Confusion in Dalit Transformation in the New Constitution
Confusion in Dalit Transformation
in the New Constitution*

*Translated by International Institute for Democracy and Electoral Assistance (International IDEA) from the original Nepali version.
Many people and organisations have contributed to the preparation of this policy paper. The Dalit members of the Constituent Assembly have contributed by providing information as to the activities within the Constituent Assembly through direct contact, telephone, and email, and by providing various documents. The National Endowment for Democracy (NED) and International Commission of Jurists (ICJ) Geneva provided technical assistance. Various people have reviewed the policy paper, giving suggestions, prior to its publication. However, these individuals and organisations do not necessary consent to the views, analysis and conclusions expressed herein.
The SAMATA Foundation was established in 2065 BS (2008 AD). The Foundation, which was originally established as a Nepal Dalit Study Center associated with Jagaran Media Center, is now registered as a not-for-profit independent trust with the Company Registrar's Office. It supports the intensifying and deepening of the understanding of the state and civil society about Dalits and excluded communities. SAMATA is engaged in policy research and advocacy through studies, research, publications, training and conferences. The Foundation believes that the development and dissemination of academic knowledge plays an important role in the transformation of the present transitional politics into a just, egalitarian and inclusive democratic system, and in leadership development of oppressed communities.

Even in the short period since it commenced, the Foundation has established itself as a research centre active in matters related to Dalits and excluded communities at national and international levels. Since 2066 BS (2009 AD), the Foundation has been carrying out research and advocacy to ensure the rights of Dalits in the new constitution. Its activities include: the publication of a profile of Dalit members of the Constituent Assembly, provision of study materials to the Dalit members, making national and international research materials on Dalits available, and the translation of a range of important materials in English and other languages into Nepali language. In addition, the Foundation is closely monitoring the constitution-making process by analysing the draft reports of all the thematic committees of the Constituent Assembly and giving suggestions to the members. This year, the Foundation is focusing on the publication of reports and books, and on conducting research that is beneficial to the Dalit members of the Constituent Assembly.

On 20, 21 and 22 June 2009, the Foundation successfully completed an international conference on the 'Envisioning New Nepal: Dynamics of Caste, Identity and Inclusion of Dalit' in Kathmandu. This conference, which was the first of its kind held in Nepal, was attended by more than 100 renowned human rights workers, academics, professors, researchers, representatives of civil society and political workers from 12 different countries. Around two dozen working papers were presented at the conference, which was successful in bringing national level Dalit organisations and experts and political workers together in one platform. It also contributed to the building of an effective international network for the Foundation.

Four Dalit youth researchers are active in the SAMATA Foundation as research fellows, conducting regular research. They are assisted by one research director and one editor. There is a management team for the management and planning of other programmes.

SAMATA Board of Directors

<table>
<thead>
<tr>
<th>Name</th>
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<tbody>
<tr>
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<td>Managing Director</td>
</tr>
</tbody>
</table>
# Table of Contents

1. Introduction 9

2. Contradictions Relating to Dalits in the Draft Constitution 12
   2.1 Crisis of identity 12
   2.2 Representation: Proportional or inclusive? 14
   2.3 Equal rights amidst inequality 26
   2.4 Indifference in implementation 34

3. Reasons for Failure to Address Dalit Issues 37
   3.1 Non-inclusive framing process 37
   3.2 Party insensitivity 41
   3.3 Inactive Dalit Constituent Assembly Member Caucus 46
   3.4 Ineffective Dalit civil society 49
   3.5 Other reasons 51

4. Conclusion and Suggestions 55
After more than five decades of demand for a Constitutional Assembly in politics and the success of the Popular Movement of 2062/63 BS (2006 AD), the then major parties of the parliamentary system – Nepali Congress (NC) and Nepal Communist Party (Unified Marxist-Leninist) – were bound to accept the Constituent Assembly, according to the agenda put forward by the Communist Party of Nepal (Maoist) during the 10-year armed conflict. However, the results of the election to the Constituent Assembly held on 28 Chaitra 2064 BS (6 April 2008 AD) contained many surprises. Contrary to the assessment of many urban-based elite and foreign analysts and election monitors, the Communist Party of Nepal (Maoist) emerged as the largest party in the Constituent Assembly. And, for the first time in the history of Nepal, there is significant representation of so-called ‘disadvantaged’ communities, including Dalits and women, in the popularly elected Constituent Assembly. The Madhesh-based parties also have a strong presence in the Constituent Assembly.

Of the 601 Constituent Assembly members elected through direct and proportional systems there is an encouraging number of Dalits, women, indigenous people and Madhesis, which has brought new hope and confidence to these groups. Dalit communities – who were confined to limited seats upon the mercy of the King during the Panchayat regime and to some seats in the National Assembly upon the kindness of various parties – now have an historic 50 members in the Constituent Assembly. Seven Dalits were elected to the Constituent Assembly through direct election, while 43 were elected through the proportional electoral system. Of the 50 Dalit Constituent Assembly members, 23 are from the Unified Communist Party of Nepal (Maoists), 11 from the Nepal Communist Party (Unified Marxist-Leninist), 9 from the Nepali Congress, 2 from the Madhesi People’s Rights Forum, and 1 each from the Communist Party of Nepal (Marxist-Leninist), Terai-Madhesh Democratic Party, Dalit Janajati Party

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1 Upon the unification of the then Communist Party of Nepal (Maoists) and NCP (Ekata Kendra-Mashal) on 29 Poush 2065 BS (2008 AD), the name of the Party changed to Unified Communist Party of Nepal (Maoists). This report refers to this Party as the Communist Party of Nepal (Maoists), Unified Communist Party of Nepal (Maoists), or just Maoists.

2 Upon the expiration of its two-year term on 14 Jestha 2068 BS (28 May 2011 AD), the Constituent Assembly’s terms was extended for one year. However, many people still doubt that a new constitution will be framed within this time.

3 The Unified Communist Party of Nepal (Maoist) is represented in the Constituent Assembly by 229 members, the Nepali Congress by 115, Nepal Communist Party (Unified Marxist-Leninist) by 108, Madhesi People’s Rights Forum by 54, Terai-Madhesh Democratic Party by 21, Nepal Sadbhavana Party by 9, Nepal Communist Party (Marxist-Leninist) by 9, Janmorcha (Nepal) by 8, Nepal Communist Party (Samyukta) by 5, Nepal Majdur Kisan Party by 5, Rastriya Jannorcha by 4, Nepal Sadbhavana Party (Annada Devi) by 3, Nepal Communist Party (Ekakrit) by 3, Rastriya Prajatantra Party by 3, Rastriya Janashakti Party by 3, Rastriya Janamukti Party by 3, Federal Democratic National Party by 2, Nepa National Party by 1, Nepal Janata Dal by 1, Dalit Janajati Party by 1, Chure Bhawar Rastriya Ekta Party Nepal by 1, Federal Democratic People’s Party by 1, Nepal Communist Party by 1, and Nepal National Party by 1. There are 2 independent members in the Constituent Assembly. This equation has been changed to some extent due to division and unity in and between some parties post election.

4 Of the 601 members of the Constituent Assembly, 163 are Brahmin-Chhetri (27.12%), 216 are from indigenous nationalities (35.94%), 196 are Madhesi (32.61%), 50 are Dalit (8.30%) and 197 are women (33%).

5 There were two, three and four Dalit parliamentarians in the National Assembly in 2048 BS (1991 AD), 2052 BS (1995 AD) and 2058 BS (2001 AD), respectively, and Dhanman Singh Pariyar from Banke was elected to the House of Representatives in 2048 BS (1991 AD).

6 Some do not include the Unified Communist Party of Nepal (Maoist) member of the Constituent Assembly, Uma Gothe (Kapali), in the Dalit quota, but as she was elected from the Dalit women list under the proportional system, she is counted as a Dalit member in this report.
and Rastriya Janamorcha Nepal. The representation of Dalits in the Constituent Assembly is very small in comparison to other ethnic groups, regions and classes oppressed by the state, at only 8 per cent, whereas Dalits constitute an estimated 13.1 per cent of the population. The representation of other ethnic groups, classes and communities is almost proportional. Nevertheless, this level of participation of Dalits, whose presence at the decision-making level of the state until now was negligible, is no small achievement.

Table 1. Dalits in the Constituent Assembly

<table>
<thead>
<tr>
<th>Party</th>
<th>Male</th>
<th>Female</th>
<th>Mountainous</th>
<th>Madhesi</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unified Communist Party of Nepal (Maoist)</td>
<td>14</td>
<td>9</td>
<td>19</td>
<td>4</td>
<td>23</td>
</tr>
<tr>
<td>Nepali Congress</td>
<td>4</td>
<td>5</td>
<td>7</td>
<td>2</td>
<td>9</td>
</tr>
<tr>
<td>Nepal Communist Party (Unified Marxist-Leninist)</td>
<td>6</td>
<td>5</td>
<td>7</td>
<td>4</td>
<td>11</td>
</tr>
<tr>
<td>Madhesi People’s Rights Forum</td>
<td>0</td>
<td>2</td>
<td>0</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>Terai-Madhesh Democratic Party</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Communist Party of Nepal (Marxist-Leninist)</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Dalit Janajati Party</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Rastriya Prajatantra Party</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Rastriya Janamorcha Nepal</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Total</td>
<td>26</td>
<td>24</td>
<td>35</td>
<td>15</td>
<td>50</td>
</tr>
</tbody>
</table>

Source: SAMATA Foundation, 2009

The general public is confident that a new constitution to be framed through the historic Constituent Assembly will present an outline of the ‘New Nepal’ founded on non-discrimination and equality, ending economic, social, cultural, racial, class and gender-based discrimination. Accordingly, the people of the various communities and classes are directly or indirectly involved in the constitution building process, putting forward their demands and points of view. The Dalit community, which is arguably the most backward class in Nepali society, expects that the new constitution, framed with Dalit participation for the first time, will guarantee equal rights and end all forms of discrimination.

Even though the constitution was not able to be finalised during the Constituent Assembly’s initial two-year term, the 10 thematic committees have presented their draft reports to the Constituent Assembly. Of the 10 thematic committees, the Committee on the Protection of the Rights of Minorities and Marginalized Communities submitted its draft to the Constituent Assembly on 8 Jestha 2066 (22 May 2009).

According to the Census of 2058 BS (2001 AD), Dalits account for 13.1 per cent of the population, but some non-government organisations claim that they account for only around 21 per cent.
2009 AD) for discussion, setting a record as the first to submit a draft report. The Committee on State Restructuring and Distribution of State Power present its draft on 7 Magh 2066 (21 January 2010 AD). After submission of the three draft reports by the Report Study Committee, the Constitutional Committee began its work. However, the Constitutional Committee is still to prepare a consolidated draft of the constitution on the basis of the concept papers presented by the thematic committees, present it to the Constituent Assembly, and finalise it by collecting opinions and suggestions from the people.

8 The Study Committee submitted the reports of the Committee on the Protection of the Rights of Minorities and Marginalized Communities; Committee on Distribution of Natural Resources, Financial Powers and Revenue Sharing; and Committee on Determination of Structure of Constitutional Bodies to the Constitutional Committee by Chaitra 2066 BS (March 2010 AD). The reports of the Committee on Determination of Forms of Governance, Committee on Determination of the Basis of Cultural and Social Solidarity, Committee on National Interest Preservation, the Judicial System Committee, Committee on Determination of Structure of Legislative Body, Committee on State Restructuring and Distribution of State Power, and Committee on Fundamental Rights and Directive Principles were not submitted to the Constitutional Committee even up until the last day of Ashad 2067 BS (June 2010 AD).
2. Contradictions Relating to Dalits in the Draft Constitution

This policy paper analyses the reports of the thematic committees of the Constituent Assembly from the standpoint of the rights of Dalits. Its main objective is to generate further discussion on the issue of Dalit rights in the process of making the new constitution. It aims to identify contradictions in the major agenda of the Dalit movement (i.e., the abolition of discrimination including untouchability, the representation of Dalits in all state organs, inclusion, economic rights and a National Dalit Commission), as well as the main reasons for such contradictions, and give some guidance as to how to address the rights of Dalits properly in the new constitution.

The drafts prepared by the thematic committees in the Constituent Assembly contain certain contradictions. When taken in the context of the constitutional history of Nepal, the reports of the thematic committees have raised many issues in relation to the rights of Dalits. However, these drafts fail to correctly identify Dalits and the issues of Dalits. Given the extension of the Constituent Assembly, time is now available to review these drafts and clearly outline the issues of concern to Dalits. An attempt is made here to analyse how the issues of identity, representation, and equality have been raised and to examine the contradictions in the drafts.

2.1 Crisis of identity

Identity is the first ground on which any class or group acquires its rights. The possibility of acquiring rights without an established identity is very low. However, the draft reports presented by the thematic committees in the Constituent Assembly do not adequately address the issue of Dalit identity. The Practical Nepali Dictionary defines the word ‘Dalit’ as one troubled or oppressed by others, deprived of enjoying prestige or honour in society and downtrodden or subjugated. Consequently, the National Dalit Commission has defined the Dalit class as those communities of caste groups that are considered untouchable under the Hindu caste system and in the Muluki Ain (Civil Code) of 1910, and marginalised from the mainstream of the state, socially, economically, politically, educationally and religiously.

How the identity of the Dalit community is defined in the draft prepared by the thematic committees of the Constituent Assembly has an important bearing on how the rights of Dalits are addressed in the new constitution. We now look at the provisions in relation to the identity of the Dalit community contained in the drafts presented by the thematic committees.

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9 See Adhikari, Hemang Raj (ed.), Practical Nepali Dictionary (Kathmandu: Student Publication Pvt. Ltd., 2061 BS, p 486)

Article 6 of the draft prepared by the **Committee on Determination of Basis of Cultural and Social Solidarity** provides for social justice. Its clause 2 defines the *Dalit* community as a class and community that is backward and oppressed from a political, economic, social, cultural, gender or economic perspective. The explanatory note to the draft mentions that women, *Dalits*, indigenous nationalities, *Madhesi* Terai communities, Muslims, bonded labourers, *Haliyas*, *Charuwas*, *Haruwas*, *Kamlaris*, *Bukahis*, *Badis*, *Dhobis*, *Mushars*, *Bantars*, *Dom*, *Majhi* and other minorities are marginalised economically, socially and educationally, and are considered backward races, castes or communities.

The draft of the **Committee on the Protection of the Rights of Minorities and Marginalized Communities** identifies the classes and communities including those that are backward, alienated or excluded. The people of the Karnali zone, *Dalits*, indigenous communities, and races and communities that are socially and culturally backward are included in this definition. The report defines excluded communities as communities that are subject to racial/caste-based discrimination and untouchability, and that are excluded from state power because of linguistic, economic, social, cultural, sexual or regional discrimination and oppression, or social or mental incompetency and disability. It goes on to say that a community subject to racial/caste-based discrimination and untouchability is a community subject to exclusion. However, the report and draft of the Committee do not identify *Dalits* separately.

Explanatory Note to Clause 1 (a) of the Chapter on the **Rights of Minorities, Marginalized and Excluded Communities**, under the heading Fundamental Rights, of the draft of the Committee on the Protection of the Rights of Minorities and Marginalized Communities defines a ‘minority community’ as a community subjected by the state to all forms of discrimination and oppression. The clause also includes ethnic, religious or linguistic communities whose population is small and who have been facing such discrimination and oppression. Similarly, clause (b) defines a ‘marginalised community’ as a community that is backward economically, socially, educationally, politically, religiously, linguistically or from the standpoints of health, sex or gender, and includes ethnic, religious or linguistic communities whose population is small and who have been facing such discrimination and oppression. Clause (c) of the proposed draft says that an ‘excluded community’ is a community that is subject to racial/caste-based discrimination and untouchability, and excluded from state power because of linguistic, economic, social, cultural, sexual or regional discrimination and oppression, or physical or mental incompetency and disability. This draft basically includes *Dalits* in the definition of excluded communities.

A separate heading in Article 15 of the draft presented by the **Committee on State Restructuring and Distribution of State Power** mentions the rights of *Dalits*. The explanatory note to clause 1 of the Chapter on the Rights of Dalits defines a *Dalit* as one that is lagging behind politically, economically, socially and economically, while mentioning that the *Dalit* community has been compelled to live a degrading life due to distortions such as racial/caste-based discrimination and untouchability, and that has been oppressed for ages in Nepalese society. The draft goes on to say that, within the *Dalit* community, the condition of the *Madhesi Dalits* is deplorable. It is positive that the draft identifies and presents the rights of *Dalits* separately. This provision attempts to present *Dalits* as a community subject to exclusion and deprivation on the basis of untouchability.
Article 25 under the heading of Fundamental Rights in the draft presented by the Committee on Fundamental Rights and Directive Principles clearly provides for the rights of the Dalit community. Its explanatory note defines Dalits and identifies the Dalit community as a community that was oppressed in the past politically, economically and socially, and that has lagged behind from an economic, social and human development standpoint. This draft can be considered positive from the perspective of the identification of Dalits.

On the whole, the definitions proposed by the Committee on State Restructuring and Distribution of State Power and the Committee on Fundamental Rights and Directive Principles are comparatively good.

Contradictions:

1. There is no uniformity in the identification of Dalits in the drafts presented by the various thematic committees of the Constituent Assembly.

2. The drafts presented by the Committee on Fundamental Rights and Directive Principles and the Committee on State Restructuring and Distribution of State Power recognise the identity of Dalits separately. The drafts of the other committees include Dalits under minority, marginalised and excluded communities.

3. The drafts are silent as to how to prioritise within the internal hierarchy of the Dalit community.

4. It is not clear who is to be accorded priority among minority, marginalised and excluded communities.

5. The tendency of ignoring rights along with identity of Dalits is still followed.

2.2 Representation: Proportional or inclusive?

The drafts of the thematic committees recognise the proportional representation of all tribes, races and communities in the various organs of the state. The drafts propose inclusion holistically in some areas and specifically in others. This section deals with inclusion and representation of Dalits in important organs of the state, such as the legislature, executive, judiciary, army, police, civil administration and constitutional bodies.

Article 25 of the draft presented by the Committee on Fundamental Rights and Directive Principles sets out the rights of the Dalit community. Its clause 2 provides that the Dalit community has the right to take part in all organs, bodies and sectors of the state structure on the basis of inclusion and proportionality, along with compensation, and that provision for compensation is to be determined by law.
Article 10 of the draft presented by the Committee on the Protection of the Rights of Minorities and Marginalized Communities provides for the legal right of minorities, marginalised and excluded communities to participate in the state mechanism in consonance with the principle of full proportional representation. Article 11 of the draft mentions that the communities or classes that have been lagging behind or isolated or excluded from an economic, social, educational, political, administrative or regional perspective within minorities and excluded and marginalised communities will be identified and special provisions made by law for their full proportional representation in every sector of the state for their protection, development and empowerment.

The draft presented by the Committee on Determination of Basis of Cultural and Social Solidarity, in Article 6(2), under the Right to Social Justice, provides for the right of oppressed regions, classes and communities that are lagging behind politically, socially, culturally, educationally and from a gender perspective to participate in the state structure.

The Preamble to the draft presented by the Committee on State Restructuring and Distribution of State Power also recognises the right to proportional representation of all races, regions, genders and communities in organs that mobilise state powers. Similarly, Article 15 provides that the Dalit community will have special rights in economic, political, educational and cultural fields.

Contradictions

1. In relation to representation, the drafts are not theoretically uniformed.

2. Proportional representation is accepted theoretically, however, even the explanatory notes are not clear on how this is to be realised.

3. The drafts presented by the Committee on Fundamental Rights and Directive Principles and the Committee on the Protection of the Rights of Minorities and Marginalized Communities provide that the Dalit community has the right of representation along with compensation. However, the drafts are silent as to the ground or basis of such compensation. Similarly, they are not clear on whether compensation is additional to proportional representation.

The proportional representation of races, classes, regions, genders and communities subject to oppression in all organs of the state is recognised in principle. This is a positive step from the standpoint of the rights of Dalits. However, irrespective of the overall recognition of proportional representation, the issue of whether or not the right to proportional representation of Dalits in important organs of the state is established or not will be determinant of their actual representation. Accordingly, the provisions contained in the drafts of the thematic committees on the representation of the Dalit community in important organs of the state, in particular the legislature, executive, judiciary, army, police, civil administration and constitutional bodies, are analysed here.
2.2.1 Representation in legislature

The legislature is an important body for making the laws of the state. Policies and laws will not be made in favour of Dalits until Dalits are properly represented in the legislature. Hence, proportional representation in the legislature is essential.

Article 3(1) of the draft presented by the Committee on Determination of Structure of Legislative Body provides for a 151 member federal legislature. The draft provides that the members of the federal legislature will be elected through a mixed electoral system: 76 members through direct election and 75 through proportional election. Similarly, Article 44 provides for a state (i.e., federal unit) level legislature consisting of 35 members: 18 elected through direct election and 17 through proportional election. It is mentioned that the law will provide for the representation of women, Dalits, indigenous nationalities and other groups among the candidates fielded by political parties for the proportional segment in elections to both the federal and the state legislatures. According to Article 4 of the draft, a 51-member national assembly will be formed, consisting of 38 members from each of the 38 states, and 13 members under the principle of proportional representation comprised of women, those ethnic and linguistic communities that are not represented in the house of representatives of the federal legislature, and persons and experts who are renowned in national life. Article 4(2) mentions that the inclusive principle will be paid as much attention as possible in the formation of the national assembly.

The Committee on Determination of Forms of Governance was not able to forge a consensus on the electoral system. The most popular electoral system, which received 18 votes, provides that the members of federal legislature will be elected through the multi-member proportional electoral system as provided by law, and that 90 per cent of the members of the state legislatures will also be elected through this system, as provided by law. The electoral system that received the next highest number of votes (16 votes) provides that election will be held through the multi-member proportional electoral system. The least favoured electoral system, which received only 3 votes, proposes that candidacy is be ensured on the basis of the proportional inclusion principle and members are elected through the first-past-the-post electoral system.

Article 8 of the draft presented by the Committee on State Restructuring and Distribution of State Power provides for a special structure. Article 8(2), (3) and (4) provide that a region dominated by one indigenous community or linguistic community within a state may be established as an autonomous region; any region may be established as a protected region for the protection and promotion of such communities that are in extreme minority or are marginalised and on the verge

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11 Three different concepts were presented in the Committee on Determination of Forms of Governance. As no proposal on electoral system received a two-third majority out of the three proposals, namely, (1) consensual presidential system and multi-member direct proportional electoral system, (2) governance system with constitutional president and executive prime minister and mixed-member proportional electoral system, and (3) parliament elected presidential system and mixed electoral system, all three drafts were submitted to the Constituent Assembly for decision. Out of these three concept papers, the first proposal received 18 votes, the second 16, and the third 3 votes.
of extinction; and any specific geographical region may be set as a special region for the development of the region or specific sectors of society that are backward and lagging behind economically and socially within the concerned state that have not been covered by these both.

Article 13 of the draft presented by the Committee on State Restructuring and Distribution of State Power provides for political preferential rights. Article 13(1) and (2) provide that a tribe or community having dominance in a state formed on the basis of that tribe/community will have preferential rights in terms of the major leadership position of the state, and any tribe/community having dominance in an autonomous region to be set under the special structure will have preferential rights in terms of the major leadership for two years.

Article 15(2) of the draft presented by the Committee on State Restructuring and Distribution of State Power provides for Dalit proportional representation on the basis of population at the federal state and local levels, and that the law will provide for 3 and 5 per cent additional representation in federal state structures.

Contradictions:

1. The Committee on Determination of Structure of Legislative Body and the Committee on State Restructuring and Distribution of State Power contain divergent provisions on Dalit representation. The draft of the Committee on Determination of Structure of Legislative Body does not provide for proportional representation of the Dalit community in the legislature, whereas the draft of the Committee on State Restructuring and Distribution of State Power provides for compensation in addition to proportionality. The Committee on Determination of Structure of Legislative Body provides for the election of 75 and 17 members through the proportional electoral system to the federal house of representatives and state legislature, respectively. Nevertheless, there is no mandatory provision for proportionality in respect to the 76 and 18 representatives who are to be elected to the federal and state legislature, respectively. Accordingly, the possibility of proportional representation of Dalits seems to be almost nil.12

2. The thematic committees of the Constituent Assembly generally recognise proportional representation. Nevertheless, the provisions contained in their drafts will not ensure the proportional representation of Dalits in the national assembly. The draft presented by the Committee on Determination of Structure of Legislative Body provides for the formation of proportional representation at all levels of the state is one of the main demands of the Dalit movement. In the present situation, the possibility of a Dalit winning a seat through the direct electoral system is very slim. In the 2048 BS (1991AD) election, Krishna Singh Pariyar was elected through the direct electoral system. And in the elections to the Constituent Assembly, among the candidates fielded by the Communist Party of Nepal (Maoist), Khadga Bahadur Bishwakarma was elected in Kalikot, Tilak Pariyar was elected in Banke, Sita Baudel in Nawalparasi, Durga Bishwakarma in Kaski, Mahendra Paswan in Siraha and Gopi Achhami in Morang through the first-past-the-post system. Adequate analysis is yet to be made of whether or not this victory is the result of the popularity of the Maoists at that time, or also the result of a change in the traditional attitude towards Dalits in society.

12 Proportional representation at all levels of the state is one of the main demands of the Dalit movement. In the present situation, the possibility of a Dalit winning a seat through the direct electoral system is very slim. In the 2048 BS (1991AD) election, Krishna Singh Pariyar was elected through the direct electoral system. And in the elections to the Constituent Assembly, among the candidates fielded by the Communist Party of Nepal (Maoist), Khadga Bahadur Bishwakarma was elected in Kalikot, Tilak Pariyar was elected in Banke, Sita Baudel in Nawalparasi, Durga Bishwakarma in Kaski, Mahendra Paswan in Siraha and Gopi Achhami in Morang through the first-past-the-post system. Adequate analysis is yet to be made of whether or not this victory is the result of the popularity of the Maoists at that time, or also the result of a change in the traditional attitude towards Dalits in society.
a 51-member national assembly, consisting of 1 member from each of the 38 states and 13 members under the principle of proportional representation from among women, ethnic and linguistic communities that are not represented in the house of representatives of the federal legislature, and from among those persons and experts who are renowned in national life. There is neither provision for Dalits to be included in the two from each of the states nor is it likely that a Dalit will be included as a renowned person in national life. So it seems that the possibility of Dalit representation in the national assembly is very slim, and proportional representation is not possible at all.

As to representation, the draft of the Committee on Determination of Forms of Governance recognises the principle of proportional representation, whereas the draft of the Committee on State Restructuring and Distribution of State Power provides for 3 per cent additional representation of Dalits at the federal level and 5 per cent at the state level. Nevertheless, the draft of the Committee on Determination of Structure of Legislative Body fails to even adopt the principle of proportional and inclusive representation. As the principle of proportional representation is not adopted – the representation principle is in itself rejected – the Dalit members of the Constituent Assembly do not support the draft of the Committee on Determination of Structure of Legislative Body. As representation of only half of the population of the Dalit community is provided in the draft of the Committee on Determination of Structure of Legislative Body, they recommend that a special provision be made for the proportional representation of the Dalit community in the house of representatives and national assembly. Comparatively, the concept put forward by the Committee on State Restructuring and Distribution of State Power is progressive and more beneficial to the Dalit community. The Dalit Constituent Assembly Members Forum has also put forward the concept of 20 per cent Dalit representation, along with compensation, at all levels of the state.

3. The draft presented by the Committee on State Restructuring and Distribution of State Power does not guarantee special rights in all organs of the state, despite mentioning special rights for the Dalit community in addition to proportionality. Article 15(2) of the draft provides for proportional representation for Dalits in all political structures on the basis of population, and additional representation of 3 and 5 per cent in the federal and state structure, respectively. However, the draft is silent on their additional representation in local bodies.

4. The Committee on State Restructuring and Distribution of State Power provides for an additional 3 and 5 per cent representation, in addition to proportionality, for the Dalit community. However, the theoretical basis for additional representation is not clear, nor is the basis of

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Confusion in Dalit Transformation in the New Constitution

representation of 3 or 5 per cent. Also, it is not clear why the 7 per cent right\textsuperscript{14}, in addition to proportionality, as demanded by the Dalit community, could not be established or why equal rights of 5 per cent could not be added at both the state and the federal level. Similarly, a great number of other issues are not addressed by the drafts, such as what are the areas or sectors intended for additional powers to the Dalit community and whose powers are to be curtailed in order for the Dalit community to enjoy these additional powers. The principle of proportional representation and the principle of additional rights with compensation contradict each other. Only one among these two principles should be acceptable. The application of the principle of proportional representation equally between those who were in power in the past and those who were alienated from power cannot ensure realisation of social justice. The equal application of this principle might give space for domination by the same groups that were in power in the past and that have access to education and power networks.

5. The draft of the Committee on State Restructuring and Distribution of State Power is silent on how the representation of the Dalit community is to be forged in autonomous regions, protected regions and special regions within a special region, as provided for in Article 8 of the draft. It is necessary to clarify the interpretation of the representation of the Dalit community to prepare their leadership while empowering them right from the local level and special structure level.

6. Preferential rights have to be granted to the tribes and communities that have been subject to oppression in order to establish their rights along with their identity. However, preferential rights in relation to the political leadership of Dalits, who were most oppressed in the past, is not provided for anywhere in the drafts. The draft presented by the Committee on State Restructuring and Distribution of State Power provides for preferential rights in the main leadership position of any state formed according to tribe/community, and for that right in an autonomous region to be formed under the special structure. However, it fails to provide that a Dalit will be the chief of a local body dominated by the Dalit community within such a state or autonomous region.\textsuperscript{15}

\textbf{2.2.2 Representation in the executive}

The executive is the main organ for implementing the policies and laws made by the legislature and running the day-to-day administration of the state. Dalit representation in the executive is important

\textsuperscript{14} The United Political Dalit Organization has demanded 20 or 23 per cent representation in all organs of the state, the Nepal National Dalit Emancipation Front has demanded a special provision for an additional 7 per cent on top of proportionality, the Nepal Dalit Association has advocated for 23 per cent consisting of an additional 10 per cent on top of proportionality, an agreement reached with the United Political Dalit Organization provides for 23 per cent representation, and the Federation of Dalit Non-governmental Organizations, Dalit Service Organization and others have advocated for proportional representation.

\textsuperscript{15} In Magha, 2066, members of the Constituent Assembly Bishwabhakta Dulal, Santoshi Bishwakarma and Chandradevi Ram filed amendments for the insertion of a provision to ensure an additional 7 per cent representation as compensation, in addition to the proportional representation of the Dalit community, in all political structures at the union, state and local levels, and for a provision that Dalits should hold the position of chief in a local structure where the Dalit community is dominant.
for the effective implementation of laws made in favour of the Dalit community. Past experience shows that, despite untouchability being abolished through the Muluki Ain (Civil Code) of 2020 BS (1963 AD), untouchability was not abolished in reality because there was no Dalit presence at the law enforcement level and such bodies remained indifferent.

The Committee on Determination of Forms of Governance is responsible for addressing the issue of representation in the executive. However, this Committee was not able to forge a consensus on the form of governance of the state. There has been no agreement on the issues of election of a president, executive powers and formation of the cabinet (executive). Due to differences of opinion, the Committee has presented three concepts to the Constituent Assembly. In relation to the formation of the cabinet, Article 12 of the concept that secured 18 votes provides for a directly elected executive president, who will form the cabinet according to the principle of proportional inclusion from among the members of the legislature in proportion to the number of seats secured by each party represented in the legislature. Similarly, Article 15(3) of the concept that secured 16 votes provides for a president elected by the members of both houses of the federal legislature and for the leader of the party that commands the majority in the lower house of the legislature to be appointed by the members of the state legislatures as prime minister and, on the recommendation of the president, the cabinet will be formed from among the members of the legislature on the basis of the proportional inclusion principle. The draft that secured 3 votes provides for a president to be elected by the lower house of parliament and the cabinet to be formed by the president, who is the chairperson of the cabinet, from among the members of legislature.

In relation to the state council of ministers, Article 7(4) provides for the appointment of the chief minister from among the members of the state legislature on the basis of the proportional inclusion principle. Article 5(2), which deals with the local executive, provides for the formation of the executive body of the local government in accordance with the proportional inclusion principle.

Contradictions:

1. How the executive is formed is a determinant of the representation of Dalits in that body. As the Constituent Assembly has not been able to settle the mode of formation of the executive, the matter of whether there will be proportional representation of Dalits or not is also not settled. The issues, including the method of election and formation of the cabinet, will remain unresolved until a consensus is found among the three major divergent opinions included in the draft.

2. The draft provides for the cabinet to be formed on the basis of the proportional inclusion principle. However, it is not clear what the structure and form of the cabinet would be.

3. The executive will be inclusive only if the legislature is proportional and inclusive. Unfortunately,
the draft fails to provide for the proportional representation of the Dalit community in the legislature, and for their proportional and inclusive representation in the executive, indicating that the exclusion of Dalits will continue.

Even the Dalit Constituent Assembly Members Caucus and Dalit political organisations are not able to clarify what form of governance would be most effective for the Dalit community. The Dalit members of the Constituent Assembly have consented to the concepts of their respective parties on the issue of executive president or executive prime minister. Given that the form of governance is a concern for the whole nation, rather than any specific race/caste or class, the Dalit members of the Constituent Assembly seem to be in favour of a form that serves the national interest. One group of Dalit members of the Constituent Assembly argues that the executive presidential system is appropriate for a strong and permanent government, while another group of members stands for the executive prime ministerial system.

2.2.3 Representation in judiciary

The judiciary is the main body for interpreting laws made by the legislature and for imparting justice. There has not been proper representation of the Dalit community in this body in the past. The new constitution should ensure the proper representation of the Dalit community in the judiciary. There should be proportional inclusion of Dalits in all provisions in relation to the judiciary, including the appointment of judges to all bodies for the administration of justice.

Article 2 of the draft presented by the Judicial System Committee provides for a federal supreme court, state/province supreme/high courts and district/local courts. Article 29 of the draft proposed by this Committee mentions that a federal legislature special judicial committee, state/province legislature special judicial committees and district/local legislature special judicial committees will be formed in accordance with the proportional inclusion principle. It mentions that this principle will be followed in the forming of committees such as the special judicial committee, to be formed pursuant to Article 29(5), and the district/local special judicial committees, to be formed pursuant to Article 29(8). Article 29(3) states that the appointment of judges at all levels will be made in accordance with the proportional and inclusion principle, according to population size.

Contradictions:

1. The representation of Dalits in the judiciary is possible only if provision is made for their mandatory inclusion in all bodies related to the dispensation of justice. The provisions in the

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16 According to Bishwabhakta Dulal, a member of the Constituent Assembly, the Caucus of Dalit Members of the Constituent Assembly is yet to decide what form of governance is most beneficial for the Dalit community.

17 Interview with members of the Constituent Assembly, Ramprit Paswan, Nepal Communist Party (Unified Marxist-Leninist) Bishwabhakta Dulal, Unified Communist Party of Nepal (Maoist), and Shambhuhajara Paswan, Nepali Congress in Jestha 2066 BS (May 2009 AD).
draft of the Judicial System Committee requiring the appointment of judges by the judicial body committee and that the formation of the judicial bodies of all institutions dispensing justice be based on the proportional and inclusion principle are positive. However, the draft is silent on whether this provision will come into force immediately, and the courts restructured accordingly, or sometime later. This draft fails to offer a clear framework for the restructuring of the judiciary.

2. Given that there are very few Dalit judges, there is no possibility of immediate proportional representation in the courts. However, the policy of the state should be to empower communities, including the Dalit community, whose judges are few by making it mandatory that their representation in the courts is proportional and inclusive. This matter is not addressed in the draft.

2.2.4 Representation in constitutional bodies

The legislature, executive and judiciary are the three main organs of the state. In addition, a constitution also provides for some important constitutional bodies for the proper implementation of constitutional provisions. The representation of Dalits is necessary in such important constitutional bodies.

The draft presented by the Committee on Determination of Structure of Constitutional Bodies proposes 11 constitutional commissions, including one Dalit commission, on the basis of proportional inclusion. These include a three-member commission for the investigation of abuse of authority, an audit commission, election commission, Dalit commission, women’s commission, a five-member national human rights commission, and a public service commission consisting of members as required.

Article 24 of the draft presented by the Committee on Distribution of Natural Resources, Financial Powers and Revenue Sharing proposes one national natural resources committee consisting of three members including the chairperson, and Article 35 provides for one finance commission as constitutional bodies.

Contradictions:

1. The commissions, other than the Dalit commission, would consist of three and five members. Owing to the small number of members in the constitutional bodies, it is not clear how the proportional representation of communities such as Dalits can be ensured. The draft is also not able to clarify the provision of proportional representation for the Dalit community in all of the constitutional bodies.
2. The draft presented by the Committee on Distribution of Natural Resources, Financial Powers and Revenue Sharing contains provision for forming a national natural resources commission and national finance commission as constitutional bodies. However, the draft is silent on how these commissions are to be formed and on what basis representation in these commissions will be forged. An analysis of the provisions and the language used in the proposed draft reveals problems with the proportional representation of Dalits in such commissions.

2.2.5 Representation in civil administration, army and police

Article 15 of the draft presented by the Committee on State Restructuring and Distribution of State Power provides for the fundamental right of Dalits. Sub-clauses (d) and (e) of Article 15(1) and clause (3) thereof provides that special provisions will be made by law in relation to the proportional and inclusive basis for the empowerment, representation and participation of Dalits in education, health, civil service, police and army, as well as in employment for social progress.

Article 18 of the draft presented by the Committee on Fundamental Rights and Directive Principles provides for the right to employment. Article 18(1) provides that each citizen will have the right to employment and to choose employment, and the unemployed will have the right to an allowance as provided by law. Article 25(3) of the draft presented by this Committee provides that special opportunities will be created for the Dalit community on the basis of positive discrimination in relation to education, health, employment and social security.

Article 23 of the draft presented by the Committee on National Interest Preservation provides that there will be one military service commission formed as provided by law for the recruitment and promotion of the national army. Article 24, in provisions relating to the national army, provides for an institution called the Nepal Army. Article 25 provides for the formation of para-military forces and the establishment of a para-military force service commission. Article 26 provides for an intelligence bureau and Article 27 provides for the formation of a police service to maintain internal peace and security in the country and for the constitution of a police service commission to handle appointments and promotions.

Article 4 of the draft presented by the Judicial System Committee provides for the formation of a special military court under the chairpersonship of a judge of the supreme court to hear appeals from decisions made by the military court.

Sub-clause (5) of Article 3(a) of the draft presented by the Committee on Fundamental Rights and Directive Principles, under the policies of the state, provides that a policy of making all security bodies, including the army and police, strong, consolidated professional, inclusive and accountable to public will be pursued.
Article 15(3) of the draft presented by the Committee on State Restructuring and Distribution of State Power provides that special provisions will be made under law for proportional and inclusive grounds for the empowerment, representation and participation of Dalits in the civil service, police and army, as well as in employment.

Contradictions:

1. The draft presented by the Committee on State Restructuring and Distribution of State Power provides that special provisions will be made by law on the basis of the proportional inclusion principle for the empowerment, representation and participation of the Dalit community in employment, and the Committee on Fundamental Rights and Directive Principles incorporates, as a fundamental right, the matter of granting special opportunity to the Dalit community in employment on the basis of positive discrimination. These provisions are positive, however, the draft is silent on when positive discrimination will apply in the bureaucracy.

2. Even though the Committee on Fundamental Rights and Directive Principles mentions that security bodies, including the army and police, will be made inclusive and accountable, this provision is included under the policies of state, which is not mandatory for implementation, and there is no recourse to a court in the event of non-implementation.

3. The drafts presented by the Committee on National Interest Preservation and the Judicial System Committee do not recognise that the commission to be formed for the constitution of a body related to army, policy and security, and appointment and promotion of personnel should be inclusive. This indicates that the Dalit community will again be deprived of representation in the formation of a security body as well as a commission to be formed for promotions.

2.2.6 Representation: Ambiguous in mode

The drafts presented by the various thematic committees of the Constituent Assembly are, in principle, uniformed on the issue of the representation of the Dalit community. Nevertheless, they present divergent opinions as to the mode of representation. Representation cannot be ensured unless the proportional and inclusive representation of the Dalit community is ensured in all organs of the state machinery. Theoretical ambiguity and divergent views or contradictions among the various parties vis-à-vis Dalit representation are also reflected in the reports of the thematic committees of

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18 Advocate and researcher Yam Bahadur Kisan says that the state is not bound to carry out any provisions of the constitution that are included as directive principles or policies of the state, and not as fundamental rights, and that guiding principles are those that the state may gradually carry out, depending on the availability of resources (conversation with Yam Bahadur Kisan in Shrawan 2067 BS [July 2010 AD]).
the Constituent Assembly.\textsuperscript{19} Dalits from various organisations and institutions have one voice: that Dalits should be granted additional rights to proportionality as compensation for the discrimination they have suffered for so long at the hands of the state.\textsuperscript{20}

Article 3(3) of the draft presented by the Committee on Fundamental Rights and Directive Principles, on the right to equality, provides that the Dalit community will have the right to special opportunities on the basis of positive discrimination in education, health, employment and social security. Similarly, Article 25(2), on the rights of the Dalit community, provides that the Dalit community will have the right to participation, along with compensation, in all organs, bodies and sectors of the state machinery on the basis of proportionality and inclusion. The same draft, in Article 3(11) of the directive principles, policies and obligations of the state, mentions that racial/caste-based discrimination and untouchability will be made punishable and the Dalit community will be entitled to special rights, along with compensation, on the basis of positive discrimination.

Article 15(1) of the draft presented by the Committee on State Restructuring and Distribution of State Power provides that the Dalit community will have special rights in economic, political, cultural and educational, as well as social, fields. Article 15(2) of the same draft mentions that provisions will be made for an additional 3 and 5 per cent representation of Dalits in the federal and the state structures, respectively, and in all political structures at the federal, state/province and local levels, according to population.

The draft presented by the Committee on the Protection of the Rights of Minorities and Marginalized Communities mentions that Dalits and women, among others, will have full proportional representation. Clause (3) under fundamental rights provides that the state will make special provision by law on the basis of positive discrimination for their protection, development and empowerment. Clause (10) of the draft relating to the rights of minorities and marginalised communities provides for the right to take part in governance in line with the principle of full proportional representation. Clause (11) provides that special provisions will be made for representation, along with full proportional representation, in every organ of the state.

\textsuperscript{19} Different parties hold different opinions on the mode of securing representation of the Dalit community. The Unified Communist Party of Nepal (Maoist) has interpreted the representation of Dalits at all levels of the state as a special right. The Nepal Communist Party (Unified Marxist-Leninist) is in favour of inclusion of Dalits through progressive reservation. The Nepali Congress has put forward the concept of reservation for the communities, including Dalits, in the public sector. Other parties, including Rastriya Janamorcha Nepal and Terai-Madhesh Democratic Party, have been advocating for reservation along with positive discrimination and proportional representation. Parties such as the Madhesi People’s Rights Forum and Unified Communist Party of Nepal (Maoist) or Nepal Communist Party (Unified Marxist-Leninist) have also put forward the representation of Madhesis, women and Dalits, on the basis of proportional inclusion. Various parties have expressed such opinions in their Constituent Assembly election manifestos and in the suggestions handed over by them to the Constituent Assembly.

\textsuperscript{20} The Nepal Dalit Liberation Front has demanded a 7 per cent special right of representation in addition to proportionality, and the Nepal Dalit Organization has demanded an additional 10 per cent representation. The Nepal Oppressed Dalit Caste Liberation Society has demanded that there be progressive reservations for Dalits and the participation of Dalits in the governance of the state on the basis of proportional inclusion according to population. The 20-point understanding between the Dalit political organisations and associations demands the right to 23 per cent participation for the Dalit community, while the Dalit Constituent Assembly Members Forum has demanded 20 per cent representation for the time being, by adding 7 per cent to proportionality.
Article 3(2) of the draft presented by the Committee on Determination of Forms of Governance, under fundamental rights, states that special provisions may be made by law for the protection, empowerment or development of women, Dalits and indigenous peoples that are lagging behind economically, socially or culturally. Similarly, it is mentioned in the basic guiding principles of public administration contained in Article 3(1), relating to the governance and formation of governmental services, that compensation will be provided on the basis of the human development index for Dalits, indigenous peoples, and classes, regions and communities that are backward.

Contradictions:

1. The Committee on Restructuring of State and Distribution of Powers and the Committee on Fundamental Rights and Directive Principles have provided for special rights for Dalits. However, the special rights provided by Article 3(11) under the chapter on directive principles of state, policies and responsibilities is contradictory to explanatory note provided by Article 3(1) under the chapter for fundamental rights in the same draft. The explanatory note provides that all persons are born free and are equal in dignity; therefore, no citizen is entitled to special rights on the basis of origin, religion, race and gender. This curtails the special rights along with compensation of the Dalit community.

2. It is necessary to specify the method of making the state proportional and inclusive in the constitution. The drafts contain various phrases relating to inclusion and the method of Dalit representation, such as ‘special rights’, ‘special rights along with compensation’, ‘proportionality’, ‘inclusive’, ‘positive discrimination’, ‘reservation’ and ‘rights along with compensation’. The use of such words does not make it clear as to how the representation of Dalit community will be secured.

3. The drafts do not contain a clear interpretation of any method of inclusion mentioned. For example, the drafts are not clear about in what sense special rights are different from compensation and proportionality.

4. The drafts state that special provisions will be made by law for the protection, empowerment and development of communities including Dalits. However, they do not guarantee proportional representation or make it mandatory to legislate to that effect.

2.3 Equal rights amidst inequality

Equality is a basic norm of any modern constitution. A study of world constitutions shows that they incorporate the basic values of justice such as freedom, equality and security. The constitutions of capitalist countries basically incorporate freedoms, without paying much attention to the values
of equality and security. Similarly, the constitutions of socialist countries incorporate equality as the primary value of justice, without paying much attention to the other two values (freedom and security). The constitutions of feudalist countries put security at the centre.

The Constitution of the Kingdom of Nepal, 2047 BS (1990 AD), which is considered to be the most progressive in the constitutional history of Nepal, gave proper space to liberty. However, it did not incorporate the principle of equality in the true sense. The equality related provisions contained in the 1990 Constitution were basically formal. The Interim Constitution of Nepal, 2063 BS (2006 AD), which repealed the 1990 Constitution, give space to equality in addition to freedom. However, from an implementation point of view, these provisions are getting lost.

The modern Nepal cannot go ahead based only one norm or value. Only a constitution that truly addresses the aspirations of people and strikes a proper balance between the values of justice can be sustainable. However, the Constituent Assembly has not been able to pay proper attention to this fact. The draft presented by the thematic committees, despite paying proper attention to the rights associated with freedoms, only recognises the rights associated with equality in a formal sense. Like in the 1990 Constitution, this draft puts the economic, social and cultural rights of citizens associated with equality under directive principles. Similarly, even the rights incorporated under fundamental rights are subject to limitations in their enforcement as they will only be enforced if laws are enacted to bring them into force. The draft fails to give a clear outline of how the provisions independently included within fundamental rights will be truly and effectively implemented. Even the explanatory note to the draft does not make proper provision in this regard. So, what is clear from this is that the new constitution will also run the risk of adopting, only formally, the people's economic, social and cultural rights associated with equality.

The right to equality is different in nature from the rights associated with freedom. In other words, merely formally recognising equality entails the risk of continuing inequality. It is necessary to understand equality as equal treatment between equals and unequal treatment between unequals. According to the historical development of Nepal, the condition of Dalits is different from that of other communities, and much weaker. Formal equality will not address their real and actual condition. So, their rights and demands should be addressed in a different manner. It is also necessary to pay attention to the fact that the oppressed and backward communities including Dalits will not be able to properly exercise their right to freedom set forth in the constitution unless their economic, social and cultural rights are guaranteed. Hence, it is necessary to understand and analyse this matter in depth.

2.3.1 Right to equality

The essence of equality is equal treatment between equals and unequal treatment between unequals. The drafts of thematic committees fail to truly incorporate this norm. The drafts presented by the
Confusion in Dalit Transformation in the New Constitution

various committees do incorporate this norm formally, but fail to propose clear provisions for its implementation on the ground. The provisions contained in the drafts presented by the Committee on Fundamental Rights and Directive Principles and the Committee on the Protection of the Rights of Minorities and Marginalized Communities are relevant in this context.

Article 3 of the draft presented by the Committee on Fundamental Rights and Directive Principles includes the right to equality. Clause (1) of Article 3 dealing with the right to equality provides that all citizens shall be equal before the law, and no person shall be denied the equal protection and fruits of the law. Similarly, clause (2) provides that no discrimination shall be made against any citizen in the application of general laws on the grounds of religion, colour, sex, caste, tribe, gender and so forth. Moreover, it is provided that special provisions may be made by law for the protection, empowerment or advancement of women, Dalits, indigenous peoples (adibasi, janajati) as well as other communities that are economically, socially or culturally backward. Clause (3) provides that the state shall not discriminate among citizens on the grounds of race, caste, tribe, sex and so forth.

The draft presented by the Committee on the Protection of the Rights of Minorities and Marginalized Communities also incorporates the same provisions in relation to equality. In addition to this, Article (4), under the right to equality, provides that no discrimination shall be made against any person for the same work in respect of remuneration, as well as any kind of facility, on grounds of caste, race or otherwise.

Contradictions:

1. Inequality cannot be abolished by granting the same powers or rights to those who are equal and those who are unequal. Equality can only be achieved when more powers or rights are granted to those who are unequal, relative to those granted to those who are equal. However, the proposed provisions in the draft of the Constituent Assembly only provide that discrimination cannot be made on the ground of race or caste and that all citizens are equal before law. The draft fails to recognise the fact that, as the Dalit community has lagged behind due to discrimination by the state itself, there is a need to grant more powers and rights to this community to ensure equality in the true sense.

2.3.2 Ending untouchability

Untouchability is a severe form of social discrimination being faced by Dalits. Untouchability has weakened Dalits, not only socially, but also economically. Because so-called ‘untouchables’ are not in a position to carry on occupations and business according to their will and qualifications, they are economically backward; hence, not able to enjoy the fundamental rights guaranteed by the constitution. Therefore, it is necessary for the new constitution to present a clear outline to end untouchability – constitutionally, legally and practically. The drafts presented by the thematic
committees of the Constituent Assembly are analysed here in the context of making a new egalitarian society by ending untouchability.

Article 15(1)(a) of the draft presented by the Committee on State Restructuring and Distribution of State Power provides that no person shall be discriminated against as untouchable in any place on grounds of caste, race, community, descent or occupation. Any person committing such discrimination shall be punishable for a serious social offence against humanity. The victim shall be entitled to compensation as determined by law.

Article 25 (1) under fundamental rights, contained in the draft presented by Committee on Fundamental Rights and Directive Principle mentioned that Dalit shall not be discriminated, humiliated and differentiated in any place against caste and untouchability and that will be social crime and punishable. Clause (1) of Article 9, under same article, provides that no person shall be discriminated or regarded as untouchable against caste and ethnicity, origin, community, occupation or physical condition. Similarly, clause (2) provides that, in producing or distributing any goods, services or facilities, no person belonging to any particular caste or tribe shall be prevented from purchasing or acquiring such goods, services or facilities, nor shall such goods, services or facilities be sold, distributed or provided only to persons belonging to a particular caste or tribe. Clause (3) sets forth that no act that purports to demonstrate the superiority or inferiority of any person or persons belonging to a caste, tribe or of a particular origin, or to justify social discrimination on the ground of caste or race, or to publicise ideology based on racial superiority or hatred, or to encourage caste-based discrimination in any manner shall be allowed. Similarly, it is set down in clause (4) that no person may be engaged in work against his or her will, and no person shall be subjected to any form of discrimination in the workplace, with or without committing untouchability on the ground of caste or race. Clause (5) provides that untouchability and discriminatory acts shall be punishable by law as social offences, and the victims shall be entitled to appropriate compensation.

The draft presented by the Committee on the Protection of the Rights of Minorities and Marginalized Communities provides for the right against racial discrimination and untouchability. Article (1) of that right provides that no person shall be discriminated against as untouchable on the grounds of caste, race, being a Dalit, or because of their community or occupation. Article (2) sets down that no person shall, on grounds of caste or race, be deprived of the use of services, facilities or utilities available to the public. Similarly, Article (4) provides that the state shall discourage acts that purport to demonstrate any superiority or inferiority of a person or persons belonging to any caste or tribe or of a particular origin, or to justify social discrimination on the grounds of caste or race, or to publicise ideology based on racial superiority or hatred, or to encourage caste-based discrimination, and that any person committing discrimination shall be punishable for committing a serious social offence against humanity.

Article 5(1) of the draft presented by the Committee on Determination of Basis of Cultural and Social Solidarity also includes the right against untouchability and racial discrimination. Clause (2) provides that no person shall, on the ground of caste or race, be deprived of the use of services, facilities or utilities available in any place.
Contradictions:

1. As in the past, racial discrimination/untouchability exists in Nepal because of non-implementation of policies and laws, despite the fact that the country has been declared free from untouchability and that untouchability has been abolished by law. If untouchability is to be ended completely, it has to be defined in the constitution as a crime against humanity and should be made punishable. Although a prohibition on all kinds of untouchability and discrimination at any place is provided by the drafts of the Committee on Restructuring of State and Distribution of Powers and the Committee on Fundamental Rights and Directive Principles, the drafts of other committees do not adopt this prohibition. The Committee on the Protection of the Rights of Minorities and Marginalized Communities prohibits untouchability discrimination in all places; however, the drafts of other committees do not define untouchability as a grave social crime against humanity.

2. Untouchability is a punishable crime against humanity. However, all kinds of untouchability against any race, caste, community or person in any place is not prohibited, and the commission of such acts is not yet recognised as a serious punishable crime against humanity in Nepal.

2.3.3 Right to land

Economic rights are a prerequisite for the enforcement of the other fundamental rights guaranteed by the constitution. Given that more than 76 per cent of people depend on agriculture in Nepal, land is the main source of economic rights. If those who have less than two ropani of land can be considered agro-landless people, 77 per cent of Dalits in mountainous areas and 95 per cent in the Terai are agro-landless. Talking of economic rights without discussing and analysing the right to land and how Dalits access to, and control over, land can be ensured constitutionally and legally is to undermine their rights.

Clause (4) of Article 10, dealing with the right to property, as contained in the draft presented by the Committee on Fundamental Rights and Directive Principles, provides that compensation shall be provided for any property of a person requisitioned or acquired by the state for the purpose of distributing to landless farmers and squatters in the course of enforcing a scientific land reform programme, or in the public interest pursuant to clause (3), in accordance with law. The amount and basis of compensation and the procedure for compensation shall be as determined by law.

Clause (5) of Article 2, dealing with fundamental rights, as contained in the draft presented by the Committee on Distribution of Natural Resources, Financial Powers and Revenue Sharing.

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provides that the state may acquire or requisition the land of any person or organisation beyond the ceiling in accordance with law in the course of enforcing a scientific land reform programme. Similarly, clause 12(7) of Article 4 provides that the state shall pursue a policy of enforcing a scientific land reform programme, while ending feudalist land ownership, and clause 12(8) provides that the state shall pursue a policy of making alternative provision for economic and social security including land for the landless squatters, bonded labourers, *Haliya*, *Haruwa*, *Charuwa* and *Kamlari*, as well as those classes that are backward or made backward economically and socially.

Article 15(1)(c) of the draft presented by the Committee on State Restructuring and Distribution of State Power mentions that the state will provide land once to, and arrange for the settlement of, the landless *Dalit* community.

**Contradictions:**

1. The drafts recognise the right to land in principle, however, even though the Committee on State Restructuring and Distribution of State Power provides that the state will provide land once to the landless *Dalits*, the reports of the other committees fail to concretely present a clear outline of how the land reform programme will be enforced and how the communities, including the *Dalit* community, that have been deprived of the right to land are to benefit from this programme.

2. All drafts are uniformed in relation to land reform, but they differ on whether compensation is to be provided for land requisitioned by the state in excess of the ceiling. The Committee on Fundamental Rights and Directive Principles provides that compensation has to be guaranteed as a fundamental right, while the Committee on Distribution of Natural Resources, Financial Powers and Revenue Sharing mentions that provisions relating to compensation should be provided by laws enacted by the legislature. Taking the view that acquiring land in excess of the ceiling by paying compensation is not land reform in the true sense, the drafts indicate the possibility of ‘not ensuring’ land reform.

3. The drafts are silent as to the manner of distribution of land acquired from land reform and the priority in such distribution. Therefore, if land reform was to be undertaken tomorrow, and the *Dalit* community is to be granted the right to land, then the constitution should provide that landless *Dalits* will have first priority in the distribution of land in excess of the ceiling.

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22 According to Hari Rokka, Constituent Assembly member and member of the Committee on Distribution of Natural Resources, Financial Powers and Revenue Sharing, to talk of undertaking land reform as the paying of compensation by the state for land in excess of the ceiling is a trick and will not ensure land reform (Interview with Rokka, Chaitra 2066 (March 2010 AD).

23 The *Dalit* movement has demanded that first priority be accorded to *Dalits* in distributing land. The National *Dalit* Commission, various *Dalit* organisations and *Dalit* civil society have demanded that such a right be established in the constitution itself.
2.3.4 Right to employment

Every citizen has the right to do work of his or her choice, except for that restricted by the state. It is the obligation of the state to create opportunities for its citizens to work. The state has to grant the right to employment to its citizens, and also the right to livelihood. Dalit people are still engaged in various forced occupations and professions due to labour provisions and the caste system, which requires people of a certain caste only to do certain work. Dalit people are victimised and compelled to work as bonded labourers because of exploitative labour provisions including Balighare, Haliya, Khali, Haruwa and Charuwa. The state is protecting this system even now, and is not able to provide employment even to those who are indented to earn their livelihood through labour. It is necessary to make provision to allow members of the Dalit community to do work of their choice, and for the professionalization and industrialisation of their occupations and work, as well as a constitutional provision relating to the right to employment.

The right to employment contained in Article 18 of the draft presented by the Committee on Fundamental Rights and Directive Principles provides that every citizen shall have the right to employment and the right to choose employment, and that the unemployed shall have the right to an allowance as specified by law. Similarly, Article 19, granting the right to labour, provides that every worker shall have the right to appropriate labour exercise.

Clause (b) of Article 15, dealing with the right of Dalits, contained in the draft presented by the Committee on State Restructuring and Distribution of State Power, provides that employment will be guaranteed in governmental, semi-governmental sectors, industries and industrial enterprises on a proportional basis. Similarly, clause (c) mentions that priority will be given to Dalits in modern business related to their traditional business and skills, and resources will be provided accordingly.

Clause 1(1) of Article 2, dealing with economic rights, contained in the draft presented by the Committee on Distribution of Natural Resources, Financial Powers and Revenue Sharing, provides that every citizen shall have the freedom to carry on an occupation, business, employment, industry, and trade, and to make investment in any place. Its clause (8) provides that every citizen will have the right to employment and the state will regulate this by law. Clause 12(4) provides that it is the objective of the state to prevent economic exploitation against any race, caste, sex, class or person by avoiding concentration of natural and economic resources in a limited number of persons.

Contradictions:

1. It is positive that the Committee on State Restructuring and Distribution of State Power provides for proportional representation in governmental, semi-governmental sectors, industries and industrial enterprises, and for the development of the traditional business of Dalits. However, the draft does not state that it should be the policy of the state to modernise, professionalize and industrialise the traditional skills, business and professions of the Dalit community.
2.3.5 Right to education

Access to education means the creation of opportunities. The state has been depriving the Dalit community of education. According to the Census of 2058 (2001 AD), the literacy rate of Nepal is 54 per cent. However, that of the Dalit community is only 33 per cent. The number of Dalits that have undertaken higher education is very low. The Dalit community, which has been deprived of the right to education as compared to other communities, has demanded free education up to a higher level, accompanied by scholarships. If this right is not guaranteed constitutionally, the educated will keep moving ahead and the Dalit community will keep lagging behind. This section looks at how the various committees of the Constituent Assembly have presented the right of Dalits to education in their drafts.

Article 16 of the draft presented by the Committee on Fundamental Rights and Directive Principles provides for the right to education. Article 16(2) provides that every person shall have the right to compulsory and free primary education. Article 16(3) provides that citizens belonging to the indigent class shall have the right to free higher education, as provided by law. Clause (3) of Article 25, dealing with the rights of the Dalit community, provides that the Dalit community shall have the right to special opportunities on the basis of positive discrimination in education, health, employment and social security.

Clause (2) of the Article dealing with the right to culture and education mentions that every citizen shall have the right to free education up to a higher level. Clause (3) of the Article dealing with the right to equality mentions that those communities or classes that are backward in economic, social, political, education and health sectors will be identified and the state will make special provisions by law, on the basis of positive discrimination, along with compensation for past oppression, for their protection, development and empowerment.

Contradictions:

1. The draft of the Committee on Fundamental Rights and Directive Principles provides for universal free education up to the higher level. Nevertheless, the draft fails to provide for free education up to the higher level, along with scholarships, to the Dalit community, which has lagged behind in education because of discrimination by the state.

2. The Committee on Fundamental Rights and Directive Principles provides the Dalit community with the right to special opportunities in education, on the basis of positive discrimination, and the Committee on the Protection of the Rights of Minorities and Marginalized Communities also provides that the state will make special provision by law, on the basis of positive discrimination, along with compensation for past oppression, for the protection, development and empowerment of backward communities in various sectors, including education. However, the drafts are silent
on how the policy of positive discrimination in favour of the Dalit community in the education sector will be enforced.

3. The drafts also fail to address the issue of setting aside certain quotas in technical education for the Dalit community and of providing them with opportunities for free technical education, along with scholarships.

2.4 Indifference in implementation

If the implementation mechanism is not effective, despite rights being constitutionally guaranteed, policies and laws exist merely on paper. Lack of political will, absence of proper and effective implementation mechanisms, the failure of existing mechanisms to act effectively and, in particular, lack of sensitisation of the state towards the Dalit community are some important factors responsible for the non-implementation of constitutional and legal provisions made in the past for the abolition of racial discrimination and untouchability. The new constitution must contain proper mechanisms for the smooth enjoyment of constitutional and legal rights by citizens. The Dalit movement has demanded an effective mechanism to end discriminatory acts against the Dalit community. Some demands being raised by the Dalit movement include the establishment of a separate bench in the courts dealing with cases of racial discrimination and untouchability and that the National Dalit Commission be empowered and its roles enhanced.

2.4.1 National Dalit Commission

The draft presented by the Committee on Determination of Structure of Constitutional Bodies proposes 11 constitutional commissions, including a Dalit commission. The Dalit movement has demanded the formation of a National Dalit Commission as a constitutional commission entrusted with executive and quasi-judicial powers for the protection and promotion of the rights and interests and development of the Dalit community. The Dalit movement has demanded a commission with quasi-judicial powers for the implementation of the constitutional and legal powers of the Dalit community and to put an end to discriminatory acts against Dalits. The proposed functions of the commission include conducting studies and research on Dalits and making recommendations to the government; formulating national policies and programmes concerning the interests of Dalits and recommending them to the government for implementation; monitoring whether the prevailing laws on the interests of Dalits, including special provisions on the interests of Dalits, have been implemented effectively; and making recommendations to the government for the observance or implementation of such laws. In addition, the Commission’s terms of reference include monitoring whether reports to be furnished by Nepal under international treaties and agreements related to the rights of Dalits to which Nepal is a party have been furnished or not; reviewing, monitoring and evaluating the policies and programmes in force for the mainstreaming of the Dalit community into national development and for their proportional representation in all organs of the state;
making recommendations to the government for the effective implementation of such policies and programmes; and performing such other functions as specified by laws.

Clause (2) of Article 16 of the draft presented by the Committee on State Restructuring and Distribution of State Power provides that there will be one federal Dalit rights commission in Nepal. The draft also provides for the formation of such a commission at the state level as well.

Clauses (1) through (5) of Article 16 of the draft presented by the Committee on Determination of Basis of Cultural and Social Solidarity provides for the establishment of a Dalit commission. It provides that there will be one Dalit commission under the federal government and the commission may, in coordination with state governments, set up its branches at the state level.

Contradictions:

1. The Dalit movement has demanded a National Dalit Commission with quasi-judicial powers. However, the functions, duties and powers specified in the draft are insufficient to make the Dalit commission powerful enough, and it will be rendered a routine work institution. Such a commission cannot ensure the enforcement of the constitution and laws in favour of the Dalit community.

2. The drafts of all three committees provide for a Dalit commission in each state. However, the drafts do not elaborate on the mode of formation, functions, duties and powers of the state level commission.

2.4.2 Courts

The courts are the main organ for interpreting the laws of the state and imparting justice. Given that the problems faced by the Dalit community are of a specific nature and different than those faced by others, it is necessary for the courts to be structured in a manner that addresses these problems.

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24 The Dalit Constituent Assembly Members Forum, sister Dalit organisations of political parties and the National Dalit Commission, as well as organisations active in favour of the rights of Dalits have furnished suggestions to the Constituent Assembly to make the Dalit commission a powerful constitutional commission. Dalit rights activists have demanded that the commission be entrusted with powers including the power to immediately investigate incidents of racial/caste-based discrimination, arrest and take deposition of the accused and make binding recommendations to the government for legal action.

25 In an interaction program on the ‘Dalit commission in the new constitution’ organised by the Awareness Media Center on 29 Ashad 2066 BS (July 13 2009 AD), Dalit rights activists Yam Bahadur Kisan, Ganesh Bishwakarma and Commission Chairperson Ram Lal Bishwokarma, were among others that expressed the opinion that, according to the provisions made in the draft, the Dalit commission would not be able to protect and ensure enforcement of the fundamental, constitutional and legal rights of Dalits.
Article 2 of the draft presented by the Judicial System Committee provides for a federal supreme court, state/province supreme/high courts and district/local courts. Similarly, in relation to judicial service, the draft provides that the service will be formed on the basis of proportional inclusion. Article 3 provides that special judicial bodies or tribunals may be established and formed by law to try and settle cases of a certain type and nature.

**Contradictions:**

1. The proposed draft does not recognise the demand for the formation of a Dalit special bench in the courts at all levels to try cases involving the Dalit community, which has been facing special problems compared to the other communities as well as economic, social, cultural, political, and racial/caste-based discrimination and untouchability. The draft talks of special courts, but makes no explanation of such an institution relating to the Dalit community.

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26 A letter demanding that the rights of Dalits be guaranteed in the new constitution was handed over to the chairperson of the Constituent Assembly on behalf of the Dalit Constituent Assembly Members Forum in Poush 2066 BS (January 2010 AD), and a common understanding was made between joint political Dalit organisations in Ashwin 2066 BS (September 2009 AD), which also demanded the formation of special benches in the courts to provide easy and speedy justice on cases of oppression against Dalits. The Nepal National Dalit Liberation Front has also made a similar suggestion to the Constituent Assembly. Even the suggestion furnished by the National Dalit Commission demands a separate bench to try cases of untouchability.
3. Reasons for Failure to Address Dalit Issues

What is clear from the analysis of the reports and drafts presented by the thematic committees of the Constituent Assembly is that these reports and drafts have failed to properly address the legitimate demands of the Dalit movement. This section identifies and analyses the root causes of such failure.

3.1 Non-inclusive framing process

It is said that it is the process that ensures the ultimate result. Accordingly, the participation and representation of the Dalit community in the constitution-making process and the level of sensitivity accorded to the issues of Dalits in the entire process is very important. The Dalit Constituent Assembly members have also realized that, even though the issues of Dalits were given importance de jure in the Constituent Assembly, these issues were not given proper importance in the specific decision-making process.27 This lack of sensitivity appears right from the time of the formation of the committees in the Constituent Assembly. There was also a lack of sensitivity in processes relating to the collection of opinions and consultations with experts, including in the framing of questionnaires.

Fourteen committees have been formed by the Constituent Assembly pursuant to Article 79 of the Interim Constitution of Nepal, 2063 BS (2007 AD) and Rule (8) of the Constituent Assembly Rules, 2065 BS (2008 AD). These committees include 3 procedural committees, a Constitutional Committee and 10 thematic committees. Fifty of the 601 members of the Constituent Assembly are Dalits. This representation of Dalits in the process of constitution making is important from a numerical point of view. After pressure by the Dalit community, advocate Min Bishwakarma was included in the 16-member Interim Constitution drafting committee in 2063 BS (2007 AD). This was the first time in the history of Nepal that the participation of Dalits was sought in the constitution-making process. From this viewpoint, the presence of Dalits in the Constituent Assembly should be considered important and encouraging. However, the basis for ensuring the rights of Dalits in the new constitution is not only their presence in the Constituent Assembly, but the representation and activeness of the Dalit Constituent Assembly members in the constitution-making process, including in the drafting committee. The fact that due importance has not been given to Dalit representation in the formation of committees is a darker side.

Thirty-five Dalit Constituent Assembly members are represented in the 10 thematic committees of the Constituent Assembly. The Constituent Assembly member from Nepali Congress, Shambhu

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27 The Constituent Assembly members have felt that, despite the issues of Dalits being raised in the Constituent Assembly committees, serious discussions and deliberations have not been held in the committees on these issues (telephone interview with Bishwindra Paswan, member of the Constitutional Committee, Chaitra 2066 BS (April 2010 AD).
Hajara, is the only Dalit member leading a committee. He is the chairperson of the Committee on Determination of Forms of Governance. There is no equal participation of Dalit Constituent Assembly members in the thematic and technical committees. The Committee on the Protection of the Rights of Minorities and Marginalized Communities has eight Dalit Constituent Assembly members, the Committee on Determination of Basis of Cultural and Social Solidarity has six Dalit Constituent Assembly members and the Committee on Fundamental Rights and Directive Principles has five Dalit Constituent Assembly members. The Judicial System Committee, the Committee on Distribution of Natural Resources, Financial Powers and Revenue Sharing, and the Committee on Determination of Structure of Constitutional Bodies each have two Dalit Constituent Assembly members. Similarly, the Committee on National Interest Preservation has one Dalit Constituent Assembly member. Even though Babulal Paswan was included at the time of formation of the Committee on Determination of Structure of Legislative Body, the Committee became Dalit-less after 26 days.

Rule 69(2) of Chapter 11 of the Constituent Assembly Rules, 2065 BS (2008 AD) provides that, while nominating members to each of the committees, proportional representation shall be made on the basis of the political structure in the Constituent Assembly and the presence in the Constituent Assembly of women, indigenous/tribal people, Madhesis, Dalits, backward regions, Muslims, and other minority communities, having representation of all political parties representing to the Constituent Assembly. However, the political parties, Chairperson and Dalit Constituent Assembly members themselves are responsible for unequal participation in the committees and for the lack of presence of Dalits in the drafting process.

Forty-six sub-committees and taskforces have been formed under the 10 thematic committees, of which, Dalit Constituent Assembly members are represented on 22 sub-committees and taskforces. Some single sub-committees and taskforces contain up to 8 Dalit Constituent Assembly members, while some have none. Coordinators of three sub-committees are Dalit Constituent Assembly members.

All four sub-committees and one taskforce under the Committee on the Protection of the Rights of Minorities and Marginalized Communities have Dalit representation. One sub-committee of the Committee on Determination of Basis of Cultural and Social Solidarity has four Dalits, three sub-committees out of the eight sub-committees of the Committee on Fundamental Rights and Directive Principles have four Dalit representatives, two sub-committees of the Committee on State Restructuring and Distribution of State Power.

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28 Bimala Mijarr was appointed to the Citizen Relations Committee under the procedural Committee on Distribution of Natural Resources, Financial Powers and Revenue Sharing in Poush 2065 BS (December 2008 AD).
29 In Mangsir 2065 BS (December 2008 AD), less than a month after its formation, the Committee was restructured and Babulal Paswan was not included. The Committee on Determination of Structure of Legislative Body is the only committee in the Constituent Assembly that is Dalit-less.
30 Tilak Pariyar is the coordinator of the Drafting Sub-Committee and Puransingh Dayal is the coordinator of the Opinion and Suggestion Study and Analysis Taskforce of the Committee on the Protection of the Rights of Minorities and Marginalized Communities. Similarly, Bishwabhakta Dulal is the coordinator of the taskforce formed to prepare the draft of concept paper of Chapters 8 and 9 of the Committee on State Restructuring and Distribution of State Power.
Determination of Forms of Governance have three Dalit representatives, two sub-committees out of the eight sub-committees of the Committee on Determination of Structure of Constitutional Bodies have two Dalit representatives, five sub-committees and taskforces out of the 11 sub-committees and taskforces of the Committee on State Restructuring and Distribution of State Power have two Dalit representatives, two sub-committees of the four sub-committees of the Committee on National Interest Preservation have three Dalit representatives, and two sub-committees and taskforces of the six sub-committees of the Judicial System Committee have one Dalit representative. The Committee on Distribution of Natural Resources, Financial Powers and Revenue Sharing has not formally included sub-committees, while one sub-committee of the Committee on Determination of Structure of Legislative Body has no representation of Dalits. Failing to include the Constituent Assembly members of the Dalit community in important places in sub-committees formed in the course of the constitution-making process shows a lack of sensitivity.

Collecting the opinions and suggestions of the general public and ensuring their participation is important in the constitution-making process. The questionnaire prepared to collect opinions and suggestions is a determinant of meaningful public participation and of how such opinions and suggestions will be reflected in the constitution. The questionnaires prepared by the various committees of the Constituent Assembly to collect suggestions from the people are not satisfactory; they do not properly address the voice of the Dalit community. If the questionnaires are not designed to address the issues of Dalits, then is unlikely that information relevant to Dalit issues will be obtained. A study of the questionnaires contained in the draft reports of the 10 thematic committees shows that only 3 committees have put forward questionnaires with direct concern for Dalit issues. The questionnaires of 5 committees incorporate matters related indirectly with Dalits, while those of 2 committees do not mention the issues of Dalits at all.31

The questionnaires deserve criticism also from the standpoint of language style. The language used was not simple and understandable to the general public, but more suited to experts.32 The issues concerning the general public should have been put before them only after making the language simple and clear. However, the questionnaires intended for experts were directly put to the general public, defeating the purpose of obtaining the true feelings of the people. The Committee on the Protection of the Rights of Minorities and Marginalized Communities even fails to make clear into which of the minorities, marginalised or excluded communities the Dalit community falls. The draft

31 The questionnaire of the Committee on State Restructuring and Distribution of State Power asks whether or not non-geographical federalism is required for Dalits. The questionnaire of the Committee on Fundamental Rights and Directive Principles includes a reference to what sort of special provision should be made in the Constitution for communities, including the Dalit community, and also contains some other questions that are indirectly related to Dalits. The questionnaire of the judicial System Committee asks what sort of structure is needed to ensure the easy access of communities, including the Dalit community, to justice. Similarly, the questionnaire of the Committee on the Protection of the Rights of Minorities and Marginalized Communities indirectly asks about the measures for inclusion of minorities and backward communities. The questionnaire of the Committee on Determination of Basis of Cultural and Social Solidarity includes a reference to what would be the basis of social and cultural solidarity. The questionnaire of the Committee on Determination of Structure of Legislative Body contains a question as to whether it would be appropriate to have a provision for reservation in the federal and state legislatures. The questionnaire of the Committee on the Determination of Forms of Governance asks how to determine quotas in the fixed system and the questionnaire of the Committee on National Interest Preservation asks what should be the content of national interest.

32 Telephone interview with Professor Krishna Khanal, Kartik 2066 BS (October 2009 AD).
The draft report presented by the Committee on the Protection of the Rights of Minorities and Marginalized Communities defines the people of the Karnali, Dalits, indigenous communities, and ethnic communities that are backward socially and culturally as excluded communities. The term ‘excluded communities’ is generally used to refer to those communities that are not included in state power owing to their being subjected to racial discrimination and untouchability, or due to linguistic, economic, social, cultural, sexual, or gender-based or regional discrimination and oppression, or physical or mental inability or disability. It does not make it clear whether the Dalit community, which is facing special problems including caste-based untouchability, is included within these communities or not. On the contrary, all classes and communities subject to oppression are interpreted as excluded communities. Had public opinion been collected on clarifying in which of the minorities, marginalised, excluded or other communities the Dalit community falls, straightforward responses would have been given by the public. Around half the Dalit community was not addressed by the questionnaires because 41.44 per cent are Madhesi Dalits and most Madhesi Dalits in rural areas do not understand the Nepali language. The issues of concern for Madhesi Dalits and public opinion could not be collected because of the complexity of the questionnaires and the language problem.

Participation of, and consultation with, experts in the constitution-making process is another important aspect. However, an equally important question is whether or not the experts selected and consulted by the committees were chosen using the inclusive principle. The list of experts appointed and invited for consultation by the committees does not show that the inclusive principle was adopted. Ten thematic committees held interactions with 253 subject experts in the course of making their preliminary drafts, out of whom, only 7 were experts from the Dalit community. This is only 2.76 per cent of the total number of experts. Only two committees involved experts from the Dalit community in discussions and deliberations: The Committee on Determination of Structure of Constitutional Bodies involved 4 Dalits out of 50 experts and stakeholders, while the Committee on the Protection of the Rights of Minorities and Marginalized Communities involved 3 Dalit experts out of 10 experts. Not even 1 Dalit expert out of the 193 experts was appointed or invited to discussions by the other 8 thematic committees.

The general public has also submitted opinions and suggestions to the Constituent Assembly. Out of 1016 suggestions submitted by various persons and social organisations to the Committee on National Interest Preservation, Committee on Determination of Basis of Cultural and Social Solidarity, Committee on Fundamental Rights and Directive Principles, Committee on the Protection of the Rights of Minorities and Marginalized Communities, Judicial System Committee and Committee on State Restructuring and Distribution of State Power, only 88 are from the Dalit community. The Dalit community has submitted 2 out of 27 suggestions to the Committee on National Interest Preservation, 8 out of 103 suggestions to the Committee on Determination of Basis of Cultural and Social Solidarity, 33 out of 334 suggestions to the Committee on Fundamental
Rights and Directive Principles, 28 out of 194 suggestions to the Committee on the Protection of the Rights of Minorities and Marginalized Communities, 9 out of 283 suggestions to the Judicial System Committee, and 7 out of 75 suggestions to the Committee on State Restructuring and Distribution of State Power. Similarly, the suggestions received by the Committee on Distribution of Natural Resources, Financial Powers and Revenue Sharing, Committee on Determination of Structure of Legislative Body, Committee on Determination of Structure of Constitutional Bodies, and Committee on Determination of Forms of Governance have also been included in edited form in the drafts.

3.2 Party insensitivity

It is the political parties that lead all policies in democracy. Constitutional or legal provisions are made on the basis of the conceptions of the political parties. How the rights of Dalits are addressed in the new constitution depends on the conceptions of the major political parties regarding Dalits. The rights of Dalits are determined in the new constitution on how sensitively various political parties raise the issues of Dalits including the identification, representation, and economic rights of the Dalit community, as well as the abolition of racial discrimination and untouchability. However, the drafts of the thematic committees clearly show that the parties are not serious and sensitive about the issues raised by the Dalit community. Theoretical ambiguity and the insensitivity of political parties about the issues of Dalits, and the absence of any political will to establish the rights of Dalits are reflected in the drafts of the committees. Another reason for the failure of the committees to raise the rights of Dalits properly in their drafts is the divergent views held by various parties about these rights. Even Dalit members of the Constituent Assembly are divided because of the divergent viewpoints of their political parties.

It is not possible to ensure constitutional rights without first establishing the identity of the Dalit community, which is facing special problems including caste-based untouchability. Rights along with identity are an important agenda of the Dalit movement. It is important that all political parties acknowledge the establishment of the rights of Dalits along with their identity in the new constitution. However, major parties, other than the Unified Communist Party of Nepal (Maoist), have failed to clearly interpret the rights of Dalits along with identity. In its election manifesto and the draft submitted to the Constituent Assembly, the Unified Communist Party of Nepal (Maoist), which is the largest party in the Constituent Assembly, has advocated for the inclusion of the rights of the Dalit community separately, and has stood in favour of the rights of Dalits along with identity. The Nepali Congress has not proposed separate rights for Dalits along with identity. However, it has raised the matter of the development of the Dalit community and abolition of untouchability in its manifesto; it has also submitted this as a suggestion to the Constitutional Committee. The Nepal

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33 Of the major parties, the Unified Communist Party of Nepal (Maoist) has separately interpreted the rights of the Dalit community in the outline of the new constitution presented to the Constituent Assembly. It has also addressed the matter of the rights of Dalits along with identity. However, other parties, including the Nepali Congress and Nepal Communist Party (Unified Marxist-Leninist) have only raised the declaration of the state as an untouchability-free state and reservations for Dalits.
Communist Party (Unified Marxist-Leninist), in its manifesto and in its suggestions given to the Constituent Assembly, has proposed the abolition of untouchability and recognised the right against racial/caste-based discrimination. The Madhesi People’s Rights Forum has advocated for reservations for the Dalit community in all facilities and bodies of the state on the basis of social justice, as compensation for social exclusion and the state-made policy of exclusion. A review of the concepts of political parties shows that the Unified Communist Party of Nepal (Maoist) seems to be in favour of separate rights for the Dalit community. However, the Nepal Communist Party (Unified Marxist-Leninist) has only included the right against untouchability and the Nepali Congress has not been able to concretely interpret the identity of the Dalit community.

The drafts of the thematic committees are not clear and uniformed as to the identity of the Dalit community. The drafts of the Committee on Fundamental Rights and Directive Principles and the Committee on State Restructuring and Distribution of State Power establish the identity of the Dalit community. However, the draft presented by the main Committee on the Protection of the Rights of Minorities and Marginalized Communities fails to clearly identify the Dalit community. The thematic committees have created confusion by failing to identify the Dalit community when framing questionnaires and by including Dalits, indigenous peoples, women and sexual minorities in the same basket.

Another important demand of the Dalit movement is proportional representation in all organs of the state. The Dalit movement has demanded additional rights on top of proportionality as compensation for untouchability and the discrimination imposed by the state in the past. Politically, the Unified Communist Party of Nepal (Maoist) in its election commitments mentioned that special rights would be provided for a certain period as compensation to the women, Dalits and Muslim communities, which have been oppressed the most. The concept paper presented by the Unified Communist Party of Nepal (Maoist) to the Constituent Assembly mentions in the provision relating to the rights of the Dalit community, that there will be representation of Dalits, on the basis of special rights, in legislative and executive organs, constitutional bodies, and governmental, political and administrative organs.
Table 2. Caste-based situation in central committees of political parties

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<tbody>
<tr>
<td>Hill Brahmin/Chhetri</td>
<td>83 (60.14)</td>
<td>41 (67.21)</td>
<td>68 (58.62)</td>
<td>2 (5.71)</td>
<td>0</td>
</tr>
<tr>
<td>Indigenous peoples</td>
<td>39 (28.26)</td>
<td>13 (21.31)</td>
<td>24 (20.68)</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Madhesi upper caste</td>
<td>10 (7.24)</td>
<td>6 (9.83)</td>
<td>16 (13.79)</td>
<td>32 (91.42)</td>
<td>52 (94.54)</td>
</tr>
<tr>
<td>Dalits</td>
<td>6 (4.34)</td>
<td>1 (1.63)</td>
<td>8 (6.89)</td>
<td>1 (2.85)</td>
<td>3 (5.45)</td>
</tr>
<tr>
<td>Total</td>
<td>138 (100)</td>
<td>61 (100)</td>
<td>116 (100)</td>
<td>35 (100)</td>
<td>55 (100)</td>
</tr>
</tbody>
</table>

Source: SAMATA Foundation, 2009,  
Note: Figures in brackets are percentages.

In its election manifesto, the Nepali Congress has expressed its commitment to ensure the proportional participation of backward communities including the Dalit community and also mentions that the state will accord special attention to the enhancement of access of the Dalit community to the system of governance. The concept paper for the constitution presented by the Nepali Congress says that the state will pursue a policy of positive discrimination in order to enable small groups to participate in the state structure and decision-making process for the purpose of making the state inclusive. The Nepal Communist Party (Unified Marxist-Leninist) has provided that the policy of inclusion will be pursued for the identification, representation, and access of the classes and communities that are economically and socially backward and that the policy of inclusion will be adopted in making political appointments to various organs of the state in the course of restructuring the state. It also stands in favour of ensuring the representation of the Dalit community through progressive reservation. The Madhesi People’s Rights Forum has also put forward the concept that Dalits should be entitled to reservations in all bodies of the state as compensation for exclusion by the state. On the whole, the Unified Communist Party of Nepal (Maoist) has recognised the demand of the Dalit movement that the Dalit community should be provided with additional rights along with compensation for oppression by the state, while other parties have stood in favour of proportional representation.37

34 If Madhesi nationalities are included in both the lists of Madhesi and nationalities it would lead to data distortion. However, for the purpose of this policy paper, Madhesi and Madhesi nationalities are included in the same list because this paper intends to analyse the situation from the Dalit perspective.
35 Ibid.
36 Out of eight Dalits, four are central members and four are alternate central members.
37 The promotion of the inclusive representation and participation of all backward classes, communities, nationalities, genders and regions in the legislature, state assembly, local government and party is mentioned, although there is no separate provision on the representation of the Dalit community.
The Committee on State Restructuring and Distribution of State Power provides that 3 and 5 per cent representation will be provided to the Dalit community at the federal and state levels, respectively. However, this draft is silent on the representation of Dalits in local bodies. Similarly, it is silent on the representation of Dalits in autonomous regions, protected regions and special geographical regions within the special structure. Also, it is not clear if there is to be proportional representation in the legislature, executive, national assembly, constitutional body, civil administration, and army and police administration. The draft of the Committee on Determination of Structure of Legislative Body fails to ensure the proportional representation of the Dalit community. The draft proposed by the Committee on Determination of Structure of Constitutional Bodies provides that appointment to a three and five-member commission will be made on the basis of the principle of proportional representation. However, the possibility of the inclusion of Dalits in this commission is low.

Different parties hold different opinions as to the method of inclusion. The Unified Communist Party of Nepal (Maoist) has provided that special rights will be given to the Dalit community, while the Nepali Congress has advocated for reservation on the basis of positive discrimination. Similarly, the Nepal Communist Party (Unified Marxist-Leninist) proposes the inclusion of Dalits through progressive reservation. The Madhesi People’s Rights Forum has also demanded reservations on an equal basis. The Terai-Madhesh Democratic Party has, in its election manifesto, put forward the concept that all bodies of the state should be fully inclusive for the citizens of all sectors including women and Dalits. Some parties are of the opinion that special provision should be made by law for the Dalit community. However, there is confusion about how the Dalit community will be represented because of ambiguities in the positions of the various parties.

The Dalits want the new constitution to ensure their access to, and control over, means of production, including land. The Dalit community wants the state to open a constitutional route for an effective land reform programme and distribute land in excess of the ceiling and acquired in pursuance to that programme to the oppressed communities including landless Dalits. The parties within the Constituent Assembly have failed to show the requisite sensitivity in this respect. The Unified Communist Party of Nepal (Maoist) has provided for the right of tiller farmers (people who work the land) to land and mentioned in the concept paper presented to the Constituent Assembly a revolutionary land reform programme under which land will be provided to the landless Dalits. The Nepal Communist Party (Unified Marxist-Leninist) and Nepali Congress have put forward the concept that the state shall give compensation while acquiring land in excess of the ceiling in the course of enforcing the land reform programme. However, the draft presented by the Committee on Distribution of Natural Resources, Financial Powers and Revenue Sharing provides that the state may acquire or requisition land in excess of the ceiling, in accordance with law, in the course of enforcing a scientific and revolutionary land reform programme. To say acquiring land ‘in accordance with law’ is a clear indication of an intention to avoid land reform in the true sense. Hence, the draft fails to make mandatory provision for land reform, and the matter of giving priority to the landless Dalit community while distributing land is also not addressed.
Table 3. Representation of Dalits in central committees of Madhesi political parties

<table>
<thead>
<tr>
<th>Class</th>
<th>Population (%)</th>
<th>Madhesi People's Rights Forum (%)</th>
<th>Terai-Madhesh Democratic Party (%)</th>
<th>Madhesi People's Rights Forum (Democratic) (%)</th>
<th>Nepal Sadbhavana Party (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Higher caste</td>
<td>3.04</td>
<td>16</td>
<td>31.48</td>
<td>27.27</td>
<td>9.04</td>
</tr>
<tr>
<td>Yadav, others</td>
<td>44.08</td>
<td>72</td>
<td>37.03</td>
<td>38.63</td>
<td>61.90</td>
</tr>
<tr>
<td>Nationalities</td>
<td>27.35</td>
<td>0</td>
<td>18.51</td>
<td>20.45</td>
<td>14.28</td>
</tr>
<tr>
<td>Muslims</td>
<td>13.19</td>
<td>12</td>
<td>7.40</td>
<td>4.54</td>
<td>0</td>
</tr>
<tr>
<td>Dalits</td>
<td>12.32</td>
<td>0</td>
<td>5.55</td>
<td>9.09</td>
<td>4.70</td>
</tr>
<tr>
<td>Total</td>
<td>100</td>
<td>100</td>
<td>100</td>
<td>100</td>
<td>100</td>
</tr>
</tbody>
</table>

Source: SAMATA Foundation, 2009

The Dalit movement has demanded that untouchability and caste-based discrimination be constitutionally defined as a social crime against humanity and that as stringent a punishment as possible be imposed. The manifesto of the Unified Communist Party of Nepal (Maoist) has set down that untouchability should be taken as a crime against humanity. The outline of the new constitution handed over to the Constituent Assembly also addresses this matter. The Nepali Congress, in its manifesto, has taken the abolition of untouchability as a special obligation of the state. The Nepal Communist Party (Unified Marxist-Leninist) has mentioned, in its manifesto, that the country will be declared a country free from untouchability and untouchability will be ended completely. The outlines of the new constitution presented by the Nepal Communist Party (Unified Marxist-Leninist) and the Nepali Congress to the Constituent Assembly also mention that untouchability will be ended completely. The major parties seem to have one voice on the abolition of untouchability. However, some parties including the Nepali Congress and the Nepal Communist Party (Unified Marxist-Leninist) have not made their position concrete on the demand that untouchability be defined as a serious social crime against humanity. The drafts of the committees do not define untouchability as a serious social crime against humanity or prohibit untouchability everywhere, including both public and private places. The drafts in one place prohibit untouchability and in another place provide that no person shall be deprived of access to any place of public services, facilities or use. It fails to state that untouchability is prohibited even in private life. Untouchability cannot be abolished unless untouchability is prohibited in the private sector as well. However, the political parties do not seem aware of the need to have untouchability addressed as a serious social crime in the draft.

Demand is being made by the Dalit movement, for a constitutional Dalit commission for the guarantee of the rights of Dalits. The major parties have not included this demand in their manifestos. The Unified Communist Party of Nepal (Maoist), Nepali Congress, Nepal Communist Party (Unified Marxist-Leninist) and other parties have refused to include provision for a Dalit commission in their manifestos. However, the Unified Communist Party of Nepal (Maoist) has put forward the concept of the formation of an inclusive commission for the protection of the rights and interests
of Dalits, Madhesis and indigenous peoples, among others. The Nepal Communist Party (Unified Marxist-Leninist) has, in the concept paper of its party presented to the Constituent Assembly, also shown that it is in favour of a Dalit commission. The draft proposed by the Committee on Determination of Structure of Constitutional Bodies includes the Dalit commission in the list of constitutional commissions. However, the functions, duties and powers delegated to the commission are very limited. The draft does not address the matter of making the commission a quasi-judicial institution, as demanded by the Dalit movement.

The Dalit community has been historically deprived of education. The literary rate in Nepal is 54 per cent, according to the Census of 2058 BS (2001 AD); however, the literacy rate of Dalits is only 33 per cent. Parties hold a common position on the provision of free education to the Dalit community up to class 12. However, the draft has not addressed the provision of free higher education, along with scholarships, as demanded by the Dalit movement. Similarly, the draft does not guarantee the proportional representation of the Dalit community in the civil administration, army, police and other sectors.

3.3 Inactive Dalit Constituent Assembly Member Caucus

The Dalit Constituent Assembly members have an important role to play in the proper establishment of the rights of Dalits in the new constitution. How, and in what form, the rights of Dalits are established in the constitution depends on the work of Dalit Constituent Assembly members in the thematic committees. It is important that Dalit Constituent Assembly members have a common position in order to guarantee that the rights of Dalits are included in the drafts of the thematic committees.

Immediately after the election to the Constituent Assembly, there was felt a need for a Dalit Caucus to develop a common position on the rights of Dalits among the Dalit Constituent Assembly members. However, the Caucus was formed only in Mangsir 2066 BS (November 2009 AD), some 20 months after the formation of the Constituent Assembly. The Dalit Constituent Assembly Member Caucus was formed with the objective of ensuring the rights of Dalits in the new constitution and facilitating the role of Dalit Constituent Assembly members in the legislature. The Caucus built a common understanding in Poush 2066 BS (December 2009 AD) and handed over a 23-point concept paper to the chairperson of the Constituent Assembly and the major parties. However, the Caucus was unable to play an important role in having these points included in the drafts of the committees. The Caucus could not even formulate a strategy for developing an integrated viewpoint on the Dalit agenda or take a unified initiative in the thematic committees. The Caucus, which was formed with the involvement of all of the Dalit Constituent Assembly members with a view to using the historical

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38 Prior to the making of this concept paper by the Forum, the committees, other than the Committee on Determination of Forms of Governance and the Committee on State Restructuring and Distribution of State Power, had already submitted their drafts to the Constituent Assembly.
opportunity available to Dalits, could not even continue to hold mutual discussions. This reflects the inactivity of the Dalit Constituent Assembly members in the constitution-making process and their lack of unity on common issues.\(^{39}\)

With the opportunity presented by the extended term of the Constituent Assembly, the Caucus can now proceed to build concrete positions on important issues such as federalism, the electoral system and the form of governance of the state. The following important points of the 23-point concept paper developed by the Caucus may provide the basis thereof:

- The Dalit Constituent Assembly Member Caucus has put forward as important that 20 per cent representation along with compensation in proportionality should be ensured by the new constitution in all organs of the state (federal, state and local legislature and executive; army and police; governmental and semi-governmental bodies; and constitutional bodies). However, none of the drafts guarantee 20 per cent representation of the Dalit community. Committees have divergent opinions about the representation of Dalits, and the Committee on State Restructuring and Distribution of State Power proposes an addition 3 and 5 per cent representation in proportionality at the federal and state levels, respectively. The demand for 20 per cent representation raised by the Dalit Constituent Assembly Member Caucus is not fulfilled in this draft, nor does the draft ensure additional representation in other bodies as well. Owing to the inaction of the Dalit Constituent Assembly Member Caucus, divergent views were presented in the committees on the representation of Dalits and the matter of representation along with compensation was not raised in the Constituent Assembly.

- The Caucus has raised as important the issue of legally defining racial discrimination and untouchability as a heinous social crime, attracting severe punishment, and the provision of compensation to the victims. However, the drafts have no convergence on the issue of defining untouchability as a heinous social crime and prohibiting untouchability in all sectors. The Committee on State Restructuring and Distribution of State Power accepts that untouchability is prohibited in any place and considers such treatment a heinous social crime. However, the Committee on the Protection of the Rights of Minorities and Marginalized Communities proposes prohibition of untouchability in any place, and the Committee on Fundamental Rights and Directive Principles proposes prohibition of untouchability only in the workplace. These proposals will not guarantee the abolition of untouchability in private life. This situation has occurred due to the inactivity of the Caucus in developing an integrated view among the Dalit Constituent Assembly members.

- The Caucus has raised the issue of providing land constitutionally to the landless Dalit community. It has sought the guarantee of preferential rights of Dalits to develop modern business from the

\(^{39}\) The Forum held two meetings one and half months before the termination of the two-year term of the Constituent Assembly on 14 Jestha 2067 BS (28 May 2010 AD). However, it could not hold intensive discussions on any agenda, and its contact office also could not be established.
traditional business of Dalits by abolishing, through land reform, all distortions or malpractices such as Haliya, Khali Dholi, Haruwa and Charuwa related to land and occupation, and by bringing all traditional occupations into the cash system. However, because of the weakness of the Caucus, the issues to give priority to Dalits in land reform was not included in the draft.

• The Caucus maintains the position that the right of the Dalit community to education, health, employment and food security should be ensured with priority. It has advocated for the provision of free education up to higher education, along with scholarships, to Dalit students and for setting aside a 20 per cent quota in technical higher education. However, the draft does not recognise that special provision of education should be made for the Dalit community.

• The Caucus demands a constitutional Dalit commission with ample powers. It has voiced the need for a constitutional Dalit rights commission with quasi-judicial powers. However, the Committee on Determination of Structure of Constitutional Bodies does not give quasi-judicial powers to the proposed commission. If the Dalit Constituent Assembly Member Caucus was effective, it could play a role in the formation of a powerful commission.

Failure to form the Caucus on time inhibited representation of the Dalit community in the thematic committees. The Constituent Assembly members did not pay sufficient attention to these issues, as the Committee on Determination of Structure of Legislative Body was Dalit-less. The issues to be raised in the committees were not even identified because of the failure of the Caucus to develop a strategy on the establishment of the rights of Dalits. Consequently, pro-Dalit views could not be built on issues such as the form of federalism, electoral system and method of inclusion, and these issues were, therefore, not included in the drafts. The Dalit Constituent Assembly Member Caucus has raised, in its 23-point concept paper, a demand for a guarantee of 20 per cent representation, with compensation in proportionality at all levels of the state. However, the Caucus could not agree on the issue, with the Dalit Constituent Assembly members putting forward different opinions against this demand. The Caucus has been unable to perform a leadership role in effectively mobilising the Constituent Assembly members in the thematic committees and civil society to build public opinion in favour of the agenda of Dalits.

The Dalit Constituent Assembly members could not move beyond the ideological boundaries of their respective parties. Consequently, the Dalit agenda was overshadowed in the Constituent Assembly. Dalit Constituent Assembly members were afraid to differ from their party line for fear of action by

\[40\] Khadga Bahadur Basyal, Constituent Assembly member for the Nepali Congress, and Chhabilal Bishwokarma, Constituent Assembly member for the Nepal Communist Party (Unified Marxist-Leninist), who represent to the Constitutional Committee, have signed the different opinions filed in favour of substituting the word ‘inclusive’ for proportionally inclusive in relation to the appointment of Nepalese ambassadors and special representatives. Similarly, Bishwokarma has signed the proposal of the Constituent Assembly members of the Nepal Communist Party (Unified Marxist-Leninist) for inserting the words ‘based on pluralism’ replacing the words ‘people’s proportional inclusion’ contained in the preamble of the draft of that committee. It is mentioned in the proposal that, given that proportional inclusion is not the system of governance, but only its feature, so the words ‘proportional inclusion’ are not appropriate between the words ‘competitive, multi-party, democratic system of governance’.
their parties. They even consented to a range of provisions that were clearly against the interests of the Dalit community in the course of the drafting by the committees. The Regulation of the Caucus provides that it will publish and disseminate information in order to acquaint the Dalit community with the constitution-making process, and hold consultations and forge collaboration and support with political parties and non-Dalit personalities on matters of concern to the Caucus. However, these Regulations were never implemented.

The Caucus could not forge collaboration with civil society, human right activists and other non-governmental organisations engaged in favour of the Dalit community in order to attain its goal. The inaction of the Caucus has weakened the hopes and confidence of the Dalit community in relation to the new constitution. To convert this despair into power, it is necessary for the Caucus to take advantage of the extended term of the Constituent Assembly to formulate an integrated agenda for restructuring and take the initiative to establish the rights of Dalits in economic, social, political, cultural and other fields.

### 3.4 Ineffective Dalit civil society

Civil society is understood as a group of people who independently raise issues that concern people despite the fact that they are involved in various occupations or professions. Dalit groups are now appearing among the various groups active in the name of civil society. Non-governmental organisations active in the rights of Dalits are dominant in Dalit civil society; however, some other human rights activists and Dalit intelligentsia are also involved. Civil society can play an important role in identifying common agenda and putting pressure on stakeholders. The role of Dalit civil society is important in putting pressure on the Dalit Constituent Assembly members and parties to ensure the rights of Dalits in the new constitution. However, Dalit civil society has not been able to play an effective role in the constitution-making process.

Dalit civil society has not been able to play a meaningful role in activities such as building an integrated viewpoint through comprehensive discussions on the agenda of the Dalit community in the new constitution; making the Dalit community vigilant on establishing their rights in the new constitution; and pressuring various parties to be responsible towards the rights of Dalits. Dalit civil society was not active in bringing together the Dalit Constituent Assembly members and holding comprehensive discussions on the Dalit agenda. Dalit civil society also failed to lobby through the

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41 Khadga Bahadur Basyal, Constituent Assembly member for the Nepali Congress, and Chhabilal Bishwokarma, Constituent Assembly member for the Nepal Communist Party (Unified Marxist-Leninist), who represent to the Constitutional Committee, have signed the different opinions filed in favour of substituting the word 'inclusive' for proportionally inclusive in relation to the appointment of Nepalese ambassadors and special representatives. Similarly, Bishwokarma has signed the proposal of the Constituent Assembly members of the Nepal Communist Party (Unified Marxist-Leninist) for inserting the words 'based on pluralism' replacing the words 'people's proportional inclusion' contained in the preamble of the draft of that committee. It is mentioned in the proposal that, given that proportional inclusion is not the system of governance, but only its feature, so the words 'proportional inclusion' are not appropriate between the words 'competitive, multi-party, democratic system of governance' (Draft: pages 47–51).
mass media for the Dalit agenda. Whatever programmes were carried out by Dalit civil society in the course of constitution making were project oriented and sporadic, and these programmes were more of formal nature than for empowering Dalits.\(^{42}\)

A review of the drafts of the thematic committees shows that only a few suggestions were put forward by Dalit civil society. The suggestions made were mostly related to untouchability. Dalit organisations have given importance to suggestions relating to fundamental rights, rather than to establishing access at the policymaking level.\(^{43}\) Even though it may give some immediate relief, this does not help in resolving the problems of Dalits in the long run. The Dalit community needs to be more vigilant to ensure their rights in the new constitution. The Dalit Constituent Assembly members and Dalit civil society were unable to perform an effective role. Consequently, the agenda of Dalits established over more than 50 years of the Dalit movement is likely to be overshadowed.

One of its reasons for this is division within Dalit civil society.\(^{44}\) Generally, the representatives of civil society are not supposed to be involved in active politics. However, because members of the Dalit civil society are also involved in party politics, they were not able to agree on a common agenda.\(^{45}\) The people involved in Dalit civil society were happy to operate separate project-oriented programmes at a time when they should have stood united. Resources obtained from donor agencies were not used for the empowerment of the Dalit community, or in making a constructive contribution to the Constituent Assembly. The Madhesi Dalit Federation spent millions of rupees in holding Constituent Assembly related programmes in six districts of the Terai. However, the suggestions presented by it to the Constituent Assembly failed to incorporate even the general matter of how the rights of Dalits can be ensured.

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\(^{42}\) The Federation of Dalit Non-Governmental Organizations prepared the ‘Dalit Agenda in the New Constitution’ as a summation of the regional level discussions and submitted the same in the form of suggestions to the Constituent Assembly. The Network of Dalit Non-Governmental Organizations completed the ‘Dalit Rights in New Constitution Opinion Survey 2066’ in eight districts and presented the same in the form of an opinion to Nilambar Acharya, Chairperson of the Constitutional Committee. The Dalit non-governmental organisations, which stood together in launching projects, were not united to establish their agenda in the new constitution.

\(^{43}\) The thematic committees invited suggestions by issuing a public notice. Five out of 268 suggestions made to the Committee on Fundamental Rights and Directive Principles were related to Dalits. Similarly, 28 out of 194 suggestions made to the Committee on the Protection of the Rights of Minorities and Marginalized Communities, 4 out of 72 suggestions made to the Committee on Determination of Structure of Constitutional Bodies, and 8 out of 103 suggestions made to the Committee on Determination of Basis of Cultural and Social Solidarity were related to Dalits. It is not clear how many of the 294 suggestions made to the Committee on National Interest Preservation and of the 283 suggestions made to the Judicial System Committee were related to Dalits. Suggestions were also made to the Committee on Determination of Forms of Governance, Committee on State Restructuring and Distribution of State Power, and Committee on Distribution of Natural Resources, Financial Powers and Revenue Sharing.

\(^{44}\) The Federation of Dalit Non-Governmental Organizations, which was an umbrella organisation of more than 500 Dalit non-governmental organizations, was divided into two factions in the convention held in Pokhara in Jestre 2063 BS (May 2006 AD). The institution faction was led by DB Sagar and the new group was coordinated by Moti Lal Nepali. Once divided by party politics, the Federation could not be reunited.

\(^{45}\) Binod Pahadi, who led the Dalit Civic Movement before the election to the Constituent Assembly, became Unified Communist Party of Nepal (Maoist) Constituent Assembly member after the election. Bom Bishwokarma, the Secretary General of the Federation of Dalit Non-Governmental Organizations, was a candidate for Secretary General in the Fifth National Conference of the Liberation Society, a sister organisation of the Nepal Communist Party (Unified Marxist-Leninist), held on 28 Jestre 2067 BS (11 June 2010 AD). Ganesh BK, who contested with him and won, was the Chairperson of the Dalit Non-Governmental Organizations National Dalit Network. Most of those who are involved in Dalit civil society and non-governmental organisations also have various responsibilities within the political parties. Even the Dalit Liberation Front, which is affiliated with Unified Communist Party of Nepal (Maoist), has made a ‘secret mechanism’ to mobilise non-governmental organisations and civil society.
It is a pity that Dalit civil society is not able to take concrete steps, even when the thematic committees have already submitted their drafts, undermining the rights of Dalits before the Constitutional Committee. Dalit civil society has not analysed the draft of the committee, nor has it launched any programme or made any suggestions in order to make the draft favourable to the Dalit community. The civil society groups of indigenous peoples and the Madhesi community have made interventions. However, the Dalit groups have not been able to do so. Consequently, the Dalit community is again likely to lag behind.

The Dalit community, which has always remained at the forefront of movements by oppressed communities, is now lagging behind in the Constituent Assembly. The grounds for ensuring the rights of the Dalit community are being weakened because of the project-oriented and ineffective role of Dalit civil society. Dalit civil society was not able to put forward a pressure-oriented programme to ensure the rights of Dalits. The level of consciousness of civil society could not be raised above these project-oriented programmes. This is the reason for its failure to hold critical discussions on the drafts of the thematic committees. The role of the Dalit community in the constitution making of India five decades ago and their experience of how the rights of the Dalit community were ensured in that constitution is highly pertinent to the Nepali Dalit community and could assist in making a pro-Dalit constitution. However, the Dalit civil society and media have not paid attention to this aspect.

3.5 Other reasons

There are other historical reasons why the agenda of the Dalit community has not been properly addressed in the drafts of the Constituent Assembly, in addition to the non-inclusive constitution-making process, the insensitivity of political parties, inactive Constituent Assembly Members Caucus, and divided civil society. These include the weak economic condition of Dalits, social disgrace and discrimination, weak representation in political parties and lack of education.

3.5.1 Weak economic-social condition

Poverty and the weak economic-social condition prevalent in the Dalit community is one of the reasons why the issues of Dalits have not been addressed in the Constituent Assembly. Dalit people are living an arduous life in weak economic conditions and are compelled to live in disgrace because

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46 According to Bishwendra Paswan, member of the Constitutional Committee, only 6 out of 96 points of the draft prepared by that Committee relate to Dalits and Muslims.

47 The Constituent Assembly members from indigenous peoples burnt the draft handed over by the Committee on Fundamental Rights and Directive Principles on that very day as protest that it was not able to ensure the rights of indigenous peoples. Similarly, the Madhesi parties declared a movement protesting that the Committee on State Restructuring and Distribution of State Power was not able to ensure the rights of Madhesi people.

48 Interview with Binod Pahadi, Chairperson of Dalit civil society.
of discriminatory social-cultural norms. Poverty in Nepal decreased from 41.8 per cent in 1995/96 to 30.8 per cent in 2003/04. However, the poverty of Dalits is still 45.5 per cent.\footnote{Human Development Index (UNDP, 2009)} The poorest community in Nepal is still the Dalit community.

Because of their weak economic condition, Dalit people, albeit being associated with political parties, do not remain in politics for long. When the head of a Dalit family is engaged in politics, the other family members suffer financial and struggle to buy the necessities of life. Dalit people cannot afford the luxury of being involved in politics. Consequently, Dalits have been unable to hold on to decision-making positions in politics. Moreover, owing to disgrace because of social untouchability and other communities being unwilling to accept them in leadership, Dalit people have been unable to hold higher portfolios in political parties. Many capable Dalit activists are compelled to quit politics for economic reasons, and, as a result, the agenda of Dalits is excluded politically. The issues of Dalits have not been put forward strongly in the Constituent Assembly because Dalits have been unable to reach the political decision-making level. Moreover, some Constituent Assembly members also hold discriminatory attitudes towards the Dalit community. As a result, the issues of the Dalit community have not been properly addressed in the Constituent Assembly.

3.5.2 Absence of representation at decision-making level in political parties

Effective representation is necessary for the formulation and implementation of political policies. Experience shows that the issues of a community can only be addressed when the community has representation at the high level of party leadership. Hence, the representation of the Dalit community in decisive positions within political parties represented in the Constituent Assembly determines how much space their issues can occupy. Dalit representation in the main leadership of all political parties represented in the Constituent Assembly is very weak.\footnote{The main leadership of all parties represented in the Constituent Assembly is held by other ethnic communities, except for the Dalit Nationalities Party, which is chaired by Constituent Assembly member Bishwendra Paswan.} This is another reason why the issues of Dalits have not received proper importance and space in the Constituent Assembly. Because of this weak representation, the Dalit Constituent Assembly members are compelled to prioritise their parties’ views, rather than focusing their parties on the interests of Dalits. So, the issues of the Dalit community are being overshadowed.

3.5.3 Inferiority complex due to social discrimination

Dalits are not easily recognised as leaders because of untouchability and discrimination. Hence, Dalits have not entered the main leadership. It is a characteristic of Nepalese politics not to give social status or the main responsibility for the party to Dalits. However, this tradition has slowly weakened over the past decade. The Dalit Constituent Assembly members have not been able to play an effective role because they are often blocked, treated discriminatorily and not provided major
roles in party politics. The inferiority complex firmly embedded in Dalits is yet to fully leave. The Dalit leadership to raise their issues is also being affected by this situation, and they are often victims of discriminatory treatment by their own parties.

3.5.4 Absence of a strong theoretical stand and position in various parties

The Dalit Constituent Assembly members are also representatives of various parties. They cannot go against the policies and directions of their parties in the Constituent Assembly. This prevents them from confidently raising the agenda of the Dalit community. Also, by virtue of this fact, their role has not been seen as effective in favour of Dalits in the Constituent Assembly. Given that they may be removed by their parties if they violate party directions, and they do not have another alternative, the Dalit Constituent Assembly members are compelled to compromise on various issues.

3.5.5 Weak education and lack of public awareness

The Dalit community has been forced to lag behind educationally since ancient times. Education is essential for examining any matter critically. In seeking responses to the questionnaires by the Constituent Assembly, the Dalit community could not express their opinions clearly due to illiteracy. Except for some educated and informed Dalits, most of the Dalits interviewed could not identify their basic problems and give suggestions for their resolution. Because of their weak educational status, Dalits are excluded from important decisions, which has affected the constitution-making process. This has also affected the collection and analysis of important information on the subject of Dalit issues. The dominance of educated Constituent Assembly members in the thematic committees has made Dalit Constituent Assembly members hesitant to put forward their views openly. Lack of education has meant that the issues of the Dalit community have not been addressed effectively in the Constituent Assembly.

3.5.6 Divergence of opinion of Dalit political organisations on Dalit issues

The Dalit political organisations did not work hard enough to prepare the common issues of the Dalit community to be addressed by the Constituent Assembly, or to take these issues to the thematic committees of the Constituent Assembly. With four months of the first term of the Constituent Assembly to go, the common issues of the Dalit community were developed and handed over to the leaders of the seven political parties, the Prime Minister and the Speaker. However, significant action has not been taken to have these demands met. Struggles for prestige among Dalit political organisations, as well as lack of a clear action plan, are negatively affecting the task of ensuring that the rights of Dalits are upheld in the new constitution.

51 The Joint Political Dalit Struggle Committee handed over a memorandum of 13 common demands and a 20-point demand letter to be immediately addressed to the chairpersons of the parties, the Office of the Prime Minister and Chairperson of the Constituent Assembly.
3.5.7 Issues of Dalits not a priority for media

The media can play an important role in forming public opinion by stimulating national debate on various issues. The debate about restructuring is gaining momentum. However, the national media has not paid much attention to the issues of the Dalit community in the course of constitution making. The role of the media has been weak in the analysis of the views of the political parties and in the formation of public opinion on the issues of the Dalit community for the establishment of the constitutional rights of the Dalit community.
The constitution-making process was not completed within the first two-year term of the Constituent Assembly, and its term was extended on 14 Jestha 2067 BS (28 May 2010 AD) for one more year. However, the constitution-making process seems to be stuck. Issues such as the formation of the states, the form of state governance, the electoral system, the mode of appointment of the chief justice and land reform are yet to be settled. Political understanding is yet to be forged on a basic agenda in relation to state restructuring. Even though these issues are yet to be settled politically, the drafts prepared by all of the committees of the Constituent Assembly have already been submitted to the Constituent Assembly.

These drafts incorporate, in principle, the governance of the state according to the principle of proportional inclusion and address various matters, such as the making of all forms of untouchability and discrimination a social crime punishable by law and the granting of equal opportunity to Dalits. However, the drafts are not clear on how these rights are to be provided. Some of the drafts provide for proportional representation to Dalits, some special rights and some rights additional to proportionality. However, it is not clear what rights will be granted to Dalits and how these rights will be enforced.

In many respects, the clear identity of the Dalit community has not been established and their rights are accordingly vague. The drafts fail to give a clear understanding of the problems of Dalits and the solutions thereto through the new constitution. Some of the provisions are contradictory. The draft of the Committee on State Restructuring and Distribution of State Power provides for the right to 3 and 5 per cent additional representation at the federal and the state levels, respectively. The draft of the Committee on Determination of Structure of Legislative Body does not provide for the proportional representation of Dalits in such an important organ as the legislature. The Committee on Determination of Forms of Governance has failed to settle the electoral system to be adopted. So, based on these drafts, the possibility of establishing the rights of Dalits in the new constitution seems to be low.

There are many reasons why the draft reports are vague, contradictory and inadequate on the rights of Dalits. The Dalit Constituent Assembly members are not represented in all committees of the Constituent Assembly. Some committees have many Dalit Constituent Assembly members, while the Committee on Determination of Structure of Legislative Body does not contain even a single Dalit Constituent Assembly member. Political party sister organisations have not made adequate efforts to make political parties sensitive and committed to the issues in relation to the rights of Dalits, and even the Dalit Constituent Assembly members were not active enough in this regard. The Dalit Constituent Assembly Member Caucus was formed only 18 months after the initiation of the process of constitution making. The Caucus has not been able to prepare the agenda of Dalits to be concretely presented to all committees of the Constituent Assembly, nor was it able to make an action plan for how to strategically address the issue of the rights of Dalits to be included in the drafts. The Dalit Constituent Assembly Member Caucus prepared a 23-point concept paper, but
the concept paper could not determine what kind of electoral system should be adopted and what kind of federalism would be appropriate for Dalits. The rights of Dalits are not adequately and clearly reflected in the drafts, because of the lack of a united effort on the part of Dalit Constituent Assembly members.

Even the role of Dalit civil society was not so effective in the process of constitution making. Adequate campaigns from the centre to the local level on the rights of Dalits to be included in the constitution were not launched. Dalit civil society was also not able to conduct extensive advocacy and discussions on the issues of Dalits, including federalism and the electoral system. The vigilance and pressure that should have been focused on political parties and members of the Constituent Assembly by civil society was absent. The vigilance of the Dalit community generally also remained weak. On the whole, it seems difficult for the Dalit community to establish the rights it intends to obtain in the restructuring of state because of the lack of sensitivity of political parties in the context of establishing the rights of the Dalit community, inactiveness of the Dalit Constituent Assembly Member Caucus and the weak role played by Dalit civil society.

The Dalit Constituent Assembly members, Dalit political organisations and civil society should use the one-year extension of the term of the Constituent Assembly as an opportunity. Possibilities remain if the Constituent Assembly members review the vagueness, contradictions and inadequate references contained in the drafts on the rights of Dalits. The Dalit community must make a united effort and Dalit civil society must perform an effective role. Now is the time to gather the resources, capacity and capability inherent in the Dalit community and use them optimally. This is the way ahead.