Designing Affirmative Action for Nepal: A Tour of the Choices and Problems

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The effort, contributions and support of many made this two day event possible. We are extremely grateful to Professor Marc Galanter for coming to Nepal and sharing his experiences with us and for raising important questions. We would like to thank International IDEA for providing the funds necessary to organize this two day event. We are also thankful to the Fulbright Commission and Action Aid for supporting us with additional funding. The board of directors offered strategic advice and participated as chairpersons for the events. We would to like to express our heartfelt gratitude to each member of the board. During the Discussion with the Constituent Assembly members and the SAMATA Annual Lecture, political leaders and civil society activists presented their views on affirmative action. We would like to thank the distinguished speakers for their insights that added more color to Professor Galanter's presentation. We would also like to acknowledge the contribution of deputy chairperson of Constitution Assembly Hon. Purna Kumari Subedi as the chief guest during the discussion. Moreover, thanks go to Dr. Narendramangal Joshi and Erisha Suwal from SAMATA for their effort to make this annual lecture a success. Last but not least, the contributions made by Dr. Rabindra Roy, Rajendra Maharjan and Razen Manandhar to bring this publication into this shape are also duly acknowledged. We thank all the participants for attending and engaging in the discussions.

SAMATA foundation family
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Professor Marc Galanter
The report is on SAMATA foundation's two-day events on "Designing Affirmative Action for Nepal: A Tour of Choices and Problems". Professor Marc Galanter from the University of Wisconsin-Madison presented on the topic. On 22 September 2011, SAMATA organized a dialogue with Constituent Assembly [CA] members, which was attended by 56 participants. In the program, Professor Galanter shared his presentation with 21 politicians, 19 of whom were CA members. Ten politicians were from United Communist Party of Nepal [Maoists] [UCPNM], five from Communist Party of Nepal – United Marxist Leninist [UML], three from Madheshi Janaadhikar Forum [Loktantrik] and three from Nepali Congress [NC]. Among all the CA members present, 15 were Dalit. In addition to Professor Galanter's presentation, other three CA members Hon. Rima Kumari Nepali, Hon. Khadka Bahadur Basyal and Hon. Padamlal Bishwokarma presented their views on affirmative action policies in Nepal. The event ended with questions and answer session.

Although there are 51 Dalit CA members, they have not been able to influence their political parties to support formulation of pro-Dalit policies for the Dalit community in the constitution. The truth behind is the limited access to the policy and decision making process to the Dalit CA members within their respective political parties. The Dialogue with Professor Galanter on affirmative action aimed
to provoke a thoughtful discussion of the various dimensions of affirmative action and the alternative shapes that such policies of inclusion might take.

On 23 September 2011, SAMATA another Lecture, attended by 144 participants. The lecture aimed to create an environment where activists, academicians and other interested individuals can come together to discuss on the issues of social inclusion and transformation. Through these discussions and debates, SAMATA hopes to deepen the discourse on social inclusion and Dalit rights with the underlying objective to influence policy-making process. Such discussions are particularly important today when Nepal stands at a politically challenging juncture with political consciousness of oppressed groups reaching new levels.

The event is part of SAMATA foundation's larger goal to create caste-based discrimination free society and to promote inclusive democracy in Nepal by conducting research, informed-advocacy and building capacity of leaders of next generation from marginalized communities, especially from Dalit community. Established in 2008, SAMATA foundation organized Nepal's first International Dalit Conference titled *Envisioning New Nepal: Dynamics of Caste, Identity and Inclusion of Dalits*. The SAMATA has published a policy brief that analyzed the draft reports of all the thematic committees of the Constituent Assembly to lay out the contradictions and confusion relating to Dalits in the Draft Constitution. The policy brief then provided suggestions to the CA members aimed at promoting Dalit rights. SAMATA also published Suvash Darnal's *The Land of Our Own: Conversation with Dalit Members of Constituent Assembly* and more recently published Ahuti's *Nepalma Varnabyawastha ra Varga Sangharsha [Caste System and Class Struggle in Nepal]*. We are happy to note that chapters from this book have been included as a reference under the Central Department of Sociology and Anthropology, Tribhuvan University in the graduate level. It is the first time that a Dalit's book has been included in graduate curriculum.
At present, SAMATA is conducting research on Dalits and landlessness, citizenship, and education. SAMATA is also reviewing academic and non-academic literature written on the Dalit community to assess what knowledge has been produced on them to ascertain where the gaps are. We hope to get your support as we continue research for policy-making.

Padam Sundas
Chairperson
1. Introduction

1.1 Affirmative Action in Nepal

A long history of oppression, inequality and social exclusion underlies the urgency of affirmative action measures to support Nepal’s nascent democracy. Appreciation of the need for affirmative action for Nepal’s excluded and marginalized groups emerged with the establishment of multi-party democracy in 1990. One manifestation of this concern is the policy of reserved seats for Dalit students only in medical education i.e. MBBS that commenced in 2003. This concern gained momentum after the election of the Constituent Assembly in April 2008. Policies to remedy the exclusion and oppression of Dalit and other groups remain one of the central tasks of the Assembly. As the constitution-drafting process moves forward, a need to have vigorous examination of possible measures emerges for affirmative action that engages the conditions prevailing in Nepal.

SAMATA foundation's policy paper titled *Confusion in Dalit Transformation in the New Constitution of Nepal* examines the drafts presented by various thematic committees under the constitutional committee to understand what provisions have been made for
representation of the Dalit communities. Findings related to affirmative action in policies related to political representation, right to education and employments are as follows:

**Political Representation**

Political representation entails Dalit representation in different state bodies. The policy paper reviews provisions for Dalit representation in the legislature, executive, judiciary, constitutional bodies, civil administration, army and police. The findings illuminate that proportional representation of Dalit communities, which fall within the larger category of minorities and marginalized communities, is theoretically accepted, but it is not clear how it will be realized. Moreover, the policy paper also discovered that right to Dalit representation along with compensation is provided for in certain drafts such as the one from the Committee on Fundamental Rights and Directive Principles and the Committee on the Protection of the Rights of Minorities and Marginalized Communities. However, nothing is mentioned on the basis of such compensation or whether compensation is additional to proportional representation. Therefore, inclusion of provisions for proportional representation in all organs, bodies and sectors of the state structure, along with compensation to be determined by law, should be elaborated upon. The basis for compensation and strategies of implementation and enforcement remains should be explained.

**Education**

The Draft of the Committee on Fundamental Rights and Directive Principles provides bases for universal free education up to the higher level. However, it fails to provide for education with scholarships to the children from the Dalit community. The drafts provide the Dalit community with the right to special opportunities in education on the basis of positive discrimination along with compensation for past
discrimination. Once again, it does not mention how the policies on positive discrimination towards Dalits in the education sector will be enforced. The drafts fail to address the issue of setting aside quotas in technical education for the Dalit community and of providing them with opportunities for free technical education along with scholarships.

The draft of the Committee on Fundamental Rights and Directive Principle states that special opportunities on the basis of positive discrimination in education, health, employment and social security will be provided for the Dalit community. Furthermore, it mentions that the state will make special provisions in law to compensate for the past oppression against the Dalits.

**Employment**

Although the draft from the Committee on State Restructuring and Distribution of State Power provides for proportional representation in governmental, semi-governmental sectors, industries and industrial enterprises, and for the development of the traditional business of Dalit, it does not mention that the state is responsible for modernizing, professionalizing and industrializing the traditional occupations of the Dalit community. There is little chance that the Dalit community members will win priority in programs to be included in modern professions and business.

The overall impression one gets from the provisions relevant to affirmative action in the drafts presented by different thematic committees for drafting the constitution is that there is no direct mention of affirmative action. Nonetheless, the state appears to be committed towards proportional representation and in certain cases, compensation too. The drafts are, however, silent on how to ensure proportional representation. In this context, Professor Galanter's presentation equips with key questions that need to be raised when thinking of affirmative action or implementation of proportional representation.
1.2 Dialogue with Constituent Assembly Members and SAMATA Annual Lecture

The main objective of the discussion and SAMATA Annual lecture I is to bring Professor Galanter, an expert on affirmative action in India to present on: "Designing Affirmative Action for Nepal: A Tour of Choices and Problems." The presentation aimed at providing a point of departure for political leaders, activists, scholars, civil society members and students to discuss, debate and determine the appropriate modality of affirmative action for the Dalits in Nepal. In addition, SAMATA believes that Professor Galanter's presentations will provide an opportunity to reexamine accumulated knowledge and insights on South Asian history and the theory of affirmative action to find solutions for Nepal.

During the dialogue with Constituent Assembly members, Professor Galanter presented justifications for affirmative action and a range of questions that have to be raised while designing affirmative action programs. His presentation was followed by short responses from three Dalit CA members belonging to the three major political parties: Hon. Rima Nepali from CPN [UML], Hon. Khadka Bahadur Basyal from NC, and Hon. Padmalal Bishwokarma from the UCPN [M]. The Chief Guest Hon. Purna Kumari Nepali closed the formal program with her reflections on the lecture. A question and answer session with other CA members followed. Nineteen CA members from the four major political parties were present. Among them, 15 were Dalit. Some other members from civil society were also present. There were in total 56 participants in the program.

The first SAMATA Annual Lecture was launched with Professor Galanter's presentation as well; 144 people representing Dalit organizations, NGOs, INGOs, attended the lecture and participated in the discussion. Following Professor Galanter's lecture, two political party leaders and a public intellectual presented their views on the lecture and contextualized the lecture. The three distinguished speakers
were Hon. Khimlal Devkota, CA member from UCPN [Maoists]; Hon. Rampreet Paswan, CA member from CPN [UML]; and Shyam Shrestha, a public intellectual.

1.3 Brief biographies

**Prof. Marc Galanter** is the John and Rylla Bosshard Professor of Law and South Asian Studies at the University of Wisconsin, Madison. He studies lawyers, litigation and legal culture. He has worked intensively on such questions in the United States, the United Kingdom, Israel and India. He is recognized as a leading American student of Indian law. In particular, he has for half a century been a close student of India’s policies of affirmative action. He is the author of *Competing Equalities: Law and the Backward Classes in India* [1984; 1991] and *Law and Society in Modern India* [1989; 1992] and many articles on the legal system and legal culture of India. He has lectured on Indian legal developments at dozens of universities and professional groups around the world. He is currently engaged in research on access to justice in India and in preparation of a new edition of his classic work on affirmative action in India.

He has been editor of the *Law & Society Review*, the leading journal on the empirical study of the legal system, president of the Law and Society Association, chair of the International Commission on Folk Law and Legal Pluralism, a member of the council on the Role of Courts, a Guggenheim Fellow, and a Fellow of the Center for Advanced Study in the Behavioral Sciences. He is a member of the American Law Institute and a Fellow of the American Academy of Arts and Sciences. Until recently, he was the LSE Centennial Professor at the London School of Economics.

**Hon. Purna Kumari Subedi** is currently the deputy chairperson of the Constituent Assembly. She was elected in the CA representing from UCPN [Maoist] and was one of the 24 women to win elections under the First Past The Post [FPTP] system from Banke-4.
Hon. Rima Kumari Nepali is a CA member through the Proportional Representation [PR] system from Rapti and belongs to CPN [UML]. Nepali became active in politics to fight against the injustices directed at Dalits and women during the autocratic Panchayat regime.

Hon. Khadka Bahadur Basyal is a CA member through PR system representing the NC from Surkhet. Basyal played an important role in promoting the Dalit movement in Nepal. He was also the chairperson of the Nepal Dalit Organization, a sister organization of NC.

Hon. Padmalal Bishwokarma is a CA member through the PR system from Ilam representing the UCPN [Maoists]. He is the vice-chairperson of the Maoist affiliated Dalit Liberation Front. He has worked as a lecturer at Butwal Multiple Campus and Mahendra Multiple Campus in Morang, and as adjunct professor at Tribhuvan University. Bishwokarma has played an important role in establishing the Dalit movement through regular publications in newspapers, magazines and books.

Hon. Khimlal Devkota, a lawyer, is a CA member through the PR system representing from UCPN [Maoists] from Kaski. He is active member in the constitutional committee of constituent assembly.

Hon. Rampreet Paswan is a CA member through the PR system representing from CPN [UML] from Saptari. Paswan became a member and vice-chairperson of the National Assembly in 2001. He chaired the street-parliament during the royal regime and helped to uplift the People's Movement into greater heights. He is the recipient of the Bhim Rao Ambedkar International Award from Indian Dalit Sahitya Akademi.

Shyam Shrestha is a civil society activist and a coordinator of The Campaign for Progressive Transformation. He is a renowned political analyst and a former chief editor of Mulyankan Monthly magazine.
2.

Designing Affirmative Action for Nepal:
A Tour of the Choices and Problems

Prof. Marc Galanter

Let me begin by acknowledging something that you will quickly discover: that I know very little about Nepal. For many years I have been engaged in analyzing India’s programs of affirmative action [as they have come to be called]. From time to time, I have also looked at counterpart programs elsewhere in the United States, South Africa, Israel, and Brazil. Affirmative action programs tend to touch very sensitive issues about the deep structures of identity and society. It takes no special insight to conclude that social and political situation here in Nepal is extraordinarily complex and contested. As an outsider, I cannot bring you answers because at the bottom, these entail political choices that only Nepalis can make. What I propose to bring you are questions. I hope that I can use my perspective as an outsider to articulate the questions involved in this enterprise, questions which I hope will reveal and clarify some of the choices you face when you design a program of affirmative action.

But, before we plunge in to designing a program, it is useful to think about why we should have such a program and what we are trying to accomplish.
I. Justifications for Affirmative Action Policies

What is the basis for our affirmative action (AA) policy? There are several distinct justifications for AA. They are often entwined in practice. But we can separate out three sorts of justification for affirmative action policies, which I label - the non-discrimination, the general welfare, and the reparations themes.

A. The non-discrimination theme. We are establishing a new regime of equal treatment in a society in which inequality and oppression have been long established. Affirmative action may be viewed simply as an extension of the new norms of equal treatment to the Dalits. We know that even when long standing invidious discriminatory standards are abandoned and repudiated, there remain subtle and tenacious forms of discrimination and structural factors, which limit the effective application of new norms of equality. Aspiring members of previously victimized groups encounter biased expectations, misperceptions of their performance, and cultural bias in selection devices; they suffer from the absence of informal networks to guide them to opportunities; entrenched systems of seniority crystallize and perpetuate the results of earlier discriminatory selections. Thus, norms of nondiscrimination in present distributions are insufficient to erase or dislodge the cumulative effects of past discrimination. So we embrace AA to counter the residues of discrimination and to overcome structural arrangements, which perpetuate the effects of past selections in which invidious discrimination was a major determinant. In this non-discrimination view, affirmative action serves to assure personal fairness to each individual applicant. Since the earlier discrimination was on the basis of membership in specified groups, we can employ group membership to identify those individuals who require special protection in order to vindicate their claim for selection on grounds of personal desert. That is the non-discrimination theme.
B. The general welfare theme. On the other hand, affirmative action may be advocated, not as a device to assure fairness to individuals, but as a means to produce desired social outcomes — e.g., to reduce group disparities, to afford representation to the underrepresented and bring their voices into public deliberation, to encourage the development of wasted talent, or simply to reduce friction and promote communal harmony and so forth. In pre-Independence British India, arrangements for reservations were justified on such "functional" grounds; as are the various preferences for "Oriental" Jews in Israel today. Americans are familiar with the "balanced ticket" and other arrangements by which shares are apportioned among various constituencies in the expectation that abrasive disparities are kept in bounds, participation is spread out, representation is secured, and government responsiveness is assured. The units in such functional "welfare" calculations are groups rather than individuals. In these schemes, the chances of individuals are affected by the rearrangement of the chances of groups. But the guiding purpose is not to rectify discriminatory selection among individuals, but to introduce a standard quite distinct from personal desert.

The contrast of non-discrimination and welfare themes is displayed in imaginary alternative proposals for admitting more members of Group Z to medical colleges. The non-discrimination proposal might argue that selection procedures be revised to eliminate subtle bias which impinges on individual Zs — e.g., culturally biased tests or differences in networks for acquiring recommendations. The general welfare proposal might argue that more Zs should be admitted in order to equalize the distribution of medical services or to enlarge representation of Z views in making health policy or to afford non-Z doctors the experience of fellowship with Zs. The goal is not a non-discriminatory selection among individual applicants, but a selection that optimizes specified social goals. Such a selection might diverge from that which would be dictated merely by the prospects of individual performance on the job, because it defines the job to
include symbolic, representational, and educational aspects that may not be included in the conventional job description.

C. The reparations theme. In some cases, affirmative action policies have yet another root - that a history of invidious treatment has resulted in accumulated disadvantages, which are carried by certain groups. No matter how fair and unbiased the measures employed for distributing benefits in the present, the victims of past injustice will not fare well in terms of current performance. To distribute benefits by “neutral” performance, standards will perpetuate and amplify the unjust exactions and exclusions in the past. Fairness, then, demands that present distributions be arranged to undo and offset old biases, not to perpetuate them.

Like the non-discrimination theme this is a fairness argument. It is not a welfare argument, although it may be accompanied by the assertion that society as a whole will be better off if justice is pursued here. But the reparations argument is different from the argument suggested by the nondiscrimination theme because it regards groups in a different way. It understands groups as the carriers of historic rights rather than as indicators of individual victimization. And it looks to a very different time frame. Welfare arguments are prospective—they look to results in the future; nondiscrimination arguments look at the present situation and seek to refine out lingering inequalities. The reparations theme sees the present as an occasion to reckon accounts for the past injustice. Proponents of all three of these themes may agree on a proposed measure. But it is worth remembering these different justifications because it will help us to understand profound differences among those who declare their support for affirmative action.

II. A Simplified Model

So let us look at the choices that are involved in constructing an affirmative action program. I shall present a schematic model, which
I hope will be useful in pointing to some of the major problems and trade-offs that we encounter. Obviously this kind of schematic treatment, abstracting from the complexities, conflicts and passions of real social settings, embalms the subject, wringing out the meaningful particulars and the layered passions. But the goal of this exercise is not to convey the full complexity of the real world, but to simplify it so that we can see what might otherwise be obscured. It is an X-ray; not a portrait.

To provide common shorthand, I shall construct a model of a society and its affirmative action policy. Imagine the XYZ society, composed of three hereditary groups of people: the Xs, Ys, and Zs. Each of these groups is itself a composite, made up of sub-sections with their own history; the groups have a somewhat different geographical distribution, so there are areas in which each is a majority and others where it is a minority. In some but not all cases Xs, Ys and Zs are visually distinguishable from one another, but in most cases they are not.

In recent centuries, the Xs have dominated the society; they have severely restricted the Zs' opportunities for political participation, economic activity and educational advancement; the opportunities of the Ys have also been restricted, but not as severely. In interaction with other factors [for example, geographic isolation], these restrictions have accentuated original differences in power, wealth and education, so that the present distribution of power, wealth and education is quite unequal, with the Xs having the most of all these valued goods, the Ys considerably less, and the Zs far less than that. Within each of these groups, women enjoy fewer advantages and endure more restricted life chances than men.

The XYZ society is in the process of conferring on itself a new political dispensation in which previous relations of domination by the Xs are relinquished and a new regime of "equal rights" is established. Aware that, given the accumulated inequalities of resources, a regime
of formal equality may perpetuate or even accentuate the differences in wealth, power and accomplishment, they seek a program of affirmative action that will permit the Ys and Zs to enjoy equal dignity and to catch up economically, politically, and culturally. They hope to do this without abandoning the notion of open merit competition for the various rewards society has to offer.

As a start, the planners envision three sorts of affirmative action programs. [1] a program of medical school admissions for Ys and Zs; [2] a program for recruitment of entry level clerks in government service; [3] a pre-school tutoring program in which enrichment and preparation for school are provided to young children. The planners are also concerned that a significant share of the benefits under these programs goes to females in the hope of lessening and eventually overcoming their disadvantages.

This medical admissions program is one that will benefit the best off among the Ys and Zs — those with a prior endowment of education, family stability, etc. Only that small minority of Ys and Zs who are able to negotiate the various hurdles of school, college, etc. will be able to utilize this benefit. It is a high-echelon benefit that can only be used by those who have considerable resources. In contrast, the pre-school tutoring program is a low-echelon benefit that is available to almost all Ys and Zs. It requires little in the way of matching resources or prior preparation to use it. The government clerks program is a middle-echelon benefit, somewhere in-between; it is accessible only to those with certain educational attainments. We should note that high-echelon benefits do not necessarily require a greater expenditure of state resources. In fact, it is frequently the case that high-echelon benefits are cheap and easy and low-echelon benefits are costly and difficult. [But recall that programs that are cheap for the state may impose large costs on specific individual citizens].

Let us consider the kinds of decisions that have to be made in designing these programs:
III. Source[s] of Policies

A. First there is the question of who is to make AA policies?
   1. Are they to be ordinary legislative enactments? Or;
   2. Written into an easily-amendable constitution? Or;
   3. Written into a hard-to-amend constitution; or; and
   4. Entrenched beyond the ordinary process of amendment.

B. Federalism Considerations: To the extent that the constitution authorizes AA programs, these can be designed and enacted:
   1. Exclusively by the Central Government; or
   2. Exclusively by Provincial/State or Local governments; or
   3. These powers may be shared or distributed among Central and other governments; or
   4. Each agency, department, university, etc. is authorized to enact its own AA programs.

C. Then there is the question of the modality of the constitutional provisions:
   1. The Constitution may itself include specific provision for AA [for example, reserved seats in Parliament]; or
   2. The Constitution may mandate AA programs; or
   3. The Constitution may authorize various bodies to enact such programs.

D. The Scope of Affirmative Action:
   1. Should AA be confined to public employment and education?
      a. Should some jobs and schools are exempt?
   2. Should private businesses and educational institutions be included in the general government programs? Or should they be required to have their own AA programs?
E. The Time Dimension: How long should such provisions [or mandates or authorizations] endure?

1. AA provisions may be without time limits; or
2. They may be time-bound, but subject to extension by ordinary means; or
3. Time-bound and unextendable [at least without extraordinary exertion]

IV. Selection of Beneficiaries

A. How will the eligible classes of beneficiaries be selected?

1. Globally for all programs; or
2. Program-by-program?

B. Who will do the selection?

1. Legislative bodies?
2. Or a special body [standing, one-time, periodic]?
3. What provisions for review/modification of selection?

C. Will the beneficiaries of these policies be selected by?

1. Membership in named communities [castes, tribes, etc.].
   a. by what criteria will these be selected?
      i. Historic subordination
      ii. Aggregate economic, educational disadvantage
      iii. Isolation

   b. Will there be disqualification for the well-off individuals/families/sub-groups within the group? [Compare the Indian “creamy layer” concept].
      i. Should benefits be limited to one [or more] generations of beneficiaries in a given family?
c. Such limits could apply to some benefits but not others:
   1. Geographic criteria [remote, undeveloped]
   2. Gender
   3. Personal disability
   4. Economic criteria [income, occupation, etc.]
   5. Incidents of personal history [for example, those who suffered in the "People's War"]

V. Determination of Individual Eligibility

A. If eligibility on economic grounds
   1. Whose income or occupation? Parents? Extended family?
   2. Are there authoritative records? If not, how to certify?

B. If eligibility is on grounds of membership in a group
   1. Does one become a member of the group by birth [do both parents have to be members or is one sufficient?]
   4. Does membership depend on the views or rules of the group itself? On the perceptions of others? On some general rules for recognizing such membership?
      a. Is membership exclusive—so that a person can be a member of only a single group?
   5. How is group membership going to be certified?
      a. Will membership be recorded as a public record?
      b. Will self-report be unchallengeable?
      c. Will determination by the group be conclusive?
6. Who decides when group membership is challenged? Agency? Court?
   a. Should it apply clear-cut mechanical rules or engage in individualized weighing? Assume that these questions were resolved to the planners' satisfaction, at least for the moment, and our three AA programs were established. How should they operate?

VI. How Much?

A. What portion of national resources should be spent on such programs? For example, what portion of medical school places should be reserved for the Ys and Zs?

1. Should it be a fixed portion?

2. Should the portion be proportionate to the proportion of Ys and Zs in the population? Or the portion of Ys and Zs in the pool otherwise eligible to compete? Or, should its magnitude be determined by other factors, such as the need for Y and Z doctors or educated leaders?

3. Should the specified reservation be "over and above" those who are selected on "merit?" Or, should the reservation act as a guaranteed minimum for the beneficiary group, rather than an entitlement apart from any members of the group who succeed on "merit?" [Note that the guaranteed minimum type of reservation is self-liquidating. If the performance of the beneficiary group improves, the net reservation delivered by a guaranteed minimum system will decrease correspondingly. But under an “over and above” system the reservations will continue to divert places even when the performance of the group is no longer wanting. “Guaranteed minimum” programs have their own down side: they can lead to an exaggerated public estimation of the amount of AA benefits that are being conferred.]
4. Should a specified portion be accompanied by [or displaced by] relaxation of age standards, special efforts at recruitment, coaching, etc?

5. Should "reservation"—that is, a specified percentage of seats—be avoided and Ys and Zs instead be given "bonus points" in the admission process? For example, a certain number of additional points could be added to the score of Ys and Zs. Or, women or the disabled or residents of very remote areas. Should points received for being in one category [e.g., Z] be additive to points received for being in another category [e.g., women].

6. Should there be a lower floor on admissions? On performance in medical school?

7. Should there be preferential treatment at later stages as well as at admission?

VII. Distribution within the Beneficiary Groups

A. Should distribution between and within the Ys and Zs be entirely by "merit" — i.e., performance on impersonal tests [that may or may not be predictive of performance on the job]?

B. Or, should these benefits be distributed more widely, merit notwithstanding, among the beneficiary groups? e.g., by apportioning it among component groups within the Zs? Or by reserving some portion for candidates from the most disadvantaged backgrounds?

C. Should there be a single reservation for women candidates? Or separate reservations for women within each beneficiary group?

D. More generally, how should we handle cross-cutting “orthogonal” categories [for example, women, and the handicapped] that cut across the caste and ethnic categories?

E. Should receipt of benefits be conditioned to assure that there would be some flow through of benefits through the individual beneficiaries to the Z community? For example, by a requirement that Z doctors spend a specified period providing medical service to Zs, or that they remain in the country, etc.
VIII. Administering Multiple Groups of Beneficiaries

A. Should benefits for multiple groups of beneficiaries be administered separately or together?
B. Should benefits for the [most deprived] Zs and the [less deprived] Ys be proportional in extent or amount to the relative severity of their deprivation?
C. What happens to benefits that are not utilized by the specified group — do they revert to the general pool or go to the other beneficiary groups?
D. Are members of one beneficiary group exempt from being disadvantaged by AA for others? Are Ys who make it on the bottom of the merit list to be bumped in favor of Zs who are entitled by AA provisions — or are they exempt from bumping?

IX. Oversight

A. Monitors. What mechanisms will there be for dealing with disputes and complaints that arise from the working of the AA policies?
   1. Review by courts [All courts; or higher courts only; or a specialized court for AA issues.]
   2. Ombudsmen [A general ombudsman; or a separate one for AA problems?]
   3. Will administrative bodies [for example, education authorities] be authorized to resolve such disputes?
   4. Will political bodies [for example, Parliamentary committees] be authorized to resolve such disputes?

B. Review: What sort of review of AA policies should such bodies undertake?
   1. Should courts [or other reviewing agencies] give individual relief to claimants; or
   2. Should the reviewing agency be empowered to strike down/modify a whole program?
3. Where AA schemes are challenged, should they be defended by the government or should beneficiaries be entitled to be representation of their own?

4. Should complaints by putative beneficiaries [that schemes are insufficient, underfunded, not implemented] be treated the same as complaints that schemes are unfair to others [excessive, arbitrary, etc.]?

X. Evaluating the Costs and Benefits of Affirmative Action Policies

Affirmative action programs provide benefits, but they are not costless. Like other government programs, they should be examined critically and audited periodically. The evaluation of these affirmative action programs involves a two-stage inquiry. First, there is what we might call the problem of performance. Does the program actually deliver the goods [more jobs or housing or better performance in schools or whatever]? In making such judgments we must be wary of all the pitfalls of measuring program effects. [For example, is improvement the temporary result of increased attention rather than an enduring effect of the program? Is improvement explainable as part of long-term change, such as urbanization or better communications, that is occurring independently of the program?]

Having satisfied ourselves that the program has the projected effect, we then face what we might call the problem of achievement. Do the program’s effects produce the end results that it is supposed to achieve — do more jobs for Zs produce considerate treatment by officials, or stimulate educational accomplishment, or produce social integration? To what extent does delivering the jobs entail the costs alleged by critics of affirmative action — such as stigmatizing the beneficiaries, fomenting group resentments, lowering self-esteem?

What follows is a list of the good and bad effects that are alleged to flow from the performance promised by the program, including
the effects attributable to the specifically preferential aspects of the program. Even if all of these dimensions enter into estimation of the overall working of the affirmative action policy, each of them is involved in every specific scheme. Nor is it implied that they are to be accorded equal weight in making such evaluations. Presumably, specific schemes in different fields [education, housing, etc.] or for different groups have a different mix of intended effects. And, the relative weights to be assigned to those effects [and to unintended by-products] will differ among various participants and observers.

The utility of the list is to remind us of the range of claims and counter claims about the effects of AA measures and to suggest the complexity of any definitive assessment. The right-hand column also provides a useful checklist of the pitfalls that program designers face.

The list asks about programs at a moment of time. It is a photograph; but the program in its actual setting is an ever changing film. Program effects and their achievements change over time, so that recurrent assessment of costs and benefits is needed to enable the program to maximize benefits and minimize costs.

XI. Conclusion

I have been speaking about affirmative action (AA) in a detached, mechanical and instrumental way—which is appropriate when we are engaged with questions of institutional design. But I want to acknowledge that such an approach leaves out the equally important expressive side of such policies/ Affirmative action provisions are a medium through which the national envisions itself and its further, the bonds between its citizens and what it means to be a nation. The details can be worked out, evaluated, revised. But the commitment to the fellowship of equal citizenship is a gift that the nation must give itself first.
Table 1: Alleged Benefits and Costs of *Policy of Affirmative Action*

<table>
<thead>
<tr>
<th>Redistribution</th>
<th>vs.</th>
<th>Diversion</th>
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<tbody>
<tr>
<td>Affirmative action provides a direct flow of valuable resources to the beneficiaries in larger measure than they would otherwise enjoy.</td>
<td></td>
<td>These resources are enjoyed by a small segment of the intended beneficiaries and do not benefit the group as a whole.</td>
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<tr>
<th>Representation</th>
<th>vs.</th>
<th>Misrepresentation</th>
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<tbody>
<tr>
<td>Affirmative action provides for participation in decision-making by those who effectively represent the interests of the beneficiaries, interests that would otherwise be underrepresented or neglected.</td>
<td></td>
<td>By creating new special interests that diverge from those of the beneficiaries, affirmative action obstructs accurate representation of their interests.</td>
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<tr>
<th>Integration</th>
<th>vs.</th>
<th>Alienation</th>
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<tbody>
<tr>
<td>By affording opportunities for participation and well being affirmative action promotes feelings of belonging and loyalty among the beneficiaries, thereby promoting the social and political integration of these groups into the national society</td>
<td></td>
<td>By emphasizing the separateness of these groups, affirmative action reduces their opportunities for [and feelings of] common participation.</td>
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<tr>
<th>Acceptance</th>
<th>vs.</th>
<th>Rejection</th>
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<tr>
<td>Affirmative action induces in others awareness that the beneficiary groups are participants in the national life whose interests and views have to be taken into account and adjusted to.</td>
<td></td>
<td>Preferences frustrate others by what they consider unfair favoritism and educate them to regard the beneficiaries as separate, with their own facilities and having no claim on general public facilities.</td>
</tr>
<tr>
<td>Integrity</td>
<td>vs.</td>
<td>Manipulation</td>
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<tr>
<td>Affirmative action permits forms of action that promote pride, self-respect, a sense of achievement and personal efficacy that enable the beneficiaries to contribute to national development as willing partners.</td>
<td></td>
<td>Affirmative action subjects these groups to manipulation by others, aggravates their dependency, and undermines their sense of dignity, pride, self-sufficiency and personal efficacy.</td>
</tr>
<tr>
<td>Incubation</td>
<td>vs.</td>
<td>Over-protection</td>
</tr>
<tr>
<td>By broadening opportunities, affirmative action stimulates the acquisition of skills and resources needed to compete successfully in open competition.</td>
<td></td>
<td>Affirmative action provides artificial protection, which blunts the development of the skills and resources needed to succeed without them.</td>
</tr>
<tr>
<td>Mobilization</td>
<td>vs.</td>
<td>Enervation</td>
</tr>
<tr>
<td>By cultivating talents, providing opportunities and incentives and promoting their awareness and self-consciousness, affirmative action enhances the capacity of the beneficiary groups to undertake organized collective action.</td>
<td></td>
<td>By making them dependent, blunting the development of talent, undermining self-respect, affirmative action lessens the capacity for organized effort in their own behalf.</td>
</tr>
<tr>
<td>Stimulation</td>
<td>vs.</td>
<td>Sedation</td>
</tr>
<tr>
<td>By increasing the visibility of the beneficiary groups, promoting their placement in strategic locations and emphasizing the national commitment to remedy their condition, affirmative action serves as a stimulus and catalyst of enlarged efforts for their uplift and inclusion.</td>
<td></td>
<td>By projecting an image of comprehensive governmental protection and preferment, affirmative action stirs the resentment of others, allaying their concern and undermining initiatives for measures on behalf of the beneficiary groups.</td>
</tr>
<tr>
<td><strong>Self-liquidation</strong></td>
<td>vs.</td>
<td><strong>Self-perpetuation</strong></td>
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<tr>
<td>The benefits of affirmative action are mutually reinforcing and will eventually render unnecessary any special treatment.</td>
<td></td>
<td>These arrangements create vested interest in their continuation, while discouraging the development of skills, resources, and attitudes that would enable the beneficiaries to prosper without special treatment.</td>
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<tr>
<th><strong>Fairness</strong></th>
<th>vs.</th>
<th><strong>Unfairness</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Affirmative action compensates for and helps to offset the accumulated disablements resulting from past deprivation of advantages and opportunities.</td>
<td></td>
<td>Affirmative action places an unfair handicap on individuals who are deprived of opportunities they deserve on merit.</td>
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<tr>
<th><strong>Individualism</strong></th>
<th>vs.</th>
<th><strong>Communalism</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>By reducing tangible disparities among groups affirmative action promotes the development of a society in which individual achievement is recognized and rewarded.</td>
<td></td>
<td>By recognizing and stimulating group identity affirmative action perpetuates invidious distinctions, thereby undermining recognition of individual achievement.</td>
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<tr>
<th><strong>Development</strong></th>
<th>vs.</th>
<th><strong>Stagnation</strong></th>
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<tbody>
<tr>
<td>Affirmative action contributes to national development by providing incentive, opportunity, and resources to utilize neglected talent.</td>
<td></td>
<td>Affirmative action impedes development by misallocation of resources, lowering of morale and incentive, and waste of talent.</td>
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3.

Discussions

3.1 Day I: Dialogue with CA members

[Note: Discussions have been translated from Nepali and summarized]

Hon. Purna Kumari Subedi
Deputy Chairperson of the Constituent Assembly, UCPN [Maoists]

Thank you for organizing this event. It is important that we learn from other countries' experiences on affirmative action. It is important to give special rights to deprived groups for some time so that they can compete with those who have always been privileged. This opportunity to compete should be given in all aspects of state administration. We need to advocate for special rights.

Hon. Rima Kumari Nepali
CA member, CPN [UML]

SAMATA foundation has been continuously working to empower the minority and to internationalize Dalit discrimination. Today they have presented on positive discrimination, which is an important topic. I would like to thank Professor Galanter for sharing his views, for explaining how to prioritize and what mechanisms to use. On behalf of CPN-UML, I would like to show the party's commitment to take this issue forward. The CA is struggling to complete the constitution
making process. I believe that such a presentation and discussion on positive discrimination should help the discussions in CA. I commit to follow up on the issue of positive discrimination.

Hon. Khadka Bahadur Basyal
CA member, NC

Discrimination against Dalit is widespread and has been going on for a long time. The Government has made pro-Dalit policies such as rewarding one hundred thousand Nepalese rupees [1 USD equals to NPR 76] for inter-caste marriages. At the same time there are Dalits who are made to pay fine for inter-caste marriage. Although policies are made, its effective implementation and monitoring to prevent abuses is not taking place. Inequality in Nepal needs to be addressed because there will not be peace while there is inequality.

Hon. Padamlal Bishwokarma
CA member, UCPN [Maoist]

Professor Galanter has spoken a lot on topics such as who should be given reservations and how to monitor. His talk is timely as we need to put more thought on what kind of perspectives we Nepalis should keep while writing the constitution to ensure positive discrimination. He has rightly mentioned that the constitution-making process is our own and that it is context-driven.

Based on experiences from India and other countries that Professor Galanter has worked in, what we can see is that positive discrimination should not be limited to reservation. There are many other things that need to be considered within positive discrimination. A different practice of positive discrimination is found in Malaysia, where the government has implemented positive discrimination on the majority of people. What I would like to argue is a case of special rights.

Reservation is an outdated medicine to Nepali Dalit. This is our observation in Nepal. It is true that reservations in India have improved
lifestyle of the lower caste people. However, the impact is limited. What we have seen in India is that reservations gave birth to a new class, the creamy layer. And, real Dalits are left as Dalit. Having seen that, as a member of the UCPN [Maoist], I would like to mention that we do not see that Dalit freedom and empowerment will come from reservation. Reservation is limiting in terms of the areas that a Dalit can get access to and the time period of reservation policy. Reservations cannot place Dalit in positions of political power, decision-making or even of technical positions. If Dalit are seen in such positions, it is mostly symbolic. This is also evident from many cases in India. We are trying to find reservation within reservation. We want to find special rights within special rights. Special rights program is additional right on top of proportional representation, based on population in order to compensate for past injustices and discrimination. At least 7 to 10 % additional rights in proportion to the population should be added. Maoist Dalits are fighting for special rights. Others say reservation, but that is up to them.

The country has been declared a federal state and we are in the process of restructuring the state. What kind of state structure should be created for Dalits? We are against non-territorial federal units for Dalits. Special rights are also important within federal provinces. We also need to think about the position of Dalits in the federalism debate.

**Question and Answer Session**

**Question 1**] Hon. Padmalal Bishwokarma: What is the impact of affirmative action for blacks? I am eager to know about Malaysian form of positive discrimination.

**Question 2**] Hon. Kalawati Paswan: Why do such programs happen only in urban areas?

**Answered by Professor Galanter:** It is much easier for people in leadership positions to think about urban areas to devise programs. It is
very difficult to make the programs work in rural and deprived areas. It is important to put efforts into devising programs that will work in those areas. This goes to the observations made about the creamy layer. One of the problems in these programs is that it is very difficult to devise programs that really get down to the people at the bottom. Because when you give somebody something, the degree to which they can benefit from it depends not only on what you give but also on what they have to begin with in terms of resources, education, experience, and confidence. Therefore helping people in the bottom is a great challenge. On that I hope you will have some success. It requires fieldwork, some experimentation to get social scientists to go out and to figure out what will reach the people at the bottom. It is not easy for us sitting in the urban environment to really go out to see what will work there.

### 3.2 Day II: SAMATA Annual Lecture

**Hon. Khimlal Devkota**  
CA member, UCPN [Maoist]

Thank you for the valuable topic and in-depth knowledge that Professor Galanter brought here to share. It is very important to the current time as we are drafting our constitution. The politics of Nepal is stuck in sloganeering. Civil society and academicians are also stuck in slogans. What is scientific is not talked about much. Moving away from slogans, Professor Galanter has presented to us a checklist affirmative action should be based on the country’s context, as what shapes the country is its history, culture and past discrimination. Professor Galanter has emphasized equality in access and distribution of wealth, power and education. However, he has not touched on the differences between "formal" and "real" equality. Everybody talks about "formal" equality, even the Ranas talked about “formal” democracy. But, nobody is talking about real democracy and real equality.

Professor Galanter has made a checklist of what needs to be done to implement affirmative action programs in Nepal. He raises important
questions: Who will make it? Through what process will affirmative action be formed? Who will administer? Who will be the beneficiaries? What changes have been made? How to determine individual eligibility?

I believe that based on this checklist, we can formulate our policies and develop programs and implement. Then we can put forward a holistic justification. We live in a world where many countries have implemented affirmative action policies. It is necessary to maintain equality in a society. Affirmative action programs will not be necessary only when class differences are completely eradicated. Reservations are part of positive discrimination; so is the proposal for special rights program. People accept both positive discrimination and reservation but view special rights as undemocratic. Democracy is about competition. If positive discrimination, affirmative action and reservations are not against democracy then why are special rights considered as against democracy?

Hon. Rampreet Paswan
CA member, CPN [UML]

Nepal's history is full of discrimination and it still continues. The Indian experience is indeed very important for us to learn from. Dr. Ambedkar made significant contributions to place reservations. But, within that there was class discrimination. Internal discrimination within the larger Dalit community continues and this does not come up in program discussion. What about Badi and Dharikar and other groups at the bottom of the social hierarchy who suffer from internal discrimination? Dalit too are divided into Madheshi and Pahadi Dalit. No one talks about the divisions within Dalit.

Pahadi and Madheshi Dalit should unite. Even after laws are made, the discrimination will not end. Another important question is time. How much time will you allocate to end discrimination? There is still discrimination in India. Federalism is a central topic and it is linked to positive discrimination as well. Why is there no Sahalesh province for Dalits, especially if they have such a large representation?
Shyam Shrestha
civil society activist and public intellectual

What we learn from positive discrimination is that we need to correct inequality. Power, education and wealth should be equally accessible to all. So the question that emerges is; should we have affirmative action in Nepal? I believe everyone agrees that Nepal needs affirmative action. But debates continue on where and to what extent affirmative action should be implemented. Till today, no one has come to a consensus on these questions: How, where and to what extent?

Professor Galanter's presentation raises many questions, but gives few answers. I would like to share some of my ideas on how affirmative action programs should be devised and what factors should be considered. First, Dalits need access to law-making. For this, inclusive election should be assured. Mandatory laws should ensure proportional representation in elections. The First Past the Post and the mixed system are not good to place Dalit in policy-making positions. In addition to existing proportional representation, we need to add 5% extra representation of Dalit to the law to make affirmative action for Dalit. Second, political party leadership also needs to be inclusive. Laws should be made for compulsory quota policy within government, cabinet of ministers, and party leadership. Without compulsory rules, the politicians will not do anything for Dalit. Third, Dalit representation should be ensured in the army and judiciary. Special access to opportunities in education and employment for Dalits should also be ensured. If government provides free education up to 12th grade for all, then it should provide free higher education for Dalits. We should prioritize access to power first and then on education and then employment. A question that remains is how affirmative action will occur in the private sector.

As mentioned by previous speakers, special rights for Dalit should be included in the constitution. With the federalism question, what Dalit, whose population is estimated to be 5 million, absolutely need is non-territorial federalism. Monitoring within such a federal structure is a
key. Therefore, Watchdogs are essential. Non-territorial federalism might not give resources to Dalit, but it will take them to a decision-making level.

Within Dalit there should be 50% representation of Dalit women. We also need to think about how to bring other backward communities such as Badi and Dom forward within reservation. This is related to inclusion within inclusion. If only Bishwokarma succeed through reservations then it will not be justice.

Additionally, Dalit are a professionally divided community. They need more training and capital so that they can improve and modernize their professions. This is especially important because their social status form their economic role. Similarly, Haruwa and Haliya should get 50% land right. In addition to economic and political policies, cultural changes are needed to end discrimination. Uneducated Dalit have been psychologically affected. They view themselves as oppressed. Civil society, state and media should work together. It might take 20 to 30 years. Maybe we can end the situation and create a world where the word Dalit does not exist anymore.

**Question and answer session**

**Question 1**] Bishwa Mohan Acharya, National Cooperative Development Board: How would it be to not have the word Dalit at all? I propose the term *Bishesh Suchikrit Class* [Special Scheduled Class] for them.

**Question 2**] Dr. Keshab Man Shakya, Nepaa Rashtriya Party: Although Dalit are represented in the CA, they do not have the power to influence. Rampreet Paswaan does not have access to power. Therefore, Dalits need their own party. When it comes to affirmative action, I think 90% representation should be made through proportional inclusion and only 10% should be represented through free competition.
Question 3] Khem Nepali, Dalit Activist: I have been an activist since Hira Lal was a minister. We still live in a society where Dalit women are accused of being witches and killed. Why should discrimination go on for another 20 to 30 years?

Question 4] Hem Bahadur Lamsal, student of conflict studies: When you talk about affirmative action in education, what will happen in private schools? Dalit cannot afford private schools and there are not reservations in private schools. So, Dalit will go to public school, where the quality of education is poor. So tomorrow, their education quality will be low and they will be the ones who go and work in different parts of state mechanism. Another question usually raised by the privileged group is about benefits to them from affirmative action, which will oblige them to give away the privileges that they have been enjoying.

Question 5] Ramesh Nepali, student: What is the experience of India to provide inclusion within inclusion? As the wave of new liberal economy has pushed Dalit out of their traditional professions, what provisions should be made to revitalize their tradition? Will they be able to access the market?

Question 6] Kabita Parajuli, HRI: Policies are only one part of what politicians can do for an equitable society. From India's experience, can you mention what could or should be avoided?

Question 7] Renchin Yonjan, social architect: Thank you for your questions. We Nepalis never ask the right questions. I was very touched when you said that affirmative action is a gift that the nation must give itself. It is something that we need to focus on. Unfortunately, from the three commentators we only got more of the political and cultural aspects. We always hear how oppressed we are and how little we are. No one focuses on the strengths of the community or what we can promote. What is the affirmative action question that people of Nepal should ask themselves?
Question. 8] Bikalpa Raj Bhandari, student: You mentioned three justifications for affirmative action: nondiscriminatory, welfare and reparation. Is it possible to have a blend of three models or is there any past experience?

Answered by Professor Galanter: Any program has some sort of blend of the three justifications. The emphasis may be different. For example, in the US, there is very little acknowledgement of reparations. It is important to recognize that affirmative action in itself is not sufficient. The measures that we have been talking about in affirmative action such as government jobs and reservations in medical schools are important. But they are only one part of public policy. We did not talk about land reform or industrial development. Such policies may have more impact in distribution of power, education and wealth.

Affirmative action policies are important at the margin, but they are not likely to be the great driving forces in a society. If society is moving ahead in other ways such as with land reform and industrial development, then affirmative action policies can help to make sure that that people who have been excluded are now included. And in themselves effects of the affirmative action are limited. They are good in combination with other policies.

It has come up often and is it definitely important to enable the Dalit engaged in traditional occupations to modernize or to switch to the modern counterparts. For example, modern plumbing creates a lot of jobs so does keeping offices in Kathmandu clean. These are parts of modern life. So maybe we can give groups within Dalit the opportunity to move from traditional activity to the modern context. People who have been at the bottom often get tied up with prestige; they want government services even though there may be much less developmental potential. They want to be clerks in government offices than become plumbing contractors. When people have been oppressed and excluded for so long, their perspective can be so narrow. One of the problems with oppression is that it diminishes the oppressed people.
The question on inclusion within inclusion references the cross-cutting factors. Nepal, since it is just starting out and has the opportunity to observe what is happening outside, can try new things. Sometimes it is the advantages of being a late-comer. You are able to skip over the mistakes that people in other countries have made.

It is very exciting time in Nepal in the sense that you are at this moment of making your own future. It is true that nobody has the capacity to determine your own future you can only influence it. You can not plan what will happen, but you can nudge it one way or the other.

Closing remarks from Dr. Sumitra Manandhar Gurung, Board of Director, SAMATA foundation

As Professor Galanter mentioned, we should take advantage of being a new comer and put in collective effort. Affirmative action programs should be complemented with other programs on mentoring, and providing vocational training. Dalits should also be given encouragement. History has given us an opportunity and we should level the playing field.
4. Conclusion and Recommendations

Affirmative action tells us what the nation envisions itself to be. It indicates the bonds that Nepalese want to build with each other. In a way, affirmative action programs, when effectively implemented along with other policies ranging for economic development to mentoring, contribute to building our imagined community. Who gets access to what opportunities is central to defining who we are as a nation. The two-day event revealed that dialogues on affirmative action, especially with policy-makers must be continued. The justifications explained by Professor Galanter have provided us a framework to work with and contextualize.

Prior to formulating policies on positive discrimination, the state must recognize and accept the accumulated historic discrimination against Dalit community. Without recognition of past and on-going caste-based discrimination, appropriate policies cannot be formulated. For example, drafts formulated by the different thematic committees still in confusion to acknowledge that Dalit need to be granted more power and rights to ensure equality in the Nepali society because they have lagged behind due to discrimination. Moreover, only one draft from the Committee on Restructuring of State and Distribution of Powers and the Committee on Fundamental Rights and Directive Principles
has a provision prohibiting all kinds of untouchability. Other drafts do not adopt this provision. Therefore, past and ongoing practices of untouchability must be recognized before formulating policies to redress them.

Acceptance of historically accumulated discrimination against the Dalit community will also contribute to a thorough understanding of the Dalit identity. Dalits are usually grouped together with other marginalized groups when in reality their experiences of discrimination are very different. Policy-makers must be conscious of the complexities involved in the Dalit identity. Sub-groups, hierarchy and discrimination within the Dalit community add to the complex nature of Dalit identity and need to be constantly kept in mind when devising affirmative action policies. The sub-groups within the Dalit community become particularly important to avoid the emergence and rise of a "creamy layer" class within the Dalit community.

From the dialogues, it is evident that affirmative action on its own will not reach the bottom to distribute power, wealth and educational opportunities. Affirmative action needs to be implemented in tandem with other economic and political policies. Land reform is one of the policies at the nucleus of economic and political development. Although the Committee on State Restructuring and Distribution of State Power provides that the state will provide land to the landless Dalit, no explanation is provided on how such a land reform policy will be implemented. As the Dalit movement has demanded, land reform will bring real change to Dalit community's economic development only if they are given first priority during land distribution and are given land for free by the government. This right is yet to be established in the constitution.

Another key economic policy to be considered and suggested during the discussions is modernizing, professionalizing and industrializing the traditional skills and occupations of Dalits such
as those of Sarki, Bishwokarma, Pariyar, Gandharva, Badi, and Dom among others.

While favorable economic and political environment will augment the impacts of affirmative action, changes in cultural practices and attitudes towards the Dalits are also necessary for social transformation. The discussions revealed that it is necessary to focus on the strengths of the Dalit community instead of focusing on how oppressed and 'backward' the community is. The state and the civil society should work together to build the confidence of Dalit community and change attitudes held by the non-Dalits towards them. Education is the key to change the attitude within the Dalit and non-Dalit communities. Existing education system perpetuates the status quo. Reforms in the education sector and an inclusive curriculum at all levels of education will in the long run help create an open, equal society.

Lastly, affirmative action should not be used merely as part of the political campaign. Some Dalit leaders raised the issue of special or additional rights, which is a demand for additional representation on top of proportional representation. Proponents of special or additional rights need to be elaborated on the mechanism of designing and implementing such a policy. They should also clarify how special rights will be enforced and monitored. A clear vision and plan of action on special rights is imperative to prevent a situation in which special or additional rights become a demand of Dalit leaders to expand their voter base.

Based on the presentation and the discussions that followed and an assessment of priority issues related to affirmative action, SAMATA foundation makes the following policy recommendations.

1. Affirmative Action is not limited to quota system

Professor Galanter listed non-discrimination, social welfare and reparations as the three justifications for affirmative action. In Nepal,
the common understanding of affirmative action is that it provides quotas to groups that have been discriminated against. From this perspective, the justification for affirmative action in Nepal is that of reparations. Non-Dalit community has not completely accepted this justification as they are uncomfortable and feel threatened with the idea of compensating Dalits, which is understood as giving up their own access to resources and opportunities. What we can learn from Professor Galanter's presentation is promoting the social welfare justification. Affirmative action for Dalits should be understood as increasing the size of the pie along with redistribution of resources and opportunities. If Dalit are educated and provided with vocational training, they will contribute to the economy and consequently enhance the social welfare.

Therefore, implementation of affirmative action should not be limited to quotas. It should include support programs that build capabilities of Dalit in all spheres of life. Mentoring and counseling programs for Dalit students, training programs for Dalit workers, and information and networking centers will help Dalit to learn about the opportunities available to them and prepare to benefit from them. Therefore affirmative action programs should be justified in terms of social welfare and should include additional support programs.

2. Recognize intra-Dalit discrimination and take measures to prevent growth of a "creamy layer"

The Dalit community can be broadly divided into Hill Dalit, Madheshi Dalit and Newar Dalit. Each of these groups is further divided into sub-groups. Intra-Dalit discrimination is not discussed because of fears that it will weaken the entire Dalit movement. Moreover, the struggle so far has focused on reducing discrimination between Dalits and non-Dalits. At the same time, intra-Dalit discrimination is an issue that needs to be addressed to avoid the growth of a "creamy layer" class similar to that in the Indian context. Already, Bishwokarma, Pariyars, Paswan, and Ram are sub-groups within the Dalit community that
enjoy better access to resources and opportunities. Therefore, prior to devising affirmative action policies, policymakers must conduct a detailed study of intra-Dalit discrimination and classify the Dalit community based on social and economic status. Policy-makers should prioritize subgroups within the Dalit community to ensure that affirmative action is benefiting those who need it the most and others as well.
Prof. Marc Galanter is the John and Rylla Bosshard Professor of Law and South Asian Studies at the University of Wisconsin Madison. He is recognized as a leading American student of Indian law and has been a close student of India’s policies of affirmative action since last five decades. He is the author of Competing Equalities: Law and the Backward Classes in India (1984, 1991) and Law and Society in Modern India (1989, 1992) and many articles on the legal system and legal culture of India. He has been editor of the Law & Society Review, the leading journal on the empirical study of the legal system, president of the Law and Society Association, chair of the International Commission on Folk Law and Legal Pluralism, a member of the council on the Role of Courts, a Guggenheim Fellow, and a Fellow of the Center for Advanced Study in the Behavioral Sciences.