

**CASTE IN INTERNATIONAL LAW:
A PRELIMINARY STUDY**

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fulfilment of the requirements for the award of the Degree of*

MASTER OF PHILOSOPHY

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DECLARATION

I declare that the dissertation entitled "CASTE IN INTERNATIONAL LAW: A PRELIMINARY STUDY" submitted by me for the award of the degree of MASTER OF PHILOSOPHY of Jawaharlal Nehru University is my original work. This dissertation has not been previously published or submitted for any other degree of this University or any other university.

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We recommend that this dissertation be placed before the examiners for evaluation.

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To

My Grandmother and my parents

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Purva Raghunath Kartik

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
ICESCR:	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
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

CONTENTS

ACKNOWLEDGEMENT	i
ABBREVIATIONS	ii-iii
CHAPTER 1- INTRODUCTION	1-10
1.1. Caste System	2
1.2. Caste in International Human Rights Law	5
1.3. Objective of the Study	8
1.4. Research Questions	8
1.5. Hypotheses	8
1.6. Research Methodology	9
CHAPTER 2- INDIAN NATIONAL LAWS AND UNITED KINGDOM LAW	11-30
2.1. Introduction	11
2.2. Indian Laws	12
2.2.1. Constitution of India	12
2.2.2. Untouchability (Offence) Act, 1955	14
2.2.3. Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989	16
2.2.4. The Bonded Labour System (Abolition) Act, 1976	19

2.2.5. Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993	19
2.2.6. Report of National Human Rights Commission	24
2.3. UK Law on Prohibition of Caste Discrimination	26
2.3.1. Background	27
2.3.2. Report of National Institute of Economic and Social Research (NIESR)	29

CHAPTER 3- CASTE IN INTERNATIONAL HUMAN RIGHTS LAW 31-56

3.1. Introduction	31
3.1.1 General understanding of treaty bodies	32
3.2. International Human Rights Conventions	33
3.2.1. Universal Declaration of Human Rights, 1948	33
3.2.2. Two Covenants and ILO	34
3.2.3. International Convention on the Elimination of All Forms of Discrimination against Women 1979	35
3.2.4. Convention on Rights of the Child, 1989	36
3.3. International Convention on the Elimination of All Forms of Racial Discrimination, 1965	38
3.3.1. Thematic Discussion for General Recommendation	42
3.4. Constitutional Assembly Debates of India	48

CHAPTER 4- DURBAN AND AFTERMATH 57-74

4.1. Introduction	57
4.2. World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance 2001	57

4.2.1. Preparatory Meetings	59
4.2.2. Bellagio Consultation on UN World Conference Against Racism	59
4.2.3. 1 st World Conference Preparatory Committee Meeting	59
4.2.4. Declaration of the Asia Pacific NGO Forum	60
4.2.5. Asian Legal Resource Centre (ALRC)	61
4.2.6. The Global Conference against Racism and Caste-based Discrimination	62
4.2.7. The Declaration of NGO Forum	63
CHAPTER 5- CONCLUSION	75-80
REFERENCES	81-90

CHAPTER 1

INTRODUCTION

The formation of United Nations (UN) anticipated promotion and protection of human rights with international cooperation¹ (Article 1(3)). It prohibits distinction on the ground of race, sex, language or religion. UN charter reaffirmed its -

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:

- a) higher standards of living, full employment, and conditions of economic and social progress and development (Article 55 (a));
- b) solutions of international economic, social, health, and related problems; and inter- national cultural and educational cooperation (Article 55 (b)); and
- c) 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)).

In other words, UN Charter focuses on two areas; one, state-state relations i.e. to maintain peaceful and just relations among the states and second, state-individual relations i.e. respective state to guarantee human rights to its citizens eliminating all forms of discrimination.

All democratic States are bound to provide basic human rights including right to freedom of speech, expression, association, assembly, etc. While providing these rights the major challenge before democracy is to maintain balance between majority rule and rights of the minorities. Most of the social systems practice inequality in one form or the other. The legal system attempts to eliminate such inequality and strives to maintain egalitarian society. However, there exists discrimination on the basis of

¹ Article 1(3) of the UN Charter "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".

religion, race, sex, descent, etc. hampering human development. Among the various forms of discrimination ‘caste discrimination’ has been considered as the oldest form of discrimination practiced in Asian countries, mainly India, Pakistan, Nepal, Sri Lanka and Bangladesh. As a result, with Asian diaspora it has travelled to other parts of the world.

1.1 Caste system

The caste system has existed in India since time immemorial, denying all basic human rights to untouchables. The age old practice of caste discrimination draws its source from Vedas. It is based on hierarchal system of Chaturvarnya, which divided society into four classes namely, *Brahmins (Priests)*, *Kshatriyas (soldiers)*, *Vaishyas (traders)* and *Shudras (menials)*. Later on a fifth class *Untouchable* was added. Initially, within this class system individuals had the liberty to shift their class on acquiring requisite qualification, which was subsequently restricted. As, Dr. B. R. Ambedkar observed:

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.

So, there existed a scope for every individual to shift its 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 classes². As a result, these classes were turned into ‘caste’ and ‘sub-caste’ through imitation and excommunication; it formed a social system based on graded inequality³ (Ambedkar 1916). Shudras and Untouchables were placed at the bottom of the system, deprived from 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

² The superimposition of endogamy on exogamy means the creation of caste (Ambedkar 1916: 246).

³ Dr. B. R. 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 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).

were traditionally prohibited from engaging in agriculture. In addition, they were denied access to water, education, land, markets and employment. Moreover, the concept of pollution was also attached with untouchables. The untouchable was equated with polluter, a sign of impurity, its touch or shadow would pollute upper castes. This whole practice had religious sanction derived from Vedas, which forms the sacred books of Hindu religion (Ambedkar 1989:102). And due to religious and social sanction untouchability is still practiced in India.

It is difficult to precisely define caste system. As Indian society in its historical perspective was never racially integrated; it was a complex entity of Aryan, Dravidian, Mongolian and Scythian races (Purane 2000: 19). Many efforts were made by various authors to define, characterize and explain the caste system. After immense study of caste system Dr. B. R. Ambedkar concluded that,

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 understood⁴ (Ambedkar1916:245).

The caste system based on structural inequalities, where untouchables are isolated and excluded from participating in social, political and economic process and development of the society (Sarkin and Koenig 2010: 542). In social perspective caste system was based on hierarchical nature. 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, caste system is based on social inequality and mutually ranked within a single hierarchy (Louis 2003:21). While explaining practice of caste discrimination Thorat mentioned:

“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).

⁴ Dr. B.R. Ambedkar further observed, ‘endogamy is the only characteristic of caste and when I say origin of caste I mean the origin of mechanism for endogamy’ (Ambedkar 1916: 252).

This practice of caste system generated worst form of discrimination against Shudra and untouchables. As a result, they experienced discrimination in every quarter of life, the dignified life of Shudra and untouchables were completely ruled out. The post-constitutional era introduced revolutionary measures ensuring equality in all spheres. The Constitution of India abolished 'untouchability' and the State is under constitutional obligation to protect people from all forms of discrimination by enacting protective laws. It vowed to establish egalitarian society with equal status and equal opportunities to all irrespective of any kind of discrimination. It ensured justice, equality and fraternity to all for the first time in the history of India. The legal system has responded to discrimination with preventive and curative approaches, with an objective to attain social justice and equality (Bhat 2009:513). As a result in 1989 the Scheduled Caste and Scheduled Tribes (Prevention and Atrocities) Act was enacted to prevent and punish state and private actors committing atrocities. Under this Act provisions were made to establish special courts to resolving atrocity cases along with the rehabilitation of the victims. Similarly, various other legislative enactments such as Protection of Civil Rights Act (1955) and rules 1977; Bonded Labour (system) Abolition Act, 1976; Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993; Devadasi system Abolition Act in the states of Andhra Pradesh, Maharashtra and Karnataka; Child Labour (Prohibition and Regulation) Act, 1986; Minimum Wages Act, 1948 and Equal Remuneration Act, 1976 were passed. However, everyday the untouchables are subjected to atrocities, isolation and discrimination. Dalits are often victims of police abuses and discrimination by executive and judiciary (Narula 1999). Many laws lack credibility as they are not effectively implemented. Despite all these enactments the Indian government failed to generate political will to prohibit caste discrimination (Sarkin and Koenig 2010). This failure and unwillingness to implement the laws in effective manner results in gross violation of human rights and invites attention of the international community. This intervention has generated enormous debate on inclusion of 'caste' as a form of discrimination in international law within and outside India.

1.2. Caste in International Human Rights Law

UN introduced various international human rights conventions to protect and regulate human rights. All state signatories to the conventions must ensure that national laws act in accordance with international human rights laws. It gives scope to an individual to seek international mechanism on the failure of national laws. Article 1 of Universal Declaration of Human Rights, 1948 states that,

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in spirit of brotherhood.

UN through various conventions strived to maintain human dignity, which could be achieved through the spirit of brotherhood. Discrimination of any form hampers human development and ultimately the peace round the globe. Taking this into consideration these outcomes, the Universal Declaration of Human Rights, 1948 recognized the grounds of discrimination, 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 (Article 2). Beside this fundamental text, which internationally recognized for the first time various human rights, there are two covenants namely, the International Covenant on Civil and Political Rights, 1966 which prescribes equal protection of law to all people without any discrimination (Article 26) and the International Covenant on Economic, Social and Cultural Rights, 1966 assigned every individual the right to gain his/her living by work which he/she freely chooses or accepts (Article 6, Para 1). Beside these two covenants, Article 1(1) of the International Convention on Elimination of All Forms of Racial Discrimination (ICERD), 1965 determines five grounds for 'racial discrimination' such as race, colour, descent, or national or ethnic origin to prohibit the discrimination. At the same time, the principle of non-discrimination is the basis of labour standard established in International Labour Organization (ILO). 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)). Overall nearly, every discriminatory practice has been sought to be excluded for the fullest enjoyment of human rights.

But neither the Universal Declaration of Human Rights nor the two International Covenants with other conventions explicitly recognize 'caste discrimination' as a form of discrimination. However, at the 'World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (WCAR)' 2001 various Dalit international organisations and NGOs like International Dalit Solidarity Network placed the issue of caste discrimination before WCAR for its adequate representation as a form of discrimination. This intervention invites debate on caste is race or race is caste. The Indian government opposed the inclusion of caste discrimination as a form of 'racial' discrimination. It argued that the problem of caste is a local problem of India and various laws and government schemes are in place at national level to protect the rights of the Dalits from discrimination and to promote their welfare and socio-economic development. Therefore there was no need to utilize international human rights mechanisms and bodies for this purpose. The government also argued that, 'caste discrimination' in India is outside the purview of the Article 1(1) of the International Convention on Elimination of All Forms of Discrimination, as caste is not a race. However, the 'Committee on Elimination of Racial Discrimination (CERD)' in its 'Concluding Observation' stated that the term 'descent' contain in Article 1 of the Convention does not refer solely to race. It encompasses the situations of scheduled caste and tribes, and affirms that "the situation of Scheduled Caste and Scheduled Tribes fall within the scope of the Convention.'

However in the fourteenth periodic reports to the Committee on the Elimination of Racial Discrimination (CERD/C/299/Add.3) (1996) India had noted that 'caste' denotes social and class distinction and is not a race. On the other hand the term 'descent' used in Article 1 of the Convention clearly referred to race. The communities which fall under the definition of Schedule caste and Schedule tribes are unique to Indian society and therefore do not come under the purview of Article 1 of the Convention. However, in the concluding observations CERD stated that the term 'descent' does not solely refer to race and it affirmed that the situation of the Scheduled Caste and Scheduled Tribes falls within the scope of the Convention (CERD/C/304/Add.13). In response to the concluding observation of the CERD India reiterates its position that 'caste' cannot be equated with 'race' or covered under 'descent'. India argued 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). After taking note of the Indian position the Committee maintained its position in General Recommendation No. XXIX as 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 Committee reaffirmed that discrimination based on caste is fully covered by Article 1 of the Convention (CERD/C/IND/CO/19).

Now-a-days other countries too are witnessing the problem of caste discrimination, among the Indian diaspora. As Dr. B. R. Ambedkar anticipated, the Indian migrants will carry the caste system to other regions of earth and it would become a problem of the world. Caste discrimination has indeed migrated with the Indian diaspora to East and South Africa, Mauritius, Fiji, Surinam, the Middle East (for example in *Bahrain*, *Kuwait*, the *United Arab Emirates*), Malaysia, the Caribbean, the United Kingdom, North America, and other regions.

The government of UK has accepted the existence of caste discrimination after the study carried out by the National Institute of Economic and Social Research (NIESR) in 2010. As a result the UK government agreed to amend section 9 (5) (a) of the Equality Act, 2010 to include caste discrimination. This is a step towards eradication of caste discrimination in the Asian diaspora. But the Government of UK has yet to take a final decision to trigger the power to introduce secondary legislation in the Equality Act that would make caste discrimination illegal.

Further, the overall population of dalits (who are victims of caste discrimination) approximately comprises twenty four percent of the total Indian population and it is around twenty-five crores, half of the population of England. Ironically their victimization on the basis of caste remains unaddressed in express terms at the international fora. Therefore there is a need to study various international human rights laws from the perspective of ‘caste’ as a form of discrimination.

1.3. Objective of the Study

‘Caste discrimination’ is one of the oldest and gravest forms of discrimination in India. It is still in existence due to social and religious sanctions and the inability of the Indian government to completely eliminate it from the society. The failure of Indian government led to the international community’s intervention. The present study will consider whether the inclusion of caste discrimination in international law discourse will help to eliminate caste discrimination. The present study will focus on core issues involved in inclusion of caste discrimination in international law. It will analyze the national and international legislations concerning prohibition of caste discrimination and its effectiveness in dealing with problem. In keeping with the concluding observance of CERD that caste discrimination is covered under descent based discrimination, the study will examine whether caste is a form of descent-based discrimination or not.

1.4. Research Questions

- What are the international human rights treaties that deal with caste discrimination?
- Is caste discrimination covered under the phrase descent-based discrimination in ICERD?
- What are the recommendations and views of the CERD?
- What remedies can international law provide to eliminate caste discrimination?

1.5. Hypotheses

- Caste discrimination is a form of descent based discrimination.
- International law and institutions can help to eliminate caste-based discrimination.

1.6. Research Methodology

The study will follow various methods, approaches, tools, techniques for collecting and analyzing the relevant materials. For this purpose, the study will depend on primary and secondary source materials. The study will use the official documents of United Nations, including resolutions of its various organs and international conventions. The secondary sources of literature will include books, articles from various national, international legal journals, news paper clippings, other reports of research institutes and internet sources.

With the objective of the study the dissertation is divided into further four chapters.

The next chapter examines various Indian laws concerning prohibition of caste discrimination including ‘Untouchability (Offences) Act, 1955’; ‘Protection of Civil Rights Act, 1976’; ‘Scheduled Caste and Scheduled Tribes (Prevention of Atrocities), 1989’; ‘Bonded Labour System (Abolition) Act, 1976’; ‘Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993’. Beside it also focuses on the key Supreme Court judgments on practice of caste discrimination. It further highlights certain provision of the United Kingdom (UK) law namely, ‘Equality Act, 2010’ on prohibition of caste discrimination.

Chapter 3 traces the various international conventions prohibiting discrimination and reports of the various UN committees recognizing the practice of caste discrimination. It includes the Universal Declaration of Human Rights, 1948, International Covenant on Civil and Political Rights, 1966, International Covenant on Economic, Social and Cultural Rights, 1966, and International Convention on Elimination of All Forms of Racial Discrimination (ICERD), 1965. It further analysis the issue of 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 assessed the interpretation of ‘descent’ made by the CERD while issuing General Recommendation XXIX to include caste-based discrimination under the concept descent based discrimination.

Chapter 4 reviews the ‘World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance’ (WCAR) 2001. This chapter addresses the WCAR and its preparatory committee meetings. It mainly assesses the different opinions on two issues namely, equating caste with race and internationalization of caste discrimination.

The final chapter contains a brief summary of the dissertation and the salient conclusions.

CHAPTER 2

INDIAN NATIONAL LAWS AND UNITED KINGDOM LAW

2.1 Introduction

Age old practice of caste discrimination in India received strong opposition and prohibition from the Indian constitution after independence. During the British era too, efforts were made to eliminate caste discrimination, but with the adoption of the Constitution of India it set the milestone. Moreover states are under the constitutional obligations, to protect people from all forms of discrimination. The post constitutional era introduced various revolutionary measures, ensuring equality in all spheres, with various legislative enactments to eradicate caste discrimination. However, still there exists caste discrimination as there are instances of rampant atrocities against SC/ST's across the nation. Simultaneously, it is witnessed in the other parts of the world, within Indian diaspora, as recently UK introduced law on prohibiting caste discrimination. This existence of caste discrimination introduce before international forum for prohibition and protection of human rights.

The ongoing debate on taking assistance of international law after exhausting national laws for eradication of caste discrimination, questioned the viability of national laws. To answer the question there is a need to study the national laws and there implementation. Therefore, this chapter examines various Indian laws concerning prohibition of caste discrimination which includes Untouchability (Offences) Act, 1955; Protection of Civil Rights Act, 1976; Scheduled Caste and Scheduled Tribes (Prevention of Atrocities), 1989; Bonded Labour System (Abolition) Act, 1976; Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993. Beside it also focuses on the key Supreme Court judgments on practice of caste discrimination. It further highlights certain provisions of the United Kingdom's (UK) law namely, 'Equality Act, 2010' on prohibition of caste discrimination.

2.2. Indian laws

In order to maintain equality and to provide basic human rights to the Scheduled Caste and Scheduled Tribes, various steps have been taken by the Indian government. In pre-independence era various resolutions and orders were passed by the Britishers, to protect the rights of the untouchables such as, equal use of government facilities, schools and wells, in Bombay, Madras and other princely states. In 1923, the Bombay Legislative Council passed a resolution, permitting untouchables to use all public water places, wells, schools, dispensaries, etc. (Galanter1972: 237). From 1932 to 1936, a number of temple-entry and anti-disabilities bills were introduced in Central Legislative Assembly, Madras legislature and Bombay legislature. In 1938, for the first time, a comprehensive penal act was passed by Madras legislature to remove social disabilities. In removing 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. Any act against such use was declared as an offence. These social disabilities with other fundamental rights were ensured by the Constitution of India. The period after the independence was the dawn of new beginning for Scheduled Caste and Scheduled Tribes, achieving equal status and dignity in laws.

2.2.1. Constitution of India

The Constitution of India was adopted with the commitment to bring social reforms in terms of seeking justice to all and one such attempt was to abolish caste system which ingrained dense social inequalities (Grinsell 2010). Further, Part III guaranteed fundamental rights to every citizen to maintain equality, thereby restraining 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 near future, to enact laws in fulfilling constitutional goals.

Part III of the Constitution guarantees fundamental rights. The following are certain fundamental rights which eliminate caste discrimination. Article 14 states that the “State shall not deny to any person equality before the law or equal protection of the

laws within the territory of India". Article 15 prohibits discrimination on the basis of religion, race, caste, sex or place of birth. Article 16 lays down 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. Further, Article 17 abolishes untouchability and forbids its practice in any form. The enforcement of any disability arising out of untouchability is to be an offence punishable in accordance with law. Further, Article 25 guarantees right to freedom of religion, freedom of conscience and free profession, practice and propagation of 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). On the other hand, Article 29 (2) states that no citizen shall be denied admission to any educational institution maintained by the state or receiving aid out of state funds on grounds only of religion, race, caste, language or any of them. Beside this some political safeguards are provided, for the welfare of the scheduled caste and scheduled tribe under Article 164 (1), where 'Minister in charge of tribal welfare' shall be appointed in selected states. In seeking equal political representation, Article 330 and 332 provides reservation for SC's and ST's in Lok Sabha and State Legislative assemblies respectively. Further, Article 338 provides for constitution of 'National Commission for Scheduled Caste and Scheduled Tribes'. Under Article 338 (5) (b), the Constitution imposes duty on Commission to enquire specific complaints. Through these provisions Constitution of India attempt to change the social status of SCs and STs. It ensured legal protection through enforcement of equality and removing disabilities. The Constitution provides compensatory discrimination while enforcing reservation provisions in public services, representative bodies and in educational institutions. For better development measures were introduced to bridge the gap between SCs/STs and other communities these three strategies reflect form the schemes of Constitution (Saxena 2004). With these constitutional rights and political representation, legislative safeguards are introduced to protect the interest of the Scheduled Caste and Scheduled Tribes. The next section contains overview of the various legislations meant for the safeguard of SC's and ST's.

2.2.2. Untouchability (Offence) Act, 1955

The practice of untouchability has been abolished by Article 17 of the Constitution. For its effective implementation Parliament enacted the Untouchability (Offence) Act, 1955. Though the Act did not define 'untouchability', but described certain acts which amounted to untouchability. These were as follows:

- a) refusing any person from entering and worshipping at temples (Section 3 (a));
- b) refusing access to shops and restaurants (Section 4 (i));
- c) refuse to 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 jewellery and finery (Section 4 (xi)).

Violation of these acts constituted an offence, thereby attracting six months imprisonment and fine up to five hundred rupees. However, it contained certain loopholes, which led to difficulties in its effective implementation (Purane 2000: 44). The purpose for which it was established remained unattained and drew lot of criticism. As the punishment provided was inadequate the legislation lacked teeth. In the light of the 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 (Purane2000 :83). In 1969 the report was submitted, 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 Untouchability (Offence) Act, 1955 amendment after twenty-one years. 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).
- 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).
- 7) Refusing to sell goods or render services (Section 6).
- 8) Unlawful compulsory labour (Section 7A).

The punishment for the offence was also enhanced. Still the Act was inadequate in punishing offences such as making the Scheduled Caste persons to eat inedible substances like, human excreta, killings of helpless Scheduled Caste and Scheduled Tribes and rape of women belonging to this group (Purane 2000:221). Further this Act was criticised as cases of atrocities on SCs/STs 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 them. No reference to this violence was a greatest deficiency in the Protection of Civil Rights Act (Narula 1999: 112). Therefore, there was need to introduce new legislation to control abuses against Scheduled Caste and Scheduled Tribes. To accomplish the need of the society and to control the commission of such offences new Act was enacted. The Act was named as Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

2.2.3. Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989

After thirty-four years from the enactment of Untouchability Offences Act, 1955 the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act was enacted to include the other forms of abuse against Scheduled Caste and Scheduled Tribes. The preamble of the Act states that it was:

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.

So, the main object of the Act is -

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

The Act specifies acts amounting to atrocities. It mentions that acts done by a non-member of the Scheduled Caste and Scheduled Tribe against the Scheduled Caste and Scheduled Tribes are atrocities and thereby punishable. These acts are as follows:

- 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 neighbourhood (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 form 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));

These offences committed against Scheduled Caste and Scheduled Tribes attract exemplary punishments and imprisonment up to five years and fine. Beside, providing strict punishment for various offences, the Act also imposes certain positive duties on the state and central government to ensure proper implementation of the Act. The state 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, to avail justice (Section 21 (2) (i));
- 2) Provide travelling expenses and maintenance to victims and witnesses during investigation and trial of 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 the committee to assist State Government for formulation or implementation of measures (Section 21 (2) (v));
- 6) provision for 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 a measures for the safety of Scheduled Caste and Scheduled Tribes (Section 21 (2) (vii));
- 9) the Central Government shall coordinate with State government on appropriate measures Section 21 (3));
- 10) every year Central Government must produce the report on the measures taken by itself and state government to House of Parliament Section 21 (4);

The court of session deemed as ‘special court’ under this Act, and carry speedy trial (Section 14). This Act is considered as a milestone for prohibiting offences against Scheduled Caste and Scheduled Tribes. Its aim is to eradicate caste based discrimination from the society. For this purpose the effective implementation of the Act is the need of the hour. With earlier experience the Government of India promulgated associated Rules known as the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Rules, 1995 for a proper implementation of the Act. Under

this rule certain duties are imposed on central and state government for proper implementation.

Apart from the prevented acts discussed above some other factors contribute to caste discrimination. Caste-based occupation is a fundamental factor contributing in practice to caste discrimination. The caste system has imposed degrading work on the Scheduled Caste and Scheduled Tribes. Mostly, the scavenging and prostitution 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). Most of the time the bonded labours belong to the lower caste, illiterate and poor, while creditors are usually from educated, wealthy higher caste (Narula 1999: 86). To abolish this practice of caste based bonded labour the Act was enacted in 1976.

2.2.4. The Bonded Labour System (Abolition) Act, 1976

The object of the Act is to abolish bonded labour system which arises out of custom, tradition or any contract. It prohibits creation of new bondage agreements and releases all labourers from bondage (Section 4, 5). Under Indian tradition victims of the bonded labour are also the victims of the caste discrimination. Further the Act cancels every obligation of a bonded labourer to repay any bonded debt (Section 6). The Act also provides punishment for compelling any person to render any bonded labour (Section 16). The implementation of the Act is in question. Apart from the Bonded Labour System (Abolition) Act, 1976, the Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993 has been enacted to eliminate caste-based occupation.

2.2.5. Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993

Millions of people belonging to the lower castes make their living through manual scavenging. The term manual scavenging is used to describe 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 discrimination because the whole field is occupied by untouchables¹ (Ambedkar 1989: 108). To prohibit the practice of manual scavenging the new legislation named *Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993* was passed. The preamble of the Act states that it is:

An Act to provide for the prohibition of employment of manual scavengers as well as construction or continuance of dry latrines and for the regulation of construction and maintenance of water-seal latrines and for matters connected therewith or incidental thereto.

The Act thus prohibits the employment of manual scavengers or construction of dry latrines and provides punishment for such offences with imprisonment and/or fine. The offenders are also liable to prosecution under the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989. But the Act does not prohibit the construction of dry latrine and manual scavenging in a true sense, as the Act operates in area only after the notification issued by State Government. This notification can only be issued after giving notice of ninety days and only where 'adequate facilities for the use of water-seal Latrines in that area exist' (Section 3(2)). This provision of the Act has created hurdles in eliminating manual scavenging. Most of the state governments claim that lack of water supply prevents states from constructing flush latrines. It results in continuing practice of manual scavenging. In most of the states women work as manual scavengers.

In addition to these legislative enactments various other statutes are relevant to prohibit caste discrimination. These include the Minimum Wages Act, 1948, Equal Remuneration Act, 1976, Inter State Migrant Workmen (Regulation of Employment and Service Conditions) Act, 1979, Child Labour (Prohibition and Regulation) Act, 1986. Moreover the Government of India has also attempted to increase the self-sufficiency of the Scheduled Caste population through financial assistance for self

¹ 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 discrimination steps in the matter of higher posts (Ambedkar 1989: 108, 109).

employment activities and through development programmes designed to increase education and skills. To observe the protection of rights of Scheduled Castes and Scheduled Tribes various monitoring bodies were instituted through laws. As National Commission for SCs and STs were formed under the authority of Constitution of India. Similarly, National Human Rights Commission was established under Protection of Human Rights Act, 1993, National Commission for Women and National Commission for Safai Karamcharis was created through National Commission for Women Act, 1990 and National Commission for Safai Karamcharis Act, 1993 respectively (Saxena 2004). These Commissions were established with an objective to promote and protect human rights irrespective of caste. The commissions were assigned to monitor proper implementation of laws. Despite the implementation of all these Acts caste discrimination is still practiced in India. As evidence, various Supreme Court judgments recognize the existence of such practices.

In a recent judgment *Arumugam Servai v. State of Tamil Nadu* (2011) 6 SCC 405 the Supreme Court of India directed the state governments on practice of two tumbler system. As in many tea shops and restaurants there are separate tumblers for serving tea or other drinks to Scheduled Caste persons and non-Scheduled Caste persons. This is age old practice to use separate vessels so that they do not get polluted from the lower caste people. The court also noted honor killing 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.

In one of the landmark judgement *Indra Sawhney v. Union of India* (1993) 1 S.C.J. 353, 393 justice S. R. Pandian noted that caste system has taken its root so deep in structure of Indian society, that it began its authority over a new born child from the moment it takes its first breath. In *People's Union for Democratic Rights v. Union of India* AIR 1982 SC 1473 Supreme Court held that, the fundamental right against untouchability is available against private individual also. It is constitutional duty of state to take necessary steps to protect the right.

In *Ganpat vs Returning Officer & Ors* 1975 AIR 420 the Supreme Court held that, for a person who has grown up in Indian society it is very difficult to get out of the coils of the caste system. Further the court talk about practice of caste discrimination among the Scheduled Castes themselves, as it is based on the hierarchy. As well as the discrimination followed by Muslims, Sikhs, Christians among themselves as many Scheduled Caste 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 got to be eradicated. It has got to be eradicated not merely by making constitutional provisions or laws but also by eradicating it from the minds and hearts of men. For that it is even more important that members of communities who are untouchable should assert their self-respect and fight for their dignity than that member of the other communities should forget about it. The Act suffers with poor conviction rate evident from data provided by the Ministry of Social Justice and Empowerment on disposal of cases by courts during 2008 under Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and Protection of Civil Rights Act, 1955 as follows:

Items	Cases under SC/ST (Prevention of Atrocities) Act, 1989	Cases under Protection of Civil Rights Act, 1955	Total
Total number of cases	1,24,350	1987	1,26,337
No. cases disposal by courts	24,541	492	25,033
No. of cases ending with conviction	7,706	55	7,761
No. cases ending with acquittal	16,835	437	17,272
No. of cases compounded or withdrawn	1110	10	1120
No. of cases pending before the courts	98,699	1485	1,00184

Table 2 (A)

(Source: Report Under Section 15 (A) 4 of The Protection of Civil Rights Act, 1955 and Report Under Section 21 (4) of The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 for the year 2008, Government of India Ministry of Social Justice and Empowerment)

From the table 2 (A) it appears that the conviction rate² under Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 is 31.40% on the contrary acquittal rate³ is 68.59% with the pendency⁴ of 79.37% which is extremely high. Similarly under the Protection of Civil Rights Act, 1955 the conviction rate is 11.17% and acquittal rate is 88.82% with the pendency of 79.29% cases. It clearly shows that the Act failed to generate desired results.

In *State of Karnataka v. Appa Balu Ingale AIR 1993 SC 1126* the Supreme Court found that in more than seventy five percent of the cases of atrocities against Dalits resulted into acquittal. In a recent statement made by Social Justice and Empowerment Minister Mukul Wasnik mentioned that, over one lakh cases of atrocities are pending before the courts at the end of 2010 (The Indian Express 2012). While the conviction rate in atrocity cases is low, registration of cases is high. Even the failure of administration in implementing the laws, the judiciary also shows reluctance in deciding the cases of atrocities. The judiciary and executive are considered pillars of the democracy, in this cases these pillars are not standing in supportive role. These conditions were predicted by Dr. B. R. Ambedkar, in his speech addressing constituent assembly he observed:

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;

² Conviction rate = No. of cases ending with conviction*100/ Total No. of cases disposal.

³ Acquittal rate = No. of cases ending with acquittal * 100/ Total No. of cases disposal.

⁴ Pendency rate = No. of cases pending before the courts *100/ Total No. of cases.

however good the Constitution may be, it requires no prophet to say that it will fail. It is, therefore, futile to pass any judgement upon the Constitution without reference to the part which the people and their parties are likely to play (Ambedkar 1949: 1210).

The relevant authorities proved that, well crafted laws will result in failure because of unwillingness to effectively implement them. All above laws prohibiting caste discrimination have failed to get rid of the impact of the caste system on mindsets of the executive and judiciary. To ensure the proper implementation of laws National Human Rights Commission (NHRC) appointed Mr. K. B. Saxena to prepare a report. The next section discusses the report which is an evidence for failure of State machinery in proper implementation of the law.

2.2.6. Report of National Human Rights Commission

The 'Report on Prevention of Atrocities against Scheduled Castes and Scheduled Tribes' submitted by K. B. Saxena to the NHRC in 2004. The main object of the report was to examine the implementation of laws that prohibit atrocities against Scheduled Caste and Scheduled Tribes. The report shows that 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 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.

For these failures state machinery was held responsible, with police machinery being central to the failure. As, the process started with the registration of case, the police resorts to various ways to discourage Scheduled Caste and Scheduled Tribes from registering cases. Furthermore, they dilute the seriousness of the violence to shield the accused from arrest and prosecution. In some cases 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 breach of duties. The report discussed the manner of breach of duties by civil administration as follows:

- 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 Scheduled Caste, which leads to the atrocities.

Apart from this other sectors of administration were also responsible for helping in atrocities against Scheduled Caste through intellectual dishonesty in discharge of their duties, as medical personnel and Public Prosecutors.

After experiencing biased conduct of police officials and civil administration, the victims approaches to the judiciary. From there also victims came back with empty hands, as magistrates often provide a shield police 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. Further, the report gave certain judicial trends 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.

Beside such reports and laws millions of people in India witness the practice of untouchability. Entire villages remain segregated by caste. Dalits are the victims of police abuses. Specifically Dalit women are frequently victims of sexual abuses. The legislative protection provided by the Government of India has become a mask of social realities, as discrimination and violence results due to poor implementation of legislative provisions (Narula1999). Indian law enforcement machinery enforces the rule of the caste system, and not the rule of law (Narula 2008: 257). Moreover the discrimination is practiced by executive while implementing the law, and by the judiciary while deciding atrocity cases (Agrawal and Gonsalves 2005: 71). In order to control police abuses, corruption and proper implementation of constitutional provisions in eradicating caste discrimination, various human rights organizations, Dalit organizations and international community and Government of India are making efforts. This efforts lack somewhere, as still we witness the problem of caste discrimination. Nowadays, the practice of caste discrimination is also being witnessed in other parts of the world. For Indian migrants carry this practice with them to different countries, like in advertisement for marriages they mention their caste. This and other kinds of practise are carried out in different countries. As a result United Kingdom, the first country, has legislated against such practices. It has enacted 'Equality Act, 2010' (www.idsn.org).

2.3. UK Law on prohibition of caste discrimination

As Dr. B. R. Ambedkar anticipated, the Indian migrants will carry the caste system to other regions of earth and it would become a problem of the world. This prediction came true as caste discrimination has indeed 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).

The international community has taken cognizance of the practice of caste discrimination. The ‘Committee on the Elimination of Racial Discrimination’ (CERD) has issued a General Recommendation on ‘caste and inherited status’ (General Recommendation XXIX). The Committee affirmed that caste is a form of racial discrimination covered under descent-based discrimination. The signatory states to the ‘Convention on Elimination of Racial Discrimination’ are expected to implement the recommendations where caste discrimination is practiced (Mahtani 2003). To comply with the recommendation the United Kingdom introduced a provision under section 9(5) (a) of Equality Act, 2010.

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.

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. The passage of secondary legislation in a true sense will make caste discrimination illegal. The Government of UK still has to make amendment for the exercise of power given under the above section.

2.3.1. Background

After 1950s large number of Indians migrated to UK. With them the cultural, traditional and religious values and practices too migrated. Thus it carried practice of caste discrimination to the shores of UK. There are a number of incidences of practice

of caste discrimination (Memorandum submitted by Caste Watch UK (E 67) 2009). On immigration to UK the Dalits experience dual discrimination, caste discrimination from their own countrymen and racial discrimination from white society. Initially, the identity of Dalit remains invisible under the umbrella of a South Asian. But this advantage has been limited to first generation immigrants only, as they fuse 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). This practice attracted the attention of Committee on the Elimination of all forms of Racial Discrimination (CERD), as UK is a party to the International Convention on Elimination of All forms of Racial Discrimination (ICERD).

In its 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). To answer this concluding observation UK Government in 2005 drafted a letter and memorandum from Fiona Mactaggart MP, the then Parliamentary under Secretary of State, Home Office. In 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). Afterword 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). 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.

2.3.2. Report of National Institute of Economic and Social Research (NIESR)

The government of UK decided that further research was needed to decide whether to exercise the power given under section 9. For this purpose government commissioned National Institute of Economic and Social Research (NIESR). 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 and 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 violence⁵. 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 “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. Relying on the Indian community to take action to reduce caste discrimination and harassment is also problematic. The Government of UK has still to respond to the report of NIESR. Therefore the decision to exercise the power given by

⁵ The Report was prepared by Hilary Metcalf and Heather Rolfe titled “Caste discrimination and harassment in Great Britain” in 2010.

section 9 (5) (a) of the Equality Act, 2010 to introduce secondary legislation which would make caste discrimination illegal has yet to take place.

To introduce a provision in the Equality Act, 2010 as a prohibition of caste discrimination is a first step taken by the UK Government to maintain equality. It happened due to the intervention made by international community. As caste discrimination is becoming the problem of world CERD plays an important role to prohibit it. UK is the best example for moving towards eradication of caste discrimination. The practice of caste discrimination in the UK and in India differs in many ways. The problem of caste discrimination in India is much more serious than in UK. To deal with this problem the Indian Government has introduced various legislations. The laws made by Indian Government are well crafted with an object to eradicate caste discrimination. But the problem arises in its implementation. This failure results in enormous violation of human rights, and has attracted attention of international community. The international intervention came in the form of CERD concluding observations. In its concluding observation CERD recommended to both the governments to address practices of caste discrimination. In the beginning both respective governments opposed the existence of practice of caste discrimination.

Afterwards UK government accepted it and introduced a provision for the protection of rights of the victims of caste discrimination. This provision took place in UK's Law because of the intervention made by international community. In the same way the intervention of international community may help to eradicate the caste discrimination from India as well.

The elimination of caste discrimination from India will assist in eradicating caste discrimination that exists in Indian diaspora. On the other hand this practice in Indian diaspora is also outcome of the failure of the Indian Government in implementing the anti-discriminatory provisions effectively.

CHAPTER 3

CASTE IN INTERNATIONAL HUMAN RIGHTS LAW

3.1 Introduction

The human rights protection became main concern with the formation of the United Nations. The adoption of Universal Declaration of Human Rights in 1948 by the United Nation led to the codification and promotion of the human rights with the common standard of achievement for all people and nations. Subsequently, the concept of human rights has expanded, from first generation of political and civil rights, the second generation of economic, social and cultural rights, to the third generation of right to development and the rights of indigenous people. One of the important guiding concerns of human rights framework is the principle of non-discrimination (Thorat and Umakant 2004). Non-discrimination ensures human dignity and human dignity forms the bedrock of protection of human rights. So, the principle of non-discrimination forms the basis of human rights. The United Nations through various conventions recognizes and eliminates various forms of racial discrimination round the globe and mandates state parties to abide by its obligations. UN human rights bodies have addressed various human rights issues in India, such as gender discrimination, poverty, illiteracy etc. The root cause of all these problems is caste-based discrimination. Caste discrimination is the major factor contributing to these problems (Divakar and Aja. 2004). Caste discrimination is considered as one the oldest forms of discrimination. It is practiced in India from time immemorial. The Indian Government has taken various steps to eradicate caste-based discrimination. However, after sixty-five years of independence the practice of caste system still prevails, which shows the failure of the domestic policies to eradicate the system. This led to the intervention of international human right treaty bodies. The issue arose, as to how caste based discrimination should be addressed in international human right laws.

Various UN Human Rights treaty bodies have recognised ‘caste discrimination’ and often recommended to the Indian government to take necessary measures to eliminate

it. This chapter addresses the various international human rights conventions and recommendations of human rights committee and human rights treaty bodies concerning caste as a form of discrimination. It 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 assesses the interpretation of ‘descent’ made by the CERD while issuing General Recommendation XXIX.

3.1.1 General understanding of treaty bodies

The international treaties create legal obligations on state parties for protection and promotion of human rights. To monitor the implementation of these treaties, seven human right treaty bodies were formed (Fact Sheet No. 30). The treaty bodies included independent experts. This treaty bodies were formed according to the provisions of the administering treaty (Fact Sheet No. 30). The chart given below shows the conventions and their respective committees:

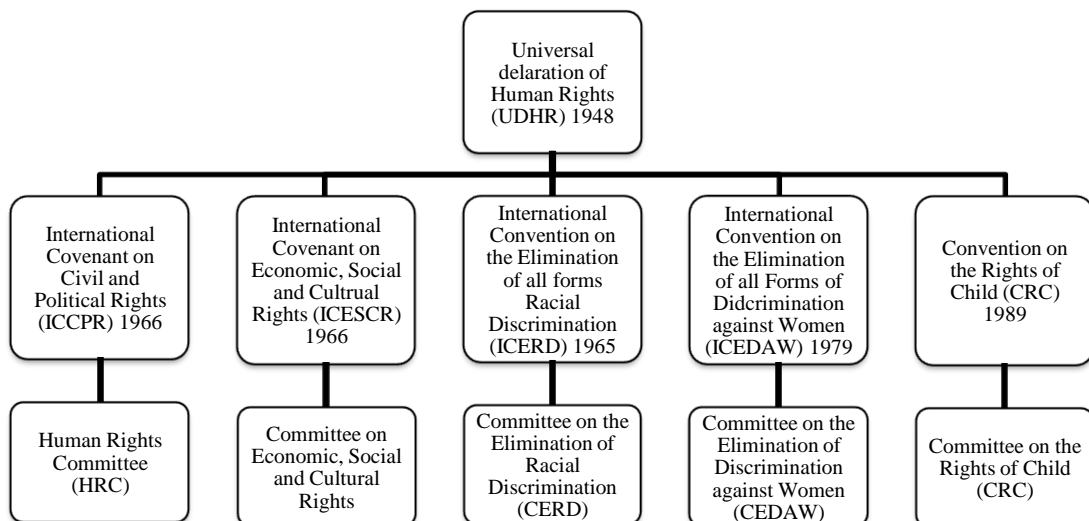


Figure 3 (A) (Fact Sheet No. 30)

The state parties have to submit the regular report to the respective treaty body on 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, press and academic institutions. After gathering the information, treaty bodies issue list of questions and suggestions to state parties, where state parties give their responses. After examining state report, treaty bodies issue a concluding observation or general comment (general recommendations). The general comment is the interpretation of the human rights provisions of the treaty made by treaty bodies¹. The treaty bodies may conduct thematic discussion on issues before issuing general comment.

3.2 International Human Rights Conventions:

In order to protect human rights, international conventions have prohibited various forms of discrimination. However, most of the treaty bodies in their reports have recognized 'caste' as a form of discrimination. In order to understand the position of caste discrimination in international law, this section discusses various conventions and reports of the treaty bodies on the caste-based discrimination.

3.2.1 Universal Declaration of Human Rights, 1948

The Universal Declaration of Human Rights (UDHR) for the first time forbids all forms of discrimination. It recognizes the various grounds of discrimination, derogatory to the practice of human rights. These include race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (Article 2). A year after the independence India adopted UDHR. However, no reference was made by India to include 'caste' as a form of discrimination under Article 2 of the UDHR. Further, 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'. However, the Indian delegation found the terms 'other status' and 'social origin'

¹ 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).

sufficiently broad to include caste, and therefore did not insist upon its proposal (A/C.3/SR.102). Mr. Saint-Lot representative of Haiti agreed with Indian delegation and said: ‘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.

3.2.2. The Two Covenants and ILO

Thereafter, the International Covenant on Civil and Political Rights (ICCPR) prescribes equal protection of law to all people without any discrimination. Article 26 of the ICCPR guarantees:

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.

In 1997 the Human Rights Committee in its concluding observations found 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:

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. While the Committee notes the efforts made by the State party to eradicate discrimination: It recommends that further measures be adopted, including education programmes at national and state levels, to combat all forms of discrimination against these vulnerable groups, in accordance with articles 2, paragraph 1, and 26 of the Covenant (CCPR/C/79/Add.81).

The grounds of discrimination under the International Covenant on Economic, Social and Cultural Rights (ICESCR) are identical to the ICCPR² (see Article 2 and 6 of ICESCR).

² Article 2 (2) “The States Parties to the present Covenant undertake to guarantee that 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 6 (1) “The States Parties to the present Covenant recognize the right to work,

Moreover, the principle of non-discrimination is the basis of labour standard, established by the International Labour Organisation (ILO). The ILO 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)). While elaborating these seven grounds under Declaration on Fundamental Principles and Rights at Work, it covered caste-based discrimination under the category of social origin³.

3.2.3 International Convention on the Elimination of All Forms of Discrimination against Women 1979

The object of the 'International Convention on the Elimination of All Forms of Discrimination against Women' (ICEDAW) is to promote equality of right of men and women. For full enjoyment of their rights it 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 as follows:

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.

As per the above Article women are discriminated on the basis of sex only. Apart from the sex, caste is a major factor contributing in violence against Dalit women. Dalit women's are discriminated on sex and on the basis of caste. As observed:

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

which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right."

³ The declaration explains social origin as discrimination towards certain individuals because of their social class, socio-occupational category or caste. In some context, the social origin can influence the professional future of the subject because he/she is denied access to certain jobs or he/she only assigned certain activities.

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).

The situation of SCs and STs women is most vulnerable due to the caste system. In order to improve the condition of SCs and STs women, the attempt was made in 2000, where for the first time the 'Committee on the Elimination of the Discrimination against Women' (CEDAW) recognised violence against women on the basis of caste.

India is signatory to the convention and submitted its first report to the CEDAW in the year 2000. The committee in its concluding observation of the India's report raised the issues of discrimination faced by the 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). Discrimination against women who belong to particular castes or ethnic or religious groups also manifest extreme forms of physical and sexual violence and harassment. The Committee concerned with the continuing discrimination, including violence, suffered by women of the Dalit community, despite the passage of the Scheduled Castes and Scheduled Tribes (prevention of atrocities) Act of 1989. The Committee urged the Government to enforce laws preventing discrimination against Dalit women and prohibit the devadasi system. It 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. It noted that, widespread poverty, social practices such as the caste system and son preference, as reflected in a high incidence of violence against women. Further, significant gender disparities and an adverse sex ratio, present major obstacles to the implementation of the Convention (A/55/38).

3.2.4 Convention on Rights of the Child, 1989

The Convention on Rights of the Child guarantees certain rights with special care to the children. The Committee on the Rights of the Child (CRC) in its concluding observation to the report submitted by India in 2000 recognised the caste system as an

obstacle to combat discrimination. Article 2 of the Convention defines 'Discrimination' as:

1. 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.
2. State Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

In the light of Article 2, CRC expressed concern over the 'striking disparities' in terms of access to education and opportunity between children belonging to different caste. 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). Further, the 'Commissions Special Rapporteur on sale of children, child prostitution and pornography' found that children of 'untouchables' are most often victimised in child labour situations (E/CN.4/1994/84). 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. Moreover, in compliance with Article 46 of the Constitution of India⁴, the State party is encouraged to implement, inter alia, 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

⁴ 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).

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 the doubt 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 Caste and Tribes, reflected, inter-alia, by gross violations of the Act, and low number of such violations dealt by the courts. The fact is that a majority of the states have failed to set up the special courts provided under this Act (CRC/C/15/Add.228).

All the above respective human rights treaty bodies reports recognised 'caste' as a form of discrimination by one or another term. After recognition it recommended that the Indian Government should take preventive measures. Despite all the evidences and occasional recognition of caste-based discrimination by the UN Human Rights treaty bodies, neither Universal Declaration on Human Rights nor the two Covenants and other Conventions has mentioned 'caste' as a form of discrimination in express terms. The international human rights treaties prohibit all form of discrimination, but the word 'caste' does not appear in any international human rights treaty (Keane: 2007:213). However, caste as a form of discrimination came into picture after 1996. The Committee on the Elimination of Racial Discrimination (CERD) in 1996 made first attempt to favour such recognition. The next section deals with the inclusion of the 'caste' as a form of discrimination under descent-based discrimination.

3.3. International Convention on the Elimination of All Forms of Racial Discrimination 1965

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) 1965 was adopted to eliminate racial discrimination throughout the World. At the time of drafting the convention special attention was

given to apartheid. But it also covers other forms of discrimination. The scope of 'racial discrimination' has also been expanded through interpretation.

The term 'racial discrimination' is defined under Article 1 (1) of the ICERD as follows:

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.

Article 2 of ICERD added that, states shall take all necessary measures for development, protection of all human rights and fundamental freedoms of certain racial groups and individual belonging to them. India is a signatory to the ICERD and obliged to comply it. Indian government opposed to the discussion and inclusion of 'caste discrimination' under the rubric of the ICERD as it is not a form of 'racial discrimination'. As per the above definition racial discrimination is based on race, colour, descent or national or ethnic origin. On this basis Indian government argues that, discrimination on the basis of caste is not covered under the convention. The whole debate started with the submission of India's tenth to fourteenth periodic report to the Committee on Elimination of the Racial Discrimination (CERD). The provisions of the ICERD explicitly deals with the discrimination based on race and colour. On the contrary, the convention is unclear about discrimination arising out of attributes other than race and colour such as discrimination based on descent, ethnic or social origin. It leaves considerable scope for the further interpretation (Thorat 2009: 142).

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'. It has its origins in the functional division of Indian society during ancient times (CERD/C/299/Add.3). 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 Caste and Schedule Tribes are victims of caste 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 Caste 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 caste and Scheduled Tribes falls within the scope of the Convention (CERD/C/304/Add.13). In response 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).

Prior to the 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 the report the special rapporteur raised a question about age-old caste system of India, which had produced several millions of untouchables. It arguably could be regarded as racial discrimination (E/CN.4/1999/15). In reply Indian Government rejected the allegations and provided list of measures taken to prohibit caste discrimination. To support the statement India made following arguments:

- 1) "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).

- 2) 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).
- 3) 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).
- 4) Persons who belong to the Scheduled Caste 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)”.

The response also notes that the practice of caste discrimination is age-old, and so it was not possible to eliminate it rapidly (E/CN.4/1999/15). With this stand of Indian government the issue of inclusion of 'caste' into 'descent-based discrimination' and distinction between 'caste' and 'descent' came into various thematic discussions of CERD.

At its sixty-first session, the CERD decided to issue general recommendation on work and descent based discrimination rather saying on caste based discrimination. For making a draft of the general recommendation thematic discussions were organized by CERD in 2002.

3.3.1. Thematic Discussion for General Recommendation

While examining the periodic reports of the State parties CERD has found that, some form of discrimination are common to several States and can usefully be examined from a more general perspective. In August 2000 CERD had organized a thematic debate on the discrimination against Roma, which is one example of the descent based discrimination. Afterward, in August 2002 CERD organized the thematic discussion on descent based discrimination. The CERD requested state parties for further information about persons belonging to the groups distinguished on the ground of descent. It further asked about their social and economic conditions, and policies framed by respective government for eliminating discrimination against them. The NGOs representing descent based discrimination also submitted information to the CERD.

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

Mr. Thornberry was agreeing with Mr. Pillai saying that the scope of term descent is wide 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 he mentions 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’. As well as he mentioned:

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 descent is not biological, but social and cultural. A person born without definition, and other attached a definition to him that limited his rights and inflicted suffering on him (CERD/C/SR.1531).

Mr. V. Rodriguez explained term descent as it is implied 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 if the interpretation is made 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. 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 (CERD/C/SR.1531).

Mr. Sicilianos suggested for inclusion of caste in general recommendation on descent and that there should be a subparagraph entitled 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 action 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. There was proposal for direct inclusion of caste-based discrimination 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 draft of general recommendation was prepared by working group. In 1547th meeting of the CERD it adopted the general recommendation XXIX. It is an outcome of the debate going on from 1996 periodic reports of 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 recommends that all state parties to the ICERD adopt some measures, which are appropriate for their particular circumstance. In measures it mentioned the steps to identify communities suffering on descent based discrimination.

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 practice in one form that is 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 term 'descent' was only meant to include caste under the descent based discrimination. Rather defining "caste" the CERD interpreted descent. This interpretation was continuously and strongly opposed by Indian Government on various grounds. Then the question arises whether the title of the discriminatory practice play such an important role? The grounds of discrimination are same but the term used to identify it are different. Rather going on content the Indian Government or international community struck with a particular term for reference. The CERD is going on interpreting the term descent but is not ready to accept and recognize caste as a form of discrimination, because it is a mere problem of particular country or Asian region.

Furthermore, this interpretation does not offer exact definition of 'descent based discrimination' (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:

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. And in a caste system, one caste has multiple descents, and could not intermarry and supposed to marry outside their own 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 look into *travaux preparatoires* 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. 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 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). For this it is important look into the sources referred by the Indian government.

Prior to the ICERD the word ‘descent’ is found in Constitution of India. With Article 15 (1) of the Constitution, dealing with general prohibition discrimination on the ground of religion, race, caste, sex or place of birth. Clause 2 of Article 15 states:

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.

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, the descent is not a ground in general prohibition on discrimination as per the Indian Constitution. It clearly shows that ‘caste’ and ‘descent’ are two different grounds of discrimination as both are placed alongside in Article 16 (2). To make clear differentiation between these two words it is important to look into the Constitution Assembly Debates of India (Keane 2007:232).

3.4 Constitution Assembly Debates of India

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 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.280⁵ which was moved by

⁵ 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

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 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:

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

might attempt to make discrimination against citizens will do so not on the ground of religion, race, caste or sex ... In my opinion attempts may be made to make discrimination against citizens on the ground of place of birth (Constituent Assembly Debates 2009:650).

eliminated. In fact all such discrimination should be eliminated (Constituent Assembly Debates 2009:656).

Shri Raj Bahadur made references to 'descent' together with '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 preparatoires* 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'. Rather interpreting the term the CERD should concentrate on designating 'caste' as form discrimination.

On the contrary after the interpretation of word descent by CERD various reports were submitted by UN Sub-Commission of Promotion and Protection of Human Rights on the practice of descent based discrimination as discussed below:

The UN Sub-Commission first time passed a resolution in 2000 on 'Discrimination based on Work and Descent'. In resolution 2000/4 the Sub-Commission declared that 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:

“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.

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 communities witnesses 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 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 effort made by United Nations to combat the discrimination throughout the globe is mainly concerned with racial discrimination. All the conventions discussed above prohibit racial discrimination. No express provision prohibits 'caste discrimination' except interpretation of 'descent' offered by CERD. "It reached on consensus that 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). To cover all forms of discrimination under a one rubric it is essential to analysis the definition of 'discrimination' given by the UN human rights conventions. All the above discussed human rights convention specified the cases of discrimination on particular grounds as mentioned by Human Rights Committee:

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 definition of '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 widening scope of racial discrimination and descent based discrimination was an attempt to create 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. These recommendations are mere suggestions to the state parties as “treaty bodies have no means to enforce their recommendation” (Fact Sheet No. 30). These decisions of the treaty bodies lack the legitimacy and binding obligation, because the basis of legitimacy is the consent of the states (Nollkaemper and Alebeek 2011:37). CERD has to make extra efforts to take the consent of India as well as to prohibit ‘caste discrimination’. It seems that like Indian national laws, international law and the concluding observations of treaty bodies lack its credibility at the time of implementation.

Apart from CERD interpretation one more convention included ‘caste’ as a form of discrimination that is ILO ‘Declaration on Fundamental Principles and Rights at Work’. This Declaration covered ‘caste-based discrimination’ under the category of the ‘social origin’. As the 100th meeting of ‘Third Committee of General Assembly’ 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’ have 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

prohibits directly 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' as well.

Regarding the India's position on the above discussed report on 'discrimination based on work and descent' clearly mentioned that the caste system of India had religious sanction. With religious sanction it has social sanction which makes it unique to the Indian system. So, it is not acceptable to discuss this issue at international level as there is no need to use international mechanism.

So, to prohibit this worst form of discrimination United Nations and its human rights bodies need to focus on 'caste-based discrimination' separately as it has an effect on other countries as well. UN as a face of international community can create a pressure on Indian government as Dalit NGOs anticipated. With this hope once again the problem of 'caste' was placed before the international community, this time through other actors.

This attempt was made at the 'World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance' 2001. Various Dalit international organisations and NGOs like 'International Dalit Solidarity Network' (IDSN), 'National Campaign on Dalit Human Rights' (NCDHR) utilised the opportunity and placed the issue of caste discrimination before international forum for its adequate representation as a form of discrimination.

CHAPTER 4

DURBAN AND AFTERMATH

4.1. Introduction

The struggle for giving status to caste discrimination as one of the forms of discrimination came in picture at international level at the time of ‘World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance’ 2001 (WCAR). This conference 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 it provided a broader platform to examine different forms of intolerances. For this purpose the conference invited the international community to unite their efforts to combat racial and other forms of discrimination. Through the WCAR various Dalit NGOs succeeded in drawing the attention of the international community towards the caste-based discrimination. But it was again contradicted by Indian government. This chapter deals with the WCAR and its preparatory meetings as well as issues tackled by international community at the conference. It also assessed different opinions on the issues, equating caste with race? And should the problem of caste discrimination discussed at international forum? These issues invited opinions from government, Dalit organisations, academicians and civil society.

4.2. 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. Instead racism, racial discrimination, xenophobia and related forms of intolerance, ethnic antagonism and acts of violence are showing signs of increase. Keeping this in mind 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 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 reappraise the obstacles to further progress in the field and ways to overcome them;
- b) To consider ways and means to better 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;

The UN General Assembly also decided that, while forming the agenda of the World Conference there is need to address all forms of racism, racial discrimination, xenophobia and related contemporary forms of intolerance. For this purpose the UN General Assembly designated the Commission on Human Rights as the preparatory

committee. It also allowed full participation of all States Members of the United Nations, members of the specialized agencies and observers (A/RES/52/111).

4.2.1. Preparatory meetings

In accordance with the UN General Assembly resolution various meetings were organized for the preparation of the forthcoming World Conference against Racism. Various Dalit organizations made series of interventions in United Nations Human Rights Bodies and in international meetings. Many of these interventions were made with the collaboration of other communities such as Burakumin and Roma Shinti who faced similar discrimination. The objective of these interventions was to ensure the inclusion of caste discrimination on the main agenda of the WCRD (Divakar and Ajai 2004:12).

4.2.2. Bellagio Consultation on UN World Conference against Racism:

In January 2000 the International Human Rights Law Group organized consultation with the 25 leaders from influential government, international organizations, national institutions and the non-governmental sector in Bellagio, Italy. The object of the consultation was to formulate recommendations for the WCAR, 2001. In its report to the WCAR and preparatory committee it recommended that caste system and discrimination against Dalits needed to be addressed. It was also urged that there was a 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). This consultation report was submitted in the first session of the Preparatory Committee for the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance in may 2000 (A/CONF.189/PC.1/10).

4.2.3. 1st World Conference Preparatory Committee Meeting

With the Bellagio Consultation Report submissions were made by the National Campaign on Dalit Human Rights (NCDHR) and other International Dalit Solidarity Network (IDSN) members to the preparatory committee. In mere submission the organizations suggested to include caste and Dalits in the themes. But the Indian

Government consistently opposed the submission. 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/PC.1/21).

Prior to 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.

4.2.4. 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 caste discrimination it stated that even though states have enacted laws to prohibit caste discrimination it is often states themselves that violate these laws. Further it recommended that implementation of such legislation should be ensured through transparent and effective monitoring mechanism of respective government of the countries. With this the Asia Pacific NGO Forum strongly recommended that, caste

based and similar form of discrimination explicitly addressed within the agenda of the World Conference against Racism.

Moreover, 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).

4.2.5. Asian Legal Resource Centre (ALRC)

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 demonstrates how caste discrimination is practiced, such 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 practice of caste discrimination. Some countries introduced a constitutional and legal provision to prohibit this worst form of discrimination but these legal measures failed to significant impact. Citing the example of Constitution of India ALRC 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).

With the national efforts it alleged that caste discrimination is worse than slavery and apartheid but the UN failed to take significant position on it as UN conventions does not recognize the problem of millions in the form of caste discrimination. If WCAR will not address the caste discrimination then it will be a failure of a Conference (E/CN.4/2001/NGO/61).

4.2.6. The Global Conference against Racism and Caste-based Discrimination

A global conference was held in New Delhi between 1 to 4 March 2001. 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. In its declaration it demanded that, caste system to be included in the WCAR documents as a major source of discrimination (Final Declaration of the Global Dalits Conference Against Racism and Caste-based Discrimination 2001). It also called for a declaration by the UN that untouchability constitutes a crime against humanity. It also recommended that there is a need to pay particular attention through UN development agencies towards caste discrimination.

After the all these conferences the NGO Forums gathered in South Africa during 28th August to 3rd September 2001 for the WCAR with the recommendations. It made a declaration for the preparation of the World Conference.

4.2.7. The Declaration of NGO Forums

This NGO Forums constitute of 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 covers vast number of issues connected with racial discrimination and related intolerance. With this context 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.

On caste and discrimination based on work and descent the Declaration states:

- 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 practice has religious and cultural sanction, which is hereditary in nature. It affects at the personal, social and structural levels, irrespective of their religious affiliation.
- 2) The practice of untouchability is rooted in the caste system. The untouchables are considered as polluted or impure. Because of this nature they are denied to enter into place of religious worship and participation in religious festivals. Moreover under caste system untouchables are assigned work of degrading nature and menial such as, manual scavenging, skinning and disposal of dead animals, digging graves and sweeping. The condition of untouchable women is worse as following the traditional system of temple prostitution (Devadasi)

Dalit women and girls are forced into prostitution. The 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' 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 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) Work and descent based discrimination against the Buraku people of Japan has existed for over 400 years and continues to be experienced today by over 3 million people in relation to marriage, employment and education, with new forms of discrimination emerging such as 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 that fail to protect them and hence are responsible for the continued perpetuation of discrimination, and by States that are themselves often the law-breakers" (WCAR NGO Forum Declaration 2001).

On these ground the NGOs urged the WACR include 'caste discrimination' in the main agenda. Dalit NGOs were turn in favour to include 'caste' in to 'descent based

discrimination'. The NGOs position was opposed by the government of India and received mixed response from civil society and academicians. One group supported equating caste with race and use of international forum. Another group opposed the intervention made by Dalit organizations and one more group was opinion that its democratic right of Dalits to address the issue internationally, but this intervention would not be gain much (Thorat and Umakant 2004:xxvi). The next section is an overview of various positions taken by Dalit organisations, civil society and academicians.

Firstly, it observes the supportive arguments. The pressure created by international community would result to prohibit gross violation of human rights. To attract the attention of international community towards caste discrimination it is important to equate it with race¹ (Panini 2001: 183). 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 bring the issue before the international community was the only alternative before dalits (Pinto 2001 :122). Since the independence Dalits utilised the national mechanism to promote and protect their rights but impact of caste prejudice prevails all levels of government, weaken the political will to implement these laws that they have been emasculated² (Divakar and Ajai 2001: 19). This lack of political will to implement laws worsen the conditions of dalits therefore the NGOs alleged that Indian government was putting saffron curtain over 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. As many attempts were made to include caste into UN framework but UN is unable to recognised caste discrimination, the one reason could be because European societies are unfamiliar with the concept of caste and due to complex nature of caste system they found it difficult to understand (Thorat 2009: 145). Considering caste as similar to race may help to understand the caste discrimination to UN bodies.

¹ Then 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 2001: 251).

² 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).

On caste is form of descent based discrimination it was argued that as per the caste system, by its nature of descent the children of SCs/STs and other marginalised communities are compelled to do degrading work and expected to follow practices of their descendents. (Pinto 2001: 122). However on contrary to Indian government's argument Dalit organisation was in favour to consider caste as race. Ambrose Pinto on the issue whether caste is race or race is caste states that,

- 1) in both the caste and race people are not only facing 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;
- 5) discrimination and prejudice both are important element of caste and race³;
- 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 judge according to their culture' (Pinto 2001: 122).

With this comparison he poses question 'What is the difference in the claims made by the white race in Europe and the upper caste in India? 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'. With these similarities it is important to note that, the caste system of India is worse than racism, so it demanded international scrutiny (Pinto 2001: 125). The comparison between race and caste neither this systems are unique or alone in their social situations and experiences:

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 must deem similar as in Article 25 of the Constitution of India considers Buddhists, Sikhs and Jains as Hindus.

³ The 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 2001: 125).

“Casteism is not social preference but India’s apartheid”. the Durban Conference was not about to include caste into race it was about to fight these evil practices (Dhavan 2001: 167).

Further to fulfill the objective of the Conference discussed earlier, 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 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 2001: 139).

With this ground Dalit organizations urges that after exhausting national laws Dalits have democratic rights to access the international forum for protection of their rights. Now a day’s international cooperation is an accepted aspect of our political life (Macwan 2001: 38). As:

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 2001: 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 problem of ‘caste discrimination’ would become important⁴ (Narang 2001: 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 Dalit organizations to urge for strengthening the laws and introduce changes in the attitude of government agencies.

⁴ The 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 2001: 210).

For social change there is need to change the agency and as “agency changes, the discourse changes, the levels alter and with it comes the possibility of more effective politics of empowerment” (Visvanathan 2001: 252).

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 2001: 193). Moreover, if there is similarity up to certain extent in caste and race discrimination the important thing is it differs with physical and ideological characteristics (Oommen 2001: 106). Regarding biological concept of race Oommen argued that “race as a biological concept does not have any validity”. The author further states 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 2001: 97).

On the contrary on equating caste with race Beteille 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 2001: 51).

While referring to differences between caste and race, he noted that 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 2001: 60). This exercise to equating 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, 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 reopen the debate on caste based reservation, simultaneously, pose the question on constitutional provisions for reservations (Sheth 2001: 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 2001: 52).

The caste system is comprised by various castes, where every caste having superior position on some other as based on graded inequality, with this context not only Dalits or untouchables are victims of caste discrimination but the ‘other castes or upper castes’ also witnesses the same. It’s true that there is difference as compared to discrimination faced by Dalits and by other castes. Addressing only dalits issues through international mechanism would not result in eradicating caste discrimination (Radhakrishnan 2001: 60, 61). Though the Durban Conference will discuss on caste issue and it will further include into UN convention, this inclusion will help to eliminate caste discrimination? UN does have magic wand for this dramatic change (Radhakrishnan 2001: 61). This inclusion will result short term achievement as stated:

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-a-vis Dalits? (Guru 2009: 179).

As consequences “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). As well as the caste system is characterized as complex and based on graded inequality which poses extreme difficulty before eradication of caste discrimination whether through national laws or international laws as:

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).

For better understanding of international community Dalit organization agree 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 social discrimination in western countries from the perspective of 'caste' it would result in positive aspect of comparative sociology (Sheth 2001: 95). But for attract the attention of the international community equating caste with race this justification is not sustainable. This inclusion will create a pressure on Indian government to protect the interest of lower caste this claim:

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 2001: 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 2001: 53, 54).

To protect the human rights in Asian countries whether it is child labour, violation of women rights, poverty, education etc. and now caste every time Asian countries has to follow the western practices. It is established practice at international level which demonstrates the Euro-centricity of international law.

The Indian government maintained its position to introduce caste discrimination at international forum. In contrast to the government's position the National Human Rights Commission of India (NHRC) adopted middle stand and made a statement in WCAR in favour Dalit NGOs for inclusion of caste discrimination at WCAR. Justice K. Ramaswamy as a representative of the NHRC said:

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).

Further, he mentioned the issue of 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 issue of discrimination in different forms all over the world. Including the form of discrimination persist in India. In this context:

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 the form of WCAR the UN should recognise the form of discrimination irrespective of its source of discrimination as well as regardless of whether it is a form of race, colour, caste and social origin⁵ (Thorat 2009: 161).

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 be created within the country (Radhakrishnan 2001: 61, 62). Raising the problem of caste discrimination before international forum will help the government through providing additional sources to

⁵ 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).

reform the society with providing assistance for education. The Constitutional provisions failed to benefit much to the Dalits like 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 2001 :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’s introduced positive difference in the conditions of disadvantaged castes groups. For the uplift 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 Mr. 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 said:

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 mentioned:

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).

This was an attempt to dilute the focus of Conference through referring caste as 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”.

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 Government of India (Divakar 2002: 317). States took their support off because of extreme pressure not only from India but USA (Prove 2002:322). At the end of the WCAR no reference was made of caste-based discrimination. But it was a first step to highlight the issue of caste discrimination at international level. To that extent it was successful to grab the attention of the international community. These efforts of the NGOs question, at national level as well as at international level was significantly in drawing attention to the theoretical rejection on equating caste and race and secondly, on the attempt to internationalize the issue of caste based discrimination (Setalvad 2001: 135).

Meanwhile, the NGOs tried to create pressure through other countries, with which India has bilateral treaties. As a result in 2007 European and US parliament passed a resolution for combating caste discrimination in India. However, the NGOs role has criticized of being involved with 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. 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).

All NGOs and Dalit organizations played a very important role in internationalizing the caste problem. The justification given by them is somewhere accepted by the Indian society. On in the whole debate of the role of Indian government suggested that it was insensitive and failed to protect human rights. NGOs tried to prove the

failure of Indian government before the international community and government itself. If we consider the impact of caste system, over Indian society and its age old practice as well as the historical development of Indian society, then it shows there is not total failure of the government. But, NGOs have the attitude to blame the government. While making allegations it is also responsibility of NGOs also to help in social reforms. The role of NGOs in social reforms and consequences of their activities needs further clarification.

After discussed all the debate over inclusion of 'caste' the important thing should note by UN that it is a form of discrimination as per the definition of discrimination given by UN (Thorat 2009: 161). So, it must be recognised as a form of discrimination rather inserting it into other form of discrimination.

CHAPTER 5

CONCLUSION

The Indian social system is governed by caste system since time immemorial. It regulates the society on the basis of inequality, creating fragments in the society. Caste forms the most important factor in the Indian social system. It creates upper caste's authority over a lower caste, as per the idea of graded inequality. These depressed castes are not strong enough to stand against the system because of their social, economic and educational backwardness. This ultimately results into the violation of human rights. This humiliating structure of the Indian society received attention at the time of independence. The awareness about the rights led by social reformers during colonial rule introduced social reforms and challenged the caste system. This generated a hope in untouchables to live with dignity. The aspiration becomes conscious while framing law of the land. For the first time, the Constitution of India assured fundamental rights to every citizen irrespective of their caste and assured to form a society on equality, fraternity and justice. It generated awareness and vitality among lower caste people about their rights, which can be seen at national as well as international level. In order to fulfill constitutional commitments, it prohibited caste discrimination and enacted laws to curb such practice and ensure social justice. These well crafted laws obligate State governments to take necessary measures to prohibit this practice.

The practice of caste discrimination is so deeply rooted in the Indian society, that it governs the belief and faith of society. It has religious sanction that prevents its (caste discrimination) dissolution. Besides, well crafted laws have become paralyzed due to poor implementation. The executive and judiciary have failed to curb the hegemony of the caste system. To this failure, Indian government in defence argues that, as it is an age old practice, it will take time to change the mindset of the people. This justification for failure is not accepted at national as well as international level. Moreover, this apathy of the Indian government is responsible to some extent for spreading this cancer (caste practice) to other parts of the world. As a result, the Indian diaspora with cultural and traditional practices carries this evil practice to other

countries. The presence of caste discrimination among the Indian diaspora has in recent years attracted the attention of the international community.

The failure of national laws eventually led the international law to open its doors to discuss caste discrimination. Various UN 'human rights treaty bodies' have recommended Indian government to create awareness among the people about the principle of non-discrimination through education and economic empowerment. UN human rights bodies consider themselves as the guardian of international human rights laws. As a result through various conventions they have recognized and prohibited discriminations. In prohibiting discrimination they have of course focused on, among other matters, but have 'racial discrimination' sidelined 'caste' as a form of discrimination. This is mainly due to the reason that "discrimination related to race and colour is rooted in the empirical reality of European and American society" (Thorat 2009: 161).

None of the international conventions such as ICCPR, ICESCR, CRC and CEDAW directly addresses the issue of caste discrimination. However, through respective human rights treaty bodies reports, it is recognized that caste discrimination represents a grave violation of human rights. From time to time these treaty bodies have recommended to the Indian government to take necessary measures to curb age old practice. But there has been a failure on the part of Indian government to have effective implementation of laws. At the same time, the inability of the UN human rights treaty bodies to create pressure on Indian government has led to a crucial debate on recognition of 'caste' as separate form of discrimination and demand for its discussion in international forums. CERD has made major efforts to include 'caste' within the definition of 'racial discrimination'. The main objective of ICERD is to prohibit racial discrimination. It specifically deals with race, colour and national origin. The inclusion of 'caste discrimination' has been consistently opposed by Indian government. In 1996 CERD for the first time recommended to the Indian government to take necessary measures to prohibit caste discrimination. This recommendation introduced caste system of India to the world. But the Indian government has consistently opposed the move to internationalize 'caste discrimination', so as to protect its image of being a pro-human right state.

Within this context, three vital questions arise. The first question is whether the problem of caste discrimination should be placed at the international level? Firstly, India is signatory to various human rights conventions, so it is the prime responsibility and legal obligation on Indian government to comply with the norms of these conventions. Secondly, a large section of the Indian society is poverty ridden and witnesses rampant violence mainly against women, child, minorities, etc. Time and again these issues have been discussed at international fora; various guidelines have been issued to the Indian government on submission of reports to various treaty bodies. But still violence continues unabated. The problem of caste discrimination has been neglected. However, recently with CERD efforts the caste inclusion debate has commenced. The prohibition of 'caste discrimination' can lead to the protection of human rights of all. Therefore 'caste discrimination' should be taken up at international level.

However, there is strong opposition on the part of the Indian government. This dispute the fact that the first attempt to introduce caste discrimination at international level was made by Indian government in 100th meeting of Third Committee of General Assembly. It demanded the inclusion of 'caste' in Article 2 of UDHR as a form of discrimination. But later on deferred its move as it found that the phrases 'other status' and 'social origin' under Article 2 sufficiently broad to include 'caste discrimination'.

The NGOs on the other hand erred in equating caste with race. Since they felt that Europe lacked complete understanding of caste discrimination; therefore it would be convenient to equate caste with race. This justification is utterly wrong and erroneous. Caste and race are completely different forms of discrimination. On the contrary, caste can be covered under 'social origin' which the NGO's failed to take into consideration.

The second important question is whether the categories "caste" and "race" are same? The Constitution of India prohibits discrimination on the basis of caste and race as mentioned under Article 15. For this 'caste' and 'race' are placed alongside in the Constitution of India. Further it is said that, Indian society is a mixture of various races, and caste system came into existence long after these different races comingled

in blood and culture (Ambedkar 1936: 256). Caste discrimination is not among two different races, it is discrimination among people belong to same race, based on social division. It does not demarcate a racial division (Ambedkar 1936: 265). Dr. B. R. Ambedkar further explains that:

If caste means race then differences of sub-castes cannot mean differences of race because sub-castes become *ex hypothesia* sub-division of one and same race (Ambedkar 1936: 265).

It shows that caste discrimination is not racial discrimination. But to cover 'caste discrimination' through ICERD, efforts were made to widen the scope of the term 'racial discrimination'. As per the convention racial discrimination is based on five grounds such as race, colour, descent or national or ethnic origin. It urges that, racial discrimination is not related solely with race. It therefore encompasses 'caste discrimination' as well. On the other hand, Indian government argues that the convention specifically deals with race. Caste and race are not similar. Further, the CERD reports and General Recommendation XXIX mention 'caste discrimination' as one of the form of 'descent based discrimination'. The term 'descent' was inserted in definition of 'racial discrimination', through amendment proposed by India. Afterwards, this effort of India was interpreted by CERD, as the intention behind inserting 'descent' was to include 'caste' as a basis of discrimination. Apart from these efforts UN Human Rights Committee has highlighted the limited scope of definition of 'racial discrimination' of ICERD which is based on specific grounds. Further it is clearly mentioned that the scope of definition of 'discrimination' (which is not given by any UN convention) should be widened.

Rather given specific the definition of 'discrimination' and the widening the scope of discrimination continuous efforts are being made to include caste under descent. It is important to examine whether 'caste' is a form of 'descent based discrimination'? The Constitution of India also prohibits discrimination on the basis of 'descent'. Similarly, it incorporates 'caste' and 'descent' alongside, which clearly shows that, caste and descent are different forms of discrimination. In one caste there are many descents. While inserting 'descent' into ICERD Indian delegation referred to Constitution of India as a source. There was no intention to cover caste under descent. Indian government intended to cover it under 'social origin'. But after thirty years of

inclusion of word 'descent' efforts were made to include 'caste' in it. As, the term 'descent' has a specific meaning in the Constitution of India and occurred in reference to discrimination in public employment. The Indian delegation suggested that the term 'descent' is inserted into the Constitution of India taking into consideration its colonial history and discriminatory practices against Indian diaspora (CERD/C/SR.1796).

It led to the examination of the interpretation advanced by CERD. In General Recommendation XXIX CERD introduced criteria to identify 'descent' communities. If we compare these grounds of descent based discrimination given by CERD with the acts prohibited and punishable under Indian national laws, such as, Protection of Civil Rights Act, 1955, Scheduled Caste and Scheduled Tribes (Prevention and Atrocities) Act, 1989 and Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993, it shows similarities because it is interpreted by CERD in the context of caste. It seems that the proposed interpretation of 'descent' is meant to include caste discrimination. It clearly shows a weak attempt to expand the scope of 'descent based discrimination' and simultaneously the scope of 'racial discrimination'.

With the consideration of discussion at the time of '*travaux preparatoires*' of the ICERD it is seen that, the word 'descent' was suggested to replace 'national origin'. So the interpretation offered by CERD is not acceptable to Indian government. Still CERD is making efforts to include 'caste' under the 'descent based discrimination' but these efforts will not serve the purpose unless and until Indian government accepts the CERD interpretation (Sarkin and Koenig 2010: 569). In these circumstances international community should step forward to eliminate discrimination practices in Asian countries. It must, recognize 'caste' as a separate form of discrimination. The act of including 'caste' in 'racial discrimination' will be an act of political and moral irresponsibility (Beteille 2001: 51). On the other hand, it is a need of hour to eliminate the evil practice of discrimination inside and outside of India. For this purpose along with the legislative provisions there is the need to generate political will, because millions of people are victims of this inhuman practice. This practice is also being carried out in other countries with cultural and traditional values, which made the conditions of dalits worse in other countries. To stop the migration of caste

system with the practice of it in diaspora there is indeed need to recognize caste discrimination at international level.

The reluctance of the Indian government to discuss caste discrimination at international fora encouraged a comparison with UK's reaction on the caste issue. After the recommendations made by CERD for recognition and its practice UK government proposed a law. Contrary to the reluctance of Indian government, the Government of UK accepted the existence of caste discrimination practice in the Indian diaspora. By introducing a provision in Equality Act, 2010, it would appear to consider caste as an aspect of racial discrimination. However, it is the first step towards eradication of caste discrimination in Indian diaspora. The UK government has to make an amendment to introduce secondary legislation which will make the practice of caste discrimination illegal in true sense. This could be an example of how intervention of international community results in elimination of caste discrimination.

Thus India's stand that caste system is unique to India is true, but somewhere this argument of uniqueness becomes a hurdle to eradicate caste discrimination. The mere acceptance of practice of caste discrimination is not enough, given the failure of Indian government to effectively implement national laws. The government should take drastic measures to find out the lacunae in implementing process. Further, genuine efforts should be made to change the mindset of Indian society. For this change international community can provide assistance. Therefore, the Indian government should allow international community to discuss the issue of caste discrimination as a separate form of discrimination.

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