Ongoing Exclusion of Indigenous Peoples' Representatives from the Making of Nepal's New Constitution

A Request for Consideration under the United Nations Committee on the Elimination of Racial Discrimination's Urgent Action and Early Warning Procedures

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Submitted by

Lawyers' Association for the Human Rights of Nepalese Indigenous Peoples
Kirat Yakthum Chumlung
Kirat Rai Yahokha
Newa Deya Dabu
Sunuwar Sewa Samaj
Lila Fung
Kirat Radu Nachiring
Hyolmo Sanrachan Tatha Utthan Parisad
Nepal Bote Samaj
Athpaharia Kirat Rai Samaj
Adivasi Janajati Sarokar Manch
Himalaya Bhote Samaj
National Indigenous Women's Federation
Indigenous Women Legal Awareness Group
Forest Peoples Programme

29 July 2009

SUBMITTING ORGANISATIONS:

- **Lawyers' Association for the Human Rights of Nepalese Indigenous Peoples:** is an indigenous lawyers' organization, established in 1995, which has been working to defend, protect and promote the human rights and fundamental freedoms of indigenous peoples in Nepal. **Address:** Anamnagar-32, Kathmandu Metropolitan city, Kathmandu, Nepal. Tel: (+977-14770710, Fax: 977-1-4233625, email: lahurnip.nepal@gmail.com

- **Kirat Yakthum Chumlung** is a representative institution of Limbu indigenous people. The KYC facilitates and ensures that the Limbus can exercise their political, social, economic, cultural, linguistic, customs and customary rights. **Address:** Lalitpur District, Lalitpur Sub-Metropolitan city Nepal, Tel: 977-1 -550349 Email: chumlung@wlink.com.np

- **Kirat Rai Yayokha** is a representative institution of Rai indigenous people. The Kirat Rai Yayokha facilitates and ensures that the Rai's can exercise their political, social, economic, cultural, linguistic, customs and customary rights. **Address:** Kathmandu District, Kathmandu Metro Politan City, Koteshwor, 35 Nepal, Tel: 977-9841227339 Fax 977-1-4601435 kiraya47@gmail.com

- **Newa Deya Dabu** is a representative institution of Newar indigenous people. The Newa Deya Dabu facilitates and ensures that the Newars can exercise their political, social, economic, cultural, linguistic, customs and customary rights. **Address:** Kathmandu District, Kathmandu Metropolitan city Nepal, Tel: 977-1-4267605 Fax 977-1-4259160

- **Lila Phang** is a representative institution of Ghale indigenous people. The Lila Phung facilitates and ensures that the Ghale can exercise their political, social, economic, cultural, linguistic, customs and customary rights. **Address:** Kathmandu District, Kathmandu Metropolitan city, Samakhusi Nepal, Tel: 977- 012160226

- **Kirat Radu Nachiring** is a representative institution of Nachiring indigenous people. The Kirat Radu Nachiring ensures that the Nachiring peoples can exercise their political, social, economic, cultural, linguistic, customs and customary rights. Address: Kathmandu District, Kathmandu Metropolitan city, 29 Nepal, Tel: Email: sakham.ktm@gmail.com

- **Nepal Bote Samaj** is a representative institution of Bote indigenous people. The Newa Deya Dabu facilitates and ensures that the Bote can exercise their political, social, economic, cultural, linguistic, customs and customary rights. **Address:** District, Chitawan, Bharatpur Municipality Nepal, Tel: 977-9847095988

- **Nepal Himalaya Bhote Samaj** is a representative institution of Bhote indigenous people. The Himalaya Bhote Samaj facilitates and ensures that Bhote's can exercise their political, social, economic, cultural, linguistic, customs and customary rights. **Address:** Kathmandu District, Kathmandu, Kapan, 3 Nepal, Tel: 977-9841580860

- **National Indigenous Women Federation** is the representative federation of twenty-nine indigenous women's organizations. NIWF has been working to manifest, defend and create awareness about the indigenous women's rights in Nepal. **Address**: District Kathmandu, Samakhushi -14, Tel: 977-0166226804 Email: niwf_nepal@yahoo.com

- **Indigenous Women Legal Awareness Group** is an organization established to provide legal service to indigenous women for protection their rights. **Address:** District Lalitpur, Manbhawan Tel: 977-1016214638 Email: inwolage@yahoo.com

- **Forest Peoples Programme** is an international NGO, founded in 1990, which supports the rights of indigenous peoples. It aims to secure the rights of indigenous and other peoples, who live in the forests and depend on them for their livelihoods, to control their lands and destinies. **Address**: 1c Fosseway Business Centre, Stratford Road, Moreton-in-Marsh GL56 9NQ, UK. Tel: (44) 01608 652893, Fax: (44) 01608 652878, e-mail: info@forespeoples.org

ONGOING EXCLUSION OF INDIGENOUS PEOPLES' REPRESENTATIVES FROM THE PROCESS OF MAKING NEPAL'S NEW CONSTITUTION

I. INTRODUCTION

1. This request is respectfully submitted to the United Nations Committee on the Elimination of Racial Discrimination ("the Committee") by ten Nepalese indigenous peoples' organisations and one international NGO ("the submitting organisations"). It concerns the ongoing exclusion of indigenous peoples' freely chosen representatives from the process of making Nepal's new constitution and requests that the Committee continues to consider this situation under its early warning and urgent action procedures. [1]

2. According to Nepal's 2001 census, indigenous peoples comprise 37.19 percent of the total population of almost 29 million people. Indigenous peoples' organizations, however, assert that the true number exceeds 50 percent of the population. In real numbers, the exclusion of indigenous peoples' representatives from Nepal's constitution reform process causes grave harm to the rights of between approximately 11 - 15 million persons as well as to the collective rights of more than 60 indigenous peoples.

3. The exclusion of indigenous peoples' freely chosen representatives from the constitution making process persists despite the Committee's prior communication on this point. This communication was adopted under the early warning procedure at the seventy-fourth session "with a view to avoiding irreparable harm to indigenous peoples."[2] It observes that "Nepal's new constitution is currently being drafted by a Constituent Assembly in which indigenous persons may only formally participate if they were chosen by political parties and act in strict conformity with the manifestos of those parties."[3]

4. In addition to requesting that Nepal submit information about its constitution making process no later than 31 July 2009, the Committee recommended that "mechanisms be established to ensure indigenous peoples' free, prior and informed consent in relation to the constitutional preparation process, and that an indigenous peoples thematic committee be set up to guarantee the representation and participation of indigenous peoples in political life."[4]

5. As explained herein, Nepal has chosen to disregard the Committee's recommendation and has refused to redress the discriminatory treatment of indigenous peoples in its constitutional revision process. Instead, the State is actively opposing indigenous peoples' right to participate through their own representatives in proceedings before its Supreme Court and the Chairman of the Constituent Assembly has stated that it will not be possible to establish a thematic committee on indigenous peoples (see para. 11-6 below).

6. Previously the State had argued that an indigenous peoples committee was not needed because indigenous peoples' rights would be addressed in the Minority

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1 Indigenous peoples (*Adivasi Janajati* in the Nepali language) are constitutionally and otherwise recognized as distinct peoples. Section 2 of the *Foundation for the Development of Indigenous Nationalities Act* 2002 recognizes the collective nature of indigenous peoples and defines them as groups with distinct mother tongues, traditions, customs, identities, social structures, and their own oral or written histories.

2 *Communication of the Committee, 13 March 2009*, at p. 1. Available at: http://www2.ohchr.org/english/bodies/cerd/docs/early_warning/Nepal130309.pdf.

3 *Id.*

4 *Id.* at p. 2.

Rights thematic committee. Leaving aside the fact that indigenous peoples are denied their right to effectively participate in this committee, its most recent report demonstrates that indigenous peoples' rights have not been addressed. This report is discussed further in paragraph 14 below and is annexed hereto in full (Annex C).

7. This ongoing and flagrant denial of indigenous peoples' right to choose their own representatives through which to participate in the crucial process of drafting the new constitution perpetuates centuries of "deep rooted" and "deeply-engrained" discrimination against indigenous peoples in Nepal.[5] In this respect, the Office of the High Commissioner for Human Rights ("OHCHR") explains that indigenous peoples have been systematically excluded from participation in Nepal's political life for over 200 years and that they have been denied any formal role in building and defining the state in which they now find themselves.[6]

8. United Nations Special Rapporteur on the human rights and fundamental freedoms of indigenous people, S. James Anaya, reached the same conclusion in December 2008, stating that a "long history of oppression and marginalization has excluded indigenous peoples from political representation and decision-making, full citizenship, and economic and educational opportunities…."[7] He also unambiguously concluded that the treatment of indigenous peoples in the constitution revision process contravenes Nepal's international legal obligations.[8]

9. Special Rapporteur Anaya emphasised in December 2008 that the constitution revision process represents "a critical moment to respond to the many challenges that indigenous peoples of Nepal face."[9] However, Nepal's ongoing and continuous denial of indigenous peoples' right to participate in the process of drafting the new constitution through their own freely chosen representatives will only perpetuate the systematic discrimination that has heretofore characterised indigenous-State relations in Nepal. There is little possibility that indigenous peoples' rights will be recognised in the new constitution and a substantial risk that indigenous peoples will suffer irreparable harm in this process, the same harm that the Committee sought to avoid when it adopted its communication under the early warning procedure earlier in 2009.

II. NEPAL IS OPPOSING RESPECT FOR INDIGENOUS PEOPLES' RIGHTS TO PARTICIPATE THROUGH THEIR OWN REPRESENTATIVES

10. On 12 February 2009, indigenous peoples and their organisations filed a writ petition with Nepal's Supreme Court challenging their exclusion from the constitution reform process. They allege in their petition (see Annex A) that the

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5 *Report of the United Nations High Commissioner for Human Rights on the human rights situation and the activities of her Office, including technical cooperation, in Nepal.* UN Doc. A/HRC/4/97, 17 January 2007, at para. 62 & 68.

6 *Id.* at para. 68 (stating that "Discrimination on the basis of caste, ethnic, gender, geographic and other considerations has marginalized and excluded millions of Nepalese people from full participation in political processes and State institutions as well as equal access to housing, water, land and other such rights").

7 'UN expert urges Nepal to act on commitments to indigenous rights', 2 December 2008 (He urged the Government to ensure that indigenous peoples "receive fair representation and resources"). Available at: http://www.un.org/apps/news/story.asp?NewsID=29152&Cr=Nepal&Cr1=.

8 *Id.* The UN press release issued at the conclusion of his November 2008 *in situ* visit to Nepal unambiguously states that "Although a significant number of Constituent Assembly members belong to indigenous groups, the Special Rapporteur argued for additional mechanisms in the constitution-making process that consult directly with indigenous peoples, through their own chosen representatives and in accordance with their own methods of decision-making, as required by the international standards to which Nepal has committed").

9 *Id.*

exclusion of indigenous peoples contravenes constitutional norms and Nepal's international treaty obligations, obligations that are incorporated into national law pursuant to Nepal's Interim Constitution and the 1991 *Nepal Treaty Act*.[10] The writ petition also formally invokes the provisions of the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD"), particularly Article 5(c).

11. After a preliminary hearing, on 1 March 2009, a single bench of Justice Min Bahadur Rayamajhi ordered all Government Ministers, the Prime Minister's Office and all Constituent Assembly committees to submit written answers on the issues within 15 days. While most of these answers were submitted in March 2009, the Court has not scheduled a hearing on the merits to date and the matter remains pending. In the meantime, the Constituent Assembly is proceeding with drafting the new constitution without any meaningful participation by indigenous peoples.

12. In response to the writ petition submitted by indigenous peoples, the State argued before the Court that the petitioners' arguments should be dismissed for failure to state a colourable claim (see Annex B). It further argued that indigenous peoples are presently adequately represented in the Constituent Assembly irrespective of the manner by which they were selected and the conditions that may apply by virtue of maintaining political party discipline.[11]

13. The State's submission to the Supreme Court was accompanied by a number of affidavits, including one by the Chairperson of the Constituent Assembly (Annex B). Therein, the Chairperson explains that it is not possible to establish a separate committee on indigenous peoples within the Constituent Assembly. He further argues "that full respect has been paid to the issue of the participation of all groups and parties concerned in the committees formed under the 'project' of constitution writing and their related topics and the activities to be undertaken by the committees."[12] This, however, ignores the fact that indigenous peoples had no say in choosing who would represent them in the Constituent Assembly in the first place and no say in who would represent them in the various committees. These decisions were made by political parties without any reference to indigenous peoples' right to participate through their own freely chosen representatives.

14. The Chairperson has rejected the establishment of a separate committee on indigenous peoples on more than one occasion, most recently in June 2009 when indigenous peoples' organisations met with him to protest against the recommendations of the Minority Rights thematic committee.[13] This committee is the body that has a remit, if it so decides, to make recommendations on indigenous peoples' rights, yet it has failed to include any recommendations in this respect in its draft report (see Annex C). Indeed, indigenous peoples are not even mentioned in this report.

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10 Article 33(m) of the Interim Constitution and Treaty Act 1991. In *Rabindra Prasad Dhakal v Government of Nepal* (Nepal Kanoon Patrika 2064), the Nepal Supreme Court held that this also applies in the case of international human rights treaties, such as ICERD.

11 *See* Annex B, *Written Reply of the Ministry of Culture and State Restructuring, Minister of Culture and State Restructuring, Gopal Kirati*, para. 7-8 and; *Written Reply of the Chairperson of Constituent Assembly Subhaschandra Nembang*, para. 3-4.

12 *See* Annex B, *Written Reply of the Chairperson of Constituent Assembly Subhaschandra Nembang*, para. 4.

13 *See* Annex C, *Concept Paper and Preliminary Draft Report of the Committee (2009): Conclusions and Recommendations*, no date.

15. In addition to rejecting the establishment of a thematic committee on indigenous peoples, Nepal has failed to propose an effective alternative that could otherwise ensure indigenous peoples' participation in political life.

16. Nepal's arguments before the Supreme Court conclusively demonstrate that it is actively seeking to legitimate the ongoing denial of indigenous peoples' internationally guaranteed right "to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures...."[14] Nepal's requirement that indigenous peoples may only participate through political party structures nullifies this right in violation of, *inter alia*, Articles 1(1), 2(1) and 5(c) of the ICERD.[15] It also contravenes various provisions of International Labour Organisation Convention No. 169, a convention presently in force for Nepal.[16]

III. CONCLUSION AND REQUEST

17. By virtue of Nepal's discriminatory acts and omissions, indigenous peoples are denied their right to participate through their own representatives in Nepal's nation-building project, a project that will bring about considerable changes to the way the country is governed. The political parties that control the constitution reform process are dominated by the same ethnic groups that have historically excluded indigenous peoples and deprived them of the recognition and enjoyment of their rights. The result is thus expected to be the perpetuation of the systematic discrimination that has characterised the situation of indigenous peoples in Nepal for over two centuries.

18. Nepal is aware that its acts and omissions contravene the rights of indigenous peoples and their members. Rather than respect indigenous peoples' rights, it has defended and sought to legitimate its discriminatory treatment of indigenous peoples before its Supreme Court. It has also rejected the Committee's recommendations with respect to the rights of indigenous peoples to participate in political life, recommendations that both acknowledge the substantial risk of irreparable harm to indigenous peoples and seek to avoid that harm.

19. Exclusion of tens of millions of people from the crucial process of revising Nepal's constitution solely on the basis of their race and ethnicity constitutes an urgent situation, an example of massive racial discrimination, nullifies indigenous peoples' human rights, and threatens massive and irreparable harm. It thus, typifies

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[14] *Declaration on the Rights of Indigenous Peoples*, UNGA Res. 61/295, 13 September 2007, Article 18. *See also* Article 19, which provides that "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them."

[15] Article 5(c) guarantees the right, without discrimination of any kind, to participate in elections and to take part in government and the conduct of public affairs at any level. The Committee has previously interpreted this provision to require respect for indigenous peoples' right to effective participation through their own representatives in state bodies and structures, including in constitutional reform processes, and has repeatedly affirmed that decisions directly relating to indigenous peoples' rights shall be taken only with "their informed consent." *See inter alia* United States, 08 May 2008, CERD/C/USA/CO/6, at para. 29; Guyana, 04/04/2006, CERD/C/GUY/CO/14, at para. 14; Australia, CERD/C/AUS/CO/14, 14 April 2005, at para. 11; Argentina, 24/08/2004, CERD/C/65/CO/1, at para. 18; Mexico, 04/04/2005, CERD/C/MEX/CO/15, at para. 12; Guatemala, 15/05/2006, CERD/C/GTM/CO/11, at 16; and General Recommendation XXIII on Indigenous Peoples 1997.

[16] *See* International Labour Organisation Convention No. 169, *inter alia*, Arts. 3, 4, 5 and 6. Article 6(1)(a), for instance, provides that states shall "consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly."

the existence of a serious, gross and persistent pattern of racial discrimination against the indigenous peoples of Nepal[17] and represents a situation "requiring immediate attention to prevent or limit the scale or number of serious violations of the Convention" and to reduce the risk of further racial discrimination.[18]

20. In the light of the preceding, the submitting organizations respectfully request that the Committee again and further considers the situation of the indigenous peoples in Nepal under its early warning and urgent action procedures. In particular, the submitting organizations request that the Committee adopts a decision under these procedure recommending, *inter alia*, that Nepal:

a) recognises and respects indigenous peoples' right to effective participation in the Constituent Assembly through representatives freely chosen by themselves in accordance with their own processes and representative institutions;

b) amends the Interim Constitution, the 2007 *Constituent Assembly Election Act* and its implementing Regulation to ensure consistency with (a) above;

c) further recognises indigenous peoples' rights and participation in the constitution making process by forming an Indigenous Peoples thematic committee and by ensuring indigenous representation thereon from among their freely chosen representatives identified according to their own processes; and,

d) establishes mechanisms to otherwise consult with and obtain indigenous peoples free prior and informed consent in relation to the constitutional revision process in accordance with the ICERD, UNDRIP and ILO 169.

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17 *See Guidelines for the Use of the Early Warning and Urgent Action Procedure,* August 2007, at p. 3, para. 12 (specifying that the adoption of new discriminatory laws is one of the indicators for the use of these procedures).

18 *Prevention of Racial Discrimination, including early warning and urgent procedures: working paper adopted by the Committee on the Elimination of Racial Discrimination*. UN Doc. A/48/18, Annex III, at para. 8-9.

Annex A

Writ Petition Filed at the Supreme Court

Subject: Request for the issuance of Mandamus with Certiorari or other necessary order

On behalf of Lawyers Association for Human Rights of Nepalese Indigenous Peoples (LAHURNIP), Kathmandu District, Kathmandu Metropolis, Kathmandu Secretary, Ward 32, Advocate Shankar Limbu, Age 38, resident of Kathmandu District, Kathmandu Metropolis, Ward 32.....1
On behalf of Kirat Radu Nachhiring Sakham (Organization of Nachhiring indigenous people), Kathmandu District, Kathmandu Metropolis, Ward 29, Thamel, Kathmandu, Former Chairperson, Pratap Singh Nachhiring, Age 52, resident of Kathmandu Metropolis, Ward 13, Bafal.....1
On behalf of Kirat Rai Yayakkha (Organization of Kirat Rai indigenous peoples), Kathmandu District, Kathmandu Metropolis, Ward 32, Maitidevi, Kathmandu, Secretary, Advocate Bhim Rai, Age 39, resident of Kathmandu Metropolis, Ward 32,Ghattekulo...1
On behalf of National Indigenous Nationalities Women's Federation, Kathmandu District, Kathmandu Metropolis, Ward 29, Samakhusi, Kathmandu, Chairperson, Chinimaya Majhi, Age 38, resident of Kathmandu District, Kathmandu Metropolis, Ward 4, Chandol.....1
On Behalfbof Indigenous Women's Legal Awareness Group, Kathmandu District, Kathmandu Metropolis, Ward 35, Kotehwor, Kathmandu, Secretary, Advocate Indira Kumari Shrish, Age 39, resident of Lalitpur District, Bhainsepati, Ward.....1
On behalf of Hyolmo Protection and Promotion Council, Kathmandu District, Kathmandu Metropolis, Ward 8, Jorpati, Kathmandu, Chairperson, Tashi Chhiring Lama, Age 23, resident of Kathmandu Metropolis, Ward 8, Arubari.....1
On behalf of Sunuwar Service Society, Kathmandu District, Kathmandu Metropolis, Ward 10, Baneshwor, Kathmandu, General Secretary Bimala Sunuwar, Age 29, resident of Kathmandu Metropolis, Ward 9.....1
On behalf of Kirat Rai Athpahariya Society, Kathmandu District, Kapan V.D.C., Ward 3, Kathmandu, Joint Secretary, Manoj Rai, Age 28, resident of Kathmandu Metropolis, Ward 7, Chabahil.....1
On behalf of Newar National Forum, Kathmandu District, Kathmandu Metropolis, Ward 23, Ombahal, Kathmandu, Member, Mangala Karanjit, Age 55, resident of Kathmandu Metropolis, Ward 21, Jyabahal.....1
On behalf of Nepal Bote Society, Chitwan District, Gardi V.D.C., Ward 7, Chitwan, Secretary, Gyan Bahadur Bote, Age 31, resident of Nawalparasi District, Argyouli V.D.C., Ward 4.....1
On behalf of Himalayan Bhote Society, Kathmandu District, Kathmandu Metropolis, Ward 6, Bouddha Tinchuli, Kathmandu, Chairperson, Dawa Sangmu Bhote, Age 31, resident of Kathmandu District, Dhaparsi V.D.C., Ward 3.....1
On behalf of Kirat Chamling Rai Language and Culture Promotion Association, Kathmandu District, Kathmandu Metropolis, Ward 5, Kathmandu, General Secretary, Raju Bikram Chamling, Age 28, resident of Kathmandu District, Kathmandu Metropolis.....1
On behalf of Lil Phang, Kathmandu District, Kathmandu Metropolis, Ward 29, Samakhushi, Kathmandu, General Secretary, Jit Bahadur Ghale, Age 36, resident of Kathmandu Metropolis, Ward 29, Samakhushi, Kathmandu.....1
On behalf of Nepal Kumar Society Reform Committee, Kathmandu District, Kathmandu Metropolis, Ward 32, Anamnagar, Kathmandu, Secretary, Advocate

Nagendra Kumar Kumal, Age 31, resident of Kathmandu Metropolis, Ward 32, Anamnagar,
Kathmandu.....1
On behalf of Nepal Majhi Development Association, Sunsari District, Madhuban V.D.C., Ward 7, Sukrabare, Vice-Chairperson, Dhan Bahadur Majhi, Age 60, resident of Kathmandu Metropolis, Ward 4.....1
On behalf of Karani Society Service Association, Kathmandu Metropolis, Ward 6, Bouddha, Kathmandu, Secretary, Guru Syangyap Lama, Age 31, resident of Kathmandu Metropolis, Ward 6, Bouddha,
Kathmandu.....1
On behalf of Yamphuhang Kirat Rai Unity Society, Lalitpur District, Lalitpur Sub-Metropolis, Ward....., Lalitpur, Secretary, Bichari Yamphu 'Bishal', Age 35, resident of Lalitpur Sub-Metropolis.....1
On behalf of Kirat Yakthung Chumlung (Organization of Limbu indigenous people), Lalitpur District, Lalitpur Sub-Metropolis, Ward 14, Dhobighat, Lalitpur, Vice-Chairperson, Uttam Singh Thangden, Age 46, resident of Lalitpur Sub-Metropolis, Ward 14, Dhobighat, Lalitpur.....1
On behalf of Nepal Tamang Association, Kathmandu District, Kathmandu Metropolis, Ward 16, Sorhakhutte, Kathmandu, Joint Treasurer, Ravi Tamang, Age 40, resident of Kathmandu District, Phutung V.D.C., Ward 5.....1
On behalf of Nepal Thami Society, Kathmandu District, Kathmandu Metropolis, Ward 35, Kabiraj Thami, resident of Kathmandu Metropolis, Ward 35.....1

vs.

Right Honourable Prime Minister Mr. Pushpa Kamal Dahal, Office of the Prime Minister and Council of Ministers, Singhdurbar,
Kathmandu.....1
Government of Nepal, Office of the Council of Ministers, Singhdurbar,
Kathmandu.....1
Right Honourable Chairperson, Mr. Subhaschandra Nemband, Office of the Chairperson of the Constituent Assembly and Legislature-Parliament, Office of the Legislature-Parliament, Singhdurbar,
Kathmandu.....1
Honourable Minister Mr. Ramchandra Jha, Ministry of Local Development, Shrimahal, Lalitpur.....1
Honourable Minister Mr. Dev Prasad Gurung, Ministry of Law, Justice and Constituent Assembly Affairs, Singhdurbar,
Kathmandu.....1
Mr. Chairperson, Constituent Assembly, Constitutional Committee, Committee Secretariat, Parliament Building, Singhdurbar, Kathmandu.....1
Mr. Chairperson, Fundamental Rights and Directive Principles Committee, Committee Secretariat, Parliament Building, Singhdurbar,
Kathmandu.....1
Mr. Chairperson, Committee to Protect the Rights of Minorities and Marginalized Communities, Committee Secretariat, Parliament Building, Singhdurbar,
Kathmandu....1
Mr. Chairperson, Committee for State Restructuring and Division of Powers of the State, Committee Secretariat, Singhdurbar,
Kathmandu.....1
Mr. Chairperson, Committee to Determine the Form of the Legislature, Committee Secretariat, Singhdurbar, Kathmandu.....1

Mr. Chairperson, Committee to Determine the Form of the Government System, Committee Secretariat, Singhdurbar, Kathmandu.....1
Mr. Chairperson, Committee Concerning the Judicial System, Committee Secretariat, Singhdurbar, Kathmandu.....1
Mr. Chairperson, Committee to Determine the Structure of the Constitutional Bodies, Committee Secretariat, Parliament Building, Singhdurbar, Kathmandu.....1
Mr. Chairperson, Natural Resources, Economic Rights and Revenue Allocation Committee, Committee Secretariat, Parliament Building, Singhdurbar, Kathmandu.....1
Mr. Chairperson, Committee to Determine the Basis for Cultural and Social Solidarity, Committee Secretariat, Singhdurbar, Kathmandu.....1
Mr. Chairperson, National Interest Protection Committee, Committee Secretariat, Singhdurbar, Kathmandu.....1
Mr. Chairperson, Citizens Relations Committee, Committee Secretariat, Parliament Building, Singhdurbar, Kathmandu.....1
Mr. Chairperson, Opinion Collection and Coordination Committee, Committee Secretariat, Singhdurbar, Kathmandu.....1
Mr. Chairperson, Capability Enhancement and Resource Management Committee, Committee Secretariat, Singhdurbar, Kathmandu.....1

We writ petitioners as the representative organizations and institutions active for the rights, human rights, fundamental freedoms and development of Nepalese indigenous peoples have been denied of our constitutional and legal rights to freely participate through our own representatives directly chosen from our representative organizations and institutions in the recently elected Constituent Assembly and in the ongoing constitution writing process, rights that have been guaranteed as the fundamental rights of indigenous peoples by the Interim Constitution of Nepal 2007 as well as by the international instruments to which Nepal is a state party to. Also, the issue presented below is an issue of public concern for us al. By denying us of our rights an injustice has been committed against us. Therefore, we, providing below the details of the injustice suffered and including the receipt of the Rs. 500 necessary for filing the writ, petition the honourable Supreme Court for justice.

1. Indigenous nationalities have been given due recognition as indigenous nationalities by the Interim Constitution of Nepal 2007 and the National Foundation for Development of Indigenous Nationalities Act 2001. Article 2(a) of the National Foundation for Development of Indigenous Nationalities Act 2001, along with defining indigenous nationalities as groups with their own language and traditional customs, distinct cultural identity and social structure and written or unwritten history, has listed 59 groups of the country as indigenous nationalities. In addition, there are also other indigenous groups in the country that have defined themselves as indigenous peoples on the basis of self-identification, and also because they fall within the definition of the Act as well as the criteria put forth by Article 1 of the International Labour Organisation Convention No. 169 (hereafter, ILO Convention No. 169). The indigenous groups which have yet to be included in the list of the National Foundation for Development of Indigenous Nationalities Act 2001 have their own kind of traditional and representative organizations and institutions. Through these organizations and institutions the respective indigenous groups exercise their political rights according to their customs and traditions. As regards the issues related to indigenous peoples and issues that negatively impact upon them, various international human rights instruments to which Nepal is a signatory have guaranteed as a special right the fundamental rights of indigenous peoples to participate and represent themselves through their

representative organizations and institutions in the decision making bodies and mechanisms of the state at various levels.

2. Appropos the issues mentioned above (No. 1), the Preamble of the Interim Constitution of Nepal 2007 mentions that in order to solve the existing problems related to class, ethnicity, religion and gender, a forward-looking restructuring of the state has to be carried out. It also mentions that the fundamental right of the Nepalese people to make their own constitution by themselves and to participate in free and impartial elections to the Constituent Assembly held in an environment without fear or coercion has to be guaranteed. Article 2 of the Interim Constitution of Nepal specifically provides for the right of every Nepalese citizen to take the final decision regarding any issues concerning them by stating that the sovereignty and state authority of Nepal resides with the Nepalese people. Article 12(3)(a) under fundamental rights of the Interim Constitution guarantees every citizen the right to freedom of opinion and expression while Article 21, also under fundmental rights, guarantees the right of economically, socially and educationally backward women, *dalit*, indigenous nationalities, *Madhesi*, oppressed classes, poor farmers and labourers to participate in the state structure on the basis of the principle of proportionality and inclusiveness. All the above-mentioned constitutional provisions and fundamental rights have been infringed upon by Articles 5 and 6 of the Election to the Constituent Assembly Members Act 2064 B.S. (2007/2008) and Election to the Constituent Assembly Regulation 2064 B.S. (2007/2008), which provide for the participation in the constitution writing process on an individual basis or through political parties only. This has led to the prohibition and exclusion of and discrimination against the participation of indigenous nationalities in accordance with their fundamental and political rights through their chosen representatives from their traditional and representative ethnic organizations and institutions. It has also given preference to political parties and carried out the enforced assimilation of indigenous peoples into those political parties. By giving continuity to all this also in the constitution writing process, it is clear that indigenous nationalities have been deprived from using their above-mentioned fundamental rights.
3. Article 13(1) under fundamental rights of the Interim Constitution of Nepal 2007 states that all citizens are equal before the law and that no citizen shall be denied the equal protection of the law. Likewise, Article 13(3) under fundamental rights mentions that the state shall not discriminate among its citizens on the basis of religion, color, caste, ethnicity, sex, origin, language or ideology or any of the above. The prohibitory clause accompanying the article has provided clear guidance to the state to protect groups like the indigenous nationalities through the enactment of special laws. Although the constitution prohibits the discrimination against indigenous nationalities on the basis of ideology, this provision has been disregarded and the state has discriminated against indigenous nationalities through the enactment of laws related to the Constituent Assembly and the constitution writing process. These laws have deprived indigenous nationalities the right to practice their own political systems and processes through their traditional and representative institutions, institutions that are part of their existence, identity and beliefs. Not only have the indigenous peoples been denied of “communitarian democracy” to utilize and practice their political rights through their own political processes and mechanisms, but with regard to the indigenous peoples it is also clear that the state, by protecting an alien political system, has denied indigenous peoples equal protection of the law.
4. The legal rights of indigenous peoples to freely and directly, as well as through their own processes, participate in the formation of the Constituent Assembly and in the constitution writing process that have been guaranteed by the

international instruments that Nepal is a signatory to, like the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), International Convention on the Elimination of all forms of Racial Discrimination (ICERD), ILO Convention No. 169, United Nations Declaration of the Rights of Indigenous Peoples 2007 (UNDRIP 2007) (hereafter referred to as Declaration) and others, have been infringed upon. Appropos these above-mentioned international instruments, Article 9 of the Nepal Treaty Act 2047 B.S. (1990/1991) has mentioned that with regard to an international instrument that Nepal is a state party to, following the ratification, approval or agreement of the parliament, the provisions of the international instrument shall take precedence over existing national laws. And to the extent that national laws are in conflict with the international instruments, they shall be null and void. In such a situation the provisions of the international instruments shall have the force of national laws and will applied as such. Nepal cannot be exempt from the responsibility of adhering to the standards and principles that have been developed in accordance with the decisions of international courts and human rights related regional courts. The Nepalese court can take as an example the established principle regarding the responsibilities of the state vis-à-vis the citizens made to disappear as an accepted principle of justice. And although Article 36 of the constitution has stated that no questions can be raised in the courts regarding the implementation or non-implementation of the provisions under part 4 of the constitution, there cannot be any dispute that the provisions are the commitments of the state. Also, Article 33(m) of the Interim Constitution of Nepal 2007 has made it the responsibility of the state to effectively implement the provisions of the international instruments that Nepal is a state party to. Contrary to this, the provisions and precedents of the above-mentioned international instruments as well as the responsibilities designated by the constitution have been infringed upon and disregarded.

5. With regard to the issue mentioned above (No. 4) of the infringement upon the rights of indigenous peoples as guaranteed by the international instruments to participate in the Constituent Assembly through their own representative organizations and institutions and by adopting their own original practices, the United Nations Special Rapporteur on the human rights and fundamental freedoms of indigenous peoples Prof. James Anaya has through a press statement recommended that the state make alternative arrangements to ensure the rights provided to indigenous peoples by international instruments to participate through their own processes and representative organizations in the Constituent Assembly and to acquire their freely given consent. Since international instruments have not been followed and indigenous peoples have been denied participation in the Constituent Assembly and the constitution writing process, there does not seem to be any alternative to the state making necessary arrangements to address these issues.

6. The international instruments mentioned above (No. 5) have guaranteed the human rights and fundamental freedoms of indigenous peoples. These guaranteed rights are collective as well as individual in nature. In this context, Article 1(6) of the ILO Convention No. 169 has given recognition to the traditional, social, economic and cultural institutions of indigenous peoples. Likewise, Article 5 of the United Nations Declaration of the Rights of Indigenous Peoples 2007 states that indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the state. Article 18 of the Declaration states that indigenous peoples have the right to participate in decision making in matters which would affect their rights, through

representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision making institutions. This has guaranteed the collective political rights of indigenous peoples to participate through their own institutions in decisions affecting them. Article 6(1)(b) of the ILO Convention No. 169 has mentioned that the state should establish means by which indigenous peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision making in elective institutions and in administrative and other bodies responsible for policies and programs which concern them. Articles 6(1)(a) of the Convention states that the state consult the indigenous peoples concerned through appropriate procedure and in particular through their representative institutions, Contrary to all these provisions—without any direct participation and consultation with indigenous peoples in the constitution writing process, a process that has direct impact upon them and which is closely related to their future developments—Articles 5 and 6 of the Constituent Assembly Elections Act 2064 B.S. (2007/2008) have made provisions for the participation in the Constituent Assembly of only individuals and political parties. This has seriously infringed upon the rights guaranteed to indigenous peoples by Articles 6(1)(b) and 6(1)(a) of ILO Convention No.169 to directly participate through their representatives chosen from their representative institutions. Also, contravening Article 3(1)(2) of the Convention which states that indigenous peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination and that no form of force or coercion shall be used in violation of the human rights and fundamental freedoms of indigenous peoples, The Election Commission Act 2063 B.S. (2006/2007) and Election to the Constituent Assembly Act 2064 B.S. (2007/2008) and Election to the Constituent Assembly Regulation 2064. B.S (2007/2008) have been implemented and indigenous peoples excluded from the formation of the Constituent Assembly.

7. Article 2(1) of the ILO Convention No.1 169 mentions that governments shall have the responsibility of developing, with the participation of the indigenous peoples, coordinated and systematic action to protect their rights and to guarantee respect for their integrity. Article 2(2)(a) of the Convention further states that such action shall include measures for ensuring that members of the indigenous peoples benefit on an equal footing from the rights and opportunities which national laws and regulations grant to other members of the population. These provisions have been totally disregarded and infringed upon by the Constituent Assembly and the constitution writing process.

8. Articles 2(l) and 7(3) of the Election to the Constituent Assembly Act 2064 B.S. (2007/2008) mention that while preparing the closed list of their candidates for elections to the Constituent Assembly, political parties should take into consideration the issue of proportional representation of indigenous nationalities. Articles 65(4), 66 and 69 of the Constituent Assembly Regulation 2065 B.S. (2008/2009) mention that while forming the committees in the Constituent Assembly, political parties should on the basis of the party representation in the Constituent Assembly take into consideration the proportional representation of groups like the indigenous nationalities. The provision of proportional representation mentioned in these laws and regulations is of direct concern to indigenous peoples and impacts upon them directly. In this context, as per the provisions of Article 6(1) of ILO Convention No. 169 and Article 5(c) of International Convention on the Elimination of all forms of Racial Discrimination, these laws and regulations have to be implemented only after prior consultation with indigenous peoples. The committee to monitor the International Convention on the Elimination of all forms of Racial Discrimination, explaining the issues related to the Convention

and in order to guarantee the rights of indigenous peoples, has mentioned in its General Recommendation XXIII No. 2 to the state parties that the Convention is applicable with regard to indigenous peoples. Also, Recommendation No. 4(c) mentions that state parties should give recognition to the right of indigenous peoples to effectively participate in public affairs. It also mentions that with regard to the issues that directly impact upon their rights and interest, no decision shall be taken without the prior informed consent of indigenous peoples. Article 19 of the United Nations Declaration on the Rights of Indigenous Peoples, to which Nepal has expressed its consent, mentions that the state shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them. It is clear that contrary to the above mentioned provisions, the formation and elections to the Constituent Assembly have been carried out and the Acts and Regulations related to the Constituent Assembly implemented without the prior consultation and consent of indigenous peoples.

9. Article 64 of the Constituent Assembly Regulation 2065 B.S. (2008/2009) has provided for the formation of constitutional committees, issuewise committees and procedural committees. Article 65 has provided for the formation of constitutional committees. Article 66 has provided for the formation of committees vis-à-vis the various issues to be incorporated in the constitution. These committees formed for the purpose of preparing the preliminary draft that also includes the concept paper on one particular designated topic include the: (1) Fundamental Rights and Directive Principles Committee (2) Committee to Protect the Rights of Minorities and Marginalized Communities (3) Committee for State Restructuring and Division of Powers of the State (4) Committee to Determine the Form of the Legislature (5) Committee to Determine the Form of the Government System (6) Committee Concerning the Judicial System (7) Committee to Determine the Structure of the Constitutional Bodies (8) Natural Resource, Economic Rights and Revenue Allocation Committee (9) Committee to Determine the Basis for Cultural and Social Solidarity and (10) National Interest Protection Committee. Article 67 has provided for the formation of committees for the important administrative and procedural activities necessary for the effective functioning of the constitution writing process of the Constituent Assembly. These include the (1) Citizens Relations Committee (2) Opinion Collection and Coordination Committee and (3) Capability Enhancement and Resource Management Committee. The above-mentioned committees after delineating their respective work areas have even begun preparing the draft of the constitution. The issuewise committees formed have disregarded the indigenous nationality groups occupying 37.2% of the population of the country according to the national census of 2001 and recognized as such by the National Foundation for Development of Indigenous Nationalities Act 2001. They have not provided for the formation of a committee related to indigenous nationalities. This has consequently infringed upon the right provided by Articles 21 and 33(d)(1) of the Interim Constitution of Nepal 2007 to indigenous nationalities to participate in the state structure. In addition, provisions of Articles 6(1)(a) and 6(1)(b) of ILO Convention No. 169 to establish appropriate processes and mechanisms for indigenous peoples to guarantee, at least the same extent of other sectors of the population, their free and without external interference representation have also been infringed upon, and no committee for indigenous peoples has been formed in the constitution writing process. Also, with regard to the committees formed, they have not been given the responsibility of working on the issues of indigenous peoples. Moreover, seriously impacting upon the rights and concerns of indigenous

people, the process of drafting the constitution has begun without the participation of indigenous peoples.

10. The issue regarding the development and protection of indigenous peoples, who are represented in the state structure to a minimal extent, is an issue associated with the development, rule of law, sustainable peace, good management and the restructuring of the state of the entire nation. It is almost certain that without the meaningful participation of indigenous peoples in the constitution writing process, the restructuring of the state will be inadequate, incomplete. The restructuring of the state is a process of nation building based on the principle of inclusiveness and with the inclusion and participation of issues and communities that had been excluded from the nation building processes undertaken in the past. The process of nation building is an issue associated with the right to self-determination, a right that has been guaranteed by the International Covenant on Civil and Political Rights, Article 1 of the International Covenant on Economic, Social and Cultural Rights ("All peoples have the right to self-determination. By virtue of that right they can freely determine their political status and freely pursue their economic, social and cultural development.") and by Article 3 of the United Nations Declaration on the Rights of Indigenous Peoples ("Indigenous peoples have the right to self-determination. By virtue of that right they can freely determine their political status and freely pursue their economic, social and cultural development.") Given that indigenous peoples have been denied of the right to freely participate in the process of state restructuring, this has infringed upon their right to self-determination, democratic participation and the right to development and protection.
11. Therefore, as mentioned above, as per the letter and spirit of the Preamble and the provisions of Articles 12(3)(a), 21 and 63(3)(c) of the Interim Constitution of Nepal 2007 and in order to guarantee the right to opinion and expression and participation of indigenous peoples in the Constituent Assembly and the constitution writing process through their freely chosen representatives from their own representative organization and institutions, we request for the issuance of an order to amend the Election to the Constituent Assembly Members Act 2064 B.S. (2007/2008), Election to the Constituent Assembly Members Regulation 2064 B.S. (2007/2008) and Constituent Assembly Regulation 2065 B.S. (2008/2009) or to make other necessary arrangements.
12. As per Article 5(c) of the International Convention on the Elimination of all forms of Racial Discrimination and General Recommendation XXXIII No. 2 and 4(d) of the Convention Monitoring Committee, Article 6(1) of the ILO Convention No. 169 and Article 18 of the United Nations Declaration on the Rights of Indigenous Peoples, we request for the issuance of an order to make the necessary amendments to the Constitution, Acts and Regulations for the participation of indigenous peoples in the constitution writing process through their freely chosen representatives from their own organizations and institutions.
13. In order to ensure the right of prior informed consent guaranteed by Articles 21 and 33(1)(d) of the Interim Constitution of Nepal 2007, Article 5(c) of the International Convention on the Elimination of all forms of Racial Discrimination and General Recommendation XXXIII No. 2 and 4(d) of the Convention Monitoring Committee, Articles 2.2 (1)(a), 2.2 (1)(b), 6(1)(a) and 6(1)(b) of the ILO Convention No. 169 and Article 19 of the United Nations Declaration on the Rights of Indigenous Peoples, we request for the issuance of a mandamus or other necessary order for the formation in the Constituent Assembly of a separate issuewise committee or mechanism focusing specifically on indigenous peoples.

14. The Constituent Assembly and the constitution writing process have begun without the free and direct participation of indigenous nationalities as guaranteed by the above mentioned Articles of the Interim Constitution of Nepal 2007 as well as international instruments. This, as a consequence, has led to the very high possibility that it will infringe upon our, i.e. writ petitioners' rights as well as the rights of all indigenous nationalities. Therefore, we request for the issuance of an order in the name of the adversary that all activities related to the writing of the constitution undertaken without the establishment of appropriate processes and mechanisms for the free participation and freely given consent of indigenous nationalities and without the formation of a separate committee in the Constituent Assembly focusing on indigenous nationalities be halted and not be allowed to proceed until a final decision regarding this case is reached.
15. We request that the arguments and precedents to be put forward in the court by lawyers representing us in this case be considered an integral part of this writ petition.
16. Copies of enclosed documents
    (i) Decision of the working committee meeting of the organizations filing the writ
    Copies.....19
    (ii) Press release issued by the United Nations Special Rapporteur on the human rights of indigenous peoples and published by the Office of the United Nations High Commissioner for Human Rights
    Copies.....1

We hereby attest that all the details and information in this writ petition are true. In case they are found to be false, we are willing to face any action taken against us in accordance with the law.

Writ Petitioners
On behalf of LAHURNIP Shankar Limbu
On behalf of Kirat Radu Nachhiring Sakham Pratap Singh Nachhiring
On behalf of Kirat Rai Yayokha Bhim Rai
On behalf of National Indigenous Nationalities Women Federation Chinimaya Majhi
On behalf of Indigenous Women's Legal Awareness Group Indira Kumari Shrish
On behalf of Hyolmo Protection and Promotion Council Tashi Chhiring Lama
On behalf of Sunuwar Service Society Bimala Sunuwar
On behalf of Kirat Rai Athpahariya Society Manoj Rai
On behalf of Nepal Bote Society Gyan Bahadur Bote
On behalf of Himalayan Bhote Society Dawa Sangmu Bhote
On behalf of Kirat Chamling Rai Language and Culture Promotion Association Raju Bikram Chamling
On behalf of Lil Phang Jit Bahadur Ghale
On behalf of Nepal Kumal Society Reform Committee Nagendra Kumal
On behalf of Nepal Majhi Development Association Dhan Bahadur Majhi
On behalf of Karani Society Service Association Guru Syangyapdama
On behalf of Yamphuhang Kirat Rai Unity Society Bichari Yamphu 'Bishal'
On behalf od Kirat Yakthung Chumlung Uttam Singh Thangden
On behalf of Nepal Tamang Association Ravi Tamang
On behalf of Nepal Thami Society Kabiraj Thami

Date: Fagun 1, 2065 B.S. (February 12, 2009)

ANNEX B (unofficial translation)

Supreme Court Single Bench of Honourable Justice Mr. Min Bahadur Rayamajhi
Order

2065 B.S. (2008/2009) Writ No. 0475
Subject: Certiorari:

On behalf of Lawyers Association for Human Rights of Nepalese Indigenous Peoples (LAHURNIP) Advocate Shankar Limbu and others...Petitioner

vs.

Office of the Prime Minister and Council of Ministers, Singhdurbar, Kathmandu...Adversary

What has happened in this case? Why should an order not be issued as per the request of the writ petitioner filing the writ? Notify the Office of the Prime Minister and Council of Ministers by including a copy of the writ petition to submit a written reply along with the necessary documents via the Office of the Attorney General within, not including the time taken for delivering the message, fifteen days of receiving this order and present it within the stipulated period or following expiry of the stipulated period in accordance with the law.

.....
Justice

Date: Fagun 18, 2065 B.S. (March 1, 2009)

Written Reply Submitted to the Supreme Court

Via: Office of the Attorney General, Ramshah Path

Chairperson, Constituent Assembly Subhaschandra Nembang....Person providing the written reply Defendant

vs.

On behalf of Lawyers Association for Human Rights of Nepalese Indigenous Peoples (LAHURNIP) Advocate Shankar Limbu and others.....Petitioners

Subject: Mandamus with Certiorari (2065 B.S. (2008/2009) Writ No. 0475)

Following the writ filed making me, i.e. Chairperson, Constituent Assembly as defendant and in accordance with the order issued regarding the same by the honourable Supreme Court to submit a written reply within, not including the time taken for delivering the message, fifteen days of receiving the order vis-à-vis the issue of what has happened in the case and why should an order not be issued as per the request of the petitioner, this written reply has been submitted within the given time after receiving the court order on 2065/11/21 B.S. (March 4, 2009).

1. As the full details regarding the writ can be known from the writ petition filed at the Supreme Court itself, it has not been replicated here.
2. The petitioners have stated that although the letter and spirit of the Preamble as well as the Articles 12(3)(a) and 63(3)(c) under the fundamental rights of the

Interim Constitution of Nepal 2007 have guaranteed the rights of indigenous peoples to freely participate and express their views and opinions through their representative organizations and institutions in the Constituent Assembly and in the constitution writing process, these provisions have been disregarded while forming the fourteen different committees under the Constituent Assembly Regulation 2065B.S. (2008/2009) for the purpose of writing the constitution. Despite the formation of fourteen different committees, a committee for indigenous nationalities has not been formed. The petitioners have also stated that disregarding the responsibility, as per the provisions of Articles 6(1)(a) and 6(1)(b) of the International Labour Organisation Convention No. 169 for the establishment of appropriate processes and mechanisms to guarantee the free and without interference representation on at least the same footing as other groups, a committee for indigenous peoples in the constitution writing process has not been formed. Even with regard to the committees formed and their work areas, it does not include the responsibility of working on the issues of indigenous peoples. Therefore, in order to establish the appropriate processes and mechanisms for the free participation and freely given consent of indigenous nationalities in the constitution writing process, the writ petitioners have requested the issuance of an order under Articles 32 and 107(2) of the Interim Constitution of Nepal 2007 to amend the Constituent Assembly Regulation 2065 B.S. (2008/2009) or to make other necessary arrangements.

3. The writ petition has made the Chairperson, Constituent Assembly defendant with regard to the issue that while forming the committees in the Constituent Assembly for the purpose of writing the constitution, a separate committee for indigenous nationalities has not been formed. The writ claims that the Constituent Assembly Regulation 2065 B.S. (2008/2009) and the committees formed under it are not sufficient vis-à-vis the rights of indigenous nationalities as per the provisions of Articles 12(3)(a), 21 and 63(3)(c) of the Interim Constitution of Nepal 2007. The petitioners cannot deny that the country is moving forward on the national goal of writing a constitution by the people themselves through the Constituent Assembly by guaranteeing the inclusive and proportional representation of all ethnic groups, languages, religions, communities, genders and cultures. With this aim a Constituent Assembly that is a model to the world with regard to the issue of inclusive participation has been formed. It is automatically clear that each and every honourable member of the Constituent Assembly has equal and independent status in the writing of the constitution. This cannot be restricted or prohibited by any of the provisions of the Constituent Assembly Regulation 2065 B.S. (2008/2009). The petitioners themselves in their writ petition have not claimed that such a situation exists. Appropos the issue raised by the petitioners that a separate committee to look into the issues of indigenous nationalities has not been formed in the Constituent Assembly, the committees formed in the Constituent Assembly have not been formed on the basis of any particular class, ethnic/caste group or religion. They have been formed as an integral part of the Constituent Assembly with the aim of assisting the Constituent Assembly fulfill its responsibilities as regards the contents to be incorporated in the new constitution quickly and in an efficient manner. It is necessary to be clear about this fact. On no issue in the constitution will the decision of the committees be final. The committees are entitled only to present their reports. These reports will be discussed and a decision regarding them reached by the full meeting of the Constituent Assembly with all its members attending; it is their responsibility. Given that the constitution is the fundamental law of the land and is a document guaranteeing the equal rights and protections that all its citizens are entitled to and is not a document in which the issues of any one particular region or ethnic/caste group will be mentioned separately, it is an issue that is of common concern to al. This has been well heeded by the current constitution writing process and the

Constituent Assembly Regulation 2065 B.S. (2008/2009). The regulation to establish the constitution writing process was not made and promulgated by any state official or body. It was made by the honourable members of the Constituent Assembly themselves by collectively using their right to make the necessary provisions to regulate their internal affairs as per Article 78 of the Interim Constitution of Nepal 2007. Given this, it is not justifiable that a writ be filed by making the Chairperson, Constituent Assembly an adversary—a Chairperson who has an impartial role to play as leader of the Constituent Assembly. Also, as the issue of the formation of committees for various purposes is an issue related to the internal work procedure of the Constituent Assembly, it is a special prerogative of the Constituent Assembly. It cannot be an issue to be decided by the honourable court. In this context, the writ petition is against Article 77(2) of the Interim Constitution of Nepal 2007 and is, prima facie, deserving of annulment. I request that it be annulled.

4. Even if we enter into the subject matter without negatively impacting upon the arguments put forth above (No. 3), there cannot be any dispute that as the writ petitioners have demanded in their writ there should be, as per the letter and spirit of the constitution, direct and effective participation in the Constituent Assembly and the constitution writing process therein of all, including the indigenous nationalities. The state right from the time of the formation of the Constituent Assembly through elections has been cognizant of this fact. The Constituent Assembly has also been taking into account the issue with considerable sensitivity. Articles 65(4) and 69(2) of the Constituent Assembly Regulation 2065 B.S. (2008/2009) have provided for the selection of the committee members in a proportionate and inclusive manner based on the representation in the Constituent Assembly of political parties, women, indigenous nationalities, *Madhesi*, *dalit*, backward regions, Muslims and all other minority groups. This, as a consequence, affirms that full respect has been paid to the issue of the participation of all groups and parties concerned in the committees formed under the "project" of constitution writing and their related topics and the activities to be undertaken by the committees. Also, the selection of the committee members and the results of the elections for the chairperson of the committees held on January 13, 2009 show that the sentiments and feelings of the petitioners have been realized in practice. In this context, the Constituent Assembly that is moving forward with a clear timetable on the national goal of writing a new constitution within the stipulated time period has not committed any constitutional error regarding the Constituent Assembly Regulation and the committees formed in the Constituent Assembly. So there is no cause for the issuance of any order. I respectfully request for the annulment of the writ petition.
5. As all the other parties concerned against whom the writ has been filed will provide their own written replies, it is not necessary to mention anything about them here.
6. I request that when the writ petition comes before the bench of the honourable court the defense and the arguments of the government lawyer be considered an integral part of this written reply.
7. I hereby sincerely attest that all the details and information provided above are true. In case they are found to be false, I am willing to face any action taken against me in accordance with the law.

Written reply submitted by

Subhaschandra Nembang
Chairperson
Constituent Assembly

Date……Fagun, 2065 B.S. (February/March 2009)

Written Reply Submitted to the Supreme Court

Via: Office of the Attorney General, Ramshah Path

Chair, Constitutional Committee, Constituent Assembly.....1
Chair, Fundamental Rights and Directive Principles Committee, Constituent Assembly.....1
Chair, Committee to Protect the Rights of Minorities and Marginalized Communities, Constituent Assembly.....1
Chair, Committee for State Restructuring and Division of Powers of the State, Constituent Assembly.....1
Chair, Committee to Determine the Form of the Legislature, Constituent Assembly.....1
Chair, Committee to Determine the Form of the Government System, Constituent Assembly.....1
Chair, Committee Concerning the Judicial System, Constituent Assembly.....1
Chair, Committee to Determine the Structure of the Constitutional Bodies, Constituent Assembly.....1
Chair, Natural Resources, Economic Rights and Revenue Allocation Committee, Constituent Assembly.....1
Chair, Committee to Determine the Basis for Cultural and Social Solidarity, Constituent Assembly.....1
Chair, National Interest Protection Committee, Constituent Assembly.....1
Chair, Citizens Relations Committee, Constituent Assembly.....1
Chair, Opinion Collection and Coordinate Committee, Constituent Assembly.....1
Chair, Capability Enhancement and Resource Management Committee, Constituent Assembly.....1
and also on behalf of the Secretariat of the Constituent Assembly Joint Secretary Legal Advisor of the Secretariat, Constituent Assembly Tek Prasad Dhunghana.....Person

submitting the written reply

Defendant

vs.

On behalf of Lawyers Association for Human Rights of Nepalese Indigenous Peoples (LAHURNIP) Advocate Shankar Limbu and others.....Adversary Writ Petitioner

Subject: Mandamus with Certiorari

Following the writ filed making also the Constituent Assembly Secretariat as defendant and in accordance with the order issued regarding the same by the honourable Supreme Court to submit via the Office of the Attorney General a written reply within, not including the time taken for delivering the message, fifteen days of receiving the order vis-à-vis the issue of what has happened in the case and why should an order not be issued as per the request of the petitioner, this written reply

has been submitted within the given time after receiving the court order on 2065/11/21 B.S. (March 4, 2009).

1. As the full details regarding the writ can be known from the writ petition filed at the Supreme Court itself, it has not been replicated here.
2. The petitioners have stated that although the letter and spirit of the Preamble as well as the Articles 12(3)(a) and 63(3)(c) under fundamental rights of the Interim Constitution of Nepal 2007 have guaranteed the rights of indigenous peoples to freely participate and express their views and opinions through their representative organizations and institutions, in the Constituent Assembly and in the constitution writing process, these provisions have been disregarded while forming the fourteen different committees under the Constituent Assembly Regulation 2065 B.S. (2008/2009) for the purpose of writing the constitution. Despite the formation of fourteen different committees, a committee for indigenous nationalities has not been formed. The petitioners have also stated that disregarding the responsibility, as per the provisions of Articles 6(1)(a) and 6(1)(b) of the International Labour Organisation Convention No. 196, for the establishment of appropriate processes and mechanisms to guarantee the free and without interference representation on at least the same footing as other groups, a committee for indigenous peoples in the constitution writing process has not been formed. Even with regard to the committees formed and their work areas, it does not include the responsibility of working on the issues of indigenous peoples. Therefore, in order to establish the appropriate processes and mechanisms for the free participation and freely given consent of indigenous nationalities in the constitution writing process, the writ petitioners have requested the issuance of an order under Articles 32 and 107(2) of the Interim Constitution of Nepal 2007 to amend the Constituent Assembly Regulation 2065 B.S. (2008/2009) or to make other necessary arrangements.
3. The writ petition has also made the chairpersons of all the committees of the Constituent Assembly and the Constituent Assembly Secretariat defendant with regard to the issue that while forming the committees in the Constituent Assembly for the purpose of writing the constitution, a separate committee for indigenous nationalities has not been formed. The writ claims that the Constituent Assembly Regulation 2065 B.S. (2008/2009) and the committees formed under it are not sufficient vis-à-vis the rights of indigenous nationalities as per the provisions of Articles 12(3)(a), 21 and 63(3)(c) of the Interim Constitution of Nepal 2007. The petitioners cannot deny that the country is moving forward on the national goal of writing a constitution by the people themselves through the Constituent Assembly by guaranteeing the inclusive and proportional representation of all ethnic groups, languages, religions, communities, genders and cultures. With this aim a Constituent Assembly that is a model to the world with regard to the issue of inclusive participation has been formed. It is automatically clear that each and every honourable member of the Constituent Assembly has equal and independent status in the writing of the constitution. This cannot be restricted or prohibited by any of the provisions of the Constituent Assembly Regulation 2065 B.S. (2008/2009). The petitioners themselves in their writ petition have not claimed that such a situation exists. Appropos the issue raised by the petitioners that a separate committee to look into the issues of indigenous nationalities has not been formed in the Constituent Assembly, the committees formed in the Constituent Assembly have not been formed on the basis of any particular class, ethnic/caste group or religion. They have been formed as an integral part of the Constituent Assembly with the aim of assisting the Constituent Assembly fulfill its responsibilities as regards the contents to be incorporated in the new constitution quickly and in an efficient manner. It is necessary to be clear about this fact. On no issue in the constitution

will the decision of the committees be final. The committees are entitled only to present their reports. These reports will be discussed and a decision regarding them reached by the full meeting of the Constituent Assembly with all its members attending; it is their responsibility. Given that the constitution is the fundamental law of the land and is a document guaranteeing the equal rights and protections that all its citizens are entitled to and is not a document in which the issues of any one particular region or ethnic/caste group will be mentioned separately, it is an issue that is of common concern to all. This has been well heeded by the current constitution writing process and the Constituent Assembly Regulation 2065 B.S. (2008/2009). The regulation to establish the constitution writing process was not made and promulgated by any state official or body. It was made by the honourable members of the Constituent Assembly themselves by collectively using their right to make the necessary provisions to regulate their internal affairs as per Article 78 of the Interim Constitution of Nepal 2007. Given this, it is not justifiable that a writ be filed by making the Chairpersons of the committee in the Constituent Assembly and the Constituent Assembly Secretariat adversaries. Also, as the issue of the formation of committees for various purposes is an issue related to the internal work procedure of the Constituent Assembly, it is a special prerogative of the Constituent Assembly. It cannot be an issue to be decided by the honourable court. In this context, the writ petition is against Article 77(2) of the Interim Constitution of Nepal 2007 and is, prima facie, deserving of annulment. I request that it be annulled.

4. Even if we enter into the subject matter without negatively impacting upon the arguments put forth above (No. 3), there cannot be any dispute that as the writ petitioners have demanded in their writ there should be, as per the letter and spirit of the constitution, direct and effective participation in the Constituent Assembly and the constitution writing process therein of all, including the indigenous nationalities. The state right from the time of the formation of the Constituent Assembly through elections has been cognizant of this fact. The Constituent Assembly has also been taking into account the issue with considerable sensitivity. Articles 65(4) and 69(2) of the Constituent Assembly Regulation 2065 B.S. (2008/2009) have provided for the selection of the committee members in a proportionate and inclusive manner based on the representation in the Constituent Assembly of political parties, women, indigenous nationalities, *Madhesi*, *dalit*, backward regions, Muslims and all other minority groups. This, as a consequence, affirms that full respect has been paid to the issue of the participation of all groups and parties concerned in the committees formed under the "project" of constitution writing and their related topics and the activities to be undertaken by the committees. Also, the selection of the committee members and the results of the elections for the chairperson of the committees held on January 13, 2009 show that the sentiments and feelings of the petitioners have been realized in practice. In this context, the Constituent Assembly that is moving forward with a clear timetable on the national goal of writing a new constitution within the stipulated time period has not committed any constitutional error regarding the Constituent Assembly Regulation and the committees formed in the Constituent Assembly. So there is no cause for the issuance of any order. I respectfully request for the annulment of the writ petition.
5. As all the other parties concerned against whom the writ has been filed will provide their own written replies, it is not necessary to mention anything about them here.
6. I request that when the writ petition comes before the bench of the honourable court the defense and the arguments of the government lawyer be considered an integral part of this written reply.

7. I hereby sincerely attest that all the details and information provided above are true. In case they are found to be false, I am willing to face any action taken against me in accordance with the law.

Written reply submitted by

Tek Prasad Dhunghama
Joint Secretary
Constituent Assembly Secretariat

Date……Fagun, 2065 B.S. (February/March 2009)

Written Reply Submitted to the Supreme Court

Via: Office of the Attorney General, Ramshah Path
Writ No. 430/0475 of the Year 2065 B.S. (2008/2009)

Subject: Request for the annulment of writ petition

On behalf of Ministry of Culture and State Restructuring Minister of Culture and State Restructuring Gopal Kirati……Person submitting the written reply

vs.

On behalf of Lawyers Association for Human Rights of Nepalese Indigenous Peoples (LAHURNIP), Kathmandu Metropolis, Ward 32 Advocate Shankar Limbu, age 38, resident of Kathmandu Metropolis, Ward 32, and others……Adversary Writ Petitioner

Case: Mandamus with Certiorari

Following the writ filed making also this ministry as adversary and in accordance with the order issued regarding the same to submit via the Office of the Attorney General a written reply along with the necessary documents within, not including the time taken for delivering the message, fifteen days of receiving the order vis-à-vis the issue of what has happened in the case and why should an order not be issued as per the request of the petitioner, this written reply, after receiving the court order on 2065/11/21 B.S. (March 4, 2009) and given that the reply could not be submitted within the stipulated period due to the busy work schedule of the ministry, has been submitted requesting additional time in accordance with Article 42(a) of the Supreme Court Regulation 2049 B.S. (1992/1993).

1. The other parties against whom the writ has been filed will no doubt provide their own written replies.
2. It has not been made clear in the writ petition by the writ petitioners which decisions or activities of this ministry have infringed upon their fundamental rights.
3. The main thrust of the argument of the writ petitioners is that an order be issued as per Articles 32 and 107(2) of the Interim Constitution of Nepal 2007 to amend the Election of the Constituent Assembly Members Act 2064 B.S. (2007/2008), Election of the Constituent Assembly Members Regulation 2064 B.S. (2007/2008) and the Constituent Assembly Regulation 2065 B.S. (2008/2009) or to make other necessary arrangements in order to ensure the rights of

indigenous peoples to express their views and opinions in the Constituent Assembly and the constitution writing process freely through their representatives chosen from their own representative organizations and institutions in accordance with their own processes and procedures. The writ petitioners claim that the above-mentioned Act and Regulation are contrary to the letter and spirit of the Preamble and the provisions of Articles 12(3)(a), 21 and 63(3)(c) under fundamental rights of the Interim Constitution of Nepal 2007.

4. There finds mention in the writ petition also of an international treaty. The issue regarding the status of such a treaty vis-à-vis the existing laws of the country has been made clear by Article 9 of the Nepal Treaty Act 2047 B.S. (1990/1991). Nevertheless, given that an individual cannot directly invoke as his or her right the provisions of an international treaty, the writ petition and the arguments put forth by mentioning such a treaty is not valid according to the law. Hence, I request the annulment of the writ petition.
5. The issue regarding the making of laws on any subject or amending them remains the exclusive prerogative of the legislature. Even if we take as our basis the principle of the division of powers under which the three bodies of the state have to be independent so as to ensure the smooth functioning of state activities, the right to make new laws or to amend or modify existing ones remains exclusively with the legislature. Given such an existing situation, the issue related to the making of laws or amending them does not fall within the regular activities undertaken by the ministry, or within the work area of the executive. It is an exclusive right of the legislature, hence this ministry cannot be made adversary in the issue. It is not justifiable and the writ petition filed making this ministry also an adversary in an issue that is not concerned with this ministry is deserving of annulment. I request that it be annulled.
6. Given that the sovereign Constituent Assembly, in order to conduct its activities, makes the Constituent Assembly Regulation by itself, this ministry does not have the right to amend it. The petitioners' claim in this regard is hence not valid according to the law. Therefore, the writ petition is deserving of annulment. I request that it be annulled.
7. Given that the process of writing the constitution has been initiated following the holding of elections to the Constituent Assembly on April 10, 2008 with the aim of drafting a new constitution focusing on the restructuring of the state as well as other issues through the mandate and the participation of the people themselves, the claim of the petitioners that an order be issued to amend the Election of the Constituent Assembly Members Act and Elections of the Constituent Assembly Members Regulation is not justifiable. Hence, the writ petition is deserving of annulment. I request that it be annulled.
8. As per the constitutional provisions to ensure the representation of indigenous nationalities, women, *dalit*, *Madhesi*, backward regions and other classes in the Constituent Assembly, these groups and classes have been represented in the Constituent Assembly. Therefore, the claim of the petitioners is not valid according to the constitution and the laws and is deserving of annulment. I request that it be annulled.
9. I request that when this writ petition comes before the bench that the defense and the arguments of the government lawyer representing this ministry be considered an integral part of this written reply.
10. I hereby respectfully request the honourable court that on the basis of the arguments and evidence put above, the writ petition be annulled.

Gopal Kirati, Minister
Ministry of Culture and State Restructuring, Singhdurbar, Kathmandu
Date: Chaita 20, 2065 B.S. (April 2, 2009)

ANNEX C (unofficial translation)

Committee for Protecting the Rights of Minority and Marginalized Communities

Concept Paper and Preliminary Draft Report of the Committee (2009): Conclusions and Recommendations

3.1 Conclusion

The Committee has come to the following conclusions by studying and analyzing the opinions and suggestions provided by experts through institutions and on an individual basis as well as by using questionnaires circulated by the Committee in order to include the opinions of ordinary people.

1. **Definition**

a. **Definition of a minority community:**

1. There is no unanimously accepted definition of a minority community. In this regard, on the basis of available information and statistics, it would be appropriate to define the minority communities by classifying them according to the three categories that follow:

- Caste minority

- Religious minority
- Linguistic minority

b. **Definition of a marginalized community:**

2. There is no unanimously accepted definition of a marginalized community. Generally, a marginalized community is understood to be a community that is impoverished economically, socially, educationally, politically, linguistically, ethnically, religiously, territorially or based on gender and sexual orientation. Highly marginalized and moribund communities are included within the definition of marginalized community.

c. **Definition of an excluded community:**

3. There is no unanimous definition of an excluded community. Generally, an excluded community means a community that has been labeled as "untouchable"; or a community that has been racially, linguistically, socially, culturally, sexually and/or regionally discriminated against or suppressed; or those communities that have not had the opportunity to be included in the State structure on account of mental and physical disabilities.

2. The Basis of Identification

a. The basis of identification of a minority community:

4. There is no unanimously accepted basis for the identification of a minority community. Generally, there are two bases for identifying a minority community:

- Those communities who have been subject to all forms of State suppression and discrimination

- Those communities who have suffered from such discrimination and suppression and who are religious, linguistic and ethnic minorities (numerically)

b. The basis of identification of a marginalized community:

5. There is no unanimously accepted basis of identification for marginalized community. Generally, the following will be the basis for identifying a marginalized community:

- Communities that have been made backward in one or more of the following ways: social, economic, educational, political, racial, linguistic, regional, religious, or gender

c. The basis of identification of communities that have been excluded, made backward or have voluntarily isolated themselves:

6. There is no unanimously accepted basis of identification for communities that have been excluded, made backward or have voluntarily isolated themselves. Generally, there are four bases for identifying these communities:

- Communities that have been racially discriminated against or labeled as untouchable; or
- Communities that have been linguistically, economically, socially, culturally, sexually or regionally discriminated against or suppressed; or
- Communities with physical and mental disabilities;
- Communities that have not had an opportunity to be included in the state culture.

3. Provision for Protection

7. The forthcoming constitution should grant the following rights to individuals from minority communities in order to protect them effectively:

a. **Right against discrimination:** the constitutional guarantee of equal rights and treatment and non-discrimination for minority communities. Any laws, policies, regulations, plans, discriminations and treatment that call for differential treatment of an individual member of a minority community shall be deemed null and void.

b. **Right against discrimination on the basis of race and untouchability:** the constitutional guarantee that any discriminatory action on the basis of race and untouchability shall be considered a severe offence against humanity and shall be deemed punishable.
c. **Right to live with identity:** the constitutional guarantee to live with one's own identity, equality and prosperity in equal status with citizens from other communities.
d. **Right to exercise, protection and promotion of one's own religion, language, script and culture:** an individual from a minority community has the prerogative right to exercise, protect and promote the religion, language, culture and script associated with the community's identity in public and private life.
e. **Right to participate:** an individual from a minority community shall have a right to participate in economic, social, religious, political, educational, administrative and public life and be ensured of the right to participate in the making of decisions concerning their community at national, regional and local levels.
f. **Right to establish and run organizations:** an individual from a minority community shall have a right to establish and run organizations in order to protect and promote their racial, linguistic, religious, cultural and fundamental identity.
g. **Right to establish free and peaceful relations with other communities:** an individual from a minority community shall have the right to establish free and peaceful relations with other individuals or institutions from other minority communities, both national and international, who are of similar racial, religious or linguistic composition so long as these relationships do not affect the national interest.
h. **Right to exercise individual and collective rights:** the rights of an individual from a minority community shall be ensured both individually and collectively.
i. **Right not to be deprived of access to benefits:** an individual from a minority community shall not be deprived of the right to obtain State benefits or services on the basis of exercising or not exercising their community rights.

8. The forthcoming constitution should grant the following rights to individuals from marginalized and excluded communities in order to protect them effectively:

a. **Right against discrimination:** the constitutional guarantee of equal rights and treatment and non-discrimination for marginalized and excluded communities. Any laws, policies, regulations, plans, discriminations and treatment that call for differential treatment of an individual member of a marginalized and excluded community shall be deemed null and void.
b. **Right against discrimination on the basis of race and untouchability:** the constitutional guarantee that any discriminatory action on the basis of race and untouchability shall be considered a severe offence against humanity and shall be deemed punishable.
c. **Right to participate:** an individual from a marginalized and excluded community shall have a right to participate in economic, social, religious, political, educational, administrative and public life and be ensured of the right to participate in the making of decisions concerning their community at national, regional and local levels.

4. Measures for Inclusion in State Affairs

9. The following should be measures for inclusion in State affairs of minority, marginalized and excluded communities:

a. **Measures for Racial Inclusion:**

- Equal treatment to all castes and ethnicities should be ensured,
- Elimination of discrimination on the basis of race and untouchability should be ensured,
- Restoration of human dignity should be ensured,
- Special provisions for racially impoverished, excluded, voluntarily isolated, minority, marginalized, and moribund communities should be ensured.

b. **Measures for Linguistic Inclusion**

- Equal treatment of all languages should be ensured,
- Equal use, protection and promotion of all languages should be ensured,
- The end of linguistic discrimination should be ensured, and
- Special measures for isolated, excluded, minority, marginalized or moribund languages should be ensured.

c. **Measures for Religious Inclusion:**

- All religions should be treated equally,
- Equal protection, exercise and promotion of all religion should be ensured,
- In order to realize the principle of secularism, religious discrimination should be ended,
- Customs which are negative and contrary to human values and norms should be ended, and
- Special provision for the protection of impoverished, voluntarily isolated, marginalized, minority or moribund religions should be ensured.

d. **Measures for Gender and Sexual Inclusion**

- Equal treatment of all genders and sexes should be ensured,
- The end of gender and sexual orientation-based discrimination should be ensured,
- The recognition of third gender identities should be ensured, and
- Special measures should be ensured for individuals who have been excluded based on gender and sexual orientation.

e. **Measures for Economic Inclusion**

- Equal access to and control over the distribution of State resources should be ensured,
- Equal participation of all concerned citizens in public policy program formulation, implementation and evaluation should be ensured,

- Proportional access to and control over the relatively equal distribution of State services and privileges for all citizens should be ensured,
- Equality in all economic opportunities for all citizens should be ensured,
- The use of local skills, labor, capacities, and efficiency should be ensured, and
- Special measures for the economic protection of impoverished, voluntarily isolated, marginalized, minority or moribund individuals from all castes, ethnicities, religions, creeds, genders, third genders, disabled groups, classes and regions should be ensured.

f. **Measures for Political and Administrative Inclusion**

- Equal access and proportional representation in politics and political processes for people from all castes, ethnicities, religions, languages, creeds, genders, third genders, disabled groups, classes and regions should be ensured,
- Equal access and proportional representation in public authorities for people from all castes, ethnicities, religions, languages, creeds, genders, third genders, disabled groups, classes and regions should be ensured, and
- Special measures for politically and administratively excluded castes, ethnicities, religions, creeds, genders, third genders, disabled groups, classes and regions should be ensured.

g. **Measures for Regional Inclusion**

- Equal treatment for all regions should be ensured,
- The end of regional discrimination should be ensured,
- A federal and decentralized government system should be ensured,
- Equal distribution of means and resources should be ensured,
- Equal access and distribution of State services and privileges for all regions should be ensured,
- Regional decentralization of rights should be ensured,
- Balanced development should be ensured,
- Participation of concerned groups in public policy planning and program formulation, implementation, observation and evaluation should be ensured,
- The use of local skills, labor, capacities, and efficiency should be ensured, and
- Special provisions for those individuals who are excluded or isolated based on their regions should be ensured.

The above-mentioned rights, subject of measures and natures in paragraphs number 7, 8 and 9 should be incorporated in various provisions of the constitution, e.g. preamble, chapters, articles and sub-articles as applicable.

Limitation on exercise the right of Minority, Marginalized and Excluded Community

10. Rights or Freedoms are not absolute *albeit* they are relatively limited so absolute and unlimited rights or freedoms are not possible. State can impose restrictions over these rights and freedoms conditionally. Thus, the rights and

freedoms granted of Minority, Marginalized and Excluded community should be restricted partially or fully on following grounds:

- Sovereignty,
- National Integration,
- Jeopardize harmony, tolerance, among various caste, ethnicity, religion and sects ,
- Defamation ,
- Contempt of Court,
- Jeopardize public peace and security,
- Any action against public health, courtesy or morality

3.2 Suggestions:

On the basis of aforementioned conclusion, the committee makes following suggestions. The suggestions are appropriate to address.

3.2.1 Definition

(a) Definition of Minority community
In the context of Nepal, following definition shall be construed limiting to racial minority, linguistic minority and religious minority.
"Minority Community means that community who are discriminated and suppressed by the state. The world "Minority" refers to the less numbered community that has been facing suppression.

(b) Definition of Marginalized community:
2) The Marginalized community shall be defined as follow:
"Marginalized community means the community who is improvised economically, socially, educationally, politically, racially, linguistically, religiously, regionally, sexual orientation and health. The term also refers highly marginalized and moribund community. "

(c) **Excluded and Forced isolated community**
3)

"The Excluded and forced isolated community means that community who is deprived from opportunity to be participated in the state structure due to the linguistic, economic, social, cultural, disable or sexual orientation discrimination"

3.2.2 The basis of identification to the Marginalized community:

4) Minority community shall be defined as follows:
- Community who faced all forms of discrimination and suppression by state, and
- Less numbered r religious, racial ad linguistic community who are facing such types of discrimination and suppression.

(b) Identification basis of Marginalized community:
5)
- Community who is improvised on the basis of economic, social or political, racial, health or sexual orientation.

(6)

3.2.3 Provision for Protection

8. Following rights should be granted in the forthcoming constitution.

(a) **Right against discrimination**- The Constitutional guarantee of non-discrimination from state and laws on the equal right, dignity and treatment to a person of Minority on the basis of equal footing to a person of other community. Constitutional guarantee of any law, policy, regulation, plan, and treatment inter *alia* action of differential treatment to a person of minority shall be deemed punishable.

(b) **Right against racial discrimination and unsociability** -