

SOCIAL DIVERSITY, INCLUSIVITY AND THE JUDICIARY IN NEPAL

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Abstract

The article delves to examine in detail about the social diversity and inclusivity adopted under the judiciary of Nepal. It illustrates the composition of the judicial department and intends to give a picture about the epicentre of the decision-making power in the country. The constitution vows for an inclusive judiciary. However, the constitutional guarantee is yet to be translated in letter and spirit. The article explains the provisions of the constitution and the other relevant legislations and the practices prevalent in Nepal. It gradually proceeds to examining the current representation of underprivileged community members in the law Courts, in brief, and critically presents a broader picture. It also presents inconsistencies between the constitution, and embedded legislations.

Keywords: *inclusiveness, nepal, judiciary, judicial appointments, diversity, underprivileged groups*

Introduction

The Constitution of Nepal introduced in 2015 aims to ensure proportional representation of various communities in the state apparatuses, including that of judiciary. The preamble of the constitution stands for an egalitarian society based on the proportional inclusive and participatory principles in order to strengthen diversity, social justice, equality and to eliminate discrimination. In addition to this, the preamble envisages for independent, impartial and competent judiciary.

The concluding part of the preamble clarifies that the constitution aims to achieve “sustainable peace, good governance, development and prosperity through the federal democratic republican system of governance.” As per the principles of good governance formulated by the United Nations, there has to be inclusivity, equity and participation of vulnerable sections in the state institutions for realising the dreams of good governance. Article 42, which is one of the part and parcel of the fundamental rights, envisages that the weaker and vulnerable sections would have right to participate in the state structures on the basis of proportional inclusion. Article 18 empowers the parliament to adopt special legislations for the betterment of underprivileged communities.

From ensuring equality, to equity, to proportional inclusion; the constitution aims to promote egalitarian way of life in Nepal. In order to achieve this sacrosanct goal, there appears provisions, like equality clauses, guaranteeing “equality before law”, “equal protection of laws”, and prohibition of discrimination; rights of women, where discrimination has been outlawed on the basis of gender and women have been conferred with equal right to participate in private and public life; positive discrimination; free education for weaker sections and inclusive measures for underrepresented communities.

The erstwhile constitutions of 1990 and Interim Constitution of 2007 too mandated for inclusivity and diversity. Article 11 of the 1990 charter directed the state to formulate special laws and policies for the advancement of the weaker sections. The Interim constitution pushed for the adoption of laws for the betterment of weaker sections, including that of reservation mechanism. The 2007 amendment brought under Civil Service Act, 1993 introduced 45 per cent of reservation in the state apparatuses. The Judicial Council Act, 2016, under Section 5, prescribes for the appointment of judges in line with principle of proportional inclusion.

This respect, the constitution and legislations adopted to enforce the constitutional values favour for the judicial appointments favouring inclusivity and diversity. Still, the implementation of law is a challenge in Nepal.

Constitutional Scenario

The Constitution of Nepal, which entered into force on September 20, 2015, empowers the judiciary to dispense judicial functions. Article 126 is the relevant provision in this regard. Article 127 outlines a 3-tier structure of the judiciary with the Supreme Court at the apex position and High Court as appellate court and the District Court as the court of first instance. Article 127(2) recognizes the judicial institutions at local level. Although Nepal has been declared a federal democratic republic, the judiciary is yet to adopt a federal character. Nepal's judiciary continues to be unitary in country's federal set up as well.¹

The constitution favours the formation of specialized courts or benches in the courts. Article 152 provides that specialized courts, judicial institutions or tribunals could be constituted to initiate and settle specific matters. Article 152(2) declares that the offences punishable with more than one year of jail sentence cannot be tried by the judicial institutions other than courts. Article 137 provides for the formation of the Constitutional Bench, (which is comprised of Chief Justice and four other justices designated by the Chief Justice of Nepal on the recommendation of the Judicial Council, which is powerful body shouldered with the responsibility to make recommendation for the appointment or transfer of judges, or to take disciplinary action against the judges. Article 153 explains Judicial Council which is comprised of Chief Justice as Chairperson and other members, including that of Federal Law Minister; Senior-most judge of the Supreme Court; legal expert appointed by the President on the recommendation of the Prime Minister; and an advocate (who has practiced law for more than two decades) appointed by the President on the

recommendation of Nepal Bar Association. The members of the JC hold the office for a term of four years and they receive remuneration and facilities equivalent to those of a Justice of the Supreme Court.

On the other hand, Article 154 of the constitution provides for Judicial Service Commission which plays role in the appointment, transfer or promotion of gazetted officers under the federal judicial service. This body is also responsible for holding departmental action against the gazetted officers in judicial service. The Commission sees Chief Justice as Chairperson and four members, including that of Federal Law Minister; Senior-most judge of the Supreme Court; Chair of the Public Service Commission; and Attorney General.

In regard to the appointment of judges at the courts, the Judicial Council has been entrusted with the responsibility to make recommendations. Article 149 provides arrangement for the appointment of judges at district court. It provisions that the vacant post of judges for the District Court would be fulfilled by reserving 20 per cent of the seats, on the basis of seniority and competency, for Gazetted Class-II officers who has served for at least three years; 40 per cent of the seats reserved for the Gazetted Class-II officers who has served for at least three years in the office and cleared the open competition examination; and the remaining 40 per cent of the vacant seats would be filled by the candidates, who has practiced Law, or worked as gazetted officer Class-III in judicial service for at least eight years, passing open competition examination.

Article 149 talks for the appointment of judges at the court of first instance. It prescribes procedures regarding the appointment of judgeship at trial court. The Judicial Council Act, 2016, under Section 5, provisions that the Judicial Council would take the principle of proportional inclusion into account while recommending the names of persons eligible to be appointed as judge at district court, High Court, or Supreme Court. However, the Section does not prescribe about the number of seats or percentage of the seats reserved for different clusters. Article 149 nowhere uses the term "inclusion" and this way, constitutional mandate remains silent regarding adherence to inclusive principle during the appointment of judges at trial court.

¹ Fourth Five-Year Strategic Plan of Judiciary, p. 18 (2020, Kathmandu: Supreme Court of Nepal) available at: <https://supremecourt.gov.np/web/assets/downloads/strategic/4th%20strategic%20plan%20of%20judiciary.pdf> (accessed on Oct 1, 2023) This plan aims to strengthen representation and inclusiveness.

The Judicial Council also plays role in appointment of judges at High Courts. Article 140 (1) of the constitution provides that the judges and Chief Judge of the High Court would be appointed by the Chief Justice on the recommendation of the Judicial Council. Article 140(2) provides that any citizen who has served as a judge for at least five years or an advocate who has practiced law for at least ten years or who has been engaged in teaching or research in the field of law, or who has served in the post of Gazetted Class-I officer of the Judicial Service for at least five years would be deemed to be eligible for the judgeship at the High Court. The Article does not necessarily oblige the Judicial Council to take the principle of proportional inclusion into consideration while recommending the names of persons eligible to be appointed at High Courts.

Article 129 deals with the provisions regarding the appointment of the judges at the apex court. Clause (1) envisages that the Supreme Court would be comprised of Chief Justice and maximum of 20 justices. The President appoints Chief Justice on the recommendation of Constitutional Council and other justices on the recommendation of the Judicial Council. As per Article 129(5), any citizen who has served as the Chief Judge or Judge of the High Court for at least five years, or who has constantly practiced law as an advocate for at least 15 years or who is a distinguished jurist having constantly worked for at least 15 years or who has served in the post of Gazetted Class-I or a higher post of the Judicial Service for at least 12 years would be eligible candidate for the office of the judgeship at the apex court.

In regard to the appointment of the Chief Justice, Article 129(3) provisions that any person who has served as Justice of the Supreme Court for at least three years could be eligible for being appointed as Chief Justice on the recommendation of Constitutional Council. Article 284 enshrines provisions relating to the composition of Constitutional Council. As per the provision, the Prime Minister holds the office of Chairmanship, while Chief Justice, Speaker of the House of Representative, Chairperson of the National Assembly, Leader of Opposition Party in House of Representative and Deputy Speaker of the House of Representative work as members of the Constitution Council. However, the Constitutional

Council will include Law Minister while making recommendation for the Chief Justice. This respect, the Prime Minister, Law Minister, Speaker of the lower house and chair of the upper house, leader of opposition as well as deputy speaker of lower house have a role to play while recommending for Chief Justice. It demonstrates the influence of politics in the appointment process of Chief Justice. It does not oblige the government to appoint senior-most judge of the apex court at the office of the Chief Justice.

The Articles dealing with the appointment procedure of judges at the district court, High Court or Supreme Court don't necessarily obligate the government to adopt inclusive measures or reserve certain number of seats to certain clusters of marginalized communities. This way, the constitutional provisions regarding the judicial appointments remains silent on adherence to positive discrimination. There is no clear provision pressing for ensuring seats to underprivileged category people in High Courts and Supreme Court.² The representation of women and other underprivileged community members in judiciary is yet to be ensured as envisioned under the constitution.³

Despite this, the Judicial Council Rule, 2017 provides, while fulfilling the post of district judges, in accordance with the mandate of Article 149 of the constitution, 45 per cent of the seats would be reserved for marginalized sections. Keeping that (45 per cent of) seats as gross, 33 per cent of seats would be reserved for women, 27 per cent of the seats reserved for indigenous community members, 22 per cent to Madheshi community members, 9 per cent of the seats for Dalit people, five per cent of seats for differently-able people, and four per cent of the seats would be reserved for weaker sections. This way, the Judicial Council Act and Judicial Council Rules expressly recognize proportional inclusion mechanism.

Unlike the laws relating to the appointment of judgeship, the Judicial Service Commission Act, 2016 under Sections 9 and 10 recognize positive discrimination in the appointment of the officers of the judicial service and

² Gender Equality and Social Inclusion (GESI) Strategy for the Judiciary 2021/2022-2025/2026, p. 15 (Kathmandu: National Judicial Academy, Nepal).

³ *Ibid*

oblige the government to allocate seats under reserved category in line with the prevailing laws governing the civil service.

The strategic plans of the judiciary have pushed for adoption of inclusive principles. The Third-five Strategic Plan of the Judiciary (2014/15-2018/19) and Fourth Five-Year Strategic Plan of the Judiciary (2019/20-2023/24) intend to ensure appointment of judges in inclusive way.

In order to ensure representation of various communities in judiciary, to the post of District Judges as envisaged under Article 149, it's imperative to ensure inclusion in legal education.⁴ Moreover, the marginalized community members should be encouraged to study law and enter in the judicial service.⁵

The erstwhile constitutions of 1990 and 2007 too advocated for positive discrimination. For instance, Article 11 of 1990 constitution prescribed for the right to equality and directed the state to formulate special provisions for the advancement of weaker and marginalized sections. Under the Directive Principles, Article 27(10) of the 1990 constitution stated that the state would formulate policies to mainstream the marginalized groups.

In a bid to give effect to this constitutional mandate, the government in 2002/2003 decided to reserve certain number of seats in economic and administrative sector. Pursuant to this policy, the government-aided colleges and university started providing reservations in admission to marginalized sections. This development paved the ways for the reservation of 10 per cent of seats to Dalit; 15 per cent of seats to Indigenous community members; and 20 per cent of seats to women.⁶

The Interim Constitution of 2007 had embraced provision for right to equality and right to social justice. These provisions pushed for the enactment of special laws for the betterment of weaker sections. In order to realize the goal of the constitution, the government brought an amendment in the Regulation Relating to Scholarship and thereby provisioned for reservation to underprivileged

community members, including that of women, Madheshi and Dalits.

Moreover, the Government of Nepal issued an ordinance in 2008, which came into force on February 10, 2009, (titled Ordinance Relating to Inclusiveness, 2008) sought to bring amendment in the Acts to ensure inclusion in the state machinery.

The issue of inclusion started gaining momentum after the enactment of 1990 Constitution. The 1999 amendment made under the Civil Service Act, 1993 elevated the age of entrance in the service from 35 to 40 and reduced the probation period of one year to six months for women. It was an attempt to encourage women participation in the state apparatus. In addition, the 2007 amendment introduced under Civil Service Act, 1993 sought to reserve 45 per cent of seats in civil service. Taking that 45 per cent as total, 33 per cent of seats have been reserved for women; 27 per cent of seats for Indigenous Community members; 22 per cent of seats for Madheshis; 9 per cent of the seats for Dalit; 5 per cent for differently-able citizens; and remaining 4 per cent of the seats have been reserved for backward classes.

The Army Service Rules, Police Rules and Armed Police Rule too contain provisions for reservations and positive discrimination. The Acts promulgated to enforce the fundamental rights guaranteed under the current constitution too contain provisions pressing the need for special arrangement for weaker sections. For instance, Public Health Act, 2018 obligates the state to guarantee special arrangements, like free medication and other reliefs, for weaker sections. In contrast, the Rights to safe motherhood and maternity health Act, 2018 provides paid maternity leave of 98 days, beginning from either before or after the delivery of baby. Section 13 of the Act, 2018 is a relevant provision in this regard. It guarantees unpaid maternity leave of up to one year in case the woman has complexity in postpartum or any other issues. Also, Section 13(3) underscores the need of designated place (at workplace) for lactating mother to feed milk to her baby.

Moreover, the fundamental rights guaranteed under 2015 constitution too advocate for inclusion, positive discrimination and diversity. For instance, Article 18 guarantees right to equality wherein government has been obliged to enact special provisions for mainstreaming the

⁴ Gender Equality and Social Inclusion (GESI) Strategy for the Judiciary 2021/2022-2025/2026, p. 2 (Kathmandu: National Judicial Academy, Nepal).

⁵ *Ibid.*

⁶ *Id* at p.8

weaker sections. Article 38 guarantees bundle of rights to women, which include right to lineage and right to participate in state agencies under proportional inclusion. Article 24 and Article 29 outlaw untouchability and exploitation, respectively. Article 31 deals with right to education which obliges the government to provide free education to disabled citizens. Much like this, Article 40 ensures free education and participation of Dalits in state agencies in line with principle of proportional inclusion. Article 42 allows the state to introduce measures for strengthening the equilibrium of social justice. The clauses of Directive Principles oblige the state to enact policies for cementing the cause of gender equality, inclusion and social justice.

The instruments, like UN Basic Principles on the Independence of Judiciary, 1985; Beijing Statement of the Principles of Independence Judiciary, 1997; and Bangalore Principles of Judicial Conduct, 2002 advocate for non-discrimination in judicial selection and appointment. For instance, Article 10 of the UN Basic Principles on the Independence of Judiciary, 1985 envisages that there shall be no discrimination on the grounds of race, colour or any during judicial appointments.

Representation of marginalised sections: Speaking through facts

Ever since Nepal embraced the path of inclusivity and federalism, the selection criteria of judges and diversity in judiciary have been a topic of discussion among jurists and political scientists. Nepal's judiciary is yet to travel the path of federalism. Despite this, people have a legitimate expectation of seeing diversity and inclusivity of judges in adjudicating bodies.

As of 2 October 2023, of 15 incumbent Justices at the Supreme Court of Nepal, two judges—Chief Justice Biswambhar Prasad Shrestha, and Justice Til Prasad Shrestha— hail from Newar community; one judge—Justice Anil Kumar Sinha— hails from Madheshi community; and two judges—Justice Sapana Pradhan Malla and Justice Sushmalata Mathema—are women. The women judges—Justice Malla and Justice Mathema—belong to Indigenous (Newar) community. The remaining ten judges are from upper Hill caste Bahun-Kshetri.

S.No	Supreme Court Judges (=15)	Number	Percentage
1.	Indigenous community	2	13.33%
2.	Women	2	13.33%
3.	Madheshi	1	6.66%
4.	Bahun-Kshetri	10	66.66

This respect, one-third of judges at the apex court belong to the underprivileged category, while more than 66 per cent of the judges belong to the so called upper Hill caste—Bahun-Kshetri.

Of 128 incumbent High Court judges, we have 19 women judges. Among the 19 women judges, 15 judges hail from upper Hill Brahmin-Kshetri caste; three judges' hail from Newar community and one hail from Madheshi community. Newar community falls under indigenous category. This way, currently, we don't have any non-Newar woman judge at High Courts.

Total High Court Judges	Women	Percentage
128	19	14.84

S.No	Of 19 women Judges at High Courts	Number
1.	Bahun-Kshetri	15
2.	Indigenous community	3
3.	Madheshi	1

Similarly, of 16 male judges, who hail from Janajati (Indigenous) category, five judges are from Newar community in High Courts. We have one High Court judge who represents Muslim community. The number of High Court judges belonging to Dalit and Madheshi community stands at 3 and 6, respectively. Of 16 High Court judges from Janjati cluster, three judges hail from Tharu community.

S.No.	Clusters	High Court Judges (=128)	Percentage of Representation
1.	Women	19	14.84%
2.	Janajati	16	12.5%

3.	Muslim	1	0.78
4.	Dalit	3	2.34%
5.	Madheshi	6	4.68%
6.	Bahun-Kshetri	83	64.84%

Meanwhile, of 265 judges across the District Courts of Nepal, the number of women judges stands at 18. Of 18, 11 women judges represent Bahun-Kshetri cluster, while one each hails from Dalit and Madheshi community and five judges are Janajati community. Of five women judges belonging to Janajati (Indigenous) community, three are from Newar community members. This way, Bahun-Kshetri community has dominance even under women category.

S.No.	Number of District Judges	Women judges	Percentage
1	265	18	6.79 %

The number of judges belonging to Madheshi community stands at 4. We have two judges belonging to Dalit community. In addition, 14 district judges are from Indigenous community. Of 14 judges from indigenous community, 9 are from Newar community and the remaining five are from non-Newar Indigenous community.

S.No.	Clusters	District Judges (=265)	Percentage
1.	Madheshi	4	1.50%
2.	Indigenous community	14 (Newar: 9; non-Newar 5)	5.28%
3.	Women	18	6.79%
4.	Dalit	2	0.75%
5.	Bahun-Kshetri	227	85.66%

One of the largest demographic minorities in Nepal, the Newars comprises 4.6% of the population according to the 2078 BS (2021) Census. But, they make up 5.88% of the judgship as the number of judges from Newar community stands at 24, including that of 8 women judges, out of the 408 judges deployed at Supreme Court, High Court and District Court. When it comes to the

representation of the marginalized communities, Newar population fares better than the other underprivileged community members in the representation score.

In Nepal, the dominant Hill Brahman-Kshetri make up around 27.74% of the population according to 2021 Census⁷, they form 84.80% of the judgship in Nepal's judiciary. Of 408 judges across the country at Supreme Court, High Court and District Court, the Hill Brahmin-Kshetri is over-represented with a score of 346, including that of 26 women.

The Muslims population constitute 4.86% of the national population, but they are under-represented with one judgship at the High Court. Simply put, Nepal's District Courts and Supreme Court are yet to see any Muslim judgship.

Likewise, Dalits make up of 14% of the national population⁸, as per 2011 Census, but has only a 1.47% representation in the judiciary. To put it simply, the number of judges—deployed across the High Courts and District Courts— belonging to Dalit community stands at 6 (including that of one woman judge at District Court) out of 408 judgships. The Madheshi ethnic group comprises 19.3% of the total population⁹ (as per 2011 Census) but make up only 3.18%. Madheshis have representation of 13 judges, including that of two women, out of 408 judgships in judicial departments across the country. These data suggests that “the judiciary displays a distinct lack of diversity.”¹⁰

⁷ National Population and Housing Census 2021: National Report on Caste/ethnicity, Language and Religion,” National Statistics Office, Kathmandu, Government of Nepal, page 1, available at: https://censusnepal.cbs.gov.np/results/files/result-folder/Caste%20Ethnicity_report_NPHC_2021.pdf

⁸ “Nepal's Caste Struggle,” *Nepali Times*, (29 June 2021), available at: <https://nepalitimes.com/news/nepal-s-caste-struggle> (accessed on 21 Oct 2023).

⁹ Sujit Mainali, “Madhesis comprise only 19.3 percent of Nepal's population,” *South Asia Check*, (23 November 2015), available at: <https://southasiacheck.org/fact-check/madhesis-comprise-only-19-3-percent-of-nepals-population/> (accessed on 20 Oct 2023)

¹⁰ Dipendra Jha, “Comparing the 2007 and 2015 Constitutions,” in “Accord, an International Review of Peace Initiatives, Issue 26: Two Steps forward, one step back: The Nepal Peace process,” page 67 (London:

Until 2016 March, the Supreme Court saw the presence of 71% of the judgeships from Bahun-Kshetri community, 10% of the judgeships from Madheshi community, and women had the privilege to share just 14% of the judicial berths. Along with this, of the 21-judges at the Supreme Court, there were no representation of Dalit and Muslim community. There were four judges from indigenous community which makes up 19% of the representation.¹¹

S.No	Representation Cluster	Representation percentage	Population
1.	Bahun-Kshetri	84.80%	27.74% (2021 Census)
2.	Dalit	1.47%	14% (2011 Census)
3.	Madheshi	3.18%	19.3% (2011 Census)
4.	Indigenous community ¹² (Newar)	5.88%	4.6% (2021 Census)
5.	Muslim	0.24%	4.86% (2021 Census)

Conciliation Resources), available at: https://rc-services-assets.s3.eu-west-1.amazonaws.com/s3fs-public/Two_steps_forward_one_step_back_The_Nepal_peace_process_Accord_Issue_26.pdf

¹¹ *Id* at page 66. Moreover, until March 2016, of 180 District Judges, 163 judges were from Bahun-Kshetri community, 3 judges were from Madheshi community, 13 judges were from Indigenous group, and one each from women and Muslim community. Similarly, of 96 High Court judges, 70 judges were from Bahun-Kshetri community, eight judges were from Madheshi community, 4 judges were from Muslim community and 13 judges were from Indigenous group. See, Dipendra Jha, "Comparing the 2007 and 2015 Constitutions," in "Accord, an International Review of Peace Initiatives, Issue 26: Two Steps forward, one step back: The Nepal Peace process.

¹² There are many communities which fall under Indigenous group. Here in this section, the representation of Newar community has exclusively been studied.

These data suggest that Nepal has a long way to go when it comes to fairer representation of marginalized communities in judiciary. However, Nepal's journey towards inclusion depends, to a great extent, on the quality of democracy and constitutionalism it will achieve on the foundation of its constitution.¹³

In *Advocate Bhakta Biswakarma and Others v Judicial Council, Kathmandu and Others*¹⁴, the Supreme Court was of the view that principle of reflection of society and merit, both, should be taken into account while considering for the appointment of judges. Its the merit that should come at the first priority during the appointments made at the judicial offices, held the apex court. It was further observed that its unrealistic to acknowledge the reservation schemes in judiciary in line with civil the service laws, for there could be different caste from among the same sex, class or caste/ethnicity and every caste could not be accurately represented in every appointment. The apex court concluded that the schemes of reservation cannot supersede the merit. Its the professional competency that should have the role to play in entire judicial appointment process.

Much like Nepal, India's judiciary too has miles to go ensure fair representation of weaker sections. As of September 2023, women's representation at Supreme Court stands at 9.4%,; while the same at the High Court makes up 13.6% and 36.3% at the District Courts. The proportion of women judges in High Courts is less than 15% in India.¹⁵ Currently, there are three sitting women judges (out of 31 Justices in office) at the Supreme Court of India.¹⁶

¹³ Bipin Adhikari, et al, *From Exclusion to Inclusion: Crafting a New Legal Regime in Nepal*, p. 152, (2022, Kathmandu: Social Science Baha).

¹⁴ NKP (2076 BS), Decision Number 10444, SC. [Nepal].

¹⁵ "India's gender gap: A look at women's participation in politics, judiciary, civil services and economy," The Economic Times, (19 Sept 2023), available at: <https://economictimes.indiatimes.com/news/india/indias-gender-gap-a-look-at-womens-participation-in-politics-judiciary-civil-services-and-economy/articleshow/103790933.cms?from=mdr> (accessed on 20 Oct 2023)

¹⁶ Chief Justice and Judges, Supreme Court of India, available at: <https://main.sci.gov.in/chief-justice-judges> (accessed on 20 Oct 2023).

Advocating for Inclusivity

The Constitution of Nepal has introduced schemes in the recognition of identity, inclusion and participatory democracy. It outlaws distinctions on the ground of caste, ethnicity, and religion and among others.

The preamble of the constitution declares that the country would be pledged to end every form of distinction and to upkeep social justice by promoting inclusivity. Article 3 defines Nepal as a multi-ethnic, multilingual, multi-cultural and multi-religious state. Article 4 further clarifies that Nepal is a secular, democratic, republic, federal, inclusive, and socialism-oriented country. Article 42 of the constitution guarantees rights of marginalized communities to participate in the state bodies on the basis of proportional inclusion principle. This way, the constitution stands for an inclusive state structure where people of diverse community would be represented in proportion to their corresponding size in the national population.

The charter, under Article 38(4), provides that women shall have the right to access and participate in all the state structures and bodies on the basis of principle of proportional inclusion. Similarly, Article 40 of the constitution provides a right to Dalit community members to participate in the state apparatuses on the basis of principle of proportional inclusion.

Article 270(2) envisages that any law, arrangement, or decision shall be *ipso facto* void if it is made to so as to allow for the participation of a single party, or person having similar political ideology, philosophy, programmes in the elections or in the political system or in the conduction of the governance of the country. Even the cabinet should be formed on the basis of principle of inclusion, says Article 76(9). Article 259 empowers the National Inclusion Commission of Nepal to conduct studies for the protection of the rights of underprivileged communities. Article 267(3) envisages that women, Madhesis, Muslims, Tharus, and among other backward classes would be ensured participation in Nepal Army on the basis of principles of equality and inclusion.

As per Article 283, the appointments in the constitutional organs and bodies would be made on the basis of principle of inclusion. The position of all the federal

governmental services would be filled through competitive examinations on the basis of principle of proportional inclusion (Article 285). The Commissions established for the protection of the rights of Dalit, women, Muslims, Tharus, or Madheshi endeavour to strengthen the concept of inclusivity.

The inclusivity and diversity are the core focus of the 2015 constitution.¹⁷ The representation of diverse community members in judiciary, like that of other wings of the state, would certainly enhance court's representativeness. The underprivileged people would get opportunity to voice their observations from the Benches of the Courts of justice. In addition, the judiciary would have opportunity to lay down robust precedents, reflecting various issues, worldviews, agendas and concerns of marginalized community. The differences at the Benches of court could make differences.

The diversity and inclusivity at the Benches of the law courts would enhance public confidence, fairness and impartiality. The presence of marginalized communities would augment democratic legitimacy, for such a move will break down the stereotypes and will encourage youths to study Law. The principle of inclusion works to improve the terms, like ability, opportunity, and dignity, on which individuals participate in society. It counteracts with the principle of exclusion, which robs marginalized individuals of their dignity, security and opportunity to works towards a better life.¹⁸

Above all this, the Constitution of Nepal embraces progressive provisions protecting and promoting inclusivity and diversity in state mechanism. The charter obliges the state to adopt special laws for ensuring inclusiveness in state apparatus. This way, the state could give birth to legislations ensuring inclusivity and diversity in judiciary too.

¹⁷ Bipin Adhikari, *Salient Features of the Constitution of Nepal*, 2015, p. 159 (Edn. 1st, 2016, Kathmandu: Nepal Consulting Lawyers Inc)

¹⁸ Bipin Adhikari, *Salient Features of the Constitution of Nepal*, 2015, p. 156 (Edn. 1st, 2016, Kathmandu: Nepal Consulting Lawyers Inc)

The Way Forward

The representation of diverse communities and inclusivity would provide a diverse perspective to judgments. The presence of women, indigenous community members, Dalits, Muslims, Madheshis and among other marginalized sections will substantially enhance the justice delivery system. The representation of weaker and marginalized sections in judiciary would fade away lack of sympathy reflected in some of the critical judgments relating to marginalized sections.

If the data is something to standby, Nepal's judiciary is yet to adopt inclusive character. As per the 2021 Census, the predominant Hill Brahman-Kshetri community in Nepal constitutes around 27.74% of the country's population and holds 84.80% of the judgeship in the judiciary. With a score of 346 out of 408 judges nationwide, including 26 women, the Hill Brahmin-Kshetri is disproportionately represented in the Supreme Court, High Court, and District Court. Although making up 4.86% of the country's population, Muslims are underrepresented with the only one judgeship at the High Court. Currently, there is no Muslim judgeship in Nepal's Supreme Court or District Courts.

Similarly, according to the 2011 Census, Dalits comprise 14% of the country's population, although they are underrepresented in the judiciary, with a mere 1.47%. In other words, out of 408 judgeships, there are now 6 judges from the Dalit group serving in the High Courts and District Courts (one of whom is a woman judge in the District Court). According to the 2011 Census, the Madheshi ethnic group makes up 19.3% of the overall

population, but comprises only 3.18% of the share in judgeships.

Moreover, women constitute more than half of the national population but their proportional representation is yet to be ensured in Nepal's judicial department. Of 408 judges, the number of women judges stands at 39, which make up just 9.55% of their share in judgeships.

The Constitution of Nepal envisages for an egalitarian society with the proportional representation of marginalized sections. Though the Articles of the constitution don't necessarily oblige the state to provide certain percentage of berths to certain community members, they open the door of inclusivity and diversity under fundamental rights and other clauses. The highest law of the land expressly permit the state to adopt special laws for the betterment of underprivileged community members. In this light, the Judicial Council Act opens the door of inclusivity in judicial appointment process by stipulating that the judicial appointments would be made in line with proportional inclusion. Still, this legal mandate is yet to be followed in the letter and spirit. Nepal's judiciary would not have fair representation of marginalized communities unless the constitutional spirit of inclusivity is implemented in true and material sense. Its high time to acknowledge the constitutional ethos for strengthening Nepal's federal democratic republican character. If the constitution is to be implemented in true sense, the country's judiciary would have fair representation of underprivileged community members at judgeships.