

A Treatise on the Constitution of Nepal 2015

Bipin Adhikari
Editor



Kathmandu University School of Law

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Dedication

Dedicated to all political leaders and activists who strove
for due process, rule of law and constitutionalism in
Nepal since the middle of the 20th Century.

Foreword and Acknowledgements

Organising an international academic conference and preparing its proceedings (including commentaries and opinions from national and international participants) present a two-fold challenge. We decided to take up this challenge with the organisation of the Conference on the Constitution of Nepal, held in Kathmandu on August 11-13, 2018. And now, we present the report on the Conference in the form of this volume, *A Treatise on the Constitution of Nepal, 2015*. We believe this is the first complete review of the Constitution of Nepal, one of the newest constitutions in the world and representing the worldview, hopes, and desires of a country and people in the second decade of the 21st century.

The Conference was intended as an opportunity to discuss the content of the new Constitution as well as the challenges it had faced in its implementation in approximately three years since its promulgation. The Conference was indeed a timely initiative in view of its objective, intended output, and limited timeframe. The book builds upon papers submitted by national and international experts and practitioners and proceedings of live discussion sessions. Following the Conference, our team poured many hours into transforming the Conference materials into its present form.

As organisers, we had been enthusiastic about organising an academic conference on the new Constitution since it was promulgated in September 2015. Aside from bringing significant changes to national life, the Constitution was very distinct in its orientation. It was interpreted differently by various stakeholders; some supported it whole-heartedly, others decided to work with the enshrined compromises, and others still who remained critical of several provisions contained within the document. Many appreciated the historical events and large-scale efforts that led to the Constitution's promulgation and wanted it implemented. Additionally, there was significant international interest in Nepal's constitution-making process, and the Constitution clearly has had geopolitical implications as well. The promulgation of the Constitution even led to an economic blockade against the country. With its history embedded in the work of two Constituent Assemblies, the Constitution certainly required evaluation in an independent and impartial way.

Almost three years after the promulgation of the Constitution and its implementation, though it was slightly early for an exhaustive study, its evaluation could nevertheless be insightful for moving forward, especially in making recommendations for any "course correction" that may be required. As organisers, we believed that a thorough review of the Constitution in the Conference such as this could guide the future processes of constitution-building and informed decision-making by the Government of Nepal and other responsible actors. We believed that it could also assist the interpretation of the Constitution in the days ahead by the Government, the courts, academic circles, and civil society. Moreover, the Conference would also help spawn further studies and inform international parties of the efforts made by the Nepali polity to ensure the rule of law, inclusive democracy, human rights, due process, and social justice, among other goals.

We are indebted to many friends, colleagues, and national and international organisations for their invaluable efforts and commitment to the wide range of activities leading up to the Conference and the publication of this book. Following our decision to hold the Conference, as Convener and Co-convener, we formed an advisory group of five members comprised of Prof. Surya Dhungel, former member of National Human Rights Commission Mr. Sushil Pyakurel, Advocate Mr. Sunil Ranjan Singh, who was a member of the Commission for the Determination of the Number and Boundaries of

Village Bodies, Municipalities and Special, Protected or Autonomous Regions, Director of Social Science Baha Mr. Deepak Thapa, and Policy Analyst Dr. George Varughese. We drew a list of potential resource persons, national as well as international, and our preparatory activities commenced on mid-March 2018. We sincerely appreciate the cooperation and commitment of the members of the advisory group. We are also thankful that with their assistance and networks, we were able to assemble a group of distinguished experts from the country and from around the world; our experts' academic and professional contributions were immensely important for the proper review and interpretation of the 2015 Constitution. We are particularly grateful to the many framers of the Constitution and members of the Constituent Assemblies I and II, who wholeheartedly contributed their time and efforts to the Conference.

We express gratitude to the President of Nepal, Rt. Hon. Bidhya Devi Bhandari, for inaugurating the Conference and delivering her opening address to a sizeable gathering of approximately 250 people at the opening plenary. Her presence in the inaugural ceremony provided a much-needed gravitas to the event and helped to draw the attention of stakeholders towards the Conference's objectives. The keynote speech was delivered by an eminent Bangladeshi jurist and framer of Bangladesh's constitution, Dr. Kamal Hossain. At the inaugural session, we were privileged to hear from Mr. Subash Chandra Nemwang, Chair of the Constituent Assemblies I and II, as well as Dr. Ram Sharan Mahat, Nepali Congress leader and senior economist. The addresses at the inaugural session provided substantive information, opinions, and, consequently, a fillip for discussions scheduled over the next two days. We are grateful to each of them for their remarks.

We are also grateful to Rt. Hon. Prime Minister K. P. Sharma Oli for kindly gracing the closing ceremony and his concluding address. Prime Minister Oli referred to the constitutional advance achieved by Nepal as represented by the new Constitution and the commitment of his Government to its implementation, including through the introduction of necessary laws. As organisers, we look forward to the Government of Nepal prioritising implementation of the Constitution in its best spirit, continuing the process of constitution-building, and strengthening the foundations of representative, inclusive democracy through the delivery of justice, the rule of law, due process, and, most importantly, constitutionalism.

While we also facilitated some sessions, all the panels or thematic sessions held at the Conference were chaired and moderated very efficiently by national-level political leaders, scholars, and civil society stalwarts, each of whom were well-known for their status and contributions. They included Senior Advocate and former Speaker of the House of Representatives Mr. Daman Nath Dhungana, former Assistant Secretary General of the United Nations Dr. Kul Chandra Gautam, Supreme Court Justice Hon'ble Sapana Pradhan Malla, Member of Parliament and women's rights activist Dr. Binda Pandey, researcher and analyst Mr. Deepak Thapa, former Chief Commissioner of the Election Commission Mr. Neel Kantha Uprety, former minister and Nepali Congress leader Dr. Minendra Rijal, former Chief Justice Mr. Kalyan Shrestha, and former Chief Justice Mr. Kedar Nath Upadhyay. We are grateful to these distinguished chairpersons and facilitators.

We were delighted to have top-notch experts as panelists and commentators. They included cultural historian Dr. Ramesh Dhungel, constitutional expert Dr. Surendra Bhandari, Hon. Member of Parliament Mr. Rajendra K. Shrestha, former Supreme Court Justice Mr. Girish Chandra Lal, former member of the National Human Rights Commission Mr. Sushil Pyakurel, former Lieutenant General of the Nepal Army Mr. Bala Nanda Sharma, member of the Truth and Reconciliation Commission Dr. Madhabi Bhatta, political analyst Prof. Ranabir Sammadar (India), constitutional expert Dr. Bhimarjun Acharya, comparative constitutional law expert Prof. Guobin Zhu (Hong Kong, China), constitutional expert Dr. Menaka Guruswamy (India), Prof. Purna Man Shakya, former Assistant Inspector General of Police Mr. Surendra Shah, legal consultant Prof. Robert Taylor (United States), constitutional expert Dr. Bipin Adhikari, Senior Advocate Prashant Bhushan (India), expert of human rights and constitutional reform Dr. Mario Gomez (Sri Lanka), barrister Dr. Sara Hossain (Bangladesh), historian Dr. Pratyoush Onta, disability rights expert Dr. Birendra Raj Pokharel, lesbian, gay, bisexual, and transgender (LGBT) rights professional Ms. Manisha Dhakal, former member of the National Human Rights Commission Dr. Gouri Shanker Lal Das, civil rights expert Dr. Yam Bahadur Kisan, electoral expert Mr. Kåre Vollen (New Zealand), Attorney Ms. Nicole Töpferwien (Switzerland), member of the Election Commission Ms. Ila Sharma, United Nations Development Programme (UNDP) governance official Mr. Tek Tamata, Advocate Mr. Sunil Ranjan Singh, constitutional

expert Dr. Ram Krishna Timalsena, Senior Advocate Dr. Chandra Kanta Gyawali, federalism expert Prof. Rekha Saxena (India), Senior Advocate Shambhu Thapa, Advocate Lalit Basnet, Prof. Surya Dhungel, Prof. Kumar Innam, Member of Parliament Hon. Parshuram Meghi Gurung, political analyst and Constituent Assembly II Member Mr. Lal Babu Yadav. We take this opportunity to thank each of them for their precious contributions to the Conference.

The panelists and commentators also included Member of Parliament and former Minister Hon. Sher Bahadur Tamang, constitutional expert and Member of Parliament Hon. Radheshyam Adhikari, Chief Attorney of Province No 2 Mr. Dipendra Jha, constitutional expert Mr. Budhi Karki, Prof. and educationist Dr. Yubaraj Sangroula, Chief Minister of Gandaki Province Mr. Prithvi Subba Gurung, former secretary of the Government of Nepal Mr. Balananda Poudel, policy analyst Dr. George Varughese, political analyst Prof. Mahendra Lawoti, Mayor of Dhulikhel Municipality Mr. Ashok Byanju Shrestha, peace advisor Mr. Robert Bartel (Germany), journalist Mr. Mahabir Paudyal, constitutional expert Prof. Mara Malagodi (United Kingdom), gender activist Ms. Bharati Silwal, constitutional expert Prof. Mahendra Pal Singh (India), historian Mr. Thomas Robertson (United States), constitutional expert Prof. David Law (Hong Kong, China), constitutional expert Prof. Qianfan Zhang (China), economist and former head of the National Planning Commission Dr. Shanker Sharma, economist Prof. Sagar Raj Sharma, economist and former head of the National Planning Commissions. Dr. Swarnim Wagle, Member of Parliament Hon. Bimala Rai Paudyal, Economist Mr. Niraj Paudyal, economist and banker Mr. Radhes Pant, Advocate Dr. Dina Mani Pokharel, human rights expert Hari Phuyal, Prof. Linda Yanti Sulistiawwati (Indonesia), Prof. Ajeet N. Mathur (India), human rights activist Mr. Subodh Raj Pyakurel, senior lawyer and former Chief Commissioner for Investigation of Abuse of Authority Commission Mr. Surya Nath Upadhyay, political analyst Mr. Hari Sharma, Member of Constituent Assembly I Mr. Nilamber Acharya, sociologist Prof. Ganesh Man Gurung, and Senior Advocate and constitutional analyst Mr. Dinesh Tripathi. We take this opportunity to thank each of them for their precious contributions.

On the management side, the rapporteurs' responsibility was coordinated by Advocate Semanta Dahal and his team: Ms. Needika Adhikari, Mr. Satish Adhikari, Ms. Bijita Dhakal, Ms. Susma Giri,

Mr. Sushrey Nepal, Ms. Prakriti Kandel, Ms. Subekshya Pokhrel, and Ms. Richa Shrestha. They deserve special thanks. The volunteers from Kathmandu University School of Law Mr. Abhishek Jha, Mr. Aayush Koirala, Ms. Avishee Dahal, Ms. Aanya Mishra, Ms. Deepika Acharya, Ms. Kirit Mani Adhikari, Ms. Luna Niraula, Ms. Padma Rijal, Ms. Rashila Banjara, Ms. Sandhya Wagle, Ms. Shinja Niraula, and Ms. Shreya Nepal also provided valuable support. We thank Mr. Kiran Maharjan for the design scheme for the Conference as well as its literature and paperwork. The English-Nepali simultaneous interpretations during the Conference were provided by Mr. Manoj Karki and Mr. Alok Tumbahangphey for which we are thankful to them. We acknowledge the invaluable contribution of Ms. Shubhecha Tewari for her voluntary spirit before and after the Conference as well as for her central role as coordinator of the Conference Secretariat. We thank the team in the Secretariat, which included Mr. Yagya Thapa, Ms. Bidushi Adhikari, Mr. Prabin Paudel, and Ms. Sarada Gurung. Finally, we also thank Ms. Bidushi Adhikari for her editorial assistance.

This Conference was made possible through the moral and financial support of different agencies in Nepal and abroad. We want to note here the support and encouragement of the Government of Nepal from the very beginning. It would not have been possible to organise the Conference without the financial support of the Swiss Agency for Development and Cooperation (SDC), the Australian Aid (AusAid), the International Foundation for Electoral System (IFES), the Asia Foundation (TAF), the National Democratic Institute (NDI), and the Niti Foundation. On behalf of the Kathmandu University School of Law and the Southasia Trust, we thank these missions and organisations for the financial support and understanding of the value of an international conference to review, discuss, and debate the new Constitution of Nepal.

We would like to also thank all participants of the Conference, including its framers, legal and technical experts, representatives of the civil society organisations, bureaucrats, representatives from political parties, and members of Nepal's indigenous communities and other minority groups, whose contributions were invaluable in ensuring a productive conclave.

For an undertaking of this size and depth, inevitably there will have been lapses and omissions, for which we apologise to anyone so aggrieved. We worked diligently to ensure the quality of the deliberations as well as of this present book. We hope that the deliberations of the Conference, as carried in this volume will provide a useful compendium with which to study the Constitution of Nepal, 2015 and set the future course.

Bipin Adhikari, Convener / Kanak Mani Dixit, Co-convener
Conference on the Constitution of Nepal, 2015 (August 11-13, 2018)

September 2020, Kathmandu

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Part

1

**Significant Features
and Proceedings**

The Constitution of Nepal (2015)

A Review

■ **Bipin Adhikari**

I. Introduction

The Constitution of Nepal (2015) was promulgated on 20 September 2015 in the aftermath of a decade of internal conflict that ended with the signing of the Comprehensive Peace Accord (CPA) in November 2006, which was followed by the overthrow of the monarchy, takeover by a republican government, and a decade of political transition. The 2015 Constitution replaced the temporary Interim Constitution of 2007, promulgated after Nepal's transformation into a federal republic. It was adopted by the second Constituent Assembly (CA II), after the failure of the first Constituent Assembly (CA I) to meet the deadline for promulgation. This Constitution was adopted by a majority of the members of the CA II, with 507 out of 598 members voting in favour.¹ Following adoption of the document, the CA II converted itself into a parliament until the time a new parliament could be elected under the new provenance.² Compared to the earlier constitutions of Nepal, the 2015 Constitution is regarded as a progressive, people-centric document based on the modern principles of constitutionalism. It is a lengthy document by Nepal's historical standards, with 35 Parts, 208

¹See Adhikari, B. (2016), *Salient Features of the Constitution of Nepal*, Kathmandu: Nepal Consulting Lawyers Inc. (hereinafter, "Adhikari (2016)").

²Constitution of Nepal, 2015, Article 296

Articles and nine Schedules.³ Some of the length may be explained by the new features that the Constitution has incorporated to respond to the new democratic context, not only in Nepal but the world over. This paper highlights some of the significant features of the 2015 Constitution along with some critical perspectives on these features.⁴ In highlighting such areas, I conclude that despite comments from various quarters on different aspects of the Constitution, it is an outstanding departure in the context of Nepal's history and features many elements that, if effectively implemented, can fulfill the desire of the people of Nepal for prosperity and change.⁵

II. Significant Features of the 2015 Constitution

A. Preamble and Spirit

The Preamble of the 2015 Constitution sets the tone for the entire document. It pays homage to the historic people's movements and the conflict era, commits to end all forms of discrimination and oppression in Nepali society and promote diversity and inclusiveness, and seeks to further socialism based on democratic norms and values.⁶ These expressions did not exist in previous constitutions, save for the Interim Constitution of 2007.

There is determined positioning in the Preamble to end all forms of discrimination and oppression created by the feudal, autocratic, centralised, unitary system of governance that historically existed in the country. It seeks to protect and promote "social and cultural solidarity, tolerance and harmony, and unity in diversity by recognising the multi-ethnic, multi-lingual, multi-religious, multi-cultural and diverse regional characteristics, resolving to build an egalitarian society founded on proportional, inclusive and participatory principles in order to ensure economic equality, prosperity and social justice, by eliminating discrimination based on class, caste, region, language, religion and gender and all forms of caste-based untouchability...". The Constitution intends to secure these milestones through the federal, democratic, republican system of governance. In a constitutional system, in which the contents of the Preamble have been used to

³Constitution of Nepal, 2015, available at <http://www.lawcommission.gov.np/en/archives/category/documents/prevailing-law/constitution/constitution-of-nepal>.

⁴For the constitutional history of Nepal, see S Dhungel, B Adhikari, et al. (1998), *Commentary on the Nepalese Constitution*, Kathmandu: Delf (hereinafter, "Dhungel and Adhikari (1998)"), at pp. 14-47.

⁵See, generally, Adhikari (2016).

⁶Constitution of Nepal, 2015, Preamble.

interpret the Constitution, these expressions certainly show the very modern perspective of the Constitution and a departure from conventional standards.

Part One of the Constitution, the “Preliminary,” asserts that the Constitution “is the fundamental law of Nepal” and that “[a]ny law inconsistent with this Constitution shall, to the extent of such inconsistency, be void.”⁷ It further clarifies that “[i]t shall be the duty of every person to observe this Constitution.”⁸ Additionally, “[t]he sovereignty and state authority of Nepal shall be vested in the Nepali people.”⁹ The concept of the rule of law is also enshrined in the document and appears four times throughout, beginning with the Preamble, where it lists the rule of law as one of the democratic norms and values to which the state commits itself. As a principle, rule of law ensures the supremacy of the constitutional values in the system of law and preserves fundamental rights, justice, and security for all citizens as obligations of state power. Article 1 of the Constitution states the principle in clear terms.¹⁰

B. Fundamental Rights and Freedoms

Part Three of the Constitution, entitled “Fundamental Rights and Duties,” contains 33 Articles dealing with the rights and duties ensured for each Nepali citizen. They include both civil and political rights as well as economic, social and cultural rights. In this, the Constitution builds on past traditions, earlier Constitutions, the Interim Constitution of 2007, and recent human rights discourse. The essential right to life, liberties, equality and significant economic, social, and cultural rights incorporated in the Constitution are identified in the table below.

As the table above shows, fundamental rights include the rights to live with dignity (Article 16), to freedom (Article 17), to equality (Article 18), to communication (Article 19), to social justice (Article 20), against untouchability and discrimination (Article 24), to freedom of religion (Article 26), relating to education (Article 31), relating to health (Article 35), of women (Article 38) and of the *Dalit* (Article 40), the historically and traditionally deprived, so-called Hindu ‘Sanajat’

⁷Constitution of Nepal, 2015, Article 1 (1).

⁸Constitution of Nepal, 2015, Article 1 (2).

⁹Constitution of Nepal, 2015, Article 2.

¹⁰Constitution of Nepal, 2015, Article 1 (1) states: “This Constitution is the fundamental law of Nepal. Any law inconsistent with this Constitution shall, to the extent of such inconsistency, be void.”

Table 1: Right to Life, Liberties, Equality Rights, and Economic, Social and Cultural Rights in the 2015 Constitution

Right to Life	Liberties		Equality right	Economic, social and cultural rights
Right to live with dignity Article 16 (includes right against capital punishment)	Personal liberty (Article 17(1))	Right relating to justice (Article 20)	Right to equality (Article 18)	Right relating to education (Article 31)
Right against exploitation (Article 29)	Freedoms:	Right of victims of crime (Article 21)	Right against untouchability (Article 24)	Right to language and culture (Article 32)
Right to clean environment (Article 30)	(a) freedom of opinion and expression,	Right against torture (Article 22)	Right of women (Article 38)	Right to employment (Article 33)
Right against exile (Article 45)	(b) freedom to assemble peaceably,	Right against preventive detention (Article 23)	Right of the child (Article 39)	Right to labour (Article 34)
	(c) freedom to form political parties,	Right relating to property (Article 25)	Right of <i>Dalit</i> (Article 40)	Right relating to health (Article 35)
	(d) freedom to form unions and associations,	Right to freedom of religion (Article 26)	Right of senior citizens (Article 40)	Right relating of food (Article 36)
	(e) freedom to move and reside in any part of Nepal,	Right to information (Article 27)	Right to social justice (Article 42)	Right to housing (Article 37)
	(f) freedom to practice any profession, carry on any occupation, and establish and operate any Industry, trade and business in any part of Nepal.	Right to privacy (Article 28)		Right to social security (Article 43)
	Right to communication (Article 19)			Rights of the consumer (Article 44)
Article 46: Right to constitutional remedies: There shall be a right to obtain constitutional remedies in the manner set forth in Article 133 or 144 for the enforcement of the rights conferred by this part.				
Article 47: Implementation of fundamental rights: The State shall, as required, make legal provision				

communities). The right to equality guaranteed by Article 18 comes with an affirmative action provision. It clearly states 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 culturally backward women, *Dalit*, indigenous people, *Madhesi*, *Tharu*, Muslim, oppressed class, *Pichhada* class, minorities, the marginalised, farmers, labours, youths, children, senior citizens, gender and sexual minorities, persons with disabilities, persons in pregnancy, incapacitated or helpless, persons from backward region and indigent *Khas Arya*.”¹¹ The duties of citizens are outlined thus in Article 48:

Every citizen shall have the following duties:

- to safeguard the nationality, sovereignty and integrity of Nepal, while being loyal to the nation;
- to abide by the Constitution and the law;
- to render compulsory service as and when the State so requires;
- to protect and preserve public property.

The right to constitutional remedies when any of these rights is violated, has been guaranteed by Article 46. Article 133 confers upon the Supreme Court the jurisdiction to enforce these rights. The available options for the petitioners are as follows.

- (1) Any citizen of Nepal may file a petition in the Supreme Court to have any law or any part thereof declared void on the ground of inconsistency with this Constitution because it imposes an unreasonable restriction on the enjoyment of any fundamental right conferred by this Constitution or on any other ground, or to have any law or any part thereof made by a Provincial Assembly declared void because it is inconsistent with any law made by the Federal Parliament or to have any law or any part thereof made by a Municipal Assembly or Village Assembly declared void because it is inconsistent with a law made by the Federal Parliament or the Provincial Assembly, and the Supreme Court shall have extraordinary power to declare that law to be void either ab initio or from the date of its decision if the law appears to be so inconsistent.

¹¹Constitution of Nepal, 2015, Article 18 (3) (proviso).

- (2) The Supreme Court shall, for the enforcement of the fundamental rights conferred by this Constitution or of any other legal right for which no other remedy has been provided or for which the remedy even though provided appears to be inadequate or ineffective or for the settlement of any constitutional or legal question involved in any dispute of public interest or concern, have the extraordinary power to issue necessary and appropriate orders, provide appropriate remedies, enforce such right or settle such dispute.
- (3) Under the extraordinary jurisdiction under Clause (2), the Supreme Court may issue appropriate orders and writs including the writs of habeas corpus, mandamus, certiorari, prohibition and quo warranto. Provided that except on the ground of lack of jurisdiction, the Supreme Court shall not under this clause interfere with any internal proceeding of the Federal Parliament or Provincial Assembly, and with any proceedings instituted by the Federal Parliament or Provincial Assembly concerning violation of its privileges and penalties imposed therefor.
- (4) Subject to this Constitution, the Supreme Court shall, as provided for in the Federal law, have the power to originally try and settle cases, hear appeals, test judgments referred for confirmation, revise cases, hear petitions or review its judgments or final orders. Judges other than those having handed down the previous judgment shall make such review.
- (5) The Supreme Court shall settle appeals from cases originally tried and settled by a High Court and matters of public importance involving questions of interpretation of the Constitution and law or cases recommended by a High Court, accompanied by its opinion, that it is reasonable that decision be made by the Supreme Court.
- (6) Other powers and procedures of the Supreme Court shall be as provided for in the Federal law.

Under Article 144, the High Courts in the provinces also have the power to issue the necessary and appropriate orders for the enforcement of fundamental rights or any other legal right for which no other remedy has been provided or for which the remedy, although provided, appears to be inadequate or ineffective or for the settlement of any legal question involved in any dispute of public interest or concern. High Courts may also issue appropriate orders and writs, including the writs of habeas corpus, mandamus, certiorari, prohibition, and quo warranto.

The implementation of fundamental rights, especially those that require new legislation, is a challenge. The Constitution has required the State to make legal provisions for the implementation of the rights conferred by this Part within three years of the commencement of the Constitution.¹²

Apart from the Supreme Court and High Courts, the National Human Rights Commission (NHRC), an independent constitutional commission established under Article 249, has been given the duty to respect, protect, and promote human rights and ensure effective enforcement thereof. The NHRC was created under a parliamentary statute of 1997,¹³ as a national human rights institution (NHRI)¹⁴ of Nepal,¹⁵ and was inducted as a constitutional body by the Interim Constitution of Nepal in 2007. The NHRC works in a vast area of rights protection, including fundamental rights, other legal rights, or rights under international human rights. Under the 2015 Constitution, the Commission has the power to perform the following functions:

- (a) to inquire, on its own initiative or on petition or complaint presented in or sent to the Commission by a victim or any person on his or her behalf or on information received by the Commission from any source, into and investigate complaints of violations of human rights of an individual or group or abetment thereof, and make recommendation for action against the perpetrators;
- (b) if any official who has the responsibility or duty to prevent violation of human rights fails to fulfill or perform his or her responsibility or duty or shows reluctance in the fulfillment or performance of his or her responsibility or duty, to make recommendation to the concerned authority to take departmental action against such official;
- (c) if it is required to institute a case against any person or organisation that has violated human rights, to make recommendation to file a case in the court in accordance with law;

¹²Constitution of Nepal 2015, Article 47.

¹³Human Rights Commission Act, 1997.

¹⁴See Principles relating to the Status of National Institutions (The Paris Principles) adopted by United Nations General Assembly resolution 48/134 of 20 December 1993, available at <https://www.ohchr.org/en/professionalinterest/pages/statusofnationalinstitutions.aspx>.

¹⁵See B. Adhikari (2004), Building Capacity of National Human Rights Institutions: The Case of Nepal, Kathmandu: Right to Education Foundation.

- (d) to coordinate and collaborate with civil society in order to enhance awareness on human rights;
- (e) to make recommendation, accompanied by the reasons and grounds, to the concerned body for taking departmental action against and imposing punishment on those who have violated human rights;
- (f) to carry out periodic reviews of the relevant laws relating to human rights and make recommendation to the Government of Nepal¹⁶ for necessary improvements in and amendments to such laws;
- (g) if Nepal has to become a party to any international treaty or agreement on human rights, to make recommendation, accompanied by the reasons therefor, to the Government of Nepal; and monitor whether any such treaty or agreement to which Nepal is already a party has been implemented, and if it is found not to have been implemented, to make recommendation to the Government of Nepal for its implementation;
- (h) to publish, in accordance with law, the names of the officials, persons or bodies who have failed to observe or implement any recommendations or directives made or given by the National Human Rights Commission in relation to the violations of human rights, and record them as violators of human rights.¹⁷

While formal courts in the administration of justice generally move on the basis of complaints, applications or writ petitions, the NHRC need not wait for these procedures. It can start suo motu proceedings. In discharging its functions or performing its duties, the NHRC may exercise all such powers of a court of law with respect to summoning and enforcing the attendance of any person and seeking and recording his or her statements or depositions, examining evidence, and producing exhibits and proofs. On receipt of information in any manner that a serious violation of human rights has already been committed or is going to be committed, the NHRC is authorised to search any person or his or her residence or office, enter such residence or office without notice, and, in the course of making such searches, take possession of any document, evidence, or proof related to the violation of human rights. In the event that action must be immediate upon the receipt of information that the human rights of any person are being violated, the

¹⁶The federal government has been referred to as the "Government of Nepal" in the Constitution.

¹⁷Constitution of Nepal 2015, Article 249 (2).

NHRC is also authorised to enter any government office or any other place without notice and rescue such person(s). It has the power to order for the provision of compensation to any person who is a victim of the violations of human rights in accordance with the law. Nepal also gained attention for its forward-looking provisions regarding gender and sexual minorities rights enshrined in the Constitution. Nepal became the 10th country in the world to include specific protections for members of this community.¹⁸ Under the right to equality, it states: “The State shall not discriminate citizens on grounds of origin, religion, race, caste, tribe, 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 culturally backward women, *Dalit*, indigenous people, ... gender and sexual minorities...”¹⁹ Additionally, the Constitution states under the right to social justice that gender and sexual minorities, among other vulnerable groups, “shall have the right to participate in the State bodies on the basis of inclusive principle.”²⁰ Article 281 requires appraisal and review of special rights of the women and the *Dalit* community and impacts thereof on the basis of the Human Development Index, concurrently with a national census to be held every ten years. This responsibility lies with the Government of Nepal.

C. Directive Principles of the State

Part Four of the Constitution outlines the “Directive Principles, Policies and Obligations of the State,” which are better articulated and more comprehensive than in the earlier constitutions of Nepal. Article 49 holds that these principles, policies and obligations shall be the guiding principles for the governance of the State, and the State shall mobilise, or cause to be mobilised, means and resources, as required, to implement the principles, policies and obligations set forth in this Part.

The major changes are to be seen in Articles 53 and 54. Article 53 requires that the Government of Nepal submit an annual report, containing the steps taken and achievements made in the implementation of the directive principles, policies and obligations of the state, to the President, and the President shall cause such a report to

¹⁸Knight, K. (Oct. 2015), “How Nepal’s Constitution Got Queered,” *Law Review of Books*, available at <https://lareviewofbooks.org/article/how-nepals-constitution-got-queered>.

¹⁹Constitution of Nepal, 2015, Article 18 (3) (emphasis added).

²⁰Constitution of Nepal, 2015, Article 42 (1).

be laid before the Federal Parliament through the Prime Minister. More importantly, Article 54 requires that there shall be a committee, in accordance with law, in the Federal Parliament to monitor and evaluate whether or not the directive principles, policies and obligations of the State set forth in this Part have been implemented progressively.²¹ In other words, even though these principles, policies and obligations of the State are not enforceable in any court, the representatives of the people, including the loyal opposition in the Parliament, now have the power to seek accountability of the government in this regard.²² Scholars have found it commendable that the Constitution contains institutional mechanisms such as mandatory legislative reporting to ensure that the State complies by the Directive Principles, Policies and Obligations.²³

Article 50 states, under Directive Principles, that:

- (1) 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...
- (2) 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...
- (3) The economic objective of the State shall be to achieve a sustainable economic development, while achieving rapid economic growth...

The Constitution includes broad state policies relating to national unity and national security, political and governance systems of the state, social and cultural transformation, agriculture and land reform, development, protection, promotion and use of natural resources, basic needs of citizens, labour and employment, social justice and inclusion, justice and penal system, and international relations. These policies elaborate upon the spirit of the Preamble. They also provide a macro-

²¹Rule 27 of the Federal Parliament Joint Meetings and Joint Committees (Conduct of Business) Rules, 2018 provides for the Committee on Implementation, Monitoring and Evaluation of the Directive Principles of the State, Policies and Obligations to do the job.

²²See Constitution of Nepal, 2015, Article 55 regarding enforceability.

²³Khaitan, T. (2019), "Constitutional Directives: Morally-Committed Political Constitutionalism," *The Modern Law Review*, 82(4), 603-632, at p. 26.

level environment for the protection of most of the fundamental rights. For example, state policies regarding social justice and inclusion, which are included in the Preamble, have been built upon strongly in several ways. Table 2 outlines the state policies in the 2015 Constitution that relate to social justice and inclusion.

D. Separation of Powers and Checks and Balances

The Government of Nepal, per the Constitution, has a horizontal system of separation of powers between the legislative, executive and judiciary, as practiced in countries with a parliamentary system based on the Westminster model. As a doctrine, the separation of powers is essentially a theory of government whose objectives are the protection of liberty and the facilitation of good governance through appropriate specialisation. This specialisation refers to the fact that there is no concentration of power, and each branch of the government is confined to the exercise of its own functions and not allowed to encroach upon the functions of the other branches. In the Westminster model of government, the head of state is usually a person distinct from the head of government (i.e. the executive), and the head of the government derives its democratic legitimacy from its ability to command the confidence of the legislature, typically a parliament, and is also held accountable to said parliament. Even though the executive and the legislature have functional specialisations, they are nevertheless related. The independence of the judiciary, however, is guaranteed.

Under the Constitution, there is also a “vertical separation of powers” applicable to the federal structure, down from a very modern perspective of the Constitution the federal (national) level to the provincial and local levels.²⁴ There is little difference between the federal and provincial arrangements. However, the separation of power at the local level is more prominent, because the local executive is formed independent of the legislature, and the relationship between the executive and legislature is not based on the parliamentary system.²⁵ The 2015 Constitution also provides for a third system, a personal separation of powers. There is, in some respect, an incompatibility of office that is expected to hinder excessive power concentration on single persons; for example:

²⁴The vertical system of separation of powers has been discussed under Section II, E (“Three-tier Federal Structure and their Relationship”).

²⁵See Adhikari, B. (2019), *Local Legislatures in the Constitution of Nepal: Aspects of Their Justification and Experimentation*, Dhulikhel: Kathmandu University School of Law.

Table 2: State Policies Relating to Social Justice and Inclusion

<ol style="list-style-type: none">1. to keep on making appropriate arrangements for the livelihoods of the helpless single women, while according priority to them in employment on the basis of skills, competency and qualification;2. to make self-dependent the women who are vulnerable, subjected to social and family exclusion and victims of violence self-reliant by making their rehabilitation, protection and empowerment;3. to ensure enjoyment of requisite services and facilities at the reproductive stage;4. to evaluate economically the work and contribution such as maintenance of children and care of families;5. to take into consideration primarily of the best interests of the child, (6) to identify the freed bonded labour, Kamlari, Harawa, Charawa, tillers, landless, squatters and rehabilitate them by providing housing, housing plot for residence and cultivable land or employment for their livelihoods;6. to create an atmosphere conducive to the full enjoyment of the political, economic, social and cultural rights, while enhancing the participation of youths in national development, to make their personality development, while providing special opportunity in areas including education, health and employment for the empowerment and development of the youths and provide them with appropriate opportunities for the overall development of the State;7. to make the indigenous nationalities 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 indigenous nationalities and local communities;
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8. to make special provisions for opportunities and benefits to minority communities to enjoy social and cultural rights, with maintaining their identity;
9. 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;
10. 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;
11. to accord priority to the indigent within all sexes, regions and communities in the provision of social security and social justice;
12. to make planned investment in sports and sport-persons in order to prepare healthy, competent and disciplined citizens, and to develop sports as a means of consolidating national unity and enhancing national prestige at the international level;
13. to adopt a single door system for the establishment, approval, operation, regulation and management of community-based and national or international non-governmental organisations and to involve such organisations only in the sectors of national need and priority, while making investment and role of such organisations transparent and accountable.

- if a person who is elected as President or Vice President already holds a political position through election, nomination or appointment, the position held by such a person shall automatically become vacant (Articles 62(6) and 67(2));
- persons holding office of profit are considered ineligible to become members of the Federal Parliament (Article 87). In this regard, the final decision shall be made by the Constitutional Bench of the Supreme Court (Article 90); and,
- the Chief Justice and Justices may not be engaged in any office other than that of a judge (Article 132).

Within the framework of the parliamentary system, the Constitution has also adopted checks and balances under which the separate executive, legislature and judiciary are empowered to prevent actions by each other and are induced to share power. The following section highlights some of the main characteristics and issues pertaining to the separation of the three branches of government.

1. The Judiciary

The Judiciary is addressed in Part 11 of the 2015 Constitution, while Part 12 provides five articles on the regulation of the Attorney General. The Constitution continues the focus on enhancing institutional independence of the Supreme Court as the apex judicial body, just as the provisions in previous Constitutions of 1990 and 2007. There are three different courts, according to Article 127, which are the Supreme Court, the High Court, and the District Court. There could be other judicial bodies at the local level to try cases under the law, or other bodies as required may be formed to pursue alternative dispute settlement methods.²⁶ In addition, a three-member judicial committee, coordinated by its Vice-Chairperson in the case of a Village Body and by the Deputy Mayor in the case of a Municipality, is to exist in order to settle disputes under their respective jurisdictions.²⁷ The committee consists of two members elected by the members of the Village Assembly or the Municipal Assembly from amongst themselves. As these Committees consist of elected decision-makers, they have been given the power to handle some type of grassroots litigations and cases that may be mediated.²⁸

²⁶Constitution of Nepal, 2015, Article 127 (2).

²⁷Constitution of Nepal, 2015, Article 227.

²⁸See Local Government Operations Act, 2017

The Supreme Court has the final authority to interpret the Constitution and laws;²⁹ however, “the structure of the constitutional jurisdiction is based on a diffuse model of constitutional review,” which indicates that the Supreme Court does not have the exclusive power to interpret the Constitution.³⁰ Lower courts also have the authority to interpret the Constitution, but the Supreme Court has the final word, and it sets legal precedent which is binding on all courts and authorities in Nepal.³¹ While the Supreme Court has the authority for constitutional review, the Constitution limits the jurisdiction of the Supreme Court to interfere in the Federal Parliament’s internal affairs unless they find an error in jurisdiction or excess of jurisdiction.³²

Additionally, the Supreme Court’s jurisdiction has been affected, as it no longer has clear jurisdiction over the extraordinary counter-majoritarian powers provided by the Constitution of 1990;³³ this means that, while previously the Supreme Court had the authority to review constitutional amendments on the basis that they were contrary to the spirit of the Preamble of the 1990 Constitution, it no longer enjoys the strength of the same provision³⁴ to intervene in the amendment process and review the constitutionality of amendments.³⁵ It, however, needs to be noted that there is a strong tradition in Nepal for the basic structure doctrine, which pleads that a constitution cannot be amended in order to destroy its basics.³⁶

The 2015 Constitution has also significantly introduced a Constitutional Bench within the Supreme Court that is comprised of the Chief Justice and other four Judges designated by the Chief Justice on recommendation of the Judicial Council.³⁷ Due to fears that a parallel

²⁹Constitution of Nepal, 2015, Article 128 (2).

³⁰Zhu, C., and Kouroutakis, A. (2019), “The Role of the Judiciary and the Supreme Court in the Constitution-Making Process: The Case of Nepal,” *Stan. J. Int’l L.*, 55, 69-82 (hereinafter, “Zhu and Kouroutakis (2019)”), at p. 71.

³¹Zhu and Kouroutakis (2019), at p. 71.

³²Zhu and Kouroutakis (2019), at p. 71.

³³Zhu and Kouroutakis (2019), at p. 73.

³⁴Article 116 (1) of the 1990 Constitution stated: “A Bill to amend or repeal any Article of this Constitution, without prejudicing the spirit of the Preamble of the Constitution, may be introduced in either House of Parliament: Provided that this Article shall not be subject to amendment.” It is important to note here that the Preamble emphasised basic human rights, a parliamentary system of government, constitutional monarchy, a system of multiparty democracy, and an independent and competent system of justice, among other such features, as the pledges of the Constitution.

³⁵Zhu and Kouroutakis (2019), at p. 73.

³⁶Adhikari, B. et al (1998), *Commentary on the Nepalese Constitution*, Kathmandu: Delf - Lawyers Inc., at pp. 646-656.

³⁷Constitution of Nepal, 2015, Article 137.

constitutional court, adopted along with a Supreme Court, would lead to conflicts in status and jurisdiction, the decision was made to create a Constitutional Bench within the Supreme Court.³⁸ This Court is to deal with “disputes relating to jurisdiction between the Federation and a Province, between Provinces, between a Province and a Local level and between Local levels” as well as “disputes relating to election to members of the Federal Parliament or Provincial Assembly and matters relating to disqualification of a member of the Federal Parliament or of the Provincial Assembly.”³⁹ The Supreme Court has to find way out for some of the issues that have cropped up, including the Constitutional Bench’s failure to meet regularly to settle cases under its jurisdiction; this has been “hampering the implementation of the Constitution and federalism,” largely because of the provision that all its members must be present at its meetings.⁴⁰ Given the large backlog of Supreme Court cases and its judges preoccupation with them, the Constitutional Bench has ended up with numerous pending cases.⁴¹

The independence of the judiciary is another significant matter addressed by the Constitution. It provides various institutional guarantees to protect the independence of the Supreme Court, regarding the selection and appointment of judges as being of paramount importance in terms of their impartiality and independence from political influence.⁴² Additionally, judges’ impartiality and independence are protected by constitutional protection of their salary and benefits, which cannot be affected by the political branches of government.⁴³ However, the fact that the Chief Justice and the Justices are to retire at 65 leaves room for indirect political pressure, as “the retirement age provision might create a competition among the judges (High Court judges, aspiring senior lawyers and law professors) on who is going to be the favourite of the legislative and executive branches represented in the recommending Councils and to be appointed for the replacement, thus affecting their impartiality.”⁴⁴

³⁸Zhu and Kouroutakis (2019), at p. 72.

³⁹Constitution of Nepal, 2015, Article 137 (2) (a)-(b).

⁴⁰Pradhan, T. K. (Sept. 2019), “Ineffective Constitutional Bench will hamper implementation of constitution and federalism, experts say,” *The Kathmandu Post*, available at <https://kathmandupost.com/national/2019/09/24/ineffective-constitutional-bench-will-hamper-implementation-of-constitution-and-federalism-experts-say> (hereinafter, “Pradhan (2019)”).

⁴¹Pradhan (2019).

⁴²Zhu and Kouroutakis (2019), at p. 75.

⁴³Zhu and Kouroutakis (2019), at p. 76.

⁴⁴Zhu and Kouroutakis (2019), at p. 76.

Article 157 of the Constitution establishes the office of the Attorney General whose duty is to give opinions and advice on constitutional and legal matters to the Government of Nepal and such other authorities as the Government of Nepal may specify. He/she is politically appointed by the President on the recommendation of the Prime Minister. Clause (2) of Article 158 enables the Attorney General or government attorneys subordinate to him or her to represent the Government of Nepal in lawsuits wherein the rights, interests or concerns of the Government of Nepal are involved. Except as provided otherwise in the Constitution, the Attorney General shall have the right to make a final decision as to whether to institute any case on behalf of the Government of Nepal in any court, judicial body or authority. Clause (3) states that opinion of the Attorney General must be obtained for withdrawing a case filed on behalf of the Government of Nepal. At the provincial level, a Chief Attorney appointed by Chief of Province on recommendation of the concerned Chief Minister works as subordinate to the Attorney General.⁴⁵ He/she shall be the chief legal advisor to the Provincial Government. It shall be the duty of the Chief Attorney to give opinions and advice on constitutional and legal matters to the Provincial Government and such other authorities as the State Government may specify.

2. The Legislature

The 2015 Constitution provides the guidelines for the formation of the legislatures at the federal, provincial and local levels. Part Eight deals with the provisions for the federal legislature. In particular, Article 83 states that there will be two Houses in the Federal Legislature known as the House of Representatives (HoR) and the National Assembly (NA), called the Federal Parliament. The HoR will consist of 257 members, 165 of whom will be elected through the first-past-the-post electoral system, one for each constituency, and 110 through the proportional electoral system, through which voters will vote for political parties.⁴⁶ Article 84 (2) states that Federal law shall provide that, in fielding candidacy by political parties for the election to the HoR under the proportional electoral system, representation shall be ensured on the basis of a closed list also from women, *Dalit*, indigenous communities, *Khas Arya*, *Madhesi*, *Tharu*, Muslims and backward regions, on the basis of population. In so fielding candidacy, regard shall also be had

⁴⁵Constitution of Nepal, 2015, Article 160

⁴⁶Constitution of Nepal, 2015, Article 84 (1) (a)-(b).

to geography and territorial balance. This criterion must also include representation of persons with disabilities as per Clause (3). The HoR has a five-year term, although its term may be extended by a Federal Act for a year, at most.⁴⁷

As for the NA, which is deemed to be a federal House giving representation to federal constituencies, it has permanent existence through rolling membership.⁴⁸ It shall consist of 59 members, 56 of whom are selected from each Province by an electoral college composed of members of the Provincial Assembly, chairpersons and vice-chairpersons of the village bodies, and Mayors and Deputy-Mayors of the Municipalities, as per Article 86 (2) (a). The NA has a term of six years, and the term of one third of its members is to expire every two years.⁴⁹ Article 92 (1) then states that members of the NA shall, not later than fifteen days of the date of holding of its first meeting, elect the Chairperson and the Vice Chairperson of the NA from amongst themselves. Additionally, according to Clause (2), election under Clause (1) shall be so held that there is one woman between the Chairperson and the Vice Chairperson.

For someone to qualify to be a member of the Federal Parliament, he/she must meet the following criteria (Article 87 (1)):

- (a) be a citizen of Nepal,
- (b) over the age of 25 years for the House of Representatives, and over 35 for the National Assembly,
- (c) not convicted of a criminal offense involving moral turpitude,
- (d) not disqualified by any Federal law, and
- (e) not holding any office of profit.

Article 93 declares that the President shall summon a session of the Federal Parliament within 30 of the declaration of final results of the election to the HoR. Thereafter, the President shall, from time to time, summon sessions of both or either of the Houses pursuant to the Constitution. Regarding voting, Article 99 states that except when otherwise provided in the Constitution, any motion submitted for decision in either House of the Federal Parliament shall be decided

⁴⁷Constitution of Nepal, 2015, Article 85 (1) (a)-(b).

⁴⁸Constitution of Nepal, 2015, Article 86 (1).

⁴⁹Constitution of Nepal, 2015, Article 86 (3).

by a majority vote of the members present and voting. The member chairing the meeting shall not have the right to vote. Importantly, under privileges in Article 103, the Constitution makes it clear that there shall be full freedom of speech in both Houses of the Federal Parliament; and no member shall be arrested, detained or prosecuted in any court for anything expressed or any vote cast by him or her in the House. Additionally, according to Clause (2), each House of the Federal Parliament shall, subject to this Constitution, have full power to regulate and decide its internal business, and the concerned House shall have the exclusive right to decide whether or not any of its proceedings is regular or irregular. No question shall be raised in any court on this matter.

Similar provisions are included for the Provincial Legislature in Part 14 of the Constitution. The Provincial Legislature, unlike the Federal Parliament, is unicameral and called the Provincial Assembly as per Article 175. The Provincial Assembly is composed of twice the number of members elected to the HoR through the first-past-the-post system from the concerned Province.⁵⁰ Aside from this number, comprising of 60 per cent of the Provincial Assembly, 40 per cent of the membership is to be elected through the proportional electoral system, according to Clause (3). For the election of afore mentioned members, election constituencies shall be set on the basis of geography and population as provided for in Federal law. Additionally, election to the members of the Provincial Assembly under Clause (3) shall be held through adult suffrage by secret ballot in accordance with the law. Article 177 states that the Provincial Assembly shall have a five-year term.

Similar to the procedures of the federal legislature, in fielding candidacy by political parties for the election to the Provincial Assembly under the proportional electoral system, representation shall be ensured on the basis of a closed list of women, *Dalit*, indigenous communities, *Khas Arya*, *Madhesi*, *Tharu*, Muslims and members from backward regions, on the basis of population. In so fielding candidacy, regard shall also be had to geographical balance of the concerned Province, according to Article 176 (6). The proportional election system in the federal and provincial legislatures ensures that there is inclusion in representation, and the weaknesses in the FPTP system are compensated in a society that has such rich communitarian diversity. Article 182 (1) states that

⁵⁰Constitution of Nepal, 2015, Article 176 (1).

the members of the Provincial Assembly shall, not later than 15 days of the date of holding of its first meeting, elect a Provincial Speaker and a Deputy Provincial Speaker from amongst themselves.

Similar to federal procedures, the Chief of Province shall summon a session of the Provincial Assembly within twenty days of the declaration of final results of the election to the Provincial Assembly. Thereafter, the Chief of Province shall, from time to time, summon other sessions pursuant to the Constitution, according to Article 183 (1). With regards to voting, all questions submitted for decision in the Provincial Assembly shall be decided by a majority vote of the members present and participate in voting. The member chairing the meeting shall not have the right to vote, as per Article 186. As far as privileges go, aside from full freedom of speech, the Provincial Assembly shall, subject to the Constitution, have full power to regulate and decide its internal business, and it shall be the exclusive right of the Provincial Assembly to decide whether its proceedings are to be regular or irregular. No question shall be raised in any court in this regard, according to Article 187 (2).

For the local level, the legislative powers are vested in the Village Assembly and the Municipal Assembly, with a five-year election term (Part 18). Each Village Body shall have a Village Assembly, which shall consist of Chairperson and Vice-Chairperson of the Village Executive, Ward Chairpersons, and four members elected from each ward and Members of the Village Executive elected from the *Dalit* and minority communities, as per Article 222 (2). Moreover, each ward of a Village Body under the Federal law shall have a Ward Committee composed of the Ward Chairperson and four members. Such Ward Chairperson and Ward members shall be elected in accordance with the first-past-the-post electoral system, as per Clause (4). Article 223 states that each Municipality shall have a Municipal Assembly, which shall consist of the Municipal Executive, Ward Chairpersons, and four members elected from each Ward and members of the Municipal Executive elected from the *Dalit* or minority communities. Similarly, Clause (4) of the Article states that each ward of a Municipality shall have a Ward Committee composed of one Ward Chairperson and four members as provided for in the Federal law. Such Ward Chairperson and Ward members shall be elected in accordance with the first-past-the-post electoral system.

Regarding term of office for these entities, Article 225 states that it shall be five years from the date of election. A new Village Assembly and Municipal Assembly shall be elected not later than six months of expiration of such a term. Importantly, Article 227 highlights other matters relating to the conduct of business of a Village Assembly and Municipal Assembly, rules of procedures of meetings, formation of committees, conditions in which the office of member falls vacant, facilities receivable by members of the Village Assembly and Municipal Assembly and employees and offices of the Village Body and Municipality shall be as provided for in the provincial law.

All the legislatures have legislative and financial powers and are entitled to use a committee system to facilitate their business.⁵¹ The Constitution deals with legislative as well as financial procedures that apply in federal, provincial and local legislatures.⁵² If a decision is made by a two-thirds majority of the total number of the sitting members of the Federal Parliament that it is necessary to hold a referendum with respect to any matter of national importance, decision on that matter may be taken by way of referendum.⁵³

Although treaty-making power vests in the Government of Nepal, such a treaty must be ratified by the Federal Parliament. Article 279 (1), regarding ratification of, accession to, acceptance of, or approval of, treaties or agreements, states that the ratification of, accession to, acceptance of, or approval of, treaties or agreements to which Nepal or the Government of Nepal is to become a party shall be as provided for in federal law. Clause (2) further clarifies that any law to be made pursuant to Clause (1) shall, inter alia, require that the ratification of, accession to, acceptance of, or approval of, treaties or agreements on the following subjects must be made by a majority of two-thirds of the total number of the then members of both Houses of the Federal Parliament: (a) peace and friendship, (b) defense and strategic alliance, (c) boundaries of the State of Nepal, and (d) natural resources, and the distribution of their uses. Clause (3) then states that after the commencement of this Constitution, unless a treaty or agreement is ratified, acceded to, accepted or approved in accordance with this article, such treaty or agreement shall not apply to the Government of Nepal or Nepal.

⁵¹Constitution of Nepal, 2015, Articles 97, 193, and 227.

⁵²Constitution of Nepal, 2015, Parts 9 and 10, Parts 15 and 16, and Part 19, respectively.

⁵³Constitution of Nepal, 2015, Article 275.

3. The Executive

Part Seven of the Constitution is concerned with the Federal Executive. Article 74 states that the form of government in Nepal shall be multi-party, competitive, federal, democratic, republican, parliamentary form of government based on pluralism. The Constitution provides for, at the highest level as head of the state, an elected President in the place of the earlier constitutional monarch. It is the President's responsibility to promote Nepal's national unity and perform the main duty of abiding by and protecting the Constitution. The Constitution does not provide any special constitutional functions for the President, and he/she shall perform his/her functions in accordance with the Constitution and federal law.⁵⁴ The Prime Minister is the link between the President and the Council of Ministers, which exercises executive power. In the absence of the President, the Vice-President shall perform the President's functions.⁵⁵

Under the Constitution, the national executive power is vested in the Council of Ministers, its responsibilities including the issuance of general directives and controlling and regulating the governance of Nepal (Article 75 (2)). The Council also has the power to issue ordinances through the President to address pressing requirements, except when both Houses of the Federal Parliament are in session, which must later go through the parliamentary approval process.⁵⁶ The leader of a parliamentary party that commands a majority in the HoR shall be the Prime Minister, under whose chairpersonship the Council of Ministers is constituted (Article 76 (1)). The Council of Ministers is limited to a maximum of 25 ministers, including the Prime Minister, wherein the members are collectively responsible to the Federal Parliament while being individually responsible for the work of the respective Ministries (Article 76 (9-10)). The limit on the number of ministers is meant to restrict the proclivity of prime ministers to increase membership of the Council of Ministers in order to control intra-party dissent and unprincipled coalitions. They must be appointed in accordance with the inclusion principle from amongst the members of the Federal Parliament.⁵⁷

One-fourth of the total members of the HoR may table a motion of no-confidence against the Prime Minister. This cannot be done until

⁵⁴Constitution of Nepal, 2015, Article 61.

⁵⁵Constitution of Nepal, 2015, Article 67.

⁵⁶Constitution of Nepal, 2015, Article 114.

⁵⁷Constitution of Nepal, 2015, Article 76 (9).

two years have passed since his/ her appointment and until another one year after the date of failure of the motion to be passed. The Constitution makes it clear that such a motion of no confidence shall also indicate the name of member proposed for the next Prime Minister. This provision is supposed to ensure stability in the leadership, which was a crucial issue in the parliamentary era between 1994 to 2015.⁵⁸

Part 13 of the Constitution is concerned with the Provincial Executive. In the provinces, executive power is vested in the Provincial Council of Ministers, and its responsibilities include issuing general directives and controlling and regulating the province (Article 162). The Council also has power to issue ordinance through the Chief of Province, except when the Provincial Assembly is in session to attend pressing requirements, so the ordinance must later go through provincial assembly approval process.⁵⁹ Article 163 (1) and (2) state that there shall be a Chief of Province in each Province, as a representative of the Government of Nepal and appointed by the President. The Province Chiefs are appointed for five-year terms (Article 163 (3)). The leader of a parliamentary party that commands a majority in the Provincial Assembly is appointed Chief Minister, under whose chairpersonship the Provincial Council of Ministers shall be constituted (Article 76 (1)). Only a maximum of 20 per cent of the total number of members of the Provincial Assembly, including the Chief Minister, may be appointed as Provincial Ministers. They must be appointed in accordance with the inclusion principle.⁶⁰ Regarding no-confidence motions against the Chief Minister, here too there is requirement of tabling the name of the alternative Chief Minister together with the no-confidence motion.

Lastly, Part 17 of the Constitution is concerned with the Local Executive. The executive power is vested in the Village Executive or the Municipal Executive, and the responsibilities include issuing general directives and controlling and regulating the Village Body and the Municipality (Article 214). Article 215 (1) and (2) state that there shall be a Chairperson of Village Executive in each Village Body, and under him/her the Village Executive (which may otherwise be understood as Village Council of Ministers) shall be formed. They are elected directly through the FPTP system. The Chairperson, Vice-Chairperson, and

⁵⁸Constitution of Nepal, 2015, Article 100 (4) - (6).

⁵⁹Constitution of Nepal, 2015, Article 202.

⁶⁰Constitution of Nepal, 2015, Article 168(9).

Ward Chairperson have a five-year term (Article 215 (6)). Additionally, each Municipality shall have a Mayor, and the Municipal Executive (which may otherwise be understood as Municipal Council of Ministers) shall be formed under his or her chairpersonship, according to Article 216 (1). The Municipality Executive is elected directly through the FPTP system. As part of the Local Level, Article 220 (1) stipulates that there shall be a District Assembly to make coordination between the Village Bodies and Municipalities within the district.

Within the Local Level, the Constitution also provides a District Assembly and a District Coordination Committee for district level coordination. The district was a key entity of the state structure under the erstwhile 1990 Constitution and maintains a presence under the 2015 Constitution through the district assemblies. The District Assembly shall consist of Chairpersons and Vice-Chairpersons of Village Executives, and Mayors and Deputy Mayors of Municipal Executives within the district.⁶¹ Article 220 (3) states that the Assembly shall elect the District Coordination Committee consisting of a maximum of nine members. According to Clause (4), the District Coordination Committee shall discharge all functions required to be discharged by the District Assembly. Clause (5) maintains that a Member of a Village Assembly or Municipal Assembly within the concerned district shall be eligible to be a candidate for the office of Chief, Deputy Chief, or Member of the District Coordination Committee. If elected to the offices of Chief, Deputy Chief, or Member of the District Coordination Committee, Clause (6) states that his or her office of the member of the Village Assembly or of the Municipal Assembly shall ipso facto lapse. The term of office of the Chief, Deputy Chief, and member of the District Coordination Committee shall be five years after the date of being elected.⁶²

According to Article 267, the President is the Supreme Commander-in-Chief of the Nepal Army. A National Security Council has been created under Article 266 for making recommendations to the Council of Ministers for the formulation of policies on overall national interest, security and defence of Nepal, and the mobilisation and control of the Nepal Army. This National Security Council shall consist of the Prime

⁶¹Constitution of Nepal, 2015, Article 220 (1) - (2).

⁶²Constitution of Nepal, 2015, Article 220 (5).

Minister as the Chairperson, and its members shall be the Minister for Defense, the Minister for Home, the Minister for Foreign Affairs, the Minister for Finance, the Chief Secretary, and the Commander-in-Chief of the Nepal Army. The secretary at the Ministry of Defence serves as member secretary of the Council.

Article 282 provides for the appointment of ambassadors by the President, as well as special emissaries for specific purposes. The President confers titles, honours and decorations on behalf of the State.⁶³ The President may, in accordance with law, grant pardons, suspend, commute, or remit any sentence passed by any court, judicial, or quasi-judicial body or any administrative authority or body.⁶⁴ All these powers of the President are to be exercised on the advice or recommendation of the Council of Ministers through the Prime Minister. According to Article 66, the President shall exercise such powers and perform such duties as conferred to him or her pursuant to the Constitution or a Federal law. Clause (2) makes it clear that in exercising the powers or duties, the President shall perform all other functions to be performed by him or her on recommendation and with the consent of the Council of Ministers than those functions specifically provided to be performed on recommendation of anybody or official under this Constitution or federal law. Such recommendation and consent shall be submitted through the Prime Minister.

The Government of Nepal's power to 'remove difficulties', a power that has been much abused in the past and used to dismiss elected governments, has been redefined in the new Constitution. If any difficulty arises in connection with the implementation of the Constitution, the President may, on the recommendation of the Government of Nepal, issue the necessary orders to remove such a difficulty. However, this power can be exercised only until the commencement of the first session of the Federal Parliament. In other words, after the election of the Federal Parliament, this power cannot be exercised any more.⁶⁵

⁶³Constitution of Nepal, 2015, Article 277.

⁶⁴Constitution of Nepal, 2015, Article 276.

⁶⁵Constitution of Nepal, 2015, Article 305.

4. Checks and Balances

Checks and balances between these three organs in the federal and provincial level are explicitly laid out in the 2015 Constitution. The executive power of appointment of some key officials is subjected to the Constitutional Council.⁶⁶ As far as judges, other than the chief justice, are concerned, they are subject to the Judicial Council's recommendations for appointment.⁶⁷ Checks and balances operate through exercise of parliamentary power to adopt a no-confidence vote against a sitting government.⁶⁸ The power of the prime minister to dissolve the HoR has been withdrawn.⁶⁹ While the Constitution regards the Parliament as the supreme representative body at the national level, laws passed by it are subject to judicial review by the Supreme Court for constitutionality.⁷⁰ Many important powers of policy-making have been taken away from the executive and legislature and relegated to constitutional commissions (see below). However, all judges of the Supreme Court and officials of constitutional bodies who exercise independent powers are subject to impeachment procedures at HoR through specified procedures.⁷¹ On the issue of corruption by any person holding public office, the Commission for the Investigation of Abuse of Authority has been given important powers to conduct, or cause to be conducted, investigations of any abuse of authority, and file cases independent of the executive influence.⁷² Certain key appointees under the constitutional process are subject to parliamentary hearing.⁷³ All these features in the Constitution help promote checks and balances in the polity.

E. The Three-Tier Federal Structure and Inter-Relationships

Part Five of the 2015 Constitution, entitled "Structure of State and Distribution of State Power," provides a three-part vertical structure

⁶⁶Constitution of Nepal, 2015, Article 284.

⁶⁷Constitution of Nepal, 2015, Article 153.

⁶⁸Constitution of Nepal, 2015, Article 100.

⁶⁹See Dhungel and Adhikari (1998), at pp. 326-343 (commenting on Article 53 (4) of the 1990 Constitution, which allowed the King to dissolve the House of Representatives on the recommendation of the Prime Minister).

⁷⁰Constitution of Nepal, 2015, Article 133.

⁷¹See Constitution of Nepal, 2015, Articles 101 (impeachment procedures), 130 (3) (the Supreme Court Judges), 153 (6) (the Judicial Council), 238 (c) (the Commission for the Investigation of Abuse of Authority), 240 (4) (c) (Auditor General), 245 (4) (c) (the Election Commission), 248 (5) (b) (the National Human Rights Commission), 250 (4) (c) (the National Natural Resources and Fiscal Commission), and 252 (4) (c) (the National Women's Commission), and 255 (4) (c) (the National Dalit Commission).

⁷²Constitution of Nepal, 2015, Article 238.

⁷³Constitution of Nepal, 2015, Article 292.

of power separation, comprising of the federal, provincial and local levels. At the local level, to coordinate at the district level (a unit left over from the earlier dispensation) between village bodies and municipalities, the Constitution provides for District Assemblies and District Coordination Committees.⁷⁴

The Constitution proposes that these different levels are meant to “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.”⁷⁵ Article 56 (2) says that the Federation, Provincial, and Local levels shall exercise power of the State of Nepal pursuant to the Constitution and law. The model of federalism that has been followed may be characterised as ‘cooperative federalism’, in which the federal (national) government enjoys significant authority to influence the constituent parts to administer and enforce national policies; however, all the entities are to interact under the Constitution cooperatively and collectively to solve common problems, rather than making policies separately but more or less equally (such as the dual federalism of the 19th-century United States) or clashing over a policy in a system dominated by the national government.⁷⁶

The federation is represented by the Government of Nepal and other federal institutions that exist at the national level. There are seven provinces at the provincial level that have the power to decide their provincial capitals through a two-thirds majority in their respective Provincial Assemblies.⁷⁷ Schedule Four, alluding to Article 56, which states that “[t]here shall be Provinces consisting of the Districts as mentioned in Schedule Four existing in Nepal at the time of commencement of this Constitution,” provides the demarcation of the seven provinces in the federal structure, from No. 1 to No. 7. There are 753 local governments at the local level created under Article 295 (3) as advised by the Commission for the determination

⁷⁴Constitution of Nepal, 2015, Article 220.

⁷⁵Constitution of Nepal, 2015, Article 56 (6).

⁷⁶See Hills, Roderick M. (1998), “The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and ‘Dual Sovereignty’ Doesn’t,” *Michigan Law Review*, 96 (4): 813–944.

⁷⁷Constitution of Nepal, 2015, Article 288.

of the number and boundaries of village bodies, municipalities and special, protected or autonomous regions. Article 56 (4) states that there shall be Village Bodies, Municipalities and District Assemblies under the local level. The number of wards in a Village Body and Municipality shall be as provided for in the federal law. Additionally, any Special, Protected or Autonomous Region can be set by the federal law for social, cultural protection or economic development, as per Clause (5).

Schedule Five provides the list of powers of the Federation, including relating to defense and the military, Central Police, Armed Police Force, national intelligence and investigation, peace, security, and customs, excise-duty, value-added tax, corporate income tax, individual income tax, remuneration tax, passport fee, visa fee, tourism fee, service charge and fee, penalty, and health policies, health services, health standards, quality and monitoring, national or specialised service providing hospitals, traditional treatment services, and communicable disease control. Additionally, the power to make treaties or agreements is vested in the federal government under Article 278. In making a treaty or agreement on a matter falling within the list of provincial powers, the federal government must consult the province concerned. The province may, with the consent of the federal government, make contractual agreements on financial and industrial matters.

Schedule Six lists the powers invested in the Province, including includes provincial police administration and peace and order, operation of banks and financial institutions in accordance with the policies of Nepal Rastra Bank,⁷⁸ cooperative institutions, foreign grants and assistance with the consent of the federal government (erroneously specified here as the 'Centre'), and house and land registration fee, motor vehicle tax, entertainment tax, advertisement tax, tourism, agro- income tax, service charge, fees, penalties. The local level's list of powers (Schedule Eight) includes town police, cooperative institutions and local taxes (wealth tax, house rent tax, land and building registration fees, motor vehicle tax), service charge, tourism fee, advertisement tax, business tax, land tax (land revenue), penalty, entertainment tax and land revenue collection.

All three levels of government have the authority to exercise powers, including making laws, framing annual budget, decisions, formulate

⁷⁸Nepal Rastra Bank is a statutory national bank of Nepal.

and implement policies and plans on any matter related to the financial powers within their respective jurisdictions.⁷⁹ Additionally, Article 59 (2) states that the Federation may make necessary policies, standards and laws on any of the matters enumerated in the Concurrent List and other areas of financial powers as to be applicable also to the Provinces. The Federation, Province and Local levels shall make budget of their respective levels, and the time for submission of budget by the Provincial and Local level shall be as provided for in the federal law, as per Clause (3). Importantly, the federal, provincial and local levels shall provide for the equitable distribution of benefits derived from the use of natural resources or development. Certain portions of such benefits shall be distributed, pursuant to law, in forms of royalty, services or goods to the project affected regions and local communities, as per Clause (4). If, in utilising natural resources, the local community desires to make investment therein, all three levels shall accord priority to such investment in such portion as provided by law on the basis of the nature and size of such investment, as per Clause (5).

Under Clause (6), the Government of Nepal has power to obtain foreign assistance and borrow loans. Such assistance or loans shall be so obtained or borrowed for the sake of macro-economic stability. Additionally, provisions relating to the management of budget deficits and other fiscal discipline of the federal, provincial and local level are to be provided for in the Federal law.

Schedule Seven provides a list of concurrent powers that are to be shared by the Federation and the Province, including matters relating to civil and criminal procedure, evidence and oaths (legal recognition, public acts and records, and judicial proceedings), supply, distribution, price control, quality and monitoring of essential goods and services, and acquisition, requisitioning of property and creation of right in property.

Schedule Eight lists the exclusive powers of the local level. There are 22 enumerated, which include many powers of local significance, from town police, cooperative institutions, local taxes (wealth tax, house rent tax, land and building registration fee, and motor vehicle tax) to management of local services, local statistics and records, local level development plans and projects, and planning. The federal

⁷⁹Constitution of Nepal, 2015, Article 59 (1).

government has already enacted the Local Government Operations Act that elaborates these 22 entries in Schedule Eight, providing required institutions and procedures. As far as the District Assembly and the District Coordination Committee in each district is concerned, they have been created as part of the local level, and they do not have a scheduled list of powers. However, Article 220 (7) prescribes them with the following functions, duties, and powers at the local level:

- (a) coordinate between the Village Bodies and Municipalities within a district;
- (b) monitor development and construction works to ensure fair balance;
- (c) coordinate between the Federal and the State Government offices and Village Bodies and Municipalities in a district;
- (d) perform other functions as provided for in the State law.

Additionally, Schedule Nine provides a list of concurrent powers of the federation, provincial and Local levels, which includes cooperatives, education, health, newspapers, agriculture, forests, wildlife, mines and minerals and disaster management.

Article 60 addresses the distribution of sources of revenue. Clause (1) states that the each level may impose taxes on matters falling within their respective jurisdictions and collect revenue. The Government of Nepal shall make provisions for the equitable distribution of the collected revenue to the three levels. The amount of fiscal transfer receivable by the Province and Local Government shall be as recommended by the National Natural Resources and Fiscal Commission, as per Clause (3). Moreover, Clause (5) states that each Province shall, in accordance with the provincial law, distribute fiscal equalisation grants out of the grants received from the Government of Nepal and revenues collected from its sources, on the basis of the need of expenditure and revenue capacity of its subordinate local level. Clause (8) concludes that a Federal Act on the distribution of revenues shall be made giving due regard to the national policies, national requirements, autonomy of the provincial and local levels, services to be rendered by provincial and local levels to the people and financial powers granted to them, capacity to collect revenues, potentiality and use of revenues, assistance to be made in development works, reduction of regional imbalances, poverty and inequality, end of deprivation, and assistance to be made in the performance of contingent works and fulfillment of temporary needs.

The Constitution also lays down the basic rules of the interrelations between the federal, provincial and local levels. Article 231(1) says federal law can be made applicable to all of or, if required, to any part, of the territory of Nepal. Similarly, a provincial law may be made applicable to the whole of, or as required, to any part of the territory of a province.⁸⁰ According to Clause (3), if two or more provinces make a request to the Government of Nepal to make laws on any matter enumerated in Schedule Six, the Federal Parliament may make the necessary laws, which shall be applicable only to the concerned provinces.

As part of the basic rules of the interrelations between the three tiers of governments, Article 232(1) clarifies that the relations between the federal, provinces and local levels shall be based on the principles of cooperation, co-existence and coordination. Clause (2) further clarifies that the Government of Nepal may, pursuant to the Constitution and federal law, give necessary directions to any Provincial Council of Ministers on matters of national importance and on matters to be coordinated between the Provinces. It shall be the duty of the concerned Provincial Council of Ministers to abide by such directions. If any such type of act that seriously undermines the sovereignty, territorial integrity, nationality, or independence of Nepal is carried out in any Province, the President may, as required, warn such Provincial Council of Ministers and suspend or dissolve the Provincial Council of Ministers and the Provincial Assembly for a period not exceeding six months.⁸¹

Such a suspension or dissolution must be ratified by a two-thirds majority of the total number of the sitting members of the Federal Parliament within 35 days.⁸² In case of such ratification, election to the Provincial Assembly shall be held in such Province within six months. If Parliament does not ratify the suspension, it shall ipso facto be deemed invalid.⁸³ Federal rule shall apply to such a province during the period of such suspension if ratified and until elections of the Provincial Assembly. During the continuance of the federal rule, the Federal Parliament may make laws with respect to any matter enumerated in the List contained in Schedule Six.⁸⁴ Such laws shall continue to exist until repealed by other laws made by the concerned Provincial Assembly.⁸⁵

⁸⁰Constitution of Nepal, 2015, Article 231 (2).

⁸¹Constitution of Nepal, 2015, Article 232 (3).

⁸²Constitution of Nepal, 2015, Article 232 (4).

⁸³Constitution of Nepal, 2015, Article 232 (5).

⁸⁴Constitution of Nepal, 2015, Article 232 (6).

⁸⁵Constitution of Nepal, 2015, Article 232 (7).

Article 232 (8) states that the Government of Nepal may, directly or through the Provincial Government, render necessary assistance to, and give necessary directives to any Village Executive or Municipal Executive, pursuant to the Constitution and the federal law. It shall be the duty of the Village Executive or Municipal Executive to abide by such directives.⁸⁶

Article 233 provides that Provinces shall render assistance in the execution of legal provisions or judicial and administrative decisions or orders of each other. Clause (2) makes clear that a province may exchange information and consult with another province on matters of common concern and interest, coordinate with each other on their activities and legislations, and extend mutual assistance. A province shall, in accordance with its provincial law, provide equal security, treatment and facility to residents of another province.⁸⁷

Article 235 deals with coordination between the federal, provinces and local levels. The Federal Parliament is entitled to make necessary laws in order to maintain coordination between all levels of governments.⁸⁸ Additionally, the Provincial Assembly may maintain coordination between the Province and Village Bodies or Municipalities and settle political disputes, if any, that arise, in coordination with the concerned Village Body, Municipality, and the District Coordination Committee.⁸⁹ Clause (3) holds that the processes and procedures for the settlement of disputes under Clause (2) shall be as provided for in the provincial law.⁹⁰

As far as inter-provincial trade is concerned, Article 236 makes clear that the freedom of trade is not going to be impaired under the present federal scheme. It prohibits creating any kind of obstruction to the carriage of goods or extension of services by a province or local level to another province or local level or to the carriage of goods or extension of services to any provincial or local level or to levy tax, fee or charge thereon, or to make any kind of discrimination on the carriage or extension of such services or goods.

⁸⁶Constitution of Nepal, 2015, Article 232 (8).

⁸⁷Constitution of Nepal, 2015, Article 233 (3).

⁸⁸Constitution of Nepal, 2015, Article 235 (1).

⁸⁹Constitution of Nepal, 2015, Article 235 (2).

⁹⁰Constitution of Nepal, 2015, Article 235 (3).

The coordination power of the Federal Government has been clearly set out by Part 20 of the Constitution, however the exercise of such power must be exercised under federal parameters. In particular, despite the provision regarding residual power,⁹¹ which rests with the Federal Government, there exists the Inter-Provincial Council (elaborated later) for the non-judicial resolution of disputes, Article 237 maintains that “[n]othing contained in this Part shall affect the jurisdiction of the Constitutional Bench of the Supreme Court under Article 137.”

Article 285 empowers the Government of Nepal to constitute the federal civil service and such other federal government services as may be required. The Provincial Council of Ministers, the Village Executives, and the Municipal Executives may, by law, constitute and operate various government services as required for the operation of their administrations.

F. Parameters of Constitutional Economics

The Preamble of the Constitution makes it clear that Nepal is “committed to socialism based on democratic norms and values.” Article 4 defines Nepal, among other things, as “socialism-oriented.” Article 50 (3) further elaborates on the economic objective of the State, which will “be to achieve a sustainable economic development, while achieving rapid economic growth, by way of maximum mobilisation of the available means and resources through participation and development of public, private and cooperatives, and to develop a socialism-oriented independent and prosperous economy while making the national economy independent, self-reliant and progressive in order to build an exploitation free society by abolishing economic inequality through equitable distribution of the gains.” Article 51 (d-g) lay down the policies relating to economy, industry and commerce and policies relating to agriculture and land reforms, policies relating to development, and policies relating to the protection, promotion, and use of natural resources, and so on. All State point to a liberal, mixed and welfare economy envisaged by the framers of the Constitution.

The right of freedom to practice any profession, carry out any occupation, and establish and operate any industry, trade and business in any part of Nepal is guaranteed under Article 17(1)(f). There could be reasonable restrictions, for example, to ensure the harmonious

⁹¹Constitution of Nepal, 2015, Article 58.

relations between the federal units or to confer on the State the exclusive right to undertake any specific industry, trade or service, or to prescribe any condition or qualification for carrying on any industry, trade, occupation, employment or business.⁹²

Article 25 guarantees the right relating to property. Clause (1) guarantees that every citizen, subject to law, has the right to acquire, own, sell, dispose, acquire business profits from, and otherwise deal with, property. Clause (2) clarifies that the State shall not, except in the public interest, requisition, acquire or otherwise create any encumbrance on the property of a person. Clause (3) clarifies that the basis of compensation to be provided and procedures to be followed in the requisition by the State of property of any person for public interest shall be as provided for in the respective Act. Clause (4) further states that the State can work for land reform, management and regulation in accordance with law for the purposes of enhancing the product and productivity of land, modernisation and commercialisation of agriculture, environment protection, planned housing, and urban development. Clause (5) further adds that nothing shall prevent the State from using the property of any person, which it has requisitioned in the public interest for utilising for any other public interest instead of the public interest it was requisitioned for.

F. Inclusion and Participation in State Structures and Protection of Identity

The 2015 Constitution provides various provisions with regards to inclusion and participation of historically-deprived and marginalised groups in the structures of the state. As noted earlier, the Preamble itself contains a clear resolve “to build an egalitarian society founded on the proportional inclusive and participatory principles.” More extensively, under Article 42 (1), with regards to fundamental right to social justice, the Constitution states:

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

⁹²The Constitution of Nepal, Article (7) (f) (6).

The right outlined in Article 42 (1) is also known as the right to proportional inclusion. The groups that have been given the entitlements may be segregated into 16 groups. It simply means that these 16 groups of Nepali society have the right to participate in the State bodies in proportion to their share in the national population. Seemingly, the objective is to change the existing scenario and augment the existing deficit through a constitutional guarantee to ensure that these 16 groups are fairly represented in State bodies. Out of these 16 groups, seven groups are what can be considered identity-based (*Dalits*, indigenous people, *Madhesi*, *Tharu*, Muslim, minorities and *Khas Arya*), two groups are related to gender and sexuality (women and gender and sexual minorities), and seven groups are based on economic (backward classes, marginalised people, farmers, labourers and oppressed citizens or those of backward regions), in addition to the category of persons with disabilities. The definitional problems with these groups, with overlaps and harmonisation with the other fundamental rights guaranteed to the citizens under Part 3 of the Constitution, may be handled by the laws made to implement this fundamental right.

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

Article 51 addresses many policies that the State must pursue. Article 51(a) (5) states that, regarding national unity and national security, the State shall make army, police, armed police and other security organs strong, capable, professional, inclusive and accountable to people on the basis of national security system. Clause (c) (6), regarding policies related to social and cultural transformation, states that the State shall

preserve and develop the language, texts, culture, literature, arts motion pictures and property of different castes and communities, on the basis of equity, while also maintaining the country's cultural diversity. Relating to development policy, the State shall formulate strategies and programs for sustainable socio-economic development under regional development plans for balanced and inclusive regional development and to implement them in a coordinated manner, as per Clause (f)(1).

Article 51(j), regarding State policies, highlights various policies in the areas of social justice and inclusion. Some of these policies include making appropriate arrangement for single women in helpless conditions on the basis of skill, capability and merit (Clause 1); rehabilitation of bonded labourers and otherwise deprived Kamaiya, Kamlari, Haruwa, Charuwa, Haliya, the landless and squatters by identifying them, and making arrangements for housing, or providing plots of land or house, employment, or arable land for livelihoods (Clause 6), and making special arrangements to ensure the rights of indigenous ethnic groups to lead a dignified life with their respective identities, and making it possible for them to participate in decision-making processes that concern them, and preserving and maintaining the traditional knowledge, skill, experience, culture and social practices of indigenous people and local communities (Clause 8).

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

Article 70 states that while conducting election of the President and Vice-President under the Constitution, the election shall be held so as to represent the different genders or communities. Article 76, regarding the formation of the Council of Ministers, in Clause (9) states that the President shall, upon the recommendation of the Prime Minister, form a council of ministers consisting of members not exceeding 25 in number from among the members of the Federal Parliament on the basis of the principle of inclusion.

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

Similarly, under policies of the State (Article 51 (j)), there is obligation to make arrangements related to social justice and inclusion for the benefit of single women, in their employability, to ensure the participation of indigenous communities in decision-making, and to create provisions for enhanced opportunities and benefits for minority communities. Additionally, with regard to provisions relating to the Nepal Army (Article 267), the Constitution states that the entry of women, *Dalit*, indigenous peoples and communities, *Madhesi*, *Tharu*, and backward classes and regions will be based on the basis of equality and inclusion and ensured by federal law.

There are other principles of inclusion and representation of traditionally under-represented minority communities in the executive as well. For example, with regard to the composition of the HoR, Article 84 (8) states that at least one-third of the total number of members elected from each political party represented in the Federal Parliament must be women. If women are not so elected as to constitute one-third of the elected members of any political party, then such a political party must ensure that women constitute at least one-third of the total number of members elected to the Federal Parliament from that party.

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

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

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

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

Article 90, concerning the Speaker and Deputy-Speaker of the HoR, in Clause (1) states that the HoR shall, within 15 days of commencement of its first meeting, elect a Speaker and a Deputy Speaker from among its members. Clause (2) then clarifies that while electing Speaker and Deputy Speaker as per Clause (1), either the Speaker or Deputy Speaker shall be a woman and belong to different parties.

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

Article 168 (9), addressing the constitution of Provincial Council of Ministers, states that the Provincial Head shall, on the recommendation of the Chief Minister, constitute from among the members of the Provincial Assembly the Provincial Council of Ministers on the basis of the principles of inclusion and not exceeding more than 20 per cent of the total number of members of the Provincial Assembly, including the Chief Minister.

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

Article 215 (4) states that the members of the Village Executive shall also include four women members elected by the members of the Village Assembly from amongst themselves and two members elected by the Village Assembly from the *Dalit* or minority communities, in

possession of the qualification under Clause (5). Article 216 (4) goes on to state that the members of the Municipal Executive shall also include five women members elected by the members of the Municipal Assembly from amongst themselves and three members elected by the Municipal Assembly from the *Dalit* or minority communities, in possession of the qualification under Clause (5).

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

Within Article 267, which outlines provisions relating to the Nepal Army, Clause (3) demands that the entry of women, *Dalits*, indigenous communities, *Khas Arya*, *Madhesi*, *Tharu*, Muslim, people of backward classes and backward regions shall be ensured in Army, based on the principles of equality and inclusion as provided for in the federal law.

Article 269, which is concerned with the constitution, registration and operation of political parties, in Clause (4) (c) calls for proportional participation so as to reflect the diversity of Nepal, in the executive committees at various levels of the parties. Article 282, regarding Nepal's ambassadors and emissaries, states in Clause (1) that the President shall appoint ambassadors of Nepal and other emissaries for specified purposes based on the principle of inclusion. Article 283, entitled 'Appointments to be made on inclusive principles', states that appointment to constitutional bodies and agencies shall be made based on the principles of inclusion. Article 285 (2), regarding formation of the government service, highlights that positions of all federal governmental services shall be fulfilled through competitive examinations on the basis of the principle of open and proportional inclusion according to federal law.

Part 27 of the Constitution provides for a cluster of seven Commissions promoting equality, inclusion, participation, and protection of identity, among other things. They are the National Women Commission, the

National Dalit Commission, the National Inclusion Commission, the Indigenous People Commission, the *Madhesi* Commission, the Tharu Commission, and the Muslim Commission. All these Commissions have been created to examine the policy and programme interests of each section of these national populations, vesting in them the power to make recommendations to the Government of Nepal. For example, Article 258 establishes the National Inclusion Commission, consisting of a Chairperson and four other members. Article 259 outlines its functions, duties, and powers, which include carrying out research and studies for protecting rights and welfare of *Khas Arya*, backward class, persons with disability, senior citizens, labourers, peasants, marginalised and minority communities, people of Karnali region, and economically disadvantaged persons (as per Clause (1) (a)), to review the policies of the Government of Nepal for inclusion of the persons as mentioned in Section (a) and their implementation, and to forward necessary recommendation to the Government for reform (as per Clause (1) (b)), and to conduct study on the rightful representation of the persons as mentioned in Section (a) in the state mechanisms, and to forward recommendations to the Government of Nepal to ensure their representation therein (as per Clause (1) (c)). The functions, duties, and powers of the Indigenous People Commission, the Madhesi Commission, the Tharu Commission, and the Muslim Commission – the major deprived communities and identity groups – have not been specified and kept open for the laws to be enacted by the Parliament.

It is clear that the establishment of the constitutional commissions under Part 27 will have a great role in establishing equality, inclusion, and protection of various identity groups in the country. For example, one can see how the Parliament sees the role of the *Madhesi* Commission under the Act of 2017. The functions, duties and powers of the Commission are stated as follows:

- (a) to study the overall situation of the *Madhesi* community and make recommendations to the Government of Nepal on policy, legal and institutional reforms to be made in that regard;
- (b) to formulate national policies and programmes for the protection and promotion of the rights and interests of the *Madhesi* community, to empower the community, and to make recommendations to the Government of Nepal for their implementation;

- (c) to suggest to the Government of Nepal the steps to be taken for the effective implementation of the provisions for the protection and promotion of the rights and interests of the *Madhesi* community and for its empowerment;
- (d) to suggest to the Government of Nepal the reforms to be made in the legal, policy and institutional arrangements for the protection and promotion of the rights and interests of the *Madhesi* community and its empowerment;
- (e) to review, monitor and evaluate the implementation of policies and programmes related to the *Madhesi* community;
- (f) to monitor or enforce the implementation of the recommendations or suggestions made by the Commission;
- (g) to formulate and implement special programmes for the development and empowerment of economically or socially backward persons within the *Madhesi* community and to recommend to the Government of Nepal;
- (h) To study and research various languages, scripts, culture, history, traditions, literature and art within the *Madhesi* community and to formulate programmes for the protection and development of such languages, scripts, culture, history, traditions, literature and art and to make appropriate recommendations to the Government of Nepal;
- (i) to conduct awareness programmes for the protection and promotion of the rights and interests of the *Madhesi* community and for the empowerment of the community;
- (j) to formulate a programme for the empowerment of the *Madhesi* community and to recommend to the Government of Nepal to end the prevailing superstitions and all forms of exploitation in the *Madhesi* community;
- (k) to make necessary recommendations or suggestions to the Government of Nepal for the implementation of the international treaty or agreements in relation to the *Madhesi* community by monitoring its implementation;
- (l) to collect complaints against the person or organisation violating the rights of the *Madhesi* community and make recommendations to the concerned body for investigation;
- (m) to recommend to the Government of Nepal the list of surnames of the members of the *Madhesi* communities after conducting detailed study and research on their identity;

- (n) to review, monitor and evaluate the awareness programmes conducted by the Government of Nepal and other organisations for the protection, promotion and empowerment of the rights and interests of the *Madhesi* community;
- (o) to formulate and implement a code of conduct for the chairperson, members and staff of the Commission; and,
- (p) to approve the annual plan and programme of the Commission.

There are similar provisions in the parliamentary statutes for the Indigenous People's Commission, Tharu Commission, and Muslim Commission, meant to facilitate equal treatment, empowerment and social transformation under the new Constitution. Additionally, these Commission will work towards greater inclusion in the country and indicates how progressive the 2015 Constitution is in the issue of inclusive governance. Under the current framework, the chiefs and officials of the constitutional bodies must be accountable and responsible to the Federal Parliament. The committees of the HoR may monitor and evaluate the functioning of the constitutional bodies, other than the National Human Rights Commission, and give necessary direction or advice.⁹³ Their annual reports shall be submitted to the President, who shall place them before the Federal Parliament via the Prime Minister.⁹⁴ Article 265 makes it clear that the Federal Parliament will review these commissions formed under Part 27 after ten years of the commencement of the Constitution. It is inconceivable that an issue of inclusion, participation, or identity will go unattended in the given constitutional framework.

Despite these developments in favour of inclusive governance through the mechanism of constitutional commissions, some issues remain. The prevalence of numerous constitutional bodies leads to overlapping jurisdiction and powers and a waste of institutional resources due to duplication of effort.⁹⁵ Worse still, even now many constitutional bodies including these Commissions remain without all office-bearers.⁹⁶ The reason for the partially empty offices are supposedly the disagreement among political parties in the appointment of officials,

⁹³The Constitution of Nepal, Article 293.

⁹⁴The Constitution of Nepal, Article 294.

⁹⁵Wagley, N. (Oct. 2018), "Nepal Human Rights: Too Many Cooks?" *The Asia Foundation*, available at <https://asiafoundation.org/2018/10/24/nepal-human-rights-too-many-cooks/>

⁹⁶Dahal, A. (Jun. 2019), "Constitutional bodies without officials despite mandatory provision", *My Republica*, available at <https://myrepublica.nagariknetwork.com/news/constitutional-bodies-without-officials-despite-mandatory-provision/>.

which has ab initio compromised the integrity and independence of these commissions.⁹⁷ The issue of appointing high quality professionals to be office-bearers cannot be compromised if the challenge of bringing about change is to be met in a timely manner.

G. Secularism and Multiculturalism

Article 4 of the 2015 Constitution declares Nepal a secular country:

State of Nepal: (1) Nepal is an independent, indivisible, sovereign, secular, inclusive, democratic, socialism-oriented, federal democratic republican state...

Explanation: For the purposes of this Article, 'secular' means religious, cultural freedoms, including protection of religion, culture handed down from the time immemorial.

This provision comes with the perambulatory commitment for diversity by recognising the multi-ethnic, multi-lingual, multi-religious, multi-cultural and diverse regional characteristics of Nepal, the right to equality,⁹⁸ the right against untouchability and discrimination,⁹⁹ the right to freedom of religion,¹⁰⁰ the right to language and culture,¹⁰¹ the rights of women,¹⁰² and the rights of the *Dalit*,¹⁰³ among others. The right to freedom of religion, enshrined in Article 26, guarantees the freedom to profess, practice and protect one's religion according to individual conviction. The right to operate and protect religious sites and religious trusts has also been included. Significantly, Article 26 (3) prohibits converting any person from one religion to another or any act or conduct that may jeopardise another's religion; such act shall be punishable by law.

Article 6 states that all languages spoken as the mother tongues in Nepal are to be the languages of the nation. However, Article 7 clarifies that the Nepali language in the Devanagari script shall be the official

⁹⁷Pradhan, T. R. (Dec. 2019), "Continued political interference is weakening crucial constitutional bodies," *The Kathmandu Post*, available at <https://kathmandupost.com/politics/2019/12/08/continued-political-interference-is-weakening-crucial-constitutional-bodies>.

⁹⁸Constitution of Nepal, 2015, Article 18.

⁹⁹Constitution of Nepal, 2015, Article 24.

¹⁰⁰Constitution of Nepal, 2015, Article 26.

¹⁰¹Constitution of Nepal, 2015, Article 32.

¹⁰²Constitution of Nepal, 2015, Article 38.

¹⁰³Constitution of Nepal, 2015, Article 40.

language of Nepal. There is a continued desire to maintain Nepali language as the lingua franca of the people of Nepal. However, the provinces independently have the power to determine one or more than one languages of the nation spoken by a majority of people within the province as the official language(s), in addition to the Nepali language, as per Article 7(2). The right to equality (Article 18) explicitly states in Clause (2) that no discrimination shall be made in application of general laws on the grounds of various diversity factors, including language. Additionally, Article 32(1) states that every person and community shall have the right to use their languages.

Article 287 declares that the Government of Nepal shall, no later than one year of the commencement of the Constitution, constitute a Language Commission comprising representation of the provinces. The Commission's functions, duties and powers are outlined as follows (Clauses (a-d)):

1. determine the criteria to be fulfilled for recognition of the official language and make recommendations on languages to the Government of Nepal;
2. make recommendations to the Government of Nepal on the measures to be adopted for the protection, promotion and development of languages;
3. measure the level of development of mother tongues and make suggestions to the Government of Nepal, on the potential for use in education;
4. study, research and monitor languages.

Article 290 also requires the Federal Parliament to make necessary laws in relation to the rights of the trust (Guthi) and the farmers enjoying possessory rights over trust lands in a manner not to be prejudicial to the basic norms of the trusts. The words of the national anthem, contained in Schedule 2, reflect the commitment of the Constitution to unity in diversity:

We are the one garland made up of a hundred bunch of flowers
Spread from Mechi to Mahakali as a sovereign people.
Endowed with a vast range of natural heritage
Made free and steadfast by the blood of heroes
Land of Knowledge, Land of Peace– our plains, hills and
mountains

Indivisible, our dear motherland Nepal!
A culture so vast, diverse peoples, languages and religion
Long live Nepal, our pioneering nation!¹⁰⁴

H. Women's Rights and Citizenship Laws

The citizenship rules outlined under Part Two of the Constitution deal with claims of Nepali citizenship. It outlines the provisions for imparting citizenship by descent, citizenship by birth, naturalised citizenship, and honorary citizenship. Overall, Article 10 specifies that no citizen of Nepal shall be deprived of the right to obtain citizenship, a provision appears in a constitution for the first time in Nepal.

A person who has obtained the citizenship of Nepal by descent prior to the commencement of this Constitution is a citizen of Nepal.¹⁰⁵ A person whose father or mother was a citizen of Nepal through birth at the commencement of the Constitution is also a citizen by descent.¹⁰⁶ A child of a citizen having obtained the citizenship of Nepal by birth prior to the commencement of this Constitution shall, upon attaining majority, acquire the citizenship of Nepal by descent if the child's father and mother are both citizens of Nepal.¹⁰⁷ Every minor found within Nepal 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.¹⁰⁸ Citizenship by descent is also available to 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 yet traced.¹⁰⁹

In the second category, 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 traced to be a foreigner, the citizenship of such person shall be converted into naturalised citizenship, as provided for in Federal law, if the citizenship by descent has already been given.¹¹⁰ This federal law is yet to be enacted at the time of this publication. A foreign woman who has a matrimonial relationship with a citizen of Nepal may, if she so wishes, acquire the naturalised citizenship of Nepal as provided for

¹⁰⁴The author's own translation.

¹⁰⁵The Constitution of Nepal, 2015, Article 11 (2) (a).

¹⁰⁶The Constitution of Nepal, 2015, Article 11 (2) (b).

¹⁰⁷The Constitution of Nepal, 2015, Article 11 (3).

¹⁰⁸The Constitution of Nepal, 2015, Article 11 (4).

¹⁰⁹The Constitution of Nepal, 2015, Article 11 (5).

¹¹⁰The Constitution of Nepal, 2015, Article 11 (5) (Proviso).

in the federal law.¹¹¹ Such a federal law has not yet been adopted. 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 naturalised citizenship of Nepal in accordance with federal law if he or she has permanently resided in Nepal and has not acquired citizenship of a foreign country.¹¹² 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.¹¹³ In cases other than those mentioned in this Article, the Government of Nepal may, in accordance with federal law, grant the naturalised citizenship of Nepal.¹¹⁴ This law has not yet come into existence.

In the third category, the Government of Nepal may, in accordance with federal law, grant honorary citizenship of Nepal to foreigners. Whenever any territory is acquired by way of merger into Nepal, a person having his or her domicile in such territory shall become a citizen of Nepal, subject to the federal law. This law has not been enacted so far. Article 12 of the Constitution provides for citizenship with identity of descent and gender. A person who obtains the citizenship of Nepal by descent in accordance with this Constitution may obtain a certificate of citizenship of Nepal with gender identity by the name of his or her mother or father.¹¹⁵ The erstwhile tradition of issuing the certificate based on the identity of father alone has been changed. Other matters relating to the acquisition, reacquisition and termination of citizenship are to be provided for via federal law, which is yet to be enacted.¹¹⁶

As per the demand of the non-resident Nepali living overseas, Article 14 deals with non-resident citizenship, which may be given to Nepali nationals abroad. The non-residential citizenship 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 (SAARC), and who or whose father, mother, grandfather or grandmother was previously a citizen of Nepal by decent or birth but subsequently acquired the citizenship

¹¹¹The Constitution of Nepal, 2015, Article 11 (6).

¹¹²The Constitution of Nepal, 2015, Article 11 (7).

¹¹³The Constitution of Nepal, 2015, Article 11 (7) (proviso).

¹¹⁴The Constitution of Nepal, 2015, Article 11 (8).

¹¹⁵The Constitution of Nepal, 2015, Article 12.

¹¹⁶The Constitution of Nepal, 2015, Article 15.

of the foreign country. Such persons may enjoy economic, social and cultural rights in Nepal in accordance with federal law. Other matters relating to the maintenance of records setting out the identity of every citizen of Nepal and the citizenship of Nepal shall be as provided for in federal law.¹¹⁷

There are certain privileges associated with certain types of citizenships as well. For example, Article 289 provides provisions relating to citizenship of officials, in which it states:

- (1) In order for a person to be elected, nominated or appointed to the office of President, Vice-President, Prime Minister, Chief Justice, Speaker of the House of Representatives, Chief of Province, Chief Minister, Speaker of a Provincial Assembly and chief of a security body, the person must have obtained the citizenship of Nepal by descent.
- (2) A person who has obtained the citizenship of Nepal by descent, a person who has obtained the naturalised citizenship of Nepal, or a person who has obtained the citizenship of Nepal by birth shall also be qualified for the office of a constitutional body other than that mentioned in Clause (1).

Articles 11 (5) and 11 (7) provide specific conditions under which women can confer citizenship to their children, even though Article (11) (2) (b) provides that women have equal rights as men when conferring citizenship.¹¹⁸ Specifically, Article 11 (5) states:

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.

Provided that his or her father is held to be a foreign citizen, the citizenship of such person shall be converted into naturalised citizenship as provided for in the federal law.

¹¹⁷The Constitution of Nepal, 2015, Article 14.

¹¹⁸Mulmi, S., and Shneiderman, S. (2017), "Before and after the 2015 Constitution," in *Understanding Statelessness*, eds. T. Bloom, K. Tonkiss, and P. Cole, (hereinafter, "Mulmi and Shneiderman (2017)"), at p. 139.

Article 11 (7) then states:

Notwithstanding anything contained elsewhere in this Article, 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 naturalised 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.

I. Independent and Impartial Constitutional Bodies

There are various national entities that the Constitution establishes as independent and impartial constitutional bodies in the interest of some core values of Nepal's constitutional democracy. Article 306(1) lists the constitutional bodies as the Commission for the Investigation of Abuse of Authority, the Auditor General, the Public Service Commission, the Election Commission, the National Human Rights Commission, the National Natural Resources and Fiscal Commission, the National Women's Commission, the National Dalit Commission, the National Inclusion Commission, the Indigenous Nationalities Commission, the *Madhesi* Commission, the Tharu Commission and the Muslim Commission. The powers that these constitutional bodies exercise could be abused or compromised if left to the executive branch of government under their normal executive power.

The appointments to these independent and impartial constitutional bodies are to be done by the President of Nepal on the recommendation of the Constitutional Council.¹¹⁹ All these officials are to be qualified as specified in the Constitution and are entitled to remuneration and other conditions of service under federal law. They are appointed for their constitutional term and can be removed by impeachment at the HoR. All the constitutional commissions, including others not recognised as 'constitutional bodies but have been featured here or elsewhere, are taken as dignified institutions. The very idea of creating these commissions was to entrust power that may otherwise be exercised by the sitting government. Their independence in relation to state bodies

¹¹⁹The Constitution of Nepal, 2015, Article 284 (1)

and political parties essentially reflects non-partisan approach to the constitutionalism, rule of law, and the principles of justice on the one hand, and the democratic culture, development concept, intellect, social direction and expectations of citizens on the other. The more powerful and independent the independent commissions are, the more they are believed to function on the basis of the principle of balance and control, with full responsibility and accountability to the public interest.

Part 21 establishes the Commission for the Investigation of Abuse of Authority (CIAA) as an anti-graft body independent of government. The CIAA has been given the power to conduct, or cause to be conducted, investigations of any abuse of authority committed through corruption by any person holding public office.¹²⁰ Article 239 (3) states that, upon investigation, if the Commission finds that a person holding public office has committed an act which is defined by law as corruption, it may file, or cause to be filed, a case against that person and other person involved in that offense in the competent court in accordance with law. Additionally, if the Commission finds that any act or action done or taken by a person holding public office appears to be of such nature as to be falling under the jurisdiction of another official or body, the CIAA may write to the concerned official or body for necessary action. The CIAA cannot take action against public officials who can be removed from office by the HoR by passing a motion of impeachment under Article 101,¹²¹ judges who can be removed by the Judicial Council, and persons who are liable to action under the Army Act. However, in all these cases the CIAA may conduct, or cause to be conducted, investigations in accordance with the federal law after the individuals in question have been removed from office.¹²² Additionally, the Commission may delegate any of its functions, duties and powers on conduct of investigations or filing of cases, to the Chief Commissioner, a commissioner or an officer employee of the Government of Nepal, subject to the specified conditions, according to Clause (5).

¹²⁰The Constitution of Nepal, 2015, Article 239 (1).

¹²¹They are President or Vice-President of Nepal, the Chief Justice and the Judge of the Supreme Court, Chief Commissioner or Commissioners of CIAA, Auditor General, Chairperson and Member of Public Service Commission, Chief Election Commissioner or Election Commissioner, Chairperson or member of the National Human Rights Commission, Chairperson or member of the National Natural Resources and Fiscal Commission, Chairperson or member of the National Women's Commission, Chairperson or member of the National Dalit Commission, and Chairperson or member of the National Inclusion Commission. They may be impeached by the House of Representatives on various grounds.

¹²²The Constitution of Nepal, 2015, Article 239(2).

Part 23 of the Constitution establishes the Public Service Commission, whose duty it is to conduct examinations for the selection of suitable candidates to be appointed to positions in the Civil Service.¹²³ In other words, the Government of Nepal cannot exercise any power in this regard. Under Article 243, the Commission shall conduct written examinations to be given for appointment to the offices of the Nepal Army, Nepal Police, Armed Police Force, other federal governmental services and of bodies corporate, other than the positions in the Civil Service. Additionally, the Commission shall be consulted on the general principles to be followed in the course of making appointments and promotion to any position of the Nepal Army, Nepal Police, Armed Police Force and other federal government services, as per Clause (3). Clause (4) maintains that the Commission shall be consulted on the laws relating to the conditions of service of the employees in the service of a body corporate and on the general principles to be followed in the course of making promotion to any position of such service and taking departmental action against any such employee. Importantly, Clause (5) clarifies that no permanent appointment to any pensionable position chargeable on the Government of Nepal shall be made except in consultation with the Public Service Commission. The Commission must be consulted in a host of other public service issues,¹²⁴ but it does not interfere in the matters falling within the jurisdiction of the Judicial Service Commission under Article 154.

Additionally, there also exists a Judicial Service Commission, but under Part 11, whose job it is, together with the Supreme Court and the Judicial Council, to submit annual reports to the President. The President shall submit such reports to the Federal Parliament through the Prime Minister, as per Article 138. Clause (2) states that if the Federal Parliament, upon deliberating on the annual reports submitted under Clause (1), deems it necessary to give any suggestion, it may give it to the concerned body through the Government of Nepal, Ministry of Law and Justice. Additionally, the Judicial Service Commission shall, in accordance with the federal law, hold written and oral competitive examinations for the persons who have possessed the qualification under sub-clauses (b) and (c) of clause (2), and make recommendation, in order of merit, to the Judicial Council for appointment as district judges. Moreover, Article 154(1) states that in appointing, transferring

¹²³The Constitution of Nepal, 2015, Article 243 (1).

¹²⁴The Constitution of Nepal, 2015, Article 243 (6)-(7)

or promoting gazetted officers of the Federal Judicial Service or taking departmental action concerning such officers in accordance with law, the Government shall act on recommendation of the Judicial Service Commission. Additionally, Article 156 states that provisions relating to the formation of a Provincial Judicial Service Commission and the remuneration, facilities and conditions of service of the employees of the Provincial Judicial Service shall be as provided for in federal law.

Part 24 establishes the Election Commission of Nepal. In other words, none of the elections under the constitutional system can be conducted by the Government of Nepal. The duty of the Commission is to conduct, supervise, direct and control the election to the President, Vice-President, members of the Federal Parliament, members of Provincial Assemblies and members of local level. For these purposes, the Election Commission shall prepare electoral rolls.¹²⁵ The Election Commission is also empowered to hold referenda on matters of national importance pursuant to the Constitution and federal law, as per Article 246 (2).¹²⁶ Additionally, Clause (3) states that if, after nomination of candidacy for the President, Vice-President, member of the Federal Parliament, member of Provincial Assemblies or member of local level has been filed but before the election results are declared, a question arises about the qualification of a candidate, the Election Commission shall decide on that question. Article 247 states that the Government of Nepal, Provincial Government and Local Government shall provide employees and other assistance to the Election Commission as may be required to perform its functions.

Article 286 states that the Government of Nepal may constitute an Election Constituency Delimitation Commission, to determine election constituencies for the purpose of election to the members of the Federal Parliament and members of the Provincial Assemblies in accordance with the Constitution. Clause (5) states that while determining election constituencies, the Election Constituency Delimitation Commission shall give due regard to population and geography as the basis of representation, and to ensure that the ratio between the geography, population and number of members of such election constituencies is equal, so far as practicable. Additionally, Clause (7) states that no question may be raised in any court on any matter of the determination,

¹²⁵The Constitution of Nepal, 2015, Article 246 (1).

¹²⁶The Constitution of Nepal, 2015, Article 275.

or review, of election constituencies made by the Election Constituency Delimitation Commission. As per Clause (8), Election Constituency Delimitation Commission shall submit a report on the works it has performed to the Government of Nepal.

Part 25 establishes the National Human Rights Commission (NHRC), whose duty it is to respect, protect and promote human rights and ensure effective enforcement thereof.¹²⁷ The Constitution also provides an extensive list of functions, duties and powers of the NHRC. Article 249 (4) states that the NHRC may delegate any of its functions, duties and powers to the Chairperson of the Commission, any of its Members or a government employee as to be exercised and complied with subject to specified conditions.

Importantly, Part 26 establishes a National Natural Resources and Fiscal Commission (NNRFC). It has a combination of responsibilities that facilitates fairness and efficiency regarding decision-making in certain areas important for the newly federalised country. They include allocation of competencies (expenditure side) and fiscal instruments (revenue side) across the vertical layers of the three-tier federal administration. An important part of the Commission's subject matter is the system of transfer payments or grants by which the federal (national) government shares its revenues with lower levels of government. Certain decisions regarding natural resources in the country are also affected by its recommendations. Article 251 (1) highlights the Commission's functions, duties and powers, which include:

1. determining the basis and modality for the distribution of revenues between the federal, provincial and local governments out of the Federal Consolidated Fund in accordance with the Constitution and law;
2. making recommendations on equalisation grants to be provided to the provincial and local governments out of the Federal Consolidated Fund;
3. conducting study and research work and prepare parameters as to conditional grants to be provided to the provincial and local governments in accordance with national policies and programmes, norms/standards and infrastructure;

¹²⁷The Constitution of Nepal, 2015, Article 249 (1).

4. determining basis and modality for the distribution of revenues between the provincial and local governments out of the Provincial Consolidated Fund, and,
5. recommending measures to meet expenditures of the federal, provincial and local governments, and to reform revenue collection, among others.¹²⁸

These functions of the independent Commission saves the Government of Nepal from possible accusations of bias and helps it to make fiscal federalism functional in the country based on an independent, impartial and fair system. Article 251 (2) further explains that the Commission shall carry out the necessary study and research regarding environmental impact assessment required in the course of distribution of natural resources, and to make recommendations to the Government of Nepal.

Part 27 establishes some important identity- and empowerment-oriented commissions to deal with issues that come up in an ethnically diverse and complex society. The issues of language, religion, culture, indigeneity and equality are important considerations in seeking to bring about empowerment and change. These commissions are as follows: National Women’s Commission (Article 252), National Dalit Commission (Article 255), National Inclusion Commission (Article 258), Indigenous Nationalities Commission (Article 261), *Madhesi* Commission (Article 262), Tharu Commission (Article 263), and Muslim Commission (Article 264). There are various provisions that have been commended for ensuring the impartiality and independence of these constitutional bodies.

The National Women’s Commission, among other things, has been given a constitutional status to formulate policies and programs concerning the rights and interests of the women and submit them to the Government of Nepal for implementation. It is also to monitor whether laws concerning the rights and interests of women and related obligations under international treaties to that Nepal is party to have been implemented, and make suggestions for their effective compliance and implementation to the Government of Nepal.¹²⁹ The National Dalit Commission shall conduct the study and exploration

¹²⁸The Constitution of Nepal, 2015, Article 250 (2) (a)-(e).

¹²⁹The Constitution of Nepal, 2015, Article 253 (1) (a)-(b).

of the overall situation of *Dalit* community, identify areas for necessary policy, legal, and institutional reforms in that field, and make recommendations to the Government of Nepal. It is also set to formulate national policies and programs concerning the interests of *Dalits* for uplifting and supporting the development of *Dalits*, putting an end to caste-based discrimination, oppression, and discrimination, and submit such policies and programs to the Government of Nepal for their implementation.¹³⁰

The National Inclusion Commission has been created to conduct the study and research works for the protection of the rights and interests of the communities, including *Khas Arya*, *Pichhada* class, persons with disabilities, senior citizens, labours, peasants, minorities and marginalised community, backward class, people of Karnali, and the indigent class, to study the status of implementation of the policies and laws adopted by the Government of Nepal for the inclusion of the community, class, and region, and make suggestions to the Government for reforms.¹³¹ The Indigenous People Commission, the *Madhesi* Commission, the Tharu Commission, and the Muslim Commission are similar commissions. The functions, duties and power of the National Women's Commission, the National Dalit Commission, and the National Inclusion Commission are very broad. The role of the latter commissions has been left to be decided by parliamentary statutes, but are not supposed to be different in any sense. Among all these commissions under Part 27, it is the National Women's Commission and National Dalit Commission that have been explicitly given power to file cases against any persons or body in order to defending the rights of women and *Dalits*, when necessary.¹³²

Part 22 provides for an Auditor General of Nepal. According to Article 241 (1), the accounts of all Federal and State Government offices, constitutional bodies and offices thereof, courts, office of the Attorney General, Nepal Army, Nepal Police and Armed Police Force shall be audited by the Auditor-General in accordance with law, having regard to, inter alia, the regularity, economy, efficiency, effectiveness and propriety thereof. Clause (2) states that the Auditor General shall be consulted in the matter of appointment of an auditor to carry out

¹³⁰The Constitution of Nepal, 2015, Article 256 (1) (a)-(b).

¹³¹The Constitution of Nepal, 2015, Article 259 (1) (a)-(b).

¹³²The Constitution of Nepal, 2015, Articles 253 (1) (f) and 256 (1) (f).

the audit of a corporate body of which the Government of Nepal or Provincial Government owns more than 50 per cent of the shares or assets. The Auditor General may also issue necessary directives setting forth the principles for carrying out the audit of such a corporate body. Clause (3) clarifies that the Auditor General shall, at all times, have power to examine any book of accounts for the purpose of carrying out the functions under Clause (1). It shall be the duty of the concerned chief of office to provide all such documents and information as may be demanded by the Auditor General or any of his/her employees. Clause (4) states that the accounts to be audited pursuant to Clause (1) shall be maintained in the form prescribed by the Auditor General, as provided for in federal law. In addition to the accounts of the offices mentioned in Clause (1), federal law may also require the accounts of any other office or body to be audited by the Auditor General.¹³³

J. Constitutional Council for High Level Appointments

Article 284 (1) states that there shall be a Constitutional Council for making recommendations for appointment of the Chief Justice and heads and officials of the constitutional bodies.¹³⁴ The Council is a check on the power of the Head of Government in the appointment of public functionaries who have the constitutional responsibility to work independently and outside the influence of the Government in power.

The Council is led by Prime Minister as chairperson, with the following members: Chief Justice, Speaker of the HoR, Chairperson of the NA, Leader of main opposition party in the HoR, and Deputy Speaker of the HoR. Clause (2) states that while making a recommendation for appointment to the office of the Chief Justice, the Constitutional Council shall include the Minister for Law and Justice of the Government of Nepal as its member. While the Prime Minister proposes candidates, as being the head of government, with the support of the Secretariat or his or her Council of Ministers, the vetting by these members of the nominees as proposed by the Prime Minister is necessary. Clause (4) of Article 284 emphasises that other functions, duties and powers of the Constitutional Council and rules of procedures on the appointment of the Chief Justice or chiefs or officials of constitutional bodies shall be as provided for in the federal law, as per Clause (5).

¹³³The Constitution of Nepal, Article 241 (5).

¹³⁴The Constitution of Nepal 2015, Article 306 (1) (1).

The Constitution provides for parliamentary hearings for the appointments to the offices of the Chief Justice and judges of the Supreme Court, members of the Judicial Council, chiefs and members of constitutional bodies appointed on the recommendation of the Constitutional Council, and to the offices of ambassadors, as provided for in federal law. A 15-member joint committee, consisting of members of both houses of the Federal Parliament, in accordance with federal law, has the responsibility of conducting the hearings. No member of the joint committee, under Clause (2) shall practice law in the Supreme Court during the term of the Federal Parliament. Federal law, when enacted, would have to make sure that the members of different parties in the Federal Parliament have to form the majority, rather than the members of the ruling party of the day, in the joint committee to avoid the influence of political power in the ultimate outcome of the process. This issue has to be carefully dealt with, because Nepal has a parliamentary form of government at the federal level, and the federal level maintains control in parliamentary decision-making in ideal cases.

K. Appointment of Judges to the Integrated Judiciary, Judicial Council, and Judicial Service Commission

Selection of high quality judges who can maintain the supremacy of the Constitution, protect fundamental rights and liberties of the people, ensure due process of law, and guarantee justice for all is a most important issue for any constitution. Under the present framework, while the Chief Justice is recommended for appointment by the Constitutional Council, the Judicial Council is to make recommendations or give advice, in accordance with the Constitution, on the appointment, transfer, disciplinary action against and dismissal of judges, and other matters relating to the administration of justice. In other words, these powers, which matter most for the independence of judiciary, has neither been given to the government nor to the judicial bureaucracy, not even to the Chief Justice or the Supreme Court. This Council, which has been created as a mixed body, is led by the Chief Justice as chairperson, with the following as members: the Federal Minister for Law and Justice, the senior-most judge of the Supreme Court, one jurist nominated by the President on recommendation of the Prime Minister, a senior advocate or advocate who has at least 20 years of experience, to be appointed by the President on the recommendation of the Nepal Bar Association.

The chairperson and a member of the Judicial Council may study the case associated with a complaint filed in respect of any Judge, and make a report to the Judicial Council. If a preliminary inquiry of a complaint filed in respect of any judge reveals a need to have a detailed inquiry by an expert, the Council may form an inquiry committee. If a judge, other than a judge who must be removed from office through impeachment under the Constitution, commits abuse of authority by way of corruption, the Judicial Council may investigate into the matter and institute a case in accordance with the law. The Council must prepare updated records of the persons who are qualified for appointment to offices of the Chief Justice, judges of the Supreme Court, chief judges and judges of the High Courts. Other functions, duties and powers of the Judicial Council shall be as provided for in federal law. The present structure of the Judicial Council has been carried over from the Constitution of 1990 and the Constitution of 2007.

The Judicial Service Commission has been created under Article 154. The Constitution makes it mandatory that the Government of Nepal should act on the recommendation of this Commission in appointing, transferring or promoting gazetted officers of the federal judicial service or taking departmental action concerning such officers in accordance with the law. In making new, permanent appointments to gazetted posts of the federal judicial service from persons who are not already in the federal government service or making promotions from non-gazetted posts of the federal judicial service to gazetted ones of that service, the Government shall act on the recommendation of the Public Service Commission. The Commission consists of the Chief Justice as chairperson and the following members: the Federal Minister for Law and Justice, the senior-most judge of the Supreme Court, the Chairperson of the Public Service Commission, as well as the Attorney General.

L. Provisions Regarding Political Parties

Since the promulgation of the 1990 Constitution, Nepal has provided constitutional guarantees for the formation and operation of political parties, in view of their role for the development and sustenance of pluralistic democracy. They are considered crucial entities for the public's ensuring participation in political life and the expression of the will of the people. It is this will of the people that forms the basis

of the authority of the government in a democratic state. It is Part 29 of the Constitution which addresses provisions relating to political parties. Article 269 states, regarding the formation, registration and operation of political parties, that persons who are committed to common political ideology, philosophy and programme may, subject to laws made under Article 17(2)(c),¹³⁵ form and operate political parties, and generate publicity in order to secure support and cooperation from the general public for their ideology, philosophy and programme.

Clause (2) further states that a political party formed in accordance with Clause (1) must register the party with the Election Commission upon fulfillment of the procedures established by law. Apart from the submission of the constitution and manifesto of the concerned political party, the applicant must convince the Commission that: (1) its constitution and rules are democratic, (2) the constitution provides for election of each of the office-bearers of the party at the federal and provincial levels at least once every five years (with six month's grace period), and, (3) that it includes a provision on inclusive representation in its executive committees at various levels reflecting the diversity of Nepal. If the name, objective, insignia or flag of a political party is of such a nature as to fragment the country or jeopardise the religious and communal unity of the country, such a party shall not be registered.¹³⁶

Importantly, Article 270 (1) states that any law, arrangement or decision that imposes any restriction on the formation and operation of a political party and its efforts to secure support and cooperation of the general public for its ideology, philosophy and programme in accordance to Article 269 shall be deemed to be inconsistent with the Constitution and shall, ipso facto, be void. Clause (2) goes further to emphasise that any law, arrangement or decision that allows participation of only a single political party or persons having similar political ideology, philosophy or programme in the elections or in the political system of, or in the conduct of governance of, the country shall be deemed to be inconsistent with this Constitution and shall, ipso facto, be void.

¹³⁵It concerns the right to freedom to form political parties. The proviso to this right states that this freedom may have reasonable restrictions on certain grounds stated therein.

¹³⁶The Constitution of Nepal, 2015, Article 270 (4) (a) - (c).

M. Emergency Powers

The Constitution contains a provision for emergency power for the executive in certain difficult situations under a system of democratic control and the rule of law. Part 30, which only comprises of Article 273, addresses the subject of emergency powers. It states that if a grave emergency arises in regard to the sovereignty, territorial integrity of Nepal or the security of any part thereof, by war, external aggression, armed rebellion, extreme economic disarray, natural calamity or epidemic, the President may declare or order a state of emergency in respect to the whole of Nepal or of any specified part. Furthermore, Clause (2) explains that notwithstanding anything contained in Clause (1), if there arises a grave emergency in a province by a natural calamity or epidemic, the concerned Provincial Government may request the Government of Nepal to declare a state of emergency in respect of the whole of the Province or of any specified part.

If a declaration or order laid for approval in accordance with Clause (3) is approved by at least two-thirds majority of the total number of sitting members of both Houses of the Federal Parliament, the declaration or order shall apply and continue in force for three months from the date of issuance. Clause (9) explains that after the making of a declaration or order of a state of emergency in accordance with Clause (1), the President may issue such orders as are necessary to meet exigencies. Orders so issued shall apply as of law so long as the state of emergency is in operation. At the time of making a declaration or order of a state of emergency, the fundamental rights as provided in Part Three may be suspended as long as the declaration or order is in operation, as per Clause (10).

Clause (12) states that if, during the continuance of a declaration or order under Article 273, any injury is caused to a person from any act done by any official in bad faith, the victim may, within three months from the date of termination of that declaration or order, file a petition for compensation for such injury. If such petition is made, the court may order for compensation by, and punish, the perpetrator as provided for in the federal law. Lastly, Clause (13) clarifies that the President may, at any time, withdraw a declaration or order of a state of emergency made in accordance with Article 273.

N. Inter-Provincial Council

Article 234 of the Constitution establishes an Inter-Provincial Council as the machinery for federal dispute resolution at the political level. Clause (1) states that there shall be an Inter-Provincial Council to settle political disputes arising between the Federation and a province and between provinces: Prime Minister (chairperson), Minister for Home Affairs of the Government of Nepal, (c) Minister for Finance of the Government of Nepal, and (d) the chief ministers of the concerned provinces. The Council meets as required. Additionally, the Council may invite to its meeting a minister of the Government of Nepal and a minister of the concerned Province who is responsible for the matter of dispute as well as a concerned expert.

The Council is an important political forum in the hands of the Prime Minister, as it allows him/her to bring forth all controversial issues for deliberation, thereby minimising their potential to develop as intractable issues or issues for judicial resolution through, for example, the Supreme Court's Constitutional Bench. The Council also allows the provinces to refer issues of their interest to this Prime Minister-led entity for discussion and resolution at the highest level. Local governments do not have direct representation in this Council, but the machinery may deal with issues related to local governments. The rules of procedures of the meeting of the Inter-Provincial Council shall be as determined by the Council itself, as per Clause (4).

O. Constitutional Amendment

The Constitution has a liberal provision regarding its amendment, as contained in Part 31. Article 274 (1) states that no amendment shall be made to this Constitution in a manner prejudicial to the sovereignty, territorial integrity, independence of Nepal and the sovereignty vested in the people. There is no restriction on amending the Constitution to further democratise it or consolidate the preambular aspirations. The Government with a two third majority, either by itself by building a coalition, can go ahead with amendment proposal.

Subject to Clause (1) and other articles of the Constitution, a Bill to amend or repeal any Article of the Constitution may be introduced in either House of the Federal Parliament, as per clause (2). Clause (4) states that if a bill introduced pursuant to Clause (2) is related with the alteration to the borders of any Province or matters set forth in Schedule 6, the Speaker or the Chairperson of the concerned House must send

that Bill to the Provincial Assembly for its consent, within thirty days after its introduction in the Federal Parliament. Then, the concerned Provincial Assembly must, by a majority of the total number of its sitting members, accept or reject the bill presented for its consent pursuant to Clause (4) and give information thereof to the Federal Parliament within three months.

Clause (6) explains that in the event of failure to give information of acceptance or rejection of such Bill within the period set forth in Clause (5), nothing shall prevent the House of the Federal Parliament in which the Bill was originated from proceeding with the bill. As per Clause (7) (7), if a Provincial Assembly, by its majority, gives a notice of rejection of such bill to the concerned House of the Federal Parliament within the period under Clause (5), the bill shall be inoperative. Clause (8) states that a bill which does not require the consent of the Provincial Assembly or a bill accepted by a majority of the Provincial Assembly under Clause (5) must be passed by at least two-thirds majority of the total number of the then members of both Houses of the Federal Parliament. Then, per Clause (9), a Bill passed under Clause (8) shall be presented to the President for assent. Lastly, under Clause (10), the President shall give assent to a bill within fifteen days from the date of its receipt, and the Constitution shall get amended from the date of assent.

III. Comments on the Significant Features

The Preamble of the Constitution considers the features that have been discussed in this chapter as significant for the goal of transforming Nepal. The significant features, as well as the way they have been presented in the Constitution, however, are not without criticism. There have been much comments and feedback on the Constitution and its provisions from various quarters regarding its provisions, and it is important for Nepali civil society and the political leadership to consider the critiques in an effort to make the Constitution more representative, inclusive, progressive and effective in achieving the lofty goals that it sets for itself.

Firstly, there is no doubt that the Constitution of Nepal, 2015, is overly wordy and its length is a matter of concern. There are clumsy provisions, and even basic editing would have made it a tighter document. The document is repetitive at times from the perspective of a legal draftsman. For example, it was possible to deal with all

issues related to equality and discrimination under one article, rather than spreading out this theme under different provisions. Similarly, it should have been possible to integrate all identity-based Commissions into the NHRC, giving the leadership of this Commission to able candidates have secured the confidence of women, *Dalits*, indigenous peoples, *Madhesis*, or minorities.

The Constitution's listing of fundamental rights should have been rationalised, so that there is reduced need to further elaborate on these rights through new legislation. Although the Supreme Court oversees, there are always risks in emphasising legislation to elaborate upon the constitutional guarantees, as such elaboration gives the opportunity to retract what the Constitution has already provided. Similarly, the category of *Khas Arya* was entirely unnecessary while defining various communities, because this is an identity group that does not require constitutional protection in relation to other groups. The social, economic and educational needs of the *Khas Arya* is encompassed in other provisions. The overlaps between fundamental rights and directive principles and, state policies could also have been avoided to a great extent. Additionally, the division of state power in different schedules could have been more focused on the exclusive lists rather than the concurrent lists. These shortcomings were on the whole avoidable.

The federal system of governance and the division of the provinces have faced much criticisms from activists and even scholars. Many of them were not in support of federalisation as a means of state restructuring; rather, they recommended a devolution of power within the unitary state according to the need and willingness, on asymmetrical basis, and only where necessary. But even those who supported federalism disagreed on its exact model, including the number of provinces, their sizes, and their names, while downplaying the importance of issues such as electoral districting, electoral threshold, district magnitude, the Election Commission, voter registration, electoral dispute resolution, and even strengthening proportional representation system in favour of deprived ethnic groups and communities. The debates were concentrated on carving out provinces in such a way that the major indigenous communities could re-establish their real or perceived ethnic territories, give them ethnic names, historical or modern, and build electoral strength as much as possible. There was no consensus on any such plan between the major political parties or their leaders.

Others who objected to such arrangements argued that such ethnic divide may satisfy some at the expense of many, given the presence of more than one hundred ethnic groups in the country. Others believe that the number of provinces must be kept to a minimum to make federalism sustainable economically, socially, and politically. Democracy and empowerment concerns were more important to them. A combination of factors influenced the federalisation plan. The ultimate outcome in the Constitution, even though it is democratic and inclusive by prevailing standards, was not accepted by some.

There were various controversies when demarcating the provinces. Prior to the promulgation of the Constitution, there was much debate on how the provinces should be divided in the federal state system. Hundreds of maps of the various federal setup proposals were circulated, differing basically on how identity and territory would be articulated. There was debate on whether it would be an ethnic (e.g. based on language, historical identity, etc.) or territorial (e.g. geography or population) criteria.¹³⁷ All issues relating to the number of provinces, their size and demarcations were problematic. The effort to carve out provincial territories based on the identity of dominant indigenous communities was as resisted as was the effort to carve out provinces based on a geographical and developmental model. For *Madhesis* and indigenous people, the federal arrangement would be a way to express their collective, suppressed identities and to counter discrimination and exclusion through territorial political autonomy.¹³⁸ For the dominant political parties, such as the Nepali Congress, identity-based federalism was perceived as being unfair, illiberal, and a threat to Nepal's unity and integrity.¹³⁹

Article 56 (5) of the Constitution was seen by many indigenous and local people as a medium to explore possibilities for the development of their identity and ethnicity at the local level, if not at the provincial level. It stated that any special, protected or autonomous region may be set by the federal law for social and cultural protection or economic development. The provision could have been helpful to not only

¹³⁷Breen, M. G. (2018), "Nepal, federalism and participatory constitution-making: deliberative democracy and divided societies," *Asian Journal of Political Science*, 26 (3), 410-430 (hereinafter, "Breen (2018)"), at p. 12.

¹³⁸Lecours, A., and Arban, E. (2015), "Why federalism does not always take shape: The cases of Italy and Nepal," *Regional and Federal Studies*, 25 (2), 183-201 (hereinafter, "Lecours and Arban (2015)"), at p. 192.

¹³⁹Lecours and Arban (2015), at p. 195.

dominant indigenous groups, but also for marginalised and deprived groups such as the *Dalit*. The Federal Commission was constituted by the Government of Nepal under Article 295 (2) to determine the number and boundaries of village bodies, municipalities and special, protected or autonomous regions to be formed under Clauses (4) and (5) of Article 56. However, the Federal Commission was not able to submit any proposal for the last category, apparently due to time pressure because of imminent local elections in 2017. Although the Commission was able to determine the number and boundaries of the village bodies and municipalities, it was not able to do so regarding the special, protected or autonomous regions. It is important for the Government to prepare for the same before and regain lost opportunity by forming these regions in the interest of the deprived and marginalised communities.

The three tier federalisation under the Constitution has been criticised on other grounds as well. For example, in the all-important agricultural sector, which is the backbone of the national economy, some argue that the federal system makes more difficult the overcoming of the challenges of poor coordination, low human resources capacity, and inadequate financial resources.¹⁴⁰ In the area of development and conservation, a 2018 study found that given the federal government structure, “many powers exercised by existing community-based organisations are at risk of being ‘pulled up’ to the local government or provincial level, where governance structures are in their infancy and enabling resources remain weak.”¹⁴¹ In order to overcome this challenge, Nepal requires “adequate investments in training and capacity building, and assuming facilitating sub-national governments collaborate with existing community-based organisations to mainstream conservation into local, provincial, and national development planning and implementation.”¹⁴²

With regards to the distribution of financial powers, although sub-national units are created considering demography, geography, and sustainability, “if economic realities are ignored in shaping these units, the state restructuring [will] not address, principally, the vertical fiscal imbalance, [and] federalism would rather inversely affect the economic

¹⁴⁰Kyle, J., and Resnick, D. (2016), *Nepal's 2072 Federal Constitution: Implications for the Governance of the Agricultural Sector*, vol. 1589, Intl Food Policy Res Inst.

¹⁴¹Thakali, S., Peniston, B., Basnet, G., and Shrestha, M. (2018), *Conservation and Prosperity in New Federal Nepal: Opportunities and Challenges*, Australian Aid, Executive Summary (hereinafter, “Thakali et al. (2018)”).

¹⁴²Thakali et al. (2018), Executive Summary.

well-being of the entire nation.”¹⁴³ Additionally, the study found that vertical fiscal imbalance between the federation and sub-national units still persist in federalised Nepal.¹⁴⁴ With regards to education, although it was expected that decentralisation would lead to better and more efficient financing of technical and vocational education and training (TVET) at the local levels, it remains a deprived sector, and the involvement of the private sector is still important in generating resources and linking TVET to the employment sector.¹⁴⁵ Additionally, experts point to the necessity of a TVET Umbrella Act that would unify the legal framework and resolve conflicts and the problematic parts of the legal framework, while clearly laying out the responsibilities and functions of each tier of government and agency.¹⁴⁶

Although the support from the public was about even for the ethnic and geographical models, by the time the 2015 Constitution was actually promulgated, there was a shift towards a mixed model of federalism.¹⁴⁷ Additionally, Madhes-focused parties were dissatisfied with the seven-province structure, as they had asked for a 10-province structure with a single Madhes province across the length of the Tarai plains – although later they were ready to settle for two Madhes provinces.¹⁴⁸ When the dominant parties in the CA – II decided on the six-province model, Madhes-focused parties began to abstain from the CA – II proceedings altogether.¹⁴⁹ Indigenous groups were also dissatisfied with how the provinces were divided: they argued that their identities were denied in the demarcation and that the boundaries as drawn would retain the Khas political dominance.¹⁵⁰ Other factors contributing to the violence erupting following the promulgation of the 7-province map included the dominance of the Khas groups from the hills of Nepal at the expense of marginalised communities and the rushed manner, as some described,

¹⁴³Wagle, A. (2018), “Fiscal Imbalances in Nepal’s Federalism: An Empirical Analysis,” *NRB Economic Review*, 30(1), 49-68 (hereinafter “Wagle (2018)”), at p. 66.

¹⁴⁴Wagle (2018).

¹⁴⁵Parajuli, M. N., Renold, U., Bhandari, U., and Lamsal, H. P. (2020), *Financial Flow in TVET in Nepal: Transitioning from the Old to the New Constitution*, vol. 10, LELAM Working Paper.

¹⁴⁶Caves, K. M., and Renold, U. (2017), “Constitutional Reform and its Impact on TVET Governance in Nepal: A report in support of developing understanding and finding the way forward for federalising the TVET sector in Nepal”, *KOF Studies*, 89.

¹⁴⁷Breen (2018), at p. 12.

¹⁴⁸Muni, S. D. (2015), “Nepal’s New Constitution” *Economic and Political Weekly*, 50 (40), 15-19 (hereinafter, “Muni (2015)”), at p. 16.

¹⁴⁹Muni (2015), at p. 16.

¹⁵⁰Muni (2015), at p. 16.

in which the Constitution was promulgated.¹⁵¹ The allegation of “rush” is largely a political coin, as the constitution-making process lasted for more than seven years; by 2015, there was an urgency for it to be promulgated. The CA – II worked on compromise and was not able to meet all demands of all groups with the same intensity.

The Constitution, no doubt, has many forward-looking provisions regarding inclusion and social justice. But there are many challenges facing the participation of marginalised communities in government and public service. Thus, in the initial years, there have been great laxity in implementing the Constitution’s strictures on inclusion. For example, one study has found that despite provisions for inclusion and participation, many seats reserved for women in government are vacant due to various factors, including low familial orientation and education that discourage women from participating.¹⁵² Additionally, despite increased participation of women, male political leaders are found to be monopolising major policy negotiations, often outside formal institutions.¹⁵³

Indigenous and minority communities continue to face hurdles when it comes to the usage of diverse languages in the country in formal and informal settings. The federalisation process in Nepal enabled various municipalities, including that of Kathmandu, Lalitpur, Kirtipur, as well as Dang, to adopt non-majoritarian languages, (i.e. Nepal Bhasa and *Tharu* Bhasa) for official communications. At the provincial levels too, there have been positive developments in terms of diverse language usage, such as in Province Two, where, upon election to the Provincial Assembly, members took their oaths in Maithili, Bhojpuri, Nepali and Hindi. However, there are challenges aplenty, particularly in providing education in the mother tongue, particularly in the early years of school when it is thought to be important. Private educational institutions continue to use English as the primary language of instruction, and public schools, whose funding continue to decline, follow in an effort to compete with private schools.¹⁵⁴

¹⁵¹Strasheim, J. (2019), “No ‘end of the peace process’: Federalism and ethnic violence in Nepal,” *Cooperation and Conflict*, 54 (1), 83-98, at p. 12.

¹⁵²Paudel, N. R. (2018), “Limits of inclusion: Women’s participation in Nepalese civil service,” in *Women in Governing Institutions in South Asia* (pp. 193-208), Palgrave Macmillan, Cham.

¹⁵³Baniya, J., Kharel, S., Thapa, D., and Ramsbotham, A. (2017), *Gender and Nepal’s Transition from War, Conciliation Resources*, Key findings (hereinafter, “Baniya et al. (2017)”), at p. 4.

¹⁵⁴Phyak, P., and Ojha, L. P. (2019), “Language education policy and inequalities of multilingualism in Nepal,” *The Routledge International Handbook of Language Education Policy in Asia* (hereinafter, “Phyak and Ojha (2019)”), at p. 349.

The record of the Language Commission shows the inability of the State institutions to implement constitutional principles. The Commission initially conducted a series of consultation meetings with various stakeholders, including language activists, researchers and teachers, to decide on draft policy recommendations for official languages of the federal, provincial and local governments.¹⁵⁵ The Commission also began researching the feasibility of implementing mother tongue education in various public schools around the country. However, as of this writing, the government had still not appointed seven commissioner members, i.e. the representatives from the seven provinces, while local bodies continued to make decisions on language use without prior consultation with the Language Commission.¹⁵⁶

Some comments are there on the model of secularism that Nepal has invented for itself. Notably, the country has been declared as ‘secular’ and the word ‘Hindu’ does not appear anywhere in the Constitution. It is a great departure in a Hindu-dominated country, which is also the land where Buddha was born and established Buddhism and Kirat civilisation thrived. On the explanation that has been added to the reference to secularism, it is made clear that ‘secular’ means religious, cultural freedoms, including protection of religion, culture handed down from the time immemorial. A commentator thus states: “to say that Nepal is secular is to say that there is religious freedom and that someone, presumably the government, must protect those traditional religions and customs “practised from ancient times” – which, it seems, does not apply to religions and customs that are less ancient.”¹⁵⁷ Additionally, there is also a point of view that the Nepali Congress and the Communist Party of Nepal-Unified Marxist-Leninist (UML) were in favour of a secular state in 2007 and 2008 because they viewed it as necessary to dismantle the monarchy, which was strongly associated with Hinduism.¹⁵⁸ The commentators must take the provision on secularism in the context of equality, non-discrimination, proportional inclusion and other socio, economic and cultural rights under the Constitution.

However, with the election of the second CA, the political scene had changed, and the Rastriya Prajatantra Party-Nepal, which was for

¹⁵⁵Phyak and Ojha (2019), at p. 350.

¹⁵⁶Phyak and Ojha (2019), at p. 350.

¹⁵⁷Letizia, C. (2017), “Secularism and Statebuilding in Nepal,” *Two Steps Forward, One Step Back: The Nepal Peace Process*, London: Conciliation Resources (hereinafter, “Letizia (2017)”), at p. 109.

¹⁵⁸Letizia (2017), at p. 110.

constitutional monarchy and a Hindu state, became the fourth largest party, supported by Hindu middle classes.¹⁵⁹ Additionally, the declaration of secularism by the 2015 Constitution has not brought about radical legal changes, including an end to ‘anti-secular laws’, including one criminalising the slaughter of cows, as well as the upholding of practices like rituals featuring the participation of the head of the state.¹⁶⁰ Additionally, monarchists and Hindu fundamentalists in Nepal, while gaining moral and material support from Hindutva forces elsewhere have pressed for making Nepal a Hindu state and eliminating the word “secular” from the Constitution.¹⁶¹ Specifically, “secularism has been an essential step in the larger project to create a new, inclusive and republican Nepal, but it has also led to a public debate on the relationship between religion and the state that has at times become fractious.”¹⁶² Indeed, Nepali secularism “is still evolving, and actual secularist practices and accommodations can be built and worked out over time, without recourse to identity politics.”¹⁶³ The way missionary activities are increasing in Nepal, and Hindus, Buddhists and Kirats are being Christianised, the local psychology will remain disturbed.

The citizenship rules of Nepal are believed to have been influenced by the fear of the open and unregulated Nepal-India border, which is believed to have been there due to Indian pressure to maintain the status quo. This promotes excessive immigration leading to demographic pressure in Nepal and change in Nepal’s economic, social and cultural life. Besides, there is marital relationship between Nepalis and Indians, and Hindu marriages have certain clear features, which needed to be regulated to protect Nepal’s national interest in the long run. The restrictiveness on citizenship provisions has been explained by some politicians as the issue of the open border with India and the prevalence of cross-border marriages, especially among *Madhesi* communities in the Tarai.¹⁶⁴ Needless to say, the citizenship rules have garnered much controversy and continue to do so. Gender-based discriminations must be eliminated. The provisions of Article 11 (5), critics argue, “undermines the independent identity of women” and “denies their

¹⁵⁹Letizia (2017), at p. 109.

¹⁶⁰Letizia (2017), at p. 110.

¹⁶¹Muni (2015), at p. 17.

¹⁶²Letizia (2017), at p. 111.

¹⁶³Letizia (2017), at p. 111.

¹⁶⁴Baniya et al. (2017), at p. 4.

unquestionable biological role in birthing children.”¹⁶⁵ That such children have to be born and reside in Nepal “restricts children born to Nepalis working or resident in other countries and children born to rescued trafficked women” from acquiring citizenships.¹⁶⁶

Civil society research in Nepal finds that distributing naturalised citizenship certificates have been limited, and even a 2013 Supreme Court directive order to provide naturalised citizenship to one such person is still not complied with by the Ministry of Home Affairs as of 2017.¹⁶⁷ Similarly, although Article 11 (4) states that “[e]very minor who is found within Nepal” and whose parents’ whereabouts are unknown would be conferred as a citizen of Nepal by descent. However, the Nepal Citizenship Regulation, 2006 has additional conditions that such a child must be, including that they must be either legally adopted or been raised in a government-approved child care centre to be allowed to apply for such a citizenship certificate.¹⁶⁸ This would leave out street children, children growing up as domestic helpers, or children in school hostels deprived of citizenship.¹⁶⁹

Under the 2015 Constitution, its previously-restrictive provision that a person’s “father and mother” be Nepali citizenship when acquiring citizenship was excluded from the final draft.¹⁷⁰ However, while the “and” was changed to “or” there still remained provisions that discriminated on citizenship based on father or mother. Additionally, “[p]atriarchal assumptions embedded in the legal code have deprived women of the right to confer citizenship to their children independently.”¹⁷¹ Grossman-Thompson and Dennis (2017) argue that “resurgent resistance to equitable citizenship laws reflects both hegemonic Hindu patriarchal norms and a nationalist reactive stance against Indian influence as embodied by the real and potential coupling of Nepali women and Indian men whose children would further ‘Indianise’ Nepal.”¹⁷² Moreover, “constitutionally restricting Nepali

¹⁶⁵Mulmi and Shneiderman (2017), at p. 139.

¹⁶⁶Mulmi and Shneiderman (2017), at p. 139.

¹⁶⁷Mulmi and Shneiderman (2017), at p. 140.

¹⁶⁸Mulmi and Shneiderman (2017), at p. 140.

¹⁶⁹Mulmi and Shneiderman (2017), at p. 140.

¹⁷⁰Mulmi and Shneiderman (2017), at p. 139.

¹⁷¹Mulmi and Shneiderman (2017), at p. 148.

¹⁷²Grossman-Thompson, B., and Dennis, D. (2017), “Citizenship in the Name of the Mother: Nationalism, Social Exclusion, and Gender in Contemporary Nepal,” *Positions: Asia Critique*, 25(4), 795-820 (hereinafter, “Grossman-Thompson and Dennis (2017)”), at p. 796.

women's right to bestow citizenship on their children is a form of policing the boundaries of the state body via policing women's bodies, especially their sexual and reproductive capabilities."¹⁷³

Women rights groups came to the forefront to argue that these citizenship laws were discriminatory, as motherhood was not considered the basis for citizenship.¹⁷⁴ The motivation behind this provision is to exclude children who are born to a Nepali mother and a foreign father, as only those who receive citizenship by descents are entitled to high posts.¹⁷⁵ Additionally, *Madhesis*, who are largely effected by these provisions, fear that these provisions would lead to many persons remaining stateless.¹⁷⁶ A comparative analysis of international standards of statelessness in Nepal demonstrates that certain groups of people are effectively stateless.¹⁷⁷ The state has refused to provide citizenship certificates according to the country's laws, leaving some stateless.¹⁷⁸ Oftentimes, it is the children of Nepali mothers and unidentified/foreign fathers who have been unable to acquire citizenship certificates.¹⁷⁹

It is true that many states in Asia govern the conveyance of citizenship through legislation, though the state constitution may often include a framework provision on citizenship as well. Several Asian states do not automatically confer citizenship on individuals born within the state, but require that at least one of the individual's parents be a state citizen. The same generally applies to individuals born outside of the state. States may also convey citizenship via a legal process of registration or naturalisation, which may take into account an individual's marriage to a state citizen. In recent years, most states have revised laws for citizenship by descent and registration such that they apply equally to both sexes. This is fair as well.

There are several other comments, often very intellectual, on the new Constitution. Some critics think the parliamentary system of government was a wrong choice for Nepal and that Nepal should have

¹⁷³Grossman-Thompson and Dennis (2017), at p. 796.

¹⁷⁴Muni (2015), at p. 17.

¹⁷⁵Muni (2015), at p. 17.

¹⁷⁶Muni (2015), at p. 17.

¹⁷⁷Mulmi and Shneiderman (2017), at p. 148.

¹⁷⁸Mulmi and Shneiderman (2017), at p. 148.

¹⁷⁹Mulmi and Shneiderman (2017), at p. 148.

pursued the presidential or mixed form of government. They also insist that there should have been a separate constitutional court apart from the Supreme Court. These choices were discussed and decisions made based on compromise solutions. Some comments were made carelessly and without due consideration. Many even advocated for the inclusion of rules, like naming all the different indigenous groups, that otherwise would have been efficiently addressed by the laws to be enacted under the Constitution. Not only individuals, but political parties and civil society groups have also made these comments. Article 274 on constitutional amendment offers the possibilities to the able political parties or their coalition to initiate or help initiate the required processes, if they are able to mobilise support for their agenda in the general elections to the Federal Parliament.

IV. Conclusion and the way forward

The Constitution of Nepal, 2015 passed with a majority, wherein 507 members of the total 598 (as existed at the time) of the CA II voted in favour, 25 voted against, and 66 abstained. It is regarded as a document of compromise and followed many years of Nepal's history that can be described as painful. An important criticism the process faced was regarding the speed with which it was passed following the devastating earthquake of April 2015. However, the speed must be considered a natural outcome following the calamity, because the society had already invested seven wrenching years during the CA I and CA II and the interregnum between them. The efforts towards building consensus was given priority throughout those years, and there was no logic at all for going in for a CA III process. A democratic resolution at the last stage was therefore the only choice. The passage of the Constitution was surrounded by continued protests by some indigenous groups, including from the *Tharu* and *Madhesi* communities, many of whom remained dissatisfied with some of the provisions. On the other hand, the larger number of the CA members who were from these groups did vote in favour of the Constitution. The attempt at excessive involvement by certain international players cannot be ignored when one considers the final days before the Constitution was promulgated, and we will have to wait for some of the framers to write their recollections about this when the time comes.

It is perhaps inconceivable that there would be no disagreements with the final document that was to be the Constitution. However, there can be no doubt that at the time of promulgation the Constitution of Nepal,

2015 was widely-accepted and welcomed by the mainstream of all diverse communities of the country. The composition of the CA II, the legislative body which wrote the Constitution, itself is telling in this regard. The individuals who cumulatively wrote the Constitution reflected, to a considerable extent, the diversity of Nepali society. In the 2008, there were 30 political parties elected, with the highest number of seats (207) captured by the Nepali Congress, followed by the Communist Party of Nepal (Unified Marxist–Leninist, 181), the Communist Party of Nepal (Maoist–Centre, 82), and the Rastriya Prajatantra Party (37), among others. Several of them merged in due course.

The Constitution of Nepal, 2015, may be considered the best among the Constitutions of Nepal promulgated since 1948, and it does represent an outstanding departure in the country's political historical evolution. The Constitution features many elements that, if effectively implemented, can fulfill the longstanding desires of the people of Nepal for prosperity and change. While the Constitution continues to stir debate regarding its provisions in terms of what the CA II could have done differently and better and what is the road to reforms and amendments ahead, it must be recognised that overall, it is a document that will reshape Nepali society as a whole. Most importantly, however, to state is that only committed and uncorrupted implementation of the Constitution can help society reap the benefits of the document and all its progressive, forward-looking provisions.

The quality of laws enacted by Parliament to implement the Constitution will be the best indicator of the commitment of the present political generation to implementing a Constitution that this generation largely had a hand in promulgating. Like every other fine constitution in the world, the fate of the Constitution of Nepal, 2015 will depend on whether members of the political elite – most of them the framers of Constitution themselves – will allow its implementation and healthy evolution through their positive attitudes, beliefs and sentiments, thus giving order and meaning to the constitutional political process. It is for this cohort to demonstrate its commitment to the Constitution. The political ideals and the operating norms of a polity become a culture when the Constitution is able to bring transformation into the lives and livelihoods of the most deprived and marginalised sections of society.

As highlighted above, there are various aspects of the 2015 Constitution that stand out in terms of guiding the people's aspirations and future. These aspects include the forward-looking Preamble and spirit of the Constitution that derives authority from the will of the people via an elected Constituent Assembly. Fundamental rights and duties included in the Constitution are extensive and of vital importance to address the myriad of socio-economic dissonance that persist in Nepal in terms of caste, class, gender, geographical location and the status of various marginalised communities. Additionally, the Directive Principles of the State oblige the government administration to honour the constitutional provisions intended for the development of the country and the rights and privileges of its citizens. Separation of power and a robust system of checks and balances have been instituted; the three branches of government, the judiciary, the executive, and the legislature, are equipped to hold each other accountable in fulfilling their responsibilities to the people through various mechanisms. Additionally, the innovation introduced through the three-level federal structure has allowed for decentralisation and the devolution of power, and the local and provincial governments are equipped and empowered to make decisions in many areas that have been transferred from the central administration.

Looking ahead, the electoral system, which includes FPTP as well as proportional representation, needs to be effectively used by the Election Commission as an independent constitutional body. Oversight and administration of the electoral process is an important element of election management. Effective oversight improves accountability and confidence in the Election Commission. Both performance and financial oversight through internal and external systems are necessary for an effective and accountable administration of the electoral process. The electoral system plays an important role in a state's ability to function effectively as a democracy by encouraging voter participation, accountability, and transparency; the elements of inclusion injected into the electoral system by the Constitution makes the proper functioning of the Commission even more important.

An effective electoral system promotes stability in the state while permitting flexibility in the electoral process. The Commission can be a catalytic agent to help create or revise laws dealing with electoral districting, district magnitude, indigenous people and minority representation, representation of women, timing of elections,

qualifications for voter enfranchisement, voter registration, dispute resolution, and voter education. The mixed system of representation along with the constitutional commitments for inclusion provides a strong basis to the Commission at the federal and provincial levels to monitor the efforts of political parties in ensuring diversity, representation of *Dalit women*, indigenous peoples, *Madhesi*, and other underrepresented groups. Both the FPTP and proportional elections are held together, but independently of each other, and compensate for any disproportionality arising under plurality.

The Constitution has definitively led to the institutionalisation of the principles of inclusion and participation in state structures, so that historically-marginalised communities and groups are able to participate in decision-making and also to impact laws, policies and programmes that effect their communities and the national society as a whole. Secularism and multiculturalism have been guaranteed by the Constitution, further enabling the protection of diversity at various levels. The term “secularism” being an imported word from the larger South Asian context, it has been elaborated through an explanatory note which refers to protection of handed-down faith while freedom to practice religion is protected. As in many other areas, the application of secularism in the “new Nepal” will require proper implementation of both the intent and wording of the Constitution.

With the establishment of various constitutional bodies, diverse groups are better represented and empowered to push forward an agenda of progress and development relevant to their respective communities. The role of the Constitutional Council and the Judicial Council in the appointment of core judicial professionals is exceptionally important. The competence, character, independence and impartiality of the officials of the constitutional bodies and the judges add to the quality of their performance. Continuous vigilance by civil society on behalf of the public is important to ensure the effective implementation of the Constitution, so that the reforms it envisages are translated into reality.

The fundamental rights that have been guaranteed to the people have been expressed in both a general and specific manner. If constitutional provisions relating to the rights and their protections are too vague, there is a risk the government may ignore these rights because of inadequate detail regarding protection mechanisms. However, the specificity or broadness of a right does not alone determine the degree to which a government actually observes and protects such a right.

The judiciary's capacity to enforce fundamental rights is an important form of protection and depends on the power and independence of the judiciary. The Nepali Judiciary will have a vital role in protecting the deprived and marginalised people, including the women, *Dalit*, indigenous people and *Madhesi*, and promoting their full participation in society, state structures, and political processes.

Beyond political measures, a stable pluralistic system will need to address horizontal inequalities, which often accompany historical divisions between groups in a diverse society. Economic inequality among such groups is one of the main causes of ethnic, religious and class-based conflict. Proactive measures to eliminate horizontal inequalities can help ease such conflicts and facilitate the realisation of a fully pluralistic society. The concept of proportional inclusion, as proposed in the Constitution through various provisions, may represent the Constituent Assembly's most daring attempt at reform. While the Constitution stands clear on the matter, there remains a great many details of the new system that require elaboration through laws and diligent application of the same. The guardianship of the judiciary becomes necessary in maintaining constitutional supremacy in this process.

Even otherwise, the administration of the judiciary is of critical importance. All stakeholders in society should, in their self-interest, push for the system's compliance with the criteria for the appointment and removal procedures for judges at the higher level and promotion of a judiciary unaffected by political influence. The Judicial Council has been created to protect the judicial arm from undue influences of the other branches of government or of political interests. The Council's members have a great responsibility in ensuring the independence and quality of the Nepali judiciary. Given that the Council has the power to recommend judges for appointment, it must work to ensure that the selection procedures are fair and transparent.

Nepal's federal system provides a model for the devolution of power from the federal government to sub-state entities. The Nepali model not only guarantees the powers to the seven provincial government, as does happen under the federal system generally, but additionally and emphatically it provides decision-making powers to the lowest level of government as well. Thus, there is continuity with the traditional means of governance and management of the commons in Nepal, in the manner that the local tier has been empowered by the new

Constitution, allowing people at the grassroots to participate directly in governmental procedures and decisions at the municipality and ward levels. Only to the extent of ensuring the supremacy of the Constitution, state cohesion and state unity is the federal government permitted to intervene in provincial and local affairs. Further, by providing recourse to the judiciary and a political mechanism of dispute resolution, the Constitution ensures the separation of powers between the federal, provincial and local governments. Given the autonomy of provincial and local entities as afforded by the federal system, the federation is enabled to recognise ethnic, faith-based, linguistic and other kinds of diversity within the State while maintaining its overall cohesion.

The demographic diversity of Nepal has had a significant influence on the Constitution of Nepal and government structure. The Constitution, which establishes a federal system with strong unitary elements, reflects the goals of the restructured state: (1) to establish a workable system of governance that maintains aspects of a unitary state but also incorporates federalism; and (2) to establish a cohesive cultural identity that prevents sectarian divisions. The Constitution aims to preserve cultural diversity and various identity streams while also establishing a cohesive national cultural stream that would also help prevent fissiparous tendencies. A third goal is a laudable intention to empower various ethnic groups and indigenous peoples. In this context, in fashioning a scheme for the distribution of revenue, the Constitution seeks to minimise the clashes between the levels of government and strive for a degree of equity among federal units.

Of course, despite the many progressive developments, in the eyes of some there remain unresolved issues within the 2015 Constitution or in its implementation. In the implementation, already, the federal level leadership as well as bureaucracy has been accused of holding on to its powers and hesitating in delegating important matters that are within the jurisdictions of sub-national governments as per the constitutional provisions. The inclusion of women and marginalised communities has been criticised for being an embodiment of tokenism, and impactful and meaningful participation of such groups is still some ways away. The judiciary has also faced criticisms for improprieties and for being subject to pressure from political interests. Women's rights are being violated due to the citizenship laws, as explained, which limit their ability to pass citizenship by descent to their offspring, in stark contrast to their male counterparts. These, and the various other

challenges discussed in this chapter, indicate that there are numerous issues within the Constitution itself that need resolving. At the same time, it has to be said that many pending issues are rooted in a poor implementation of constitutional provisions that otherwise support the rule of law, diversity and equality, and national development. In totality, the Constitution's undoubted commitment to federalism, gender-quality, diversity and inclusion – among other matters – has to be reflected in the exercise of power by the political elite.

The uniqueness of the Constitution of Nepal, as has been remarked, is that it was not written by a committee or council, but by an elected Constituent Assembly. When the first effort came to naught amongst political wrangling and social polarisation, another effort was made through another elections, and the second Constituent Assembly was able to adopt the Constitution. While some maintain that a sense of urgency developed given the difficulties the people faced as a result of the earthquake of April 2015, which forced the politicians to put their individual self-interest somewhat in the backburner, we must also remember that the Constitution was written in spite of unprecedented intervention by certain foreign forces, including in the constitution drafting itself.

On the whole the Constitution of 2015 was written not by scholars, jurists or constitutionalists, but by politicians who were also responding the demands of the populace, which related to and end to Kathmandu-centrism, respect for myriad cultural identities, and recognition of the people's need to take command of their own lives and livelihoods. One could say that the Constitution represents unfiltered demands of the people, and may have departed from the short and crisp documents that many constitutionalists hold as the ideal. Further, one hopes that the contradictions existing within the provisions, the lack of clarity and even the issues of penmanship will be managed through sagacious “technical” amendments over the course of time. Much more importantly, the amendments demanded in response to socio-political demands should not be denied, and in due course they should be taken up by the Parliament. In the meantime, we suggest that the framers of the Constitution, many of whom remain at the head of the ruling party as well as the parties in opposition, take full responsibility and ownership of the document they have brought forth. This loyalty to the Constitution, which ipso facto includes amendments to be discussed and adopted as required, is the sine qua non of ensuring that the Constitution succeeds. The alternative is too horrific to comprehend,

which would be a failure of the Constitution leading to breakdown of the social contract that made the document possible, and the rise of anarchic and polarising tendencies which may derail the hard-earned democratic stability and hopes for at-long-last socio-economic progress.

It was fortunate that the basic underpinnings of a democratic society had already been put in place and cemented by the 1990 Constitution, so those values found place in the 2015 Constitution as a matter of course, though the arena of fundamental rights was enlarged, reflecting the hopes and aspirations of the populace. Likewise, the republican nature of the Nepali state had already been declared by the Interim Constitution, and this too was carried over into the new Constitution without a hitch. The definition of the provinces under newly-accepted federalist super-structure turned out to be one of the difficult knots to untie, for there were demands for identity-based provinces whereas by and large the demography of the country had become mixed. In the end, the demand for provincial demarcation became a debate between those who thought a north-south delineation would be best for socio-economic advance, those who rooted for ethnic-based federalism, and one stream that sought a plains-only province, all of 500 miles wide and 20 miles wide along the length of the Tarai. The seven province that were ultimately negotiated in CA-II can be said to have represented the highest calibre of negotiations of the framers who led the constitution-drafting process.

In terms of the new Constitution leading Nepal into a politically stable, democratic future that opens the door to economic growth and equity, there are two vital points that have to be made. Firstly, Nepal's political leaders will have to reject the undesirable international, especially neighborly, interference in the nation-building process, which was a challenge even in the constitution-writing. Secondly, they must be united against corruption, which is the most challenging national problem that has weakened rule of law, transparency and democratic accountability, and in the process made the public cynical and frustrated. Common reasons for the failure of the constitutional strictures, especially in developing countries, include corruption in high places, accumulation of illegal wealth by bureaucrats, nepotism in the distribution of government jobs, and protection from the due process of the law through illegal means, including bribery and intimidation of the judiciary.¹⁸⁰ Personal gain and political interests must be minimised

¹⁸⁰Brandt et al. (2011), at p. 14.

if not eradicated if the country and its people are to experience the progress they have been promised through the implementation of the Constitution and its provisions. Indeed, the implementation of the letter and spirit of the Constitution is the challenge before Nepali society. It is not necessary to glorify the Constitution, because such moves at times limit the prospects of possibilities and change. However, there is no doubt that the implementation of the Constitution will empower the people while making way for its reform and further development. The weakening of the Constitution would result in a weakening of the space for the very individuals and groups that want amendments in the Constitution, because one would face the danger of an unravelling and derailment. Weakening of the Constitution also provides opportunity to the Government to run away from its responsibilities while also empowering the unaccountable powerbrokers. In this way, the liberal democratic environment will be affected and the decades of people's commitment and wait will be wasted.

This is precisely what happened in the case of the 1990 democratic Constitution, when the armed conflict was allowed to develop and wash away everything on its path. The initiators of the conflict saw the forests for the trees, leading to a loss of two precious decades which could have been used for the continuous development and refinement of the polity. We must remember that constitution-building is an ongoing process, and this process fails when there is no commitment to and the infrastructure necessary for the rule of law. In a country like Nepal, with its great diversity of peoples, values and aspirations, the Constitution must help to develop common civic values even as diverse peoples are represented in state structures and participate in the political process. With the continuity of persisting habits and loyalties, Nepal will need to the Constitution's values, aspirations, rules, institutions and procedures to further this 'unity in diversity' – a term that in the case of Nepal is hardly a cliché.¹⁸¹ In this scenario, the implementation of the constitutional provisions for deprived communities will be vital in gaining their trust and confidence in the State, while honouring constitutional values of equality, inclusiveness and diversity. Full, undivided attention must be given to implementation of the Constitution of Nepal, 2015, so that there is no backtracking, meandering or diversion on the road to democratic political stability, economic prosperity and delivery of equity to the populace. The promise has been made, it must be realised.

¹⁸¹Brandt et al. (2011), at p. 14.