

**CASTE DISCRIMINATION IN INTERNATIONAL LAW:
NORMS, INSTITUTIONS AND PRACTICES**

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DOCTOR OF PHILOSOPHY

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DECLARATION

I declare that the thesis entitled "CASTE DISCRIMINATION IN INTERNATIONAL LAW: NORMS, INSTITUTIONS AND PRACTICES" submitted by me for the award of the degree of DOCTOR OF PHILOSOPHY of Jawaharlal Nehru University is my original work. The thesis has not been previously published or submitted for any other degree of this University or any other University.

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Abbreviations

ALRC:	Asian Legal Resource Centre
CEDAW:	Committee: Committee on the Elimination of Discrimination against Women
CERD:	Committee on the Elimination of Racial Discrimination
CRC:	Committee on the Rights of the Child
HRC:	Human Rights Committee
ICCPR:	International Covenant on Civil and Political Rights
ICEDAW:	International Convention on the Elimination of All Forms of Discrimination against Women
ICERD:	International Convention on Elimination of All Forms of Racial Discrimination
ICESCR:	International Covenant on Economic, Social and Cultural Rights
IDSN:	International Dalit Solidarity Network
IIDS:	Indian Institute of Dalit Studies
ILO:	International Labour Organization
NCDHR:	National Campaign on Dalit Human Rights
NGO:	Non-governmental organization
NHRC:	National Human Rights Commission
NIESR:	National Institute of Economic and Social Research (UK)
SCs:	Scheduled Castes

STs: Scheduled Tribes

UDHR: Universal Declaration of Human Rights

UK: United Kingdom

UN: United Nations

WCAR: World Conference against Racism, Racial Discrimination, Xenophobia
and Related Intolerance

CHAPTER 1

INTRODUCTION

“To deny people their human rights is to challenge their very humanity”

Nelson Mandela¹

Since ages the principle of equality and non-discrimination sets the milestone of fundamental human rights. It is the notion that all human beings are equal and deserve to be treated equally. Universally this notion receives intuitive support (Moeckli 2013: 157). The principle of equality and non-discrimination provides moral and analytical mechanism to ensure effective enjoyment of human rights. It is the foundation and justification provided to human rights standards. Indeed, international human rights law has developed the multidimensional relationship with the principle equality and non-discrimination (Clifford 2013: 420, 444). As a result, “the principle of equality and non-discrimination lies at the heart of international human rights law” (Farrior 2015: xi).

On the other hand, it is evident that most of the societies in the world practice one or other form of discrimination. It includes discrimination on the basis of race, colour, caste, sex, and ethnic, among others. The practice of discrimination and the claim of superiority by one race over the others resulted into mass violence in the form of wars. Discrimination on the basis of race, colour, and religious belief was one of the main causes of First World War.² It resulted into mass destruction. To overcome the root cause

¹ Address by Nelson Mandela to the Joint Session of House of Congress, Washington DC- United States on 26 June 1990.

² Where race and racism traced as a one of the reasons for combatant countries to wage a war (Fogarty\BRichard) <http://www.bl.uk/world-war-one/articles/race-racism-and-military-strategy#> Race, racism and military strategy Article by: Richard Fogarty Theme: Race, empire and colonial troops – See more at:

of was the League of Nations was formed. The main purpose of the League of Nations was to maintain world peace and resolve international disputes. To prohibit discriminatory practices it guaranteed the protection of minority rights through various treaty agreements. The minority treaties ensured formal equality to all individuals against discrimination and guaranteed equal treatment of law. The treaties also strived for the preservation of minorities cultural, linguistic and religious values (Wippman 1997: 600). However, these country-specific treaties failed to give rise to a general jurisprudence applicable to racial, linguistic, and religious minorities (Wippman 1997: 601). In other words, the League of Nations eventually failed to adequately address the problem of minorities and discrimination.

As a result, the discrimination on the basis of race, colour, ethnic, religion and so on continued unabatedly. The most severe outcome of the discrimination was the Holocaust. It ultimately resulted in Second World War (Dower 1986: 312). The War generated colossal loss to life, property, and environment. In fact, it was a loss of humanity. This horrifying situation of human crises compelled the world leaders to urgently recognise the protection and promotion of human rights. Subsequently, it was realised with the adoption of the United Nations (UN) Charter in 1945.

The preamble of the UN Charter clearly outlined its intention to save the future generations from the scourge of war that had caused immense sorrow in the past. It recognised the need to protect human rights in order to ensure international peace and security. The UN is founded on the principle of equality and non-discrimination. This ultimate objective can be traced in a UN Third Committee report which states that the “United Nations Organization had been founded principally to combat discrimination in the world”³ (Weiwei 2004 : 5, Farrow 2015: xiii). It can be observed that the principle of equality and non-discrimination is today acknowledged as a norm of international customary law (Ramcharan 1981: 249).

<http://www.bl.uk/world-war-one/articles/race-racism-and-military-strategy#sthash.K8RxR0R0.dpuf> ,
Accessed on 25th Feb 2014.

³ UN document A/C 3/ S.R 100, 7, cited in Warwick Mckean, *Equality and Discrimination under International Law*, 1983, p. 59.

The purpose of the UN, as mentioned under Article 1 (3) of UN Charter, is to promote and protect human rights without any distinction on the grounds of race, sex, language or religion.⁴ With this purpose, the UN has interwoven the principle of equality and non-discrimination into fundamental human rights and the Charter reaffirms the:

“...faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations.”

In order to realise this objective the Charter undertakes to promote, higher standards of living, full employment, and conditions of economic and social progress and development [Article 55 (a)]; solutions to the international economic, social, health, and related problems; and international cultural and educational cooperation [Article 55 (b)]; and universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion [Article 55 (c)].

Later, the human rights principles of the UN Charter were elaborated in the Universal Declaration of Human Rights 1948 (UDHR) and other UN Covenants and Conventions. The adoption of UDHR led to the codification and promotion of the human rights as the common standard of achievement for all people and nations. Article 1 of the UDHR incorporates the principle of equality and non-discrimination and states that, “All human beings are born free and equal in dignity and rights.” UDHR also recognizes certain grounds of discrimination which are derogatory to the practice of human rights. Article 2 of the UDHR specifies that everyone is entitled to enjoy all rights and freedom without any distinction on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Subsequently, the concept of human rights was expanded from the first generation of human rights to second and third generation of human rights. The first generation of human rights includes civil and political rights enshrined in UDHR and International

⁴ Article 1(3) of the UN Charter mentioned “To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”.

Covenant on Civil and Political Rights (ICCPR) 1966. Article 26 of the ICCPR prescribes equal protection of law to all people without any discrimination. The second generation of human rights is recognised under the International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966 that includes social, economic and cultural rights of the individuals. It inter alia assigns every individual the right to gain his/her living by work which he/she freely chooses or accepts (Article 6, Para 1). The third generation of human rights is collective or solidarity rights that mainly include the right to development, rights of indigenous people, the right to clean and healthy environment among others. These transitions of human rights from first generation to third generation are also based on the principle of equality and non-discrimination (Thorat & Umakant 2004: xv). Beside the three generation of human rights, the International Labour Organization (ILO) adopts the principle of non-discrimination in determining labour standards through its conventions. For instance, the Convention 111 on Discrimination (Employment and Occupation) of 1958 prohibits distinction, exclusion and preference on the basis of race, colour, sex, religion, political opinion, national extraction or social origin [Article 1 (a)].

Despite the presence of the above human rights instruments, the UN felt the need to introduce a separate convention on the prohibition of racial discrimination. After the World War Second the problem of racial discrimination was raised at the UN. It invited the attention and cooperation of the international community to prohibit the practice of racial discrimination (McDougall 1997: 571, Martin 1997: 36). As a result, in 1965 the International Convention on Elimination of All Forms of Racial Discrimination (ICERD) was adopted. Article 1(1) of ICERD determines five grounds of 'racial discrimination' which includes race, colour, descent, or national or ethnic origin. Further, Article 3 of ICERD prohibits and eradicates the practices of racial segregation and apartheid. The ICERD is considered as a milestone in the efforts to realise the principle of equality and non-discrimination.

In sum, the principle of equality and non-discrimination has been the dominant and recurring theme of the international human rights law. However, international human

rights law did not provide uniformity in the recognition of the principle of equality and non-discrimination (Bayefsky 1990: 2). For instance, the grounds of discrimination vary with the conventions. It shows that these international instruments are limited in scope to certain forms of discrimination. Specifically, the term ‘discrimination’ used in ICERD was narrowed down to racial discrimination. Moreover, while drafting the ICERD, apartheid received the special attention. This is clearly evident from both the title of the Convention and the grounds of discrimination under Article 1 and 3 of the ICERD. Though all human rights conventions are universally applied, it is mere an imposition of European understanding of discrimination on the other parts of the world, which is not a coherent and complete understanding (Thorat 2009: 161). As Thorat points out:

“...historical understanding of discrimination related to race and colour is rooted in the empirical reality of European and American society” (Thorat 2009: 161).

As a result, the issues of discrimination associated with the non-race and non-colour categories such as caste was left out of the purview of the UN human rights framework (Thorat 2009: 143). Caste has its roots in Indian social system, but it has spread to other South Asian countries and also to the other parts of the world through its diaspora.

1.1. Concept of Caste

On the problem of caste system various anthropological, historical and sociological studies are available. Many authors have defined the complex system of caste. After extensive study of caste system, Ambedkar believed that endogamy is the only characteristic of caste, and that ‘caste is an enclosed class’ (Ambedkar 1916: 252-253). Thorat has enlisted certain characteristics of the traditional caste system such as “social-physical isolation, exclusion through endogamy, residential segregation or separation, social distance through the religious notions of pollution and untouchability, restriction on property rights and occupation (except the polluting ones), lack of access to civil and religious rights and maintenance of the system through social ostracism and penalties with support from religious ideology” (Thorat 2009: 157).

Castes are inscriptive status groups with no individual social mobility between them. Further, they are divided into sub-castes and sometimes sub-sub-castes. From the economic perspective, caste system is defined as division of labour and occupations that are caste specified. These are some salient features of the caste system on which one can assert that caste system is based on social inequality and mutually ranked within a single hierarchy (Louis 2003: 21, Sarkin and Koenig 2010: 542). Moreover, the caste system assimilated the every aspect of the life. Through this wider scope it has generated the other forms of discrimination.

Caste discrimination contributes to gender discrimination, poverty, illiteracy, health care, unemployment, bonded labours, migratory labour, forced prostitution etc. (Chowdhury 2009: x, Divakar and Ajai 2004: 9, Narula 2008). On the practice of caste discrimination in India, Narula highlights the suffering of millions of people who witness the practice of untouchability. The entire villages remain segregated by caste. Moreover, they are also victims of police abuses. Further, Dalit women are at the threshold of the caste system and face extreme discrimination in the form of sexual abuses (Narula 2008: 277). Nevertheless, to overcome the complex problem of caste discrimination various State governments adopted various laws on the prohibition of caste discrimination.

1.2. Normative Framework of South Asian States and United Kingdom against Caste Discrimination

The caste system of South Asia forms a unique form of discrimination in the world. This practice of discrimination has social, religious, and legal sanction, which leads people to maintain a hierarchical division among themselves to the level of untouchability (touch of lower caste pollutes). It not only divides the people but also assigns rights and duties to the individuals according to their caste. It can be seen that, duties are imposed on lower caste people without protecting basic human rights. On the contrary, the caste system authorizes the upper caste people to punish lower caste with severe punishments for the non-performance of duties. Moreover, the lower castes are deprived from reclaiming the basic human rights such as right to clean water, land, food, education, right to life with dignity, etc.

Though in sources, meaning and form caste-based discrimination varies across South Asia, its effects are similar. The practice of endogamy, residential segregation, low status, low paid jobs, hereditary and hierarchical system is common to South Asia (Jodhka and Shah 2010: 100). Subsequently, it resulted into the imbalance in the society, as lower caste people were denied basic human rights and upper castes possessed the right to humiliate lower castes. Across South Asia, millions of people witness the practice of 'caste' discrimination. Moreover, the practice of caste discrimination has crossed territorial boundaries and is practiced by South Asian diaspora across the world. However, to eliminate and prohibit the age old practice of caste discrimination the legal system has been develop in South Asian States such as, India, Nepal, Pakistan, Bangladesh, and Sri-Lanka.

Jodhka et al., (2010) compares caste discrimination in South Asian countries. The authors conclude that in South Asia mainly four religions exist namely, Hinduism, Islam, Christianity and Buddhism, and the caste system exists in all the religious traditions. Though the practice of caste system varies in South Asian countries, it effects on the people placed at the bottom are quite similar. In Muslim countries such as Pakistan and Bangladesh Hindu dalits faces dual discrimination. On the legal provisions of the States it is argued that apart from India other South Asian countries have not shown reasonable concern on the caste issue.

The Constitution of India abolishes the practice of untouchability. It obligates the State not to discriminate the individuals on the ground of caste. Moreover, the State has to protect individuals from all forms of discrimination by enacting appropriate laws. As a result, the Scheduled Castes and Scheduled Tribes (Prevention and Atrocities) Act, 1989 was enacted to prevent and punish state and private actors committing caste atrocities against the Scheduled Caste and Scheduled Tribe individuals. Similarly, various laws on prohibition of caste discrimination were passed such as Protection of Civil Rights Act (1955); Bonded Labour (system) Abolition Act, 1976; Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993 and The Prohibition of Employment as Manual Scavengers and their Rehabilitation Act 2013.

While examining Indian laws on prohibition of caste discrimination Gonsalves et al., (2005) observe that, in India laws are framed to abolish untouchability and to prohibit caste discrimination but they lacked proper enforcement. The authors also examine the discrimination practice by the executive while implementing the law, and by the judiciary while deciding atrocity cases. The authors suggest that there is a need to educate Dalits about the availability, scope and application of various laws at national as well as at international levels concerning their rights (Purane 2000). Yet in another study Narula (1999) concludes that, the legislative protection provided by the Government of India has become a mask for social discrimination and violence due to its poor implementation.

In the case of Nepal, National Code of 1854 divided society into caste hierarchies and provided the legal sanction to the caste system. Nonetheless, after 1950 Nepal adopted various constitutional measures to prohibit caste discrimination (Bhattachan et al., 2008: 41). For instance the Constitution of 1951 impliedly prohibited caste discrimination within the broader framework of equality and non-discrimination. However, for the first time the Constitution of 1990 explicitly prohibited caste discrimination under Article 11 (4). Further this provision was strengthened by the Interim Constitution of 2007. Presently the Constitution of 2015 explicitly prohibits practice of caste-based discrimination and ensures affirmative action for the development of the Dalits. Due to consistent international intervention the government has also enacted a special legislation i.e. Caste Based Discrimination and Untouchability (Offence and Punishment) Act, 2068 (2011) to overcome caste discrimination. Nevertheless, caste discrimination continues. The Indian Institute of Dalit Studies prepared a report on the caste discrimination in Nepal. In the report, the authors mentioned that the caste discrimination is practiced in Nepal as a part of the caste system of the Indian subcontinent (Bhattachan et al. 2008: II).

On the contrary to India and Nepal, Pakistan denies the practice of caste discrimination as it is an Islamic state and Islam teaches equality. However, in reality the religious minorities and Scheduled Caste Hindus are often victims of caste discrimination. Moreover, the Scheduled Caste Hindus witness dual discrimination in the Pakistan. Firstly, being a religious minority (being a Hindu) and secondly, being a lower caste.

Similarly, conditions of the women are derogatory. Further to prohibit the practice of caste discrimination the Constitution of Pakistan has introduced certain measures. However, it was argued that many laws of the Pakistan are discriminatory in nature. This discriminatory nature of the laws creates hurdles in the prohibition of caste discrimination. Therefore, it was urged that being a responsible State Pakistan should enact laws for the well-being of its citizens without any discrimination (Shah 2008: 13).

In Bangladesh, the practice of caste discrimination is visible in all spheres of life including education, health care, accesses to public and private places, employment, property issues etc. This practice of caste discrimination has become an obstacle in the overall socio-economic development of the country. There are certain provisions in the Constitution of Bangladesh which prohibits the practice of caste discrimination. Through the Constitution it has establish equal rights to all irrespective of caste, race, creed and religion. However, the existence of the practice of caste discrimination is a reality of the Bangladesh. One of the reasons for its existence as cited by the Chowdhury is inadequacy of the legal mechanism for prohibition of caste discrimination. Most of the policy makers or researchers do not know what exclusive programmes they have for the betterment of Dalits (Chowdhury 2009: 129).

On the practice of caste discrimination in Sri Lanka, Silva et al., (2009) reveals that the caste system prevails in certain groups in Sri Lanka. There is no uniform notion of untouchability, but certain groups practice caste discrimination of some kind. There exist mainly three parallel caste systems i.e. Sinhala, Sri Lankan Tamil and Indian Tamil (Silva et al. 2009: 1). However, the notion of caste system is less rigid in the Sri Lanka due to “secular nature of the hierarchy, a critical doctrinal perspective relating to caste in Buddhism, the predominant religion in Sinhala society, a relatively weak notion of untouchability in caste systems in Sri Lanka and relatively small size of the bottom layer of society” (Silva et al. 2009: 2). Further, to prohibit the caste discrimination apart from the constitutional measure Sri Lanka has a separate law on prohibition of social disabilities arising out of caste. However, it was argued that the existing laws prohibiting caste discrimination needs a review (Silva et al. 2009).

The existing legal mechanism of the South Asian States mainly India, Nepal, Pakistan, Bangladesh and Sri Lanka seems to be inadequate as there is a big gap between law and practice. The legal framework is not helpful in ensuring human rights, unless and until social, economic and cultural inequalities embedded in society are addressed (Thorat & Umakant 2001: 308). Indeed, the lack of effective implementation of State policies legitimately invites international intervention. It was argued that in order to make the government sensitive and responsible one can use the international mechanisms (Radhakrishnan 2001: 62). One of the examples of such intervention made by the international community is the initiative taken by the United Kingdom (UK) to recognise the prevalence of the caste discrimination among the South Asian diaspora.

1.2.1. Caste Discrimination in United Kingdom

Ambedkar had anticipated that Indian migrants will carry the caste system to other regions of earth and it would become a problem of the world (Ambedkar 1916: 242). His fears have come true as caste discrimination has indeed migrated with the Indian diaspora to the East and South Africa, Mauritius, Fiji, Suriname, the Middle East (Bahrain, Kuwait, the United Arab Emirates), Malaysia, the Caribbean, the United Kingdom, North America, and other regions (Narula 2001: 22). There are a number of incidences of practice of caste discrimination in UK (Memorandum submitted by Caste Watch UK (E 67) 2009). On migration to UK, the Dalits experience dual discrimination, caste discrimination from their own countrymen and racial discrimination from white society. During the 1950s the identity of Dalit remained invisible under the umbrella of South Asian (Waughray and Thiara 2013: 116-117). This advantage was limited only to the first generation immigrants, as they fused their identity under the all encompassing Asian identity. Also during this period the upper caste community remained unorganized to assert their identities. But the second generation Dalits began to witness the problem of caste discrimination in UK (Ghuman 2011: 3).

With the consideration of practice of caste discrimination in UK, the CERD made a recommendation to UK government to introduce domestic prohibition of descent based discrimination (CERD/C/63/CO/11). Later, the government commissioned National

Institute of Economic and Social Research (NIESR) to prepare report on the 'Caste discrimination and harassment in Great Britain'. Subsequently, the Equality Act of 2010 came up with the provision on the prohibition of caste-based discrimination. However, it has noted caste as an aspect of the race. The implementation of the provision is subjected to the secondary legislation. Due to strong opposition from the Hindu organisations the secondary law on prohibition of caste discrimination yet remained to be adopted. Nevertheless, the UK government has begun the consultations on what methods to adopt to prohibit caste discrimination.

The South Asian States and UK are parties to the various international human rights treaties and promises to prohibit racial discrimination in their States. However, the national legal mechanism shows the inconsistency in practice, leading to the prevalence of caste discrimination. Therefore, there is need to examine the available international human rights law dealing with the prohibition of caste discrimination. The international human rights law and its implementing mechanisms played a significant role in addressing the problem of caste based discrimination. However, without recognizing and including caste discrimination in the international human rights law it would be difficult to prohibit it. The non-recognition and non-inclusion of caste-based discrimination in the international human right laws, led States to challenge the applicability of the conventions to the caste discrimination.

1.3. International Human Rights Laws on Caste Discrimination

Caste-based discrimination at the international level can be studied under two waves. First wave includes the internationalization of the caste discrimination at the early formation of UDHR. It highlights the role played by the India and in particular the Ambedkar's approach on the inclusion of caste in the human right framework. The second wave begins in 1990s with the submission of India's tenth to fourteenth periodic report to the Committee on Elimination of the Racial Discrimination (CERD). Further, the matter was taken by the various NGOs. It initiated the debate on the inclusion of caste as a form of discrimination in the international human rights law.

In the first wave of internationalization of the caste discrimination, Ambedkar was very keen to recognise caste as a form of discrimination at the level of international human rights law. He was of the view that all societies in the world have one or other form of lowly people who are victims of discrimination such as slaves, helots, villeins, negroes among others, similarly India has untouchables. Ambedkar observed that,

“Most parts of the world have had their type of what Ward calls the lowly. The Romans had their slaves, the Spartans their helots, the British their villeins, the Americans their Negroes and the Germans their Jews. So the Hindus have their Untouchables. But none of these can be said to have been called upon to face a fate which is worse than the fate which pursues the Untouchables” (Ambedkar 1943: 401).

Therefore, all the forms of discrimination require attention of the international community leading towards prohibition. In this process, the third world and critical race movements succeeded in tabling the issue of race and racial discrimination at the UN. Ambedkar also planned to raise the problem of caste-based discrimination at UN. Therefore, in 1940s, Ambedkar wrote a letter to the W.E.B. Du Bois and observed :

“There is so much similarity between the position of the Untouchable in India and of the position of the Negroes in America and that study of the latter is not only natural but necessary... I was very much interested to read that the Negroes of America have filed a petition to the U.N.O. The Untouchables of India are also thinking of following suit.”⁵

In a reply to the Ambedkar’s letter W.E.B. Du Bois mentioned that, “...every sympathy with the Untouchables of India.”⁶ As a result, Ambedkar prepared a report on the conditions of the Scheduled Castes for the UN. However, the report was not submitted, as opportunity was given to the Constituent Assembly and future Parliament of India to deal with the caste discrimination (Ambedkar 1951: 1320). Similarly, in the 100th meeting of the ‘Third Committee of the General Assembly’, India proposed the insertion of word ‘caste’ as a form of discrimination under Article 2 of the UDHR. The proposal was made

⁵ Letter from Dr. B.R. Ambedkar to W.E.B. Du Bois available at: <https://www.saada.org/item/20140415-3544> Accessed on April 24, 2015.

⁶ Letter from W. E. B. Du Bois to B.R. Ambedkar available at: <https://www.saada.org/item/20140415-3545> Accessed on April 24, 2015.

due to increasing objections on the inclusion of ‘birth’. However, the proposal was set aside, as Indian delegation found the terms ‘other status’ and ‘social origin’ sufficiently broad enough to include caste, and, therefore, did not insisted upon its proposal (A/C.3/SR.102).

On the other hand, the issue of racial discrimination received UN attention due to the efforts of the social movements organized by the African third world states against apartheid and racial discrimination. It began with the efforts of intellectuals, social right activists, countries and social movements who internationalised the problem of racism. On racism in U.S, W.E. B. Du Bois as cited by McDougall observed that “the problem of colour line, is international and no matter how desperately and firmly we may be interested in settlement of race problemin the United States, it cannot ultimately be settled without consultation and cooperation with the whole civilised world” (McDougall, 1997: 571). Subsequently, various American civil rights organisations welcomed the internationalisation of the problem. The organisations further presented own formal petitions to the UN on the racial discrimination and urge for the assistance (Martin 1997: 36).

Omvedt compares the parallel development of Dalit movement and the Black Panther movement and argues that,

“African American found themselves empowered in a new way by rising independent Third World countries, especially the African one..... African Americans made their most significant gains in this period, and by the 1990s had move into the position where they now are a leading force in anti-racist and anti-discrimination movement at a world level” (Omvedt 2009: 387).

On the contrary, the Dalits⁷ were isolated in India, as, the Indian Government blocked the internationalization of the problem of caste discrimination (Omvedt 2009: 387). This is

⁷ The use of word ‘Dalit’ receives contestations however as Omvedt noted “...it is a great over simplification to write of the anti-caste movement only in terms of Dalit; however, they were clearly the most exploited within the framework of caste and the most militant against it.... The wider definition of the term Dalit given in the 1972 manifesto of the militant youth organization Dalit panthers sees them as including all the caste oppressed and class oppressed.” (Omvedt 2009: 376). Moreover, the Nepal

also evident from the conversation that took place between Indian delegation and South African counterparts. Thakur argues that the Indian delegation to the UN and South Africa in the late-1940s provided ‘Casteist Solution’ to the racist problem of South Africa. The upper caste Indians argued that the racial discrimination could continue as long as it did not practice racial discrimination towards upper caste Indians in South Africa. As a result, the apartheid of South Africa was highlighted at the UN, and problem of caste remained unheard due to the unwillingness of the Indian officials (Thakur 2016). Ultimately, the problem of caste remains outside the realm of international human rights law.

Moreover, the Third World also failed to identify the problem of caste-based discrimination and subsequently failed to make clear distinction between problem of caste, apartheid, and racial discriminations (Reynolds 2012: 213, Burra 2016: 114). Dalits within the Third World are not merely marginalized sections, but within marginalized sections, they are the most socially, economically and educationally disadvantageous sections. Even Dalits after Ambedkar failed to generate noticeable representation of caste discrimination among the Third World countries and world at large.

The second wave of the internationalization of caste discrimination under human rights law began in 1990s, after the CERD attempted to include caste under the descent based discrimination. Before CERD, neither UDHR nor the two Covenants and other Conventions mentioned ‘caste’ as a form of discrimination in express terms (Keane: 2007; Thorat and Umakant 2004: xvii). Moreover, the UDHR and Covenants fails to provide the precise definition of discrimination. This was recognised by the Human Rights Committee in its General Comment no.18 where it noted that,

While these conventions deal only with cases of discrimination on specific grounds, the Committee believes that the term "discrimination" as used in the Covenant should be

National Dalit Commission “has defined *Dalit* as those communities who, by virtue of caste-based discrimination, and untouchability, are the most backward in the social economic, educational, political and religious spheres, and are deprived of human dignity and social justice” (NHDR 2004, p. 54). At the international level the word ‘Dalit’ has received wider prominence. Considering it the thesis uses term Dalits. However, the emphasis has been given to the legal terminology provided by the States such as Scheduled Castes and Scheduled Tribes as well.

understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms (General Comment 18).

On the one hand, the Human Rights Committee interprets the Covenant and attempted to provide a wider definition of discrimination. On the other hand, the unavailability of the definition of discrimination led the CERD to interpret the term descent based discrimination. This interpretation included caste discrimination under the heading of descent based discrimination. The efforts to include caste into international human rights laws began from 1996. In that year India submitted its tenth to fourteenth periodic reports, a consolidated document, wherein it noted that, 'caste' denotes 'social' and 'class' distinction and is not based on 'race'. It has its origins in the functional division of Indian society during ancient times (CERD/C/299/Add.3). Thus, India categorically mentioned that the caste and descent are distinct grounds of discrimination.

On the contrary, CERD noted that the term 'descent' was inserted in Article 1 of the ICERD through an amendment proposed by India in 1965. But India did not elaborate on the possible meaning of 'descent'. It left the scope for the CERD to interpret term 'descent'. It was believed that the India intended to address caste discrimination through descent based discrimination. After India's submission of periodic report in 1996, the CERD in 2002 issued General Recommendation No.29 which states that, "discrimination based on 'descent' includes discrimination against members of communities based on forms of social stratification such as caste and analogous system of inherited status which nullify or impair their equal enjoyment of human rights" (CERD General Recommendation No. 29). Therefore, CERD reaffirmed that discrimination based on caste and is covered under Article 1 of the Convention (CERD/C/IND/CO/19). Further the CERD in its concluding observations stated that the term 'descent' does not solely refer to race. The situation of the Scheduled Castes and Scheduled Tribes (Dalits) falls within the scope of the Convention (CERD/C/304/Add.13).

Subsequently, the UN Sub-Commission appointed R. K. W. Goonesekere with the task of preparing a working paper on the topic of discrimination based on work and descent (UN Doc. E/CN.4/SUB.2/RES/2000/4). This report was followed by a second Expanded Working Paper on Discrimination based on work and descent. The Sub-Commission examined the problem of diaspora communities. It found that in United States and in United Kingdom discrimination on the basis of caste among the diaspora communities was common. Further, the paper set out a Proposed Framework for a Draft Set of Principles and Guidelines for Elimination of Discrimination based on Work and Descent ((E/CN.4/Sub.2/2004/31:part III).

After the CERD's approach, the human rights treaty bodies such as Human Rights Committee, CEDAW, and CRC also started considering caste as a ground of discrimination (Setalvad 2001: 140-141, Divakar and Ajai 2004: 9). The CEDAW in its concluding observation on India's report raised the issues of discrimination faced by Dalit women. The Committee mentioned that because of customary practices such as dowry, sati and the devadasi system there is a high incidence of gender-based violence against women (A/55/38).

CRC expressed concern over the 'striking disparities' in terms of access to education and opportunity between children belonging to different castes. It also expressed concern on the existence of caste-based discrimination and discrimination against tribal groups, despite this practice being prohibited by law (CRC/C/15/Add.115). Further, the 'Commissions Special Rapporteur on sale of children, child prostitution and pornography' found that children of 'untouchables' are most often victimized in child labour situations. The Committee recommended that the State party should take appropriate steps, which includes abolition of 'untouchability', prevention of caste and tribe motivated abuse, and prosecution of state and private actors responsible for such practices or abuses (E/CN.4/1994/84; Sait 2004: 219).

Caste discrimination has sustained through ages. This existence of the caste-based discrimination poses serious challenge to the national laws and subsequently to the international human rights law. At the international level once again the problem of caste-

based discrimination was raised. But this time it was raised providing possible interpretations to the caste-based discrimination most importantly, providing the racial interpretation of the caste-based discrimination. The non-recognition of Dalit rights and violation through the practice of caste discrimination lead inclusion of caste into the racial discrimination. It was often resulted in the comparative study of race and caste, mostly concluded with caste as an aspect of the race. It suggests the unwillingness of international bodies to understand and recognize the practice of caste discrimination.

1.4. Caste in WCAR

Simultaneously, the problem of caste discrimination was raised before the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance in 2001. It was organised to examine different forms of intolerances (WCAR), also known as Durban conference. In the conference, the Dalit NGOs raised the issue of caste discrimination. The efforts were made to attract the attention of the international community towards the prohibition of caste discrimination through international law. This initiated a debate at the international level for the inclusion of caste as one of the ground of discrimination in international human rights law.

After the approach of the CERD and other human rights bodies, the role of the NGO was also very crucial in the internationalization of caste. This inclusion of caste in descent based discrimination and ultimately in racial discrimination invites vast debate at international level mainly at WCAR. In this discussion arguments were made in favour and against of the inclusion of caste discrimination in international human rights law (Thorat and Umankant 2004: 292, Waughray 2009: 184). India submitted its 15th to 19th periodic report in 2006 and stated that, neither 'caste' can be equated with 'race', nor it can be covered under 'descent' of Article 1 of the convention (CERD/C/IND/19). The ordinary meaning of the term 'racial discrimination' did not include 'caste' (CERD/C/SR.1796). It was argued that caste discrimination does not come within the concept of racism, as Indian caste system is not racial in origin (Beteille 2004: 65, Radhakrishnan 2004: 60, Sorabjee 2004: 47).

Ambedkar had denied the suggestion that race had anything to do with it, and did not subscribe to the position that caste has its basis in race. The caste system is a social division of people of the same race. If we considered caste as race then it is difficult to say that, differences of sub-caste means a differences of races (Ambedkar 1936: 266). According to Keane the religious and social sanction behind 'caste' makes it a unique problem, and it is not same as a race. As race is one of grounds for racial discrimination it clearly shows that racial discrimination is a broader concept than race. He argues that the word 'descent' which was introduced by India into the Convention, did not originally refer to the caste system. Further, caste and descent are used in Indian Constitution alongside to prohibit the discrimination. Therefore, CERD should not pretend descent originally meant caste and it should recognize that it is re-interpreting the term (Keane 2007).

Rodriguez explains the term "descent" as implying one generation inheriting from another specific characteristic that were positively or negatively evaluated by society. The excluded groups of people from society as a result of stratification are regarded as 'untouchable'. Regarding the interpretation of descent he observed that if the interpretation is must then it should be made in accordance with the national laws and in particular with individual countries. Then the term descent would not have been specifically mentioned in the Convention. For the interpretation of a Convention the main requirement is that, the provisions of the convention should be of a general nature and independent of national legislation and circumstances (Rodriguez 2002: CERD/C/SR.1531).

Moreover, he argued that the term 'descent' has been included in the convention to clarify certain ambiguities arising from terms 'place of origin' and 'national origin'. So, the intention behind including the term descent in the convention is that the descent based discrimination had social and class origins and not racial one. The interpretation of term descent should be in a way that it gives protection to those groups that were discriminated on the ground of certain inherited characteristic which by tradition, society set them apart (Rodriguez 2002: CERD/C/SR.1531). Sicilianos suggests the inclusion of caste in general

recommendation on descent and that there should be a subparagraph titled as “Discrimination based on descent: the problem of caste” (CERD/C/SR.1531). Later, it was argued that UN is unable to deal with issues related with non-race and non-colour such as discrimination based on caste and social status essentially due to limitation of its own human rights framework (Thorat 2009: 143). With this discussion one important argument came forward was that the inclusion of caste in UN conventions will result in short term achievement (Guru 2001; Radhakrishnan 2004; Gupta 2004: 54). Within this dichotomy, it is important to examine the prohibition of caste discrimination under the international human rights law.

1.5. Objective and Scope of the Study

Caste discrimination is one of the oldest and gravest forms of discrimination in South Asia. It exists with social and religious sanctions and therefore State governments are unable to eliminate it. This failure of the State governments to overcome caste based discrimination has led the international community’s intervention. The present study analyzes the international human rights law and its implementation in prohibiting caste discrimination, and its impact on the framing of State laws. It also undertakes a comparative study of different State laws in the South Asia that includes India, Nepal, Pakistan, Bangladesh and Sri Lanka. Thereby it examines the effectiveness of their laws in prohibiting the caste discrimination. The study further examines the practice of caste discrimination in South Asian diaspora and its prohibition under UK laws. It also looks into the position of Dalit women within the legal framework and the role of international law in protecting their rights. Finally, it evaluates the role of NGOs in WCAR and its impact on State and international law in prohibiting caste discrimination.

1.6. Research Questions

- 1) Which are the international human rights treaties that deal with caste discrimination? What is the impact of international human rights laws in framing national policies?
- 2) How effective are international human rights laws in prohibiting racial discrimination? Can the same model be applicable to caste discrimination?

- 3) Will a comparative study of anti-discriminatory laws help to identify a set of practices to combat caste discrimination?
- 4) Is the UK Equality Act, 2010 adequate to eliminate caste discrimination practiced by diaspora communities in UK?
- 5) What legal protection do Dalit women have within the national laws? Do they get adequate protection? Does International Convention on the Elimination of all forms of Discrimination against Women address their situation?
- 6) What is the role of the NGOs in the development of anti-discriminatory laws at national as well as international levels?

1.7. Hypotheses

- National laws are not adequate to address the problem of caste discrimination.
- A comparative study of national and international anti-discriminatory laws may help identify the best ways of combating caste discrimination.

1.8. Research Methodology

The proposed study uses descriptive and analytical methods. It relies on the primary and secondary source materials at international and State level. The primary source includes the official documents of United Nations, such as resolutions of its organs, international conventions and reports of the Charter based bodies and treaty bodies. It also includes the reports of Special Rapporteurs and Universal Periodic Reviews. Further, to trace the source of word descent it has referred Constituent Assembly debates of India. The secondary sources of literature includes books, data publish by public and private institutions, articles from various national and international legal journals, newspaper clippings, other reports of research institutes and internet sources.

1.9. Chapterisation

Chapter 2 traces the sociological understanding of the caste system. Though it provides an overview, it begins examining different theories of the origin of caste system. The theories of origin of caste, racial theory, occupational theory, political theory, evolution

theory, religious theory and traditional theory identifies certain common factors responsible for the evolution of the caste system. The factors comprises of three sanctions behind the caste system, legal sanction, social sanctions and the religious sanctions. These sanctions strengthened the practice of caste system and discrimination. It is evident that the caste system exists South Asia and its diaspora. The chapter further undertakes the study of nature and practice of caste discrimination in India, Nepal, Pakistan, Bangladesh, and Sri Lanka. The South Asian diaspora practices caste system and discrimination in other parts of the world. However, most of the countries rejected the practice and failed to recognize the grievance of the caste discrimination. On the contrary, UK after the intervention of international community accepted the practice of caste discrimination by South Asian diaspora and proposed to introduce the legal mechanism on its prohibition. Therefore the study undertakes the caste discrimination practice by diaspora UK.

Chapter 3 focuses on the withdrawal of legal sanction behind the caste system. The British rule in India withdraws the legal sanction of the caste system through introducing new laws against the practice of caste discrimination. After independence, the Indian Government adopted number of laws on the prohibition of caste discrimination. The Constitution of India guarantees equality before law and equal protection of law without any discrimination. Further, to fulfill constitutional goals the Untouchability (Offence) Act, 1955, Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989 among others were introduced. The chapter examines these legal developments on the prohibition of caste discrimination in India. To undertake the analysis of these laws it examines the various Supreme Courts judgments and reports of the National Human Rights Commission of India.

Chapter 4 deals with the ‘Comparative Study of Anti-discriminatory Laws in South Asia.’ After examining the Indian laws on prohibition of caste discrimination in the previous Chapter, this Chapter examines the laws of the Nepal, Pakistan, Bangladesh, and Sri Lanka. The present chapter discusses the laws on the prohibition of caste discrimination. It began with the Nepal’s longstanding history of the constitutions. After the interventions

by various international human rights treaty bodies Nepal Government adopted the “Caste-Based Discrimination and Untouchability (Offence and Punishment) Act, 2068 (2011)”. On the contrary, the other South Asian States such as Pakistan, Bangladesh, and Sri Lanka failed to introduce a special legislation on the prohibition of caste discrimination. Though the constitution of these States explicitly prohibits the caste discrimination, the need for the special legislation did not received due attention. Apart from these South Asian States, the Chapter deals with the laws proposed by the UK government on the prohibition of caste discrimination. It focuses on the UK’s Equality Act, 2010 caste is considered as an aspect of the race and subject to the prohibition.

After examining the national laws on the prohibition of the caste discrimination the Chapter 5 attempts to study the prohibition of caste discrimination by international human rights laws. The issue of caste discrimination was raised at the UN since the formation of UN. At the first time in the 100th meeting of the ‘Third Committee of the General Assembly’ India proposed to insert the word ‘caste’ as a form of discrimination under Article 2 of the UDHR objecting to the inclusion of ‘birth’. It failed to direct inclusion of ‘caste’ as a form of discrimination. After acquaintance of the grievance of the caste discrimination, human rights treaty bodies interpreted the international human right laws. Through this interpretation human rights treaty bodies prohibits the practice of caste discrimination. The chapter focus on International Convention on the Elimination of All Forms of Racial Discrimination, 1965 and inclusion of ‘descent based discrimination’ and caste discrimination into the ICERD.

Chapter 6 deals with the effectiveness of the international human rights treaty bodies. Though the interpretation human rights treaty bodies’ covers caste discrimination under the descent-based discrimination, its implementation poses the serious challenge. To prohibit the practice of caste discrimination and achieve the human rights standards human rights bodies i.e. human rights treaty based bodies and Charter based bodies issued number of recommendations and general comments to the States. The chapter analyzes these reports and recommendations. To ensure the proper implementation and protection of the human rights UN adopted the method of Universal Periodic Reviews,

States have to produce the reports on the protection of the human rights in the States. The chapter limits itself to the UPR reports dealing with the issue of caste discrimination.

Chapter 7 traces the discussion on the inclusion of the 'caste' in the international human rights laws. It is evident that apart from the human rights treaty bodies various NGOs and WCAR plays a significant role in the inclusion of 'caste' in the international human rights laws. In other word, the WCAR internationalized and recognized the problem of the practice of caste discrimination. The chapter addresses the process of the recognition of caste discrimination and the role played by the NGOs in raising the issue of caste discrimination at the international platform. The present chapter mainly focuses on the WCAR and its preparatory meeting reports. The chapter further focuses on the aftermath of the WCAR regarding the prohibition of caste discrimination.

Chapter 8, the concluding chapter summarizes the major findings of the present study. It attempts to give suggestions and recommendations, with respect to the development of international human right law on prohibition of caste discrimination.

CHAPTER 2

SOCIOLOGY OF CASTE: AN OVERVIEW

“All paradises, all utopias are designed by who is not there, by the people who are not allowed in.”

Toni Morrison¹

2.1 Introduction

It is said that the law is the mirror of society. According to Ehrlich, “All legal developments are based upon the development of society, and the development of the society consists in this, that men and their relations change in the course of time” (Ehrlich 1962: 396). In other words, law and societal development are interdependent. In this interdependency the law has been used as an instrument for social change. The existence of the caste system and legal development around it is the best example of this interdependency. In the existence of the caste system the caste laws have played significant role. In the beginning, the caste rules came into existence and were practiced following the divine order. It evolved with certain discriminatory social norms. These rules are embedded in the society in such a manner that it reflects customary and traditional practices. Later on, these rules were codified in the form of legal norms. They received legal sanctions with the in codification by Manu in *Manusmriti* followed in 1854 by *Muluki Ain* in Nepal.

¹ Farnsworth Elizabeth (2008) “Conversation: Toni Morrison” in Carolyn C. Denard (ed.) *Toni Morrison: Conversations*, USA: University Press of Mississippi.

However, over a period of time, the social changes with awareness of rights and duties challenged these discriminatory practices. As a result, the caste rules seem to have lost some of its rigidity. It is mainly due to withdrawal of its legal sanction. The post-independence period of India saw and introduced a new regime of anti-discriminatory laws. Nevertheless, the adequacy of the anti-discriminatory laws is a matter of concern. The national and international laws on prohibition of caste discrimination have confronted with definitional and operational challenges. In order to address the definitional and operational challenges one need to understand the structure of the caste based societies. In other words, it is important to study the evolution, practices, institutions and characterization of the caste system.

Various philosophers, sociologist, anthropologist among others have examined the practice of the caste system. These studies provide vast literature on the origin, characteristics, and practices of the caste system. It may be mentioned that the caste system of the South Asia has created a unique form of discrimination that trespasses religious and territorial boundaries. Though it traces its origin to the Hindu practices of India, it is visible among all communities across the sub-continent.² Other religions of South Asia such as Islam, Christianity, and Buddhism have failed to maintain a distance from the caste system. Although non-Hindu religious texts per se denounce the discrimination on the basis of caste, the influence of Hindu ancestry with traditional and cultural caste practices have significantly influenced the other religious groups to retain the caste practice in their social intercourse (Jodhka & Shah 2010: 100).

As a result, the practice of caste system is visible across South Asia albeit with varied practices of caste discrimination. Moreover, the South Asian diaspora has carried these traditional and cultural practices to the other parts of the world. It raises pertinent questions on the deep influence of caste, the causes for survival of the age old practice and its changing nature with societal development. In the quest of these questions the present chapter is divided into sections and sub-section. Section 2 discusses the origin of caste system. The caste being a Hindu phenomenon originated in India has led to the

² The India sub- continent comprises of India Pakistan, Bangladesh, Nepal, Sri Lanka, among others. It is also known as South Asia.

production of a vast Indian literature on origin of caste. The next section i.e. section 3 discusses the role of legal sanction behind the caste system. Section 4 examines the nature and practice of caste discrimination. For clear understanding, this section is further divided into five sub-sections. These sub-sections deals with practice of caste discrimination in India, Nepal, Pakistan, Bangladesh, Sri Lanka and United Kingdom.

2.2 Origin of Caste System

The origin of the caste system has debated and examined by historians, sociologists, political scientists and anthropologist among others. In this debate, some scholars emphasize that we must speak of ‘origins of caste’ rather than ‘origin of caste’ (Ambedkar 1916: 252). Following this, various theories on the origin of caste have evolved; it includes racial theory, occupational theory, political theory, evolution theory, religious theory and traditional theory. Each theory gives its own explanations of the origin of caste system, with some tracing it to divine sanction and others to religious sanctions, some traces its racial base some argues for occupational. A study of the theories of origin of caste system will contribute to build the proper understanding of the nature and practices of caste system. Therefore, this section discusses the various theories of origin of the caste system.

2.2.1 Racial Theory

The racial theory claims that the Aryan’s invasion and conquest of India initiated the evolution of caste system. After the invasion, the conquered races i.e., the non-Aryans were treated as Dasa Varna i.e. vassal and were referred as the Shudras. The Aryans considered themselves superior and racially pure than non-Aryans. Further, to maintain the racial purity Aryans initially followed hypergamy, hypogamy and finally culminated in endogamy. However, the intermixing of these races triggered the creation of hierarchical caste system (Ghurye 1986, Risley 1908: 44, JT 2014). The racial theory of origin of caste have been criticized by many scholars on the ground that apart from India many societies in the world practice racial discrimination but, it did not result into a caste system. Ambedkar observed that “If caste means race then differences of sub-castes

cannot mean differences of race because the sub-castes become *ex hypothesia* sub-division of one and same race” (Ambedkar 1936: 266). He further noted that the caste system is the social division of the same race. It does not demarcate the racial division (Ambedkar 1936: 266). Therefore, the racial theory seems inadequate to trace the origin of caste system. It led other theories on the origin of the caste to advance.

2.2.2. Occupational Theory

The occupational theory draws its base on the occupations assigned to particular castes. In the words of Nesfield, “Function and function only as I think, was the foundation upon which the whole caste system of India was built up” (Nesfield 2007: 141). In other word, it clearly observed that the function and function only is the origin of caste system. According to this theory, people were divided on the basis of their occupation. The prestigious work ranked higher in position vis-à-vis degrading work. The prestigious work gives pride and status in the society. On the contrary, the degrading work signifies stigma with polluting nature. Consequently, the earlier open nature of occupations closed its door with the practice of endogamy. This confinement of the occupation resulted in the emergence of caste system. The scholars who propound the occupational theory notes that most of the castes are named after the occupations practiced by the people, for example, Chamar (engaged in tanning leather), Lohar (blacksmith), Sonar (goldsmith) among others. It shows that, “...the whole basis of diversity of caste is diversity of occupation” (Ibbetson 2007: 23, Nesfield 2007: 109). However, this theory failed to address other aspects such as birth, descent, social origin of the caste system and discrimination arising out of it. Moreover, it has been criticised on the line that changing of the occupation does not change the caste and therefore fails to remove the stigma attached with the individual due to his/her caste.

2.2.3. Political Theory

The political theory traces the dominance of particular caste over the others. It claims that to retain its authority and political power the dominant Brahmin caste created the caste system. According to Ghurye “Caste is a Brahminic child of Indo-Aryan culture cradled

in the land of the Ganges and thence transferred to other parts of India” (Ghurye 1986: 163). The theory pointed out that the Brahmins claim the occupational nobility to establish the authority. On the ground of occupational nobility, they claim superiority and purity and subsequently acquired political power. Further, to maintain this superiority with the purity, the Brahmins introduced certain rules. These imposed rules on the others created the caste system (Ghurye 1986). It observed that:

“The main ingredient of caste system viz., the regulation of endogamy or rather its earlier form, permitted hypergamy, was the result of the desire on the part of Aryans of the Gangetic plain to preserve their physical purity and cultural integrity...”(Ghurye 1986: 173).

Further, the restriction on the intermarriages and food are imposed to preserve the purity. However, the imposition of caste system solely by Brahmins received criticism. Ambedkar observed that “The Brahmin may have been guilty of many thinks, and I dare say they were, but the imposing of caste system on the non-Brahmin population was beyond their mettle” (Ambedkar 1916: 255).

2.2.4. Evolution Theory

According to this theory, the caste system has evolved slowly and gradually. It was not the sudden creation. Neither any act nor any class created caste at the first instance. It has been the result of long process of social evolution. During this process, various factors are responsible for the creation of the caste system such as, the hereditary nature of occupation, concept of purity, belief in rebirth, the doctrine of Karma, the lack of rigid unitary control of the state; the unwillingness of rulers to enforce a uniform standard of law and custom and their readiness to recognize the varying customs of different groups as valid; ideas of exclusive family, ancestor worship, and the sacramental meal; clash of antagonistic cultures particularly of the patriarchal and the matriarchal systems; clash of races, colour prejudices and conquest; deliberate economic and administrative policies followed by the various conquerors particularly by the British; foreign invasions among

others. These and many more factors contribute in the process of creation and the practice of the caste system.³

2.2.5. Religious Theory

The religious theory found its source in religious principles and customs. It claims that these religious principles and customs resulted into the evolution of the caste system. The the religious dogmas and powerful priesthood dominated the social life of India. In other words, the religion has played a prominent role in the societal life of the ancient India. At that time, the King was worship as God. Further, priest and King assigned various groups with distinct duties, of offering sacramental food to the deities. The groups gradually divided deities and considered themselves as descendants of particular deity. This division of the deities resulted into division of the society. The particular deity follower considered itself different from others and sometimes superior among the group. Thus, it resulted in the hierarchical caste system. One can argue that, in religious theory, caste is a reflection of the hierarchical system of the deities (Senart 2007: 74, Hocart 2007: 93).

2.2.6. Traditional Theory

According to this theory, caste system has a divine origin. The source of the divine origin lies in the Vedic literature; it claims that the Brahma created the caste. To support it the advocates of the traditional theory cites literature from Rig Veda to Manusmriti, Puranas, Ramayana, and Mahabharata among others. The Rig Veda while describing the creation of the universe elaborated the creation of the Varna system. According to it, the *Purusa* sacrificed himself and created the universe. During this sacrifices the four classes arose from his body, those classes were called as *Chaturvarnya*. The “Brahmana (priests) was his mouth, Kshatriyas (soldiers) was his arms, Vaishyas (traders) was his thighs and the Shudra (menials) was his feet” (Ambedkar 1946: 22, Griffith 1896). Further, the emergence of four Varna from different parts of the *Purusa* body indicated the work

³ Shah S. 7 Major Theories Regarding the Origin of Caste System in India, available at <http://www.sociologydiscussion.com/caste/7-major-theories-regarding-the-origin-of-caste-system-in-india/2354> assessed on October 23, 2015.

assign to them. Brahmana was assigned to educate, Kshatriyas to protect, Vaishyas to feed and Shudras to serve the above three. At that time, the individuals would change their class after acquiring certain qualifications (Ambedkar 1916: 256).

Later on, the Brahmins began to practice endogamy, which was further imitated by the other Varnas (Ambedkar 1916: 246). Subsequently, the practice of endogamy resulted into the practice of caste system. Moreover, the theory of Karma and Dharma was also attached with the caste system. It states that the individual's Karma of past life decides the status of birth in the future life. The practice of caste dharma in its true spirit led individual to acquire better position in next life. Consequently, individuals practice caste dharma in the pretext of next life without questioning it. As a result, the force of divine sanction behind the Varna system initiated the creation of the caste system.

Similarly, Kisan of Nepal validates the above mentioned theories for the emergence of the caste system in the Indian sub-continent. To elaborate it, the author further cites five grounds for the emergence of the Varna system. It includes, (a) *Purush Sukta*, (b) colour, (c) occupation, (d) personal characteristics, and (e) heredity (Kisan 2005: 14-24). Moreover, while identifying the reasons for the emergence of Shudras, the author noted down certain factors such as — (a) non-Aryan slaves and those vanquished in battle, (b) Aryan non-conformists, Aryan enemies, (c) inter-marriage, (d) progeny, and (e) occupation and powerlessness (Kisan 2005: 25-27).

After the brief understanding of the above theories it seems difficult to endorse any single theory. Most of the theories trace the origin from the descriptions of the caste system. As Ambedkar rightly pointed out that these theories are mere explanations of the origin of the caste system. While criticizing the student of caste, Ambedkar says, "...they have mistaken mere descriptions for explanations and fought over them as though they were theories of origin. There are occupational, religious etc., castes, it is true, but it is by no means an explanation of the origin of caste" (Ambedkar 1916: 261). Although the theory on origin of the caste system is still a debatable issue, the surveyed theories crafted out certain identical attributes responsible for the evolution of the caste system.

The identical attributes are — firstly, most of the theories identify the existence of class system or Varna system. Secondly, the theories elaborate the transformation of class system into the caste system. Finally, they provide certain reasons and identify practices that are responsible for the transformation of class to caste. The causes listed out by the above theories specifies such as the preserving purity of blood, imposing superiority and authority are some of the prime reasons for the transformation of class to caste. Further, most of the theories recognise the existence of endogamy as the common phenomenon that led to the emergence of caste system. Therefore, on the origin of caste Ambedkar argues that the origin of caste means origin of mechanism of endogamy (Ambedkar 1916: 252). Moreover, while elaborating on the origin of mechanism of endogamy Ambedkar observed:

This critical evaluation of the various characteristics of caste leave no doubt that prohibition, or rather absence of intermarriage - endogamy, to be concise- is the only one that can be called the essence of caste when rightly understood.A class system in which individuals, when qualified, could change their class, and therefore classes did change their personnel. At some time in the history of the Hindus, the priestly class socially detached itself from the rest of the body of the people and through a closed door policy became a caste by itself (Ambedkar1916: 245).

It shows that there existed a scope for every individual to shift his/her class. A Shudra could become a priest and vice-versa. It was merely a qualification criteria. But the priest class unilaterally followed endogamy, which was imitated by other lower classes.⁴ As a result, these classes were turn into ‘caste’ and ‘sub-caste’ through imitation and excommunication. Subsequently, this practice of endogamy and excommunication formed a social system based on graded inequality⁵ (Ambedkar 1916: 258-59).

⁴ The super imposition of endogamy on exogamy means the creation of caste (Ambedkar 1916: 246).

⁵ Ambedkar coined the term ‘graded inequality’ to the caste system. Further, he differentiates between social system based on inequality and social system based on graded inequality. As, in social system based on inequality, the low orders can combine to overthrow the system. None of them have any interest to preserve it. In a social system based on graded inequality the possibility of general common attack by the aggrieved parties is non-existent. In a system of graded inequality, the aggrieved parties are not on a common level. This can happen only when they are only high and low. In the system of graded inequality there are the highest (the Brahmins). Below the highest are the higher (the Kshatriyas). Below the high are

Chakravarti also emphasizes that, the practice of endogamy reproduces the caste system. The violation of the practice of endogamy created new groups or new caste. Thus, for example, a marriage between Brahmin man and Kshatriya woman formed a new caste or group. Similarly, a marriage between lower caste woman and higher caste man formed a new caste or group. Even among these new groups hierarchy was established on the basis of patriarchy i.e. male Brahmin secured higher position than the female Brahmin in the inter-caste marriages (Chakravarti 2013: 27-36). The law of Manu clearly depicts the mixed castes it mentioned that:

“In all castes (varna) those (children) only which are begotten in the direct order on wedded wives, equal (in caste and married as) virgins, are to be considered as belonging to same caste (as their fathers). Sons, begotten by twice-born man on wives of the next lower castes, they declare to be similar (to their fathers, but) blamed on account of the fault (inherent) in their mothers” (Buhler 1886: 403).

It shows that the practice of endogamy following the notion of purity and impurity plays significant role in characterizing the caste system. Recently, one of the genetic researches on population mixture in India substantiates the existence of endogamy as the prime reason in the formation of caste in South Asia (Moorjani 2013: 430). Even today, the practice of endogamy receives strict adherence. Any violation of the rules of endogamy invites severe and adverse repercussions. Observation of endogamy is equivalent with the attainment of pride. The quest for maintaining pride, purity, and endogamy is the cause of violence in the form of honour killing, social boycotts, rape and much more. There are number incidences of honour killing to prohibit inter-caste marriages.⁶ The lower caste family members of immediate married couple have to face social boycotts and females

the low (Shudra) and below the low are those who are lower (the Untouchables). All have a grievance against the highest and would like to bring about their down fall. But they will not combine (Ambedkar 1989: 101).

⁶ According to the Indian Human Development Survey (IHDS) conducted by the National Council for Applied Economic Research and University of Maryland only five per cent of the marriages in India are inter-caste (Available at <http://www.thehindu.com/data/just-5-per-cent-of-indian-marriages-are-intercaste/article6591502.ece>, . This meagre figure appears as a huge blow to the Supreme Court observation in *Lata Singh v. State of Uttar Pradesh and Another* AIR 2006 SC 2522 that inter-caste marriages are in the national interest as they destroy the caste system. However, in the same case, the apex court pointed out the reason for the low turnout of inter-caste marriage as the deep-rooted violence meted out against the inter-caste married couples.

members with immediate threats of rape. This prevalence of endogamy is not only limited to India but it is also evident in the South Asian diaspora in the west in general and United Kingdom in particular. In UK, for instance, many matrimonial advertisements contain caste as a one of criteria for marriage (Waughray 2009: 198).

As discussed above various theories traces the trajectory of caste from class. The above-mentioned instances depict the strict adherence of caste practice that was deeply embedded in endogamy. Then the question arises as to what led the people of various castes to strictly follow the endogamy, whether it was due to religious sanctions or social sanctions or divine-origin or sacred literature or in the combination of all preceding factors or anything else. Indeed, religious sanctions, social sanctions, divine origin and sacred literature to some extent all played significant role in the creation of endogamy and thereby in the creation of caste system. But that was not the whole truth, in addition to that, presence of rules of rights and duties in the form of legal codification added more severity to the caste system. In other words, the legal sanctions behind the caste system appeared very crucial and hence need a special attention. The next section traces the existence of such legal sanctions particularly the law of *Manusmriti* and *Muluki Ain*. Further, it examines the role of legal sanctions in retaining the practice of caste system.

2.3. Legal Sanctions behind the Caste System

The laws plays important role in the societal development. Similarly, the caste laws i.e. *Manusmriti* and *Muluki Ain* are significant in legalizing and establishing the *Chaturvarnya* and subsequently the caste system. Ambedkar observed:

Chaturvarnya would have been a very innocent principle if it meant no more than mere division of society into four classes. Unfortunately, more than this is involved in the theory of Chaturvarnya. Besides dividing society into four orders, the theory goes further and makes the principle of graded inequality the basis for determining the terms associated life as between the four Varnas. Again, the system of graded inequality is not merely notional. It is legal and penal” (Ambedkar 1949: 385).

In sum, the *Manusmriti* and *Muluki Ain* legalized the graded inequalities to practices as caste Dharma. The general perception existed among various castes that the practice of caste Dharma secures better life in the next birth. This perception led to the practice of caste system, but it was not the sole reason, the presence of legal sanctions was also significant factor. As discussed earlier, the *Purusha* (Creator) created a universe, this creation of Varna system became prominent after its practice by the people, with religious and divine sanctions. Following these many law-givers at that time defended *Purusha Sukta*. Further, while propagating it they reiterated its sanctity (Ambedkar; 1946: 24). In other words, the norms imposing duties and rights given by the *Purusha Sukta* received the social and legal sanctions. On discussing the uniqueness of the *Purusha Sukta* Ambedkar said that, all the societies in the world has a class system but “no community has given the *de facto* state of class composition a legal effect by accepting it as a *de jure* connotation of an ideal society” (Ambedkar; 1946: 26).

2.3.1. Laws of Manusmriti

The *de jure* connotation attached with the caste system had its implications on the society. It mainly attempted to maintain the caste order. Manu codified these caste rules with caste privileges, duties and penalties that preached the caste Dharma (Ambedkar 1916: 254). The Varna system was firmly established only after the codification of caste rules. After the codification of caste rules, it was the prime duty of the King to enforce the caste laws. Caste laws assigned specific caste duties and privileges of respective castes. These obligations were introduced for each caste according to its hierarchical status in the society (Chakravarti 2013: 50). Subsequently, it strengthens the castes in the watertight compartments. Singh argues that:

“...in Manu-smriti, Manu set three essential principles of the Hindu Social Order which are responsible for the origin of the caste system in India. The first and foremost is the principle of graded inequality. Second is the principle of fixity of occupation for each caste and continuous thereof by heredity. Third is the fixation of people within their respective castes or classes. This system of graded inequality is merely not made legal by Manu but spiritual and moral as well. It is

best illustrated in the law of slavery, law of marriage, law of punishment, and the law of samskaras and sanyas in manusmriti” (Singh 2010: 51).

The *Manusmriti* was codified with the aim to protect the universe. The Manu in *Manusmriti* mentioned that, the creator *Purusha* scarified himself and created the universe. While creating the universe the four Varnas were formed. The four Varnas were created from different parts of the body of the *Purusha* i.e. mouth, arms, thighs and feet. The four Varnas were Brahmins born from mouth, Kshatriya from shoulder, Vaishya from thighs and Shudras from feet (Buhler 1886: 13). Further, the creator assigned duties to the Varnas according to their origin body part. According to the Law of Manu the Brahmana is born from mouth and being a first born possesses the Veda and “he is by right the lord of the whole creation”. It further mentioned that the Brahmana is born to fulfill sacred law (Buhler 1886: 24-25). The sacred laws derived its source from the Vedas and Smritis (Buhler 1886).

This codification of the existing rules i.e. caste Dharma by Manu played an important role in the preaching and the practice of the caste system. The rules enclosed all aspects of human life; it began with the birth of the child, his/her upbringing, then marriage, occupation, food, place of living, societal status, death and even covered the after death life. All different castes have different set of rules emphasizing rights and duties of individuals. Moreover, there are penal provisions for non-performance of the caste Dharma and/or breach of the caste Dharma (Buhler 1886: 28). The penal provisions were provided on the violation of caste Dharma, Brahmin and Shudras both receives punishment on the violation. However, the degree of punishment differs on the ground that all man are not equal and degree of punishment was decided on the degree of hierarchy. The purpose of punishment was not mainly to deter a person from crime, but it was meant to maintain the rank order and prevention of miscegenation between the social species (Bougle 1971: 123). Bougle observes that:

“...the codes of Hindu law appears to us penetrated by religion and linked with inequality, less concern with reparation than with punishment, and the most severe punishments at that” (Bougle 1971: 123).

In this caste rule-book i.e. law of Manu, the laws were meant to protect and preserve the caste system. Therefore, the upper castes were given more privileges than the lower castes. Moreover, in the *Purusha's* scheme of four Varnas — the untouchables — did not receive any place, hence they were an outcaste. These outcaste people later on added to the *Chaturvarnya* system as a fifth Varna. In this graded inequality system, Shudras and Untouchables were placed at the bottom of the system, deprived of all forms of resources and basic human rights. They were assigned to do works of degrading nature such as, manual scavenging, leather work, sweeping, etc. and were traditionally prohibited from engaging in agriculture. In addition, they were also denied the access to water, education, land, markets and employment. Moreover, the concept of pollution was attached with untouchables. The untouchables were equated with the polluter, a sign of impurity, his/her touch or shadow would pollute upper castes. The concept of pollution was attached with the caste system to maintain the purity and pure status of the priestly occupations (Ambedkar 1916: 244). The concept of pollution and purity are so deeply attach with the castes that the changing of occupation failed to separate it.

2.3.2. Caste Laws under Muluki Ain of 1854

In modern times, the impact and realisation of *Manusmriti* through legal code can be traced in Nepal. Following the *Manusmriti* and other religious norms, Nepal has codified the caste rules in the form of *Muluki Ain* of 1854. *Muluki Ain* means a national code. Though *Muluki Ain* of 1854 did not cite any specific Hindu text, it was primarily based on the Hindu religious and legal texts. Moreover, apart from the Hindu caste laws *Muluki Ain* maintain some customary laws of the various communities (Pradhan 2005: 10). Similar to the *Manusmriti*, the *Muluki Ain* also regulate the different aspects of the life for instance, matter relating to the marriage, inter-caste marriage, property, inheritance, court proceeding among others (Pradhan 2005: 10).

The legal sanction of caste system in Nepal has a brief history. In Nepal, the caste system began to develop in Fourteenth century during the regime of King Jayashiti Malla. The King restructured the Newar society of the Kathmandu Valley on the suggestion of five Brahmin experts invited from northern India. The Newars were divided into sixty-four

castes, based on the division of labour or occupation. Subsequently, because of the growing influence of Indian caste system, it evolved into an hierarchical structure creating Dalit's such as Poda, Chyame, Kusule, and Kasai among the Newars (Bhattachan et al. 2008: 8). Later on King Ram Shah introduced some rules and regulations regarding relations among the various groups. The Shah rulers in Nepal “...used the concept of the caste hierarchy as an organizing principle for consolidating the diverse peoples inhabiting Nepal into a nation state under their authority” (Bennett et al. 2008: 2).

After the establishment of the Rana regime in Nepal, Prime Minister Jang Bahadur Rana visited European countries mainly England and France in 1850 to observe their legal system. During the visit, he was influenced by the legal system of the Europe. As a result, after returning to Nepal he began to review the law of Nepal and subsequently appointed the Law Council (Ain Kausal). In 1854, the *Muluki Ain* i.e. the National/Country Code was promulgated by the Rana rule. The Code consists of civil law, criminal law, land law, administrative law, and family law among others. However, these laws are mainly based on the traditional and customary practices of the Nepal. It includes codification of customs, usages, social norms, traditions and royal proclamations. The Code also legalized the practice of Untouchability and caste discrimination in the Nepal. Any breach of these practices invited penal provision mentioned in the Code. For this, the *Muluki Ain* drew its source from the Hindu jurisprudence specifically from the *Manusmriti* (Bennett et al. 2008, Thapa 2010: 518).

The *Muluki Ain* followed the classical four-fold Varna System but with certain changes. Although it adopted the structure of Varna System, the objective categories bear distinct nomenclatures. Moreover, the indigenous people and Muslims — in spite of their distinct religious and cultural categories — were incorporated under the caste system through the National Code of 1854. Later, the *Muluki Ain* divided people into four classes/castes. These four classes are comprises of number of castes. The main four castes are:

1. *Tagaddhari* (Sacred thred wearing or Twice-born)
2. *Matawali* (Liquor drinking)

3. *Pani nachalne choi chhito halnu naparne* (Water unacceptable but no purification required if touched or Touchable Low Castes)

4. *Pani nachalne choi chhito halnu parne* (Water unacceptable and purification required if touched or Untouchable Low Castes).

The above Varna system of the Nepal attempted to cover many castes into its four-fold classification. However, it failed to comprise all. For instance, there are number of untouchable groups were not included in the *Muluki Ain* (Bennett et al. 2008: 3). Moreover, it was argue that the “indigenous people of Nepal have no system of caste-based untouchability. However, their incorporation with the legal framework of caste hierarchy forced them to practice caste-based discrimination, including untouchability in everyday life. Hence, those indigenious peoples who came close to the rulers or went through the process of Hinduisation or Sanskritisation were compelled to practice it” (Bhattachan 2008: 9). Further, the National Code of 1854 was subject to the many amendments and subsequently replaced by the new National Code of 1963. However, the new code was neutral towards the caste system i.e. it did not explicitly prohibited the caste system. As a result, the Dalits of Nepal witness same set of caste discrimination practiced in India (Bhattachan et al. 2008: 10).

The legal sanction behind the caste system resulted into the strict practice of caste discrimination. The classical text *Manusmriti* and its realisation in the *Muluki Ain* of 1854 in Nepal outlawed the non-observation of caste practice with legal sanctions. These legal sanctions were generated from the highest authority i.e. the King, to overcome any deviance. Chakravarti observed that:

“Maintaining the caste order as the order of statuses, of occupation and services is of sustained concern to Manu; from this we may deduce that the brahmanical varna order is not yet firmly established, but is being sought to be legitimize and regarded as an obligation to be enforced by the kings, operationalized, and then made hegemonic. Among the basis duties of the king is to enforce the obligations of each caste according to their respective locations. The king is asked to ‘compel’ the vaisyas and the sudras to do their duties, for, say Manu...” (Chakravarti 2013: 50).

The enforcement of the caste Dharma was the duty of the King. The King was assigned to protect the world and preserve the Varna system. He had the power to punish the breach of the caste rule or non-performance of caste duties. The inhuman punishments compelled the common people to preach the caste Dharma. In other words, the fear among the people led the flourishing of caste system. To understand this it is important to study the nature of the practice of caste system and subsequently the practice of caste discrimination. Therefore, the next section deals with the nature and practices of the caste system.

2.4. Nature and Practice of Caste Discrimination

The brief study on the origin of caste system, underlines complex nature of the caste system. It is varied in the practice and difficult to identify the similarities. For instance, if we take study of Indian society in its historical perspective then it shows that the Indian society was never a racially integrated society. It was a complex unity of Aryan, Dravidian, Mongolian and Scythian races. This intermixing of races makes caste system more difficult to define precisely (Purane 2000: 19). Nevertheless, many scholars have attempted to define the caste system and the nature of caste discrimination. To begin with basic tendencies the caste have, it is said that if someone wishes to give complete definition of caste then he/she must recognise the three tendencies namely, repulsion, hierarchy and hereditary. The caste comprises these three tendencies. In other words, caste unite these three tendencies (Pocock 1971: 9). With these tendencies, caste has been able to leave its impression on the social, political, economic and cultural life of the individual.

It is evident from the structural inequalities practiced under the caste system. In these practices, Shudras and untouchables are isolated and excluded from participating in social, political and economic processes and subsequently from the development of the society (Sarkin and Koenig 2010: 542). Louis studied caste from the social and economic perspectives. According to social perspective, caste system was based on hierarchical structure. It is an inscriptive status groups with no individual social mobility between them. Further, it is divided into sub-caste and sometimes sub-sub-castes. In economic

perspective, caste system is defined as division of labour and occupations are caste specified. These are some salient features of the caste system on which one can assert that it is based on social inequality (Louis 2003: 21). It shows that caste system is in itself a socio-economic system, “which shapes the local economies, social and cultural entitlements and political regimes” (Jodhaka & Shah 2010: 100). In the words of Risely:

“...caste is a collection of a families, bearing a common name, claiming a common descent, from a mythical ancestor, human and divine, professing to follow the same hereditary calling and regarded by those who are competent to give an opinion as forming a single homogeneous community” (Risely 2007: 45).

Moreover, claiming caste as a scheme for allocating social status Sliva & Hettihewage argues that, “Castes are arranged into a hierarchical social order, members of each caste having a more or less fixed position predetermined by custom, social interaction and notions of purity and pollution which are particularly strong in Hindu society. In the first place a caste system is a scheme for allocating social status, i.e. the level of dignity or social honour to which each person is entitled, within a fixed and neatly defined social hierarchy” (Sliva & Hettihewage 2001: 60). While explaining practice of caste discrimination Thorat observes:

“...the main attributes of traditional caste system are social-physical isolation and exclusion through endogamy, residential segregation or separation, social distance through the religious notions of pollution and untouchability/unapproachability, restriction on property rights and occupation (except the polluting ones), lack of access to civil and religious rights and maintenance of the system through social ostracism and penalties with support from religious ideology” (Thorat 2009: 157).

Having briefly worked on the caste system it is clear that the caste is attached with the individual before birth. The privileged castes bring pride and enjoy every right to life. On the contrary, the lower castes bring the stigma with the humiliating life. With the changing societal conditions, the dimensions of caste are also changing. The rigidity of caste rules are diluted with the social and legal reforms. However, allowing social

participation of the Dalits with holding dignified jobs, abolition of untouchability, segregation, providing legal measures against the practice of caste discrimination and so on, could not change the stigma attached with the lower caste. The stigma attached with the untouchable continue for lifelong and nothing can keep that stigma away (Narula 2008: 269). Ambedkar rightly said that the notion attached with the caste system plays important role in prevalence of caste practices. No matter what post or rank one holds as a government official, the attached caste and the hierarchical status of caste cannot be altered (Ambedkar 1936: 299).

The discrimination arising out of the caste system violates rights of the individuals, across the South Asian States. It is considered as the social stratification based on the hierarchical order. Population is divided into the class and castes. Klass observed that:

Social stratification means the differentiation of a given population into hierarchically superposed classes. It is manifested in the existence of upper and lower layers. Its basis and very essence consists in unequal distribution of rights and privileges, duties and responsibilities, social values privations, social power and influences among the members of a society” (Klass 1993: 162).

This social stratification is visible among all States practicing caste discrimination. The severity may vary country to country, but the violation of human rights through practice of caste discrimination is the reality of the South Asian States. It is mainly practice in India, Nepal, Pakistan, Bangladesh and Sri Lanka. Moreover, South Asian diaspora practices caste discrimination in UK. Therefore, a brief understanding of the practice of caste discrimination in the South Asia States and UK appears pertinent. It provides the glance at the varied existence of the castes with different nomenclature and practices.

2.4.1. Caste in India

In India, the practice of caste system has survived through all the ages, beginning from Veda to Buddhist, Mughal, to British periods among others. Dirks observed, “When thinking about India it is hard not to think of caste...caste has become a central symbol for India” (Dirks 2002: 3). The existence of caste became omnipresent in the Indian

history. It was argued that because of this omnipresent of caste India does not have any history or any sense of history (Dirks 2002: 3). However, the practices of caste system has been changing over a period, the impact of caste system on social life is similar. For instance, after the independence, the untouchables were officially termed as Scheduled Castes. They are the worst victim of the caste system. With this official terminology, the situation of untouchables has been changing in Modern India (Narula 2009: 273).

In the past, the practice of untouchability has imposed various social disabilities. According to old customs, the lower castes were prohibited from walking on public streets to avoid their “polluted” shadow from falling on the “pure” upper castes. Moreover, many additional rules were imposed on the low castes as polluter. They had to mark themselves with the black bracelets, string a broom around their waists to sweep the “polluted” dust they walked on, and hang an earthen pot around their necks so that their spit should not fall on the earth that could pollute a Hindu who might unknowingly happen to tread on it. However, in modern India these practices do not exist rather have changed their form. Dalits are still prohibited from entering into temples, hotels, and other public places. Moreover, they are segregated into Dalit ghettos, and in some areas are still forced to get off their bike or take off their slippers while passing from the non-Dalit homes. Many gestures are made towards Dalits, more specifically to the Dalit women, to show their inferior social status according to caste system.⁷

In addition, the segregation of houses based on castes among Dalit's and non-Dalit's or upper castes is extensively practiced. The entire villages in India remain completely segregated by caste. As noted by Ambedkar, “India is admittedly a land of villages and so long as the village system provides an easy method of marking out and identifying the untouchable, the untouchable has no escape from untouchability” (Ambedkar 1947). Every village has its ghetto, and the ghetto is where the Dalits live. “Untouchability” relegates Dalits to a lifetime of discrimination, exploitation, and violence, including severe forms of torture perpetrated by state and private actors.

⁷India Untouched: Stories of a People Apart (Navsarjan Trust &Drishti Media 2007).

Housing segregation on caste is also evident in urban areas of India. Besides housing segregation, segregation in schools is also visible. Dalit's children are separated from non-Dalit in most of the schools. Similar practice also witnessed in employments as well. Dalits are forced to work in “polluting” and degrading occupations and are subject to exploitative labour arrangements such as bonded labour, migratory labour, and forced prostitution. Dalit children are vulnerable to trafficking and the worst forms of child labour. Dalits are also discriminated in hiring and in the payment of wages by private employers (Narula 2009: 257).

Migration and the anonymity of the urban environment in some cases resulted in upward occupational mobility for Dalits, but the majority continues to perform its traditional or “polluting” functions. Lack of training and education along with the discrimination faced in seeking other forms of employment, have subsisted these traditions and their hereditary nature even in recent times. The majority of the Dalit rural workforce who are landless agricultural labourers survive on the menial wages. Those in urban areas mostly work in the unorganized sector.

2.4.2. Caste in Nepal

The caste system and discrimination in Nepal is identical with the practice of caste discrimination in India. *Muluki Ain* or National Code of 1854 provides extensive evidence in the legal and social structure of the caste system in Nepal. The hill Hindus or *Parbaitya*, who mainly spoke Sanskrit based language, migrated into Nepal from the western hills. They brought with them the caste system in Nepal. Among them the Bahuns (Brahmins) and the Chhetris and Thakuris (Kshatriya) was allocated the highest status and were considered as ‘Pure’. They were referred as *tagedhari* or the ‘wearers of sacred thread’ under the 1854 Code, and were ‘twice born’ as mentioned in the Hindu texts (Bennett et al. 2008: 2).

The second group was the *Matawali* i.e. alcohol drinking castes. They were further divided into two sub-groups viz. *namasinya matawali* or non-enslavable alcohol drinkers and *masinya matawali* or enslavable alcohol drinkers. Non-enslavable included Gurung,

Magar, Sunuwar, Thakali, Rai, Limbu Newar. Whereas, the enslavable castes included Bhote, Tamang, Chepang, Gharti, Hayu, Kumal, Tharu (Subedi 2010: 152).

The third group was titled as *Pani nachalne chhoi chitto halnu naparne* (Impure but touchable castes). It mainly included Dhobi (Newar Washerman), Kasai (Newar Butcher), Kusale (Newar Musicians), Kulu (Newar tanners), Muslim, Mlechha (foreigners). The fourth category was Impure and Untouchable caste called as *Pani nachalne chhoi chitto halnu parne*. It included Badi (Musicians), Damai (tailors and musicians), Gaine (minstrels), Kadara (stemming from the union of Kami and Sarki), Kami (blacksmiths), Sarki (tanners, shoemakers), Chyame (Newar scavengers), Pode (Newar skinnners and fisherman). They are currently known as Dalits (Pradhan 2005: 11).

These different hierarchies had distinct privileges, duties and punishments. The lowest among all the castes was the Chyame who performed scavenging work. They survived on the leftover food of the other castes (Subedi 2010: 153). According to the 2001 census, the dalits in Nepal include twenty-two castes as recognised by National Dalit Commission listed in Annex-1, comprises about fourteen per cent of the total population. The dalit comprises Kami and Sarki in the hills and Chamar, Mushahar, Dusadh/Paswan/Pasi in Terai (IIDS 2008: 3). Dalits face severe traditional discriminations. Exploitative labour practices such as *Haliya/Haruwa*, *Charuwa* and *Balighare* systems imposed on the Dalits. Bonded labours still rampantly practiced. Any opposition to the discriminatory practices meted out with social banishment or boycott or physical violence. As compared to Dalit men, Dalit women face double hardship on the ground of gender and on the caste (Lamsal 2012: 77). The Action Aid in its field study on caste discrimination in Nepal identified 205 caste-discrimination practices in the eight sample sites. Some of the practices were related to denial of – resources, temple entry,; forced or discriminatory labour, dominance, inhuman treatment, social boycott, attitudinal untouchability among others. Such discriminatory practices were visible at occupation, educational institutions, governmental programs, NGO offices (IIDS 2008: 3).

2.4.3. Caste in Pakistan and Bangladesh

The situation of Dalit's in Bangladesh and Pakistan are identical to that in India, as both the States shares cultural and traditional values with India. However, due to their religious identity of Islamic State both the States deny the practice of caste discrimination, as Islam teaches equality. This denial has resulted in limited studies on caste discrimination in Pakistan and Bangladesh. Subsequently, it contributed in the worse practices of caste discrimination.

In Pakistan, according to the Census report of 1998 the Hindu scheduled castes comprised 0.25 per cent of the total population. The Hindu scheduled caste faced two-fold discrimination, one as a Hindu minority on religious ground and another on the ground of caste. Hindu lower castes also discriminated on the ground of descent and occupation. No affirmative action introduced to improve the plights of the scheduled castes in Pakistan. According to Zulfiqar Shah, who undertook an extensive survey in the various regions of Pakistan to record the plights of schedule castes, observes that scheduled castes face immense discrimination in wages, employment, health, literacy, bonded system *haris* among others (Shah 2007: 27; IIDS 2008: 8). The members of scheduled castes community also experience indiscriminate application of blasphemy laws (Shah 2007: 23).

In spite of the absence of extensive research, several Muslim castes are also considered as lower castes for instance, Mallah and Machhi of fishing communities are considered as lower castes and witness discrimination. At the same time, some castes are discriminated on the ground of occupation such as Mochi (cobblers), Bhangi (Sweeper), Pather (brick maker) irrespective of religion but who are mostly Muslims (Shah 2007: 15). Haris Gazdar describes the existence of caste discrimination in Pakistan as, "...groups that were known to face caste-based oppression, such as the 'kammis' (service castes) and 'menial' Muslim shaikhs in Punjab and the NWFP; groups such as the 'masihi' Christians in Punjab, and the bheels, kolhis and other scheduled caste Hindus in Sindh who, in addition to caste-based oppression, were also vulnerable to the religious discrimination" (Gazdar 2007: 86).

As compared to Pakistan, Bangladesh government has accepted that there are victims of caste discrimination. In other words, Bangladesh has not forcefully denied the practice of caste discrimination among Muslim community. Studies of practice of caste discrimination in Bangladesh, suggests that the “Hindus of Bangladesh are traditionally divided into various upper, lower and scheduled caste groups; those are internally homogeneous but heterogeneous to each other and are arranged in hierarchical order. Besides Brahmin, Kashtriya and Vaishya, there are lower castes known as Shudra i.e. the traditional serfs, craftsmen, agricultural labourers, and outcastes (Atishudras), who perform manual labour that is considered to be degradable kind” (Mohanty: 2004).

Further focusing on caste system practice by Muslims, Chowdhury notes that “Muslims in Bengal patterned its social stratification among four major castes – Syed, Mughal, Sheikh, and Pathan as has been peculiar in India for its imitation to Hindu Varna system, which divides the society into four main classes. All are noble, indeed, but the former two, as representing the tribe of Mahomet and the direct progeny of Alee, his son-in-law, are pre-eminent” (Chowdhury 2008: 7). In addition the author claims that the Hindu and Moslem caste prejudices practice by the community resulted in to the creation of separate number of thirty five caste among the Moslem of Bengal (Chowdhury 2008: 7).

The Dalit's of the Bangladesh represents the most marginalized and deprived section of the minority community. As noted, Muslim of Bangladesh, are in the majority, the Hindus are the minority. The Dalit community usually lives at the edge of the villages. Since they are still “considered ‘unclean’, they live separately from the so called ‘clean’ groups in their own neighborhood”. However, the Dalit's may live next to either, Hindu or Muslim neighborhoods, but they are only forced to live in the most vulnerable areas (Chowdhury 2008).

2.4.4. Caste in Sri Lanka

The practice of caste system and discrimination has a less rigid form in Sri Lanka. Caste discrimination is visible in three different groups in the Sri Lanka in varied forms. It has been argued that due to the secular nature of hierarchy and weak notion of untouchability

has resulted into less rigid practice of caste discrimination (Sliva et al. 2009: 2). The scholars and government agencies do not explicitly acknowledge the existence of caste discrimination in Sri Lanka, however, the presence of caste discrimination is internally grounded (Sliva & Hettihewage 2001: 63).

In pre-colonial Sri Lanka the existence of caste system was based on hierarchy. In this period, the organization of Kandyan State was mainly based on the caste system. The society was divided into four-fold castes, which comprises, “Goigama (farming) caste at the top, coastal caste groups as the next layer, artisan service castes and three highly despised and ostracized groups (Kinnara, Gahala and Rodi) at the bottom”. The group at the bottom of the system witnesses various forms of discrimination in private and public life (Sliva et al. 2009: 2).

During the British period, the caste system travelled from India to the Sri Lanka with the plantation workers. These plantation workers mainly came from the three depressed castes of South India, namely Pallan, Parayan and Chakkilian (PPC castes). The plantation economy has reproduced the caste system for its own advantage. For instance, the labour supervisors were selected from the ‘higher caste’. Similarly, some of the caste occupations such as sanitary labour and washing of clothes were reproduced within the plantations.

Apart from the caste system practice in the Sinhala society and Indian Tamils in Sri Lanka, the rigid form of caste system was prevalent in the Sri Lankan Tamils of Jaffna. The caste discrimination practice by Sri Lankan Tamils of Jaffna draws its source from the religiously defined notion of untouchability. Under the Tamils of Jaffna, the land-owning Vellālar caste, considered as the dominant caste and on the bottom is “Panchamar”, consisting of Vannār (dhoby), Ampattar (barber), Pallar (landless labourers), Nalavar (toddy tappers) and Parayar (funeral drummer) traditionally accorded with untouchable status in Jaffna society (Sliva et al. 2009: 121).

The lower castes face a range of discrimination, where they are prohibited against any kind of respectable clothing to denial of access to public transport, drinking water,

temples, tea-houses and the like. The violation of human rights was questioned and attempts were made by various social movements to stop it. However, these movements lost their strength with the rise of Tamil identity politics leading to the war in Sri Lanka. As a result, the lower caste groups became most vulnerable sections in the war (Sliva et al 2009).

2.4.5. Caste in United Kingdom

After 1950, many South Asians in general and Indians in particular migrated to United Kingdom (UK) with cultural, traditional and religious values and practices, which also included practice of caste discrimination. As Ambedkar anticipated that, the Indian migrants will carry the caste system to other regions of earth and it would become a global problem. This prediction came true as caste discrimination has indeed migrated with the South Asian diaspora to East and South Africa, Mauritius, Fiji, Suriname, the Middle East (for example in *Bahrain, Kuwait, the United Arab Emirates*), Malaysia, the Caribbean, the United Kingdom, North America, and other regions (Narula 2001: 22). The migration of Indians to the UK also included considerable Dalits population. It has been estimated that around 250,000 Dalits are living in the UK (CERD79 UK report).

Initially, the identity of Dalit remained invisible. But this was confined to first generation immigrants only, as they fused their identity under the all-encompassing Asian identity. During this period the upper caste community remained unorganized to assert their identities. From the second generation Dalits began to witness the problem of caste discrimination (Ghuman 2011: 3). Further, to identify the caste background of the individual certain markers are used in UK such as, cultural resonance, name, ancestral occupation, place of origin, residence and religious affiliation (Waughray 2009: 88).

As a result, Dalit diaspora witnesses dual discrimination i.e. caste discrimination from their own countrymen and racial discrimination from white society. Likewise, the South Asian diaspora started practicing age-old practice of caste far away from its origin land. There are a number of incidences of caste discrimination among the South Asian diaspora. The practice of caste discrimination in UK is less rigid than India. But the fact,

that it is prevalent at the time of marriages, place of worship, politics, in the workplace etc (Green et al 2009). Indian diaspora practices caste discrimination in UK in the name of traditional or customary practices in the absence of legal, political and social recognition of it. Caste has become so intrinsic in life that it is difficult to transcend the language of the caste. It has inscribed into the ritual, familial, communal, socio-economic, political and public life of the individuals (Dirks 2002: 6).

2.5. Conclusion

The overview of the practice of caste system and caste discrimination among the South Asian States reveals the complexity of the social structure. It also shows the influence of the caste system in social development. Certain factors are responsible for its survival since ages. These are, firstly, the religious sanction of the caste system derived from the divine and sacred literature. Secondly, the legal sanction given by the *Manusmiriti* and *Muluki Ain*. Finally, the social sanctions emerging from the acceptance and practices of the system.

If we look at the viability of the religious sanctions, it can be said that though it has begun with the particular religion its practice is evident across religions in South Asia. It has become a traditional and customary practice. In other words, the withdrawal of the religious sanction may not result in the annihilation of the caste system. It may be better to pursue legal sanctions. Regarding legal sanctions behind the caste system Dr. B. R. Ambedkar clearly mentioned that the introduction of British laws on prohibition of caste discrimination invalidated the legal sanction behind the caste system, though it did not abolish the practice of Varna system. However, these also not succeed in eliminating the social sanctions. Rather it has been changing its dimensions as Jodhka notes the caste system has under gone changes with time across the regions (Jodhka 2012).

The mere invalidation of the legal sanction will not result in the eradication of the caste system these are necessary. To challenge and abolish the age-old practice of caste discrimination, laws should be used as an instrument for social change. Some of the South Asian States have adopted this method. As a result, various laws have been

introduced at the national level to prohibit caste-based discrimination. Therefore, the study focuses on the national laws on the prohibition of the caste discrimination. For this purpose, the next chapter exclusively deals with the Indian laws on the prohibition of caste discrimination.

CHAPTER 3

INDIAN LAWS AND CASTE DISCRIMINATION

“In that Country the laws of religion, the laws of the land, and the laws of honour, are all united and Consolidated in one, and bind a man eternally to the rules of what is called his *caste*.”

Edmund Burke¹

3.1. Introduction

The brief study of the caste system in the previous chapter demonstrated the practice of inequality in South Asian States. It offered an understanding of the discrimination and inhuman practices arising out of the caste system. It also highlighted the three contributing factors in prevalence of caste system i.e. the religious, social and legal sanctions behind the caste system. All these sanctions interwoven with each other created a social system called caste system. Therefore, each sanction has its own significance in the prevalence of the caste system. However, the legal sanction played an important role. The religious and social norms were converted into the legal norms. The Kings acted as an implementing authority. For instance, in ancient India lawgivers like Manu codified, propagated and reiterated the caste rules. As a result, this codification legitimized the caste system and provided the legal sanction to it. The violation of these rules may invite stringent punishments according the caste of an individual. It shows that the codification of caste rules strengthened the caste system.

¹Speech on the opening of the Impeachment of Warren Hastings, 15 February 1788 in P.J. Marshall, (eds.), *The Writings and Speeches of Edmund Burke, Vol. 6*, Clarendon Press, Oxford, 1991, pp. 302-3.

From ancient to modern period, India played a significant role in the legal development of caste question. In the ancient period, it granted legal sanction to the caste system. Later on, in the modern period with the shifts of power, it withdrew the legal sanction. The withdrawal of these legal sanctions was a major challenge. However, the Britishers initiated the steps. For instance, the colonial courts restrained its support to the caste rules. Moreover, the British introduced various prohibitory and affirmative measures for the betterment of the untouchables (Galanter 1963: 545). In prohibitory measures, colonial India adopted various laws against the practice of caste discrimination. With the prohibition, the affirmative actions were introduced to protect the interest of the lower castes. The 'Indian Caste Disabilities Removal Act' of 1850 was the first law, across the globe, on prohibition of direct discrimination in general and caste discrimination in particular (Khaitan 2015: 16).²

Subsequently, after independence, the Constitution of India abolished the practice of untouchability. The Constitution further guaranteed the fundamental rights and freedoms to every individual. It prohibits the practice of caste discrimination in public sphere and provides equal opportunity to its citizens. Moreover, the Constitution directed the State governments to adopt effective enactments on prohibition of caste discrimination. As a result, the legal regime developed against the practice of caste discrimination. These include the Untouchability (Offences) Act, 1955; Protection of Civil Rights Act, 1976; Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989; Bonded Labour System (Abolition) Act, 1976; and the Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 2013.

On the one hand, India has developed the legal mechanisms against caste discrimination. But, on the other hand, India extensively witnesses the rampant practice of caste discrimination. This existence of the practice of caste discrimination raises serious doubts

² It is noted that, in the overall development of discrimination law, India and US were the first to introduce laws on the prohibition of direct discrimination in the nineteenth century. The 'Indian Caste Disabilities Act' came into existence in 1850. Similarly, the US introduced fourteenth amendment to the US constitution in 1868 (Khaitan 2015: 16). The amendment referred as the reconstruction amendment. It was the response to the problems relating to the former slaves. It addresses the citizenship rights and equal protection of law.

on the adequacy of the anti-discriminatory laws. It raises questions such as whether the existing laws are adequate to prohibit caste discrimination? Whether the implementing mechanisms are effective to overcome the caste based discrimination? What are the alternative solutions to the failure of national laws? This chapter addresses the above questions. It is divided into four sections. The first section deals with the British laws on the prohibition of caste discrimination. The next section examines the constitutional provisions dealing with non-discrimination and equality. The third section focuses on the various laws on the protection against the caste atrocities. Finally, the last section analyses the functioning of the laws by undertaking the examination of various statutory reports.

3.2. Caste Discrimination and law in Colonial Period

The British era played a significant role in the legal development around the caste question. The colonial legal development on caste based discrimination can be analysed under two phases. Generally, the categorization of these two phases is made on the ground of early rule of the company and its inability to understand the Indian social system. Nevertheless, the second phase is an outcome of colonial maturity to understanding the Indian social system that developed after the visit of Christian missionaries in India (Kolsky 2010: 108). In the first phase, the British government supported caste laws. The practice of untouchability received limited or in other words indirect support from the British legal system (Galanter 1972: 228). It adopted the plural legal order acquiring the administrative and sovereign authority (Benton 2002: 131-132, Cohn 1996: 61). This plural legal system was the mixture of indigenous and colonial rules (Jaffe 2015: 48-49). In this mixture, the indigenous rules governed the issues regarding marriage, property, caste, and religion among others. In other words, the native adjudicators such as Maulvies and Pundits were entrusted with the authority to govern the personal laws, which also included the laws of the Manu i.e. caste laws. On the other

hand, the colonial rulers governed the matter relating to the civil administration³, revenue and European subjects (Galanter 1963: 545, Benton 2002: 139, Cohn 1996: 61).

Accordingly, the judiciary was set up which included experts on personal laws. For the matters relating to Hindus, the Brahmin Pandits having authorities over the *Dhamashatras*, were appointed. They were assigned with the obligation to advise the judges on the applicability of the Hindu rules and its interpretations to the concerned issues. Similarly, Moulvis were appointed to interpret and to determine the applicability of the Muslim laws to the Muslim subjects (Galanter 1963: 545, Benton 2002: 139, Cohn 1996: 61). The interpretations provided by the Brahmin Pandits and Moulvis introduced new caste rules. Consequently, the list of the instances of caste discrimination began expanding by introducing new rules, and these rules were enforced by the social sanctions (Galanter 1963: 547). For instance, in the case of use of temples certain rules of preferences and exclusiveness practiced which received colonial sanctions. For the use of religious institutions, the colonial courts restrained the lower caste individuals from entering the temples. Even though they were part of the Hindu fold, their entry was considered as pollution. Hence, the upper caste worshippers were entitled to file an action of trespass against the polluter. The damages were awarded in the form of purificatory ceremonies. Moreover, if the excluded caste knowingly polluted the temple then it was a criminal offence (Galanter 1963: 548). From the above instance, it is evident that the court supported the practice of caste discrimination. Moreover, these judicial pronouncements validated and strengthened the caste system. As a result, the courts lost its authority over the caste questions (Galanter 1963: 547).

In the second phase, the British government realized the repercussions of caste system. Therefore, it began to introduce laws against the practice of caste discrimination. It was mainly an outcome of the establishment of Indian Law Commission under the Charter of 1833 (Kolsky 2010: 75). Post-1833 the colonial law makers preferred to have principles based on justice and decency and above all on the scientific administration of justice

³ Marc Galanter highlights the withdrawal of caste question from the civil jurisdiction as - “As early as 1827 a Bombay regulation withdraw from the civil courts jurisdictions over cases involving caste questions (Galanter 1963: 546).”

system (Kolsky 2010: 110). Hence, they revisited the caste question. In 1864, it abolished the judicial institutions comprising Pandits and Moulvis. On the contrary, it appointed the Common law judges to determine the applicability of the rules and their interpretations (Galanter 1963: 545). The courts began to restrict its support to caste laws. Moreover, the British government passed various resolutions and orders dealing with the caste discrimination (Galanter 1963: 545). It started with the passage of the 'Caste Disability Removal Act, 1850'. This Act mentioned that there will be no forfeiture of civil or property rights on the ground of the renouncement or exclusion from a caste or a religious group.

Further, Bombay, Madras and other princely states followed the initiative and passed various resolutions to protect the rights of the Shudras and Untouchables. The resolutions guaranteed equal rights to Shudras and Untouchables with regard to equal use of government facilities, schools and wells. In 1923, the Bombay Legislative Council passed a resolution, permitting untouchables to use all public water places, wells, schools, dispensaries, etc. (Galanter 1972: 237). But, it failed to yield intended outcomes as the policy executors or administrator were touchable Hindu who did not wish to go against the Hindu belief. They feared that if this resolution implemented then their existing and future generations will go to hell (Khairmode 2013: 45). Further, from 1932 to 1936 a number of temple-entry and anti-disabilities bills were introduced in Central Legislative Assembly of Madras and Bombay legislature. In 1938, for the first time, a comprehensive penal act was passed by Madras legislature to remove social disabilities. With the object to remove such social disabilities it permitted the untouchables to use publicly supported facilities such as roads, wells and transportation, and other secular institutions, to which the general public were admitted, including restaurants, hotels, shops, etc. Further, any act against the permitted use was declared as an offence (Galanter 1972: 239).⁴

⁴ The Madras Removal of Civil Disabilities Act, 1938 (Madras Act XXI of 1938). Following this with the passing of power to the Indian most of the provinces passed the similar Acts, includes, Bombay Harijan (Removal of Social Disabilities) Act, 1946; Orissa Removal of Civil Disabilities Act, 1946 (X of 1946); Utter Pradesh Removal of Social and Religious Disabilities Act, 1947; The Bihar Harijan (Removal of Civil Disabilities) Act, 1949 (Bihar Act XIX of 1949); The Bombay Harijan Temple Entry Act, 1947 (Bombay Act XXXV of 1947); The Central Provinces and Berar Scheduled Castes (Removal of Civil Disabilities) Act, 1947 (Central Provinces and Berar Act XXIV of 1947); The Central Provinces and Berar

On the introduction of various British laws against the caste based discrimination Ambedkar observed that, “it only means that the general legal sanction behind the *Varna* system has been withdrawn” (Ambedkar 1946: 13). He observed that:

“...new, law is not the only sanction which goes to sustain social institutions. Institutions are sustained by other sanctions also. Of these, religious sanction and social sanction are the most important. The *Varna* system has a religious sanction. Because it has a religious sanction, the *Varna* system has the fullest social sanction from the Hindu society. With no legal prohibition, this religious sanction has been more than enough to keep the *Varna* system in full bloom. The best evidence to show that the *Varna* system is alive notwithstanding there is no law to enforce it, is to be found in the fact that the status of the *Shudras* and the Untouchables in the Hindu society has remained just what it has been” (Ambedkar 1946: 13).

It suggests that there is need to prohibit the practice of *Varna* system and subsequently the caste system. Overall, the British law-makers initially validated the caste discrimination in the absence of concrete understanding, but with the consolidation of power and concrete understanding they initiated steps to overcome their mistakes. As a result, few reforms were introduced, in particular, the withdrawal of legal sanction to the caste validity. The reforms in the colonial period against caste discrimination were insufficient, nevertheless the foundations were sowed during this period.

After independence, various efforts were made to prohibit practice of caste discrimination. As during the freedom struggle, the issue of caste-based discrimination and inequality were the prime concern of Ambedkar. Subsequently, after the

Temple Entry Authorisation Act, 1947 (Central Provinces and Berar Act XLI of 1947); The East Punjab (Removal of Religious and Social Disabilities) Act, 1948 (East Punjab Act XVI of 1948); The United Provinces Removal of Social Disabilities Act, 1947 (U.P. Act XIV of 1947); The West Bengal Hindu Social Disabilities Removal Act, 1948 (West Bengal Act XXXVII of 1948); The Hyderabad Harijan Temple Entry Regulations, 1358F (No.LV of 1358 Fasli); The Hyderabad Harijan (Removal of Social Disabilities) Regulation, 1358F (No.LVI of 1358 Fasli); The Madhya Bharat Harijan Ayogta Nivaran Vidhan, Samvat 2005 (Madhya Bharat Act No. 15 of 1949); The Removal of Civil Disabilities Act, 1943 (Mysore Act XLII of 1943); The Mysore Temple Entry Authorization Act, 1948 (Mysore Act XIV of 1948); The Saurashtra Harijan (Removal of Social Disabilities) Ordinance (No XL of 1948); The Travancore-Cochin Removal of Social Disabilities Act, 1125 (Travancore-Cochin Act VIII of 1125); The Travancore-Cochin Temple Entry, Removal of Disabilities Act, 1950 (Travancore-Cochin Act XXVII of 1950); The Coorg Scheduled Castes (Removal of Civil and Social Disabilities) Act, 1949 (Coorg Act I of 1949); The Coorg Temple Entry Authorisation Act, 1949 (Coorg Act II of 1949), subsequently, these Acts was further repealed by the Protection of Civil Rights Act 1955.

independence a new democratic form of government on equal participation principle was established. However, the principle of inequality of the caste system poses major challenge to Indian constitutional values of egalitarian society. As noted by the Tocqueville, inequality of dignity practiced by Indian caste system makes democracy empty word. He further observed:

“One of the most ‘vicious institutions’ is obviously the caste system, which cannot be reconciled with democracy. The fundamental inequality of dignity within the caste system is deeply rooted in the Indian habits of the mind and heart, meaning that any ‘official’ abolition of the caste system does not transform the Indian way of thinking and feeling – does not generate the recognition of the hidden law of providence, let alone its obedience. Even if all Indians are offered equal opportunities and equal treatment by law, their habits of the mind and heart will not change in their political and social relationships” (Annelien & Geenens 2007: 97).

Though it is evidently visible that even after six decades of the adoption of the Constitution the caste discrimination exists, the reforms introduced during the same period are to some extent are significant. In other words, the period after the independence was the dawn of new beginning for Scheduled Castes and Scheduled Tribes, achieving equal status and dignity. The next section examines the constitutional provisions on the prohibition of caste discrimination.

3.3. Prohibition of Caste Discrimination under the Constitution of India

The post-colonial era saw the introduction of revolutionary measures ensuring equality in all spheres of life. The Constitution of India was adopted with the commitment to bring social reforms, in terms of ensuring justice to all and one such attempt was to abolish caste system that incorporates deep social inequalities (Grinsell 2010: 205). The Constitution strives to protect the interest of marginalized and deprived sections of the society to achieve the social justice. Further, to attain the social justice it broke traditional system of social hierarchies i.e. caste system and ensured justice, liberty, equality, and fraternity to all for the first time in the history of India (Bhargava 2008: 14-15). Austin pointed out three significant elements of the Indian Constitution to uplift the

downtrodden masses. Those are national unity and integrity, democracy and a social revolution (Austin 2002: 319). He observed that:

“The Indian Constitution is first and foremost a social document. The majority of its provisions are either directly aimed at furthering the goals of social revolution or attempt to foster this revolution by establishing the conditions necessary for its achievement” (Austin 2012: 50).

Further, to achieve the goals Part III of the Constitution guaranteed fundamental rights to every citizen to maintain equality, liberty thereby restraining the State from engaging in any kind of violation of such rights. At the same time, Part IV ‘directive principles of state policy’ set out policy consideration on the part of the State in the near future, to enact laws in fulfilling constitutional goals. It vows to establish an egalitarian society with equal status and equal opportunities to all.

At the first place, the fundamental rights protect the individuals from arbitrary, prejudicial State actions. Subsequently, few articles of the Part III protect the individuals against the actions of the private citizens i.e. Article 17, 15, and 29 (Austin 2012: 51, Galanter 1972: 241). Under Article 17, the Constitution abolishes the practice of ‘Untouchability’ and forbids its practice in any form. It obligates the State to protect people from all forms of discrimination by enacting protective laws. The enforcement of any disability arising out of untouchability is an offence punishable in accordance with law. However, the Constitution does not provide any definition of the term “untouchability” neither had it specified what constitutes the “practice in any form or a disability arising out of untouchability” (Galanter 1972: 243). Similarly, Justice Ramaswamy in *State of Karnataka V. Appa Balu Ingle and others* observed that neither the Constitution nor the Protection of Civil Rights Act, 1955 defines the untouchability.⁵ The reasons for not defining untouchability in the Constitution and the 1955 Act, Justice Ramaswamy viewed as:

⁵ AIR 1993 SC 1126

“Neither the Constitution nor the Act defined 'Untouchability'. Reasons are obvious. It is not capable of precise definition. It encompasses acts/practices committed against Dalits in diverse forms. Mahatma Gandhiji in his 'My philosophy of Life' edited by A.T. Hingorani 1961 Edn. at p. 146, stated that "untouchability means pollution by the touch of certain person by reason of their birth in a particular state of family. It is a phenomenon peculiar to Hinduism and has got no warrant in reasons or sastras". According to Dr. Ambedkar, "the untouchability is the notion of defilement, pollution, contamination and the ways and means of getting rid of that defilement. It is a permanent hereditary stain which nothing can cleanse". The Parliamentary Committee on Untouchability headed by L. Elayaperumal in their 1969 report stated that 'untouchability' is a basic and unique feature and inseparably linked up with the caste system and social set up based upon it. It does not require much research to realise that the phenomenon of untouchability in this country is fundamentally of a religious or political origin. Untouchability is not a separate institution by itself, it is a corollary of the institution of the caste system of Hindu Society. It is an attitude on the part of a whole group of people. It is a spirit of social aggression that underlies this attitude.”⁶

Untouchability is one of the facets of the caste system. It is an extension of the caste system. Therefore, defining untouchability became a difficult task. The framers of the Constitution highlighted the need for defining the offence of untouchability. Moreover, concerns were raised on the abolition of the untouchability without abolishing the caste system (CAD 2009: 403-436). As noted by Justice Ramaswamy the “Caste system and untouchability stand together and will fall together. The idea of hoping to eradicate untouchability without destroying caste system is an utter futility.”⁷

However, on one hand, the Constitution of India abolishes the untouchability, and on the other hand, it prohibits the practice of caste discrimination. Therefore, after examining Article 17 it is equally important to examine the other constitutional provisions guaranteeing equality and prohibition of caste discrimination. As, mentioned earlier, Part III of the Constitution guarantees various fundamental rights which prohibits caste discrimination. Article 14 states that “State shall not deny to any person equality before the law or equal protection of the laws within the territory of India”. Article 15 restrains

⁶ AIR 1993 SC 1126

⁷ Ibid

the State from discrimination against any citizen on the basis of religion, race, caste, sex or place of birth. Further, on the access to the public places it states that:

Article 15 (2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to—

(a) access to shops, public restaurants, hotels and places of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

(4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

(5) Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30.

With this Article the Constitution of India opens the door of public places for the Scheduled Castes⁸ and Scheduled Tribes⁹. It prohibits the caste discrimination by the State. It also prohibits the caste discrimination by private person with respect to use of public facilities and accommodations (Galanter 1968: 312). Similarly, on practice of untouchability by private individual Supreme Court in *People's Union for Democratic Rights v. Union of India* held that, the fundamental right against untouchability is also

⁸ The term Scheduled castes was introduced by the Government of India Act, 1935, it comprises the list of the deprived castes among others. After the independence, the Constituent Assembly adopted the definition and term Scheduled Castes. Therefore, The Constitution (Scheduled Castes) Order 1950 gives the detail list of the Scheduled castes. As, Article 341 of the Constitution of India defines Scheduled Castes as “the castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purposes of this Constitution be deemed to be Scheduled Castes in relation to that State.”

⁹ Similarly, The Constitution (Scheduled Tribes) order 1950 give the list of Scheduled Tribes.

available against private individual. It is the constitutional duty of the state to take necessary steps to protect the right.¹⁰

In addition, it urges the introduction of provisions for the betterment of socially and educationally backward sections. The Constitution also directs the States to introduce provisions for the advancement of socially and educationally backward in educational institutions including private institutions except unaided minority institutions. More precisely, according to Article 21 (A), “The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine”. The Government of India has enacted the “Right of Children to Free and Compulsory Education (RTE) Act, 2009”. As per this Act, 25 per cent of seats are reserved for the socially and educationally backward sections in private schools as well. Moreover, Article 29 (2) states that, “no citizen shall be denied admission to any educational institution maintained by the State or receiving aid out of the State funds on grounds only of religion, race, caste, language or any of them”.

While expanding the scope of anti-discrimination law to the sector of employment Article 16 (1) provides equality of opportunity to all citizens in offices under the State. It further lays down the general rule that no citizen shall be discriminated against or be ineligible for any employment or office under the State on grounds only of religion, race, caste, sex, descent, place of birth or residence (Article 16 (2)). Following the principle of equality and non-discrimination for the upliftment of backward sections of the society, mainly, Scheduled Castes, Scheduled Tribes and Other Backward Classes, reservation was offered. The provision of reservation is mainly confine to the offices under the State or public sector. As mentioned in Article 16:

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

(4A) Nothing in this article shall prevent the State from making any provision for reservation 3 [in matters of promotion, with consequential seniority, to any class] or

¹⁰ AIR 1982 SC 1473.

classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.

(4B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent reservation on total number of vacancies of that year.

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

While introducing special provisions for certain classes in Part XVI, Article 335 deals with the claims of Scheduled Castes and Scheduled Tribes to the services and posts. In addition, to ensure an equal political representation, Article 330 states, “seats shall be reserved in the House of the people for the Scheduled Castes and Scheduled Tribes” (330 (1)). Apart from the House of the people, the seats are also to be reserved for the Scheduled Castes and Scheduled Tribes in the State Legislative Assemblies (Article 332). The reservation policy was criticized and debated many times on various grounds. However, the conditions of Scheduled Castes and Scheduled Tribes received limited attention (Das 2000: 3831).

Furthermore, Article 25 guarantees right to freedom of religion. It mentions that every individual have the right to freedom of conscience and are free to profess, practice, and propagate any religion. While protecting the interest of ‘minorities’ Article 29 (1) guarantees to any section of the citizens residing in any part of India having a distinct language, script or culture of its own, the right to conserve the same. All minorities whether based on religion or language have the right to establish and administer educational institution of their choice as guaranteed by Article 30 (1).

Besides this, Article 338 (1) and 338 (A) deals with the constitution of National Commission for Scheduled Castes and National Commission for Scheduled Tribes

respectively. The Commissions are empowered to regulate their own procedures. The Commissions are delegated with certain duties. Most importantly, they are assigned with powers to investigate and monitor all matters relating to the rights provided to the Scheduled Castes and Scheduled Tribes (Article 338 (5), Article 338 (A) (5)). The Commission for Scheduled Caste is authorized to conduct investigation and officers are advised on how best the interest of Scheduled Castes can be promoted:

Article 338 (1) –

b) to inquire into specific complaints with respect to the deprivation of rights and safeguards of the Scheduled Castes;

(c) to participate and advise on the planning process of socio-economic development of the Scheduled Castes and to evaluate the progress of their development under the Union and any State;

(d) to present to the President, annually and at such other times as the Commission may deem fit, reports upon the working of those safeguards;

(e) to make in such reports recommendations as to the measures that should be taken by the Union or any State for the effective implementation of those safeguards and other measures for the protection, welfare and socio-economic development of the Scheduled Castes; and

(f) to discharge such other functions in relation to the protection, welfare and development and advancement of the Scheduled Castes as the President may, subject to the provisions of any law made by Parliament, by rule specify.

(6) The President shall cause all such reports to be laid before each House of Parliament along with a memorandum explaining the action taken or proposed to be taken on the recommendations relating to the Union and the reasons for the non-acceptance, if any, of any of such recommendations.

(7) Where any such report, or any part thereof, relates to any matter with which any State Government is concerned, a copy of such report shall be forwarded to the Governor of the State who shall cause it to be laid before the Legislature of the State along with a memorandum explaining the action taken or proposed to be taken on the recommendations relating to the State and the reasons for the non-acceptance, if any, of any of such recommendations.

Similarly, duties are assigned to the National Commission for Scheduled Tribes under Article (338 (A)). It has the power of a civil court trying suit on matters relating to sub clause (a) and (b) of clause 5 (338 (8), 338 (A) (8)). Clause 9 of both the Articles states that the Union and every State Government shall consult the Commission on all major policy matters affecting Scheduled Castes and Scheduled Tribes. All these constitutional safeguards and the problems of their implementation can be examined by reviewing annual reports of both the Commissions. The later part of the chapter discusses these in a detail. All the above-cited constitutional provisions have initiated the process of social transformation. But the caste rules practiced by society diminishes the constitutional goals. In other words, a dichotomy can be witnessed between laws given by the State and living laws¹¹ practiced by the society. This has highlighted by the Supreme Court in many cases. In one of its landmark judgments, *Indra Sawhney v. Union of India*, Justice S. R. Pandian noted that, the caste system has taken deep roots in structure of Indian society, exercising caste authority over a new born child from the moment he/she takes first breath.¹²

In another case, *Ganpat v. Returning Officer & Ors.*, the Supreme Court noted that for a person who has grown up in the Indian society it is very difficult to get out of the coils of the caste system. It also pointed to the practice of caste discrimination among the Scheduled Castes themselves, due to its hierarchical nature. Moreover, the caste discrimination exists amongst the Muslims, Sikhs, Christians as many Scheduled Castes Hindus are converted to these religions. All this is merely to indicate the difficulty of persons getting out of the caste customs and the mentality generated thereby. The evil of untouchability has to be eradicated. It has to be eradicated not merely by making constitutional provisions or laws but from the minds and hearts of men. It is important that members of communities who are untouchable should assert their self-respect and fight for their dignity.¹³

¹¹ According to the Ehrlich E. (1962) societies are governed by two type of norms first the norms having official sanctions and the second the societal practices. All customs, usages, cultural and traditional practices forms the living law on the contrary to laws given by the sovereign.

¹² AIR 1993 SC 477

¹³ 1975 AIR 420

The observations made by the Court clearly highlighted the practice caste discrimination by other religious groups and among untouchables. The caste system is based on the hierarchy. Every single caste discriminate the lower castes. In other words, caste discrimination exists among Brahmins, Kshatriyas, Vaishyas, Shudras and Untouchables (Galanter 1963: 551). Article 17 and 15 abolishes untouchability and prohibit caste discrimination, but does it prohibit discriminatory practices among above Varnas. On this Galanter observed that:

“The meaning of untouchability then is to be determined by reference to those who have traditionally been considered "untouchables." But it is no easier to define untouchables than it is to define "untouchability." "Beyond the pale of the caste system" is a misleading and unworkable formulation. Even the lowest castes are within the system of reciprocal rights and duties; the disabilities and prerogatives are articulated to those of other castes” (Galanter 1963: 551).

Nevertheless, to fulfill the constitutional aspirations and to address this complex but unique hierarchical caste system, a prime concern was to identify discriminatory acts that amount to caste discrimination. Therefore, the legislature enacted various laws codifying the discriminatory acts and the punishments to overcome it. The next section of the chapter addresses the various laws dealing with the discriminatory acts based on caste and the description of punishments for such acts under the respective laws.

3.4. Laws on the Prohibition of Caste Discrimination

The Constitution of India abolishes the untouchability and prohibits the caste discrimination. However, to enforce the fundamental rights and penalized the practice of untouchability and caste discriminations the legislature has introduced a secondary legislations. As a result, various Central and State laws came into force. It began with the Untouchability (Offence) Act, 1955, followed by the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, Bonded Labour System (Abolition) Act 1976, Prohibition of Employment as Manual Scavengers and their Rehabilitation Act, 2013. These laws identify the acts constituting the practice of untouchability and caste

discrimination. After the identification of the acts, it has come up with the penal provisions against the practice of untouchability and caste discrimination.

3.4.1. Early Laws against Untouchability

Article 17 of the Constitution abolished the untouchability. Further, it is extended in the Untouchability (Offence) Act, 1955. The purpose of the Act was to prohibit traditional practice of untouchability. It prohibits number of acts that amounts to untouchability. However, the Act does not define ‘untouchables’ and ‘untouchability’. The Act provides the list of acts that amounts to the untouchability, where it confines the practice of Untouchability arising only out of birth rather attained in life (Galanter 1963: 551). The acts which amounts to Untouchability includes,

- a) Refusing any person from entering and worshiping at temples (Section 3);
- b) Refusing access to shops and restaurants (Section 4 (i));
- c) Refusing the practice of occupations and trades (Section 4 (iii));
- d) Refuse the use of water sources, places of public resort and accommodation, public conveyances, hospitals, educational institutions (Section 4 (iv)(v)(vi)(vii));
- e) Refusing construction and occupation of residential premises, holding of religious ceremonies and processions (Section 4 (viii));
- f) Refuse to use of jewelry and finery (Section 4 (xi)).
- g) Refusing to admit persons to the hospitals, etc. (Section 5).
- h) Refusing to sell goods or render services (Section 6).

The performance of above acts constitutes a punishable offence under the Act. On the practice of any single above act, the person may receive imprisonment of up to six months and fine up to five hundred rupees. Moreover, this was the first Act, which

attempts to reach boycotts and caste disciplinary power (Galanter 1972: 250). Section 7 of the Act deals with other offences arising out of the practice of untouchability. According to it, the boycott of one person by another, following the practice of untouchability invites punishments. However, it does not speak of the social boycotts, or boycott of untouchable by the whole community. With such kind of loopholes, there are difficulties in its effective implementation (Purane 2000: 44).

The purpose for which the Act was established remained unattained and it drew a lot of criticism, particularly with reference to punishment, which was inadequate. In the light of this criticism, the Government of India appointed a committee under the chairmanship of L. Elayaperumal. The objective of the committee was to examine, amongst other things, the problem of untouchability with reference to the working of the Untouchability (Offence) Act, 1955 and to make recommendations to the Government for its amendment (Purane 2000 : 83). The report was submitted in 1969 and the committee stated that:

“We constrained to point out that during the course of our tours, we came to know that the copies of the Act were not even available at many of the district offices and many Government officials had no knowledge of the provision of the Act” (Purane 2000: 45).

The committee report led to the amendment of Untouchability (Offence) Act, 1955. In 1976, the Act was amended and renamed as ‘Protection of Civil Rights Act’. With this amendment, the scope of the Act was enhanced by including the offences of preaching and practice of “Untouchability” as:

- 1) Insulting a member of a Scheduled Caste on the ground of untouchability (Section 7 (1) (d)).
- 2) Preaching untouchability directly or indirectly (Section 7 (1) (c) Explanation II)¹⁴.

¹⁴ Explanation II- For the purpose of clause (c) a person shall be deemed to incite or encourage the practice of "untouchability" – i) if he, directly or indirectly, preaches "untouchability" or its practice in any form; or

- 3) Justifying untouchability on historical, philosophical or religious grounds or on the ground of tradition of the caste system (Section 7 (1) (c) Explanation II); it further provided punishment for –
- 4) Enforcing religious disabilities (Section 3).
- 5) Enforcing social disabilities (Section 4)).
- 6) Refusing to admit persons to hospital, educational institutions or hostels established for the benefit of the general public (Section 5).

Moreover, Section 7 (A) was inserted into the Act prohibiting compulsory labour on the ground of untouchability, which includes manual scavenging, and sweeping among others. Further, while giving explanation for the ‘compulsion’ it says, the ‘compulsion’ includes threat of social or economic boycott. However, it did not elaborate the term ‘social’ or ‘economic’ boycott. Similarly, the Act was inadequate in punishing offences such as making the Scheduled Caste persons to eat inedible substances like human excreta, killings, rape of women belonging to this groups (Purane 2000: 221).

With this shortfall the Act invited criticism, many cases of atrocities on Scheduled Castes and Scheduled Tribes were not specifically covered under the provisions of Protection of Civil Rights Act, 1955 (Agrawal and Gonsalves 2005: 71). It was also mentioned that the abuses against Dalits were not limited to name calling or denial of entry into a public place. The main defining characteristic of the abuses against Dalits is violence against

ii) if he justifies, whether on historical philosophical or religious grounds or on the ground of any tradition of the caste system or on any other ground, the practice of "untouchability" in any form. (IA) Whoever commits any offence against the person or property of any individual as a reprisal or revenge for his having exercised any right accruing to him by reason of the abolition of 'untouchability" under article 17 of the Constitution, shall, where the offence is punishable with imprisonment for a term exceeding two years, be punishable with imprisonment for a term which shall not be less than two years and also with fine.2) Whoever – i) denies to any person belonging to his community or any section thereof any right or privilege to which such person would be entitled as a member of such community or section, or ii) takes any part in the ex-communication of such person, on the ground that such person has refused to practise "untouchability" or that such person has done any act in furtherance of the objects of this Act.

them. No reference to this violence was the greatest deficiency in the Protection of Civil Rights Act (Narula 1999: 112). The 1955 Act was inadequate to provide the safeguard to SC/ST and to prohibit crime against untouchability (Thorat 2002: 572). Therefore, there was a need to introduce new legislation to control abuses against Scheduled Caste and Scheduled Tribes. As a result, in 1989, the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act was introduced to protect interests of the Scheduled Castes and Scheduled Tribes.

3.4.2. The Atrocity Act of 1989 and the Prohibition of Caste Discrimination

The eternal nature of caste atrocities, or rather say the countless manner showing a practice of caste discrimination, forced the Government to widen the scope of the prohibitory measures. In these attempts, the enactment of *Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989* was one more step forward. Identifying the lacunas of Protection of Civil Rights Act, the present Act attempts to include other forms of abuse against Scheduled Caste and Scheduled Tribes. To begin with, the preamble of the Act as it describes the object and purpose of the Act:

“an Act to prevent the commission of offences of atrocities against the members of the Scheduled Castes and the Scheduled Tribes, to provide for special courts for the trial of such offences and for the relief and rehabilitation of the victims of such offences and for matters connected therewith or incidental thereto.”

The preamble of the Act clearly specifies three main objectives of the Act, that is -

- 1) To prevent atrocities against the Scheduled Castes and Scheduled Tribes;
- 2) To establish special courts in dealing with atrocities under this Act;
- 3) To give relief and rehabilitate the victims of such offences.

With these objectives, the Act identified a list of acts performed by a non-member of Scheduled Castes and Scheduled Tribes as atrocities. The commencement of these acts is an offence and punishable under the Act. These includes:

- Forcing a person to drink or eat any inedible or obnoxious substance (Section 3 (1)(i));
- Dumping waste matter, excreta, carcasses or any other obnoxious substance in his premises or neighborhood (Section 3 (1)(ii));
- Forcibly removing clothes from the person or parading him naked or with painted face or body, or committing any similar act which is derogatory to human dignity (Section 3 (1)(iii));
- Wrongfully occupying or cultivating any land owned by Scheduled Caste or Scheduled Tribe, or getting the land allotted to him transferred (Section 3 (1)(iv));
- Wrongful dispossessing of owner from his land or premises, or interfering with the enjoyment of his rights over any land, premises, or water (Section 3(1)(v));
- Compelling or enticing for begging or other similar forms of forced or bonded labour (Section 3 (1)(vi));
- Intimidating during the voting (Section 3 (1)(vii));
- Assaults or uses force to women with intent to dishonour or outrage her modesty (Section 3(1)(xi));
- Make a use of a position to exploit the women sexually (Section 3(1)(xii));
- Fouling of water sources (Section 3 (1)(xiii));

- Obstructing from entry to a place of public resort (Section 3(1)(xiv));
- Forcing to leave the house, village, or other place of residence (Section 3(1)(xv));
- Fabrication of false evidence (Section 3(2));

The study of these acts is extensive enough to identify the inhumane practice of caste discrimination in today's life. Though the Act provides exemplary punishments of imprisonment up to five years and fine, it lacks the effective implementation. However, the Act also imposes certain positive duties on the Central and State government to ensure proper implementation of the Act. The government is required to take all necessary measures for the effective implementation of the Act (Section 21 (1)) such as:

- 1) Provide legal aid and adequate facilities to the victims of atrocities so that they can avail justice (Section 21 (2) (i));
- 2) Provide travelling expenses and maintenance to victims and witnesses during investigation and trial of the offence (Section 21 (2) (ii));
- 3) Provision for the economic and social rehabilitation of the victims of the atrocities (Section 21 (2) (iii));
- 4) Appoint officers for supervision of prosecution for contravention of the provisions of the Act (Section 21 (2) (iv));
- 5) Setting up of the committee to assist State Government in the formulation or implementation of measures (Section 21 (2) (v));
- 6) Provision for a periodic survey of the working of the Act (Section 21 (2) (vi));

- 7) Identify the area where members of the Scheduled Caste and Scheduled Tribes are likely to be subjected to atrocities (Section 21 (2) (vii));
- 8) Adopt the measures for the safety of Scheduled Castes and Scheduled Tribes (Section 21 (2) (vii));
- 9) The Central Government shall coordinate with the State government on appropriate measures (Section 21 (3));
- 10) Every year the Central Government must produce the report on the measures taken by itself and the State government to the House of Parliament (Section 21 (4));

Besides this, to conduct a speedy trial of the offences under this Act, the Court of Session in each district is designated as ‘Special Court’ (Section 14). This Act is considered as a milestone for prohibiting offences against Scheduled Castes and Scheduled Tribes. Subsequently, to strengthen it *The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Amendment Bill, 2014* was introduced in the Parliament. After one and half year, in December 2015, the Amendment Bill was passed in both the Houses. It has further added more acts that amounts to atrocities against Scheduled Castes and Scheduled Tribes.

Further, to widen the scope of the Act and encompass all possible acts that amount to caste discrimination and untouchability, the 2015 Amendment defined “economic boycott” and “social boycott”. According to the Section 2 (1) (bc) economic boycott means:

- (i) a refusal to deal with, work for hire or do business with other person; or
- (ii) to deny opportunities including access to services or contractual opportunities for rendering service for consideration; or
- (iii) to refuse to do anything on the terms on which things would be commonly done in the ordinary course of business; or

(iv) to abstain from the professional or business relations that one would maintain with other person;

Similarly, it defines “social boycott” as “a refusal to permit a person to render to other person or receive from him any customary service or to abstain from social relations that one would maintain with other person or to isolate him from others” (Section 2(1)(eb)). It also penalizes the social and economic boycott against the members of Scheduled Castes and Scheduled Tribes. It is said that, the “Social boycott is a weapon used in rural and some urban communities to reinforce hierarchies and power structure” (Kumar 2016:10). Therefore, recently the Maharashtra State passed the separate Act on the prohibition of social boycott i.e. *Social Boycott (Prevention, Prohibition and Redressal) Act, 2016*. According Section 2(1) (g) of the Act, “social boycott means the gesture or an act, whether oral or written of any social discrimination between the members of the community specified in section 3.¹⁵ It prohibits the social boycott in the form of obstructing the observation of social, religious customs or usages etc. denial of performing any religious ceremonies such as marriage and funeral. Causing social ostracism, cut off social or commercial ties, obstructing to use any place established for the public purpose; to provoke to sever social, religious, professional relationship, prevent entering into place of worship; discriminate on the morality, social acceptance, political inclination, sexuality; force to wear particular type of cloths; expel any member of the community from said community (Section 3).

The initiative of the Maharashtra government is appreciable. However, the definition of community does not deal with the inter-religious communities. Nevertheless, this is the second attempt of the Maharashtra government to prohibit social boycott. As the Bombay Prevention of Excommunication Act, 1949 was adopted with the object to remove any legal disabilities that may be suffer by a person who had been excommunicated from the community (Kumar 2016: 10). Later on in *Dawoodi Bohra case* the Supreme Court struck down the Act as it was contrary to the Article 26 of the Constitution.¹⁶

¹⁵ See Section 3 of the Act.

¹⁶ Sardar Syedna Taher Saifuddin Saheb v. The State of Bombay 1962AIR 853.

However, both the Acts i.e. Social Boycott (Prevention, Prohibition and Redressal) Act, 2016 and the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 it did not elaborate the crimes committed to protect the caste pride. On the other hand, the 1989 Act has added few categories constituting the atrocities such as:

- Forcing or obstructing a Scheduled Castes or Scheduled Tribes individual to vote or not to vote to a particular persons, which itself is an offence by law (Section 3(1)(l)(A));
- Wrongfully occupies or cultivate the land of Scheduled Castes or Scheduled Tribes (Section 3(1)(f));
- Wrongfully dispossess a member of Scheduled Castes or a Scheduled Tribes from his land or premise, etc. (Section 3(1)(g));
- Garlanding with footwear or parades naked or semi-naked to a member of Scheduled Castes or Scheduled Tribes (Section 3(1)(d));
- Forcibly tonsuring of head, removing moustaches, painting face or body of a member of Scheduled Castes or Scheduled Tribes, which is derogatory to human dignity (Section 3(1)(e));
- Forcing a member of a Scheduled Castes or a Scheduled Tribes for begging (Section 3(1)(h));
- Compels a member of a Scheduled Castes or a Scheduled Tribes to dispose or carry human or animal carcasses, or to dig graves (Section 3(1)(i));
- Force a member of a Scheduled Castes or a Scheduled Tribes to do manual scavenging or
- Employs or permits the employment of such member for the purpose manual scavenging (Section 3(1)(j)).

Apart from these inclusions, the separate provisions were introduced protecting the rights of Scheduled Castes and Scheduled Tribes women. They constitute the most vulnerable section of the society, and are at the receiving end of the atrocities. The new Act began with prohibiting the dedication of a Scheduled Castes or a Scheduled Tribes woman to a deity, idol, object of worship, temple, or other religious institution as a devadasi or any

other similar practice (Section 3(1)(k)). On assaulting and sexual offence against Scheduled Castes and Scheduled Tribes women, the Act crafted out certain acts which amounted to an offence under the Act. It includes, intentionally touching of Scheduled Castes or Scheduled Tribes woman in a sexual manner without her consent, or using words, acts or gestures of a sexual nature (Section 3(1)(w)(i)(ii)).

Moreover, a separate chapter on “rights of victims and witness” is inserted into the main Act. This chapter specifically mentions that, “it shall be the duty and responsibility of the State to make arrangements for the protection of victims, their dependents, and witnesses” (Section 15(A)(1)). The State must provide the protection against any kind of intimidation, coercion, inducement, violence or threat to violence (Section 15(A)(1)). Considering this, the State has introduced specific schemes to ensure the implementation of victims’ rights and witnesses in accessing justice. Further, the Act has given a list of victim rights under Section 15 (A)(11), which consists of the following:

- (a) to provide a copy of the recorded First Information Report at free of cost;
- (b) to provide immediate relief in cash or in kind to atrocity victims or their dependents;
- (c) to provide necessary protection to the atrocity victims or their dependents, and witnesses;
- (d) to provide relief in respect of death or injury or damage to property;
- (e) to arrange food or water or clothing or shelter or medical aid or transport facilities or daily allowances to victims;
- (f) to provide the maintenance expenses to the atrocity victims and their dependents;
- (g) to provide the information about the rights of atrocity victims at the time of making complaints and registering the First Information Report;
- (h) to provide the protection to atrocity victims or their dependents and witnesses from intimidation and harassment;
- (i) to provide the information to atrocity victims or their dependents or associated organisations or individuals, on the status of investigation and charge sheet and to provide copy of the charge sheet at free of cost;

Furthermore, the new Act penalizes the public servants of dereliction of duty. It mentioned that, if a public servant who is not a member of the Scheduled Castes and Scheduled Tribes willfully neglect his duties, he shall be punishable with imprisonment for a term not less than six months but which may extend to one year (Section 4). In a recent judgment, *Arumugam Servai v. State of Tamil Nadu* the Supreme Court directed the State governments on practice of two tumbler system as in, many teashops and restaurants there are separate tumblers for serving tea or other drinks to Scheduled Caste persons and non-Scheduled Caste persons. It is an age-old practice to use separate vessels so that the non-Scheduled Caste persons do not get polluted from the lower caste people. The court also noted that honor killing are still prevalent as a result of inter-caste marriages. All these and other practices of caste discrimination are still practiced in India. The court directed the State governments to hold administrative and police officials accountable for occurrence of caste discrimination in their respective areas, who shall be prosecuted for such incidence.¹⁷

Further, to ensure the speedy trial the State has to establish Exclusive Special Courts at the district level. Public Prosecutor and Exclusive Public Prosecutor must be appointed for the Special Court and Exclusive Special Courts respectively. Nevertheless, there are several major causes of atrocities and offences against the SC/ST. In many cases these are related with the land, property, access to water, wage payments, forced and bonded labour among others (Thorat 2002: 578). Further, to prohibit discrimination in the field of occupation based on caste and offences, various legislative enactments were adopted. The caste-based occupation is a fundamental factor contributing in practice to caste discrimination. The caste system has imposed degrading work on the Scheduled Castes and Scheduled Tribes. Mostly this degrading work includes scavenging and prostitution, which are hereditary occupations of 'untouchables'. They are forced to work in polluting and degrading occupations and are subject to exploitative labour arrangements such as bonded labour, migratory labour and forced prostitution (Narula 2008: 274).

¹⁷ (2011) 6 SCC 405

3.4.3. Bonded Labour and Caste Discrimination

Another major significant law that catered caste discrimination was the Bonded Labour System (Abolition) Act, 1976. Bonded labour refers to debt bondage. A person forced to work like a slave to repay the loan. Such bondage was an outcome of caste discrimination against the lower castes (Narula 1999: 139). It is estimated that the majority of the individuals involved in bonded labour comprised of Scheduled Castes and Scheduled Tribes (Keane 2007: 247). Due to the lower social and economic status in the society, the lower caste people are most vulnerable at the job work. As noted above, the bonded labours belong to the lower castes that are illiterate and poor, while creditors are usually from educated, wealthy higher caste (Narula 1999: 86). To abolish this practice the Bonded Labour System (Abolition) Act, 1976 was passed.

The Bonded Labour System (Abolition) Act, 1976 was introduced with an object to abolish bonded labour system, which arises out of custom, tradition or any contract. It defines ‘bonded labourer’ as — “a labourer who incurs, or has, is presumed to have, incurred, a bonded debt”. According to the Act, a bonded labourer can arise either from the bonded debt or from the bonded labour system as mentioned in Section 2(d). Section 2(g)(v) defines ‘bonded labour system’ that also includes labour system generated by caste. Certain individuals due to their birth in particular caste may also be forced to work as bonded labourers. The Act prohibits creation of new bondage agreements and releases all labourers from bondage. Section 4 of the Act abolishes the bonded labour system. It mentioned that, every bonded labour shall “stand free and discharged from any obligation to render any bonded labour”.

Moreover, Section 5 of the Act declares any custom, tradition, contract, agreement or other instruments, which obliged any person to do any work or render any service as a bonded labourer shall be void and inoperative. As mentioned above, under the Indian tradition, victims of the bonded labour are also the victims of the caste discrimination. Further, the Act extinguishes every obligation of a bonded laborer to repay any bonded debt (Section 6). The Act also provides punishment for a term extending to three year and a fine which may extend to two thousand rupees, whosoever compels a person to render

any bonded labour (Section 16). Although the Act declares the offences as cognizable, they all are bailable (Section 22). Further, under Section 13 every State government has to constitute a Vigilance Committee under the Act to co-ordinate the governmental machinery over the functioning of this Act. No substantial powers entrusted to the Vigilance Committee of any decision making, which also included members of the Scheduled Castes and Scheduled Tribes.

Further, on the functioning of the Act, the Supreme Court in *Bhandua Mukti Morcha v. Union of India* addressed few important questions for the proper implementation of the Act. It noted that the identification of the bonded labour is the major task for the implementation of the Act. The apex court found that in many cases administration showed reluctance on the existence of bonded labour. The Court further enumerates various methods to identify the bonded labour. It also affirmed that, “It is statistically established that most of the bonded labourers are members of the Scheduled Castes and Scheduled Tribes or other backward classes.”¹⁸

The majority of Scheduled Castes and Scheduled Tribes works as bonded labourers in agriculture, mines, among others. Apart from these areas, manual scavenging, as per the caste rules, is one another area where untouchables occupy the whole field (Ambedkar 1989: 108). The members of the Scheduled Caste are forced to do manual scavenging, which is a kind of a bonded or forced labour. Therefore, apart from the Bonded Labour System (Abolition) Act, 1976, the Parliament enacted the Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993 to eliminate caste-based forced occupation. The following section deals with the Prohibition of Employment as Manual Scavengers and their Rehabilitation Act, 2013. Manual scavenging is an outcome of the practice of caste-based occupations. All manual scavengers engaged in such jobs due to duties assigned to them by the caste system and even more to support the livelihood. As a result, all manual scavengers belong to the Scheduled Castes or Scheduled Tribes.

¹⁸ 1984 AIR 802

3.4.4. Manual Scavenging and Law

The term ‘manual scavenging’ is describe as the job of removing human excreta from dry toilets and sewers using pathetic tools such as thin boards, buckets and baskets, lined with sacking, carried on the head (Bhoi 2011: 6). This is the one field where untouchables do not face any discrimination because the whole field is occupied by untouchables themselves¹⁹ (Ambedkar 1989: 108). Millions of individuals belonging to the lower castes make their living through manual scavenging. It mainly includes women of the lower castes who are engaged in this undignified job. It is said that, “Manual scavenging is not a career chosen voluntarily by workers, but is instead a deeply unhealthy, unsavory and undignified job forced upon these people because of the stigma attached to their caste. The nature of the work itself then reinforces that stigma” (Pillay 2013).

The *Scheduled Castes and Scheduled Tribes (Prevention of Atrocity) Act, 1989* incorporates a provision, which punishes individuals, who compels a Scheduled Castes and Scheduled Tribes member to do manual scavenging under Section 3(1)(j). However, a detailed law on manual scavenging, to ensure dignified life for manual scavengers, the Parliament passed the *Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993*. The Act prohibits the employment of manual scavengers and construction of dry latrines. Its object is to regulate and maintain water-seal latrines. Section 2(j) defines ‘manual scavengers’ as a person engaged in or employed for manually carrying human excreta. The Act under Section 3 assigns the State government to notify and prohibit areas with dry latrines and those engage individuals for manually carrying of human excreta.

¹⁹ The problem of isolation faced by untouchables in service sector he mentioned that, the principle in general is maintained that the untouchables shall not be placed in administrative authority over the Hindu. The consequence is that unless some entire branch of service is turned over the Untouchables, there are very few posts of consequence, which the untouchables are allowed to fill. To put it concretely, the only field of service in which there is no discrimination against the Untouchables is scavenging. There is no need for discrimination in this field because the whole of it is made over to the Untouchables and there is no competition from Hindus. Even here the discrimination steps in the matter of higher posts (Ambedkar 1989: 108-109).

However, the Act does not prohibit the construction of dry latrine and manual scavenging, as the Act operates in an area only where the notification issued by the State Government. This notification issued after giving notice of ninety days and only in such areas where the adequate facilities for the use of water-seal latrines exist (Section 3(2)). This provision of the Act created hurdles in eliminating manual scavenging. Most of the State governments' claimed that, the lack of water supply prevented them from constructing flush latrines. In many cases the local authorities accepts the existence of the manual scavenging in the area, however, they claims that the manual scavengers does not carry the human extract on their head. It is mockery of the law (Singh 2014: 210). This resulted into continuing practice of manual scavenging. Moreover, Section 4 entrust the State government with the power of exemption of any area if the circumstances demands it. Overall, the 1993 Act caters the manual scavenging and dry latrines. The 1993 Act has shortcoming for instance the does not clearly specifies to who must receive the punishment on the practice of manual scavenging (Singh 2014: 210). Moreover, many States failed to notify the 1993 Act.

Considering the failure of the 1993 Act in 2013, a new Act was introduced to prohibit manual scavenging. The known as the *Prohibition of Employment as Manual Scavengers and their Rehabilitation Act, 2013* also prohibits manual scavenging, but in comparison with 1993 Act, it introduces a holistic approach. According to the preamble of the Act, the 1993 Act proved inadequate in eliminating insanitary latrines and manual scavenging from iniquitous caste system. As a result, the preamble states the main object of the Act as — to prohibit the employment of manual scavengers and to rehabilitate the manual scavengers and their families.

The Prohibition of Employment as Manual Scavengers and their Rehabilitation Act 2013 defines the manual scavengers under section 2(1)(g) as:

“manual scavenger” means a person engaged or employed, at the commencement of this Act or any time thereafter, by an individual or a local authority or an agency or a contractor, for manually cleaning, carrying, disposing of, or otherwise handling in any manner, human excreta in an insanitary latrine or in an open drain, or pit into which the

human excreta from insanitary latrines is disposed of, or on a railway track or in a such other spaces or premises, as the Central Government of a State Government may notify, before the excreta fully decomposes in a such a manner as may be prescribed, and the expression manual scavenging shall be construed accordingly.

The definition of ‘manual scavenger’ in 2013 as compared to 1993 is broad. The Act, to ensure manual scavengers, prohibits ‘insanitary latrines’ and ‘hazardous cleaning’ of sewer or a septic tank under Sections 5(1) and 7 respectively. According to Section 2(1)(e) ‘insanitary latrines’ means —

a latrine which requires human excreta to be cleaned or otherwise handled manually, either in *situ*, or in an open drain or pit into which the excreta is discharged or flushed out, before the excreta fully decomposes in such manner as may be prescribed: Provided that a water flush latrine in a railway passenger coach, when cleaned by an employee with the help of such devices and using such protective gear, as the Central Government may notify in this behalf, shall not be deemed to be an insanitary latrine.

Whereas, Section 2(1)(d) defines ‘hazardous cleaning’ as —

manual cleaning by such employee without the employer fulfilling his obligations to provide protective gear and other cleaning devices and ensuring observance of safety precautions, as may be prescribed or provided in any other law, for the time being in force or rules made thereunder.

With this definitions, the Act assigns a duty on the local authority to conduct a survey of insanitary latrines within its jurisdiction. All local authorities are under an obligation to issue notice to the occupier of the insanitary latrine to either demolish it or convert it into a sanitary latrine (Section 4). While prohibiting construction of dry latrine, the Act also prohibits both the direct or indirect engagement or employment of manual scavengers. With the commencement of the Act, all employed or engaged manual scavengers are immediately discharged from their duty (Section 5). All the contracts and agreements for executing the employment of manual scavenging are declared void after the commencement of the Act (Section 6). Whoever, engages any individual for ‘hazardous cleaning’ i.e. violates Section 7 shall be punished with the imprisonment of two years or

fine of two lakh rupees or both for the first time contravention but on the repetition the imprisonment extend to five years or fine of five lakh rupees or both (Section 9). Similarly, whoever constructs an insanitary latrines or engages manual scavengers or makes any agreement void under section 6 shall be punished with imprisonment for a term which may extend to one year or fine of fifty thousand rupees or both for first contravention. But on repetition the imprisonment of two years or fine of one lakh rupees or both (Section 8).

In addition to this, the Act directes the Muncipalties, Cantonment Boards, Railway Authorities and Local Authorites to consturct an adeuqate number of community sanitary latrines (Section 4 (2)(3)). Further, to carry out the rehabilitation programme, the Muncipalties and Panchayats are assigned to conduct a survey identifying manual scavengers in respective jurisdiction (Sections 11 and 14). After the identification of manual scavengers the rehabilitation shall be carried out in the following manner as provided under Section 13(1) —

- a) within one month the individual shall be given a photo identity card containing details of his family dependents on him.
- b) the childerns of the manual scavengers are entitled for the Central or State Governments scholarships as per the relevant schemes.
- c) for resident he shall be allotted a residential plot or finacial assistance to build home.
- d) he or any of his adult family member shall be given a training of livelihood skill with the stipend of not less than three thousand rupees. To take an alternative occupation he shall be given subsidy and concessional loan.

The resposibility to rehabilitate manual scavengers is imposed on the District Magistrate, who can delegate it to subordinate officers (Section 13 (2)). Although the Act limits itself to the manual scavengers, the Act does not include sewage workers more specifically the provisions dealing with the rehabilitation (Sathyaseelan 2013: 33). Moreover, the District Magistrate and other local authorites have to examine whether provisions of the Acts were duly complied (Sections 18 and 19). At the district, state and central level the Vigilance Committee, State Monitoring Committee and Central Monitories Committee

are established to advise the State governments on effective implementation of the Act (Sections 24 to 30). Apart from the above committees, the National Commission for Safai Karmacharies is also assigned the responsibility to examine the implementation of the Act (Sections 31 and 32). On the implementation of the Act, the Supreme Court time again directed the States and Union Territories to fully implement the Act and take appropriate actions against non-implementation and violation of the Act.²⁰

3.5. Analysis

Despite the enactment of the above laws, the practice of caste discrimination still exists. This existence of caste discrimination raises doubts on the efficacy and the proper functioning of the above laws. The existence of the laws suggests that the legal jurisprudence against caste discrimination is rapidly evolving. However, these laws addresses particular issues or certain attributes that arises from the caste system, it does not fully address the causes of caste discrimination i.e. existence of caste system. The importance is given to the specific ‘effects’ and not the ‘causes’. In other words, laws do not prohibit or abolish the ‘practice of caste system’, it prohibits the ‘practice of caste discrimination’. For instance, Articles 15 and 17 of the Constitution prohibits the practice of caste discrimination and abolishes untouchability respectively. Both the Articles prohibit the attributes of the caste system. However, none of the constitutional provisions directly prohibits the practice of caste system. Without abolishing the caste system with holistic approach, it is difficult to prohibit practice of caste discrimination and untouchability (CAD 2009: 403-06). The caste system with holistic approach includes inter-caste marriages, prohibition of segregation, property redistribution, bonded labour, manual scavenging, withdrawal of religious and social sanctions among others. Any leniency in one aspect will certainly strengthen the caste system. Hence, the abolition of the caste system requires immediate attention of the legislature.

Although the Parliament has passed various secondary laws to expand the fundamental rights guaranteed by Constitution, the scope of these laws is limited. Firstly, as discussed

²⁰ Safai Karmachari Andolan & Ors. v. Union of India & Ors. Writ Petition (Civil) No. 583 of 2003

above none of the Act fully encompasses overall attributes of the caste discrimination. For example, the Protection of Civil Rights Act, 1955, and Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 provides the list of offences against Scheduled Castes and Scheduled Tribes that amounts to caste atrocities. However, the Prevention of Atrocities Act does not prohibit caste discrimination practices among the Scheduled Castes and Scheduled Tribes. On the other hand, the Protection of Civil Rights Acts provides civil rights to all citizens, but lack of precise definition of ‘untouchability’ resulted into poor implementation of the Act. Moreover, both the Acts did not substantively address the hierarchical nature of the caste system. In this hierarchical nature of caste system, every single caste practices caste discrimination in one or other form against the lower castes. But the caste discrimination among the upper castes and the Scheduled Castes did not receive adequate attention. In the caste hierarchy, Scheduled Castes are at the worse end, which experiences extensive discrimination and violence as against all other higher castes.

This inadequacy of the laws in prohibiting overall caste system subsequently resulted into the failure of the laws at the implementation level itself. The implementation of existing laws is matter of concern. Moreover, the failure of implementing mechanism is also the result of caste mindsets of the administration and judiciary. This is evident from various reports submitted by the respective statutory commissions. The various commissions constituted under the respective Acts to examine and monitor the implementations of the above Acts. As a result, the reports of these commissions identified certain factors responsible for the non-implementation of the laws. It includes the unwillingness and biasness of the executive at administrative level and judiciary in the administration of justice of caste discrimination cases.

3.5.1. Role of the Administrative Machinery

The administrative failure is visible at the initial stage of the proceedings against the caste atrocities. It begins with the unwillingness and reluctance of the police authorities to register a First Information Report (FIR). Generally, it is observed that the police rampantly abuse the Scheduled Castes and Scheduled Tribes. This is explicitly mentioned

by the National Human Rights Commission (NHRC) Report. The NHRC in order to identify the caste discrimination practice by the State machineries and to trace the shortcoming of the prevention of atrocity laws appointed K.B. Saxena to prepare a report. Subsequently, in 2004 the 'Report on Prevention of Atrocities against Scheduled Castes and Scheduled Tribes' was submitted by K. B. Saxena to the NHRC. The main objective of the report was to examine the implementation of laws that prohibit atrocities against Scheduled Caste and Scheduled Tribes. The report mentions that the organs of the state machinery are responsible for the failure of implementation of laws. This failure occurred on several fronts such as:

- a) Failure to effectively implement laws relating to atrocities against Scheduled Castes and Scheduled Tribes;
- b) Failure to act against its own agencies involved in the commission of violence;
- c) Failure to implement large number of labour and social welfare laws;
- d) Failure to implement programmes which would facilitate assertion by Scheduled Castes against violence;
- e) Failure to mobilize Scheduled Castes politically;
- f) Failure of the State in mobilization of the caste Hindus in favour of social democracy embedded in the Constitution and various laws and State policies;
- g) Failure of the State to withstand pressures.

According to the report, for all these failures, the State machinery was responsible, with police machinery being central to the failure. The report mentioned that the caste atrocity proceedings starts with the registration of a case, the police resorts to various ways to discourage Scheduled Castes and Scheduled Tribes from registering the cases. Furthermore, they dilute the seriousness of the violence to shield the accused from arrest

and prosecution. In some cases, the police themselves inflict violence. The District Civil Administration is equally responsible for failure. In most of the cases the violence or atrocities are neglected by civil administration, results in breach of duties (NHRC 2004). The report lists the following manner of breach of duties by civil administration:

- a) Not conducting an enquiry;
- b) Delay in distributing cash compensation and making false promises to give compensation;
- c) Not providing travel allowances to the victim and witnesses for trial and investigation, as well as not providing maintenance expenses, medical expenses, etc; and
- d) Ignorance of social boycott of the Scheduled Castes, which leads to the atrocities.

Moreover, the report mentions that, the administration is also responsible for assisting the commission of atrocities against Scheduled Castes through intellectual dishonesty in discharge of their duties (NHRC 2004). Further, to ensure the proper implementation of laws, the 2004 report gave recommendations under different heads. On the recommendations, the government took some efforts to ensure proper implementation. However, these efforts proved to be insufficient, as the Department of Social Justice and Empowerment in its recent annual report of 2016- 17, mentioned that, “Despite the deterrent provisions made in the Prevention of Atrocities Act, continuing atrocities against the members of Scheduled Castes and Scheduled Tribes had been a cause of concern. High incidence of occurrences of offences against them also indicate that the deterrent effect of the Prevention of Atrocities Act was not adequately felt by the accused” (Annual Report 2016-17: 39).

Further, the Report provides data on the cases filed under Protection of Civil Rights Act and Prevention of Atrocities Act, and their disposal by the court and investigation made by the police during the year 2015. The report mentioned the progress of investigation of

cases by police during 2015. Among the total cases registered under both the Acts, in 51.8 per cent of cases the charge sheet was filed in the Courts. Further, 15.08 per cent of the total cases were closed after the investigation and 29.74 per cent of cases are still pending (Annual Report 2016-17). The National Commission for Scheduled Castes (NCSC) in its annual report of 2016 noted that, "...instance of procedural lapses are frequent while dealing atrocity cases by both police and civil administration" (NCSC Annual Report 2016: 285). The NCSC pointed out the lacunae in police investigation which ultimately result into the high acquittal rate in many States (NCSC Annual Report 2016: 286). The onus on the official for ineffective implementation has always been given the less importance. On the contrary, the misuse of the Prevention of Atrocity Act is been highlighted vis-à-vis poor implementation of the Act (Mangubhai 2016: 258,277). Moreover, the police in most of the cases the Prevention of Atrocity Act was not applied, or if applied incorrect sections were invoked. Further, to protect the accused often police applied less punitive sections of the Indian Penal Code (Mangubhai 2016: 272, 280).

On manual scavenging, the National Commission for Scheduled Castes in its Annual Report 2015-2016 equally pointed out the laxity on the part of the many State government on the timely implementation of the provisions of the Prohibition of Employment on Manual Scavengers & Rehabilitation Act 2013. It mentioned that even the few States who have submitted the reports has mismatch between the actual figures. The dry latrines were high in numbers as compared to the manual scavengers. Therefore, it demanded re-conduct of the survey objectively and not mere as an eye-wash (NCSC Annual Report 2016: 250). Singh observed that the laws on the prohibition of manual scavenging are loosely formulated, and the administration implementing these laws reluctant towards it. Singh further noted that "The desire of the lawmakers is clear: everything should remain as it is and whatever little is left may be given to the manual scavengers" (Singh 2014: 209).

3.5.2. Role of the Judiciary

Similarly, the role of the judiciary appears dubious. The cases filed under the Protection of Civil Rights Act, 1955 and Scheduled Castes and Scheduled Tribes (Prevention of

Atrocity) Act, 1989 shows the huge gap between cases filed and their disposal. Moreover, the conviction rate is very low. The Act suffers from a poor conviction rate as this is evident from the data provided by the Ministry of Social Justice and Empowerment on disposal of cases by courts during 2015 under Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and Protection of Civil Rights Act, 1955 (Table 3A).

Table 3 (A)

Items	Cases under SC/ST (Prevention of Atrocities) Act, 1989	Cases under Protection of Civil Rights Act, 1955	Total
Total number of cases	150687	641	151328
No. cases disposal by courts	18586	63	18649
No. of cases ending with conviction	4802	3	4805
No. cases ending with acquittal	13784	60	13844
No. of cases compounded or withdrawn	584	0	584
No. of cases pending before the courts	131517	578	132095

(Source: Annual Report 2016-17 of the Department of Social Justice and Empowerment, Ministry of Social Justice and Empowerment, Government of India)

From the Table 3 (A) it appears that only 25.76 per cent cases ended with conviction. On the other hand, the acquittal rate²¹ is much higher than conviction, as around 74.25 per cent cases ended with acquittal. However, 87.29 per cent pending cases before the Courts. It highlights the lacunae in the system. In *State of Karnataka v. Appa Balu Ingale*²² the Supreme Court found that in more than seventy five per cent of the cases of atrocities against Dalits resulted into acquittal. The court further noted that the “Apathy and lack of proper perspectives even by the courts in tackling the naughty problem is obvious.”²³ This low conviction rate raised the doubt on impartiality of the enforcement machinery of the laws. The enforcement mechanism including executive and judiciary seems to be practice a caste laws (Narula 2008: 257).

The 2004 report of the NHRC noted certain judicial trends while deciding the cases under Prevention of Atrocity Act and Civil Rights Act such as:

- a) Technicalities often take priority over the intent of the Act and the merits of the case;
- b) The prosecutions are quashed on the ground that the offence was not committed because victim is Scheduled Castes or Scheduled Tribes but with some other reasons;
- c) There is tendency to accept evidence only from non-Scheduled Caste and non-Scheduled Tribes;
- d) Judges personal perception of caste and gender influence the cases.

²¹ Acquittal rate = Number of cases ending with acquittal * 100/ Total Number of cases disposal.

²² AIR 1993 SC 1126

²³ Ibid.

In most of the cases, technicalities often resulted in the non-applicability of the Prevention of Atrocities Act. On the technicalities, Baxi observed:

“PoA Act aim to infuse criminal law with constitutional ideals of substantive equality, by re-signifying previously stigmatized bodies as bearers of rights. As a special law, the PoA Act mandates the institution of a governmental apparatus to allow Dalits and tribals greater access to courts. Yet impunity is produced when the law institutes a series of hyper-technicalities to disarticulate atrocity” (Baxi 2016: 318).

In the case of prohibition of manual scavenging and rehabilitation of manual scavengers following the technicalities Supreme Court passed the buck to the high courts (Singh 2014: 205). Considering it, the report clearly specifies the causes of the failure at the level of implementing atrocity laws. It questions the role played by judiciary and executive. The caste bias of the judiciary has been a matter of grave concern as the acquittal vis-a-vis conviction rate is higher and suggests the discrimination practice by judges while deciding atrocity cases (Agrawal and Gonsalves 2005: 71). There are number of cases dealing with the caste question, which raises doubts on the impartiality of the judges. For instance, in most of the Scheduled Caste women rape cases the judges struck down the applicability of the Prevention of Atrocity Act on the ground that, the violence was based on the lust and not on the caste. Moreover, in *Bhanwari Devi* case the judges also commented that the rape could not have taken place because the accused belongs to the upper caste, including a Brahmin, would not rape the lower caste woman (Mangubhai 2016: 278, Shukla 2017). Mangubhai Further mentioned that:

“The narrow interpretation of the SC/ST (Prevention of Atrocities) Act, the erasure of sexual violence and the unwillingness of judicial actors to understand and take into account the social context of highly unequal caste and gender power relations are perhaps best exemplified in the Khairlanji case” (Mangubhai 2016: 282).

In *V.P. Shetty v. Sr. Inspector of Police and others* the Bombay High Court while interpreting the Section 3(1)(x) of the Prevention of Atrocity Act held that “...the acts amounting to insult or humiliation to the member of Scheduled Castes or Scheduled Tribes should be visible and audible to the public. Otherwise, it would not amount to an

offence under the said provision of law.”²⁴ Similarly, the Madhya Pradesh High Court in *Phulsingh v. State of Madhya Pradesh* held that “Now calling a Chamar a Chamar may be insulting him but it would not be an insult on the ground of untouchability.”²⁵ Recently, the Gujarat High Court asked the petitioner to explain that, “...how social boycott of dalit families by upper castes in his village amounts to the practice of untouchability.”²⁶

Therefore, in the overall process of the implementation the role played by the judiciary is been always the matter of concern. The prevailing caste prejudices make the Scheduled Castes and Scheduled Tribes are frightened to register complaint against atrocities. Because, after registration of complaint many cases end up with the closure due to inadequate investigations and non-investigation as most of the cases are pending before police for investigation. After experiencing biased conduct of police officials and civil administration, the victims approach the judiciary. From there also victims return with empty hands, as magistrates often provide a shield police to excesses. Further, the judicial delay and dilution of the scope of applicability and meaning of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 has resulted in denial of justice to the Scheduled Castes. Moreover, the various Commissions discussed above do not properly monitor the implementation of the Acts. Though various Commissions are established to monitor and are bound to submit the reports on the implementation of these laws, the functioning of the Commissions appeared irregular. It causes unreasonable delay in submission of the reports, which rendered the whole implementation process ineffective. Often the submitted reports and recommendations have failed to receive reasonable attention of the Parliament.

Overall, the judiciary and executive who are considered as pillars of the democracy, in the caste atrocity cases, do not appear true to its assigned constitutional role. Ambedkar predicted these outcomes long ago. Before Constituent Assembly, he argued that:

²⁴ 2005 CriLJ 3560

²⁵ 1991 CriLJ 2954

²⁶ Times of India, “How is Social Boycott of Dalits Untouchability: HC”,(June 9, 2017), available at – <http://timesofindia.indiatimes.com/city/ahmedabad/how-is-social-boycott-of-dalits-untouchability-hc/articleshow/59060124.cms>

“However good a Constitution may be, it is sure to turn out bad because those who are called to work it, happen to be a bad lot. However bad a Constitution may be, it may turn out to be good if those who are called to work it, happen to be a good lot. The working of a Constitution does not depend wholly upon the nature of the Constitution. The Constitution can provide only the organs of State such as the Legislature, the Executive and the Judiciary. The factors on which the working of those organs of the State depend are the people and the political parties they will set up as their instruments to carry out their wishes and their politics. Who can say how the people of India and their parties will behave? Will they uphold constitutional methods of achieving their purposes or will they prefer revolutionary methods of achieving them? If they adopt the revolutionary methods; however good the Constitution may be, it requires no prophet to say that it will fail. It is, therefore, futile to pass any judgment upon the Constitution without reference to the part which the people and their parties are likely to play” (Ambedkar 1949: 1210).

In other words, the well-crafted laws will result in failure because of unwillingness of the State to effectively implement them. All above laws prohibiting caste discrimination have failed to get rid of the impact of the caste system. In the words of Tocqueville, “... the Indian habits do not sustain equality of living conditions. The ‘evil maxims’ make democratic relationships in temporal life impossible; the corrupted hearts reject the equal dignity of each and everyone” (Annelien & Geenens 2007: 97).

3.6. Conclusion

The Indian laws began with the withdrawal of the legal sanctions behind the caste system. A legal regime against the caste discrimination was established. The laws addressed the entire range of acts that violated basic human rights. During the colonial rule, some attempts were initiated to overcome certain attributes of caste discrimination. The Constitution of India began a new epoch in the Indian social and political history. It denounced the practice of untouchability and caste discrimination. In tune with the constitutional values, various laws were enacted to overcome caste practices such as Protection of Civil Rights Act 1955, Bonded Labour System (Abolition) Act 1976, Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989, Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act 1990 and Prohibition of Employment as Manual Scavengers and their Rehabilitation Act

2013. These laws cover many aspects of social life that results into caste discrimination against the Scheduled Castes and Scheduled Tribes. However, what appears challenging is that as the legal rules change caste discrimination assumes new forms. The practice of caste discrimination moulds itself and adopts new methods of discrimination. This becomes evident from the discrimination faced at the workplace, educational institutions, and at the time of marriage. Among these social boycott and honor killing are yet to receive the stringent legal approach.

Besides the inability to address the changing caste rules, the anti-discriminatory laws also lack effective implementation. The obvious reason for the ineffective outcomes is the absence of will of the implementing authorities to overcome the discrimination. Marc Galanter among others considers the derelictions of administrative machinery as one reason for the poor implementation of the laws. Galanter also highlights the dichotomy entrenched in the legal regime. On the one hand, the State enacts laws to prohibit practice of caste discrimination through constitutional measure. On the other hand, the same State validates the personal laws based on religion. Personal laws are intact with the caste system as they justify the social and religious norms relating to marriage, property, maintenance, etc. This dubious approach of the government contributes to the prevalence of the caste discrimination. As a concrete and substantial solution, the State should introduce laws with holistic approach i.e. it should overcome the caste system and not few attributes of the caste discrimination. At the same, it should extensively infuse the awareness programme against the evils of caste system through education that will yield substantial outcomes.

With the incorporation of intended holistic approach against the caste system, India can appear as a model for the prohibition of caste discrimination. The other South Asian States too practices caste system with similar discriminatory practices like in India. They are at different phases of legal recognition and prohibition of caste discrimination. The next chapter examines the anti discrimination laws of the South Asian States viz. Nepal, Pakistan, Bangladesh, and Sri Lanka. Moreover, it also highlights the recent legal

initiative undertaken by the United Kingdom against the practice of caste discrimination among the South Asian diaspora in general and Indian diaspora in particular.

CHAPTER 4

COMPARATIVE STUDY OF ANTI-DISCRIMINATION LAWS IN SOUTH ASIA

“We allow our ignorance to prevail upon us and make us think we can survive alone, alone in patches, alone in groups, alone in races, even alone in genders”

Maya Angelou¹

4.1. Introduction

It is prominently believed that the caste phenomenon is endemic to India. This understanding has been developed during the British rule. During the colonial rule, many British officers and intellectuals in order to prepare a census report extensively undertook studies that included examination of social conditions and discriminatory practices in India. Ultimately, these studies attempted to articulate the caste system, its origin and its practices. These studies played a very crucial role in shaping the ‘...sociological and social anthropological conceptualization of caste’ (Jodhka 2012: xiii, Kannupillai 2007: 6, Dirks: 2001). As a result, various theories were propounded on the origin of the caste system as discussed in Chapter 2. Though these theories differ on the origin of the caste system and its practices, they included a common element of *Chaturvarna* system throughout India.

In Chapter 2 we also observed that the development of the understanding of caste system mostly relies on Indian experiences. Even in India the experiences are limited only to the

¹ Ann Kannings, (2014) “Maya Angelou: Her Words”, Lulu Press, Inc.

Hindu population. In other words, the caste system practiced by non-Hindus of India did not receive adequate consideration. Similarly, the caste system practices in other South Asian countries historically have been a matter of least concern. Consequently, the limited studies and reports on the presence of caste system in other South Asian countries remained in the shadow as compared to India. However, the intervention of the UN human rights treaty bodies have highlighted and encouraged the studies on the caste system and discriminatory practices in Nepal, Pakistan, Bangladesh and Sri Lanka (Jodhka & Shah 2010: 2).

Chapter 2 also examined the sociological understanding of caste system in India and other South Asian countries. It reviewed the caste system in terms of sources, meaning, forms and discrimination which varies across South Asia, albeit it has similarity in terms of notion and effects. For instance, the practice of endogamy, residential segregation, low status, low paid jobs to the lower castes, hereditary and the hierarchical system among others are common in all the countries. These identical effects attached to the caste system generated in all the countries raises pertinent issues.

The first question is whether the caste system in non-Hindu groups survives without the sanction of the religion. It is a well-known fact that the “caste and religion have always been interwoven in complex ways” However, in South Asia mainly four religious practices prevails i.e. Hindu, Islam, Buddhist, Christianity. Despite the different religious identities, the caste system is practiced by all religious members (Jodhka 2010: 14). The practice of caste discrimination by non-Hindu members do not require the sanction of Hindu religion per se. This response to the first question, paves way to the second question as to what led the non-Hindu groups to follow the caste system in spite of its absence in their respective non-Hindu religions. The caste system has survived after crossing the religious and territorial boundaries. The existence of the caste system across the religion and territories encourages examining of transmission of the caste system. The answer to the second question can be traced in the various studies that argues that the cultural and traditional baggage containing caste system have influenced the other religious groups. Thus, in other words, caste practice in non-Hindu groups is an outcome

of cultural and traditional practices irrespective of the religious sanctions and territorial boundaries (Narula: 2009, Jodhka: 2010).

The cultural and traditional baggage containing caste system has not only crossed the religious boundaries, but also travelled to the other parts of the world (Narula: 2009: 54). This transmission of caste system from India to other sub-continent with changing dimensions shows the outreach of caste discrimination practice and its effect on the lower caste people particularly women who face multiple level of discrimination. Moreover, from human right perspective it challenges the dignity of life. Further, it poses serious challenge to the anti-discriminatory laws of the States as well as international human rights mechanism. Hence, it is important to examine the available legal mechanism on prohibition of caste-based discrimination in South Asian countries.

We have already discussed the Indian legal perspective on caste discrimination in Chapter 3. The study of legal perspective on caste discrimination of India in comparison with the other South Asian states is an easy task. It is mainly because of the fact that in India extensive literature on caste system exists. At the same time, in an ongoing process various social reforms are consistently confronted with the rampant caste-based discrimination practice. As a result, new laws against the caste-based discrimination have been introduced.

On the other hand, the South Asian countries such as the Pakistan, Bangladesh and Sri Lanka deny and neglect the existence of the caste discrimination in their States. However, Nepal has recently recognised the existence of the caste-based discrimination at the UN. The other states failed to provide stringent legal mechanism against caste discrimination due to the denial of its existence by the States, and the belief that the nature of the caste is less rigid, in these countries. The aforesaid reasons were advanced by States while citing the constitutional provisions on the prohibition of caste-based discrimination as representing sufficient safeguard. Therefore, the present chapter attempts to examine the constitutional provision of Nepal, Pakistan, Bangladesh, and Sri Lanka on the prohibition of caste-based discrimination.

The present chapter has been divided into sections. The first section focuses on the constitutional provisions of the Nepal, and then undertakes examination of the Caste-Based Discrimination and Untouchability (Offence and Punishment) Act, 2011. The second and third sections deal with the anti-discriminatory laws of Pakistan and Bangladesh respectively. It concludes that no effective legislative measures exist in Bangladesh and Pakistan. Although the Constitution of both the States guarantees equality with the prohibition of discriminatory practices, the Hindu scheduled castes in both the States witness double discrimination first on religious status (being non-Muslims) and second on the ground of caste. The fourth section focuses on Sri Lanka. In Sri Lanka caste discrimination is less rigid as compared to other South Asian countries. However, it is practiced by three groups viz., Buddhist Sinhalese, Sri Lankan Tamils and Indian Tamils. The Constitution of Sri Lanka 1978 prohibits discrimination on the ground of caste, work or decent with special legislations.

The fifth and final section deals with prohibition of caste discrimination in UK. The migration of South Asian diaspora to UK has also led to migration of caste discrimination practices. After an extended intervention by the international community, UK government commissioned the National Institute of Economic and Social Research (NIESR) to prepare a report on “*Caste Discrimination and Harassment in Great Britain*”. Subsequently, the UK government accepted the practice of caste-based discrimination by the South Asian diaspora. The government proposes to introduce the law on prohibition of caste discrimination in order to overcome the caste practice. It is evident that the practice of caste discrimination has been followed by South Asian diaspora in other parts of the world. For instance, caste discrimination has been migrated to East and South Africa, Mauritius, Fiji, Suriname, the Middle East (for example in Bahrain, Kuwait, the United Arab Emirates), United Kingdom (UK), North America and other regions (Narula 2001: 22). However, most of the States are unwilling to accept the existence of the practice caste-based discrimination. Therefore, this chapter limits itself to the initiative taken by the UK government.

4.2. Laws on Prohibition of Caste Discrimination in Nepal

Nepal became the second State after India to introduce the separate law on the prohibition of caste-based discrimination. The caste system of Nepal receives religious, cultural, and traditional baggage from India. After borrowing the evil practice from India, the King of Nepal was influenced by the western legal system. As a result, the King ordered the codification of the laws. In 1854 the first codified law of the Nepal came into existence, which was known as *Muluki Ain* (Country Code) of 1854. The Country Code of 1854 was the first code of the modern Nepal that dealt with criminal law, civil law, administrative law, land law among others. All these laws fundamentally based on the customs, usages, and social norms. These customs, usages and social norms further established on the bedrock of caste system. In other words, it was the first Code which codified and legalized the caste system in Nepal.

As the Country Code of 1854 was significantly influenced by *Manusmriti*, it divided the society into four-fold caste hierarchy namely – (1) Sacred thread wearing or Twice-born, (2) Liquor drinking, (3) Touchable Low Castes, and (4) the Untouchables (Bhattachan et al. 2008: 9, Pradhan 2005: 4). Efforts were made to accommodate all sections of society into four-fold castes. Untouchables formed the lowest category in the caste hierarchy. With this classification, the 1854 Code assigned certain rights, privileges, and duties to the respective castes. Any violation of the norms of the Code attracted penal punishments. However, the nature of the punishments differed according to the castes (Khanal et al. 2012: 14, Thapa 2010: 518).

With the end of the Rana rule, Nepal underwent various political changes. Further, these changes led Nepal to study the outside world, in particular the Western political system, which encouraged the process of democratization and modernization in Nepal. As a result, in the late 1940s various social movements emerged against the caste-based discrimination. During this period, social and political organizations engaged in mobilising and sensitising the untouchables about their rights and dignity (Lamsal 2012: 76). Subsequently, after the revolution of 1951 Nepal adopted democracy. As a result, for the first time, a new Constitution titled as the Interim Government of Nepal Act of 1951

ensured individual liberty, right to equality among others. However, the constitutional mechanism was inconsistent due to continuous power shift.

In 1963 Nepal in order to fulfill the constitutional aspirations laid down under new Constitutions adopted the New Country Code known as *Naya Muluki Ain*. The New Country Code as against the Old Country Code of 1854 abolished the practice of caste-based discrimination and untouchability (Bhattachan et al. 2008: 42). Further, the abolition of caste discrimination and untouchability were strengthened by the subsequent constitutional provisions. For instance, the Constitution of 1990 explicitly prohibited the practice of caste-based discrimination in Nepal under Article 11 (4). Moreover, with the Constitutional provision, additionally the penal provisions were also introduced to prohibit the practice of caste-based discrimination and Untouchability mainly for the effective realisation of the constitutional goals.² Nevertheless, the scope of the provisions and its implementation has been the issue of concern.

One of the reasons for non-implementation of the prohibitory measures could be the shift in the forms of government. It is a well known fact that before 1990 there was a shift in the democratic form of government to the autocratic form of government. This shift imposed severe inroads on the substantive realisation of the prevention of caste discrimination. Further, in 1990 once again the democracy was restored in the Nepal with the adoption of new constitution (Khanal et al. 2012: 15). Moreover, the shift in the form of governments also compelled and initiated various social, political and Maoist movements in Nepal.

These post-1990 movements played a very significant role in the constitutional and legal development of the Nepal. The development is very much evident from the different constitutions adopted by the Nepal. For instance, the adoption of the Interim Constitution of 2007 further followed by the Constitution of 2015 (Thapa 2010: 518). Under the Interim Constitution, the prohibitory measures on the caste-based discrimination received

² Article 11 (4) of 1990 constitution.

due attention. The next section traces the constitutional measures by examining various constitutional provisions adopted by the Nepal over a period of time.

4.2.1. Prohibition of Caste Discrimination and Constitutional Aspirations of Nepal

Before examining the constitutional provisions on the prohibition of caste-based discrimination it is important to undertake the brief study of the constitutional history of the Nepal. As Nepal has a long constitutional history, it all commenced with the passage of the Government of Nepal Act, 1948. For the first time, it laid down various fundamental rights to the citizens such as freedom of speech, freedom of worship, equality before law among others. However, there was no separate provision on the prohibition of caste-based discrimination or elimination of the untouchability. But due to the steep opposition from the social justice and political forces, which ultimately culminated into the revolution of 1951 and emergence of democratic forces which replaced the 1948 Act with the Interim Government of Nepal Act 1951. The 1951 Act attempted to prohibit caste discrimination under the wider concepts of equality and non-discrimination.³

Subsequently, the Constitution of Kingdom of Nepal 1959 replaced the 1951 Act. It guaranteed equality as a fundamental right. Article 4(1) of the Constitution mentioned that “all citizens are entitled to equal protection of law.” Further, it prohibits State from discriminating individuals on the grounds of religion, sex, race, caste or tribe at the time of general application of the law and in respect of appointment to the service of the Crown (Article 4 (2)(3)). Though Article 4 did not prohibit caste-based discrimination among citizens, it mentioned that, “no person shall disseminate hatred, contempt or create enmity between people belonging to different areas, or between different classes of people, castes and tribes of the Kingdom of Nepal.” Similarly, the Constitution of Nepal of 1962 under Article 10 mentioned that “there shall be no discrimination against any citizen in respect of appointment to the government services or any other public services only on the grounds of religion, sex, race, caste or tribes any of them under the right to

³ Article 13, 14, 10 of the 1951 constitution

equality.” However, the end of the Rana rule did not result in the prohibition of caste discrimination. The *Muluki Ain* retained its strong hold in the society (Pradhan 2005: 11).

The year after the commencement of the 1962 Constitution, the King Mahendra abolished the caste-based untouchability by introducing the amendment to the *Muluki Ain* which is further known as the *Naya Muluki Ain* of 1963. Again in the 1990s, the people’s movement emerged that toppled down the autocracy and reinstated the democracy. As a result, the Constitution of the Kingdom of Nepal 1990 was introduced. It was for the first time, the Constitution of Nepal prohibited discrimination against an untouchable on the ground of caste. It protected the fundamental rights against caste-based discrimination. It categorically mentioned that the State shall not discriminate any citizen on the ground of caste. It prohibited the practice of untouchability at public places or the use of any public utility. All, including untouchables, had access to public places, and if there was any violation, then according to Article 11 it would be punishable. Later, the Constitution of 1990 was replaced by the Interim Constitution of 2007. The 2007 Constitution was framed on the foundation of the 1990 Constitution. In comparison with all the previous Constitutions, the 2007 Constitution was a milestone in the prohibition of caste discrimination. It was mainly an outcome of the various Dalit movements (Lamsal 2012: 77-84).

The preamble of the Interim Constitution of 2007 determined to secure the progressive restructuring of the State by resolving the existing problem of caste in the country. The Interim Constitution, to achieve the goals enshrined in the preamble, further guaranteed the fundamental rights. It includes the right to live with dignity, with personal liberty and fundamental freedoms such as freedom of opinion and expression, association, peaceful assembly, forming a political party, among others (Article 12). However, all these freedoms were subject to certain restrictions. It mentioned that any act which may “jeopardize the harmonious relations subsisting among the peoples of various castes” is subjected to restriction as per the laws (Article 12). Apart from these freedoms, the Interim Constitution also guaranteed “equality before the law” and “equal protection of the law” under Article 13. Article 13 to secure the right to equality stated that:

“(2) No discrimination shall be made against any citizen in the application of general laws on grounds of religion, race, sex, caste, tribe, origin, language or ideological conviction or any of these.

(3) The State shall not discriminate among citizens on grounds of religion, race, caste, tribe, sex, origin, language or ideological conviction or any of these.

Provided that nothing shall be deemed to prevent the making of special provisions by law for the protection, empowerment or advancement of the interests of women, Dalit, indigenous ethnic tribes, Madeshi, or peasants, labourers or those who belong to a class which is economically, socially or culturally backward and children, the aged, disabled and those who are physically or mentally incapacitated.”

The above Article imposes duty on the State to apply general laws without any discrimination on the grounds of religion, race, sex, caste, tribes, origin among others. Moreover, it encourages the State to introduce special provisions for the empowerment and advancement of the Dalits. Besides Article 13 as a general clause against discrimination, another Article 14 guaranteed the rights against untouchability and racial discrimination. Article 14 lays down “no person shall, on the ground of caste, descent, community or occupation, be subject to racial discrimination and untouchability of any form.” Article 14 unifies both the untouchability and racial discrimination in a single provision. As a result, it creates confusion over the application of grounds enlisted in the provision, for instance, as to how caste leads to racial discrimination. Both untouchability and racial discrimination are distinct on the basis of grounds of discrimination. Moreover, Article 14 failed to cover other grounds of racial discrimination such as race, colour among others as laid down by various international human rights conventions.

Further, Article 14 specifies the list of the discriminatory acts that amounts to racial discrimination and untouchability. It prohibits the denial of access to any public place, public religious place, producing or distributing any goods, services or conveniences, on the basis of caste and tribes. Moreover, it laid down one of the significant provision which says that the demonstration and dissemination of superiority or inferiority on the basis of caste, or encouragement of caste discrimination in any form invites punishments

according to law.⁴ With this, it laid down the responsibilities of the State to eliminate caste discrimination.⁵ However, the Interim Constitution of 2007 was temporary and subject to change after the promulgation of new Constitution. After extensive deliberations, finally in 2015, the Nepal has adopted a new Constitution. The salient features of the 2015 Constitution are discussed below.

4.2.1.1. The Constitution of Nepal

The preamble of the Constitution of Nepal 2015 promises “to ensure economic equality, prosperity, and social justice by eliminating discrimination based on the class, caste, region, language, religion and gender and all forms of caste-based untouchability.” The Part three of the Constitution guarantees fundamental rights and duties to the citizens to ensure social justice. It begins with the right to live with the dignity, and right to freedom of opinion and expression, assembly, association among others (Article 16 & 17). Further, Article 18 guarantees right to equality. It mentions that “all citizens shall be equal before the law. No person shall be denied equal protection of law.” Moreover, Article 18 to ensure equality specifies prohibitory grounds of the discrimination on the application of general laws. Article 18 under clause 2 and 3 prohibits the State from discriminating its citizens on the ground of origin, religion, race, caste, sex, tribe, economic condition, language, region, ideology or on similar other grounds.

⁴ Article 14 (2) No person shall, on the ground of caste or tribe, be deprived of the use of public services, conveniences or utilities, or be denied access to any public place, or public religious places, or be denied to perform any religious act.(3) No person belonging to any particular caste or tribe shall, while producing or distributing any goods, services or conveniences, be prevented to purchase or acquire such goods, services or conveniences; or no such goods, services or conveniences shall be sold or distributed only to a person belonging to a particular caste or tribe.(4) No one shall be allowed to demonstrate superiority or inferiority of any person or a group of persons belonging to any caste, tribe or origin; to justify social discrimination on the basis of cast and tribe, or to disseminate ideas based on caste superiority or hatred; or to encourage caste discrimination in any form.(5) Any act contrary to the provisions of sub-clauses (2), (3) and(4) shall be punishable in accordance with law.

⁵ See Article 33 of the Interim Constitution 2007. It crafts out the responsibilities of the State under the directive principles and policies of the State. It mentioned, Article 33 (d) To carry out an inclusive, democratic and progressive restructuring of the State by eliminating its existing form of centralized and unitary structure in order to address the problems related to women, Dalits, indigenous tribes, Madhesis, oppressed and minority community and other disadvantaged groups, by eliminating class, caste, language, sex, culture, religion and regional discriminations.

Besides imposing the obligation on State to not to discriminate citizens on the ground of caste, the Constitution under Article 24 (5) declares the practice of untouchability and discrimination as a severe social offence punishable by the law. It further enlists the acts that amount to untouchability and discrimination. Unlike previous constitutions, the Constitution of 2015 provides a separate provision on the 'Rights against the Untouchability and Discrimination' and 'Rights of Dalits'. However, the term 'Racial Discrimination' did not receive any place in the 2015 Constitution. Article 24 of the Constitution states that, "no person on the ground of caste, origin, profession occupation shall be subjected to the any form of untouchability or discrimination in any private or public place." Moreover, it prohibits caste-based discrimination in producing or distributing any kind of goods, services and facilities. It prohibits caste-based discrimination and practice of untouchability at the workplace.⁶

One of the important significance of the Article 24 is that it not only prohibits the acts that amount to untouchability and caste-based discrimination. It also under clause (5) of Article 24 deters the justifications of the social discrimination on the basis of caste and untouchability, any propagations of such ideology, demonstration of the caste hierarchy and encouragement of caste-based discrimination in any manner. With these prohibitory measures, the Constitution under Article 40 guarantees certain affirmative action for the protection of the rights of the Dalits. Article 40 states that,

⁶ Article 24- Right against untouchability and discrimination: (1) No person shall be subjected to any form of untouchability or discrimination in any private and public places on grounds of his or her origin, caste, tribe, community, profession, occupation or physical condition.
(2) In producing or distributing any goods, services or facilities, no person belonging to any particular caste or tribe shall be prevented from purchasing or acquiring such goods, services or facilities nor shall such goods, services or facilities be sold, distributed or provided only to the persons belonging to any particular caste or tribe.
(3) No act purporting to demonstrate any person or community as superior or inferior on grounds of origin, caste, tribe or physical condition or justifying social discrimination on grounds of caste, tribe or untouchability or propagating ideology based on untouchability and caste based superiority or hatred or encouraging caste-based discrimination in any manner whatsoever shall be allowed.
(4) No discrimination in any form shall be allowed at a workplace with or without making untouchability on the ground of caste.
(5) Any act of untouchability and discrimination in any form committed in contravention of this Article shall be punishable by law as a severe social offence, and the victim of such act shall have the right to obtain compensation in accordance with law.

Rights of *Dalit*: (1) The *Dalit* shall have the right to participate in all bodies of the State on the basis of the principle of proportional inclusion. Special provision shall be made by law for the empowerment, representation and participation of the *Dalit* community in public services as well as other sectors of employment.

(2) Provision of free education with scholarship, from primary to higher education, shall be made by law for the *Dalit* students. Special provision shall be made by law for the *Dalit* in technical and vocational education.

(3) Special provision shall be made by law in order to provide health and social security to the *Dalit* community.

(4) The *Dalit* community shall have the right to use, protect and develop their traditional occupation, knowledge, skill and technology. The State shall accord priority to the *Dalit* community in modern business related with their traditional occupation and provide skills and resources required therefore.

(5) The State shall once provide land to the landless *Dalit* in accordance with law.

(6) The State shall, in accordance with law, arrange settlement for the *Dalit* who do not have housing.

(7) The facilities conferred by this Article to the *Dalit* community must be distributed in a just manner so that the *Dalit* women, men and *Dalit* in all communities can obtain such facilities proportionately.

It also guarantees under Article 42 the right to social justice where all socially backward sections including women and dalits have right to participate in the State bodies on the basis of inclusive principle. Further, the Constitution to fulfil and ensure the participation of all sections of society provided representation to all the section of the society. Therefore, certain seats were reserved for Dalits in the Federal legislature, National Assembly, State Assembly, State Legislature, District Assembly and Municipal Executive, Village Assembly and Local Executive. Although the number of seats is the

issue of contestation, it is for the first time the Constitution of Nepal considered the representation of the Dalits.⁷

Further the Constitution gives importance to the assessment and monitoring of the implementation of the policies and programmes that meant for the prohibition of caste-based discrimination and the development of the Dalits. As a result, to monitor and assess these policies, Article 255 of the Constitution establishes the National Dalit Commission. Under Article 256 it lays down a range of functions and duties of the Commission. It delegates the duty to the Commission to suggest and formulate the policies and programmes to end the caste discrimination and untouchability. The implementation and adequacy of these provisions can be the best judge in the future course. In the present time, one of the relevant enactment on caste discrimination in Nepal is “Caste-Based Discrimination and Untouchability (Offence and Punishment) Act, 2068 (2011)”. This is the first legislation besides the Constitutions that prohibits the practice of caste-based discrimination and punishes accordingly. The next section deals with the 2011 Act.

4.2.2. Caste-Based Discrimination and Untouchability (Offence and Punishment) Act, 2011

The preamble of the Act promises to create an environment where no untouchability or discrimination, exclusion, restriction expulsion, or any other discriminatory acts that is against the humanity on the basis of caste, race, descent, among other. With the prohibition of these forms of discrimination, it strives to maintain equality with the protection of human dignity. It further attempted to prohibit caste-based discrimination throughout Nepal. Moreover, while expanding its scope of jurisdiction Section 1 (2) mentioned that, the Act is applicable to ‘Nepalese citizens residing outside Nepal having committed an offence pursuant of this Act against other Nepalese citizens.’ Section 3 of the Act imposes restriction on the caste-based discrimination and untouchability. It states that, “no one shall commit, aid, abet or provoke anyone to commit caste-based discrimination and untouchability” (Section 3).

⁷For further detail see the Articles 84, 86, 176, 215, 216, 220-223.

Further, Section 4 of the Act specifies the list of the acts that constitutes the caste-based discrimination and untouchability. It clearly specifies that if anyone commits any following acts on the ground of custom, tradition, religion, culture, rituals, caste, race, descent, community or occupation in public or private sphere against any person it shall deemed to have committed caste-based discrimination and untouchability. The acts includes –

(1) to prevent anyone from entering, attending or participating in public or private sphere.

(2) to expel anyone individually or collectively from public place or public occasion or to commit social exclusion or discrimination of any kind or to impose restriction on such act or to demonstrate any other kind of intolerant behavior.

(3) to deprive a person of using or enjoying public service, organizing public occasion or performing any act to be organized publicly.

(4) to instigate or provoke anyone to commit an act that causes caste-based discrimination or untouchability or abet any one to commit such act, or knowingly participate in such act.

(5) to prohibit any one to carry on profession or business or compel any one to carry on any occupation or business.

(6) to deprive any one from performing any religious act.

(7) to prevent any one from producing selling or distributing any goods, services or facilities.

(8) No one shall, while producing, selling or distributing any goods, services or facility, produce, sell or distribute any goods, services or facility only for particular caste or race.

(9) to exclude any member of family or prevent him/her from entering in to the house or evict him/her from the house or village, or compel him/her to leave the house or village.

(10) to community, prevent a person of marriageable age pursuant to prevailing law from getting inter-caste marriage; or shall deny to perform naming ceremony for the person born from such marriage or compel or cause to compel for divorce.

(11) No one shall, by dissemination, publication or exhibition of audio visual materials, articles, pictures, figure, cartoon, poster, book or literature or by any other means, denote hierarchical supremacy of a person belongs to particular caste or race or commit an act that justifies social discrimination on the ground of caste or race or transmit the views based on caste- supremacy or hatred or use derogatory words or indicate there of, by his/her conduct, gesture or behavior, or instigate or abet or cause to do so in any manner that promotes caste based discrimination.

(12) No one shall, on the ground of caste, race, decent or community, deny anyone to provide employment or discriminate in remuneration or cause to do so.

All these acts constitute the caste discrimination and untouchability punishable with the imprisonment from one month to three years with fine (Section 7). Moreover, the Act under Section 8 punishes a person obstructing the investigation of the offences listed above. However, the Act stipulates the time limitation to file a complaint i.e. within three months from the commencement of the prohibited acts (Section 10). The ground of prohibitions discussed above also includes significant prohibition of acts such as social exclusion, social boycott, imposition of caste supremacy among others. Moreover, it promotes the inter-caste marriages. Apart from this special legislation, various other laws directly or indirectly prohibits practice of caste discrimination and untouchability such as, Section 3 of the Libel and Defamation Act 1959, Section 2 of the Public Offences Act 1970, and section 12 of the Civil Rights Act 1955. However, with all legal mechanism Nepal government lacks the will to implement national as well as international laws prohibiting caste discrimination (Bhattachan et al. 2008: 153, Sait 2001: 212).

It seems unlike India, Nepal has understood the hierarchical nature of the caste system. Therefore, it attempted the prohibition of caste-based discrimination in all caste groups rather specifically prohibiting caste-based discrimination against the Dalits, because in the hierarchical system the discriminatory practices prevails even among the non-Dalit groups. Whereas in India the 'Prevention of Atrocity Act, 1989' prohibits the caste-based

discrimination against the Scheduled Castes and Scheduled Tribes, it has neglected the discriminatory practices among the non-Dalits and intra-Scheduled Castes and Scheduled Tribes. Overall, the prohibition of caste discrimination in Nepal has a historical transition beginning from 1951 to 2015. Caste discrimination in Nepal is a reality and laws are introduced to overcome it, but the true realisation can only take place with the conformity of theory and practice. The next section deals with the caste-based discrimination and legal mechanism in the Pakistan.

4.3. Caste Discrimination in Pakistan

Before 1947, Pakistan was part of India. It shared cultural, social, traditional and religious values with India. After partition in 1947, the Pakistan framed its own Constitution that declares itself as an Islamic State with the same cultural, social, traditional, and religious practices which it shared with India. Consequently, the practice of caste-based discrimination has been evident in Pakistan, irrespective of the Islamic State. Moreover, in Pakistan besides Muslims, Hindus, Sikhs and Christians constitute religious minorities. These groups witness discrimination on the ground of religious minority. But on the contrary, the Scheduled castes witnesses dual discrimination, one as a religious minority and, second on the ground of lower castes among the religious minorities. The situation of Dalit Muslims is not much different from other religious Dalits. The lower caste Muslims also undertakes the work of degrading nature, such as manual scavenging, lethal work, etc. (Shah 2008: 8).

In spite of the allegation of existence of caste discrimination, Pakistan denies the practice time and again. It argues that Pakistan, as per the Constitution, is an Islamic State and Islam preaches equality. In the garb of religion, the embedded caste system in the Muslims is always repudiated by the Pakistani Government. This rejection by the Pakistan is one of the factors for non-availability of data on the caste atrocities and practices of caste-based discrimination among the Muslims. The lack of research on the subject limits the study on conditions of Dalit Hindus and their rights in Pakistan. Nevertheless, it is important to study the legal provision on the prohibition of caste-based discrimination. Though Pakistan does not have special law on the prohibition of caste-

based discrimination, some of its constitutional provisions strive to maintain equality. The next section examines the protection of the rights of the Scheduled Castes under the Constitution of Islamic Republic of the Pakistan.

4.3.1. Constitution of Pakistan

Like Nepal, the Constitution of Pakistan also underwent extensive changes during its initial years of establishment. The first Constitution in Pakistan after its formation was established in 1956. However, within two years of its enforcement i.e. in 1958 the Major-General Iskander Mirza, the first President of the Pakistan, abrogated the Constitution, and established the martial law. Further in 1962 the new Constitution was introduced, but it also did not last for a long time. In 1969 again the martial law was imposed that superseded the 1962 Constitution. Finally, the third attempt was made to establish the new Constitution in 1973. So the existing constitutional norms are governed according to the Constitution of 1973. The approach of the Constitution towards discrimination can be analysed from its Preamble, Fundamental Rights and Principles of Policies. The preamble of the Constitution of 1973 proclaims that the “principle of the democracy, freedom, equality, tolerance, and social justice, as enunciated by Islam, shall be fully observed.” Further it guarantees the fundamental rights to its citizens. It mentions that,

“adequate provision shall be made for the minorities freely to profess and practise their religions and develop their cultures;..... adequate provision shall be made to safeguard the legitimate interests of minorities and backward and depressed classes” (Constitution of Pakistan 1973).

The Constitution of Pakistan to attain the objectives specified in the Preamble, particularly to secure the interests and rights of minorities, categorized individuals into two groups viz., Muslims and Non-Muslims. The Non-Muslims mainly comprise of Hindu, Christian, Sikh, Buddhist, Parsi, Ahmadis, and Scheduled Castes.⁸ In general,

⁸ Article 260 (2)(b) "non-Muslim" means a person who is not a Muslim and includes a person belonging to the Christian, Hindu, Sikh, Buddhist or Parsi community, a person of the Qadiani Group or the Lahori Group who call themselves 'Ahmadis' or by any other name or a Bahai, and a person belonging to any of the Scheduled Castes.

these groups are recognised as minority in Pakistan. So to safeguard the interests of Non-Muslims the Constitution of Pakistan introduced various provisions. Moreover, the Constitution incorporates certain provisions to prohibit the practice of caste discrimination. At the same time, it also adopts certain measures for the overall advancement of the Scheduled Castes.⁹

Further, the Constitution of Pakistan under Article 25 ensures to all its citizens “equality before the law and equal protection of law.” Article 25 is the general provision that applies to all citizens. But against this provision, other special provisions were incorporated as exceptions. Basically, the exceptions are the safeguards initiated to secure the interests of the minorities which also includes the Scheduled Castes. For instance, Article 22 provides safeguards as to educational institutions in respect of religion, etc. wherein it says -

(1) No person attending any educational institution shall be required to receive religious instruction, or take part in any religious ceremony, or attend religious worship, if such instruction, ceremony or worship relates to a religion other than his own.

(2) In respect of any religious institution, there shall be no discrimination against any community in the granting of exemption or concession in relation to taxation.

(3) Subject to law,

(a) no religious community or denomination shall be prevented from providing religious instruction for pupils of that community or denomination in any educational institution maintained wholly by that community or denomination;
and

⁹ For the definition of Scheduled Caste the Ordinance of 1956 gives the list of the castes which comes under Scheduled Caste. Like India, the Constitution of Pakistan also recognizes and comprises the group of lower castes in the Scheduled Castes.

(b) no citizen shall be denied admission to any educational institution receiving aid from public revenues on the ground only of race, religion, caste or place of birth.

(4) Nothing in this Article shall prevent any public authority from making provision for the advancement of any socially or educationally backward class of citizens (Article 22).

Overall, Article 22 has clearly drawn the line between different educational institutions for distinct religious practices. Moreover, it attempted to prohibit caste discrimination with other forms of discrimination at the admission level only in those institutions, which receives aid from public revenues.

Another Article 26 provides access to public places. It opens specific places that are not intended for the religious purpose to all citizens. It states that,

26. Non-discrimination in respect of access to public places.-

(1) In respect of access to places of public entertainment or resort not intended for religious purposes only, there shall be no discrimination against any citizen on the ground only of race, religion, caste, sex, residence or place of birth.

(2) Nothing in clause (1) shall prevent the State from making any special provision for women and children.

It shows that, the practice of caste discrimination is prohibited (or permitted), though not in express terms, but with certain conditions. In addition to this, the practice of discrimination was also prohibited in services.¹⁰

¹⁰ Article 27 Safeguard against discrimination in services.- (1) No citizen otherwise qualified for appointment in the service of Pakistan shall be discriminated against in respect of any such appointment on the ground only of race, religion, caste, sex, residence or place of birth: Provided that, for a period not exceeding forty years from the commencing day, posts may be reserved for persons belonging to any class

Besides the above fundamental rights under Chapter 1 of Part I, the Constitution of Pakistan also lays down the 'Principles of Policies' in Chapter 2 of Part I. Article 29 of the Constitution outlines the nature of the principles of policies. It states that the organs of the State should execute the policies depending on the availability of resources. Broadly the focus of the Principles of Policies is to secure social justice. As a result, Article 37 directs the State to promote social justice and eradicate social evils, by promoting, with special care, the educational and economic interests of backward classes or areas.¹¹ However, the problem of caste-based discrimination, one of the biggest social evils, witnessed by Scheduled Castes was sidelined from Article 37. The Constitution provides certain liberty under Article 37(h) to non-Muslims, but it only allows consumption of alcohol for a religious purpose.

Article 38 gives reference to caste but from a general perspective of social well beings without any presence of substantive support. Article 38 relates with the promotion and securing of the social and economic well-being of the people. Article 38 of the Constitution states that,

or area to secure their adequate representation in the service of Pakistan: Provided further that, in the interest of the said service, specified posts or services may be reserved for members of either sex if such posts or services entail the performance of duties and functions which cannot be adequately performed by members of the other sex:

(2) Nothing in clause (1) shall prevent any Provincial Government, or any local or other authority in a Province, from prescribing, in relation to any post or class of service under that Government or authority, conditions as to residence in the Province, for a period not exceeding three years, prior to appointment under that Government or authority.

¹¹ 37. Promotion of social justice and eradication of social evils.- The State shall- (a) promote, with special care, the educational and economic interests of backward classes or areas; (b) remove illiteracy and provide free and compulsory secondary education within minimum possible period; (c) make technical and professional education generally available and higher education equally accessible to all on the basis of merit; (d) ensure inexpensive and expeditious justice; (e) make provision for securing just and humane conditions of work, ensuring that children and women are not employed in vocations unsuited to their age or sex, and for maternity benefits for women in employment; (f) enable the people of different areas, through education, training, agricultural and industrial development and other methods, to participate fully in all forms of national activities, including employment in the service of Pakistan; (g) prevent prostitution, gambling and taking of injurious drugs, printing, publication, circulation and display of obscene literature and advertisements; (h) prevent the consumption of alcoholic liquor otherwise than for medicinal and, in the case of non-Muslims, religious purposes; and (i) decentralise the Government administration so as to facilitate expeditious disposal of its business to meet the convenience and requirements of the public.

Article 38- Promotion of social and economic well-being of the people.- The State shall-

(a) secure the well-being of the people, irrespective of sex, caste, creed or race, by raising their standard of living, by preventing the concentration of wealth and means of production and distribution in the hands of a few to the detriment of general interest and by ensuring equitable adjustment of rights between employers and employees, and landlords and tenants;

(b) provide for all citizens, within the available resources of the country, facilities for work and adequate livelihood with reasonable rest and leisure;

(c) provide for all persons employed in the service of Pakistan or otherwise, social security by compulsory social insurance or other means;

(d) provide basic necessities of life, such as food, clothing, housing, education and medical relief, for all such citizens, irrespective of sex, caste, creed or race, as are permanently or temporarily unable to earn their livelihood on account of infirmity, sickness or unemployment;

(e) reduce disparity in the income and earnings of individuals, including persons in the various classes of the service of Pakistan;

(f) eliminate riba as early as possible; and

(g) ensure that the shares of the Provinces in all Federal services, including autonomous bodies and corporations established by, or under the control of, the Federal Government, shall be secured and any omission in the allocation of the shares of the Provinces in the past shall be rectified.

So Article 38 expressly refers to the caste only in two clauses i.e. (a) and (d). Clause (a) refers to the well being of the people irrespective of caste. This well being is extended to

non-concentration of wealth and economic resources. Clause (b) refers to the food, clothing, education, and medical relief to be distributed irrespective of caste. Both these clauses appear to be general and broad. No substantial and special policy addressed the plights of the Scheduled Castes.

In this regard, Article 33 requires a special mention. Article 33 imposes a future obligation on the State to discourage parochial, racial, tribal sectarian and provincial prejudices among the citizens. However, it fails to address the caste prejudices in the society. Article 33 does not discourage the caste prejudice in express terms. In other words, it clearly establishes no State policy on the elimination of caste discrimination. Moreover, while protecting the interest of minorities Article 36 states “The State shall safeguard the legitimate rights and interests of minorities, including their due representation in the Federal and Provincial services”. For this, it has reserved the seats of the National Assembly for non-Muslims.

The Constitution of Pakistan made efforts to prohibit caste-based discrimination, however not in express terms or either the existing provision are of vague in nature. Such as, the definition of non-Muslims consist various religious groups with Scheduled Castes. It shows the denial of caste system among the Muslims. Moreover, it does not specify that, the non-Muslims come under the minorities. If the whole branch of non-Muslims comes under the minorities then the upper caste Hindus and Scheduled Castes Hindus are placed at the same footing. Scheduled Castes faces discrimination not just because they are in minority; rather they witness it as a practice of religious, social, traditional or cultural practices. It shows Scheduled Castes of Pakistan face dual discrimination as minority (as per the Constitution of Pakistan) and being a lower caste among the Hindus.

Further, the Constitution of Pakistan makes reference to the backward classes in Article 22(4). It is a notwithstanding clause that ensures that the public authority may make provision for the advancement of any socially and educationally backward classes of citizens. This is again a vague provision that do not expressly define the backward classes. Scheduled Castes are not expressly recognised in the backward classes. At the same time, the Constitution do not establishes any National Commission to identify the

backward classes. In fact, the Scheduled Castes are most backward people in terms of their social, educational and economic conditions. The members of the Scheduled Castes in Pakistan are most vulnerable to the practice of bonded labours, slavery, human trafficking, prostitution and all type of heinous crimes ranging from killing to rapes.

Some miniscule measures have been introduced to address the plights of the Scheduled Castes by abolition of bonded labour system under the 'Bonded Labour (System) Abolition Act 1992. Moreover, in 2002 for the welfare of the children of released bonded labours, a special Bonded Labour Fund was established. However, these all legislative measures fail to protect bonded labours at the implementation level (Shah 2008: 22). International bodies have consistently argued that the practice of bonded labour arises out of caste system in South Asia and particularly in Pakistan.

Overall, the Pakistan Constitution of 1973 in its preamble ensures social justice, provides fundamental rights and lays down the principles of policies for the future government. But there is no concrete provision that explicitly addresses caste discrimination and safeguards to the Schedule Castes. The Constitution provides a very general reference to the caste. In true sense, Pakistan should substantively enact laws for wellbeing of citizens without any discrimination. But in reality, many laws are discriminatory in nature. The government of Pakistan must declare the practice of caste discrimination as an offence and further enact necessary legislation on prohibition of caste discrimination. For this purpose, the Indian legislations can be taken as a model to introduce laws on prohibition of caste discrimination in Pakistan (Shah 2008: 13). The next section deals with the practice of caste discrimination in Bangladesh. Bangladesh was once a part of India and Pakistan. Therefore it shares strong social and cultural fabric with these countries in particular with India as it is adjacent to India and has considerable Hindu population. The next section examines the prohibitory legislative measures adopted by Bangladesh on caste-based discrimination.

4.4. Caste Discrimination in Bangladesh

Bangladesh shares religious, cultural and traditional values of India and Pakistan. Consequently, the practice of caste discrimination in Bangladesh is visible both among Hindus and Muslims in all spheres of life including education, health care, access to public and private places, employment, property issues, etc. This practice of caste discrimination has become an obstacle to the overall socio-economic development of the country (Chowdhury 2009: 128).

After separation from Pakistan in 1971, Bangladesh established a new Constitution i.e. the 'Constitution of the People's Republic of Bangladesh' in 1972. Under the Preamble and in Article 2A, the Constitution declared itself as an Islamic State. It was argued that Muslims in Bengal patterned to follow the social stratification while imitating Hindu Varna system (Chowdhury 2009: 7). This shows that the caste system had severe influence on the Muslims. Moreover, this influence further created many castes among the Moslem (Chowdhury 2009: 7, Talke 1914). The recent studies have also substantiated the existence of caste system among the Muslims of rural Bangladesh (Chowdhury 1978, Jain 1975, Chowdhury 2009: 9, 129, IDSN 2008: 2).

This existence of age old practice of caste discrimination among the Hindus and Muslims is a major issue before the Government of Bangladesh. As an Islamic State it also allows other minority religious groups to practice their own religion in Article 2A of the Constitution. So a dual responsibility lies on the government i.e. to protect the rights of the minority religious groups and also of the marginalized groups such as Hindu Dalits of Bangladesh. This dual objective warrants an examination within the Constitution of Bangladesh, in particular the prohibition of caste discrimination.

4.4.1. The Constitution of Bangladesh

After a long struggle against Pakistan, finally in 1971 Bangladesh achieved independence. As an independent State, it adopted its own Constitution in 1972. The Constitution, as underlined by its Preamble is based on four principles namely,

Nationalism, Socialism, Democracy and Secularism. Although the Constitution in its preamble declares Islam as a State religion, it ensures equal status and equal rights to the other religions such as Hindus, Buddhists, Christians and others under Article 2A.¹² This recognition of other religions and their co-existence with the Islam is mainly a Secularism principles outlined in the Part II of the Constitution i.e. Fundamental Principles of State Policy. The Fundamental Principles of State Policy as per Article 8 are not judicially enforceable, nevertheless, they act as a guide and basis for the interpretation of the Constitution and work of the State respectively. Accordingly the Constitution under Article 12 of Part II lays down the policy of Secularism principle. Article 12 directs the State to frame its secularism policy that should eliminate communalism, to overcome use of religion for political purpose, political abuse of religion, religious discrimination.¹³ In addition to Article 12, the Constitution under Article 41 of Part III of fundamental rights category provides the freedom of religion to every citizen. Article 41 states that,

Article 41 (1) Subject to law, public order and morality-

- a) Every citizen has the right to profess, practice or propagate any religion;
 - b) Every religious community or denomination has the right to establish, maintain and manage its religious institutions.
- (2) No person attending any educational institution shall be required to receive religious instruction, or to take part in or to attend any religious ceremony or worship, if that instruction, ceremony or worship relates to a religion other than his own.

¹² Article 2A states that the state religion of the Republic is Islam, but the State shall ensure equal status and equal right in the practice of the Hindu, Buddhist, Christian and other religions.

¹³ Article 12. The principle of secularism shall be realised by the elimination of - (a) communalism in all its forms ;(b) the granting by the State of political status in favour of any religion;(c) the abuse of religion for political purposes;(d) any discrimination against, or persecution of, persons practicing a particular religion.

Unlike Pakistan, the Constitution of Bangladesh does not classify the citizens of Bangladesh as Muslims and non-Muslim (religious minorities). Evidently, the rights of the minority in general and rights of Dalits in particular, failed to acquire direct reference in the Constitution of Bangladesh. On the other hand, it urges to ensure the society to be free from the exploitation of man by man.¹⁴ It guarantees the respect for the human dignity and worth with the other fundamental human rights and freedoms.¹⁵ Article 27 of the Constitution provides fundamental right to equality before the law and equal protection of law to all citizens.¹⁶ The exploitation and violation of basic rights of the Dalits are sidelined. However, some fundamental rights under Articles 28, 29 and 38 broadly refers to the caste. Article 28 imposes limitation on the State from discriminating its citizens on certain grounds. Article 28 states that,

1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex or place of birth.

(2) Women shall have equal rights with men in all spheres of the State and of public life.

(3) No citizen shall, on grounds only of religion, race, caste, sex or place of birth be subjected to any disability, liability, restriction or condition with regard to access to any place of public entertainment or resort, or admission to any educational institution.

(4) Nothing in this article shall prevent the State from making special provision in favour of women or children or for the advancement of any backward section of citizens.

The Article clearly prevents the State from discriminating any citizen on the ground of caste, race, sex, religion or place of birth. On contrary to Pakistan, Bangladesh has widened the scope of access to any public place. Further, the Constitution focuses on to attain the uniform level of economic development of the State. It urges the State, as a

¹⁴ Article 10 — A socialist economic system shall be established with a view to ensuring the attainment of a just and egalitarian society, free from the exploitation of man by man.

¹⁵ Article 11. The Republic shall be a democracy in which fundamental human rights and freedoms and respect for the dignity and worth of the human person shall be guaranteed, and in which effective participation by the people through their elected representatives in administration at all levels shall be ensured

¹⁶ Article 27. All citizens are equal before law and are entitled equal protection of law.

Fundamental Principles of State Policy, to introduce policy and measures for removal of social and economic inequalities between man and man through ensuring equal opportunity.¹⁷ Further, the reference to the caste appears with respect to opportunity under Article 29. Article 29 of the Constitution states that,

(1) There shall be equality of opportunity for all citizens in respect of employment or office in the service of the Republic.

(2) No citizen shall, on grounds only of religion, race, caste, sex or place of birth, be ineligible for, or discriminated against in respect of, any employment or office in the service of the Republic.

(3) Nothing in this article shall prevent the State from—

(a) Making special provision in favour of any backward section of citizens for the purpose of securing their adequate representation in the service of the Republic;

(b) Giving effect to any law which makes provision for reserving appointments relating to any religious or denominational institution to persons of that religion or denomination;

(c) Reserving for members of one sex any class of employment or office on the ground that it is considered by its nature to be unsuited to members of the opposite sex.

Overall, Article 29 provides safeguards against discrimination and unequal opportunity in public employment. However, under clause 3(a) of 29 the State shall provide special safeguards to the backward classes in the public employment who are not adequately

¹⁷Article 19.(1) The State shall endeavour to ensure equality of opportunity to all citizens.(2) The State shall adopt effective measures to remove social and economic inequality between man and man and to ensure the equitable distribution of wealth among citizens, and of opportunities in order to attain a uniform level of economic development throughout the Republic. (3)The State Shall endeavour to ensure equality of opportunity and participation of women in all spheres of national life.

represented. But how the backward classes will be identified has not been explicitly laid down in the Constitution. Moreover, there is also a considerable difference between the backward classes and the Dalits.

The third reference to the caste appears in Article 38 as amended in 2011. Article 38 envisages fundamental right to every citizen to form associations or unions. But it also imposes certain reasonable restrictions of morality or public order while forming such associations or unions. Article 38 states that,

38. Every citizen shall have the right to form associations or unions, subject to any reasonable restrictions imposed by law in the interests of morality or public order

Provided that no person shall have the right to form, or be a member of the said association or union, if-

(a) It is formed for the purposes of destroying the religious, social and communal harmony among the citizens;

(b) It is formed for the purposes of creating discrimination among the citizens, on the ground of religion, race, caste, sex, place of birth or language;

(c) It is formed for the purposes of organizing terrorist acts or militant activities against the State or the citizens or any other country; (d) its formation and objects are inconsistent with the Constitution (Article 38).

Thus, Article 38 among other grounds refers caste and states that no association or union will be allowed if it is formed for the purpose of creating discrimination among citizens on the ground of caste. This Article stands as an important provision in curbing caste discrimination. Caste as a social structure establishes various groups on the basis of hierarchical status. If associations are allowed, then it will contribute in the practice of caste discrimination in different forms. Thus, the provision imposes moral duty on the

citizens to eradicate practice of caste discrimination and imposes constitutional obligation on the State to discourage such caste associations or unions. But Article 38 mainly relates with the associations or unions created under the law and not the one which exists outside it.

With all the above provisions i.e. Articles 28, 29, and 38 the Constitution of Republic of Bangladesh attempts to eliminate some forms of caste discrimination. Unlike India and Nepal it lacks a special provision and enactment on prohibition of caste-based discrimination. Moreover, there is also absence of any special policy and exclusive programmes for betterment of the Dalits in Bangladesh. This was mainly an outcome of inadequate attention paid by the government towards the elimination of caste discrimination. Moreover, the poor implementation of policies and weak representation of Dalit leaders in policy making resulted in vast violation of human rights through practice of caste discrimination (Chowdhury 2009: 53).

Meanwhile, Dalit organisation 'Bangladesh Dalit and Excluded Rights Movement' are consistently demanding the introduction of special law on caste discrimination and dalit rights in Bangladesh. As a result, it has prepared a draft of 'Anti-discrimination Law'. The draft was further submitted to the government for consideration. It has been making persistent efforts at the international level to build pressure on the Bangladesh government to introduce Anti-discrimination law to address caste discrimination. Overall, the timely passage of the anti-discrimination law is the key to overcome caste discrimination. The next section deals with the Constitutional and legal framework against caste discrimination in Sri Lanka.

4.5. Caste discrimination in Sri-Lanka

On the contrary to other South Asian States, the practice of caste system and discrimination in Sri Lanka appears to be in the mild form. However, this mild practice of caste discrimination can be traced in three different groups of Sri Lanka with varied forms. These groups are Sinhalese, Indian Tamils and Sri Lankan Tamil. It is argued that the less rigid practice of caste-based discrimination is mainly an outcome of secular

nature of hierarchy and weak notion of untouchability (Sliva et al. 2009: 2). However, this does not mean that the caste do not exists. It exists in latent form. The Sri Lanka society do not discuss the problem of caste openly, as a result it has been deeply concealed and latent (Sliva and Hettihewage 2001: 63). Therefore, it is important to examine how the Constitution of Sri Lanka addresses this deeply concealed and latent problem of caste-based discrimination.

4.5.1. The Latent Caste-based Discrimination and Sri Lankan Laws

The preamble of the *Constitution of the Democratic Socialist Republic of Sri Lanka 1978* proclaims Sri Lanka as Democratic, Socialist and Republic State into a representative democracy. It assures freedom, equality, justice and fundamental human rights and the independence of judiciary to maintain the dignity and well-being of all people. Like Pakistan and Bangladesh, the Sri Lanka Constitution under Article 9 of Chapter II establishes Buddhism as State religion. It is the foremost responsibility of the State to establish *Buddha Sasana*. However, Article 10 guarantees every citizen the fundamental right to freedom of thought, conscience and religion. At the same time, Article 14(1) (e) guarantees every citizen the freedom to association to manifest his religion, or belief in worship, observance, practice and teaching.

The Constitution in two provisions i.e. in Article 12 and 27 refers to caste discrimination. Article 12 of the Constitution ensures fundamental right to equality. It states that “all persons are equal before the law and are entitled to the equal protection of the law”. Furthermore, clause 2 of Article 12 prohibits discrimination on the ground of race, religion, language, caste, sex, political opinion, place of birth or any one of such grounds. Moreover, in clause 3 of Article 12 the Constitution states that no person on the ground of caste among others subjected to any disability, liability, restriction or condition with regard to access to shops, public restaurants, hotels, places of public entertainment and places of public worship of his own religion.

Article 27 is included in the category of ‘Directive Principles of State Policy and Fundamental Duties’ of Chapter VI. Article 27 under clause (1) lays down the aim and

object of Chapter VI as a guide to the State to establish just and free society. In Article 27 (2) the State is pledged to establish the democratic socialist societies with the objective of full realization of fundamental rights and freedom of all persons, equal distribution of material resources, raising the moral and cultural standard among others. The reference to caste appears in Article 27 (6). It states that “the State shall ensure equality of opportunity to citizens, so that no citizen shall suffer any disability on the ground of race, religion, language, caste, sex, political opinion or occupation.” So, caste shall not be a barrier or disability in offering equal opportunity to the citizens.

In addition to the above Constitutional provisions, a separate law titled as ‘Prevention of Social Disability Act’ was enacted in 1957. The Act contains four sections. It prohibits social disabilities arising out of castes. The object of the Act is to “prevent the imposition of the social disabilities on any person by a reason of their caste”. Section 2 of the Act penalizes the imposition of social disability on any person by reason of his caste, with imprisonment not exceeding six months or fine not exceeding one hundred rupees. Then section 3 defines ‘imposition of social disability’ as –

- (a) If he prevents or obstructs such other person from or in-
 - i) Being admitted as a student to, or being employed as a teacher in , any
 - ii) Entering or purchasing any article at, any shop, market or fair,
 - iii) Entering or being serve at, any public hotel, rest house, eating house, restaurant or any other place where article of food or drink are sold to the public,
 - iv) Obtaining any room for residence in a public hotel, rest house, or lodging house,
 - v) Obtaining or using water from any public well, spring, water-pipe, or any other source of supply of water to the public,
 - vi) Entering or obtaining service provided at, a hairdressing saloon or laundry,

vii) Entering any public cemetery and attending or taking part in any burial or cremation therein,

viii) Wearing any kind of clothes, head covering, or foot covering at any place to which the public have access whether on payment or otherwise, or at the place of such other persons employment, or in the course of such other person's trade, business or employment,

ix) Being carried as a passenger in any public vehicle or vessel,

b) If he prevents or obstruct such other person, being the follower of the any religion, from or entering, being present in, or worshiping at any place of worship or portion thereof to which followers of that religion have access, or

c) If he being a public officer, does not perform or exercise any duty or power which he is legally bound to perform or exercise for the benefit of such other person, or

d) If he is being proprietor of, or person having control over, or a person employed as a worker in, a place to which the public have access whether on payment or otherwise, subjects such other person to any discrimination or ; and

(e) If he corrupts or fouls the water of any public well, spring, tank or reservoir so as to make it less fit or unfit for the purpose for which it is ordinarily used by such other person, or

(f) If he prevents or obstructs such other person, being a teacher or a student or an employee in any educational institution, from or in obtaining or using water from any well, spring, tank, reservoir or water-pipe in that institution or in the precincts of that institution, or

(g) If he prevents or obstructs such other person, being a teacher or a student or an employee in any educational institution, from or in participating in any activity in that institution.

Further, Section 4 inserted 1971 of the Act conferred powers of arrest to the police officers to “prevent the imposition of social disabilities on person by reason of their caste.” The Sri Lanka government with the above constitutional provisions and the 1957 Act attempts to prohibit the practice of caste discrimination. It seems that the approach of the Sri Lankan government towards caste discrimination is indiscreet as it undermines the problem of caste discrimination. This approach is mainly due to two reasons, first the liberal nature of caste hierarchies, and second, Sri Lanka is a Buddhist State which, in theory propounds principle of humanity. Due to these reasons the Sri Lankan government has maintain a hands-off attitude towards caste discrimination, and it also assumes that the caste will die a natural death due to the impact of modernization and market forces (Sliva & Hettihewage 2001: 63).

Thus, the South Asian states are reluctant to accept existence of caste discrimination in their respective State. However, the European State in particular United Kingdom is not an exception to this. Although caste discrimination is not a form of racial discrimination it is evidently practiced by South Asian diaspora in UK, the Dalits demanded recognition of the caste discrimination as a form of discrimination. Subsequently, UK has convinced that the practice of caste discrimination exists among the South Asian diaspora and has initiated the legal proceedings in this direction. The next section deals with the UK’s law on the practice of caste discrimination.

4.6. UK Law on the Prohibition of Caste Discrimination

In 1950s a large number of South Asians migrated to United Kingdom (UK) with cultural, traditional and religious values and practices, which also included practice of caste discrimination. As B. R. Ambedkar in his book *Caste in India: Their Mechanism, Genesis and Development* anticipated that “if Hindus migrate to other regions on earth, Indian caste would become a world problem” (Ambedkar 1916: 242). Indeed, this prediction came true as caste discrimination migrated with the Indian diaspora to East and South Africa, Mauritius, Fiji, Suriname, the Middle East (for example in *Bahrain, Kuwait, the United Arab Emirates*), Malaysia, the Caribbean, the United Kingdom, North America, and other regions (Narula 2001: 22). With the other South Asian diaspora dalits

(untouchables) of India also migrated to the United Kingdom. It has been estimated that around 250,000 Dalits are living in the UK (CERD79 UK report). At this point the migrant carried their caste practices with other values. Kumar observed:

When people they do not migrate, only as biological souls. Rather they migrate in tandem with social — cultural baggage. They take along with them their family and caste values as well as their prejudices” (Kumar 2008: 39).

These practices are visible in the South Asian diaspora. During the initial years i.e. in 1950s, the identity of Dalit remained invisible under the umbrella of South Asian. But this advantage was limited only to the first generation immigrants, as they fused their identity under the all encompassing Asian identity. At the same time, during this period the upper caste community remained unorganized to assert their identities. But the second generation Dalits began to experience the problem of caste discrimination (Ghuman 2011: 3). As a result, the Dalit diaspora witnesses dual discrimination, caste discrimination from their own countrymen and racial discrimination from the white society. The Indian diaspora started practicing caste discrimination, an age old practice of India, far away from its origin land. There are a number of incidents witnessed on the practice of caste discrimination among the diaspora community in UK.

The practice of caste-based discrimination in UK is less rigid than India, but its prevalence is evident at the time of marriages, place of worship, politics, in the workplace, etc. (Green et al 2009). The South Asian diaspora practices caste discrimination in UK on the name of traditional or customary practices in the absence of legal, political and social recognition of it. The Dalit groups in UK took enormous efforts to acquire the attention of the UK government over the impact of caste discrimination on the protection of human rights. One of the major concerns was to seek legal protection against caste discrimination.

For the first time in *Begraj v. Heer Manak Solicitors* the practice of caste-based discrimination was challenged before the tribunal. It urged for legal protection against caste discrimination in UK. Moreover, as UK population comprises large number of dalit

diaspora, it attracted the attention of international community. Consequently international community recommended UK government to introduce legislative provisions protecting rights of the victims against caste discrimination. The intervention of international community and existing evidences initiated legislative developments in the UK's anti-discriminatory law.

Though UK laws prohibit racial discrimination, the practice of caste discrimination infringes the right to equality and right to non-discrimination. As the subject of caste discrimination was not directly covered under any international human rights law, subsequently it necessitated enormous efforts and time to prohibit practice of caste discrimination by South Asian diaspora in UK. The battle came to end after the recommendation XXIX issued by Committee on the Elimination of all forms of Racial Discrimination (CERD). The CERD stated that, 'caste' is a form of racial discrimination and States are directed to take necessary measures to prohibit caste discrimination.

Subsequently, to comply with the International Convention on Elimination of All forms of Racial Discrimination (ICERD) and to protect the rights of the South Asian diaspora community the UK government introduced a provision under the Equality Act, 2010. In the beginning, the UK government denied the practice of caste discrimination in South Asian diaspora communities. However, the continue efforts of CERD and international community encouraged the UK to rethink seriously on caste practice. In the 'Concluding Observation' of the 16th and 17th combined report of the UK, CERD made recommendations to the UK government. The Committee recalled its general recommendation XXIX in which it condemned descent-based discrimination, such as discrimination on the basis of caste and analogous systems of inherited status, as a violation of the Convention, and recommended that a prohibition against such discrimination be included in domestic legislation (CERD/C/63/CO/11).

In response to the Concluding Observation of the Committee, the UK Government in 2005 drafted a letter and memorandum from Fiona Mactaggart MP, the then Parliamentary under Secretary of State, Home /Office. In the letter it stated that, "We have noted CERD's comments about caste based discrimination, but also that they have

made no suggestion that this is a problem in the UK. We have seen no evidence that there is a particular problem in the UK, but would be happy to consider any that is put to us (CERD 79th Session).” Further in its next report to the CERD on 9th March 2010 UK government asserted that there was no evidence of the existence of caste-based discrimination in the field covered by the Convention (CERD/C/GBR/18-20). However, the UK Government accepted the recommendation made by CERD and the practice of caste discrimination in the country. The UK government proposed the amendment in Equality Bill while inserting new provision in the form of section 9 (5).

Section 9 (5) A Minister of the Crown may by order—

- (a) Amend this section so as to provide for caste to be an aspect of race;
- (b) Amend this Act so as to provide for an exception to a provision of this Act to apply, or not to apply, to caste or to apply, or not to apply, to caste in specified circumstances.
- (6) The power under section 207(4) (b), in its application to subsection (5), includes power to amend this Act.

According to this section caste is considered as an aspect of race. With this section UK government accepted the practice of caste discrimination among its Indian diaspora. This provision has been introduced in the Act with a condition that for the implementation of the section it requires secondary legislation. In December 2010 the UK Government commissioned independent research by the ‘National Institute of Economic and Social Research (NIESR)’ to observe the evidences of practice of caste discrimination in UK and make recommendations to the government.

4.6.1. Report of NIESR and Recent Legal Developments

The government of UK decided that further research was needed to determine the exercise of power laid down under section 9. For this purpose the government commissioned National Institute of Economic and Social Research (NIESR) in 2010. The NIESR prepared a report titled as “*Caste discrimination and harassment in Great*

Britain”. The objective of the research is to assess the nature, extent and severity of caste prejudice, discrimination and harassment in Britain and the implications of Government policy’. It aimed to identify whether caste discrimination and harassment exists in relation to employment, education, supply of goods and services covered by the Equality Act, 2010.

The study identified evidence suggesting caste discrimination and harassment of the type covered by the Equality Act 2010 in relation to work (bullying, recruitment, promotion, task allocation; provision of services; and education (pupil on pupil bullying).The study also identified evidence suggesting caste discrimination and harassment which may fall outside the Equality Act 2010 in relation to voluntary work, harassment, demeaning behaviour and violence. Further regarding provisions on religious discrimination of the Equality Act, 2010 the report states that it cannot cover caste discrimination and harassment as effectively as caste-specific provisions would.

After observing the practice of caste discrimination and harassment NIESR made certain recommendations. The report recommended that the “extending the definition of the race to include caste would provide further, explicit protection.” The report also recommended that to reduce caste discrimination and harassment the government might take educative or legislative approaches, either would be useful in the public sector. However, non-legislative approaches are less likely to be effective in the private sector and do not assist where the authorities themselves are discriminating. The complete reliance on the Indian community to take action to reduce caste discrimination and harassment is also problematic (Metcalf et al 2010: vi). Subsequently, various efforts were made to introduce prohibitory measures on caste discrimination in UK law. This attempt would convey the recognition of caste discrimination unacceptable and unlawful wherever it occurs (Waughray 2009: 219).

Further, British parliament activated the clause 9(5) of the Equality Act to outlaw caste discrimination. In 2013, new amendment was proposed to the Enterprise and Regulatory Reform Bill, making caste as a new subset to the race under section 9(1) of the Equality Act. However, the amendment was withdrawn, and instead the subsequent amendment

adding of caste to the definition of race was adopted. As a result, the Section 97 of the Enterprise and Regulatory Reform Act, 2013 requires that the caste be made an aspect of the race under the Equality Act (Dhanda et al. 2014: 11). In other words, this amendment replace the discretionary power under Section 9(5)(a) with the duty to make caste as an aspect of race (Dhanda et al. 2014: 2). Though it shows that the government of UK is committed to eliminate the practice of caste discrimination, it has to make secondary legislation prohibiting caste discrimination.

The final draft of Affirmative Order outlawing caste discrimination was intended to introduce in the Parliament in 2015. This introduction of legislative provision to protect the rights of diaspora community and to eradicate caste discrimination was welcomed by the international community, which eventually did not happen. It was mainly due to strong opposition from the caste Hindu groups. It was opposed on the basis of non-existence of the caste discrimination. Introducing caste legislation would result as interference in the religious affairs. Moreover, it was argued that the caste system and caste discrimination has nothing to do with the Hindu religion. On the contrary it was argued that it is an outcome of the centuries of British rule than ancient religion (Samani & Ahmad 2017).

On the account of this debate, UK government once again felt the need to gather references on the existence of caste discrimination in UK. It was argued that, in the Equality Act the provision dealing the caste was inserted at the last movement without having sufficient supportive research. Therefore, for strong legislation there is need have adequate evidences. Consequently, in March 2017, UK government began the consultations. The purpose of the consultations as mentioned is — firstly it would provide an opportunity to for the government to open a public debate on considering caste as aspect of race. Secondly, it invite the views on the which method to be used against the caste discrimination. It provided number alternatives such as: a) whether the prohibition of caste discrimination is best ensured by developing case laws under the Equality Act; b) whether making caste as aspect of race under the Act would serve the

purpose; c) the reliance on the developing case laws in a courts and tribunals would be likely to mean that caste as an aspect of ethnic origin under the Act.¹⁸

With this objective the UK government has began the consultation. However, it is criticised on the ground that it would cause the delay in introducing the legislation on the prohibition of caste discrimination. Moreover, it raised the doubts on the intentions of the UK government (Purohit 2017). With the intended affirmative action and criticism, the UK government as compared to the other States is consistently engaging in the debate over eradication of caste discrimination for ensuring the rights of the diaspora community. The legislative action and its implementation will set a model before other countries to come forward and legislate on prohibition of caste discrimination (Pillay 2013). It shows that the UK government has reached halfway with a long history that began with the rejection of existence of the practice of caste discrimination among the South Asian diaspora.

4.7. Conclusion

The examination of national laws of Nepal, Pakistan, Bangladesh, Sri Lanka of the South Asian countries on the practice of caste discrimination and UK law on the South Asian diaspora on the prohibition of caste discrimination pointed out certain peculiar phenomenon of the caste system. Firstly, the codified rules of caste system are identical to all South Asian States across religions, although it differs in sources. Secondly, these rules are embedded in the society's cultural and traditional values with the religious support. Finally, it resulted into strong practices with the supplement of faith or notion.

The existing laws in the South Asian countries against caste discrimination are not sufficient. A new legal regime is required to strengthen them against the caste discrimination that will substantively overcome the very notion of caste. The constitutional provisions and various laws discussed in this and previous chapter attempted to prohibit the practice of caste discrimination. However, these lack credibility due to various reasons. First and foremost are the religious and social sanctions behind it.

¹⁸ Government Equality Office (2017), Caste in Great Britain and Equality Law: A Public Consultation

In the States such as India and Nepal the religious and social sanctions play a vital role in strengthening caste. Beside these sanctions, the changing dimensions of caste discrimination are coloured with politics, and has rendered it even more difficult to prohibit.

On the other hand, Bangladesh, Pakistan and Sri Lanka always take defence of their State religion which do not allow discrimination and hence deny the existence of caste system in their State. Although the cultural and traditional practice are intermixed since time immemorial both Bangladesh and Pakistan claims that being an Islamic States they do not follow the Hindu notion of caste. This ignorance about the practice of caste discrimination is evident from the inadequate legal mechanisms that are in existence in these States.

The national anti-discriminatory laws in India have failed to challenge the social sanction of caste. Additionally, they have also failed to identify all acts that result in caste atrocities. As discussed in previous chapter it is difficult to precisely define the caste system. It is equally difficult to identify and cover all acts that amount to caste discrimination or caste atrocities. It is required that the law should expand its scope to meet new forms of caste discrimination. Since 1955 the Indian laws prohibiting caste discrimination time and again comes with the amendment for inclusion of some new act amounts to the caste atrocities. But the State laws are not clear on caste discrimination practiced in the private and public sphere.

Apart from these shortcomings, there is also a lack at the level of implementation. The implementation of well-crafted laws plays a significant role. However, it is evident from all the States, that the laws are not implemented with true spirit. With the executive's failure, the caste bias of judiciary is equally responsible for non-implementation of the laws. All together the practice of caste discrimination is sustained due to social and religious sanctions, inadequate legal mechanism and non-implementation of these laws.

In recent years it has invited the attention of international human rights laws, as the human rights treaty bodies took cognisance of the practice of caste discrimination. The

treaty bodies recommended that States introduce measure to prohibit caste discrimination. They also attempted to include the caste as a form of discrimination in the international human rights laws. This inclusion or the applicability of international human right laws to caste-based discrimination also raised many questions such as, to what extent the international human right laws cover the practice of caste-based discrimination. Which international human rights conventions prohibits caste based discrimination and how. And in the case when national mechanisms fail at the level of implementation how international human right laws will survive. The next chapter addresses these questions and attempts to answer them. It also focuses on inclusion of ‘caste’ as a form of discrimination in the international human rights laws.

CHAPTER 5

ROLE OF INTERNATIONAL HUMAN RIGHTS LAW TO COMBAT CASTE DISCRIMINATION

“Governments that block the aspirations of their people, that steal or are corrupt, that oppress and torture or that deny freedom of expression and human rights should bear in mind that they will find it increasingly hard to escape the judgement of their own people, or where warranted, the reach of international law”

William Hague¹

5.1. Introduction

Historically, human rights were known as natural rights. The protection of these rights was the concern of States. As a result, States introduced laws for the protection of human rights (Baderin and Ssenyonjo 2010: 1). Subsequently, these concerns about the protection of human rights were echoed in international organizations such as the League of Nations, followed by the United Nations. The principles of equality and non-discrimination are central to working United Nations human rights bodies. Non-discrimination ensures human dignity and human dignity forms the bedrock of the protection of human rights.

The adoption of Universal Declaration of Human Rights in 1948 by the United Nations led to the codification and promotion of human rights with the common standards of achievement for all people and nations. Subsequently, the concept of

¹ Kirkup, James (2011) “William Hague: ‘Arab Spring’ could topple Robert Mugabe”. *The Telegraph*. Available at <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8398938/William-Hague-Arab-spring-could-topple-Robert-Mugabe.html> (Accessed on March 24, 2013)

human rights has been expanding, from the first generation of civil and political rights, to the second generation of economic, social and cultural rights, to the third generation of collective or solidarity rights such as the right to development and the rights of indigenous people. This transition and expansion of human rights of the principle of non-discrimination sets the basis for all human rights frameworks.

The principle of non-discrimination led to the emergence of various international human rights conventions that attempted to prohibit different forms of discrimination. It includes discrimination on the basis of race, colour, sex, descent, place of birth, ethnic, social origin, and social status, among others. These developments have been seen evolving around various rights, considering the criticism from subaltern groups. In 1960s critical race theory strongly critiqued the approach of UN on racial discrimination. The United Nations took into account its criticism and introduced a separate convention on racial discrimination. The convention was titled as 'International Convention on the Elimination of All Forms of Racial Discrimination 1965' (ICERD), which specifically dealt with the racial discrimination. The ICERD attempted to cover possible grounds of discrimination under the rubric of racial discrimination.

The forms of discrimination prohibited in various international human rights conventions vary with the conventions. The international human rights conventions, however, failed to cover all other forms of discrimination. Caste discrimination is one of the forms of discrimination that is consistently debated for its non-inclusion as a form of discrimination in international human rights law. It is argued that the Eurocentric understanding of human rights lacks clarity in terms of expressly prohibiting caste discrimination. It can be best evident from the limited (restricted to the racial discrimination) understanding of the principle of non-discrimination (Thorat and Umakant 2004: 3).

As a result, the international human rights law sidelines the discriminatory practices of subaltern countries. Therefore, the caste-based discrimination practiced by South Asian States failed to receive a separate status as one of the ground of discrimination under international human rights law. On the one hand, various UN human rights bodies have addressed human rights issues, such as gender discrimination, poverty,

illiteracy, child rights, etc. of the South Asian States. In fact the root cause of all these problems i.e. the practice of caste-based discrimination has not received full attention of UN human rights bodies (Divakar and Ajai 2004: 4). Therefore, it is a prime concern to include 'caste' as a form of discrimination into the international human rights law, irrespective of its prohibition through national laws.

We have discussed the adequacy and shortcomings of the national laws in chapter 3 and 4. These raise number of questions, which leads to the imperative study of international human rights law and the development of the international anti-discriminatory law. First, the scope of the international human rights law was questioned. Second, the applicability of the international human right law to the caste-based discrimination was challenged. The inclusion of caste-based discrimination under the descent-based discrimination was also questioned along with the delay in recognizing caste as a ground of discrimination.

Therefore, the present chapter attempts to examine the anti-discriminatory provisions of the various international human rights conventions and their applicability to the prohibition of caste-based discrimination. At the outset, the chapter focuses on the international anti-discriminatory laws. It examines the grounds of discrimination given under the various human rights conventions. The chapter then shifts its focus to the definition of discrimination given by human rights treaty bodies, followed by discrimination faced by women and children on the basis of caste. The chapter also examines the inclusion of caste-based discrimination under descent-based discrimination. For this, it focuses on reports of the Committee on Elimination of all form of Racial Discrimination (CERD) and Indian Constituent Assembly Debates. It also evaluates the interpretation of 'descent' given by the CERD while issuing General Recommendation XXIX.

5.2. International Anti-discriminatory Law

Before the adoption of the UN Charter, few minority treaties were dealing with the prohibition of discrimination. Later with the adoption of UN Charter the limited scope of the principle of non-discrimination was expanded. The UN Charter made the principle of non-discrimination applicable to everyone while including it in the basic

part of international law (Weiwei 2004: 5, Fink 1995: 197). The range of Articles of the Charter promote and encourages the respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion under Articles 1(3), 13(1)(a), and Article 55(c). These provisions dealing with the prohibition of discrimination viewed as the only unambiguous provisions of the UN Charter (Weiwei 2004: 6).

On the contrary, the other provisions of the UN Charter are falling short to establish an immediate obligation on the State Parties to guarantee or observe the practice of human rights (Weiwei 2004: 6). Weiwei further argues that the provisions of the UN Charter impose “...vague obligation to promote universal respect for, and observance of human rights”. It highlighted the inability of the international law to establish the effective mechanism (Weiwei, 2004: 6). Nevertheless, the principle of non-discrimination started evolving with the adoption of Universal Declaration of Human Rights (UDHR) in 1948, it strengthen the promotion and protection of human rights.

5.2.1. UDHR and Caste

Article 1 of the Universal Declaration of Human Rights (UDHR) declares a universal principle that, “All human beings are born free and equal in dignity and rights”. The UDHR prohibits discrimination to maintain the equality with the dignity. It recognizes various grounds of discrimination under Article 2 which are derogatory to the practice of human rights. It includes race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. While prohibiting discrimination it notes that,

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination (Article 7).

Both the Articles i.e. Article 2 and 7 of the UDHR signifies that the discrimination of any kind is subject to prohibition. However, the caste-based discrimination continues to hamper the human dignity. Rita Izsak Ndiaye notes that the caste-based discrimination is a “...serious human rights violation infringes upon the basic

principle of universal human dignity and equality, as it differentiates between “inferior” and “superior” categories of individuals because of their inherited caste status” (A/HRC/31/56). In spite of the knowledge of caste realities, the Government of India adopted the UDHR just a year after the independence. However, no reference was made by the India or from the UDHR drafting committee to include ‘caste’ as a form of discrimination under Article 2 of the UDHR. Moreover, the existence of caste-based discrimination was known to the world through Round Table Conferences in the 1930s (Keane 2007: 60, Divakar and Ajai 2001: 8).

Further, for the first time, in the 100th meeting of the ‘Third Committee of the General Assembly’ 1948, India proposed the insertion of word ‘caste’ as a form of discrimination under Article 2 of the UDHR. The proposal was made due to increasing objections on the inclusion of ‘birth’. Time and again, the proposal was set aside, as Indian delegation found the terms ‘other status’ and ‘social origin’ sufficiently broad enough to include caste, and, therefore, did not insisted upon its proposal (A/C.3/SR.102). Saint-Lot, a representative of Haiti, agreed with Indian delegation and said that, “...the word ‘caste’ had never been properly defined” (A/C.3/SR.102). As a result, caste as a form of discrimination expressly did not find a place in UDHR. Nevertheless, the UDHR successfully sets the universal standards of the human rights. After UDHR, two separate covenants i.e. International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) were adopted for the better protection and promotion of the human rights. On the one hand, ICCPR protects the civil and political rights, and on other hand, ICESCR deals with the economic, social and cultural rights. The next section examines the ICCPR, ICESCR and ILO conventions and the relevance and qualification of practice of caste discrimination as a form of discrimination.

5.2.2. Definition of Discrimination under ICCPR, ICESCR, and ILO

On the basis of the human rights standards set by the UN Charter and UDHR, the ICCPR and ICESCR significantly recognizes various aspects of human rights. Both covenant categories human rights into political rights, civil rights, economic rights, cultural rights and social rights. Each division is comprises of various rights such as right to life, right to live with dignity, right to religion, right to work, right to

education, right to justice, right to health, right to food, right to water along with others. The protection of all these rights would not be possible without prohibiting discrimination against it. Therefore, the International Covenant on Civil and Political Rights (ICCPR) 1966 prescribes equal protection of the law to all people without any discrimination. Article 26 of the ICCPR states that,

“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (Article 26).”

Moreover, Article 2 Paragraph 1 obligates State parties of the ICCPR to ensure rights given under the Covenant to its citizens and persons under its jurisdiction. It further emphasizes the protection of these rights without any distinction on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. In addition, Article 4 paragraph 1 deals with protection of rights without any discrimination in the public emergency, and Article 20 paragraph 2 prohibits any advocacy of national, racial or religious hatred that constitute an incitement to the discrimination.

The provisions of the ICESCR are identical to the ICCPR. According to the Article 2 Paragraph 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) all State parties are obliged to guarantee “the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (Article 2 para 2).” The Committee in its General Comment No. 20 cautioned the States about the obligation under the Covenant and urged its immediate application in the areas of economic, social and cultural rights. It further notes that:

“discrimination constitutes any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant

rights. Discrimination also includes incitement to discriminate and harassment (E/C.12/GC/20).”

After the overview of the provisions of ICCPR and its implementation, the Human Rights Committee in its General Comment 18 clarifies that the Covenant neither defines the term ‘discrimination’, nor it indicates what constitutes the discrimination. Thus, to understand the term ‘discrimination’ under the ICCPR the Human Rights Committee refers to Article 1 of the ‘International Convention on the Elimination of All forms of the Racial Discrimination, 1965’ and Article 1 of the ‘Convention on the Elimination of All Forms of Discrimination against Women, 1979’ respectively and it concluded that,

“While these conventions deal only with cases of discrimination on specific grounds, the Committee believes that the term “discrimination” as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms (General Comment 18).”

The interpretation given by the Human Rights Committee clarifies that any discrimination is constituted by an act of distinction, exclusion, restriction or preference. Similar interpretation was followed by Committee on Economic, Social and Cultural Rights in its General Comment No. 20. It pointed out that the discrimination has become the major hurdle in fulfillment of the economic, social and cultural rights of individuals, which comprises a significant amount of world’s population (E/C.12/GC/20). These four characteristics i.e. distinction, exclusion, restriction or preference individually or with the combination of each other constitutes the act of discrimination. Consequently, this act of discrimination prohibits individual from enjoying the basic human rights. Then the pertinent questions arises, firstly, does these four characteristics exist in the practice of caste-based discrimination? Secondly, though the Covenants did not define discrimination, it provides the list of grounds of discrimination, hence whether the list on the grounds of discrimination is exhaustive or narrow?

The caste rules do not guarantee the political, civil, cultural, economic and social rights to the lower castes. Further, to maintain the sanctity of the caste rule, the caste violence including rape, killing etc. is often committed against the lower caste people. It violates the right to life and physical security and integrity. It also violates – right to political participation, right to access to justice, right to freedom of religion, right to health, food, sanitation, water, clothing and housing, right to marriage at free will, right to education, right to equal opportunity, free choice of employment, right to free from bonded labour, among others. All these violations by caste discrimination are recognised by UN human rights bodies (A/HRC/31/56, Bob 2009: 35). Though most of the South Asian States have abolished the caste rules and introduced laws on protection of human rights (discussed in the Chapter 3 and 4), the violation of ICCPR and ICESCR is clearly visible from the acts of caste-based discrimination.

The Human Rights Committee and Committee on Economic, Social and Cultural Rights has consistently emphasize on the violation of the obligations under the covenants. Moreover, while emphasizing the obligations, the Committee on Economic, Social and Cultural Rights elaborated the grounds of discrimination as discussed under the Covenant. Further, it noted that, apart from Article 2 various other Articles such as Article 3, 7 and 10 also prohibits discrimination and demands for equality.² As a result, Part III of General Comment No. 20 expanded the scope of

² Article 3 – The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant. Article 7 – The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular: (a) Remuneration which provides all workers, as a minimum, with: (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work; (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant; (b) Safe and healthy working conditions; (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence; (d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays. Article 10 – The States Parties to the present Covenant recognize that: 1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses. 2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits. 3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States

the Article 2 by interpreting the term ‘other status’. It stated that the list of the grounds of discrimination mentioned in Article 2 is not exhaustive in nature. The inclusion of term ‘other status’ in the list indicate that it could incorporate other grounds of discrimination in the current list. Hence, the Committee has incorporated other express and implied grounds of discrimination. It includes the discrimination on the basis of disability, age, nationality, marital and family status, sexual orientation and gender identity, economic and social situations, health status, and place of residence. However, the Committee also mentioned that the list proposed by it is not intended to be exhaustive (E/C.12/GC/20).

Further, to cover caste-based discrimination the Committee has discussed descent-based discrimination under the sub-heading of ‘birth’. ‘Birth’ is further covered under the heading of ‘social origin’. While explaining the term ‘national or social origin,’ it mentioned that the ‘social origin’ outlines the person’s inherited social status. It was further elaborated in the context of individual’s property status³, descent-based under the birth⁴, and economic and social status⁵. The prohibited ground of birth also includes descent-based discrimination, especially the discrimination on the basis of caste and analogous system of inherited status (E/C.12/GC/20).

However, it has confined the caste-based discrimination to the discrimination witnessed by birth or descent-based discrimination. Though caste is attached by birth, it is a prime source of other forms of discrimination. For instance, the caste of the

should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

³Property status, as a prohibited ground of discrimination, is a broad concept and includes real property (e.g. land ownership or tenure) and personal property (e.g. intellectual property, goods and chattels, and income), or the lack of it (E/C.12/GC/20 para 25).

⁴ Discrimination based on birth is prohibited and article 10, paragraph 3, of the Covenant specifically states, for example, that special measures should be taken on behalf of children and young persons “without any discrimination for reasons of parentage”. Distinctions must therefore not be made against those who are born out of wedlock, born of stateless parents or are adopted or constitute the families of such persons. The prohibited ground of birth also includes descent, especially on the basis of caste and analogous systems of inherited status. States parties should take steps, for instance, to prevent, prohibit and eliminate discriminatory practices directed against members of descent-based communities and act against the dissemination of ideas of superiority and inferiority on the basis of descent (E/C.12/GC/20 para 26).

⁵ Individuals and groups of individuals must not be arbitrarily treated on account of belonging to a certain economic or social group or strata within society. A person’s social and economic situation when living in poverty or being homeless may result in pervasive discrimination, stigmatization and negative stereotyping which can lead to the refusal of, or unequal access to, the same quality of education and health care as others, as well as the denial of or unequal access to public places (E/C.12/GC/20 para 35).

person determines individual's social status, economical status, property, educational and family status. At the upper level, caste gives pride to the privileged castes, which enjoys all the above statuses. On the contrary, the lower castes have to compromise all the rights, as caste gives them the stigmatize status in every aspect of life. It affects their right to education, right to property, right to live with dignity, and life without social status. Therefore, it is pertinent to identify the various forms of discrimination that arise out of caste system. Among these different forms of discrimination, occupation based discrimination plays a significant role. Some of the theories as discussed in Chapter 2 claims that the occupation is the origin of caste system. Castes are divided on the basis of occupation. As a result, the lower castes have to perform polluting or degrading occupation. They are indeed forced to work as bonded labour.

At the international level, the International Labour Organisation (ILO) was founded in 1919 to set labour standards, to promote rights at work, encourage decent employment opportunities, enhance social protection and strengthened the dialogue on the work related issues. In 1985, the ILO adopted the Convention No. 111 known as 'Discrimination (Employment and Occupation) Convention, 1958'. According to Article 1 (a) of the Discrimination (Employment and Occupation) Convention of 1958 the term 'discrimination' includes the "distinction, exclusion and preference on the basis of race, colour, sex, religion, political opinion, national extraction or social origin." The practice of caste-based discrimination and its effects on the economic and social status were often recognised by the Global Reports. The Global Reports are meant to follow-up to the ILO Declaration on Fundamental Principles and Rights at Work.⁶

During the various International Labour Conferences, these Global Reports recognizes some new forms of discrimination. It also attempted to elaborate and interpret the existing forms of discrimination under Article 1 of the Convention which were seven in number. While elaborating these seven grounds under Convention No. 111, it covered caste-based discrimination under the category of social origin. It notes that the social origin as "Discrimination based on social origin arises when an

⁶ Declaration on Fundamental Principles and Rights at Work and its Follow-up was adopted in 1998, with the objective to respect the principles in four areas, i.e. freedom of association and collective bargaining, the elimination of force labour, the elimination of child labour, and the elimination of discrimination in respect of employment and occupation.

individual is denied a job or certain economic activities or only assigned particular jobs because of the class or socio-occupational category or caste to which she or he belongs” (Global Report 2007: 34). The 2007 Global Report observes that the impurity and inferiority attached with the caste results into violence, discrimination and segregation against millions of men and women. It clearly mentioned that the “...caste remains the dominant factor in defining the economic and social status of the Dalit men and women throughout the sub-region” (Global Report 2007: 35-36).

Similar observations were made by the Global Report of 2011. It observed that:

“The problem of discrimination on the basis of social origin arises when an individual’s membership of a class, socio-occupational category or caste determines or influences his or her occupational situation either by denying access to certain jobs or activities or, on the contrary, by assigning that person to certain jobs (Global Report 2011 para 167).”

Moreover, the Report highlighted the widespread problem of the caste-based discrimination in South Asia. It mentioned that the Dalit population has limited access to certain jobs; and are forced to do polluting job such as manual scavenging, removal of dead animals, etc. Moreover, there is huge wage gap between the Dalit populations as compared to the general population. Similarly, considerable difference can also be seen between castes in terms of education (Global Report 2011 para 168). The Global Report of 2011 further noted that the condition of the women at the workplace is more challenging than men. It highlighted multiple discriminations witnessed by women. Women are often discriminated on the combination of multiple grounds i.e. on the basis of sex, religion, and social origin (Global Report 2011:16).

Among women, the Dalit women witnesses multiple discrimination, firstly, on the basis of sex and secondly, on the basis of caste. From this perspective, the discrimination faced by Dalits at work place or at the level of the jobs become worse in the case of women. As compare to the working women, the situation of the non-working lower caste women is no different. In the caste system they are at the worse-off situation. The Special Rapporteur Rashida Manjoo rightly mentioned that:

“The intergenerational nature of caste-based discrimination condemns women to a life of exclusion, marginalization and disadvantage in every sphere of life. Many of those women are denied an education and economic opportunities, and perform dangerous and unprotected work, including bonded labour (debt bondage), and manual scavenging, which are both widely regarded as forms of forced labour and modern forms of slavery” (A/HRC/26/38/Add.1).

On this note, the ILO has issued recommendations for the advancement of the lower caste women. It introduces various projects to prohibit manual scavenging in India among others. Nevertheless, the caste-based discrimination affects every aspect of women life. Though the ILO conventions attempts to prohibit caste-based discrimination against women in the economic sphere, the social and political sphere requires special attention. In other words, the economic, social, political, and cultural aspects of life are inter-dependent. Therefore, to provide and protect the dignified life of the individual, the discrimination on the basis of caste requires strong deterrence in every aspect of life. Further, to protect the rights of the women, in 1979 UN adopted the special ‘International Convention on the Elimination of All Forms of Discrimination against Women’ (ICEDAW).

5.2.3. Multiple Discrimination against Women and ICEDAW

The object of the ‘International Convention on the Elimination of All Forms of Discrimination against Women’ (ICEDAW) is to promote equality of right between men and women. The Preamble of the ICEDAW for the full enjoyment of their rights emphasizes on “...eradication of apartheid, all forms of racism, racial discrimination, colonialism, neo-colonialism, aggression, foreign occupation and domination and interference in the internal affairs of States.” Article 1 of ICEDAW prohibits sex-based discrimination. It states that:

“For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

Thus, Article 1 determines discrimination on the basis of sex. But that is not the only reason for discrimination; caste is also a major factor that contributes to the violence against Dalit women. Dalit women face dual discrimination, one on the ground of sex and another on the ground of caste. Geetha describes the plights of Dalit women as,

“Women are seen as ‘gateways’ to the caste system: their bodies are the sites of caste honour and the higher the status of the caste, the more securely must the female persons of caste be graded and protected from the roving gaze of lower caste men; concomitantly, the lower the status of caste, the bodies of women of that caste are literally freely available- for possession, abduction, sexual assault by men of higher caste. A caste strives to maintain its integrity by policing female sexuality, and by encouraging women to hold their chastity dear, not only for their sakes, but for the sake of caste honour as well. Dalits, by virtue of who they are considered to be, are easily punished by ‘dishonouring their women (Geetha 2009: 225).”

It clearly shows that the Dalit women are at the vulnerable situation. They are the victims of caste, class and gender discrimination. They witness discrimination at multiple levels, ranging from general community to the family. Dalit women’s often receive the violence and discrimination from the State, non-state actors of different genders, castes and socio-economic groupings (Aloysius et al. 2006). These multiple levels of the discrimination against Dalit women are not directly addressed by the definitional clauses or any other Article of the ICEDAW.

However, the General Recommendation no. 25 of the ‘Committee on the Elimination of the Discrimination against the Women’ (CEDAW) elaborated Article 4 Paragraph 1⁷ and emphasises on the State obligations under the Article. It urges the State Parties to introduce temporary special measures for the elimination of multiple forms of discrimination against women. The multiple forms of discrimination may arise from the discrimination on the basis of race, ethnic or religious identity, disability, age, class, caste or other factors (Para 12). These discriminatory practises may affect the women primarily, or to a different degree or in a different way than man.

⁷ “Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved (Article 4 para 1).”

Furthermore, the General Recommendation no. 28 of the CEDAW focuses on State obligation to prohibit new forms of discrimination that has not been identified at the time of drafting. It mentioned that the “Intersectionality was a basic concept for understanding the scope of the general obligations of States parties contained in Article 2.” As the discrimination faced by women on the basis of sex and gender are linked with other factors discussed above. It obliged the State parties to identify various ground of discrimination and their intersection. It further recalls the obligations under Article 2⁸ of ICEDAW, and urges the State parties to introduce the adequate measures on the prohibition discrimination against the women (CEDAW/C/GC/28).

The existence of the caste-based discrimination clearly specifies that, on the one hand, women are victims of the caste-based discrimination. On the other hand, they play a significant role in the prevalence and creation of the caste system. The caste status of the women in inter-caste marriages was equally important to determine the caste status of the couple and creation of new caste (Chakravarti 2013: 27-35). Subsequently, the child receives the same caste in succession. As a result, the caste-based discrimination against the Dalits began with birth. Throughout the childhood, Dalit children are victims of the various kinds of discrimination that arises out of caste system. For instance, at a school level, Dalit children are asked to seat at the back of the class, they are forced to clean the school premises and toilets, often the upper caste children refuses to seat with them or have food with them. Simultaneously, they are discriminated by the teachers, in the classrooms, at the playgrounds, and often given the less marks in the exams (Narula 2008: 54). In other

⁸ Article 2 – States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle; (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women; (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination; (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation; (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise; (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women; (g) To repeal all national penal provisions which constitute discrimination against women.

words, the caste discrimination is very much visible in schools and higher educational institutions. Moreover, it is also evident that dalit children are forced into child labour, child prostitution, child trafficking and many more.

5.2.4. Caste-based Discrimination and Rights of the Child

The UN adopted the Convention on Rights of the Child in 1989. Its main objective was to provide special care and ensure assistance of the childhood to live a dignified life. The Convention of Rights of the Child obligates State Parties to protect the rights of the child without any discrimination. For instance, Article 2 of the CRC notes that,

“State parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status (Article 2 Para 1).”

Article 2(1) clearly mentioned that the State parties should protect the rights of the child without any kind of discrimination. Further, it specifies grounds of discrimination such as race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. The States under Article 2 (2) of the CRC are obliged to introduce appropriate measures for the protection of child rights against all forms of discrimination. It also prohibits the punishment against the child on the basis of status, activities, expressed opinion, or belief of the child’s parents, legal guardians, or family members Article (2 (2)). However, like other international instruments discussed above, the Convention on the Rights of the Child also do not directly address the caste-based discrimination faced by Dalit Children. Nevertheless, the Committee on the Rights of the Child discussed the issue in its General Comments and reports to the State Parties.

In 2006, the Committee on the Rights of the Child issued a General Comment No. 7. It was the outcome of the Committees experiences of reviewing state party’s reports. The aim of this general comment was to give recognition to the entitled rights of the young children enshrined in the Convention. The objective of general comment was to emphasize the vulnerability of children to the discrimination, poverty, family

breakdown, and multiple other adversities. Further, to strengthen the understanding of human rights of the child the general comment provides explanations of the principles. It identifies various Articles of the Convention as general principles. It includes Article 2, which deals with the right to non-discrimination. While interpreting the Article 2 of the Convention, the CRC mentioned that the “discrimination may take the form of reduced levels of nutrition; inadequate care and attention; restricted opportunities for play, learning and education; or inhibition of free expression of feelings and views.” It may subsequently result in exploitation or abusive of the child through the harsh treatment and the unreasonable expectations (CRC/C/GC/7/Rev.1).

Further, while citing the examples of such exploitative and abusive practices, the CRC referred to the discriminations arising out of ‘caste.’ It notes that:

“Discrimination related to ethnic origin, class/caste, personal circumstances and lifestyle, or political and religious beliefs (of children or their parents) excludes children from full participation in society. It affects parents’ capacities to fulfil their responsibilities towards their children. It affects children’s opportunities and self-esteem, as well as encouraging resentment and conflict among children and adults; (v) Young children who suffer multiple discrimination (e.g. related to ethnic origin, social and cultural status, gender and/or disabilities) are especially at risk (CRC/C/GC/7/Rev.1).

However, it neither incorporates ‘caste’ as a ground of discrimination, nor it discusses the situation of Dalit children. In 2013 the CRC issued a General Comment No. 17 on the protection of cultural rights of the child. The General Comment No. 17 identified certain groups of children that includes girls, children living in poverty, children with disability, children in institutions, children from indigenous and minority communities, and children in situations of conflict, humanitarian and natural disasters. Further, on elaborating the ‘children from indigenous and minority communities’ the committee discusses four major groups/grounds of discrimination. It includes ethnic, religious, race or caste discrimination. It states that these groups requires special attention to realise their rights under the Article 31 of the Convention (CRC/C/GC/17).

According to the Article 31, the States should recognise various rights of child such as “...rest and leisure, to engage in play and recreational activities appropriate to the age

of the child and to participate freely in cultural life and the arts.” It also obliged the States to promote the child right to participate in cultural and artistic life and urge to create equal opportunities for cultural, artistic, recreational and leisure activities (Article 31). Considering Article 31, the General Comment no.17 further states that the “Ethnic, religious, race or caste discrimination can serve to exclude children from realizing their rights under Article 31.” It further observed that,

Hostility, assimilation policies, rejection, violence and discrimination may result in barriers to enjoyment by indigenous and minority children of their own cultural practices, rituals and celebrations, as well as to their participation in sports, games, cultural activities, play and recreation alongside other children. States have an obligation to recognize, protect and respect the right of minority groups to take part in the cultural and recreational life of the society in which they live, as well as to conserve, promote and develop their own culture. However, children from indigenous communities also have the right to experience and explore cultures beyond the boundaries of their own family traditions. Cultural and artistic programmes must be based on inclusion, participation and non-discrimination (CRC/C/GC/17).

It has identified the certain discriminatory practices common to all i.e. ethnic, religious, race or caste. However, the caste system is complex entity of the hierarchical system, where traditional, cultural practices though differs according to the caste but it comes under an umbrella of single caste system and religion. The protection and preservation of one’s cultural, traditional and religious practices of caste would be discriminatory act against the another caste group. Similarly, the prohibition of cultural, traditional and religious practice of caste system would pose serious question against the preservation of traditional and cultural practices. Therefore, it is important to segregate victims of caste system and privileged groups of caste system.

After the study of caste discrimination and various human rights convention discussed above, it is clear that the caste discrimination violates human rights. It includes violation of the civil, political, cultural, economic, and social rights of the individual. Among these individuals, the status of women and children is at the worse-off situation in the caste system. In the late 1990s, the UN human rights treaty bodies took the cognizance of practice of caste-based discrimination. Further, the above discussed international human rights conventions and the interpretations given by the

conventions respective Committees attempted to engage with the problem of caste-based discrimination. However, none of the core provisions and its interpretations by the respective Committees considered caste-based discrimination as a separate ground of the discrimination (Keane: 2007: 213). Moreover, as per the Human Rights Committee, the definition of discrimination is itself in question.

Nevertheless, it has attempted to craft out the definition of discrimination from the provisions dealing with it. The Human rights Committee pointed out that any “distinction, exclusion, restriction or preference which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms” constitute discrimination. Though it has given a list of grounds of discrimination, they were mentioned as an example of grounds of discrimination. Later on, it can be seen that similar attempt was followed by the other human rights treaty bodies.

The definition and grounds of the discrimination are subjected to change with the different conventions. It is evident that, over a period of time the definition of discrimination became inclusive. In the whole process of inclusiveness, the CERD played a critical role. As the International Convention on Elimination of All Forms of Racial Discrimination is the sole convention that directly deals with the prohibition of racial discrimination. The title of the convention itself shows the inclusiveness of the term ‘racial discrimination’. Further, this inclusiveness encompass the discrimination on the basis of caste. Therefore, it is important to study the ICERD and its inclusion of caste-based discrimination under the term descent-based discrimination and ultimately into the racial discrimination.

5.3. Caste-based Discrimination vis-à-vis Racial Discrimination

The adoption of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) 1965 has remarkable historical background. It is a result of combine factors which led to the preparation and eventually the adoption of ICERD. It was mainly an outcome of the “...reaction to an epidemic of swastika painting and other manifestation of anti-Semitism and other forms of racial and national hatred and religious and racial prejudices of a similar nature” (Schwelb 1966:

997). It began with the efforts of intellectuals, social right activists, countries and social movements who internationalised the problem of racism. On racism in U.S, W.E. B. Du Bois as cited by McDougall observed that “the problem of colour line, is international and no matter how desperately and firmly we may be interested in settlement of race problem ...in the United States, it cannot ultimately be settled without consultation and cooperation with the whole civilised world” (McDougall, 1997: 571). Subsequently, various American civil rights organisations welcomed the internationalisation of the problem. The organisations further presented own formal petitions to the UN on the racial discrimination and urge for the assistance (Martin 1997: 36).

Further, the process of decolonisation of Asian and South African countries highlighted the treatment received by non-white and colonial people at the international level. In this process, the caste practicing country i.e. India played a significant role. Therefore, it is important to note the actions taken by the developing countries. In 1946 India requested to the UN to initiate the investigation on the treatment receive by Indian nationals and their descendants in South Africa (McDougall 1997: 573, Kwong 2003: 18). It was argued that the General Assembly adopted the Convention in response to Third World pressure against the South African policy of apartheid (Parsch 1996: 339). During the Cold War in the midst of rivalry between the Soviet and USA, the Soviet denounced the American racial practices. Further, it was argued that the Soviet Union’s condemnation of racism was mainly to win the allegiance of the Third World people (Martin 1997: 35). As a result, of these contributing factors, the General Assembly adopted the ICERD. Therefore, at the time of drafting the convention special attention was given to apartheid. This was evident from the incorporation of separate provisions in ICERD dealing with the apartheid.⁹

On the one hand, the role played by the India is crucial it advocates the prohibition of racial discrimination and internationalisation of it. On the other hand, it did not insist the intervention of the UN in prohibition of caste discrimination. In other words, India gave importance to the racial discrimination witness by the upper caste people in South Africa over the caste discrimination face by the Dalits in India. Therefore,

⁹See Article 3 of the ICERD

having caste prejudices the upper caste Indian delegations to the UN sideline the inclusion of caste as a form of discrimination in international law (Thakur 2016). Similarly, the Third World also failed to address and highlight the problem of caste discrimination at the UN. Because, upper caste hegemony in the Third World thinkers and limited representation of the Dalits (Burra 2016).

Nevertheless, the interpretation of the term 'racial discrimination' was begun with the inception of the ICERD. These interpretations were made to expand the scope of the term 'racial discrimination' and to avoid mentioning of the separate forms of racial discrimination such as anti-Semitism, Nazism and so on. The reason for not mentioning the separate grounds was to form a legal text of general scope covering them all under the head of the term 'racial discrimination' (Schwelb 1966: 1014). With this understanding, the convention incorporated the term 'racial discrimination'.

The Article 1 (1) of the ICERD offers a definition of the term 'racial discrimination' as,

“the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”

As per the above definition, it seems that the general scope of the term 'racial discrimination' was narrowed down to accommodate only certain acts of discrimination. The definition clearly says that, the act of omission or discrimination constitute distinction, exclusion, restriction or preference must be based on the certain grounds, which are race, colour, descent, or national or ethnic origin (Schwelb 1966: 1021, Keane 2007: 212). Further, these grounds were interpreted by the Committee on Elimination of Racial Discrimination (CERD).

However, the Article 3 of the ICERD deals with the racial segregation and apartheid. Article 3 states that, “State parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.” The direct reference to the particular form of

discrimination was criticized. The Bolivian delegate to the Third Committee observed that, the preference was given to the most general text of the draft Convention. Moreover, the "...preamble and Article III intended to deal with the problem of racial discrimination from a regional standpoint by referring to the form of discrimination peculiar to the certain parts of the world." Therefore, the adopted text appeared abstract and lacked the universality (A/C.3/1314).

The reason supplied for the direct and separate inclusion of apartheid in the ICERD was that, the apartheid was the most violent kind of racial discrimination and it was the official policy of the State Members of the United Nations. In other words, the reference to the apartheid was "directed exclusively to the Government of South Africa"¹⁰ because no other country had instituted that form of racial discrimination (Schwelb 1966: 1021). It raised the substantial question of the applicability of the ICERD and non-inclusion of other forms of discrimination such as caste-based discrimination. Like apartheid, the practice of caste-based discrimination was enforced by the State's legal mechanisms. In other words, the ancient law of India and Nepal, as discussed in the previous Chapters, enforced the practice of caste-discrimination.¹¹ However, no direct reference was found for the inclusion of caste-based discrimination under the ICERD.

Moreover, the Indian delegates welcomed the adoption of the Convention and claimed that the "Indian people were partisans of racial and religious harmony" (A/C.3/SR.1374). The delegate further observed that,

The Convention was an instrument which would set standards not only for the present but for the future. The text already condemned all forms of racial discrimination and nothing could be gained from the inclusion of examples, which would associate the definition of racial discrimination with certain known forms and would thus limit the instrument scope (A/C.3/SR.1313).

Indian delegates, on one hand, advocated non-inclusion of other forms of discrimination, as according to them they merely appeared as list of instances. On the other hand, while describing racial discrimination in India they referred discrimination

¹⁰ See also Nigeria, UN Doc. A/C.5/SR.1313.

¹¹ See Chapter II and Chapter IV

faced by Jews in India as an instance. But very selectively the Indian delegates excluded the north-east people who are also victims of racial discrimination. Also, the Indian delegates made no reference to the practice of caste discrimination (A/C.3/SR.1313).

Apart from the definition of racial discrimination, the ICERD is not clear about discrimination arising out of attributes other than race and colour such as discrimination based on descent, ethnic or social origin. It subsequently renders considerable scope for further interpretation of these grounds (Thorat 2009: 142). For instance, the reference of the term 'descent' was made in the single Article i.e. Article 1 of the ICERD. On the contrary, the reference of term 'race' is often for example in the Article 2 of the ICERD.

Article 2 of the ICERD addresses the fundamental obligations of the State parties. It undertakes promotion of "understanding of among all races" (Article 2 para 1). Further, Article 2 paragraph 1 (e) mentioned that, "Each State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division (Schwelb 1966: 1021)." Though the Article obligates the State parties to condemn racial discrimination and introduce appropriate measures to eliminate racial discrimination, however, at the promotional level it failed to expressly incorporate other grounds of racial discrimination.

The Indian Government challenged the applicability of the Article 1 and overall ICERD application to the problem of caste-based discrimination. This is evident from the dialogue that took place between the Indian Government and CERD. The extensive dialogue was on the interpretation of 'descent-based discrimination' to include the caste-based discrimination. The next section of the Chapter focuses on the dialogue and the outcome of it.

The whole debate came into light with the submission of India's tenth to fourteenth periodic report to the Committee on Elimination of the Racial Discrimination (CERD). It was argued that the provisions of the ICERD explicitly deals with the discrimination based on race and colour and not on the caste discrimination. In 1996

India submitted its tenth to fourteenth periodic reports, a consolidated document, wherein it noted that, ‘caste’ denotes ‘social’ and ‘class’ distinction and is not based on ‘race’. Caste originates from the functional division of Indian society which was created during ancient times (CERD/C/299/Add.3). Hence, caste and race were distinct, with this understanding the Government of India refused the applicability of Article 1(1) of the ICERD to the policies of the Indian Government relating to Scheduled Caste and Scheduled Tribes. It stated that,

“Article 1 of the Convention includes in the definition of racial discrimination the term "descent". Both castes and tribes are systems based on "descent" since people are normally born into a particular caste or a particular tribe. It is obvious, however, that the use of the term "descent" in the Convention clearly refers to "race". Communities which fall under the definition of Scheduled Castes and Scheduled Tribes are unique to Indian society and its historical process. As conveyed to the Committee during the presentation of India's last periodic report, it is, therefore, submitted that the policies of the Indian Government relating to Scheduled Castes and Scheduled Tribes do not come under the purview of Article 1 of the Convention. As a matter of courtesy to the members of the Committee, the Government is, however, happy to provide any information that they may require on this subject (CERD/C/299/Add.3).”

The government contented that the communities which fall under the definition of Schedule Castes and Schedule Tribes are victims of caste-based discrimination, which is unique to Indian society. The term ‘descent’ used in Article 1 (1) of the Convention does not have any reference to the ‘caste’. Therefore, Article 1 (1) of the Convention is not applicable to the conditions of Scheduled Castes and Scheduled Tribes. However, regarding the scope of term ‘descent’ mentioned in Article 1 (1) of the Convention, the CERD in its concluding observations stated that the term ‘descent’ does not solely refer to race. It affirmed that the situation of the Scheduled Castes and Scheduled Tribes falls within the scope of the Convention (CERD/C/304/Add.13).

In response to the CERD’s concluding observation India submitted its 15th to 19th periodic report in 2006 and stated that, neither ‘caste’ can be equated with ‘race’, nor it can be covered under ‘descent’ of Article 1 of the convention (CERD/C/IND/19). The ordinary meaning of the term ‘racial discrimination’ did not include ‘caste’

(CERD/C/SR.1796: 7). The caste discrimination does not come within the concept of racism, as Indian caste system is not racial in origin (Sorabjee 2001: 47).

Before the submission of India's 2006 periodic report, in 1999, a report was submitted by Gele Ahanhanzo on 'Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance'. In that report, the Special Rapporteur raised a question about age-old caste system of India, which had produced millions of untouchables. It could arguably be regarded as racial discrimination (E/CN.4/1999/15). In reply the Indian Government rejected the allegations and provided list of measures introduced to prohibit caste-based discrimination. India in order to support its statement made following arguments,

"History has made India home to people of diverse origins. Over the millennia, the assimilative character of the Indian civilization combined with the process of intermingling of inhabitants after waves of immigration has resulted in a composite society. A variety of racial sources have therefore contributed to the "mix" that is the hallmark of the Indian people today. The fusion of these diverse racial elements over centuries has meant that Indian society is neither racially nor ethnically homogenous. Categorical distinctions of "race" or "national or ethnic origin" have ceased to exist and race itself as an issue does not impinge on the consciousness or outlook of Indian citizens in their social relations. Today, India is a mosaic of different groups who seek identification in terms of language, religion, caste or even regional characteristics, rather than race, colour or ethnic origin" (E/CN.4/1999/15).

India propounded the heterogeneous nature of Indian society. The nature itself invites number of discriminatory practices. Further, on the nature of the caste, the Indian Government noted that:

"The term "caste" denotes a "social" and "class" distinction and is not based on race. It has its origins in the functional division of Indian society during ancient times. A hierarchical arrangement is the principal characteristic of this social institution in which certain privileges or disabilities are enjoined on its members from birth and are not supposed to change during a person's lifetime. Each caste group is functionally dependent on the other caste groups and has a well-defined role in a social setup based on a symbolic relationship between persons belonging to different castes. Racial hierarchy appears as an aberrant adjunct to the main structure of society, while the multi segmented and intricately ranked social grouping of castes has been the central principle of a functional organization of Hindu society. Further, there is ample

evidence of persons belonging to different castes having the same racial characteristics” (E/CN.4/1999/15).

The report categorically mentioned that the caste is not based on race as persons belonging to different caste may have same racial characteristics. It found its source in the functional division of the Indian society. The principal characteristic of the caste system is its hierarchical nature. Further, to maintain the social structure of hierarchies it developed the functional dependency of the caste on each other. In the system of interdependency, the untouchables were kept outside the fold. Further these untouchables comprises the term ‘Scheduled Castes.

“Communities which fall under the category of “Scheduled Castes” are unique to Indian society and its historical process. They comprise persons who were excluded from the caste system and subjected to severe discrimination in ancient India. These persons were treated as “untouchables” and social and physical contact with them was shunned by the dominant castes (E/CN.4/1999/15). Persons who belong to the Scheduled Castes communities are today considered different from others because of their social, economic and educational backwardness, not because they belong to a separate “race” (E/CN.4/1999/15).”

In the hierarchical system of caste, every caste is inferior to other which involves discrimination. This discrimination gets severe in the case of Scheduled Castes. The Scheduled Castes were outside the fold in the beginning, later placed at the bottom of the caste system. The social status given by the caste system made their position vulnerable and opens to all kinds of discrimination. The response also notes that the practice of caste discrimination is age-old, and so it was not possible to eliminate it rapidly. Therefore, the caste cannot be equated with the race (E/CN.4/1999/15).

However, one of the characteristics of the caste is that it comes with the birth. This led the CERD to include caste into a descent-based discrimination. The arguments given by the Indian government regarding racial aspect of descent-based discrimination fall short to exclude caste-based discrimination. As a result, the CERD organized various thematic discussions on the inclusion of caste-based discrimination in to the descent based discrimination. At its sixty-first session, the CERD decided to issue general recommendation on work and descent-based discrimination rather expressly

mentioning the caste-based discrimination. In 2002, the CERD organized thematic discussions to prepare a draft of general recommendation.

5.3.1. Inclusion of Caste under the Descent-based Discrimination

While examining the periodic reports of the State parties CERD found that, some forms of discrimination are common to several States and can usefully be examined from a more general perspective. With this purpose, in August 2000 CERD organized a thematic debate on the discrimination against Roma, which is one of the examples of the descent based discrimination. It was further followed by the 2002 thematic discussion on the descent-based discrimination. The CERD requested the State parties to provide the information about persons belonging to the groups distinguished on the ground of descent. Moreover, the CERD requested the State parties to provide information on their social and economic conditions, and policies framed by respective government for prohibition of the discrimination against them. Apart from the State government various NGOs also submitted reports to the CERD on the practice of descent based discrimination.

The whole debate revolved around the interpretation of word “descent”. The interpretation was given by CERD after considering the tenth to fourteenth periodic reports of India. This interpretation attracts the attention of other human rights bodies and Sub-Commission on the Promotion and Protection of Human Rights. While interpreting the term descent CERD included caste-based discrimination as a form of a descent based discrimination. On this inclusion, Pillai in thematic discussion mentioned that:

There were similarities and differences in the discriminatory social and other practices of the different countries and, unless the Committee could find some common denominator identifying all such practices as caste discrimination, it should continue to use the expression “discrimination based on descent”, and should employ the term “caste” only with reference to countries where, in their own terms, caste existed (CERD/C/SR.1531).

He further stated that the studies of caste system must be undertaken, as more than 200 million people in South Asia suffered from caste based discrimination. Therefore,

discrimination on basis of caste must occupy a permanent place in the discussions of the Committee. The Committee, however, must resist any temptation to consider caste as a form of discrimination only based on descent (CERD/C/SR.1531: para 8).

Mr. Thornberry convinced with Mr. Pillai saying that the scope of term descent is wider and caste is one of the facets of it. He further defines caste system as:

It represented hierarchy, not equality; segregation, not integration; bondage, not freedom; and value determined at birth without regard for morality, achievement, intelligence or character (CERD/C/SR.1531).

With this understanding, he mentioned that there is no need to form a strict definition or vast study for possible meaning and final definition of the descent-based discrimination. The term descent clearly encompassed caste and other analogous system of social stratification based on birth (CERD/C/SR.1531). Another member of the CERD Mr. de Gouttes said it is difficult to define a 'caste', which should not be confused with 'social class'. In addition he mentioned that,

It did not refer to the de facto family, cultural or professional hierarchies that existed in most societies and did not lead to any form of exclusion or discrimination, nor did it refer to all vulnerable groups of people; for example, the Roma did not belong to caste system. Conversely, it referred to a system that deprived individual's freedom and human dignity. It signified a total lack of social mobility, for the status of an individual was determined by the birth or social origin and could never change, regardless of personal merit (CERD/C/SR.1531).

Mr. Thiam said the term descent was drawn from birth, and it was the umbilical cord tying a person to a community. In his view, the Committee must give broadest possible definition to the term descent. About descent, he mentioned that 'descent' is not biological, but social and cultural. A person born without definition, and others attach a definition to him that limited his rights and inflicted suffering on him (CERD/C/SR.1531).

Mr. V. Rodriguez explained the term 'descent' as it implies one generation inheriting from another specific characteristic that was positively or negatively evaluated by society. The excluded groups of people from the society as a result of stratification

regarded as 'untouchable'. Regarding interpretation of descent, he said that if the interpretation is made accordance with the national law and in particular with individual countries. Then the term descent would not have been specifically mentioned in the Convention (CERD/C/SR.1531).

The main requirement for the interpretation of Convention is that the provisions of the convention should be of general nature and independent of national legislation and circumstances. Moreover, he argued that the term 'descent' has been included in the convention to clarify certain ambiguities arising from terms 'place of origin' and 'national origin'. The intention behind including the term descent in the convention is that the descent-based discrimination had social and class origins and not racial one. The interpretation of term descent should be in a way that it gives protection to those groups that were discriminated on the ground of certain inherited characteristic which by tradition, society set them apart (CERD/C/SR.1531). Mr. Sicilianos suggested the inclusion of caste in general recommendation on descent and that there should be a sub-paragraph as "Discrimination based on descent: the problem of caste". Other members of the Committee also supported this proposal (CERD/C/SR.1531).

With this discussion there were other arguments pertaining the implementation of general recommendation. After exhausting all the national legislations regarding prohibition of descent based discrimination, the victims should be able to seek justice at international level. Some member of the CERD argued that, the term descent is wider concept than caste. Some strongly opposed the interpretation of term descent to mean merely 'caste' as an important aspect of the descent but surely not the sum of it. Further it was also argued that caste discrimination is a problem of a particular country so it is not important to focus on this problem. The problem of particular country was peculiar to that country and therefore insignificant to other countries. On the contrary, there was proposal for direct inclusion of caste-based discrimination into the Convention rather including it into descent-based discrimination, as with the term descent it would be difficult to make progress (CERD/C/SR.1531). The above thematic discussion on descent based discrimination resulted in increasing the scope of descent as well as convention through interpretation. The whole debate took place to include caste-based discrimination in the descent-based discrimination.

After the thematic discussion, the Working Group prepared a draft of general recommendation. In 1547th meeting of the CERD, it adopted the general recommendation XXIX. It is an outcome of the debate that began from 1996 with the submission of periodic reports by India and thematic discussion on descent-based discrimination. The discussion took place just after the WCAR of 2001, where WCAR fails to address huge violation of human rights through the practice of caste discrimination. In the general recommendation CERD recommended that all State parties to the ICERD adopt some measures, which are appropriate to their particular circumstances. In terms of measures, it laid down steps to identify communities that face descent-based discrimination.

Subsequently, in 2002 the CERD issued a General Recommendation XXIX interpreting the term ‘descent’. It set out certain norms in identifying descent based discrimination in relation to caste as,

those descent-based communities under their jurisdiction who suffer from discrimination, especially on the basis of caste and analogous systems of inherited status, and whose existence may be recognized on the basis of various factors including some or all of the following: inability or restricted ability to alter inherited status; socially enforced restrictions on marriage outside the community; private and public segregation, including in housing and education, access to public spaces, places of worship and public sources of food and water; limitation of freedom to renounce inherited occupations or degrading or hazardous work; subjection to debt bondage; subjection to dehumanizing discourses referring to pollution or untouchability; and generalized lack of respect for their human dignity and equality (Gen. Rec. No. 29 Article 1 para 1).

Further, taking note of the Indian position, CERD maintained its position in General Recommendation No. XXIX. It states that ‘discrimination based on ‘descent’ includes discrimination against members of communities based on forms of social stratification such as caste and analogous system of inherited status which nullify or impair their equal enjoyment of human rights’. Therefore, the CERD reaffirmed that discrimination based on caste is fully covered under Article 1 of the Convention (CERD/C/IND/CO/19).

It appears that the interpretation made by CERD of descent based discrimination flows from the practice of caste based discrimination in India. In India, all the above grounds specified by CERD in General recommendation XXIX are practiced under caste based discrimination. The victim of the caste based discrimination most of the time are victims of all the grounds specified by CERD. It seems the interpretation of the term 'descent' was only meant to include caste under the descent based discrimination. The CERD rather defining "caste", it interpreted descent.

This interpretation was continuously and strongly opposed by Indian Government on various grounds. Then the question arises that whether the title of the discriminatory practice has any important role to play. The grounds of discrimination are same but the term used to identify it are different. Both the Indian Government and international community rather debating the content should expressly recognise caste based discrimination. The CERD is consistently engaged in interpreting the term descent but is not ready to accept and recognize caste as a form of discrimination, because it is mere a problem of particular country or of South Asian region.

Furthermore, the arguments of the Indian government made clear that the 'descent-based discrimination' was not precisely defined (Keane 2007: 219). The inclusion of 'caste' into 'descent' was strongly opposed by India in response to the concluding observations of CERD. India reiterated its position that 'caste' cannot be equated with 'race' or covered under 'descent'. India argues that 'race' and 'caste' are mentioned alongside in the Indian Constitution as prohibited grounds of discrimination. Therefore, they cannot be considered as synonymous (CERD/C/IND/19). It noted that Article 15 of the Constitution of India prohibits discrimination on the grounds of religion, race, caste, sex or place of birth. Further, Article 16 (2) states that,

"No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State."

Thus, 'descent' represents genealogically demonstrable characteristics, whereas under caste system, one caste has multiple descents, and individuals of two castes cannot intermarry. They were supposed to marry outside their lineage. Caste does not have genetic characteristics (CERD/C/SR.1796: 13).

The different interpretations of the concept of ‘descent-based discrimination’ came to be viewed as a far wider problem than ‘caste-based discrimination’ (Keane 2007: 8). To understand the exact meaning of ‘descent’ and intention of makers of the ICERD, there is a need to examine the *travaux préparatoires* of the convention.

The term ‘descent’ was inserted in Article 1 (1) ‘definition of racial discrimination’ of the ICERD through amendment proposed by India in 1965 to the Resolution 1904 (XVIII). The amendment was intended to meet the objections raised by delegations to the words ‘national origin’ (Keane 2007: 227). The amendment was unanimously approved, but no further contribution was offered from the Indian delegation as to its possible meaning (Thornberry 2000: 96). This amendment and the absence of any explanation of the meaning ‘descent’ led CERD to conclude that discrimination on the basis of descent was intended to cover discrimination on the basis of caste (Schwelb 1966: 1003). Schwelb observed that:

The term ‘descent’ does not appear in any other international instruments and draft instruments dealing with relating subjects...nor was it contained in the draft submitted by the Sub-Commission and by the Commission on Human Rights. It was suggested in an amendment proposed by the India...The records gives no indication of the situations the word was intended to cover which would distinct from the concepts of national or ethnic origin (Schwelb 1966: 1002-3).

Schwelb further argued that, “It is reasonable to assume that the term “descent” includes the notion of “caste” which is prohibited ground of discrimination in Indian Constitutional law” (Schwelb 1966: 1003). The Indian contribution to the debate on subsequent provisions of the Convention reveal that India was concerned with the relationship between caste and the Convention, but that concern was for its constitutional system of affirmative action and the need to ensure that this would not represent racial discrimination under the Article 1. It is submitted that it would be unusual for India to expressly introduce the concept of caste into the Convention (Keane 2007: 215). Therefore, it is important to trace India’s intention behind the inclusion of ‘descent’ into the Convention and the sources referred by the Indian government on ‘descent’.

The Indian delegate's adherence to 'descent' directly emanated from the Constitution of India. In the Indian Constitution two significant Articles gives the list of the prohibitory grounds of discrimination. According to the Article 15 (1) of the Constitution "the State shall not discriminate against any citizen on the grounds only of religion, race, caste, sex or place of birth or any of them." Clause 2 of Article 15 states that,

No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to

a) access to shops, public restaurants, hotels and place of public entertainment; or

b) the use of wells, tanks, bathing ghats, roads and place of public resort maintained wholly or partly out of State funds or dedicated to the use of general public.

This is the general clause on the prohibition of discrimination in the public life. Apart from this general clause, Article 16 deals with prohibition discrimination and provides equal opportunities. Article 16 (2) prohibits discrimination based on descent but only regarding to equal opportunity in matters of public employment. It is not given as a general ground of discrimination in Article 15. In general sense Article 15 prohibit practice of caste system, and Article 16 gives equal opportunity to individual irrespective his/her caste. So, under the Indian Constitution descent is not a ground in general prohibition on discrimination. It clearly shows that 'caste' and 'descent' are two different grounds of discrimination as both are placed alongside in Article 16 (2) (Schwelb 1966). Further, to have clear differentiation between these two terms, it is important to look into the Constitution Assembly Debates of India (Keane 2007: 232).

5.3.2. Constituent Assembly Debates of India: Source of Descent

The Constituent Assembly debates of India are covered in 12 volumes. It represents a redoubtable corpus of law forming the framework to the longest constitution in the world. On 29th April 1947, discussion took place in the Assembly on right to equality, which is set forth in clauses 4 and 5 of the interim report prepared by Advisory Committee on Fundamental Rights. Clause 4 contains general grounds for non-discrimination such as religion, race, caste, or sex. The members of the Constituent

Assembly discussed all the four grounds regarding obligation on State to prohibit discrimination on these grounds. Following the debate on clause 4 clause 5 is passed over for further consideration. On 30th April 1947, clause 5 is taken up for debate. No explanation was given for the inclusion of the ground ‘descent’ (Keane 2007: 233).

The whole debate was on right to equal opportunity, trade, occupation, business shows that the communities covered under ‘descent’ needed a protection against discrimination in equal opportunity. There is only one reference found in the debates of the Constituent Assembly regarding the term ‘descent’. On 29th November 1948 debate started on draft Article 9 which contained religion, race, caste or sex as grounds for non-discrimination. The draft article 9 corresponds to clause 4 of the Interim Report on Fundamental Rights, and would eventually form the general prohibition on discrimination in Article 15 of the 1950 Constitution (Constituent Assembly Debates 2009). The Vice-President placed the Article for general discussion where Shri Raj Bahadur said that:

Sir, as you announced today in this House that amendments Nos. 280, 282 and 279 would be taken up for discussion, I studied them again and a new meaning, which did not occur to me previously, disclosed itself to me. In amendment No.280¹² which was moved by Friend Syed Abdur Rouf, the words used are ‘place of birth’, whereas in the amendment that was to be moved by Mr. Prabhu Dayal, the word ‘descent’ also occurs. It is unfortunate that that amendment of Mr. Prabhu Dayal has not been moved. Even so, when we study the article we observe that whereas discrimination is sought to be eliminated on other grounds, nothing has been said about the discrimination on the basis of descent, on the basis of privileges enjoyed by some on account of their dynastic or family status. I, therefore, suggest an amendment to amendment No.280, to the effect that the words ‘place of’ be deleted, from the words sought to be inserted in the article by the amendment No.280. It is clear that the words ‘place of’ occurring before the word ‘birth’ have restricted and limited the meaning of the whole Amendment to the ‘place of residence’ only. Therefore, if the

¹² Amendment No.280 ran as follows: ‘That in Article 9, after the word “sex” wherever it occurs, the words “place of birth” be inserted.’ Syed Abdur Rouf subsequently explained the meaning behind the proposal: The intention of the article is to prohibit discrimination against citizens. We have prohibited discrimination on grounds of ‘religion, race, caste or sex’. But I am afraid, Sir, the evil elements who might attempt to make discrimination against citizens will do so not on the ground of religion, race, caste or sex ... In my opinion attempts maybe made to make discrimination against citizens on the ground of place of birth (Constituent Assembly Debates 2009: 650).

words 'place of' are deleted, we may achieve a double objective. Firstly that the word 'birth' when it occurs in the context of the whole article would imply not only residence, but also 'descent', and as such the purpose which was contemplated by the mover of the amendment shall be satisfied (Constituent Assembly Debates 2009: 656).

The Vice-President opposed the proposed amendment as Article was opened only for general discussion, and requested Mr. Shri Bahadur to speak generally. Shri Bahadur continued that,

Yes, sir. What occurs to me is this. We have seen it in the past and even at present, in the matter of distribution of offices and appointments in the State or in the matter of rights and privileges enjoyed on the basis of property etc., that there has been some discrimination on account of 'descent'; on account of dynasty or family status as also on account of factors of an allied nature. It is my humble submission that when we are here to forge our constitution, we should eliminate all sorts of distinctions arising on the basis not only of religion, caste, sex etc. but also on the basis of family and descent. While I agree that the purpose and the idea that is covered by amendment No.280 is necessary, I would also suggest that something must be put in this article which may obviate all possibilities of, and eliminate all chances of discrimination, favouritism, or nepotism, on the basis or birth or descent. It is common experience, rather it is a kind of grievance with most of us that in the distribution of offices and appointments of the State and also in the services, some discrimination is observed on the basis of birth and descent. We see it in the recruitment to the Air Force, and to some extent in the army or elsewhere in the services of Government. It is a grievance with us that people who are better placed and who happen to be born with a silver spoon in their mouth get better chances than those born in mud huts or cottages in the villages. All must, however, have equal chances.

There is to be a provision in the Constitution to the effect that there shall be Raj Pramukhs and not Governors, in the States and the States' Union and in this we observe there would be discrimination again on the basis of birth or descent, on the basis of one's being a prince or a member of a royal family or not. That sort of discrimination also should be eliminated. In fact all such discrimination should be eliminated (Constituent Assembly Debates 2009: 656).

Shri Raj Bahadur made references to 'descent' together with the 'family status'. Further, the explanation given by Shri Raj Bahadur links the concept of discrimination on the basis of descent and employment, but no further linkage was offered between

‘descent’ and ‘caste’. Furthermore, despite forming a part of original amendment No. 280, the word ‘descent’ did not appear as a ground in Article 15 of the Constitution. This raises a doubt that the concept of descent did not refer to caste. While introducing the word ‘descent’ into the Article 1 (1) of the ICERD there was no intention on the part of India to connect it with the caste (CERD/C/SR.1796).

During the *travaux préparatoires* of the convention, Indian delegation made an attempt to find an expression to replace the term ‘national origin’ (CERD/C/SR.1796). The interpretation given by CERD claimed that India’s intention behind inserting ‘descent’. The CERD rather interpreting the term should concentrate on designating ‘caste’ as form of discrimination. On the contrary, after the interpretation of word descent by CERD various reports were submitted by the UN Sub-Commission of Promotion and Protection of Human Rights on the practice of descent based discrimination as discussed below:

The UN Sub-Commission for the first time passed a resolution in 2000 on ‘Discrimination based on Work and Descent’. In resolution 2000/4 the Sub-Commission declared that the discrimination based on the work and descent is a form of discrimination prohibited by international human rights law. Under this resolution, it requested governments to ensure that all necessary constitutional, legislative and administrative measures, including appropriate forms of affirmative action, are in place to prohibit and redress discrimination on the basis of work and descent. Moreover, the Sub-Commission appointed Mr. Goonesekere with the task of preparing a working paper on the topic of discrimination based on work and descent (UN Doc. E/CN.4/SUB.2/RES/2000/4). The object of the paper was:

- a) to identify communities in which discrimination based on work and descent continues to be experienced in practice;
- b) to examine existing constitutional, legislative and administrative measures for abolition of such discrimination; and
- c) to make any further concrete recommendations and proposals for the effective elimination of such discrimination as may be appropriate in the light of such examination (UN Doc. E/CN.4/SUB.2/RES/2000/4).

In the report to the Commission, expert R.K.W. Goonesekere emphasizes that caste systems are inherently economic and social in their consequences and represent a deeply oppressive form of work and descent-based discrimination (UN Doc. E/CN.4/Sub.2/2001/16). He observed:

Discrimination based on work and descent is a long-standing practice in many societies throughout the world and affects a large portion of the world's population. Discrimination based on descent manifests itself most notably in caste- (or tribe-) based discrimination. These distinctions, determined by birth, result in serious violations across the full spectrum of civil, cultural, economic, political and social rights. Likewise, the nature of a person's work or occupation is often the reason for, or a result of, discrimination against the person. Persons who perform the least desirable jobs in a society are often victims of double discrimination, suffering first from the nature of the work they must perform and suffering again by the denial of their rights because they perform work that is unacceptable. In most cases, a person's descent determines or is intimately connected with the type of work they are afforded in the society. Victims of discrimination based on descent are singled out, not because of a difference in physical appearance or race, but rather by their membership in an endogamous social group that has been isolated socially and occupationally from other groups in the society (UN Doc. E/CN.4/Sub.2/2001/16).

With this observation Goonesekere noted the limitation of the report as,

“The focus of this paper has been countries in Asia. At the time the resolution was discussed in the Sub-Commission it was mentioned [that] the problem was not limited to Asia alone and that it existed in some parts of Africa and perhaps in South America. The author has not been able to include in this paper the situation in these other areas because of constraints of time and lack of access to relevant material.”

Therefore the Sub-Commission adopted decision 2002/108, in which it decided to entrust Mr. Asbjørn Eide and Mr. Yozo Yokota with the preparation of expanded working paper. This expanded working paper on work and descent was published in 2003 and was read together with the Goonesekere's original working paper. With these papers the interpretation of word 'descent' is widened. In the report the "work" is understood in with reference to occupation or functional role of individuals or groups 'descent' referred to lineage or family origin (E/CN.4/Sub.2/2003/24). The meaning and application of caste has correspondence with descent. Therefore there is no doubt

that social institutions of caste fall under the term ‘descent’, and the discrimination arising from such social institutions falls under the definition of ‘racial discrimination’. The term ‘descent’ is wider and can encompass other situations, such as ‘caste’ (E/CN.4/Sub.2/2003/24: para 7). In its conclusion it observes:

“...the prevalence of discrimination based on work and descent is more widespread than might have been envisaged at the outset of this process.... This form of discrimination is distinct, in its combination of causal factors and expressions, from other forms of discrimination examined in the history of the Sub-Commission” (E/CN.4/Sub.2/2003/24).

The authors observed the similarities in the causes and expressions of affected communities. In causal factors descent was a defining criterion to recognize the status of the communities and discrimination associated with it. Membership of the community is acquired by birth into that group or by descent from that lineage. Once acquired the status cannot be removed by individual merit or achievement (E/CN.4/Sub.2/2003/24: para 45).

The second principal causal factor is work or occupation. The individuals of various community witness discrimination on the basis of occupation, such occupation which is considered as dirty and menial. The practice of such occupations sometimes has ritual or religious sanctions. In some cases occupations are no longer exist but still the stigma is attached with the communities (E/CN.4/Sub.2/2003/24: para 46). While observing the situation of the affected communities, it witnessed certain common causes of discrimination as:

- a) Endogamous isolation – the practice of marrying within the community, results in segregation of housing and residences. Prohibition of intermarriage is consequential result of stigmatization of these communities (E/CN.4/Sub.2/2003/24: para 47, 52).
- b) The notion of pollution – this is very common feature found in practice against concerned communities. It is based on the ritual beliefs that, communities are sources of potential pollution to others, because of their physical dirtiness or functional role assigned to them. (E/CN.4/Sub.2/2003/24: para 48).

- c) Hierarchical ranking - in most of the society's hierarchical ranking is followed either explicitly or implicitly. The caste system of India is a complex example of hierarchical ranking. This rank relationship between individual jatis of India is not always clear and may change over time. Apart from jati system, the hierarchical ranking is based on categories 'pure' and 'impure' (E/CN.4/Sub.2/2003/24: para 49).

- d) Religious sanction and myths – the caste system of South Asia has religious sanction, through Vedic prescriptions in Hinduism. It is less clear in other cases whether there is a link between religious traditions and descent-based discrimination. In the case of discrimination against the Burakumin of Japan, associations have been made with Shinto beliefs concerning purity and impurity, and with Buddhist precepts and practices. In the cases of African communities the sanction or justification is based on myths (E/CN.4/Sub.2/2003/24: para 50).

In the second Expanded Working Paper on Discrimination based on work and descent the Sub-Commission examined the problem of diaspora communities. It found that in United States and in the United Kingdom discrimination among the diaspora communities is most common. Further, the paper set out a Proposed Framework for a Draft Set of Principles and Guidelines for Elimination of Discrimination based on Work and Descent ((E/CN.4/Sub.2/2004/31:part III).

In 2009, the final report of Mr. Yozo Yokota and Ms. Chin-Sung Chung, Special Rapporteurs on the topic of discrimination based on work and descent was submitted (A/HRC/11/CRP.3). In this report the authors recommended to the Human Rights Council to include the topic of discrimination based on the work and descent among the studies to be undertaken by the Council. It also recommended the necessary changes in the draft Principles and Guidelines. The report gave a definition of discrimination based on work and descent as follows:

Discrimination based on work and descent is any distinction, exclusion, restriction, or preference based on inherited status such as caste, including present or ancestral

occupation, family, community or social origin, name, birth place, place of residence, dialect and accent that has the purpose or effect of nullifying or impairing the recognition, enjoyment, or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural, or any other field of public life. This type of discrimination is typically associated with the notion of purity and pollution and practices of untouchability, and is deeply rooted in societies and cultures where this discrimination is practiced (A/HRC/11/CRP.3).

The reports highlighted the deep rooted caste practices in societies and their cultural values. Moreover, the notion of purity and pollution plays the significant role. Therefore, the above discussed reports played significant role and attempted to provide exhaustive definition of descent-based discrimination.

5.5. Analysis and Conclusion

The effort made by United Nations to combat discrimination throughout the globe are mainly concerned with racial and gender discrimination. No express provision on the prohibition of caste discrimination is offered by international human rights law, except interpretation of ‘descent’ offered by CERD. Indeed the “...UN is unable to bring the issue of discrimination associated with non-race and non-colour categories such as caste and social status under their preview essentially due to limitation of its own human rights framework” (Thorat 2009: 143).

Apart from CERD interpretation one more convention included ‘caste’ as a form of discrimination, that is the ILO ‘Declaration on Fundamental Principles and Rights at Work’. This Declaration covered ‘caste-based discrimination’ under the category of the ‘social origin’. At the 100th meeting of ‘Third Committee of General Assembly’ 1948 the Indian delegation found word ‘other status’ and ‘social origin’ sufficiently broad to cover ‘caste’. According to Chang:

The concept of race, colour, social origin and in most cases sex, involved the question of birth while the social origin also embraced the idea of class or caste (A/C.3/SR.102).

Further the concept of ‘social origin’ was also interpreted by the Committee on Economic, Social and Cultural Rights in its General Comment XX as:

Social origin refers to a person's inherited social status....in the context of 'property' status, *descent-based discrimination* under 'birth' and 'economic and social status'.....The prohibited ground of birth also includes *descent*, especially on the basis of caste and analogous systems of inherited status. States parties should take steps, for instance, to prevent, prohibit and eliminate discriminatory practices directed against members of descent-based communities and act against dissemination of ideas of superiority and inferiority on the basis of descent (E/C.12/GC/20).

It clearly shows that the term 'social origin' has wider scope than 'descent'. This could be one of form of discrimination where CERD can include 'caste'. For this purpose there is need to further study the definition of 'social origin'. There is also a need to clarify the relationship or similarities between social origin and caste and also social origin and descent, because, the criteria concerning racial discrimination differs from convention to convention. ICERD is the only human rights convention that directly prohibits discrimination on the basis of descent. As per Article 1 of the ICERD racial discrimination is based on five grounds i.e. race, colour, descent or national or ethnic origin; it has not covered 'social origin'.

Therefore, to cover all forms of discrimination under one rubric it is essential to analyse the definition of 'discrimination' given by the UN human rights conventions. These specified the cases of discrimination on particular grounds as mentioned by Human Rights Committee but none of the convention gives precise definition of discrimination. As Human Rights Committee observed,

The Committee notes that the Covenant neither defines the term "discrimination" nor indicates what constitutes discrimination. However, article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination provides that the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. Similarly, article 1 of the Convention on the Elimination of All Forms of Discrimination against Women provides that "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their

marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.....While these conventions deal only with cases of discrimination on specific grounds, the Committee believes that the term "discrimination" as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms (General Comment 18).

The general comment of Human Rights Committee clarified the scope of the definition 'racial discrimination' under the ICERD. It shows the definition of racial discrimination deals with specific grounds and does not include other grounds such as caste and social origin. The Committee further attempted to provide the definition 'discrimination'. The international human rights treaty bodies and ultimately the international law must come up with the precise definition of 'discrimination' encompassing all possible forms of discrimination.

The lack of definitional clause led Indian Government to challenge the applicability of the international human rights laws. Similarly, the other South Asian States distinct itself from the existence of caste discrimination. This non-acceptance of the caste practices subsequently questioned the applicability of international human rights law. However, Nepal was the single State in South Asia accepted the existence of caste discrimination and urged the UN to provide assistance in eradication of caste discrimination. The UN requested the States to submit their reports on the existence of caste-based discrimination, legal provision on its prohibition and its implementation.

In the previous chapter we have discussed the national laws of India, Nepal, Pakistan, Bangladesh, Sri Lanka. Similarly, the United Kingdom obliged by international conventions considered caste as a form of race and pursues to prohibit it. It shows that the existence of laws does not serve the purpose without proper implementing mechanism. The same rule is applicable at the application of the international law. The wider scope of racial discrimination and descent based discrimination was an attempt made by an implementing and monitoring bodies of international human rights laws. It was mainly done to examine the implementation of human rights in

India and other South Asian States. As a result, it created a pressure on Indian government. As India is a party to Human Rights Conventions obliged to comply with it. To monitor effective implementation of conventions in India respective treaty bodies issued general recommendations and concluding observations. Therefore, the next chapter deals with the implementing mechanism of international human rights laws.

CHAPTER 6

EFFECTIVENESS OF INTERNATIONAL HUMAN RIGHTS INSTITUTIONS

“...however, good Constitution may be, it is sure to turn out bad because those who are called to work it, happen to be a bad lot. However, bad Constitution may be, it may turn out to be good if those who are called to work it, happen to be a good lot.”

DR. B. R. Ambedkar¹

6.1. Introduction

The effectiveness of law depends among other things on the presence of an effective enforcing mechanism. The same principle is equally applicable to the international human rights law. In the absence of enforcement mechanisms, human rights will remain a shallow promise. In the words of Smith, “...human rights should not remain simply in ‘law books’ – just a beautiful promise” (Smith 2010: 215,216). Hence, the concern regarding the implementation of prescribed human rights standards were raised since the inception at the UN. These concerns have sought to be addressed in the evolution of the monitoring systems.

UN human rights monitoring mechanisms are generally classified into Charter-based bodies and Treaty-based bodies. In the treaty system, treaty bodies were formed to monitor the implementation of treaties by signatory States. The Charter-based bodies

¹Dr. Ambedkar’s last speech in the Constituent Assembly of India, on the adoption of the Constitution dated November 25, 1949.

derive their source from the UN Charter, and monitor human rights practice of all member States of the UN (Smith 2010: 215). The functioning of the human rights bodies often overlap with each other (Smith 2010: 215). Moreover, the evolving treaty body mechanism are entangled between implementing mechanisms and monitoring mechanisms (Smith 2010: 215). However, the development of the effectiveness of monitoring system is remain the overriding challenge for the future (Alston & Crawford 2000: xv).

The prohibition of apartheid is considered as one of the most significant achievements of the UN Charter based bodies. Most of the enforcement mechanisms were created to 'respond the scourge of apartheid' (Buergethal 1997: 710). On the contrary, unlike apartheid the practice of caste-based discrimination did not receive significant attention from these bodies. It was only after 1996 that the monitoring system of UN played a significant role in the recognition of the practice of caste-based discrimination in the South Asian States and its diaspora. This recognition by the treaty bodies invited efforts for the inclusion of 'caste-based discrimination' as one of the grounds of racial discrimination. Although no success was made in terms of expressly recognizing caste as a distinct and separate form of discrimination, the recognition was a step forward to examine national laws and their implementation on the prohibition of caste-based discrimination.

The implementing mechanism of national laws witness inconsistencies in realizing the true outcomes mainly due to the social sanctions that are attached to the caste. In other words, the laws challenging the social and religious sanctions behind the caste system are inadequate at the level of implementation. The implementing mechanism of the States i.e. India, Nepal, Pakistan, Bangladesh, and Sri Lanka lack credibility on the prohibition of caste-based discrimination. The inadequacy of national mechanism raises serious questions about the efficiency of international human rights implementing mechanism vis-à-vis the practice of caste discrimination. First, how can the problem of caste-based discrimination be addressed by human rights treaty bodies? Second, in view of the failure of national laws, how can international human rights treaty bodies be effective in

prohibiting caste-based discrimination? Third, can the initiative of the human rights treaty bodies result in the inclusion of caste-based discrimination as a separate form of discrimination?

This Chapter addresses the above questions. The first section of the chapter gives a general understanding of human rights bodies. It highlights the emergence and functions of various charter based bodies and human rights treaty bodies. The second section of the Chapter focuses on treaty body reports on the practice of caste discrimination in South Asian States such as India, Nepal, Pakistan, Bangladesh, Sri Lanka and among the diaspora in the United Kingdom. These human rights treaty body reports include reports of the Human Rights Committee, Committee on Economic, Social and Cultural Rights, Committee on the Elimination of the Discrimination against Women, Committee on the Rights of the Child, and the Committee on the Elimination of the All Forms of Racial Discrimination. However, this section merely focuses on the State party reports and concluding observations of the preceding committees and is do not address the general comments or general recommendations dealing with the practice of caste-based discrimination as they are discussed in Chapter 5. The final section examines the role of Charter based bodies such as the influence of Universal Periodic Review of the respective States on the prohibition of caste-based discrimination and the report of the Special Rapporteur. The Universal Periodic Review complements the work of treaty bodies (Smith 2010: 221).

6.2. General Understanding of International Human Rights Bodies

The human rights values are the basis of human rights treaties and conventions. These values are based on the principle of non-discrimination which forms the bedrock of the international human rights law. Further, to monitor the proper implementation of the international human rights laws various human rights bodies came into existence. Generally, the human rights bodies are divided into two groups; nevertheless they may overlap with each other. Firstly, there are Charter based bodies that derive their source from the UN Charter. It includes Human Rights Council, Universal Periodic Review,

Special Procedure of the Human Rights Council, and Commission on Human Rights (it was replaced by the Human Rights Council).

Secondly, there are treaty bodies. They are ten in number. The development of international human right laws consistently struggled to achieve its effective implementation. As a result, the monitoring mechanisms have evolved with various treaty bodies. The treaty bodies monitor the compliance of the States with the principle of non-discrimination in general and the international human rights instruments in particular. Each convention has its own treaty body to examine the states compliance with the convention. The treaty bodies, in addition to the monitoring function, are authorised to interpret the provisions of respective conventions. For instance, the treaty bodies have expressly discussed the practice of caste-based discrimination as a form of discrimination. These treaty bodies are established in accordance with the provisions of the administering treaty (Fact Sheet No. 30). However, the 'Committee on Economic, Social, and Cultural Rights' is an exception to the general rule as it was not created by its parent treaty. It is created by the Economic and Social Council with the adoption of ECOSOC Resolution 1985/17. It was adopted to monitor the implementation of the ICESCR. The object of all the treaty bodies is to monitor the proper implementation of the administrative treaty.

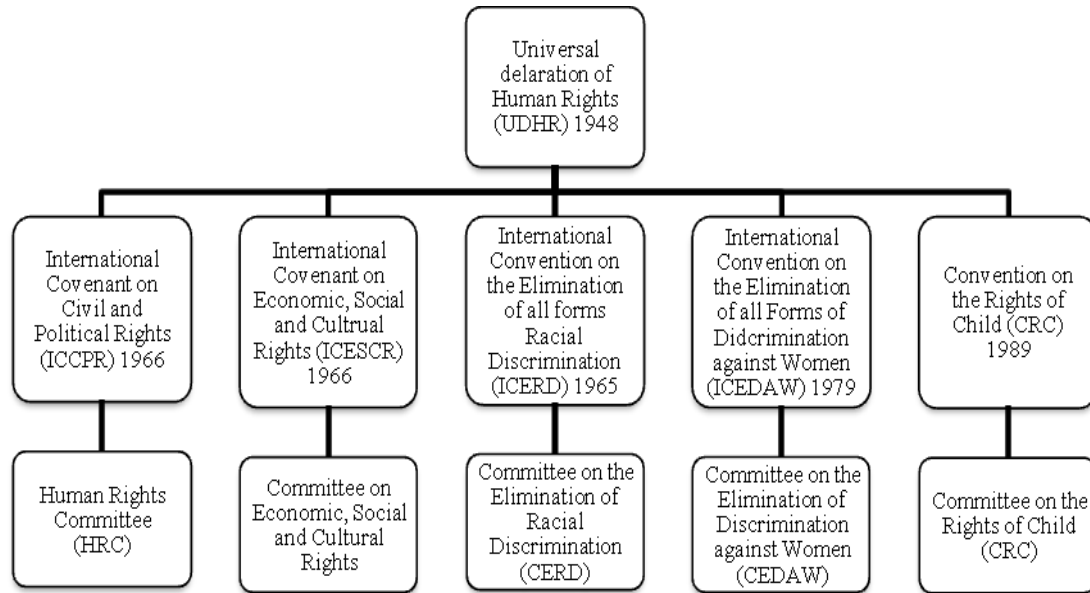
The state parties have to submit their regular reports to the respective treaty body on the implementation of human rights (Fact Sheet No. 30). Apart from the State party report, the treaty bodies may receive the information from UN agencies, intergovernmental organizations, non-governmental organizations, academic institutions, and press. After gathering the information, the treaty bodies' issues a list of questions and suggestions to the State parties about the application of provisions of the treaty at the national level (Fact Sheet No. 30). Consequently, the State parties have to submit their responses. For this purpose, the treaty bodies may issue guidelines to assist the State parties with the preparation of their reports. Additionally, the treaty bodies drafts the general comments

or general recommendations² interpreting the provisions of the treaty. Further, if needed the treaty bodies organize the thematic discussions on the themes related to the treaties.

There are ten treaty bodies. The chart mentioned in figure 6 below discusses only five treaty bodies as they address the practice of caste discrimination. The other treaty bodies which do not find mention are — Committee Against Torture under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (1984), Committee on Migrant Workers under the ‘International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990)’; Committee on the Rights of Persons with Disabilities under the ‘International Convention on the Rights of Persons with Disabilities (2006)’; Committee on Enforced Disappearances under the ‘International Convention for the Protection of All Persons from Enforced Disappearance (2006)’; and the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment established under the Optional Protocol of the Convention against Torture (2002)’ (Fact Sheet No. 30). Figure 6 given below shows five conventions and their respective committees.

² A treaty body's interpretation of the content of human rights provisions, on thematic issues or its methods of work. General comments often seek to clarify the reporting duties of State parties with respect to certain provisions and suggest approaches to implementing treaty provisions. Also called "general recommendation" (CERD & CEDAW) (Fact Sheet No. 30).

Figure 6



As mentioned above, the present study limits itself to the five treaty bodies i.e. Human Rights Committee (HRC), Committee on Economic, Social and Cultural Rights, Committee on the Elimination of Racial Discrimination (CERD), Committee on the Elimination of Discrimination Against Women (CEDAW), and Committee on the Rights of the Child (CRC), as they expressly deals with the problem of caste-based discrimination.

Any mass violation of human rights in the States is subjected to scrutiny by various internal and external factors, which obliges the State governments to respond for its behaviour to the international community (Buergenthal 1997: 704). Similar scrutiny was initiated with respect to the practice of caste based discrimination. As a result, India, Nepal, Pakistan, Bangladesh, Sri Lanka, and the United Kingdom submitted their State reports to the respective treaty bodies on the prohibition of caste-based discrimination. Moreover, the Special Rapporteur was appointed to investigate the discrimination based on the work and descent and subsequently on the caste. Following it, various Universal Periodic Reviews were conducted on the situation of human rights and the caste-based

discrimination. Overall, the general understanding of human rights bodies suggests that the implementation of human rights received a major concern and a two way mechanism was adopted in terms of implementation viz., treaty based bodies and charter based bodies.

The next section examines the various reports and concluding observations made by the five treaty based bodies. It also examines the functioning and impact of international human rights bodies at national level.

6.3. Reports of International Human Rights Treaty Bodies

The human rights treaty bodies request party States to submit their annual reports on the compliance of the respective convention. After examining the party State reports, the treaty bodies provides list of the questions to the States, and then makes the concluding observations. Apart from the concluding observations, the treaty bodies may issue the general comment or general recommendations. This section only deals with the State party reports to the Committees and their concluding observations, and not the general comment or general recommendations as it is already discussed in Chapter 5.

6.3.1. Human Rights Committee (HRC)

The Human Rights Committee (HRC) was established under Article 28 of the 'International Covenant on Civil and Political Rights' (ICCPR). It is a body of independent experts, mainly formed to monitor implementation of the Covenant on Civil and Political Rights. The Committee authorised to receive reports from the State parties on the implementation of the Covenant in the States. After examining the State party report, the Committee issues a general comment to assist the State parties to comply with the Covenant. In addition, the Committee has a jurisdiction to receive individual

complaints on violation of rights by States. Similarly, it also entertains the complaints made by one State party against the other State for the non-compliance of the Covenant.³

India, being a party to the ICCPR, in 1991 submitted its second periodic report to the Human Rights Committee (HRC). In response to this periodic report, the Human Rights Committee raised concern on the effectiveness of the special provisions introduced for the betterment of the Scheduled Castes and Scheduled Tribes. In addition, it questioned that how the Government determines the individual's membership to the Scheduled Castes and Scheduled Tribes. In reply to the Human Rights Committee, the representative of India explained the constitutional provisions and special law on the prevention of atrocities against Scheduled Castes and Scheduled Tribes (A/46/40: 272, 274). Moreover, these queries further addressed in the third periodic report of India.

In 1996, India submitted its third periodic report elaborating the measures adopted at the national level for the advancement of Scheduled Castes and Scheduled Tribes (CCPR/C/76/Add.6). On the contrary, the Human rights Committee pointed out the delay in submission of the report. In its concluding observations, the Human Rights Committee noted that India was violating its obligation under the ICCPR as the members of Scheduled Castes and Scheduled Tribes faced severe social discrimination on the basis of caste. It observed that:

“The Committee observed that, despite measures taken by the Government, members of scheduled castes and scheduled tribes, as well as the so called backward classes and ethnic and national minorities continue to endure severe social discrimination and to suffer disproportionately from many violations of their rights under the Covenant, inter alia inter-caste violence, bonded labour and discrimination of all kinds. It regrets that the de facto perpetuation of the caste system entrenches social differences and contributes to these violations (CCPR/C/79/Add.81).”

The Human Rights Committee further recommended that the State Government should adopt further measures including education programmes to eliminate the practice of caste-

³See Article 28 to 45 of the Part IV of the International Covenant on Civil and Political Rights for further details of the formation and functions of the Human Rights Committee.

based discrimination. It also mentioned that these measures must be in accordance with Article 2 paragraph 1 and the Article 26 of the ICCPR (CCPR/C/79/Add.81).

Similarly, in 1994 Nepal has submitted its initial report to the ICCPR. After examining the report the Human Rights Committee in its concluding observation noted that the non-discrimination clauses given under Article 11 of the Constitution are not exhaustive. In other words, Nepal's the then Constitution does not include the grounds discrimination provided under Article 2 and 26 of the ICCPR. The Human Rights Committee precisely shows the concern over the violation of the rights to equality and non-discrimination due to the practice of caste discrimination (CCPR/C/79/Add.42).

Further, in 2012 Nepal has submitted its second, third and fourth periodic report to the Human Rights Committee. The report was submitted after the adoption of the Interim Constitution of 2007 and the 'Caste-based Discrimination and Untouchability (Offence and Punishment) Act' in 2011. The provisions of these two instruments prohibiting caste-based discrimination are discussed in detail in the report (CCPR/C/NPL/2). However, in 2014, the Human Rights Committee in its concluding observation questioned the effective implementation of these laws in combating the caste-based discrimination. It also doubts the resources provided to the National Dalit Commission and effective implementation of its recommendations. It recommended strengthening of the measures adopted for the proper implementation of the laws (CCPR/C/NPL/CO/2).

Apart from the above South Asian States, Pakistan and Bangladesh has submitted their initial reports to Human Rights Committee in 2015. However, the reports were due in 2011 and 2001 respectively. Nevertheless, both the States claims the incorporation of the principle of non-discrimination and equality in the respective Constitutions (CCPR/C/PAK/1, CCPR/C/BGD/1). Both the Constitutions prohibit discrimination on the basis off caste.⁴ However, it has yet to receive the concluding remarks of the Human Rights Committee. In the case of Sri Lanka, the Human Rights Committee and the Sri Lankan Government are silent on the existence of the practice of caste-based

⁴See Chapter IV for detail provisions of Constitution of Pakistan and Bangladesh on prohibition of caste discrimination.

discrimination. Nevertheless, the Constitution of Sri Lanka prohibits the practice of caste-based discrimination.

6.3.2. *Committee on Economic, Social and Cultural Rights (CESCR)*

The ‘Committee on Economic, Social and Cultural Rights’ (CESCR) was established under the ‘Economic and Social Council’ (ECOSOC) Resolution 1985/17. It was formed to carry out the functions assigned to the ‘United Nations Economic and Social Council’. According to the Part IV of the Covenant, all State parties have to submit their report to the Economic and Social Council. Subsequently, as per the above resolution, the CESCR was established.⁵ The CESCR in its General Comment No. 20 focuses on the caste-based discrimination as a ground of discrimination. Moreover, the CESCR time and again reminded the State parties about the obligations under the Covenant.

In 1983, India submitted its initial report to the CESCR to fulfill the obligations under Article 16⁶ and 17⁷ of the ICESCR. It followed by concluding observation of the CESCR in 1984. In the meetings the concern was expressed in terms of development of the ‘backward classes’⁸. In response, the Indian representative argued that the Constitution of India has provisions for advancement of the backward classes. Moreover, the representative also argued that the Constitution has assigned special responsibility on the State to protect and advance the plights of backward classes (E/1984/WG.I/SR.8). The

⁵ See ECOSOC Resolution 1985/17 for details on formation and functioning of the Committee on Economic, Social and Cultural Rights.

⁶ Article 16 Para 1 – “The States Parties to the present Covenant undertake to submit in conformity with this part of the Covenant reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized herein.”

⁷ “Article 17 (1). The States Parties to the present Covenant shall furnish their reports in stages, in accordance with a programme to be established by the Economic and Social Council within one year of the entry into force of the present Covenant after consultation with the States Parties and the specialized agencies concerned. (2) Reports may indicate factors and difficulties affecting the degree of fulfillment of obligations under the present Covenant. (3) Where relevant information has previously been furnished to the United Nations or to any specialized agency by any State Party to the present Covenant, it will not be necessary to reproduce that information, but a precise reference to the information so furnished will suffice.”

⁸ The term ‘backward classes’ was defined by the Indian representative citing the Constitution of India as, “regarding the meaning of the term “backward classes”, in an under-developed country like India it referred to the scheduled castes and scheduled tribes and any other groups defined as particularly backward, socially and ‘educationally, by the Commission for Backward Classes established under article 340 of the Indian Constitution (E/1984/WG.I/SR.8).”

issues arising out of the practice of caste-based discrimination were precisely raised in the second to fifth periodic reports of the India.

In 2007, India submitted its second, third, fourth and fifth periodic report to the CESCR. After submission of the report, the CESCR raised a number of issues such as, what measures are adopted for the effective implementation of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocity) Act, 1989? What are the measures in place for the overall development of members of the Scheduled Castes and Scheduled Tribes includes their employment, education, cultural participation, prohibition of manual scavenging, etc. (E/C.12/IND/Q/5/Add.2).⁹ The CESCR in its concluding observation expressed its regret against the India mainly on the grounds of – delay of fifteen years in submitting the periodic reports, abstained from answering all the questions assigned to it, and unsatisfactory answers to the question (E/C.12/IND/CO/5).

However, the CESCR welcomes the submission of reports and opportunity to have a dialogue with the State representatives. In the concluding observation, the CESCR displayed its concern about the lack of progress by the State party in combating de facto caste-based discrimination despite legal provisions. The discriminatory attitude and prejudices of enforcement machinery specifically by police is a major obstacle to the victim's access to justice. In addition, it has focused on the trafficking of the Scheduled Castes and Scheduled Tribes women and children. It pointed out the vulnerability faced by the Scheduled Castes and Scheduled Tribes women. Keeping this in mind the CESCR urged the Indian Government to submit its next periodic report with the “updated annually collected comparative data disaggregated by sex, age, caste, ethnicity, religion and by region, regarding all the provisions in the Covenant, paying particular attention to the disadvantaged and marginalized individuals and groups (E/C.12/IND/CO/5).” In other words, the CESCR urged the State to remove the obstacle in combating caste-based discrimination and create awareness among the people about equality and non-discrimination.

⁹See (E/C.12/Q/IND/5) for further details.

In the case of Nepal, since its initial report in 2000, the CESCR expressed its concern that, despite the laws the caste-based discrimination is very much in existence in Nepal (E/C.12/Q/NEP/1). With this concern, the CESCR expressed regret against the Nepal for nine-year delay in the submission of its initial report. In its concluding observation, it urged the State party to enforce laws prohibiting customary practices such as dowry, polygamy, and prostitution among the *Bedi* castes. Moreover, it also urged to introduce laws on prohibition of discrimination against the Dalit's at the level of education, work and access to housing (E/C.12/1/Add.66).

At the time of its second periodic report, Nepal was going through enormous political and social changes. However, in 2006 it has submitted the annual report, citing the customary and traditional hurdles in the fulfillment of obligations given under the ICESCR. The report gives a detailed understanding of protection granted to the Dalits through National Dalit Commission and other legal provisions.¹⁰ It also highlighted lacunae in the implementing mechanism, with the general societal attitude towards Dalit's. In order to cope up with the ICESCR, it urged cooperation between the international community and Nepalese to conduct a mass movement for spreading awareness and education on the plights of Dalits (E/C.12/NPL/2).

The concluding observation of the second report came in 2008. Meanwhile, in 2007 the Nepal Government adopted the Interim Constitution. Subsequently, the CESCR in its concluding observation welcomed the prohibition of untouchability and caste-based discrimination by the Interim Constitution. However, it noted that the denial of public wells, food, health measures, housing, education and much more to the lower castes. It observed that the Dalits require special attention. In other words, the denial of basic immunities directly threatens the rights to an adequate standard of livings. The CESCR recommended the Nepal Government to introduce the mechanism for proper implementation of prohibition caste-based discrimination and review the discriminatory laws. Moreover, it requested the State party to include a separate section in its third

¹⁰See Paragraph 26 to 38 of the second periodic report of the Nepal to CESCR (E/C.12/NPL/2).

periodic report on measures adopted to prohibit caste-based discrimination and fulfillment of economic, social, and cultural rights (E/C.12/NPL/CO/2).

On this note, the Nepal government before its third periodic report reviewed its laws. The main object of the review of laws was to identify and ratify all provisions that may directly or indirectly permit discrimination on the basis of caste. Subsequently, it identified the discriminatory laws and amended them. Moreover, new laws and provisions are introduced to prohibit caste-based discrimination (E/C.12/NPL/3). In the concluding observation in 2014, the CESCR welcomed the adoption of the ‘Caste-Based Discrimination and Untouchability (Offence and Punishment) Act 2011’. With the appreciation, the CESCR raised concern over the implementation of the Act and availability of inadequate resources to the National Dalit Commission (E/C.12/NPL/CO/3).

The issue of the implementation of laws on prohibition of caste discrimination is identical to all State parties. Apart from implementation issue, the vulnerability of the Dalit women and its recognition also set major hurdle before anti-discrimination laws. As, mentioned above the Dalit women witnesses triple discrimination. It makes them marginalized among marginalized. However, most of the treaty bodies recognized the situations of the Dalit women the Committee on the Elimination of the Discrimination against Women set the milestone.

6.3.3. Committee on the Elimination of the Discrimination against Women (CEDAW)

The Part V of the ICEDAW deals with the establishment of the ‘Committee on the Elimination of the Discrimination against Women’ (CEDAW). The CEDAW was established to monitor the implementation of the ICEDAW. For this, the CEDAW invites State Parties periodic reports on the implementation of the ICEDAW. After receiving the report the CEDAW issues concluding observations and general recommendations. Although the CEDAW did not recognize the caste-based discrimination faced by the Dalit women at the earliest, it was in 2010 that it issued general recommendation no. 28 (CEDAW/C/2010/47/GC.2). The details of general recommendation no.28 are discussed

in the previous chapter. Hence, the present section only focuses on the State party reports and its concluding observations.

India is a signatory to the convention and submitted its first report to the CEDAW in the year 1999. The CEDAW in its concluding observation of the India's report raised issues of discrimination faced by Dalit women. The CEDAW mentioned that because of customary practices such as dowry, sati and the devadasi system there is a high incidence of gender-based violence against women (A/55/38). Discrimination against women who belongs to particular castes or ethnic or religious groups also manifests extreme forms of physical and sexual violence and harassment.

The CEDAW was deeply concerned with the continuing discrimination, including violence, suffered by women of the Dalit community, in spite of the passage of the Scheduled Castes and Scheduled Tribes (prevention of atrocities) Act of 1989. The CEDAW urged the government to enforce laws preventing discrimination against Dalit women and prohibit *devadasi* system. The gender-based violence takes worse form against the women belonging to the Scheduled Castes and Scheduled Tribes on the contrary to general women in India (A/55/38).

The CEDAW also recommended the government to introduce affirmative action programmes in the areas concerning education, employment, and health. This was mainly to provide life chances to Dalit women and girls and create an environment conducive to their progress. The CEDAW noted that the "widespread poverty, social practices such as caste system and son preference, as reflected in a high incidence of violence against women." Further, significant gender disparities and an adverse sex ratio, and practice of caste discrimination present major obstacles to the implementation of the Convention (A/55/38).

In 2005, India submitted its second and third periodic report to the CEDAW. In this report, India has noted down various provisions dealing with the prohibition of caste discrimination. Moreover, it has provided the data of atrocities against the Scheduled Castes and Scheduled Tribes. However, it failed to identify the cases of atrocities against

Scheduled Castes and Scheduled Tribes women. Though it has recognized the discrimination faced by women of these groups, it is worse as compared to discrimination witness by other caste women. Moreover, it falls short of identifying special laws dealing with it (CEDAW/C/IND/2-3).

As a result, in 2007, the CEDAW issued its concluding observation. It requested the State party to review and monitor the fulfillment of the provision of ICEDAW specifically in the case of Scheduled Castes, Scheduled Tribes and backward classes women. The CEDAW further recommended the State party to introduce monitoring mechanism for the effective implementation of the Prevention of Atrocity Act and to ensure the accountability and impunity for crimes committed against the Scheduled Castes and Scheduled Tribes women. With other recommendations, the CEDAW urged the State party to introduce measures for better education and access to higher education to the Scheduled Castes, Scheduled Tribes, and Muslim women (CEDAW/C/IND/CO/3).

Moreover in 2014, the CEDAW issued concluding observation of India's fourth and fifth periodic report. In this concluding observation, the CEDAW concerned over the absence of comprehensive anti-discrimination law. It noted that the anti-discrimination law must contain all forms of direct and indirect discrimination against women. Moreover, it must focus on intersectional discrimination discussed in General Recommendation No. 28 of the CEDAW. Apart from this, the CEDAW noted its concern on the practice of dowry, devadasi, witchcraft, trafficking, exploitation of prostitution, honor killing these and much more violence against women in general and Scheduled Castes and Scheduled Tribes women in particular (CEDAW/C/IND/CO/4-5).

The situation of Nepal does not differ from the India. The Dalit women in Nepal are also victims of child marriage, dowry, polygamy, *deuki*¹¹, *badi*¹² and many other discriminatory practices that derive from the caste system, and they are still prevalent (A/54/38/Rev.1). Keeping this in mind, the CEDAW in its next, concluding observation

¹¹ It is "a tradition of dedicating girls to a god or goddess, who become "temple prostitutes", which persists, despite the prohibition of the practice by the Children's Act."

¹²Badi caste practice is the ethnic practice of forcing young girls to become prostitutes.

of the Nepal's second and third periodic report (2003) showed concern on the condition of Dalit women. It urged the State party to abolish these harmful discriminatory practices. Further to create awareness, it focused on the delivery of education. However, the fewer educational opportunities to the rural women and women from different castes invite special attention. With this, the CEDAW commended the State party for creating several institutional mechanisms including National Dalit Commission to monitor the implementation of the ICEDAW (A/59/38 (Part I)).

In 2010, the Nepal submitted its fourth and fifth periodic report to the CEDAW. In the report, it gave the data specifying the decline and dropout rate of the Dalit girls at the school level. In addition, it noted down that,

“The cultural, religious and traditional values often tend to perpetuate gender discriminations and violations of women's rights. Insufficient political commitment, weak institutional capabilities of delivery and regulatory mechanisms and lack of awareness of information technology in rural areas have contributed to women's deprivation of their rights. Despite a lot of initiatives taken for the protection and promotion of human rights of women, the rights of *Dalit* women, women with disabilities, ethnic minorities and the ones infected with HIV/AIDS are yet to be fully realized (CEDAW/C/NPL/4-5).

The government of Nepal has taken various legislative and other measures for the inclusion of these marginalized and vulnerable women (CEDAW/C/NPL/4-5). However, in 2011, in the concluding observation of the State report, the CEDAW noted that the Dalit women still face multiple forms of discrimination. It ranges from the domestic violence, low rate of enrollment at the school level, less representation at the Constituent Assembly, the persistence of sexual exploitation, human trafficking among others. The government of Nepal in order to protect the rights of the Dalit women and to prohibit the multiple forms of discrimination against them has to take concrete steps as recommended by the CEDAW (CEDAW/C/NPL/CO/4-5).

The Bangladesh is also the party to the ICEDAW. In 2010, it submitted its sixth and seventh periodic report to the CEDAW. Subsequently, for the first time, the CEDAW in

its concluding observation raised concern over the conditions of Dalit women in Bangladesh. After the State party report, the CEDAW has given the list of issues to the State. One of the questions was raised on the situation of minority and indigenous women. In reply to the question, the State mentioned that it recognizes the problem of lower caste persons as they are subjected to social injustice and are marginalized. However, it did not provide any direct and further details about the plights of Dalit women (CEDAW/C/BGD/Q/7/Add.1).

As a result, the CEDAW noted its concern about the multiple discrimination faced by the Dalit women mainly with regard to access to education, health care and employment, housing, protection from violence and access to justice. On this note, the CEDAW recommended the State party to collect data on the disadvantaged group of women including Dalit women. Moreover, it recommended the State party to take proactive measures including temporary special measures eliminate the discriminatory practices and to protect women from all forms of violence and abuse (CEDAW/C/BGD/CO/7).

All the above observations of the CEDAW clearly identify the multiple forms of discrimination witnessed by Dalit women. It shows that the social status of the Dalit women in the caste-system is at the worst position. They are prone to the caste violence, such as rape, gang rape, naked parades, victims of honor killings and so on. Moreover, the CEDAW has not yet recognized and specifically did not discuss any situation of Dalit women in the Pakistan and Sri Lanka. However, the 'Committee on the Rights of the Child' addresses the issue of Dalit children of the Pakistan and Sri Lanka. The next section has a brief overview of the reports of the State Parties and the reports of the Committee on the Rights of the Child dealing with caste discrimination.

6.3.4. Committee on the Rights of the Child (CRC)

The Part II of the 'International Convention on the Rights of the Child' deals with the formation and functioning of the 'Committee on the Rights of the Child' (CRC). The CRC is formed to monitor the implementation of the Convention on the Rights of the Child. In addition, it has to monitor the implementation of the two Optional protocols to

the Convention.¹³ Similar to the other treaty bodies, the CRC also receives the State Parties report. On receiving the State party report, the CRC examines the report issues and makes the concluding observations to the reports. Moreover, CRC can organize the thematic discussions on the themes which may lead to the interpretation of the provisions of the Convention. While performing its functions, the CRC identified the problem of caste-based discrimination faced by the children. Subsequently, it issued the General Comments and various other concluding observations concerning the prohibition of caste-based discrimination against the children.

After examining the initial report of India, in 2000, the CRC made the concluding observation. It shows deep concern on the implementation of Article 2 of the Convention, which deals with the principle of non-discrimination. It expressed concern over the 'striking disparities' regarding access to education and opportunity between children belonging to different castes. It also expressed concern as to the existence of caste-based discrimination and discrimination against tribal groups, despite this practice has been prohibited by law (CRC/C/15/Add.115). The CRC further observed that,

In accordance with article 17 of the Constitution and article 2 of the Convention, the Committee recommends that the State party take steps to ensure states abolish the discriminatory practice of "untouchability", prevent caste and tribe motivated abuse, and prosecute State and private actors who are responsible for such practices or abuses. Moreover, in compliance with article 46 of the Constitution, the State party is encouraged to implement, inter alia, affirmative measures to advance and protect these groups. The Committee recommends the full implementation of the 1989 Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, the 1995 Scheduled Castes and Scheduled Tribes Rules (Prevention of Atrocities) and the 1993 Employment of Manual Scavengers Act. The Committee encourages the State party to continue its efforts to carry out comprehensive public education campaigns to prevent and combat caste-based discrimination. In line with the Committee on the Elimination of Racial Discrimination (CERD/C/304/Add.13), the Committee stresses the importance of the equal enjoyment by

¹³ The CRC also monitors the implementation of the Optional Protocol on Involvement of Children in Armed Conflict (OPAC) and the Optional Protocol on Sale of Children, child prostitution and child pornography (OPSC). Moreover, on 19 December 2011, the UN General Assembly approved a third Optional Protocol on a communications procedure (OPIC), which allow individual children to submit complaints regarding specific violations of their rights under the Convention and its first two optional protocols. The Protocol entered into force in April 2014.

members of these groups of the rights in the Convention, including access to health care, education, work, and public places and services, such as wells.

The Committee recommended that the State party should take appropriate steps, which includes the abolition of 'untouchability,' prevention of caste and tribe motivated abuse, and prosecution of State and private actors responsible for such practices and abuses.

Moreover, in compliance with Article 46 of the Constitution of India¹⁴, the State party is encouraged to implement, among other things, affirmative measures to advance and protect these groups. The Committee recommended that there should be full implementation of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, with Scheduled Castes and Scheduled Tribes Rules (Prevention of Atrocities), 1995 and the Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993. The Committee encouraged the State party to continue its efforts to carry out comprehensive public education campaigns to prevent and combat caste-based discrimination (CRC/C/15/Add.115).

In its concluding observation to the second periodic report of India, the CRC expressed concern at the wide disparity in levels of enjoyment of the rights in the Convention by girls, children living in certain states, rural areas and slums, and children belonging to certain castes and tribal and indigenous groups. It recommended concerted efforts to address social inequalities by reviewing and reorienting policies, including increasing budgetary allocations for programmes targeting the most vulnerable groups (CRC/C/15/Add.228).

At the same time, it raised doubts as to the effective implementation of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. In the light of significant social discrimination against children belonging to Scheduled Castes and Tribes, reflected, inter-alia, by gross violations of the Act, and a low number of such violations dealt by the courts. The fact is that a majority of the States i.e. provincial government in

¹⁴ The State shall promote with special care the educational and economic interests of the weaker sections of the people, and in particular, of the Scheduled Castes and Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation (Article 46 of the Constitution of India).

India have failed to set up the special courts provided under this Act (CRC/C/15/Add.228). Similarly, in 2014 CRC showed its concern in its concluding observation of third and fourth periodic report of India. It urged the State party to recognize the multiple forms of discrimination faced by the children, to ensure proper implementation of the anti-discrimination laws and affirmative schemes (CRC/C/IND/CO/3-4).

In the initial report of the Nepal, the Nepal accepted the adverse effects of the caste system. It noted that, despite the legal mechanism on the prohibition of caste-based discrimination, it is equally difficult for the lower caste children to associate with the upper caste children. Subsequently, it affects the child's right to education which further results into the high dropout rate in school. It also resulted into trafficking and indulgent of lower caste girls into prostitution (CRC/C/3/Add.34). The initial report was followed by the concluding observation of the CRC in 1997.

In the concluding observation, the CRC noted its concern on the tradition of the caste system and discussed the effects of the caste system. It mentioned that the limited attention was given by the State government toward the caste issues. In other words, it requested the State to take adequate measures to prohibit caste-based discrimination. It urged the State to introduce concrete measures including the awareness campaigning to change the negative attitude of the people. It aims to protect the lower caste children from anykind of exploitation and discrimination (CRC/C/15/Add.57).

In the second periodic report, the State has discussed on caste discrimination in the separate sections dealing with the other forms of the exploitation. While discussing, it noted that the laws alone are not sufficient to prohibit caste discrimination. As, these social practices deter the various initiative taken by the Government such as, the education and awareness programmes, temple entry,etc. However, it appreciated the various schemes and helping hand of the NGOs to the Government (CRC/C/65/Add.30). In the concluding observation of this report, the CRC noted that the caste system as a major impediment for the fulfillment of the Convention. It expresses the concern about

the harmful effects of the caste discrimination on the physical, emotional and psychological health of the Dalit children (CRC/C/15/Add.261).

Apart from this, Nepal has submitted its initial report to the Optional Protocol to the Convention on the Rights of the Child. In 2012, the CRC issued its concluding observation with the concern about the situation of Dalit children. In its observation, the CRC welcomed the legislative measures on the prohibition of caste discrimination. It urged the State party to consider the matter of caste discrimination against the Dalit children as urgent and initiate immediate necessary measures (CRC/C/OPSC/NPL/CO/1).

Pakistan submitted its second periodic report to the CRC. After examining the second periodic report, the CRC issued a concluding observation in 2003. In its observation, the CRC expressed its concern on the discriminatory social attitude and discrimination against the minority children. Furthermore, it is concerned at the disparities in the enjoyment of rights and the social discrimination experienced by children belonging to the most vulnerable group's i.e. children belonging to a religious or other minority group (CRC/C/15/Add.217). Similarly, in its next, concluding observation, the CRC recommended State party to take appropriate measures to eliminate discriminatory practices. Moreover, it urged the Government to mobilize politicians, community and religious leaders to support the elimination of the traditional discriminatory practices against the religious and other minority children (CRC/C/PAK/CO/3-4).

The second periodic report of the Bangladesh clearly mentioned the policies and provisions of the Constitution prohibiting caste-based discrimination. In the report, it noted that, the National Children Policy stated that, "all children of Bangladesh, irrespective of caste, creed, colour, sex, language, religion or opinion, social status, wealth or birth, shall enjoy equal rights and opportunities" (CRC/C/65/Add.22). Though the CRC in its concluding observation in 2003 failed to directly address the issue of caste-based discrimination, it has recommended the State to introduce measures for the proper implementation of the Article 2 of the Convention. Moreover, it asked the State to provide data in its next periodic report considering the Durban Declaration and Programme of Action (CRC/C/15/Add.221).

Further in 2008, Bangladesh submitted its third and fourth periodic report. In the report, it mentioned that children belonging to the minorities and indigenous groups are most disadvantaged groups. In the list of these groups, it focuses on the Dalits. Further, it noted that due to the lack of studies and survey on the socio-economic condition of these people, limited information is available about the people (CRC/C/BGD/4). Consequently, the CRC shows its concern about the discrimination faced by children on the basis of their parent's social origin, or other status (CRC/C/BGD/CO/4). In 2015, while reviewing the State's fifth periodic report the CRC reiterate its previous position and recommended the State to adopt comprehensive measures to prohibit discrimination against the Dalit children (CRC/C/BGD/CO/5).

Sri Lanka submitted its third and fourth periodic report to the CRC in 2010. It mentioned that the caste-based discrimination is prohibited under the constitutional provisions. However, in its concluding observation, the CRC expressed its concern on the practice of caste-based discrimination. It mentioned that the practice of caste-based discrimination affected 20 to 30 per cent of the Sri Lankan population. Due to discriminatory practice of caste the people are living in the extremely poor conditions, they are marginalized and rejected by the society. The CRC urged the State government to investigate the practice of caste-based discrimination, its effects on the society. It further recommended the State to mobilize the communities and government employees against the discrimination through awareness and raising programme (CRC/C/LKA/CO/3-4).

All the above-discussed State reports and their concluding observations by respective Committees reviewed the prevalence of the practice of caste-based discrimination. Moreover, the Committees recommended State parties to introduce adequate measures and ensure the proper implementation of it. In general, the issue of caste-based discrimination has been discussed and its practice accepted by the State parties. Moreover, none of the State party challenged the applicability of these Conventions to the practice of caste-based discrimination. On the ground that, the Articles defining the term discrimination is not exhaustive. Without any direct reference to the caste-based discrimination under the definition clause, the State parties have provided information on

the practice of caste-based discrimination. Moreover, the State parties neither argued for the inclusion of caste-based discrimination under definitional clause of the conventions. It has discussed under the broader principle of human rights.

However, the non-inclusion of caste-based discrimination as a one of the ground of discrimination raised many questions on the drafting of international human rights laws. Nevertheless, India in its reports to the Committee on the Elimination of All Forms of Racial Discrimination (CERD) challenged the applicability of the International Convention Elimination of All Forms of Racial Discrimination (ICERD). The denial of applicability by India encourages the treaty bodies to expand the scope of term 'racial discrimination'. In other words, it attempted to define the term racial discrimination. Bearing this in mind, the next section deals with the reports of the 'Committee on the Elimination of the All Forms of Racial Discrimination' (CERD).

6.3.5. Committee on the Elimination of Racial Discrimination (CERD)

The Committee on Elimination of Racial Discrimination was the first such a body to be established. According to the Part II of the ICERD there shall be a Committee called Committee on the Elimination of Racial Discrimination (CERD). It further describes the formation and functioning of the CERD. The main object of the CERD is to monitor the implementation of the ICERD. For this purpose, it requests the State parties to submit their periodic reports on the implementation of the ICERD. After the acceptance of reports, the CERD on the basis of report issues list of questions to the State party. On receiving the reply to the questions, the CERD issues the concluding observation. Apart from it, the CERD can interpret the provisions of the ICERD after having a thematic discussion on the issue.

The CERD in 1987, on the eighth and ninth periodic report of India, appreciated India's contribution to the international struggle against apartheid. In addition, the CERD paid tribute to India's commitment to the elimination of racial discrimination both at the national and international level. Nevertheless, it requested the government to provide information regarding the situation of the untouchables. It asked the measures taken by

the government to improve the social and educational condition of the untouchables and abolition of untouchability. It also raised questions about religious belief behind the caste system. It requested for the clarification regarding the legislative purpose behind the introduction of the concept 'race' in the Article 15 of the Indian Constitution (A/42/18).

In reply, the Indian representative gave details about reservation policy of India in relation to jobs and education for the backward classes. It argued that the significant numbers of Scheduled Castes are in jobs currently as compared to the situation of 1947. Similarly, noted down the various provisions of the Constitution (A/42/18). However, in its tenth to thefourteenth periodic report, it denies the applicability of the Article 1 of the ICERD. It further mentioned that the reports providing details on the conditions of Scheduled Castes and Scheduled Tribes submitted to the CERD are made out of courtesy. With this, it shifted all its attention towards the measures dealing with theprohibition of racial discrimination. Moreover, it pointed out that, India was the first State demanding the inclusion of racial discrimination and apartheid in the UNs agenda (CERD/C/299/Add.3). With this argument, India has sidelined the issue of caste-based discrimination. On the inclusion of 'race' in the Article 15 of the Constitution, the Indian representative mentioned that the framers of the Constitution were highly influenced by the UN Charter and the movements against the apartheid (CERD/C/299/Add.3).

Consequently, in the concluding observation, the CERD expressed its regret towards the report and delegation on the claim that the "situation of the Scheduled Castes and Scheduled Tribes does not fall within the scope of Convention". However, it appreciated the information on situation of Scheduled Castes and Scheduled Tribes provided to CERD. With this appreciation, the CERD affirmed that the situation of Scheduled Castes and Scheduled Tribes fall within the scope of the ICERD (CERD/C/304/Add.13).

Meanwhile, the CERD issued a General Recommendation No. 29 where it interpreted the term 'descent' and extended its scope to include caste. However, in 2006 India submitted its fifteen to nineteen periodic reports and reiterated its previous position (CERD/C/IND/19). On the other hand, the CERD quoted the General Recommendation

No. 29 and reaffirm the applicability of the ICERD to the caste-based discrimination (CERD/C/IND/CO/19).

Nepal in its nine to thirteen reports to the CERD drew a comprehensive picture of the caste system in its State. While giving the social background of Nepalese society, it emphasized on the effects generated by the caste system on the social fabric. Moreover, it acknowledged the prevalence of the practice of caste discrimination despite its legal prohibition. The report gives detail on the legislative measures adopted by the Nepal (CERD/C/298/Add.1). Subsequently, in its concluding observation, the CERD noted that the information provided on the composition of the population by caste is incomplete and unclear. It further viewed caste discrimination as a hurdle in the enjoyment of rights given under Article 5 of the ICERD (CERD/C/304/Add.61).

Similarly, in its fourteen report Nepal has elaborated the practice of caste system and its legal mechanism prohibiting the caste discrimination (CERD/C/337/Add.4). As a result, in 2001, the CERD issued a concluding observation to the fourteen periodic report of Nepal. In its observation, the CERD recommended the State to implement practical and substantive measures prohibiting the practice of caste-based discrimination. Moreover, it encourages the State party to introduce affirmative measures for the victims of the caste-based discrimination (CERD/C/304/Add.108).

In 2003, Nepal submitted fifteen and sixteen periodic report. In the report it gives a brief history of the caste system and mentions the establishment of National Dalit Commission (CERD/C/452/Add.2). The CERD in the concluding observation welcomed the formation of National Dalit Commission, however, it expressed concern about the functioning of the Commission. It recommended the State to adopt relevant statutory laws enabling the Commission. In addition, it expressed its concern about the existence of segregated residential areas for Dalits, denial of public places such as place of worship, food, water, isolation of inter-caste couples among others. Moreover, it recommended the State party to furnish further information in next periodic report under the descent-based discrimination as mentioned under the General Recommendation No. 29 (CERD/C/64/CO/5).

In the case of Pakistan, the CERD welcomes the various developmental schemes against the caste-based discrimination. Moreover, it appreciated appointment of the member of Scheduled castes as an advisor of the Sindh Province Senate. It also appreciated the State for introducing various provisions prohibiting various forms of discrimination. However, it shows the concern that the State party has not adopted any separate legislation on the prohibition of caste-based discrimination. Subsequently, it urged State to introduce and adopt a law on the prohibition of caste-based discrimination, following the guidelines given under the General Recommendation No. 29 (CERD/C/PAK/CO/20). In other words, the CERD urged State party to prepare a report examining and providing information on the practice of caste-based discrimination with considering the descent-based discrimination.

The Bangladesh in its previous reports denied the existence of any practice of racial discrimination or racism. However, the eleventh periodic report submitted in 2000 discussed the various legal provisions that prohibit racial discrimination. It mentioned that the present report contains legal framework prohibiting all forms of racial or any other form of discrimination towards tribal and religious minorities. Subsequently, it also attempted to create “unique example in the region of a social and cultural orientation that does not recognize any social class or caste systems or discrimination on the basis of religion.” Moreover, it has introduced the history of slavery, apartheid, racial discrimination, caste system, discrimination based on race, gender, religion, etc. in the school curriculum. By focusing on history it focuses on the human rights violation arising out of discrimination (CERD/C/379/Add.1).

However, on the racial angle to the caste, Bangladesh has clearly stated that “the issue of caste did not have racial character”. The caste must be seen in the light of religious and cultural context. Moreover, it argued that the modernization and economic changes in the society pose serious challenge towards the rules imposed by the caste system (CERD/C/SR.1458). On the contrary, Sri Lanka claims the racial phenomenon is attached to the caste system practiced in Sri Lanka.

After its second periodic report in 1987, Sri Lanka government was asked the inter-relations between Sinhalese, Buddhism and Hindu caste system. In reply the Sri Lankan representative stated that there could be no racial distinction between Sinhalese and Tamil communities. It further mentioned that Buddhism is in antithesis to existence of caste system. It mentioned that “In Sri Lanka, the caste system was a racial phenomenon that was not based on any religious factor and was to be found among Tamils and Sinhalese” (A/42/18). Further, in its future reports the Sri Lankan Government cited its laws prohibiting various forms of discrimination including caste based discrimination.

In 2003, the CERD recommended the United Kingdom (UK) to prohibit caste-based discrimination by incorporating it in the domestic legislation (CERD/C/63/CO/11). Further, the UK government in reply to the concern of the CERD informed its attempt to introduce caste discrimination under the descent-based discrimination. As a result, it made a commitment to appoint a commission for further research on the practice of caste-based discrimination (CERD/C/GBR/18-20).

Overall, the above brief overview of the CERD reports suggests the emergence of certain common factors. The CERD completely relied on the information submitted by the State parties. This is evident from the questions raised by the CERD on the implementation of the ICERD. Moreover, it is also evident that the States are not willing to answer certain questions. The CERD has expressed deep regrets for not answering the questions as it sidelines the whole discussion.

However, in terms of prohibition of apartheid among the State parties a strong consensus was found. On the implementation of Article 3 of the ICERD the State parties were asked to express their position on the apartheid and their relations with the South Africa. Most of the States in their reply clearly mentioned the abolition of apartheid, support to the anti-apartheid movement and favoured the imposition of restrictions on the relations with the South Africa. Those having any commercial relationship with the South Africa were recommended to suspend it. Moreover, the apartheid revolved around the racial discrimination. The CERD did not address other forms of discrimination which were equally significant as race.

Overall, this section focused on the State parties reports submitted to the five treaty bodies on the issue of caste-based discrimination. Beside the treaty based bodies, the Charter based bodies also addresses the problem of caste-based discrimination. Although the human rights bodies i.e. Treaty based bodies and Charter based bodies overlap in terms of their obligations, the mechanism always resulted into the support of promotion and protection of human rights. The next section deals with the reports of the Charter Based Bodies.

6.4. Charter Based Bodies and Caste Discrimination

The Charter based bodies include the Human Rights Council (HRC) and Special Procedures. The Human Rights Council with the support of the ‘Office of High Commissioner for Human Rights’ (OHCHR) played a significant role in recognizing the problem of caste discrimination. Further, the Human Rights Council under Special Procedures appoints Special Rapporteur, who are independent experts and works on the agenda set up by the HRC. The HRC appointed various Special Rapporteurs to investigate the practice of caste-based discrimination. Moreover, it has introduced the State driven process of Universal Periodic Review to ensure proper implementation of international human rights laws. It is a unique system that reviews the human rights situations in the States. The present section gives a brief understanding of Universal Periodic Review. It further discusses the reports of Universal Periodic Reviews and the Special Rapporteurs on the practice of the caste-based discrimination by South Asian States such as India, Nepal, Pakistan, Bangladesh, and Sri Lanka; and United Kingdom.

6.4.1. Universal Periodic Reviews and Caste

The Universal Periodic Review (UPR) was established by the UN General Assembly with the Human Rights Council in the Resolution 60/251. UPR is a unique process; it invites the periodic review of the human rights records of the all members States of the UN. It is based on the principle of equal treatment towards all countries. Moreover, it gives an opportunity to the State to declare any action taken by the State for the improvement of human rights situations in their respective State. More significantly it

includes the sharing of best human rights practices around the globe. It is established with an object to prompt, support and expand the promotion and protection of the human rights. It also provides technical assistance to the States to enhance the capacity to deal with the human rights challenges (A/HRC/RES/5/1).

India submitted its National Report in 2012. In this report, India followed the same method as it followed at the submission of reports to the treaty bodies. It shared details elaborating measures taken for the improvement of the Scheduled Castes and Scheduled Tribes (A/HRC/WG.6/13/IND/1). The report further followed by the interactive dialogue with the responses and questions from other States. Finally, the conclusion and recommendations were issued. In its conclusion, various recommendations were made by the different States such as, to take adequate measures to guarantee the effective implementation of the Atrocity Act, to provide data disaggregated on the ground of caste, gender, etc. (A/HRC/21/10). India accepted some of the recommendations. However, in its previous UPR in 2008 India mentioned that,

“India has been deeply conscious of the need to empower the Scheduled Castes and Scheduled Tribes and is fully committed to tackle any discrimination against them at every level. The Constitution of India abolished “untouchability” and forbids its practice in any form. There are also explicit and elaborate legal and administrative provisions to address caste-based discrimination in the country. The caste system, which is unique to India, is not racial in origin, and therefore, caste based discrimination cannot be considered a form of racial discrimination (A/HRC/8/26).”

In the interactive session, India reiterated its previous position on the ICERD. It mentioned that the caste system of India is unique to it. Moreover, caste is not racial in its origin and therefore cannot be considered as a form of racial discrimination (A/HRC/8/26). Recently, in May, 2017 the third round of India’s UPR once again examined and issued various recommendations on the situation of Scheduled Castes and Scheduled Tribes.

On the 4 May 2017, the Working Group on the UPR reviews the situation of human rights in India. In the review process, number of States has shown the concern on the

violation of human rights of the Scheduled Castes and Scheduled Tribes. Many States highlighted problem of caste discrimination witness by Scheduled Castes and Scheduled Tribes in includes, education, health, manual scavenging, registration of birth, caste discrimination against the lower caste woman and many more. After highlighting these issues States recommended the Indian government to ensure effective implementation of the laws, repeal and amendments in the laws and to adopt the laws with the standard of the international law (A/HRC/WG.6/27/L.8). On the other hand, Indian delegation retreated the amendment to the Prevention of Atrocity Act, 1989 and stated that “...safeguarding the rights of minorities formed an essential core of India’s polity and the State made no distinction between the caste, creed, colour, or religion of a citizen” (A/HRC/WG.6/27/L.8).

Similarly, Nepal in its UPR of 2011 cited the provisions prohibiting the practice of caste-based discrimination. However, many States recommended it to introduce separate laws on the prohibition of caste-based discrimination. Moreover, they demanded adoption of the pending bill on the prohibition of untouchability into an Act. Moreover, in the formation of new Constituent Assembly for establishing the Constitution it demanded full participation of all ethnic groups and castes. Nepal accepted some recommendations (A/HRC/17/5).

Pakistan in 2008 rejected the concept of Dalit. It noted that, “it is free from such kind of prejudices, and the existing norms do not contain discrimination on the basis of caste or creed.” On the contrary, the recommendation made by Denmark mentioned that, the lower caste people (officially call Scheduled Castes) faced caste-based discrimination in the State. It noted the absence of any legal mechanism for prohibition of caste-based discrimination. Subsequently, recommended to introduce a laws on the prohibition of caste and descent based discrimination (A/HRC/8/42). Later on, in its next UPR it was recommended to take measures against the rape, sexual exploitation and forced conversion of the Scheduled Castes girls among others (A/HRC/WG.6/14/L.10).

Bangladesh submitted Universal Periodic Review report in 2013. It received recommendation in the interactive UPR sessions. It partly accepted two recommendations

dealing with the caste-based discrimination. It was recommended to adopt the measures addressing the discrimination faced by the Dalits. It was asked to introduce measures for the better improvement of the situations of Dalits specifically for the betterment of Dalit children and women (A/HRC/24/12).

The Sri Lanka submitted the UPR report in 2012. It was recommended to gather more information regarding the practice of caste-based discrimination in the State. At the same time it was requested to ensure prohibition of discrimination through legal mechanism (A/HRC/8/46). On the other hand, the UK Government did not accept the recommendation to introduce a national strategy on prohibition of caste-based discrimination according to General Recommendation No. 29 of CERD. The UK Government noted that without proper information regarding the practice of caste-based discrimination it cannot introduce the mechanism. As a result, it has commissioned the body to conduct survey on the prevalence of caste-based discrimination in UK (A/HRC/21/9).

Recently, the UK was reviewed under the UPR. IDSN with other organizations made the submission to the UPR. It outlined the need to prohibit caste discrimination in the UK and failure of the UK government to implement the law. However, none of the State member highlighted the practice of caste discrimination in UK (Kleinaityte 2017). On the one hand, various treaty bodies shows the concern on the practice of caste discrimination by South Asian diaspora in UK. On the other hand, the UPR failed to take account of the caste discrimination.

Overall, the reports of the Universal Periodic Review appear as a replica of the recommendations made by the human rights treaty bodies. Most of the States noted down the recommendation but does accept it. Nevertheless, it is appreciable initiative driven by States, where all the member countries can contribute by tabling the questions and recommendations (Smith 2010: 221). It could be result in creating a pressure on the States to address the human rights violation. Apart from these State reports and its observation, the human rights body relies on the information provided by the Special Rapporteurs.

6.4.2. Special Rapporteurs on the Practice of Caste-Based Discrimination

The Special Procedure is adopted to enhance the capacity of Human Rights Council to address the human rights issues. It is the body of independent experts, either composed of working group of five members or comprises of independent expert also called as Special Rapporteur. The Special Rapporteur has to prepare a report in accordance with the mandate to report and advice on the human rights from the thematic and country specific perspective. There are few reports of the Special Rapporteurs dealing with the problem of caste-based discrimination.

In 1994, the Special Rapporteur on ‘Sale of Children, Child Prostitution, and Child Pornography’ submitted its report. The report highlighted that the discrimination on the basis of race and social origin are interwoven with the caste and contributes to the exploitation of children belonging to the particular group. It noted that,

It has become increasingly obvious that many children used for labour and sexual exploitation are lured from particular racial or social groups, rather than from the well-endowed groups in power. In South Asia, it is the children of the "untouchables" who are most often victimized in child labour situations. Another case in point, drawn from the Special Rapporteur's field visit to Nepal, is that it is primarily girls from hill-tribe groups in that country who are tricked and sold into prostitution, both local and transnational. The pattern is repeated in other parts of the world, where the children of minorities, migrant workers and/or indigenous peoples, who are already marginalized, are often the main victims of such exploitation (E/CN.4/1994/84).

The report further observed that the Indian laws prohibit child labour in hazardous industries. However, it mentioned that there is widespread violation of these laws. The socio-economic and cultural discrimination against the Scheduled Castes and Scheduled Tribes forces the members of these groups including their children to opt for hazardous employment. Most of the children of Scheduled Castes and Scheduled Tribes work in the hazardous industries such as, producing matches, fireworks, glass and bricks, diamond cutting, lock making, and in stone quarries (E/CN.4/1994/84).

Further, in 2000 the Sub-Commission on the Promotion and Protection of Human Rights passed the resolution declaring that the discrimination based on the work and descent is a form of discrimination prohibited under the international human rights laws. It further appointed the Special Rapporteur to identify the communities practicing discrimination on the basis of work and descent. It was also mandated to examine the legal and constitutional provisions on the prohibition of such discrimination. Subsequently, report identifies the caste practicing communities of South Asia as communities practicing discrimination on the basis of work and descent (E/CN.4/Sub.2/2003/24).¹⁵

In 2016, the Special Rapporteur on minority issues submitted its report to the Human Rights Council. This report attempted to encompass the discrimination on the basis of caste and analogous system into the minority rights framework. The Special Rapporteur believes that,

“while many caste-affected groups may belong to the same larger ethnic, religious or linguistic community, they often share minority-like characteristics, particularly their non-dominant and often marginalized position, stigma, and the historic use of the minority rights framework to claim their rights” (A/HRC/31/56).

The victims of the caste-based discrimination witnesses multiple and intersecting forms of discrimination on the ground of minority status and descent. These caste affected groups are characterizing by their non-dominant position in the society. Moreover, the ethnic, religious, and linguistic differences also characterize some caste affected groups as minority. Therefore, the Special Rapporteur claims the applicability of minority status to the caste affected group. With the acknowledgement of the “complexity of addressing this topic within the minority rights framework, as there exists the view that caste systems are a way to organize society without the domination of majority groups, and therefore, “lower caste” groups may not strictly fall under the category of minority groups” (A/HRC/31/56).

¹⁵The detailed report is discussed in the chapter 5.

The report further highlighted the violation of political, civil, cultural, economic, and social rights of the individual due to the practice of caste discrimination. The caste based discrimination is the major cause of poverty, inequality, and social exclusion. It categorically mentioned the vulnerable situation of women. The lower caste women face multiple and intersecting discrimination due to their gender and social status. The prohibition of such evil practice is not possible with mere having a legal mechanism it requires the community based approach to change the mindsets of the individuals.

The Special Rapporteur observed that as per the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, States has to introduce various measures to ensure “that persons belonging to minorities may exercise fully and effectively all their human rights and fundamental freedoms without any discrimination and in full equality before the law” [art. 4 (1)]. It believes that the “relevant elements and standards emanating from the minority rights framework, including equality, non-discrimination, consultation, participation, and special measures, can contribute to the protection of the rights of the caste-affected communities and should be applied to combat discrimination based on caste and analogous systems” (A/HRC/31/56).

6.5. Conclusion

The emergence of international human rights institutions i.e. the monitoring mechanisms are primarily meant to provide some effectiveness to human rights. UN human rights conventions established human right bodies such as Charter based bodies and treaty based bodies. Both the human right bodies received reports on the human rights status under respective conventions. In the case of caste-based discrimination, the reports of the different human right bodies addressed various aspects of the caste-based discrimination. The Human Rights Committee (HRC) has examined the violation of civil and political rights in the practice of caste system. Similarly, the Committee on Economic, Social and Cultural Rights (CESCR) has observed that, the economic, social and cultural factors play an important role in the existence of caste discrimination. Further, the Committee on

the Elimination of the Discrimination against Women (CEDAW) has highlighted the plight of Dalit women who faced severe and multiple intersecting discriminations.

Likewise according to the Committee on Child Rights (CRC) the Dalit children face enormous discrimination. It has observed that Dalit children are victims of striking disparities in the access to education and opportunities between children belonging to different castes. The Committee on the Elimination of Racial Discrimination (CERD) has considered caste from the perspective of racial discrimination. Although it has attempted to address caste discrimination on the ground of descent, it has been opposed by India. Beside the treaty bodies, the Charter bodies i.e. the Human Rights Council and Special Procedure provide monitoring systems such as Universal Periodic Review and Special Rapporteurs for the implementation of human rights. Both the monitoring authorities have addressed the practice of caste discrimination and issued recommendations to overcome it.

All the above concluding observations of the human rights bodies were shaped by State reports which furnished information on the violation of human rights such as civil, political, cultural, economic, and social rights of the individuals. All these aspects of human rights violations have been discussed by the human rights bodies on regular basis. Although none of the conventions in its definitional clauses have directly and expressly recognised 'caste' as a form of discrimination, the State parties submitted their reports on the status of caste-based discrimination. The dialogue took place between the State parties and human rights bodies on the prohibition of caste-based discrimination.

Neither the State parties nor the human rights bodies objected to the discussion on the caste-based discrimination within the purview of the Conventions. In spite of the denial of the applicability of ICERD to caste discrimination, India and other States have furnished information on the caste discrimination in their respective States. In other words, all the human rights conventions except ICERD deal with the violation of human rights caused by the caste system. They recommended that the State parties take adequate measures to prohibit it. While including caste into the descent-based discrimination, the

CERD made an attempt to prohibit the root cause of all these effects i.e. caste-based discrimination.

The recommendation of the human rights bodies on the prohibition of caste-based discrimination does not result in the full-fledged prohibition or eradication of caste-based discrimination. Human right bodies' observations are mere recommendations and not obligations on the State parties. However, the State parties to the conventions have an obligation to submit their report within a stipulated period. But considerable delay is committed in the submission of the report, a common practice among all State parties. Similar to the delay in submission, the recommendations made by the human rights bodies have received less attention from the State parties.

The State parties continue to stress that there are sufficient laws on the prohibition of caste discrimination. However, the implementation of these laws at the grass root level is dismal. In other words, the implementing mechanism at the State level and at international level through treaty bodies faces many challenges. At the State level, it is consistently argued by the State parties that the age old practice of caste needs considerable time to change as it requires change in the mindset of the people. This approach justifies in the final analysis the prevailing inefficient national mechanism. Moreover, the effective functioning of the international institutions on caste-based discrimination is directly proportional to the effective performance of the State's national mechanisms. As the international human rights mechanism cannot provide effective solution to the human right violations, "...they are not substitute for effective national mechanisms. At best international mechanism can only supplement effective domestic mechanism" (Smith 2010: 216).

The institutional mechanisms on caste-based discrimination so far appear as a pressure group without substantive outcome. But even in terms of pressure there is no uniformity and this is at least evident in the reports of UPR and treaty based bodies. The UPR reports played a significant role in reminding the State parties such as India, Bangladesh, and Pakistan on the practice of caste-based discrimination against backward castes. Moreover, under this mechanism the other States such Denmark and Slovenia posed

questions to the Pakistan and Bangladesh respectively on the palpable situation of Dalits in terms of enjoyment of human rights. Many State parties gave recommendations to the South Asian states on the issue caste-based discrimination. In the treaty based bodies, the Committee members called for response on the status of caste-based discrimination from the South Asian State parties. After receipt of the reports, the Committees recommended the States on the inclusion of certain measures.

However, in both the systems i.e. UPR and treaty bodies the effect of the pressure was insufficient and offered enough liberty to the State parties to overcome it. In the UPR, the State parties may accept the recommendation or deny it. In the case of treaty bodies, the States have willfully abstained from answering the questions on caste-based discrimination. Further, to overcome the practice of caste-based discrimination these recommendations need proper implementation by the State parties. For the effective implementation of human rights with respect to caste-based discrimination through international institutions there is a need to have sincere and genuine international pressures like curtailment of commercial activities or diplomatic relations with the State parties who failed to make genuine efforts, which was done during the struggle for the abolition of apartheid. In other words, the State parties should adopt the human right bodies' observations as obligations and not mere recommendations. The State parties should be constantly made answerable to the international community.

The Non-governmental Organisations (NGOs) have been playing an important role in the creation of international pressure on the State parties regarding the situation of human rights. Beside the human right mechanisms, the NGOs also investigate the human rights situation in the State parties and brief the human rights bodies. For instance, various NGOs raised the problem of caste-based discrimination at the 'World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance' in 2001. This initiative of the NGOs ultimately gave wider outreach to the caste-based discrimination debate at the international level. But the role of the NGOs was completely against the Indian State approach. India objected to the internationalization of caste discrimination and this shows its dubious approach. In fact it was India who addressed the problem of

racial discrimination of South Africa before the UN, but the problem of caste was never tabled as a form of discrimination. Therefore, the issue of the inclusion of caste-based discrimination in the international laws is seen debated outside the mechanism of human rights bodies. The next chapter deals with the role of the NGOs in internationalizing the problem of the caste-based discrimination.

CHAPTER 7

THE DURBAN CONFERENCE AND AFTERMATH

“The world owes a duty to the Untouchables as it does to all suppressed people to break their shackles and to set them free.”

B.R. Ambedkar¹

7.1. Introduction

The Non-governmental Organizations (NGOs) and civil society groups have always made important contribution in the promotion and protection of the human rights. The various NGOs often investigate and report to the respective bodies of the UN on the violation of the human rights. It is a parallel system for the protection of human rights. The establishment of the treaty bodies and related institutions has given NGOs extensive opportunities to contribute to the promotion and protection of human rights (Buergenthal 1997: 711). There is synergic relationship between the UN human right bodies and the NGOs. The UN human rights bodies invite inputs from the NGOs, and thereby engage them with human rights issues. It is mainly done to reduce the workload of the human rights bodies (Alston & Crawford 2010: 3). Most importantly, the involvement of NGOs is invited to build the pressure on the human rights violating States. One of such attempt was made in 2001.

In 2001, the Dalit NGOs and civil society groups gathered at Durban, South Africa. The purpose of the gathering was to attract the attention of the international community and the UN human rights bodies towards the practice of caste-based discrimination. It was the struggle to include caste-based discrimination into the international human rights laws. Dalit NGOs urge States to consider ‘caste’ as one of the grounds of discrimination, and introduce measures to prohibit discrimination

¹Ambedkar, B.R. (1943), “Mr. Gandhi and Emancipation of Untouchables”, in Vasant Moon (eds.) *Dr. Babasaheb Ambedkar Writing and Speeches* Vol. 9. New Delhi: Dr. Ambedkar Foundation.

arising out of caste practices. To achieve this outcome the gathered Dalit NGOs and civil society groups protested before the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance 2001 (WCAR) at Durban.

As per the guidelines of the UN General Assembly, the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance 2001 was organised in Durban, South Africa. It is also known as 'Durban Conference'. It demanded a new look at the issue of racial discrimination. For the first time, a broader platform emerged to examine different forms of intolerances that amounted to the violation of human rights. The conference invited the international community to unite their efforts to combat racial and other forms of discrimination. As a result, various Dalit NGOs succeeded in drawing the attention of the international community towards the caste-based discrimination. They initiated the debate on the internationalisation of caste based discrimination. On the one hand, this internationalisation received criticism, but on the other hand, it obliged human rights bodies to recognise the practice of caste-based discrimination.

The whole debate on internationalising caste raises certain questions such as, whether before WCAR the problem of caste was raised at the international level? How Dalit NGOs and civil society groups tabled the caste question at WCAR? Did WCAR include the problem of caste discrimination into its agenda? Can human rights treaty bodies include caste into the descent-based discrimination? The first section of the Chapter deals with internationalisation of caste-based discrimination. It focuses on the internationalisation of caste prior to the WCAR. The second section focuses on the WCAR and its preparatory meetings dealing with the inclusion of the caste-based discrimination into the theme agenda of the WCAR. The third section highlights the debate on the inclusion of caste at the WCAR. The debate invited different sets of arguments. For instance, one argument favoured the internationalisation of caste and for that reason was ready to equate 'caste' with the 'race'. The second argument favoured internationalisation but criticised equating caste with race. The third argument questioned the viability of the international laws. The fourth argument criticised the internationalisation of caste. However, it urge the members to build a pressure within the nation itself, as caste discrimination is the problem of respective State and home solutions would be more effective. After reviewing these varied

arguments on the internalisation of caste discrimination the next section deals with the aftermath of the Durban Conference.

7.2. Early Debate on Inclusion of Caste

The problem of caste-based discrimination was not unique to the international community. It was raised before the international community much earlier than the WCAR. From 1930 to 1932 at Round Table Conference, Ambedkar for the first time demanded the basic rights for the untouchables. During this period only the plights of untouchables were brought at the international forum. This was considered as an epoch in the history of Dalit emancipation. On this Ambedkar observed that, “From the point of view of the Indians the Round Table Conference was an event of great significance...For the Untouchables it was a landmark in their history” (Ambedkar 1945: 40). It was also the first time that the untouchables were allowed to represent themselves at the Round Table Conference. As a result, Ambedkar submitted the memorandum on the rights of untouchables to the Minority Committee of the Round Table Conference. Subsequently, the reports of the Minority Committee and Federal Structure Committee were placed before the Conference. This report was successfully accepted by the Conference. It was for the first time that the Conference recognised the untouchables as separate entities for political and constitutional purposes (Ambedkar1945: 54).²

The reference of untouchable at international level was made considering that, “The world owes a duty to the Untouchables as it does to all suppressed people to break their shackles and to set them free” (Ambedkar 1943: 398). Although the existence of discrimination such as racism, imperialism, anti-semitism were well recognised in the world, the discrimination such as untouchability or the plights of untouchables was always laid down in shadow. Ambedkar mentions that:

“...there are three problems which the Peace Conference is expected to tackle. They are (1) Imperialism, (2) Racialism, (3) Anti-semitism and (4) Free Traffic in that merchandise of death popularly called munitions. There is no doubt these are the

²Ambedkar in the preface of the ‘What Congress and Gandhi have done to the Untouchables’ specifically mentioned that, the purpose of his writing was to produce a knowledge for particular audience i.e. untouchables and foreigners (Ambedkar1945: vi).

plague glands in which nation's cruelty to nation and man's inhumanity to man have their origin. There is no doubt that these problems must be tackled if a new and a better world is to emerge from the ashes of this terrible and devastating war. What my fear is that the problem of the Untouchables may be forgotten as it has been so far. That would indeed be a calamity. For the ills which the Untouchables are sufferings if they are not as much advertised as those of the Jews, are not less real. Nor are the means and the methods of suppression used by the Hindus against the Untouchables less effective because they are less bloody than the ways which the Nazis have adopted against the Jews. The Anti-semitism of the Nazis against the Jews is in no way different in ideology and in effect from the Sanatanism of the Hindus against the Untouchables" (Ambedkar 1943: 397-398).

This clearly shows the intention of the Ambedkar, whose main agenda was to draw the world attention towards the problem of untouchability in comparison with the problem of slaves, Jews, and Negroes (Ambedkar 1943: 398). The use of international platform to discuss caste issues although slowed down after the death of Amedkar, but did not stop completely. After Ambedkar, there was no profound leader to carry forward his legacy, however, in 1982 the problem of caste discrimination was tabled before the Sub-committee on the human rights (Darapuri 2010: 16). The attempts were made to raise the issue at U.N.O, World Conference of Religions on Peace and Asian Conference on Religion and Peace (Darapuri 2010: 16). Similar effects are visible at the discussion of the various human rights treaty bodies. Consequently, in the late 1990s the awareness about the using international platform to address caste-based discrimination received momentum. As a result, Dalit NGOs strongly advocated the inclusion of caste-based discrimination into the WCAR agenda.

7.3. World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance 2001 (WCAR)

In 1997, the General Assembly of United Nations passed resolution A/RES/52/111. Under this resolution, the UN General Assembly noted that despite the efforts of the international community, the principal objectives of the two previous Decades for Action to Combat Racism and Racial Discrimination have not been attained and that millions of human beings continue to this day to be the victims of varied forms of racism and racial discrimination. On the contrary, the instances of racism, racial discrimination, xenophobia and related forms of intolerance, ethnic antagonism and

acts of violence are showing signs of increase. Considering it, the UN General Assembly decided to hold the 'World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance' not later than 2001. This was the third conference of this nature. The first and second conferences against racism were held in Geneva, in 1978 and 1983 respectively.

The objectives of the WCAR 2001 set forth by the General Assembly were as follows:

- a) To review the progress made in the fight against racism, racial discrimination, xenophobia and related intolerance, in particular, since the adoption of the Universal Declaration of Human Rights, and to re-appraise the obstacles to further progress in the field and ways to overcome them;
- b) To consider and trace the effective ways and means to ensure the application of existing standards and the implementation of the existing instruments to combat racism, racial discrimination, xenophobia and related intolerance;
- c) To increase the level of awareness about the scourges of racism and racial discrimination, xenophobia and related intolerance;
- d) To formulate concrete recommendations on ways to increase the effectiveness of the activities and mechanisms of the United Nations through programmes aimed at combating racism, racial discrimination, xenophobia and related intolerance;
- e) To review the political, historical, economic, social, cultural and other factors leading to racism, racial discrimination, xenophobia and related intolerance;
- f) To formulate concrete recommendations to further action-oriented national, regional and international measures to combat all forms of racism, racial discrimination, xenophobia and related intolerance;

- g) To draw up concrete recommendations for ensuring that the United Nations has the financial and other necessary resources for its actions to combat racism, racial discrimination, xenophobia and related intolerance;

In order to pursue the above prescribed objectives, the UN General Assembly felt need to address various forms of discrimination. It includes all forms of racism, racial discrimination, xenophobia and related contemporary forms of intolerance. Therefore, UN General Assembly designated the Commission on Human Rights as the preparatory committee. The object to form a preparatory committee was mainly to gather information on the different forms of discrimination and to form the agenda of the ‘World Conference against Racism, Racial Discrimination, Xenophobia, and Related Intolerance.’ The preparatory committee invited the inputs and full participation from the all States Members of the United Nations. It also welcomed the intervention made by the various NGOs, specialized agencies, observers, and civil society groups (A/RES/52/111). At the same time, it organised the meetings in different parts of the world and received corpus of information on the varied forms of discrimination and its practices.

7.3.1. Preparatory meetings

In accordance with the UN General Assembly resolution various meetings were organized for the preparation of the forthcoming World Conference against Racism. In addition to the preparatory meeting, various consultations were organized to support the preparatory meetings. In the process of consultations and meetings various Dalit organizations made series of interventions before the United Nations Human Rights Bodies and in various international meetings. Many of these interventions were made with the collaboration of other communities such as, Buraku and Roma Shinti who faced similar discrimination. The objective of these interventions was to ensure the inclusion of caste-based discrimination into the main agenda of the WCAR (Divakar and Ajai 2004: 12).

7.3.1.1. Bellagio Consultation on UN World Conference against Racism

In January 2000, the International Human Rights Law Group organized consultation programme. It invited the twenty-five leaders from the influential State governments, international organizations, national institutions and the non-governmental sector. The consultation took place at the Bellagio, Italy. The main object of the consultation was to formulate the recommendations for the WCAR, 2001. With this object the consultation came up with the report. In the month of May 2000, the consultation report was submitted in the first session of the Preparatory Committee for the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (A/CONF.189/PC.1/10).

In this report, the preparatory committee specifically recommended that, the caste system and discrimination against Dalits requires special attention of the world community. It was also urged that there is need to consider similarly oppressed communities such as Buraku in Japan and Korea, Osu in Nigeria and Roma Shinti people of Europe (A/CONF.189/PC.1/10). It has linked caste-based discrimination with racism. It mentioned that, “Racism is linked with other forms of discrimination and intolerance. Every human being has multiple bases of identity, including race, colour, ethnicity, national or linguistic origin, class, caste, gender and sexual orientation (A/CONF.189/PC.1/10).”

Apart from the Bellagio Consultation various reports of the other NGOs made efforts to include caste-based discrimination in the main agenda of the WCAR. These reports include the Declaration of the Asia Pacific NGO Forum, the report of the Asian Legal Resource Centre (ALRC), Global Conference against Racism and Caste-based discrimination, and the Declaration of NGOs Forum. Before the inter-governmental Asian Preparatory Meeting for the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, convened in Tehran, in February 2001 the Asia Pacific NGO Forum came out with the Declaration of the Asia Pacific NGO Forum.

7.3.1.2. Declaration of the Asia Pacific NGO Forum

Around three hundred groupings from different racial, national, religious backgrounds came together to attend preparatory meetings organised by Asia Pacific NGO Forum. The Asia Pacific NGO Forum came out with a Declaration, which mentioned that governments have the responsibility to eliminate discrimination based on race, caste, colour, sex, descent, occupation, ethnic origin, national origin and other factors (WCAR Asia Pacific NGO Declaration Teheran/Kathmandu 2001). Regarding the practice of caste-based discrimination the declaration significantly pointed out the discriminatory nature of the States. It mentioned that, even though States have enacted various laws on the prohibition of the caste-based discrimination, often the States and the State machineries are in violation of these laws.

Therefore, it further recommended that, there should be a proper implementation of laws dealing with the prohibition of caste-based discrimination. States must ensure the transparent and effective monitoring mechanism of the laws. The Asia Pacific NGO Forum strongly recommended that the caste based and similar form of discriminations need to be explicitly addressed in the agenda of the World Conference against Racism. One of the contributing factors for these recommendations was the position taken by the Nepal government on the practice of caste-based discrimination. At the Asia Pacific Regional Preparatory Meeting for WCAR in Tehran, Nepal Government admitted the existence of caste discrimination in the country and urged that the issue should be addressed in the WCAR (WCAR Asia Pacific NGO Declaration Teheran/Kathmandu 2001).

7.3.1.3. Asian Legal Resource Centre (ALRC)

Similarly, the Asian Legal Resource Centre submitted its written statement on issue of caste-based discrimination in South Asia. It mentioned that the caste discrimination is practiced throughout South Asia. It further elaborated the practice of caste discrimination as,

- (a) "Caste lies behind the many social crises in South Asia. Caste society does not recognise the right to dissent as valid ethical principle;

(b) Caste society has no absolute prohibition of torture. The caste system can be maintained only through indifference cruelty;

(c) The lack of agreement on ethical principles against cruelty has a direct bearing on such practices;

(d) That caste hierarchy is no longer easily legitimised has in itself contributed to the emergence of a broadly acceptable public discourse about caste status coded as cultural difference. Because people cannot readily speak of castes as unequal, they describe them as “different”. In this case, difference is another name for inequality. Thus, when for the sake of international relations the proponents of caste enter into dialogue accepting equality as the basis of discussion, they engage in such discourse only artificially. Their real position remains outside the discourse;

(e) Claims to a “special religiosity” are also often made internationally by the South Asian caste elite in defence of their system. When caste discrimination was developed, religious and judicial notions followed to justify it. To make this purported special religiosity “Indian”, the views of Dalits and lower caste Indians were excluded, and have been since” (E/CN.4/2001/NGO/61).

These are the some contributing factors in the practice of caste-based discrimination. It also noted that, most of the South Asian countries introduced constitutional measures following the special legal provisions on the prohibition of caste-based discrimination. However, these measures had not significant impact on the society. To support its argument the ALRC cited the example of the Constitution of India, it stated that:

“...the world’s largest democracy has failed to develop beyond a mere formal democracy. No amount of criticism about the conflict between constitutional principles and practice can be of any impact on ethical principles and practices based on the opposite ideal. Ethically, there is unity of theory and practice, as inequality is accepted both as ideal and is practiced. Legal confusions have no bearing on the ethical foundation of caste-based societies. Constitutional declarations of equality or acceptance of international covenants founded on the principle of equality may create legal obligations; nonetheless they do not change the ethical foundations of a given society (E/CN.4/2001/NGO/61).”

It clearly mentioned that, though the Constitution of India adopts the principle of equality, it failed to challenge the ethical foundation of the caste-based society. The failure of States legal mechanism reflects in the measures adopted by the UN. It

alleged that, the caste-based discrimination is the worse form of discrimination as compare to the slavery and apartheid. However, the UN failed to address the problem of caste-based discrimination. It failed to take significant position on the existence of caste discrimination. As a result, the various human rights conventions of the UN did not recognize the problem of caste-based discrimination, which affects the millions of people in the world. It further expressed its deepest concern that, if WCAR did not address the problem of caste-based discrimination, then this would result in the failure of a Conference. In other words, it urged the inclusion of caste problem into the agenda of the WCAR (E/CN.4/2001/NGO/61).

7.3.1.4. The Global Conference against Racism and Caste-based Discrimination

In March 2001, the global conference was organised in the New Delhi. The conference was attended by various representatives and victims from India, Nepal, Bangladesh, Pakistan, South Africa, Japan, Sri Lanka, the Netherlands, Denmark, Germany, Hong Kong SAR, the United Kingdom, and the United States. The proceeding of the conference adopted the 'Declaration of the Global Dalits Conference against Racism and Caste-based Discrimination 2001'. While discussing the practice of untouchability and its attributes, it mentioned that the practice of untouchability constitutes crime against the humanity, and urged the UN to declare it as a crime against humanity.

Moreover, in its declaration it demanded that the caste-based discrimination to be included in the WCAR documents. The practice of caste system constitutes the major source of discrimination (Final Declaration of the Global Dalits Conference Against Racism and Caste-based Discrimination 2001). It also recommended that there is a need to pay particular attention through UN development agencies towards caste discrimination. After all these conferences, the NGO Forums gathered in South Africa from 28 August to 3 September 2001 for the WCAR with the recommendations. It also made a declaration for the preparation of the World Conference.

7.3.1.5. The Declaration of NGO Forums

This NGO Forums is a body constituted of the local, national and international non-governmental organizations along with other civil society groups. All these actors gathered to make representations before WCAR in South Africa. For this purpose, the forums made a declaration and programme of action which contain the recommendation of NGOs (WCAR NGO Forum Declaration 2001). The declaration covered vast number of issues connected with racial discrimination and related intolerance. It included issues regarding Africans and African descendants, Anti-Semitism, Arab and Middle East, Asians and Asian descendants, caste and discrimination based on work and descent, colonialism and foreign occupation (especially Tibet), criminal justice and judicial systems, persons with disabilities, education, environmental racism, ethnic and national minorities and groups, gender, globalization, hate crimes, health and HIV/aids, indigenous peoples, labour, media and communication, migrants and migrant workers; Palestinians and Palestine; refugees, asylum seekers, stateless and internally displaced persons; religious intolerance; reparations; Roma Nation and travellers; sexual orientation; slave trade and slavery; trafficking; and young people, children and the girl child.

In the corpus of issues, one section of the declaration dealt with the problem of caste-based discrimination. It has discussed caste-based discrimination under the heading of ‘Discrimination based on the work and descent’. It observed that,

- 1) The discrimination based on work and descent including caste based discrimination and untouchability affects more than 300 million people in Asia Pacific and Africa region. This historical discriminatory practice has both religious and cultural sanctions, which is hereditary in nature. Sometimes irrespective of religious affiliation it is prevalent at personal, social and structural levels.
- 2) The practice of untouchability is rooted in the caste system. The untouchables are considered as polluted or impure. As a result, they are denied an entry into the places of religious worship and participation in religious festivals. Moreover, under the caste system untouchables are assigned with work of

degrading nature and menial such as, manual scavenging, skinning and disposal of dead animals, digging graves and sweeping. Further, the condition of untouchable women is even worse. On the ground of traditional practice of Devadasi or temple prostitution, the Dalit women and girls are forced into this prostitution. Hence, 260 million Dalits in South Asia are victims of this caste system.

- 3) The system of 'hidden apartheid' based on caste practices of distinction, exclusion and restrictions denies Dalits' with the enjoyment of their economic, social, political, cultural and religious rights, exposing them to all forms of violence and manifests itself in the segregation of housing settlements and cemeteries, segregation in tea stalls (two-cup system), denial of access to common drinking water, restaurants, places of worship, restrictions on marriage and other insidious measures all of which inhibit their development as equals.
- 4) Caste discrimination and 'untouchability' practised against generations of Dalits for centuries together amounts to systemic 'generational and cultural Daliticide', which is the mass-scale destruction of their individual and collective identity, dignity and self-respect for generations through cultural methods and practices.
- 5) Any action or even any sign of an attempt to act by Dalits either individually or collectively to assert their rights is met with extreme measures of violence such as burning or destruction of their homes, property and crops, social boycott, rape or gang rape of Dalit women and murder by the dominant caste individuals or groups, police or the bureaucracy, and that in such instances the State often acts with impunity and in connivance with these perpetrators.
- 6) The Buraku people of Japan face work and descent based discrimination for over 400 years and continues to experience it. Today more than 3 million people witness discrimination in relation to marriage, employment and education. Moreover, they are also victims of new forms of discrimination

such as the discriminatory propaganda and incitement to discrimination against them, especially on the Internet.

- 7) The vulnerability of the victims of work and descent based discrimination, including caste discrimination and untouchability, is aggravated by legal systems and law enforcement machinery who fail to protect them and hence are responsible for the continued perpetuation of discrimination, and by States that are themselves often the law-violators (WCAR NGO Forum Declaration 2001).

In simple terms, the Declaration of the NGO Forums highlighted the basic characteristics of the caste system, which subsequently resulted into the discriminatory practices. However, it correlated the practice of caste-based discrimination to the discrimination based on the work and descent. It has contributed into the debate on the inclusion of 'caste' into the descent-based discrimination. It is important to note that all the reports on the inclusion of caste-based discrimination into the WCAR resulted into affirmative. With the Bellagio Consultation Report, various other submissions were made by the National Campaign on Dalit Human Rights (NCDHR) and International Dalit Solidarity Network (IDSN) members to the preparatory committee. In the submitted reports, the organizations made suggestions on the inclusion of the caste-based discrimination in the theme of the World Conference. However, the stand of Dalit NGOs was consistently opposed by the Indian Government.

On one hand, all the above discussed reports strongly recommended for the inclusion of caste-based discrimination into the main agenda of the WCAR. On the other hand, the CERD's contribution to the preparatory meeting did not address the problem of caste-based discrimination. Rather, it appreciated the constitutional provisions of the India and Nepal on the prohibition of caste-based discrimination (A/CONF.189/PC.2/13). It did not stress on the inclusion of caste into the agenda of the WCAR. Consequently, the Preparatory Committee adopted the five broad themes of the provisional agenda. The themes were as follows:

- Sources, causes, forms and contemporary manifestations of racism, racial discrimination, xenophobia and related intolerance;
- Victims of racism, racial discrimination, xenophobia and related intolerance;
- Measures of prevention, education and protection aimed at the eradication of racism, racial discrimination, xenophobia and related intolerance, at the national, regional and international levels;
- Provisions of effective remedies, recourse, redress, (compensatory) and other measures at the national , regional and international level;
- Strategies to achieve full and effective equality, including international cooperation and enhancement of the United Nations and other international mechanisms in combating racism, racial discrimination, xenophobia and related intolerance, and follow up (A/CONF.189/1/Rev.1, A/CONF.189/PC.1/21).

On the examination of above themes, it is clear that the ‘caste’ as a ground of discrimination did receive the world’s attention, but failed to secure a place in the WCAR agenda. Nevertheless, it has initiated the debate outside the WCAR. The debate mainly focuses on the internationalizing the caste. For instance, is there any need to discuss the national issue i.e. problem of caste-based discrimination at the international level? To attract the attention of the international community is it appropriate to equate ‘caste’ with the ‘race’? Does the international intervention would assist in eradicating caste-based discrimination? The next section addresses these questions and thereby attempts to focus on the debate on internationalization of caste.

7.4. Debate on the inclusion of Caste in WCAR

Since the beginning of preparatory meetings of the WCAR, the debate on the exercising international mechanism was in full swing. Dalit NGOs felt the need to raise the issue of caste-based discrimination at the international level and substantiated the following reasons as firstly, it was an attempt to create awareness

about the continuing impact of the caste-based discrimination, by raising the matter before the international media, international human rights organisations, and foreign government officials. Secondly, it would create a pressure on the governments (Indian government) to implement existing policies on the prohibition of caste-based discrimination and violence against untouchability irrespective of whether the internationalisation of caste bring shame to the India or not (Bob 2009: 35). Moreover, the Dalit activists demanded express recognition of the discrimination faced by the groups as a distinct human rights violation under international law (Bob 2009: 35).

On the above grounds, the NGOs urged the WCAR to include 'caste discrimination' in the main agenda. For this purpose, Dalit NGOs even ultimately turned in the favour of inclusion 'caste' in to 'descent based discrimination'. Nevertheless, the position of NGOs was often opposed by the government of India, and received mixed response from civil society and academicians. Consequently, it divided the entire community (i.e. civil society groups, NGOs and academicians) into different groups. One group supported the equating caste with race and use of international forum. Another group opposed the entire interventions made by Dalit organizations. Moreover, the rest claimed that it is a democratic right of Dalits to address the issue internationally, but this intervention would not gain much (Thorat and Umakant 2004: xxvi). The next section is an overview of various positions taken by Dalit organisations, civil society groups and academicians.

Firstly, it observes the supportive arguments. It was claimed that the involvement of international community would create pressure to prohibit gross violation of human rights. Thus, the pressure would be effective if it attracts the attention of international community towards caste-based discrimination and equates caste with race (Panini 2004: 183). As a result, "...suddenly Dalit activists want to see caste as fragment of race not conceptually, not analytically, not even empirically but legally. Dalits exclaims we know caste and race are different yet treating one like the other might make the difference" (Visvanathan 2004: 251). Moreover, Dalit activists gave number of reasons why this issue of caste discrimination needed to be discussed in WCAR. The first reason, it was an opportunity to show the gross discrimination and practice of untouchability. Where the state fails to protect the human rights of dalits, then

bringing the issue before the international community was the only alternative before dalits (Pinto 2004: 22). Since independence, the Dalits utilised the national mechanism to promote and protect their rights but the pervasive and deep-rooted nature of caste prejudice within the society and its prevalence in all levels of governmental machinery. This was equally supported by the weakening political will to implement these caste discrimination laws (Divakar and Ajai 2004: 19).³

This lack of political will to implement laws worsened the conditions of dalits and therefore the NGOs alleged that the Indian government is putting a curtain on the gross violation of human rights in order to hide its failure (Kaur 2001). So, to draw the attention of international community and promotion and protection of Dalit human rights Dalit activists made an attempt to equate caste with race. It mentioned that, there were many attempts made to include caste in the UN framework, but UN did not recognise the caste discrimination. This happened mainly due to the unfamiliarity of the concept of 'caste' to the European societies. At the same time, the complex nature of caste made it difficult to understand (Thorat 2009: 145). Equating 'caste' with the 'race' may help Europeans and UN to understand the nature of caste and caste discrimination.

Similar justifications were provided on the inclusion of caste-based discrimination into the descent-based discrimination. It was argued that the caste system is a system based on descent. Due to the descent factor the children of Scheduled Castes, Scheduled Tribes and other marginalised communities are compelled to do degrading work and expected to follow the practices of their ascendants (Pinto 2004: 122). It was further elaborated by proclaiming the relationship of caste and race as caste is race or race is caste. Ambrose Pinto observed that:

- 1) In both the caste and race people not only face discrimination, but also compelled to do menial jobs;
- 2) Endogamy is followed in both the systems;
- 3) Social institution is based on hierarchy and stratification;
- 4) Inequality is inter-generationally transmitted in caste and race;

³ It has to be established that there is a correlation between discrimination and the lack of political will of the nation and its people to change their irresponsible, inhuman and anti-national practice and behaviour (Macwan 2001: 35).

- 5) Discrimination and prejudice both are important element of caste and race⁴;
- 6) The attitude of superiority of group existed in caste and race theories ‘that their culture is superior to all other cultures and all other groups should be judged according to their culture’ (Pinto 2004: 122).

Following the comparison, Ambrose Pinto raises pertinent question that, ‘What is the difference in the claims made by the white race in Europe and the upper caste in India? Further, to answer the question the author categorically mentioned that, in both the systems the distribution of society’s resources including power are proportionately large to the pure in comparison to the impure or polluted’. On the basis of these similarities, it is important to note that, the caste system of India is worse than racism, so it demanded international scrutiny (Pinto 2004: 125). The comparison between race and caste identifies that, neither these systems are unique or alone in their social situations and experiences. As Tartakov observed that:

However unique India’s caste system is-in the extreme elaboration and rigidity of its categories, in its extreme development of shunning in “untouchability”, or in its metaphysical explanation of karma-its result was more or less the same social persecution and economic exploitation of Blacks in America, based on supposedly natural mental inferiority (Tartakov 2009: 136).

The concept of ‘casteism’ is not same as ‘racism’ but it appears similar to Article 25 of the Constitution of India which consider Buddhists, Sikhs and Jains as Hindus. “Casteism is not social preference but India’s apartheid” the Durban Conference was not about the inclusion of caste into race it was a fight against these evil practices (Dhavan 2004: 167). Moreover, the similar comparison was drawn between the situation of caste and apartheid. The comparison was mainly done on considering the objective of the Conference discussed earlier. It noted that, it is important to identify caste discrimination at international level. In the era of globalization, there is need for assistance of international community to dissolve caste system, as:

The abolition of apartheid in 1991 did not, of course, immediately result in the transformation of South Africa into an egalitarian society with an equitable

⁴The worse is that such prejudice and discrimination are not merely personal, but institutional, a part of the structure and process of whole society. Basically, a system of institutionalised behaviour, norms, sanctions and vested interests are constituted in both (Pinto 2004: 125).

distribution of resources. But the discrediting and abolition of such a discriminatory system within the South Africa was largely due to international pressure and support (Setalvad 2004: 139).

Undoubtedly, the problem of apartheid received a strong blow from the international community and the same support from it can be expected in the case of caste discrimination. As observed, the inadequacy of the national laws led Dalit organizations to exercise their democratic rights to access the international forum for protection of their rights. Now-a-days international cooperation is an accepted aspect of our political life (Macwan 2004: 38). As Macwan mentions that,

“the areas of cooperation are not just economic and military or combating terrorism but also action on the Universal Declaration of Human Rights. It is an undemocratic and discriminatory practice on the part of the state to deny any section of its society the right to international cooperation for human rights” (Macwan 2004: 38).

The issues like child labour, gender, education, poverty, environment etc. received international attention and assistance. Through international cooperation these issues became an important social issue at national level. Similarly, internationalization of the problem of ‘caste discrimination’ would also yield similar outcomes⁵ (Narang 2004: 210). As argued:

“The Indian government has historically encouraged international participation on a number of other issues such as labour, including child labour in ILO, women, environment, terrorism, WTO and others. Therefore, Dalits felt that by singling out and opposing their democratic and lawful right of participation at the UN forum including WCAR, the Indian government had in fact revealed its discriminatory attitude against the minority community” (Thorat 2009: 155).

This attitude of Indian government encouraged the Dalit organizations to demand for strengthening the laws and introduce changes in the attitude of government agencies. There is a need to introduce changes in the agencies for the better social change as “agency changes, the discourse changes, the levels alter and with it comes the possibility of more effective politics of empowerment” (Visvanathan 2004: 252).

⁵The WCAR will help the virtuous circle to prevail. So allowing discussion on caste discrimination in Conference then we will get the help to locate such a virtuous circle as additional inputs in our efforts for effective elimination of such discrimination (Narang 2004: 210).

Further, on the correlation between caste and race Omvedt observed that, the caste is not based on the race but the justifications of caste discrimination are similar to the racism to allow a racial interpretation of caste (Omvedt 2004: 193). Moreover, if there is similarity up to certain extent in caste and race discrimination the important thing is that, it differs with physical and ideological characteristics (Oommen 2004: 106). Regarding biological concept of race Oommen argued that “race as a biological concept does not have any validity” and further mentioned that,

“Therefore what is relevant is not a race, but racism, that is, the ranking being based on the presumed biological origins and features. Similarly, caste as a social category is constructed on the basis of imagined attributes but casteism, that is preferential treatment to one’s fellow caste men and caste discrimination based on belief that some castes are inferior and others superior are of great significance” (Oommen 2004: 97).

With this understanding the comparison between race and caste came to the understanding of racism and casteism. On the contrary, the different sets of argument have developed on equating caste with race.

Beteille on equating caste with race states that, ‘treating caste as race is politically mischievous and scientifically nonsensical’. In his word,

“Interesting parties within and outside the UN would like to bring caste discrimination in general and the practice of untouchability in particular within the preview of racial discrimination. The practice of untouchability is indeed reprehensible and must be condemned by one and all; but that does not mean that we should now begin to regard it as a form of racial discrimination. The Scheduled Caste of India taken together are no more a race than are the Brahmins taken together. Every social group cannot be regarded as a race simply because we want to protect it against prejudice and discrimination” (Beteille 2004: 51).

While referring to differences between caste and race, it was observed that the caste system is an age old complex system based on multiple hierarchies, as compared to racism that is of recent origin. Race is based on phenotypic criteria and there can be no dispute about where one belongs in the race hierarchy (Radhakrishnan 2004: 60). This exercise to equate caste with race would make it more complex as:

“Once we use the language of race to the caste situation the emphasis shifts from removing the scourge of caste from Indian society to making one’s caste identity a fixed political resource. In which case, quite understandably, castes would tend to be viewed as permanent fixtures and caste identities as political assets. The task would then be not so much to eradicate caste but to give proportionate representation to different castes in educational institutions, in jobs, housing and so on” (Gupta 2001: 82).

Moreover, if UN accepted the view that the caste is same as race, then the social and democratic movement against the caste system has to revise the ideology and organizational objections to the caste system. As well as, the upper caste people will also claim themselves as victims of racial discrimination. It would be an opportunity to upper caste people to re-open the debate on caste based reservation, which ultimately pose the question on constitutional provisions for reservations (Sheth 2004: 88, 92, 94). With this the Muslim and other religious minorities even the linguistic minorities will claim that they are also victims of the racial discrimination and “...this initiative taken by UN is bound to encourage that kind of claims” (Beteille 2004: 52).

The caste system comprises various castes, where every caste has superior position on some other caste as it is based on graded inequality, in this context it can be said that, not only Dalits or untouchables are victims of caste-based discrimination but the ‘other castes or upper castes’ also witnesses the repercussions of the caste system. Nonetheless, it is true that there is a difference as compared to discrimination faced by Dalits and discrimination witness by other castes or upper caste. Addressing only dalits issues through international mechanism would not result in eradication of caste-based discrimination (Radhakrishnan 2004: 60, 61). Though the Durban Conference will discuss on caste issue and it will further include into the UN convention, this inclusion will help to eliminate caste discrimination? UN does have magic wand for this dramatic change (Radhakrishnan 2004: 61). This inclusion will result as a short term achievement as observed:

“In the short term, taking caste to Durban might give some assurance that may have mesmerized Dalits including those who had gone to Durban. But it still does not address the real issue that is..... “what are the ways in which global capital decides the agenda of the state?” the truth that the capital has forced upon all individual states

is the reduction in the state's control over the social sphere. Given this truth, what is the meaning that one can then derive from this vis-à-vis Dalits?" (Guru 2009: 179).

As a result, "Dalits will have to face new kind of social ostracism that would leave them with complete liability rather than an asset. It would lead to the "withering away" of Dalits (as a politically and socially powerful national force), a different kind of "annihilation of Dalits" rather than annihilation of caste as Ambedkar dreamed" (Guru 2009: 179). The complex characteristic of the caste system and its base of graded inequality create difficulties before the national laws or would before the international law, in the process of eradication of caste discrimination. As noted that,

"The caste system is one in which doors to other castes are closed. To open the doors cannot be a decision of just one caste. It has to be a decision by consensus, because the breaking of caste boundaries involves an exit as well an entrance. While one caste may make a decision to exit from its boundaries, entering into boundaries held by others requires their consent. When the most socially and politically powerful castes want to remain enclosed, lower castes' decisions to break open can have little effect. Emancipation lies in destroying caste enclosure from all sides. The international community must help to achieve this by examination and exposure of the ethical foundations underpinning caste-based societies" (E/CN.4/2001/NGO/61).

This optimistic approach towards international laws led to frame the caste into the race boundaries. In other words it is an attempt to interpret caste from the perspective of race. It was mainly done for better understanding of international community, and therefore the Dalit organizations were agreed to consider caste as race, and trying to cover it under western categories. This attempt clearly shows the impact of western world over the international laws. Rather doing this one should try to understand the social discrimination in western countries from the perspective of 'caste' as it would result in positive aspect of comparative sociology (Sheth 2004: 95). But, just to receive the attention of the international community, the caste is equated with race does not provide a sustainable justification. Moreover, this inclusion will create a pressure on Indian government to protect the interest of lower caste was criticized. As observed that:

"...is tacit admission that even as an independent nation India should continue to the 'white man's burden' and continue to have big brother to clean up its Augean stable

(Radhakrishnan 2004: 61). “We are looking for foreign help to fight everything including caste system. We have ceded knowledge advantage to the West on one front after another- beginning with the economic, then flowing on to the political and now we need tips on how to handle cultural discrimination as well. It is not as if one must not learn from western experience that would indeed be stupid” (Gupta 2004: 53, 54).

It has been established practice that, to protect the human rights in Asian countries whether it is child labour, violation of women rights, poverty, education and many more, and now the caste, every time Asian countries has to follow the western practices. It demonstrates the Euro-centricity of international law.

However, the Indian government maintained its position on the introduction of caste discrimination at international forum. On the contrary to the government’s position, the National Human Rights Commission of India (NHRC) adopted a middle path and made a statement at the WCAR in the favour of Dalit NGOs. It was consider as the significant initiative against the caste discrimination. The NHRC’s approach was seen as the strong support for inclusion of caste discrimination at WCAR. Justice K. Ramaswamy as a representative of the NHRC said that:

“The Indian Commission has considered it its duty to listen attentively to those in our country who have been the victims of historical injustices, and who are hurting because of discrimination and inequality. I refer in particular to those who, under our Constitution, comprise the Scheduled Castes and Scheduled Tribes - the Dalits and Adivasis of India - with the protection of whose human rights our Commission is itself deeply involved” (Ramaswamy 2001).

The representative of the NHRC further mentioned that the issue of whether caste is race or similar form of discrimination is not the essence of the matter. The important thing is that it is a form of discrimination. The WCAR is providing an opportunity to the international community to deal openly and courageously with the issues of discrimination in different forms all over the world. Including the form of discrimination persist in India. In this context the important observation was made that,

“...it is not so much the nomenclature of the form of discrimination that must engage our attention, but the fact of its persistence that must cause concern. Given this perception, the Commission is of the view that the debate on whether race and caste are co-terminus, or similar forms of discrimination, is not the essence of the matter. The Constitution of India in Article 15 expressly prohibits discrimination on either ground, and that Constitutional guarantee must be rigorously implemented. In this connection, the Commission believes deeply in the value of engaging Governments, non-governmental organizations, national institutions, and all concerned elements of civil society in the process of fighting discrimination, and urges that this process be conducted at all levels in a spirit that is genuinely interested in the furtherance of human rights, and not vitiated by self-righteousness or by political and other extraneous considerations” (Ramaswamy 2001).

In true sense, the UN should prohibit all forms of discrimination violating basic human rights, rather focusing on the nomenclature of the discrimination. The WCAR was the opportunity for the UN to recognise the various forms of discrimination irrespective of its source of discrimination as well as regardless of whether it is a form of race, colour, caste and social origin⁶ (Thorat 2009: 161).

However, the NGOs role has been criticized on the ground that there was involvement of politics of representation, as it was a “partial claim of representation of Dalit issues may have been necessitated by some pragmatic reasons behind it” (Guru 2009: 180). It was alleged that it was a high profile campaigning confined to certain Dalits from urban areas, mostly the campaign was done through Christian-led NGOs. The absence of common Dalit people shows that there was some hurry to communicate the problem of caste discrimination to the international community without creating an impact on the civil society at home (Guru 2009: 179).

⁶ Thorat argued: “it has to be recognized that the reason for UN accepting the category of “race and colour” is not merely the fact that this category actually exists naturally within the population. It is mainly because the people in the U.S. America and European societies have ascribed and attributed meaning to the physical differences and treated some as inferior and others as superior. Such a treatment, in turn, got translated into the idea that different races are entitled to different rights. Therefore, it is not race but racism which is important (in any case, the recent biological research also tends to disprove differences on the basis of biological race) in the sense that people draw the distinction of ‘high’ and ‘low’ and superior and inferior based on race and colour and subjected them to discrimination and exclusion. Therefore, the central concern with the UN is the act of discrimination involved in race and colour and hence, from the point of view of the UN, what should matter is the practice of discrimination irrespective of the sources of discrimination” (Thorat 2009: 160, 161).

Similar arguments were visible while building the pressure inside the home. The lack of effective implementation of national laws clearly shows insensitivity and irresponsibility of the Indian government towards the problem of caste discrimination. To make the government sensitive and responsible one can use the international mechanism. But simultaneously the pressure should also be created within the country (Radhakrishnan 2004: 61, 62). Raising the problem of caste discrimination before international forum will help the government through providing additional sources to reform the society with the assistance for education. The Constitutional provisions failed to benefit much to the Dalits, similarly this inclusion of caste in the WCAR will not do much. But it is important to emphasis on ‘fault line in India’s governance’ with this the pressure should be on Indian government to answer the world what the State has done with Constitutional provisions to protect the rights of the Dalits (Radhakrishnan 2004: 63).

On the other side Government of India accepted the existence of practice of caste discrimination in the country and mentioned that the issue of caste discrimination is placed at the top of national agenda. The constitutional affirmative action has brought positive difference in the conditions of disadvantaged castes groups. For the upliftment of these groups government is working on removal of poverty and spread of literacy with this it empowered millions of people belong to weaker sections (Abdullah 2001). Moreover, Omar Abdullah the member of the State for External Affairs, while criticizing the NGOs on their stand for inclusion of caste-based discrimination in the agenda of WCAR mentioned that:

“In the run up to the world conference, there has been propaganda, highly exaggerated and misleading often based on anecdotal evidence, regarding caste based discrimination in India”(Abdullah 2001).

The government clearly mentioned that, the issue of caste discrimination is not an appropriate subject for discussion at this conference. Abdullah further observed that,

“We are here to ensure that there is no state-sponsored, institutionalised, discrimination against any individual citizen or groups of citizens. We are here to ensure that states do not condone or encourage regressive social attitudes. We are not here to engage in social engineering within member states. It is neither legitimate nor

feasible nor practical for this World Conference or, for that matter, even the UN to legislate, let alone police, individual behaviour in our societies. The battle has to be fought within our respective societies to change thoughts, processes and attitudes; indeed, the hearts and souls of our peoples. This is the task that we pledge ourselves to remain engaged in” (Abdullah 2001).

Raising caste problem at WCAR was an attempt to dilute the focus of Conference through referring caste as a racial phenomenon. As a result, the issue of caste-based discrimination was not addressed by WCAR and further was not included in the Durban Declaration and Programme of Action adopted by WCAR. There was only one paragraph in the Draft Programme of Action dealing with caste-based discrimination. This paragraph 73 of the Draft Programme of Action made a reference of caste-based discrimination and related forms of discrimination. The paragraph read as follow,

“To ensure that all necessary constitutional, legislative and administrative measures including appropriate form of affirmative action are in place to prohibit and redress discrimination on the basis of work and descent and that such measures are respective and implemented by all states authorities at all levels” (Divakar 2004: 317).

This paragraph was also dropped due to lack of support from the States. It was therefore not included in the final WCAR Programme of Action because of delay tactics employed by the Government of India (Divakar 2004: 317). States took their support off because of extreme pressure not only from India but also from USA (Prove 2002: 322). At the end of the WCAR, no reference was made to the caste-based discrimination in the Durban Declaration and Plan of Action. But it was a step ahead to highlight the issue of caste discrimination at international level. To some extent, it was successful to grab the attention of the international community. These efforts of the NGOs were significant to draw the attention towards the theoretical rejection on equating caste and race and, secondly, on the attempt to internationalize the issue of caste based discrimination (Setalvad 2004: 135).

7.5. Aftermath of Durban

The problem of caste-based discrimination was not addressed at the WCAR. However, the outcome of the WCAR which was laid down in the Durban Declaration and Plan of Action (DDPA) refers the discrimination based on the descent. Though DDPA and WCAR failed to officially include caste into its agenda, the debate on caste-based discrimination reached at the unprecedented level. As a result, various human rights bodies recognize the practice of caste-based discrimination. Specifically, the CERD interpreted the term ‘descent based discrimination’ and included caste-based discrimination under the descent based discrimination. This initiative was subsequently followed by the other human rights treaty bodies.

Just after one year of WCAR, in 2002, the interpretation of CERD came in the form of General Recommendation 29. The interpretation was further cited by the NGOs and claimed that the DDPA deals with the prohibition descent-based discrimination, which means it indirectly deals with problem of caste-based discrimination. With this claim, once again the problem of caste was tabled before the Durban Review Conference.

The Durban Review Conference was the follow-up programme of the WCAR. It was organized to evaluate the progress of the goals set by the WCAR. At the Durban Review Conference, Dalit NGOs made the same claim, however, at this time they urged for the recognition and prohibition of work and descent based discrimination. Some of the recommendation made by International Dalit Solidatory Network (IDSN) and National Campaign on Dalit Human Rights (NCDHR) are discussed below,

1. Discrimination based on work and descent should be recognized as an expression of contemporary manifestations of racial discrimination under the existing DDPA;
2. Persons affected by this form of discrimination, including the degrading practice of “untouchability”, should be explicitly acknowledged as having been subjected to perennial and persistent forms of discrimination and abuse on this basis;
3. The Review Conference should include a reference to CERD General Recommendation No. 29, thereby affirming the Committee’s interpretation of

“descent” in article 1(1) of the ICERD, and should recommend this framework as a basis for framing national government policies in affected countries;

4. The Review Conference should tackle the causes and consequences of this kind of discrimination and must regret the continued lack of political will in countries with the most ingrained caste systems;

5. All States Parties should have National Plan of Action to implement the DDPA, and its implementation should be ensured by special monitoring mechanisms involving the rights holders to ensure accountability and transparency;

6. The Durban Review Conference should recommend follow-up on the work that the former Sub-commission had carried out on discrimination based on work and descent, in particular the draft principles and guidelines for the effective elimination of this form of discrimination, and promote the use of this framework.

7. Discrimination against Dalit women and children should be recognized as falling under the consideration of multiple forms of discrimination and corrective measures should be initiated at all levels accordingly in all affected countries;

8. Disaggregated data should be made available on the number of people affected by caste or descent based discrimination in all affected countries;

9. All UN agencies and other international agencies should ensure adequate focus on the issues of social equity and education with special emphasis on unique features of discrimination and exclusion, due to prevalence of this form of discrimination.⁷

However, the DDPA and Durban Review Conference remain silent on the issue of caste-based discrimination. The human rights bodies played a significant role in recognizing the problem of caste based discrimination. As a result, the UN terminology of ‘caste-based discrimination’ i.e. ‘descent-based discrimination’ receives comprehensive legal framework. Though the legal framework ‘draft UN Principles and Guidelines for the Effective Elimination of Discrimination based on Work and Descent’ is a soft law, it is an outcome of the prolonged battle.

⁷The recommendations made by the NGOs in the position paper are available at <http://idsn.org/un-2/un-documentation/un-d-durban-review-conference/>

Further, these guidelines were promoted by the resolution passed by the European Parliament. In 2013, the European Parliament adopted the resolution on caste-based discrimination. It urged the caste practicing countries to comply with the international human rights laws and the draft 'UN Principles and Guidelines for the Effective Elimination of Discrimination based on work and Descent' (2013/2676(RSP)). Following the EU, U.S. introduced the resolution in the U.S. House of Representatives "Condemning Dalit untouchability, the practice of birth-descent discrimination against Dalit people, which is widely practiced in India, Nepal, the Asian diaspora, and other South Asian nations, and calling on these countries to recognize the human rights of the Dalit people and end of all forms of untouchability within their borders" (H.Res.158).

7.6. Conclusion

The internationalization of caste the question began in 1930. The intentions behind using the international platform was to highlight the degrading situation of Dalits and to create international pressure on the State governments to introduce adequate laws and measures on the prohibition of caste-based discrimination and ensure effective implementation of these laws. It was thought that it would encourage the caste-practicing States to reconsider their policies and position on the caste based discrimination. In the whole process, all Dalit NGOs and Dalit organizations and civil society played a very important role. However, the influence of the West over international law is extensive. To voice at international level the concerns of the marginalized communities have to accept the terminology given by the majority. Indeed, it is a failure on the part of the UN and international human rights law mechanism to limit its boundaries. The UN should promote caste-based discrimination as a form of discrimination as per the definition of discrimination given by it (Thorat 2009: 161). It must be explicitly recognised as a form of discrimination rather inserting it into other forms of discrimination.

In the whole debate the role played by the Indian government suggested that it was insensitive toward the caste-based discrimination and failed to protect human rights. NGOs tried to prove the failure of Indian government before the international community. However, if we consider the impact of caste system, over the Indian

society and its age old practice as well as the historical development of Indian society, then it shows there is not a total failure of the government. While making allegations NGOs also have the responsibility to help in social reforms. The role of NGOs in social reforms and consequences of their activities however needs further clarification.

CHAPTER 8

CONCLUSIONS AND RECOMMENDATIONS

Human worth and dignity is the bedrock of human rights, which the United Nations strives to achieve mainly to overcome inequality. UN Third Committee Report proclaims that the UN principal aim is to combat discrimination in the world. International human rights law has developed the multidimensional relationship with the principle of equality and non-discrimination. Various international human rights conventions prohibit different forms of discrimination. On the other hand, the caste discrimination is the antithesis to the idea of equal worth and dignity of all individuals. Since time immemorial, the caste-rules exist in South Asia. It is justified on the basis of an intrinsic element of the universe that emerged with human evolution. Any deviation from caste norms is viewed as the sacred violation with no possible penance. The basis of the caste has however been contested for over centuries.

There are various theories on the origin of caste system such as racial theory, occupational theory, political theory, evolution theory, religious theory and traditional theory. These theories are highly complex and often overlap. However, certain common attributes of caste system can be traced from the above theories. Firstly, it reveals the complexity of the social structure, which is based on the *Chaturvarna* system. The four Varnas i.e. Brahmin (the priests), Kshatriyas (soldiers), Vaishyas (traders) and Shudras (menials) placed in the hierarchical order. Later, the fifth category i.e. untouchables, who were outcaste to the Varna system, were added. Secondly, in the *Chaturvarna* system every Varna governed through separate rules and regulations. Further, each Varna is divided into a number of castes and sub-castes. Overall, these castes and sub-castes are based on graded inequality between them. Each one of these sub-castes has its separate rules and regulations. These rules are strictly observed as a divine order.

In the beginning, these rules derived its source from the divine and sacred literature, which gives religious sanction to the caste system. Further, throughout the evolution of caste system these rules became the customs, usages and traditions. These customs, usages and traditions are deeply embedded in the society. They became social practices and eventually received social sanction. Moreover, the practice of these customs, usages and tradition became so intrinsic that the caste system transgresses the religious boundaries. It can be seen that the existence of the caste system prevails among other religious groups of South Asia such as Muslims, Buddhists, and Christians. It can be said that though it has begun with the particular religion but its practice is evident across South Asia without having any religious dogmas. In other words, the caste system breaks the religious shackles and derives other sources for existence such as social and legal sanctions.

Legal sanction to the caste system played an important role in the prevalence of caste system. The customs and usages are interpreted and dictated by the Brahmins. Further, Manu codified these practices in the *Manusmriti*. In this rule book, all castes and sub-castes have certain rights and duties. The rights and duties varies with the castes to which an individual is born. The top-most/upper castes have many rights and privileges and few obligations. In contrast, the lower castes entrusted with fewer rights but more obligations. This unequal distribution of rights and duties are equally applicable to women and children. In fact, the lower caste women and children are at the worse end of the caste system. Such inequality in rights and duties attached to the caste generates severe form of discrimination. It is an ascending order of reverence and descending order of contempt as rightly said by Ambedkar.

According to the Manu Code, any violation of these duties attracted severe punishments. Moreover, it did not ensure any rewards to the lower castes on the performance of caste duties. It was the sole discretion of the upper castes whether to reward the lower castes or not. The influence of *Manusmriti* was not merely limited to India, the Nepal's new code viz., *Muluki Ain* of 1854 legalized the caste system. The Nepal code was mainly based on the *Manusmiriti*. With all these codifications of the practices, the caste system receives

the legal sanction to it. In sum, all these sanctions i.e. religious, social and legal sanctions rendered the caste system as a formidable force.

Since ages attempts have been made to challenge the practice of caste system. In India, various movements took place to deter the caste system beginning from the period of Buddha to Bhakti movement to present times. However, as Ambedkar noted that the removal of one sanction could not prohibit the practice of caste discrimination. Ambedkar mentioned that the removal of legal sanction of the caste system by the Britishers' in India did not overcome caste as it did not attack the social sanctions behind the caste system. For instance, British India introduced the Indian Caste Disabilities Removal Act 1850 among others to prohibit the practice of untouchability and caste discrimination, but no significant headway was made. However, the Britishers' establishment of legal system in colonial India was viewed as a challenge to the traditional caste system.

After independence, the adoption of the Constitution of India ruptured all the caste barriers and introduced equality before law and equal protection of law. It ensured one person, one value. Apart from the equality provisions, it also incorporated provisions for the abolition of untouchability and prohibition of caste discrimination. Later, a separate legislation i.e. the Prevention of Atrocity Act 1989 was introduced to prohibit caste atrocities committed against the members of the Scheduled Castes and Scheduled Tribes. The Act prohibits various forms of atrocities with the definitional clause of atrocities still evolving. Similarly, various other laws were introduced to prohibit caste discrimination that includes – Protection of Civil Rights Act 1955, Bonded Labour (System) Abolition Act 1976, Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993 and the Prohibition of Employment as Manual Scavengers and their Rehabilitation Act 2013.

The above laws widened the scope of anti-caste discrimination laws. But the caste-rules have the ability to transform and re-exist in the form of new rules. In other words, the practice of caste discrimination moulds itself and adopts new methods of discrimination. This is evident from the discrimination faced by Dalits at the workplace, educational institutions, marriage among others. Moreover, social boycott and honor killings are yet

to receive a stringent legal approach. In fact, caste discrimination affects many aspects of social life that remained untouched. For instance, the existence of the caste discrimination among the upper castes and among the Scheduled Castes has not received adequate attention.

Besides, the existing Indian laws on the prohibition of caste discrimination face definitional and operational challenges. For instance, the Protection of Civil Rights Act 1955 prohibits practice of untouchability, but the use of the Act is limited. In terms of definitional challenge, the 1955 Act fails to provide precise definition of the “untouchability”. From the operational perspective, the Act does not receive effective implementation due to the unwillingness of the implementing authorities. At the same time, the less awareness about the laws results into poor implementation. Moreover, the legal dichotomy between private and public laws is also equally responsible. In this regard, Galanter has mentioned that the personal laws are intact with the caste system. The lenient approach of the Indian government towards these laws reinforces the existence of the caste discrimination. Galanter argues that on one hand India prohibits practice of caste discrimination through constitutional provisions, but on the other hand, it permits personal laws to regulate matters relating to marriage, property, etc. which creates dichotomy. In other words, caste rules are prohibited from regulating the public relations, but it prevails in private life. Therefore, the overall eradication of caste discrimination requires introduction of the awareness programme and education.

Apart from India, caste discrimination is also a reality of South Asian States such as Nepal, Pakistan, Bangladesh, and Sri Lanka. Further, the South Asian diaspora carries discriminatory caste practices to other nations. Though, the Constitution of Pakistan, Bangladesh, and Sri Lanka prohibits the caste discrimination, none of them has introduced a separate law on the prohibition of caste discrimination. These States in defence argues that their State religion does not allow discrimination and hence deny the existence of caste system in their country. Although the cultural and traditional practice are intermixed since time immemorial. However, both Bangladesh and Pakistan claim that being an Islamic State it does not follow the Hindu notion of caste. This ignorance

about the practice of caste discrimination is evident from the inadequate legal mechanisms that are in existence in these States. A new legal regime is required to oppose caste discrimination. On the contrary, in 2011 Nepal passed the Act on the prohibition of untouchability and caste discrimination. It is an outcome of the international interventions.

Similarly, the intervention of the international community in the form of treaty bodies recommended UK government to address the problem of caste discrimination practice by the South Asian diaspora. In this regard, the UK government has taken a serious consideration of the caste discrimination practice among the South Asian diaspora. It has accepted the existence of the practice of caste discrimination in the diaspora. It considered caste as one of aspect of the race, and accordingly introduced measures to prohibit caste discrimination in the Equality Act 2010. However, to initiate the provision of the Equality Act it has to introduce the secondary legislation. The proposal of a secondary legislation has received strong opposition from the upper caste groups on the ground of non-existence of caste discrimination and interference in the religious affairs. As a result, the secondary legislation is yet to be introduced. Nevertheless, in March 2017 UK government began the consultation process on whether there should be separate laws on prohibition of caste discrimination or whether legal protection against caste is best to be ensured by developing case laws under the Equality Act. Overall, the caste discrimination among South Asian diaspora is yet to be prohibited with stringent legal mechanism.

It appears that most of the national laws fall short of eliminating the practice of caste discrimination. Moreover, the existing laws against the caste discrimination are not implemented in its true spirit. The non-implementation is mainly an outcome of caste prejudices and caste notions. As the implementing authorities carry the baggage of caste prejudices. It ultimately results in the prevalence of the caste discrimination. The attitude of the judiciary is also a matter of concern. As a result, caste discrimination can be witnessed in both society and state institutions.

These lacunas necessitate the attention of the international community to address the practice of caste discrimination. However, similar to the national laws the international human rights law also faces definitional and operational challenges. Firstly, at the definitional level, various international human rights conventions prohibit one or other forms of discrimination such as UN Charter, UDHR, ICCPR, ICESCR, CRC, CEDAW, ICERD among others. Nevertheless, none of the convention provides precise and universal definition of discrimination. Moreover, the grounds of discrimination vary with the conventions. Further, the limited understanding of discrimination restricted the United Nations from focusing on other forms of discrimination. The UN had always rendered special attention to the racial discrimination. As a result, it framed the ICERD. It is mainly due to the active role played by the critical race approach and Third World. On the contrary, it was argued that the formation of UN is mainly to prohibit the discriminatory practices in the world. However, the counter studies show that in drafting of the UDHR and UN Charter only discriminatory practices of South Africa and United States were considered.

Moreover, the Third World approach did not address the problem of caste discrimination. It failed to distinguish between caste, apartheid and racial discrimination. As a result, the problem of marginalised among the marginalize did not receive due attention. One of the reasons as noted by Burra is the less representation of lower castes people in the Third World approach. Apart from the failure of the Third World approach the role played by India is significant. India was the first country who raised the problem of racial discrimination at the UN. Indian delegation supported the inclusion of racial discrimination as it was prominently practiced against the upper caste Indians in South Africa. However, on the inclusion of caste discrimination it has contradictory opinion since beginning.

India's relationship with the UN on caste discrimination began during the framework of UDHR. This can be referred as the first wave for inclusion of caste discrimination in the international human rights law. During the framing of UDHR, Ambedkar was desperate to include caste discrimination in it and he even prepared draft proposal on the plights of

untouchables, but never submitted it to UN. He adopted a policy of wait and watch as the Constituent Assembly of India was in the process of framing a constitution. At the same time, the Indian delegation to the UN found term 'other status' and 'social origin' sufficiently broad enough to include "caste". Therefore, the delegation did not insist on inclusion of 'caste' as a ground of discrimination in the UDHR. Later, India did not substantially extend efforts to table the problem of caste discrimination before UN hence the caste discrimination remained unheard. Ultimately, the problem of caste remained outside the realm of international human rights law.

The second wave of the internationalization of caste began in 1990s. It all began with the CERD's observation in 1996, calling upon the Indian government to address the situations of the Scheduled Castes and Scheduled Tribes who continued to be the victims of caste discrimination. India rejected the contention of the CERD. It argued that caste discrimination did not fall under the purview of ICERD. As the title of the ICERD suggest that it limits itself only to the racial discrimination. Moreover, Article 1 of the ICERD defines 'racial discrimination' and not the 'discrimination' in general. After examining these contradictions, the Human Rights Committee (HRC) noted the absence of precise definition of the term 'discrimination' under the UN treaties. Nevertheless, it laid down certain components of discrimination as "any distinction, exclusion, restriction or preference.... which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms" (General Comment 18). It clearly mentioned that discrimination could be based on any grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

On the other hand, CERD considered the issue of caste discrimination to be under its purview on the ground of descent. It interpreted the term 'descent-based discrimination' to include caste based discrimination. This interpretation attempted to characterize caste discrimination on the ground of inclusion of the word 'descent', but it failed to make a distinction between caste and descent. The word 'descent' exists alongside 'caste' under the Constitution of India. Consistently, the CERD reaffirmed its position and considered

caste as a form of racial discrimination. It has therefore recommended the State parties to take necessary measures to prohibit caste-based discrimination. On the contrary, India continuously opposed the interpretation and applicability of the ICERD to Caste discrimination. But this contestation between India and CERD did not include any discussion of viable solutions to the elimination of caste discrimination.

As a concrete solution, the UN should define the term discrimination inclusively i.e. it should include all forms of discrimination. But the international community with its eurocentric approach had restricted ICERD to the racial discrimination and intended to include all other forms of discrimination within the term racial discrimination. However, a distinct provision i.e. Article 3 of the ICERD was introduced against the South African apartheid and not dealt under the single term of racial discrimination. The international community did not have any objections for the inclusion of this distinct provision, as they believed that apartheid is a State policy which need to be severely condemned. On the contrary, it failed to address the caste rules. This eurocentric approach of the international community was limited and at the cost of the cause of Dalits who are broken people and voiceless minority.

Secondly, the operational perspective of international human rights law appears significant. Beside the recognition of caste-based discrimination as a form of discrimination, the performance of the international human rights law mechanisms is also crucial. The emergence of international human rights institutions i.e. the monitoring bodies are primarily meant to provide some effectiveness to the human rights. There are thus both Charter based bodies and treaty based bodies. Charter based bodies include the Human Rights Council and Special Procedure provides monitoring system such as Universal Periodic Review (UPR) and Special Rapporteurs for the implementation of human rights. The treaty based bodies i.e. Human Rights Committee (HRC) examines the violation of civil and political rights in the practice of caste system. Similarly, the 'Committee on Economic, Social and Cultural Rights' (CESCR) observed that, the economic, social and cultural factors play an important role in the existence of caste discrimination. Further, the 'Committee on the Elimination of the Discrimination against

Women' (CEDAW) highlighted the plight of Dalit women who faced severe and multiple intersecting discriminations. At the same time, according to the 'Committee on Child Rights' (CRC) the Dalit children also face enormous discrimination. It observed that the Dalit children are victims of striking disparities in the access to education and opportunity between children belonging to different castes. Moreover, the 'Committee on the Elimination of Racial Discrimination' (CERD) has considered caste from the perspective of racial discrimination.

In the context of this thesis, the concluding observations of the human right bodies are significant as these bodies recommend the State parties to prohibit caste-based discrimination. However, the observations are mere recommendations without any binding force. The treaty bodies are established merely to monitor the implementation of the respective conventions. Moreover, the State parties to the Conventions although have an obligation to submit their report within stipulated period, but considerable delay is committed in the submission of the report and it is a common practice among all State parties. Similar to the delay in submission, the State parties did not seriously follow the recommendations.

The State parties argue that they have sufficient laws to prohibit caste discrimination. However, the implementation of these laws at the State level leaves much to be desired. In other words, the implementing mechanisms at the State and international levels face many challenges. At the State level, it is consistently argued by the State parties that the elimination of age-old practice of caste needs considerable time to change the mindset of the people. This approach in the final analysis justifies the prevailing inefficient national mechanisms. On the other hand, the effective functioning of the international human rights bodies depends on the effective performance of the State's national mechanisms. Any failure of the national mechanisms affects the human rights.

In order to secure the effective functioning of international mechanisms there is a need to generate international pressures through curtailment of commercial activities or diplomatic relations with the State parties who failed to make genuine efforts, as was done in the instance of apartheid. The State parties should be constantly made answerable

to the international community. Moreover, the international human right bodies could provide technical and financial assistance to the caste practicing States for creating awareness among the people through education. The implementing mechanisms of the national laws and the international human rights laws need to work in tandem to deal with caste prejudices.

In making an effective link between the international and national mechanisms, the role of the non-governmental organisation (NGOs) has been significant. Since the beginning of the twenty-first century the NGOs have played a vital role in the internationalisation of caste. They raised the problem of caste-based discrimination at the 'World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance' in 2001. This initiative of the NGOs ultimately gave wider outreach to the caste-based discrimination debate at the international level. NGOs were also completely against the approach adopted by India which objected to the internationalization of caste discrimination. In the whole debate, the role played by Indian government showed that it was insensitive toward the caste-based discrimination and failed to protect human rights. NGOs demonstrated the failure of Indian government before the international community.

Overall, the members of the lower castes in South Asian States in general and India in particular face immense discrimination. This poses a serious challenge to the human rights enshrined in the the international human rights law, and to its monitoring mechanisms. One way forward is for the UN to expressly recognise caste as a form of discrimination and recommend States to introduce stringent laws against the caste discrimination. Further, the international community and nation states should adopt a collaborative approach to overcome caste discrimination. They should actively create awareness in the society against caste discrimination.

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