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The rights of Dalit women

CLAIRE MCNEIL AND ANOUSKA PERRAM



DEC 05 - When a diarrhoea epidemic strikes in Nepal, it comes as no surprise that a disproportionate number of the victims are Dalit women. When a village woman is stoned for practicing witchcraft, it is understood that she is Dalit. Despite the fact that untouchability was legally abolished in 1963, Dalit women in Nepal still struggle in their everyday lives against multiple forms of discrimination. Dalit women suffer not only as Dalits, nor only as women, but as Dalit women and as the poorest citizens in Nepal. Can we create a new Nepali Constitution that will deliver on its promises of equality and make changes in the lives of Dalit women?

Poverty and discrimination prevent Dalits, and particularly Dalit women, from accessing food, water, temples, healthcare services, education, citizenship, and other essential services. Domestic violence, rape and other forms of gender violence impact them disproportionately because of their marginalized social status. Even within the Dalit community, Dalit women are disadvantaged: Dalit women, for example, are twice as likely as men to be illiterate.

In 2009 Dalit women want to know: will it be any different this time around? For the first time ever, the Constituent Assembly (CA) includes 24 Dalit women representatives, and 197 women. With this new, more representative CA, will the Constitution offer true change — or will it be nothing more than a piece of paper?

The process for Constitutional reform has reached the point where most CA Committees have released their concept papers. What these papers tell us is that the CA is looking to include an important shopping list of “rights”, from freedom of thought and religion to the right to equality, food, health, housing, education, social security, environment and employment. Significantly for the Dalit community, discrimination and exploitation based on caste are specifically outlawed. These are positive signs.

However, when we look a little closer, the effectiveness of these rights is questionable. Several of the rights contain loopholes for Government to evade its commitments — because they are dependent on the Government’s future willingness to make national laws to implement them. In this sense, the current draft of the new Constitution looks more like a promise of a Constitution than a real commitment to human rights.

Let’s take the right to higher education for persons belonging to a disadvantaged class. The proposed right sounds good — until we get to the final words of the recommended provision “as prescribed by law.” These words mean that, for the right to have any substance, a future government must pass legislation regarding access to higher education. If the government does nothing, this right will become yet another empty Constitutional promise.

What about the right to equality? The draft concept paper certainly provides that the State shall not discriminate based on gender and caste. However, the law does not clearly protect against both direct discrimination (where someone intends to discriminate) and indirect discrimination (where no intention to discriminate can be proven but nonetheless, a disadvantaged group experiences a disproportionate burden). Indirect or systemic discrimination often results from governments overlooking marginalized communities in their planning and service provision — a problem which, as the Dalit community knows, certainly exists in Nepal.

Take for example the diarrhoea epidemic in Jajarkot earlier this year. Given the Dalit population is disproportionately high in Jajarkot, the government’s failure to provide adequate health and social services in this particular district can be seen as an example of indirect discrimination.

Direct forms of discrimination are easier to identify and thus eradicate, but systemic injustice is arguably a greater challenge to disadvantaged groups such as Dalit women. To be effective, the equality rights provisions in the Constitution need to protect against both. If the intention is to include both types, why not say so? It can only strengthen the Constitutional equality provisions.

For Dalit women, however, by far the biggest gap by far in the proposed Constitution is the lack of a clear guarantee of their inclusion in the Nepali State. It is no coincidence that the first Dalit women were elected in Nepal only after the adoption of a reservation system that made specific provision for Dalit women. Nor is it coincidence that Nepal’s first domestic violence law was passed after women’s representation increased. Representation is important. Dalit women, and other marginalized groups, need this to be recognized in the Constitution.

At present, however, the guarantees of proportional representation are extremely vague. In fact, political parties have reportedly agreed that Dalits should be guaranteed only 3% representation at central level — despite the fact that they make up at least 13% of the population.

Similarly, the committees propose that women should be guaranteed 33% representation in the legislature. But why only 33%? Women are just over 50% of the population in Nepal, and they are entitled to 50% representation in political

Finally, it is essential that all fundamental rights in the Constitution — and the right to proportional representation — are enforceable in the courts by any Nepali citizen. At present, the Fundamental Rights Committee is suggesting that economic, social and cultural (ESC) rights should not be enforceable under the Constitution, but under a future law to be passed by government. This is not acceptable. The Constitution provides the rules that everyone, and especially the government, must follow. It is essential that the Supreme Court has the power and authority to judge whether the government lives up to the human rights standards in the Constitution.

Naysayers may say that Nepal does not have the resources to implement all ESC rights immediately. However, it is a well-recognized principle of international law that ESC rights are subject to progressive realization, according to the resources available to the State. Rather than removing legal accountability for the government, the Constitution should simply recognize this principle. By doing this, the government remains accountable for the policies it adopts (or fails to adopt) towards the achievement of these objectives.

What is to be done? Those in support of a just society need to make their voices heard. Here are four points that at a minimum should be adopted in drafting the new Constitution.

1. Include specific wording to protect against both direct and indirect forms of discrimination.
2. Remove all restrictions on the enforceability of the Constitution including “as prescribed by law” or “as provided by law”.
3. Remove section 31 of the Fundamental Rights Committee proposed provisions, restricting the enforcement of Constitutional rights, and include a direct right for Nepali citizens to appeal to the courts where a violation of any fundamental right has occurred.
4. Include a right to proportional representation in elected and public bodies for all marginalized groups, on an equal gender basis, and for women overall.



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