

FROM EXCLUSION TO INCLUSION

Crafting a New Legal Regime in Nepal



**Bipin Adhikari, Deepak Thapa,
Bandita Sijapati & Sudeshna Thapa**
with
Rakshya Chalise & Pooja Chaudhary

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Abbreviations and Acronyms

CA	Constituent Assembly
CA-1	Constituent Assembly-1
CA-2	Constituent Assembly-2
CEDAW	Convention on Elimination of Discrimination Against Women
CIAA	Commission for the Investigation of Abuse of Authority
CPA	Comprehensive Peace Accord
CPN-Maoist	Communist Party of Nepal (Maoist)
CPN-UML	Communist Party of Nepal (UML)
DCC	District Coordination Committee
EFA	Education for All
FPTP	First-Past-the-Post
HoR	House of Representatives
ICCPR	International Covenant on Civil and Political Rights
ICDC	Interim Constitution Drafting Committee
ICERD	International Convention on the Elimination of All Kinds of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO 169	ILO Indigenous and Tribal Peoples Convention, 1989
LGBTIQA+	Lesbian, Gay, Bisexual, Transgender, Intersex, <u>Q</u> ueer/ Questioning, Asexual
MJF	Madhesi Janadhikar Forum
NCP	Nepal Communist Party
NDC	National Dalit Commission
NFDIN	National Foundation for Development of Indigenous Nationalities
NHRC	National Human Rights Commission
NIC	National Inclusion Commission
NWC	National Women's Commission
PR	Proportional Representation

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RPP–N	Rastriya Prajatantra Party–Nepal
SC	Supreme Court
SPA	Seven-Party Alliance
SRC	State Restructuring Commission
UCPN–Maoist	Unified Communist Party of Nepal–Maoist
UDMF	United Democratic Madhesi Front
UNCRPD	United Nations Conventions on the Rights of Person with Disabilities
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples

Foreword

The issue of diversity and social inclusion is a global challenge and is going to be on the agenda of all right-thinking countries for decades to come, if not longer. In the context of change and transformation, a society becomes stronger, smarter, more creative and more innovative if it commits itself to promoting diversity, practising inclusion, and achieving transformation of the State in the best interests of all citizens and communities. Ensuring recognition of diversity and introducing inclusive practices are monumental tasks which can only be achieved by the collective endeavour of everyone.

From Exclusion to Inclusion: Crafting a New Legal Regime in Nepal is the latest study in this context. It deals with recent efforts in Nepal's journey from exclusion to inclusion, particularly with the foundation the Constitution of Nepal 2015 has laid for a new future. It outlines the legal provisions aimed at benefitting women, Adibasi Janajatis, Dalits, Madhesis and other marginalised communities, and discusses the steps taken so far to address the discrimination that exist in the country on the basis of caste, ethnicity, language, religion, gender, class and geographical territory.

The book looks at how the Comprehensive Peace Accord of 2006 and the adoption of the Interim Constitution, 2007 set the stage for the creation of an inclusive Nepali state. It analyses how the two Constituent Assemblies elected to draft a new constitution for Nepal dealt with the question of inclusion while dealing in some detail with the provisions in the 2015 Constitution that ensure inclusive practices. It also provides a brief update on the state of inclusion of different excluded groups and provides pointers for the way forward.

There are many in Nepal who believe that the Constitution should have tackled the problems of diversity and social inclusion in their entirety. Here, it is important to point out that the Constitution is certainly not the end of everything. Instead, it serves to guarantee the process of change, and its sincere implementation is the sine qua non for developing an understanding on how to set about the reform agenda.

What is more important is the continued effort of all concerned, especially

the Government, to implement the Constitution in its right spirit and maintain transparency in the process. That, however, will only be possible with the participation of everyone concerned and with access to all the information required. A narrow bureaucratic approach not only undermines the quality of public decision-making and prevents citizens from checking the abuse of public power but can also impact many aspects of society and governance, including the question of diversity and social inclusion. The authors of this publication have tried to provide a holistic assessment of the current scenario while also highlighting where the focus will be required since implementation is likely to be haphazard going forward.

I believe this volume will serve as an easy reference for all researchers and practitioners in this area. The Government of Nepal and its policymakers are certainly going to be the principal beneficiaries of this work.

Bhola Thapa
Vice-Chancellor
Kathmandu University
March 2022

Preface

Nepal is changing. The most pressing issue facing the country in its recent history has arguably been that of the exclusion of women and various social groups from the mainstream of state and society. In fact, the story of their marginalisation in all spheres of public life—social, political, economic, and cultural—has been the dominant feature of the political discourse in the country for over two decades. At the same time, however, it has also led to some of the most momentous changes in the relationship between the State and the citizenry, more specifically, in how various legislative devices have been introduced to ensure that previously excluded groups are brought into the mainstream of the Nepali polity and society. It is this transformation over time that this book attempts to capture.

This publication is an updated and revised version of the research paper, ‘Gender, Caste and Ethnic Exclusion in the Law’ by Bipin Adhikari and Bandita Sijapati, which had been developed as background material for the follow-up to the Gender and Social Exclusion Assessment (GSEA). Commissioned by the then Department for International Development of the United Kingdom and the World Bank, the GSEA itself had been completed in 2006 and the paper by Adhikari and Sijapati, along with others, was meant to document changes in Nepal’s social and political development that followed the People’s Movement II, the end of the Maoist conflict, and the promise of a new era of inclusive democracy. It was finalised in April 2011 and its content used in the analysis of the updated GSEA published in 2013 as *Gender and Social Exclusion in Nepal: Update*.*

Since then, the country has gone through a decisive period. This includes the promulgation of the Constitution of Nepal 2015, elections to the three tiers of government, and the drafting of new laws for federal Nepal, all of which have had a direct bearing on the question of inclusion. It is in this context that an update to the 2011 paper was conceived of and brought to fruition with the generous support of the Department

* Bennett et al (2013).

of Foreign Affairs and Trade of the Australian Government and The Asia Foundation.

The book has benefitted from inputs and reviews by Bishal Khanal of the Kathmandu University School of Law and Advocate Indu Tuladhar, and their contribution is gratefully acknowledged. Social Science Baha would like to thank Bhola Thapa, Vice-Chancellor of Kathmandu University, for kindly contributing the foreword to the book. Thanks are also due to colleagues at The Asia Foundation, in particular, Bishnu Adhikari, Governance Director, Carolyn O'Donnell, Monitoring, Evaluation, Research and Learning Director, and Srijana Nepal, Senior Program Officer. Lastly, a thank you to Rita Bhujel at Social Science Baha as well for the continued administrative support in steering the team throughout the project period.

1

Introduction

Although not wholly acknowledged, Nepal's journey from exclusion to inclusion began with the first efforts to establish democracy and constitutionalism in the country after the 1950-51 revolution led by the Nepali Congress dismantled the dictatorial Rana regime and kick-started the country's journey towards democratisation and the rule of law. In the immediate years after that momentous political change, political parties were allowed to operate, a constitutional monarchy of sorts replaced the traditional monarchy, a seemingly parliamentary form of government took over from the hereditary prime ministerial system, a movement towards a separation of powers began, and the independence of the judiciary from the executive began taking root. Nepal started to open up as a modern democratic state.

In the four decades between 1951 and 1990, Nepal struggled through as many as four different constitutions in its attempts to modernise the constitutional legal system. The Interim Government of Nepal Act, also known as the first Nepali constitution after the revolution, was enacted in 1951. It had been framed to help run the government for a brief transitional period—until an elected constituent assembly wrote a new constitution for the country. The Interim Government of Nepal Act remained in place for eight years.

Amidst continued instability, the second constitution of Nepal, the Constitution of the Kingdom of Nepal, was promulgated by King Mahendra in 1959. By then, the idea of drafting a new constitution through an elected constituent assembly had been scrapped in the face of an increasingly recalcitrant king and the perennial political instability. The Constitution of the Kingdom of Nepal, 1959 was a full-fledged constitution that established a parliamentary system of government based on modified British parameters. It also entrenched fundamental rights, an independent judiciary, periodic elections, different and independent constitutional functionaries, and many other modern political institutions.

Not long after the Constitution became effective, and the process of its implementation started, it was withdrawn by Mahendra, further complicating Nepali politics. After a brief period of direct rule, Mahendra promulgated a new constitution in 1962 based on, what he called, the Panchayat

system. It was an authoritarian system with seemingly modern institutions. After 28 years, following another mass movement now known as the People's Movement I, this time spearheaded jointly by the Nepali Congress and the United Left Front, Mahendra's son, Birendra, promulgated the fourth Constitution of Nepal.¹ The 1990 Constitution was not only a democratic constitution, but also the first in Nepal which, even though it did not go far enough, provided a window for the shift from exclusion to inclusion—the focus of this publication.²

1.1 **Setting the Stage**

Six years after the restoration of democracy in 1990, the Communist Party of Nepal (Maoist) (CPN–Maoist) submitted a memorandum to the government of Nepal, warning that an 'armed struggle against the existing state power' would commence if the charter of 40 demands contained therein was not fulfilled.³ The government, headed by Sher Bahadur Deuba of the Nepali Congress, basically ignored the CPN–Maoist, then an insignificant party that had opted to stay out of parliamentary politics. Consequently, on 13 February 1996, the Maoists launched the 'People's War', beginning a conflict that was to consume the nation for the next decade, resulting in the loss of thousands of lives and widespread impact on the national economy.⁴

Despite an ongoing insurgency that appeared to be growing stronger over time, politics continued as usual in Nepal. Instability was the hallmark of those years with rapid changes in government, a trend that continued even with the royal family massacre of 2001 and the entry of the military into the conflict nearly six years after it began. Things came to a head in October 2002 when King Gyanendra removed the prime minister, Sher Bahadur Deuba of the Nepali Congress, on the charge that the latter had failed to hold the constitutionally mandated elections to the House of Representatives (HoR), which had been dissolved in May earlier that year at the latter's recommendation. After expressing the usual platitudes of providing a better alternative, Gyanendra made a mockery of the hallowed principle of people's sovereignty, especially in the manner he subsequently appointed and dismissed one prime minister after another in the name of tackling the 'People's War' and the inability of the consecutive governments to deal with

1 For a constitutional history of Nepal till 1990, see Adhikari et al (1998) and Adhikari (2008).

2 See Upadhyay (2020).

3 Thapa with Sijapati (2005).

4 For a detailed examination of the Maoist conflict, see Thapa with Sijapati (2005); Hutt (ed) (2004); and Einsiedel, Malone and Pradhan (eds) (2012), among many others.

it effectively. With the HoR, the body mandated with choosing the prime minister, non-existent, the king, who was supposed to act on the advice of the prime minister, started expanding his role, and the office of the prime minister became the king's to give or withhold at will.

Even as the political parties attempted to seek a *modus vivendi* with the king, the latter was able to exploit the divisions among them and further consolidate his hold on the state. Then, on 1 February 2005, after having brought him back as prime minister in June 2004, Gyanendra dismissed Deuba a second time and took on the role of the country's chief executive himself. A state of emergency was proclaimed and many of the fundamental rights suspended. With democracy itself under direct threat, the major political parties were able to make common cause against the king. In May of 2005, seven of the parties formed what came to be known as the Seven-Party Alliance (SPA)⁵ and resolved to fight against the king's 'undemocratic, unconstitutional and regressive step' and establish 'complete democracy and lasting peace'.⁶

The king's takeover and hardened stance against them also provided the Maoists an opportunity to reach out to the parliamentary parties. Consequently, in November 2005, the SPA and the Maoists reached the 12-point understanding in New Delhi, India, setting the stage for joint action to 'establishing permanent peace by bringing the existing armed conflict in the country to an end through the progressive political outlet of the establishment of full democracy by ending the autocratic monarchy'.⁷ The significance of this agreement was that while the Maoists departed from their avowed agenda of a Maoist 'people's democracy' and declared their commitment to a 'competitive multiparty system of governance, civil liberties, fundamental rights, human rights and the concept of rule of law', the SPA agreed to do away with the existing Constitution of the Kingdom of Nepal 1990 and go for a constituent assembly to draft a new constitution. In April 2006, Nepal saw 19 days of a nation-wide civic uprising, unprecedented in

5 Comprising the CPN-UML, the Nepali Congress, the Nepali Congress (Democratic), People's Front Nepal, United Left Front, Nepal Peasants' and Worker's Party, and Nepal Sadbhavana Party (Ananda Devi).

6 'Rastriya Sankat Samadhanka Lagi Sajha Sahamati ra Pratibaddhatako Ghosana' (Declaration of Common Consensus and Commitment to Resolve National Crisis) by the SPA, 8 May 2005, <https://drive.google.com/file/d/1ZtIuqeGqBQ2l5Gtn17orX0gGVhdBsdrl/view>. Note: All the Nepali texts cited here have been translated by the authors.

7 Asian Study Center for Peace and Conflict Transformation (2011). Note: The documents cited in this from this source and others that have been translated from the original Nepali have sometimes been edited for clarity, grammar, inconsistencies and even outright errors.

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its scale of participation and breadth of organising. The king was left with no choice but to cave into popular demand and agree to the terms set by the SPA, including the one to revive the dissolved HoR.

The restored HoR convened on 27 April 2006 to reassert the sovereignty of the Nepali people. The last time the House had met, in April 2002, part of its main agenda had been to enact the Terrorist and Disruptive Acts (Prevention and Punishment) Act to bolster the Nepali state's fight against the Maoists. The dissolution of the HoR in May 2002 had itself resulted from the intense infighting within the ruling Nepali Congress party, fuelled mainly by the question of how to deal with the Maoist insurgency.

On 28 April 2006, however, when the prime minister-designate, Girija Prasad Koirala of the Nepali Congress, proposed 'this meeting of the House of Representatives vows and decides to hold constituent assembly elections to draft a new constitution',⁸ in a concession to one of the major demands of the till-then insurgent Communist Party of Nepal (Maoist), it was met with universal acclaim. In less than three weeks, on 18 May, the HoR declared itself sovereign and made a number of declarations that parted from the core of the Hindu monarchical system, including the removal of the term 'royal' from all government institutions while the State itself was declared to be secular,⁹ severing the link that embodies the State in the monarch in a Hindu kingdom.

The restoration of democracy and the subsequent end of the Maoist 'People's War' was thus deeply suffused with the hope of a peace dividend, stemming from the repeated promise by the political parties that they had learnt a lesson and now would reform their ways,¹⁰ and the birth of what increasingly came to be known as a 'New Nepal'. The May 2006 parliamentary declaration laid the legal basis for a country that provided equal citizenship and equal opportunities to everyone. Negotiations between the SPA and the Maoists moved rapidly forward and, just a day short of the anniversary of the signing of the 12-point understanding, the Comprehensive Peace Accord (CPA) was signed, followed by the promulgation of the Interim Constitution on 15 January 2007.¹¹ With the adoption of the Interim Constitution, the CPN–Maoist entered the national legislature—re-named

8 Marty Logan, 'Nepal: People Power Remains Poised', Inter Press Service, 28 April 2006, <http://www.ipsnews.net/2006/04/nepal-people-power-remains-poised>.

9 Asian Study Center for Peace and Conflict Transformation (2011).

10 For instance, Clause 7 of the 12-point agreement states: 'The seven political parties, undertaking self-evaluation, have expressed commitment not to repeat the mistakes of the past which were committed while in parliament and in government.'

11 In between came the Agreement on Monitoring the Management of Arms and Armies (AMMAA) that disarmed the Maoist combatants.

the Legislature-Parliament—and a few months later, the government itself.

The Constituent Assembly (CA) to be elected under the Interim Constitution was to draft a new constitution that would carry out ‘the progressive restructuring of the state in order to resolve the existing problems of the country relating to class, caste/ethnicity, region and gender’.¹² Originally scheduled for June 2007, the CA election was finally held in April 2008. The CPN–Maoist emerged as the largest party, followed by the Nepali Congress and then the Communist Party of Nepal (UML) (CPN–UML). The Madhes-based parties, especially those formed after 2006 (i.e., the Madhesi Janadhikar Forum [MJF], which had spearheaded the 2007 Madhes Movement,¹³ and the even newer Tarai Madhes Democratic Party [TMLP]), also performed well enough to be able to claim a major stake in the new political dispensation. On 28 May 2008, the very first day of its meet, the CA voted to abolish the monarchy,¹⁴ and also amended the Constitution for the fourth time, introducing provisions for the president to become head of state with a vice-president as the deputy.¹⁵ There were some delays in the transfer of power to a new government to be led by the CPN–Maoist by virtue of being the largest party in the CA. That arose mainly from the reluctance of the Nepali Congress and the CPN–UML to cede power to the thus-far untested Maoists without introducing institutional checks.¹⁶ Ultimately, a fifth amendment of the Interim Constitution was pushed through in July, somewhat watering down the prime minister’s pre-eminent position in post-2006 Nepal, and a non-Maoist was elected president. In August 2008, Pushpa Kamal Dahal, aka Prachanda, chairperson of the CPN–Maoist, took office as prime minister at the head of a multi-party coalition.¹⁷

12 Preamble of the Interim Constitution. http://constitutionnet.org/sites/default/files/interim_constitution_of_nepal_2007_as_amended_by_first_second_and_third_amendments.pdf.

13 The Madhes Movement was set off by the failure of the Interim Constitution to address the demands of the Madhesi population, particularly with regard to regional autonomy in the form of a federal political structure.

14 This was part of the deal agreed upon by the major parties in December 2007 at the insistence of the Maoists and was included in the Interim Constitution through its third amendment the same month, undertaking that Nepal would be declared a republican state by the very first sitting of CA (Article 159).

15 In order to emasculate the king completely, the role of head of state had previously been transferred to the prime minister by the third amendment.

16 For more details on the exchanges at the time, see International Crisis Group, *Nepal’s New Political Landscape*, 3 July 2008, Asia Report No. 156, <https://www.refworld.org/docid/486dd61e2.html>.

17 After becoming prime minister, Dahal began to use the name Pushpa Kamal Dahal Prachanda.

1.2 Laying the Foundations of an Inclusive State

Of the 40 demands outlined by the Maoists in their memorandum to the government in 1996,¹⁸ there were some that reflected a specific time period, while others bordered somewhat on the frivolous.¹⁹ Some were calculated to boost the country's national sovereignty as well. But there was a good number that would not only seem reasonable but would also appeal to those who felt excluded from the national mainstream, namely,

- Nepal should be declared a secular nation.
- Patriarchal exploitation and discrimination against women should be stopped. Daughters should be allowed access to paternal property.
- All caste/ethnic exploitation and suppression should be ended. Where ethnic communities are in the majority, they should be allowed to form their own autonomous governments.
- Discrimination against downtrodden and backward people should be stopped. The system of untouchability should be eliminated.
- All languages and dialects should be given equal opportunities to prosper. The right to education in the mother tongue up to higher levels should be guaranteed.
- Regional discrimination between the hills and the Tarai should be eliminated. Backward areas should be given regional autonomy. Rural and urban areas should be treated at par.
- Local bodies should be empowered and appropriately equipped.

Many of these issues were ones that had been raised by various marginalised groups in the country over the years. While there have been other forms of social movements such as against the *kamaiya* system of bonded labour, it is women, Adibasi Janajatis (indigenous nationalities, hereafter, Janajatis), Dalits and Madhesis who have been most effective in collective action.²⁰ It was their efforts that succeeded in defining Nepal as a multi-ethnic and multi-lingual state in the 1990 constitution. As Tamang has noted, 'after

18 The full list is provided in the annex in Thapa with Sijapati (2005).

19 An example of the former is: 'The whereabouts of citizens who disappeared in police custody at different times, namely, Dilip Chaudhary, Bhuwan Thapa Magar, Prabhakar Subedi and others, should be investigated and those responsible brought to justice'; and of the latter: 'Vulgar Hindi films, videos and magazines should be immediately outlawed.'

20 These groups form what Gellner (2016) has termed 'macro-categories' in post-1990 Nepal with each category including multiple caste or ethnic groups within its fold. These 'macro-categories' consist of Dalits (12.6% of the population), Janajatis (35.8%), Khas-Arya (31.2%), Madhesis (14.8%, excluding Madhesi Dalits, who comprise 4.5%) and Others (including Muslims) (4.5%) (Sharma [2014]).

1990, the articulation of their agendas against long-standing grievances and their mechanisms of mobilisation became more robust. Mainstream political parties at that time remained largely oblivious to the growing aspirations of these movements or viewed them as peripheral...The parties saw issues of language, gender, caste and ethnic equality as secondary and believed that social equilibrium would come automatically with modernisation...Nevertheless, social movements in the 1990s were pioneering in transforming Nepal's public debate and raised issues fundamental to deepening democracy: social and economic inequality, linguistic and cultural rights, secularism, caste- and ethnicity-based discrimination, and recognition of diversity and identity'.²¹

To its credit, the government had taken some small steps to reduce social disparities, particularly through its periodic development plans. The Sixth Plan (1981-1985) had some programmes targeting women while the Eighth Plan (1992-1997) recognised both the lack of women's representation in decision-making and the existence of gender-based discrimination, without, however, articulating what those meant.²² It was also in the Eighth Plan that the government first indicated issues related to caste/ethnic differences, while the Ninth Plan (1997-2002) specifically mentioned Dalits and Janajatis and even dealt extensively with the issue of the latter, which included allocation of funds to conduct various programmes aimed specifically at them.

It, however, took the Maoist insurgency, with all the losses in life, property and other collateral damage, to create the conditions for political parties to begin considering these matters with more seriousness. In other words, it was the Maoist insurgency that forced the ruling and other political parties to consider issues of exclusion. As has been rightly observed by Lawoti: 'The most significant impact of the Maoist insurgency on the minorities is perhaps the recognition of some of the minority grievances and issues by the state, mainstream political parties, and dominant society.'²³

With the launch and rapid spread of the Maoist insurgency, the government and political parties also began some exercises to examine the causes of the growing Maoist movement in a well-intentioned effort to address its demands through policy reform as well as formulation and implementation of programmes of different kinds. To this end, the government formed two

21 Tamang (2017).

22 DfID and World Bank (2006).

23 Lawoti (2003). 'Minorities' here is not to be taken in the numerical sense since neither any social group nor any of the macro-categories the Nepali population is divided into comprise anywhere close to 50 per cent of the population. The term is used to denote their relative lack of access to state provisions.

taskforces—under Prem Singh Dhimi of the CPN–UML in 1997 and under Sher Bahadur Deuba of the Nepali Congress in 1999—to provide suggestions to resolve the Maoist conflict. The principal mandate of both was to identify ways that could lead to a peaceful resolution of the Maoist conflict. Having engaged in wide-ranging consultations with key stakeholders as well as the public, these two bodies came up with more or less similar proposals such as the urgent need to launch poverty alleviation programmes through income generation, skill development, and employment targeted at people from conflict-prone areas.²⁴ They also recommended social reforms through the abolition of gender- and caste-based discrimination and ensuring equality of opportunity to underprivileged sections of the population. Recommendations included creating an enabling environment for the participation of disadvantaged people in governance and in the public sector.

Thus, these two initiatives provided an opportunity to the government and political parties to note that Dalits and Janajatis were disenchanted with government performance affecting their lives and that there was a growing realisation of having been side-lined and denied representation and participation in policy- and decision-making processes. Until then, the Tarai had been largely unaffected by the Maoist movement and therefore, the reports of the taskforces did not touch upon Madhesi and Muslim (who overwhelmingly live in the Tarai) disaffection at all.

Due to the political instability of the time and frequent changes in government, there was no action taken on the recommendations of either report. However, after Deuba became prime minister once again in July 2001, within three weeks he had presented his programme of reform in Parliament which included ‘a 25-year action plan to provide special opportunities and protection in education, employment, and [the] national development process to women, Dalits and Janajatis, who for centuries have been deprived of socio-economic, political rights and other developmental opportunities’ along with the declaration that ‘[e]ffective from this moment, the practice of social discrimination and untouchability are declared to be grave and punishable crimes’.²⁵

Deuba also announced the formation of national commissions for women and Dalits and a ‘fully authorised academy for the preservation and devel-

24 CPN–UML (2001); and ‘Ekikrit antarik surakshya tatha bikas yojana’ (Integrated Internal Security and Development Programme), 2057 BS (2000–01) (unpublished).

25 ‘Eight-Point Reform Initiatives for Socio-economic Transformation’, speech delivered by Sher Bahadur Deuba at the joint session of the Parliament, 16 August 2001. https://nepal-conflictreport.ohchr.org/html/documents/2001-08-16_document_govt-of-nepal_eng.html.

opment of the religion, culture, and language' of Janajatis. To add weight to his actions, Deuba mentioned that the proposed reforms would also incorporate elements of what the preceding government—under Girija Prasad Koirala, also of the Nepali Congress—had planned in terms of land reforms, women's right to ancestral property, and ending the practice of untouchability along with the opposition CPN-UML's demand for a special programme for the 'upliftment' of Janajatis.

King Gyanendra dismissed Deuba in October 2002 and appointed two governments loyal to him in succession. With the first, led by Lokendra Bahadur Chand, the Maoists reached a ceasefire in January 2003. In its opening gambit in the negotiations, the insurgents put forth a proposal to address issues related to 'class, nationalities, region, gender...through political, economic and cultural changes'.²⁶ The proposal contained, among others, granting the right to self-determination and ethnic and regional autonomy to oppressed groups and Madhesis; providing equal rights to women over parental property; ensuring conditions for Dalits to equal rights; and instituting secularism. By then, the fact that social marginalisation was driving the conflict had been more or less universally accepted, and accordingly, even earlier, in March 2003, the Chand government had approved the 10th Five-Year Plan, which targeted women, Dalits and Janajatis (and the disabled and residents of remote regions) with special programmes.²⁷

In the meantime, the major mainstream political parties had been agitating against the king, and in July 2003, five of them, including the main faction of the Nepali Congress²⁸ and the CPN-UML, published an 18-point 'Forward Looking Reform Agenda' that was duly endorsed by a 'special session' of the dissolved HoR.²⁹ The document dealt mostly with how the powers of the king should be reduced but notably also included the following proposals:

- Increase representation of women, Dalits and Janajatis in parliament;

26 'An Executive Summary [sic] of the Proposal Put Forward by CPN (Maoist) for the Negotiations (Presented by the Negotiation Team of CPN (Maoist) on April 27, 2003 in Kathmandu)', https://nepalconflictreport.ohchr.org/html/documents/2003-04-27_document_cpn-m_eng.html.

27 'Nepal: Poverty reduction strategy paper', <http://www.imf.org/external/pubs/ft/scr/2007/cr07176.pdf>.

28 Following his dissolution of the HoR in May 2002, Deuba had been expelled from the Nepali Congress party. In retaliation he had walked off with a substantial section of the party members and formed the Nepali Congress (Democratic).

29 'Ke chha 18 bundama' (What do the 18 points contain?), *Himal Khabarpatrika*, Jestha 1-15, 2061, <http://nepalihimal.com/article/7919>.

- Transform the upper house of parliament into an assembly of women, Dalits and Janajatis, and prominent figures of the country;
- Resolve the problem of citizenship in the Tarai;
- End all kinds of discrimination against women; provide equal opportunities to women; and increase women's representation in parliament and local bodies to 33 per cent;
- Protect, preserve and develop all religions, languages and cultures; and devise programmes to provide equal opportunity and equal access to marginalised groups, including through special treatment;
- Criminalise the practice of untouchability; and
- Eliminate all forms of discrimination based on caste/ethnicity,³⁰ geography, language, culture and religion.

For its part, in August 2003, the government, now led by Surya Bahadur Thapa, responded to the Maoists' April proposal with its own set of suggested reforms on the eve of the third round of peace talks.³¹ The government's position was remarkable in that it included almost in toto the provisions mentioned in the political parties' 18-point agenda mentioned earlier and actually went even further by explicitly stating that it would ensure proportionate representation of Dalits and Janajatis in the upper house of parliament and at least 25 per cent in both houses. The government's proposal also included provisions to strengthen a plural society by promoting all religions and languages, including allowing the use of non-Nepali languages in local bodies, and introducing reservations for women, Dalits and Janajatis in education, government service and elected institutions. Justification for these steps were provided in the following words: 'It is not possible to easily end the situation of ethnic and gender discrimination, exploitation and inequalities prevailing in Nepali society for centuries. The treatment of an

30 In discussions around caste and ethnicity, the Nepali terms *jatiya* and *jat-jati* are commonly used and have been variously translated by government sources and others as 'caste', 'caste-based', 'racial' and so on, in the case of the former and 'caste', 'caste and tribal', etc, in the case of the latter. Since the intent in all cases is clearly to refer to all of Nepal's social groups, whether caste-based (i.e., belonging to the Hindu caste system) or not (i.e., belonging to non-caste groups, mainly, Janajatis but also religious minorities like Muslims), in this study, these terms have been translated as 'caste/ethnic', 'caste/ethnicity', etc, as the case may be. Likewise, *jati* has been translated as 'ethnic', and not as 'tribe' or 'race' found in many translations.

31 'His Majesty's Government of Nepal, Concept of forward-looking reforms in the State System: Concept on forward-looking agenda on the reforms of the state system presented by His Majesty's Government, including HMG's view on the proposal of the Nepal Communist Party (Maoists) on Baisakh 14, 2060 BS (April 27, 2003)', https://nepalconflict-report.ohchr.org/files/docs/2003-08-17_document_govt-of-nepal_eng.pdf.

extraordinary problem can only be found in extraordinary remedies.’

In November 2003, the Thapa government went a step further. Among its plans announced were reservations in government service for women, Dalits and Janajatis, and addressing the citizenship issue of Madhesis. Most meaningful was the explicit acknowledgement, for the first time ever by a Nepali government, of the need for radical socio-political changes:

The concept of a forward-looking state system presented by His Majesty’s Government during the third round of talks with the Maoists *were not directed only to the Maoists* [emphasis added]. Forward-looking reforms in the present state system had already been extremely necessary both to end all kinds of inequalities, discrimination and exploitation in the society and to translate into action the changed expectations of the people. The forward-looking reforms concept prepared in the context of these realities do not have to be stalled merely because of an obstruction in talks with the Maoists.³²

The Thapa government’s stated commitment could be said to have set the standard for future action on inclusion, in particular the rationale for creating a more inclusive state. Thapa’s government was replaced by one led by Deuba again and a High-Level Reservations Committee was set up in December 2004 to provide recommendations on how affirmative action measures could be put in place for women, Dalits and Janajatis.³³ At the same time, the Ministry of General Administration also began working on a plan to set aside 35 per cent of all civil service seats for specific groups.³⁴ With the king’s takeover in February 2005, the Committee was dissolved without having completed its task.

It was only to be expected that the May 2005 pact establishing the SPA would also address the issue of gender and social exclusion. Its Declara-

32 ‘Statement by Rt. Hon. Prime Minister Surya Bahadur Thapa at the Press Conference regarding Future Plan, Strategies and Programmes of His Majesty’s Government, November 4, 2003’, https://nepalconflictreport.ohchr.org/files/docs/2003-11-04_document_govt-of-nepal_eng.pdf.

33 DfID and World Bank (2006). In fact, in July 2003, the Thapa-led government, expressing ‘grave concern’ over the low access of Dalits and Janajatis in higher education had declared that all colleges and universities funded by the government would have to ensure that in every session at least 20 per cent of the seats would be set aside for women, 10 per cent to Dalits and 15 per cent to Janajatis. See Budget Speech for 2003/04 available at https://www.mof.gov.np/uploads/document/file/Budget%20Speech%202003_20201118043117.pdf.

34 The formula for dividing up the 35 per cent of the seats was to be as follows: 20 per cent for women, 10 per cent for Janajatis and 5 per cent for Dalits.

tion of Common Consensus and Commitment to Resolve National Crisis expressed the parties' commitment to provide reservations while also resolving the citizenship issue along with the 'concept of proportionate development, progressive land reforms, equal opportunities for personal development, simplified and adequate arrangement for education and health services'.³⁵

In that sense, while the People's Movement of April 2006 was aimed at the restoration of democracy which had been derailed, embedded in it was also a broader desire to change the exclusionary nature of the Nepali state. The expectation, thus, was as much for the peace dividend resulting from the long-hoped for end of the Maoist conflict as the radical reconfiguring of the state in all its aspects. There was strong participation in the popular movement from marginalised sections of society, i.e., women, Janajatis, Dalits, Madhesis and other neglected communities. The rights-based discourse in the movement was clearly discernible and was preceded by the recognition in the 12-point agreement between the SPA and the CPN-Maoist that discriminations along the lines of gender, caste/ethnicity, language, region, community and class were rife in the country, and that these had to be resolved in order to achieve full democracy. More specifically, it declared at the very outset:

The struggle between absolute monarchy and democracy running for a long time in Nepal has now taken a very grave and new turn. It has become the need of the hour to establish peace by resolving the armed conflict being waged for the past 10 years through a progressive political outlet. Therefore, there is an *imperative need for implementing the concept of full democracy through a forward-looking restructuring of the state to resolve the problems related to all sectors including class, caste/ethnicity, gender, region, political, economic, social and cultural*, by bringing the autocratic monarchy to an end and establishing full democracy [emphasis added].³⁶

The 18 May 2006 proclamation by the restored HoR declared that the path forward would be to fulfil 'the mandate given by the Nepali people through

³⁵ 'Rastriya Sankat Samadhanka Lagi Sajha Sahamati ra Pratibaddhatako Ghosana' (Declaration of Common Consensus and Commitment to Resolve National Crisis) by the SPA, 8 May 2005, <https://drive.google.com/file/d/1ZtluqeGqBQ2l5Gtn17orX0gGVhdBsdr/view>.

³⁶ Emphasis added. For the full text of 12-point understanding reached between the Seven Political Parties and Nepal Communist Party (Maoist) on 22 November 2005, see Asian Study Center for Peace and Conflict Transformation (2011).

the People's Movement to establish inclusive governance and sustainable peace, along with democracy, and restructuring of the state, by framing a constitution through a Constituent Assembly pursuant to the roadmap of the Seven Political Parties and the 12-Point Understanding between the Seven Political Parties and the CPN–Maoist'.³⁷ It failed though to specifically mention issues raised by women, including through the Inter-Party Women's Alliance of the SPA formed earlier in the year.³⁸ However, through intense lobbying, on 30 May, the HoR unanimously adopted the motion for resolution that called for a minimum of one-third participation of women in state mechanisms; for children to be able to claim citizenship through either parent; for the repeal of anti-women laws; and an end to violence against women. The parliamentary resolution was the first sign of how socio-political issues of this nature were likely to evolve in the immediate future.

The 8-point agreement between the SPA and the Maoists that followed in June 2006 intended, among other things, to 'carry out progressive restructuring of the state so as to resolve the class-based, ethnic, regional and gender-based problems through the Constituent Assembly election'.³⁹ This was interpreted as providing a firm basis to what is generally referred to as 'group rights' since issues of caste/ethnicity, gender, regionalism are group-specific matters that require that groups be recognised first and be granted collective rights and not simply as individuals.

Thus, in addition to the end of the decade-long armed conflict in the country, the post-2006 period also saw a move towards making Nepal's polity a more inclusive polity. In some measure, due to the continued pressure from various segments of the society, the Interim Constitution of 2007, with all its amendments, emerged as one of the most liberal documents in Nepal's history to guide the Nepali state in terms of the recognition of diversity and inclusion. As a result, among other things, the Interim Constitution recognised the various economic, social and cultural rights of its diverse population groups. This is especially apparent when the Interim Constitution is compared with the earlier Nepali constitutions, including the 1990 one drafted under a democratic regime, and even, in some sense, the constitution finally adopted by the Constituent Assembly in 2015 (see Annex 1).

However, as has often been the fate of progressive policies in the past, most of the provisions of the Interim Constitution remained only on paper and while the aforementioned rights of the marginalised groups were rec-

37 Asian Study Center for Peace and Conflict Transformation (2011).

38 Mahato, Paudyal and Baruah (2019)

39 Asian Study Center for Peace and Conflict Transformation (2011).

ognised as fundamental, they were limited since not all the enabling laws were formulated. Provisions that were very promising fell victim to insufficient commitment from the political parties, continued domination by some elements of ‘upper-caste’ individuals within the state machinery who did not want change, and the general environment of political instability at the centre. This became especially apparent with the election of the second Constituent Assembly (CA-2) in 2013 held not long after the near-completion of the management of arms and the peace process itself. The CA-2 saw the Maoists routed from their pre-eminent position in the CA-1 and an equally poor showing by the Madhes-based parties, and power shifted decisively to the Nepali Congress and the CPN-UML as well as the two factions of the pro-monarchy Rastriya Prajatantra Party (Table 1-1).

This study covers broadly the period from the prelude to the People’s Movement II till the end of the summer session of the federal parliament in 2019. That was the last meaningful session of the parliament in terms of adopting new laws or amending old ones pertinent to the theme of this study. Almost all legislative business stalled thereafter following the onset of the Covid-19 pandemic and the concurrent infighting that took place within the Nepal Communist Party (NCP) that was voted to power at the centre in 2018 following the first general elections under the Constitution of Nepal 2015.

It looks at the constitutional, legal and policy developments related to the promotion of inclusion, in its broadest sense, to groups that have been historically excluded from the mainstream. The analysis provided here is mainly derived by reviewing relevant national laws and policies as well as, when required, Supreme Court decisions, international human rights treaties, declarations, UN resolutions and other instruments ratified by the Government of Nepal. It does not deal with laws and policies that have been adopted at the provincial and local levels. Such an examination would by itself have to be part of a much larger study. It should also be noted though that besides analysing legal provisions, since it is not the focus of this study, political developments following the adoption of the 2015 Constitution are dealt with only in passing, if at all.

This book is divided into seven chapters. Following this introduction that provides the political context in which the developments discussed here have evolved, the second chapter deals with the initial years after the CPA and the enactment of the Interim Constitution and how that document, in conjunction with other laws, proved to be a major development in paving the way for an inclusive Nepali state. The third chapter dwells on the workings of

Table 1-1: Constituent Assembly Results, 2008 and 2013*

Party	CA-1, 2008	CA-2, 2013
Communist Party of Nepal–Maoist/ Unified Communist Party of Nepal–Maoist [†]	220	80
Nepali Congress	110	196
Communist Party of Nepal–UML	103	175
Madhesi Janadhikar Forum, Nepal	52	10
Madhesi Janadhikar Forum, Nepal (Loktantrik)	–	14
Tarai Madhes Loktantrik Party	20	11
Nepal Sadbhavana Party	9	–
Sadbhavana Party	–	6
Rastriya Prajatantra Party Nepal	4	24
Rastriya Prajatantra Party	8	13
Others	49	46
Total	575	575

Source: 'PARLINE: NEPAL (Sambidhan Sabha)', Inter-Parliamentary Union, http://archive.ipu.org/parline-e/reports/arc/2386_08.htm, and 'PARLINE: NEPAL (Byabasthapika-Sansad)', Inter-Parliamentary Union, http://archive.ipu.org/parline-e/reports/arc/2386_13.htm.

* The tally does not include the 26 CA members to be nominated by the government. While CA-1 had the full contingent of 601 members with the inclusion of the 26 nominated one, the CA-2 never exceeded 599 since two of the 26 were never nominated throughout its term.

[†] Following its merger with smaller extreme left parties in January 2009, the Communist Party of Nepal–Maoist became the Unified Communist Party of Nepal–Maoist.

the first Constituent Assembly and the various provisions that were recommended for adoption in a future constitution. It attempts to capture the major advances made by the thematic committees by providing norms, values, institutions and procedures to respond to the issues of exclusion through the new constitution. The fourth looks at how the second Constituent Assembly functioned, and steps taken towards the ultimate adoption of the 2015 Constitution. The fifth chapter delves into the provisions of the 2015 Constitution that promote greater inclusion and the problems implicit therein. The penultimate chapter examines the implications of existing laws and policies on different marginalised groups, and how the cause of inclusion has been advanced so far. The final one provides a conclusion by way of providing recommendations on possible ways forward by highlighting key elements and issues that need to be resolved in order to ensure that Nepal becomes an inclusive nation-state for all its peoples.

2

Interim Constitution: Roadmap for Social Inclusion

The focus of this chapter is the Interim Constitution of 2007 and the changes that followed in its wake in the years immediately following its promulgation. Having been adopted concurrently with the CPA, which actually was included as one of its schedules, the Interim Constitution can be said to have embodied the aspirations of a new era in Nepal. That embodiment was not a perfect one for it underwent a number of amendments in response to demands from different sections of society as well as to political exigencies of the time. The content of the Interim Constitution on the whole, however, provided the broad contours of a future constitution. This chapter outlines the Interim Constitution's major features in terms of its contribution to institutionalising the language of social and political inclusion at the highest levels of the state, and also to how that created the impetus for the introduction of a number of other legal provisions in the then-resolute march towards a more inclusive state.

2.1 Contestations during Drafting of the Interim Constitution

In January 2007, the Interim Constitution drafted by a commission of political nominees and legal constitutional experts nominated by the government was adopted by the House of Representatives, paving the way for the establishment of an interim parliament. This body, known as the Legislature-Parliament, consisted of the SPA and the Maoists. Notwithstanding the gains made by the political settlement represented by the new arrangements following the CPA and the Interim Constitution, the demand for change, particularly in terms of representation and recognition of hitherto-marginalised groups, continued to gain momentum in the months that followed with Madhesis, Janajatis, Dalits, Muslims, women, and other neglected communities launching protests in the capital and other areas, forcing the government to engage in dialogue and enter into agreements with one group after another.⁴⁰

⁴⁰ Starting with the first of such agreements in August 2007, the Nepali government signed a total of 43 such agreements until April 2012, a month before the CA-1 was dis-

Among the more significant was the Madhes Movement of January 2007, which succeeded in bringing the historically excluded Madhesi to the centre-stage of Nepali politics.⁴¹ A 22-point agreement was signed in August 2007 between the government and the Madhesi Janadhikar Forum (MJF), which had spearheaded the Madhesi movement. That agreement, among others, included, national recognition of the languages, culture and customs of Madhesi; balanced and proportionate representation of marginalised communities, including Madhesi, Janajatis, the disabled, minorities⁴² and Muslims in all state structures; greater local autonomy through a federal system of governance; immediate dispatch of citizenship distribution teams; proportional distribution of the revenue to the Madhes⁴³; and return of properties and personal arms seized by the Maoists to their owners.⁴⁴

Even earlier, an agreement between the government and Janajatis on several issues, including allocation of proportional seats even for the first-past-the-post (FPTP) part of the then-upcoming election to the constituent assembly, had also been signed.⁴⁵ Further, ILO Convention No. 169 on Indigenous and Tribal Peoples 1989 (hereafter, ILO 169) and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), both considered to be international instruments of vital importance to Nepal's Janajatis, were also ratified in September 2007.⁴⁶

solved. Some of these included agreements were with the same group more than once. See Ministry of Peace and Reconstruction (2012). This does not include the 17 May 2012 agreement to recognise the five hill caste groups of Bahun, Chhetri, Thakuri, Dasnami, Sanyasi and Dalit communities as adibasi (indigenous) or the subsequent agreement five days later rescinding the same in the raucous days leading to the CA-1's dissolution (Adhikari and Gellner, 2016).

41 For more details on the Madhes Movement of 2007, see Sijapati (2012) and Gautam (2008).

42 In this study, the term 'minorities' refers to 'disadvantaged groups' and not to a numerical concept, following the UN's recognition of the fact that minorities are in 'a non-dominant position' (Office of the High Commissioner for Human Rights, *Minority Rights: International Standards and Guidance for Implementation*, 2010, http://www.ohchr.org/Documents/Publications/MinorityRights_en.pdf).

43 Whereas in the past, both were used more or less interchangeably to denote the southern plains of Nepal, 'Madhes' and 'Tarai' have been strongly contested terms in recent years. 'Madhes' has assumed political overtones since it grants a singular identity to Madhesi whereas 'Tarai' is seen more as referring only to the geographical area. Adding to the complexity are Tharus and other Janajati groups from the Tarai, many of whom object to being categorised as Madhesi. See Darshan Karki and Miriam Wenner, 'What Is Not in a Name? Toponymic Ambivalence, Identity, and Symbolic Resistance in the Nepali Flatlands', *EchoGéo* [Online], 53, 2020, <http://journals.openedition.org/echogeo/19987>, for a detailed discussion on the subject.

44 Asian Study Center for Peace and Conflict Transformation (2011).

45 Asian Study Center for Peace and Conflict Transformation (2011).

46 Elaborated further in Chapter 6, 'Legal Inclusion of Various Groups'.

In keeping with the spirit of the times, a number of Dalit groups organised a National Dalit Conference to articulate the demands of Dalits for a democratic and inclusive state. The Conference led to the passage of the Kathmandu Charter of Dalit Rights 2007. The Charter's preamble identified the 'feudal, Hindu caste system' as the cause of the marginalisation of Dalits and endorsed the call by the House of Representatives in its Proclamation of 4 June 2006 'to make the nation free of untouchability'.⁴⁷

The process of drafting of the Interim Constitution of Nepal 2007 was itself an empowering exercise. Initially, when announced in June 2006, there was no representation of women, Dalits or Janajatis in the Interim Constitution Drafting Committee (ICDC).⁴⁸ However, following pressure from civil society and the excluded groups themselves, the government expanded the Committee to include representatives from these groups, marking only the second instance of women and the first of Dalits being included in the four such bodies Nepal had seen thus far.⁴⁹

Debates in Parliament about the Interim Constitution, street protests by stakeholders, and dialogues with civil society guided the drafting process and compelled the State to fulfil the more vociferous aspirations of the People's Movement II, primarily around inclusion,⁵⁰ as exemplified by the successful demand mentioned above to make the ICDC more inclusive. Aimed at promoting inclusion, non-discrimination, and recognition of socio-cultural and ethnic identities in the new context, the subsequent period witnessed a number of legal and policy changes. These, including amendments to the Interim Constitution, will be discussed below.

47 UNDP (2008).

48 Headed by a former justice of the Supreme Court, Laxman Prasad Aryal, the other members were Sindhunath Pyakurel, Shambhu Thapa, Harihar Dahal, Khim Lal Devkota and Mahadev Yadav, all of whom belonged to the hill 'upper-caste' groups, with the exception of the last, a Madhesi.

49 The later additions were: Chhatra Kumari Gurung (Janajati woman), Pushpa Bhusal (Bahun woman), Shanta Rai (Janajati woman), Sunil Prajapati (Janajati man), Sushila Karki (woman), Min Bahadur Bishwakarma (Dalit man), Chandeshwor Shrestha (Janajati man), Kumar Yonjan Tamang (Janajati man), Parshuram Jha (Madhesi man) and Agni Kharel (Bahun man).

50 As Ghai (2008) notes, 'A major demand of the 2006 jana andolan was social and regional inclusion and the empowerment of the marginalised. The Interim Constitution, drawn up by the leaders of the major political parties, acknowledges the exclusion of and discriminations [of various social groups]...and commits the state to an extensive programme of inclusion and social justice through the restructuring of the state, including reservations and other forms of affirmative actions.'

2.2 Interim Constitution and Social Inclusion

The Interim Constitution has, undoubtedly, been the most progressive constitution that has guided the nation so far. Its predecessor, the 1990 Constitution, restored multi-party democracy and constitutional monarchy, and to some extent recognised Nepal as a multi-ethnic and multi-lingual state. However, it did not, as had been expected by representatives of marginalised groups, address the historical exclusion of women, Janajatis, Dalits, Madhesis and religious and cultural minorities. The State was still considered to be Hindu and Hinduism remained the state religion, which harboured a feeling of marginalisation among certain Janajati groups, lacked special guarantees against ‘untouchability’ of Dalit castes, and did not provide specific recognition to religious minorities, namely, Muslims, Christians and Sikhs, in particular, as equal citizens. The 1990 Constitution also failed to address Nepal’s linguistic and religious diversity, and instead gave Nepali the status of the only official language of the state.⁵¹

In a significant departure from the 1990 Constitution, one of the key objectives of the Interim Constitution that emerged from the CPA was the commitment to a ‘forward-looking restructuring of the state by resolving the prevailing problems related to class, ethnicity, regional and gender differences’.⁵² As a result, the Interim Constitution, which declared Nepal to be a secular, democratic, federal state, took upon itself to address the ‘problems’ the country had been facing based on class-, caste/ethnicity-, religion- and gender-related exclusions.⁵³ It emphasised the need to strengthen national unity not by ignoring the existence of diversity but by maintaining cultural diversity through the promotion of healthy and harmonious social relations. Taking into account the shortcomings of a centralised and unitary state structure, the Interim Constitution also expressed a commitment to ‘carry out an inclusive, democratic and progressive restructuring of the state’, which came partly to fruition through the fourth amendment dispensing with the monarchy while also declaring Nepal to be a federal republic (see Box 2-1).

For the first time, the Interim Constitution also explicitly recognised Dalits, Janajatis, Madhesis and Muslims⁵⁴ as historically marginalised groups

51 Articles 4, 6, 18 and 19. The Constitution of The Kingdom of Nepal 1990.

52 Asian Study Center for Peace and Conflict Transformation (2011).

53 Preamble, Part 1, Articles 3, 5; Part 3, Article 13, 14, 1; Part 4, Article 33, 35 (3); Part 7, 63 (3.a) and (4.5); Part 16, Article 142 (4), Part 17, Article 138, Interim Constitution of Nepal 2007.

54 Even though Muslims were mentioned by name only once in Article 35 (14) of the 2007 constitution.

Box 2-1: Major Constitutional Provisions in the Interim Constitution to Promote Inclusion

Perambulatory pledge:

Having determined upon the progressive restructuring of the state in order to resolve the existing problems of the country relating to class, caste/ethnicity, region and gender.

Definition of state:

Article 4(1): Nepal is an independent, indivisible, sovereign, secular, inclusive federal democratic republican state.

Language of the nation:

Article 5(1): All the languages spoken as mother tongue in Nepal are the national languages of Nepal.

Article 5(3): Notwithstanding anything written in Clause 5(2) [specifying that Nepali language in the Devanagari script is the language of official business], the use of one's mother tongue in a local body or office shall not be barred. The state shall translate the language used for such purposes into the language of official business for the record.

State responsibilities:

Article 33(d): to carry out an inclusive, democratic and progressive restructuring of the state by eliminating its existing form of centralised and unitary structure in order to address the problems related to women, Dalits, Adibasi Janajatis, Madhesis, oppressed and minority communities and other disadvantaged groups by eliminating class, caste/ethnic, linguistic, gender, cultural, religious and regional discrimination.

Article 33(d1): to enable Madhesis, Dalits, Adibasi Janajatis, women, labourers, farmers, the physically impaired, disadvantaged classes and disadvantaged regions to participate in all organs of the state structure on the basis of proportional inclusion.

Article 33(i): to adopt a policy of ensuring socio-economic security and provide land to the economically backward classes, including *kamaiyas*, *haliyas* and *haruwa-charuwas*.

Directive principles of the State:

Article 34(4): The fundamental economic objective of the State shall be to transform the national economy into an independent and self-reliant

system by preventing the available resources and means of the country from being concentrated within a limited section of society, by making arrangements for equitable distribution of economic gains based on social justice, by making such provisions as will prevent economic exploitation as well as economic disparity of any caste/ethnicity, gender, class, origin or individuals...

Article 34(5): The social objective of the State shall be to establish and develop a healthy social life on the foundation of justice and morality, by eliminating all types of economic and social inequalities and by establishing harmony among diverse castes, ethnicities, religions, languages, races [?], communities and sects.

State policies:

Article 35(3): The State shall pursue a policy of strengthening the unity of the nation by maintaining the cultural diversity of the country through the promotion of healthy and harmonious social relations, on the basis of equality and coexistence, among people of various religions, cultures, castes/ethnicities, communities, sects, origins, languages and linguistic groups, and by assisting in the equal promotion of their languages, literatures, scripts, arts and cultures.

Article 35(14): The State shall pursue a policy of making special provisions on the basis of positive discrimination women, Dalits, Adivasi Janajatis, Madhesi and Muslims along with minorities, the landless, squatters, bonded labourers, persons with disability, [people belonging to] backward areas and communities, and victims of conflict.

and specified them as beneficiaries of special treatment by the state.⁵⁵ That was significant since none of the previous four constitutions had any such provision for anyone. The only one that had come anywhere close was in the National Assembly, the upper house of Parliament under the 1990

55 The 1990 Constitution had recognised the existence of different 'communities' in the country, when dealing with the right to culture and education (Article 18), different 'denominations' when dealing with the right to religion (Article 19), and 'cultural diversity' when dealing with the policy of 'strengthening the national unity by promoting healthy and cordial social relations amongst the various religions, castes, ethnicities, communities and linguistic groups, and by helping in the promotion of their languages, literatures, scripts, arts and cultures' (Article 26[2]). But it had no reference to Dalits, Janajatis and Madhesi as historically marginalised groups.

Constitution, which set aside three seats for women (Article 46).

Among the new provisions enshrined in the Interim Constitution were: right against untouchability and racial discrimination (Article 14), the provision of positive discrimination for women, Dalits, Janajatis, Madhesis, farmers, and other socially and economically marginalised communities [Article 13(3)], right to women over reproduction and ancestral property (Article 20), right to social justice on the basis of proportionate representation of women, Dalits, Janajatis, Madhesis and other oppressed groups in state structures (Article 21). In addition, new measures for affirmative action, land distribution, elimination of the forced labour system (*kamaiya*, *haliya* and *haruwa-charuwa*),⁵⁶ and for the overall upliftment of historically marginalised communities in Nepal were also introduced in the Constitution. Besides making the Nepali state pluralistic, the Interim Constitution also obliged political parties to follow the spirit of inclusion.⁵⁷ As a result, the number of women, Dalits, Janajatis and Madhesis in decision-making bodies within political parties increased even though they did not become fully inclusive in proportion to their respective shares of the population.⁵⁸

Finally, the Interim Constitution also recognised the multilingual character of Nepal and entitled the use of languages other than Nepali in local bodies.⁵⁹ This was a significant step given that as late as 1999, based on a literal interpretation of Article 6 of the 1990 Constitution, the Supreme Court had

56 *Kamaiyas* were bonded labourers under a traditional system of bonded labour practised mainly in the western Tarai region of Nepal before the system was abolished in 2000. *Haliyas* are agricultural bonded labourers who work on another person's land. The *haliya* system is still practised mainly in the far-western hilly region of Nepal. The *haruwa-charuwa* system is a forced-labour system based on debt bondage, prevalent in the agricultural sector of the eastern Tarai region in Nepal. While the *haruwa* are tillers and are usually adult males, *charuwa* are usually women and children involved in cattle-herding.

57 Article 142(3)(c) states that 'there should be a provision for the inclusion of members from neglected and oppressed groups, including women and Dalits in the executive committees at various levels' of the political parties.

58 In the allocation of seats in the central committees of the party conventions held after the Interim Constitution was promulgated, none of the three major parties were anywhere close to proportionate inclusion as envisaged in its Article 21 on the right to social justice even though it did meet the conditions mentioned in the previous footnote. Hence, the Nepali Congress had the following breakdown in its 85-member central committee elected at its 12th convention in 2010: 20 per cent women, 7 per cent Dalits, 20 per cent Janajatis, 9 per cent Madhesi, and 2 per cent Muslims; the UML in its 115-member central committee elected at its 9th convention in 2014: 19 per cent women, 6 per cent Dalits, 29 per cent Janajatis, 5 per cent Madhesi, and 3 per cent Muslims; and the UCPN (Maoist) in its 151-member central committee elected at its 7th convention in 2013 had 15 per cent women, 2 per cent Dalits, 29 per cent Janajatis, 11 per cent Madhesi, and 0.7 per cent Muslims (Simkhada, 2017).

59 For a commentary on the issue, see Dhungel et al (1998).

barred local authorities from using local languages in their offices, sparking protests in the capital and other cities (see Annex 1 for a more detailed comparison between the 1990 and 2007 constitutions).⁶⁰

2.2.1 Limitations of the Interim Constitution

As mentioned earlier, the Interim Constitution (which underwent 12 amendments⁶¹) served as the minimum roadmap for the inclusion of historically marginalised groups and as a model for the new constitution to be drafted. Despite all its attempts to promote inclusion, there were, however, several provisions that went against the spirit of making Nepal a truly inclusive state. The major gap was regarding citizenship, with the Interim Constitution clearly discriminating against women on the basis of marital status. Thus, while a woman of foreign nationality married to a Nepali man would be allowed to acquire naturalised Nepali citizenship automatically, the same choice was not given to a foreign man married to a Nepali woman [Article 9(6)]. Likewise, while children born to Nepali fathers married to foreign women automatically acquired citizenships by virtue of descent there were restrictions placed on children born to Nepali mothers married to foreign men getting citizenship [Article 9(7)]. Another shortcoming was the lack of explicit recognition of various groups, including religious minorities such as Muslims (barring a single mention under state policies) and Christians, in the expansive list of groups to receive special consideration from the state.

Also missing were special measures for marginalised groups in accordance with international instruments Nepal had adopted such as the Convention on Elimination of Discrimination Against Women (CEDAW) (ratified in 1991), and the International Convention on the Elimination of All Kinds of Racial Discrimination (ICERD) (acceded to in 1971). Although Article 156 of the Interim Constitution clearly stated that a treaty or agreement ratified, acceded to, accepted or approved by Nepal according to its law is binding on the State, it did not require the government to create the necessary sanctions within a certain specified period of time. The law in question, i.e., the 1990 Treaty Act also provided no clue in this regard. National enabling provisions are a must to enforce the treaty commitments but the Interim Constitution gave no guidance within the new constitutional framework and neither did

60 Yagyanidhi Dahal et al v. Ministry of Local Development, Dhanusha District Development Committee, Kathmandu Metropolitan City and Rajbiraj Municipality (1999).

61 While amendments 1 to 7 made changes to the substance of the Interim Constitution itself, amendments 8, 9, 10 and 11 dealt with extending the tenure of CA-1 while amendment 12 only introduced changes to the process of passing the draft constitution.

any of the 12 amendments deal with these or others ratified after the Interim Constitution had come into force. The UNDRIP (signed in 2007), although a declaration, and the ILO 169 (ratified in 2007) also remained unattended.⁶² This omission was particularly glaring given that the Interim Constitution obligated the State ‘to implement effectively international treaties and agreements’ to which Nepal is a party [Article 33(m)].

Since instruments such as CEDAW and ILO 169 require that parties develop enabling laws for their implementation, the failure to do so was especially problematic. As a result, the stipulations contained within such instruments could not be fully implemented despite the spirit of the Constitution. That failure assumed greater significance given how the Supreme Court in 2004 issued a mandamus to the government to enact a special law ensuring reservation for women and other backward groups as per the 1990 Constitution’s provisions allowing the government to enact affirmative action policies in the context of right to equality but which required an enabling law as well.⁶³

The Interim Constitution was not jurisprudentially accurate either in some cases. Some of its provisions on inclusion lumped together various categories of people like farmers, labourers and other economically deprived communities along with the historically marginalised groups of Nepal. Generally, protective or special measures recommended by the ICERD, CEDAW, UNDRIP and ILO 169 are for the benefit of historically or systematically

62 Article 4 of CEDAW states: ‘Temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.’

63 Notably, affirmative action was not recognised in the context of group rights but rather was limited to the context of the right to equality in the 1990 Constitution. According to Article 11(3), ‘The State shall not discriminate among citizens on grounds of religion, race, sex, caste, ethnicities, or ideological conviction or any of these. Provided that special provisions may be made by law for the protection and advancement of the interests of women, children, the aged or those who are physically or mentally incapacitated or those who belong to a class which is economically, socially or educationally backward.’

A case was filed at the Supreme Court opposing the government’s affirmative action policy in relation to seats being reserved for women, Dalits and Janajatis in higher education as per the budget speech of 2003/04. Since the necessary laws for the ‘special provisions’ mentioned in the 1990 Constitution had not been enacted, the policy was challenged. Ruling on the case, the Supreme Court took the government to task for not having a law in place despite the passage of 14 years, nullified the policy on reservations, and issued a directive order to the government to enact a law to implement the provisions for affirmative action (*Pradyosh Chhetri et al v. His Majesty’s Government, Office of the Prime Minister and Council of Ministers*, 2004). No such law was enacted until 2007 when the Civil Service Act was amended to guarantee reservations to marginalised communities and women.

marginalised communities only, which means that the problems of economically weaker groups are to be addressed through other welfare schemes.

Other contradictions and/or limitations of the Interim Constitution, especially with regard to the ways in which it sought to address the problem of historically marginalised groups, included the following:

- Article 13 outlined the need to ensure special measures for the ‘protection, empowerment or advancement of women, Dalits, Adibasi Janajatis and Madhesis, or farmers, labourers, or those who belong to a class which is economically, socially or culturally backward’. That was an important provision since it also stated that ‘nothing shall be deemed to prevent the making of special provisions’ for these groups. However, it did not make the introduction of such special measures time bound.
- Articles 13(2) and 13(3) adopted the principle of non-discrimination on the basis of religion, caste, ethnicity, gender, origin, language or ideological conviction.⁶⁴ But it did not take into account discriminations based on other factors—colour, property, birth or other status—included in the International Covenant on Civil and Political Rights (ICCPR).⁶⁵ Nor did it cover factors generally deemed to fall within the purview of human rights jurisprudence, i.e., disability, sexual orientation, age, marital status, maternity, status of health and so on.⁶⁶
- Article 13(4) recognised the right to equal remuneration as a separate provision. However, the provision only covered discrimination between men and women but not against Dalits when in fact Dalits have been victims of discrimination with regard to remuneration for the same work because of their identity.⁶⁷
- Article 18 recognised the right to social security but limited this right to ‘women, labourers, and the aged, disabled, as well as incapacitated and helpless citizens’. That was in contradiction to the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR),

64 Article 13(2) prohibited ‘discrimination against any citizen in the application of general laws on grounds of religion, race, gender, caste, ethnicity, origin, language or ideological conviction or any of these’, while Article 13(3) declared that the state ‘shall not discriminate among citizens on grounds of religion, race, caste, ethnicity, gender, origin, language or ideological conviction or any of these’.

65 International Convention on Civil and Political Rights, (ICCPR), 1966.

66 Convention on Ending All Forms of Discrimination against Women (CEDAW), 1979

67 See Menuka Karki and Alok K. Bohara, 2014. ‘Evidence of Earnings Inequality Based on Caste in Nepal’, *The Developing Economies*, Institute of Developing Economies, 52:3, <https://onlinelibrary.wiley.com/doi/full/10.1111/deve.12049>.

Box 2-2: ICESCR Provisions Inadequately Reflected in the Interim Constitution

- Article 7: The right to fair wages, a decent living, safe and healthy working conditions, equal opportunity to be promoted in employment to an appropriate higher level.
- Article 8(1): The right to strike.
- Article 10(2): Special protection to mothers for a reasonable period before and after childbirth with accorded paid leave or leave with adequate social security benefits.
- Article 11: The right to adequate standard of living.
- Article 12: The right to enjoyment of the highest attainable standard of physical and mental health.
- Article 13(20): A clear right to education.
- Article 14(2): Progressive introduction of free education.
- Article 15: The right to take part in cultural life, to enjoy the benefits of scientific progress.

which Nepal ratified in 1991. Under the ICESCR, Nepal is under obligation to uphold the ‘right of everyone to social security, including for social insurance’ (Article 9). As a result, some deprived groups like Dalits, Janajatis and other disadvantaged communities may not have qualified to exercise the right to social protection, which, although recognised as a fundamental right, remained limited (see Box 2-2 as well).

- Under the sub-heading ‘Right to Social Justice’, Article 21 guaranteed social justice to women, Dalits, Janajatis, Madhesis, oppressed groups, poor farmers and labourers who are economically, socially or educationally backward in terms of the ‘right to participate’ in state structures, based on the principle of proportionate inclusion. This Article, even though impressive, limited the scope of social justice to these groups only in terms of representation in state bodies. There is no guarantee of a society in which individuals and groups receive fair treatment and a just share of social benefits in all aspects of public life. Likewise, here, again, historically disadvantaged groups were clubbed together with others who have claims on the state but not on the same grounds.
- Article 33(d1), which formed part of the ‘Responsibilities of the State, Directive Principles and Policies’ section, sought to enable women, Dalits, Janajatis, Madhesis, labourers, farmers, the physically impaired,

disadvantaged classes and disadvantaged regions to participate in all organs of the state on the basis of proportionate inclusion. The coverage of this provision seemed limited in that it only covered ‘participation’ in state organs and not ‘participation and representation’. This distinction is important because representation and participation are different processes, and hence demand different mechanisms to achieve them. In particular, the latter would have allowed individuals to stand in for others or speak for their constituents as and when necessary.

- Article 154 provided for the formation of ‘necessary commissions’ to protect and promote the rights of various groups, namely, women, Janajatis, Dalits, Madhesis and the disabled (along with labourers and farmers), but only stipulated that the government ‘may’ and not ‘shall’ form those commissions. And, even if these had been set up, their status would have been inferior to constitutional bodies such as the National Human Rights Commission.

Compared to its predecessors, the Interim Constitution was liberal in recognising various economic, social and cultural rights such as the right to education, basic health, employment, social security, food security, property, social justice, as well as child rights and community rights to preserve and promote different languages, cultures and heritages, and to receive basic education in the respective mother tongues. However, although recognised as fundamental rights, these were limited to the extent that they were to be provided for by formulating enabling laws. In the absence of such legal provisions, the Interim Constitution, in effect, could not guarantee all the fundamental rights of the individuals, citizens and communities historically facing discrimination and disadvantages. Further, in addition to judicial remedies, the implementation of economic, social and cultural rights requires special mechanisms, but the Interim Constitution did not provide for those. For example, in order to implement the right to employment, the South African constitution had created a provision for the creation of an Employment Equity Commission but, in Nepal, such a mechanism was not contemplated by the Interim Constitution.

2.3 Other Notable Steps towards Promoting Social Inclusion

The extent to which the need for a more inclusive society and polity had been internalised within the state apparatus was underscored by the first post-2006 periodic plan of the Government of Nepal, the Three-Year Interim Plan (2007/08–2009/10). Under a separate chapter entitled ‘Social Justice and

The issue of inclusion has come into the forefront due to weak implementation of past initiatives in making the society equitable by reducing the existing regional, class, caste/ethnicity and other disparities and discriminations. Recognising this situation, the Tenth Plan included inclusion as a strategic pillar for poverty alleviation. Important provisions of inclusion have been included in the Interim Constitution, 2007 in the spirit of the People's Movement of 2006 so as to ensure citizen's rights for all castes/ethnic groups, gender, religions, regions, ages, and classes by restructuring the State.²⁹

This government document also contains perhaps the most succinctly clear expression of the need for and character of an inclusive society and polity.

Inclusion means to fulfil the physical, emotional and basic needs of all the people, groups or castes. It has to be achieved by respecting their dignity and their own culture and also reducing the disparities between excluded and advantaged groups and by reducing the gap in the existing opportunities and access. In addition to this, it is to help to build a just society by ensuring rightful sharing of power and resources for their active participation as a citizen.

The Interim Plan was prepared during a period when very progressive legislations were being adopted by the Government of Nepal to promote greater inclusion.³⁰ Besides the Interim Constitution, perhaps the most significant of the laws aimed at inclusion were the Constituent Assembly Election Act, 2007 and the amendment to the Civil Service Act, 1993, as discussed below.

2.3.1 Inclusion through Constituent Assembly Elections

In order to make the Constituent Assembly fully inclusive of women, Dalits, Janajatis and Madhesis, the Interim Constitution followed a two-pronged strategy. The first was the adoption of a mixed electoral form consisting of the first-past-the-post (FPTP) and the proportional representation (PR) systems.³¹ This was meant to ensure that the composition of candidates reflect-

²⁹ National Planning Commission (2007).

³⁰ The status of various marginalised groups as well as key achievements during this period is discussed in detail in Bennett et al (2013).

³¹ The crucial agreement reached between leaders of the SPA and the CPN (Maoist) of 8 November 2006 which paved the way for the CPA included the adoption of the mixed system for the CA election. In its note of dissent to the same agreement, the CPN-UML had stated that it believed 'the proportional system would be the most democratic method to adopt for the

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systems.⁷⁰ This was meant to ensure that the composition of candidates reflected the country's social diversity.⁷¹ Second, the Constitution also provided for special measures through reservations in the electoral system. Article 63 of the Interim Constitution required that a third of each political party's list of election candidates consist of women according to the principle of inclusion and proportionate representation. Additionally, like Article 113(3) of the 1990 Constitution, Article 142(40), stated that 'the Election Commission shall not register any political parties if any Nepali citizen is discriminated against in becoming a member of the political party on the basis of religion, caste, ethnicity, language or gender'.

Pursuant to the provisions enshrined in the Interim Constitution, the Election to the Members of the Constituent Assembly Act, 2007 had detailed requirements for the list of candidates and for the allocation of proportional seats (see Table 2-1). This strategy was successful in bringing 197 women, 51 Dalits (16 Tarai Dalits and 35 hill Dalits), and 210 Janajatis (160 from the hills and mountains, and 50 from the Tarai) into the 601-member CA-1 following its election in April 2008.⁷² Such diversity set a record in the history of political participation of the marginalised groups in Nepal. There were, however, some notable gaps. For example, Dalits had only 9 per cent representation in the CA-1, far short of their national population of approximately 13 per cent. Notably, the under-representation of Dalits came about despite the argument put forth by Dalits and other such groups that because of the systemic discrimination in the past, previously excluded groups should have received more than simple proportional representation. Further, several neglected and disadvantaged communities with sizeable populations, particularly from the Tarai, most notably, the Musahar (0.8 per cent of the national population) and the Mallah and Kalwar (with 0.5 per cent each) had no representation in the CA-1.

Notwithstanding the increased representation of the previously

70 The crucial agreement reached between leaders of the SPA and the CPN (Maoist) on 8 November 2006, which paved the way for the CPA, included the adoption of a mixed system for the CA election. In its note of dissent to the same agreement, the CPN-UML had stated that it believed 'the proportional system would be the most democratic method to adopt for the Constituent Assembly election'. Asian Study Center for Peace and Conflict Transformation (2011).

71 Article 63 of the Constitution provided for the principle of inclusiveness to be taken into consideration by political parties while selecting candidates for the FPTP part of the election while following electoral laws in drawing up the candidate lists for the PR part to ensure representation of all social groups. Further, it was required that a third of the combined total of candidates fielded in both parts of the election had to be women.

72 Volla (2015).

Table 2-1: Quotas for Proportional Representation in CA Elections

Representative Group		Proportion of Candidates
Women		50
Adibasi Janajatis	Women	18.9
	Men	18.9
Dalits	Women	6.5
	Men	6.5
Madhesis	Women	15.6
	Men	15.6
Backward Regions*	Women	2
	Men	2
Others [†]	Women	15.1
	Men	15.1

* Backward regions consist of the districts of Achham, Kalikot, Jajarkot, Jumla, Dolpa, Bajhang, Bajura, Mugu and Humla.

[†] 'Others' denotes all the groups not explicitly listed here, including Bahuns and Chhetris, the dominant groups in Nepal.

under-represented groups, the main problem was that political leaders and policymakers had yet to materialise into action the concept of equal power-sharing and building equal relations, which constituted one of the fundamental demands of women, Dalits, Janajatis and Madhesis. For instance, Section 5(3) of the Election to the Members of the Constituent Assembly Act, 2007 stated that political parties were to consider the principle of inclusiveness while selecting candidates for the FPTP part of the election and Section 7(3) also required that for the PR part, the political parties were to prepare closed lists of candidates in proportion to their population with women comprising 50 per cent in each of the categories. However, the parties were only obliged to propose candidates from these groups in the FPTP system, not necessarily to secure their seats in the final tally. Thus, in general, while political parties did recommend a large number of women, Dalits, Janajatis and Madhesis in the FPTP part, most of the candidates from marginalised groups were fielded in constituencies where the party itself did not have much influence. Similarly, what were supposedly 'closed lists of candidates' for the proportional representation system were in fact open lists and parties were allowed to pick any candidate from the list (and not required to select the ones based on their initial ranking of candidates). Hence, the results did not favour women as was initially expected. With the exception of Madhesi caste groups, in the case of all the other marginalised

Table 2-2: Results of Constituent Assembly–1 Elections
(per cent by social group)

Group	FPTP	PR	Population per cent (2011 census)
Hill Castes	41.3	28.1	31.3
Hill and Mountain Janajatis	25.4	26.8	27.2
Tarai Janajatis	7.1	8.4	8.7
Hill Dalits	2.5	8.7	8.6
Madhesi Dalits	0.4	4.5	4.7
Madhesi Castes	20.8	20.5	15
Muslims	2.5	2.7	4.3
<i>Women</i>	5.2	28.0	51.5

Source: Vollan (2015).

groups, overall representation was pulled up by the PR section of the election, with five times more women and 11 times more Dalits elected under that system compared to the FPTP part (Table 2-2).

Representation of Dalits was further undermined while selecting the 26 members to be nominated to the CA–1. Despite the mandatory constitutional provision of proportionate representation in appointments to public organs, not a single Dalit featured among the 26 members eventually chosen by the political parties.

2.3.2 Amendments to Make Public Services Inclusive

The 1st amendment to the Interim Constitution in April 2007 recognised the need to include women, Dalits, Janajatis and Madhesis, among others, in all state organs on a proportionate basis. Though progress in that direction was somewhat limited, a noteworthy development was the amendment of the Civil Service Act, 1993 in August 2007 to set aside quotas for excluded groups and people from backward regions. Accordingly, 45 per cent of the seats for new entrants into the civil service was earmarked for the inclusion criteria, with 33 per cent of that 45 per cent reserved for women, 27 per cent for Janajatis, 22 per cent for Madhesis, 9 per cent for Dalits, 5 per cent for persons with disabilities, and 4 per cent for those from backward regions.⁷³ That was followed by amendments in November 2007 to the rules governing

⁷³ In absolute terms, these proportions translate thus: women, 14.9 per cent; Dalits, 4.1; Janajatis, 12.2; Madhesis, 9.9; the disabled, 2.3; and people from backward regions, 1.8.

recruitment into the Nepali Police, the Armed Police Force and the Nepali Army, with the 45 per cent reserved divided up as follows: women (20 per cent), Janajatis (32 per cent), Madhesis (28 per cent), Dalits (15 per cent), and residents of backward regions (5 per cent).

In February 2009, the Government of Nepal promulgated the Ordinance to Amend Some Nepal Acts to Making Public Services Inclusive to incorporate the provision of the quota system in the relevant Acts themselves, as with the Civil Service Act, instead of mentioning it only in the regulations. Accordingly, the Ordinance amended the Police Act, the Development Committee Act, the Education Act, the Nepal Special Services Act, the Health Service Act, the Armed Police Act and the Army Act.⁷⁴ However, in the uncertain political climate following the resignation of the Unified Communist Party of Nepal–Maoist (UCPN–Maoist)-led government, the legislature-parliament did not pass the Ordinance, leading it to automatically lapse after six months.

There was a similar attempt in 2012 to institutionalise those provisions with the introduction of the Bill Made to Amend the Nepal Act to Make Some Public Services More Inclusive, following the four-point agreement signed between UCPN–Maoist, which had come back to power, and the United Democratic Madhesi Front (UDMF), an alliance of Madhes-based parties, in August 2011.⁷⁵ Among others, the Bill proposed increasing the proportion of reserved seats from 45 per cent to 48 per cent while also defining Madhesis to include Dalits, Janajatis and Muslims with origins in the Tarai. Most significantly, the Bill also had the provision that reserved seats that could not be filled due to lack of suitable candidates from the target group would be carried over to the next year and not allocated to the ‘open’ category. Further, the Bill would also have ensured reservations for marginalised groups within the women’s quota while also ensuring reservations for Madhesis in the army.⁷⁶

Following the dissolution of the CA–1 in May 2012, and politics taking a different turn, the Bill died a quiet death. The Bill was also apparently undermined by the state bureaucracy.⁷⁷ It should, however, be noted that although

74 Nepal Gazette, Part 58, 10 February 2009 (Additional 47). These quotas or reservations are meant only for new recruitment.

75 Awasthi (2012).

76 International Crisis Group (2012).

77 The International Crisis Group report cited above mentions that the ‘cabinet bills committee reportedly held the bill up for weeks. One sticking point was that Brahmins, Chhetris and some smaller associated castes, which total just over 30 per cent of the population, were classified as “others”’. The pushback from within the civil service ranks becomes

Table 2-3: Reservations Ensured to Marginalised Groups in Various Government Services

Group	Civil Service, Teachers Service, Health Service	Army, Police, Armed Police
Women	14.9	9.0
Dalits	4.1	6.8
Janajatis	12.2	14.4
Madhesis	9.9	12.6
Persons with disabilities	2.3	—
Residents of backward regions	1.8	2.3

Source: Civil Service Act, 1992, Section 7(1); Teachers Service Commission Rules, 2000, No 11a(1); Health Service Act, 1997, Section 8(5); Army Service Regulations, 2013, No 5(2); Police Service Regulations, 2014, No 9(5); and Armed Police Force Rules, 2015, No 9(3).

the changes envisaged in the Ordinance and the Bill did not get through at the time, all government services have now adopted quotas. Some examples of the system now being followed are shown in Table 2-3.

While these steps towards making public services inclusive have been positive, the government still lacks a timeframe for making state structures such as the civil service, police, army, judiciary and constitutional bodies inclusive. Further, the quota system has been enacted almost haphazardly and not based on any logical basis. For example, the percentage allocated to Dalits is significantly lower than their population share as is the case with women.

Similarly, reservations were provisioned for only during recruitment and not for promotions, undermining the possibility of marginalised groups reaching decision-making levels. No objective basis was given for such a lapse. Not much discussion or thinking appears to have gone into ensuring meaningful representation of the marginalised communities through genuine representation either. For instance, with the exception of women, there is no relaxation in age (i.e., increasing the age bar) for candidates eligible for reservation, as is the practice in some countries.⁷⁸ And, although not strictly

clear from this excerpt from a Public Service Commission publication from 2013: ‘The growing emphasis on inclusiveness in recruitment and promotion of public servants seems to have narrowed the scope of the PSC for selection of candidates on a merit basis, besides increasing complexities in its work processes reducing efficiency in operation. To some extent, it has also posed a challenge on maintaining meritocracy in the civil service’ Public Service Commission (2013).

⁷⁸ Section 10(1)(c), Civil Service Act, 1991 (as amended in 1998 by Civil Service First

adhered to, all the laws on recruitment, starting with the Civil Service Act, further qualify the provision of reserved seats to apply only to the 'economically and socially backward' among the target groups mentioned even though that has not been faithfully adhered to in practice (see also Boxes 5-2 and 6-1).

2.4 Restructuring of the State

That the driving force behind the April 2006 People's Movement was as much the desire for peace as the hope for a more equitable Nepal has been well established. The 12-point agreement was clear about the 'imperative need' for 'a forward-looking restructuring of the state' to contribute to such an outcome. The concept of state restructuring was reiterated in various other documents following the success of the 2006 People's Movement.⁷⁹ And although none of these equated a restructured political system with federalism and even though 'federalism' per se did not feature in these documents, the idea was implicit in the political discourse surrounding the Maoist conflict. Starting with the idea of 'regional autonomy' in the 40-point charter of demands from the Maoists that preceded the insurgency to the 'forward-looking reforms in the present state system' mentioned in the government programme of November 2003 and the 'proportionate development' promised in the May 2005 Declaration that gave rise to the SPA, the need for a major overhaul of the extant system had been demanded and acknowledged by political forces.

The concept of federalism itself is not new for Nepal. As Khanal has written:

The Tarai Congress, a Madhes-based regional political party, first floated it [federalism] in the early 1950s with the advent of democracy following the overthrow of the Rana oligarchy. The call for federalism was revived in 1990 after the downfall of the partyless Panchayat political system and the restoration of democracy. Once again, the call came from a Madhes-based political party, the Nepal Sadbhavana Party, but the Janajati-oriented Rastriya Janamukti Party and other Janajati groups also

Amendment Act) relaxed the age limit for entry by women to 40 while retaining 35 as the cut-off for men.

⁷⁹ In particular, the 18 May 2006 proclamation of the restored House of Representatives, the 8-point agreement between the SPA and the Maoists of 16 June, and the decisions following the meeting of the top leaders of the SPA and the Maoists on 8 November 2006 that paved the way for the signing of the CPA and subsequently the adoption of the Interim Constitution.

raised similar demands. While these efforts failed to capture the political imagination...[the] debate on federalism gained momentum from 1996 with the Maoist insurgency. The rebels' political mobilisation centred on the promise of ethnic self-determination, regional autonomy and an end to discrimination based on caste, ethnicity, language and religion. In 2004, at the height of the insurgency, the Maoists actually declared the division of the country into nine 'autonomous regions'.⁸⁰

The original formulation of the Interim Constitution on the structure of the state had limited itself to stating that the goal would be 'an end to discrimination based on class, caste/ethnicity, language, gender, culture, religion and region by eliminating the centralised and unitary form of the state' by making the state 'inclusive and restructured into a progressive, democratic system' (Article 138). While 'eliminating the centralised and unitary form of the state' could be construed as meaning federalism, the absence of an explicit mention of federalism set off the first Madhes Movement in January 2007. Bowing to one of the main demands of that movement, in April 2007, the Interim Constitution was amended to state that the objective of the progressive restructuring would be to create a state that is 'inclusive and restructured into a progressive, democratic federal system', bringing to fruition a long-standing demand from a large section of the population. Subsequent constitutional amendments further cemented the federal nature of the future Nepali state with the final authority on its structure in the new constitution granted to the soon-to-be-elected Constituent Assembly.

80 Khanal (2017). Seven of these autonomous regions were named after social groups historically associated with those areas. Khanal also notes that the Maoists had not used the term 'federalism' in any of their documents, 'indicating that they had not given it much thought as an organising principle of the state'.

3

Inclusion and the Constitution-Drafting Process: CA-1

Any review of the legal reforms relating to gender, caste and ethnic exclusion in the post-2006 era would have to consider developments in the first sovereign body elected to write a new constitution for Nepal, the Constituent Assembly-1 (CA-1) (2008-2012), and what it bequeathed to its unprecedented and unexpected successor, the Constituent Assembly-2 (CA-2). This is particularly important for two reasons. First, the CA-1's thematic committee reports built on the Interim Constitution's provisions promoting greater inclusion and, in most cases, expanded on them with regard to inclusion in the constitution it had been elected to enact. And, second, the CA-2 took up where the CA-1 had left off, with most of the provisions provided in the latter's committee reports included in the 2015 Constitution. The tasks accomplished by the majority in the thematic committees thus provided some indication of how the issues of inclusion were going to be dealt with in the new constitution. And even though opposed by various marginalised groups, the CA-2 also managed to resolve the 'contentious issues' on which agreement had not been possible in the CA-1.

The discussion that follows provides a snapshot of the provisions in the various CA-1 committees' reports dealing with the idea of promoting inclusion. Footnotes have been supplied to denote where the 2015 Constitution has diverged from what the CA-1 had outlined. It is important to note here that while some of the draft reports were available in translation, these were not official and hence, the clauses and provisions as presented in this document are the authors' own translations of the Nepali versions of the respective reports. As such, direct quotations have been used only sparingly.

3.1 The Workings of the Constituent Assembly-1

Under the Constituent Assembly Rules, 2008, 14 different committees—one constitutional, 10 thematic and three procedural—were formed to

facilitate the process of writing the constitution. Those were as follows:⁸¹

- i. Constitutional Committee

Thematic Committees

- ii. Committee on Fundamental Rights and Directive Principles
- iii. Committee on Protection of Rights of Minorities and Marginalised Communities
- iv. Committee on State Restructuring and Division of State Powers
- v. Committee on Determination of Forms of Legislative Organs
- vi. Committee on Determination of Form of Government of the State
- vii. Committee on Judicial System
- viii. Committee on Determination of Structure of Constitutional Bodies
- ix. Committee on Natural Resources, Economic Powers and Allocation of Revenues
- x. Committee on Determination of Grounds of Cultural and Social Solidarity
- xi. Committee for Protection of National Interests

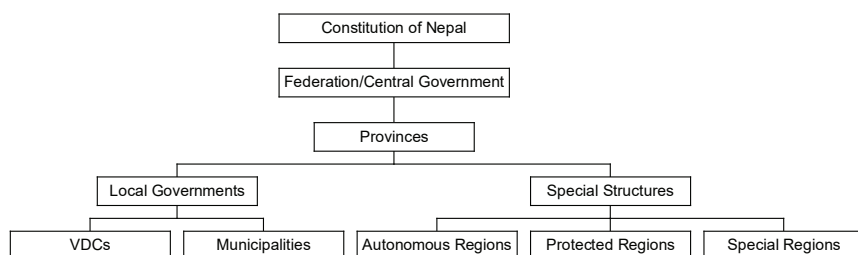
Procedural committees

- xii. Committee on Civic Relations
- xiii. Committee on Collection and Coordination of Public Opinions
- xiv. Committee on Capacity Development and Resource Management

All the committees submitted their thematic concept papers and preliminary constitutional drafts to the CA-1 Chairperson wherein issues of inclusion were addressed from different perspectives for discussion at the plenary of the Assembly. These thematic committees' drafts were to be sent to the Constitutional Committee—the principal drafting organ of the CA-1—once they were cleared by the full House along with additional inputs in the form of 'suggestions' or 'directives'.

The largest of all committees and including senior leaders of all the political parties, the Constitutional Committee was also a miniature version of the CA-1 itself in terms of representation. It was also inclusive in terms of identity groups. According to procedure, this Committee was to finalise the first integrated draft of the new constitution, and once approved by the

81 Each thematic committee had 43 CA members, with the exception of the Constitutional Committee, which had 63. Four of these committees, including three thematic ones, were headed by women.

Figure 3-1: State Restructuring Committee's Federalisation Plan

CA, it would be taken to the people for discussion and public inputs to be collected through participatory mechanisms. All the stakeholders (including the marginalised groups) would thus have the opportunity to once again provide comments on the draft as during the preliminary exercises at the committee level and at the level of the plenary sessions. The revised draft of the Constitutional Committee would then be taken to the CA for a 'clause-wise' discussion, voting and adoption of the new constitution.⁸²

3.1.1 State Restructuring

The Committee on State Restructuring and Division of State Powers (hereafter, State Restructuring Committee) of the CA-1 proposed Nepal's federalisation under a three-tier structure: the central government at the top, 14 autonomous provinces, and local self-government units (Figure 3-1).⁸³ In addition, there were also provisions for special regional structures: autonomous regions,⁸⁴ protected areas,⁸⁵ and special areas.⁸⁶ These regional structures were to co-exist with local government units.⁸⁷

82 See Article 70 of the Interim Constitution of Nepal, 2007 and the Constituent Assembly Rules, 2008, for the applicable procedures. The 12th amendment, in May 2012, however, changed the procedure whereby the provision of consultations among parliamentary party leaders to achieve consensus following any disagreement over the preamble or articles of the proposed constitution was scrapped.

83 'Constituent Assembly Restructuring of the State and Distribution of State Power Committee, Report on Concept Paper and Preliminary Draft, 2066' (unpublished). All the references in this book to this committee's report are from the same source.

84 Consisting of areas with a concentration of an ethnic group or a linguistic community or with a dense population within a province, of which 23 were identified in the report.

85 To be formed in order to protect and promote the culture, identity, and community of marginalised ethnic groups who are in an extreme minority.

86 Comprising backward regions that have remained behind in socio-economic terms and not covered by autonomous regions or protected areas. In other words, areas which do not have ethnic grounds for reorganisation, could be established as special zones, if the region is very backward or deprived.

87 The 2015 Constitution states that 'special, protected and autonomous regions may be created for socio-cultural protection or economic development according to federal law'

The restructuring of the state into 14 provinces was proposed with ethnicity, language, culture, historical continuity, regional and territorial continuity as the primary factors for consideration. Other issues to be considered included: economic interrelationships, viability as a province, status of natural resources, development infrastructure, and administrative convenience. Ethnic factors were no doubt given greater prominence in the federalisation plan than the other criteria. As an analytical report argued,

Federalism is not simply the decentralization of political power; it has become a powerful symbol for a wider agenda of inclusion, which encompasses other institutional reforms to guarantee ethnic proportional representation and a redefinition of Nepali nationalism to recognize the country's ethnic and cultural diversity.⁸⁸

Out of the 14 provinces proposed, seven—Limbuwan, Kirant, Sherpa, Tam-saling, Newa, Tamuwan, and Magarat—could be identified as ethnic territories since each was named after the group most historically associated with the area but marginalised in the nation-building process. If the Jadan province, populated by the Khas, were also to be counted as an ethnic territory, that number would rise to eight. Two of the proposed 14 provinces were in the Tarai, and the rest in the hills and mountains. The draft made clear that Nepal's state powers would be exercised jointly by the central government, provinces, local units, and special regional structures. The committee members expected this plan to empower all the people in the respective provinces to enjoy regional self-rule and make decisions in all areas under their enumerated powers and get the identity and recognition they deserved.

The draft proposal provided several schedules of state powers or competencies for the federal, provincial and local governments, and special regional structures (see the discussion below). As for the rest, the provincial laws were to lay out the division of powers based on the framework provided by the national legislature. Overall, it was clear from the draft that 'progressive restructuring of the state' by eliminating the unitary and centralised structure was deemed necessary to solve the country's existing class, caste/ethnic, linguistic, regional, gender and community-based problems,⁸⁹ and

[Article 56(5)] although none had been created till the end of 2021.

88 International Crisis Group (2011).

89 The argument was that devolution of powers through federalisation would ensure better distribution of rights, improved access to resources and local opportunities, and enhance participation.

establish Nepal as a proportionate federal republic with a fully inclusive democracy. In other words, within the democratic form of governance, the restructuring was intended to guarantee participation of all the people in the national power structures and accountability systems and put an end to the state's exclusionary practices.

More specifically, the draft submitted by the State Restructuring Committee included the right to self-determination and priority rights (see Section 3.1.1.2), both of which were hotly contested.

3.1.1.1 *Right to Self-Determination*

The State Restructuring Committee's draft acknowledged the right to self-determination of Janajatis and Madhesis in that they would be granted the 'right of self-determination internally and locally in the area of politics, culture, religion, language, education, information, communication, health, settlement, employment, social security, financial activities, commerce, land, mobilisation of means and resources and environment'. The draft mentioned that while these rights would be ensured through appropriate laws, and under the Constitution, they would be contingent on their not being used in a way affecting the sovereignty, freedom, unity and territorial integrity of the country.⁹⁰

In the case of Janajatis, the draft referred to the right to self-determination based on the International Covenant on Civil and Political Rights, 1966; the International Covenant on Economic, Social and Cultural Rights, 1966; the UNDRIP, 2007; and the ILO 169. With Madhesis, the draft report, while privileging the historical claims of the Madhesis, maintained that they were citizens of Bideha, Birat, Sahalesh, Simraungarh, Shaka and other federal states during pre-historic, historic and Vedic times. It also noted that since they lagged behind due to discrimination, deprivation and exploitation for almost a millennium, Madhesis would also have the right to self-determination at par with Janajatis. Despite some resistance in public to the right to self-determination, particularly arising from fears of the possibility of secession, that provision as envisioned by the Committee's preliminary draft, did not contain any dissenting note attached to it.

3.1.1.2 *The Issue of Agraadhikar*

The State Restructuring Committee draft also maintained that in the case of provinces named after a particular Janajati group, political parties would be

90 The 2015 Constitution does not mention the right to self-determination at all.

required to give preference to members of the titular ethnic community at the time of election and during the formation of the provincial government under the principle known as *agraadhikar* (priority entitlement to political leadership).⁹¹ Similarly, rights would also be enjoyed by the titular group in the autonomous areas. In both these instances, however, such rights were to cease after two terms. These provisions were recommended to ensure high-level representation of some of the major Janajati groups and for recognising the identity of these hitherto-suppressed people who had had very limited role in the state. This provision was considered problematic though because in almost all the ‘ethnic provinces’, the titular group would not constitute the majority of the population. And, for such an arrangement to be endorsed would require the good faith of the rest of the population as well as an understanding that it would not compromise on the principle of rule by the majority.

In addition to *agraadhikar* on political leadership, Janajatis had also been demanding similar rights over natural resources, particularly, over water, land and forests.⁹² While the issue of prior entitlement to political leadership was accepted by the State Restructuring Committee, it accorded prior rights over natural resources not only to Janajatis but also to wider local communities in the concerned areas.

3.1.2 Fundamental Rights

3.1.2.1 Equality, Non-Discrimination and Special Provisions

The draft presented by the Committee on Fundamental Rights and Directive Principles (hereafter, Fundamental Rights Committee) proposed a new provision for the right to equality:

The state shall not discriminate against any citizen in the application of general laws on grounds of religion, colour, caste, ethnicity, gender, *sexual orientation, physical condition, disability, health condition, marital status, pregnancy, economic condition, origin*, language or region, ideological conviction or other such grounds [emphasis added].⁹³

91 The 2015 Constitution did not dwell on this issue at all.

92 The Nepali alliterative phrase of *jal, jameen ra jungle* was the common refrain.

93 ‘Sambidhan Sabha, Maulik Adhikar tatha Niredhak Siddhanta Samiti, Sambidhan Sabha Nyamawali, 3065 to Niyam 73(1) Anusar Tayar Pari-yeko Avadharanapatra’ (Constituent Assembly, Committee on Fundamental Rights and Directive Principles, Concept Paper Prepared in Accordance with Section 73(1) of the the Constituent Assembly Rules, 2008) (unpublished). All the references in this book to this committee’s report are from the same source.

This non-discrimination clause on the grounds shown in italics above would be the first time that any such clause would have appeared in the provision relating to the right to equality in any constitution of Nepal.⁹⁴ Further, the specific provisions attached to this general clause would make it clear that nothing would be deemed to prevent the making of special provisions by law for the protection, empowerment or advancement of marginalised groups (e.g., women, Dalits, Janajatis, Madhesis, Muslims, minorities, farmers, labourers, oppressed regions, backward classes, marginalised and endangered communities). The destitute; youths; children; senior citizens; the disabled or physically or mentally incapacitated and the helpless; and the economically, socially or culturally backward were also put in the same group as possibly requiring extra support from the state. Broadly speaking, that was a shortcoming of the draft report since historically marginalised groups would need to be treated as a category separate from the other groups excluded on the grounds of economic status, physical abilities, or age.⁹⁵

The draft submitted by the Committee on the Rights of Minorities and Marginalised Communities (hereafter, Minority Rights Committee) also contained provisions relating to the right to equality.⁹⁶ The draft held that persons from minorities, marginalised and excluded communities are free and have the right to equality and dignity by birth, thus placing the onus on the State to ensure that they would not be discriminated against while exercising their constitutional and legal rights.

3.1.2.2 *Right to Social Justice*

The right to social justice was included in the drafts of the State Restructuring Committee, the Minority Rights Committee and the Committee on Determination of Grounds of Cultural and Social Solidarity (hereafter, Cul-

94 The 2015 Constitution [Art 18(2)] has retained almost all the categories apart from 'sexual orientation' and 'origin'.

95 The conflation of these two disparate groups—one based on social identity and the other having to do with characteristics extraneous to exclusion historically—had begun with the 2007 Interim Constitution, which listed the historically marginalised identity groups along with 'farmers, labourers, economically, socially or culturally backward classes or children, the aged and the disabled or those who are physically or mentally incapacitated' in the same article dealing with 'special provisions' from the state. The raft of groups in the 2015 Constitution to be included was even broader, and included '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'.

96 'Final Draft Text of CA Committee on the Protection of the Rights of Minorities and Marginalized Communities' (unpublished). All the references in this book to this committee's report are from the same source.

tural and Social Committee). The draft presented by the State Restructuring Committee stated that women, Dalits, Madhesis, Janajatis, Muslims, sexual minorities, etc, would have the right to participate in state structures on the basis of the principle of proportionate inclusion. It also added that economically weak citizens would be given priority while making these provisions, and accordingly, the destitute, the disabled, and citizens belonging to endangered communities would have the right to special privileges in education, health, accommodation, employment, food and social security.

The Cultural and Social Committee also proposed the right against 'untouchability' and caste-based discrimination.⁹⁷ More specifically, the provision on the right to social justice, among others, laid emphasis on the effective implementation of international treaties to which Nepal is party. For the Directive Principles of the State and State Policies, the Committee stressed the removal of political, economic, social, cultural and all other kinds of inequalities and the strengthening of national unity, with the latter to be accomplished by developing extensive social relations on the basis of equality among various communities and people from different language, religion, and cultural groups. The state would also be expected to encourage social harmony by providing equal protection, and promoting the practice and development of all languages, cultures, and associated norms and values.

Going further, the Minority Rights Committee maintained that besides positive discrimination there should also be a provision for compensation for past victimisation for the protection, development and empowerment of those economically, socially, politically and educationally backward but only after the deserving groups had been identified. The provisions recommended by the Minority Rights Committee would have given a new dimension to the jurisprudence of equality in Nepal with the State required to make special arrangements to ensure more rights and 'overrepresentation' of communities who had suffered from caste- or ethnicity-based discrimination, untouchability, and religious and cultural victimisation in the past.

3.1.2.3 *Right to Religious Freedom, Language and Culture*

The draft submitted by the Fundamental Rights Committee guaranteed the right to religious freedom, which also included 'the right to refrain from any religion'. The draft, however, added that such religious freedom would not entitle anyone to act contrary to public health concerns, decent behaviour

97 'Constituent Assembly, Committee to Decide the Basis of Cultural and Social Solidarity, Preliminary Draft of the Constitution' (unpublished). All the references in this book to this committee's report are from the same source.

and morality, indulge in activities that would jeopardise public peace, or convert others from one religion to another. Further, the draft report stated that no person would be allowed to act or behave in a manner that may infringe upon the religion of others.

The rights regarding language and culture in the draft submitted by the Fundamental Rights Committee stated that every person and community would have the right to use their own language and also enjoy the right to participate in the cultural life of their community. Further, the Fundamental Rights Committee maintained that every Nepali community would have the right to protect and promote their language, script, culture, cultural civilisation and heritage. The right of every individual to create arts and literature, develop them, protect their intellectual heritage, and reap gains thereof, according to the law, was also emphasised.

The right of Janajatis to their language and culture was also emphasised by the Cultural and Social Committee and the Minority Rights Committee. More specifically, the Cultural and Social Committee stated that Janajatis would have the right to their identity and respectful access to natural resources on the basis of their dependence on such resources. Likewise, the draft submitted by the Minority Rights Committee proposed that every person, family or community residing in Nepal would have the right to protect, promote and use his/her language, script, culture, customs, traditions, rituals and practices so long as they were also consistent with universal norms and values of human rights.

3.1.2.4 *Right to Education*

The rights relating to education presented by the Fundamental Rights Committee stated that every citizen would have the right to basic education. That was to be accomplished by making primary education free and compulsory while ensuring the right of every citizen to obtain free education up to the secondary level. Citizens from 'destitute classes' would also have the right to free higher education. Every Nepali community in the country would also have the right to run and operate schools and academic institutions in order to provide education in their mother tongue.

While the Fundamental Rights Committee's draft proposed that citizens of 'destitute classes' would have the right to free higher education, the Minority Rights Committee's draft stated that 'every citizen' would have the right to receive education up to high school level free of cost. The latter draft also stated that it would be the duty of the State to ensure the right of all religious, cultural and linguistic communities to open and run educational

institutions. Additional provisions proposed in the Minority Rights Committee's draft included:

- No educational institutions opened and run by a particular religious, cultural or linguistic community would be deprived of state assistance.
- No person would be deprived of the opportunity to enrol in or receive higher education from any public educational institution for the sole reason that it was opened or run by a particular religious, cultural or linguistic community.
- No person would be deprived of the opportunity to enrol in or receive education from educational institutions run by or those receiving assistance from the State.

In addition, the Cultural and Social Committee also recommended provisions relating to the right to education, albeit along the same lines as that of the Fundamental Rights Committee.⁹⁸

3.1.2.5 Right to Food, Health and Accommodation

In the draft submitted by the Fundamental Rights Committee, every person would have the right to food. Additionally, he/she would have the right to protect himself or herself from vulnerable conditions of life arising from food scarcity. The right to 'food sovereignty' in accordance with the law was also recognised in the Fundamental Rights Committee's draft although it was not elaborated upon.

The right to health also emerged as a substantial feature in the draft submitted by the Fundamental Rights Committee, which recognised the right of every citizen to free basic health services and specified further that no person would be deprived of emergency health services. It also provided guarantees to the right to reproductive health, the right to informed health services, and equal access to both. In addition to health, the draft report stated that every citizen would have the right to access to clean drinking water and sanitation.

The right regarding accommodation was recognised for the first time in Nepal. Under the Fundamental Rights Committee's draft, every citizen would have the right to access proper accommodation. Except in instances where it went against the law or a court order, no person would be evicted from his or her residence or no encroachment made on the same.

⁹⁸ The 2015 Constitution included the provisions mentioned here but not the ones recommended by the Minority Rights Committee.

3.1.3 Group-specific Rights

In addition to fundamental rights, the draft reports submitted by various committees also included provisions for group-specific rights. The discussion that follows deals with the report of the Fundamental Rights Committee with provisions from other committee reports noted where relevant.

3.1.3.1 Rights of Women

The rights relating to women had new dimensions and jurisprudence. There would be a specific guarantee that there would be no gender-based discrimination in any form. Further, women's reproductive rights were also recognised. The report also proposed that no physical, mental, sexual, psychological or other form of violence or exploitation would be inflicted on any woman on the basis of religious, social, cultural, traditional customs or values, or any other grounds. Such violence would be made punishable by law with the victim having the right to receive proper compensation.

In terms of improving women's representation, the draft report proposed that women would have the right to proportionate participation in all state agencies. Following the principle of positive discrimination, every woman would have the right to special opportunities in education, health, employment and social security. The draft also proposed that proportionate representation of women from Dalit, Janajati, Madhesi and other minority communities would be ensured in all the provisions related to women.

3.1.3.2 Rights of Dalits

The draft proposed a new set of guarantees on the rights of Dalits. It would bar any form of discrimination, humiliation or intolerant behaviour against Dalits on any grounds. Such acts would be regarded as a social offence and punishable in accordance with the law. Victims of such acts would be accorded with the right to proper compensation.

The draft also recognised the right of Dalits to participate in all state organs, agencies and sectors on the basis of proportionate inclusion. It mentioned the right of Dalits to special privileges in education, health, employment and social security on the basis of positive discrimination with destitute Dalits given priority under such a provision. In addition, the State Restructuring Committee also proposed proportionate representation of both hill and Madhesi Dalit men and women.

3.1.3.3 Rights of Janajatis

The draft proposed granting Janajatis the right to identity, and protection, promotion and development of their language and culture. Further, Janajatis were accorded the right to special privileges with priority given to their empowerment and development. The minorities among Janajatis would also have the right to special privileges to maintain their identity and enjoy their social and cultural rights.

3.1.3.4 Rights of Madhesis

Madhesis would have the rights to proportionate representation and inclusion at all levels of the State. The draft added that these provisions would be made in accordance with existing laws based on population size and composition. Further, Madhesis would also have the right to equal access to economic, social and cultural opportunities and benefits, and to special privileges for the protection, upliftment, empowerment and development of the destitute and backward classes among Madhesi communities.

3.1.4 Language Policy

The Cultural and Social Committee proposed that all the languages spoken as mother tongues in Nepal be granted the status of national languages of the country. Accordingly, it would be the State's responsibility to preserve, promote and develop all national languages. The draft report also specified that each community with their own mother tongue would have the right to lingual identity and be able to use their language in a dignified manner.

While the draft stated that the Nepali language in the Devanagari script would continue to be the official language of the central government, others that fulfil the criteria established by a language commission would also be recognised as the official languages of the central government (understood to mean the federal government). The only caveat here was that the recommendations provided by the language commission would have to be passed by the central (federal) legislature first. In terms of the official language of provincial governments, the draft stated that the official language would be: i) the language of official business of the federal government, and ii) one or more national languages spoken in the concerned province to be determined by the provincial legislature. The provincial legislature would also have the authority to determine other languages for use in local bodies.

The draft of the Cultural and Social Committee stated that the use of the mother tongue in acquiring public services would not be deemed a hin-

drance to anybody.⁹⁹ Further, while the official language(s) of the central government would also be the language(s) of court proceedings, everyone would be allowed to make a claim or a request to present a problem in their mother tongue in a court of law. The draft mentioned that it would be the responsibility of the concerned court to translate any document, record, etc, relating to the claim or controversy in any mother tongue into Nepali, and maintain a record of the same.

As proposed in the draft, even though the official language of the central government would be the language of official business between the central and provincial governments, provinces would be able to conduct official business with the central government in any one of the languages prescribed as the official language(s) of the said province.¹⁰⁰ The official language between provinces would be the language of official business of the central government and any other language mutually agreed upon by the provinces themselves.

3.1.5 Directive Principles and State Policies

The Fundamental Rights Committee's draft enjoined upon the State to make appropriate provisions for the implementation of the rights relating to education, health, accommodation, food, social justice and social security. It specified that the State would enact legal provisions within two years, or a time frame deemed necessary for the implementation of these rights. On the issue of representation and participation, the draft would require the State to make special provisions for the representation, participation, protection and development of financially deprived, endangered and marginalised communities at all levels of the federal structure (see Box 3-1 for details on the provisions). The right to judicial remedy was also provided for in the draft provisions of the Fundamental Rights Committee.

More specifically, under Directive Principles, the draft of the Fundamental Rights Committee laid down that it would be the social and cultural objectives of the State to end all kinds of discrimination, exploitation and injustice meted on the basis of religion, cultural system, tradition, customs or any other such grounds. Similarly, it specified that it would be the responsibility of the State to create a civilised and equitable society and develop social and cultural values based on respect for national pride, democracy and orientation towards people along with respect for labour, enterprise, discipline and tolerance. According to the draft, the State would also be re-

99 The 2015 Constitution has left this issue open, implying that the issue of languages would be dealt with following the recommendations of the Language Commission.

100 The 2015 Constitution is silent on this issue as well.

Box 3-1: Specific Directive Principles and State Policies in the Fundamental Rights Committee Report

On Social and Cultural Transformation

- To end all kinds of discrimination, inequality, exploitation and injustice prevalent in the society in the name of religion, system, tradition, rituals, or customs;
- To build a well-cultured and civilised society based on healthy and harmonious social relations by fostering a democratic culture;
- To protect and develop languages, scripts, cultures, literatures, arts and heritages of different castes, ethnicities and communities on the basis of equality and coexistence while maintaining the cultural diversity of the country;
- To study, research, excavate, protect, promote and publicise historical, archaeological and cultural heritage in order to protect, promote and develop such heritage;
- To support community development by enhancing local people's participation while promoting and mobilising the creativity of the local community in social, cultural and service-oriented works; and
- To emphasise the development of arts, literature and music, that have remained as national heritage.

On Social Justice and Inclusiveness

- To ascertain the right of every citizen to be able to live a dignified and respectable life free of any kind of social and/or cultural discrimination;
- To ensure the participation of women, Dalits, Adibasi Janajatis, Madhesis, backward groups/regions, Muslims, minority and marginalised communities, oppressed class, sexual and gender minorities, disabled (differently abled), poor, farmers, workers, and youths in the state structures of the nation on the basis of the 'principle of inclusiveness' and in public services on the basis of the 'principle of proportionate participation';
- To support the livelihoods of helpless, single women, etc, by giving them priority in employment;
- To make women who are vulnerable, excluded from family and community, and/or victims of violence more self-reliant through rehabilitation, protection/patronage and empowerment;

- To ascertain the availability of necessary services and conveniences to women who are in all stages of reproduction while keeping in mind women's reproductive role as a social responsibility;
- To make special provisions for inclusive proportionate participation of women in all organs of the State;
- To provide special rights to Dalits, along with compensation, on the basis of positive discrimination, while also declaring caste-based discrimination and practice of untouchability to be a crime;
- To make special provisions for ascertaining the right of ethnic, religious, linguistic minorities and marginalised communities to live a dignified and respectable life along with the recognition of their identity;
- To ensure the rights of Janajatis to live a dignified life along with their distinct identity, make the necessary provisions enabling them to participate in decisions concerning their community, protecting and promoting their traditional knowledge, skills, culture, social tradition and experience, and giving them priority while accessing natural resources.
- To make special provisions to fulfil the right of gender and sexual minorities to lead a dignified and respectable life.

quired to respect cultural diversity, maintain communal goodwill, solidarity and harmony while consolidating national unity.

The Fundamental Rights Committee's draft also contained provisions for state policy to promote national unity by maintaining mutual goodwill, tolerance and solidarity among different castes, ethnicities, religions, languages, cultures and communities. By the same token, it also underscored the need for such a policy to develop mutually cooperative relationships among the federal units.

The draft of the State Restructuring Committee recognised that special protection would be required for the representation, participation and development of endangered communities which had been excluded from accessing state power and also suppressed and oppressed by the State. To this end, the State Restructuring Committee created a provision for the State to draft and implement special protection policies by enacting laws to ensure representation, participation and development of such groups at all levels of the federal structure.

Notably, the draft took the Directive Principles and State Policies a step further and acknowledged that with regard to the implementation of special rights relating to women, Dalits and other marginalised communities and

its impact, it would be necessary to periodically review the status of these groups on the basis of their human development. Accordingly, a provision was included for the Government of Nepal to review and revisit the situation of the various groups receiving special rights following the decennial national censuses.

It is important to note here that the aforementioned Directive Principles and State Policies proposed by the various thematic committees were not meant to be enforceable in a court of law. However, unlike in the past, they would have assumed more meaning than the previous constitutions because the Head of State would have the responsibility to present an annual report before the federal legislature relating to the measures taken in order to execute the Directive Principles and Policies, and the gains achieved. Additionally, they would also have provided for a committee in the federal legislature to monitor the progress and implementation of these principles and policies.

3.1.6 Provision of Independent Commissions

The Committee for the Determination of the Structure of Constitutional Bodies (hereafter, Constitutional Bodies Committee) recommended the creation or rejuvenation of several different commissions to work in the areas of gender, caste and ethnicity.¹⁰¹ These included: the Federal Human Rights Commission, the Federal Women's Commission, the Federal Dalit Commission, the Federal Adibasi Janajati Commission, the Federal Commission for the Protection of the Rights of People with Disabilities, Minorities and Marginalised Communities and People of Backward Regions, the Federal Madhesi Commission; and the Federal Muslim Commission.¹⁰² All these commissions were to consist of a chairperson and members appointed on the basis of proportionate representation and inclusiveness.

Interestingly, the draft report did not seek to rectify the often-cited criticisms charged against the existing commissions—the lack of effective linkages amongst the different commissions. Thus, for example, the Federal Dalit Commission would conduct studies on issues relating to Nepal's Dalits,

101 'Constituent Assembly, Committee to Decide on the Structure of Constitutional Bodies, Preliminary Draft 2066 (2009)' (unpublished). All the references in this book to this committee's report are from the same source.

102 The 2015 Constitution provided for the National Human Rights Commission, the National Women Commission, the National Dalit Commission, the National Inclusion Commission, the Janajati Commission, the Madhesi Commission, the Tharu Commission, and the Muslim Commission. Notably, while the 2015 Constitution did not contain provisions for a separate commission for people with disabilities, minorities and marginalised communities, and people of backward regions, it provided for the formation of a National Inclusion Commission, which was mandated to protect the rights of these groups and others.

identify measures that need to be taken in order to end racial oppression and discrimination, and make recommendations to the Government of Nepal for implementation. Similarly, the Federal Madhesi Commission would be required to conduct studies to examine issues related to Madhesis, identify proper measures to address those issues, and make recommendations to the Government of Nepal. Despite these similarities in roles and responsibilities and obvious overlaps, the various commissions proposed were to be treated as separate units with prescribed responsibilities of drafting policies and programmes pertaining to their respective areas of business, and any semblance of linkages with the broader commissions like the National Human Rights Commission (to be rechristened the Federal Human Rights Commission) completely absent in the draft.

The draft by the State Restructuring Committee also provisioned for a Federal Women's Commission and a Federal Dalit Rights Commission with such commissions formed in each province as well. There would be a Federal Madhesi Commission and similar commissions were to be formed in individual provinces as required. The Cultural and Social Committee's draft had also proposed setting up a Dalit Commission under the central government.

With reference to the Federal Human Rights Commission, the Constitutional Bodies Committee gave continuity to the mission and structure of the National Human Rights Commission with the chairperson and members appointed on the basis of proportionate representation and inclusiveness. The draft stated that it would be the duty of the National Human Rights Commission to ensure respect for as well as protection and promotion of human rights and their effective implementation. It did not, however, make any mention of any linkages with the other commissions proposed by the other committees.

3.1.7 Citizenship

On the issue of citizenship, the draft of the Fundamental Rights Committee proposed that an individual whose parents were both Nepali citizens at the time of his/her birth would be entitled to Nepali citizenship by descent. The draft also provisioned for citizenship by ancestry, without gender discrimination, to those children born of a Nepali citizen married to a foreign national on the condition that the child would have been born and lived in Nepal, would not have obtained foreign citizenship by virtue of the citizenship of the parent of foreign origin, and both of whose parents would have received Nepali citizenship at the time the child obtains his or her own citizenship. However, if either parent is not a Nepali citizen at the time of

the child obtaining citizenship, he or she would be granted citizenship by naturalisation.

A foreign national married to a Nepali citizen would be able to obtain naturalised Nepali citizenship on the condition that he/she has lived legally in Nepal for 15 years and renounced the citizenship of the foreign country. However, if a foreign woman married to a Nepali man prior to the promulgation of the Constitution were to wish to obtain Nepali citizenship, she would be able to obtain naturalised citizenship after applying to renounce her citizenship of the foreign country.¹⁰³

Another provision in the draft provided for an individual who would have renounced his/her Nepali citizenship in favour of foreign citizenship to be provided with the same kind of citizenship he/she enjoyed previously if he/she were to return and live in Nepal for five years and renounce foreign citizenship.

The draft had the provision that only those Nepalis who had obtained citizenship by descent would be eligible to be elected or appointed head and deputy head of the state, head of federal and provincial legislatures, executives and judiciaries, and heads of constitutional bodies and security organs. A person with naturalised citizenship or citizenship by birth would have had to have lived in Nepal for at least 10 years to be eligible to be appointed to constitutional positions while the duration of residence mandated was five years for those who would have re-obtained Nepali citizenship by descent.

Some of these provisions went against the draft report submitted by the Minority Rights Committee, which in its preamble emphasised that democracy, rule of law and long-lasting peace, stability and development is possible only by building a just, inclusive state that provides equal treatment to persons from all castes, ethnicities, religions, regions regardless of their colour, sex, class, caste, regional or religious backgrounds.

3.2 Dissolution of CA-1

On 28 May 2012, the CA-1 was dissolved, having failed in its mandate to draft a new constitution for a federal Nepal.¹⁰⁴ The four years of its existence consisted of its original tenure of two years as well as extensions

¹⁰³ The 2015 Constitution remains silent on the issue of how foreign men married to Nepali women can acquire Nepali citizenship while granting the right to a foreign woman married to a Nepali man to acquire naturalised citizenship.

¹⁰⁴ EKantipur, 'CA dissolved; PM proposes fresh election for Nov 22', *EKantipur*, 28 May 2012, <https://web.archive.org/web/20150403102035/http://www.ekantipur.com/2012/05/28/top-story/ca-dissolved-pm-proposes-fresh-election-for-nov-22/354644.html>.

achieved by amending the interim constitution repeatedly.¹⁰⁵ There were several factors behind the breakdown of the constitution-drafting process. Those included the absence of any leader or leadership trusted by all the major parties in the CA, fundamental differences between key stakeholders on whether the country should go with provinces divided on the basis of a single ethnic identity or of multiple identities, equally strong differences on the number of provinces and their boundaries, factionalism along ethnic lines, and the failure to find a compromise solution.¹⁰⁶

Despite the setback of not having been able to agree on a constitution, there was a fair degree of progress towards one. The thematic committees had submitted their draft reports by February 2010, and the Constitutional Committee had drawn up a framework for the contents of the reports to be incorporated in the new constitution. There were, however, also a number of issues that required consensus, especially since they called for compromises at the highest political level. These had to do with the system of government (parliamentary, presidential or mixed), the electoral system at different levels of government, and independence of the judiciary, among others.¹⁰⁷ Most of the provisions accepted as initial preliminary drafts were also clumsy, ridden with political overtones and demanded clarity. Many issues also required harmonisation when the reports of all thematic committees were considered together. One such example was the issue of right to equality mentioned by several thematic committees in their preliminary drafts even though as a matter of principle, the right to equality lay under the thematic jurisdiction of the Fundamental Rights Committee.

In May 2009, a 15-member Report Study Committee had been formed by the CA-1 with a view to ensuring uniformity as well as comprehensiveness in the thematic reports, and in anticipation of ‘duplications, repetitions, contradictions, controversies’.¹⁰⁸ Despite the efforts of this Committee, agreement could not be reached on 210 issues. In February 2011, a Dispute Resolution Subcommittee, comprising prominent leaders from the five major political parties in the CA-1, was formed under the Constitutional Committee to find a resolution to those 210 issues as well as the 78 other

105 The 8th to the 11th amendments extended the life of the CA-1 by varying periods, ranging from three months to one year.

106 See Adhikari (2012).

107 See Annex D in ‘The Constitution Information Centers Implemented by Nepal Law Society/International IDEA/ UNDP/USAID/RDIF, Summary Report: July 2011–October 2011’ for further details, <https://bit.ly/3JXzRfV>.

108 Ibid.

contentious ones from the State Restructuring Committee.¹⁰⁹ The Subcommittee was able to whittle down the number of issues under dispute to 117. The ‘initial outline’ of the constitution prepared by the secretariat of the Constitutional Committee on the basis of issues on which agreement had been reached left whole sections blank for the form of the state and division of powers; federal executive; federal legislature; local legislature; judiciary; local-level management procedure; and local-level fiscal procedure.¹¹⁰ In effect, despite having spent four years deliberating over it, the CA-1 was far from having completed its main task of drafting a complete constitution.

3.2.1 Disagreement over Provinces

It was state restructuring, i.e., the kind of federalism to be adopted, including provincial boundaries, which was to prove to be the main stumbling block to agreement on a new constitution. As stated earlier, the Interim Constitution had addressed the demands of Janajatis and Madhesis more substantially than any of the previous constitutions of Nepal. The first amendment to the Interim Constitution declared Nepal would adopt a federal democratic system of governance. The stated objective of the federal democratic system was to end discrimination based on class, caste/ethnicity, language, gender, culture, religion and region, by eliminating the centralised and unitary form of the state. Accordingly, the Interim Constitution stated that the state would be restructured following the recommendations of a high-level state restructuring commission (see Box 3-2).

Although the State Restructuring Committee of the CA-1 had proposed a federal model with 14 provinces, there was strong opposition from the leadership of the non-Maoist and non-Madhes-based parties, as well as from among Bahun-Chhetri members of the Maoists, basing their argument mainly on questions over the economic viability of so many provinces as well as the possibility of ethnic violence erupting.¹¹¹ It was also reported that instead of holding a debate in the CA plenary on the proposal, the State Restructuring Committee’s report was forwarded to the Constitutional Committee, which placed the issue of federalism among the ‘contentious issues’.¹¹²

109 This heavyweight sub-committee was headed by Pushpa Kamal Dahal Prachanda of the UCPN–Maoist with Ram Chandra Poudel of the Nepali Congress, Madhav Kumar Nepal of the CPN–UML, Laxman Lal Karna of the Sadbhavana Party, and Kalpana Rana of the CPN–Unified as members.

110 For more details, see Secretariat of the Legislature–Parliament of Nepal (2013).

111 International Institute for Democracy and Electoral Assistance (2015).

112 International Crisis Group (2012).

Box 3-2: Article 138, Progressive Restructuring of the State

1. To bring an end to discrimination based on class, caste/ethnicity, language, gender, culture, religion and region by eliminating the centralised and unitary form of the state, the state shall be made inclusive and restructured into a forward-moving' democratic federal system.*
- 1a. According to the aspirations of Madhesis along with Adibasi Janajatis and people from backward and other regions for autonomous provinces, Nepal shall be a Federal Democratic Republic. The provinces shall be autonomous with full rights. The Constituent Assembly shall determine the number, boundary, names and structures of the autonomous provinces and the distribution of powers and resources, while maintaining the sovereignty, unity and integrity of Nepal.
2. A high-level commission shall be constituted to make recommendations for the restructuring of the state in accordance with Clause (1) and (1A). The composition, function, duty, power, and terms of service of such a commission shall be as determined by the Government of Nepal.
3. The final decision relating to the structure of the state and federal system shall be as determined by the Constituent Assembly.

*Amended to introduce the word 'federal' on 13 April 2007 by the Interim Constitution of Nepal (First Amendment), 2063

In accordance with Article 138(2) of the Interim Constitution, in April 2009, the government formed a high-level two-member commission to provide recommendations for state restructuring.¹¹³ However, the Commission was unable to commence work because of concerns amongst some political segments, including Madhesi parties, who felt that they had not been adequately consulted prior to forming such a commission. Again, in November 2011, a nine-member State Restructuring Commission (SRC) was formed, with the mandate to consider the report of the State Restructuring Committee and provide recommendations on state restructuring while taking heed

113 Pradeep Meyangbo and Saru Joshi Shrestha, 'Mantriparishad Baithak/Rajya Punar-samrachana Ayog Gathan' (Cabinet Meeting/State Restructuring Commission Formed', *Kantipur*, 14 April 2009, <https://ekantipur.com/40/2009/04/16/189639.html>; BBC Nepali.com, 'Pradhanmantrile Pheri Pratibaddhata Todeko Congresssko Arop' (Congress Accuses Prime Minister of Breaking His Commitment), https://www.bbc.com/nepali/news/story/2009/04/printable/090419_pm_congress.

of issues of both identity and economic viability.¹¹⁴ Owing to disagreements within the commission, the SRC ended up submitting one ‘majority report’ (endorsed by six members of the SRC) and one ‘minority report’ (endorsed by three members).¹¹⁵ The majority proposed an 11-province model, 10 on the basis of identity,¹¹⁶ and one non-territorial province for Dalits. The minority came up with six provinces without specifying any names. Both reports were roundly opposed by a host of identity groups with their own specific interests.¹¹⁷

Following a last-ditch attempt made in May 2012, just days before the tenure of the CA-1 was to end, the Dispute Resolution Subcommittee was able to arrive at an informal political agreement over all those contested issues.¹¹⁸ These included agreement on the shape of federalism, form of government, legislative system, and judicial system.¹¹⁹ Most pertinently, there was agreement on the number of provinces as well: 11. But apart from the fact that the Tarai would be divided up among five provinces, neither the boundaries nor the names of the proposed provinces had been agreed upon, having left it to a federal commission to decide upon. That model was rejected by Janajati and Madhesi leaders and activists. The national debate in the last few days of the CA-1 revolved around this particularly touchy question of federalism, whereby proponents of identity-based federalism tussled with those virulently opposed to such a conception of federalism. With the two positions not being able to find common ground, the CA-1 ran out of time and dissolved at midnight of 27 May 2012.

The Interim Constitution, promulgated in 2007 to govern the country during the transition to a new constitution, had not contemplated a situation where the CA would expire without producing a new constitution. The period of constitutional crisis that followed came to an end only after fresh elections to a second CA was called under exceptional arrangements.¹²⁰ The discussion regarding the design of Nepal’s federal system was thus carried over to the CA-2.

114 Nepali Times, ‘SRC formed’, 22 November 2011, <http://archive.nepalitimes.com/blogs/thebrief/2011/11/22/src-formed>.

115 Thapa (2017).

116 Namely, Karnali-Khaptad, Madhes-Awadh-Tharuwan, Magrat, Tamuwan, Narayani, Tamsaling, Newa, Madhes-Mithila-Bhojpura, Kirat and Limbuwan,

117 See Spotlight, ‘SRC Report: Burning Issue’, *Spotlight*, 10 February 2012, <https://www.spotlightnepal.com/2012/02/14/src-report-burning-issue>.

118 For more details, see Secretariat of the Legislature-Parliament of Nepal (2013).

119 For more details, see International Institute for Democracy and Electoral Assistance (2015).

120 See, generally, Adhikari (2013).

4

Inclusion and the Constitution-Drafting Process: CA-2

Fresh elections to the second Constituent Assembly (CA-2) were slated for November 2012 but the political stalemate that had contributed to the demise of the CA-1 continued even after its dissolution. Finally, in March 2013, an agreement was reached aimed at resolving the crisis among the four major political forces, the Nepali Congress, the CPN-UML, the UCPN-Maoist and the United Democratic Madhesi Front, the alliance of political parties based in the Tarai. As part of the agreement, an Interim Election Council was formed under the then Supreme Court (SC) Chief Justice.¹²¹ Elections for the CA-2 took place in November 2013, with 122 political parties contesting, a marked increase from the 56 in the fray for the CA-1.¹²²

The elections were held under the same rules as earlier: 240 FPTP and 335 PR seats with 26 to be nominated by the post-election government.¹²³ The results saw the Nepali Congress emerge as the largest party, winning 196 of the 575 elected seats, followed closely by the CPN-UML with 175, and the UCPN-Maoist placed a distant third with just 80 (Table 1-1).¹²⁴ A coalition government was formed with the Nepali Congress leading it and the CPN-UML as a junior partner along with a cast of other smaller parties. The new CA convened in January 2014. Like its predecessor, the CA-2 was also mandated to work as a regular legislative body, the so-called Legislature-Parliament, pursuant to Article 83 of the Interim Constitution.

¹²¹ International Institute for Democracy and Electoral Assistance (2015).

¹²² Hachhethu (2013).

¹²³ The March 2013 agreement had proposed reducing the PR seats to 240, at par with the FPTP's 240, and the nominated ones to 11, bringing the total to 491. However, in September 2013, it was decided that the CA-2 elections would be held under the same arrangement as earlier. National Democratic Institute, 'In Nepal, Women Fight to Maintain Seats in the Constituent Assembly', 24 January 2014, <https://www.ndi.org/nepal-women-fight-to-maintain-seats-in-parliament>.

¹²⁴ The Freedom House (2017).

4.1 Composition and Representation

The caste, ethnic and political composition of the CA-2 was very different from the CA-1 owing to ‘developments such as the rise of ethnic movements led by Bahun-Chhetris to counter Janajati and Madhesi influence’.¹²⁵ The CA-2 elections were bound to be different than the one five years earlier for two main reasons: i) the shadow of the Maoists that had loomed large during the 2008 election no longer existed, and ii) those who had voted for the Maoists seeking change had had the opportunity to see their performance throughout the tenure of the CA-1 and become disillusioned.

Regardless of the cause, in terms of representation of the marginalised groups, the CA-2 saw a considerable decline in comparison to their strength in the CA-1. Representation of women went down from 33 to 29 per cent, of Janajatis from 35 to 33, of Madhesi from 23 to 18,¹²⁶ and of Dalits from 9 to 7 per cent (see Table 4-1). Concomitantly, the seats occupied by hill caste groups went up from 33 per cent to 41 per cent. Representation of Muslims and Sikhs also inched up to 3.2 per cent from 2.8 in the CA-1. Notably, while the CA-1 had seen representation of the LGBTIQ+ community, albeit with just one member, the CA-2 had none.¹²⁷ As in the CA-1, the Chair of the CA-2 was a male, and the Deputy Chair was once again a woman. Further, all the three thematic committees in the CA-2 were chaired by men while the two seemingly less important procedural committees were headed by women.

4.2 The Workings of the Constituent Assembly-2

In order to facilitate its work of drafting the new constitution under circumstances different than during the CA-1, particularly the fact that a lot of preliminary work had already been completed by the various committees, the new body adopted a new set of Constituent Assembly Rules in March 2014.¹²⁸ A couple of weeks later, it endorsed a calendar of operations, which included fixing the date for completing the constitution-drafting process as 22 January 2015, exactly a year after the CA-2’s first sitting.

The CA-2, elected with a fresh mandate, agreed to take ownership of

125 Hachhethu (2017).

126 Madhesi Dalits are also included in the category of Madhesi for this discussion.

127 Sunil Babu Pant, ‘Constitutional Change and Participation of LGBTI Groups’ (Stockholm: International Institute for Democracy and Electoral Assistance, 2015), <https://www.idea.int/publications/catalogue/constitutional-change-and-participation-lgbti-groups-case-study-nepal>.

128 The Constituent Assembly Rules, 2014, https://constitutionnet.org/sites/default/files/nepal-constituent_assembly_rules_2014.pdf.

Table 4-1: Results of Constituent Assembly 1 and 2 Elections
(by social group)

Group	2008												2013												Share of national population (2011)								
	FPTP				PR				Nominated				Total				FPTP				PR					Nominated				Total			
	M*	W*	T*	M	W	T	M	W	T	M	W	T	%	M	W	T	M	W	T	M	W	T	M	W		T	%						
Hill Castes	83	16	99	49	45	94	7	1	8	139	62	201	33.4	130	2	132	54	48	102	10	3	13	194	53	247	41.2	31.3						
Hill and mountain Janajatis	54	7	61	45	45	90	5	4	9	104	56	160	26.6	44	2	46	47	42	89	4	1	5	95	45	140	23.4	27.2						
Tarai Janajatis	16	1	17	15	13	28	4	1	5	35	15	50	8.3	18	3	21	14	18	32	3	-	3	35	21	56	9.3	8.7						
Hill Dalits	4	2	6	16	13	29	-	-	-	20	15	35	5.8	1	0	1	13	13	26	-	-	-	14	13	27	4.5	8.6						
Madhesi Dalits	1	0	1	5	10	15	-	-	-	6	10	16	2.7	1	0	1	4	7	11	-	-	-	5	7	12	2.0	4.7						
Madhesi Castes	47	3	50	38	31	69	3	-	3	88	34	122	20.3	32	2	34	33	28	61	3	-	-	68	30	98	16.4	15						
Religious groups (Muslims & Sikhs)	5	1	6	6	4	10	1	-	1	12	5	17	2.8	4	1	5	8	6	14	-	-	-	12	7	19	3.2	4.5						
Total	210	30	240	174	161	335	20	6	26	404	197	601	100	230	10	240	173	162	335	20	4	24	423	176	599 [†]	100	100						

* M=men, W=women, T=total
[†] Nominations to CA-2 were done in batches but never reached the full contingent of 601 members.
 Source: Volla (2015), Election Commission (2017) and Sharma (2014).

all the unfinished, often very contentious, work of the CA-1.¹²⁹ The CA-2 Rules provided for five committees to be formed to assist in the drafting of the new constitution. These five were a notable decrease from the 14 constituted in the CA-1, but that was mainly because the CA-2 was adopting the proceedings from the earlier body and the many constitutional provisions on which agreement had already been reached. In effect, the CA-2's role was to complete the constitution-drafting process by finding common ground on issues under dispute. Soon after the CA-2 started working, the archives and records of the decisions and actions of the CA-1 were submitted to the Chairperson. These archives and records were immediately forwarded to the CA Committee on Study of Constitutional Archives and Their Conclusions. The report of the High-level State Restructuring Commission was also sent to the same committee for necessary further action.

4.2.1 CA-2 Committees

As noted earlier, of the five committees in the CA-2, three were thematic and the other two procedural.¹³⁰

Thematic committees

- i. Constitutional Political Dialogue and Consensus Committee
- ii. Committee for the Study of Constitutional Archives and Their Conclusions
- iii. Constitution Drafting Committee

Procedural committees

- i. Civic Relations and Constitution Suggestions Committee
- ii. Committee for Capacity Development and Resource Management

Constitutional Political Dialogue and Consensus Committee

The Constitutional Political Dialogue and Consensus Committee (hereafter, the Political Dialogue Committee) had the primary responsibility of forging consensus within the CA and, additionally, consulting with organised groups with little or no representation in the CA, including the Mohan Baidya-led Communist Party of Nepal (Maoist), the breakaway faction of the Maoist party which had boycotted the CA-2 elections, and representatives of identity-based organisations that had been pushing for federalism

129 Adhikari (2016).

130 Section 64, The Constituent Assembly Rules, 2014, http://constitutionnet.org/sites/default/files/nepal-constituent_assembly_rules_2014.pdf.

along the lines of identity.¹³¹ The CA-2 Rules stipulated that the Committee would ensure representation of all the political parties in the CA while ensuring that its membership would be inclusive of the various social groups as well.¹³² Counting the senior leadership of all the political parties in the CA-2 among its members, the Political Dialogue Committee worked to resolve points of contention between the parties carried over from thematic committees in the CA-1, numbering 117 in all.¹³³

Six sub-committees were constituted under the Political Dialogue Committee.¹³⁴ Working through these bodies, the Committee adopted in toto nearly everything that had been agreed upon in the CA-1.¹³⁵ Meanwhile, the two sides in dispute over the other aspects of the constitution—the governing coalition (with a two-third majority in the CA-2) and the opposition 30-party alliance led by the UCPN-Maoist—continued to seek common ground.¹³⁶ As the disagreements—mainly on federalism, form of government, electoral system and the judiciary—also fell in the ambit of the Political Dialogue Committee, the subcommittee on Dispute Resolution came up with possible compromise solutions to some of these intractable issues, such as bringing parity to the number of FPTP and PR parliamentary seats, providing for a constitutional court for a fixed period of time, and ensuring proportionate representation of all the macro-categories of social groups throughout the state apparatus, including in the judiciary, even though it failed to provide any recommendation on federal state structure.¹³⁷ In any case, these recommendations did not find favour with the Political Dialogue Committee, and having failed to forge consensus on the issue of state restructuring and federal design, the CA-2 missed the self-imposed deadline of 22 January 2015.

131 The Carter Center, 'Nepal After the 2013 Constituent Assembly Elections', 26 June 2014, <https://www.cartercenter.org/resources/pdfs/news/pr/nepal-post-election-assessment-063014.pdf>.

132 Section 65 (5), Constituent Assembly Rules, 2013.

133 Hachhethu (2017).

134 These committees were mandated to work as follows: i) determination of concepts relating to constitution drafting after a study of agreements, consensuses, understandings, declarations and decisions so far on Nepal's peace process; ii) identification of political parties and stakeholders outside the constituent assembly and the formulation of the negotiation process, procedures and modalities; iii) identification of matters/subjects requiring consent out of disputed issues identified in the contents of the constitution; iv) preliminary discussions/negotiations; v) dispute resolution; and vi) identification of constitutional matters/subjects (Secretariat of the Legislature-Parliament of Nepal, 2017).

135 International Institute for Democracy and Electoral Assistance (2015).

136 International Institute for Democracy and Electoral Assistance (2015).

137 Hachhethu (2017).

Committee for the Study of Constitutional Archives and Their Conclusions

The Committee for the Study of Constitutional Archives and Their Conclusions was responsible for reviewing the documents produced by the CA-1 and identifying issues ‘agreed upon’ and those that were not.¹³⁸ The former were to be forwarded to the Constitution Drafting Committee and the disputed ones to the Political Dialogue Committee. Accordingly, six sub-committees were constituted under this Committee with each given the responsibility to study the reports produced by the different thematic committees of the CA-1.¹³⁹

Constitution Drafting Committee

The Constitution Drafting Committee had the responsibility of preparing the draft constitution. Five sub-committees were constituted under the Committee to look at different aspects of the Constitution, namely:

- i. the Preamble and Definitions,
- ii. Fundamental Rights and Directives Principles and Commissions under the Constitution,
- iii. the Judiciary.
- iv. the Legislature, and
- v. the Executive

All the issues ‘agreed upon’ by the CA-1 were compiled by the respective sub-committees by June 2014,¹⁴⁰ and almost all were adopted by the CA-2.¹⁴¹ Areas still under dispute were sent to the Political Dialogue Committee.

138 International Institute for Democracy and Electoral Assistance (2015).

139 Secretariat of the Legislature-Parliament of Nepal (2017). The different subcommittees look at the reports of: i) the Constitutional Committee, the Committee on the Study of the Report on Concept Paper and the Preliminary Draft, and the Sub-Committee on Dispute Resolution; ii) the Committee on Fundamental Rights and Directive Principles, and the Committee on the Judicial System; iii) the Committee on Protection of Rights of Minorities and Marginalised Communities, and the Committee on Determination of Bases of Cultural and Social Solidarity; iv) the Committee on State Restructuring and Division of State Powers, and the Committee on Determination of Form of Government of the State; v) the Committee on Determination of the Forms of Legislative Organs, and the Committee on Determination of Structure of Constitutional Bodies; and vi) the Committee on Natural Resources, Financial Powers and Revenue, and the Committee for Protection of National Interests.

140 International Institute for Democracy and Electoral Assistance (2015).

141 Secretariat of the Legislature-Parliament of Nepal (2017).

Civic Relations and Suggestions for Constitution Committee

The Civic Relations and Suggestions for Constitution Committee was primarily responsible for disseminating the preliminary draft of the proposed constitution, collecting public opinions and suggestions on the draft, conducting public hearings, documenting the suggestions received, and presenting an analysis of the same.¹⁴²

Committee on Capacity Development and Resource Management

The Committee on Capacity Development and Resource Management was formed for the purpose of managing resource materials for the CA members and enhancing their capacity.¹⁴³

4.2.2 The 16-point Agreement and the 2015 Constitution

Having missed the January 2015 deadline, the constitution-drafting process drifted into deadlock.¹⁴⁴ The main point of disagreement between the ruling alliance and the opposition at the time was whether the constitution should be passed by consensus or through a two-third majority vote as mentioned in the Interim Constitution. Given that the former had the numbers to push through the constitution, if necessary, the UCPN–Maoist and the Madhes-based parties used the only leverage they had—threaten to disrupt the entire process. As a result, the drafting process remained stalled until the tumult created by the massive earthquake that struck central Nepal on 25 April 2015. The earthquake suddenly brought a lot of pressure on the political parties to get their act together to respond to the devastation the earthquake had wrought while also serving as a reminder of the unfinished business of drafting a new constitution.

On 8 June 2015, within weeks of the devastating earthquake, four major parties in the CA–2—the Nepali Congress, CPN–UML, UCPN–Maoist and the Madhesi Janadhikar Forum (Democratic)—signed a 16-point agreement that saw consensus, among others, on the following:¹⁴⁵

- i. There would be eight provinces formed with the boundaries delineated by a federal commission and the names decided by a two-third majority of the provincial assemblies.

142 Secretariat of the Legislature-Parliament of Nepal (2017).

143 Ibid.

144 International Institute for Democracy and Electoral Assistance (2015).

145 ‘The 16-point agreement’, https://www.satp.org/satporgtp/countries/nepal/document/papers/16-point_agreement.htm.

Table 4-2: Different Bodies Formed for State Restructuring

Name of body	Establishment	Functions
State Restructuring Committee	Formed during the CA-1 under the CA Rules, 2008	To propose the form of a restructured state
State Restructuring Commission	Established in April 2009 in accordance with Article 138 of the Interim Constitution	To provide recommendations for state restructuring
State Restructuring Commission	Established in November 2011 in accordance with Article 138 of the Interim Constitution	To work on the report of the State Restructuring Committee, including suggestions and comments, interpret identity and economic viability in relation to state restructuring
Constitutional Political Dialogue and Consensus Committee	Formed during the CA-2 under the CA Rules, 2014	To forge consensus within the CA-2, including on state restructuring
Sub-committee on Dispute Resolution	Constituted under the Constitutional Political Dialogue and Consensus Committee	To resolve outstanding issues, including on state restructuring

- ii. The federal parliament would be bicameral while the provincial assemblies would be unicameral.
- iii. Elections to the federal parliament would be held under a mixed system with 165 elected through FPTP and 110 PR.
- iv. The prime minister would be the chief executive of the country elected by a majority of the House of Representatives.
- v. A constitutional court would be set up for a period of 10 years.

A compromise solution thus began to emerge slowly on some key contentious issues. Following this agreement, the issue of 'identity' which had driven the federalism discourse till then faded gradually, and the role, power and competencies of the provinces were also considerably watered down.¹⁴⁶ That was only to be expected since the ruling alliance consisting of parties vehemently opposed to identity-based federalism and various aspects of inclusion itself, had enough strength to easily have pushed

¹⁴⁶ Hachhethu (2017).

through a constitution, and all the Maoist-led alliance could hope to achieve were some concessions in lieu of not setting off political unrest.¹⁴⁷

The drafting of the constitution pushed ahead, and, accordingly, the Constitution Drafting Committee presented the first draft to the CA-2 on 30 June, and this preliminary draft was adopted on 7 July.¹⁴⁸ Thereafter, a 15-day consultation plan was put in place, which included two days allocated for the collection of public feedback from each of the 240 electoral constituencies in the presence of members of the CA-2.¹⁴⁹ In addition to the public hearings in the electoral constituencies, individuals could also register their comments online or through fax and by telephone.¹⁵⁰ However, the process drew criticism for the arguably short time allocated for public consultation and the discussions that followed thereafter in the run-up to the promulgation of the constitution.¹⁵¹ There were also obstructions by cadres of Madhes-based parties in the Tarai to the consultation process.¹⁵²

The draft was subsequently revised to incorporate public submissions and tabled on 23 August as the Constitution Bill of the new constitution of Nepal. The CA-2 members were given three days to go through the draft before deliberations began on 26 August for five days.¹⁵³ Thereafter, members were given until 5 September to register their amendment proposals on the Constitution Bill, which would require endorsement by a two-third majority of the CA-2 to be included in the new constitution.¹⁵⁴

The rapid developments in the CA-2 towards adopting a new constitution gave rise to agitations across the Tarai, in particular the proposal that many Tarai districts would form part of provinces that included hill districts

147 In comparison, the coalition comprising the UCPN(M) and the Madhes-based parties in the CA-1 could muster only 54 per cent of the house.

148 International Commission of Jurists, 'Nepal's Draft Constitution: Procedural and Substantive Concerns', July 2015, <https://www.icj.org/wp-content/uploads/2015/07/NEPAL-CONSTITUTION-ADVOCACY-ANALYSIS-BRIEFS-2015-ENG.pdf>.

149 Nepali Times, 'Protests over draft statute', Nepali Times, July 20, 2015, <http://archive.nepalitimes.com/blogs/thebrief/2015/07/20/protests-over-draft-statute/>.

150 EKantipur, 'CA endorses 15-day action plan on seeking public opinion', *EKantipur*, July 9, 2015, <https://kathmandupost.com/miscellaneous/2015/07/09/ca-endorses-15-day-action-plan-on-seeking-public-opinion>.

151 Amnesty International Public Statement, 'Nepal: Extend Time for Public Consultation on New Constitution, Repeal Regressive Aspects of Draft', 22 July 2015, <https://www.amnesty.org/download/Documents/ASA3121382015ENGLISH.pdf>; Hachhethu (2017).

152 Kamal Dev Bhattarai, 'Two day public consultation begins today', *The Kathmandu Post*, July 20, 2015, <https://kathmandupost.com/miscellaneous/2015/07/20/two-day-public-consultation-begins-today>.

153 International Institute for Democracy and Electoral Assistance (2015).

154 International Institute for Democracy and Electoral Assistance (2015).

as well. Curfews were imposed in different places and an indefinite shut-down continued for five weeks.¹⁵⁵

Despite widespread dissatisfaction among various interest groups, the Constitution of Nepal 2015 was ultimately endorsed by more than two thirds of the CA-2 (507 of the 598 members at the time), and promulgated on 20 September 2015.¹⁵⁶ The process was boycotted by the Madhes-based parties while the pro-monarchy Rastriya Prajatantra Party-Nepal (RPP-N) voted against it.¹⁵⁷ Thus ended a process that had begun a decade earlier when the seven political parties and the Maoists had decided to bring to an end both the absolute monarchy and the ongoing insurgency and work together to craft a 'full democracy' and a 'forward-looking restructuring of the state' through a new constitution. That Nepal finally succeeded in adopting and promulgating a constitution democratically and through a people-elected assembly was in itself an achievement. With that, the country entered a new phase of understanding, implementing, and reforming where necessary but it also called for an introspection of what that achievement meant and where efforts should be directed in the future.¹⁵⁸

155 International Institute for Democracy and Electoral Assistance (2015).

156 The Kathmandu Post, 'Constitution of Nepal 2015 promulgated', *The Kathmandu Post*, September 20, 2015, <https://kathmandupost.com/valley/2015/09/20/people-celebrate-constitution-promulgation-in-photos>.

157 International Institute for Democracy and Electoral Assistance (2015). There were 60 CA members who boycotted the process; 25 voted against the adoption of the constitution; five were absent while the CA chair did not cast a vote. Prakash Acharya and Tika R Pradhan, 'Overwhelming majority endorses draft constitution', *The Himalayan Times*, 17 September 2015, <https://thehimalayantimes.com/kathmandu/overwhelming-majority-endorses-draft-constitution>.

158 By the time the CA-1 started working on a new constitution on 28 May 2008 until the CA-2 was re-elected and adopted the new Constitution (i.e., a period of seven years and four months), many other countries produced new constitutions, leaving their own histories behind. In 2008, Bhutan, Burma, Ecuador, the Maldives, and Kosovo promulgated their new constitutions. In 2009, Bolivia and the Falkland Islands did the same. In 2010, Angola, Curaçao, the Dominican Republic, Guinea, Kenya, Kyrgyzstan, Niger, and Sent Maarten followed suit. Hungary, Libya (an interim constitution), and South Sudan were also able to do the same in 2011. In 2012, Haiti, Somalia, Syria, and the Turks and Caicos Islands took their turns. In 2013, Fiji, Vietnam, and Zimbabwe enacted their constitutions, and 2014 was the year for Egypt and Tunisia. Nepal's constitution-making process was the most protracted and longest of them all. See Adhikari (2016).

5

The 2015 Constitution and Social Inclusion

This chapter looks at the various provisions in the Constitution of Nepal 2015 that aim to promote inclusive practices or consolidate what had already been achieved. It lays out the various rights granted to different marginalised sections of society under the rather broad set of Fundamental Rights as well as the aspirational ones contained in the Directive Principles and State Policies. That is followed by a discussion on the restructuring of the state, including the contentious issue of federalism and how it has been operationalised along with the electoral system adopted at different levels of government. The last section of this chapter is devoted to two significant steps adopted to ensure inclusive governance, namely, the provision of constitutional commissions and the language policy adopted.

5.1 First People's Constitution

As the first document drafted by a constituent assembly, the 2015 Constitution (hereafter, the Constitution) had come 65 years after the country's modern constitutional history had begun. Following the promise of a constituent assembly to write a constitution of Nepal first mooted in 1951 after the ouster of the Rana regime and the return of the Shah kings as paramount rulers, the country had seen five different constitutions all written by committees or commissions formed for that specific purpose. They were not elected bodies. Apart from the historic nature of its provenance in that sense, the Constitution was also meant to institutionalise changes that Nepal had undergone in the years since the success of the People's Movement II. While it is true that there was some backsliding in its approach to the issue of inclusion compared to the 2007 Interim Constitution (see Box 5-1), the Constitution is new in a significant sense, and there is much to commend it for how it has progressed vis-à-vis the earlier documents.

The Constitution arrived with reforms in several key areas of the system of government. These reforms often concerned with responding to broad challenges of democratisation and rule of law, peacebuilding, reconciliation,

Box 5-1: Inclusion in the 2007 and 2015 Constitutions

The right to social inclusion was first introduced by the Interim Constitution under the Right to Social Justice (Article 21): ‘Women, Dalits, Adibasi Janajati, Madhesi, oppressed groups, poor farmers and labourers, who are economically, socially or educationally backward, shall have the right to participate in state structures on the basis of principles of proportional inclusion.’

The 2015 Constitution has carried over some of the relevant provisions from the Interim Constitution such as the guarantee of 33 per cent representation for women in the federal and provincial legislatures. Similarly, it also continues with the provision of ‘proportionate inclusion’ in government service (Article 285).

But, at the same time, in the Right to Social Justice (Article 42), the 2015 Constitution also increased the number of groups that would qualify for reservations. When first adopted, there were a total of 17 such groups: ‘Women, Dalit, Adibasi, Adibasi Janajati, Madhesi, Tharu, minorities, persons with disabilities, marginalised communities, Muslims, backward classes, gender and sexual minorities, youth, farmers, labourers, oppressed or citizens of backward regions, and indigent Khas Arya shall have the right to participate in state bodies on the basis of principles of inclusion.’

Following the first amendment of the constitution in January 2016, the wording ‘principles of inclusion’ was changed to ‘principles of proportional inclusion’. Thus, while ‘proportionate inclusion’ had previously been mentioned only for women (Article 38) and Dalits (Article 40), it now covered all the groups mentioned in Article 42. The amendment also got rid of two categories, ‘youth’ and the superfluous ‘Adibasi’ (which would be the same as Adibasi Janajati, also mentioned). Article 42 also included such undefined groups as ‘backward classes’ and ‘marginalised communities’.

The 2015 Constitution also provides reservations to the already dominant Khas Arya. Although meant to apply only for the indigent among the Khas Arya, setting aside seats for that group is likely to reduce the number of positions reserved for marginalised communities as well as for women in general.

inclusion, and socioeconomic development in a way that is seen as legitimate and widely accepted. The design aspects were as significant as were the procedures. Based on the perambulatory pledges and the anatomy of the Constitution, the reforms addressed most of the significant issues raised during Nepal's democratic struggle through the appropriate constitutional provisions. The major areas of reform can be studied in terms of the enrichment of fundamental rights, identity, inclusion, and participation in state structures, restructuring of the state and federalisation, executive power and political stability, and institutionalisation of limited government. The focus here is on the progress made to promote and institutionalise inclusion with caveats mentioned where necessary.¹⁵⁹

Beginning with the Preamble, the Constitution has expressed commitment to creating an egalitarian society based on the principles of proportionate inclusion and participation. It states clearly that the promulgation of the Constitution was to end 'all forms of discriminations and oppression created by the feudal, autocratic, centralised and unitary system' while also

[e]mbracing multi-caste/ethnic,¹⁶⁰ multi-lingual, multi-cultural and diverse geographical specificities, by ending discriminations relating to class, caste/ethnicity, region, language, religion and gender discrimination, including all forms of caste-based untouchability, in order to protect and promote unity in diversity, social and cultural solidarity, tolerance and harmonious attitudes, we also express our determination to create an egalitarian society on the basis of the principles of proportional inclusion and participation, to ensure equitable economy, prosperity and social justice...¹⁶¹

Articles 38(4), 40(1) and 42(1) provide the right, respectively, to women,

159 See Adhikari (2016).

160 This is the translation of the Nepali term *bahujatiya*. The term is often mistakenly translated as 'multi-caste', probably given the preponderance of references to caste in Nepali social life. But since Nepal is home to both caste and non-caste social groups, it actually denotes 'multi-ethnic' as in the reference to Nepal consisting of *bahul jati* people in the new national anthem adopted in 2007. But given the role of caste in Nepali society, it can be said to mean both 'multi-caste' and 'multi-ethnic'. According to Gurung, although *jat* and *jati* have a common root, meaning 'species', 'native usage makes a subtle distinction of the former as 'caste' and the latter as 'ethnic' group' (Gurung, 2006). That is borne out by 12 occurrences of *jati* in the 2015 Constitution, each time following a reference to *jat*, hence, covering both the caste and ethnic groups of Nepal. It is the ethnic groups that are now known as *Adivasi Janajati* in Nepal.

161 Constitute, 'Preamble' in 'Nepal's Constitution of 2015', https://www.constituteproject.org/constitution/Nepal_2015.pdf. This translation also had 'multi-caste' for *bahujatiya*.

Dalits and various marginalised groups and communities to participate in all bodies of the state on the basis of the principle of proportional inclusion.¹⁶² The last article also guarantees the right to social justice for the marginalised. The Directive Principles of the State [Article 50(1)] expresses commitment to establishing a welfare state while internalising the principle of inclusion in the governance system on the basis of local autonomy and decentralisation. Under State Policies, Article 51(j) deals specifically with the issue of social justice and inclusion. The principle of inclusion is to be followed in the formation of the federal Council of Ministers [Article 76(9)], parliamentary joint committees (Article 97), and Provincial Councils of Ministers [Article 168(9)]. Article 285 states that positions in the federal government will be filled competitively while also heeding the principle of proportionate inclusion.

The Constitution also provides for all levels of government to protect human rights and fundamental rights, an equitable society based on pluralism and equality, inclusive representation, and identity [Article 56(6)]. Equally significantly, the organisation of Nepal Army is to be inclusive in character [Articles 267(1) and 267(3)].

5.2 Fundamental Rights

Compared to the Interim Constitution, the gamut of fundamental rights recognised in the Constitution is much wider, with 32 such rights listed in the latter compared to only 20 in the former, which itself was a significant jump from the 12 mentioned in the 1990 Constitution. (The 32 fundamental rights exceeded by one the 31 mentioned in the draft submitted by the Fundamental Rights Committee of the CA-1.) The prominent additions were the rights to health, to food, to language and culture, and to housing along with the rights of Dalits and senior citizens, none of which had been mentioned as fundamental rights in any of the previous six constitutions of Nepal.

Under the 'right to equality' the Constitution has expanded the scope of non-discrimination to encompass several groups that had not been included in the corresponding article in the Interim Constitution. Hence, according to the Constitution, 'no discrimination shall be made in the application of general laws on grounds of origin, religion, race, caste, ethnicity, sex, physical condition, condition of health, marital status, pregnancy, economic condition, language or region, ideology or on similar other grounds' [Article 18(2)]. 'Pregnancy', 'physical condition', 'condition of health', 'marital status',

162 In its original formulation Article 42(1) only mentioned 'inclusion'. 'Proportional' was added preceding 'inclusion' with the first amendment to the Constitution in January 2016.

Table 5-1: Fundamental Rights in the Interim and 2015 Constitutions

Interim Constitution of Nepal 2007		Constitution of Nepal 2015	
Article	Right	Article	Right
12	Right to freedom	17	Right to freedom
13	Right to equality	18	Right to equality
14	Right against untouchability and racial discrimination	24	Right against untouchability and discrimination
15	Rights regarding publication, broadcasting and press		
16	Rights regarding environment and health	30	Right to clean environment
17	Education and cultural rights	31	Right relating to education
18	Rights regarding employment and social security	33	Right to employment
19	Right to property	25	Rights relating to property
20	Rights of women	38	Rights of women
21	Right to social justice	42	Right to social justice
22	Rights of children	39	Rights of children
23	Right to religion	26	Right to freedom of religion
24	Rights regarding justice	20	Rights relating to justice
25	Right against preventive detention	23	Right against preventive detention
26	Right against torture	22	Right against torture
27	Right to information	27	Right to information
28	Right to privacy	28	Right to privacy
29	Right against exploitation	29	Right against exploitation
30	Right regarding labour	34	Right to labour
31	Right against exile	45	Right against exile
32	Right to constitutional remedy	46	Right to constitutional remedy
		16	Right to live with dignity
		19	Right to communication
		21	Right of victim of crime
		32	Right relating to language and culture
		35	Right relating to health
		37	Right to housing
		36	Right to food
		40	Rights of Dalits
		41	Rights of senior citizens
		43	Right to social security
		44	Rights of consumer

‘economic condition’ and ‘region’ had not been mentioned as grounds proscribing discrimination in the Interim Constitution.

The article on ‘right to equality’ further provides for ‘special provisions’ for the ‘protection, empowerment or development’ of citizens, including socially or culturally backward women, Dalits, ‘indigenous people’,¹⁶³ Janajatis, Madhesi, Tharus, Muslims, oppressed classes, backward classes, minorities, the marginalised, farmers, labourers, youth, children, senior citizens, gender and sexual minorities, persons with disabilities, persons who are pregnant, the incapacitated or helpless, residents of backward regions and the indigent Khas Arya [Article 18(3)]. ‘Tharu’, ‘Muslim’, ‘backward classes’, ‘youths’, ‘children’, ‘senior citizens’, ‘gender and sexual minorities’, ‘persons with disabilities’, ‘persons who are pregnant’ and ‘indigent Khas Arya’ were groups absent in the Interim Constitution; in the case of Tharus and Muslims, they had been included as part of Janajati and Madhesi groupings, respectively.

Similarly, the ‘right to social justice’ provides that ‘socially backward women, Dalit, Janajatis, Madhesi, Tharu, Muslims, backward classes, minorities, marginalised communities, 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 State bodies on the basis of principle of proportional inclusion’ (Article 42[1]). As with the ‘right to equality’, ‘Tharu’, ‘minorities’, ‘marginalised communities’, ‘Muslim’, ‘gender and sexual minorities’, ‘persons with disabilities’, and ‘indigent Khas Arya’ are new additions not mentioned in the Interim Constitution.

In addition, with regard to ‘indigent citizens and citizens of the communities on the verge of extinction’, the scope of the article has been further expanded to include ‘the right to get special opportunities and benefits in education, health, housing, employment, food and social security for their protection, upliftment, empowerment and development’ [Article 42(2)].

The rights of ‘citizens with disabilities’ have also been acknowledged under a separate sub-article under ‘right to social justice’, ensuring their right to ‘live with dignity and honour, with the identity of their diversity, and have equal access to public services and facilities’ [Article 42(3)]. The rights

163 ‘Indigenous people’ is the English translation of ‘Adibasi’ in the Nepali original. Since ‘Adibasi Janajati’ (indigenous nationality) is a category already recognised by the government, it is not clear which group(s) ‘Adibasi’ refers to. ‘Adibasi’ and ‘youth’ as groups requiring special attention were deleted from Article 42 in the first amendment to the Constitution made in January 2016 but retained elsewhere.

Box 5-2: Positive Discrimination and Its Beneficiaries

A somewhat-recent Supreme Court (SC) ruling on the scope of application of positive discrimination has the potential to set a precedent for how the 'special provisions' envisaged in the 2015 Constitution 'for the protection, empowerment or development' of marginalised groups will be implemented in the future. Article 18(3) of the Constitution states that there shall be no discrimination against anyone on any grounds but also that '[n]othing shall prevent the enactment of special provisions for the protection, empowerment or development of socially and culturally backward women, Dalits, Adibasi Janajatis, Madhesis, Tharus, Muslims, oppressed classes, backward classes, minorities, the marginalised, peasants, labourers, the youth, children, senior citizens, sexual minorities, persons with disability, pregnant, the incapacitated and the helpless, people from backward regions and the indigent Khas Arya'.

The SC decision on a writ petition requesting it to issue a directive ensuring reservations in graduate-level medical education for those targeted by the 'special provisions' mentioned in Article 18(3) provided an extensive interpretation of the said Article. The SC accepted that the provisions in Article 18(3) can be understood as positive discrimination and that the latter can be used interchangeably with 'protective discrimination', 'affirmative action', and the like. The SC also concluded that positive discrimination is not linked to Article 42(1) of the Constitution, which enshrines the right to social justice. Positive discrimination, it said, is a legal measure to equalise unequal conditions whereas the right to social justice guarantees the right to participate in state structures on the basis of the principle of proportional inclusion. Unlike with Article 18(3), no separate law is required for the implementation of this fundamental right.

The SC noted that the provision of reservations is a tool to reduce inequality and not meant to be applied among equals. Providing reservations to equals is against all legal values and also against the principle of natural justice. The SC judgement also considered how the 'special provisions' had evolved over time in Nepal. It pointed out that between the 'the protection and development of economically, socially and educationally backward classes' in the 1990 Constitution to 'the protection, empowerment and development of economically, socially and culturally backward classes' in the Interim Constitution, 'educationally' had been replaced by 'culturally'. By the time of the 2015 Constitution, 'economically' had also been dropped

and only 'socially and culturally backward' defined the groups eligible for the 'special provisions.'

The SC also made the important observation that it is not easy to understand what the intent of the term 'culturally backward' is. It declared that 'culturally backward' does not seem to be the correct formulation since viewing any community as either forward or backward is a reflection of paternalistic thinking and hence, objectionable. Referring to the draft report of the Committee on Fundamental Rights and Directive Principles of the CA-1, the SC concluded that 'culturally backward' can be understood in the context of highlighting Nepal's cultural diversity. The intended target of positive discrimination, on the other hand, appears to be groups that are 'socially backward', and Article 18(3) does not appear to have taken caste or ethnicity as the basis for positive discrimination but instead emphasises class differentiations.

The SC judgement further said that it is necessary to ensure that the system of reservations is targeted and just, and that it is not to be extended to the 'creamy layer' among the social groups mentioned in Article 18(3). The latter include those who have succeeded in reaching the upper class politically, economically or socially such as ministers, parliamentarians, members of constitutional bodies, judges, high officials, army or police officials, those employed by the United Nations or other international organisations, and professionals in a high-income bracket such as doctors, engineers, chartered accountants, senior advocates, families with high education, professors, industrialists, etc. It said that except in the case of those in need of reservations due to physical disability, only by using human development indicators to measure backwardness can the truly backward individuals or classes be reached.

The SC refused to issue the order as petitioned, opting instead for a directive order to the government to conduct an extensive study and consultations on what policies, laws and institutional arrangements are appropriate from the point of view of equality, equity and participation in order to make appropriate policy, legal and institutional arrangements vis-à-vis affirmative action in accordance with the language and spirit of the Constitution.

In sum, the ruling did not affect the laws and policies governing reservation. The SC did not try redefining the groups eligible for reservations as per the Constitution. Instead, its view was that reservations should be extended

to the weakest sections within the specified groups. It did not issue a pre-emptive decision or a restrictive order but only specified which areas require additional work on the part of the government to implement the Constitution with regard to positive discrimination.

* Vinay Kumar Panjiyar v. Medical Education Commission, Office of the Prime Minister and Council of Ministers, and Ministry of Health and Population, Writ No. 077-WO-0237, Date of decision: 16 December 2020.

of farmers 'to have access to lands for agro activities, select and protect local seeds and agro species which have been used and pursued traditionally' [Article 42(4)] and the rights of families of martyrs¹⁶⁴ to 'prioritised opportunity, with justice and due respect, in education, health, employment, housing and social security' [Article 42(5)] have also been enshrined under 'right to social justice' in the Constitution for the first time.

Under 'right to equality', the Constitution identifies all the groups entitled to 'state protection, empowerment and development' while the 'right to social justice' is extended to encompass those groups for whom the state is required to enforce some sort of special provisions in order to ensure their 'right to participate in state bodies on the basis of inclusive principles'. Although many of the groups mentioned lack both basic human and economic development as well as political representation, some are only encompassed under 'right to equality' and not under 'right to social justice', with the poor, the 'oppressed classes', and the 'incapacitated and helpless' being prominent omissions from the latter (see Table 5-2).¹⁶⁵

Article 42(1) is a clumsy formulation. It has been argued that having such an extensive list of groups entitled to reservations under various articles in the constitution is an attempt to dilute the commitments of the state towards greater inclusion.¹⁶⁶ However, as mentioned in Section 2.2.1, this concept comes from the Interim Constitution and its jurisprudential inaccuracy since it puts together disparate groups defined by different parameters as all requiring special consideration. Further, some of the groups specified under the 'right to equality' and/or the 'right to social justice'—such as 'oppressed classes', 'backward classes' or 'backward regions'—have been left undefined. Some sort of classification of these groups by future legislation will be necessary to attend to their particular concerns. Specifically, the concerns of

164 This group includes those killed in various popular struggles, supporters of the Maoist movement and the security personnel arrayed against them, etc.

165 Gender Equality and Social Inclusion Working Group (2017).

166 See Jha (2017).

Table 5-2: Defining Eligibility for Welfare and Development Assistance and Affirmative Action in the 2015 Constitution

SN	Group	Right to Equality (eligible for special support)	Right to Social Justice (eligible for affirmative action for employment in state structures)
1.	The poor	X	
2.	Socially or culturally backward women	X	X
3.	Dalits	X	X
5.	Adibasi Janajati	X	X
6.	Madhesis	X	X
7.	Tharus	X	X
8.	Muslims	X	X
9.	Oppressed classes	X	
10.	Backward classes	X	X
11.	Minorities	X	X
12.	Marginalised communities	X	X
13.	Farmers/Peasants	X	X
14.	Labourers	X	X
15.	Youths	X	X
16.	Children	X	
17.	Senior citizens	X	
18.	Gender and sexual minorities	X	X
19.	Persons with disabilities	X	X
20.	Persons who are pregnant	X	
21.	Incapacitated and helpless people	X	
22.	Residents of backward regions	X	X
23.	Indigent Khas Arya	X	X

Source: Adapted from Gender Equality and Social Inclusion Working Group (2017)

identity groups, which was the major impetus for change, can be clearly separated from the rest of the categories for inclusion. Further, there appears to be considerable overlap of many of these clusters with the category called the ‘marginalised’, which has been defined as:

those who have been forced to fall behind politically, economically and socially, those who have been unable to avail services because of discrimination and harassment and because of geographical distance, or commu-

nities excluded from such services living below the human development level specified by federal law, including the ultra-marginalised and communities on the verge of extinction [Article 306(1)(m)].

In addition to expanding the scope of the articles on 'right to equality' and 'right to social justice' to cover a wider range of social groups, the Constitution has also introduced the 'rights of senior citizens' (Article 41) and the 'rights of Dalits' (Article 40) as separate fundamental rights. Under 'rights of senior citizens', the Constitution states that senior citizens shall be accorded special protection and social security from the State.

The 'rights of Dalits' is quite an elaborate article, with the Constitution providing for Dalits the right to participate in all the bodies of the State on the basis of the principle of proportionate inclusion while detailing a list of sectors in which Dalits are entitled to special provisions such as 'public services as well as other sectors of employment'. Further, it provides that free education along with scholarships will be made available for Dalit students from the lowest to highest levels of education, including technical and vocational education. The article further provides that the Dalit community 'shall have the right to use, protect and develop their traditional occupation, knowledge, skill and technology' and that the State will give priority to Dalits engaged in business related to their traditional occupations. Provision has been made for landless Dalits to receive land from the State and for homeless Dalits to be housed. The Article also stipulates that the facilities conferred to the Dalit community will have to be distributed in a way that all Dalits, including women, receive these benefits.

Separate articles on 'right relating to education' and 'right to language and culture' have been enshrined in the Constitution as opposed to the one on 'education and cultural rights' in the Interim Constitution. Under right to 'language and culture', the Constitution provides that 'every person and community shall have the right to use their languages' [Article 32(1)] and 'to participate in the cultural life of their communities' [Article 32(2)], in addition to the right to 'preserve and promote its language, script, culture, cultural civilization and heritage' [Article 33(3)].

5.3 Directive Principles and State Policies

Under the Directive Principles, the Constitution provides that the political objective of the State shall be to establish a 'public welfare system of governance, by establishing a just system in all aspects of national life through the rule of law, values and norms of fundamental rights and human rights,

Box 5-3: Legislating Fundamental Rights

At the time of writing, there were 16 laws either enacted or amended to secure the fundamental rights guaranteed by the Constitution:

1. Land Act, 1964
2. Public Health Service Act, 2018
3. Act Relating to Children, 2018
4. Caste-Based Discrimination and Untouchability (Offence and Punishment) Act, 2011
5. Consumer Protection Act, 2018
6. Social Security Act, 2018
7. Right to Employment Act, 2018
8. Right to Safe Motherhood and Reproductive Health Act, 2018
9. Act Relating to Rights of Persons with Disabilities, 2017
10. Act Relating to Compulsory and Free Education Act, 2018
11. Public Security Act, 1989
12. Environment Protection Act, 2019
13. Privacy Act, 2018
14. Right to Housing Act, 2018
15. Crime Victim Protection Act, 2018
16. Right to Food and Food Sovereignty Act, 2018

Among these, the focus of three is entirely on specific groups, namely, on children, on women with regard to motherhood and reproductive health, and on the disabled. Two have no provisions dealing with inclusion: the Public Security Act and the Consumer Protection Act. Of the remaining 11, three contain generic references. As for the rest even though there was plenty of scope for ensuring that the interests of marginalised groups, there are only scattershot mention in them, and, in most cases cover only some of the excluded groups. Of relevance to the discussion here are the following.

Laws with general provisions prohibiting discrimination.

1. Caste-Based Discrimination and Untouchability (Offence and Punishment) Act, 2011 (2018 amendment): 'Whereas it is expedient to make timely provisions to protect the right of every person to equality, freedom and to live with human dignity, by creating a situation where there exists no untouchability and discrimination, on grounds of origin, caste, ethnicity, descent, community, occupation or business or physical condition...' (Preamble).
2. Crime Victim Protection Act, 2018: 'No discrimination shall be made

on the ground of the victim's religion, colour, gender, caste, ethnicity, origin, language, marital status, age, physical or mental unsoundness, disability or ideology or other similar ground' (Section 3).

3. Public Health Service Act, 2018: 'No health institution shall discriminate, or cause to be discriminated, anyone in the treatment on the basis of his or her origin, religion, colour, caste, ethnicity, gender, occupation, sexual and gender identity, physical or health condition, disability, marital status, pregnancy, ideology or similar other basis' [Section 12(3)(3)].

Laws with provisions for specific groups.

1. Right to Food and Food Sovereignty Act, 2018: The governments at all three levels will have targeted agricultural development programmes aimed at Dalit, endangered, indigenous [sic] and landless farmers [Section 18(1)]. Likewise, women's groups will be granted priority in the operation of fair price shops or public food distribution centres [Section 30(2)].
2. Lands Act, 1964: Priority shall be given to freed bonded labourers, Dalits, the indigenous and Janajatis [sic] among the landless when selling or disposing of land acquired or confiscated by a municipality [Section 21(1)]. Within three years the government would provide one-time land grant to landless Dalits [Section 52(A)].
3. Environment Protection Act, 2019: Special priority will be granted to women, persons with disabilities, children, senior citizens and the poor while crafting prevention or mitigation plans (Section 24[2]).
4. Right to Employment Act, 2018: Women, Dalits, the poor, martyrs' families and families of victims of enforced disappearances will be granted priority while providing the unemployed with minimum employment (Section 8).
5. Public Health Service Act, 2018: Provincial and local governments will implement special social health security programme for women, children, adolescents, Dalits, martyrs' families, among others [Section 47(1)].

Source: Law Books Management Committee (2018).

gender equality, proportional inclusion, participation and social justice, while at the same time protecting the life, property, equality and liberties of the people, in keeping with the vitality of freedom, sovereignty, territorial integrity and independence of Nepal' (Article 50). Furthermore, the

social and cultural objective of the State, as provided in the Constitution, is 'to build a civilised and egalitarian society by eliminating all forms of discrimination, exploitation and injustice on the grounds of religion, culture, tradition, usage, custom, practice or on any other similar grounds...and to consolidate the national unity by maintaining social cohesion, solidarity and harmony, while recognising cultural diversity' (Article 50).

The Constitution also features explicit State Policies 'to end all forms of discrimination, inequality, exploitation and injustice in the name of religion, custom, usage, practice and tradition existing in the society' [Article 51(c)(5)]; 'to protect and develop languages, scripts, culture, literature, arts, motion pictures and heritages of various castes, ethnicities and communities on the basis of equality and co-existence, while maintaining the cultural diversity of the country' [Article 51(c)(6)]; and 'to pursue a multi-lingual policy' [Article 51(c)(7)].

Under a separate article on 'policies relating to social justice and inclusion', the Constitution enshrines, among others, the following key policies [Article 51(j)]:

- to give priority to helpless single women in employment,
- to identify freed bonded labourers, *kamlari*, *haruwa*, *charuwa*, tillers, landless, squatters and rehabilitate them by providing land and housing;
- to empower Janajatis through special provisions enabling them the right to live with dignity, and protecting and promoting traditional knowledge, skills, cultures and social traditions;
- to make special provisions for equal distribution of economic, social and cultural opportunities and benefits to Madhesis, Muslims and backward classes, including for the poor among them;
- to make special provisions to benefit the oppressed and those living in backward regions; and
- to accord priority to the indigent among all groups in the provision of social security and social justice.

5.4 State Restructuring

As outlined earlier, the form of federalism was the most contentious issue in the CA-1, and the failure to agree mainly on provincial boundaries ultimately led to its demise without producing a constitution.¹⁶⁷ The election of

¹⁶⁷ Khanal (2017).

the CA-2 saw a reconfiguration of power with the Nepali Congress and the CPN-UML in the driving seat with a near two-third majority. The earlier push for a federal Nepal to be named after some of the country's major ethnic and regional groups remained a major issue in the CA-2 as well but did not find any favour with the new political configuration in power.

The preliminary draft of the constitution presented on 30 June 2015 envisaged eight provinces to be delineated by a federal commission at a later date. The four major parties later reached agreement on reducing the number of provinces to six, with the provincial boundaries marked out as well with the names to be decided by the provincial legislatures. But there was an immediate negative reaction from the Karnali region and the far-west, which had been lumped together in a massive province. Political leaders subsequently came up with a revision that separated the two and, hence, a seven-province model was accepted. The number of districts were increased to 77 with two of the existing 75 districts divided between two provinces each.

Nepal thus devolved into a federal state with three tiers of government—federal, provincial and local—with the number of local bodies to be determined by a government commission (Article 295). The Constitution foresees the role of all levels of government in developing an egalitarian society based on pluralism and equality, inclusive representation and identity [Article 56(6)] while intergovernmental relations are based on principles of cooperation, coexistence and coordination [Article 232(1)]. Similarly, the Constitution provides for policies relating to social justice and inclusion directed at creating a conducive atmosphere for uplifting and empowering distinct communities and mandates for special measures for their overall development [Article 18(3)].

5.4.1 Devolution through Federalism

The Constitution has spelt out the number of powers and competencies of the three tiers of government as follows: 34 to the federal level, 21 to the provincial, 25 concurrent to the federal and provincial levels, 22 to the local level, 15 concurrent to all three levels, with all powers and competencies not specifically mentioned, i.e., residual powers, to rest with the federal government (Schedules 5, 6, 7, 8 and 9, and Article 58) (see Table 5-3 also). With the division of powers, the Constitution granted each level its own legislative, executive and fiscal powers.

The extent to which the functioning of the government would be affected by the Constitution is clear from a government estimate that more than 300 acts and almost the same number of rules would have to be enacted, revised

Table 5-3: Major Areas of Jurisdiction among Three Tiers of Government

Federal Government	Provincial Government	Local Government
<ul style="list-style-type: none"> • National security • Central planning • Federal civil service and judicial service • Foreign relations and diplomatic affairs • Central taxation • Large infrastructure • Central universities • National and international environment management 	<ul style="list-style-type: none"> • Provincial police and administration • Provincial statistics • Provincial civil service • House and land registration fees, tourism taxes • Province-level projects • Provincial universities, higher education • Use of forests and water resources within the province 	<ul style="list-style-type: none"> • Collection of local statistics and records • Management of local services • Management of village and municipal assembly • Local taxes (house tax, wealth tax, land revenue) • Local-level development plans and projects • Basic and secondary education, basic health and sanitation • Local environment protection and biodiversity.

Source: Pradhan (2017).

or amended in order to implement it or to make existing ones compatible with its provisions.¹⁶⁸ These covered 138 different areas: 110 are at the federal level, 22 at the provincial, and six at the local. The scale of law-making was evident from the fact that the Election Commission alone would require enactment of eight new laws in order to hold elections to the three levels.

5.4.2 Legislatures and the Electoral System

The Constitution provided for the following legislative arrangements for the three levels of government: a bicameral parliament at the federal level, consisting of the House of Representatives and the National Assembly; a unicameral provincial assembly; and municipal assemblies at the local level as local legislatures.¹⁶⁹ Various provisions to ensure diversity of elected officials were constitutionally mandated, which have since been reflected in the laws that have been formulated thereafter. Most notable is the requirement that either the president or vice-president be a woman and also belong to different social groups (Article 70). The provision of the mandatory election of a woman to high positions of the State also applied to the Speaker and Deputy Speaker of the House of Representatives, Chairperson and Vice-Chairperson of the National Assembly, and the Speaker and Deputy Speaker of provincial assemblies [Articles 91(2), 92(2) and 182(2)].

¹⁶⁸ Pradhan (2017).

¹⁶⁹ Local-level governments are of two types: municipalities and rural municipalities.

5.4.2.1 *Federal Legislature*

The Constitution provides for the 275-member House of Representatives (HoR) to be elected through a mixed electoral system with 165 through the FPTP (i.e., 40 per cent) and 110 through the PR [Article 84(1)]. This proportion is a near-reversal of the rules under which the two CAs were elected earlier, when the PR system had received a 58 per cent weightage. Since the proportion of seats which mandated group representation was reduced quite drastically, it followed that inclusive representation also went down.¹⁷⁰

In order to fulfil the constitutional mandate that a third of all representatives in the HoR are women [Article 84(8)], the House of Representatives Election Act, 2017 requires parties to ensure half of the candidates in the closed list for the PR part should consist of women [Section 28(3)]. Further, parties have to follow the prescribed balance of various social groups (Table 5-4) while preparing the closed list [Section 28(5)] while ensuring that the list is representative of backward areas and persons with disabilities [Section 28(6)].¹⁷¹ Further, a 50 per cent discount is granted to women, Dalits, members of minority communities and economically deprived candidates on their security deposits required to file candidacies under the FPTP [Section 70(2)].

The National Assembly has 59 members, with 56 elected by the seven provinces and three appointed by the government [Article 86(2)]. Of the eight elected by each of the provinces, at least three have to be women, one has to be Dalit, and one a person with disability(ies) or from a minority community. Of the three members nominated by the government, one has to be a woman.

Table 5-4: Quotas for Proportional Representation in Elections to House of Representatives

SN	Group*	Percentage
1.	Dalit	13.8
2.	Janajati	28.7
3.	Khas Arya	31.2
4.	Madhesi	15.3
5.	Tharu	6.6
6.	Muslim	4.4

Source: Schedule-1, House of Representatives Election Act, 2017.

¹⁷⁰ Vollan (2020).
¹⁷¹ Perhaps unforeseen by framers of the law, as Vollan has pointed out, is that anyone who does not belong to any of these named groups would not be able to stand as a candidate in the PR part of the elections in either the federal or provincial level (Vollan, 2020).

5.4.2.2 Provincial Assemblies

Election to the provincial assemblies also follows a mixed system of FPTP and PR. Due to the differences in population size, the strengths of the provincial assemblies vary, derived from the formula as follows [Article 176(1)]:

- the number of members elected to the provincial assembly under FPTP is twice the number of members elected to the HoR from that province under the FPTP system, and
- the number of members elected under the FPTP system is considered to be 60 per cent, with the remaining 40 per cent elected through the PR system.

As with the HoR, following the constitutional mandate to ensure that women make up a third of all the representatives in the provincial assemblies [Article 176 (9)], the Election of Members of Provincial Assembly Act, 2017 also has similar provisions requiring parties to ensure women constitute half the candidates in the closed list for the PR part [Section 28(3)]. Likewise, the principle of inclusion has to be followed when parties prepare closed lists of candidates for the PR part by ensuring geographic balance

Table 5-5: Strength of Provincial Assemblies

Province	FPTP (60 per cent)	PR (40 per cent)	Total
1	56	37	93
Madhes	64	43	107
Bagmati	66	44	110
Gandaki	36	24	60
Lumbini	52	35	87
Karnali	24	16	40
Sudurpaschim	32	21	53

Source: Election Commission (2018)

and population with fixed proportions mentioned for Dalits, Janajatis, Khas Arya, Madhesis, Tharus and Muslims along with members of minority groups and those living in backward areas¹⁷² (Table 5-6) [Section 28(5)]. The first amendment to the Election of Members of Provincial Assembly Rules 2017, however, diluted the latter provision by inserting ‘as far as possible’

¹⁷² The Provincial Assembly Member Election Act, 2017 states ‘minority groups’ and ‘backward regions’ of a province are those as per government notification.

to the proportions specified.¹⁷³ The list also has to ensure the inclusion of persons with disabilities [Section 28(6)], while a 50 per cent waiver on the security deposit to file candidacies under the FPTP part is granted to women, Dalits, members of minority communities and economically deprived candidates [Section 70(2)].

5.4.2.3 *Local Government*

As mandated by the Constitution, in February 2016, the government formed the Local Level Restructuring Commission to determine the number and boundaries of local bodies. In its final report, the Commission recommended 719 such units but the government later added 34 more bodies, bringing the total to 753, with 460 rural municipalities, 276 municipalities, 11 sub-metropolises, and six metropolitan cities. Although it had the mandate, the Commission did not recommend any special, protected and autonomous regions (see Section 6.7.3 for a discussion on this provision).¹⁷⁴

The ward is the lowest administrative unit in the governance structure in Nepal and rural municipalities can consist of between five and 21 wards while municipalities can have nine to 35 wards.¹⁷⁵ Each ward elects a five-member committee consisting of one chairperson and four members. Two of the latter have to be women and of the two women, one has to be a Dalit.¹⁷⁶ Together with the mayor and deputy mayor (of a municipality) or chairperson and vice-chairperson (of a rural municipality), the ward chairpersons and members of all the wards within the local government make up the local legislature known as the municipal/rural municipal assembly. The head of municipalities is a mayor who is supported by a deputy mayor and a municipal executive comprising all the ward chairs, five women elected by the assembly from among their women members, and three more members elected by the assembly from Dalits or minority groups. In a rural municipality, the head is the chairperson who is assisted by the vice-chairperson and a municipal executive consisting of all the ward chairs, four women members elected from the assembly and two Dalits or members of minority groups.

173 An example of how this loophole was exploited was in Madhes Province wherein for the first provincial elections held in 2017, the Rastriya Janata Party, Nepal, which emerged as the second largest after and joined the coalition that formed the first government in the province, submitted a slate of 42 candidates consisting only of Madhesi candidates (Election Commission, 2018).

174 Khanal (2019).

175 Section 5(2) of the Local Government Operation Act, 2017.

176 Section 6 of the Local Level Election Act, 2017.

Table 5-6: Quotas for Proportional Representation in Provincial Assemblies

	Province 1	Madhes	Bagmati	Gandaki	Lumbini	Karnali	Sudurpaschim
<i>Total seats</i>	37	43	44	24	35	16	21
Dalit	10.1	17.3	5.8	17.4	15.1	23.3	17.3
Jana-jati	46.8	6.6	53.2	42.4	19.6	13.6	3.6
Khas Arya	27.8	4.9	37.1	37.2	28.8	62.2	60.0
Madhesi	7.6	54.4	1.6	0.5	14.4	0.2	1.6
Muslim	3.6	11.6	0.7	0.7	7.0	0.2	0.2
Tharu	4.2	5.3	1.7	1.7	15.2	0.5	17.2
<i>Minorities*</i>	17.5	25.2	7.8	6.0	8.5	1.5	2.4
<i>Residents of backward areas†</i>	0.4	2.1	1.0	0.08	1.2	32.5	12.8

Note: Minorities and residents of backward areas are to be accommodated within the quotas for the different social groups.
 * The government has identified a total of 98 caste and ethnic groups, each constituting less than 0.5 per cent of the national population according to the 2011 census, as minorities. These groups range from the Kalwar with a population of 128,232 (0.48 per cent of the national population) to the Kusunda, who number only 273. (Onlinekhabar, '98 Jati Alpasankhyak Suchima Kun-Kun Pare?' [Who Were Listed among the 98 Minority Groups], Onlinekhabar.com, 22 April 2017, <https://www.onlinekhabar.com/2017/04/574280>.)

† The government has designated 57 rural municipalities as backward areas of which, there are two such municipalities in Province 1, four in Madhes, two in Bagmati, one in Gandaki, one in Lumbini, 30 in Karnali, and, 17 in Sudurpaschim. (Onlinekhabar, '57 Sthaniya Taha Pich-hadiko Chhetrama Suchikrit' [57 Local Bodies Listed as Backward Areas], Onlinekhabar.com, 11 October 2017, <https://www.onlinekhabar.com/2017/10/631178>).

Source: Election of Members of Provincial Assembly Rules 2017.

The Constitution also provides for a district assembly in each of the country's 77 districts to play a coordinating role among the municipalities in the district (Article 220). The district assembly is made up of the mayors/chairpersons and deputy mayors/vice-chairpersons of all the municipalities within the district. The executive function of the district assembly is taken by a district coordination committee (DCC) elected from among all the members of the municipal and rural municipal assemblies in the district. The DCC has a maximum of nine members with at least three women and one Dalit or a member of a minority community. Significantly, political parties have to ensure that at least one of the candidates they field for the positions of mayor and deputy mayor, chairperson and vice-person, and DCC chairperson and vice-chairperson is a woman.¹⁷⁷

Governance

Under the Constitution, governments at the municipality and rural municipality level have become the primary point of contact for the public seeking a number of services. The Local Government Operations Act, 2017 is the most important legislation institutionalising local governments. Apart from detailing local government functions and powers and providing a basic structure for the working of municipalities, it also specifies various steps to be taken to promote inclusion.

Ward committees have been given the responsibility of keeping records of economically and socially backward women, children, Dalits, people with disabilities, seniors citizens, minorities, and marginalised communities, and work for their social and economic upliftment (Section 12). They also have the responsibility of adopting the necessary measures to fight against gender-based violence and discrimination, *chhaupadi* practices,¹⁷⁸ and other social taboos and superstitions. Likewise, while developing and implementing local-level plans, issues of gender and social inclusion have to be taken into account, including by involving people from various marginalised communities (Section 24).

The Resource Estimation and Budget Ceiling Determination Committee of municipalities has to have representation of women, Dalits or minorities from among the members of the municipal executive (Section 66). Most importantly, the concept of proportionate inclusion has to be adhered to while forming committees, subcommittees and task forces as required (Section 111).

¹⁷⁷ Section 17(4) of the Local Election Act, 2017.

¹⁷⁸ See Section 6.2.7.3 as well.

5.4.2.4 Other Electoral Provisions

The Constitution stipulates that in order to qualify for registration, all the parties must have the provision of inclusive representation in their executive committees at various levels, reflecting the diversity of the country (Article 269). The Political Party Act, 2017 prohibits any party from restricting membership on the basis of religion, caste, ethnicity, community, language or gender. Echoing the Constitution, the Act requires political parties to uphold the principle of inclusion in their organisational structure at the local, provincial and federal levels, reflecting Nepal's social diversity and upholding the principle of proportional representation, including the requirement that a third of the membership of every committee be women (Section 15). Similarly, the Election Commission Act, 2017 provides for the Election Commission to uphold the principles of gender and social inclusion while developing election policies, conducting programmes, deploying staff, and during monitoring and evaluation (Section 42).

5.5 Constitutional Commissions

The Constitution provides for the formation of several independent commissions to ensure the rights of marginalised and underprivileged communities. These are the National Human Rights Commission (NHRC) and those lumped together as 'Other Commissions', namely, the National Women's Commission (NWC), the National Dalit Commission (NDC), the National Inclusion Commission, the Adibasi Janajati Commission, the Madhesi Commission, the Tharu Commission and the Muslim Commission (Parts 25 and 27).¹⁷⁹

Even though the functions outlined in the Acts governing them are pretty much similar to those of the 'national' commissions, the Adibasi Janajati Commission, the Madhesi Commission, the Tharu Commission and the Muslim Commission are not prefixed with 'national'. These four were all created as a result of popular demands from marginalised communities towards the end of the constitution-drafting process because there could be no agreement on an overarching national inclusion commission with exhaustive jurisdiction dealing with all the constituencies.¹⁸⁰ The haste with

179 It should be noted here that the Committee for the Determination of the Structure of Constitutional Bodies of the CA-1 had recommended the creation of a number of federal commissions, all of which were provided for in the Constitution, with the exception of the Tharu Commission, the need for which had not been foreseen earlier.

180 Hari Phuyal, 'Nepal's new constitution: 65 years in the making', *The Diplomat*, 18 September 2015, <https://thediplomat.com/2015/09/nepals-new-constitution-65-years-in-the-making/>. Muslim community leaders, in particular, called for a separate constitutional Muslim commission, as they felt that the National Inclusion Commission would not be able to ensure

Box 5-4: Committees and Commissions

Even as the Maoist conflict propelled the discourse on gender and social exclusion into the political centre-stage, concurrent, albeit limited, efforts were ongoing on the part of the State to address these issues. Thus, following the 1990 Constitution, which allowed for special provisions for ‘women, children, the aged or those who are physically or mentally incapacitated or those who belong to a class which is economically, socially or educationally backward’ (Article 11), a number of government policies were put in place.* As part of these efforts, in 1997, the government set up the Upekchhit, Utpidid ra Dalit Barga Utthan Bikas Samiti (Committee for the Upliftment and Development of the Neglected, Oppressed and Dalit Class) and the Rastriya Janajati Bikas Samiti (Committee for the Upliftment and Development of Janajatis).

In 2002, the government formed the National Women’s Commission, the National Dalit Commission, and the National Foundation for Development of Indigenous Nationalities, with all three placed directly under the executive. In January 2007, a day before the Interim Constitution was promulgated, the parliament enacted the National Women Commission Act, changing its status from a wing of a governmental ministry to a statutory body. The Dalit Commission and the Adibasi Janajati Commission were provided for in the 2015 Constitution and the relevant acts enacted in 2017.

Source: Adapted from Niti Foundation and Social Science Baha (2022)

* Such as the ‘special socio-economic programmes... for socially and economically weaker sections of the rural population, ethnic groups and women’ (8th Five-Year Plan, 1992-1997) or the very similar sounding ‘special socio-economic development programmes... for the welfare of economically and socially weak groups, ethnic people and women community of the society’ (9th Five-Year Plan, 1997-2002).

which these four commissions were created is clear from the fact that the Constitution only briefly mentions they would be created, that commissioners would be appointed, and prescribes how long they would serve, leaving aside all other details to be decided at a later date. On the other hand, the other (‘national’) commissions are dealt with at length, and their functions, duties and powers and the authority to establish a presence at the provincial level are also spelt out.

the rights of the Muslim community. Rajendra Nath, ‘Sambaidhaanik Muslim Aayog ko Maag’ (Demand for a Constitutional Muslim Commission), *Kantipur*, 20 July 2015, <https://ekantipur.com/printedition/2015/07/20/350861.html>.

These commissions have the constitutional mandate to identify areas of necessary policy, legal and institutional reforms and make recommendations to the government. Among the ‘national’ commissions, with the exception of the National Inclusion Commission, the NHRC, the NWC and the NDC have the constitutional mandate to receive complaints and to look into cases concerning violations of human rights in general, women’s rights and Dalit rights, respectively, even though it is up to the government whether it wants to take up any recommendations for action. In contrast, the four ‘ethnic’ commissions and the National Inclusion Commission are only recommendatory bodies without adjudicative power. Unless they work with the NHRC, these commissions can only work to promote the rights and culture of the concerned groups and recommend changes in the laws and policies in relation to issues affecting the respective groups.

All the commissions are mandated to consist of a chairperson and four other members and be regulated by federal laws (Article 265). However, apart from the NHRC and the NWC, the other commissions have been devoid of human resources and necessary infrastructure for much of the period since the adoption of the Constitution, rendering them largely non-functional.¹⁸¹ The laws necessary to activate the commissions were enacted in October 2017,¹⁸² and it was only in 2021 that the full complement of commissioners were appointed to all the commissions.¹⁸³ This long delay is significant since all of these commissions are up for review by the parliament 10 years after the Constitution came into effect (Article 265), which means that most had only five years to fulfil the mandate given to them.

Even more worrisome was the impact of a sweeping amendment to the Acts governing these ‘Other Commissions’ in 2019.¹⁸⁴ First, the top civil servant assigned to them was downgraded from special class to first class, according these commissions less leverage within the government. Second, it curtailed the authority of the commissions to issue necessary directives to the government regarding non-compliance with international treaties and conventions Nepal is party to and instead was limited to making recommendations and providing suggestions. Third, it did away with the requirement that any vacancy among the commissioners be filled within 35 days. And,

181 Niti Foundation and Social Science Baha (2022).

182 The NWC Act and NHRC Act were enacted in 2007 and 2012, respectively.

183 See Niti Foundation and Social Science Baha (2022) for a detailed discussion on the ‘ethnic’ commissions and their functions.

184 The Act in question was the Some Nepal Acts Amendment Act, 2019.

Box 5-5: A Tale of Two National Inclusion Commissions

A National Inclusion Commission (NIC) was formed in early 2009 in accordance with the spirit of the Interim Constitution of Nepal on promoting inclusion and the Government of Nepal's Policies and Programmes 2008/09.* The main objective of the Commission was to make recommendations to fulfil the government's mandate to ensure inclusion in state mechanisms. The three-member body never took its full shape of seven members while all the three members appointed were male. It did not include any Dalit member either.

The NIC had the following responsibilities:

- Identify state organs and structures that need to be made inclusive and recommend ways to achieve it;
- Assist the government in identifying and classifying the population into specific groups;
- Review, monitor and evaluate the existing laws, policy, regulations or programmes and make recommendations for necessary policy changes;
- Review the policies and programmes of various state mechanisms to find out whether they are based on the principle of inclusion; and
- Study the proposed models of state to ensure that they do not exclude any social group and provide recommendations to the government.

Housed within the NPC, there was hope initially that the NIC might provide the locus for a more holistic approach to inclusion. Unfortunately, it had neither the authority nor the resources to achieve anything meaningful. After it submitted its report to the government in May 2010, the term of the NIC lapsed. That report has still not been made public, and no action was taken on its recommendations either.

* * *

The 2015 Constitution also provided for the formation of a National Inclusion Commission. Unlike the earlier version of the NIC, the new one had the express mandate to work on behalf of communities other than Dalits, Janajatis, Madhesis, Muslims and Tharus, i.e., social groups which did not have designated commissions of their own (even though there was considerable overlaps with the 'ethnic commissions'). The Committee for the Determination of the Structure of Constitutional Bodies in CA-1 had recommended the formation of a Federal Commission for the Protection

of the Rights of People with Disabilities, Minorities and Marginalised Communities and People from Backward Regions. The NIC has been granted a mandate pretty much along those lines with the exception that the number of target groups it covers has been expanded to include the Khas Arya, among others. As mentioned in the Constitution, the NIC is meant to protect the 'rights and welfare of the Khas Arya, backward class, persons with disability, senior citizens, labourers, peasants, marginalised and minority communities, people of Karnali region and economically disadvantaged people' and ensure that these groups have 'rightful representation' in state bodies.

Similar to delays with the other commissions, a chairperson was finally appointed to the NIC in January 2019, but he resigned within months, citing government indifference to the work of the NIC.[†] It was only in 2021 that the NIC saw the appointment of the full body of office-bearers.

* Government of Nepal's Policies and Programme 2008/09, <http://bit.ly/366doM4>.

† Himalkhabar, 'Samabeshi Ayogka Adakshyako Rajinama, Karan "Sarkari Asahayog"' (Resignation by Chairperson of Inclusion Commission, Reason 'Unhelpful Government'), 26 July 2019, <https://www.himalkhabar.com/news/13649>.

finally, the Adibasi Janajati Commission was also prohibited from operating offices at the local level.¹⁸⁵

Additionally, other constitutional commissions, namely, the Public Service Commission, the Election Commission and the Commission for the Investigation of Abuse of Authority (CIAA) are to be constituted in line with the constitutional requirement that the principle of inclusion be applied in the appointments of all constitutional bodies (Article 283). The Public Service Commission is primarily responsible for the selection of officials for a number of government services. The Constitution has expanded its powers to be involved in the staff selection processes of various organisations that the government has a stake in as well. Likewise, the Election Commission has the responsibility of holding free and fair elections at various levels of government, electing more than 35,000 representatives across the country while adhering to the constitutional principles of inclusive representation. As its commitment to that end, the Election Commission has even adopted the Gender and Inclusion in Election Management Policy.¹⁸⁶ Both commis-

185 Niti Foundation and Social Science Baha (2022).

186 Nirwahan Byawasthapanma Laingik tatha Samabeshi Niti, 2077 (Gender and Inclusion in Election Management Policy, 2077 [Bikram Sambat], <https://election.gov.np/source/>

sions, therefore, have key roles to ensure proper representation of excluded groups in the selection processes of government/public officials and electoral representation at all levels of governance.

5.6 Language Policy

The Constitution recognises all languages spoken as mother tongues in the country as ‘languages of the nation’ (Article 6). In addition, it provides that while the Nepali language in the Devanagari script is the official language of the country, provinces can determine one or more language(s) spoken by a majority of people within the province as their official language(s)¹⁸⁷ in addition to the Nepali language (Article 7). Whereas the Interim Constitution had allowed the use of the mother tongue while conducting official business and requiring the State to keep a translation of the business for the official record [Article 5(3)], the 2015 Constitution envisaged a Language Commission to provide suggestions to the government on matters related to language.

The ‘right to language and culture’ has been enshrined as a separate fundamental right under the Constitution whereby everyone has the right to use their language and the right of all communities to ‘preserve and promote their language, script, culture, civilization and heritage’ has been guaranteed (Article 32). The Constitution further guarantees the right of every community to get education in their mother tongue and, for that purpose, to open and operate schools and educational institutes [Article 31(5)].

The role of the Language Commission included recommending how any language could ‘acquire the status of official language’ [Article 286(6)]. The Constitution also envisioned the formation of language commissions in each province to decide on matters relating to language (Article 287), provided it is thought necessary. The functions and power of the commissions so formed—further detailed in the Language Commission Act, 2017—are, however, to be regulated by federal law. The commissions are to identify languages spoken in Nepal, and provide recommendations to the federal, provincial and local governments for the protection and promotion of the languages spoken as mother tongues in Nepal.¹⁸⁸

Resources%20Other/03_ECN_GI_Policy_Final_English_Nepali_e-copy.pdf. This policy was preceded by the Election Commission’s Gender and Inclusion Policy of 2013 and the Gender and Inclusion Strategy, 2015-2020, https://www.np.undp.org/content/dam/nepal/docs/Reports_2021/gender-and-inclusion-policy-ecn-2013-en.pdf.

187 It must be noted that the language(s) implied is the one ‘spoken’ by a majority of people within the province not necessarily the mother tongue(s) of the majority.

188 Section 3, Language Commission Act, 2017.

As dictated by the Constitution that the Language Commission be constituted within a year of its promulgation, i.e., by September 2016, the government did form such a commission with the appointment of a chairperson alone. Although the Commission was meant to see representation from all the provinces, that provision was disregarded, and only one other member was appointed after two years.¹⁸⁹ The Language Commission Act itself came more than a year later. While the functioning of the Commission was thus hindered, the recommendations it has provided the government on a language policy have not been adopted thus far.¹⁹⁰

189 Baahrakhari, 'Ajhai Purna Bhayena Bhasa Ayog, Sarvekshan ra Namuna Sankalanmai Sakiye Dui Barsha' (Language Commission Still Not Complete, Two Years Spent Only on Survey and Sample Collection), 1 March 2019, <https://baahrakhari.com/news-details/175987/2019-03-01>.

190 Ganesh Rai, 'Prativedanmai Simit Bhasa Ayog' (Language Commission Limited to Reports), *Kantipur*, 19 October 2019, <https://ekantipur.com/news/2019/10/19/157148645726559538.html>.

6

Legal Inclusion of Various Groups

Various laws have been formulated for greater inclusion since the success of the People's Movement II and the dawn of what was to be a New Nepal. This included the signing of the CPA and the adoption of the Interim Constitution and the 2015 Constitution and their amendments as well as reforms in laws already in place along with the enactment of new ones. This chapter discusses how far these legal arrangements have moved the inclusion agenda forward while also highlighting areas where implementation has fallen short.

The forms of discrimination faced by women and the marginalised social groups are multifarious. While there are natural overlaps, there are issues specific to certain groups as well. One early examination of how the agenda of inclusion could be furthered to address the main causes of marginalisation of three major social groups, Dalits, Janajatis and Madhesis, is given in Table 6-1, which has been adapted from a 2003 paper by the late scholar Harka Gurung.¹⁹¹ The first three columns have been borrowed from his work while the fourth column consists of an assessment by the present authors of the situation as it exists at the time of writing. While the issues discussed do not deal with discrimination based on gender or religion, comparing it with the positive changes achieved since then for the groups mentioned above provides an indication of the extent to which the Nepali state has moved towards becoming more inclusive.

The rest of this chapter focuses on the effects of the various laws and policies adopted since 2006 on the various marginalised groups of Nepal, namely, women, Dalits, Janajatis, Madhesis and Muslims, along with those who cut across identity boundaries. It seeks to highlight both the gains made in terms of effectively addressing the issues and grievances of the hitherto-marginalised groups by the State, and also to point to some of the challenges and gaps that might hinder the effective implementation of these laws and policies.

191 Gurung (2003).

Table 6-1: The Agenda for Inclusion

Social group	Source of exclusion	Agenda for inclusion	Current status, post-2015 Constitution
Dalit	Social		
	Caste discrimination	Secular state	Achieved with reservations*
	Economic		
	Poor literacy	Free education	Achieved
	Unemployment	Seat reservation	Achieved
	Landlessness	Alternative livelihood	Not addressed
	Political		
	Poor representation	Collegiate education	Partially addressed through reservations in the political sphere
Janajati	Cultural		
	Religious	Secular state	Achieved with reservations*
	Linguistic discrimination	Official status to Janajati languages	Achieved
	Economic		
	Low literacy	Education targeting	Partially addressed through targeted scholarships
	Unemployment	Affirmative action	Partially addressed through quota system in government jobs and education
	Political		
	Poor representation	Proportional representation	Partially addressed
Madhesi	Subjugated in governance	Ethnic autonomy	Not addressed
	Cultural		
	Linguistic discrimination	Official status to Tarai languages	Achieved
	Economic		
	Employment bar	Recruitment in army	Achieved through quotas
	Political		
	Hill dominance	Regional autonomy	Partially addressed through quota system in the political sphere
Madhesi	Citizenship problem	Ascertain long-term residents vis-a-vis recent immigrants	Partially addressed

Gurung (2003).

* Mainly because 'secularism' was defined in the Constitution to accord primacy to Hinduism.

6.1 Electoral Representation and Government Service

It is beyond the scope of this study to assess how far the push for inclusion and a more inclusive legal regime has qualitatively affected the different target groups in totality. But there are two major and highly visible indicators, albeit with some reservations, that can stand as proxy to the progress Nepal has made towards an inclusive society and polity: electoral representation and employment in government agencies.

6.1.1 Representation

As outlined previously, laws governing elections at all levels of government have inbuilt mechanisms to ensure greater diversity of representation. As a result, at the national level, the outright dominance of the hill castes (i.e., the Khas Arya) in the three House of Representatives (HoRs) of the 1990s, which included 62 per cent in the 1994 house (not to mention the presence of just a single Dalit representative in all three) has been undercut (Annex 2 and Tables 6-2 and 6-3). Following the first flush of the push towards inclusion with the success of the People's Movement II and the adoption of the Interim Constitution, the proportion of the Khas Arya went down to almost their share of the population in the CA-1. Their share has since crept up though with each successive election, with the National Assembly formed in 2018 again showing the Khas Arya in their dominant position.

The figures become more problematic in the provincial assemblies with the Khas Arya represented in excess of their population share in all the provinces with the exception of Madhes (Table 6-2). In Lumbini, they exceed their share of the population by nearly 25 per cent. Likewise, in Madhes, Madhesi representation is nearly 20 per cent more than the proportion of the Madhesi population in the province. The only other group that is over-represented is Janajatis in Province 1, by less than 2 per cent. All other groups are under-represented, with Dalits faring the worst across all the provinces, with their representation coming overwhelmingly from women elected through the PR part, most notably, the entire contingent of Dalits in the Province 1 assembly consisting entirely of Dalit women (Table 6-3).

Figures from local governments are somewhat better in terms of representation of women and Dalits even though that was mainly because of the election of two women from each ward, including the mandatory requirement of one of them having to be a Dalit. Even though the expectation would be for local leadership to be more diverse socially since it would reflect the population composition at the grassroots, the dominance of the Khas Arya is very clear.

Table 6-2: Federal Parliament and Provincial Assembly Results
(by social group)

Popu- lation group	HoR (2017)	NA (2018)	Popu- lation share (2011)	Provincial Assemblies											
				Province 1			Madhes			Bagmati			Gandaki		
				%	Popu- lation share (2011)	%	Popu- lation share (2011)	%	Popu- lation share (2011)	%	Popu- lation share (2011)	%	Popu- lation share (2011)	%	Popu- lation share (2011)
Dalit	6.9	11.9	12.6	3.2	9.4	6.5	16.4	1.8	5.7	8.3	17.4	5.7	14.3	12.5	23.3
Janajati	30.9*	22	28.6	48.4	46.7	4.7	9.6	43.6	53	36.7	42.3	13.8	19.2	7.5	13.5
Khas Arya	42.5	55.9	31.2	35.5	27.7	3.7	4.8	53.6	37	55	37.1	52.9	28.7	77.5	62.2
Madhesi [#]	16.4	8.5	14.8	6.5	7.7	72.9	51.9	0.9	1.8	-	0.5	9.2	15.3	2.5	0.3
Muslim	3.3	-	4.4	3.2	3.6	9.3	11.6	-	0.7	-	0.7	4.6	7.0	-	0.2
Tharu	1.7	1.7	6.6	3.2	4.1	2.8	5.3	-	1.6	-	1.7	13.8	15.3	-	0.4
Women	32.7	37.3	51.5	34.4		34.6		33.6		35.0		36.8		32.5	34.0

Source: : Vollan (2020); Mahato et al (2019); Bhola Paswan, 'Khas Arya biggest winners in five provinces, Janajati and Madhesi in one each', Record Nepal, 20 January 2018, <https://www.recordnepal.com/khas-arya-biggest-winners-in-five-provinces-janajati-and-madhesi-in-one-each>; and calculation of Census 2011 data.

* This figure includes Tharus as well. [#] Excluding Madhesi Dalits, who are captured under the category of Dalits.

Table 6-3: Members Elected to Provincial Assemblies under the PR System, 2017

Province	Province 1			Madhes		Bagmati		Gandaki		Lumbini		Karnali		Sudurpaschim							
	Reserved seats (37)	Proportion of seats won		Reserved seats (43)	Proportion of seats won		Reserved seats (44)	Proportion of seats won		Reserved seats (24)	Proportion of seats won		Reserved seats (35)	Proportion of seats won		Reserved seats (16)	Proportion of seats won		Reserved seats (21)	Proportion of seats won	
		Number	Proportion of total seats		Number	Proportion of total seats		Number	Proportion of total seats		Number	Proportion of total seats		Number	Proportion of total seats		Number	Proportion of total seats		Number	Proportion of total seats
Dalit	3	9.4	8.1	6	16.4	14.0	2	5.7	4.5	5	17.4	20.8	5	14.3	14.3	3	23.3	18.8	5§	17.2	23.8
Janajati	19	46.7	51.4	3	9.6	7.0	27	53.0	61.4	11	42.3	45.8	6	19.2	17.1	3†	13.5	18.8	-	3.5	-
Khas Arya	10	27.7	27.0	-	4.8	-	15*	37.0	34.1	8	37.1	33.3	11	28.7	31.4	10†	62.2	62.5	12‡	59.9	57.1
Madhesi (excluding Madhesi Dalits)	2	7.7	5.4	29	51.9	67.4	-	1.8	-	-	0.5	-	6	15.3	17.1	-	0.3	-	-	1.7	-
Muslim	1	3.6	2.7	4	11.6	9.3	-	0.7	-	-	0.7	-	2	7	5.7	-	0.2	-	-	0.2	-
Tharu	2	4.1	5.4	1	5.3	2.3	-	1.6	-	-	1.7	-	5	15.3	14.3	-	0.4	-	4	17.3	19.0
Men			18.9			25.6			27.3			25.0			14.3			25.0			19.0
Women	31.0¶	33.3	81.1	35.7¶	33.3	74.4	36.7¶	33.3	72.7	20.0¶	33.3	75.0	29.0¶	33.3	85.7	13.3¶	33.3	75.0	17.7¶	33.3	81.0

Source: Pradesh Sabha Sadasya Nirwahan 2074, Nirwahan Parinam Pustak, Election Commission; Census 2011 data.

* Including one with disability.

† Including one from backward areas.

‡ Including two from backward areas.

§ Including one with disability and two from backward areas.

¶ Calculated as a third of the total seat as mandated by the Constitution.

A total of 35,041 representatives were elected from the 35,221 seats on offer.¹⁹² The share of the Khas Arya was 34 per cent in those but without accounting for the mandatory Dalit woman ward member seat, the proportion of Khas Arya local representatives rises to 42 per cent.¹⁹³ The Khas Arya dominance of the positions of mayor and deputy mayor in municipalities and chairperson and vice-chairperson in rural municipalities is also strong with a majority in the former and nearing a majority in the latter. That was true even among women representatives in leadership roles: of the 18 women mayors/chairpersons, 12 are Khas Arya (with five Janajatis and one Madhesi) as are 27 of the 64 female ward chairs.¹⁹⁴

Of the ward chairpersons, 44 per cent are Khas Arya, 16 per cent Madhesi castes, 1.4 per cent Hill Dalits, Madhesi Dalits 0.4 per cent, Janajatis 35 per cent, and Muslims 3 per cent. Women do not make up even 1 per cent of the ward chairpersons, with none from among Hill and Madhesi Dalits or Muslims.¹⁹⁵ In that sense, the electoral system adopted for local government meant that despite the quotas for women and Dalit women, local body elections of 2017 did not take heed one of the main provisions of both the Interim Constitution and the 2015 Constitution—that of proportionate representation of all the social groups in state organs.

It should be pointed out that the trend of undermining the election criteria for proportional inclusion had started much earlier and can be traced to the March 2008 agreement between the government and the United Democratic Madhesi Front (UDMF). Accordingly, where previously any party submitting a list with fewer than 20 per cent of the full strength of the CA elected under the PR system were exempt from following the quota system, under the new arrangement, the ceiling was raised to 30 per cent.¹⁹⁶ In effect, the new agreement allowed political parties to avoid caste/ethnic quo-

192 Of the 180 seats thus vacant, there were no nominations filed for the five seats in one ward of a rural municipality in Solukhumbu district, while no nominations were filed for 175 seats in the Dalit women quota across the country (Khanal, 2019).

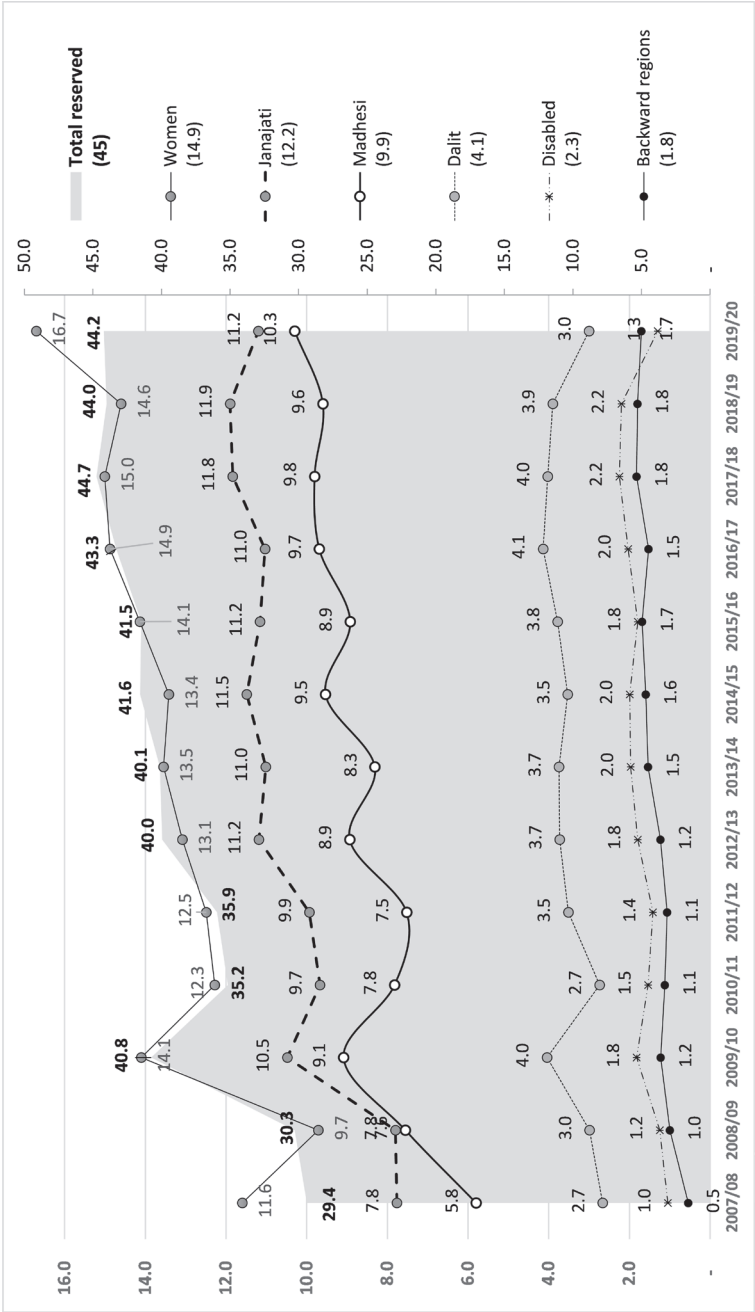
193 Bhola Paswan, 'In local government, Khas Arya men dominate all major posts', *The Record*, 1 December 2017, <https://www.recordnepal.com/in-local-government-khas-arya-men-dominate-all-major-posts>.

194 Bhola Paswan, 'Data Reveals Local Elections a Disaster for Gender Equality', *The Record*, 24 October 2017, <https://www.recordnepal.com/wire/features/data-reveals-local-elections-a-disaster-for-gender-equality>.

195 Pokharel and Pradhan (2020). It is noteworthy that Chhetris and Mountain/Hill Janajatis comprise 30 per cent of the rural municipality chairpersons followed by Bahuns at 16.3 per cent. Among the urban municipalities, however, the Khas Arya represented by Bahun (23.6%) and Chhetri (26.3%) together make up just under 50 per cent of the mayors.

196 Procedure Related to the Nomination and Selection of Candidates in Proportional Election (First Amendment) 2008, <http://rajpatra.dop.gov.np/welcome/book/?ref=20745>.

Figure 6-1: New Entrants into the Civil Service, 2007/08 to 2019/20 (% of total)



Note: The figures in parentheses underneath each group denotes the proportion of seats reserved in total for each group.

Source: Table 74, Public Service Commission, 61st Annual Report (2019-20), https://psc.gov.np/assets/uploads/files/PSC_AR_2017_update.pdf.

Box 6-1: New Civil Service Act?

A draft civil service bill under consideration since 2018 has proposed increasing the proportion of reserved seats to 50 per cent from the current 45 per cent. The bill also proposes increasing the number of beneficiary groups to 10 from the existing six, with the addition of Muslims, Tharus and Khas Arya, the new groups granted quotas in the country's electoral laws at the federal and provincial levels, as well as a minimal percentage for an undefined category called 'backward class'. Half the seats would be set aside for women, with fixed quotas for women from the other nine groups. The remaining half would be divided up according to a set formula among the eight identity groups and the 'backward class', which presumably would still be open to women as well.

Notably, the bill does not make any mention of the identity groups having to be 'economically and socially backward', as in the earlier formulation of the Civil Service Act and others. The only mention of the economic criterion is with regard to the Khas Arya men. The bill also states that reservations can be availed of only once in the course of the service and that children, either of whose parents had benefitted from this system, would also not be able to take part in it.

Source: Bill for the Composition, Management and Terms of Service of the Federal Civil Service, http://www.moga.gov.np/uploads/documentFiles/1895_4e69c97b-93c379a5450732c6ffe1b828_1506264183_s.pdf

tas if they submitted lists containing up to 101 candidates whereas under the 20 per cent threshold, the limit was 67.¹⁹⁷

6.1.2 Public Service

The increasingly diverse face of the State is now also found in government service, where 45 per cent of all new positions are reserved for women, Dalits, Janajatis, Madhesi, persons with disabilities and residents of backward regions.¹⁹⁸ Data shows that while there were initially some difficulties filling suitable candidates for the reserved seats, with only 29 per cent of the 45 per cent filled in 2007/08, by 2012/13 it had crossed 40 per cent and after

197 Vollan writes: 'The rule was a response to the demands of the Madhesi, who did not want to be forced to have hill people on their lists. As expected, in 2008, the Madhesi won 77.6 per cent of the 58 seats won by parties with short lists...'. Vollan (2020)

198 That is, the districts of Achham, Kalikot, Jajarkot, Jumla, Dolpa, Bajhang, Bajura, Mugu and Humla.

2017/18, it has come close to the 45 per cent (Figure 6-1). What this means in actual numbers is that of the 53,450 new civil service entrants between 2007/08 and 2019/20, a full 41 per cent, i.e., 21,649, belonged to the reserved category and 7,370 (14 per cent) were women. It should also be noted that these figures do not include those individuals who, despite being eligible for reservations due to their social identity, have opted to fight in the open category.

Addressing the need for extra support, such as coaching classes, for Janajati aspirants, the National Foundation for Development of Indigenous Nationalities (NFDIN), established as an autonomous statutory body by the National Foundation for Development of Indigenous Nationalities Act, 2002, has long been conducting programmes for Janajatis to participate in civil service preparatory classes.¹⁹⁹ Following suit, similar efforts are being made by various municipalities across Nepal to help members of marginalised groups prepare for civil service exams.²⁰⁰

6.2 Women and Gender

6.2.1 Amending Discriminatory Legal Provisions

Patriarchy and gender-based discrimination are deeply entrenched in Nepali society, and the unequal treatment of women has been institutionalised directly and indirectly by the State through the enactment of various discriminatory laws and practices against women.²⁰¹ It was only through the 11th Amendment in 2002 to the Country Code (Muluki Ain) of 1963, following a long struggle by various women's groups, that some legal provisions that discriminated against women were removed from the Country Code or amended. While the amendment had brought in a ray of hope, it did not achieve the expected results as it only attended to a few of the many discriminatory provisions concerning marriage, divorce, parental property, etc.

After the House of Representatives was reinstated in 2006, a bill to amend laws that perpetuated gender inequality was passed in 2006, reflecting the State's commitment to ending discriminatory laws and policies. As a result, the Act for Amending Some Nepal Laws for Maintaining Gender Equality, 2006 (hereafter, the Gender Equality Act, 2006) amended gender discrimina-

199 See, 'NFDIN Lok Sewa/Civil Service Preparatory Class Commencement Notice' November 11, 2019 <https://www.nfdin.gov.np/eng/article/40>.

200 See, for example, notices from Nijgadh Municipality and Barahathawa Municipality of Madhes, available at <https://bit.ly/3qmi6Og> and <https://bit.ly/3g6Y9pN>, respectively, and Baglung Municipality of Lumbini, available at <https://bit.ly/2I2tZHL>.

201 Forum for Women, Law and Development (2009).

tory provisions and language in the Country Code and various other Acts. One assessment from 2014 put the number of laws amended as a result of this Act at 56.²⁰²

The Gender Equality Act also brought some tangible changes in laws related to property rights. To cite a few examples, prior to the amendment, Section 2 of the Country Code's 'Chapter on Women's Share and Property' had stated: 'An unmarried girl, one having a husband or a widow who has been separated can use all the movable property of their share and up to half of the immovable property of their share without anybody's consent. An unmarried girl can with the consent of her father, if he is alive, and one having a husband or a widow with the consent of their grown-up sons if they exist, can use even the immovable property as they like.' In other words, this provision subjected women to various restrictions in the use of their property which were not applicable to their male counterparts. The amendment substituted the aforementioned provision with the following: 'An unmarried girl, married woman or a widow living separately may enjoy the movable and immovable property of their share at their own discretion.'

Similarly, the 'Chapter on Adopted Son' was amended to read 'Chapter on Adopted Son, Adopted Daughter', treating both on an equal footing. Additional amendments of a similar nature were also made to the Country Code on provisions dealing with court proceedings, relationship between husband and wife, debtor-creditor relations, registration of transactions, etc. The Gender Equality Act, 2006 was thus an important tool for ending discriminatory legal practices through legislative intervention.

Prior to the passing of the Gender Equality Act, 2006, several public interest litigations had been filed in the Supreme Court to repeal discriminatory legal provisions against women. In many cases, the court had ordered the government to make necessary arrangements to repeal such laws in accordance with international human rights treaties the country had ratified.²⁰³ By issuing directives to introduce appropriate legislative measures, the court often served thus as a catalyst in ensuring women's rights.

Following the Gender Equality Act, the Interim Constitution had also recognised the rights of women as group rights and included provisions for positive discrimination for women, ensured women's reproductive and ancestral property rights (Article 20), and right to social justice by providing for the representation of women in the State on the basis of proportionate inclusion (Article 21). All of these rights have been included in the 2015

202 UN WOMEN (2014).

203 UNDP (2010).

Constitution in addition to women's right to participate in 'family affairs'. In June 2007, Nepal also ratified the Optional Protocol of the Convention for the Elimination of All Forms of Discrimination against Women (CEDAW), a key international instrument for ensuring the rights of women across the world.²⁰⁴

Notwithstanding these changes, the State is not close to institutionalising them. This is particularly true of the international instruments Nepal is party to. For instance, the Constitution does not include all the provisions in CEDAW for promoting substantive gender equality. For example, under Article 4 of CEDAW, states are required to introduce 'temporary special measures aimed at accelerating de facto equality between men and women' but no such steps have been taken thus far. Further, as highlighted in the Shadow Report on the Sixth Periodic Report of Nepal on CEDAW, the Constitution fails to address 'intersectional and multiple forms of discrimination of women, especially multiple discrimination faced by Dalit women, women with disabilities, displaced women, women from religious and sexual minorities, indigenous women and Madhesi women'. In addition, the Constitution fails to acknowledge discrimination by non-state actors or 'the distinction in forms of discrimination experienced by women in private and public spheres'.²⁰⁵ It is important to note that the State has the obligation to ensure the implementation of these rights as legal rights by creating enabling provisions.

6.2.2 Provisions in the National Civil (Code) Act, 2017

The Civil Code adopted in 2017 to replace the 1963 Country Code introduced new provisions on marriage. Cohabitation, or live-in relationship, is recognised as marriage provided the man and woman have accepted each other as husband and wife through any measure sufficient to validate a legal relationship of marriage (Number 67). Number 74 further protects women's rights and child rights by recognising the birth of a child as a fundamental basis validating marriage. However, the Code explicitly recognises marriage as a bond between a man and a woman, failing to recognise marriage concluded among LGBTQIA+ couples.

For the first time, the Code has included several provisions that provide the basis of a harmonious conjugal relationship between spouses and their

204 The Optional Protocol establishes complaint and inquiry mechanisms for the CEDAW. Parties to the Protocol allow the CEDAW Committee to hear complaints from individuals or inquire into 'grave or systematic violations' of the Convention.

205 CEDAW Shadow Report Preparation Committee (2018).

responsibility towards each other and family.²⁰⁶ In another first, the Code has recognised the right of married women to use either the surname of her parents or that of her husband (Number 81).

The Civil Code prohibits any discrimination between son and daughter (Number 127) while also obliging parents to provide special care to any son or daughter who is physically or mentally handicapped or disabled or has contracted a deadly disease (Number 128). The Code has introduced progressive provisions in adoption laws, granting adoption rights to the LGBTQIA+ community as well (Number 169). Likewise, it also legalises changes of body organs, thus providing the legal foundation for sex-change operations for those from the LGBTQIA+ community (Number 36).

6.2.3 Representation in Elected Bodies

The push for greater gender equality in the law had begun even in the period prior to the 2006 political change. The most notable of these were the provisions in the Local Self-Governance Act, 1999 that ward committees have at least one elected woman member; a woman be nominated to village development committees in the absence of any woman being elected; and village councils include the nine female ward members and one more nominated woman member. Since no local body was elected after its enactment, the Act had no practical impact but the intent to ensure a higher-level participation of women in local governance was clear.²⁰⁷

206 These include:

Number 86. Relation and obligation of husband and wife:

- (1) The husband and wife must have mutual love and good faith.
- (2) The husband and wife must establish and spend conjugal life by living together, except as otherwise arranged through mutual understanding.
- (3) The husband and wife must help, protect and respect each other.

Number 90. Household affairs to be managed by consent:

- (1) The husband and wife of an undivided family shall manage the household affairs by mutual consent according to their property, income and capacity.
- (2) Except as otherwise provided in the law, the husband or wife shall obtain each other's consent in selling or otherwise transferring a property registered in his or her name.

Number 91. Not to preclude from exercising profession, business or occupation:

The husband or wife or any member of the family shall not preclude each other from exercising a profession, business or occupation of their respective skill, qualification or ability.

207 United Nations Resident and Humanitarian Coordinator's Office, 'Access to and Representation of Women in Decision Making Processes of Local Governance Structures: A Local Case Study', March 2012, <https://bit.ly/3LsWCtf>. The report cited notes other steps taken as well to ensure a greater presence of women in public life. This included the 7th amendment to the Education Act in 2001, which ensured that at least one of the nine members of the School Management Committee is a woman. Likewise, the guidelines issued in 2008 to govern community forestry users' committees reserved half the committee seats for women, including the position of chairperson or secretary, with proportionate represen-

Going forward, the Interim Constitution included the provision of 33 per cent reservation for women in all state structures. That was a significant improvement compared to the 1990 Constitution that recommended that parties ensure a paltry 5 per cent of the candidates to the election of House of Representatives be women. As a result, the CA-1 had 197 women in a house of 601, by far the highest number in Nepal's parliamentary history.

This achievement, however, should not distract from drawbacks in the system. None of the political parties complied with the provision requiring 33 per cent representation of women in the FPTP part. The CPN-Maoist had the highest number of women candidates (16 per cent) while the other two large parties, the Nepali Congress and the CPN-UML, included not more than 10 per cent. Moreover, no political party initially had 50 per cent women in the list of candidates for the PR section, even though this was a mandatory requirement of the Constituent Assembly Election Act, 2007. It was only after the intervention from the National Election Commission that political parties eventually revised their respective lists to include the required proportion of women. The possible reasons for that state of affairs were lack of political will amongst political parties to include women, male-dominated decision-making structures within the political parties, and the general perception that female politicians are less likely to succeed in a direct election.

Another drawback was the absence of a separate platform to debate women's issues despite the fact that women represented almost 33 per cent of the CA-1 members. An informal women's caucus operated in the House, but without any official recognition in the formal procedures of the Constituent Assembly. In general, the issue of women's rights fell under the purview of the Fundamental Rights Committee, and its report to the CA-1 duly stated that every woman would have the right to proportionate participation in all agencies of the state mechanism on the basis of inclusiveness.

The election to the CA-2 reflected a similar but somewhat worse scenario. The three main parties, the Nepali Congress, the CPN-UML and the UCPN-Maoist, agreed on a provision in the Constituent Assembly Election Ordinance, 2013 that granted political parties the flexibility to put up either 10 per cent more or 10 per cent less than the 50 per cent requirement of

tation of women from Dalit and Janajati groups as well as from among the poor. The 2010 guidelines for the formation of users' committees for local projects under district or local bodies ensured representation of at least 33 per cent women in the 7-11-member committees, while making it mandatory for a woman to serve as chairperson, secretary or treasurer.

women candidates in the list PR.²⁰⁸ That meant the parties could get away with a list that contained only 45 per cent women (and, needless to say, the intent never was to have 55 per cent women). In the absence of any such compulsion in the FPTP part, the number of women candidates was very low.²⁰⁹ As a result, the proportion of women in the CA-2 went down to 29.5 per cent compared to 32.8 per cent in the CA-1.

During the 2017 elections to the HoR, political parties once again failed women since there was no requirement to field a certain percentage of women candidates under the FPTP system. Women made up only 7.5 per cent of the 1,944 candidates in the fray. Thus, of the total 146 women candidates who contested the election, only six were elected. That number represents the lowest proportion of women elected under FPTP in the elections held after the 2006 change—3.6 per cent compared to 4.5 per cent in 2013 and a high of 12.5 per cent in 2008.²¹⁰ However, with the inclusion of the PR part, the number of women lawmakers in the HoR reached 33 per cent, as required by the Constitution.

Likewise, women comprise 34.6 per cent (i.e., 190) of the combined strength of 550 in the seven provincial assemblies. The proportion of women exceeds the constitutional requirement of 33 per cent in six of the seven provinces. However, only 17 women were elected in the FPTP part, that is, 5.2 per cent of those 330 directly elected, highlighting once again the importance of the mixed electoral system in increasing the diversity of legislative bodies.

In local governments, of the 35,041 elected positions, there were 14,339 women (or 41 per cent) although they comprised only 2 per cent of the ward members elected in seats not reserved for women.²¹¹ In terms of positions of leadership, women are far behind: 17 mayors/chairpersons in the 753 local governments but 693 deputy mayors/vice-chairpersons, and only 64 of the 6,742 ward chairs.

208 Mahato et al (2019).

209 Acharya (2013). According to Acharya, women made up only 9.3 and 10.9 per cent of the total candidates in the CA-1 and CA-2 elections, respectively. She also notes that while the figures indicate 'a slight increase in the number of women taking part in the election process...this increase is more contributed by independent candidates'.

210 Mahato et al (2019).

211 Bhola Paswan, 'Data Reveals Local Elections a Disaster for Gender Equality', 24 October 2017, <https://www.recordnepal.com/wire/features/data-reveals-local-elections-a-disaster-for-gender-equality>.

6.2.4 Women's Right to Citizenship

The right to citizenship is inextricably linked to an individual's social, economic and political rights. This is because citizenship is a legal and social/political contract comprising rights and responsibilities between individuals and the state. Such is the importance of ownership of citizenship that many have even argued that it affects individuals even when they are beyond the territorial boundary of their nation-state and is valid even after their death. However, even the best human rights provisions will not be able to ensure dignity and equal rights for women (or, for that matter, any other group) as long as there is confusion about their right to citizenship and also experience discrimination while exercising their citizenship rights.

In the context of Nepal, the granting of citizenship rights to women has been quite uneven. The 1990 Constitution, framed after the restoration of multiparty democracy, went one step back from the 1962 Constitution with regard to women's citizenship rights. According to the 1962 Constitution, any person was eligible to acquire citizenship if their father or mother was a citizen of Nepal at the time of their birth. The 1990 Constitution, however, curtailed women's right to transfer citizenship to their children and made it a prerogative only of men. The Interim Constitution revived the 1962 provision through Article 8(2)(b), which stated that 'any person whose father or mother is a citizen of Nepal at the time of his or her birth is eligible to acquire citizenship'. Thus, after a 15-year lapse, women's right to transfer citizenship to their children was reinstated.

In response to a public interest litigation filed at the Supreme Court regarding the citizenship rights of children of unknown parentage, the Court issued a mandamus order directing the government to recognise the equality provision relating to citizenship certificates.²¹² As a result, the Interim Constitution recognised that any child found within the territory of Nepal and whose parents are not known shall, until the father or mother of the child is traced, be deemed to be a citizen of Nepal [Article 8(3)]. In other words, a child could be eligible for citizenship even if such a child were later found to be the son or daughter of only a Nepali mother. Earlier, citizenship was only available through the patrilineal line of descent and in the absence

212 Tek Tamrakar for Pro Public v. His Majesty's Government (2005). The petitioner mainly raised the issue of denial of citizenship rights to Badi children, including their overall issues of privacy, discrimination and dignity. For the first time in the history of Nepal's public interest litigation, the Supreme Court formed a study committee composed of representatives of different social organisations and concerned governmental agencies, asking it to study their situation, and submit a report. After a review of the report, the court issued a mandamus order to the government to grant citizenship certificates as requested.

of the father's name, it was not possible to acquire a citizenship certificate. A continuation of this provision was also recommended by the Fundamental Rights Committee of the CA-1.

Despite these changes, the Interim Constitution still set conditions that discriminated against women on the basis of marital status. Hence, according to Article 8(7), the child of a Nepali woman married to a foreign citizen could become a naturalised Nepali citizen only if s/he was born in Nepal and had been living permanently in Nepal without having acquired the citizenship of the country of which her/his father is a citizen. However, the absence of any clauses or provisions for a child born to a Nepali man married to a foreign citizen meant that the same rule was not applicable in the case of men. On the other hand, while the Nepal Citizenship Act, 2006 stipulates rather difficult criteria for foreign women married to Nepali men such as the need for evidence indicating the initiation of procedures for the renunciation of her foreign citizenship while applying for the acquisition of Nepali citizenship (Section 5), that route is not even open to foreign men married to women with Nepali citizenship.

The Fundamental Rights Committee of the CA-1 recommended that foreigners—both men and women—married to Nepali citizens, legally residing in Nepal for 15 years, and having renounced foreign citizenship, should be granted naturalised citizenship. However, Tarai-centred political parties opposed such a proposal, using the argument that such a provision would not be practical in the special context of the Tarai where cross-border marital relationship remains a common practice and an indispensable part of the social fabric in the region. The Committee also recommended issuing citizenship on the basis of descent from either mother or father and granting citizenship to gender and sexual minorities as 'Others' in terms of their gender identity.

In a first, the 2015 Constitution provides that 'no citizen of Nepal may be deprived of the right to obtain citizenship' [Article 10(1)]. The Constitution confers Nepali citizenship, by virtue of descent, to all children born to parents, either one of whom is Nepali [Article 11(2) (b)]. Further, the Constitution provides that any person who acquires Nepali citizenship, by virtue of descent, 'may obtain a certificate of citizenship of Nepal with gender identity by the name of his or her mother or father' (Article 12). Unlike in the Interim Constitution, it does not stipulate that in the case of a Nepali mother and foreign father the child has to be born in Nepal to get Nepali citizenship. Rather, such a child can get Nepali citizenship 'if he or she has permanently resided in Nepal and has not acquired the citizenship of a foreign country' [Article 11(7)].

Likewise, the 2015 Constitution continues with the provision of naturalised citizenship to a foreign woman married to a Nepali man [Article 11(6)]. The Nepal Citizenship Act 2006 requires that a foreign woman desirous of obtaining Nepali citizenship by virtue of being married to a Nepali man does not even have to renounce foreign citizenship but just provide proof of having begun the process of renunciation. It is to be noted that neither the Constitution nor the Act provides a mandatory time-bound domicile requirement for the eligibility of naturalised citizenship in such cases.²¹³

The Constitution, however, remains silent on the issue of how foreign men married to Nepali women can acquire Nepali citizenship, a provision granted to foreign women married to Nepali men under the 2006 Citizenship Act, as mentioned earlier.

6.2.5 Women's Property Rights

The 2006 Gender Equality Act recognised women's equal rights over her ancestral property and scrapped the earlier provision that obliged the daughter to return her share of the property to her parents or close relatives after marriage. The subsequent amendment of the Country Code also maintained that a daughter is able to claim an equal share of her parental property even if married even though it did not allow for retroactive application.²¹⁴

The Interim Constitution and the 2015 Constitution recognised both wife and husband to have equal rights over property [Article 20(4) and Article 38(6), respectively]. Further, the National Civil (Code) Act, 2017 has acknowledged equal partition rights among the husband, wife, father, mother, son and daughter as coparceners for the apportionment of property held in common (Number 205) with all coparceners granted the right to equal partition (Number 206). The Code also recognises widow's right to a share of the partition in common property (Number 214). Notwithstanding changes in the law, since patriarchal values dominate family and societal relations in Nepal, it is rare for women to fully enjoy their right to parental property.

6.2.6 Women's Reproductive Rights

Due to deep-rooted patriarchal values, poverty, lack of access to health services and illiteracy among women, most women in Nepal have been deprived of their right to reproductive health. There have been several encour-

213 This preferential treatment on granting naturalised citizenship to foreign women married to Nepali men is largely because of cross-border matrimonial practices prevalent in various Nepali communities, particularly among Madhesis.

214 Section: Partition, No. 1 (a) Civil Code, 2020.

aging developments in the period under review to address these problems within the country's legal and political setup even though there is still much to be desired in terms of ensuring women's right to self-determination regarding their body and sexual health.

While Article 20(1) of the Interim Constitution 2007 stated that 'every woman shall have the right to reproductive health and other reproductive matters', it did not specifically mention the right to sexual health and decision over sexual activity. In 2008, the Supreme Court upheld a woman's right to abortion by dismissing a case that challenged the existing abortion law on the ground that it discriminated against men because it allowed a woman to terminate a pregnancy without the consent of her spouse.²¹⁵

Similarly, even though abortion was legalised in Nepal in 2002, in a landmark 2009 case, the Supreme Court had to order the government to adopt a comprehensive abortion law; establish a fund to cover abortion procedure costs; ensure stronger safeguards for women's privacy; promote access to safe services for all women; and disseminate information about safe abortion services to health service providers and the public.²¹⁶ The court maintained that such measures were necessary to implement Article 20(1) of the Interim Constitution.

The major political parties of Nepal had expressed commitment to ensuring that reproductive health would be defined as a fundamental right in the new constitution. Accordingly, Article 38(2) under the fundamental rights of women in the 2015 Constitution states: 'Every woman shall have the right relating to safe motherhood and reproductive health.' Further, under the state policies dealing with social justice and inclusion, the Constitution states that the 'necessary services and facilities' would be ensured during the reproductive stage [Article 51(j)].

The constitutional guarantee was followed by the Right to Safe Motherhood and Reproductive Health Act, 2018 which granted women a number of rights vis-à-vis their reproductive health, including the right to obtain services, counselling and information, information regarding contraceptives and their use, abortion services, and nutritious and balanced diet (Section 3). Sex-selective abortion was prohibited (Section 17). The Act also increased the number of conditions under which abortion is legal while requiring governments at all levels to set aside funds to provide for free abortion care in

215 Achyut Prasad Kharel v. Office of the Prime Minister and Council of Ministers et al (2008).

216 Lakshmi Devi Dhikta v. Government of Nepal, Office of the Prime Minister and the Council of Ministers et al (2009).

public health facilities. The Government of Nepal has since launched health programmes under the safe motherhood programme, whereby a cash payment is made to women on completion of four ante-natal care visits and institutional delivery along with free post-natal care.

Section 3 of the Privacy Act, 2018 gives every individual the right to maintain privacy about their gender identity, sexual orientation, abortion, and virginity. Section 6 further gives women the right to maintain privacy about their reproductive health and pregnancy and no information about the same is to be circulated without their consent.

While all of these progressive laws ensuring women's reproductive rights are likely to affect power relations between men and women, thereby contributing to reducing gender-based discrimination and inequality, there is no recognition yet of accepting maternity as a social function. Neither has there been any effort by the government to emphasise the equal roles and responsibilities between father and mother in terms of reproductive care and child-rearing. Thus, despite a number of significant policy changes made after the People's Movement II, fully substantive gender equality in the area of reproductive rights is yet to be achieved.

6.2.7 Rights against Violence

6.2.7.1 Domestic Violence

Patriarchy in its crudest form always manifests itself in the form of violence against women, and the case of Nepal is no different. Since fiscal 2014/15, the Nepal Police has recorded more than 10,000 cases of violence against women every year, with domestic violence accounting for 75 per cent or more of these cases.²¹⁷ Rape, attempted rape and polygamy are other major forms of violence meted out to women, and there is gross under-reporting of such cases, with the UN Special Rapporteur on violence against women, its causes and consequences identifying some of the reasons to be 'the normalisation of violence and the social stigma attached to reporting violence'.²¹⁸ In order to address these different forms of violence

217 The figures provided include crimes against both women and children. There appears to be a great deal of discrepancy in the numbers as well. For instance, there were 15,177 cases reported in 2017/18, which went up to 19,204 in 2018/19, before coming down to 15,692 in 2019/20 and rising to 18,843 again in 2020/21. These numbers are possible but also highly unlikely. '25 years' crime data against Women and Children', <https://cid.nepalpolice.gov.np/cid-wings/women-children-and-senior-citizen-service-directorate>.

218 United Nations Human Rights Council, Visit to Nepal: Report of the Special Rapporteur on violence against women, its causes and consequences A/HRC/41/42/Add.2, 2019,

against women, the government has introduced several laws and policies.

Following the Interim Constitution, which prohibited ‘physical, mental or any other form of violence’ against women (Article 20), after nearly 20 years of lobbying by women’s groups,²¹⁹ the Domestic Violence (Crime and Punishment) Act, 2009 [hereafter, Domestic Violence Act] was enacted. The Domestic Violence Act criminalised all forms of violence against women, including mental, physical and emotional violence by family members and close relatives. The 2009 Act became the first instrument in Nepal’s legal history where domestic violence as a concept has been brought under legal jurisdiction and made punishable by law.

While the Domestic Violence Act is a significant achievement for women, there are few contradictory and inconsistent provisions that are noteworthy. For example, an incident of domestic violence is treated as a personal criminal case against which the victim has to file her own case with one of various state institutions like the National Women’s Commission, local governments, the police, or directly the court. Since there is no specific institution to handle cases of domestic violence, the jurisdiction of such cases has proved to be difficult. While there is a provision for negotiation between the victim and perpetrator in the police office, this is problematic because the existing Police Act makes no clear distinction between prohibited conduct that can be resolved through a compromise and prohibited conduct that is liable to punishment. Several criticisms have also been raised regarding the leniency of punishment against the perpetrator. Section 13(1) of the Domestic Violence Act provides that a person who commits an act of domestic violence shall be punished with a fine of NPR 3,000 to NPR 25,000, or six months of imprisonment or both.²²⁰

The 2015 Constitution is similarly categorical under the Rights of Women (Article 38) in criminalising any kind of violence, including physical, mental, sexual or psychological, against women. Further, the proscription also extends to ‘oppression based on religious, social and cultural tradition, and other practices’.

6.2.7.2 Sexual Violence and Rape

The Chapter on Sexual Offences under the National Penal (Code) Act, 2017 defines rape as ‘non-consensual intercourse with an adult woman or any

<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23948&LangID=E>.

219 Deepak Thapa, Tracy Ghale and Renu Kshetry, ‘Negotiating Gender Equitable Change in Nepal’ (forthcoming), Social Science Baha.

220 Indu Tuladhar, ‘Review: Domestic Violence (Crime and Punishment Act, 2007)’, *Nari*, Shrawan, 2066, Year 7, Issue 10, Volume 82 (Kantipur Publications, Kathmandu).

intercourse with a girl under 18'.²²¹ Punishment ranges from seven years to life imprisonment, depending on the age of the victim [Section 219(2)].²²² In addition, there are provisions for extra punishment for rape if the offender commits the crime knowing he is infected with HIV or other sexually transmitted diseases as well as for gang rape or the rape of a woman who is infirm or disabled, suffering from mental or physical illnesses, or pregnant (six months or more). If the offending individual is the husband of the woman, he shall be liable to a sentence of imprisonment for up to five years. If the rape victim is a woman with whom sexual intercourse is prohibited under the provision on incest, the offender is liable to punishment under the provision of both incest and rape.

The Penal Code also includes a 'Right to Retaliation', a unique right that enables a victim of rape or attempted rape to resist and take action to defend herself by all means possible. The victim is not held to have committed a crime should the assailant be killed during the rape or immediately afterwards [Section 26 (2)(b)].²²³ The Code also allows for the abortion of a foetus up to 18 weeks with the consent of the pregnant woman if the pregnancy has resulted from rape or incest.²²⁴ The statute of limitation for reporting the crime of sexual offence has also been increased from 35 days to one year.²²⁵ The Code also provides for an appropriate compensation to the victim,²²⁶ and requires that hearing of rape cases be held in-camera. The Chapter on Sexual Offences also deals with the crime of child sexual abuse.

221 Thereby, limiting rape as committed only by men and against women and girls only.

222 On 2 December 2021, the government issued the Ordinance on Amendment of Some Acts against Sexual Violence, 2021. Among other notable changes, the Ordinance stipulates that offenders are also liable to a compensation of up to NPR 600,000 in addition to imprisonment for life if the woman/girl is below 10 or above 70 years of age or is completely disabled; compensation of up to NPR 600,000 in addition to the perpetrator being imprisoned for a term ranging from 18 years to 20 years if the minor girl is above 10 but below 14; compensation of up to NPR 400,000 and imprisonment for a term ranging from 12 years to 14 years if the minor girl is of 14 years of age or above but below 16; compensation of up to NPR 400,000 and imprisonment for a term ranging from 10 to 12 years if the woman is of 16 years of age or above but below 18; and compensation of up to NPR 200,000 and imprisonment for a term ranging from seven years to 10 years if the woman is of 18 years of age or above.

223 This provision was under the chapter on rape in the 1963 Country Code. In the new Penal Code, it is under the chapter on 'General Principles of Criminal Justice'.

224 Abortions in such cases are permissible until 28 weeks under the Safe Motherhood and Reproductive Health Right Act, 2018.

225 With the exception of incest and bestiality.

226 With the exception of incest and 'unnatural sex'.

6.2.7.3 *Chhaupadi*

The practice of following the *chhaupadi* system in which menstruating girls and women are banished from their homes to shelter in an isolated shed continues in western Nepal even though the Supreme Court issued a directive order to the government to formulate laws eliminating it back in 2005.²²⁷ The government enacted Guidelines for the Elimination of the Chhaupadi System in 2008, which included raising awareness against the practice of *chhaupadi*, providing information on nutrition and health care to girls and women directly affected by *chhaupadi*, and commending individuals, families and communities that put an end to it.

The 2015 Constitution declared practices such as *chhaupadi* punishable [Articles 24(5) and 38(3)]. The National Penal (Code) Act, 2017 also criminalised all forms of discrimination or inhumane treatment against women during menstruation [Section 168(3)].

6.2.7.4 *Witchcraft*

Accusing someone of witchcraft is one of the worst forms of violence. In Nepal, it is mostly women (generally, uneducated, poor, Dalit) who are subjected to such accusations, and often followed by violent and degrading treatment.²²⁸ Pronouncing judgement on a case brought against the practice, in 2004, the Supreme Court issued a directive order to the government to enact appropriate laws to criminalise the act of accusing someone of witchcraft.²²⁹ Following the order, the government included a provision in the Country Code, making the act of witchcraft accusation punishable with imprisonment, fine or both (Part 4, Chapter 19, Number 10B).²³⁰

However, the law was not effective enough to deter the inhumane activities directed towards women accused of witchcraft. The need for a comprehensive law that ensured strict punishment to the perpetrator and provided protection to the victims of witchcraft accusation made way to the Witchcraft Related Accusations (Crime and Punishment) Act, 2015. This Act criminalises accusing anyone of practising witchcraft and also provides for victim protection and compensation.

The National Penal (Code) Act, 2017 prohibits accusing someone of being

227 Dil Bahadur BK v. His Majesty Government, Office of the Prime Minister and Council of Ministers (2004).

228 UNFPA (2020).

229 Reshma Thapa et al v. His Majesty's Government (2004).

230 This provision was added by Some Nepal Acts Amendment Act, 2006.

a witch or expelling them from their place of residence on account of such accusations [Section 168 (1)].

6.2.7.5 *Sexual Harassment at Workplace*

The Gender Equality Act, 2006 amended the Country Code's 'Chapter on Intention to Sexual Intercourse' to detail all the actions that constitute sexual harassment and made it a criminal offence.²³¹ One criticism of this amendment was that it assumed only women would be subjected to such behaviour. Later, in 2015, Nepal introduced the Sexual Harassment at Workplace (Protection) Act, ensuring the right of an individual to a safe and healthy workplace environment. This Act is gender-neutral and protects all employees and service-seekers regardless of gender. It defines what constitutes sexual harassment, including touching or trying to touch any part of the body with sexual intentions; using or showing pornographic materials; expressing sexual intention in writing; proposing sexual activities; and flirting inappropriately. Similarly, a workplace is defined as any formal institution, government or otherwise. However, unlike laws in other jurisdictions,²³² the Act has failed to protect workers engaged in informal employment such as domestic work, construction, etc.

The Act requires the employer to institute measures to prevent sexual harassment such as including provisions in the rules of employment and also by informing employees about the process to be followed to file a complaint about sexual harassment. Employers not complying with the Act can also be penalised while there is a penalty for false accusations as well.

The 2017 Penal Code has a separate provision entitled 'Prohibition of Sexual Harassment' (Section 224), which again is gender neutral.

231 Civil Code, 1963, Chapter on Intention to Sexual Intercourse, No.1 was amended to read: 'Whoever, without consent of a woman, touches or tries to touch her sensitive organ, removes or tries to remove her undergarment, takes her to any solitary place in an unnatural manner, causes her to touch or catch his/her sexual organ or uses any sexually motivated word or symbol to her or shows to her such photographs or drawing, teases or harasses her with sexual motive or behaves with her in the like manner in an unnatural way or catches her with the motive to have sexual intercourse, it amounts to be sexual harassment and the person committing such an offence shall be liable to a punishment of imprisonment up to one year and a fine of up to ten thousand rupees. The person victimised of such an act shall also cause to be paid reasonable amount of compensation from the offender' (Section 11 of An Act to Amend Some Nepal Acts for Maintaining Gender Equality, 2006).

232 For instance, The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 of India, which has a broad definition of what constitutes a workplace, and thus includes 'any place visited by the employee arising out of or during the course of employment including transportation by the employer for undertaking such journey' and 'a dwelling place or a house', among others.

6.2.8 Gender and Employment

In addition to the different types of rights, the issue of gender and labour has been one of the important concerns affecting Nepal. While women in Nepal were for long barred from going to Gulf countries to work as labourers, the Foreign Employment Act of 2007 prohibited any form of gender discrimination in foreign employment.²³³ The Act also mentions that the government could provide special facilities to women, Dalits, Janajatis and others in respect of foreign employment even though the Act did not specify what these special facilities were meant to be.

Later laws dealing with labour reiterated non-discrimination. The Labour Act, 2017 states that employers shall not discriminate against workers on any grounds, including gender [Section 6(1)].²³⁴ It also prohibits discrimination in wages for equal value of work on the basis of gender [Section 7(1)] while also ensuring a number of facilities to women workers such as provision of transportation for work hours beginning before sunrise and ending after sunset. Section 102(k) on the formation of the Central Labour Advisory Council states that of the five representatives of employers in the Council at least two should be women. Similarly, Section 102(l) states that of the five representatives of the trade union federation at least two should be women. The Right to Employment Act, 2018 also mentions non-discrimination while providing employment (Section 6) and giving priority to women (and other disadvantaged groups) (Section 8).

6.2.9 Gender and Sexual Minorities: Achievements and Challenges

The 2006 People's Movement II had seen the active involvement of gender and sexual minorities as well. The spirit of the movement resonated with their own situation, and they believed that their rights would be protected in a socially inclusive Nepal. Since then, Nepal has taken long strides towards ensuring that the right to equality of people belonging to the LGBTIQ+ community is maintained, and they are not discriminated against on account of their gender. This includes a number of decisions by

233 The government has banned Nepali women from working in the Gulf states periodically starting from 1998. Following that first move, various bans have been placed on women's right to work in foreign countries in 2012, 2014, 2015, and 2017. For more details, see Uddhab Pyakurel, 'Restrictive Labour Migration Policy on Nepalese Women and Consequences', *Sociology and Anthropology* 6(8): 650-656, 2018, <http://www.hrpub.org> DOI: 10.13189/sa.2018.060803.

234 Actions that would not be considered discriminatory are: giving priority to someone based on the inherent requirement of the work or giving pregnant workers and workers with physical disabilities responsibilities suited to their physical condition.

Nepal's Supreme Court which have been instrumental in guaranteeing the LGBTIQ+ community's rights without discrimination.

Ruling on a case, the Supreme Court issued a directive order to the Government of Nepal to ensure that people with different gender identity and sexual orientation are able to enjoy their rights without discrimination as others and to officially recognise the third gender category in Nepal.²³⁵ It also stated that it is one adult's natural/instinctive right to get married to another consenting adult and hence ordered the Government of Nepal to form a committee to study various international human rights documents along with international practices on same-sex marriage. The committee was to provide appropriate suggestions to the government for enacting such a law.

The government has taken gradual initiatives following the Supreme Court's order to officially recognise the third gender category. In the 2011 national census, the Government allowed citizens to list their gender as 'Other' in the basic data form. Similarly, legal documents such as passports and citizenships have been issued to transgender people with identification of their gender categorised as 'Other'.

In another verdict, the Supreme Court underscored the inadequacy of national laws in protecting the rights of the LGBTIQ+ community, stating that it is entirely an individual's decision to live separately or in partnership with homosexuals or heterosexuals after or without marrying them.²³⁶ In yet another case, the Supreme Court ruled that a foreign national who submits a valid marriage certificate establishing marriage with a Nepali citizen is eligible to obtain a non-tourist visa as a dependent and the Immigration Rules do not specify that a foreign national applying for such a visa must either be of the same or opposite gender to be eligible.²³⁷ This verdict thus also granted recognition to same-sex marriage in Nepal.

The 2015 Constitution specifically mentions sexual minorities among the groups with the right to equality, including as recipients of special provisions (Article 18), and right to social justice, including the right to proportionate representation in state bodies (Article 42). The Constitution also grants the right to those entitled to citizenship by descent to any gender identity they please (Article 12).

The committee mentioned above established following the Supreme Court order to look at the legality of same-sex marriage recommended the

235 Sunil Babu Pant et al v. Nepal Government (2007).

236 Rajani Shahi v. National Women's Commission (2012).

237 Suman Panta v. Ministry of Home Affairs et al (2017).

formulation of laws towards legitimising such marriage. It also suggested that the-then upcoming bills on civil and criminal codes recognise marriage as a relationship between two individuals.²³⁸ However, both the Civil and Penal Codes of 2017 define marriage as between a man and a woman, and the Government is yet to enact any laws legalising same-sex marriage.

6.3 Dalits

6.3.1 Legacy of Caste-based Discrimination in the Legal System

The Muluki Ain (Country Code) of 1854 had institutionalised the widely prevalent caste-based discrimination in Nepal, particularly against Dalits. Multiple amendments to the Code continued to uphold the hierarchical structure of society and deny Dalits the right to equality and dignity. It was not until a new Muluki Ain was introduced in 1963 that practices of untouchability were outlawed. However, in the absence of effective means of implementation, the stipulation abolishing untouchability remained only a formal declaration and failed to significantly change the status of Dalits in the country.

The 1990 Constitution included provisions to end caste-based discrimination in the public sphere and in the use of public property.²³⁹ Caste-based discrimination and untouchability were also made punishable by law. More specifically, the Country Code was amended to make it compatible with the constitutional provision. Accordingly, Section 10(A) of the 'Miscellaneous' chapter of the Country Code provided for a penalty of a one-year imprisonment, a monetary fine, or both in the event 'anyone practices untouchability towards another, or if anyone prohibits another's presence in public places, or if anyone prevents another's use of public property'. In a 1994 verdict, the Supreme Court declared unconstitutional the 'Explanation' to Section 10(A) since it purported to legitimise discriminatory practices adhered to in Hindu temples and other religious places, such as the barring of Dalits from entering them.²⁴⁰

238 Sujan Panta, 'Nepalma Baibahik Samanta' (Equality of Marriage in Nepal), *Baahrakhari*, 4 September 2016, <https://baahrakhari.com/news-details/4831>.

239 Article 11 (1), (2), (3) and (4), The Constitution of the Kingdom of Nepal, 1990.

240 *Man Bahadur Biswakarma v. Ministry of Law Justice and Parliamentary Affairs* (1993). See Dhungel et al (1998). Section 10(A) of the Country Code was amended by the Some Nepal Acts Amendment Act, 2006. Accordingly, the punishment for being convicted of the crime of caste-based discrimination was changed from the earlier one-year imprisonment, NPR 3,000 fine, or both, to imprisonment of three months to three years, fine of NPR 1,000 to 25,000 rupees, or both. That provision was repealed by the Caste-Based Discrimination and Untouchability (Offence and Punishment) Act, 2011.

Likewise, the use of pejorative terms, *chhota* and *bada* (meaning, literally, people of low and high rank but usually also used to mean 'low' caste and 'high' caste), in the preamble of the Country Code was also challenged by a Dalit lawyer. However, in 2010, the Court rather than declaring the expression ultra vires to the Constitution, directed the State to constitute a special committee comprising a historian, a sociologist, a culture expert, a legal expert and an expert on caste-based system in Nepal to look into the claim and suggest the context in which the expression has been used.²⁴¹ The rationale was that such an analysis would provide the basis on which the Court could decide the case.²⁴² There appears to have been no follow up on this directive, and those offensive terms remained in place until the Country Code lapsed with the adoption of the 2017 Penal and Civil Codes.

Building on the 1990 Constitution, the Local Self-Governance Act, 1999 had a provision for including Dalit members in the village, municipal and district councils. Similarly, in 2002, the government established the National Dalit Commission. However, significant efforts to ensure the rights of Dalits were made only after the People's Movement II as will be discussed below. In fact, the CPA, the Interim Constitution and the government's Three-Year Interim Plan (2007/08–2009/10), along with several political negotiations, paved the path for more effectively addressing the issues of untouchability and discrimination against Dalits and the promotion of a just and an inclusive society.

6.3.2 Provisions against Caste-Based Discrimination

The Interim Constitution brought about several changes to address caste-based discrimination against the Dalits of Nepal. Apart from the right to equality that prohibited discrimination on any grounds, Article 14 stated, 'No person shall be discriminated against as untouchable and subjected to racial discrimination in any form, on grounds of caste, race, community or occupation. Such discriminatory treatment shall be punishable, and the victim shall be entitled to such compensation as determined by law.' Although considered one of the key provisions to address caste-based discrimination, there is little doubt that monetary measures alone cannot be deemed to

241 Ananta Raj Luitel, 'SC Fiat to Address Dalits' Concern', *The Himalayan Times*, 10 June 2010, <https://alldalit.blogspot.com/2013/09/sc-fiat-to-address-dalits-concern.html?zx=-f6aa31490b058be2>.

242 According to the news report, the Supreme Court said: 'Historic importance of the promulgation of the code may be lost by removing these words. A substantial study should be done to find in what context these words were used. Only after that the court will decide whether to remove these words or not from the code.'

provide justice to victims of discrimination unless accompanied by other provisions for reparations. The same article also stated that no one would be deprived of their right to use public services, conveniences or utilities, or to purchase any goods or services on the ground of caste or ethnicity. Similarly, no one would be allowed to justify social discrimination on the basis of caste and ethnicity, or to disseminate ideas of caste or ethnic superiority or hatred in any form.

Likewise, Article 29 of the Interim Constitution guaranteed the right against exploitation. Accordingly, every person has the right against exploitation, and no one would be exploited in the name of any custom, tradition or any other manner whatsoever. Moreover, no one would be trafficked, held in slavery or servitude, or required to perform forced labour.

There were clear shortcomings in the Interim Constitution vis-à-vis the issue of untouchability as well such as its limiting the coverage of application. Its provisions dealt only with caste-based discrimination in the public sphere and not in the private arena where practices of untouchability remain widely prevalent. There was also the danger that Article 14 would remain only on paper unless the right to religion were to be made wholly compatible with it. More specifically, although the Interim Constitution had declared Nepal a secular state and guaranteed religious freedom for all, it did not sufficiently address the discrimination inherent in the Hindu caste system. The provision that every citizen's 'right to profess, practise, preserve his or her own religion as handed down to him or her from ancient times paying due regard to social and cultural traditions', could be construed to perpetuate caste-based discrimination since there are many people who regard the practice to have been inherited or handed down from ancient times.

Thus, while these provisions in the Interim Constitution were positive steps, they did not provide sufficient grounds to fight against untouchability. The fundamental protection of law with a redressal and penal mechanism came into force only in 2011 with the enactment of the Caste-Based Discrimination and Untouchability (Offence and Punishment) Act. This Act was a monumental step taken by the Government of Nepal in eliminating caste-based discrimination and untouchability since it ensures the right of any person against discrimination and the practice of untouchability and penalises any act of caste-based discrimination as well as aiding, abetting and incitement to caste-based discrimination.

Besides listing a catalogue of acts deemed to be considered acts of caste-

based discrimination and untouchability,²⁴³ the Act provides clear procedures for the prosecution against such acts of discrimination and untouchability. As per the Act, a complaint can be filed at the nearby police office and in case it fails to register the complaint or take necessary action on the complaint as per prevailing law, such a failure can be reported to the National Dalit Commission or a local body. The Act initially provided for imprisonment of up to three years, a fine of up to NPR 25,000, or both as penalty against the perpetrator. In case the perpetrator is a person holding a public post, the stipulated punishment increases by an additional 50 per cent, while anyone abetting in the crime is liable to half the punishment handed to the perpetrator. The statute of limitation for any act of crime as per this Act is three months from the commission of the offence, a period that could prove to be too short for such a grave offence. (The 2018 amendment to the Act retained the same jail time but raised the cash penalty to up to NPR 200,000, which would be levied *in addition to* imprisonment. It also provided for the doubling of the penalty for repeat offenders of the same crime.²⁴⁴)

A somewhat different initiative was the one introduced in 2009 whereby the government would provide an incentive of NPR 100,000 for marriage between a Dalit and a non-Dalit.²⁴⁵ It was viewed as an initiative that could promote greater acceptance of such unions and contribute to reducing caste-based atrocities in society. It is not known whether that programme continues or not.

The 2015 Constitution reiterated all the rights enshrined in the Interim Constitution against caste-based discrimination and added some more. Thus, while the right to equality and the right against untouchability and discrimination provided protection against caste-based discrimination, the latter went further and even prohibited ‘any behavioural attitude that justifies social discrimination based on caste, ethnicity, or untouchability, or encouragement for the propagation of attitudes based on caste superiority and untouchability, or hatred’ as well as discrimination in the workplace. A sep-

243 Caste Based Discrimination and Untouchability (Offence and Punishment) Act, 2011, https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/legaldocument/wcms_190732.pdf.

244 Ibid.

245 Human Rights Situation of Dalit Community in Nepal Submission to the United Nations Universal Periodic Review of Federal Democratic Republic of Nepal for Second Cycle Twenty Third Session of the UPR Human Rights Council 2-13 November 2015, submitted by: Dalit Civil Society Organizations’ Coalition for UPR, Nepal and International Dalit Solidarity Network (IDSN), <https://idsn.org/wp-content/uploads/2015/11/Nepal-UPR-2015-Dalit-Coalition-and-IDSN-report.pdf>.

arate article (Article 40) dealt specifically with the right of Dalits, granting them the right to 'participate in all agencies of the state based on the principle of proportional inclusion' as well as the provision of free education all the way to higher education and land to landless Dalits, among others.

The Constitution, however, by defining secularism as the 'protection of religion and culture being practised since ancient times and religious and cultural freedom' appears to contradict all the safeguards put in place to protect Dalits since it is the same 'religion and culture being practised' traditionally, i.e., Hinduism, that had provided the excuse for discrimination against them in the past.

Following the Constitution, the National Penal (Code) Act, 2017 prohibits untouchability or discriminatory treatment on the grounds of caste. As provided in the Code, no person is allowed to subject anyone to untouchability or any other kind of discrimination, or prevent anyone from appearing in any public place or entering into any religious place of public nature, or deprive anyone of using communal water resources or any other objects of private or public utility or convenience, on the grounds of custom, tradition, religion, culture, rites or rituals, caste, race, community, profession, occupation, physical condition or origin of social community (Section 166).

6.3.3 Representation in Elected Bodies

The Interim Constitution served as a milestone for addressing issues of social justice vis-à-vis Dalits and promoting their inclusion in state mechanisms. Article 21 of the Interim Constitution provided for the right to social justice, especially to hitherto-marginalised groups, and their right to participate in the structures of the state on the basis of the principle of proportionate inclusion. Based on this provision, the Election to the Members of the Constituent Assembly Act, 2007 ensured proportional representation of Dalits in the election system. As a result, the number of Dalits in the CA-1 saw a dramatic increase from their near-total absence in the three previous legislatures (Table 6-4).

The presence of Dalit representatives shrank by nearly a quarter in the CA-2 though. But, despite the proportion of PR seats having been reduced in the general elections held under the 2015 Constitution, Dalit representation did not go down compared to the two CAs. In fact, the 2018 National Assembly saw Dalits represented in proportion to their population, in a first-ever such instance.

At the local level, however, Dalit representation has far exceeded their population share. As mentioned earlier, the Local Self-Governance Act of

Table 6-4: Dalit Representation in National Legislatures, 1991 to 2017 (per cent)

Group	House of Representatives (pre-2006)				Constituent Assembly		Federal Parliament		Share of National Population (2011)
	1991	1994	1999	2008	2013		House of Representatives (2017)	National Assembly (2018)	
Hill Dalits	0.5	-	-	5.8	4.5		6.5	8.9	8.6
Madhesi Dalits	-	-	-	2.7	2.0		0.4	3.6	4.7
Total	0.5	0	0	8.5	6.5		6.9	12.5	13.3

Source: Volla (2015 and 2020); Election Commission (2017); and Pokharel and Pradhan (2020).

1999 had first made the provision of including Dalit members in the village, municipal and district councils. But the scale at which Dalit representation soared in the 2017 elections was unprecedented. Dalits comprised 22 per cent (i.e., 7,737) of the 35,041 officials elected in the 753 local governments.²⁴⁶ Of them, a full 85 per cent were Dalit women (6,567), nearly all of whom were elected to the seat reserved for Dalit women in each of the 6,554 local government wards in Nepal. Dalit representation at the leadership level is quite low though—only 194 ward chairs, 10 heads and 25 deputy heads of the 753 local governments were Dalits.

6.3.4 Representation in Statutory Bodies

The establishment of the National Dalit Commission (NDC) in 2002 was an important step for improving the status of Dalits in Nepal. However, despite the international human rights obligations to enact a law to regulate the Commission, the government did not do so and the NDC functioned as a body under a government ministry. As such, the government did not allocate adequate funds nor provide the staff required for the day-to-day functioning and operation of the Commission. It was only in the 2015 Constitution that the NDC was made a constitutional body and granted the mandate to receive complaints and investigate them (see Section 5.4).

Dalits' inclusion in other constitutional bodies has, however, been non-existent for the most part, and even regressed. The National Women's Commission Act, 2006, had a provision for including a Dalit woman (along with one Janajati woman and one Madhesi woman) among the four members of the Commission. But that provision was not continued in the 2015 Constitution that established the National Women's Commission as a constitutional body.

The National Human Rights Commission (NHRC), a national institution established in the spirit of the Paris Principle²⁴⁷ and which now has a constitutional status, does not have any provisions for mandatory representation of Dalits either.²⁴⁸ The NHRC is particularly important because it was estab-

246 Bhola Paswan, 'How Quotas Provided a Footing but Left Inequality Unresolved: Dalits in the Local Election', 29 October 2017, <https://www.recordnepal.com/wire/features/how-quotas-provided-a-footing-but-left-inequality-unresolved-dalits-in-the-local-election>.

247 Adhikari (2004). See also Principles relating to the Status of National Institutions (The Paris Principles) (adopted by UN General Assembly resolution 48/134 of 20 December 1993).

248 Notably, Human Rights Commission Act of 1997 did not specify representation of either women or Dalits, <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/45830/66334/F610299850/NPL45830.pdf>.

lished to promote and protect human rights, and as such, Dalits whose basic human rights have been violated for long, should have had representation in such a commission as a matter of right.

Given that Article 283 of the Constitution mandates that appointments to all constitutional bodies be made following the principle of inclusion, it is perhaps not necessary to specify the same for each. However, the record of the government with regard to Dalit representation has been in violation of Article 283. Hence, there has been no Dalit presence in any of the following important agencies: the Commission for the Investigation of Abuse of Authority, the Election Commission, the Public Service Commission, the National Human Rights Commission, or the National Natural Resources and Fiscal Commission.

6.3.5 Measures to Improve Dalits' Access to Opportunities

In addition to the measures taken to enhance Dalits' representation, the government has also taken several steps and introduced policies, admittedly perfunctory in some regards, to improve the situation of Dalits in Nepal. In May 2006, the Supreme Court struck down the provision of scholarship quotas allotted to women (20 per cent), Dalits (10 per cent) and marginalised ethnic groups (10 per cent) under the Scholarship Regulation 2003, ruling that these measures were unconstitutional as they were inconsistent with the principle of equality under the 1990 Constitution.²⁴⁹ However, following the adoption of the Interim Constitution and its stipulation that the government cannot be prevented from making special provisions for the empowerment and advancement of marginalised groups, government scholarships were set aside for all these groups, including Dalits.

The government also initiated the Education for All (EFA) 2004-2009, a five-year strategic plan within the EFA 2015 National Plan of Action framework with the objectives of ensuring access and equity in primary education, enhancing quality and relevance of primary education, and improving efficiency and institutional capacity. Children from marginalised communities, including specifically Dalits, were to be provided with incentives and

²⁴⁹ *Rupak Dhakal v. Office of the Prime Minister and Council of Ministers et al* (2006). The Supreme Court reasoned that the proviso on Article 11(3) of the 1990 Constitution did not imagine caste as a basis for providing reservations. It further provides that the proviso on the Article 11(3), that makes room for affirmative action, do not include the terms 'Dalit' and 'caste' and hence the provision of reservation based on caste is in contravention to the constitution. Under Article 11(3), the 1990 Constitution stated that special provisions may be made by law for women, children, the aged, the physically or mentally incapacitated, those of a class economically, socially or educationally backward.

scholarships to attend primary school. However, because of the very low amounts disbursed, the various scholarship schemes have not proved to be effective.²⁵⁰

6.4 Janajatis

The 1854 Country Code had classified the entire population of Nepal according to the Hindu caste system.²⁵¹ Accordingly, a clear hierarchy was established from the *tagadhari* (wearers of the sacred thread) at the top to the *matwali* (drinkers of alcohol) in the middle and the *pani nachalne* (from whom high castes could not accept water) at the bottom. The classification was applied on everyone whether they were Hindus or not. Nepal's indigenous people, the Adibasi Janajati, were classified as *matwali*, a group further divided into those that could be enslaved and those unenslavable. This type of hierarchical structure built into the national polity jeopardised the social, political, cultural and economic rights of the majority of the population, i.e., Janajatis, Dalits, and Madhesis.²⁵²

The 1990 Constitution acknowledged the pluralistic character of Nepali society for the first time even though it still favoured the status of the king and all that the monarchy signified, including the Nepali language, the Hindu religion, and norms associated with hill 'upper-caste' groups (now, the Khas Arya). The centralised and unitary state structure continued to threaten the identity and rights of various sections of society, including Janajatis.

The period after the 1990 restoration of democracy nevertheless witnessed a resurgence of Janajati activism that increasingly gained momentum in the years that followed. As a result, the State was gradually forced to recognise social inclusion as an indispensable feature of democracy. The Nepali state first recognised the concept of Janajatis (nationalities) with the establishment of the National Committee for the Development of Nationalities in 1997.²⁵³ This was followed by the explicit mention of Janajatis in the Ninth Five-Year Plan (1997-2002) and a whole chapter devoted to them in the Tenth Five-Year Plan (2002-07).²⁵⁴ However, it was the passage of the

250 The most widely disbursed scholarship, for girls and Dalits, range from NPR 450 to 600 per annum (Department of Education, 'A Study on the Effectiveness of the Scholarship Provided at School Level and Identification of Measures for Its Improvement', 2018, <http://www.doe.gov.np/assets/uploads/files/0abf8e73c50b2cca90dc2b43e2eeb848.pdf>).

251 Höfer (2004).

252 Bhattachan (2009).

253 Onta (2006).

254 National Planning Commission, Ninth Plan (1997-2002) (1997), https://www.npc.gov.np/images/category/ninth_eng_2.pdf; and National Planning Commission, Tenth Plan (2002-2007) (2002) https://www.npc.gov.np/images/category/10th_eng.pdf.

National Foundation for the Development of Indigenous Nationalities Act, 2002, and the subsequent founding of the National Foundation for the Development of Indigenous Nationalities (NFDIN) later in the year that provided the basis for recognising the rights of Janajatis as the indigenous people of Nepal. The NFDIN Act defined Janajatis as those groups who 'have their own mother languages and traditional costumes, separate cultural identity, separate social structure and written or unwritten history'.

Despite the definition provided, identifying who the Janajatis has proved to be a challenge in light of the many groups who identify themselves as such. The NFDIN Act recognised 59 groups of Janajatis even though the 2001 census listed only 45 Janajati groups among the 103 caste/ethnic groups identified in Nepal.²⁵⁵ In part to resolve this conundrum and also to meet the rising demands from various other groups for recognition as Janajatis, the government formed a high-level taskforce in June 2009 to amend the list of indigenous groups of Nepal.²⁵⁶ Based on fieldwork and consultations, the task force identified 81 groups that could be recognised as Janajatis while also recommending that three of the 59 in the original list be removed. But owing to the controversies surrounding the issue of 'indigeneity' and even Khas groups applying to be designated as Janajati, the government has yet to make the list public. The 2011 census recognised 64 Janajati groups. (Following a series of protests in the early part of 2012, in which the Chhetri Samaj Nepal and other groups demanded *adibasi* [indigenous] status, in May 2012, a few days before the CA-1 was dissolved, the Government of Nepal announced it would categorise the Bahun, Chhetri, Thakuri, Dasnami, Sanyasi and Dalit communities as 'Khas Arya Adibasi'.²⁵⁷)

Owing to the circumstances around the time of the adoption of the 2015 Constitution, which Tharus from the far-southwestern corner of Nepal had opposed the manner in which the provincial boundaries had been drawn, Tharus were suddenly granted a status independent of the larger Janajati grouping, of which they had been part since the early 1990s and the rise of the Janajati movement. Apart from recognition as a separate group deserving of special provision for their upliftment (Article 18), Tharus were also counted as a distinct reserved category for the purpose of parliamentary

255 Acharya et al (2008).

256 Adibasi Janajati Suchi Parimarjansambandhi Uchchastariya Karyadalle Nepal Sarkar-lai Bujhaeko Pratibedan (Report Submitted to the Government of Nepal by the High-Level Taskforce on Revising the List of Adibasi Janajati) (unpublished), 17 February 2010.

257 United Nations Resident and Humanitarian Coordinator's Office, 'Perspectives on Chhetri Identity and How These Relate to Federalism', September 2012, <https://bit.ly/3qIK-At0>.

and provincial elections. Further, a Tharu Commission was also provided for in the Constitution despite Tharus by law being under the purview of the Adibasi Janajati Commission.²⁵⁸ However, Tharus have not disavowed their being Janajati and neither have organisations like the National Foundation for Development of Indigenous Nationalities or the Nepal Federation of Indigenous Nationalities taken any steps in that direction even though in practical terms of standing for elections Tharus would not be able to claim Janajati status, particularly since they have been allocated quotas distinct from Janajatis.

6.4.1 Representation in Elected Bodies

A key achievement of Nepal's Janajati movement has been the rising influence of Janajatis in national politics. Although the 35 per cent representation of Janajatis in the CA-1 was the high point achieved in the post-2006 period, with representation guaranteed through the PR system in both the federal and provincial levels, the proportion of Janajatis at the highest levels of elected government is evident (Table 6-5).

At the local level, Janajatis constitute 29 per cent of the elected officials, lower than their share of the national population but pretty satisfactory considering that nearly a sixth of all elected positions were reserved for Dalit women.²⁵⁹ Janajatis also won 25 per cent of the mayoral posts and 36 per cent of the chairpersons'.

6.4.2 Other Provisions

6.4.2.1 ILO Convention 169

Following the end of the Maoist conflict and the State adopting more inclusive policies, Nepal ratified the ILO Convention 169 in September 2007 (while also committing itself to UNDRIP adopted by the General Assembly the same month). The ratification of the ILO Convention 169 has been argued to be the most strategic and visible outcome of Janajati activism.²⁶⁰

Amongst the different provisions contained in the ILO Convention 169,

258 For instance, the National Foundation for Development of Indigenous Nationalities Act, 2002 includes Tharus among the Adibasi Janajati, <http://extwprlegs1.fao.org/docs/pdf/nep202214.pdf>.

259 Bhola Paswan, 'Adibasi Janajatis' local election representation close to share of population, but with variations within,' Record, 4 December 2017, <https://www.recordnepal.com/wire/news-analysis/adibasi-janajatis-local-election-representation-close-to-share-of-population-but-with-variations-within>.

260 Errico (2020).

Table 6-5: Janajati Representation in National Legislatures, 1991 to 2017 (per cent)

Group	House of Representatives (pre-2006)				Constituent Assembly		Federal Parliament (2017)		Share of National Population (2011)
	1991	1994	1999	2008	2013		House of Representatives	National Assembly	
Hill and Mountain Janajatis	25.4	18.0	21.5	26.6	23.4				27.2
Tarai Janajatis	0.5	-	0.5	2.3	2.3		30.9	17.9	2.1
Tharu	8.3	6.8	3.9	6.0	7.0				6.6
Total	34.2	24.8	25.9	34.9	32.7		30.9	17.9	35.9

Source: Vollen (2015 and 2020); Election Commission (2017); and Pokharel and Pradhan (2020).

the indigenous peoples' right to participation is particularly salient especially in the context of Nepal. More specifically, the Convention establishes that indigenous people have the right to participate in 'all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them' [Article 6(1) (b)]; 'formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly' [Article 7(1)]; 'use, management and conservation of these [natural resources pertaining to their lands]' [Article 15(1)]; and also to 'participate in the benefits of such activities, and [the right to] receive fair compensation for any damages which they may sustain as a result of such activities' [Article 15(2)].

Other important provisions in the ILO Convention 169 are:

- Rights of ownership and possession of the lands they traditionally occupy, or have had access to (Article 14)
- The right to natural resources including the right to participate in the use, management and conservation of such resources (Article 15)
- Right against displacement (Article 16)
- Right against land alienation (Article 17)
- Right against unauthorised intrusions (Article 18)
- Right for equivalent agrarian programmes (Article 19)
- Special measures for recruitment and conditions of employment (Article 20)
- Vocational training, handicraft and rural industries (Article 21)
- Social security and health (Articles 34 and 25)
- Education (Articles 26-31)

Implementation has, however, been a major challenge. A National Action Plan for the Implementation of ILO Convention 1969 was prepared by a government-appointed committee and submitted to the cabinet in 2009 but it has not yet received sanction.²⁶¹ Although some of the provisions mentioned in the Action Plan such as the adoption of reserved quotas for Janajatis in government service and education as well as promotion of Janajati languages have been met, one major objective—amending existing laws or drafting new ones—in keeping with the provisions of the Convention remains unfulfilled because it has not been approved by the government.

261 Gurung (2009).

Unlike some international instruments, ILO Convention 169 is legally binding and hence has deeper implications for how the government deals with issues related to Janajatis. After ratifying the convention, the Government of Nepal had formed a secretary-level committee under the coordination of the Secretary of the Ministry of Local Development to reform existing laws in conformity with the ILO Convention 169. But the committee, with representation from 24 ministries, could not perform its task on time. As a result, only some of the provisions contained in the Convention have been reflected in the 2015 Constitution and other laws, programmes and policies of the State.

Under its policies regarding social justice and inclusion, the Constitution has committed to special arrangements to ensure the rights of Janajatis 'to lead a dignified life with their respective identities and making them participate in decision making processes that concern them' as well as supporting their traditional knowledge, skills, culture and social practices [Article 51(j) (8)]. These are commitments that tie in well with meeting its obligations under ILO Convention 169, but progress has been lacking. The Nepali Government's Fourth National Plan of Action on Human Rights (2014/2015–2018/2019) tasked the Ministry of Federal Affairs and Local Development with implementing the ILO Convention 169 National Action Plan within a period of three years.²⁶² But there has been no progress so far.²⁶³

6.4.2.2 Recognition of Janajati Festivals

The governments in the years under the 1990 constitution had declared Hindu festivals as national holidays and other festivals as holidays only for the concerned ethnic or religious group.²⁶⁴ However, after much lobbying from various groups including the Janajatis, the Nepali state declared other ethnic and religious festivals as national holidays as well. While the number of holidays for Hindu festivals still outnumbers the total number for all other religions/ethnicities, the move towards giving national holidays to other groups is regarded as an encouraging step by the broader Janajati community.

Over time, however, given the criticism over the large number of holidays, the government pulled back and reverted to the earlier system of providing holidays to only those groups who celebrate the said festival—at

²⁶² The Ministry was also given the concurrent responsibility of developing and implementing programmes along the provisions of UNDRIP, <https://www.opmcm.gov.np/en/download/4th-plan-human-rights-201415-201819/#>.

²⁶³ NHRC (2019).

²⁶⁴ Nepal Rajpatra (Nepal Gazette), 21 March 2005, Vol 54, No 48.

least in principle.²⁶⁵ In practice though, the government has been declaring various non-Hindu festivals to be national holidays as well.²⁶⁶

6.5 Madhesis

The Maoist insurgency, and in particular, the Madhes movements of 2007 and 2008 helped bring the issues faced by Nepal's Madhesi people to the forefront of national politics and constitutional debate.²⁶⁷ It led to the recognition of 'Madhes' as a distinct socio-political and cultural variable in the Constitution.

Broadly speaking, Madhesis had two principal grievances against the state: lack of identity and deprivation of citizenship. On the first issue, they shared a common platform with Janajatis and other marginalised groups. As such, Madhesis called for proportionate representation of Madhesis in the government, including in the civil service, military, judiciary, bureaucracy, and electoral political bodies. The Interim Constitution as well as the 2015 Constitution recognised Madhesis as a group requiring affirmative action for 'the protection, empowerment or advancement' (Articles 13 and 18, respectively). As such, both Constitutions placed them together with other marginalised groups to ensure their participation in all organs of the state on the basis of proportionate inclusion. These provisions opened and broadened the space for Madhesi people's participation in state mechanisms, including elected bodies and public service.

The Madhes Movement of 2007 also brought forth the debate on federalism like never before and challenged the exclusionary concept of Nepali national identity earlier defined by 'high-caste' hill Hindus. In fact, it was Madhesi politicians who had first mooted the idea of federalism—in the ear-

265 See the list of holidays identified by the Nepal Rastra Bank, <https://www.nrb.org.np/contents/uploads/2021/03/2078-English-Holiday.pdf>.

266 Hence, for example, the Lhosar new year's days and Maghi were declared to be national holidays in the year 2021-22 even though they did not feature in the official list of government holidays. For the record, Christmas and Eid was also granted the status of national holidays. NL Today, 'Public Holiday Announced on Tamu Lhosar', *Nepal Live Today*, December 29, 2021, <https://www.nepallivetoday.com/2021/12/29/public-holiday-announced-on-tamu-lhosar>; Online Khabar, 'Gyalpo Lhosar: Public holiday across Nepal on Thursday', *Online Khabar*, March 2, 2022, <https://english.onlinekhabar.com/gyalpo-lhosar-public-holiday.html>; Republica, 'Govt decides to grant public holiday on Makar Sankranti', *Republica*, January 10, 2021, <https://bit.ly/36IU1Su>; TRN Online, 'Govt. Declares Public Holiday On Christmas Day', *The Rising Nepal*, December 24, 2021, <https://bit.ly/3xyyK34>; THT Online, 'Cabinet announces public holiday on Wednesday for Bakra Eid', *The Himalayan Times*, July 19, 2021, <https://thehimalayantimes.com/nepal/cabinet-announces-public-holiday-on-wednesday-for-bakra-eid>.

267 Sijapati (2013).

ly 1950s and early 1990s.²⁶⁸ The force of the Madhes Movement, along with the demands of Janajatis and the discourse on state restructuring, led to the fourth amendment of the Interim Constitution that recognised Nepal as a ‘Federal Democratic Republican State’.

On the issue of citizenship, Madhesis have had distinct claims against the State. Long treated as ‘non-Nepalis’ (more precisely, as ‘Indian immigrants’ or just ‘Indians’), Madhesis have long insisted on fair citizenship rules.²⁶⁹ In the view of Madhesis, with the strict criteria for citizenship based on descent in the 1964 Citizenship Act and the 1990 Constitution, the government had effectively denied citizenship rights to a vast majority of them because they did not have citizenship certificates and other documents to prove their Nepali origin.

The provision on citizenship was relaxed by the Interim Constitution in response to these complaints from Madhesis. Article 8(5) of the Interim Constitution stated that any person born and living permanently in Nepal before the end of the month of Chait 2046 in the Bikram Sambat calendar (i.e., the last day of the year 2046, or 13 April 1990) would be able to acquire Nepali citizenship by birth. The only conditionality was that the person seeking citizenship certificate would have to apply for this within the prescribed time frame. This relaxation was made for only a one-time opportunity.

Article 11 of the Interim Constitution also required the government to assign a Citizenship Distribution Task Force to grant citizenship to persons eligible to acquire citizenship as provided for in existing laws. The Citizenship Act was then amended subsequently to lay down necessary procedures to implement these provisions. While these provisions were hailed by Madhesis, there is no official data on how many citizenship certificates were issued under this arrangement. (See Section 6.2.4 for a more detailed discussion on citizenship laws, some of which are also relevant to Madhesis.)

6.5.1 Representation in Elected Bodies

As with other marginalised groups, representation of Madhesis in elected bodies rose with the election to the CA-1 (Table 6-6). In fact, the CA-1 saw Madhesis represented to a proportion higher than their share of the popu-

²⁶⁸ Thapa (2017).

²⁶⁹ The open border between India and Nepal and the continued immigration into Nepal has been a significant issue in Nepali politics for the last few decades. See Bipin Adhikari, Remarks on Nepal India Relations, submission made to the Eminent Persons Group for Nepal-India Relations (EPG-NIR), 2 August 2016, <https://bipinadhikari.com.np/article/notes/remarks-on-nepal-india-relations>.

Table 6-6: Madhesi Representation in National Legislatures, 1991 to 2017 (per cent)

Group	House of Representatives (pre-2006)				Constituent Assembly		Federal Parliament		Share of National Population (2011)
	1991	1994	1999		2008	2013	House of Representatives (2017)	National Assembly (2018)	
Madhesi Dalits	-	-	-		2.7	2.0	0.4	3.6	4.7
Madhesi Castes	9.3	10.2	14.1		20.3	16.4	16.4	8.8	15
Religious groups (Muslims and Sikhs)	2.4	2.4	2.0		2.8	3.2	3.3	-	4.5
Total	11.7	12.6	16.1		25.8	21.6	20.1	12.4	24.2

Source: Vollan (2015 and 2020); Election Commission (2017); and Pokharel and Pradhan (2020).
 Note: For the sake of the discussion here Muslims and Sikhs have been put together with Madhesi since that was how the state viewed them until the 2015 Constitution and the separate status granted to Muslims. See the following section on Muslims for more details.

lation. That changed over the next two election cycles, but the PR system put in place has ensured that the scale of their representation at both the federal and provincial levels did not fall too far short of the proportion of their population. The presence of Madhesi Dalits has remained an exception though—even during the two CAs, the most diverse so far.

Madhesis make up 12.8 per cent of the elected officials at the local level.²⁷⁰ Madhesi representation at the top is also creditable with 20 per cent of all mayoral posts in municipalities going to Madhesis along with 14 per cent of the post of chairperson in rural municipalities.

6.6 Muslims

Articles 3 and 4 of the Interim Constitution defined Nepal to be a multi-ethnic, multi-lingual, multi-religious, multi-cultural as well as a secular state, providing the Muslims of Nepal a steppingstone towards broader group recognition. Article 35(14) on State Policies provided for the state to pursue a policy of making special provisions on the basis of positive discrimination for Muslims, among others.²⁷¹ However, laws enacted at the time for greater inclusion, such as the Election to the Members of the Constituent Assembly Act, 2007, or amended for the same purpose, such as the Civil Service Act in 2007 and the Scholarship Rules in 2009, did not specify Muslims. Instead, Muslims were required to contest for the reserved positions as Madhesis.

Although lumped in the category of Madhesis, probably due to the fact that 96 per cent of them are of Tarai origin, Muslims sought a separate identity for themselves. In March 2009, the United National Muslim Struggle Committee (UNMSC) demanded that the provisions in the Interim Constitution and the 2009 Ordinance to Amend Some Nepal Acts to Making Public Services Inclusive that categorised them as part of Madhesis be changed.²⁷² Other demands included proportionate inclusion in state bodies and a Muslim Commission to deal with issues of particular concern to them. The agreement with the government at the time was a historic one since it was the Nepali state's 'accepting its Muslim population as citizens with equal rights rather than as *mlecchas*, or "foreigners"'.²⁷³

The 2015 Constitution continued the spirit of the Interim Constitution on its acceptance of multi-ethnic, multi-lingual, multi-religious, and multicultural-

270 Bhola Paswan, 'How did Madhesis fare in the local elections, and who won among them?', Record, 21 November 2017, <https://www.recordnepal.com/wire/features/how-did-madhesis-fare-in-the-local-elections-and-who-won-among-them>.

271 This is the single mention of Muslims in the Interim Constitution.

272 Sijapati (2012).

273 Ibid.

Table 6-7: Muslim Representation in National Legislatures, 1991 to 2017 (per cent)

Group*	House of Representatives (pre-2006)				Constituent Assembly		Federal Parliament		Share of National Population (2011)
	1991	1994	1999		2008	2013	House of Representatives (2017)	National Assembly (2018)	
Religious groups (Muslims and Sikhs)	2.4	2.4	2.0		2.8	3.2	3.3	-	4.5

Source: Volla (2015 and 2020); Election Commission (2017); and Pokharel and Pradhan (2020).
 * Although, in principle, the figures provided here include Sikhs, the number of legislators consist of Muslims only since no Sikh has been part of any of the national legislature so far.

al state and regarding Nepal a secular state (Articles 3 and 4). Going much further though, the Constitution of 2015 contains a number of provisions that support the formal inclusion of the Muslim community. These include:

- i. Identification of Muslims along with other marginalised groups with the right to participate in state bodies on the basis of proportional inclusion [Article 42(1)].
- ii. The constitution mandates that special provisions for equal distribution of economic, social, and cultural opportunities and benefits to the Muslims among other communities are to be made [Article 51(j)(10)].
- iii. Reservations for Muslims in elections to the HoR and provincial assemblies under the proportional electoral system [Articles 84(2) and 176(6)].
- iv. Provision of a Muslim Commission as a constitutional body (Article 264).

It should be noted that even though Muslims have sought and received recognition separate from Madhesis, such as the creation of the Muslim Commission, a number of laws in force such as the Civil Service Act still put them in the same category as Madhesis.

6.6.1 Representation in National Legislatures

The proportion of Muslims in national legislative bodies has always been lower than the proportion of their population and that fact has not changed much over the years.

6.7 Further Provisions

6.7.1 Right to Religion

On the issue of the right to religion, despite the rhetoric of multiculturalism and secularism, there were several contradictions within the Interim Constitution that undermined the recognition and protection of Janajatis' right to culture, identity and religion. Likewise, Article 23 of the Interim Constitution prohibited conversion from one religion to another. Under this provision, an individual was allowed to change religions at his/her own will but not under duress, which was also a punishable act under the Country Code then in place.²⁷⁴

²⁷⁴ Section: Miscellaneous, No. 1, Civil Code, 2020.

All of these provisions were carried over into the 2015 Constitution [Article 26(3)] and in the 2017 Penal Code [Section 158(1) and (2)]. Further, by defining secularism as ‘protection of religion and culture being practised since ancient times and religious and cultural freedom’, the Constitution appears to privilege Hinduism given that the definition uses the Nepali term *sanatan* (for ‘religion and culture being practised since ancient times’), one that is also used by some as a synonym for Hinduism,²⁷⁵ although there is nothing in the Constitution that denies such privileging also extends to Buddhism and Kirant, which have also both been in practice in Nepal for long.²⁷⁶

Both the Interim Constitution and the 2015 Constitution recognised the cow as the national animal of Nepal, indirectly reinforcing the values upheld by Hindu religion that regards cow as a holy animal. Cow slaughter also remains criminalised in the Penal Code with a prison sentence of up to three years (Section 289). The Penal Code, however, does absolve anyone who kills a cow while protecting self or someone else from bodily harm. The penalty is significantly lower than what existed in the earlier Country Code, which under the chapter on ‘Quadrupeds’ equated causing harm to a cow with causing harm to human beings. It had even listed the various categories of punishment for those involved in killing, attempting to kill, asking others to kill, or exporting a cow or bull with intention to kill it. Janajatis and others find it objectionable that the national law criminalises the act of killing a cow due to its symbolic linkages with Hinduism even after the declaration of Nepal as a secular state.

6.7.2 Mother Tongue and Bilingual Opportunities

Like the Interim Constitution, the 2015 Constitution has recognised every community’s right to receive basic education in their mother tongue, and to preserve and promote their language, script, culture, civilisation and heritage (see Section 5.5). Laws have also been in place to promote mother tongues in education beginning with the 1990 Constitution, which granted the right to preserve and promote the language of every community in the country and also run schools up to the primary level in its mother tongue

²⁷⁵ Encyclopaedia Britannica provides the following explanation of what *sanatan dharma* means: ‘The term has also more recently been used by Hindu leaders, reformers, and nationalists to refer to Hinduism as a unified world religion. Sanatana dharma has thus become a synonym for the “eternal” truth and teachings of Hinduism, the latter conceived of as not only transcendent of history and unchanging but also as indivisible and ultimately nonsectarian.’ The Editors of Encyclopaedia Britannica, ‘Sanatan Dharma’, <https://www.britannica.com/topic/sanatana-dharma>.

²⁷⁶ Adhikari (2016).

under cultural and education rights (Article 18). The Local Self-Governance Act, 1999 granted authority to local bodies to operate primary schools in the mother tongues.²⁷⁷ The Education Act and Regulations were amended to allow for the operation of primary schools in the mother tongue. The Education for All National Plan of Action drafted after the 2000 World Conference of Education for All also added the goal of ensuring education in the mother tongue.

The National Curriculum Framework for School Education in Nepal adopted in 2007 re-affirmed that the medium of instruction at the basic level (Grades 1 to 3) would be the mother tongue.²⁷⁸ The Multilingual Education Implementation Guidelines, 2010 provisioned for the medium of instruction for all students, apart from Nepali and English languages, would be local mother tongues up to Grade 3 while the Basic Education Curriculum 6-8 Grades, 2012 provided for the mother tongue to be taught as a subject in Grades 6 through 8.

The Act Relating to Compulsory and Free Education, 2018 provides for non-discrimination on any grounds for accessing education. One of the notable provisions of the Act is the one on multilingual education, with diverse communities granted the right to receive education in their mother tongues [Section 3(2)]. Section 26 of the Act grants local communities the right to receive education in their own mother tongue. The Act envisions the role of local governments in providing compulsory primary education and the responsibility to establish and operate informal and open education (Section 15). However, given that many linguistic communities who would benefit by operating such schools are precisely those who have been marginalised historically, the absence of any specific mechanism for the State to support them appears to undercut all these opportunities at providing education in the mother tongue.²⁷⁹

In an unrelated but relevant development, the first of its kind since the promulgation of the Constitution, in January 2016, the Supreme Court adopted the Directive on Using Interpretation Services in Court Proceedings

277 Curriculum Development Centre (2007).

278 Pushker Kadel, 'Reviewing Multilingual Education in Nepal', presentation at the International Conference on Language Policy in Multicultural and Multilingual Settings, 8-11 February 2016, Mandalay, Myanmar, <https://bit.ly/3jGzydX>.

279 Dan Raj Regmi, 'Developing and Implementing Mother-tongue Education Policy in Minority Speech Communities in Nepal: Issues and Challenges', paper presented at 6th International Conference on the Inclusion, Mobility and Multilingual Education: Exploring the Roles of Languages for Education and Development, Bangkok, 24-26 September 2019, <https://bit.ly/3uIQ4AB>.

2016 allowing the use of languages other than Nepali in all the country's courts and tribunals²⁸⁰ while also making provisions for free interpretation services on demand.²⁸¹

6.7.3 Special, Protected, or Autonomous Regions

Despite the fact that the federalisation did not follow ethnic lines specifically, Article 56(5) of the Constitution allows for the establishment of 'special, protected or autonomous regions' for 'social and cultural protection and economic development' [sic]. Schedule 5 of the Constitution, outlining the list of federal powers, mentions 'special structure', which presumably refers to special, protected and autonomous regions. The Constitution does not provide a separate schedule of powers applicable to special, protected and autonomous regions either or indicate what the relationship between such a region and the provincial or local level would be.

The special, protected and autonomous regions were initially envisaged as self-governing structures although the details were reduced in various drafts of the constitution. The preliminary draft of the State Restructuring Committee in the CA-1 contained express guidelines on them.²⁸² It provided that an area within a province containing a majority or a significant population of an ethnic or linguistic community would be granted the status of an autonomous region. Such areas needed to be identified since the main structure of the three federal levels would be unable to incorporate issues relevant to some small groups—ethnic, linguistic and marginalised. Likewise, any region inhabited by numerically declining and marginalised ethnic groups who are in an extreme minority would be maintained as a protected region. Backward regions lagging behind socioeconomically and not covered by the areas noted earlier would be maintained as special zones.

The State Restructuring Committee not only elaborated on these three areas with a clear purpose, but also categorically listed the autonomous regions to be thus formed and the manner in which they would be set up.²⁸³ The autonomous regions were to be formed within a year of provincial gov-

280 Adalatko Karvahoma Dobhase Sewako Prayog Sambandhi Nirdeshika, 2072 (Directive on Using Interpretation Services in Court Proceedings 2016) https://supremecourt.gov.np/court/public/assets/downloads/law_reach/Dobhase_Prayog_Sambandhi_Nirdeshika.pdf.

281 'Adalaharuma Sewagrahilai Upalabdha Hune Sewaharu (Services Available to Service-Seekers in the Courts)', Supreme Court, http://www.supremecourt.gov.np/web/assets/downloads/law_reach/user_benifits.pdf.

282 Adhikari (2016).

283 Ibid.

ernments taking office for the first time. If the name and number of autonomous regions thus formed needed to be changed or adjusted later on, the recommendation for the same by the provincial legislature concerned would have to be approved by a two-third majority of the federal parliament. Protected areas and special zones were to be formed by a majority decision of the provincial legislature concerned since it would be a matter that would concern the jurisdiction of only a province.²⁸⁴

A lack of these important details in the Constitution may mean a lack of guidance to lawmakers on how to implement Article 56(5) for the empowerment of smaller, special, autonomous, and protected groups. As mentioned earlier, the Constitution does not contain a schedule of these areas' special powers and competencies. The drafters removed the list of such areas in the final stages of constitution-making for no identifiable reason. However, the provision gives an opportunity to engage with the issue at some stage in the future.

There could, however, be innovative ways to create these special structures within the constitutional concept of the local level and allow them to exercise powers and competencies under Schedules 8 and 9, which deal with the powers and competencies of the local level and the concurrent ones of the federal, provincial and local levels, respectively.²⁸⁵ These special structures could prove to be very effective in establishing the identity of the most deprived ethnic groups in Nepal while also promoting their social, cultural, and economic interests.

6.7.4 National Penal (Code) Act, 2017

Besides the different provisions in the National Penal (Code) Act, 2017 mentioned in relevant sections in this report, there are others as well that promote inclusive practices in society or at least try to prevent discrimination.

The Penal Code defines genocide as any act committed with the intent of destroying, in whole or in part, any caste, ethnicity, community or religious group, or any attempt or conspiracy to commit such an act (Section 52). An offender who commits genocide or commits any offence with the objective of committing genocide is liable to imprisonment for the whole of their natural life (Section 41).

Under the section on 'factors aggravating the gravity of an offence', the Penal Code stipulates that the gravity of an offence will be aggravated if the offence was committed with the intention of destroying the identity of any

²⁸⁴ Ibid.

²⁸⁵ Ibid.

caste, ethnicity or group [Section 38(s)] or causing hatred against any caste, ethnicity, religious or cultural community [Section 38(t)].

The Penal Code also prohibits any person from damaging places, objects or burial places of religious significance or engaging in any act with the intent of insulting any religion in any which way, spoken, written or otherwise, or obstructing the practice of religion (Sections 155 and 156). The Code also prohibits persons from knowingly causing obstruction to the religious rites and rituals that have been handed down or followed for long (Section 157). At the same time, the Code continues with the long-standing prohibition on proselytising, proscribing any person from converting another, or even attempting to do so or abetting such an activity (Section 157). In fact, it proscribes conduct that undermines the religion, opinion or faith of anyone with the intention of proselytising (Section 158).

The Code criminalises discriminatory treatment towards any citizen by anyone in positions of authority under any of several grounds, including religion, caste, ethnicity, gender, physical condition, disability, marital status, pregnancy, economic condition, language or region and ideology (Section 160). It also prohibits discriminatory conduct against any person belonging to any particular caste, ethnicity or community in purchasing, selling or distributing any goods or services (Section 161).

The Penal Code enshrines several provisions aimed at protecting women. Sex-selective abortion has also been criminalised [Section 188(7)]. It also provides that no married man shall conclude another marriage and also that no woman shall conclude a marriage with a man knowing he is already married (Section 175). However, the Code is silent regarding women who conclude a marriage while still being in a marital relationship with another person.

The Penal Code also extends special protection to women, children and persons with disability, with the prohibition on indecent behaviour, man-handling or annoying any woman, child or person with physical disabilities in any public place [Section 118(1)]. Similarly, the Code provides that if an offence is committed against an elderly person above 75 years of age, a person of unsound mind by reason of physical or mental illness, a person incapable of defending himself or herself because of a disability, or a child, the gravity of the offence will be aggravated [Section 38(w)].

6.7.5 Persons with Disabilities

The Protection and Welfare of Disabled Persons Act, 1982 was the first comprehensive piece of national legislation enacted explicitly to protect the in-

terests of persons with disabilities (PwDs) in Nepal. Although guided by a welfare-based approach as opposed to a rights-based one,²⁸⁶ the Act required the government to make 'welfare arrangements' for PwDs in various sectors, including education and training, health and medical treatment, and employment. In addition, it required providing PwDs with various facilities and privileges such as exemption from taxes and other fees on equipment to be used by PwDs; provision of reserved seats in public transportation; and exemption from income tax, among others.

It took 12 years after the Act for the Protection and Welfare of the Disabled Persons Rules 1994 to be passed. Among others, the Rules outline procedural details on the establishment and operation of Disabled Person Homes and on establishing a Disabled Person Service Fund for the 'education, training, health treatment and rehabilitation of disabled persons'. A series of legislations enacted in the 1990s included PwDs among groups entitled to extra privileges, including the Education Act, 1992, the Children's Act, 1992, the Social Welfare Act, 1992, and the Local Self-Governance Act, 1999.

The 10-year National Policy and Plan of Action on Disability 2006 was launched in September 2006. The Plan, aimed at establishing an 'inclusive, obstacle free and rights-based society for people with disability and including them in the mainstream of national development', specified 17 different priority areas by way of ensuring 'basic services and facilities, equal opportunities, participation and access' to PwDs. Further strategies and action plans outlined included defining and classifying disability in accordance with international norms and practices; ensuring that the law has provisions to secure the rights of women and children with disabilities; adopting affirmative action policies for PwDs in the government, non-government and private sectors; providing discounts in fares and reserving seats for them and their assistants in public transportation; and promoting disabled-friendly construction standards.

The Interim Constitution guaranteed the right of social security to the disabled, incapacitated or helpless citizens [Article 18(2)], while also obliging the State to ensure participation of PwDs in all organs of the state structure on the basis of proportional representation [Article 33(d1)] and provide allowances to them [Article 35(17)].²⁸⁷ However, the fundamental right to

286 See Preamble, Protection and Welfare of Disabled Persons Act, 1982.

287 That was a far cry from the 1990 Constitution that simply mentioned that the state would pursue policies in education, health and social security to ensure the protection of the disabled and work for their welfare [Article 26(9)].

equality, which prohibited discrimination on various grounds, did not mention disability [Article 13(2)] (although the Supreme Court later ruled that disability is also covered by that Article²⁸⁸). The 2007 amendment to the Civil Service Act set aside 2.3 per cent of all government jobs to PwDs.

In May 2010, Nepal ratified the United Nations Conventions on the Rights of Person with Disabilities (UNCRPD), and its Optional Protocol. The Act Relating to the Rights of Persons with Disabilities was finally enacted in 2017, replacing the Protection and Welfare of Disabled Persons Act, 1982. Unlike the previous one, the new Act is guided by a rights-based approach and prohibits all kinds of discrimination on the basis of disability, and instead of the rather limiting definition featured earlier,²⁸⁹ it classifies disabilities under 10 different sub-groups²⁹⁰ and provides for the distribution of disability identity cards.

The 2017 Act outlines various rights aimed at the protection and empowerment of PwDs, including right to community life, right to protection, right of political participation, right of participation in policy making, right to form unions, right to information, and right to participate in cultural life, among others. It stipulates a set of ‘additional rights’ for women and children with disabilities, and the provision of various facilities to PwDs in sectors, including education, skill development and employment, health, rehabilitation, social security and recreation. In addition, the Act outlines the role of local governments in promoting the rights of PwDs at the local level through various measures, including record-keeping and distributing disability identity cards.

The 2015 Constitution carried over from the Interim Constitution in recognising PwDs at par with other marginalised groups, and hence, they are mentioned in almost all the Articles that deal with special privileges. According to the 2015 Constitution, PwDs also have seats set aside for them in every provincial contingent sent to the National Assembly.²⁹¹ PwDs have also been recognised in disparate sets of laws such as the Remuneration and Facilities of Officials and Members of Federal Parliament Act, 2017, the

288 Sudarshan Subedi v. Government of Nepal (2008).

289 Section 2 of the Disabled Persons Welfare Act of 1982 defines a ‘disabled person’ as follows: ‘a Nepali citizen who is physically or mentally handicapped or incapable to maintain normal daily life. The term also denotes one-eyed, blind, deaf, dumb, half-dumb, feeble, crippled, lame, limping, handless or mentally handicapped person’.

290 See Act Relating to Rights of Persons with Disabilities, 2017 for a full list of types of disabilities, <https://www.lawcommission.gov.np/en/archives/20774>.

291 Although the Constitution says at least one seat should be set aside for either a PwD or someone from a minority group in each province [Article 86(2)].

Guidelines on Relief, Compensation and Financial Assistance to the Citizen, 2009, the National Reconstruction and Rehabilitation Policy, 2016, and the Disaster Risk Reduction and Management Act, 2017, among others.

6.7.6 Senior Citizens

Over 2 million of Nepal's population is over 60 years of age, comprising almost 9 per cent of the country's population.²⁹² The Local Self-Governance Act, 1999 was probably the first legislative instrument in Nepal that featured provisions dealing specifically with the elderly population whereby under the section on Functions, Duties and Responsibilities, the Act required the erstwhile village development committees to 'carry out activities regarding the protection of orphan children, helpless women, aged and old, disabled and incapacitated persons in line with the national policy' [Section 28(k)(8)].

The Senior Citizens Policy 2002 was a major breakthrough towards establishing a national legal regime for senior citizens in Nepal since it highlighted the government's responsibility in protecting the rights of elderly citizens. The Policy, aimed at enhancing the respect and dignity of the elderly in their family, society and nation, envisaged incorporating, among others, economic benefit, social security, health service facilities, education as well as entertainment to support the elderly people in leading lives of dignity.

The Senior Citizens Act enacted in November 2006 defined senior citizens to be those above the age of 60. It provides for the establishment of care centres and day service centres for senior citizens and stipulates that senior citizens shall be provided with the 'necessary services, facilities and assistance in any public vehicles, public undertakings, medical services, religious and public places' (Section 9), the establishment of a Senior Citizen Welfare Fund at the central level (Section 17), and Senior Citizen Welfare Committees at the central and district levels (Section 14).

The 2015 Constitution included the right of senior citizens as a fundamental right (Article 41) and declared they 'have the right to special protection and social security from the State'. In general, these have taken the form of old-age allowances granted to Dalits and single women when they reach 60 and to others after the age of 70.²⁹³

292 'Ageing population in Nepal', Help Age Global Network, accessed April 5, 2021, <https://ageingasia.org/ageing-population-nepal/#:~:text=As%20of%202019%2C%20over%202,million%20people%20aged%20over%2060.>

293 The Social Security Act, 2018, <https://www.lawcommission.gov.np/en/wp-content/uploads/2019/07/The-Social-Security-Act-2018.pdf>.

6.7.7 Miscellaneous

There are other legal provisions that aim to look out for those who have been historically marginalised but who do not have the same visibility as the groups discussed above. Among those that stand out is the Social Security Act, 2018. Under Article 43 of the Constitution, the right to social security has listed the indigent, the incapacitated and helpless, helpless single women, people with disabilities, children, and those belonging to communities on the verge of extinction as those with a right to social security. Accordingly, the Social Security Act has identified these groups along with senior citizens as eligible for social security.

Likewise, the Act Relating to Compulsory and Free Education, 2018 provides for non-discrimination on any grounds for accessing education. The Act envisions the role of local governments in providing compulsory primary education and the responsibility to establish and operate informal and open education (Section 15). Local governments are also responsible for providing monthly scholarships to children from backward regions as well as families of the poor and disabled (Section 23).

A first of its kind is the inclusion of the right to housing under fundamental rights in the Constitution (Article 37). Accordingly, the Right to Housing Act, 2018 has been enacted to provide ‘the homeless citizens with appropriate and safe housing facility’ (Preamble) irrespective of ‘origin, religion, class, caste, ethnicity, gender, physical condition, disability, health condition, marital status, pregnancy, economic condition, language or region, ideology or any other such grounds’ [Section 3(2)].

7

Conclusion

Historically marginalised groups have long struggled to participate in and seek accommodation within the national polity by attempting to redefine the nature of the Nepali state. The Interim Constitution of 2007, the Constitution of 2015, and many of the statutory and legal amendments introduced after 2006 reflect the Nepali state's commitment to strengthening democracy and inclusion in the country.

The 2015 Constitution brings substantial changes to the country's political system, including the introduction of a stable parliamentary system, a three-tier federal state structure, and social inclusion, all of which represent a significant departure from the features of the earlier unitary form of government. Additionally, the Constitution enshrines the principles of republicanism, secularism, and inclusiveness, together with 'socialism based on democratic norms and values'.

The mixed electoral system ensures that women and marginalised communities are better represented in national and sub-national legislatures and other state institutions. The Constitution also contains a list of 32 fundamental rights and has created several constitutional commissions aimed at addressing the interests of and issues faced by vulnerable sections of Nepali society. The document provides for the establishment of an independent judiciary and the rule of law. Overall, the promulgation of the 2015 Constitution did manage to instil a sense of security and hope among the people for an end to instability and the reign of peace and the rule of law. The scope for further improvement will become clearer as the country's experiences unfold over time.

To be sure, there are various provisions in the Constitution on which there is a need for reform even now. Some of these are based on established principles and practices of constitutional law while others have ethnocultural and religious bases. For example, citizenship provisions are widely regarded as being discriminatory against Nepali women, especially Madhesi women. Likewise, several ethnic groups have argued that the federalisation of Nepal into seven provinces has been an insufficient projection of their demands. Moreover, there are various areas in which the jurisdiction of the

three tiers of government overlap, creating ambiguity about power distribution. There are even questions whether, given the background of the age-old legacy of the unitary state, the federal government would allow local and provincial governments to fully implement their constitutional authority.

The following recommendations from an international conference on the Constitution of Nepal 2015 held in 2018 may prove salient in this regard.²⁹⁴

- Consistent and rigorous implementation of the Constitution, with priority given to those provisions that provide support for the weaker sections of society, is essential. The most deprived and marginalised communities must find the Constitution to their advantage, and this requires efficient writing and the implementation of laws.
- The results of the three-tier elections of 2017 should be reviewed to ensure that the electoral system protects the concerns of people who have been affected on matters of representation. Reform initiatives should be undertaken where necessary.
- Laws regarding political parties, inclusion and proportionate representation should be reviewed in the best interests of the marginalised groups.
- The 'federalisation' initiative must be backed and boosted to accelerate its effective implementation, as work thus far has been unsatisfactory. The special, protected or autonomous regions provided for by the Constitution for the social and cultural protection or economic development of small groups have not been formed. The federal government has to work with provincial and local governments to urgently complete this constitutional mandate.
- The State must uphold fundamental rights by passing and implementing the required legislation to honour its commitments under the Constitution. For example, implementation of the provision on women's rights as well as the rights of gender and sexual minorities is still incomplete due to lack of appropriate legislation.
- More model laws in the spirit of the Constitution are necessary as reference documents for provincial and local governments. The federal government should make the necessary arrangements to help provinces and municipalities develop the required knowledge and skills.
- Staffing requirements must be urgently fulfilled in provincial and local governments, duplication and redundancies in the civil service as-

294 Adhikari (2020).

signments must be eliminated, and proper transfer of power effected as designed in the Constitution.

- The federal government has to focus on enabling the Truth and Reconciliation Commission and the Commission on the Investigation of Enforced Disappearance of Persons to commit to a transparent and consultative transitional justice process that complies with international law and the judgments of the Supreme Court of Nepal. It should extend cooperation to these Commissions to ensure that victims of the Maoist conflict are provided the justice, truth and reparation that they so desperately seek while also closing the final chapter on the peace process begun more than a decade ago.

7.1 Challenges to Implementing the Constitution

Nepal's further journey towards inclusion depends, to a great extent, on the quality of democracy and constitutionalism it will achieve on the foundation of its Constitution. Of the constitutions Nepal has had, the Interim Constitution was undeniably the most progressive one in terms of promoting social inclusion and representation of various segments of its population. That was so not only because it was the first such attempt by the State, containing as it did a number of provisions to ensure equal rights and opportunities for women, Dalits, Janajatis, Madhesis and Muslims, some of whom had not been given due recognition as equal citizens in the eyes of the State till then. The 2015 Constitution has largely adopted many of the provisions of the Interim Constitution and even expanded on some. However, there are also instances where the earlier provisions are considered better such as the higher share of proportional representation seats in legislative bodies.

The discussion above suggests that existing state policies are perfunctory in nature in many regards. They have only sought to address the problem of exclusion on a piecemeal basis instead of pursuing a comprehensive vision of a just and an inclusive society. Since such scattered and partial measures cannot tackle the complex and multi-dimensional nature of exclusion in Nepali society, some suggestions are provided below to address the issue better in the future.

Understanding inclusion. Existing legal provisions have limited the definition of inclusion to representation and participation of women and marginalised groups. Other important aspects of inclusion such as identity, dignity, meaningful participation, autonomy and the right to self-determination are yet to be discussed in full, let alone implemented. This is particularly perti-

ment since all the groups struggling for equal rights also lack a clear vision of what they mean by a state that is inclusive of everyone and they have yet to develop concrete strategies to achieve that vision as well.

Determining the eligibility criteria for affirmative action and state support. One of the paradoxes of identity politics, which is also true in the case of Nepal, is its 'totalising effects' wherein, in an effort to affirm an identity distinct from the larger society, groups often seek to mask their internal differences. As a result, the rights of 'minorities' amongst them such as women, Dalits amongst the Madhesi, smaller Janajati groups, etc, often get compromised. Formulating effective laws and policies to ensure effective representation and participation of these sub-groups is bound to emerge as a major challenge in the days to come.

The experience so far suggests that the government has not been totally oblivious of these differences but, at the same, it has also been jurisprudentially inaccurate in other cases. For instance, some of the provisions in the 2015 Constitution dealing with inclusive practices include various categories of people like farmers, labourers and other economically deprived communities alongside the historically marginalised groups of Nepal. The set of protective or special measures required for the benefit of historically or systematically marginalised communities generally fall under the jurisdiction of rights as opposed to the problems of economically weaker groups which need to be managed through welfare provisions.

Rights of marginalised groups. There has been a tendency in Nepal to address the needs, rights and demands of marginalised groups on an individual basis. As can be deduced from the discussion above, issues of group rights should not be viewed in isolation. Instead, attempts to address them should be accompanied by efforts to establish an effective administration, an independent and impartial judiciary, an efficient and accountable executive, representative legislature, a strong election commission as well as economic development and balanced power sharing—all with the same objective of nurturing the growth of an inclusive nation.

The need for a strong and independent human rights protection system is also key. The inability of the government to provide adequate budgetary support or even fully constitute any of the constitutional commissions meant to look into the welfare of the different marginalised groups for more than five years despite the constitutional mandate of only 10 years granted to them points to what amounts to a systematic effort to undermine their work even before it had begun.

Need to change the rules of the game. One of the reasons why Nepal has

not been able to make major strides in addressing the issue of its marginalised populations despite the numerous provisions and directives already adopted is because the rules of the game, especially in terms of informal norms and behaviour, remain unchanged. If the rights of the marginalised are to be secured, it is important to not only confine their application to state structures but also to other realms of societal relations.

Lack of political commitment. Related to the previous point, despite the number of provisions in the Constitution and various other laws and policies to ensure equality, representation and participation of different groups in the state structure, these provisions have only remained on paper and have not yet been effectively implemented due to lack of political will amongst political parties and the continued domination of hill ‘upper-caste’ men in the state machinery. As a result, there is the impending danger that even if enabling laws are formulated and enacted, they might not adequately capture the essence and coverage of universally recognised rights or those enshrined in the Constitution, especially since the formulation of the enabling laws would be left to the parliamentary majority passing them.

Thus, while Nepal has come a long way, the State’s approach and the resultant experiences thus far indicate that although the government has, in principle, accepted inclusion as its primary objective, it has yet to adopt it in practice. Experience suggests that despite the number of provisions, many of which are very progressive in terms of enhancing both individual and group rights, the country has a long way to go in terms of their effective implementation.

7.2 Consolidating Achievements

The implementation of the Constitution has two significant requirements: identifying constitutional norms, specifying their meanings, and crafting relevant doctrines; and developing standards of review to ensure compliance with these constitutional norms and doctrines.²⁹⁵ Even though there are political parties which have demanded further amendments to the 2015 Constitution or continue to have unmet expectations, they, too, will need to assist in its implementation. The process of constitutional, political, and societal evolution will progress only if agitating parties also have opportunities to pursue more equitable power sharing, inclusiveness, social justice, and devolution. Politically, this would help to achieve at least two objectives: consolidation of the gains of the 2015 Constitution, and empowerment of all

²⁹⁵ Adhikari (2016).

sections of society to understand where the shortcomings are and consider the adoption of required corrections and reforms. Such an approach would also help Nepalis leave the past behind and negotiate their future with the State. Most importantly, as a federal constitution, since the challenges facing its implementation are substantial, the political leadership has to promote the ideals of national unity and help generate an evolving social and political contract between various stakeholders regarding federalism.

The Election Commission has a pivotal role in making sure that political parties maintain their obligations regarding electoral inclusion and develop a mechanism that takes continuous stock of their compliance with legal provisions. The objective of the Constitution's Article 269, which deals with the formation, registration and operation of political parties, is not for a one-time compliance but to see that political parties remain committed to the diversity and inclusion in their own institutions and procedures. The Election Commission has not even undertaken any compliance audit of any political parties represented in Parliament with the necessary urgency required. Article 271, which requires registration of registered political parties for the purpose of elections, should not be allowed to be used only as a technical requirement.

To repeat what was pointed out earlier, it is time for the Election Commission to reappraise the inclusion and proportional representation aspects of the Constitution based on the results of the first round of local, provincial and federal elections. Such an exercise will help it provide appropriate recommendations to the government for a review of election laws and institutions. Besides requiring vigorous implementation of its Gender and Inclusion Policy of 2013, the Election Commission also needs to continue with voter education and the voter registration process to ensure that women and the marginalised are not left out. The major reason for creating the Voter Education Policy 2013 was to help reduce the number of invalid votes and make the election process more credible. NGOs concentrating their efforts on targeted communities should be encouraged and assisted by the Election Commission to achieve this objective.

The Directive Principles, Policies and Obligations of the State requires a huge commitment on many issues, including inclusion. Under Article 54 of the Constitution, the Joint Meeting of both the Houses of Parliament has framed the Federal Parliament Joint Meeting and Joint Committee (Conduct of Business) Rules 2018, which provides for a Directive Principles of the State, Policies and Obligations Implementation Monitoring and Evaluation

Committee (Section 27).²⁹⁶ The success of a Committee like this depends, to a great extent, on quality leadership, especially from the deprived and marginalised communities. Since the current arrangement of the senior-most member of the Committee heading it militates against that spirit, the said Rules will require an amendment.

Both the CA-1 and the CA-2 have generated many documents which will continue to have importance for modern Nepal for many years to come. In particular, the resources produced by the CA-1 were not only vast but also remain important. The provisions in the new Constitution were put in place by the CA-2 and often reflected political choices of the time. But there are still many soft norms and standards in the reports of the CA-1's thematic committees which could be used in drafting new laws, policies and institutions as required. While these reports certainly do not have any binding force on the State since the Constitution has long been drafted and promulgated, they contain resources which may never again be generated with the same intent with which the Constituent Assembly was elected. For example, the reports of the Committee on Fundamental Rights and Directive Principles and the Committee on State Restructuring and Division of State Powers could still provide substantial references for the unfolding legal regime as per the Constitution.²⁹⁷

The current House of Representatives has 10 specialised parliamentary committees and two joint ones with the National Assembly to monitor and evaluate the activities of the Government of Nepal, provide direction and advice to it, and to make it accountable to the House. The issue of diversity and inclusion, a key constitutional feature of the new Constitution, does not find clear mention in the terms of reference of any committee therein because their jurisdictions have been allocated mainly on the basis of existing ministries, and there is none specifically mandated to deal with diversity and inclusion. Such a ministry is not absolutely necessary since an alternative would be to rename the Law, Justice and Human Rights Committee and call it the Law, Justice, Human Rights and Inclusion Committee. The institutions which fall under it, i.e., the Ministry of Law, Justice and Parliamentary Affairs, the Judicial Council, the Judicial Service Commission, and the Office of the Attorney General, have enough of a mandate to cover the concerns

296 Sanghiya Sansadko Samyukta Baithak ra Samyukta Samiti (Karyasanchalan) Niya-mawali, 2075 (Federal Parliament Joint Meeting and Joint Committee (Conduct of Business) Rules 2018), <https://na.parliament.gov.np/publication/1597641390>.

297 One such example is provided in Box 5-2, wherein the Supreme Court has referred to the Committee on Fundamental Rights and Directive Principles of the CA-1 while rendering its judgement.

relevant to the issue of inclusion. Such a move will not only establish the agenda of inclusion in parliamentary business as an explicit issue but also help stakeholders understand where to focus their political efforts when it is at stake. Ultimately, it will contribute to keeping the issues of diversity and inclusion alive in national politics.

References

- Acharya, Indu. 2013. 'Challenges of Nepalese Women in Parliamentary Elections'. *Tribhuvan University Journal* 27:1-2.
- Acharya, Meena, Chaitnaya Subba, Badri Niraula, Harihar Regmi and Shankar Aryal. 2008. 'Executive Summary'. In *Caste, Ethnic and Gender Dimension of Nepal's Population: A Statistical Analysis, 1991-2001*. Kathmandu: Tanka Prasad Acharya Memorial Foundation, DFID, The World Bank.
- Adhikari, Bipin. 2004. *Building Capacity of National Human Rights Institutions: The Case of Nepal*. Kathmandu: Right to Education Foundation.
- _____. 2008. 'History of Constitutions and Constitution Making in Nepal' and 'The 1990 Constitution and Its Collapse'. In *Creating the New Constitution: A Guide to Nepali Citizens*, edited by Yash Ghai and Jill Cottrell, 17-47. Stockholm: International IDEA.
- _____. 2012. *Nepal Constituent Assembly Impasse: Comments on a Failed Process*, 132-144. Kathmandu: Nepal Consulting Lawyers Inc.
- _____. 2013. *Constitutional Crisis in Nepal: Ensuring Democratic Governance during the Transition to a New Constituent Assembly*. Kathmandu: Nepal Constitution Foundation.
- _____. 2015. 'Report of the Conference'. In *A Treatise on the Constitution of Nepal*, edited by Bipin Adhikari. Kathmandu: Kathmandu University School of Law.
- _____. 2016. *Salient Features of the Constitution of Nepal 2015*. Kathmandu: Nepal Consulting Lawyers Inc.
- _____, ed. 2020. *A Treatise on the Constitution of Nepal 2015*. Kathmandu: Kathmandu University School of Law.
- Adhikari, Krishna and David Gellner. 2016. 'New Identity Politics and the 2012 Collapse of Nepal's Constituent Assembly: When the Dominant becomes 'Other''. *Modern Asian Studies*, 50:06.
- Asian Study Center for Peace and Conflict Transformation. 2011. *From Conflict to Peace in Nepal: Peace Agreements 2005-10*. Kathmandu: Asian Study Center for Peace & Conflict Transformation. <https://issat.dcaf.ch/Learn/Resource-Library2/Policy-and-Research-Papers/From-Conflict-to-Peace-in-Nepal-Peace-Agreements-2005-10>.

- Awasthi, Ganga Datta and Rabindra Adhikary. 2012. *Changes in Nepalese Civil Service after the Adoption of Inclusive Policy and Reform Measures*, 17. Support to Participatory Constitution Building in Nepal [SPCBN]/UNDP.
- Bennett, Lynn, Bandita Sijapati and Deepak Thapa. 2013. *Gender and Social Exclusion in Nepal: Update*. Kathmandu: Himal Books.
- Bhattachan, Krishna. 2009. 'Discourse on Social Exclusion and Inclusion in Nepal: Old Wine in a New Bottle'. In *Identity & Society, Social Exclusion and Inclusion in Nepal*, 11-27. Social Inclusion Research Fund.
- CEDAW Shadow Report Preparation Committee. 2018. 'Civil Society's Shadow Report for Pre-Session of 6th Periodic Report on CEDAW Convention', Kathmandu: CEDAW Shadow Report Preparation Committee. https://www.ecoi.net/en/file/local/1424875/1930_1519132332_int-cedaw-ngo-npl-30016-e.pdf.
- CPN-UML. 2001 (2058 Bikram Sambat). *Nekapa (Maobadi)ko Chirphar* (A 'Surgery' of the CPN-Maoist). Kathmandu: CPN (UML) Central Secretariat.
- Curriculum Development Centre. 2007. *National Curriculum Framework for School Education in Nepal*. Sanathimi: Curriculum Development Centre, Ministry of Education and Sports, Government of Nepal. <http://www.moe.gov.np/assets/uploads/files/National-Curriculum-Framework-2007-English.pdf>.
- DfID (Department for International Development) and World Bank. 2006. *Unequal Citizens: Gender, Caste and Ethnic Exclusion in Nepal*. Kathmandu: DfID and World Bank. <http://documents1.worldbank.org/curated/en/201971468061735968/pdf/379660Nepal0GSEA0Summary0Report01PUBLIC1.pdf>.
- Dhungel, Surya, Bipin Adhikari, B.P. Bhandari and Chris Murgatroyd. 1998. *Commentary on the Nepalese Constitution*. Kathmandu: DeLF Lawyer's Inc.
- Einsiedel, Sebastian, David Malone and Suman Pradhan, eds. 2012. *Nepal in Transition: From People's War to Fragile Peace*. Cambridge: Cambridge University Press.
- Election Commission. 2018. *Pradesh Sabha Sadasya Nirwahan 2074: Nirwahan Parinam Pustak* (Provincial Assembly Member Election 2074 [Bikram Sambat]: Election Results). Kathmandu: Election Commission. <https://election.gov.np/ecn/uploads/userfiles/ElectionResultBook/PA2074.pdf>.
- _____. 2017. *Nepalko Nirbachan Itihas* (History of Nepal's Elections). Kathmandu: Election Commission.
- Errico, Stefania. 2020. 'ILO Convention No. 169 in Asia: Progress and Challenges'. *The International Journal of Human Rights* 24, no. 2-3: 156-169.
- FWLD (Forum for Women, Law and Development). 2009. *A Study on Discriminatory Laws Against Women, Dalit, Ethnic Community, Religious Minority*

- and Persons with Disabilities*. Publication no. 142. <https://fwld.org/wp-content/uploads/2016/07/A-Study-on-Discriminatory-Laws-Against-Women-Dalit-Ethnic-Community-Religious-Minority-and-Persons-with-Disabilities.pdf>.
- The Freedom House. 2017. *Freedom in the World 2016: The Annual Survey of Political Rights and Civil Liberties*, 49. Maryland: Rowman and Littlefield.
- Gautam, Bhaskar, ed. 2008. *Madhes Bidrohako Nalibeli* (Inside Story of the Madhes Revolt). Kathmandu: Martin Chautari.
- Gellner, David. 2016. *The Idea of Nepal*. Kathmandu: Social Science Baha and Himal Books. <https://soscbaha.org/wp-content/uploads/2019/11/mcrl2016.pdf>.
- Gender Equality and Social Inclusion Working Group. 2017. 'A Common Framework for Gender Equality & Social Inclusion', https://www.undp.org/content/dam/nepal/docs/generic/GESI_per_cent20framework_per_cent20Report_Final_2017.pdf.
- Ghai, Yash. 2008. 'The Dalit Agenda: Dignity, Inclusion, and Social Justice'. In *The Dalits of Nepal and a New Constitution*. Kathmandu: UNDP. <https://un.info.np/Net/NeoDocs/View/1992>.
- Gurung, Harka. 2006. *From Exclusion to Inclusion. Socio-Political Agenda for Nepal*. Kathmandu: SNV, Social Inclusion Research Fund.
- _____. 2003. 'Janajati and Dalit: The Subjugated in Governance'. *Readings on Governance and Development* 11. Cited in Gurung, Harka. 2006. *From Exclusion to Inclusion. Socio-Political Agenda for Nepal*. Kathmandu: SNV, Social Inclusion Research Fund.
- Gurung, Om. 2009. 'Major Challenges for Implementing ILO Convention 169 in Nepal', paper presented at the seminar 'Should States Ratify Human Rights Conventions?' organized by the Center of Advanced Studies, Oslo, Norway, August 18-20, <https://www.jus.uio.no/english/research/areas/intrel/projects/should-states-ratify-project/gurung-final-major-challenges-of-ilo-implemen..pdf>.
- Hachhethu, Krishna. 2013. 'The Making of Nepal's Second Constituent Assembly'. *ConstitutionNet*. International Institute for Democracy and Electoral Assistance. November 19. <http://constitutionnet.org/news/making-nepals-second-constituent-assembly>.
- _____. 2017. 'Legislating Inclusion: Post-war Constitution Making in Nepal'. In *Two Steps Forward, One Step Back: The Nepal Peace Process*, Accord 26, edited by Deepak Thapa and Alexander Ramsbotham, 59-64. London: Conciliation Resources. <https://www.c-r.org/accord/nepal>.
- Höfer, András. 2004. *The Caste Hierarchy and the State in Nepal: A Study of the Muluki Ain of 1854*. Lalitpur: Himal Books.

- Hutt, Michael, ed. 2004. *Himalayan People's War: Nepal's Maoist Rebellion*. London: Hurst.
- International Crisis Group. 2011. *Nepal: Identity Politics and Federalism*. Asia Report No. 199, 13 January, i.
- International Crisis Group. 2012. *Nepal's Constitution (I): Evolution Not Revolution*, 27 August.
- International Institute for Democracy and Electoral Assistance. 2015. *Nepal's Constitution Building Process: 2006-2015, Progress, Challenges, and Contributions of International Community*. Stockholm: Format Printing Press. <https://www.idea.int/publications/catalogue/nepals-constitution-building-process-2006-2015>.
- Jha, Dipendra. 2017. 'Comparing the 2007 and 2015 Constitutions'. In *Two Steps Forward, One Step Back: The Nepal Peace Process*, Accord 26, edited by Deepak Thapa and Alexander Ramsbotham. London: Conciliation Resources. <https://www.c-r.org/accord/nepal>.
- Khanal, Krishna. 2014. 'The Participatory Constitution Making Process in Nepal: An Assessment of the CA Process (2008-2012)'. In *The Participatory Constitution Making in Nepal: Issues of Process and Substance*, edited by Budhi Karki and Rohan Edrisinha. Kathmandu: United Nations Development Programme (UNDP) Support to Participatory Constitution Building in Nepal (SPCBN).
- _____. 2017. 'Federal Discourse'. In *Two Steps Forward, One Step Back: The Nepal Peace Process*, Accord 26, edited by Deepak Thapa and Alexander Ramsbotham. London: Conciliation Resources. <https://www.c-r.org/accord/nepal>.
- _____. 2019. 'State-Society Covenant at the Subnational Level'. In *The Politics of Change: Reflections on Contemporary Nepal*, edited by Deepak Thapa. Kathmandu: Himal Books. <https://soscbaha.org/publication/the-politics-of-change-reflections-on-contemporary-nepal>.
- Law Books Management Committee. 2018. *Nepalko Sambidhanma Samabesh Bhaeka Maulik Hak Karyanwoyan Garna Jari Bhaka Ainharu* (Acts Enacted to Implement the Fundamental Rights Enshrined in the Constitution). Kathmandu: Law Books Management Committee.
- Lawoti, Mahendra. 2003. 'The Maoists and Minorities: Overlap of Interests of a Case of Exploitation'. *Studies in Nepali History and Society* 8:1.
- Mahato, Sanjaya, Bimala Rai Paudyal and Nandita Baruah. 2019. 'Identity, Society, and State: Citizenship and Inclusion'. In *The Politics of Change: Reflections on Contemporary Nepal*, edited by Deepak Thapa. Kathmandu: Himal Books. <https://soscbaha.org/publication/the-politics-of-change-reflections-on-contemporary-nepal>.

- Ministry of Peace and Reconstruction. 2012 (2069 Bikram Sambat). *Nepalko Shanti Prakriyama Halsamma Bhaeka Samjhauta, Sahamati, Samajdhari, Ghosana ra Nirnayaharko Sankalan* (Compilation of Agreements, Consensus, Understandings, Declarations and Decisions Reached So Far in Nepal's Peace Process). Kathmandu: Ministry of Peace and Reconstruction.
- NHRC (National Human Rights Commission). 2019. *Indigenous and Tribal Peoples Convention, 1989 Implementation Status Report*. Kathmandu: NHRC. http://nhrcnepal.org/nhrc_new/doc/newsletter/ILO_169_Implimentation_Report_English_NHRC_Jestha_2076.pdf.
- National Planning Commission. 2007. *Three-Year Interim Plan (2007/08–2009/10)*. Kathmandu: National Planning Commission. https://www.npc.gov.np/images/category/11tyip_eng.pdf.
- Niti Foundation and Social Science Baha. 2022. 'Why Nepal's "Other" Commissions Matter for Justice and Inclusion: Strengthening Constitutionalism in Nepal'. Kathmandu: Niti Foundation.
- Onta, Pratyoush. 2006. 'The Growth of the Adivasi Janajati Movement in Nepal after 1990: The Non-Political Institutional Agents'. *Studies in Nepali History and Society* 11:2.
- Pokharel, Binod and Meeta S. Pradhan. 2020. *State of Inclusive Governance: A Study on Participation and Representation after Federalization in Nepal*. Kir-tipur: Central Department of Anthropology, Tribhuvan University.
- Pradhan, Krishna Man. 2017. 'A Policy Implementation of the Federal Constitution in Nepal', Search for Common Ground, March 2017, https://www.sfcg.org/wp-content/uploads/2015/04/NEPAL-Issue_Papers-Federalism.pdf.
- Public Service Commission. 2013. *The Public Service Commission of Nepal*. Kathmandu: Public Service Commission. <http://old.psc.gov.np/uploads/201308071375854409.pdf>.
- Secretariat of the Legislature-Parliament of Nepal. 2013. *Sambidhan Sabha Darpan* (Constituent Assembly Reflections). Kathmandu: Secretariat of the Legislature-Parliament of Nepal. <https://na.parliament.gov.np/uploads/attachments/cf5aoz9qa7tgdtm5.pdf>.
- _____. 2017. *Sambidhan Sabha Darpan-2* (Constituent Assembly Reflections-2). Kathmandu: Secretariat of the Legislature-Parliament of Nepal. <https://hr.parliament.gov.np/uploads/attachments/kz2nnrozsjpu7uw4.pdf>.
- Sharma, Pitamber. 2014. *Some Aspects of Nepal's Social Demography (Census 2011 Update)*. Kathmandu: Social Science Baha and Himal Books. <https://soscbaha.org/wp-content/uploads/2019/11/some-aspects-on-nepals-social-demography.pdf>.

- Sijapati, Bandita. 2012. 'Political Integration and Multiculturalism in Democratic Societies: The Case of Muslims in *Naya Nepal*'. In *Ethnicity and Federalisation in Nepal*, edited by Chaitanya Mishra and Om Gurung. Kathmandu: Central Department of Sociology/Anthropology, Tribhuvan University.
- _____. 2013. 'In Pursuit of Recognition: Regionalism, Madhesi Identity and the Madhes Andolan'. In *Nationalism and Ethnic Conflict in Nepal Identities and Mobilization After 1990*, edited by Mahendra Lawoti and Susan Hangen. London: Routledge.
- Simkhada, Dhruba. 2017. *Mulukko Muhar*. (The Face of the Nation). Kathmandu: Himal Kitab.
- Tamang, Mukta S. 2017. 'Social Movements and Inclusive Peace in Nepal'. In *Two Steps Forward, One Step Back: The Nepal Peace Process, Accord 26*, edited by Deepak Thapa and Alexander Ramsbotham. London: Conciliation Resources. <https://www.c-r.org/accord/nepal>.
- Thapa Deepak with Bandita Sijapati. 2005. *A Kingdom under Siege: Nepal's Maoist Insurgency, 1996-2004*. London: Zed Books.
- Thapa, Deepak. 2017. 'Mapping Federalism in Nepal'. In *Two Steps Forward, One Step Back: The Nepal Peace Process, Accord 26*, edited by Deepak Thapa and Alexander Ramsbotham. London: Conciliation Resources. <https://www.c-r.org/accord/nepal>.
- UNDP (United Nations Development Program). 2008. *The Dalits of Nepal and a New Constitution*. Kathmandu. <https://un.info.np/Net/NeoDocs/View/1992>.
- _____. 2010. *Outcome Evaluation for Rule of Law, Access to Justice and Human Rights 2001-2010*. Kathmandu: UNDP. <https://un.info.np/Net/NeoDocs/View/4450>.
- UNFPA (United Nations Population Fund). 2020. 'Literature Review on Harmful Practices in Nepal'. Kathmandu: UNFPA. <https://nepal.unfpa.org/sites/default/files/pub-pdf/Literature%20Review%20on%20Harmful%20Practices%20in%20Nepal.pdf>.
- UN WOMEN. 2014. 'Mapping Progress on Women's Rights in Nepal'. Kathmandu: UN WOMEN.
- Upadhyay, Surya Nath. 2020. 'Looking Back at the Constitution of 1990'. In *A Treatise on the Constitution of Nepal 2015*, edited by Bipin Adhikari, 584-590. Kathmandu: Kathmandu University School of Law.
- Vollan, Kåre. 2015. *Elections in Nepal: Identifying the Politically Excluded Groups – A Study of the Parliamentary Election Results from 1991 to 2013*. Kathmandu: Himal Books for Social Science Baha. <https://soscbaha.org/publication/election-in-nepal>.

- _____. 2020. 'The Systems of Representation in the Three Tiers after the Promulgation of the 2015 Constitution of Nepal: Implementation and Challenges'. In *A Treatise on the Constitution of Nepal 2015*, edited by Bipin Adhikari. Dhulikhel: Kathmandu University School of Law.

Annexures

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Annex 1

Progress Towards Inclusion across Four Constitutions

Theme	Nation
1962 Constitution	Article 2. The nation (1) Having common aspirations and united by the common bond of allegiance to the Crown, the Nepali people irrespective of religion, race, caste or ethnicity collectively constitute the nation.
1990 Constitution	Article 2. The nation Having common aspirations and united by a bond of allegiance to national independence and integrity of Nepal, the Nepali people irrespective of religion, race, caste or ethnicity, collectively constitute the nation.
2007 Interim Constitution	Article 3. The nation Having multi-ethnic, multi-lingual, multi-religious, multicultural 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, all the Nepali people collectively constitute the nation.
2015 Constitution	Article 3. Nation Having multi-ethnic, multi-lingual, multi-religious, multi-cultural characteristics with common aspirations of people living in diverse geographical regions, and being committed to and united by a bond of allegiance to national independence, territorial integrity, national interest and prosperity of Nepal, all the Nepali people collectively constitute the nation.
Comment	From no mention of the social diversity in the country in the 1962 and 1990 Constitutions, both the 2007 and 2015 Constitutions recognised Nepal as multi-ethnic, multi-lingual, multi-religious, and multicultural.
Theme	State
1962 Constitution	Article 3. The state (1) Nepal is an independent, indivisible and sovereign monarchical Hindu State.
1990 Constitution	Article 4. The kingdom (1) Nepal is a multi-ethnic, multilingual, democratic, independent, indivisible, sovereign, Hindu and Constitutional Monarchical Kingdom.

2007 Interim Constitution	Article 4. State of Nepal (1) Nepal is an independent, indivisible, sovereign, secular, inclusive Federal Democratic Republican State.
2015 Constitution	Article 4. State of Nepal (1) Nepal is an independent, indivisible, sovereign, secular, inclusive democratic, socialism-oriented federal democratic republican state.
Comment	The 1962 Constitution did not acknowledge the country's social diversity. The 1990 constitution was the first to recognise Nepal as a multi-ethnic and multilingual state. Subsequently, the Interim Constitution declared Nepal a secular and inclusive federal democratic republican state, a definition adopted by the 2015 Constitution as well.
Theme	Language
1962 Constitution	4. National language The national language of Nepal is the Nepali language in the Devanagari script
1990 Constitution	Article 6. Language of the nation (1) The Nepali language in the Devanagari script is the language of the nation of Nepal. The Nepali language shall be the official language. (2) All the languages spoken as the mother tongue in the various parts of Nepal are the national languages of Nepal.
2007 Interim Constitution	Article 5. Language of the nation (1) All the languages spoken as mother tongues in Nepal are the national languages of Nepal. (2) The Nepali language in the Devanagari script shall be the language of official business. (3) Notwithstanding whatever is written in clause (2), the use of one's mother tongue in a local body or office shall not be barred. The state shall translate the language used for such purposes into the language of official business for the record.
2015 Constitution	Article 6. Language of the nation All the mother tongues spoken in Nepal shall be the national language. Article 7. Language of official transaction (1) The Nepali language written in Devanagari script shall be the language of official business in Nepal. (2) In addition to Nepali language, a province shall select one or more national language that is spoken by majority of people in that province as the language of official business, as provided for by the provincial law.

Comment	Starting with the 1962 Constitution, Nepali has remained the official language of the country (and in the case of that constitution the only national language). Other languages have increasingly been accorded recognition following the 1990 Constitution, with the 2015 Constitution provisioning for other languages also to be used as official languages in provinces.	
Theme	Citizenship	
1962 Constitution	Article 7. Citizenship at the commencement of the Constitution Every person who has his domicile in Nepal and: (a) who was born in Nepal; or (b) either of whose parents was born in Nepal; or (c) who, as a woman, has any kind of relation with a citizen of Nepal constituting matrimony in accordance with the laws and customs of Nepal	
1990 Constitution	Article 9. Acquisition and termination of citizenship after the commencement of the Constitution (1) A person who is born after the commencement of this Constitution and whose father is a citizen of Nepal at the birth of the child shall be a citizen of Nepal by descent.	
2007 Interim Constitution	Article 8. Citizenship at the commencement of the Constitution (2) At the commencement of this Constitution, the following persons who have their domicile in Nepal shall be deemed to be citizens of Nepal by descent (b) any person whose father or mother was a citizen of Nepal at the birth of such person. (5) Any person born and living permanently within the territory of Nepal before the end of Chaitra, 2046 (13 April 1990) shall acquire the citizenship of Nepal by birth in accordance with the existing law. (7) ...in the case of person born to a woman citizen of Nepal married to a foreigner, if such a person is born in Nepal and has been residing permanently in Nepal and has not acquired citizenship of the foreign country by virtue of the citizenship of his or her father, he or she may acquire naturalised citizenship of Nepal...	
2015 Constitution	Article 10. Not to deprive of citizenship (1) No citizen of Nepal may be deprived of the right to obtain citizenship. Article 11. To be citizens of Nepal (2) The following person who has his or her permanent domicile in Nepal at the time of commencement of this Constitution shall be the citizen of Nepal by descent:	

2015 Constitution	<p>(a) a person who has obtained the citizenship of Nepal by descent prior to the commencement of this Constitution,</p> <p>(b) a person whose father or mother was a citizen of Nepal at his or her birth.</p> <p>(3) A child of a citizen having obtained the citizenship of Nepal by birth prior to the commencement of Nepal shall, upon attaining majority, acquire the citizenship of Nepal by descent if the child's father and mother both are citizens of Nepal.</p> <p>(4) Every minor who is found within Nepal and the whereabouts of whose father and mother are not known shall, until the father or the mother of the child is traced, be a citizen of Nepal by descent.</p> <p>(5) A person who is born in Nepal from a woman who is a citizen of Nepal and has resided in Nepal and whose father is not traced shall be provided with the citizenship of Nepal by descent.</p> <p>Provided that his or her father is held to be a foreign citizen, the citizenship of such person shall be converted into naturalized citizenship as provided for in the Federal law.</p> <p>(6) A foreign woman who has a matrimonial relationship with a citizen of Nepal may, if she so wishes, acquire the naturalized citizenship of Nepal as provided for in the Federal law.</p> <p>(7) ... in the case of a person born from a woman who is a citizen of Nepal and married to a foreign citizen, the person may acquire the naturalized citizenship of Nepal in accordance with the Federal law if he or she has permanently resided in Nepal and has not acquired the citizenship of a foreign country. Provided that if such person's mother and father both are citizens of Nepal at the time of acquisition of citizenship, such person born in Nepal may acquire the citizenship of Nepal by descent.</p>
Article 14. Power to grant non-resident Nepali citizenship	<p>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...</p>
Comment	<p>Eligibility of citizenship oscillated between having either parent a citizen of Nepal at the time of birth according to the 1962 Constitution, to only the father's citizenship being recognised in the 1990 Constitution to the Interim Constitution and the 2015 reviving the provisions of the 1962 Constitution. Provisions in the Interim Constitution barred foreign men married to Nepali women from acquiring naturalised Nepali citizenship by virtue of their matrimonial relations while foreign women married to Nepali men could do so, and also discriminated against the children of Nepali women married to foreign men in that such children could become naturalised Nepali citizens only if they were born in Nepal and had</p>

Comment	<p>been living permanently in Nepal and has not acquired citizenship of a foreign country, while no such conditions were specified for children born to Nepali men married to foreign women. Unlike the Interim Constitution, the 2015 Constitution does not stipulate that a child born to a Nepali mother and foreign father has to be born in Nepal to get Nepali citizenship. The 2015 Constitution has, however, retained provisions that discriminate against Nepali women on the basis of marital status. The 2015 Constitution also introduced the provision of non-resident citizenship.</p>	
Theme	Equality	
1962 Constitution	NA	
1990 Constitution	<p>Article 11. Right to equality (3) The State shall not discriminate among citizens on grounds of religion, race, sex, caste, ethnicity, or ideological conviction or any of these. Provided that special provisions may be made by law for the protection and advancement of the interests of women, children, the aged or those who are physically or mentally incapacitated or those who belong to a class which is economically, socially or educationally backward.</p>	
2007 Interim Constitution	<p>Article 13. Right to equality (3) The State shall not discriminate among citizens on grounds of religion, race, caste, ethnicity, gender, origin, language or ideological conviction or any of these. Provided that nothing shall be deemed to prevent the making of special provisions by law for the protection, empowerment or advancement of women, Dalits, Adivasi Janajatis, Madhesi or peasants, labourers or those who belong to a class which is economically, socially or culturally backward, or children, the aged, disabled or those who are physically or mentally incapacitated.</p>	
2015 Constitution	<p>Article 18. Right to equality (1) All citizens shall be equal before law. No person shall be denied the equal protection of law. (2) No discrimination shall be made in the application of general laws on grounds of origin, religion, race, caste, ethnicity, sex, physical condition, condition of health, marital status, pregnancy, economic condition, language or region, ideology or on similar other grounds. (3) The State shall not discriminate citizens on grounds of origin, religion, race, caste, ethnicity, sex, economic condition, language, region, ideology or on similar other grounds. Provided that nothing shall be deemed to prevent the making of special provisions by law for the protection, empowerment or development of the citizens including the socially or</p>	

2015 Constitution	culturally backward women, Dalits, Adibasi Janajatis, Madhesis, Tharus, Muslims, oppressed classes, backward classes, minorities, the marginalized, farmers, labourers, youths, children, senior citizens, gender and sexual minorities, persons with disabilities, persons in pregnancy, incapacitated or helpless, backward region and indigent Khas Arya. (4) No discrimination shall be made on the ground of gender with regard to remuneration and social security for the same work. (5) All offspring shall have the equal right to the ancestral property without discrimination on the ground of gender.
Comment	The 1990 Constitution prohibited discrimination on the grounds of religion, race, sex, caste, ethnicity, or ideological conviction. The Interim Constitution of 2007 expanded this list to also include gender, origin and language. The 2015 Constitution went even further and added origin, physical condition, condition of health, marital status, pregnancy, and economic condition to the list. Similarly, the 1990 Constitution laid down grounds for making special provisions for different groups. The Interim Constitution added a few more groups to the list and the 2015 Constitution, even more. The 2015 Constitution also ensured gender parity at the workplace and property rights.
Theme	Untouchability
1962 Constitution	NA
1990 Constitution	NA
2007 Interim Constitution	Article 14. Right against untouchability and caste/ethnic discrimination (1) No person shall, on the ground of caste, descent, community or occupation, be subject to caste-based discrimination and untouchability in any form. Such a discriminatory act shall be liable to punishment and the victim shall be entitled to compensation as provided by the law. (2) No person shall, on the ground of caste or ethnicity, be deprived of the use of public services, conveniences or utilities, or be denied access to any public place, or public religious places, or be prevented from performing any religious act. (3) No person belonging to any particular caste or ethnicity shall, in relation to the production or making available of any goods, services or conveniences, be prevented from purchasing or acquiring such goods, services or conveniences; and no such goods, services or conveniences shall be sold or distributed only to members of a particular caste or ethnicity. (4) No one shall be allowed to purport to demonstrate superiority or inferiority of any person or a group of persons belonging to any caste, ethnicity or origin; or to justify social discrimination on the basis of caste and ethnicity; or to disseminate ideas based on caste superiority or hatred; or to encourage caste discrimination in any form.

2015 Constitution	<p>Article 24. Right against untouchability and discrimination</p> <p>(1) No person shall be subjected to any form of untouchability or discrimination in any private and public places on grounds of his or her origin, caste, ethnicity, community, profession, occupation or physical condition.</p> <p>(2) In producing or distributing any goods, services or facilities, no person belonging to any particular caste or ethnicity shall be prevented from purchasing or acquiring such goods, services or facilities nor shall such goods, services or facilities be sold, distributed or provided only to the persons belonging to any particular caste or ethnicity. (3) No act purporting to demonstrate any person or community as superior or inferior on grounds of origin, caste, ethnicity or physical condition or justifying social discrimination on grounds of caste, ethnicity or untouchability or propagating ideology based on untouchability and caste-based superiority or hatred or encouraging caste-based discrimination in any manner whatsoever shall be allowed.</p> <p>(4) No discrimination in any form shall be allowed at a workplace with or without making untouchability on the ground of caste.</p> <p>(5) Any act of untouchability and discrimination in any form committed in contravention of this Article shall be punishable by law as a severe social offence, and the victim of such act shall have the right to obtain compensation in accordance with law.</p>
Comment	The Interim Constitution of 2007 first introduced the right against untouchability and caste/ethnic discrimination. While the article was rephrased to right against untouchability and discrimination in the 2015 Constitution, it also placed a prohibition on the practice of any form of untouchability or discrimination in any private and public place on grounds other than caste and ethnicity as well.
Theme	Cultural and Educational Right
1962 Constitution	NA
1990 Constitution	<p>Article 18. Cultural and educational right</p> <p>(1) Each community residing within the Kingdom of Nepal shall have the right to preserve and promote its language, script and culture.</p>
1990 Constitution	<p>(2) Each community shall have the right to operate schools up to the primary level in its own mother tongue for imparting education to its children.</p>
2007 Interim Constitution	<p>Article 17. Education and cultural rights</p> <p>(1) Each community shall have the right to receive basic education in their mother tongue as provided for in the law.</p> <p>(2) Every citizen shall have the right to receive free education from the State up to secondary level as provided for in the law.</p>

2007 Interim Constitution	(3) Each community residing in Nepal has the right to preserve and promote its language, script, culture, cultural civilisation and heritage.	
2015 Constitution	Article 31. Right relating to education	(1) Every citizen shall have the right of access to basic education. (2) Every citizen shall have the right to get compulsory and free education up to the basic level and free education up to the secondary level from the State. (3) The citizens with disabilities and the economically indigent citizens shall have the right to get free higher education in accordance with law. (4) The 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, in accordance with law. (5) Every Nepali 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...
	Article 32. Right to language and culture	(1) Every person and community shall have the right to use their languages. (2) Every person and community shall have the right to participate in the cultural life of their communities. (3) Every Nepali community residing in Nepal shall have the right to preserve and promote its language, script, culture, cultural civilization and heritage.
Comment	The right to preserve and promote the languages, scripts and cultures of different social groups, including providing basic education, introduced by the 1990 Constitution was expanded further by the Interim and the 2015.	
Theme	Social Justice	
1962 Constitution	NA	
1990 Constitution	NA	
2007 Interim Constitution	Article 21. Right to social justice	Women, Dalits, Adibasi Janajatis, Madhesi communities, oppressed group, the poor farmers and labourers, who are economically, socially or educationally backward, shall have the right to participate in state structures on the basis of principles of proportional inclusion.

2015 Constitution	Article 42. Right to social justice (1) The economically, socially or educationally backward women, Dalit, Adivasi Janajati, Madhesi, Tharu, Muslims, backward classes, minorities, marginalized communities, 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 bodies of the State on the basis of principle of proportional inclusion.	
Comment	The right to social justice introduced by the Interim Constitution guaranteed the right to proportionate participation in state structures to marginalised groups. The 2015 Constitution expanded the number of groups entitled to this consideration.	
Theme	Responsibilities of the State	
1962 Constitution	NA	
1990 Constitution	NA	
2007 Interim Constitution	Article 33. Responsibilities of the State The State shall have the following responsibilities: (d) to carry out an inclusive, democratic and progressive restructuring of the State by eliminating its existing form of centralised and unitary structure in order to address the problems related to women, Dalits, Adivasi Janajati, Madhesi, oppressed and minority community and other disadvantaged groups, by eliminating class, caste, language, gender, culture, religion and regional discriminations. (d1) to enable Madhesi, Dalits, indigenous ethnic groups, women, labourers, peasants, the physically impaired, disadvantaged classes and disadvantaged regions to participate in all organs of the State structure on the basis of proportional inclusion.	
2015 Constitution	NA	
Comment	The Interim Constitution laid the grounds for restructuring the state to address problems related to marginalised groups in terms of ensuring their proportionate representation in organs of the State. The 2015 Constitution is silent in this regard.	
Theme	Directive Principles	
1962 Constitution	NA	
1990 Constitution	NA	

2007 Interim Constitution	Article 34. Directive principles of the State (4) The fundamental economic objective of the State must be to give priority and protection to making the national economy independent, self-reliant and progressive by preventing the concentration of available resources and means of the country within a limited section of society, by making arrangements for equitable distribution of economic gains based on social justice, by making such provision as will prevent economic inequality and exploitation of any caste, gender, ethnicity, origin or individuals...
2015 Constitution	Article 50. Directive principles The political objective of the State shall be to establish a public welfare system of governance, by establishing a just system in all aspects of the national life through the rule of law, values and norms of fundamental rights and human rights, gender equality, proportional inclusion, participation and social justice...while at the same time maintaining the relations between the Federal Units on the basis of cooperative federalism and incorporating the principle of proportional participation in the system of governance on the basis of local autonomy and decentralization. The social and cultural objective of the State shall be to build a civilized and egalitarian society by eliminating all forms of discrimination, exploitation and injustice on the grounds of religion, culture, tradition, usage, custom, practice or on any other similar grounds...and to consolidate national unity by maintaining social cohesion, solidarity and harmony, while recognising cultural diversity.
Comment	The Directive Principles in the Interim and 2015 Constitutions stipulated that the State shall prevent economic inequality and exploitation on any grounds. The 2015 Constitution also mentioned that the political objective of the state shall be to establish a just system through gender equality, proportional inclusion, participation and social justice, among others, while also protecting the equality of people. Further, the 2015 Constitution stipulated that the social and cultural objective of the state shall be to build a civilised and egalitarian society by eliminating all forms of discrimination, exploitation and injustice on the grounds of religion, culture, tradition, usage, custom, practice or on any other similar grounds while also recognising cultural diversity.
Theme	State Policies
1962 Constitution	NA
1990 Constitution	Article 26 State policies (2) The State shall, while maintaining the cultural diversity of the country, pursue a policy of strengthening the national

1990 Constitution	<p>unity by promoting healthy and cordial social relations amongst the various religions, castes, ethnicities, religious communities and linguistic groups, and by helping in the promotion of their languages, literatures, scripts, arts and cultures</p> <p>(10) The State shall pursue a policy which will help promote the interests of the economically and socially backward groups and communities by making special provisions with regard to their education, health, and employment.</p>
2007 Interim Constitution	<p>Article 35. State policies</p> <p>(3) The State shall pursue a policy of strengthening the unity of the nation by maintaining the cultural diversity of the country through the promotion of healthy and harmonious social relations, on the basis of equality and coexistence, among people of various religions, cultures, castes and ethnicities, communities, sects, origins, languages and linguistic groups, and by assisting in the equal promotion of their languages, literatures, scripts, arts and cultures</p> <p>(10) The State shall pursue a policy which will help uplift the economically and socially backward Adivasi Janajatis, Madhesis, Dalits as well as marginalised communities, and workers and farmers living below the poverty line by making provisions by making reservations in education, health, housing, food security and employment for a certain period of time.</p> <p>(14) The State shall pursue a policy of making special provision on the basis of positive discrimination for the minorities, landless, squatters, bonded labourers, persons with disabilities, backward communities and sections, and the victims of conflict, including women, Dalits, Adivasi Janajati, Madhesis and Muslims.</p>
2015 Constitution	<p>Article 51. Policies of the State</p> <p>a. Policies regarding national unity and national security:</p> <p>(2) Promote the national unity while developing mutual cooperative relations between the Federal Units by maintaining mutual cohesion, harmony and solidarity between various castes, ethnicities, religions, languages, cultures and communities,</p> <p>c. Policies regarding to social and cultural transformation</p> <p>(5) Put to end all forms of discrimination, inequality, exploitation and injustice in the name of religion, custom, usage, practice and tradition existing in the society,</p> <p>(6) to protect and develop languages, scripts, culture, literature, arts, motion pictures and heritages of various castes, ethnicities, and communities on the basis of equality and co-existence, while maintaining the cultural diversity of the country,</p> <p>(7) to pursue a multi-lingual policy.</p> <p>j. Policies relating to social justice and inclusion</p> <p>(1) to keep on making appropriate arrangements for the livelihoods of the helpless single women, while according</p>

2015 Constitution	<p>priority to them in employment on the basis of skills, competency and qualification,</p> <p>(2) to make self-dependent women who are vulnerable, subjected to social and family exclusion and victims of violence self-reliant by making their rehabilitation, protection and empowerment,</p> <p>(3) to ensure enjoyment of requisite services and facilities at the reproductive stage,</p> <p>(4) to evaluate economically the work and contribution such as maintenance of children and care of families,</p> <p>(5) to take into consideration primarily of the best interests of the child,</p> <p>(8) to make the Adivasi Janajatis participate in decisions concerning that community by making special provisions for opportunities and benefits in order to ensure the right of these nationalities to live with dignity, along with their identity, and protect and promote traditional knowledge, skill, culture, social tradition and experience of the Adivasi Janajatis and local communities,</p> <p>(9) to make special provisions for opportunities and benefits to minority communities to enjoy social and cultural rights, with maintaining their identity,</p> <p>(10) to make special provisions for equal distribution of economic, social and cultural opportunities and benefits to the Madhesi community, Muslims and backward class, and for opportunities and benefits to the indigent citizens within such communities for their protection, upliftment, empowerment and development,</p> <p>(11) to make special provisions for opportunities and benefits for the protection, upliftment, empowerment and development of the citizens of the oppressed and backward regions and for the fulfilment of their basic needs,</p> <p>(12) to accord priority to the indigent within all sexes, regions and communities in the provision of social security and social justice.</p>
Comment	<p>The 1990 Constitution first introduced state policies aimed at protecting the languages, literatures, scripts, arts and cultures of different social groups. The Interim Constitution added special provisions for marginalised groups in the form of reservations. The 2015 Constitution has an even more expansive list relating to social justice and inclusion, while also including previously neglected groups among the intended beneficiaries of these policies.</p>
Theme	Structure of the State
1962 Constitution	NA
1990 Constitution	NA
2007 Interim Constitution	<p>Article 138. Progressive restructuring of the State</p> <p>(1) To bring an end to discrimination based on class, caste, language, gender, culture, religion and region by eliminating</p>

2007 Interim Constitution	the centralised and unitary form of the State, the State shall be made inclusive and restructured into a progressive, Democratic Federal System.
2015 Constitution	<p>Article 56. Structure of State</p> <p>(6) The federal, provincial and local levels shall protect Nepal's freedom, sovereignty, territorial integrity, independence, national interest, overall development, multi-party, competitive, democratic, republican, federal system of governance, human rights and fundamental rights, rule of law, separation of powers and check and balance, egalitarian society based on pluralism and equality, inclusive representation and identity.</p>
Comment	The Interim Constitution provided for the then future restructuring of the state into an inclusive federal system while the 2015 Constitution provides for all three tiers of government to protect those principles, among others.
Theme	Political Parties
1962 Constitution	NA
1990 Constitution	<p>Article 112. Prohibition on the imposition of restrictions on political organisations or parties</p> <p>(3) The Election Commission shall withhold recognition from any political organisation or any party formed...on the basis of religion, community, caste, ethnicity or region.</p> <p>Article 113. Registration required for securing recognition for the purpose of contesting elections as a political organisation or party</p> <p>(3) The Election Commission shall not register any political organisation or party if any Nepali citizen is discriminated against in becoming a member on the basis of religion, caste, ethnicity, language or sex or if the name, objectives, insignia or flag is of such a nature that it is religious or communal or tends to fragment the country.</p> <p>Article 114. Women candidates</p> <p>For the purposes of elections to the House of Representatives, at least five per cent of the total number of candidates contesting an election from any organization or party must be women candidates.</p>
2007 Interim Constitution	<p>Article 142. Registration required for securing recognition for the purpose of contesting elections as a political party</p> <p>(3c) There must be an inclusive provision that the executive committees at various levels the executive committee at various levels include the members from women, Dalits and the excluded and oppressed sectors;</p> <p>(4) The Election Commission shall not register any political party if any Nepali citizen is discriminated against in becoming a member of the political party on the basis of religion, caste, ethnicity, language or gender or if the name, objectives,</p>

2007 Interim Constitution	symbol or flag of such political party is of a character that may disturb the country's religious or communal unity or is divisive in character, or if the constitution or rules of such party have the objective of protecting and promoting a partyless or single party system of government.
2015 Constitution	Article 269. Constitution, registration and operation of political parties (4c) 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.
Comment	The 1990 Constitution prohibited the registration of political parties that discriminates in providing membership; is of religious or communal nature; or seeks to 'fragment the country'. The Interim Constitution also prohibits the registration of political parties along similar grounds. This provision, however, has been removed from the 2015 Constitution. The 1990 Constitution had a requirement of a small proportion of candidates has to be women, a provision that became moot with the mixed electoral system adopted under the Interim and 2015 Constitutions. The latter two also include the clause that the executive committees of the political parties have to be representative of the country's social diversity.
Theme	Nepal Army
1962 Constitution	NA
1990 Constitution	NA
2007 Interim Constitution	Article 144. Formation of the Nepal Army (4 A) In order to give the Nepal Army a national character and make it inclusive, enlisting of Madhesi, indigenous ethnic groups, Dalits, women, and people from backward regions into the armed forces on the basis of the principles of equality and inclusiveness shall be ensured by law.
2015 Constitution	Article 267. Provisions relating to the Nepal Army (3) Entry of women, Dalit, Adibasi Janajati, Khas Arya, Madhesi, Tharu, backward classes and backward region citizens into the Nepal Army shall, on the basis of principles of equality and inclusion, be ensured by the Federal law.
Comment	The Interim Constitution first provided for enlisting Madhesi, Adibasi Janajati, Dalits, women, and people from backward regions into the armed forces. The 2015 Constitution has expanded this list to include the Khas Arya, Madhesi, Tharu, backward classes and those from backward regions.

Theme	Constitutional Commissions	
1962 Constitution	NA	
1990 Constitution	NA	
2007 Interim Constitution	Article 154. Formation of Commissions The Government of Nepal may form necessary commissions to safeguard and promote the rights and interests of different sectors of the country including women, Dalits, Adivasi Janajatis, Madhesi, disabled, labourers or farmers. The provisions for the formation, functions, duties and powers of such commissions shall be as determined by the law.	
2015 Constitution	Article 252. National Women Commission (1) There shall be a National Women Commission of Nepal.... Article 255. National Dalit Commission (1) There shall be a National Dalit Commission of Nepal... Article 258. National Inclusion Commission (1) There shall be a National Inclusion Commission of Nepal... Article 261. Indigenous Nationalities Commission (1) There shall be a Adivasi Janajatis Commission of Nepal...	
2015 Constitution	Article 262. Madhesi Commission (1) There shall be a Madhesi Commission of Nepal... Article 263. Tharu Commission (1) There shall be a Tharu Commission of Nepal,... Article 264. Muslim Commission (1) There shall be a Muslim Commission of Nepal...	
Comment	While the Interim Constitution provided for the formation of 'necessary commissions' to protect the rights of various groups, the 2015 Constitution provisioned for commissions to protect the interest of women, Dalits, Adivasi Janajati, Madhesi, Tharus, Muslims, as well as a host of others, including minorities and the poor among the Khas Arya.	

Annex 2

Representation in National Legislatures, 1991 to 2017

(per cent)

Group	House of Representatives (pre-2006)				Constituent Assembly		Federal Parliament		Share of National Population (2011)
	1991	1994	1999		2008	2013	House of Representatives (2017)	National Assembly (2018)	
Hill Castes (Khas Arya)	53.7	62.4	58.0		33.4	41.2	42.5	58.9	31.3
Hill and Mountain Janajatis	25.4	18.0	21.5		26.6	23.4			27.2
Tarai Janajatis	0.5	-	0.5		2.3	2.3	30.9	17.9	35.9
Tharu	8.3	6.8	3.9		6.0	7.0			2.1
Hill Dalits	0.5	-	-		5.8	4.5	6.5	8.9	6.6
Madhesi Dalits	-	-	-		2.7	2.0	0.4	3.6	8.6
Madhesi Castes	9.3	10.2	14.1		20.3	16.4	16.4	8.8	4.7
Religious groups (Muslims and Sikhs)	2.4	2.4	2.0		2.8	3.2	3.3	-	15
Total	100	100	100		100	100	100	100	4.5
Women	3.4	3.4	5.9		32.8	29.5	32.7	37.4	100

Source: Volla (2015) and (2020), Election Commission (2017) and Pokharel and Pradhan (2020).

Annex 3

List of Laws Consulted

Laws Cited

1. Interim Government of Nepal Act, 1951
2. Muluki Ain, 1963
3. Lands Act, 1964
4. The Protection and Welfare of Disabled Persons Act, 1982
5. Treaty Act, 1990
6. Civil Service Act, 1991
7. Children's Act 1992
8. Education Act, 1992
9. Social Welfare Act, 1992
10. Immigration Rules, 1994
11. Protection and Welfare of the Disabled Persons Rules, 1994
12. Health Service Act, 1997
13. Civil Service (First Amendment) Act, 1998
14. Local Self-Governance Act, 1999
15. Teachers Service Commission Rules, 2000
16. National Foundation for Development of Indigenous Nationalities Act, 2002
17. Senior Citizens Policy, 2002
18. Terrorist and Disruptive Acts (Prevention and Punishment) Act, 2002
19. Scholarship Regulations, 2003
20. Act for Amending Some Nepal Laws for Maintaining Gender Equality, 2006
21. National Action Plan for Persons with Disability, 2006
22. Nepal Citizenship Act, 2006
23. Senior Citizens Act, 2006
24. Some Nepal Acts Amendment Act, 2006
25. Civil Service Act, 2007
26. Election to the Members of the Constituent Assembly Act, 2007
27. Foreign Employment Act, 2007
28. Interim Constitution of Nepal, 2007
29. Community Forest Users' Committees Guidelines, 2008
30. Constituent Assembly Rules, 2008
31. Guidelines for the Abolition of Chhaupadi Practice, 2008
32. Domestic Violence (Offence and Punishment) Act, 2009

33. Guidelines on Relief, Compensation and Financial Assistance to the Citizen, 2009
34. Ordinance to Amend Some Nepal Acts to Making Public Services Inclusive, 2009
35. Scholarship Rules, 2009
36. Guidelines for the formation of users' committees for local projects under district or local bodies, 2010
37. Multilingual Education Implementation Guidelines, 2010
38. Caste Based Discrimination and Untouchability (Offence and Punishment) Act, 2011
39. Bill Made to Amend the Nepal Act to Make Some Public Services More Inclusive, 2012
40. Police Act, 2012
41. Army Service Regulations, 2013
42. Constituent Assembly Rules, 2014
43. Disaster Risk Reduction and Management Act, 2014
44. Police Service Regulations, 2014
45. Armed Police Force Rules, 2015
46. Constitution of Nepal, 2015
47. National Reconstruction and Rehabilitation Policy (NRRP), 2015
48. Sexual Harassment at Workplace (Protection) Act, 2015
49. Witchcraft Related Accusations (Crime and Punishment) Act, 2015
50. Education Act (Eighth Amendment), 2016
51. Act Relating to the Rights of Persons with Disabilities, 2017
52. Election Commission Act, 2017
53. Election of Members of Provincial Assembly (First Amendment) Rules, 2017
54. House of Representatives Election Act, 2017
55. Labour Act, 2017
56. Language Commission Act, 2017
57. Local Government Operations Act, 2017
58. Local Level Elections Act, 2017
59. National Civil (Code) Act, 2017
60. National Penal (Code) Act, 2017
61. Political Parties Act, 2017
62. Provincial Assembly Member Election Act, 2017
63. Remuneration and Facilities of Officials and Members of Federal Parliament Act, 2017
64. Provincial Assembly Elections Act, 2017

65. Act Relating to Children, 2018
66. Civil Service Bill, 2018
67. Compulsory and Free Education Act, 2018
68. Consumer Protection Act, 2018
69. Crime Victims Protection Act, 2018
70. Federal Parliament Joint Meeting and Joint Committee (Conduct of Business) Rules, 2018
71. Privacy Act, 2018
72. Public Health Service Act, 2018
73. Right to Employment Act, 2018
74. Right to Food and Food Sovereignty Act, 2018
75. Right to Housing Act, 2018
76. Safe Motherhood and Reproductive Health Rights Act, 2018
77. Social Security Act, 2018
78. Environment Protection Act, 2019
79. Some Nepal Acts Amendment Act, 2019

Case Laws Cited

1. Man Bahadur Biswakarma v. Ministry of Law Justice and Parliamentary Affairs, NKP 2049, Issue 12, Decision No 4670 (1993).
2. Yagyanidhi Dahal et al v. Ministry of Local Development, Dhanusha District Development Committee, Kathmandu Metropolitan City and Rajbiraj Municipality, Writ No. 2931. Date of decision: 1 June 1999.
3. Reshma Thapa et al v. His Majesty's Government, NKP 2062, Issue 2, Decision No 7498 (2004).
4. Pradyosh Chhetri et al v. His Majesty's Government, Office of the Prime Minister and Council of Ministers, NKP 2061, Issue 7, Decision No 7412 (2004).
5. Dil Bahadur BK v. His Majesty's Government, Office of the Prime Minister and Council of Ministers, NKP 2061, Issue 4, Decision No 7531 (2004).
6. Tek Tamrakar for Pro Public v. His Majesty's Government, Cabinet Secretariat et al, Writ No 121. Date of decision: 15 September 2005.
7. Rupak Dhakal et al v. Office of the Prime Minister and Council of Ministers et al, NKP 2063, Issue 4, Decision No 7678 (2006).
8. Sunil Babu Pant et al v. Government of Nepal, NKP 2064, Issue 4, Decision No 7958 (2007).

9. Sudarshan Subedi v. Government of Nepal, NKP 2066, Issue 1, Decision No 8053 (2008).
10. Achyut Prasad Kharel v. Office of the Prime Minister and Council of Ministers et al, Writ No. 3352, Date of decision: 4 August 2008.
11. Lakshmi Devi Dhikta v. Government of Nepal, Office of the Prime Minister and the Council of Ministers et al, Writ No. WO-0757, Decision No. 8464 (20 May 2009).
12. Rajani Shahi v. National Women's Commission, NKP 2070, Issue 1, Decision No 8945 (2012).
13. Suman Panta v. Ministry of Home Affairs et al, NKP 2074, Issue 12, Decision No 9921 (2017).
14. Vinay Kumar Panjiyar v. Medical Education Commission, Office of the Prime Minister and Council of Ministers, and Ministry of Health and Population, Writ No. 077-WO-0237, Date of decision: 16 December 2020.

Laws Reviewed

2010

1. Passport Rules, 2010
2. Sexual Violence Prevention Fund Operation Rules, 2010

2011

1. Act to Amend Some Nepali Acts Related to Administration of Justice, 2011
2. Advance Expenditure Act, 2011
3. Armed Police Regulations, 2011
4. Civil Service (Ninth Amendment) Rules, 2011
5. Constituent Assembly (Second Amendment) Rules, 2011
6. Constitutional Council Rules of Procedure, 2011
7. Foreign Employment (First Amendment) Rules, 2011
8. Interim Constitution of Nepal (Eleventh Amendment), 2011
9. Interim Constitution of Nepal (Ninth Amendment), 2011
10. Interim Constitution of Nepal (Tenth Amendment), 2011
11. Investment Board Act, 2011
12. Karnali Academy of Health Sciences Act, 2011
13. Mediation Act, 2011
14. Nepal Law Practitioners' Council (First Amendment) Act, 2011
15. Prevention of Money Laundering (First Amendment) Act, 2011
16. Private Firm Registration (Eighth Amendment) Rules, 2011

17. Public Procurement (Third Amendment) Rules, 2011
18. Public Prosecutors (First Amendment) Rules, 2011
19. Rules of Procedure of the Constituent Assembly (Legislature-Parliament) (First Amendment), 2011
20. Rules Related to Prohibition of Kamaiya Labour, 2011
21. Supreme Court (Twelfth Amendment) Rules, 2011
22. Tobacco Products (Control and Regulation) Act, 2011
23. Value Added Tax (Thirteenth Amendment) Rules, 2011
24. Vehicle and Transportation Management (Fourth Amendment) Rules, 2011
25. Waste Management Act, 2011

2012

1. Administration and Management of Special Group Employees (First Amendment) Rules, 2013
2. Civil Servants Contribution Fund (Operation) Rules, 2012
3. Civil Service (Tenth Amendment) Rules, 2012
4. Film (Production, Performance and Distribution) (Fifth Amendment) Rules, 2012
5. Foreign Employment Tribunal Rules, 2012
6. Government of Nepal Work Division Rules, 2012
7. Higher Secondary Education (First Amendment) Rules, 2012
8. Investment Board Rules, 2012
9. Kathmandu Valley Development Authority Rules, 2012
10. National Human Rights Commission Act, 2012
11. Nepal Health Practitioners' Council (First Amendment) Rules, 2012
12. Nepal Health Service (Third Amendment) Rules, 2012
13. Regulations on the safety of health workers and health institutions, 2012
14. Scholarship (Fifth Amendment) Rules, 2012
15. Teacher Service Commission (Seventh Amendment) Rules, 2012
16. Voter Registration Rules,

2013

1. Code of Conduct for Constituent Assembly Election, 2013
2. Constituent Assembly Member Election Regulation, 2013
3. Education (Seventh Amendment) Rules, 2013
4. Emergency Child Rehabilitation Fund Operation (First Amendment) Rules, 2013

5. Environment Protection (Second Amendment) Rules, 2013
6. Gender Based Violence Prevention Fund Operation (First Amendment) Rules, 2013
7. Nalsing Gad Hydropower Project Development Committee (Formation) (First Amendment) Order, 2013
8. Nepal Judicial Service (Formation, Group and Divisional Appointment Transfer and Promotion

2014

1. Act Regarding the Duties and Rights of the Constitutional Council, 2014
2. Amendment of the Commission for Investigation, Verification and Reconciliation of Disappeared Persons Act, 2014
3. Appropriations Act, 2014
4. Civil Service (Third Amendment) Act, 2014
5. Mutual Legal Aid Act, 2014
6. Nepal Health Service (Fourth Amendment) Act, 2014
7. Public Debt Act, 2014

2016

1. Administration of Justice Act, 2016
2. Nepal Open University Act, 2016
3. Pokhara Academy of Health Sciences Act, 2016

2017

1. Act on Remuneration, Facilities and Other Conditions of Service of Chief Justice and Supreme Court Judges, 2017
2. Amendment, Integration, Adjustment and Repeal of Some Nepali Laws Act, 2017
3. Banking and Financial Institutions Act, 2017
4. Barter Market Act, 2017
5. Bonus (Fifth Amendment) Act, 2017
6. Companies (First Amendment) Act, 2017
7. Constituency Determination Act, 2017
8. Contribution Based Social Security Act, 2017
9. Control of International Trade in Endangered Species of Wild Fauna and Flora First Amendment Act, 2017
10. Cooperatives Act, 2017
11. Criminal Offences (Sentencing and Enforcement) Act, 2017

12. Direct Sale of Goods (Management and Regulation) Act, 2017
13. Disaster Risk Reduction and Management Act, 2017
14. Education Act (Ninth Amendment), 2017
15. Electricity Regulatory Commission Act, 2017
16. Employee Adjustment Act, 2017
17. Federal Contingency Fund Act, 2017
18. Health Insurance Act, 2017
19. Intergovernmental Finance Management Act, 2017
20. Local Level Election (First Amendment) Act, 2017
21. Madhesi Commission Act, 2017
22. Muluki Civil Code, 2017
23. Muslim Commission Act, 2017
24. National Civil Procedure (Code) Act, 2017
25. National Commission for Women Act, 2017
26. National Criminal Procedure (Code), 2017
27. National Dalit Commission Act, 2017
28. National Inclusive Commission Act, 2017
29. National Natural Resources and Finance Commission Act, 2017
30. National Parks and Wildlife Conservation (Fifth Amendment) Act, 2017
31. Political Parties (First Amendment) Act, 2017
32. Presidential and Vice-Presidential Election Act, 2017
33. Rajarshijanak University Act, 2017
34. Rapti Institute of Health Sciences Act, 2017
35. Remuneration and Facilities of the President and Vice-President Act, 2017
36. Remuneration, Facilities and Other Conditions of Service of High Court and District Court Judges Act, 2017
37. State Assembly Member Election Act, 2017
38. State Head's Remuneration and Facilities Act, 2017
39. Tharu Commission Act, 2017
40. Tribal Commission Act, 2017
41. Village and Municipality Ward Number Determination Act, 2017
42. Voter Registration Act, 2017

2018

1. Constitutional Council Procedure (Second Amendment) Rules, 2018
2. Consumer Protection Act, 2018
3. Financial Act, 2018

4. Lands Act (Seventh Amendment), 2018
5. Province Public Service Commission Act, 2018
6. Public Security (Third Amendment) Act, 2018
7. Right to Employment Act, 2018
8. Right to Food and Food Sovereignty Act, 2018

2019

1. Act to Amend Some Nepal Acts, 2019
2. Amendment of Some Nepal Acts to Make the Constitution of Nepal Compatible Act, 2019
3. Audit Act, 2019
4. Control of International Trade in Endangered Species of Wild Fauna and Flora First Amendment Act (First Amendment), 2019
5. Environment Protection (First Amendment) Act, 2019
6. Environmental Protection Act, 2019
7. Financial Act, 2019
8. Financial Transactions and Financial Accountability Act, 2019
9. Foreign Investment and Technology Transfer Act, 2019
10. Forests Act, 2019
11. Land Use Act, 2019
12. Loans and Guarantees (Twenty-third Amendment) Act, 2019
13. National Medical Education Act, 2019
14. Passport Act, 2019
15. Payment and Disbursement Act, 2019
16. Pesticide Management Act, 2019
17. Public Private Partnership and Investment Act, 2019
18. Public Private Partnership and Investment Act, 2019
19. Retirement Fund Act, 2019
20. Safeguards, Anti-Dumping and Countervailing Act, 2019
21. Special Economic Zone (First Amendment) Act, 2019
22. State Public Service Commission Base and Standards Determination Act, 2019

2020

1. Appropriation Act, 2020
2. Industrial Enterprises (First Amendment) Act, 2020
3. Land (Eighth Amendment) Act, 2020
4. National Identity Card and Registration Act, 2020

5. Nepal Police and State Police (Operation, Supervision and Coordination) Act, 2020
6. Police Staff Adjustment Act, 2020
7. Public Debt Act, 2020
8. Revenue Leakage (Research and Control) (First Amendment) Act, 2020

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Bandita Sijapati served as the Research Director at the Centre for the Study of Labour and Mobility, Social Science Baha, from 2010 to 2017. Among others, she co-authored the World Bank's flagship report on gender and social inclusion in Nepal, UNDP's study on the challenges faced by persons

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Sudeshna Thapa is a human rights lawyer who has worked as research assistant to the UN Special Rapporteur on Human Rights and Toxics, involved, among others, in research related to the human rights implications of exposure to toxic and hazardous substances on particular groups, including workers and indigenous communities. She is currently a Research Coordinator at Social Science Baha, where she is primarily involved in research and writing on a range of issues pertaining to Nepali labour migrants. Her research interests include labour, mobility, and minority rights. She writes regularly on a range of socio-legal issues including minority rights and social inclusion. She holds an LLM in International Human Rights Law from Lund University, Sweden.

From Exclusion to Inclusion is a detailed account of the evolution of Nepal's legal regime in the aftermath of the People's Movement II and the end of the Maoist insurgency in 2006. It traces the changes introduced in the law to achieve the overall objective of greater political and social inclusion of the hitherto-marginalised groups. The focus initially is on the Interim Constitution of 2007 before shifting to the deliberations in the two Constituent Assemblies and the promulgation of the 2015 Constitution followed by the enactment or amendment of a number of laws for a federal Nepal. The book concludes by outlining the challenges remaining to be addressed in order to realise the goal of a fully inclusive Nepal.

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