

Constituent Assembly

**Report on the Suggestions and Directives to be Made by the Constituent Assembly
to the Constitutional Committee on the report of the Committee on Protection of
the Rights of Minorities and Marginalized Communities, as prepared by the
Study Committee on Concept Paper and Preliminary Drafts**

2010

Secretariat of the Study Committee on Concept Paper and Preliminary Drafts

Singhadurbar, Kathmandu

Constituent Assembly

Study Committee on Concept Paper and Preliminary Drafts

Constituent Assembly Secretariat,
Parliamentary Building
Singhadurbar, Kathmandu, Nepal

Ref. No. 066/067

Date: 2066.12.15

Right Honorable Chairperson,
Constituent Assembly.

Re: Submission of supplementary report.

In view of the responsibility entrusted to the Committee as per the resolution adopted by the 29th meeting of the esteemed Constituent Assembly, dated 2066.2.13(-----), the Committee had submitted to the Rt. Honorable Chairperson a report, dated 2066.10.20, on the suggestions and directives to be made by the Constituent Assembly to the Constitutional Committee on the report of the Committee on the Natural Resources, Financial Powers and Revenue Allocation and a report, dated 2066.11.18, on such suggestions and directives on the report of the Committee on the Determination of Structure of Constitutional Bodies. As adopted with consensus by the 92nd meeting of the Committee held today on 2066.12.15 and as decided to submit this report to the Rt. Honorable Chairperson, we have submitted this report incorporating the suggestions and directives to be made by the Constituent Assembly to the Constitutional Committee on the report of the Committee on Protection of the Rights of Minorities and Marginalized Communities. We also make a submission that we will gradually submit reports on suggestions and directives on the reports of the other eight committees to be issued by the esteemed Constituent Assembly to the Constitutional Committee.

SN	Name	Signature
1.	Hon'ble Mr. Agni Prasad Kharel	Sd.
2.	Hon'ble Mr. Atma Ram Prasad Shah	Sd.
3.	Hon'ble Mr. Ek Raj Bhandari	Sd.
4.	Hon'ble Mr. Narayan Khadka	Sd.
5.	Hon'ble Mr. Prakash Chandra Lohani	Sd.
6.	Hon'ble Ms Prativa Rana	Sd.
7.	Hon'ble Mr. Prem Bahadur Singh	Sd.
8.	Hon'ble Mr. Barsha Man Pun Ananta	
9.	Hon'ble Mr. Yuba Raj Karki	Sd.
10.	Hon'ble Mr. Radheshyam Adhikari	Sd.
11.	Hon'ble Mr. Laxma Lal Karna	
12.	Hon'ble Mr. Bishwa Bhakta Dulal	Sd.
13.	Hon'ble Mr. Brijesh Kumar Gupta	Sd.
14.	Hon'ble Ms. Sarita Giri	

Secretary Mr. Tek Prasad Dhungana

Forewords

It is widely known that, in the course of discharging its responsibilities entrusted by a resolution adopted by the 29th meeting of the Constituent Assembly held on 2066.2.13, namely to study the concept papers and preliminary drafts submitted by all thematic committees and the Constitutional Committee; to note down the matters raised during deliberations on all reports at the Assembly; identify the matters and points which are incorporated in the reports of two or more committees and mutually contradictory; to identify any matter that is excluded from the reports of committees; to give suggestions to the Rt. Honorable Chairperson on such matters in the report of any committee as to be revised, based on the deliberations made at the Assembly and responses given by the honorable chairperson of the committee; to prepare a report on the matters, if any, to be taken into account by the Constitutional Committee, along with reasons therefor, in the course of compilation of the drafts of all committees, and submit the report to the Rt. Honorable Chairperson, a report accompanied by suggestions and directives required to be given in respect of the report of the Committee on Natural Resources, Economic Powers and Revenue Allocation was presented to the esteemed Assembly through the Rt. Honorable Chairperson, pursuant to the decision of the 73rd meeting of this Committee held on 2066.10.20, and a report accompanied by such suggestions and directives in respect of the report of the Committee on the Determination of Structure of Constitutional Bodies was presented to the esteemed Assembly through the Rt. Honorable Chairperson, pursuant to the decision of the 81st meeting of this Committee held on 2066.11.18.

Time is ripe for all of us to think again seriously about the fact that the Nepalese people have entrusted the historical responsibility to this Constituent Assembly in order to realize their years-old desire to frame a constitution for themselves. The Committee is not ignorant of the fact that it is expedient that the plenary should finally settle those matters that remained as dissenting opinions due to not being settled by the concerned Committee and those matters on which consensus could not be forged in the course of

deliberation at the Constituent Assembly on the concerned report and send them to the Constitutional Committee, out of the matters submitted to the plenary after being decided upon at the thematic committee level pursuant to the Constituent Assembly Regulation, 2065. Ample efforts were also made to this end. Despite this, at this present juncture where a long period of 22 months after holding the first meeting of the Constituent Assembly has passed. However, we still have dissenting opinions on a number of contents to be incorporated in the constitution and we have not been able to achieve the desired achievement in forging consensus on them. I, on behalf of the Committee, would like to draw, through the Rt. Honorable Chairperson, serious attention of all Honorable Members to this fact. We are not outside the ambit of time and process irrespective of the seriousness and importance of subject-matters. Rather we are tightened with the limitation of time and process. In view of this fact, the Committee is expecting creative guidance and support of the Rt. Honorable Chairperson, Honorable Vice-Chairperson of the Constituent Assembly, respectable leaders of political parties represented in the Constituent Assembly and all Honorable Members of the Constituent Assembly in exploring consensual resolution of all these pending unanswered questions, acceptable to all, in the near future.

After the submission of the preliminary report on 2066.11.18, in the course of accomplishing its responsibilities, the Committee held additional eleven meetings. Necessary effort was made to prepare and present to the Rt. Honorable Chairperson a single report on the suggestions and directives to be given by the Constituent Assembly to the Constitutional Committee on all the remaining nine reports. Despite the Committee's sincere wish and commitment to complete its responsibility in relation to all Committees as soon as possible, in view of the gravity and complexity of subject matters, there arises again a compulsion for the Committee to present a partial report. I would like to humbly submit this matter. For the time being and in the periphery of this compulsion, I have, pursuant to the decision made by the 92nd meeting of the Committee held on 2066.12.15, submitted this report, as adopted by consensus, containing the suggestions and directives to be given in relation to the report of the Committee on Protection of the Rights of Minorities and Marginalized Communities. I

would also like to inform that the Committee is actively engaged in the preparation of the suggestions and directives to be given in relation to the reports of the other eight committees and will gradually submit reports thereon on the days ahead.

Finally, I would like to express sincere gratitude to the Rt. Honorable Chairperson, Honorable Vice-Chairperson of the Constituent Assembly, respectable leaders of political parties represented in the Constituent Assembly and all Honorable Members of the Committee who have facilitated in the preparation of this instant report on suggestions and directives. I would like to extend my sincere thanks to the Committee's secretariat and the employees serving for the Constituent Assembly secretariat, who have rendered direct support in the discharge of the functions of the Committee.

15 Chaitra 2066

Sd.

Agni Prasad Kharel

Coordinator

Part-2

Chapter on matters revealed from the study undertaken by the Committee, and suggestions and directives to be given by the Assembly to the Constitutional Committee

2.3 In relation to the report of the Committee on Protection of the Rights of Minorities and Marginalized Communities:

2.3.1 Matters left to be incorporated in report:

- Clear definition of minorities and marginalized communities has not been made.
- There is no recommendation in relation to a clear constitutional provision to be made for the upliftment of minorities and marginalized communities, and a mechanism for its effective implementation.
- There is no appraisal or review of the matters contained in the previous constitutions in relation to this matter.

2.3.2 Matters falling within the terms of reference of another committee but repeated in the report of this committee:

The following matters which, despite being incorporated in the draft from the viewpoint of the Committee on Protection of the Rights of Minorities and Marginalized Communities, fall within the terms of reference of another committee pursuant to the Constituent Assembly Regulation, 2065.

The matter falling within the terms of reference of the Constitutional Committee:

- Preamble
- Definition of the nation as contained in the preliminary draft

The matter falling within the terms of reference of the Committee on Fundamental Rights and Directive Principles

- Provisions relating to citizenship contained in the preliminary draft
- Right to equality
- Right regarding culture and education
- Right regarding religion
- Directive principles of state
- Policies of state

The matter falling within the terms of reference of the Committee on Determination of bases of Social and Cultural Solidarity

- Provisions relating to the language of the nation contained in the preliminary draft

2.3.3 matters failing consensus during deliberations at the Assembly:

(a) On the preliminary draft:

- Matter that various matters under the rights of minorities, marginalized and excluded communities are overlapped with the other rights.
- Words namely, exclusion, Terai inhabitants, Madhesi, tribe, indigenous peoples and fully proportional contained in various places of the report.

✓ **Right against racial discrimination and untouchability:**

- Words "to prevent from using facilities in each and every place" as contained in page 7, point number 2.
- Words "the State shall discourage disrespect or hatred feelings" as contained in page 7, point number 4. The words " restrict or prohibit" should be substituted for the word "discourage".

✓ **Right relating to culture and education:**

- Matter that, being these rights two different ones, they should not be formulated in the same place. They should, therefore, be formulated separately.
- The proviso clause (Provided that.....) as contained in pages 8 and 9, point number 1.

- Provisions contained in page 10, point numbers 4 and 5: matters relating to the infrastructures of these educational institutes, standard of education and equivalency; these provisions have categorized education into two groups namely private and public; and these provisions give constitutional guarantee to the private sector educational institutes.
- ✓ **Rights of minorities, marginalized and excluded communities**
- Provisions contained in clauses (a), (b) and (c) set forth in the explanation of point number 1, pages 12 and 13.
 - Proviso clause (Provided that.....) as contained in page 13, point number 2.
 - The word "use" and proviso clause (Provided that.....) as contained in page 14, point number 3.
 - The words that "to use, protect and promote intellectual property by enlisting them as intellectual property", as contained in page 14 of point number 5.
 - The words that "shall have the right to establish independent and peaceful relations with any foreign communities and to be involved in therein" as contained in page 14-15 of point number 6.
 - The words "benefits to be obtained from the State" as contained in page 15 of point number 8.
 - The words "full proportional" as contained in page 15, point number 9.
 - The words "take part in the governance of the State in consonance with the principle of full proportional representation by making legal provisions" as contained in page 15-16, point number 10.
 - The words "special provisions of guaranteeing rights in addition to proportionality for compensation" as contained in page 16, point number 12.

✓ **Directive principles of the State**

- The word "brotherhood" as contained in page 18, point number 2.

✓ **Policies of the State**

- The words "the right of citizen to live a life with dignity" as contained in page 20, point number 1.
- The rationale and provision of the high level commission as

(b) On Concept Paper:

- The phrase "minorities, marginalized and deprived classes and communities" contained in the terms of reference and concept paper of the Committee is not appropriate. The phrase "oppressed tribes and nationalities" should be used.
- The matter that excluded classes and communities should be corrected in the concept paper itself. They are subjected to persecution, exploitation, oppression. But no one is excluded.
- The population of *Dalits* and nationalities set forth in page 19 is not based on statistics. The matter that Dalits account for 13 to 20% and indigenous peoples for about 40% is wrong.
- The concept paper fails to mention the grounds for including the Terai inhabitants within the marginalized and deprived communities but excluding the communities in the mountainous and remote areas.
- The marginalized communities also include single women and HIV/AIDS victims, but the concept paper does not cover them.
- The report does not incorporate the matter that what type of election system ensures the representation of minorities, marginalized and deprived classes and communities in the representative bodies of the State.
- The concept paper fails to put forward the concept of non-territorial coverage for Dalits.
- It is the ethnic autonomy that is an effective measure for the protection of the rights of minorities, marginalized and deprived classes and communities. But the report is silent on it.

2.3.4 Suggestions and directives to be given by the Constituent Assembly to the Constitutional Committee on the report of the Committee on Protection of the Rights of Minorities and Marginalized Communities:

(a) On the preliminary draft:

1. The preamble and the definition of nation contained in the preliminary draft attached with the report of the Committee on Protection of the Rights of Minorities and Marginalized Communities falls under the jurisdiction of the Constitutional Committee; the provisions relating to citizenship, right to equality, right relating to culture and education, right to religion, directive principles of the State and policies of the State fall within the terms of reference of the Committee on Fundamental Rights and Directive Principles, and the provision relating to the language of the nation within the terms of reference of the Committee on the Determination of bases of Cultural and Social Solidarity. Thus, suggestion be given to the Constitutional Committee to adopt, as an important reference material, the matters recommended for incorporation in the relevant parts, from the viewpoint of the committee, in the report of the Committee on Protection of the Rights of Minorities and Marginalized Communities, and take it into account while finalizing the relevant matters. Since the matters raised during deliberations in the Assembly on the matters presented by that Committee will be addressed by the draft of the concerned Committee, this Committee has not discussed and decided this matter here.
2. It is beyond disagreement that the right against racial discrimination and untouchability is important from the viewpoint of the rights and interests of the minorities and marginalized communities. Thus it is natural for this committee and the Committee on the Fundamental Rights and Directive Principles to prepare concept papers and draft reports in a manner to ensure this right. The title right against racial discrimination and untouchability, in Article 9, page 31 of the report of the Committee on the Fundamental Rights and Directive Principles contains appropriate provisions on this matter. So, the Constitutional Committee is directed to incorporate the draft of the said right, as contained in

the report of the Committee on the Fundamental Rights and Directive Principles, in the draft of the constitution.

3. The object of defining and identifying minorities in the course of framing the constitution is to make special protection of those groups who are in high vulnerability because of being in the verge of extinct of their racial identity, culture, language and religion due to less number, while the object of defining and identifying the groups being marginalized or excluded is to empower them by bringing about improvement in their economic and social conditions and mainstreaming them in the governance of the State. Such measures are adopted in order to create the situation and condition of substantive equality by establishing economic and social justice. The criteria deployed to distinguish the communities in the state of marginalization and exclusion from the standpoint of definition and identification and the nature of special provision of their development are also similar. So, there is no need and rationale to distinguish the groups who are in the state of marginalization and those in that of exclusion. Thus, the definition and identification of marginalized communities in itself include communities in the state of exclusion.

Thus, the explanation contained in paragraphs (a) and (b) of clause (1), in pages 12 and 13 of the preliminary draft section of the report of the committee should be revised and the explanation in paragraph (c) should be deleted; and the Definition and Interpretation part of the constitution should include the following revised definition of minorities and marginalized communities.

Minority communities: "Minority communities" means those racial, linguistic and religious groups whose population is smaller than the percentage as determined by law, and this term also includes those groups who have their own racial, religious and linguistic distinctiveness, aspiration to subsist them and are subjected to discrimination and persecution.

The contents to be included in the explanatory note of this definition:

From the anthropological standpoint, the less portion of population of the concerned groups, out of the total national population, is recognized as the

principal basis for the identification of a minority group. While from the sociological standpoint, the bases for the identification of minority groups include the groups whose population is comparatively small, who have their own racial, religious and linguistic specialty, aspiration to subsist such identity and are subjected to discrimination and persecution. So, this definition has been drafted by adopting both these concepts. Parliament has to enact a separate statute to give effect to the constitutional provision governing the rights of minority communities. This flexible definition is therefore made so that the definition of minority communities is clearer, subject to the constitutional provisions, and also based on the latest national census.

Marginalized communities: "Marginalized communities" means those communities who are subjected to political, economical and social backwardness, are not able to use services and facilities due to discrimination and persecution or geographical remoteness or are deprived of such services and facilities and are in a status below the standard of the latest human development index as determined by law, and this term also includes the communities which are highly marginalized and on the verge of extinct."

The contents to be included in the explanatory note of this definition:

There is no disagreement that one of the fundamental objects of the popular movement of 2006/2007 is to ensure the proportional representation of the marginalized communities which are beyond access of the State in each organ of the State and raise their standards of living. The Interim Constitution of Nepal, 2007 and some Acts framed and made subsequently have identified women, oppressed tribes, indigenous peoples, Madhesi, Dalit and backward regions as the communities of which special rights have to be ensured by the State. Even within such communities, people's economic, social condition is highly deplorable. So, in agreement with the principle that these communities should be defined on the basis of the latest human development index so that the class that belongs to such communities but that is weaker should be entitled with priority to the special facilities provided by the State for the empowerment and

development of such communities, by making the definition and identification of the marginalized communities more scientific and objective. If, in giving the final shape to the constitution, the racial communities are recognized as marginalized communities, the marginalized class of the concerned communities will not be able to enjoy their rights guaranteed by the constitution and law and the facilities provided by the State. In such a situation, it is better to make provisions that could enable the tribes with such communities to enjoy the same. Parliament has to enact a separate statute to give effect to the constitutional provision governing the rights of marginalized communities. This flexible definition is, therefore, made so that the definition of marginalized communities is clearer, subject to the constitutional provisions, and also based on the latest human development index. Furthermore, given that the internal condition of communities in marginalized position is in itself different, the object of this definition is that the definition and identification of marginalized communities could also be determined by law.

4. The rights to be guaranteed for minority communities and those for marginalized communities are not of the same nature. So, directive should be given to the Constitutional Committee to substitute the following provisions for the provisions made under the title of rights of minorities, marginalized and excluded communities, as contained in pages 12 through 16, subject to harmonization with the suggestions and directives to be given subsequently by the Constituent Assembly to the Constitutional Committee on the report of the Committee on Fundamental Rights and Directive Principles.

Rights of minority communities: The following rights are guaranteed for the minority communities.

- (a) Right of participation in the formulation of policies which concern and affect them.
- (b) Right relating to cultural heritage, traditional knowledge, skill and technology.

- (c) Right relating to language, script and religion.
- (d) Right relating to land and natural resources.
- (e) Right to social security.
- (f) Right to information and communication in mother tongue.
- (g) Right of special representation in the organs of the State.
- (h) Right to conservation of indigenous culture and tradition for the interests and welfare of their communities.

Rights of marginalized communities: The following rights are guaranteed for the marginalized communities.

- (a) Right of proportional representation in all organs of the State.
- (b) Special right of reservation and presence in public services.
- (c) Special right to education, health and social security.
- (d) Right relating to land and natural resources.

5. Directive be given to the Constitutional Committee to prepare the draft in a manner that any commission to remain as a constitutional body in the future constitution shall have jurisdiction, inter alia, to make recommendation for the timely revision in the definition of marginalized and excluded communities as made by the constitution, to monitor the status of implementation of the rights guaranteed to these communities, and make recommendation for revision to be made in the list of marginalized and excluded communities on the basis of periodic national census and human development index.

(b) On the Concept Paper

1. To substitute the word "consensus" for the word "authentic" contained in the second paragraph of page 10 of the Concept Paper, and to insert the following portion relating to definition after that paragraph:

Renowned sociologists Jyo R Phasin and Clerence Buhar Phasin have defined as follows:

Minorities are such communities which are excluded for different and unequal treatment because of their physical or cultural characteristics, whose members

become victims of discrimination and whose powers and resources are specially smaller or lesser than those of the dominant group. They are also called as subordinate groups.

According to J Deschens, expert of the United Nations Sub-commission, minorities are those groups of the citizens of a state who are smaller in number and in oppressed position, who have different racial, religious or linguistic characteristics than those of majority people, have the feeling of solidarity between each other internally with the desire to live collectively and have the goal to achieve equality with the majority legally and actually.

According to another rapporteur Kepototi, a minority is a group whose population is smaller than the rest population of the State and who is in a subordinate or non-dominant position and, being the member of the group nationals of the State, whose members have ethnic, religious or linguistic characteristics which are different than those of the rest population, exhibit the feeling of solidarity indirectly and aspire to safeguard their own culture, tradition, religion or language.

Another special rapporteur A Ed (1993) maintains that the number and peculiarity is enough for being a minority.

Hence, experts have put forward various grounds for the identification of minorities. Some of such grounds are as follows:

- (1) Groups with ethnic or religious, physical or cultural or linguistic peculiarities different than those of the dominant group,
- (2) Groups with strong feeling of collective identity and common heritage,
- (3) In the case of some groups, those having some degree of autonomy or history of autonomy or self-governance,
- (4) Groups with desire to safeguard their culture, tradition, religion or language,
- (5) Groups which feel or experience that they have been segregated and subjected to discrimination and inclination for different and unequal treatment because of their distinct and peculiar identity,

- (6) Groups compelled to suffer domination and oppression because of less power and resources than those of the dominant group,
- (7) Groups which are not in a position of having access to power structure from the standpoints of number and resources.

Sociologist Anthony Giddens has also further clarified the said grounds. According to him, a minority group has three characteristics:

- (1) Group that is deprived of rights, opportunities and facilities because of discrimination,
- (2) Group having solidarity between its members or feeling of mutual relationship because of discriminatory and biased treatment,
- (3) Group that has been excluded or segregated from the community at large physically and socially.

- 2. To insert the following heading in paragraph 2.7 and contents after the heading of provisions relating to the rights of the minority communities in other countries, as contained in paragraph 2.7 of Chapter-2 of the Concept Paper:

2.8 Provisions contained in the previous constitutions of Nepal in relation to the protection of the rights and powers of the marginalized and excluded communities:

- 2.8.1 The Government of Nepal Act, 2004, Nepal Interim Governance Statute, 2007, Constitution of the Kingdom of Nepal, 2015 and the Constitution of Nepal, 2019 had no provision in this respect.

- 2.8.2 The Constitution of the Kingdom of Nepal, 1990

The Constitution of the Kingdom of Nepal, 2047 does not have any explicit provision on the minority, marginalized and excluded communities. But it contains some special provisions for the classes and communities which are backward and vulnerable economically, socially and educationally. Such provisions can be enumerated as follows:

- (a) **Matters contained under the fundamental rights (articles 11(3), (4) and 18)**

- Special provisions may be made by law for the protection and advancement of those who belong to a class which is economically, socially or educationally backward.
 - Prohibition on discrimination against as untouchable, on the basis of caste.
 - Right of each community to preserve and promote its language, script and culture, to operate schools up to the primary level in its own mother tongue for imparting education to its children.
- (b) **Matters contained in the Directive Principles and Policies of the State (Articles 25 and 26):**
- To make provisions preventing economic exploitation of any class or individual.
 - To establish and develop, on the foundation of justice and morality, a healthy social life, by eliminating all types of economic and social inequalities and by establishing harmony amongst the various castes, tribes, religions, languages, races and communities.
 - The State is to pursue such policies in matters of education, health and social security of orphans, helpless women, the aged, the disabled and incapacitated persons as will ensure their protection and welfare.
 - The State is to pursue a policy which will help promote the interests of the economically and socially backward groups and communities by making special provisions with regard to their education, health and employment.
 - The State is to pursue a policy of providing free legal aid to indigent persons for their legal representation.

2.8.3 The Interim Constitution of Nepal, 2007

One of the fundamental objects of the popular movement of 2006/2007 is to ensure the access of all to each organ of the State on the basis of proportional and inclusive principle, while putting an end to all forms of discrimination. Thus, for the first time in our constitutional history, the Interim Constitution of Nepal, 2007 has used minority and marginalized communities and guaranteed some special rights and protection.

(a) Matters contained under the fundamental rights (articles 13, 14, 17, 18, 21 and 24)

- Special provisions may be made by law for the protection, empowerment or advancement of women, *Dalits*, indigenous peoples (*Adibasi Janajati*), *Madhesi* or farmers, workers, economically, socially or culturally backward classes or children, the aged and the disabled or those who are physically or mentally incapacitated.
- No person is to be discriminated against as untouchable and subjected to racial discrimination in any form, on grounds of caste, race, community or profession.
- The women, labor, aged, disabled, incapacitated and helpless citizens shall have the right to social security, as provided in law.
- The economically, socially or educationally backward women, *Dalits*, indigenous peoples, *Madhesi* communities, oppressed classes, poor farmers and labors shall have the right to take part in the structures of the State on the basis of the principle of proportional inclusion.
- Any incapable party shall have the right to free legal aid, as provided in law.
- Every community shall have the right to preserve and promote its language, script, culture, cultural civilization and heritage

and to operate schools to impart education in the mother tongue.

(b) Matters contained in the Directive Principles and Policies of the State (Articles 33, 34 and 35):

- To make a progressive restructuring of the State so as to address the problems including those of women, *Dalit*, indigenous people, *Madhesi*, oppressed, excluded and minority communities and backward regions.
- To make *Madhesi*, *Dalit*, indigenous peoples, women, workers, farmers, disabled, backward classes and regions participate in all organs of the State structure on the basis of proportional inclusion.
- To pursue a policy of providing socio-economic security including the land to the economically and socially backward classes including the landless, bonded labors, tillers and *Harawa-Charawa*.
- To prevent economic exploitation of any caste, sex, class, origin or individuals.
- To remove all forms of economic and social inequality.
- The State shall pursue a policy of making special provision of social security for the protection and progress of the single women, orphans, children, the helpless, the aged, the disabled, incapacitated persons, and tribes on the verge of extinction, *Madhesi*, *Dalit*, marginalized communities, and workers and farmers living below the poverty line.
- The State shall pursue a policy of making a special provision, based on positive discrimination, for the minorities, landless people, landless squatters, bonded labors, the disabled, backward regions and communities and victims of conflict,

the women, *Dalit*, indigenous people, *Madhesi* and Muslims, as well.

- The State shall pursue a policy of making provision for the basic land required for the settlement of the bonded labors, after determining the number of such labors.
- The State shall pursue a policy of providing allowances to the aged, incapacitated women and the unemployed by making laws.

(c) Provision contained in the election to the Constituent Assembly (Article 63)

In selecting candidates for the election to the Constituent Assembly, the principle of inclusiveness has to be taken into account, and in enlisting candidates under the proportional electoral system, proportional representation of the women, *Dalit*, oppressed communities/indigenous peoples, backward regions, *Madhesi* and other classes, as provided in law, has to be ensured.

(d) Provision relating to the constitution of commissions (Article 154)

The Government of Nepal may constitute such commissions as may be required for the protection and promotion of the women, *Dalit*, indigenous nationalities, *Madhesi*, disabled, workers or farmers as well as various sectors. The formation, functions, duties and powers of such commissions shall be as determined by law.

3. The following portion should be substituted for the provision contained in 3.2.1 and 3.2.2 under the heading of suggestions contained in 3.2, page 69 of the Concept Paper:

The process of framing constitution is also an important opportunity for the nation building. So, if the minorities, marginalized classes, communities

and groups are identified on this occasion, an important exit point can be established for their protection and development. According to the constitutional jurisprudence viewpoint, the constitution is the fundamental law of the land; and it guarantees and should guarantee equal rights to all the people residing in the country. The universal or omnipresent ground underlying the framing and making of constitution and law is equality. But there is a need to make special provisions for the exploited and oppressed communities because of the geo-political situation, status of economic and social development of the country and past discrimination and oppression, as compensation against such discrimination and oppression. In addition, there is also a need to formulate such special kinds of provisions for the development and protection of those groups which are in smaller number from ethnic, linguistic and religious standpoints as are different than those for the others. In view of this need, the framers of constitution should make reasonable and intelligent classification of the citizens. The object of defining and identifying minorities in the course of framing the constitution is to make special protection of those groups who are in high vulnerability because of being in the verge of extinct of their racial identity, culture, language and religion due to number, while the object of defining and identifying the groups being marginalized or excluded is to empower them by bringing about improvement in their economic and social conditions and mainstream them in the governance of the State. Such measures are adopted in order to create the situation and condition of substantive equality by establishing economic and social justice. The criteria deployed to distinguish the communities in the state of marginalization and exclusion from the standpoint of definition and identification and the nature of special provision of their development are also similar. So, there is no need and rationale to distinguish the groups who are in the state of marginalization and those in that of exclusion. Thus, the definition and identification of marginalized communities in itself include communities in the position of exclusion.

3.2.1 Criteria for identification and definition of minority communities in Nepal:

From the anthropological standpoint, the small portion of population of the concerned groups, out of the total national population, is recognized as the principal basis for the identification of a minority group. While from the sociological standpoint, the bases for the identification of minority groups include the groups whose population is comparatively small, who have their own racial, religious and linguistic specialty, aspiration to subsist such identity and are subjected to discrimination and oppression. So, based on these both concepts, the definition of minority groups in Nepal should be made as follows:

"Minority communities" means those ethnic, linguistic and religious groups whose population is smaller than the percentage as determined by law, and this term also includes those groups who have their own racial, religious and linguistic distinctiveness, aspiration to subsist them and are subjected to discrimination and persecution."

3.2.2 Criteria for identification and definition of marginalized communities in Nepal:

Generally, the marginalized position or status is that economic and social status that is lower than the average. Basically, lack of access to the policy making level, poverty and weak nutrition, situation resulting in deprivation of enjoyment human dignity and human rights, lack of environment for the use of own language, protection and promotion of own culture, highly deplorable educational and health condition are the factors leading people to the marginalized position. In the context of Nepal, the following criterions are to be taken as the grounds for the identification of marginalized communities:

- (1) Political: The status or position of access to, participation and representation in various levels of policy making bodies, and of political awareness.

- (2) Social: The status or position of enjoyment of human dignity, worth and human rights, and identification, protection and promotion of indigenous language religion and culture; and educational condition, health facilities.
- (3) Economic: Status or position of ownership over land; whether they have own land for housing or settlement; if yes, what type of house, cemented or not; condition of other sanitation facilities; condition of employment; condition of other assets; situation of other sources of income generation.
- (4) Condition of availability, adequacy of, and access to, services and facilities.

Based on the above grounds, the definition of marginalized communities should be made as follows:

"Marginalized communities" means those communities who are subjected to political, economical and social backwardness, are not able to use services and facilities due to discrimination and persecution or geographical remoteness or are deprived of such services and facilities and are in a status below the standard of the latest human development index as determined by law, and this term also includes the communities which are highly marginalized and on the verge of extinct."

- 4. The list of rights to be guaranteed for the minority communities, as contained in pages 70 and 71 of the Concept Paper should be so maintained as to incorporate the following rights:
 - (a) Right to participation in the formulation of policies which concern and affect them.
 - (b) Right relating to cultural heritage, traditional knowledge, skill and technology.
 - (c) Right relating to language, script and religion.

- (d) Right relating to land and natural resources.
 - (e) Right to social security.
 - (f) Right to information and communication in mother tongue.
 - (g) Right to special representation in the organs of the State.
 - (h) Right to protection of indigenous culture and tradition for the interests and welfare of their communities.
5. The following rights should be added to the list of rights to be guaranteed for the marginalized communities, as contained in page 72 of the Concept Paper:
- (1) Right to proportional representation in all organs of the State.
 - (2) Special right to reservation and presence in public services.
 - (3) Special right to education, health and social security.
 - (4) Right relating to land and natural resources.
6. The following title should be added after the final title 3.2.5 in page 75 of the Concept Paper:

3.2.6 Constitutional mechanism for the effective implementation and monitoring of the special rights and protection made by the constitution for the minority and marginalized communities:

Only the making of special provisions in the constitution for the minority and marginalized communities cannot yield effective results. Comprehensive laws and policies should be made by the Legislative and Executive Organs in consonance with the intent and spirit of the framers of constitution; and plans and programs should also be made to materialize such special provisions really and effectively. Moreover, since the concept of minority and marginalized communities is itself dynamic, there is a need of its periodic review. So, it necessitates a special constitutional mechanism to achieve effective implementation of the special provisions set forth in the constitution for the minority and marginalized communities, to review the status of implementation, and to keep on the continuity of monitoring and evaluation of the effects from such provisions in the society. Such a mechanism would also make

recommendation to the Legislative body for revision in the list of minority and marginalized communities on the basis of the periodic national census and national human development index. On the basis whereof, the Legislative body may make reforms in the prevailing laws and make new laws. So, in view of this necessity, it is expedient to entrust this power to any constitutional body, as appropriate.

(Suggestions and directives to be given in relation to the reports of the other 8 Committees will be submitted later.)