalism and respecting the system of post-constitutionalism. Bhandari has also elaborated on the phases and features of nation building in Nepal. According to him, Nepal has witnessed three phases of nation building: Formative (until 1990), Democratic (post 1990-era), and the Post-Nation State. In his description, Bhandari provides seven key features of nation building: sovereignty, centralizing integrative state, a sense of belongingness, civic state & the rule of law, affirmative actions, constitutionalism, and post-constitutionalism (S. Bhandari, 2014, p 101-114).

The formative phase of nation building is offset by three features: sovereignty, a sense of unity or belongingness, and a centralized integrative state. The democratic phase of nation building distinguishes itself qualitatively from the formative phase of nation building both at a formal and functional level. In this phase, nation building incorporates all seven features. The higher levels of the political features of nation building exist in a democracy. The key components of nation building at this stage are sovereignty, integrative centralized government, a sense of belongingness, civic state and the rule of law, and affirmative action. In this phase of nation building, people are united because they believe in sovereignty, which means that the state is a form of accumulated sovereignty of sovereign people and that the sense of belongingness would be higher when law and constitutionalism, which has the people's stake and voice, govern them.

A strong bond for the existence of a nation is an essential component for any political society; but, to flourish the bond of unity, the existence of a political society alone is not sufficient. There should be an institutionalized “democratic structure” that can substantiate the foundation of nation(s), and this takes the form of a sense of belongingness and, i.e., the factor of unity and mode of social organization. In the democratic phase of nation building, four major areas can basically be considered the uniting factors: ensuring autonomy based on the recognition of right to individual self-determination arising from the idea of human rights, equal citizenship and fairness, equity through social protection, and justice under the rule of law (S. Bhandari, 2014, p 101-114).

“A post-national stage of nation building” marks the phase where absolute sovereignty and supremacy of a constitution turns out to be inappropriate by the growing constitutionalization of international rules, which demands the compatibility of domestic rules and legal system with the international rules. With this development, the violation of international law cannot be simply ignored in the reasoning of political convenience or any other grounds (S., Bhandari, 2014, *Ibid.* P. 101-114).

While analyzing the history of nation building in Nepal based on the phases described by Bhandari, the formative phases of nation building started in the 18<sup>th</sup> century through the unification of Nepal by King Prithivi Narayan Shah. Prior to that, Nepal was divided into various, small independent principalities commonly known as “Baise and Chaubise Rajya.”

There are two contradictory opinions presented by political actors, political analysts as well as scholars with social & anthropological background that are very insistently expressed against the notion of the unification process of Nepal. The first opinion portrays King Prithvi Narayan Shah as a symbol of unity of Nepal, while the second denies the basic value of his contribution. Professor Prayag Raj Sharma argues in his article on “Nation-Building Multi-Ethnicity and the Hindu State” that Nepal’s unification process was not a collective efforts and dream of the people but the ambition of one man. However, Sharma compliments Prithivi Narayan Shah, stating that Shah, for his cause, was clever enough to demonstrate a support for broad sections of Gorkahali society, which included the Gurungs, the Magars, the Bramans, the Khas, and the others ethnic communities (pp. 476-478).

It is no doubt that King Prithvi Narayan Shah was a ruler who recognized and embraced the idea of cultural diversity in Nepal. Nonetheless, this image of King Shah has been continuously challenged, mainly in the post-1990s

movements. In particular, those who advocate for ethnic belongingness argue that the feature of the sense of belongingness was lacking in the Shah's process of unification. They argue that the unification process was fundamentally based on the idea of imposition. However, these opposing views agree that through unification process, Nepal shaped its territorial sovereignty and centralizing an integrative state.

On the other hand, Dhurba Kumar, one of the leading scholars of political science in Nepal, describes "nation building" as a process that upholds a sense of national identity and faithfulness to the state. Kumar was critical about the nation building process in Nepal over the period of modern history in Nepal. It is really stimulating that his criticism was based entirely on a social and anthropological perspective of nation building. Kumar states that the process widely disregarded many sub-national identities and aspirations, and as a result, it became problematic, which motivated the increasing reemergence of ethno-politics for self-determination (Dhurba Kumar, 2013, p. 125).

### **3. Political and Legal-Constitutional Perspectives on Nation-building**

The political and legal-constitution (hereinafter, constitutional) perspectives on nation building are deeply intertwined and overlapping in many instances. There is no clear demarcation at least in the Nepali context of nation building. For example, the democratic political revolutions and the process of establishing a constitutional and legal regime have emerged and developed simultaneously. Along with the political movement, Nepal has continuously attempted to institutionalize democratic norms and features while drafting different constitutions at different times. The constitutional regime, particularly in the post-1990s era, has been guided by the aspirations of protecting people's rights, which also brought the king under the circumference of a constitutional regime. The political process determined the monarchy to be an unnecessary and regressive institution to promoting nation building, and it ended the institution of monarchy constitutionally.

#### **3.1 Constitutional Definition of 'Nation'**

Nepal attempted to define the concept of "nation" through its constitutions in various historical phases that also witnessed major changes in the political regimes. The Constitution of Nepal, 1962 defined the concept of "nation," for the first time, as "... common aspirations and united by the common bond of allegiance to the crown ... irrespective of race ... collectively constitute the

nation.” The concept of nation later was defined by the Constitution of the Kingdom of Nepal, 1990 as “... common aspirations and united by a bond of allegiance to national independence and integrity of Nepal . . .” The fundamental difference between these two definitions is that in the 1962 Constitution, the bond of allegiance was vested in the king, whereas, in the 1990 Constitution, it was vested in the bond of allegiance to national independence and integrity of the country.

The Interim Constitution, 2007 articulated a broader concept of “nation” than the past two constitutions and recognized people’s diverse characteristics—multiethnic, multilingual, multicultural and multi-religious—with common aspirations. The people were to be united by a bond of allegiance to national independence, integrity, national interest, and prosperity, through all of which the Nepalese people collectively constituted the nation.

The Constitution of Nepal carries forward similar notions of the concept of “nation.”

The evolution of the concept of nation in Nepal’s constitutional history is largely progressive, as it widens the bond of allegiance from the crown to the civic state. The later development of the concept of “nation” has recognized the common aspirations of prosperity and independence among different self-identifying factors in uniting the people and offering them a sense of belongingness. The definition of “nation” in the various constitutions of Nepal is provided in below table.

<b><i>Name of the Constitution</i></b>	<b><i>Provisions on “Nation”</i></b>
The Government of Nepal Act, 1948	None
The Interim Government of Nepal Act, 1951	None
The Constitution of Kingdom of Nepal, 1959	None

**Name of the Constitution** **Provisions on “Nation”**

The Constitution of Nepal, 1962

The Nation: Having common aspirations and united by the common bond of allegiance to the Crown, the Nepalese people irrespective of religion, race, caste or tribe collectively constitute the nation (Art. 2.1).

It is the inalienable and indefeasible right of the nation to develop its political, economic and cultural life and to determine its relations with other nations, in accordance with its own genius and traditions (Art 2.2).

The Constitution of the Kingdom of Nepal, 1990

The Nation: Having common aspiration and united by a bond of allegiance to national independence and integrity of Nepal, the Nepalese people irrespective of religion, race, caste or tribe, collectively constitute the nation (Art. 2).

The Interim Constitution of Nepal, 2007

Nation: Having multiethnic, multilingual, multi-religious and multicultural characteristics with common aspirations and being united by a bond of allegiance to national independence, integrity, national interest and prosperity of Nepal, all the Nepalese people collectively constitute the nation (Art. 3).

The Constitution of Nepal, 2015

All the Nepalese People, with multiethnic, multilingual, multi-religious, multicultural characteristics and in geographical diversities, and having common aspirations and being united by a bond of allegiance to national independence, integrity, national interest and prosperity of Nepal, collectively constitute the nation. (Art 3).

For the first time in Nepal’s political and constitutional history, the State of Nepal was defined as an independent, indivisible, sovereign, secular, and inclusive and federal democratic republican state in Art. 4.1 of the Interim Constitution of Nepal, 2007. Nonetheless, the Constitution of Nepal, 2015 also reinforced a similar notion of the definition of “State of Nepal,” but also added the orientation to socialism (Art. 4.1). The explanation section of the same article also defines the term “secular.”

Along with that, the 2015 Constitution has also defined the language of the nation. It states that all the languages spoken as mother tongues in Nepal are considered the national languages (Art 6). The Nepali language in the Devanagari script shall be the language of official business (Art. 7.1) It has progressively recognized the use of national language (Art.72). It is noteworthy that the 2015 Constitution has elaborated on the definition of the nation as multi-ethnic, multi-lingual, multi-religious, multi-cultural characteristics with common aspirations, and being committed to and united by a bond of allegiance to national independence, integrity, national interest and prosperity of Nepal; thus, all the Nepali people collectively constitute the nation (Art 3).

All these political and constitutional developments give a kaleidoscopic image of the changing concept and understating of the term “nation” in the country. The entire effort of the revolutionary history, indeed, contributes for a more inclusive nature and understanding of a nation. It has not only broadened the concept of nation, but also has addressed the aspirations of the people by formally recognizing the diversity of ethnicity, culture, language, and so on. Furthermore, it has also conceptualized that those elements of diversity are in fact the factors of nation building.

Such progress on the understanding of a nation also enriches the process of nation building. However, there are many critical issues regarding nation building that are continuously being challenged and questioned from various perspectives by various strata of Nepalese society.

Today, Nepal stands at a crucial historical juncture. It has been making efforts to review and reflect back on the journey of its own history of nation building, exploring the uniting factors and belongingness to develop a national identity. In this pretext, analyzing the inter-relation between gender and nation building from women’s perspective has its political and social meaning in Nepal’s history as well as its future. In the context of gender studies and the analysis of power relationships, the concept of women empowerment could be considered an important theoretical and practical means and basis of power relationships. It provides sufficient support to open alternative gateways to reconsider the gender dimension for the nation building process in Nepal.

While reviewing the overall historical development of the nation building process and women rights movement, some interesting and pertinent questions arise in relation to the gender dimensions of nation building. The questions we cannot overlook are: how and to what extent have nation building processes embraced the issues and concerns of women? Is the nation building process inclusive in

terms of addressing gender concerns? How has the nation building process created the “identity of women?” Do women and men equally feel, realize, and own the belongingness to this country? Do they exercise their rights and duties as equal citizens? How could the identity of women be constructed over the period of nation building process in Nepal? It bears special significance to look at the nation building process from the perspective of women, as they have been continually raising their voices against unequal laws, the legitimization process, and the laws’ implementation at the practical level.

### **3.2 Political Developments**

Nepal has undergone major changes in the arena of political developments on many occasions. In its political history of over 250 years, Nepal has experienced five principal regime changes: the Shah regime from period 1769-1951, the Rana regime from 1846-1951 period, the transition period from 1951-1962, the Panchayat regime from 1962-1990 (D. N. Gellner, 1197, P.4), the democratic regime with constitutional monarchy from 1990-2008, and the era of democratic republic after 2007.

Over these periods, women’s rights movement in Nepal had emerged in various phases, along with political movements, which broadly aim to establish a democratic system in the country by changing the whole system. However, the traditional patriarchal setting has frequently overwhelmed the women’s movement in Nepal. Nevertheless, it is striving to overcome the influence and domination of the patriarchy. Broadly, women’s rights movements contribute to increasing feminist consciousness among Nepali women—to claim their rights, broaden the women’s rights agenda, and organize women in groups/alliances for influencing policy changes at the state level. It has been working rigorously to end gender-based discrimination and inequality with the awareness of unequal power-relations over Nepal’s history. Women are rising to establish their space and capability in various areas, like family, society, religion, art, literature, culture, law, politics, and other multiple dimensions. At the same time, they are also raising challenging questions against exploitation, tyranny, inequality, and discrimination that has been imposed on them for centuries under various pretexts: power struggle, constitutional development, army and the construction of identity, sovereignty, and citizenship.

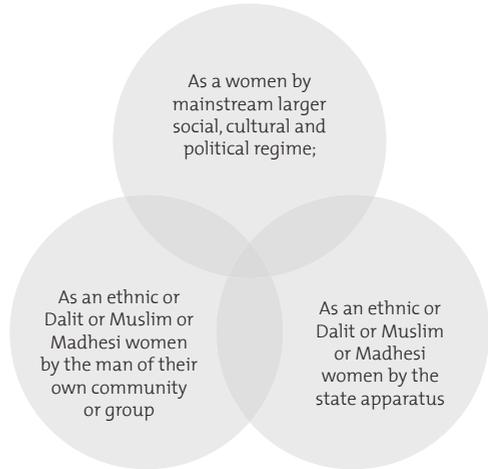
### 3.3 Power struggle and nation building

In the formative stage of nation building, King Prithvi Narayan Shah was entirely focused on fulfilling his own dream. This is the reason that most of his critics argue that though he united Nepal politically, it was not his aim to unite various nations in one nation-state and that the state power, undoubtedly, was centralized under the King's hegemony.

After the unification process completed, the Rana family captured state power. They ruled the country for 104 years and confined state power to their family. During the period of 1869-1951, Shah and Rana rulers created a centralized hierarchical "Hindu state and justice system" through both formal and informal political and legal mechanisms. Specifically, the introduction of the Muluki Ain (National Code), 1910 B.S. was the official legitimatization of ethnic-based

exclusion and a caste-based hierarchical system. It not only legitimized the ethnic-based exclusion system, but also reinforced discrimination and inequality between men and women in the application of law. Women were continuously denied economic, social and cultural rights, and the law was reinforced intersecting discrimination based on ethnicity, caste, and gender. Thus, the state sharpened structural violence, imposing the Hindu value system in the country, which particularly discriminated women everywhere (I. Tuladhar, 2056, B.S.). Thus, women from diverse communities/groups believed that they have been facing triple discrimination: discrimination imposed by the mainstream larger social, cultural, and political regime; discrimination imposed on Dalit, Muslim, and Madhesi women by the state apparatus; and discrimination imposed by men to women of their own community or group.

The new phases of democratic awakening began with the 1951's democratic movement, when the people successfully overthrew the family regime of the Ranas and introduced a democratic system in the country. Nevertheless, it was not a straightforward experience because democracy had to suffer at various



levels in the process of installation, breakdown and reinstallation, including the transition from 1951 to 1962 and the 30-year Panchayat regime from 1962 to 1990. Only after 1990 did the democratic movements streamline the need for a constitutional and legal regime that attempted to institutionalize, but did not succeed, democratic institutions in the country.

In this power struggle, Nepal has promulgated its seventh constitution to establish a democratic republican state. The first five constitutions essentially reinforced the notion of a Hindu state. Along with that, the first four constitutions, namely the Government of Nepal Act, 1948, the Interim Government of Nepal Act, 1951, the Constitution of the Kingdom of Nepal, 1959, and the Constitution of Nepal, 1962, stated that the source of the state power was vested in the King.

Particularly, Article 20 (2) of the Constitution of the Kingdom of Nepal, 1962 stated: “The Sovereignty of Nepal is vested in His Majesty and all powers, including the executive, legislative and judicial emanate from Him. These powers are exercised by His Majesty through the organs established by or under this constitution and other laws for the time being in force keeping in view the interest and wishes of His Majesty’s subjects according to the highest traditions of the Shah Dynasty.”

The following table shows the historical constitutional developments in regard to the source of state power enshrined in the constitutions.

Constitution	Source of State Power
The Government of Nepal Act, 1948	Silent
The Interim Government of Nepal Act, 1951	Silent
The Constitution of Kingdom of Nepal, 1959	“. . . it is desirable to enact and promulgate a Constitution for the Sovereign Kingdom of Nepal, I, King Mahendra Bir Bikram Shah Deva in the exercise of the <u>sovereign powers of the Kingdom of Nepal and prerogatives vested in US in accordance with the traditions and customs of our country and which devolved on us from Our . . . Promulgate this fundamental law entitled “The Constitution of the Kingdom of Nepal”</u> ” (Preamble).

Constitution	Source of State Power
The Constitution of Nepal, 1962	I King Mahendra Bir Bikarm Shah Dev, in exercise of the sovereign powers and prerogatives inherent in us according to the constitutional law, custom and usage of our country as handed down to us by our . . . do hereby enact and promulgate this Constitution (Preamble).
The Constitution of the Kingdom of Nepal, 1990	The sovereignty of Nepal is vested in the Nepalese people and shall be exercised in accordance with the provisions of this Constitution (Art. 3).
The Interim Constitution of Nepal, 2007	The sovereignty and the state authority of Nepal are vested in the Nepali people (Art. 2).
The Constitution of Nepal, 2015	The sovereignty and state authority of Nepal shall be vested in the Nepalese people. It shall be exercised in accordance with the provisions set forth in this Constitution (Art.2).

Even though the Constitution of the Kingdom of Nepal, 1990 discontinued the supremacy of the monarchy over the constitution, the People's Movement of 1990 not only replaced the 1962 Constitution, but also introduced new core values and norms in the Constitution. It brought the king under constitutional territory and officially declared that the *sovereignty of Nepal* is vested in the Nepalese people (Art.3). Thus, the democratic stage of nation building inherently assumed different ingredients both on formal and functional levels. In the post-1990 era specifically, the features of democratic nation building encompassed a parliamentary system of government, constitutional monarchy, and the system of multi-party democracy by promoting the spirit of fraternity amongst the people in visualizing the bond of unity on the basis of liberty and equality. It also contributed to establish an independent and competent system of judiciary with a view to transforming the concept of the rule of law into a living reality.

Despite all these achievements, some important features were missing in the whole democratic process, since it declared Nepal to be a Hindu kingdom, drawing criticisms from various segments of society even in those days. The criticisms later also came from scholars and Maoists, who generally pointed out that the nation building process was largely motivated by the widespread practices of imposition and exclusion based on language, culture, geographical

regions, gender, caste, and so on.

The Constitution of Nepal, 2015 has also reinforced the same aspirations, stating: “The sovereignty and the state authority of Nepal are vested in the Nepalese people” (Art. 2). It has further declared that Nepal is an independent, indivisible, sovereign, secular, inclusive, socialism-oriented federal democratic republican state (Art. 4.1). These achievements were made through a series of revolutionary movements by changing the system, rather than through an incremental development perspective. All these movements, no doubt, were centralized on the power struggle between various actors, particularly the Rana versus the King and the King versus the people, and so on (I. Tuladhar, 2013).

In Nepal’s entire history, no visible space was given for discussion on human rights and women’s empowerment until the pro-democracy agitations against the oppressive Panchayat system in 1990. The installment of multi-party democracy enabled women’s groups to voice for their political, civil, economic and social rights. The People’s Movement of 2006 eventually caused King Gyanendra to step down from power, allowing the democratic constitution-making process to create a vibrant space for women to articulate their agenda and welcome their role in the process of participatory nation building.

The power-centric nation building process ultimately shifted power from the rulers to the people; however, politics of *exclusion and inclusion* continued in the democratic mechanism, which directly affected the newly-emerging process of nation building in the country. Specifically, the issues related to women in the army, the unbalanced representation of women in decision-making processes, the denial of substantive equality to women, and freedom and the issue of gender equality in citizenship were still unambiguously lacking in the democratic as well constitutional regime of nation building. The very concept of equal citizen and justice is still lacking in the process of democratic institutionalization. A visible derogation of democratic principles had begun in post-1990s period, which had posed a threat in the enforcement of the rule of law. In this circumstance, the very feeling of belongingness was yet to be generated among the people, especially in women, for their active participation in nation building; this deficiency also affected Nepal’s transformation into a civic state.

### **3.4 Citizenship: All People, except Women, are Sovereign**

The analysis in the previous section shows that Nepal has undergone several revolutionary movements for systemic change and transformation, including

in the area of gender equality. As an outcome, Nepal's political system has changed from autocracy to people's republican, and the source of state power has been transferred from the King to people over the time. But contrary to such positive achievements, the constitutional and legal development of citizenship provisions are still regressive, discriminatory, and guided by the patriarchal idea of nation and nationalism.

In Nepal's modern political history, until the enactment of the Citizenship Act, 1952, there was no substantial legal framework developed on citizenship. However, the words "Nepali Raiti and Bidesi Raiti" were spelled out in the National Code (Muluki Ain, 1910 B.S.) to make a distinction between a citizen and a non-citizen (CLAF, 2068 B.S.).

Despite the enactment of citizenship law in 1952, Nepal has continuously suffered from a policy volatility that has endlessly aggravated the problem of citizenship. For example, the provision of citizenship by virtue of birth with a cut off date of April 12, 1981 in the Constitution of Nepal, 1962 (2019 B.S.) was removed by the Constitution of the Kingdom of Nepal, 1990 (2047 B.S.). The provision to impart citizenship by birth was again incorporated in the Interim Constitution of Nepal, 2007 (2063). These instances clearly indicate the policy level variability in terms of citizenship in Nepal.

Section 2 of the Citizenship Act of Nepal, 1952 granted citizenship to a foreign woman married to a Nepali citizen with no residency requirement. Section 3 of the Act granted citizenship to a woman born to Nepali parents and married to a foreign national based on marital relations, divorced or neglected or separated. The Nepalese people who acquired foreign citizenship could reacquire Nepalese citizenship after living in Nepal for more than a year. Also, under Section 4(d) of the Act, citizenship was granted to a person who lived permanently in Nepal for five years.

Under Article 8(d), the Constitution of Nepal, 1962 dedicated a chapter on citizenship, which set up a new basis for granting citizenship to a person of the Nepalese origin. Under Article 7(b), the Constitution also granted equal and independent right of men and women to convey citizenship to their children. However, Section 3(1) the Citizenship Act, 1964 set a basis for citizenship by descent to be given only on the basis of the father's identity. This Act was in practice with several amendments until 2007. The citizenship-related provisions in the Constitution of the Kingdom of Nepal, 1990 were the outcomes of the People's Movement, but the 1990 Constitution granted citizenship by descent only to those children whose father was a Nepali citizen. That is how it denied

citizenship by descent to the children born to a Nepali woman. The Interim Constitution of Nepal, 2007, the Nepal Citizenship Act, 2007 and Nepal Citizenship Regulations, 2007, made some positive developments on the issue of citizenship, specifically by ensuring equal rights to women in conferring citizenship on their own identity. A provision stated that a person's father "or" mother should be a Nepali citizen in order for the person to acquire citizenship by descent. But when this provision is practiced, government officials do not treat women according to the spirit of the Constitution. Women are asked to provide the evidence that father of the child is a Nepali citizen in order for their children to obtain citizenship by descent.

The 2015 Constitution subsequently came into force with the following provisions for citizenship:

- ◆ citizenship at the commencement of the Constitution,
- ◆ citizenship on the grounds of descent,
- ◆ naturalized citizenship,
- ◆ non-residential Nepalese citizenship and
- ◆ honorary citizenship.

***Citizenship at the commencement of the Constitution:*** Per Article 11 (1) and 11.2 (a), persons who had acquired Nepalese citizenship prior to the commencement of the Constitution were automatically deemed to be Nepali citizens. Article 11 (1) was applicable to all persons, irrespective of the manner in which they acquired Nepalese citizenships. Article 11.2 (a), however, only applied to persons who acquired such citizenship through descent prior to the commencement of the Constitution.

***Citizenship on the grounds of descent:*** There seems no legislative reason for the existence of Article 11.2 (a) when a person is already deemed to be a Nepalese citizen prior to the commencement of the Constitution under Article 11 (1).

***Citizenship by descent:*** Six major grounds for acquiring the Nepalese citizenship are provisioned for under Article 11 of the Constitution on the grounds of descent, with an overarching precondition of a permanent domicile. First, any person acquiring the citizenship of Nepal on the grounds of descent prior to the commencement of the Constitution is deemed a Nepalese citizen by descent.<sup>2</sup> Second, any person is deemed eligible to acquire the Nepalese citizenship if one of his/her parents (father or mother) is a Nepalese citizen

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<sup>2</sup> Article 11.2(a) of the 2015 Constitution of Nepal.

at his/her time of birth.<sup>3</sup> Third, any person can acquire Nepalese citizenship if both of his/her parents (father and mother) were Nepalese citizens by birth prior to the commencement of the Constitution.<sup>4</sup> Fourth, any person can acquire Nepalese citizenship if both of the parents are Nepalese citizens at the time of acquiring Nepalese citizenship.<sup>5</sup> Fifth, if the whereabouts of the parents of any person found within the territory of Nepal are not known, such individual shall acquire Nepalese citizenship on the grounds of descent until one of the parents is identified.<sup>6</sup> Sixth, any person born in Nepal of a Nepalese citizen mother and living in Nepal, but the whereabouts of the father are not known, can acquire Nepalese citizenship.<sup>7</sup> A person eligible for citizenship by descent can acquire citizenship with gender identity from the name of either parent (father or mother).<sup>8</sup>

**Naturalized citizenship:** Article 11 of the Constitution provides naturalized citizenship on four grounds. First, any person born in Nepal to a Nepalese citizen mother and living in Nepal, but the whereabouts of the father is not known, can acquire Nepalese citizenship on the grounds of descent. However, if the father is identified as a foreign citizen, the person can be eligible to acquire naturalized citizenship only. 9 Second, a foreign woman married to a Nepalese citizen man can acquire naturalized Nepalese citizenship if she wishes. 10 Third, a child born of a Nepalese citizen woman married to a father who is a foreign citizen can acquire naturalized citizenship of Nepal, if such a person has permanent domicile in Nepal and has not acquired foreign citizenship. 11 Fourth, the Government of Nepal (GoN) is authorized to grant naturalized citizenship to any person as prescribed by law.<sup>12</sup>

**Non-resident Nepalese citizenship:** Article 14 of the Constitution provides a non-resident Nepalese citizenship to individuals who have acquired foreign citizenship and are living outside the South Asian Association for Regional Cooperation (SAARC) countries. This type of citizenship provides rights only on social, economic, and cultural grounds. Political rights are not an aspect of such a citizenship. Thus, this provision delinks the concept of citizenship from

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3 *Id.*, Article 11 .2(b).

4 *Id.*, Article 11 .3.

5 *Id.*, Proviso of Article 11 .7.

6 *Id.*, Article 11 .4.

7 *Id.*, Article 11 .5.

8 *Id.*, Article 12.

9 52. *Id.*, Proviso of Article 11 .5.

10 53. *Id.*, Article 11 .6.

11 54. *Id.*, Article 11 .7.

12 55. *Id.*, Article 11 .8.

political relationships. At the same time, common Nepalese people have been skeptical of this provision as the legitimization of an elitist interest, since it is devised to secure the property rights of descendants of the elite Nepalese class living in North America, Europe, and other developed countries. Moreover, the non-resident Nepalese citizenship can be acquired on the grounds of lineage of a father or a mother as well as a grandfather or a grandmother. The lineage does not require either parents or grandparents to be Nepali citizens. One of them being a Nepali citizen is sufficient to establish the lineage.

**Honorary citizenship:** The GoN is authorized to confer an honorary citizenship to a person as provided by the federal citizenship law.<sup>13</sup>

The formulation of the Constitution of Nepal by the Constituent Assembly has not managed to address three major issues faced by women on citizenship rights. Article 11.2 (b) allows for either parent to impart citizenship on their children on the grounds of descent. This is, however, subject to the precondition that if the parents acquired Nepalese citizenship on grounds of birth before the commencement of the Constitution, citizenship by descent would only be granted if both parents are Nepali citizens.

Article 11.2(b) and Article 11.3 retain the subtle controversies and contradictions between the “or” and the “and” concepts of conferring citizenship. Article 11.3 seems to limit the scope of the “or” provision incorporated under Article 11.2(b). Articles 11.5 and 11.7 also substantially derogate the “or” provision incorporated under Article 11.2(b). Article 11 .3, 11.5, and 11.7 are regressive provisions in light of the progress made by the 2007 Interim Constitution, making the citizenship issue more complex by requiring one’s father and mother to be Nepalese citizens and a permanent domicile in Nepal when one applies for Nepalese citizenship. With a widespread dissatisfaction with the discriminatory citizenship provisions and growing public opinion in favor of equal and autonomous rights of fathers and mothers in imparting citizenship rights to their children, the Constitution has failed to reflect the aspirations of the Nepalese people. Therefore, the “problem” related to lineage has now been deepened and demarcated into two segments.

The first segment of lineage under Article 11.2 (b) is linked to the “or” clause, i.e., “a father or a mother” at the time of the birth of the person seeking citizenship. However, the second segment of lineage is related to parents who had acquired citizenship of Nepal on the grounds of birth, and not of descent, prior to the

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<sup>13</sup> 56. *Id.*, Article 11.9.

commencement of the Constitution. For such a person seeking citizenship under Article 11.3, both parents should be Nepalese citizens. Thus, Article 11.3 conspicuously limits the scope of the “or” clause. Therefore, the “problem” related to lineage has not been adequately and satisfactorily addressed.

Further, given that a mother is required to produce evidence about the domicile, whereabouts, and citizenship status of the father of her child under Article 11.5 and 11.7, she is not recognized as being able to impart citizenship independently. Consequently, these provisions undermine not only Article 2 of the Convention on the Rights of the Child (CRC) and other international human rights instruments, but also various decisions of the Supreme Court of Nepal that have ruled for progressive citizenship rights of single mothers to impart citizenship to their children on their own name. The problem related to the conundrum of a single mother has still not been addressed. A single mother on her own, i.e., without disclosing the identity and whereabouts of the father of her child, cannot impart citizenship to her child. Her child cannot obtain citizenship on the grounds of descent until the father is identified. When the father is identified, her child can attain a naturalized citizenship, but not a citizenship based on descent.

In other words, a Nepalese woman is still not recognized as able to impart citizenship on the grounds of descent independently of her husband. As a result, the “or” clause under Article 11.2 (b) has been further limited by Article 11.5. Moreover, if a Nepalese woman, in the course of employment or in any other situation gives birth while living outside the country, she cannot impart citizenship to her child. This limitation is in place because her child was not born in Nepal and is not residing in Nepal, which does not fulfill the requirements of Article 11.5 of the Constitution. By living outside Nepal, her child cannot have permanent domicile in Nepal under Article 11.7 as well. Moreover, there is no provision in the Constitution on imparting citizenship to a child born of a Nepalese citizen mother, i.e., a single mother. In fact, the entire citizenship regime is dominated by the concept that a mother should be married before giving birth to a child and imparting citizenship to her child.

However, with the decision of the Supreme Court of Nepal in the *Annapurna Rana* case,<sup>14</sup> an unmarried mother has been recognized as having an autonomous and dignified status. Nonetheless, the Constituent Assembly remained reluctant

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14 . See *Annapurna Rana v. Kathmandu District Court and others*, writ petition number 2187 of 2053 B.S., decided on 2055/2/25 B.S. by the Division Bench of the Supreme Court of Nepal, comprising of Justice Arbinda Nath Acharya and Rajendra Raj Nakhwa. For detail discussion on the issue see Surendra Bhandari, *Court-Constitution and Global Public Policy*, (Kathmandu, DDL, 1999).

to recognize a single mother, either married or unmarried, as able to impart citizenship to her children. With this retrogressive constitutional development on the issue of citizenship, the problem of statelessness persists in Nepal. Further, discrimination based on marriage has been perpetuated without any intervention. As a result, a foreign woman marrying a Nepalese man may obtain Nepalese citizenship through marriage alone, while a foreign man marrying a Nepalese woman has no such right. In short, the 2015 Constitution suffers from the same shortcomings in addressing the problem of citizenship that the 1964 Citizenship Act of Nepal did. Thus, in post-2006 constitutional development, efforts have failed to address the problems associated with citizenship issues in Nepal. Despite being a product of the democratically-elected body, i.e., the CA, the constitutional provisions on citizenship are regressive, discriminatory, and patriarchal, as discussed above. Consequently, citizenship laws and policies in Nepal have remained gender-biased.

This strongly evidences how Nepali society has created a visible difference between male versus female relationships with the state. Thus, in the process of nation building, females are bounded within four walls. Further, in the context of nationalism, females are reduced to the reproductive medium (Dawayer, 2000:27). According to Yuwal-Davis and Anthias (1989), females' participation is seen in the following instances:

Formal active women's citizenship has been "belated" (read prevented) for nearly 200 years compared to that of men in the "universal suffrage" which only reflects masculinity. And it is this "delay" as a concept that needs to be rescinded. (The disparity between subjectivity and citizenship of women and men is more or less consciously built and divested of its historical and political dimension. Women experienced the 'end of history' much in advance-before anyone else. Women's citizenship is still subject to unofficial customary law, which is part of their being the "embodiment of the nation.")

Stakeholders' serious attention has been drawn towards the political economy and the implications of such discriminatory provisions. Even after Nepal's entrance into the democratic constitutional and legal regime, these discriminatory provisions continued in institutionalizing inequality. Nepal's democratic polity and constitutional regime overlooked the substantive equality and individual autonomy of men and women, which is a very core value of equal citizen and identity of women and men in a civic sense. However, the continuous reinforcement of discrimination and inequality based on the status

of marriage, birth, and sex signify no real developments for women between regime changes (I. Tuladhar, 2011).

The denial of mothers' autonomy and equality constructs ideas of "no recognition of women." Ultimately, the provision indirectly allows only a father to confer citizenship to his children through blood relations. A Nepali woman cannot exercise the same autonomy, prestige, and right in conferring citizenship as a mother to her children. So this provision ultimately leads to the subordination of women to men or it denigrates women's status to second-class citizens.

Nepal's democracy and constitutions, indeed, are mostly linked to a system of male domination, subordination of women, and unequal power-relations between men and women in the name of culture, class, caste, ethnicity, and geographical situation of Nepal. Subordination can be viewed in various forms of discrimination, including disregard, insult, control, exploitation, oppression, and violence both in private and public spheres. These core ideas of patriarchal values, norms, practices, and system are now manifested in a gendered notion of citizenship till date. The provisions also consider man as the head of the household and the natural guardian of children. The provisions, thus, constitutionally provide legitimacy to a "gendered notion of nationality and national identity," which is covered in patriarchal values in the deep-rooted mindset of Nepal's constitution-makers. Thus, even in this modern age, the state attempts to control sexuality, wombs, and women's national identity through the system of discriminatory citizenship.

A modern democratic nation is formed on constitutionalist principles of equality of individuals, irrespective of race, color, gender, sex, belief, culture, and any other distinctions. Women are not only essential to building the institution of family, but also to building a nation. They can contribute to economic growth, human resources development, social inclusion, political participation, and the sustainable development of the country. The mission of nation building is not realizable simply by ignoring the roles and equal status of women in society.

A modern political or constitutional state cannot pretend to be unaware of its responsibility of protecting the rights of women and men on the basis of rationally-legitimized citizenry standards. Nation building is a continuous process beginning from the stage of securing the sovereignty of the state to the institutionalization of constitutionalism and management of the system of post-constitutionalism, in which both men and women play equal roles and should gain equal status (S. Bhandari, 2014).

The right to citizenship is a right of a child, not of parents alone. A child coming of age should be free to seek citizenship based on the grounds of the birth and lineages of one of his/her parents. This right is well-established and recognized by international human rights instruments. Any denial of the basic human rights standards will be counter-productive to building a globally competitive, locally inclusive, and politically stable nation.

The rigid and pervasive nationalist perspective in all strata of Nepalese society usually refers to Nepal's geo-political context when denying equal citizenship rights to women. This perspective constantly argues that the citizenship provisions should not be isolated from the national interests, in particular, against the background of Nepal's open border with India. However, it has not been well-noticed by the discussant that equal citizenry does not open the door for aliens, but rather, demands a better system of scrutiny, which would result in well-protected territory and better engagement with citizens.

The open border with India is not only taken for granted as an issue for the protection of gender-biased Nepali nationality, but also serves as a safety valve for the rigid citizenship policy. The paradox is that neither can this reality be ignored, nor a right policy intervention ever suspended. The inability of Nepal's political leadership to intervene policy-wise should not cause the deprivation of civilian rights of individuals. Thus, there should be a holistic approach in analyzing the issues of the open border with India, with the goal of ending the threat of the open border as well as the centuries-long discrimination against women. Two alternatives, among many, can be helpful in this regard. First is providing a clear provision in the Constitution by authorizing a citizenship statute to deal with the problems of citizenship arising from the open border. Second is making a citizenship law that would provide certain requirements for both men and women on the same footing with regard to enabling each of them able to transfer citizenship to their children on the fulfillment of those requirements.

The traditional value judgment based on the patriarchal notion of citizenship has been continued in the post-2015 constitutional era as well. The concept paper of the Committee of Fundamental and Directive Principle of Constitution Assembly-I also adopted a strict and conventional modality of citizenship provisions, which denied equal citizenship rights to women on the grounds of the geopolitical context, i.e. the country's open border and its cultural connection with India. It is commonly claimed that the unequal citizenship provisions

proposed for the new constitution are for the protection of nationalism in reference to Nepal described as a “yam between two boulders” that is a small country, which lies between the two giant countries, India and China.

In the broader horizon, mothers, wives and daughters are taken as the means of reproductive and regenerative purposes and fathers, husbands and sons are taken as important symbols of the nation, who bear the responsibility of providing safety and security.

The general perception regarding migration and citizenship in Nepal is based on the hypothesis that more and more of the Indian population may immigrate to Nepal. Against this background, rigid nationalists assume that India might send its large population to Nepal with political motivations, which might eventually influence Nepal’s territorial integrity and overall political scenario. This phobia guides politicians to subscribe a policy that bans equal citizenship rights to women. Nonetheless, it cannot be said whether or not such apprehensions are well founded.

Exaggeration unreal problems and ignoring real ones is always an erroneous political vision that has victimized those who are weak, marginalized, exploited, and systematically discriminated. While choosing a discriminatory policy decision, policymakers often forget that by adopting a rigid nationalist approach, they are actually forbidding Nepali citizens from acquiring citizenship. They are denying the rights of eligible individuals to choose their citizenship. Thus, by proposing harsh and restrictive provisions, constitution-makers have ignored the rights of the people born in Nepal and pushed them towards statelessness (L. R Baral, 2011). Furthermore, constitution-makers are also denying substantive equality between men and women. How can a society that denies substantive equality between men and women guarantee the democratic aspirations of its people and increase a sense of belongingness, which is key for nation building?

The implications of such practices reinforce and institutionalize political and social exclusion. The message that all people are sovereign but not equal will be continued with discriminatory citizenship policy. The relation between women and the state, constructed differently than the relation between men and the state, will be counter-productive. The gender-prone state-society relationship is not only undesirable, but also harmful for building an effective state. What will be bitterly memorable is that state powers, citizenships, nationality, sovereignty, democracy, inclusiveness, and other similar, forward-looking concepts will only be reflexive of the male-centered projects of nation building in Nepal.

Half of the population that comprises of women are largely ignored or systematically-denied citizenship rights. This policy has not only shattered a legal bond between an individual and the State together with the existence of reciprocal rights and duties of women, but it has also challenged the foundation of identity, dignity, justice, and security.

The sense of belongingness and inclusion are the key ingredients with universal ideals applied non-discriminatorily during the democratic phase of nation building. The democratic phase of nation building, however, in the context of Nepal is not yet accomplished or, in many ways, is largely shattered by an undemocratic and contentious legal framework, a patriarchal mindset of the actors, and faulty bureaucratic practice. Recognizing citizens from all segments of Nepalese society is an important foundation in the process of nation building. Thus, recognizing citizens and the collation of sovereignty from citizens together forms a nation. If one is unfulfilled, nation building remains unfinished.

Yuval-Davis, in her book *Gender and the Nation* (1997), explains how issues related with ethnic and national process affect people and how the people can bring change in government policies regarding these issues. The book focuses on how the state constructs men and women differently. This concept itself was not sufficient, since it overlooks the social forces that are predominant within the state (quoted in Fred Halliday, 2000, pp. 203-205). Halliday further quotes Yuval-Davis and elaborates that there is no homogeneous category of women which can be undertaken without any problem, while analyzing “ethnic, national and state policies as women are divided in class, ethnic and life-cycle lines, and in most society different strategies are directed at different groups of women.” Moreover, traditionally, the realist features—which focus on the obsession with power as the sole standard of righteousness—have constantly bent law for political and personal interests. These realist features primarily characterize Nepalese political culture. This political culture resorts to enforcing the rule of law only if the law serves the political interest of power-brokers, including political parties and leaders. Consequently, it has impudently relegated international human rights instruments into disutility; these instruments include Article 15 of the Universal Declaration of Human Rights (UDHR), 1948, Article 9 (1) and (2) of the Convention on Elimination of All forms of Discrimination against Women (CEDAW), Article 24 of the International Covenant on Civil and Political Rights (ICCPR), 1966, Article 5(d) (iii) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Article 24 (3) of International Covenant on Civil and Political Rights (ICCPR), Article 7 of the CRC, 1989, and Article 18

of the Convention on the Rights of Persons with Disabilities (CRPD), 2008. Therefore, despite being party to a number of human rights instruments, which call for equal and independent status of a mother and a father in imparting citizenship to their children, Nepal and its post-2015 political development has ignored the call of human rights instruments as reflected by the Constitutional citizenship provisions and otherwise.

#### 4. Conclusion

This paper has examined the question of why the nation building process in Nepal is gender-biased from a citizenship perspective. In other words, why are women neglected and deprived of the status of equal citizen in participating actively in the nation building process? In a single sentence, the conclusion is as follows: Despite frequent political and regime changes, the patriarchal mindset has posed as the stumbling block in depriving women from exercising and enjoying substantive equality in Nepalese society. Through legal-constitutional, the state has attempted to ensure some aspects of formal equality. Nevertheless, the gender-biased social structure and state apparatus have continued to hinder women from enjoying the formally guaranteed equality.

From the formative stage of nation building to the present stage of the democratic nation building process, the state apparatus is fundamentally guided by the idea “homogenization” that has, in turn, imposed one ethnicity, one language, one culture, and one religion on the country. Due to the homogenization process, the sense of belongingness was also imposed but never evolved voluntarily. Today, the Nepalese polity is facing a challenge in how it can encourage people to develop the sense of unflinching belongingness voluntarily. Moreover, women have always been excluded from the nation building process due to a number of handicaps: social, legal, political, cultural, customary practices, ethnic allegiance, and so on.

Even in the post-2015 political landscape, the following dangers are still markedly looming large. All people are sovereign, but women are not equal, since they cannot transfer citizenship to their children like their male counterpart do. The distinction between men and women in terms of power, authority, and rights has deprived women from participating actively in the nation building process. This danger should be urgently addressed.

- ◆ The political changes from a unitary state structure to a federal state structure, a Hindu state to a secular state, and a monarchical state to a republic state are undoubtedly progressive. However, as discussed above,

the Nepalese experience has shown that only regime changes cannot be enough to ensure the equality of women in each sphere of social life. The looming danger is that each of these progressions might be captured by the erroneous consciousness of male superiority. One example is the current discourse of citizenship that has been discussed in the paper in detail. This danger too, should be addressed, without any hesitation.

- ◆ Moreover, the ideas of self-determination, inclusion, and ethnic identity have demanded a serious political response from the state. However, as discussed above, unless the ethnic movements and rights activities are oriented with the required level of gender sensitivity, ethnic women might fall into the vicious cycle of triple discriminations: as a women in Nepalese society, as women bound by the cultural and customary practices of the community, and as women dominated by their male counterpart. Unless, these dangers are wisely addressed, the ethnic movement will not solve the problems of gender discrimination. Perhaps, the aggravation might be a bitter reality.
- ◆ Inclusion has been a buzzword with pervasive political confusion. Inclusion cannot be achieved simply with empty slogans. The problem of Dalits, Muslims, Madhesis, and others are real problems that the state cannot simply neglect. However, the existing political discourse seems completely derailed to offer a real solution to these problems. This paper, as discussed above, has offered three solutions: equal citizen, social protection, and justice.

In short, the role of women in nation building is as important as the role of men. The Constitution and any policy and measure that ignores and aims to subordinate women cannot solve the problems of nation building in Nepal. Equally, it must not be forgotten that the question of nation building cannot be answered by imposing traditional values, customary practices, ethnic beliefs, or religious dogmas that subordinate women and perpetuate discrimination. The only solution is equal citizen, universal social protection, and justice. Therefore, this paper argues that the process of nation building in Nepal must be reconstructed in line with and achieving the status of equal citizen, universal social protection, and justice through the Constitution. Only when these minimum requirements are achieved can the process of democratic nation building be institutionalized.

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# Nepalese Federal System: Ambit and Ambitions

— Khushee Prasad Tharu<sup>1</sup>

## Synopsis

*Federalism in Nepal has its root in the general aspirations of the people to end discrimination, which is also a unique value offered by the federal system. Ending discrimination seems an over-arching political goal in Nepal, as discrimination is deep-rooted, irrespective of territorial cleavages. As the key basis of discrimination is caste and gender, the remedy is not directly interlocked to state structure. Although federalism offers some space for political empowerment at all levels of government, it can hardly have the potential to cure widespread discrimination in society. Federalism is identity-sensitive but gender-neutral. It is not discrimination-specific but can be instrumental in ending discrimination. Ending discrimination needs socio-political transformation through national policies. Proper cure of the problem, therefore, is not federalism itself but inclusion enshrined in the federal system. As such, the principle of inclusion is the key constitutional value, mandatory and imperative across all levels of government and their machineries. Nepalese federalism is inclusion sensitive. This is a new value Nepal added to the federal system.*

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## 1. Meaning of federalism

Federalism is a system of government in which the same territory is governed by two or more levels of government. Generally, a national government is responsible for governance of the whole country whereas state governments are limited to state territory. The power of each government is divided but also shared; hence, living and operating together in mutual cooperation is essential. Attributed with legislative and executive power, the provinces are guaranteed some level of autonomy to realize self-rule and the power to participate in the central decision-making process. This is why federalism is known as a system of unity in diversity.

Modern federalism is a noble creation of the United States of America. At its birth, the founders described federalism as “in strictness, neither a national nor a federal constitution; but a composition of both.”<sup>2</sup> Alexander Hamilton wrote that federalism is “the constitutional principle on which the federation is based in the division of power between two levels of government: the federal government and the states. These two powers are independent but coordinated so that the federal government, which has jurisdiction over the federation’s entire territory, has a minimum of powers indispensable for political and economic unity while the states, each with jurisdiction over their own territory, have the remaining powers.”<sup>3</sup> The essence of federalism is the division of power under which the federal and state governments operate. In order to capture the meaning of federalism, it is necessary to go through definitions given by scholars.

K.C.Wheare, generally regarded as the father of contemporary federal theories, defined federalism or federal government in his famous book *Federal Government* as “the method of dividing power so that general and regional governments are each within a sphere co-ordinate and independent.”<sup>4</sup> His definition comes from the study of American federalism. The definitions underscores that federalism is a method of dividing powers between national and regional governments in such a way that each government is coordinate and independent. According to him, *coordinacy* and independence of each government is the hallmark of federalism. Independence was later brought within purview of political autonomy.

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2 James Madison, Federalist No. 39.

3 Alexander Hamilton, Federalist No. 15.

4 K.C.Wheare, *Federal Government*, 4th Ed. (London: Oxford University Press, 1963), at 11.

Whereas definition was challenged around two points. First, a growing overlap and mutual interdependence was observed between the levels of government of federal systems in the 20<sup>th</sup> century in an equilibrium termed “cooperative federalism.” Firm separation of government, in the form of the “dual federalism,” is almost impossible. The premise of independence appears no longer sustainable. Second, the premise of *coordinacy*, likewise, seemed indefensible, since in many of the areas of common concern, the ultimate solution to conflicting policy approaches was in practice the “defeat” of one level by the other. Therefore, the definition could not represent cooperative federalism.

Daniel Elazar, in his book *Federalism: An Overview*,<sup>5</sup> introduced federalism as a mode of political association and organization that unites separate polities within a more comprehensive political system in such a way as to allow each to maintain its own fundamental political integrity. He developed also a larger vision of federalism based on a non-centric model from the American experience. Federal political systems are those in which a general government is constituted by a group of two or more constituent governments, which have very substantial reserved or protected powers within the common whole. It is more appropriate to understand “federalism as constitutionalized power-sharing through systems that combine self-rule and shared rule.”<sup>6</sup> Therefore, “federalism involves some kind of contractual linkage of a presumably permanent character that (1) provides for power sharing, (2) cuts around the issue of sovereignty, and (3) supplements but does not seek to replace or diminish prior organic ties where they exist.”<sup>7</sup> It opens the federalist perspective to broader combinations. It led Elazar to a very extensive vision of federalism, eventually encompassing all the political combinations that he considers relevant to self-rule and shared rule and cross-cutting the distinction between domestic and international. Thus, Elazar takes in his survey, besides classical federal states, a broad spectrum of political arrangements, from China, with some decentralization, to the monetary union between France and Monaco.

Nepal is defined as a federal democratic country. In the Nepalese federal arrangement, state power is divided into the federation, province and local level, and each government operates distinctly according to the principle of cooperation, coordination and coexistence. Nepalese federalism is seen as centralized federalism, which is supported by a system of federal supremacy doctrine, federal coordination power and federal fiscal power. By the structure of

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5 Daniel Elazar, *Federalism: An Overview* (Pretoria: Human Science Research Council (1995)) at 2.

6 *Id.* at 12

7 *Id.* at 12.

self-rule and shared rule, Nepal is a federal country, under Elazar's definition of federalism. However, the character of federalism as coordinate and independent governments, as defined by Wheare, is not defensible in Nepalese federalism. Nepalese federalism needs a new definition that represents its structure and character. Key ingredients of the federal system in Nepal are as follows.<sup>8</sup>

- ◆ The source of power of all levels of the state is the Constitution of Nepal, and therefore, is limited by the Constitution. The center is entitled to residuary power. Legislative powers of all levels of government are coordinate and independent. However, legislative competences from the concurrent list are based on the hierarchy of government.
- ◆ Interrelation among the federation, provinces and local levels is based on the principles of cooperation, co-existence and coordination. However, the federation has the power to give instruction to the provinces on the matters of national interest.
- ◆ The ambition of federalism is to enhance national unity by ensuring inclusiveness and equal participation of all levels of government.

Therefore, in the Nepalese context, "Federalism is a political process of dividing powers into multi-level governance who operate in [the] constitutional spirit of cooperation, coordination and coexistence."<sup>9</sup>

## 2. What federalism is not?

In the discourse about federalism in Nepal, it is often confused with feudalism, regionalism and decentralization, which were in practice in different historical periods of Nepal. In order to understand federalism, the next section briefly compares federalism with similar political systems that were in practice in Nepal.

### 2.1 Diarchy (Co-rule)

In the Lichhavi period of Nepal's political history, there were two types of administrations: central administration for the capital, controlled by the King, and provincial administration for rest of territory, controlled by the *Samants* (feudalists) who were appointed by the King.<sup>10</sup> The *Samants* autonomously ruled

8 *Dharma Raj Sharma v. Thakur Baba Municipality And Others*, 074-Wo-0179, (2076 B.S.) Judgment No. 129 Of High Court Nepalgunj (Unpublished Decision).

9 *Id.*

10 Bhim Dev Bhatt, *Nepalese Administration: A Historical Perspective* (In Nepali), SopanMasik(2018), at 44.

their territories, but had to pay taxes to the center.<sup>11</sup> In 598 A.D., Lichhavi King Shiv Dev appointed Anshuvarma, who was not from the royal family, as the de-facto ruler for Nepal, while King Shiv Dev himself remaining the de-jure ruler. He awarded Anshuvarma the post of *Maha-Samant* (Great Feudalist), erected a separate Kailashkut palace for him and entrusted him all ruling powers.<sup>12</sup> After King Shiv Dev's death in 662 B.S., Anshuvarma became the King of Nepal. The existence of diarchy or co-rule, de-jure (monarch) and de-facto (great feudalist), has been described by some scholars as federalism in Nepal. Such co-ruling existed during the Rana period as well,<sup>13</sup> when the King was a ceremonial ruler and Rana Prime Ministers were de-facto rulers.

Diarchy or co-rule by the King and his appointees was described as federalism in the concept paper of the Constituent Assembly - I.<sup>14</sup> However, co-ruling by two rulers in the same territory is not federalism, but a form of feudalism, as it is a division of power between two rulers and not between regions in a compact form. As federalism means the division of power between units of the state in a compact form, co-ruling or diarchy is not a form of federalism. In diarchy, there is neither the system of self-rule and shared-rule. So, this system was feudalism, not federalism.

## 2.2 Regionalism

Before Prithivi Narayan Shah's unification of Nepal which was completed in 1825 BS (1768 AD), there were 54 sovereign and independent states in the region, which he eventually conquered and unified.<sup>15</sup> In the great Nepal, the rulers of former small countries were given some governing autonomy, which is defined by some authors as a form of self-rule. Shah recognized their autonomy with several aims, including balancing the power relationship and providing administrative services. Regional autonomy was suppressed later, and the system was reverted back into feudalism in the Rana regime, when upon becoming king, King Mahendra eliminated it in 2017 BS (1960 AD). Regional

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 37

<sup>13</sup> Rana rule began in 1846 with the rise of Jung Bahadur Rana and ended in 1951 with the promulgation of a new constitution, when power shifted back to the monarchy of King Tribhuvan.

<sup>14</sup> Report of the Committee on the Restructuring of the State and Distribution of State Powers (CRSDSP) of The Constituent Assembly (1), Constituent Assembly Secretariat, Singh Darbar, Nepal (hereinafter, "CRSDSP Report"), at 70.

<sup>15</sup> Bam Bahadur Adhikari, *Baaisi Tatha Chaubisi Rajyaha ru ko Sankhchipta Itihas*, Kathmandu: Navodit Haamro-PustakBhandar (2017), at 180. In South-Eastern Terai, there were three Sen states: Makawanpur, Bijayapur and Chaudandi. In the West, from Gorkha to Gandaki Province, there were 24 states. In the province of Karnali, there were 22 states with the Kalyan, Samaal, Shahi and Chand dynasties. Along with Gorkha and Mustang, Bhaktapur, Kantipur and Lalitpur made up the remaining five states.

autonomy in the period after the unification of Nepal and before the Rana rule, was, according to some authors, a form of federal arrangement given that society was federal in a single political order.

In consideration of the essence of federalism as a combination of self-rule and shared rule, regional autonomy cannot be defined as a federal arrangement. Shared rule does not mean the imposition of sovereignty on defeated states, but a compact between states to form a union in the common spirit of shared rule. The former 54 states were entitled to regional autonomy for their political, social and cultural influences in the center, which meant regionalism under a unitary system. Regionalism refers to a process that leads territorial subunits within states to increase their influence in governance. Unlike the regions of a federation, these regions remain subordinate to the central government. The center could increase, decrease or even suspend or withdraw the regional levels' autonomy without their consent. In addition, the scope of autonomy is limited in administration and is not as extensive as in a federation.

The practice of regionalism was a source of federal arrangement in Nepal during the constitution-writing process in 2015. Nepalese society, which was rooted in the regionalism, developed a distinct traditional ruling system in the regions, i.e. Magar, Tharu, Limbu, Rai, etc., which supported the spirit of self-rule. Ethnic federalism, which was advocated during the constitution-writing process, has its root in this region-based, traditional ruling system. Federalism was advocated as a method of accommodating social and cultural diversity in the federal arrangement.

### **2.3 Decentralization**

Nepal's political history is marked by feudalism or authoritarianism in the system of monarchy or duality. After the restoration of democracy, a Local Self-Governance Act 1999 was enacted, which aimed to respond to the demand of decentralization of power at the local level. Although it aimed to ensure local participation and ownership on planning and development at the local level,<sup>16</sup> the Act provided for only recommendatory powers to local units without any financial decentralization and was based on a principal-agent relation.

Federalism and decentralization are neither synonyms nor antonyms. Federalism is a system of voluntary self-rule in a region and shared-rule at the center. Decentralization is the transfer of authority and responsibility for public

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<sup>16</sup> Local Self-Governance Act 1999, Preamble.

functions from the central government to intermediate and local governments. In a system of decentralization, local units are subordinate to the center, and their political autonomy is limited and can be increased or decreased by the center without local participation. In a federal system, the federal government is not in charge of regions, and the existing hierarchy is not a power but a value hierarchy. Federal systems are not only decentralized political orders but are non-centralized, since no single order of government is omni-competent in everything that relates to the constitutional prerogatives of the regional governments.

### 3. Emergence of federalism

The Nepalese federal system was considered as a solution to political conflict addressed during the negotiation process as part of post-conflict reforms. However, federalism was not a tool of conflict management. It has been recognized in the Constitution of Nepal (2015) not as a healing lotion, but against the backdrop of the Maoist rebellion, Madhesh movement and indigenous peoples' movement. Federalism was believed to be the best option for accommodating social diversity in Nepal, offering power-sharing arrangements and bringing the government closer to the people. Nepalese federalism ambitiously aims to end all forms of discrimination.

The genesis of Nepal's federal project can be traced to state-sponsored differentiation as well as the discrimination and inequality among social and regional groups, particularly after the conquest of the Kathmandu Valley at the beginning of the unification of Nepal.<sup>17</sup> According to Pitamber Sharma, the rationale for federalization in Nepal has to be appreciated from three perspectives:<sup>18</sup>

- ◆ The first is that the reality of Nepal's social and cultural diversity has to be reflected in the identity of the Nepali state and the nation. The recognition of diverse ethnic, language, cultural and regional identity is a step towards the establishment and strengthening of a sense of ownership of, and affinity with, the state.
- ◆ The second perspective is related to inclusive development and the idea that socioeconomic development has to be equitable and inclusive, based on the principles of social justice.

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<sup>17</sup> Pitamber Sharma, *State Restructuring In Nepal: Context, Rationale And Possibilities, The Federalism Debate in Nepal*, UNDP, SPCBN (2014) at 79.

<sup>18</sup> *Id.* at 101.

- ◆ The third perspective relates to decentralization and the devolution of power and autonomy.

The Report of the Committee on the Restructuring of the State and Distribution of State Powers (CRSDSP) of the Constituent Assembly – I records the following key reasons for federalism in Nepal:<sup>19</sup>

- ◆ the accommodation of Nepal’s ethnic, socio-cultural diversity;
- ◆ the ending of social, economic and political discrimination and exploitation; and
- ◆ decentralization and inclusive development.

The Constitution of Nepal (2015) recognizes that federalism is adopted for ending all forms of discrimination and persecution originating from a centralistic unitary system,<sup>20</sup> protecting and promoting unity in diversity,<sup>21</sup> as society is multi-ethnic, multi-lingual, multi-religious, and multi-cultural, and building an equitable society on the basis of proportional, inclusive and participatory principles.<sup>22</sup>

#### **4. Federalism to end discrimination**

The basic aim to adopt federalism in Nepal is to eliminate all forms of discrimination created under the unitary system in the past. Ending discrimination through federalism still remains a motion of debate, since federalism does not specifically address the issues of discrimination. Ending discrimination requires a systemic interaction between the problem and its cure.

The International Convention on the Elimination of All Forms of Racial Discrimination (1969) states “the term ‘racial discrimination’ shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”<sup>23</sup> Similarly, regarding gender, the Convention

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<sup>19</sup> CRSDSP Report, at 73.

<sup>20</sup> Constitution of Nepal (2015), Preamble.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> International Convention on the Elimination of All Forms of Racial Discrimination, 1969, Article 1.

on the Elimination of All Forms of Discrimination Against Women (1979) states: “The term ‘discrimination against women’s shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”<sup>24</sup> Discrimination covers a range of issues, including the redistribution of power and wealth; however, it manifests in the Nepalese perspective in the issues of inclusion, representation and participation in all bodies of state. Common will is evidenced on the rights of women,<sup>25</sup> of dalits <sup>26</sup> and to social justice, <sup>27</sup> as guaranteed in the Constitution of Nepal. Eliminating all forms of discrimination means ensuring the right to participate in all bodies of the state on the basis of the principle of proportional inclusion.

#### **4.1 Discrimination based on caste**

Nepalese federalism is identity-sensitive at the structural level in drawing provincial and local level boundaries, as identity was a considerable factor in drawing internal boundaries. Two sides were considered when outlining provincial boundaries: drawing internal boundaries to ensure that territorially-concentrated national minorities constitute regional majorities (ethnic federalism) in a province, or drawing boundaries on the basis of preexisting development regions (territorial federalism). Finally, a political compromise was reached among the political parties, and boundaries were drawn on the basis of preexisting development regions in consideration of ethnic clusters. The nature of federalism is ethno-territorial, whereas its character is inclusion-sensitive.

There is a clear difference between systems in which boundary lines are drawn to accommodate territorially-concentrated ethnic groups and those in which they are drawn to deny accommodation. Ethno-territorial federations are the ones in which one or more territorially-concentrated ethnic groups are accommodated via the provision of a subunit homeland, but the numerically dominant ethnic group is carved up among multiple subunits.<sup>28</sup> Ethno-territorial federations

24 Convention on the Elimination of All Forms of Discrimination Against Women, 1979, Article 1.

25 Constitution Of Nepal (2015), Article 38(4).

26 *Id.* Article 40(1)

27 *Id.* Article 42(1).

28 Liam D. Anderson, *Federal Solutions To Ethnic Problems Accommodating Diversity*, Routledge London and New York (2012), at 7.

fuses the logic of territorial and ethnic federalism to produce systems that are structurally and functionally distinguishable from both.<sup>29</sup> Nepalese federalism occupies an intermediate space between ethnic federations and territorial federations. It is accommodative of the aspirations of territorially-concentrated minorities; similar to the latter, the dominant ethnic group is divided up territorially among multiple subunits. Therefore, ethnicity is not the defining feature but a considerable factor of federalism in Nepal.

Federalism is a method of dividing power into central and regional governments so that each government functions in the same territory within its spheres. Federalism is a solution to ethnic problems, but it is not a tool to eliminate discrimination based on racial or ethnic identity. Federalism is a means to accommodate social diversity on a territorial basis; conversely, it cannot interact with racial or gender disparity that is widespread in and across a society. In crux, it is a management of territorial cleavages, but not a social or racial enclave, particularly if it is widespread. If discrimination streams in the vein of society and the vein is intertwined over the whole body, then federalism, as a means of dividing state power between various levels of government, can hardly cure the problem. Rather, discrimination may be federalized among different provinces, one responsive to cure while the other remaining reluctant. Some scholars believe that federalism is not a proper medicine for discrimination, and the proper cure is basic laws, policies and practices that are mandatory for all state bodies. Ending discrimination through the federal system requires national laws and policies beyond federal vice or virtues to eliminate all forms of discrimination. It doesn't mean that elimination of discrimination is impossible in a federal system, but that it is not an appropriate means for that.

Broadly speaking, national minorities or marginalized groups can reap the fruits of federalism, which can be of help in eliminating discrimination. Federalism manifests in the maximization of civil liberties through the system's intergovernmental checks and balances and empowers the local people, which is a welcome initiative on limiting discrimination. Federalism enhances the opportunities of political participation for marginalized groups as well by creating multi-level governance and multiple forums. Denial of representation at the national level opens the door for entries at provincial or local levels. Federalism is a method of deepening democracy at the grassroots level by dividing powers in multi-level governance so that marginalized segments of society can access powers and public services. Federalism offers competition between multiple

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29 *Id.*

governments on a bidding to address the issues of discrimination. Allocating power to local levels ensures that federalism is locally sensitive and creates an environment that is responsive to local issues, including that of discrimination. In this way, a federal system can be instrumental in eliminating all forms of discrimination.

Nepalese federalism is identity-sensitive and identity-specific only in drawing boundaries. However, it does not directly interact with discrimination based on race and caste. Gender and social inclusion policies, if mandatory for all levels of government, are proper means of eliminating discrimination. As federalism is a state structure, a system of the division of power in federal units, federal system itself is not a means to eliminate discrimination but can be instrumental. Not the structure, but the inclusive character of federal system can be instrumental in ending discrimination and pursuing equality.

#### **4.2 Discrimination based on gender**

There is no common theory about the impact of different governance models on the advancement of gender equality. Indeed, gender scholars have differing views as to whether a federal model has a greater capacity to advance gender equality than a unitary model. More recently, however, an increasing body of gender scholars have argued that a federal model can, in certain circumstances, enhance the advancement of gender equality.

Federalism is inherently neither good nor bad for gender equality; it all depends on the details of the federal system and the context in which they are applied.<sup>30</sup> There are, nonetheless, some guidelines that can be gleaned from the experiences of countries around the world about the design elements that can make federalism more or less useful for promoting gender equality under different conditions.<sup>31</sup> There is a connection between gender and federalism, not at the pragmatic or design level, but at the theoretical level. It is the character of federal citizens, rather than the federal system itself, that could be inherently beneficial to gender equality.<sup>32</sup>

Gender scholars argue that a federal model of governance can provide opportunities to advance gender equality and women rights. Those include increased opportunities to sit in public office, multiple access points for women

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30 Susan H. Williams, "Federalism And Gender Equality," *Federal Law Review*, vol. 46, Digital Repository at Maurer Law, Maurer School Of Law: Indiana University (2018), at 491.

31 *Id.*

32 *Id.*

to lobby for reform measures, encouraging policy transfer between different regions of a country, protecting women from violence by responding more effectively to ethnic diversity and conflict through the provision of autonomy, self-rule and self-determination and enabling local concerns, including the different interests of women, to be better represented. In some situations, however, gender scholars argue a federal model of governance makes it difficult to achieve a uniformity of laws, programs and services that benefit women. It fragments the solidarity of the women's movements and is costly and complicated to navigate, making gender reform measures more difficult to implement.

Federalism doesn't have direct interaction with discrimination based on gender and caste. Moreover, discrimination is not a product of a unitary system but of governance. Right to equality, as outlined in the Constitution, was narrowly implemented, and widespread discrimination continued. Federalism is identity-sensitive but gender neutral. It is not discrimination specific but can be instrumental in ending discrimination. The character of federalism matters. Ending discrimination needs socio-political transformation through national policy. The proper cure of the problem is not federalism itself, but federalism intertwined with inclusion. As such, the principle of inclusion is a key constitutional value, mandatory and imperative across all levels of government and their machineries.

## **5. Federalism as an instrument of inclusion**

Ending discrimination is mandatory for and imperative to all levels of government. Nepalese federalism is tied with inclusion. The federal system's ambition is to enhance national unity by ensuring inclusiveness and equal participation at all levels. While Nepal is a federal country, the concept of inclusion is imperative in all tiers of the structure and constitutional bodies. It is imperative for the federation, provinces and local levels to protect and promote a society based on equality and inclusive representation at all levels.<sup>33</sup> The concept of inclusion is reflected in the fundamental rights chapter and directive principles and policy of state. Inclusion is mandatory in the federal, provincial and local parliaments and government in one way or the other.

The Constitution foresees the roles of all levels in developing an egalitarian society based on pluralism and equality, inclusive representation and identity.<sup>34</sup> While intergovernmental relation is based on the principles of cooperation,

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<sup>33</sup> Constitution of Nepal (2015), Article 56(6).

<sup>34</sup> *Id.* Article 56(6).

coexistence and coordination,<sup>35</sup> inclusive governance based on the principles of proportional representation is mandatory for all tiers of state. Similarly, the Constitution enables protective discrimination measures for the advancement of marginalized communities.<sup>36</sup> It also enables state policies related to social justice and inclusion to be directed to create an atmosphere conducive to uplift and empower distinct communities and mandates for the special measures for their overall development.<sup>37</sup>

The Preamble of the Constitution has expressed a commitment to create an egalitarian society based on the principles of proportional inclusion and participation. The President and Vice- President of Nepal shall come from different gender or social groups.<sup>38</sup> Appointments in all federal commissions and bodies shall be inclusive.<sup>39</sup> Inclusion is obligatory in the formation of the federal civil service.<sup>40</sup> Article 40(1) guarantees that Dalits shall have the rights to participate in all agencies of the State based on the principle of proportional inclusion. Article 42(1) guarantees the right to social justice to the people belonging to various marginalized classes and communities for representation and participation in State structure on the basis of the principle of inclusion. Under Directive Principles of the State, Article 50(1) expresses the commitment to establish a Welfare State internalizing the principle of inclusion in the governance system on the basis of local autonomy and decentralization. Article 76(9) instructs that the Council of Ministers shall be formed, not exceeding 25 members from among the members of the Federal Parliament on the basis of the principle of inclusion. Likewise, Article 168(9) provides for constituting the Provincial Council of Ministers on the basis of the principle of inclusion. Article 267(1) envisages an organization of the Nepal Army committed to democratic principles, inclusive in character and national in form. Clause (3) of Article 267 has also laid down the principles of inclusion of women, Dalits, indigenous community, Khas Arya, Madhesi, Tharu, Muslim and people of backward regions in the military service.

## 6. Conclusion

The federal system is a method of dividing power into a multi-level governance system so that each government operates within its constitutional spheres.

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<sup>35</sup> *Id.* Article 232(1).

<sup>36</sup> *Id.* Article 18(3).

<sup>37</sup> *Id.* Article 51 (J).

<sup>38</sup> *Id.* Article 70.

<sup>39</sup> *Id.* Article 283.

<sup>40</sup> *Id.* Article 285(2).

**Nepalese federalism is homegrown from its native womb and laps.** It is a political process of dividing powers into various levels of governance to operate in the constitutional spirit of cooperation, coordination and coexistence. Federalism is not to be confused with feudalism practiced in the form of diarchy in the *Lichchavi* period of Nepal, and neither with the regionalism that was practiced following Nepal's unification. Federalism is also different from decentralization under a unitary system, wherein power is delegated by the central government under legislation but under a constitution.

The elimination of all forms of discrimination is the central aim of the federal system in Nepal, which seems overambitious and every so often distracted. Federalism is identity-sensitive in drawing internal boundaries of federal units; however, in its functioning, Nepalese federalism doesn't directly interact with discrimination based on caste or race. The federal system is not identity-specific at the governance level. Federalism is gender neutral; hence by structure, it is not specifically a remedy of discrimination based on gender. However, the federal system, by character, can be instrumental in eliminating discrimination. The proper cure of discrimination is policies for gender and social inclusion that are obligatory to all levels of government. Discrimination can be addressed through the federal system by intertwining the principle of inclusion, a value Nepal has added to federal system.

# Deconstructing Federalism through the lens of Federal Constitution of Nepal

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## Abstract

A plethora of scholars' contribution elucidates that the Constitution of Nepal, which was promulgated by deliberative process, is a key instrument to deconstruct federalism. However, little was done to establish federalism as an apparatus of socio-economic transformation. This paper examines the core attributes and characteristics of federalism by analysing key constitutional provisions, such as state restructuring, power sharing, delevering fundamental rights, and intergovernmental relationships. Both primary and secondary information were used as data source, and the Constitution was used as a major source of information. This was followed by 72 key informant interviews conducted purposively to triangulate the results. Findings indicate the State was restructured into seven provinces and 753 local government units. However, no single well-known theory and indicators were adapted to delineate the provinces. Although a few indicators were designed to restructure the local governments, the political parties, mainly Madheshi ones, differed with the government decision. In addition, the Constitution gives legislative, executive and judiciary functions to all levels of governments, but due to capacity constraints and a lack of legal procedures, the federation has been extending its dominant role. Of late, inter-government relationship was adversely affected due to various reasons, including, firstly, imbalances of vertical and horizontal relationships, secondly, provincial and local governments' fiscal dependency on federal government and thirdly, the power-seeking attitude of political masters and the bureaucracy. At the end, an applicable mechanism of service delivery and governance integrity are recommended for effective federalization.

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## 1. Introduction

'Federalism is an institutional arrangement in which (a) public authority is divided between state governments and a central/federal government, (b) each level of government has some issues on which it makes final decisions, and (c) a high federal court adjudicates disputes concerning federalism' (Kelemen 2003: 185). Garan, (1929: 230) illustrates that "federalism is a form of government in which sovereignty or political power is divided between the central and local governments, so that each of them within its own sphere is independent of the other." Paleker (2006: 309) further expands the definition by characterising federalism as a political system that creates in a country "two broad levels of government with assigned powers and functions originating from a variety of factors and political bargains, and displaying a tendency to persist through active response to the challenges of changing environment by a process of adaptation through creative modes of institutional as well as functional relationship." Thus, federalism is governed mainly in democratic nations including Brazil, South Africa, Canada, the U.S., Australia, India and Argentina, which promote the right of voice and participation in political life (Shah, 2007; Burgess, 2005). This suggests federalism is a political system of governance wherein the local units experience a constitutional status and derive an inherent power to govern the state. Khan (2014) argues that federalism works under certain principles: First, it focuses on two-fold sovereignty or sharing of powers between the constituent unit(s) and the central/federal government. Second, it is based on a supreme written and rigid constitution that cannot be amended unilaterally. Third, it highlights the distribution of powers of each set of government that enjoys constitutionally-delegated powers in the spheres of legislation and execution under the constitution. Finally, it allocates genuine autonomy under the constitution, which ensures allocation of revenue resources between the two levels of governments and also some areas of genuine autonomy for each other.

The essence of federalism in Nepal is deliberated as the right model of governance to address multi-ethnic, multi-lingual and multi-religious issues, which have evolved in Nepalese society as exceptional debates over the last decade and especially after the Comprehensive Peace Accord 2006 (Acharya, 2018). Despite the fact that Nepal's journey to claim itself as a "Federal Republic" has not been an easy one, the aspiration was yielded via the Constitutional Act 1948 followed by means of the Interim Constitution of Nepal 1951 and the Constitution of the Kingdom of Nepal 1959 and then amended Constitution of Nepal 1962. The

first *Jana Andolan* (People's Movement) in 1990 brought about a new avenue for the people to fulfil their hopes and aspirations (Lamsal, 2013). However, conflicts among leading political parties escalated the armed insurgency since 1996. The second *Jana Andolan* aimed to abolish the monarchy and establish a federal republic system. In 2006, a Comprehensive Peace Accord was signed by both parties and implemented to end the internal armed conflict and move the country towards the path of federalism (Acharya, 2016). In 2007, an Interim Constitution of Nepal was promulgated that envisaged restructuring the country progressively for the resolution of class, ethnic, regional, and gender-related issues. Likewise, the Interim Constitution committed to a competitive multiparty democratic system, people's liberty, fundamental rights, adult franchise, periodic election, the provision of independent judiciary and the rule of law (GoN, 2007). In 2015, the federal republic of Nepal promulgated the Constitution, formally ending the political transition and logically concluding the peace process that institutionalized the republican system, federalism and secularism in the country.

Despite these actions to institutionalize the federalism process, numerous human right activists, *Madhesh*-based political parties and ethnic activists were dissatisfied by some provisions of the constitution, and they frequently opposed the new constitution and recurrently challenged its clauses and implementation process. Against this backdrop, the paper attempts to discuss the spirit of the new Constitution of Nepal, comprehend its core focus and explore what attributes or characteristics of federalism addresses the dissatisfaction related to the state restructuring, effective power sharing mechanism, ensuring fundamental rights to the citizen and intergovernmental relationship.

## **2. Deconstructing Federalism: Principles, Practices, And Consequences**

The term "federal" originates from the word Latin *foedus*," which means covenant, commitment and cooperation of the different levels of government. Broadly, it is a concept of a division of powers and responsibilities between national and sub-national governments for unifying solutions to the problems related to multi-lingual and multi-ethnic diversity and marginalization, which persist under exclusion (Chen, 1999). Federalism is the mode of political association that unites separate polities within a more comprehensive political system in such a way that it maintains political integrity through negotiation; in this way, all members can share the power in making and executing decisions (Elazar, 1995). Thus, federalism deliberates about the division of powers, so that

all levels of government can coordinate, collaborate and function independently. This instrumental process supports to bring unity in diversity by harmonizing opposing forces of centripetal and centrifugal entities. Federal systems can be known by a variety of names, including “states” (Australia, Malaysia, USA, and India), “provinces” (Argentina, Canada, South Africa), “regions” (Belgium, Italy), “cantons” (Switzerland), “autonomous communities” (Spain) or “Länder” (Austria, Germany)(Bulmer, 2017). These differences in terminology do not necessarily correspond to any particular formal models of federalism or to the substantive distribution of powers. However, federalism is a system of national and local governments, combined under a common sovereignty, with both the national as well as federating units having autonomous spheres assigned to them by the constitution. Finer (1961) adds that the federal idea is the plan of government of a number of contiguous territories in association, neither in separation nor in one compound.

Federalism requires power-sharing, coming together and holding together between federal institutions and those at the subnational level, such that neither level of government has absolute power (Burgess, 2005). A well-functioning federal system is by definition constitutional and pluralist, since it is based on discussion and negotiation between balanced centers of power and the recognition of minorities under a broad framework of agreed constitutional rules. According to Filippov & Shvetsova (2013: 167) “a successful federalism requires all of its benefits: well-functioning democratic institutions, judicial system, integrated national political parties, and appropriate electoral incentives that are created by democratic political competition.” There are two major theoretical conceptions of federalism that are considered in the realm of policy. The first concept regards federalism to be a uniting force or bond that results in the joining of different nationalities into a single statehood through the sharing of governmental administrative offices. The second concept regards federalism as a way of joining different nations with visible dissimilarities to form a single statehood with a much reduced objective (Amah, 2017). The most fundamental thing about federalism is a constitutional division of powers between levels of government and maintaining unity in spite of the diversity of the people, whether they be multilingual, multi-ethnic, multi-religious, and multi-cultural, that have agreed to come together. This is because federalism as a system of government emanates by means of a constitution to meet the desire of the people without necessarily losing their various identities. Other basic characteristics of a federal arrangement are fiscal autonomy, division of powers,

rule of law, democracy and demise of inequality in the population and between regions(De Figueiredo & Weingast, 2005).

In a neo-liberal structure, federalism is a constitutional mechanism, which aims to achieve institutional reforms to encompass more market-oriented public policies and distribute power between different levels of government, so that federated units can function and prosper within their roles and responsibilities(Harmes, 2007). Thus, federalism combines partial self-government with partial shared government (Elazar, 1987). Ostram (1991) illustrates that federalism is not just a form of government, but a method for solving problems, a way of life, which furnishes representational democracy under greater political participation; additionally, federalism shares province power with different levels of government, i.e. federal, province and local, in which all levels have their own institutional setups that are directly concerned with the people. Therefore, federalism is a prospect, movement and an agreement of the nation-building process. It anticipates a self-sustainable institutional mechanism of public representatives, democratic institutions, shared political understanding and an enabling environment for peoples' engagement in the service mechanism (Burgess, 2005).In this perspective, federalism creates harmonious “partnerships” between different levels of government (Shah, 2007). However, Riker (1964) argues that federalism is a game of power politics and rational choice in terms of political bargain.

In federal countries, federalism is defined through two models: dual federalism and cooperative federalism(Burgess, 2005). First, dual federalism divides sovereignty between the federal and state governments, wherein state governments exercise those powers accorded to them without interference from the federal government. Australia, Canada, India and Pakistan have adopted this model to coordinate the lower levels of government (Galligan, 2006). Importantly, although the two levels of government rule the same land and the people, each level has at least one area of action in which it is autonomous, and there is some guarantee of autonomy of each level of government in its own sphere (Riker, 1964). In this system, the national government is at the apex, and the local governments are directed either through province governments or more directly by the federal government. Local governments do not have any constitutional status;they are simply extensions of provincial governments and derive their authority from provincial governments. In this system, provinces enjoy significant autonomy from the federal government. On the other hand,cooperative federalism a concept in which federation, provinces,

and local governments work cooperatively and collectively to solve common problems (Burgess, 2005). Both national and sub-national governments each have primary responsibility for some policy areas, and they have exclusive and concurrent powers, which are areas of policy that are the own, and shared responsibility of federal, state, and local governments. In the German and South African models, the federal government promulgates policies and laws, and the province and local governments implement them as implementing actors (Shah, 2012). In cooperative federalism, all orders of government enjoy legal autonomy. They coordinate with each other both horizontally (Sharma, 2015). Under the cooperative federalism, both levels of government coordinate their actions to solve the problems, expansion the both government's power in concurrent policy areas, engage all levels of government in fiscal functions as equal partners (Galligan et al., 1991; Painter, 1996).

For some cases, society is classified by multilingual, multi-ethnic, multi-religious and multi-cultural dimensions that fall under identity federalism, which addresses the demands for regional autonomy and resolves ethnic tensions. For example, Canada, Switzerland many African countries have been adopting identity federalism (Erk, 2003). On the other hand, efficiency federalism occurs when a culturally homogeneous but geographically large nation wishes to improve democratic representation by decentralizing power and giving greater control over resources and policies (e.g. Germany, Argentina). The major benefits of this system is providing a framework for the recognition of ethnic, religious, linguistic or other cultural communities (Anderson, 2015). Thus, federalism helps to resolve identity- and efficiency-based issues that may be raised during the restructuring of the state. It enables substantial powers of central level to be exercised at the provincial or local level, in order to give people greater opportunities to exercise democratic control and tailor policies to their own needs.

Federalism supports the government's independence under the constitution and helps to cater different governments to design, develop and administer their domains of finance, development activities and enforcement of law with various conditions (Breen, 2018). In such ways, federalism has allowed a balanced approach of government for power-sharing between vertical and horizontal divisions of public power and responsibility. Shah (2006) articulates that federalism allows for the "coming together" or "holding together" of administrative and geographic units so that they may benefit from nations' greatness or smallness. Moreover, it is a balanced, constitutionally-provided

approach between “self-rule” and “shared rule.” The best example remains the United States that the provinces under constitution establishes federalism as the sharing of powers between the federal government and the individual provincial governments whereby federalism supports to seek out solution to functional problems (Elazar, 1987). Watts (2002) further explained that federalism is a desire of smaller self-governing political units, like local governments, to be more responsive to the individual citizens’ service needs, aspirations to be recognized and accepted and their freedom to express their identity, particularly their linguistic diversity, cultural ties, religious practices, historic traditions and social practices, are realized.

In federal nations, legal instruments enable greater degree of unity among the people and diversity among geographical regions that lead many people to have opportunity and participate in public life (Moreno & Colino, 2010). In Canada, the federal government has jurisdiction over the entire country and each provincial government has jurisdiction over particular portions of the population. Both levels of government derive their authority from the written constitution (Shah, 2006). Currently, the federal government centralized and brought to the national agenda major policy areas that had previously been under the control of states and localities. Some of these areas are education, infrastructure, tax collection and emergency management (Posner, 2007). In the Philippines, the federal constitution emphasizes the autonomy of local government units and recognizes the importance of information and communication technology in nation-building. It also provides social and economic rights, which entitle every citizen to food, healthcare, decent housing and livelihood (Acharya, 2018).

Unlike Canada and the United States, where federalism was realized for uniting states that had once been autonomous political entities, in Brazil, federalism was a technique for dividing what had always been a unitary system of government. In the past, Brazil was divided into a number of provinces, which were further subdivided into municipalities, with each province and municipality electing its own council. But these councils had no legislative, taxing or administrative powers (Rosenn, 2005). However, a new constitution in 1988 granted a broad array of exclusive powers to the federal government. These included the powers to maintain international relations; provide for defense; regulate currency, exchange rates and mineral prospecting; and operate or regulate radio and television broadcasting, the post office and the federal police (Souza, 2005). However, some joint powers were provisioned in 12 areas of the federal

government, states, federal district and municipalities, and some concurrent legislative authority in 16 areas in the federal government, states, and the federal district (Tillin & Pereira, 2017). In the area of concurrent authority, the federal government's power is limited and assures political, legislative, administrative and financial autonomy to local governments and grants them the power to legislate on subjects of local interest and to supplement federal and state legislation (Nobre, 1990). Nevertheless, the service delivery system in Brazil has a centralized approach. According to sub-clause of Article 22 of its constitution, the federal government of Brazil has the exclusive power to legislate on the rules carried out by government agencies, public enterprises and corporations as well as its federal bodies, municipalities, districts and states (Rosenn, 2005).

In contrast, the German social welfare system is officially decentralized (Cox, 2001). In South Africa, there are three levels of government (national, provincial and local government), which are distinctive, interdependent and interrelated. Of these levels of government, two levels are "relatively autonomous," which means that the national and state governments each have a certain range of power (Heywood, 2013). The proponents of federalism argued that in South Africa, the central government was far too large and far too remote to provide a forum for genuine self-government very outsourcing is itself outsourced. Today, there are thousands of sites and locations where tenders are issued and awarded and where contracts are managed for the performance of all manner of services and functions. Example shows only in the Eastern Cape Province alone, there are over 4,000 sites for the procurement of certain goods and services (Ndzendze, 2018).

Nevertheless, Dinch (2008) argues that the unitary system, a devil we knew, has been replaced by federalism, a devil we do not know. In developing countries like India, Iraq and Nigeria, federalism has either failed to close developmental gaps and ethno-communal tensions among various states or, more worryingly, in some cases, reinforced and reified them over the decades (Anderson, 2015). In Yugoslavia, a federal setup eventually collapsed into a genocidal civil war (Denich, 1994). Moreover, a federal system could further strengthen the power of political dynasties and warlords, which control the Philippines' peripheries. According to academic studies, around 178 so-called politicians related by kinship control 73 out of 81 provinces across the country. They also control up to 70 percent of the legislature, and thus, they seem likely to remove any proposed restrictions on the proliferation of political dynasties (Heydarian, 2018). In Pakistan, federalism deviates from its basic principles because of its

unnecessary focus on ethno-nationalism, conflicts and separatism that results in smaller identity groups feeling that they are deprived and denied equal opportunities in the state structure(Khan, 2014).Alternatively, federalism enables a logical distribution of shared power among the different levels of governments in Australia; here, federalism concludes complex and overlapping divisions of responsibilities, increases cooperation and reduces duplication of effort. However, critical issues relating to the dynamics of intergovernmental relations and the impact of federalism on sectoral development are yet to be analysed (Dredge & Jenkins, 2003). Painter (1996) adds that federalism can have both positive and negative effects on three main themes: countervailing power, overlapping jurisdictions and multiple accountabilities.

In the USA, the **Social Security Act** provisioned federal subsidies for state-administered programs for the elderly; people with handicaps; dependent mothers; and children; the Act gave state and local officials wide discretion over eligibility and benefit levels(George, 2018).In addition, there are some other advantages of US federal system. Firstly, federalism divides power between the national government and state governments that serve as a check and balance on each other. Secondly, power is diffused, where power is shared with state governments, and where the federal government is separated into three branches. Thirdly, citizen participation is increased(O'Connor, 2001). Fourthly, federalism encourages innovation in law and policy formulation. By allowing power and authorities to all state governments, different sets of laws and policies on social protection, education, health and service facilities were promulgated (Taft, 1977). However, the federal government occupies a greater share of political power with respect to individual provinces/states. This type of power structure supports a hierarchical system.

In India, the federal system faces many issues and challenges. First, regionalism is considered one of the significant challenges to federalism in India. For example, people from far northeast sometimes feel themselves at a formidable distance from New Delhi and people in the southern part of the country with bigger states feel neglected having been within larger states (Bhattacharyya, 2005).Second, division of powers, which contain both the central and state governments, are specifically enumerated in the union and state lists, respectively, while powers mentioned in the concurrent list are enjoyed by the two sets of governments. Third, absence of fiscal federalism creating a symmetrical sharing of revenue and resource crunch at the periphery results in uneven development across the country. Fourth, there is an unequal representation of states in the *Rajya Sabha* (Singh & Verney, 2003). Finally, centralized planning system through *Niti*

Aayog appointed by the center instructs states to fill in the blank spaces in the provided text meant for planning (Rao & Singh, 2006).

Despite embarrassments of federalism, Ostrom (1991) argues that federalism reaches beyond a particular institutional design and consists of an interactive set of actors and institutions that articulate decentralization in decision making and accommodation of ethnic or national diversity. A federal form of government not only promotes decentralized decision-making and, therefore, is conducive of greater freedom of choice, diversity of preferences in public services, political participation, innovation, and accountability, but also enables the regime to address historic and contemporary inequalities, discrimination and marginalization in diverse, multicultural and multi-ethnic nations (Jha, 2017).

In Nepal's case, the country has moved from a unitary structure to a more devolved federal structure. In simplistic terms, an integrated federal system is designed to integrate policies of different levels of government characteristically through a sharing of powers, shared financial resources and cooperation among the various levels of government (Brand, 2006). The constitution has elaborated three elements of federalism: administrative, political and fiscal federalism. To bolster administrative federalism, a number of initiatives, such as organization and management survey and the Civil Servant Adjustment Regulation 2019, have been forwarded that aim to adjust over 86,000 civil servants in three different tiers of government under the new federal set up. Political federalism was reinforced to replace the unitary system with the federal structure. Similarly, the country was restructured into seven provinces, 77 districts and 753 local governments, consisting of Rural Municipalities and Urban Municipalities (Acharya, 2018). Next, fiscal federalism defines the division of governmental functions related to fiscal rights power at different levels of government. These practices indicate that Nepalese federalism is a hybrid federalism, in which power, as well as fiscal resources, have been divided among the three level of governments. This study examines the key considerations of the Constitution to institutionalize federalism and the challenges it is currently facing.

### **3. Methodology**

Both primary and secondary sources were used as data sources for this study. The secondary sources are primarily the Constitution of 2015, the Local Government Operation Act 2017, the Intergovernmental Fiscal Transfer Act 2017 and several related Acts and regulations.

As for the primary source, 72 key informant interviews were conducted purposively with different people of the federal, provincial and local governments for triangulation of the results. The fieldwork was done from February – September, 2018 in which interview was conducted with 20 Mayor/Chair, 15 Deputy Mayor/Vice Chair, 10 Chief Administrative Officer and five Dalit women members from local government units. Additionally, two chief ministers (of Provinces 5 and 6), two ministers of Internal Affairs and Law (of Provinces 1 and 3) and two Principal Secretaries (of Provinces 4 and 6) from provincial governments were selected. Next, two joint secretaries, two undersecretaries, two representatives of local government associations, two representatives from development partners and four representatives from parliament-led political parties (Communist Party of Nepal, Nepali Congress, Federal Socialist Forum Nepal, and Rastriya Janata Party Nepal) were included. During the data collection period, the author physically presented themselves and observed government's capacity in service delivery, which was provisioned by the 2015 Constitution.

#### **4. Constitutional Assignments To Deconstruct Federalism**

This paper explores the conceptual framework for scrutinizing federalism in Nepal. This section highlights the major provisions of the Constitution within the broader framework of the pluralist theory, which emphasized interdependency, diversity and the dynamic interaction of relatively independent layers of government. To streamline the focus of the paper, the following analytical framework was implemented.

##### **State restructuring**

Post-Comprehensive Peace Agreement 2006, state restructuring became the central political agenda of all political parties, as it was a basic entry point of federalism. The interim Constitution of Nepal 2007 introduced the concept of “federalism” for the first time and enforced a state restructuring agenda formally in Nepali discourse. The Constitution of Nepal (2015) has further ensured that Nepal is a multi-ethnic, multi-lingual, multi-religious State supported by unanimous state restructuring. In this process, people greatly expected that the democratic government will adapt to a well-known theory so that a greater degree of pluralism, alliance and citizen representativeness could be ensured. However, difficult geographical terrain, special interests of politicians for their election constituencies and feelings of identity in the people have confined

development opportunities. Citizens also faced acute problems of governance and amplified corruption in the bureaucratic and political circles.

To address everlasting marginalization, federalism was an inevitable means of decentralizing political power; it also embraced a powerful agenda of inclusion, encompassing other institutional reforms, increased citizen engagement in the political decision making and confirmed ethnic proportional representation and cultural diversity. During the state restructuring process, three alternative ideas were recommended to the Local Level Restructuring Commission. These were ethno-regional and ethnic autonomous regions, regional capability and regional politico-administrative divisions. People's strong belief remained that the state restructuring process would conclude the peace-building process, end troublesome exclusion and scale up economic prosperity on the one hand. On the other hand, it could enforce to distribute unlimited central authority at the sub-national level.

In 2015, a new constitution was promulgated with consensus of more than 90 percent of the people's representatives; the Constitution imparted to restructure the state, machineries and local government units in order to devolve power. The Constitution directed to end the centralized and unitary system and institute an independent, sovereign, secular, inclusive, democratic and socialism-oriented federal democratic republican state. To achieve these outcomes, the government of Nepal restructured the state into seven provinces and more than 3,000 local bodies into 753 local government units, including Rural and Urban municipalities. As stated, local governments were restructured on the basis of few criteria, such as size of population, extent of geography, principle of subsidiarity, economies of scale, inclusivity and representativeness, while no single criteria was used for provincial restructuring. In line with the Constitution, the state, its functions and its functionaries were restructured and devolved to the provincial and local levels as exclusive and concurrent forms. Consequently, the newly-constituted provinces and local governments were enriched by several exclusive and concurrent powers. Although the current model of restructuring process has defined cooperative federalism, the wider participation of political actors, technocratic engagement and the peoples' referendum were absent in the state restructuring process. Despite the association of the stakeholders during the restructuring process, the subsequent governments have been claiming on cooperation, coexistence and coordination of state restructuring process. In addition, the government brought discretion that all levels of government are equally responsible for protecting the nation's

independence, sovereignty, territorial integrity, autonomy, national interests and inclusive representation and identity.

However, many *Madhesh*-based political parties, *Dalit* and *Tharu* communities and other ethnic minorities were unhappy with the federalization process, the Constitution and seven-province model. These groups argued that the province restructuring process in Nepal was not based on any rational logic. They argued that the provincial restructuring process was based on rulers' interest and their limited knowledge, which made the provinces nothing than political pocket areas. They believed that this process could not bring any tangible achievements, other than merely changing government in each season. The CPN-Maoist had highlighted ethnicity-based federalism, as they believed that the caste system was a proponent for unequal power hierarchies over the societies. Later, *Madhesh*-based political parties and *Dalit*, *Tharu*, and other ethnic activists also claimed to demarcate the provinces according to their interests and boundaries drawn to make them dominant minorities. For example, *Madhesh*-based political parties demanded a single province of *Madhesh*, including 20 districts, which adjoin Indian boundaries and could ensure the right of the *Madheshi* electoral constituency based on population only, amendment to citizenship laws, and proportional representation in every provincial institutions.

Despite the differences of *Madhesh*-based political parties, the local level elections were held in September 2015, and a large section of population, especially youth, participated for the first time to establish the cooperative, collaborative, and coordinative federalism and endow it. This election gave power and resources to the local levels and gave people a strong voice. Through the people's votes, 36,639 people's representatives, including Head, Deputy Head, Ward Chairperson and council members, were elected for 753 local government units to practice legislative, judiciary and executive functions. Similarly, provincial and federal parliamentary elections were also completed to meet the constitutional deadline. At the beginning of 2018, both federal and provincial governments were formed, and it ended the prolonged, and often painful, political transition. However, both politics and bureaucracy were fluid and lacked the capability to institutionalize federalism and maintain cooperation, coexistence and coordination at the lower levels.

## **Power sharing**

The federalization process enforces both vertical and horizontal power sharing between the national and subnational governments including legislative, executive,

and judiciary, which are enriched by the constitution. Federalization is an instrument to come up against market failures related to information asymmetries and exclusively centralized decision-making. In Nepal, federalism works to solve the issues related to hardcore poverty, severe exclusion, bad governance and underdevelopment. Globally, federalism has been accredited not only as an effective mechanism to accommodate diversity or overcome centralization, but also as a powerful tool to strengthen democracy and public accountability for economic and social development. The constitution defines the structure of the state and the distribution of power among three different levels of the government. This provision is geared to achieve the stability of political order, social cohesion, and economic growth, while aiming to massively reinforce “economic” and “political” aspects of a self-governing system. The current exercise of power-sharing ensured that not only do governments remain more accountable to citizens, or allocated resources as per real needs of the people, but also that the multi-level governance actors were able to participate politically in legislative, executive and judiciary functions.

The Constitution further guaranteed that power relations among the three levels of government are not hierarchically related; rather, their relationships have been based on the principles of co-existence, cooperation, and coordination. Each type of government enjoyed certain exclusive powers that can be exercised independently in addition to concurrent powers of the federal, provinces, and municipalities. Such a power-sharing mechanism, it was argued, created an interdependency mechanism of cooperation, competition, and shifting power from the center to the local level. The federal, provincial and local governments were able to coordinate to enact laws, create annual plans and budgets, formulate policies and strategies and implemented them in regard to the subjects related to fiscal power. However, the federal government frequently instructed local governments by forwarding model laws in which the Chief Administrative Officers were guided to approve from the council without any changes; federal bureaucrats recommended an organogram model, revamping the district level offices through different names by neglecting and by-passing LGs, transferring inadequate revenue and budget to LGs in comparison to their functional mandates and people’s expectations and interfering with the Integrated Property Tax system through fiscal acts. These types of actions created space for recentralization of power, as federal bureaucrats were not ready to devolve their power and functions to the local governments and still remained dominant in the Nepali polity.

Despite the practices, the Constitution has clearly indicated that each level of government has responsibility to protect Nepal's sovereignty, autonomy, territorial integrity and national interests and to uphold the rule of law. The separation of powers, plurality and inclusive representation are major archetype of the Constitution. Additionally, powers relating any subject that is not mentioned in the list of powers of the federation, province or the local level shall rest with the federation as residual powers, the Constitution proclaims. Further, foreign policy, national security, corruption control, regulation of I/NGOs, the effective operation of National Investigation Department, the Department of Revenue Investigation and the Department of Money Laundering Investigation are also residual powers of the federal government. To institutionalize federalism, the federation has the key responsibility of preparing basic laws and policies included in the list of concurrent/shared power, which were also be implemented in both the provinces and the local level. However, distributing power equally in every society is one of the key challenges in the federalization process. The basic reason is that current federalization practices have placed the federal government at the center, while provincial and local governments are in the periphery, as the federal government controls more public revenue and expenditure and local and provincial governments are less authorized to levy the taxes. This type of a vertical power-sharing structure creates ambiguities when implementing the concurrent power of the Constitution.

### **Scope of fundamental rights and directive principles**

The fundamental rights and directive principles are essential to maintaining socio-economic equilibrium in society. The constitutional purpose of rights and principles was to promote and achieve public welfare via reciprocal duties from both the state and the citizens. These notions have empowered citizens by guaranteeing, among others, the right to live with self-respect and dignity. In Nepal, the government has for the first time ensured 31 fundamental rights to the people under the Constitution. Fundamental human rights, such as right to freedom, right to equality, right to communication, right to justice, right against untouchability and discrimination, right to information, right to clean environment, right to education, right to health, food and shelter and social security are the most prominent fundamental rights. These rights enforced the citizens to be faithful to their nation, trustworthy to their nationality, put their belief on sovereignty of state and integrity of the country, and abide by the law and constitution of the country.

Apart from this, the Constitution has addressed many vital issues to a considerable extent. First, the Constitution has expressed the sincere pledge to create an egalitarian society on the basis of the principles of proportional inclusion and participation. Second, the creation of the federation, provinces and local levels based on plurality, inclusive representation and identity. Third, it guarantees that *Dalits* shall have the rights to participate in all agencies of the state based on the principle of proportional inclusion. Fourth, it assures the people belonging to various marginalized classes and communities by enshrining the right to employment in state structure on the basis of the principle of inclusion. Fifth, under directive principles of the state, it commits to work to establish a welfare state internalizing the principles of inclusion in the governance system on the basis of local autonomy and decentralization. Sixth, an instruction was made that the council ministers of the federal parliament shall be formed on the basis of the principle of inclusion. Last but not the least, the Constitution provides for fulfilling position of all federal government services through competitive examinations based on the principle of open and proportional inclusion according to federal law. On top of all this, the provision of a National Inclusion Commission contained in Article 259 is indicative of the state's commitment to introduce inclusion in every thread and fabric of governance of the state.

Notwithstanding all this, the Constitution could not acquire unanimous acceptability. The *Madheshi*, ethnic, *Tharu* and *Dalit* communities, accounting for one-third of the country's population, are demanding political and economic representation in proportion to their population. However, little has been done to address their concerns, including the issue of proportional representation, inclusion, citizenship and demarcation of the state territories. They claimed that four million *Madhes* were without citizenship, although 26,15,615 citizenship certificates have been distributed after 2007. Similarly, they called for redrawing of the current seven provincial structure by including Jhapa, Morang and Sunsari in the east and Kailali and Kanchanpur in the west inside the *Madhesh* province. Also, there is the issue of using *Hindi* languages as the official and working language of the provinces. Nevertheless, federal and provincial governments have taken significant steps to conclude these issues.

In the face of the Constitution, it seems to be overburdened with a comprehensive catalogue of fundamental rights. Earlier the Interim Constitution 2007 provided merely 21 fundamental rights, while the present Constitution has improved the list by guaranteeing ten more. Thus, the new Constitution has been liberal

enough to incorporate and assimilate most of the major social, political, economic and cultural rights of the people, as provided for in the international human rights law, including the international covenant on civil and political rights and the international covenant on economic, social and cultural rights.

### **Intergovernmental relation**

Intergovernmental relation is an indispensable process of federalism, which builds connections and interactions in power relationships and service functions among governmental units of all types and levels. Intergovernmental relations include a broad range of intergovernmental systems, such as institutional and fiscal frameworks; capacity development of government actors; and support of the frontlines for service delivery. The Interim Constitution 2007 began with state restructuring and created the space to establish different levels of government (federal, province and local) with a high degree of autonomy within the federalism framework. To promote the interrelations among the three tiers, Articles 231 to 236 of the Constitution focuses on the principles of cooperation, coexistence and coordination, which emphasized fiscal and administrative processes by which these governments share revenues through an inter-governmental fiscal transfer mechanism.

According to the Constitution, six major notions are highlighted to augment intergovernmental relations: legislative interrelations between federation and provinces; inter-province council; coordination among federation, provinces and local levels; commencement of inter-province trade; formal and informal processes of resource mobilization and institutional arrangements; promotion of strategic partnerships; and enlargement of bilateral and multilateral cooperation within and among the three level of governments. Article 231 highlights that the federation shall support the provinces to promulgate legislations to build intergovernmental relations between the federation and provinces. Also, the federation should assist the province(s) that requests for support in preparing the necessary laws to expedite the exclusive rights illustrated in the Schedule 6. Similarly, Article 232 illustrates that the intergovernmental relation among the federation, provinces, and local levels shall be based on the principles of cooperation, coexistence and coordination.

However, the federation shall direct to provinces on matters of national importance and the provinces should follow such directions. If any act that seriously undermines the sovereignty, territorial integrity, nationality or independence of Nepal is carried out in any province, the federation may warn

the concerned province and may suspend or dissolve the provincial government for a period not exceeding six months. Concurrently, the federation can direct or assist local governments directly or through the provincial government under the Constitution and the federal law. It is the duty of local governments to abide by such directives. Also, Article 233 highlights the relations between provinces; it states that one province shall provide capability to another province in the execution of legal provisions or judicial and administrative decisions or orders. Equally, a province shall provide equal security, treatment and facility to residents of another province if they migrate to the former province. During this process, the province can exchange information and consult with the second province on matters of common concerns and interests, coordinate with each other on their activities and legislations and extend mutual assistance.

Apart from these interrelationship apparatus, the Constitution has provisioned a number of institutional mechanisms to accelerate intergovernmental relations. First, the inter-province council mechanism has been provisioned under the chair-personship of the Prime Minister to settle political disputes arising between the federation and a province and between provinces. Second, the inter-province trade mechanism has been envisioned to avoid any kind of obstruction to the transport of goods or extension of services by a province or local level to an other province or local level. Third, the Inter-Governmental Fiscal Management Act 2017 has been promulgated to make legal provisions in relation to revenue power, revenue allocation, grant, borrowing, budget management, public expenditure and financial discipline of the federation, the provinces and the local levels. Finally, it corrects the fiscal imbalances and reduces the disparities in local service delivery among the subnational territories. Similarly, the Government of Nepal has approved the unbundling list of the exclusive and concurrent powers of the federation, provinces, and local levels under Schedule-5, Schedule- 6, Schedule-7, Schedule-8, and Schedule-9.

However, numerous differences emerged with regards to inter-government relations. First, the vertical and horizontal relationships among governments remained variant. The Constitution provisions that the federation may direct tasks to a province and the province may direct to local governments. However, local governments are always reliant on the federal government due to various reasons. First, the power and functions that were distributed arbitrarily to the local governments do not match their capabilities. Second, there were imbalances between the functional and budgetary authority at the province and local levels. Thirdly, provinces and local governments are still highly

fiscally dependent on the federal government. And finally, bureaucracy, which is known as the engine of federalism, has been highly corrupt and dominant at the local levels in the past several years. These dynamics adversely affected the quality of autonomy and institutionalization of inter-government relations. However, this existing system is an outcome of cooperative measures, through which the powers and responsibilities of all levels of government overlapped or interlocked. Thus, effective communication and mutual trust are indispensable in developing mechanisms and forums for formal coordination.

## 5. Discussions

### Service delivery at the doorstep of people

In developing countries, state services are delivered by closed institutions as these institutions are commonly considered conventional (Faguet, Fox, & Poeschl, 2014). In this system, government is on the top, and bureaucrats and politicians are answerable for the performance of service mechanism, which favors the political and bureaucratic elites to maintain the hierarchic control whose power came from “underneath” (Mccourt, 2012). In the global context, many antitheses have come out to criticize the conventional top-down approach. Major reasons were inability to deliver goods and services to doorstep of the people, less competitive in achieving economic growth, over-bureaucracy and a rent seeking attitude (Paudel, 2011). To overcome the situation, federalism is a carefully deliberated, contingent instrument that compounds mode of governments (federal, provincial, and local governments) in a single political system. Its distinctive feature is exemplified by the United States of America under the Constitution of 1787, which maintained the relationships and divide the powers between two levels of government in equal status (Beer, 1978). In Nepal, public service delivery was substandard in the past as bureaucracy believed in hierarchy, and politicians were only accessible to elite power-holders that contributed to cripple down the public services and *red-tapism* rampant (Acharya, 2014). Since 2007, federalism has been entrusted on the grounds that it allows people to choose more democratic governments to localized issues, work as more autonomous entities, and maintains checks and balances of each governments to institute better governance. As a result, public trust is amplified to entrusted federalism in establishing political stability, reinforce economic factors to scale up economic growth, create enabling environments to mobilize internal resources and improve delivery of services.

In 2007, Nepal formulated the Interim Constitution that abolished the monarchical system and prescribed federal democratic system, which was further instituted by the 2015 Constitution under the poly-centric governance approach. This Constitution not only amplifies the space to restructure the federal, provincial, and local governments and distributes exclusive and concurrent powers and functions, but also introduces measures for greater inclusion of women and *Dalits* among marginalized communities within the state mechanism (Acharya, 2018). The federal government can use 35 exclusive powers and functions related to national importance, while provincial governments can exercise 21 exclusive powers autonomously related to provincial concerns. Following constitutional provisions, 21 exclusive powers are allocated for the local level (GoN, 2015). This process of due course has been accepted to institutionalize federalism in Nepal. Further, the Local Government Operation Act 2074 (B.S.) delegates power and functions to ward units. These wards are regarded as the very closest units of governance to the people, and they ensure that the citizens have access to services. This way, citizens could promote local accountability and ensure the delivery of public services.

Despite such constitutional provisions, capacity, knowledge, and law enforcement mechanism at all levels of government are very weak. The federal government is still unable to resolve employee adjustment at the all levels of the government. This prolonged process between the central government and local government staff has created severe constraints. As a result, local governments recruit employees who are passive service providers and unsuccessful in facilitating democratic and inclusive development. At the province level, the constraints were related to institutional mechanisms, law instruments and technical and financial resources. There was a lack of a supportive political environment. Next, the status of local governments' autonomy is ambiguous and difficult to distinguish from the authority of the federal and provincial governments within whose powers and functions they fall. With such a reality, Nepal still faces difficulty in bringing basic services to the people's door step. This poor state of service delivery is worsened by leaders of the majority-based political parties capturing power mechanism, weak policy formulation, a deficiency of transparency and accountability on financing and regulation and poor match between financial allocation and local preferences. Additionally, the service centers of the local governments are remotely located, which forces ordinary citizens to face hassles to access core services. This indicates that the bigger the size of the local government is, the smaller the possibility of accessing services easily at the local level.

## **Integrity of governance**

The Constitution has made a commitment to Nepal's multi-ethnic, multilingual, multicultural and diverse geographical specificities to end discriminations relating to caste, including all forms of racial untouchability, class, ethnicity, region, language, religion and gender. It also expresses the determination to create an egalitarian society on the basis of the principles of proportional inclusion and participation and social justice. To achieve this federal objective, the Constitution sets out some key principles. Firstly, the State powers of Nepal shall be used by the three main levels of structure in accordance with the Constitution. Secondly, the power of each level of the structure has been set out in the given schedules and shall be exercised in accordance with the Constitution and the federal law. Thirdly, the Constitution also sets out concurrent/shared power of the federation and the province as well as the federation, province and the local level. Fourth, the powers relating to any subject that are not mentioned in the list of powers of the federation, province or the local level entity, or in the concurrent/shared powers of federation and the province or not stated in the Constitution shall rest with the federation as residual powers. Fifth, the Constitution also lays down norms for use of fiscal power and distribution of sources of revenue. Finally, the federation may make basic laws regarding necessary policies and criteria related to the subjects included in the list of concurrent/shared power and in other areas of fiscal authority, which may also be implemented in provinces and local level.

The 2015 Constitution guarantees that the people of Nepal have the sovereign power and right to autonomy and self-rule by maintaining Nepal's independence, sovereignty, geographical integrity, national unity, freedom and dignity. The state restructuring process was an immediate result of the promulgation of the Constitution that established not only tiers of the government, but also created new governing structures by adopting a competitive multiparty system of governance with constitutional supremacy, periodic elections, human rights, the rule of law, separation of powers as well as check and balance and an independent judiciary. The Constitution confirms that Nepal continues to be a parliamentary system at the federal and provincial levels. The form of governance shall be a multi-party, competitive, federal democratic republican parliamentary system based on plurality. The prime minister is elected by the legislative-parliament based on a majority and is the head of the government, while the president is the head of state. In terms of the judiciary, the Supreme Court specializes

on constitutional issues by creating provision for a constitutional bench. Apart from Supreme Court, there is a High Court in each province and District Courts.

In terms of the electoral system, a mixed system has been adopted at the federal level; it is a bi-cameral parliamentary form of government with the president elected through the legislative-parliament and the National Assembly as well as the provincial legislative body. The House of Representatives in the federal parliament consists of 275 members, in which 165 members are elected from single-seat constituencies and 110 from a proportional party list. Similarly, the National Assembly consists of 59 members. In the provinces, the legislature is unicameral. The Chief Minister of the state is elected by the provincial legislature whereas the head of the province is appointed by the President.

In order to institutionalize governance, the Constitution creates specific independent constitutional commissions (such as the National Human Rights Commission, Election Commission, Women Commission, Dalit Commission, Janajati Commission, Madhesi Commission, Tharu Commission and Muslim Commission). Additionally, the Constitution states that rules of the political party should be democratic. There should be the provision, in the constitution of the political party, of the election of the office-bearers in the federal and provincial levels at least once in five years. There should be the provision of proportional participation so as to reflect Nepal's diversity, in the executive committees at various levels of the party. A National Natural Resources and Fiscal Commission has been created to determine extensive grounds and measures, regarding the distribution of revenue from the federal consolidated fund to the federal, provincial and local level governments according to the Constitution and law.

A significant initiative of the Constitution is women's participation in state structures, as women are guaranteed one-third of the seats in the Federal Parliament as well as the provincial assemblies. It also requires that the positions of either the President or Vice-President of the country and Speaker or Deputy Speaker be filled by a woman. At the local level, women are guaranteed 40 percent representation. The recent elections confirmed 41 percent participation of women in representative bodies that indicates substantial achievement. However, public sector management is not separate from politics—political influences and interest group preferences pervade every system, every relationship and every transaction. The Madhesh-based political parties and some ethnic or janajati groups are demanding a major amendment to the Constitution to make the federal structure more meaningful

and autonomous. The task ahead of implementing the new Constitution looks daunting: ushering the country towards a new era of economic development through political stability; ensuring inclusivity in all aspects of governance; managing identity politics; and decentralizing power and addressing the issues of transitional justice. In line with these issues, the report of the Office of the Auditor General Nepal indicates that most of the local governments have not completed the public financing audit for the last few years. Similarly, the projects, which were done by the users committees, were not publicized, along with the work progress, project cost, expenditure, project completion status and involved members. Recently, the Office of the Auditor General has completed the public financing audit of 43 districts in which the local governments of 28 districts were found to be chaotic, and financial management looked dismal. For example, the local governments in Rupandehi district found NRs.40 million in arrears followed by NRs.155.5 million in Parsha district and NRs.4.5 million in Rolpa district (GoN, 2017). The main reasons for the large volume of arrear include delay in the settlement of the advance, release of the money without plan and uncontrolled expenditure in administrative and regulative works.

Ethiopia is exemplary of how the introduction of ethnic federalism allowed for better recognition of linguistic and cultural rights; nevertheless it failed to bring political stability and peace rather it resulted in increased local ethnic conflicts (Bélair, 2016). However, the federalism process deliberately devotes to devolve more power to the provinces and local levels with responsibility and accountability, which gives more voice, participation and initiatives to the people. It is not a division of the country on administrative lines and nor is it a division of resources; federalism is people-centric and focuses on democratic values and functions.

## **6. Conclusions**

Federalism is not merely a shared rule, but it is also a self-rule in which governing bodies are predominantly popularly-elected and are accountable to the people. They exercise power as long as they are able to command support of the people who elect them. This paper has attempted to analyze the key attributes and rationale behind the federalism aspects of the Constitution by deconstructing the Constitution through the theoretical attributes of federalism, like state restructuring, power sharing, scope of fundamental rights, directive principles and intergovernmental relation. From the analysis, it is evidently clear that the Constitution has embraced the idea of an integrated cooperative

form of federalism without explicitly addressing some of the core attributes of federalism. The Constitution has not adequately addressed the issue of political identity and disenfranchised a section of the Nepali society while challenging the peace and security of the country. This was evidenced, at least in some part, during the promulgation of the Constitution, when violent protests led to the loss of lives and continued disruptions that negatively impacted the economic growth of the country. However, the role of each of the spheres of governments is very clearly spelled out, and the role of sub-national governments is very limited, especially in terms of determining policies, program and finances. This is because decision-making powers solely rest with the federal government, and sub-national governments' roles are restricted to just implementing the decisions of the federal government. This is in line with the spirit of an integrated cooperative system of government, which in many ways exhibits some of the characteristics of a unitary system.

Therefore, one can conclude that the Constitution of Nepal recognizes the role of sub-national governments to mainly manage and implement the national program within its territorial jurisdiction. It is clear beyond any doubt that the federal government is the key decision-maker, especially with regard to policies, program and finances that have a very strong influence over the local governments' affairs. However, challenges on expenditure management, ways to integrate the national differences and regionalism, unnecessarily incremental bilateral relationship with development partners, contradiction on duties and work responsibilities among the governments, excessive enforcement of power and authorities to the people, and mis-governance and fiduciary risk are increasing.

Despite these realities, federalism is not a panacea to all ills. The success of federalism will depend much on the present and successive political leadership. It is expected that entry into the federal structure will open chances for new leadership. There are four critical ways in which the federal concept can be operated. First of all, the federal idea fosters diversity within unity. It can solve the great social, economic and political problems profoundly. Secondly, the federal idea permits and encourages creativity and innovation in meeting the needs of the people. By providing several sources of political strength and creativity, a federal system invites intensive leadership, at all levels, to work towards genuine solutions to the problems of a diverse and complex society. Finally, the federal idea is characterized by a balance that prevents excesses and invites the full, free play of innovation and initiative. This balance is essentially

achieved by the division of powers between the national and state governments, the separation of legislative, executive and judicial authority and the absence of monolithic national parties.

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# Constitutional Overview of the Right to Inclusion and Participation in State Structures

— Dr Bipin Adhikari<sup>1</sup>

## 1. Introduction

The 2015 Constitution provides various provisions with regards to inclusion and participation of historically-deprived and marginalized groups in the structures of the state.<sup>2</sup> This has been done in various ways. The Preamble itself contains a clear resolve “to build an egalitarian society founded on the proportional inclusive and participatory principles.” More extensively, under Article 42 (1), with regards to fundamental right to social justice, the Constitution states:

The economically, socially and culturally backward women, *Dalit*, indigenous [people], *Madhesi*, *Tharu*, Muslims, backward classes, minorities, marginalized [people], persons with disabilities, gender and sexual minorities, farmers, labourers, oppressed or citizens of backward regions and indigent *Khas Arya* shall have the right to participate in the State bodies on the basis of proportional inclusive principle. (emphasis added)

The issue of political inclusion is closely tied to the context of democratization. Dryzek (1996) states that democratization is “largely (though not solely) a matter of the progressive inclusion of various groups and categories of people in political life.”<sup>3</sup> The state is a political society belonging to all the people and communities in the country. The inclusion of all the groups into the political processes is not only important for the health of the political system per se, but also important in terms of socio-political integration in general, i.e. for the individual’s identification with the host society. However,

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<sup>2</sup> See B. Adhikari (2016), *Salient Features of the Constitution of Nepal*, Kathmandu: Nepal Consulting Lawyers Inc.

<sup>3</sup> Dryzek, J. S. (1996). Political inclusion and the dynamics of democratization. *American Political Science Review*, 90(3) (hereinafter, “Dryzek (1996)”), at p. 475.

following the democratization process, through which universal adult citizenships rights are procured, the attention turns to “how democracy might be made more substantial and effective through greater efforts to include a variety of disadvantaged categories and groups for which the formal promise of democratic equality has masked continued exclusion or oppression.”<sup>4</sup> The groups this concept of inclusion relates to may include ethnic and religious minorities, indigenous peoples, women, the elderly, the lesbian, gay, bisexual, transgender, and queer communities, youth, the employed, recent immigrants, and even future generations.<sup>5</sup> The objective of this article is to highlight the right to inclusion and participation in state structures under the Constitution of Nepal, 2015.

## 2. The Concept of Inclusion

Initially, the use of the term inclusion was generally limited to the context of people with disabilities. The Americans with Disabilities Act 1990 (ADA), for example, represented an attempt to hear the “inclusion” cry of the people with disabilities. The Act prohibits discrimination they face in several areas, including employment, transportation, public accommodations, communications and access to state and local government’ programs and services.

Both mental and physical medical conditions have been included by ADA disabilities. The ADA protects against the discrimination faced by people with disabilities in the same way the American Civil Rights Act of 1964 protects against discrimination based on race, religion, sex, national origin, and other characteristics. According to the World Bank, one billion people, or 15% of the world’s population, experience some form of disability, and disability prevalence is higher for developing countries. It also points out that one-fifth of the estimated global total, or between 110 million and 190 million people, experience significant disabilities.<sup>6</sup> During the last three decades, many legal systems around the world have tried to ensure that everybody has the same opportunities to participate in every aspect of life to the best of their abilities and desires.

Similarly, in Kenya, the Persons with Disabilities Act, 2003 establishes the National Council for Persons with Disabilities, whose function it is to formulate and develop measures and policies related to achieving equal opportunities for

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4 Dryzek (1996), at p. 475.

5 Dryzek (1996), at p. 475.

6 The World Bank, “Disability Inclusion,” available at <https://www.worldbank.org/en/topic/disability> (accessed in Jul. 21, 2020).

persons with disabilities, to ensure accurate figures of persons of disabilities in the national census, and recommend measures to prevent discrimination against such persons, among others (Article 7). Article 13, in particular, addresses the issue of reservation of employment and a quota system for persons with disabilities; it states: “The council shall endeavor to secure the reservation of five percent of all casual, emergency and contractual positions in employment in the public and private sectors for persons with disabilities.”<sup>7</sup>

Aside from persons with disabilities, there are various other measures in countries throughout the world to protect and promote the representation of minorities and marginalized groups. In Mauritius, additionally, some highest-polling but losing candidates of particular ethnic groups are awarded seats in the legislature to ensure a balance of ethnic representation. Many countries that reserve representation of minorities in parliament are new or non-democracies, and the harmony between diverse groups is necessary for ethnic peace. These countries include: “Croatia (where seats are reserved for Hungarian, Italian, Czech, Slovak, Ruthenian, Ukranian, German and Austrian minorities); Singapore (for Malay, Indian and other ethnic communities); Slovenia (for Hungarians and Italians); Jordan (for Christians and Circassians); Pakistan (for non-Muslim minorities); Western Samoa (for nonindigenous minorities); Colombia (for Black communities and indigenous peoples); and the Palestinian Authority (for Christians and Samaritans).”<sup>8</sup> There are various established democracies that also designate seats for members of indigenous communities; these countries include New Zealand, Norway, Finland, and Denmark.<sup>9</sup> Similarly, various consociational democracies, or democracies that have major internal divisions along ethnic, religious, or linguistic lines, wherein none of these divisions are large enough to form a majority, also guarantee parliamentary representation based on diverse factors, including region, language, or religion.<sup>10</sup> These countries include Canada, Belgium, the Netherlands or Northern Ireland.

In the United States, the Voting Rights Act (VRA) of 1965 was an important federal legislation in prohibiting racial discrimination in voting and securing the voting rights of African Americans in the South, which effected racial discrimination in elections as well.<sup>11</sup> The VRA was enacted to ensure that

7 The Persons with Disabilities Act, 2003, Kenya Gazette Supplement No. 111 (Acts No. 15), Republic of Kenya.

8 Bird, K. (2003), “The Political Representation of Women and Ethnic Minorities in Established Democracies: A Framework for Comparative Research,” Working Paper, Denmark: Academy of Migration Studies, available at Bird (2003). (hereinafter, “Bird (2003).”).

9 Bird (2003).

10 Bird (2003).

11 Whitaker, L. P (2013), Congressional redistricting and the Voting Rights Act: A legal overview, Congressional

the 15th Amendment, which states that the right to vote shall not be denied or abridged on account of race, color, or previous servitude, was upheld.<sup>12</sup> A violation of the provisions would be established if it is found that political processes are not equally open to members of a racial or language minority versus others to participate and elect representatives.<sup>13</sup>

The Act also contains provisions that outlaw literacy tests and other such obstacles that have been historically used to disenfranchise racial minorities in the United States. After the enactment of the VRA, some white lawmakers feared that districts, where the majority of the electorate was African American although they were still a minority, would elect black legislators.<sup>14</sup> To curtail this threat, white lawmakers deliberately redrew district boundaries and created large multi-members districts. However, re-drawing oddly-shaped districts actually became a key strategy for increasing Black, Latino, and Asian-American political representation in the United States.<sup>15</sup> In 1986, the Supreme Court decision in *Thornburg v. Gingles*<sup>16</sup> created an impetus to draw a maximum number of House districts that African Americans and Latinos could win.<sup>17</sup>

These changes to district boundaries after a 1990 national census led to a significant increase in the number of Black elected officials throughout the country.<sup>18</sup> However, social scientists remained divided on whether this strategy led to higher representation of African Americans. Packing minorities into majority-minority districts can mean that they are unable to influence outcomes in neighboring white districts.<sup>19</sup> Since 1993, the Supreme Court has limited states' ability to redraw district lines based on race, because it presumes that all members of the ethnic/racial minority vote in the same way and share the same political interests, which may encourage racial balkanization.<sup>20</sup>

The United Kingdom government brought into force the Equality Act in 2010, which essentially brought together 116 pieces of legislation into a single Act. In Part 2, Section 4, the Act lists nine “protected characteristics”: age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity;

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Research Service (hereinafter, “Whitaker (2013)”).

12 Whitaker (2013).

13 Whitaker (2013).

14 Bird (2003).

15 Bird (2003).

16 478 U.S. 30 (1986) (emphasizing that “the legacy of official discrimination ... acted in concert with the multimember districting scheme to impair the ability of ... cohesive groups of black voters to participate equally in the political process and to elect candidates of their choice.” The ruling invalidated districts of the North Carolina General Assembly and led to more single-member districts in state legislatures.

17 Bird (2003).

18 Bird (2003).

19 Bird (2003).

20 Bird (2003).

race; religion or belief; sex; and sexual orientation. It then goes on to elaborate on each of these characteristics and who they reference. For example, the Act considers a person as having a disability, in Section 6 (1), if the person has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on the person's ability to carry out normal day-to-day activities. Per Section 7, a person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of assigning the person's sex by changing physiological or other attributes of sex. Race, as referenced here, includes color, nationality, and ethnic or national origins. Importantly, Section 9 (4) states that the fact that a racial group comprises two or more distinct racial groups does not prevent it from constituting a particular racial group. Similarly, Section 10 (1) states, under religion or belief, that religion means any religion and a reference to religion includes a reference to a lack of religion, while (2) states that belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief. Article 12 defines sexual orientation as meaning a person's sexual orientation towards persons of the same sex, of the opposite sex, or of either sex.

Section 104 contains special provisions that apply to political parties. It defines selection arrangements as arrangements that the party makes for regulating the selection of its candidates in a relevant election, the purpose of which is to reduce inequality in the party's representation in the body concerned, and which, subject to subsection (7), are a proportionate means of achieving that purpose. Relevant elections for this section include Parliamentary Elections, elections to the European Parliament, elections to the Scottish Parliament, elections to the National Assembly for Wales, and local government elections, per subsection (8).

There are various other countries around the world that have paid attention to this matter in ensuring the participation of marginalized and minority groups in state structures and decision-making. International human rights law offers many such instances in global and regional perspectives. For example, Article 9 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa states, regarding the right to participation in the political and decision-making process: "States Parties shall take specific positive action to promote participative governance and the equal participation of women in the political life of their countries through affirmative action, enabling national legislation and other measures to ensure that: a) women participate without any

discrimination in all elections; b) women are represented equally at all levels with men in all electoral processes; c) women are equal partners with men at all levels of development and implementation of State policies and development programmes.”<sup>21</sup> Sub-article 2 further elaborates: “States Parties shall ensure increased and effective representation and participation of women at all levels of decision-making.”<sup>22</sup>

Although these initiatives are meant to empower marginalised and minority groups, Dryzek (1996) warns that it is important to “distinguish between inclusion in the state and inclusion in the polity more generally. Democratic theorists who advocate a strategy of progressive inclusion of as many groups as possible in the state fail to recognize that the conditions for authentic as opposed to symbolic inclusion are quite demanding.”<sup>23</sup> He also notes that unless “(a) a group’s defining concern can be assimilated to an established or emerging state imperative, and (b) civil society is not unduly depleted by the group’s entity into the state ... oppositional civil society may be a better focus for democratisation than is the state.”<sup>24</sup>

Aside from these theoretical issues, there are other issues seen around the world regarding political inclusion of marginalized groups. Htun (2013) analyzes the implications of the rise of the indigenous-led government that came to power in Bolivia in 2006.<sup>25</sup> Although one expects that this would mean that the government is more receptive to the claims of indigenous movements than to women, the opposite occurred: Women were able to achieve political unity by overcoming divisions based on race and region, while indigenous movements remain divided over reserved seats in parliament and indigenous autonomy.<sup>26</sup> This research indicated why quotas bring women into power but do not change other features of politics, and may produce new hierarchies within the indigenous movement.<sup>27</sup>

Similarly, George (2008) finds that after the Georgia’s Rose Revolution, meant to enhance the livelihoods of ethnic and religious minorities, its three policy goals (i.e. devolution of power to minorities, anti-corruption reform, and state

21 Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, United Nations, available at [https://www.un.org/en/africa/osaa/pdf/au/protocol\\_rights\\_women\\_africa\\_2003.pdf](https://www.un.org/en/africa/osaa/pdf/au/protocol_rights_women_africa_2003.pdf) (accessed in Jul. 21, 2020) (hereinafter, “Protocol to the African Charter”).

22 Protocol to the African Charter.

23 Dryzek (1996), at p. 475.

24 Dryzek (1996), at p. 475.

25 Htun, M., & Ossa, J. P. (2013), “Political inclusion of marginalized groups: indigenous reservations and gender parity in Bolivia,” *Politics, Groups, and Identities*, 1(1) (hereinafter, “Htun and Ossa (2013)”).

26 Htun and Ossa (2013).

27 Htun and Ossa (2013).

capacity building) “have resulted in contradictory policy outcomes that have disproportionately hurt ethnic and religious minority enclaves.”<sup>28</sup> George argues that the success of the revolution was hampered “by half-hearted decentralisation reforms, the result of the simultaneous anti-corruption campaign and state-building policies....”<sup>29</sup> The anti-corruption campaign also disproportionately targeted ethnic minorities’ livelihoods, as it “led to abrupt and systematic discrimination against groups with poor knowledge of the Georgian language.”<sup>30</sup>

### 3. Understanding Article 42(1)

The right outlined in the Constitution of Nepal, 2015, Article 42 (1) is also known as the right to proportional inclusion. The groups that have been given the entitlements may be divided into 16 groups. It simply means that these 16 groups of Nepalese society have the right to participate in State bodies in proportion to their share in the national population. Seemingly, the objective is to change the existing scenario and augment the existing deficit through a constitutional guarantee to ensure that these 16 groups are fairly represented in State bodies. Out of these 16 groups, seven groups are ethnic (*Dalits*, indigenous people, *Madhesi*, *Tharu*, Muslim, minorities, and *Khas Arya*), two groups are related to gender and sexuality (women and gender and sexual minorities), and seven groups are mostly economic (backward classes, marginalized people, farmers, labourers, and oppressed or citizens of backward regions) and persons with disabilities. There may be definitional problems with these groups, especially to avoid the overlaps with each other, and also to harmonize with the other fundamental rights guaranteed to the citizens under Part 3 of the Constitution. This may be handled by the law made to implement this fundamental right. But there are many other additional guarantees.

Article 38 (4) states that women have the right to participate in all bodies of the State on the basis of the principle of proportional inclusion. Similarly, Article 40 (1) states that *Dalit* communities have the right to participate in all bodies of the State on the basis of the principle of proportional inclusion. To support this goal, the Article elaborates that special provisions shall be made by law for the empowerment, representation and participation of the *Dalit* community in public services as well as other sectors of employment.

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28 George, J. A. (2008), “Minority political inclusion in Mikhail Saakashvili’s Georgia,” *Europe-Asia Studies*, 60(7), pp. 1151-1175 (hereinafter, “George (2008)”).

29 George (2008), at pp. 1172-3.

30 George (2008), at p. 1173.

Article 50, “Directive Principles,” clause (1) highlights that the political objective of the State is to strengthen a federal democratic republican system to ensure an atmosphere where democratic rights are exercised by, among other things, embracing the norms and values of fundamental rights and human rights, gender equality, proportional inclusion, participation and social justice. Importantly, clause (2) further states that it shall be the socio-cultural objective of the State to build a civilized and egalitarian society by ending all forms of discrimination, oppression, and injustice based on religion, culture, cultural practices, customs, traditional practices, or on any other grounds; develop socio-cultural values based on national pride, democracy, people orientation, dignity of labor, entrepreneurship, discipline, dignity and tolerance, by respecting cultural diversity and maintaining communal harmony, solidarity, and amity.

Article 51 addresses many policies the State must pursue. Article 51 (a) (5) states that, regarding national unity and national security, the State shall make army, police, armed police and other security organs strong, capable, professional, inclusive and accountable to people on the basis of national security system. Then clause (c) (6), regarding policies related to social and cultural transformation, states that the State shall preserve and develop the language, texts, culture, literature, arts motion pictures and property of different castes and communities, on the basis of equity, while also maintaining the country’s cultural diversity. Relating to development policy, the State shall formulate strategies and programs for sustainable socio-economic development under regional development plans for balanced and inclusive regional development and to implement them in a coordinated manner, per clause (f) (1).

Then, Article 51 (j), regarding State policies, highlights various policies in the areas of social justice and inclusion. Some of these policies include making appropriate arrangements for single women in helpless conditions on the basis of skill, capability, and merit (1), rehabilitation of kamaiya (bonded laborers), kamlari, haruwa, charuwa, haliya, the landless and the squatters by identifying them, and making arrangements of housing, or providing small plot of land or house, employment, or arable land for their livelihoods (6), and making special arrangements to ensure the rights of indigenous ethnic groups to lead a dignified life with their respective identities, and making them participate in decision making processes that concern them, and preserving and maintaining the traditional knowledge, skill, experience, culture and social practices of Ad indigenous people and local communities (8).

Article 56, which addresses the structure of the State, highlights in clause (6) that the Federation, provinces, and local levels shall protect Nepal's independence, sovereignty, territorial integrity, autonomy, national interests, overall development, multi-party competitive democratic republic and federal system of governance, human rights and fundamental rights, rule of law, separation of powers and check and balance, equitable society based on plurality and equality, and inclusive representation and identity.

Article 70 states that while conducting election of the President and Vice-President under this Constitution, the election shall be held so as to represent different gender or communities. Article 76, regarding the formation of the Council of Ministers, in clause (9) highlights that the President shall, on the recommendation of the Prime Minister, form a council of ministers consisting of members not exceeding twenty-five in number from among the members of the Federal Parliament on the basis of the principle of inclusion.

There are other principles of inclusion and representation of traditionally underrepresented minority communities in the executive as well. For example, with regards to the composition of the HoR (Article 84), clause (8) states:

Notwithstanding anything contained elsewhere in this Part, at least one third of the total number of members elected from each political party representing in the Federal Parliament must be women. If women are not so elected as to constitute one third of the elected members of any political party under sub-clause (a) of clause (1) and sub-clause (a) of clause (2) of Article 86, such political party must, in electing members under sub-clause (b) of clause (1), so elect that women members constitute at least one third of the total number of members elected to the Federal Parliament from that party.

Similarly, regarding the composition of the NA (Article 86), (2) states:

The National Assembly shall consist of fifty-nine members as follows:

- (a) fifty six elected members consisting of at least three women, one *Dalit* and one from persons with disabilities or minorities, from each State by an electoral college composed of members of the Provincial Assembly, chairpersons and vice-chairpersons of the Village Bodies, and Mayors and Deputy-Mayors of the Municipalities, with different weightage of vote by members of the Provincial Assembly, chairpersons and vice-chairpersons of the Village Bodies, and Mayors and Deputy-Mayors of the Municipalities, as provided for in the Federal law,

- (b) Three members consisting of at least one woman nominated by the President on recommendation of the Government of Nepal.

Article 90, concerning the Speaker and Deputy-Speaker of the HoR, in clause (1) states that the HoR shall, within fifteen days of commencement of first meeting, elect a Speaker and a Deputy Speaker from among its members. Clause (2) then clarifies that while electing Speaker and Deputy Speaker as per clause (1), either Speaker or Deputy Speaker shall be a woman and belong to different parties.

Article 97, regarding the formation of committees, states in clause (2) that in the event that a Joint Committee is formed comprising the two Houses, it shall consist of up to a maximum of twenty-five members in the ratio of five members from the HoR to one member from the NA.

Article 168 (9), addressing the constitution of Provincial Council of Ministers, states that the Provincial Head shall, on the recommendation of the Chief Minister, constitute from among the members of the Provincial Assembly the Provincial Council of Ministers on the basis of the principles of Inclusion and not exceeding more than twenty per cent of the total number of members of the Provincial Assembly, including the Chief Minister.

Article 176 (9) states that notwithstanding anything contained elsewhere in this Article, at least one third of the total number of members elected from each political party representing in the Provincial Assembly must be women. If women are not so elected as to constitute one third of the elected members of any political party under sub-clause (a) of clause (1), such political party must, in electing members under sub-clause (b) of that clause, so elect that women members constitute at least one third of the total number of members elected to the Provincial Assembly from that party. Additionally, Article 182 (2) states that election under clause (1) shall be so held either the Provincial Speaker or the Deputy Provincial Speaker must be a woman, and either the Provincial Speaker and the Deputy Provincial Speaker of the Provincial Assembly shall be representatives from different parties.

Article 215 (4) states that the members of the Village Executive shall also include four women members elected by the members of the Village Assembly from amongst themselves and two members elected by the Village Assembly from the *Dalit* or minority communities, in possession of the qualification under clause (5), no later than fifteen days after the final results of the election to the Village Assembly under Article 222. Article 216 (4) goes on to state that the members of the Municipal Executive shall also include five women members elected

by the members of the Municipal Assembly from amongst themselves and three members elected by the Municipal Assembly from the *Dalit* or minority communities, in possession of the qualification under clause (5), no later than fifteen days after the final results of the election to the Municipal Assembly under Article 223.

Additionally, Article 220 (3) states that the District Assembly shall elect the District Coordination Committee consisting of a maximum of nine Members including one Chief, one Deputy Chief, at least three women and at least one *Dalit* or minority. Similarly, Article 222 (3) clarifies that a Village Assembly to be formed under clause (1) shall have representation of at least two women from each ward. Similarly, a Municipal Assembly to be formed under clause (1) shall have representation of at least two women from each Ward, per Article 223.

Article 258, regarding the National Inclusion Commission, clause (1) creates such a Commission consisting of a Chairperson and as many as four other members. Article 259 outlines its functions, duties, and powers, which include to carry out research and studies for protecting rights and welfare of *Khas Arya*, backward class, persons with disability, senior citizens, laborers, peasants, marginalized and minority communities, people of Karnali region and economically disadvantaged people (per clause (1) (a)), to review the policies of the Government of Nepal for inclusion of the persons as mentioned in section (a) above and their implementation, and to forward necessary recommendation to the government for reform (per clause (1) (b)), and To conduct study about the rightful representation of the persons as mentioned in section (a) above in the state mechanisms, and to forward a recommendation to the Government of Nepal to review the provision to ensure their representation therein (per clause (1) (c)).

Article 267, which outlines provisions relating to the Nepal Army, clause (1) states that the Nepal Army shall exist, committed to democratic principles, inclusive in character and national in form, for the protection of Nepal's independence, sovereignty, territorial integrity, autonomy and national unity. Clause (3) then outlines that the entry of women, *Dalits*, indigenous community, *Khas Arya*, *Madhesi*, *Tharu*, Muslim, people of backward class and backward region shall be ensured in Nepal Army, based on the principle of equality and principles of inclusion as provided for in the Federal law.

Article 269, which is concerned with the constitutions, registration, and operation of political parties, in clause (4) (c) highlights that there should be

the provision of proportional participation so as to reflect the diversity of Nepal, in the executive committees at various levels of the party. Article 282, regarding Nepali ambassadors and emissaries, states, in clause (1), that the President shall appoint ambassadors of Nepal and other emissaries for specified purposes based on the principle of inclusion. Article 283, entitled “Appointment to be made on Inclusive Principles,” highlights that appointment to the constitutional bodies and agencies shall be made based on the principles of inclusion. Article 285 (2), regarding the formation of the government service, highlights that positions of all federal governmental services shall be fulfilled through competitive examinations on the basis of the principle of open and proportional inclusion according to Federal law.

#### 4. Conclusion

While the Constitution has emphasized the issue of inclusion so much, the Government of Nepal has not been able to propose a suitable bill in the parliament to operationalize the Article 42(1) right, and address the legal nuances related to its implementation. There are several provisions that need to be placed together for the purpose of implementation with adequate institutions and procedures. They must be able to reinforce each other. This is a separate issue in its own right and deserves separate but full attention.

Additionally, other challenges remain. For example, Paudel (2018) finds that education and family orientation remain as two important variables that explain the low rate of participation of women in civil service, despite policies that have reserved a certain number of seats for them in different governing institutions, including bureaucracy.<sup>31</sup> Likewise, Paudel (2016) states that although the quota has increased participation, “recruitment has remained the same as before ... selected civil servants belonged to similar families with members having already been civil servants. The legal opportunities allocated for inclusion were enjoyed by certain families in the name of disadvantaged groups ... because the disadvantaged groups were not in a position to compete in the [Public Service Commission] examinations.”<sup>32</sup> Conclusively, “the structure of civil service due to inclusive governance has changed but not entrenched in the targeted community.”<sup>33</sup>

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31 Paudel, N. R. (2018), “Limits of inclusion: Women’s participation in Nepalese civil service,” in *Women in Governing Institutions in South Asia*, Palgrave Macmillan, Cham.

32 Paudel, N. R. (2016), “Inclusive Governance: A Case Study of Civil Service in Nepal,” *South Asian Journal of Social Sciences*, 1(1) (hereinafter, “Paudel (2016)”).

33 Paudel (2016).

Similarly, Druzca (2016) finds that quotas alone will be insufficient in upholding the agenda of social inclusion in Nepal if it is not accommodated by other initiatives to increase good governance by improving accountability and meritocracy.<sup>34</sup> Gurung (2019) notes that despite the various mechanisms that have been introduced, including constitutional provisions, laws, and policies, to address political and social inclusion, it still remains an unresolved issue in Nepal, as social inclusion/exclusion is deeply rooted in Nepal's structural history.<sup>35</sup> Therefore, in order to ensure that Nepal is an inclusive society and state, "a critical analysis and deeper understanding of Nepal's structural history, respect and recognition of social diversity as well as group identities and meaningful representation of the excluded groups in the state politics" are necessary.<sup>36</sup>

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34 Druzca, K. (2017), "Talking About Inclusion: Attitudes and Affirmative Action in Nepal," *Development Policy Review*, 35(2).

35 Gurung, O. (2019), "Social Inclusion/Exclusion: Policy Discourse in Nepal," in *Including the Excluded in South Asia*, Singapore: Springer (hereinafter, "Gurung (2019)").

36 Gurung (2019).

# Nepal Law Society

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## About Nepal Law Society

The Nepal Law Society was established in 1982 by luminaries of law and justice field with the purpose to support the development of rule of law, independent judiciary and good governance. The Society has around 300 members including judges, lawyers, experts in law and justice, and law professors

### Major Program Areas

Independent Judiciary, Constitutional Development, Rule of Law/Good Governance, Human Rights, Women and Gender Justice, Good Governance and Development

### Major Objectives

To support the development, protection, promotion and policy capacity building in the areas of rule of law, human rights, independent judiciary, and good governance through research, training, interaction, workshop, conference as well as holding of public awareness program for empowerment by publishing various books, reports and bulletin

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