

# OPENING THE DOOR TO **EQUALITY**:

Access to Justice for *Dalits* in Nepal



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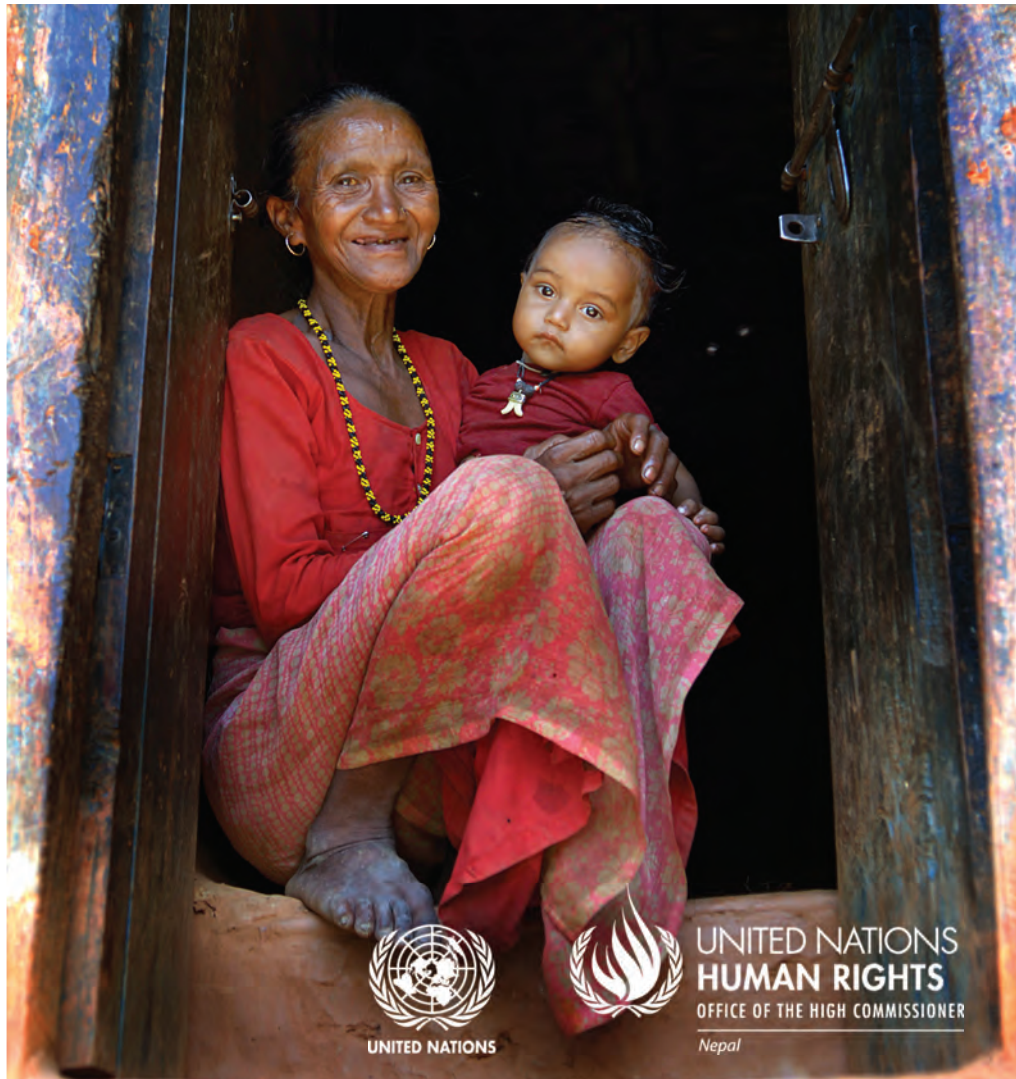
OFFICE OF THE HIGH COMMISSIONER

Nepal



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## FOREWORD

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By adopting the Caste-based Discrimination and Untouchability Act in May 2011, Nepal has become a leader on the world stage in the fight against caste-based discrimination. This builds on important commitments made by the Government of Nepal at the international level to address such discrimination, including those made by becoming a party to international human rights instruments and at Nepal's first Universal Periodic Review earlier this year.

It is now crucial to ensure the full implementation of the new law, and to realize the commitments made, so that the impact can be felt by those who experience caste-based discrimination and untouchability as part of their everyday lives.

This report - *Opening the Door to Equality: Access to Justice for Dalits in Nepal* - is the result of over five years of work of my Office in Nepal. It identifies and analyses the challenges faced by *Dalits* in Nepal in obtaining justice for caste-based discrimination and untouchability practices. The report offers concrete recommendations to the Government of Nepal, the judiciary, national human rights institutions, civil society and other key stakeholders on steps to be undertaken to ensure equal access to justice for *Dalits* in Nepal.

I am confident that this report is an important contribution to combating these discriminatory practices and I urge all actors to take every necessary step to end caste-based discrimination and untouchability in Nepal. In so doing, together we can participate in opening the door of equal access to justice for *Dalits*.

Navi Pillay  
United Nations High Commissioner for Human Rights

## EXECUTIVE SUMMARY

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In Nepal, the caste system is characterised as one of denials, discrimination, deprivation and domination. Under this caste structure, those in the lowest category - *Dalits* - are regarded as “untouchable”. The adoption of the Caste-based Discrimination and Untouchability (Offence and Punishment) Act in May 2011 was a milestone in the fight against caste-based discrimination in the country. However, to have real impact, this new Act must be accompanied by systematic reforms that address the deeply entrenched prejudices and structural failures that make the justice system inaccessible to the majority of Nepali people, and especially those from the *Dalit* community.

This report identifies factors that directly and indirectly perpetuate caste-based discrimination in Nepal, in relation to access to justice for victims. The analysis is based on data gathered through OHCHR’s work in Nepal between 2006 and 2011, focusing on the Far Western region of the country as a case study for the overall situation. The report stresses the critical importance of properly investigating cases of caste-based discrimination and prosecuting the perpetrators, providing legal redress and appropriate compensation for victims. The aim is to contribute to combating caste-based discrimination and untouchability in Nepal and in turn to enhancing the rule of law in the country. The report should serve as an advocacy tool to promote the reforms and changes necessary to promote equal access to justice for all.

“Access to justice” is defined broadly in this report, with four factors identified as necessary for equal access to justice for persons negatively affected by caste-based discrimination: strengthening the normative legal framework; increasing legal awareness; providing access to appropriate forums and improving the effective administration of justice; and strengthening accountability, enforcement of law and oversight.

The report examines the international human rights framework applicable to caste-based discrimination, emphasizing that non-discrimination and the right to equality are core international human rights principles. Nepal has committed to several international human rights treaties and mechanisms which uphold these principles and obligate them to systematically enforce the rights of victims of caste-based discrimination victims in Nepal.

There is also an elaboration of the national legal framework, including constitutional prohibitions on caste-based discrimination, the progressive role of the Supreme Court in enforcing these prohibitions, and a review of available remedies and the criminal procedure.

The main section of the report, utilising information collected by OHCHR through monitoring and investigation of emblematic cases presents a systematic analysis of the challenges faced by *Dalits* in seeking justice under the law against caste-based discrimination. It includes an analysis of such difficulties including: low levels of awareness of caste-based discrimination as a crime; inadequate legal provisions concerning punishment, compensation and accountability; obstacles in the application of the law and procedures; socio-economic factors influencing access to the justice system; various institutional challenges including insufficient resources and inadequate representation of *Dalits*; and challenges faced by the national human rights institutions in fulfilling their mandated roles.

A number of concrete and positive steps taken by the Government of Nepal, the judiciary and civil society to eliminate caste-based discrimination and untouchability are also highlighted, acknowledging the essential and complementary role of these actors in ensuring equal access to justice. The report concludes that a holistic approach needs to be taken to ensure access to justice for victims of caste-based discrimination and untouchability. While addressing institutional challenges in the criminal justice processes and improving the legislative framework, the limited opportunities open to *Dalits*, including in education and employment, must also be addressed. Furthermore, the awareness of caste-based discrimination and untouchability as a crime needs to be enhanced on all fronts – not only for law enforcement officers and other state officials, but also for victims and the Nepali society as a whole. To this end, a series of recommendations are directed to the Government of Nepal, the Nepal Police, the Office of the Attorney General, the judiciary, the national human rights institutions, political parties, civil society organizations and the broader international community.





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## LIST OF ABBREVIATIONS AND ACRONYMS

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CDEN	Caste Discrimination Elimination Network
CEDAW Committee	Committee on the Elimination of Discrimination against Women
CERD Committee	Committee on the Elimination of Racial Discrimination
CRC Committee	Committee on the Rights of the Child
DRCF	Durban Review Conference Follow-Up Committee
ESCR Committee	Committee on Economic, Social and Cultural Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
NDC	National Dalit Commission
NHRC	National Human Rights Commission
NWC	National Women Commission
UNDP	United Nations Development Programme
Untouchability Act	Caste-based Discrimination and Untouchability (Offence and Punishment) Act, 2011



■ A Dalit family at home: older children of the family were victims of caste-based discrimination at school where they were not allowed to use a communal water supply.

# 1 Introduction

## 1.1 Purpose of this report



In the recent past, Nepal has made significant progress in eradicating the traditional practices of caste-based discrimination and untouchability, particularly following the 1990 Constitution which guaranteed equality before the law and prohibited caste-based discrimination and untouchability for the first time.<sup>1</sup> In 2006, an amendment to the Civil Code widened criminal definitions to include “untouchability” practices and boycotts or restrictions against any person on the basis of caste, religion or class,<sup>2</sup> and the Interim Constitution of 2007 contains an article on fundamental rights with a right to protection from caste-based discrimination and untouchability.<sup>3</sup> Of particular note, in May 2011 Nepal’s Legislative-Parliament passed the long-awaited Caste-based Discrimination and Untouchability (Offence

<sup>1</sup> The Constitution of Nepal (1990), articles 11(1), (2), (3) and (4).

<sup>2</sup> Civil Code, Miscellaneous Chapter, section 10A.

<sup>3</sup> The Interim Constitution of 2007, article 14 includes a fundamental right to be free from untouchability and caste-based discrimination.



and Punishment) Act (Untouchability Act) which criminalizes caste-based discrimination and untouchability in both private and public spheres.

These legislative developments have been accompanied by increasingly viable, visible and vocal advocacy by actors working to eliminate caste-based discrimination and untouchability, including civil society organizations as well as the National Dalit Commission, a national human rights institution established by the State dedicated to focusing on *Dalit* issues and the promotion and protection of the rights of *Dalits*. At the same time there is an increasing trend on the part of *Dalits* to confront and challenge traditional discriminatory practices in their everyday lives.

Despite this progress, the practice of caste-based discrimination and untouchability in Nepal is still far from being eradicated. Most *Dalits*, who are on the lowest rung of the caste hierarchy, remain confined to the traditionally assigned roles and occupations that restrict their access to education and health care, and in turn restrict their employment opportunities, perpetuating the cycle of exclusion and poverty. One of the significant tools to break this cycle is access to justice for victims of caste-based discrimination and untouchability, to seek redress for the damages they suffer and to punish the perpetrators, thus discouraging repetition of similar incidents. However, out of 20,900 cases filed with the district courts (the courts of first instance) during the Nepali fiscal year from 16 July 2009 to 15 July 2010, only 12 cases dealt with caste-based discrimination.<sup>4</sup> This shows the formidable barriers faced by *Dalits* to seeking remedies for caste-based discrimination before the courts.

The introduction of the Untouchability Act in May 2011 is a milestone in the fight against caste-based discrimination. However, to have real impact, the new Act must be accompanied by other reforms that address the deeply entrenched prejudices and structural processes that make the justice system inaccessible to the majority of people from the *Dalit* community.

Effective systems to ensure access to justice are also essential for the promotion and protection of social stability. This is directly reflected in Nepal's own experience where entrenched discrimination and inequality were one of the root causes of the ten-year armed conflict. Citizens that are aware of their rights and able to access justice systems are more likely to believe that they will receive a just outcome from formal institutions, reducing the risk of reverting to violence. For all these reasons, ensuring effective access to justice is essential for Nepal to move forward towards an "inclusive, democratic and progressive restructuring of the state [and] to address the problems related to *Dalits*" as foreseen in the Comprehensive Peace Agreement.<sup>5</sup> As Nepal has already experienced, without effective access to justice, this vicious cycle of discrimination and marginalization can be a driving force for further instability, insecurity and civil disturbance.

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<sup>4</sup> Information provided to OHCHR by the Office of Attorney-General.

<sup>5</sup> *Comprehensive Peace Accord Concluded between the Government of Nepal and the Communist Party of Nepal (Maoist)*, 21 November 2006, subsection 3.5.

The purpose of this report is to identify and substantiate factors that directly and indirectly perpetuate caste-based discrimination in the Nepali justice system. This is not intended to be a comprehensive report, but rather an initial consideration of the issues and challenges for further discussion and investigation. It is hoped that the conceptual framework and information presented in this report will encourage other organizations to delve further into the concerns raised and to work towards a more accessible and effective justice system for communities affected by caste-based discrimination. By bringing the challenges identified to the attention of Government officials, legal professions, civil society and the international community, this report can serve as an advocacy tool for the reform of the judicial and law enforcement systems to render them both more accessible for victims and more effective in combating the crime of caste-based discrimination and untouchability. To that end, the report offers specific recommendations - in line with relevant international standards and good practices - to the Government, the Legislature-Parliament, national human rights institutions, civil society and the international community.

It should be noted that this report is neither an academic, nor a sociological analysis of the phenomenon of caste-based discrimination in Nepal, but rather an attempt to expose and analyse some patterns and manifestations of caste-based discrimination, based on information gathered by OHCHR in Nepal over the past five years. In this regard, the Far Western region of Nepal is used as a case study for the report, focusing on 20 cases of caste-based discrimination and untouchability to illustrate and examine the factors that hamper access to justice.

## 1.2 Context

Discrimination and inequality were among the root causes of Nepal's ten-year armed conflict. During that period, the Maoist movement continually pledged to end social and economic inequality, demanding the elimination of discrimination as well as the system of "untouchability".<sup>6</sup> Seeking to expand their support among the "depressed castes", the Maoists used the call for social and economic justice as a platform to advance their political movement and ideological agenda for a structural transformation in Nepal.<sup>7</sup> This pledge

<sup>6</sup> Communist Party of Nepal (Maoist), "40 Point Demand", 4 February 1996, section 21.

<sup>7</sup> Bishwa Nath Tiwari, "Horizontal Inequalities and Violent Conflict in Nepal," in Mahendra Lawoti and Arjun Guneratne ed., *Ethnicity, Inequality, and Politics in Nepal* (Himal Books, Kathmandu, 2010), p. 85; see also for instance Communist Party of Nepal (Maoist), "Political Line of CPN (Unity Centre)", December 1991. Available at [www.ucpn.org/english/doc1.php](http://www.ucpn.org/english/doc1.php).

was reiterated throughout the conflict, including in their negotiations with the Government.<sup>8</sup> Taking note of inequality and discrimination as causes of the conflict, the Comprehensive Peace Agreement signed in 2006 emphasizes the need to ensure the effective enjoyment of economic, social and cultural rights by all members of the society in Nepal.<sup>9</sup>

Five years since the signing of the Comprehensive Peace Agreement, there is a growing realisation that if endemic inequality, caste-based discrimination and untouchability remain unresolved, they could contribute to future instability.<sup>10</sup> Post-conflict Nepal has witnessed a rising number of groups becoming more vocal in expressing their concerns and demands through demonstrations, including general strikes and *bandhs*.<sup>11</sup> A call to address inequality - including discrimination on the grounds of caste and ethnicity - is often a major feature in the demands of these groups, demonstrating high expectations of future State restructuring processes. In this sense, *Dalit* groups have become increasingly vocal and proactive since the Comprehensive Peace Agreement was signed, including through the organization of demonstrations, sit-ins at district authority offices and blocking major roads to push for their demands.<sup>12</sup> This also reflects a growing movement across South Asia to confront the issue of caste-based discrimination and untouchability, with *Dalits* increasingly taking steps to challenge discriminatory practices against them. At the local level in Nepal, some *Dalits* in the Far Western region districts have refused to submit to traditional practices requiring them to dispose of buffalo carcasses during religious festivals. There has also been an increase in the number of inter-caste marriages between *Dalits* and non-*Dalits*. This in turn has caused a backlash in many cases as members of non-*Dalit* castes have responded through verbal and physical intimidation and violence. In September 2011, for instance, a *Dalit* man was murdered after his son married a non-*Dalit* woman. With increasing challenges to a practice that is centuries old and the inevitable societal frictions that follow, the necessity for effective mechanisms to ensure appropriate justice to victims has become ever more acute.

Access to justice for *Dalits* in Nepal needs to be situated within the overarching context of impunity and a weak rule of law, which create conditions for further discontent and

<sup>8</sup> See, for example, Communist Party of Nepal (Maoist), "An Executive Summary of the Proposal Put Forward by CPN (Maoist) for the Negotiations", presented by the Negotiation Team of CPN-M, 27 April 2003, Kathmandu. Available at [www.ucpnm.org/english/doc8.php](http://www.ucpnm.org/english/doc8.php).

<sup>9</sup> *Comprehensive Peace Accord Concluded between the Government of Nepal and the Communist Party of Nepal (Maoist)*, 21 November 2006, subsections 3.5 and 7.1.1.

<sup>10</sup> In 2008, the Committee on Economic, Social and Cultural Rights specifically noted "with concern that, in spite of the provisions in the Interim Constitution prohibiting caste-based discrimination, such discrimination persists with impunity. The Committee is particularly concerned about the obstacles that victims of caste-based discrimination reportedly face in accessing justice." Committee on Economic, Social and Cultural Rights, "Concluding observations of the Committee on Economic, Social and Cultural Rights: Nepal," E/C.12/NPL/CO/2 (2008), para. 13.

<sup>11</sup> *Bandhs* are an imposed shutdown of all businesses, educational institutions and transportation, either in a specific district or region, or nationally.

<sup>12</sup> For example, on 29 April 2011 the National Federation of Freed Haliya Society announced protest programmes in Kathmandu following the continued failure of the Government to implement commitments made towards the rehabilitation of the former bonded labourers.





■ *Shoe-making is a traditional occupation of the Dalit caste.*

instability in the country. Impunity remains entrenched and the lack of accountability for the perpetrators of serious crimes and human rights violations pervades.<sup>13</sup> For example, while the Comprehensive Peace Agreement requires the parties to guarantee accountability for crimes and human rights violations committed during the conflict, not a single case has been successfully prosecuted by civilian courts since it was adopted. Successive Governments have demonstrated little willingness to take the necessary steps to reverse this trend, and rather appear intent on providing impunity through amnesties, pardons and the withdrawal of criminal cases from the courts. At the operational level, the police are reluctant to register complaints and investigate alleged crimes, due in part to a lack of resources and capacity, but also because of a general unwillingness to take action when members of security forces are involved.<sup>14</sup> This situation is further exacerbated at the level of the District Government

<sup>13</sup> Human Rights Council, "Report of the United Nations High Commissioner for Human Rights on the human rights situation and the activities of her office, including technical cooperation, in Nepal", A/HRC/16/23 (2011), para. 10.

<sup>14</sup> USAID, "Nepal Rule of Law Assessment" (2009). Available at <http://nepal.usaid.gov/downloads/all-downloads/category/16-evaluation-reports.html>, p.8.

Attorneys who suffer from similarly limited resources and capacities.<sup>15</sup> The Government has also demonstrated a reluctance to implement recommendations made by the National Human Rights Commission concerning human rights violations.<sup>16</sup> The failure to hold persons to account for such serious crimes has eroded public faith in the ability of State institutions to enforce the law fairly and without political bias, at the same time emboldening those who engage in criminal activity.<sup>17</sup>

## 1.3 Methodology

Following its establishment in 2005, OHCHR in Nepal identified as one of its key priorities, the development of effective national mechanisms of accountability for discriminatory practices through strengthening the justice system and promoting access to justice for victims. In 2009, a dedicated project office was established in the Far Western region of Nepal, building on work previously conducted by the OHCHR Dhangadhi field office, with a primary focus on caste-based discrimination and promoting access to justice for *Dalit* victims in one of the most remote areas of Nepal. Information collected through this work forms the basis of the findings of this report. While recognizing the large number of incidents of caste-based discrimination and untouchability across Nepal, this report focuses on the Far Western region of the country as a case study. At the same time, the report does include some cases from the Terai (southern plain) region, including a few from the Central region.

This report also relies on data gathered through OHCHR's efforts to monitor and investigate emblematic cases of caste-based discrimination and untouchability in selected districts of Nepal, undertaken through interviews and meetings with victims and witnesses, human rights defenders and civil society organizations, law enforcement personnel, the local authorities, the judicial authorities and other state officials. Internal documents such as case files, field mission reports, interview reports, letters to authorities, and official documents, such as court decisions and complaints submitted to the police (known as First Information Reports) are used as primary sources.

Twenty cases were closely monitored between 2006 and 2011 through interviews with 48 victims and 67 field missions. In addition, OHCHR monitored court proceedings of two caste-based discrimination and untouchability cases in Kanchanpur and Baitadi districts

<sup>15</sup> Human Rights Council, "Report of the United Nations High Commissioner for Human Rights on the human rights situation and the activities of her office, including technical cooperation, in Nepal", A/HRC/16/23 (2011), para. 18.

<sup>16</sup> *Ibid.*, para. 25.

<sup>17</sup> *Ibid.*, para. 17.



respectively. The results of this monitoring are used throughout the report to highlight OHCHR's findings. It should be noted that the new Caste-based Discrimination and Untouchability (Offence and Punishment) Act was promulgated during the final stage of drafting of this report, and all cases cited were adjudicated under section 10A of the Civil Code's Miscellaneous Chapter<sup>18</sup> which was subsequently repealed with the passage of the new law.

The report also relies on qualitative data obtained in the context of advocacy activities for the passage of the new law, as well as capacity-building activities to strengthen the skills of the three national human rights institutions (the National Human Rights Commission, the National Dalit Commission and the National Women Commission), and civil society organizations (including, for example, the Caste-Based Discrimination Elimination Network in the Baitadi district and the Durban Review Conference Follow-up Committee). The report also reflects the deliberations from consultations organized in April 2011 with Constituent Assembly members, the National Dalit Commission, the Office of the Prime Minister, civil society organizations and human rights defenders, to identify key challenges for victims and their access to justice. A national consultation with stakeholders was held in July 2011 to finalize the recommendations and conclusions of this report.

<sup>18</sup> See section 4.2 of this report.





■ Many Dalit children look after their younger siblings, rather than attending school, while their parents are at work.

# 2 Definitions and Conceptual Framework

## 2.1 Access to justice

For Nepal to consolidate its peaceful transition, it is critical to overcome impunity, strengthen the rule of law and ensure access to justice for victims of discrimination. All of these elements are fundamentally linked. Highlighting the link between discrimination, inequality and the rule of law, a recent report of the United Nations Secretary General on legal empowerment of the poor called for equal and equitable access to justice in tackling the root causes of exclusion, vulnerability and poverty.<sup>19</sup> The report found access to justice to be a critical component of the rule of law and that challenges in obtaining justice reinforce exclusion and poverty.<sup>20</sup> Effective access to justice can aid poverty reduction strategies by, for example, providing redress to poverty caused by crime, inability to assert land rights or failure to secure inheritance or property rights upon divorce. The 2006 *World Development Report* also noted that “legal institutions play a key role in the distribution of power and rights. They also underpin the forms and functions of other institutions that deliver public services and regulate market practice.”<sup>21</sup>



<sup>19</sup> General Assembly, “Legal Empowerment of the Poor and Eradication of Poverty: Report of the Secretary-General”, A/64/133 (2009), para. 5.

<sup>20</sup> Ibid., paras 4, 8 and 23.

<sup>21</sup> World Bank, *World Development Report 2006: Equity and Development* (New York, Oxford University Press, 2005), p. 156.



While international laws and standards do not provide a single definition of “access to justice”, they do provide guidance as to the scope and detail of this right. Of primary importance is the “right to a remedy”. The Universal Declaration of Human Rights provides that “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the constitution or by law.”<sup>22</sup> The right to a remedy has been formally codified in the International Covenant on Civil and Political Rights,<sup>23</sup> with article 2(3) which provides “that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy.”<sup>24</sup> This remedy must be determined “by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State” in accordance with international human rights standards.<sup>25</sup>

Ensuring a remedy is an important part of access to justice, but to effectively ensure “justice”, a number of other aspects are also necessary. The United Nations Development Programme (UNDP) states in its *Practice Note on Access to Justice*: “Access to justice entails much more than improving an individual’s access to courts or guaranteeing legal representation. It must be defined in terms of ensuring that legal and judicial outcomes are just and equitable.”<sup>26</sup> In this report, a broad definition of access to justice is used, which entails “access by people, in particular from poor and disadvantaged groups, to fair, effective and accountable mechanisms for the protection of rights, control of abuse of power and resolution of conflicts. This includes the ability of people to seek and obtain a remedy through justice systems.”<sup>27</sup> This definition allows for a broad and holistic analysis encompassing the wide range of factors that impact on access to justice by groups marginalised by caste-based discrimination.

Based on this definition, four components of access to justice will be examined in this report, noting that each one is individually important but that all are fundamentally interdependent and mutually reinforcing:<sup>28</sup>

- 1. Strengthening the normative legal framework:** A strong legislative framework of rules, procedures, actors and institutions, in compliance with international human rights standards and principles, is the essential foundation for ensuring access to justice.

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<sup>22</sup> Universal Declaration of Human Rights (1948), article 8.

<sup>23</sup> Nepal ratified the International Covenant on Civil and Political Rights on 14 May 1991.

<sup>24</sup> International Covenant on Civil and Political Rights (1966), article 2(3)(a).

<sup>25</sup> *Ibid.*, article 2(3)(b).

<sup>26</sup> UNDP, *Access to Justice: Practice Note*, 9/3/2004 (2004), p. 6.

<sup>27</sup> This definition is taken from the World Bank paper, “A Framework for Strengthening Access to Justice in Indonesia”, 2007. Available at <http://siteresources.worldbank.org/INTJUSFORPOOR/Resources/A2JFrameworkEnglish.pdf> and is based on A. Bedner (2004), “Towards Meaningful Rule of Law Research: An Elementary Approach”, MS unpublished, VVI, Leiden; and UNDP, *Access to Justice: Practice Note*, 9/3/2004 (2004).

<sup>28</sup> World Bank, “A Framework for Strengthening Access to Justice in Indonesia Jakarta”, 2007. Available at <http://siteresources.worldbank.org/INTJUSFORPOOR/Resources/A2JFrameworkEnglish.pdf>; UNDP, *Access to Justice: Practice Note*, 9/3/2004 (2004).

**2. Increasing legal awareness:** The enforcement of rights is dependent on both an awareness that those rights exist and knowledge of avenues for redress. Lack of legal awareness is a serious impediment to accessing justice, in particular for populations already marginalised by caste-based discrimination, therefore having less access to education and information. This lack of awareness is likely to be even greater amongst women and other particularly disadvantaged groups within the *Dalit* community who face multiple forms of discrimination and who have even fewer opportunities to receive formal education.

**3. Providing access to appropriate forums and improving the effective administration of justice:** As stated in the 2006 *World Development Report*: “[P]eople’s legal rights remain theoretical if the institutions charged with enforcing them are inaccessible.”<sup>29</sup> In addition to a legal framework to protect the disadvantaged and increased legal awareness, the police and judicial system need to be accessible to all. Some of barriers that hinder accessibility include following:

- *Physical barriers* - Geographical locations of police posts and court buildings effect access to justice and require some victims to travel for extended periods.
- *Financial access* - The costs involved in accessing legal institutions, be they direct (eg: filing fees) or indirect (eg: transportation, lost wages), represent a major hindrance to access to justice for *Dalit* communities who are amongst the poorest in Nepal.
- *Professionalism of law enforcement officers* - Failure of law enforcement officers to treat caste-based discrimination and untouchability as a crime, in part as a result of their own prejudice against *Dalits*, further makes it difficult for *Dalits* to seek justice through the regular legal system.
- *Prohibition of use of so-called “mediation” processes* - Informal “mediation” processes in Nepal frequently reflect the social and political inequities present in the community and make it difficult for victims of caste-based discrimination to obtain satisfactory justice. This is exacerbated by the fact that mediation fails to recognize the nature of caste-based discrimination and untouchability as a crime and undermines efforts to reinforce the seriousness of this crime.

**4. Strengthening accountability, enforcement and oversight:** Even where disputes are resolved effectively, often the decisions are not adequately enforced and this seriously diminishes public confidence in the system. Independent systems for the public scrutiny of judicial procedures, such as national human rights institutions and a well-informed civil society, can play a key role in ensuring that cases progress through the legal system. In addition, mechanisms for ensuring increased representation of *Dalits* at all levels of the

<sup>29</sup> World Bank, *World Development Report 2006: Equity and Development* (New York, Oxford University Press, 2005), p. 6.

justice system and in law making bodies, will significantly contribute to a better justice system and a more rapid elimination of the deeply entrenched attitudes that create caste-based discrimination.

## 2.2 Caste-based discrimination

Despite being criminalized by different legislation, caste-based discrimination and untouchability are still widely practiced in Nepal. Those in the lowest category (*Dalit*)<sup>30</sup> are regarded as “untouchable”. Moreover, the act of a *Dalit* making physical contact with people from “touchable” castes or their objects is considered to be “polluting”, thus severely curtailing *Dalits* opportunities to participate in the society.

Caste as a category is embedded in the fabric of several societies in South Asia. It is a socially ascriptive identity, one which cannot be chosen but which is acquired by birth. In Nepal, sanctioned by Brahmanical texts for centuries, the caste system has rigidly classified individuals according to their descent and occupation.<sup>31</sup> In 1854, the Civil Code (*Muluki Ain*)<sup>32</sup> encoded this system, formally categorising individuals according to their occupation into a four layer hierarchy: (1) *Tagaddhari* (“sacred thread wearing” such as *Brahmin* and *Chettri*); (2) *Matawali* (“liquor drinking”, further sub-divided into two “non-enslavable” castes, such as *Magar* and *Gurung*, and the “enslavable” castes, such as *Bhote* and *Chepang*); (3) *Pani nachalne choi chhito halnu naparne* (“touchable low castes” such as *Kasai* and *Kusle*); and (4) *Pani nachalne choi chito halnu parne* (“water unacceptable and purification required if touched” or “untouchable low castes” such as *Kami* and *Sarkij*).<sup>33</sup> Although associated with Hinduism, this hierarchy is also seen amongst other religious and ethnic communities.<sup>34</sup>

<sup>30</sup> The National *Dalit* Commission defines “*Dalits*” as the castes which have been discriminated against as well as considered untouchables in the society, with a practice that the water touched by them will be defiled and therefore the people would not drink it and one must purify oneself in case touched by them, and the communities that have been made backward socially, economically, politically, educationally and religiously. While the term *Dalit* comes from the Sanskrit root “*dal*” and means “broken, ground-down, downtrodden, or oppressed”, it has been accepted for general use by the *Dalit* community.

<sup>31</sup> These include *Vedas*, the ancient texts of Hinduism (roughly 1,500 - 1,000 BC) and *Manusmriti*, the most significant work of of *Dharmasastra* tradition of Hinduism (roughly 200 BC - 200 AD).

<sup>32</sup> The legal code introduced by the first Rana Prime Minister, Jang Bahadur Rana, combined ancient Hindu sanctions and customary law and common laws modelled on the British and Indian codes with the rules of behaviour that had evolved over the centuries among the Newars in the Kathmandu valley.

<sup>33</sup> UNESCO, *Forms and patterns of social discrimination in Nepal: A report*, UNESCO Kathmandu Series of Monographs and Working Papers, No. 8 (2006), p. 17.

<sup>34</sup> In the Newar ethnic group for example both Hindus and Buddhists practice a social hierarchy based on caste and traditional occupation.



■ This house, the home of a Dalit family, was burned to the ground by non-Dalits following an inter-caste marriage.

Today, caste continues to play a determining role in regulating aspects of everyday life including marriage, birth, death, and other key cultural, social, economic and political engagements in many parts of South Asia. In Nepal, on account of predominantly rural and traditional social structures, caste has continued to be a dominant marker of the conduct of daily functioning of its citizens. Caste results in discrimination, domination, inequality and disparity, primarily through a lack of cultural and social power and access to resources. An individual's access to justice, jobs and other rights and privileges are graded within this matrix of power, which is dependent on caste affiliation.

While the institution of caste may be gradually evolving and loosening its grip on society, it has not disappeared. It remains, not only as a decisive factor in the traditionally continuing forms of social arrangements, but also continues to influence modern events such as elections. The power of caste affiliation is such that in Nepal, people are said to not only cast their vote but also "vote their caste".

In Nepal, the caste system results in a system of denials, discrimination, deprivation and domination. While *Dalits* account for more than one in eight persons in Nepal,<sup>35</sup> they remain

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<sup>35</sup> According to Nepal's 2001 census, *Dalits* were 13 per cent of the total population, although it has been claimed that the actual proportion is higher.

under-represented in political, administrative, educational and professional institutions. “Untouchability” prevents *Dalits* from using the same water sources, entering the same temples, or being able to marry someone from the so-called higher castes, severely curtailing their opportunities to participate in society.<sup>36</sup> It affects their access to education, health care, employment, water and as such their ability to secure an adequate standard of living.<sup>37</sup> For example, in some areas of the country, *Dalit* and non-*Dalit* children must still sit separately at school. In some cases, the *Dalit* children are left to stand at the back of the classroom, which is not only degrading but also severely compromises the quality of education.<sup>38</sup> The 2009 UNDP Nepal Annual Report found that the variation in human development is much greater between caste and ethnic groups than between regions and sub-regions.<sup>39</sup> With caste automatically passing to the next generation, the rigid assignment of low paid, low status professions, perpetrated by poor levels of education and inadequate health care and living conditions, condemn *Dalits* to live in severely vulnerable circumstances.

Within the *Dalit* community there are a number of particularly vulnerable groups. *Dalit* women are especially vulnerable, with their caste status multiplying pre-existing discrimination on the basis of their gender. *Dalit* women face even more restricted access to education and employment and increased exposure to sexual harassment and gender-based violence.<sup>40</sup> The *Badi* community, found mostly in the Mid and Far Western regions of Nepal, is particularly marginalized and stigmatized for being associated with ‘sex work’, while being denied other possibilities for livelihood.<sup>41</sup> The *Haliya* are a similarly vulnerable group consisting of ancestral debt-bonded labourers, located in the hill districts of the Mid and Far Western regions. Despite being formally freed by a Government declaration in September 2008,

<sup>36</sup> Human Rights Council, “Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Gith Migai”, A/HRC/17/40 (2011), para. 31.

<sup>37</sup> Non-*Dalit* doctors for instance may not physically touch *Dalits*. Similarly non-*Dalit* midwives would not attend to pregnant *Dalit* women. See K. B. Bhattachan, T. B. Sunar and Y. K. Bhattachan, “Caste-based discrimination in Nepal,” Working Paper Series, Vol. 3 (Indian Institute of *Dalit* Studies, 2009), p. 12.

<sup>38</sup> OHCHR has observed that in some Village Development Communities in remote districts, such as Baitadi district of the Far Western region, schools still confine *Dalit* children to the back rows of classrooms.

<sup>39</sup> The Terai *Dalits* have the lowest life expectancy (61.3 years) and adult literacy (27.3 per cent) rates in all social groups. This contrasts sharply with the position of the higher castes (such as *Brahmin* and *Chettri*) of the Terai. They are ranked first with a life expectancy of 63.9 years, an adult literacy rate of 83.8 per cent and an average of 6.4 years of schooling. The average per capita income of *Dalits* was 10,000 Nepali rupees, compared to national average of 15,000 Nepali rupees and that of *Brahmin/Chettri* 18,400 Nepali rupees. UNDP Nepal, *Nepal Human Development Report 2009: State Transformation and Human Development* (Kathmandu, UNDP, 2009).

<sup>40</sup> Women’s Rehabilitation Centre (WOREC), Nepal, ANWESI: *A Year Book on Violence Against Women 2008* (Kathmandu, WOREC, 2008), p.40; Committee on the Elimination of Discrimination against Women, “Report of the Committee on the Elimination of Discrimination against Women on its thirtieth session”, A/59/38 (2004), part I, para. 206.

<sup>41</sup> The Committee on the Rights of the Child, a body which monitor the implementation of the Convention on the Rights of the Child by its State parties, has also noted with concern that “[C]hildren of lower castes are disproportionately represented among sex workers, and about the persistence of the customary practice known as *Badi*, whereby young girls of the *Badi* caste are forced into prostitution.” Committee on the Rights of the Child, “Concluding observations: Nepal”, CRC/C/15/Add.261 (2005), para. 87.

many *Haliya* are forced to continue as bonded labourers, with no alternative means for a livelihood due to numerous factors including limited education, access to land and entrenched discrimination.<sup>42</sup> Despite government commitments, the *Badi* and *Haliya* communities are yet to be provided with the means to secure their release from traditional caste barriers.

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<sup>42</sup> In September 2008, the Government of Nepal issued a declaration that formally emancipated *Haliyas*, annulled their debts and established a Working Committee on *Haliya* rehabilitation. The officially declared emancipation of *Haliya* communities and the concomitant assurances given by the Government to take all necessary measures to eradicate this heinous practice were meant to pave the way for an end to the *Haliya* system and other forms of bonded labour in Nepal.







# 3 International Human Rights Framework Applicable to Victims of Caste-based Discrimination

## 3.1 Caste-based discrimination under international human rights law

### The principles of non-discrimination and equality

The principle of non-discrimination and the right to equality are core human rights principles that are enshrined in the Charter of the United Nations, the Universal Declaration of Human Rights and all international human rights treaties. These principles are now considered to have attained *jus cogens* status in that they are applicable to all countries, whether or not a State is a party to a particular international treaty. In addition, the *jus cogens* status means that countries cannot limit the application of these principles in any circumstances including when national security is threatened.

Nepal has further committed to uphold the principle of equality and non-discrimination by ratifying a number of international human rights instruments: the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities. By ratifying these instruments, Nepal has committed to guaranteeing the rights contained in them without distinction or discrimination of any kind, including national or social origin, property, birth or other status. In 1971, Nepal ratified the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which further elaborates state obligations pursuant to the principle of non-discrimination and prohibits “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin”.<sup>43</sup> In its 2004 report to the Committee on the Elimination of Racial Discrimination (CERD Committee), the authoritative body that monitors the implementation

<sup>43</sup> The International Convention on the Elimination of All Forms of Racial Discrimination (1965) (ICERD), article 1.

of the Convention by State parties, the Government of Nepal indicated that it is seriously considering accepting the competence of the Committee to receive and consider communications from individuals, however it has not yet done so.<sup>44</sup>

The CERD Committee has specifically interpreted the non-discrimination provisions in the ICERD to include a prohibition on caste-based discrimination and untouchability.<sup>45</sup> The Committee stated that “discrimination on the grounds of caste constituted a form of racial discrimination.”<sup>46</sup> Most recently, the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance has affirmed the position taken by the CERD Committee that the term “descent” in article 1 of the ICERD does not solely refer to race but that the situation of caste falls within its scope. As a State party to the ICERD, Nepal must “prohibit and eliminate racial discrimination in all its forms”.<sup>47</sup> This includes prohibiting the dissemination of ideas based on racial superiority or hatred, incitement to racial hatred or violence, and discriminatory propaganda activities and participation in organizations which instigate such hatred and discrimination.<sup>48</sup> According to the Committee, a State party’s criminal code should also include a provision to render committing offences based on racial reasons as an aggravating circumstance.<sup>49</sup>

Under the ICERD, Nepal is also obligated to eliminate both formal and substantive discrimination and ensure formal and *de facto* equality. In other words, the Government of Nepal must take positive measures to counter patterns of disadvantage and marginalization and ensure equality in opportunity and outcome for everyone. This includes, for instance, taking steps to address stereotypes and attitudes held by government officials that unfairly influence the formulation and implementation of policy measures.

<sup>44</sup> Committee on the Elimination of Racial Discrimination, “Sixteenth periodic reports of States parties due in 2002: Nepal”, CERD/C/452/Add.2 (2003), para. 124.

<sup>45</sup> See Committee on the Elimination of Racial Discrimination, “General Recommendation No. 29: Article 1, paragraph 1 of the Convention (Descent)” (2002), preamble.

<sup>46</sup> See also Human Rights Council, “Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Gith Migai”, A/HRC/17/40 (2011), para. 26. Further, the draft Principles and Guidelines for the Effective Elimination of Discrimination Based on Work and Descent prepared by the former UN Sub-Commission on Human Rights defines “discrimination based on work and descent” as to explicitly include “caste” – such discrimination is defined as “[A]ny distinction, exclusion, restrictions, 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.” A/HRC/11/CRP.3 Annex (2009), para.2.

<sup>47</sup> ICERD, article 5.

<sup>48</sup> ICERD, article 4; Committee on the Elimination of Racial Discrimination, “General Recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system”, A/60/18 (2005), para. 2(4)(a).

<sup>49</sup> *Ibid.*, para. 2(4)(a).



In some situations, the ICERD allows temporary special measures to be taken to correct the situation of marginalized groups.<sup>50</sup> These are often referred to as “affirmative measures”, “affirmative action” or “positive action” and can include, for example, quotas to remedy the disproportionate under-representation of minorities in schools and administrative bodies, as well as targeted development interventions.<sup>51</sup> These special measures would not constitute discrimination under international law, as long as they are used to correct historically produced disadvantage and serve to overcome the barriers particular disadvantaged groups face in enjoying their human rights and fundamental freedoms. The measures are to be designed and implemented on the basis of need as well as prior consultation with, and the active participation of, affected communities.<sup>52</sup>

The Committee Against Torture, the body overseeing the compliance of States parties with

<sup>50</sup> “Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.” ICERD, article 1(4).

<sup>51</sup> Committee on the Elimination of Racial Discrimination, “General Recommendation No. 32: The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination” (2009), para. 12.

<sup>52</sup> *Ibid.*, paras 17 and 18.

the Convention Against Torture, has also reaffirmed that it is the Government's duty to protect all members of society, in particular citizens belonging to marginalized and disadvantaged groups or castes, such as *Dalits*. The Committee has made specific recommendations to the Government of Nepal to take steps to safeguard the physical integrity of members of marginalized and disadvantaged groups; ensure that accountability mechanisms are in place; guarantee that caste is not used as a basis for abuse, unlawful detention and torture; and take steps to ensure more diverse caste and ethnic representation in its police and security forces.<sup>53</sup>

Further to these obligations under international law, human rights treaty bodies and special procedure mandate holders of the United Nations Human Rights Council have repeatedly expressed concerns regarding the persistence of caste-based discrimination and untouchability in Nepal. The CERD Committee expressed deep concern regarding "the persistence of the *de facto* caste-based discrimination and the culture of impunity that apparently permeates the higher strata of a hierarchical social system".<sup>54</sup> The Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance noted: "[C]aste-based discrimination remains deplorably widespread and deeply rooted. Victims face structural discrimination, locking them into a persistent and vicious cycle of poverty and marginalization."<sup>55</sup> The Committee on Economic, Social and Cultural Rights (ESCR Committee) has noted: "[T]he rigid social structures ... prevent the lower castes from benefiting from communal lands and public services and from engaging in other kinds of business activities."<sup>56</sup> The Committee further expressed concerns regarding the denial of access of persons belonging to the lower castes to public wells, directly threatening their right to an adequate standard of living and their right to the highest attainable standard of health.<sup>57</sup> The ESCR Committee also expressed concern about the obstacles victims of caste-based discrimination face in accessing justice, which is the subject of this report.<sup>58</sup>

### **Dalit women under international human rights law**

*Dalit* women and girl children can face double discrimination and marginalization on the

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<sup>53</sup> Committee Against Torture, "Conclusions and recommendations of the Committee against Torture: NEPAL", CAT/C/NPL/CO/2 (2007), para. 26.

<sup>54</sup> Committee on the Elimination of Racial Discrimination, "Concluding observations of the Committee on the Elimination of Racial Discrimination: NEPAL", CERD/C/64/CO/5 (2004), para. 12; see also Committee Against Torture, "Conclusions and recommendations of the Committee against Torture: NEPAL", CAT/C/NPL/CO/2 (2007), para. 26.

<sup>55</sup> Human Rights Council, "Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Gith Migai", A/HRC/17/40 (2011), para. 29.

<sup>56</sup> Committee on Economic, Social and Cultural Rights, "Concluding observations of the Committee on Economic, Social and Cultural Rights: NEPAL", E/C.12/NPL/CO/2 (2008), para. 22.

<sup>57</sup> *Ibid.*, para. 24.

<sup>58</sup> Committee on Economic, Social and Cultural Rights, "Concluding observations of the Committee on Economic, Social and Cultural Rights: NEPAL", E/C.12/NPL/CO/2 (2008), para. 13.

basis of both their caste and gender, thereby requiring increased attention to ensure that their fundamental rights and freedoms are protected. This is recognized in the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child.<sup>59</sup> The CERD Committee has also stated that: "Certain forms of racial discrimination may be directed towards women specifically because of their gender."<sup>60</sup> The Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance noted that: "Women are socio-economically positioned at the bottom of the caste, gender and class hierarchy, and face violence in their family and communities, and from actors in other castes."<sup>61</sup>

Concerning Nepal, the Committee on the Elimination of Discrimination against Women (CEDAW Committee) expressed deep concerns about the multiple forms of discrimination against disadvantaged groups of women, including *Dalit* women and the continued prevalence of violence particularly against *Dalit* women.<sup>62</sup> Similarly, the Committee expressed concerns, particularly on *Dalit* women's low representation in high-level decision making positions, the public services, the judicial and the diplomatic service, in the National Human Rights Commission and at the local level.<sup>63</sup>

The CEDAW Committee highlighted the need for measures to accelerate the advancement of women who are facing multiple forms of discrimination.<sup>64</sup> The Committee urged the Government of Nepal to prioritize combating multiple forms of discrimination against women from various disadvantaged groups through the collection of data on the situation of these women, and the adoption of legal provisions and comprehensive programmes, including public education and awareness raising campaigns involving the mass media as well as community and religious leaders, to combat multiple discriminations.<sup>65</sup>

### ***Dalit* children under international human rights law**

Regarding *Dalit* children, the Committee on the Rights of the Child (CRC Committee), the body overseeing the State parties' compliance with the Convention on the Rights of the Child, has reiterated its deep concern regarding "the widely prevailing *de facto* discrimination against girls and children belonging to the most vulnerable groups such as the *Dalit* community" in

<sup>59</sup> Human Rights Council, "Draft Principles and Guidelines for the Effective Elimination of Discrimination Based on Work and Descent", A/HRC/11/CRP.3 Annex (2009), footnote 5.

<sup>60</sup> Committee on the Elimination of Racial Discrimination, "General Recommendation No. 25: Gender related dimensions of racial discrimination" (2000), para. 2.

<sup>61</sup> Human Rights Council, "Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Gith Migai", A/HRC/17/40 (2011), para. 37.

<sup>62</sup> Committee on the Elimination of Discrimination against Women, "Concluding observation of the Committee of the Elimination of Discrimination against Women: Nepal", CEDAW/C/NPL/CO/4-5 (2011), paras 39 and 19.

<sup>63</sup> *Ibid.*, para. 23.

<sup>64</sup> *Ibid.*, para. 16(a).

<sup>65</sup> *Ibid.*, para. 40.

Nepal.<sup>66</sup> The Committee expressed serious concern about the harmful effects of the prevailing discrimination on the physical, psychological and emotional well-being of the *Dalit* children in the country.<sup>67</sup> The Committee noted with concern that little has been done to address the particular health vulnerabilities and needs of children at risk, including *Dalit* children, and that children belonging to vulnerable groups are especially likely to fall victim to abuse and exploitation.<sup>68</sup>

Thus, the CRC Committee stressed that all children within the jurisdiction of Nepal should enjoy all rights under the Convention on the Rights of Child without discrimination.<sup>69</sup> The Committee further recommended that the Government “prioritize and target social services for children belonging to the most vulnerable groups, and take all effective measures to ensure their protection from exploitation”.<sup>70</sup>

### **The draft United Nations Principles and Guidelines for the Effective Elimination of Discrimination Based on Work and Descent<sup>71</sup>**

The draft United Nations Principles and Guidelines for the Effective Elimination of Discrimination Based on Work and Descent are contained in the final report of two Special Rapporteurs of the former UN Sub-Commission on Human Rights on the topic of discrimination based on work and descent, which was published by the Human Rights Council on 18 May 2009. The draft Principles and Guidelines have yet to be adopted by the Human Rights Council, but nonetheless provide useful guidance on relevant international law and standards. The High Commissioner for Human Rights has lent public support to the draft Principles and encouraged Member States to debate and adopt them. The Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance has also recommended the use of the draft Principles and Guidelines “as a guiding framework for the elaboration of effective measures to be taken by States to fulfil international legal obligations, including the duty of Governments to engage in genuine efforts to dispel the prejudicial beliefs that constitute, support and reinforce discrimination based on work and descent, including notions of untouchability”.<sup>72</sup>

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<sup>66</sup> Committee on the Rights of the Child, “Concluding observations: Nepal”, CRC/C/15/Add.261 (2005), para. 35.

<sup>67</sup> *Ibid.*, para. 36.

<sup>68</sup> *Ibid.*, paras 35 and 61.

<sup>69</sup> *Ibid.*, para. 37.

<sup>70</sup> *Ibid.*

<sup>71</sup> See Human Rights Council, “Final report of Mr. Yozo Yokota and Ms. Chin-Sung Chung, Special Rapporteurs on the topic of discrimination based on work and descent,” A/HRC/11/CRP.3(2009).

<sup>72</sup> Human Rights Council, “Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Gith Migai”, A/HRC/17/40 (2011), para. 90(b).

Based on existing internationally agreed human rights standards and best practices, the draft Principles and Guidelines reiterate the obligation of States to “take all necessary constitutional, legislative, administrative, budgetary, judicial and educational measures to eliminate and prevent discrimination based on work and descent in their respective territories and to respect, protect, promote, implement and monitor the human rights of those facing discrimination based on work and descent”.<sup>73</sup> They also detail how States can prevent and address this systematic human rights problem.

The draft Principles and Guidelines call on States to not only provide the necessary protection through legislation, but to also take positive and affirmative action to ensure equality. The stipulations span a number of different topics, including: combating segregation; physical security and protection against violence; access to justice; equal employment opportunities and free choice of occupation; health; adequate food, water and housing; education; public awareness raising; the situation of women; and ensuring the participation of affected communities in decision making. In relation to each of these topics, the Principles and Guidelines call on States to ensure both *de jure* and *de facto* equality and non-discrimination.

Concerning access to justice, the draft Principles and Guidelines require national and local governments, among others, to take proper measures to protect affected communities against acts of discrimination and violence and to end impunity; investigate, prosecute and punish perpetrators of all forms of violence and atrocities, and sanction anyone found preventing or discouraging victims from reporting such incidents; encourage victims and witnesses to report such acts to the competent authorities and protect them from acts of retaliation and discrimination; ensure that complaints under relevant acts and other criminal law provisions are properly registered; publicize the number and nature of complaints registered, the convictions and sentences imposed, and the remedies and assistance provided to victims of such acts; provide legal aid or other kinds of support to public interest organizations representing the interests of the victims. The draft Principles and Guidelines also call for adequate training on the prevention, investigation, and prosecution of cases involving discrimination based on work and descent for law enforcement officials, including police, judges and prosecutors.

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<sup>73</sup> Human Rights Council, “Draft Principles and Guidelines for the Effective Elimination of Discrimination Based on Work and Descent”, A/HRC/11/CRP.3 Annex (2009), para.7.





■ Dalit women and men discuss caste-based discrimination issues with an OHCHR team.

## 3.2 International political commitments to end caste-based discrimination

The Government of Nepal has made public commitments to ending caste-based discrimination and untouchability practices in different arenas and fora. While not legally binding, these commitments represent strong political statements on which advocacy efforts can be based.

In 2001, Nepal committed itself to the Durban (World Conference against Racism) Declaration and Programme of Action which recognized that discrimination on the basis of descent is a form of discrimination and intolerance that must be eliminated. This should involve, *inter alia*: to take preventative and concerted action particularly in the field of education and awareness raising; to adopt measures of affirmative or positive action to create equal opportunities for victims in the political, economic, social and cultural decision-making spheres; and to provide effective remedies, recourse, redress and compensatory measures to victims and ensuring that victims have access to legal assistance so they can pursue such measures. This also includes creating competent national bodies to adequately investigate allegations of such discrimination and intolerance. This commitment to ending

discrimination was reiterated at the Durban Review Conference in 2009, which reviewed progress and assessed the implementation of the Durban Declaration and Programme of Action.

On 16 September 2010, at a side event during the 12th session of the United Nations Human Rights Council in Geneva, Nepal's State Minister for General Administration confirmed the Government's support for the draft United Nations Principles and Guidelines for the Effective Elimination of Discrimination Based on Work and Descent. In order to move forward the adoption of the draft Guidelines and Principles, the Government of Nepal set up a 15-member national coordination committee, chaired by the State Minister. This committee is currently considering the role that Nepal can play to encourage the adoption of the draft Principles and Guidelines by the Human Rights Council and to further its implementation.

In January 2011, during the Universal Periodic Review of Nepal by the Human Rights Council, the Government of Nepal publicly committed to ending caste-based discrimination and untouchability by accepting a number of recommendations. Such recommendations included the implementation of commitments under the ICERD, ensuring that local authorities fully implement policies to combat caste-based discrimination and to pass the bill on caste-based discrimination and untouchability.<sup>74</sup>

### **Box 3.1: Nepal's commitments to address caste-discrimination during its first Universal Periodic Review**

The first review of the human rights situation in Nepal by the Universal Periodic Review mechanism took place in Geneva on 25 January 2011. At the initiative of the Government and national institutions, a preparatory phase in 2010 brought together government representatives and various stakeholders to jointly assess the human rights situation in the country. A series of consultations were held and two joint reports were submitted, one by three national human rights institutions – the National Human Rights Commission, the National Women Commission and the National Dalit Commission – and another by 238 civil society organizations.

During the review, Government representatives provided a detailed presentation on the human rights situation in Nepal after which Member States made statements and a total of 135 recommendations. The Government initially responded by accepting 84 recommendations and committing to consider an additional 36 recommendations by the plenary session in June. The Government also acknowledged gaps in the promotion and protection of human rights in the country due to various factors such

<sup>74</sup> Human Rights Council, "Draft report of the Working Group on the Universal Periodic Review: Nepal," A/HRC/WG.6/10/L.3 (2011).

as the continuing political impasse, challenges in the peace process and a weak economy. The subsequent period until June allowed the Government to consider whether or not to accept further recommendations, including through the organization of a national consultation to finalize a draft Action Plan for the implementation of the accepted Universal Periodic Review recommendations. During the plenary session of the Human Rights Council on 7 June, the Government accepted an additional 12 recommendations.

Encouragingly, the Government of Nepal accepted all six recommendations made by Member States concerning caste-based discrimination including the criminalization of the practice and the implementation of legislation, policies as commitments under the ICERD. While these were largely consistent with existing plans to pass the new Untouchability Act, which occurred in May 2011, the Government's commitments made during the Universal Periodic Review process also encompass other aspects of access to justice for victims of caste-based discrimination, including reporting and investigating incidents of caste-based discrimination, prosecuting perpetrators and compensating victims.

### 3.3 Access to justice as it applies to victims of discrimination

International instruments and statements of international human rights mechanisms support a broad interpretation of access to justice in relation to the elimination of caste-based discrimination, as discussed in chapter 2.1 of this report. Relevant provisions and comments recognize the need to strengthen laws and justice institutions, as well as to ensure that communities suffering from caste-based discrimination can physically and financially access these services without victimization, so that the outcome is that of an "effective" remedy.

As a State party to the ICERD, the Government of Nepal is obligated to "assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions" against any acts of caste-based discrimination. The Government must also guarantee everyone "the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination".<sup>75</sup>

The draft Principles and Guidelines referred to in section 3.1 above recognize: "[E]xplicit

<sup>75</sup> ICERD, article 6.





■ *Dalit man discussing the lack of support from the community and the police in seeking justice.*

legislation ... has not proven sufficient. Assessments of the progress made by countries that explicitly prohibit human rights violations against affected communities have shown that these prohibitions often prove ineffective in the absence of diligent enforcement.”<sup>76</sup> State parties must ensure that legislation is adequately enforced. The Government should warrant an adequate and accessible presence of the police services in the regions where victims of racial discrimination reside.<sup>77</sup> Moreover the police officers must be instructed to immediately record a complaint of racism and to promptly investigate in “an effective, independent and impartial manner”.<sup>78</sup> According to the CERD Committee’s jurisprudence under the individual complaints mechanism, a State party must also ensure that upon receiving credible information, the relevant law enforcement officials initiate proper investigation.<sup>79</sup>

<sup>76</sup> Human Rights Council, “Draft Principles and Guidelines for the Effective Elimination of Discrimination Based on Work and Descent”, A/HRC/11/CRP.3 Annex (2009), footnote 8.

<sup>77</sup> Committee on the Elimination of Racial Discrimination, “General Recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system”, A/60/18 (2005), preamble and para. 10.

<sup>78</sup> *Ibid.*, para. 11.

<sup>79</sup> Under its individual complaint mechanism, the CERD Committee ruled for instance that in Denmark the police’s discontinuation of a case alleging the use of racially derogatory language by a teacher towards a Pakistani pupil contravened the ICERD. The Committee concluded that “owing to the failure of the police to continue their investigations, and the final decision of the Public Prosecutor against which there was no right of appeal, the author was denied any opportunity to establish whether his rights under the Convention had been violated. It recommended that the State party “ensure that the police and the public prosecutors properly investigate accusations and complaints relating to acts of racial discrimination, which should be punishable by law [according to] article 4 of the Convention”. Committee on the Elimination of Racial Discrimination, *Kashif Ahmad v. Denmark*, CERD/C/56/D/16/1999 (8 May 2000). Available at [www.unhcr.org/refworld/publisher,CERD,PAK,3f588f023,0.html](http://www.unhcr.org/refworld/publisher/CERD/PAK,3f588f023,0.html).

Any refusal by a police official to accept a complaint involving an act of racism should lead to disciplinary or penal sanctions.<sup>80</sup>

The CERD Committee has further elaborated upon the obligations of State parties concerning the justice system itself. The State must guarantee adequate protection for the victim or the victim's family against any forms of intimidation or reprisals.<sup>81</sup> Victims should be granted legal standing, including access to information and the opportunity to confront hostile witnesses.<sup>82</sup> They must be informed of progress in the proceedings, and guaranteed a court judgment within a reasonable period.<sup>83</sup> The justice system itself must treat victims without discrimination or prejudice and guarantee sufficient opportunity for preparation.<sup>84</sup> State parties must also facilitate right holders' ability to access justice by *inter alia* providing information to persons belonging to the most vulnerable social groups on their rights and the procedures for seeking legal redress. This can include free legal help and advice centres in areas where they reside.<sup>85</sup> A State party is also to provide those victims, who need it, with effective legal aid, including an interpreter free of charge.<sup>86</sup>

Human rights treaty bodies have expressed concerns regarding access to justice for victims of caste-based discrimination in Nepal. The ESCR Committee noted with concern that despite the constitutional prohibition of caste-based discrimination, such discrimination persists with impunity. The Committee expressed particular concern about "the obstacles that victims of caste-based discrimination reportedly face in accessing justice".<sup>87</sup> The Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance has noted that socio-economic and cultural obstacles have been acknowledged as barriers to access to justice for marginalized groups, including *Dalits*, in Nepal.<sup>88</sup> The CERD Committee has also noted that the absence of complaints and legal actions by victims may be due to the absence of relevant legislation, a lack of awareness of the availability of legal remedies as

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<sup>80</sup> Committee on the Elimination of Racial Discrimination, "General Recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system", A/60/18 (2005), para. 12.

<sup>81</sup> *Ibid.*, para. 18(d).

<sup>82</sup> *Ibid.*, para. 19(a).

<sup>83</sup> *Ibid.*, paras. 19(a), and (c).

<sup>84</sup> *Ibid.*, paras. 19(b) and (d).

<sup>85</sup> *Ibid.*, para. 8.

<sup>86</sup> *Ibid.*, para. 17b.

<sup>87</sup> Committee on Economic, Social and Cultural Rights, "Concluding observations of the Committee on Economic, Social and Cultural Rights: NEPAL", E/C.12/NPL/CO/2 (2008), para. 13.

<sup>88</sup> Human Rights Council, "Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Gith Migai", A/HRC/17/40 (2011), para. 47.

well as the absence of willingness to prosecute by the authorities.<sup>89</sup>

A number of recommendations have been made specifically to the Government of Nepal to ensure access to justice for victims of caste-based discrimination. The ESCR Committee urged the Government to strengthen its efforts to make widely known the prohibition of caste-based discrimination and to effectively improve access to judicial and administrative remedies in cases of alleged violations.<sup>90</sup> The CERD Committee stressed the need for “a determined enforcement of the criminal justice system”.<sup>91</sup> The Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance has made a more general recommendation to states to implement measures for awareness raising, particularly for the judicial, police and civil servants, “to ensure effective implementation and enforcement of the law”.<sup>92</sup>

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<sup>89</sup> Committee on the Elimination of Racial Discrimination, “Concluding observations of the Committee on the Elimination of Racial Discrimination: NEPAL”, CERD/C/64/CO/5 (2004), para. 12; see also Committee Against Torture, “Conclusions and recommendations of the Committee against Torture: NEPAL”, CAT/C/NPL/CO/2 (2007), para. 14.

<sup>90</sup> Committee on Economic, Social and Cultural Rights, “Concluding observations of the Committee on Economic, Social and Cultural Rights: NEPAL”, E/C.12/NPL/CO/2 (2008), para. 32.

<sup>91</sup> Committee on the Elimination of Racial Discrimination, “Concluding observations of the Committee on the Elimination of Racial Discrimination: NEPAL”, CERD/C/64/CO/5 (2004), para. 14.

<sup>92</sup> Human Rights Council, “Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Gith Migai”, A/HRC/17/40 (2011), para. 88.





# 4 National Legal Framework on Non-Discrimination and Access to Justice

## 4.1 Constitutional prohibition of caste-based discrimination

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Nepal has a long-standing constitutional tradition of guaranteeing the right to non-discrimination and equality as part of fundamental rights. Since the promulgation of the 1951 Constitution, “caste” discrimination has been prohibited within wider equality and non-discrimination provisions.<sup>93</sup> However, it was the 1990 Constitution that explicitly prohibited caste-based discrimination and untouchability and made the commission of such practices punishable.<sup>94</sup>

The constitutional regime against caste-based discrimination was further strengthened by the Interim Constitution of 2007, which guarantees the “fundamental” right to “equality before the law” and “equal protection of laws”, stipulating that there “shall be no discrimination in the application of general laws against any citizens based on caste, and that the State shall also not discriminate on such ground”.<sup>95</sup> Significantly, the Interim Constitution further spells out the “right against untouchability and racial discrimination”. Article 14 prohibits racial discrimination and untouchability in any form, establishing liability of the perpetrator and

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<sup>93</sup> Previous Constitutions of 1951 (article 13), 1959 (article 4), and 1962 (article 10) guaranteed the right to equality and non-discrimination, regardless of caste, as a fundamental right.

<sup>94</sup> Article 11(4) of the Constitution of the Kingdom of Nepal of 1990 provided: “No person shall, on the basis of caste, be discriminated against as untouchable, be denied access to any public place, or be deprived of the use of public utilities. Any contravention of this provision shall be punishable by law.”

<sup>95</sup> The Interim Constitution of Nepal (2007), article 13.



entitling the victim to compensation.<sup>96</sup> It also prohibits denial of access or use of any public places, goods, services or conveniences on the basis of caste. Demonstration, dissemination and encouragement of caste superiority or discrimination are also prohibited and punishable by law. Furthermore, the Interim Constitution lists a comprehensive catalogue of other

<sup>96</sup> The Interim Constitution of Nepal (2007), article 14. "Right against untouchability and racial discrimination

(1) No person shall, on the ground of caste, descent, community or occupation, be subject to racial discrimination and untouchability in any form. Such a discriminatory act shall be liable to punishment and the victim shall be entitled to compensation as provided by the law.

(2) No person shall, on the ground of caste or tribe, be deprived of the use of services, conveniences or utilities available to the public, or be denied access to any public place, or public religious places, or be prevented from performing any religious act.

(3) No person belonging to any particular caste or tribe shall, in relation to the production or making available of any goods, services or conveniences, be prevented from purchasing or acquiring such goods, services or conveniences; and no such goods, services or conveniences shall be sold or distributed only to members of a particular caste or tribe.

(4) No one shall be allowed to purport to demonstrate superiority or inferiority of any person or a group of persons belonging to any caste, tribe or origin; or to justify social discrimination on the basis of caste and tribe; or to disseminate ideas based on caste superiority or hatred; or to encourage caste discrimination in any form.

(5) Any act contrary to the provisions of clauses (2), (3) and (4) shall be punishable in accordance with law."



fundamental rights, essentially emanating from the international Bill of Rights.<sup>97</sup> These include the right to live with dignity, the right to liberty and fundamental freedoms, the right to privacy, the right against exploitation and a number of economic, social and cultural rights.

Following the promulgation of the 1990 Constitution, the processes of constitutional review and public interest litigation before the Supreme Court of Nepal led to significant strengthening of prohibitions against caste-based discrimination and untouchability. The Supreme Court supported this process by invalidating legislative and executive actions that promoted untouchability and caste-based discrimination and by ordering the Government to adopt legislative and other measures giving effect to its obligations under the ICERD and the Constitution. Judicial activism in this regard has been instrumental in advancing the implementation and enforcement of the guarantees in law.

## 4.2 Criminalization of caste-based discrimination and untouchability

Although caste-based discrimination has been unconstitutional since 1951, its recognition as a punishable criminal offence only dates back to 1991 when a new section 10A was inserted in the miscellaneous chapter of the Civil Code (*Muluki Ain*) to criminalize discriminatory practices of untouchability or denial of access to public places and the use of public utilities.<sup>98</sup> The provision was further amended in 2007 with an augmentation of the range of punishments.<sup>99</sup>

The most significant development in this regard has been the adoption of the Caste-based Discrimination and Untouchability (Offence and Punishment) Act (Untouchability Act), by the Legislature-Parliament, on 25 May 2011. This new law, repealing section 10A, provides a legal framework for practically combating discriminatory practices by detailing and specifying the criminalization of caste-based discrimination and untouchability. The law had been long-awaited, pending before Parliament for more than 20 months. While the law offers cause for optimism regarding the practical criminalization of caste-based discrimination, the extent to which it will be implemented, particularly in the more remote areas of Nepal, where

<sup>97</sup> Universal Declaration of Human Rights (1948); International Covenant on Economic, Social and Cultural Rights (1966); International Covenant on Civil and Political Rights (1966); Optional Protocol to the International Covenant on Civil and Political Rights; Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty .

<sup>98</sup> Those found responsible for crimes under section 10A were subject to imprisonment up to one year or fine up to 3,000 Nepali rupees or both.

<sup>99</sup> Amended provision prescribed the imprisonment for a term ranging from three months to three years or a fine of 1,000 Nepali rupees to 25,000 Nepali rupees or both.



■ Residents of a Dalit village where basket weaving is the traditional occupation.

untouchability practices are more acute, remains to be seen. At the time of reporting OHCHR has received reports that the police in some districts have started filing cases under the new Act.

The new law criminalizes engaging in, causing, supporting, instigating or prompting caste-based discrimination and untouchability. Thus, these broad provisions criminalize actions by those who incite or support discriminatory acts, as well as those who actually commit them. Furthermore, the law outlaws caste-based discrimination in both the public and the private spheres. Both of these elements had been missing, or at least unspecified, in the previous section of the Civil Code. The Act further contains a list of actions considered to amount to caste-based discrimination and untouchability, which includes: prohibiting the entry or

expelling a person from public places; depriving him or her from using public services; participating in any activities that instigate caste-based discrimination; prohibiting a person from engaging in any occupation or business or refusing to employ based on caste, ethnicity or origin; depriving him or her from the performance of any religious activity; preventing inter-caste marriage; and demonstrating the “hierarchical supremacy” of an individual.<sup>100</sup> The new law provides minimum and maximum penalties, depending on the seriousness of the acts committed, with those found guilty of incitement subject to 50 per cent of the relevant punishment, and those holding a public post and found guilty of caste-based discrimination and untouchability subject to an *additional* 50 per cent of the punishment.

Crimes of caste-based discrimination and untouchability may also be in violation of other domestic laws. These include section 3 of the 1959 Libel and Defamation Act,<sup>101</sup> section 2 of

<sup>100</sup> The Caste-based Discrimination and Untouchability (Offense and Punishment) Act (2011) (Untouchability Act), section 4.

<sup>101</sup> Provides that “In case any person, with the motive of undermining anyone’s prestige, or knowing that it may have that effect, or with reasonable grounds to believe so, makes any charge or publishes it in writing or by words or through any sign, posture or symbol which can be understood, he shall be deemed to have defamed the latter.” Libel and Defamation Act (1959), section 3.



the 1970 Public Offences Act,<sup>102</sup> and section 12 of the 1955 Civil Rights Act.<sup>103</sup> However, both the Libel and Defamation Act and Civil Rights Act are not covered by the State Cases Act, and as such not subject to criminal prosecution, and while the offences under the Public Offences Act are covered by the State Cases Act, possible penalties are less than those for crimes of caste-based discrimination.



## 4.3 Laws regarding positive obligations of the Government

In addition to laws criminalising caste-based discrimination and untouchability, there are legal provisions requiring the authorities to take promotional measures towards eliminating “social evils”, including untouchability. For instance, under the 1999 Local Self-Governance Act,

<sup>102</sup> Incorporates the following offences : h) behaving irresponsibly in public places; i) interrupting anyone who is staying anywhere or walking on a street or travelling by vehicle by any means or obstructing the way, by committing hooliganism, sexual molestation, assault, misconduct, or rioting or taking or damaging the property in the possession of such person or damaging the means of transportation, with the intent to cause trouble or harassment; and j) intimidating or abusing or teasing any person, or committing any improper acts through telephone, letters or any other means or medium, with the intent to terrorize, intimidate, disrespect, insult or harass. State Public (Offences and Penalties) Act (1970), section 2.

<sup>103</sup> Section 12 of the 1955 Civil Rights Act provides that “The life or individual liberty of any person shall not be taken away except in accordance with current Nepal law.” Civil Rights Act (1955), section 12.

district and village level development committees are obligated to “carry out or cause to be carried out acts regarding the wiping out of social ill-practices.”<sup>104</sup> By virtue of this provision, local bodies are supposed to devise and implement measures, including awareness-raising programmes, within their respective jurisdictions. Similarly, the Social Welfare Act of 1992 also obligates the Government of Nepal to “take effective management and actions for the welfare of the backward communities and people”.<sup>105</sup>

While these provisions do not relate directly to the Untouchability Act, such obligations to conduct awareness raising programs on caste-based discrimination at the local level could facilitate encouraging local victims of such discrimination to access justice systems. However, it is important that these programmes be conducted with reference to the legal framework and that they include information on how to access and enforce individual rights. At the time of writing this report, little information was available on the implementation or success of these legal obligations.

## 4.4 Remedies for caste-based discrimination and untouchability

### Constitutional remedy

The Interim Constitution of 2007 provides the right to a constitutional remedy as a separate right that can be invoked by directly accessing the Supreme Court when a provision of the Constitution is violated. For example, the Court is empowered “to declare any law void ... if it appears that the law in question is inconsistent with the Constitution”.<sup>106</sup> The Supreme Court also has original jurisdiction over “any constitutional and legal question involved in any dispute of public interest and concern”.<sup>107</sup> It can issue legally binding prerogative writs

<sup>104</sup> Local Self-Governance Act (1999), section 28(k)(8).

<sup>105</sup> Social Welfare Act (1992), section 4(6).

<sup>106</sup> The Interim Constitution of Nepal (2007), article 107(1) reads “Any Nepali Citizen may file a petition in the Supreme Court to have any law or any part thereof declared void on the grounds of inconsistency with this Constitution because it imposes an unreasonable restriction on the enjoyment of the fundamental rights conferred by this Constitution or on any other ground, and extra ordinary power shall rest with the Supreme Court to declare that law void either *ab initio* or from the date of its decision if it appears that the law in question is inconsistent with the Constitution.”

<sup>107</sup> The Interim Constitution of Nepal (2007), article 107(2) reads “The Supreme Court shall, for the enforcement of the fundamental rights conferred by this Constitution, for the enforcement of any other legal rights for which no other remedy even though provided appears to be inadequate or ineffective, or for the settlement of any Constitutional or legal question involved in any dispute of public interest or concern, have the extraordinary power to issue necessary and appropriate orders to enforce such rights or settle the dispute.” Supreme Court may with a view to imparting full justice and providing appropriate remedy, issue appropriate orders and writs including the writs of *habeas corpus*, *mandamus*, *certiorari*, *prohibition* and *quo warranto*.”



■ Family of the victims informing OHCHR team of the discriminatory practices at local school.

or an order of *mandamus*, both of which serve to compel a lower court or a government authority to perform their legal duties. By virtue of its public interest litigation jurisdiction, disadvantaged and marginalised groups, including *Dalits*, can be represented by any “public spirited organizations and individuals” before the Court.<sup>108</sup>

The availability of the constitutional remedy enhances access to justice for victims of caste-based discrimination and untouchability in a number of ways. The Supreme Court can order the Government to effectively implement the legal provisions dealing with caste-based discrimination, invalidate legislative and executive actions encroaching upon rights against

<sup>108</sup> In several cases, the Supreme Court has frequently accepted the *Locus Standee* of non-governmental organizations to file public interest litigation petitions.



caste-based discrimination and hold government authorities accountable for not taking adequate measures (including administrative, budgetary, regulatory and promotional) to deal with the problem as required by the ICERD. For example, the Supreme Court has held the police authorities accountable for not fulfilling their legal obligation to register complaints received from members of the public.<sup>109</sup>

#### **Box 4.1: The Supreme Court's progressive role in prohibiting caste-based discrimination and untouchability**

The Supreme Court of Nepal has been instrumental in enforcing provisions against caste-discrimination in the Constitution by taking proactive positions in relation to cases concerning caste-based discrimination and untouchability, frequently in response to public interest litigation cases. This has also been reflected in Court reviews of law and policies where it has consistently declared elements that it has found discriminatory as unconstitutional.

Three years after the promulgation of the 1990 Constitution, in the *Man Bahadur Bishwokarma* case, the Supreme Court reviewed the constitutionality of an explanatory clause for section 10A under the Civil Code's chapter on miscellaneous. This clause exempted access of *Dalits* to temples and religious places from the prohibition of caste-based discrimination.<sup>110</sup> The Court found the explanatory clause contrary to the right to equality and declared the clause a violation of article 11 of the 1990 Constitution which prohibited caste-based discrimination. The Court further declared a bylaw that restricted access to a public hostel to persons "who had undergone the thread ceremony" (the *Brahman* and *Chhetri* castes) to be discriminatory on the basis of caste and a violation of the 1990 Constitution.<sup>111</sup> Similarly, the Supreme Court found a traditional practice of restricting *Dalit* students from receiving education at public Sanskrit schools to be discriminatory and ordered that access to education must be provided by fair means, without discrimination, and in accordance with the principle of equality as guaranteed under the Interim Constitution of 2007.<sup>112</sup>

The Supreme Court has also taken steps towards the prohibition of caste-based

<sup>109</sup> See *Manju Bhatt v. District Government Attorney's Office, Dang and Others*, WPN 3369, Decision date 2062/7/2 (19 October 2005) and *Nirmal Devkota v. District Police Office Kathmandu*, Supreme Court Bulletin, 2053, Year 5, No. 4, p. 10.

<sup>110</sup> *Man Bahadur Bishwokarma v. Ministry of Law, Justice and Parliamentary Affairs*, Writ No. 2505/2049, Supreme Court, Decision date 2049/11/14 (25 February 1993).

<sup>111</sup> *Dil Bahadur Bishwokarma et al. v. HMG*, Writ No. 44/2062, Supreme Court, Decision date 2062/10/6 (19 January 2006).

<sup>112</sup> *Mohan Sashankar v. Government of Nepal, Prime Minister and Council of Ministers and Others*, Writ No. 3416/ 2063, Supreme Court, Decision date 2066/3/3 (17 June 2009).

discrimination and untouchability by issuing a number of orders requiring the Government to adopt legislative and other measures to address the discriminatory practices. For example, the Court ordered the Government to enact appropriate legislation to fulfil its obligation under the ICERD<sup>113</sup> and to take the necessary steps towards raising public awareness on caste-based discrimination and untouchability.<sup>114</sup> The Court also directed the Government to instruct its officials to abide by their duties as prescribed by law in order to bring an end to caste-based discrimination and untouchability,<sup>115</sup> and similarly acknowledged the need for legislation to ensure equal rights and to provide social justice, such as reservations or quotas for the protection and advancement of marginalized castes, including *Dalits*.<sup>116</sup>

### Criminal accountability and compensation

Under the 2011 Untouchability Act those found guilty of a practice of untouchability or caste-based discrimination should be held criminally accountable and prosecuted. The Attorney General has ultimate power to decide whether or not to initiate any prosecution and district courts have the adjudicating authority in relation to crimes under the Act. Persons convicted in relation to crimes under the 2011 Untouchability Act are liable for imprisonment from one month to three years, financial penalties ranging from 500 to 25,000 Nepali rupees (approximately 7 to 350 US dollars), or both.

Under the Act, a court can further order the perpetrator to compensate the victim by up to 100,000 Nepali rupees (approximately 1,400 US dollars).<sup>117</sup> Depending on the nature of the harm incurred, the court can further order the perpetrator to pay for medical or other expenses.<sup>118</sup> A number of other laws provide compensatory remedies in relation to acts of discrimination. For example, under the 1955 Civil Rights Act a court can order the payment of restitution to a victim.<sup>119</sup>

<sup>113</sup> *Ratna Bahadur Bagchand HMG, the Office of the Prime Minister and Council of Ministers*, Writ No. 46/2061, Supreme Court, Decision date 2062/1/8 (21 April 2005).

<sup>114</sup> *Bimal Bishwokarma et al. v. HMG*, Writ No. 3802/2062, Supreme Court, Decision date 2063/9/3 (18 December 2006); and also *Sukalal Nepali et al. v. Government of Nepal*, Writ No. 2873/2062, Supreme Court, Decision date 2063/9/3 (18 December 2006).

<sup>115</sup> *Durga Sob v. HMG*, Writ No. 3644/2057, Supreme Court, Decision date 2058/9/5 (20 December 2001); *Durga Sob v. HMG*, Writ No. 3643/2057, Supreme Court, Decision date 2058/6/12 (28 September 2001).

<sup>116</sup> *Ratna Bahadur Bagchand v. Government of Nepal*, Writ No. 3378/2061, Supreme Court, Decision date 2064/7/21 (7 November 2007).

<sup>117</sup> Untouchability Act (2011), section 9(1).

<sup>118</sup> *Ibid.*, section 9(2).

<sup>119</sup> *Ibid.*, section 17(3).





■ Baitadi district police office.

## 4.5 Criminal procedure in Nepal

The initial step for the initiation of criminal proceedings for a case of caste-based discrimination is the filing of a First Information Report at “the nearest Police Office”.<sup>120</sup> The report can be filed either in writing or verbally<sup>121</sup> by any person knowing that a crime has been, is being, or is going to be committed.<sup>122</sup> Upon the receipt of a complaint, the police must register it in the log book, known as “Diary Number 10”.<sup>123</sup> Under the *suo motu* principle,<sup>124</sup> the police are further obligated to file a report in Diary Number 10 on their own initiative if they have reasonable grounds for suspecting a crime has been committed.<sup>125</sup> The report should include, to the extent possible, information on the date, time and location of the alleged crime; the name, address and any identification marks of the alleged perpetrator; and evidence and other facts related to the crime.<sup>126</sup> However, the police are required to file the First Information Report *prima facie*, whether or not some of the information is included.<sup>127</sup>

If for whatever reason the police refuse to register a First Information Report, the

<sup>120</sup> State Cases Act (1992), section 3(1); see also the Untouchability Act (2011), section 5(2).

<sup>121</sup> State Cases Act (1992), section 3(3) provides that “In case the person supplies information verbally, the relevant Police Personnel shall produce his statement in writing as well as complete the requirements mentioned under sub Section (2) and read it to him to ensure that he understands it, and make him sign it.”

<sup>122</sup> *Ibid.*, section 3(1).

<sup>123</sup> *Ibid.*, section 3(4).

<sup>124</sup> *Suo Moto* is a Latin legal term that means “on its own motion”, when a body acts on its own cognizance.

<sup>125</sup> Section 3(4) of the State Cases Act provides that a First Information Report received from other sources should also be registered in the Diary No. 10 in the specified format. State Cases Regulation, rule 3(6) also provides that “This Rule shall not prejudice the power of a police office to take action requested by the first information report received through any medium which is not mentioned in this Rule.”

<sup>126</sup> State Cases Act (1992), section 3(2).

<sup>127</sup> *Prima Facie* is a Latin expression meaning “on its first appearance”, or “at first sight”.

complainant can submit it to a superior police office or to the Chief District Officer,<sup>128</sup> who can then instruct the concerned Police Office to proceed with the registration.<sup>129</sup> The complainant can also inform the National Dalit Commission, who would then contact the relevant Police Office,<sup>130</sup> following which the police are obligated to initiate proceedings, including a criminal investigation.<sup>131</sup> If these measures to register a complaint fail, the complainant can either challenge the refusal at an appellate court, or even at the Supreme Court, which can issue a *mandamus* order compelling the police to register the First Information Report.<sup>132</sup>

Once the First Information Report is filed, the police must submit a preliminary report to the District Government Attorney outlining the suggested lines of investigation and requesting advice as necessary.<sup>133</sup> The police then conduct a criminal investigation which should include investigating the crime scene and taking the necessary statements from witnesses and other persons.<sup>134</sup> The Untouchability Act specifically allows the investigation officer also to seek assistance from local leaders and representatives of civil society and organizations working for the rights or improvement of the situation of the victims of caste-based discrimination and untouchability.<sup>135</sup>

Any omission or unnecessary delay in conducting a criminal investigation is subject to judicial scrutiny. Here again the Supreme Court has exercised writ jurisdiction in upholding police responsibility to conduct a proper criminal investigation.<sup>136</sup> The Court has held that, as per the State Cases Act and the Police Act, it is the legal duty of the police to investigate

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<sup>128</sup> The Chief District Officer is the senior local government official at the district level in Nepal.

<sup>129</sup> State Cases Act (1992), sections 3(5) and (6).

<sup>130</sup> Untouchability Act (2011), sections 5(3) and (4); for more on the roles of the National Dalit Commission, see section 4.6 below.

<sup>131</sup> *Ibid.*, section 5(5).

<sup>132</sup> Judicial Administration Act (1991), section 8(2); Interim Constitution of Nepal (2007), article 107(2).

<sup>133</sup> *Ibid.*, sections 6(2) and 7(5).

<sup>134</sup> *Ibid.*, section 9 (2); and State Cases Regulation (1998), rule 4 (6). See format of Statement in State Cases Regulation (1998), schedule 4.

<sup>135</sup> Untouchability Act (2011), section 6.

<sup>136</sup> On 18 September, the Supreme Court issued a writ of *mandamus* to the Kavre District Police Office requiring completion of criminal investigation into murder of Maina Sunuwar within three months from the date of issuance of the order. *Devi Sunar v. District Police Office, Kavre et al.*, Writ No. 0641/2063, Supreme Court, Decision date 2064/6/1 (18 September 2007). In *Ratna Bahadur Bagchand et al v. Government of Nepal, Office of the Prime Minister and Council of Ministers*, the Court held the police responsible for failing to proceed with investigation into the First Information Report stating that the police is under a legal duty to proceed with criminal investigation in relation to State Cases scheduled under the State Cases Act. Writ No.3378/2061, Supreme Court, Decision date 2064/2/25 (8 June 2007).

the case, issuing a *mandamus* order for a prompt investigation and prosecution.<sup>137</sup>

The procedure foresees the District Government Attorney playing a critical role in ensuring the prosecution of a crime and directing the police to ensure that caste-based discrimination and untouchability cases are properly registered as such, rather than on lesser charges. The District Government Attorney should advise the police regarding the course of the investigation,<sup>138</sup> and in normal circumstances the police should seek the prior approval of the District Government Attorney before releasing any detained persons.<sup>139</sup> Upon the completion of the investigation, the police are to submit an investigation report to the District Government Attorney, which evaluates the evidence and recommends whether or not, and which charges should be filed against the suspect(s).<sup>140</sup> It is then the responsibility of the District Government Attorney to file a charge sheet with the district court.<sup>141</sup> Under the Untouchability Act this must be within three months of the commission of the crime.<sup>142</sup>

Following the filing of a charge sheet, the District Court considers both the bail hearing and the actual trial for crimes of caste-based discrimination and untouchability. For the actual trial, witnesses must be examined in the presence of both parties to the case.<sup>143</sup> If an important witness does not appear before the court despite being summoned, the Court may order the issuance of a warrant for the witness to appear. The State Cases Regulation provides that the expenses for producing a witness (including the victim) shall be made available by the concerned Police Office, including travel expenses. While in theory this should eliminate financial constraints for *Dalit* victims participating in judicial proceedings, in reality this provision has not been implemented.<sup>144</sup> It should also be noted that currently

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<sup>137</sup> In *Ratna Bahadur Bagchand v. Government of Nepal*, for instance, the Supreme Court ordered the Ministry of Home Affairs and the District Police Office in Dhanusha district to fully investigate the murder of Daya Ram Pariyar, an official of the National Human Rights Commission, based on the First Information Report registered with Dhanusha District Police Office on 25 March 2006. Writ No. 3802/2062, Supreme Court, Decision dated 2063/9/3 (18 December 2006).

<sup>138</sup> State Cases Act (1992), sections 7(5), 6(1) and (2).

<sup>139</sup> *Ibid.*, section 21; and State Cases Regulation (1998), rule 11(1). If this is not immediately possible, the police must at least notify the Government Attorney. State Cases Regulation (1998), rule 11(3).

<sup>140</sup> This report must still be submitted to the Government Attorney even if the police find that a crime has not been committed, or that a crime has been committed but the suspect cannot be identified or there is insufficient evidence. State Cases Act (1992), section 17(1).

<sup>141</sup> *Ibid.*, section 18(1); and State Cases Regulation (1998), rule 13(1); The Charge Sheet must include: the name, caste and address of the accused; the particulars of the First Information Report; the particulars of the crime; charges against the accused and relevant evidence; the applicable law; penalties sought against the accused; and the amount of compensation, if any, to be provided to the victims.

<sup>142</sup> Untouchability Act (2011), section 10.

<sup>143</sup> Evidence Act (1974), sections 49(2) and 52.

<sup>144</sup> State Cases Regulation (1988), rule 15(3).

there are no legal provisions or programmes for witness protection in Nepal.<sup>145</sup> However, as discussed in section 5.3 below, the lack of legislation should not be an excuse for law enforcement officials, who have the legal duty to protect all persons.

Within one year after the charge sheet is filed the district court must issue its judgment.<sup>146</sup> In case of an undue delay, an Interlocutory Application (*Satra Number Ko Nibedan*) may be filed with the appellate court by either party.<sup>147</sup> The district court's decisions can be appealed at the appellate court within 70 days of receiving the written judgment and then at the Supreme Court within 70 days of receiving the appellate court's decision.

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<sup>145</sup> Civil Code, Chapter on Court Management, section 115 and Evidence Act, section 47 are still coercive on the witness who refuses to be testified. At the same time, there appears an increasing trend of legislative enactment, referring to victim and witness protection concerns. They include: 11th Amendment of the Civil Code has a provision requiring for *in camera* hearing in rape cases and presence of women police personnel while a rape victim is testifying; Human Trafficking Act (2007) penalizes disclosure of confidential information regarding the victim and witness, requires the police to offer protection measures upon request and to conduct hearing of the cases in-camera (sections 25, 26 and 27); Domestic Violence Act (2009) obligates the local government and police to provide for psycho-social support, medical assistance and other protection as required for victims of domestic violence, their dependents and witnesses (section 4).

<sup>146</sup> Civil Code, Chapter on Court Management, section 14.

<sup>147</sup> Civil Code, Chapter on Court Management, section 17.







# 5 Challenges in Access to Justice for Victims of Caste-based Discrimination

The Government of Nepal has taken a number of promising steps to improve access to justice for victims of caste-based discrimination and untouchability. It has accompanied public commitments at national and international levels with progress in outlawing these practices through the Constitutional provisions and through specific legislation. On some occasions the police have initiated criminal proceedings and district courts have issued important decisions, albeit following concerted advocacy by human rights organizations including OHCHR. However, in general there have been few such examples of effective implementation on the ground. OHCHR's monitoring and investigations reveal numerous ongoing challenges preventing *Dalit* communities from accessing justice in compliance with national and international human rights law.

## 5.1 Challenges of perception: Caste-based discrimination and untouchability as a social issue rather than a crime

Caste-based discrimination and untouchability practices are often viewed as a social, rather than a criminal issue. On numerous occasions, district-level officials from the police, administration offices and Government Attorney offices have told OHCHR that the practice of caste-based discrimination and untouchability should be considered as a dispute within the community to be settled by negotiation. The police have often stated that to register such cases as criminal offences would affect the "social harmony" that has allowed *Dalit* and non-*Dalit* communities to live together for centuries. Illustrating how state officials do not treat such crimes with the appropriate levels of seriousness, in 2009 a Government Ministry nominated to public office a person found guilty by the courts of caste-based discrimination and untouchability, but who had avoided the penalty.<sup>148</sup>

<sup>148</sup> On 22 September 2009, an individual (who had been found guilty of caste-based discrimination and untouchability by the Baitadi District Court in January 2009) was nominated by the Building and Residence Section of the Ministry of Physical Planning and Works to the Town Development Committee in Mahendranagar, Kanchanpur district.



■ A segregated area for Dalits at a Hindu temple. Dalits are forbidden from entering the main temple due to their caste.

Similarly, victims are rarely aware that the practices of caste-based discrimination and untouchability are an offence punishable by law. This has been recognised by the Supreme Court which directed the Government to take measures to create wider awareness of the fact that such practices are a crime.<sup>149</sup> Between 2006 and 2011, OHCHR held several interaction programmes with *Dalit* communities on access to justice and caste-based discrimination and the practice of untouchability. The office found low levels of legal knowledge amongst the *Dalit* communities. They were usually unaware of practices even constituting a crime under the law and Interim Constitution, let alone the details of where and how they could seek justice and what the role of the police is.

This lack of awareness was also apparent in almost all of the cases investigated by OHCHR. Victims are frequently unaware that caste-based discrimination and untouchability are a crime, and as

a consequence the police were often able to deal with cases of caste-based discrimination in an ad-hoc manner and not follow proper criminal procedures.<sup>150</sup> In all cases investigated by OHCHR where First Information Reports categorizing the crime as caste-based discrimination and untouchability were successfully filed with the police, the victims had been assisted by local human rights defenders with specific knowledge about the law and rights related to these cases. OHCHR has yet to find an instance where a *Dalit* has been able to register such a case without specialist support.

<sup>149</sup> See *Bimal Bishwokarma vs. Ministry of Law et al*, WPN 2802 of 2062, decided on 2063/9/3 (18 December 2006).

<sup>150</sup> Case on file with OHCHR concerning an incident that took place on 10 and 13 September 2010, in Kanchanpur district, Far Western region.

### Box 5.1: Case “mediated” in the name of preserving communal harmony

On 6 September 2006, approximately 35 *Dalit* women were prevented from worshipping at the Shaileshwori temple, a Hindu temple in Doti district, by both the priests and a group of non-*Dalit* women who attacked and assaulted them.

Shortly after the incident, representatives of local civil society organizations attempted to register a complaint at the district police office on behalf of three of the *Dalit* women. However, the First Information Report was not registered by the police who instead forwarded the case to the Chief District Officer, the senior government official in the district. The Officer, stating that he was acting in the interests of “social harmony” and in accordance with “customs and traditions as well as the law”, organized a “mediation” process with the engagement of the seven main political parties. The temple chief also questioned the importance of the law in this case and reiterated his opinion that “*Dalits* should not be allowed to enter [Hindu] temples.”

Since neither the police nor the senior government official were prepared to pursue the incident as a criminal case, no complaint was registered under the legal provisions existing at that time concerning punishment for caste-based discrimination and untouchability. Instead, an ad-hoc “mediation” was organized and the case was considered “closed” on the basis of an agreement signed by persons involved, both *Dalits* and non-*Dalits*, including the temple management committee. The agreement stated that all temples in Doti district would be open to people of all castes as a public place of worship, and was supported by a notice of the Chief District Officer requesting “compliance with the law and respect for the right to equality”.

Tensions again escalated the following year when *Dalits* entered the Shaileshwori temple. Despite the presence of 20 police officers, 30 *Dalit* women were assaulted by a large group of approximately 150 non-*Dalits*. In total, approximately 50 to 60 *Dalits* were injured, including older persons, women and children, and 10 were hospitalized. A number of *Dalits* also fled their homes in surrounding villages as a result of the violence.

In March 2011 *Dalits* living in the area of the temple informed a joint OHCHR and National Dalit Commission team that they are now allowed to access the temple premises, which was previously prohibited, but they are still prohibited from entering the inner sanctum of the temple which remains restricted to non-*Dalit* people, despite this being in direct violation of Nepali law.

## 5.2 Substantive legal provisions that fall short: Lack of proportionate punishment, compensation and accountability

Despite the significant progress made in the criminalization of caste-based discrimination and untouchability through the 2011 Untouchability Act, some of its provisions still raise concerns about sufficient access to justice for victims.

### Inadequate statute of limitation

Most of the cases investigated by OHCHR clearly illustrate the inadequacy of the 35-day statute of limitation to file a charge sheet under the Civil Code. Although the three-month statute of limitation period under the new Untouchability Act is longer than before, it also remains insufficient. Given the mountainous terrain of much of Nepal and the distances involved in journeys from a rural area, it can take a considerable period of time to reach a police or government office to register a complaint. Additionally, it can take days or even weeks for the police to decide to register a complaint, particularly one for a charge of caste-based discrimination and untouchability, due to police reluctance. This thereby reduces the remaining time in which the police can conduct an investigation.

For example, in one case that OHCHR monitored, the statute of limitation expired before the police had agreed to file a complaint. This resulted in the victim agreeing to the police's suggestion that a charge of attempted murder be filed, since this charge carries a longer statute of limitation. However, from the outset it was clear that there was insufficient evidence for this charge and it was almost certain that the accused would be acquitted. It is therefore crucial to ensure a flexible statutory limitation period that corresponds both to the seriousness of the crime and to the practical realities of the victim in physically accessing the justice system.

### Lack of proportionate punishment

Under the Untouchability Act, the penalties stipulated include both financial penalties and imprisonment of up to three years.<sup>151</sup> Significantly, the Act identifies two categories of offences, with one carrying a heavier punishment than the other. However, the Act fails to provide any specific guidance on the elements that constitute aggravating or mitigating

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<sup>151</sup> Untouchability Act (2011), section 7.





- A Dalit man who was physically assaulted for refusing to perform a traditional Dalit role during the “Dashain” festival. He received only 500 Nepali rupees as compensation for medical treatment.

factors, except those cases where convicted defendants are holding public posts.<sup>152</sup> In the absence of comprehensive guidelines, it remains the judge’s discretion to decide on the applicable punishment. In the past, with this discretion, only nominal fines have been imposed.

<sup>152</sup> Ibid., section 7(2).



### Box 5.2: Nominal fines for acts of caste-based discrimination involving physical assaults of *Dalits*

In September 2007, a *Dalit* man in Kanchanpur district was physically assaulted by a non-*Dalit* for wearing a *Janai* (sacred thread) at a Hindu festival. The *Janai* is traditionally reserved for men of the *Brahmin* (priest) or *Chettri* (warrior) castes. The victim sustained serious injuries and received treatment at a district hospital.

The police were initially reluctant to file the victim's complaint but did so after a *Dalit* network intervened and issued a press statement condemning the police inaction. During the subsequent judicial proceedings, the victim received pressure and threats from non-*Dalits* in his community to withdraw the case. The district court found the alleged perpetrator not guilty. Although this was overturned by the appellate court following an appeal, the fine given to the perpetrator was only 1,000 Nepali rupees, less than 15 US dollars, and the lowest fine permissible by the law.

In a similar case in February 2008, an 18-year old *Dalit* youth was beaten by a non-*Dalit* stall owner for drinking water from a communal bucket, also in Kanchanpur district. The perpetrator tied the *Dalit* youth to a pole and beat him on his chest, legs and back with a metal pipe during a two hour period. The victim was severely injured and hospitalised for more than two weeks.

With the support of a *Dalit* rights organization the victim filed a complaint on discrimination charges with the police and the case proceeded to court. The district court initially found the perpetrator not guilty, and once again the appellate court overturned the verdict, but imposed the nominal fine of 1,000 Nepali rupees. The victim informed OHCHR of his frustration and distrust in the legal system, and the fact that he had actually suffered financially from the process as a result of losing daily wages.

In both cases defendants were found guilty of an act of caste-based discrimination, a crime which carried a maximum sentence of three years imprisonment and/or 25,000 Nepali rupees fine under the then applicable section 10A of the Civil Code's chapter on miscellaneous. However, on each occasion the second instance court chose to impose the lowest possible penalty for such an offence at the time with a nominal financial penalty.

### Limited compensation

Prior to the passage of the 2011 Untouchability Act, there was no applicable law requiring the perpetrator to provide compensation to the victim, nor to cover any expenses incurred for medical treatment or other damages. *Dalit* victims frequently informed OHCHR of their

need for compensation to cover medical bills and other expenses incurred as a result of the discrimination, which they were unable to pay for given their own limited income opportunities.<sup>153</sup> For example, one victim whose daily income is a mere 100 Nepali rupees (approximately 1.4 US dollars) relayed to OHCHR his frustration with the legal process and wished he had negotiated a settlement with the perpetrator to at least enable payment of his medical expenses. Many *Dalits* live in poverty and the extra medical bills place enormous financial pressures on them.

This challenge should hopefully be addressed under the Untouchability Act. The court can now order a perpetrator found guilty to pay compensation to the victim, and to pay medical or other expenses covering the damage incurred.<sup>154</sup> This is potentially a significant development, although the extent to which the available provisions will be fully implemented remains to be seen. Furthermore, compensation cannot exceed 100,000 Nepali rupees (approximately 1,400 US dollars) which may be inadequate in cases where the magnitude of the crime and its impact upon victims may be high. It would have been preferable to have no mention of the maximum amount under the law. Moreover, the responsibility of providing compensation to the victim falls solely on the convicted perpetrator. If he/she is not able to pay the amount stipulated, the law stands silent. The section should have included guidance on State responsibility to provide compensation.

### Lack of clarity regarding the role of law enforcement officers

Nepali law lacks statutory guidance on the role of the police in relation to cases of caste-based discrimination. This lack of guidance was recognised by a District Government Attorney prosecuting the first registered case of caste-based discrimination in his district.<sup>155</sup> He regarded the absence of such specific procedural guidelines for investigations into discrimination cases, which are of an entirely different nature to conventional crimes, as a real challenge and emphasised that law enforcement agencies would greatly benefit from specific guidance and training on investigating and prosecuting cases of caste-based discrimination. To date, there has been no indication of such guidance being provided by the State, or of specific training to be organized for law enforcement officials, even in the context of the new Untouchability Act. Without such guidance, it can be challenging for law enforcement officials at the district level to take the proper steps regarding these specific offences.

Furthermore, there is no specific guidance to the police regarding steps to be taken to ensure confidentiality of information received during investigations and to provide the necessary protection for the victim, their family and witnesses. In relation to caste-based discrimination

<sup>153</sup> See section 4.4 on socio-economic challenges.

<sup>154</sup> Untouchability Act (2011), sections 9(1) and (2).

<sup>155</sup> *Ganesh Koli v. Salibhan Bhandari*, Office of the Public Prosecutor Doti, Case Reg. No. 2007/08/31.

cases, where victims may be in a socially weaker position within their community, the need for such measures may be particularly acute. While the police have general responsibilities to protect persons at risk, additional regulations would properly guide the steps that should be taken. The Supreme Court has issued an order to enact appropriate law in relation to victim and witness protection, and while the Government is in the process of drafting a law, this has yet to be finalized.<sup>156</sup> In the meantime, internal procedures can be developed by the police to guide confidentiality and witness protection measures to be taken.

### **Lack of accountability for law enforcement officers**

Under Nepali criminal law, despite the obligation for a police officer to register a First Information Report, it is not a disciplinary offence and there are no penalties for a police official who refuses to do so. As set out above, the complainant can appeal to different judicial or non-judicial authorities who may instruct the concerned police station to proceed with the registration. However, none of these bodies are authorized to proceed with either a criminal or a disciplinary hearing or take any action against the police officials concerned. This gap contravenes the CERD Committee's general recommendation that any refusal by a police official to accept a complaint involving an act of racism (which includes caste-based discrimination) should lead to disciplinary or penal sanctions.<sup>157</sup> In the absence of any sanction, the police can be easily influenced by other factors, such as political and societal pressure.

Despite these shortcomings, the 2011 Untouchability Act provides increased punishment for public officials found guilty of caste-based discrimination and practicing untouchability.<sup>158</sup> Given the special responsibility of State officials to promote and protect human rights, including their obligation not to discriminate, the increased punishment is a significant step towards promoting accountability for such violations.

<sup>156</sup> See *Meera Dhungan for Forum for Women, Law and Development et al. v. Government of Nepal*, Writ No. 043/065, Supreme Court, Decision date 2066/7/18 (4 November 2009).

<sup>157</sup> See Committee on the Elimination of Racial Discrimination, "General Recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system", A/60/18 (2005).

<sup>158</sup> Untouchability Act (2011), section 7(2).



■ Police officers examining Diary Number 10 in which criminal complaints should be registered.

## 5.3 Challenges in the application of law and procedures

### Obstacles to the registration of the First Information Report by the police

Cases investigated by OHCHR demonstrate that the police consistently fail to register complaints of caste-based discrimination and untouchability in a timely manner, impacting on the ability of the case to be fully investigated and for the charges to be filed within the statute of limitation period. Furthermore, OHCHR has not found examples of the police acting on their own initiative in such cases, despite a statutory responsibility to do so, instead adopting a more passive approach and responding when complaints are submitted to them.

OHCHR has found that the police provide various unfounded reasons for failing to take the appropriate steps as set out by law. For example, the argument has been given that victims must first provide direct testimony in order for them to consider registering a complaint. In other instances, police have informed OHCHR that they do not consider the crime of caste-based discrimination and untouchability to be serious enough to take direct action, believing that such direct action is reserved for crimes of a grievous nature such as murder.



This reluctance is augmented by the current lack of accountability structures and disciplinary penalties for police who fail to comply with their obligation to take direct action.

Furthermore, in a number of cases investigated by OHCHR, the police have insisted that the complainant meet certain requirements before the complaint could be registered. For example, the police have asked complainants to hand in a formal, written complaint despite a verbal statement being sufficient under Nepal's criminal law procedures.<sup>159</sup> With limited access to education and lack of awareness about available remedies this disproportionately affects *Dalit* communities unless they rely on the support of civil society organizations, which may not be available at all times, particularly outside of district headquarters.

Area Police Offices frequently refer complainants to the District Police Offices, wrongfully arguing that such cases are beyond their jurisdiction.<sup>160</sup> For example, in May 2010, an Area Police Officer told a *Dalit* woman in Kanchanpur district to go to the District Police Office to register a complaint after a non-*Dalit* male beat her on the head with the handle of an axe after she used a public water source. As a result, she incurred significant transport expenses, more than her daily wage, to travel 25 kilometres to the District Police Office. In other cases, police officers have wrongly referred complainants to other administrative or judicial bodies.<sup>161</sup>

### **Box 5.3: Delayed police action despite having substantial information about the commission of a caste-based discrimination crime 1**

In October 2007 in the Baitadi district, 12 *Dalits* were beaten and had their possessions looted by a former police officer and seven others simply for refusing to participate in traditionally assigned practices during a religious festival, including disposing of buffalo carcasses following sacrifices at the local temple. The beatings left all the victims requiring medical treatment.<sup>162</sup>

Despite the serious nature of the crimes, and the direct relationship with caste-based discrimination, the police displayed reluctance to register the complaint as such, and instead, after some delay, eventually registered the case on lesser charges under the

<sup>159</sup> State Case Act (1992), section 3(3).

<sup>160</sup> State Case Act Section 3(1) provides that the First Information Report shall be filed at "the nearest Police Office". Section 5(1) of the Untouchability Act also expressly provides that the complaint should be filed at "the nearest police office of the district where [the alleged perpetrator] reside".

<sup>161</sup> Initially the case was referred to Chief District Officer under the Public Offences Act.

<sup>162</sup> In Hindu religion, *Dalit* caste is the caste with the role to clean dead animals in public places. During *Dashain* and *Tihar* festivals, non-*Dalits* traditionally sacrifice animals at the temples. When the festivals are over, *Dalits* have to clean the carcasses. *Dalits* are also supposed to eat the meat of the sacrificed animals which are considered "holy", despite a few days having passed since the sacrifice and consequently the meat is often rotten. Refusing to submit to such roles is considered to be rejecting the traditional belief, and could lead to stigma as well as violent repercussion from non-*Dalit* persons, as the case illustrates.

Public Offence Act, unrelated to the discriminatory nature of the crimes. It was only following repeated advocacy by local human rights defenders, supported by OHCHR, that the police registered the complaint on grounds of caste-based discrimination under section 10A of the Civil Code's miscellaneous chapter, then in force, albeit over four weeks later.

**Box 5.4: Delayed police action despite having substantial information about the commission of a caste-based discrimination crime 2**

In January 2010 a young couple, a *Dalit* man and a non-*Dalit* woman, were married outside the country. When the bride's family learned of the marriage, the couple were subjected to a series of mistreatment, including the bride being forced to marry another man who physically and sexually abused her, and the couple being forcibly abducted, detained at a hotel and physically assaulted by a group of non-*Dalit* individuals, including relatives of the bride and police officers. During this assault the bride was also raped. The mistreatment even continued later within the premises of the local police office.

With the support of local human rights organizations, the couple tried to register the case under caste-based discrimination charges. However, the police instead registered a First Information Report against the perpetrators on charges of rape and abduction. The police further refused to include the involvement of police officers in the mistreatment. Following a preliminary investigation, the District Government Attorney advised the police to drop the abduction charges due to the lack of evidence and the five detained suspects were released. While the district court issued arrest warrants against the remaining suspects on rape charges, nearly two years later there had been no further arrests and the First Information Report remains only for rape, without caste-based discrimination charges.

**Police encouraging “mediation” settlements rather than initiating criminal proceedings**

Even when a victim does come forward, the proper registration of the complaint by the police on criminal charges remains a challenge. Rather than registering the complaint in Diary Number 10 and initiating the appropriate criminal proceedings, in all of the 20 emblematic cases investigated by OHCHR between 2006 and 2010, the police initially encouraged the victim to “mediate” an informal settlement with the perpetrator. Such processes are informal in nature, usually bringing the victim and perpetrator together in the presence of the police, district government official and/or political party representatives. During the meeting the

victim will normally agree, under some pressure, to “settle” the case outside of the criminal process, receiving an apology from the perpetrator and nominal financial compensation. OHCHR has found that such processes are utilised by the police in a variety of criminal cases, including physical assaults and rapes, across Nepal.

These “mediation” processes are not sanctioned or governed by any law or police procedure. As such, they fail to meet the most basic standards of justice, bypassing the available criminal procedures and the rule of law. At the same time, they do not even follow acceptable standards for mediation and alternative dispute resolution processes, although such standards are for civil rather than criminal cases. OHCHR has further found that these informal “mediations” do not provide satisfactory compensation and reparation to remedy the harm suffered, failing to ensure accountability for perpetrators with a penalty proportionate to the crime, and in so doing ensuring non-repetition.

#### **Box 5.5: Police “mediate” instead of filing a criminal complaint on a case of physical assault of a *Dalit***

In October 2007 in Mahottari district, in the Central region of Nepal, a *Dalit* was tied to a pole and physically assaulted by non-*Dalits* when he objected to burying the carcass of a dead buffalo, a practice traditionally expected to be performed by *Dalits* during religious festivals. The *Dalit* man suffered injuries that required medical treatment at a local hospital.

Five days after the assault, the victim filed a verbal complaint with the police and submitted a written application to the District Administration Office requesting police protection and demanding legal action to be taken against the suspects. Following the filing of the complaint, the *Dalit* families of the village were effectively boycotted by non-*Dalits* and prevented from undertaking any kind of activities, including buying goods at shops, working in the fields of non-*Dalits* and using pond water for cattle.

After the Chief District Officer instructed the police to look into broader issues of security for *Dalits* in the local area, the police sub-inspector in charge of the case decided to organise a more general mediation of the issue of the disposal of buffalo carcasses, rather than the specific issues of the case. At a meeting convened by the police in the village nearly a month later it was agreed by non-*Dalits* from the village that *Dalits* would not be forced to bury animal carcasses in the future. However, the victim informed OHCHR that he was pressured to sign a document whose content he did not understand.

During a visit to the village a few months later, OHCHR found that the sanctions against *Dalits* were lifted, and that they were no longer asked to bury carcasses. However, no further steps were taken regarding the criminal case filed by the victim.

When questioned on this by OHCHR, the police head constable stated wrongly that the complaint filed was a “simple application” and not a First Information Report that would require a criminal investigation.

These “mediation” practices both echo and reinforce the unequal power structures at the local level. Many *Dalit* victims are in a weak negotiating position, often due to their limited education and knowledge of their rights, as well as their dependence on the non-*Dalit* communities for a means of subsistence and livelihood.<sup>163</sup> In one case in March 2010 in Kanchanpur district a *Dalit* man who required hospitalisation following a physical assault by non-*Dalits*, told OHCHR of his unhappiness with the amount of compensation received following a “mediation” process. He stated that the amount did not even cover half of his medical expenses.<sup>164</sup>

In some cases OHCHR noted that victims of caste-based discrimination and untouchability can be easily persuaded by police, political party leaders and influential persons in the community to agree to “mediate” to preserve “social harmony” without being given proper information about available judicial recourse.

#### **Box 5.6: *Dalit* women accepts a “mediation” process due to her lack of awareness of available remedies**

In May 2008, in Kailali district, a non-*Dalit* man physically assaulted a *Dalit* woman after she had asked a non-*Dalit* girl to fetch water for her from his water pump. During the assault the perpetrator used derogatory terms for *Dalits*, clearly indicating the caste discriminatory nature of the assault.

On the same night, a violent confrontation erupted at the water pump site between the victim’s son and other relatives and the non-*Dalit* pump owner and his relatives. The perpetrator called the police who arrested all the *Dalits* present. They were physically mistreated in detention, but released within 24 hours. Two days later the police, together with political party representatives and civil society, participated in a “mediation” process together with the victim and the perpetrator at the local ward police station. During the process, the political representative took the lead in persuading the victim to accept the “mediated” agreement, including public and written apologies by the perpetrator and his commitment not to repeat the behaviour. It was determined that the case would be considered as settled after the perpetrator apologised to the victim.

<sup>163</sup> Refer to section 5.4 on socio-economic challenges below.

<sup>164</sup> Case investigated by OHCHR, incident on 1 March 2010, in Kanchanpur district, Far Western region.



Some time later, the victim informed OHCHR that she had been unaware of her legal rights and procedures and, rather than these being explained to her, she was persuaded by the police and the political party representatives to undertake the “mediation”. She was informed that this would “preserve social harmony” in the village. The victim stated that she was dissatisfied with the outcome as she had only received a verbal apology from the perpetrator, which she did not believe had properly compensated her for the humiliation she had suffered. Although no longer possible due to the expiration of the statute of limitations period, the victim stated that she wanted the perpetrator to be prosecuted and punished.

### **Police failing to categorise cases as caste-based discrimination and untouchability**

According to the template of complaints to be filed under police procedure Diary Number 10, police can indicate the “category of crime” when filing a complaint.<sup>165</sup> However OHCHR’s investigations reveal that despite having substantive grounds, such as violence being accompanied by derogatory behaviour, police rarely categorise reported incidents as crimes of caste-based discrimination and untouchability.

The police’s initial selection of the “category of crime” in registering a complaint is critical, as it determines how the police conduct their subsequent investigation and follow-up. OHCHR’s investigations show that the police tend to choose a “category of crime” that incurs a more lenient penalty or one for which the alleged perpetrators are less likely to be held accountable, rather than on the crime of caste-based discrimination and untouchability.<sup>166</sup>

For example, in Mahottari district in October 2007, the police initially categorized a case as “robbery and looting” despite clear evidence that the motivation had been caste-based discrimination. The police later amended the complaint to caste-based discrimination, but only after sustained advocacy from civil society organizations, and more than a month after the commission of the crime, giving the Government Attorney only two days to reorient the charge-sheet towards proving caste-based discrimination and untouchability. While the perpetrators were eventually charged and convicted, at one point the judge was forced to postpone the case for two months on the ground that the police needed time to collect more evidence of the crime of caste-based discrimination and untouchability.

<sup>165</sup> State Cases Regulations (1998), schedule-3.

<sup>166</sup> Often the police opt for public offence charges, with a maximum fine of only 150 US dollars and imprisonment only in the most exceptional cases.

### Box 5.7: Police refusal to fully investigate allegations of caste-based discrimination

In March 2008 in Kailali district, shortly before national elections were held, three *Dalit* men were physically assaulted by a group of non-*Dalits* for allegedly supporting a rival political party. During the assault, the non-*Dalits* surrounded the *Dalits*, threw stones and beat them with sticks, and called them derogatory names for *Dalits*. Furthermore, they were told not to be involved in politics and were threatened that their wives would be raped and killed.

In the days and weeks that followed, the victims attempted to file a complaint at the local police post on five separate occasions but on each occasion were refused. On the last occasion, the police stated that they would only register the complaint if they could indicate the “category of crime” as attempted murder, rather than caste-based discrimination, while having admitted that the facts of the case did not support such a charge. Although the victims insisted that the crime should be categorized as caste-based discrimination, the Superintendent of Police stated that, despite the alleged use of derogatory language, the victim’s written complaint did not include sufficient evidence to warrant such charges. According to the legal procedures, the police should determine the charges based on all evidence associated with the case rather than just the information included in the original complaint.

Eventually the “statute of limitations” for cases of caste-based discrimination expired and the police proceeded with the case by indicating the “category of crime” as “attempted murder”. As anticipated, the case did not proceed on such charges, and in April 2011 OHCHR verified that three years later the police investigation is “still on-going”.

### Police failing to guarantee the protection of victims and witnesses

Given the violence and intimidation that some victims of caste-based discrimination and untouchability face, guaranteeing witness and victim protection is critical to securing their access to justice. There is no specific legislation to guarantee victim or witness protection in Nepal, even though the Supreme Court has issued an order to enact appropriate laws in this regard.<sup>167</sup> Regardless of any law, it remains the duty of the police to ensure the security of individuals and the Police Act stipulates that it is the duty of the police to maintain peace and

<sup>167</sup> See *Meera Dhungana for Forum for Women, Law and Development et al. v. Government of Nepal*, Writ No. 043/065, Supreme Court, Decision date 2066/7/18 (4 November 2009).

order including “preventing crime” and “making every possible effort to save people from [...] danger”.<sup>168</sup> Furthermore, the police currently have the power to develop more specific internal procedures on victim and witness protection prior to any new law being passed.

Despite credible fears of reprisals, in most of the cases investigated by OHCHR, the police failed to take adequate steps to ensure victim and witness protection, despite being requested to do so. For example, in Kanchanpur district in October 2010, during the assault of a woman who had participated in an inter-caste marriage, the police did not intervene or provide protection to the victim - one of the police officers even participated in the assault. On a number of occasions victims of caste-based discrimination and untouchability spoke to OHCHR of their lack of faith in the effectiveness of the police and the justice system. Their sense of insecurity is exacerbated by the fact that they continue to live in the same community as the alleged perpetrators without any effective protection. This in turn increases their reluctance to seek justice.

### **Box 5.8: Dalits forced to leave their home following an inter-caste marriage due to threats and violence receive no protection from the police**

In Darchula district in October 2009, after a wedding between a *Dalit* male and non-*Dalit* female, 17 members of the groom’s family were forced to leave their homes following threats and physical assault from relatives of the bride who also subsequently burned several of their houses. More than two years later they had been unable to return to their homes, due to continuing threats and their fears of further violence. While nine members migrated to India, the other six, including the groom’s parents continue to live in a makeshift shelter in a forest area, with very limited means to provide themselves with an adequate standard of living.

The uncle of the groom formally complained to the police, alleging harassment, physical assaults and arson as a result of an inter-caste marriage. However, the police chose to register a complaint that indicated the “category of crime” as arson, with no reference to caste-based discrimination and untouchability. None of the other victims formally complained to the police, fearing physical and economic reprisals, including the possibility of losing their jobs. An arrest warrant was issued against one suspect in October 2010 on arson charges, more than a year after the incident, but has not been acted upon.

At the request of the victims, OHCHR and other organizations have engaged in repeated advocacy calling on the police, including at the level of the Deputy Inspector

<sup>168</sup> Police Act (1955), section 15.

General, to ensure the safe return of the family to their homes, guaranteeing their protection against threats and assaults and taking measures to arrest the suspects of the previous crimes committed against the family. However, the police have failed to take any steps to facilitate this and the family remain unable to safely return. At the time of reporting the police have taken no measures to investigate the incident further or to arrest the alleged perpetrators.

### **Failure of Government Attorneys in directing the police investigation and the filing of the charge-sheet**

District Government Attorneys are mandated to advise the police during their investigation and to submit the final Charge Sheet to the district court. However, in the cases investigated by OHCHR, Government Attorneys never acted to overturn charges that indicated a category of crime unrelated to caste-based discrimination, despite sufficient evidence to that effect. For example, in April 2011 a District Government Attorney confirmed to OHCHR that, while he often advises the police during an investigation, he never amends the recommendations in the police's final investigation report. He stated that the job of the District Government Attorney is to advise the police but is not to alter or amend "their decisions". This view is contrary to the State Cases Act, which tasks the Government Attorney with directing the police for further investigation after studying the investigation report.<sup>169</sup> It also suggests that, unless the police initially register a complaint with the alleged crime as caste-based discrimination and untouchability, alleged perpetrators will rarely be charged with that crime.

### **Court-room challenges**

In general, a number of challenges persist in the Nepali judicial system including extended delays in legal proceedings. A recent report by USAID found the following:

One estimate put the minimum length of a criminal trial at over one year if all of the basic procedural rights are exercised – even without the additional adjournments frequently requested by lawyers and routinely granted by the courts. Almost all cases are appealed to the heavily backlogged appellate courts and the Supreme Court, further extending delay for cases to be finally resolved.<sup>170</sup>

The USAID report further identified that access to legal aid for Nepalis of limited financial means remains insufficient.<sup>171</sup>

<sup>169</sup> State Cases Act (1992), section 17(3).

<sup>170</sup> USAID, "Nepal Rule of Law Assessment" (2009). Available at <http://nepal.usaid.gov/downloads/all-downloads/category/16-evaluation-reports.html>, p.8.

<sup>171</sup> Ibid.



OHCHR's own monitoring has indicated some serious procedural problems with the judicial process in general, including the lack of witness protection, undue delays in proceedings and a failure to appropriately notify the victims and witnesses of the court appearances. These issues create obstacles for all persons accessing the justice system but disproportionately affect *Dalit* communities. For example, *Dalits* are more likely to lack formal education, can be more easily intimidated by formal proceedings, including the language used, and would thus benefit from sufficient time to prepare for their appearance in the court room including how they should present information. It appears that in general very little information is provided to *Dalit* victims regarding court appearances, a role that should be performed by Government Attorneys. For example, one *Dalit* victim informed OHCHR that she had received little guidance or even contact with the Government Attorney for her case, including the dates when she was supposed to appear before the court to give testimony.<sup>172</sup>

### **Box 5.9: How an inadequate judicial process adversely affects a *Dalit* victim**

In February 2008 in Kanchanpur district a *Dalit* man was tied to a pole and repeatedly beaten with an iron bar by a non-*Dalit* male for having used a communal water source at the perpetrator's market stall. After some hours the victim was released following the intervention of the police, and the perpetrator was detained. The victim sustained serious external injuries to his front and back, and was hospitalised for more than two weeks. He also required pain-killing injections in his back for more than three months. Four days after the incident, with the support of local human rights defenders, the victim filed a First Information Report with the police, categorising the crime as caste-based discrimination. The judicial process that followed demonstrated weaknesses inherent in the judicial process as a whole, and how these can disproportionately and negatively impact a *Dalit* victim. Despite the severity of the assault, and the clear vulnerability of the victim, neither the district court nor the police offered suitable protection to either victim or witnesses, including during the judicial processes. For example, during the statement taking process within the court house, a defence witness was able to directly threaten the victim, telling him to "be careful" about what he said, and warning him that he could be jailed if he said the wrong thing. Moreover, during the same hearing the perpetrator was allowed to physically intimidate a prosecution witness while he was giving his statement, standing directly behind him.

The repeated delays in the judicial process also had a significant impact. The final hearing of this case was delayed three times, and was finally held in December

<sup>172</sup> In 2010, a higher caste male had beaten the woman on the head with the handle of an axe for having drunk out of a communal water source located on her land. Case on file with OHCHR, incident on 26 May 2010, in Kanchanpur district, Far Western region.

2008, seven months after the first day of statement taking. Each time the case was postponed, the court did not provide any information regarding when it would be rescheduled. The victim informed OHCHR that the repeated postponements were having both a psychological impact and a financial impact, given that he needed to be absent from work on each occasion, incurring costs travelling to the court, and losing pay for being absent from his work. As a result, the victim informed OHCHR that he regularly considered dropping the case.

Furthermore, when hearings were eventually rescheduled, the witnesses and victims were given short notice regarding the revised dates and their requirement to appear in court. On one occasion, neither the witnesses nor the victim were informed by the court or the Government Attorney of a court hearing until OHCHR provided information regarding the hearing the day before, giving almost no time to prepare their testimony adequately.

The district court issued its verdict in December 2008 and, despite the significant available information regarding the offences committed, found the defendant guilty of assault but not guilty of discrimination due to “insufficient evidence”. OHCHR observed that the witnesses were not adequately prepared to provide testimony and were intimidated by the court procedures. Furthermore, the District Government Attorney provided inaccurate testimonies on behalf of the perpetrators, stating that the victim had fallen in front of the perpetrator’s shop as a result of being intoxicated. The Attorney was also unable to brief the court on the victim’s medical reports, although being requested to do so by the judge.

On appeal, the appellate court overturned this judgment, finding the defendant guilty of caste-based discrimination. However, the judgement was to fine him only 1,000 Nepali rupees (less than 15 US dollars) - the lowest sanction available. Similarly, in relation to the guilty verdict on assault charges, the district court had awarded a fine of only 700 Nepali rupees. Given the nature of the offences - aggravated assault on caste-based discrimination grounds - the court would have been able to give a custodial sentence as well as a significantly more substantial financial penalty.

### **The non-implementation of court decisions**

Although there have been some positive examples where district and appellate courts have found perpetrators guilty of the crime of caste-based discrimination, and even instances where custodial sentences have been handed down, there has been little if any actual implementation of these decisions. OHCHR has monitored four cases in three different district courts in the Far Western region where perpetrators have been found guilty of caste-

based discrimination and untouchability: Kanchanpur District Court in 2007; Darchula District Court in 2010; and Baitadi District Court in 2009 and 2010. In the decisions of the Baitadi court, perpetrators were given custodial sentences of between one and two years. However, as of July 2011, only one of the three perpetrators has actually served a sentence while the two others remain unpunished. As highlighted elsewhere in this report, one of the perpetrators has even been appointed to public office despite avoiding his sentence for an extended period.

OHCHR's investigations found that the non-implementation of court verdicts results largely from police failure to enforce them in accordance with the law. Police routinely failed to properly circulate arrest warrants to other police stations or to take other proactive steps to locate the perpetrators.

#### **Box 5.10: Landmark Baitadi District Court verdicts remain unimplemented**

In January 2009, in a landmark decision, the Baitadi District Court found an accused guilty of the crime of caste-based discrimination and sentenced him to two years of imprisonment and a fine of 20,000 Nepali rupees, a decision upheld by the appellate court on 23 August 2009. However, more than two years later, he has yet to serve his sentence.

OHCHR identified the role of the police as being crucial in the failure of the court verdict to be properly implemented. For example, the police unnecessarily delayed the circulation of the arrest warrants, waiting more than one year after the final appellate court verdict to circulate the arrest warrant although it was widely known that the perpetrator was residing in Kanchanpur, a nearby district, and only after repeated advocacy by OHCHR and the National Dalit Commission. Moreover, even after receiving the arrest warrant, the local police took no proactive steps to locate the perpetrator, while knowing that he lived in the district headquarters and owned and ran a hotel.

When the police finally went to the perpetrator's home to serve the arrest warrant they found that he had left for Kathmandu. However, even at that point no steps were taken to notify the police in Kathmandu and, although the Deputy Superintendent of Police informed OHCHR that he planned to send a team to Kathmandu to search for the perpetrator, many months later this has not happened. The Deputy Inspector General of the Regional Police Office also committed to look into the issue, but so far there have been no new developments and the perpetrators remains at large.



■ *Dalit man with his sole possession – a sewing machine for his traditional occupation of tailoring.*

## 5.4 Socio-economic challenges

### Fear of social boycotts, reprisal and violence

*Dalit* communities normally do not have the political influence, substantive representation or power required to challenge the social structure and to access justice. Despite progress made regarding *Dalit* representation in the Constituent Assembly following the 2008 elections, *Dalits* remain poorly represented – if at all – in national and local administration, decision making bodies and State institutions such as the police and the judiciary, particularly at the senior levels. As a result of discrimination and inequality, *Dalit* communities are often politically isolated and are in weak positions within local power structures. *Dalit* individuals have explicitly told OHCHR that as a result of being *Dalits* and poor, they “have no influence” in their local societies.

Such unequal power structures can expose *Dalit* communities to intimidation, threats and violence when they do not conform to the expected traditional practices of the caste system. OHCHR has found that where *Dalits* challenge these roles, such as through using communal water sources or choosing to marry persons from other castes, they can be exposed to physical violence and verbal abuse. In several of the cases investigated and documented, inter-caste marriages have led to violent reactions, including *Dalit* houses being destroyed or even *Dalits* being murdered. The use of communal water sources has led to serious cases of physical assault. Fear of violence further intimidates *Dalits* from trying to seek justice through



the criminal system. As a result, there is much pressure on *Dalits* to settle caste-based issues through negotiations at the village level rather than pursuing criminal processes.<sup>173</sup>

### Box 5.11: Fear of reprisals prevents a *Dalit* man from accessing criminal justice

In March 2010, a 35-year-old *Dalit* man in Kanchanpur district was seriously beaten and verbally insulted by a group of non-*Dalits* during the “Holi” religious festival.<sup>174</sup> The incident occurred when the *Dalit* had been given their religious blessing, by placing a mark on his head known as a “tika”, without realizing he was a *Dalit* and someone traditionally considered to be “impure”.

The severe nature of the assault left the man unconscious for three days with serious head injuries.<sup>175</sup> Despite the seriousness of the incident, and the clear caste-based discrimination motives of the assault, the victim informed OHCHR that he did not want to pursue a criminal case as he feared further retaliation from non-*Dalits* should he do so.<sup>176</sup> Instead, the victim agreed that the case should be “mediated” by the police. This resulted in the man being given 4,400 Nepal rupees – approximately 60 US dollars – by the perpetrators. However, this was less than half of the medical expenses that he had incurred as a result of his injuries.

This pressure on *Dalit* communities is further exacerbated by their dependence on non-*Dalit* communities for a means of living, which adds to their reluctance to seek justice in relation to caste-based discrimination and untouchability. *Dalits* have expressed fears that seeking justice may result in social boycotts from non-*Dalits* that could jeopardise their livelihood, often already precarious. For example, in Mahottari district in January 2008, after a *Dalit* male formally complained to the police of being physically assaulted for refusing to bury a dead buffalo, non-*Dalits* imposed economic sanctions on *Dalits* in the community, including a prohibition on working on land owned by non-*Dalits* – a significant source of income for *Dalits*.

In another case a *Dalit* who had also been assaulted in relation to his refusal to eat sacrificed buffalo, informed OHCHR that he would not file a police report because of his dependence

<sup>173</sup> Case on file with OHCHR, incident that took place on 10, 13 September 2010, in Kanchanpur district, Far Western region.

<sup>174</sup> A Hindu religious festival.

<sup>175</sup> Case on file with OHCHR, incident that took place on 1 March 2010, in Kanchanpur district, Far Western region.

<sup>176</sup> Ibid.

on the perpetrator, his landlord, for his means of subsistence, and his fear that he would be evicted from his land. Similarly, members of *Dalit* communities in Baitadi district, stated that they would not consider challenging discriminatory practices as it would jeopardise their livelihood from basket weaving which is their traditional occupation. They feared that to do so would prevent them from accessing the materials needed for making baskets, found in the communal forests owned by non-*Dalits*, and alternative employment opportunities were restricted both by their caste and limited education.

### Financial constraints

As already discussed, *Dalit* communities have limited and poorly remunerated employment opportunities and thus face many economic barriers in considering or attempting to access justice for crimes of caste-based discrimination and untouchability. Pursuing criminal justice and thus participating in the procedure often incurs significant expenses for the victims who have very limited income to begin with.

With Nepal's topography and the distances often involved to reach the nearest police station or court house, many *Dalit* communities face significant transport and accommodation costs in pursuing cases. Although the police should cover expenses required to bring witnesses and victims to the court, in practice OHCHR has found that this provision has rarely been applied.<sup>177</sup> Furthermore, there is no such provision regarding costs incurred to access police offices in attempting to file cases. In 2008, one *Dalit* victim in Kanchanpur district informed OHCHR that, since he and his family lived two days walk from the district headquarters, they had incurred significant food and hotel costs for just one round trip to the district court for a caste-based discrimination case hearing. Furthermore, the court postponed the hearing four times, incurring significant additional time and expenses to the victims who had to make the trip on each occasion.

There are also significant indirect costs, including loss of earnings, which are not covered. The time spent accessing remote police offices and court houses disproportionately impacts *Dalit* communities, causing a considerable loss of income when they already earn very little and often live in poverty. These difficulties are magnified in the hill and mountain districts of Nepal where it can take many days to reach the district level authorities. For example, one villager in Bajura district informed OHCHR that it had taken eight days to reach the district headquarters.

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<sup>177</sup> State Cases Regulation (1988), section 15(3).

## 5.5 Gender-related challenges

As noted by the CEDAW Committee, gender-related impediments, including gender bias in the legal system and discrimination against women in the private sphere, may further obstruct women accessing remedies and complaint mechanisms for racial discrimination.<sup>178</sup> Many



of the challenges in accessing justice for victims of caste-based discrimination and untouchability in Nepal are exacerbated when victims are not only *Dalits* but also women. *Dalit* women and girls may face multiple and intersectional discrimination and violence including sexual violence and assault based on accusation of practicing witchcraft.<sup>179</sup>

The social and economic status of *Dalit* women seriously inhibits their ability to access justice. For instance, the literacy rate of *Dalit* women aged 15-49 years is 34.8 per cent compared to *Dalit* men 59.9 per cent, the national average being 67.5 per cent.<sup>180</sup> Therefore, *Dalit* women are even more unlikely to afford the financial costs incurred for pursuing criminal justice. With higher illiteracy rates, they are less likely to have stable employment than *Dalit* men, while their gender status also limits their access to and control over land,

<sup>178</sup> Committee on the Elimination of Racial Discrimination, "General Recommendation no. 25: Gender related dimensions of racial discrimination", A/55/18, annex V (2000), para. 2.

<sup>179</sup> Committee on the Elimination of Discrimination against Women, "Concluding observation of the Committee of the Elimination of Discrimination against Women: Nepal", CEDAW/C/NPL/CO/4-5 (2011), para. 19.

<sup>180</sup> UNDP Nepal, *Nepal Human Development Report 2009: State Transformation and Human Development* (Kathmandu, UNDP, 2009).

credit, inheritance and other economic resources.

The family and societal pressure on women also discourages *Dalit* women from accessing justice. This is especially true in cases of sexual violence with high possibilities of stigmatization and alienation from the community. In the context of the patriarchal structure of Nepali society, the individual and collective cultural identity is woven around women's sexuality, and therefore, in instances of sexual violence, not only the victim but also the family or the entire community may be considered as having lost their honour.<sup>181</sup> In many cases, individual women are not allowed to decide whether a case of sexual violence will be reported to the police. *Dalit* women in Dhanusha district told OHCHR that they needed permission from their husbands and the village elders before reporting rape cases to the police.

*Dalit* women are also doubly vulnerable in any mediation process. With existing power asymmetries in favour of non-*Dalit* men, *Dalit* women are vulnerable to both being "persuaded" to "mediate" and being unable to represent themselves adequately during any "mediation process". Further, they are more likely to be subjected to a mediation outcome that reflects existing discriminatory attitudes against women.

## 5.6 Institutional challenges: Lack of resources and representation

### Lack of resources

Insufficient resources are an additional barrier to an effective response by the local authorities, and in particular by law enforcement personnel, to the challenges of the criminal justice process and in facilitating access to justice. For example, in the hill districts of Nepal, due in part to the sparse and widely dispersed population, one Area Police Office may cover between five to seven village development communities that are spread over a large area. Police personnel often lack proper means of transportation and insufficient staff to cover their areas of responsibility. Coupled with Nepal's topography and the geographic isolation of many police posts, large areas can only be covered on foot which significantly impedes their ability to enforce the law. This can have particular implications for victims of caste-based discrimination and untouchability, who frequently live in remote areas that have little contact with the police.

Police also lack special criminal investigations units at district police offices, as well as staff

<sup>181</sup> WOREC-Nepal, *Adolescents and Youth Speak about Violence and its Impact: A Case Study in Eastern Nepal* (Kathmandu, WOREC, 2003), p.83.





with specific skills related to caste-based discrimination crimes. District level police officers are tasked with all law enforcement duties, which can result in them being over-worked and unable to handle their caseload. This, coupled with other institutional constraints, renders it less likely for the police to handle caste-based discrimination cases in an effective manner. In discussions with OHCHR, both the police and District Government Attorneys emphasized the importance of having a dedicated unit or police officer specifically trained on investigating alleged incidents of caste-based discrimination at each district police office.

### **Under-representation of Dalits in the justice and law enforcement system**

The CERD Committee recognises that, as part of their obligations to prevent discrimination in the criminal justice system and thereby strengthen access to justice for marginalised groups, States "... should pursue national strategies ... [t]o promote proper representation of persons belonging to racial and ethnic groups in the police and the system of justice".<sup>182</sup> Moreover, the draft Principles and Guidelines for the Effective Elimination of Discrimination

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<sup>182</sup> The Committee on the Elimination of Racial Discrimination, "General Recommendation no. XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system", A/60/18 (2005), para. 5(d).



Based on Work and Descent state that “national and local governments should encourage the recruitment of members of affected communities into law enforcement agencies.”<sup>183</sup> In 2004, in its Concluding Observation on Nepal, the CERD Committee expressed its concerns “over the under-representation of disadvantaged groups in government, legislative bodies and the judiciary”.<sup>184</sup>

However, current statistics show that *Dalits* remain significantly under-represented in the police and judicial system. As of October 2010, out of a total of 60,076 Nepal Police personnel, only 4,285 are *Dalits*, which amounts to only 7.1 per cent of the total police force. When compared with official statistics regarding the proportion of *Dalits* in Nepal of 13 per cent, the under-representation is clear. Although OHCHR was unable to obtain disaggregated data regarding the seniority of *Dalits* within the police, it is extremely rare to find a *Dalit* in an officer rank. OHCHR was also unable to obtain disaggregated data regarding *Dalit* women in the police force.

Similarly, as of November 2011, among the total of 270 judges in the country, only one is from the *Dalit* community, while 205 are from the *Brahmin* and *Chetri* castes. The one *Dalit* judge sits on an appellate court: there is no *Dalit* justice at the Supreme Court and no *Dalit* judges at any of the district courts across the country.<sup>185</sup> OHCHR has been unable to obtain the information regarding the proportion of *Dalits* among District Government Attorneys.

## 5.7 National human rights institutions: Challenges in fulfilling their mandated roles

In accordance with their mandates, the national human rights institutions of Nepal have the potential to play a significant role in protection and promotion of human rights and to hold the Government accountable for human rights violations that occur. Nepal has three national institutions that have the potential to play a specific oversight role and ensure access to justice for victims of caste-based discrimination and untouchability practices: the National Dalit Commission, the National Human Rights Commission, and the National Women Commission. However, despite some positive developments in the recent years, all three institutions face significant challenges to reaching their full potential.

<sup>183</sup> Ibid., para. 30.

<sup>184</sup> Committee on the Elimination of Racial Discrimination, “Concluding observations of the Committee on the Elimination of Racial Discrimination: NEPAL”, CERD/C/64/CO/5 (2004), para. 17.

<sup>185</sup> Data obtained from the Judicial Service Commission in November 2010.



■ Posters of the joint NDC and OHCHR “100-Day campaign to end caste discrimination and untouchability” on display at the Dadeldhura district fair in the Far Western region of Nepal.

### National Dalit Commission

In 2002, the Government of Nepal passed an executive order to establish the National Dalit Commission (NDC) to protect and promote *Dalits*’ rights. Significantly all of its 16 Commissioners and 22 staff are *Dalits* from most *Dalit* sub-castes, although only two commissioners and four staff members are female.

The NDC has a critical role in ensuring access to justice for victims of caste-based discrimination and untouchability. Significantly, the 2011 Untouchability Act authorizes the NDC to intervene when police refuse to register a First Information Report concerning an incident of caste-based discrimination and untouchability.<sup>186</sup> The NDC also can play an important role in raising awareness across Nepal. In 2010, the NDC conducted activities in 12 districts outside of the Kathmandu valley on legal and constitutional rights for the local *Dalit* people. Furthermore, from September to December 2011, the NDC and OHCHR jointly organized a 100-day campaign – “I commit to end caste-based discrimination” – to raise awareness of the new Untouchability Act across Nepal and to encourage all Nepalis to make personal commitments to ending caste-based discrimination.

However, the NDC faces various challenges in realizing its mandate and being able to properly promote and protect the rights of *Dalits*. While the NDC can receive complaints of caste-based discrimination, it can only take subsequent action in coordination with the National Human Rights Commission and the local administration, rather than directly. Its mandate is limited to making recommendations and offering advice to the Government on policies that assist in socially and economically empowering *Dalits* and to promote the

<sup>186</sup> Untouchability Act (2011), sections 5(3), (4) and (5).



■ The NDC chairperson briefing the United Nations Deputy High Commissioner for Human Rights on the Commission's strategies and activities during her visit to Nepal in April 2011.

proportional representation of *Dalits* in state institutions.

The NDC also lacks a concrete legislative basis, having been established by an executive order rather than through a law. The absence of an adequate legal framework fundamentally affects its independence and effectiveness. For example, the Government can decide to dissolve the NDC and has the ability to fire any or all of the Commissioners. This power has been exercised on more than one occasion, and demonstrates the impact of political influence over the work of the Commission. While a draft bill has been registered with the Legislature-Parliament since July 2009, more than two years later, no progress had been made towards its adoption. Moreover, OHCHR has highlighted a number of concerns with the draft and the extent to which it will provide for a competent and independent NDC consistent with the Paris Principles which set the international standard for national human rights institutions. For example, there are insufficient guarantees of the NDC's independence, autonomy and impartiality, including in relation to the recruitment of staff, and a lack of provisions that guarantee adequate funding of the Commission.

The NDC also lacks adequate financial and human resources. This lack of resources limits the NDC to operating solely from an office in Kathmandu. Lacking funding for offices, or even regular trips outside of Kathmandu, the Commission has little opportunity to properly monitor, investigate, document and refer complaints in accordance with its mandate. It is further unable to build contacts with human rights defenders, civil society and local networks at the grass-roots level. The Commission has little opportunity to address these constraints independently since it must seek prior approval from the Government before accepting any financial support from international agencies, further limiting its independence and

resources.<sup>187</sup> During the Universal Periodic Review of Nepal, the Government committed to “providing sufficient resources to make the NDC effective”. However, no progress has yet been made toward the implementation of this commitment.<sup>188</sup>

### National Human Rights Commission

The National Human Rights Commission (NHRC) of Nepal has a broader and more comprehensive human rights mandate, with the potential to play a central role in the promotion and protection of human rights in relation to caste-based discrimination and untouchability practices, and in assisting *Dalit* communities to access justice. The NHRC has the mandate to conduct inquiries and investigation on its own initiative or upon receipt of a petition or complaint alleging human rights violations, and to then submit recommendations to the Government regarding the prosecution of perpetrators or the payment of compensation to victims.<sup>189</sup> In relation to caste-based discrimination specifically, the NHRC may recommend compensation up to 100,000 Nepali rupees, approximately 1,400 US dollars.<sup>190</sup> The NHRC can also recommend that the concerned authorities employ measures to protect the victims and witnesses of human rights violations.<sup>191</sup> Further, it can undertake human rights education and raise awareness about the legal guarantees for *Dalits* to protect their human rights.<sup>192</sup> Utilising this mandate, the NHRC has investigated some cases of caste-based discrimination. According to statistics issued by the NHRC, since its establishment in May 2000 it has received a total of 37 complaints of untouchability.<sup>193</sup> In addition, the NHRC has conducted various awareness raising programmes on challenges faced by *Dalit* people across the country.

However, the NHRC faces a number of obstacles to fully implement its mandate. An NHRC bill intended to address shortcomings in the operation of the institution has been pending at

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<sup>187</sup> The Paris Principles (Principles Relating to the Status and Functioning of National Institutions) set out basic international standards that all the national institutions should meet. They were adopted by a group of national human rights institutions at an international workshop in 1991 and were later endorsed by the United Nations Commission on Human Rights and the General Assembly in 1993. Today they are broadly accepted as the test of a national institution’s legitimacy and credibility vis-à-vis international standards. The Paris Principles state that national human rights institutions should have an infrastructure that allows them to carry out their functions; that they need adequate funding to be independent of the Government and that they should not be subject to financial control which might affect this independence.

<sup>188</sup> Human Rights Council, “Draft report of the Working Group on the Universal Periodic Review: Nepal,” A/HRC/WG.6/10/L.3 (2011).

<sup>189</sup> Human Rights Commission Act (1997), sections 9(2)(a) and 13.

<sup>190</sup> Complaint Handling and Compensation Determination Regulation (2000).

<sup>191</sup> *Ibid.*, section 13.

<sup>192</sup> *Ibid.*, section 9(2)(i).

<sup>193</sup> NHRC internal statistics, on file with OHCHR. The NHRC was unable to provide OHCHR with additional information regarding the number of caste-based discrimination cases investigated, the number of recommendations issued on such cases, or the number of recommendations on such cases implemented, either partially or fully.



the Legislative-Parliament since August 2009, without progress. Both OHCHR and the NHRC have raised concerns that the bill may not be sufficiently consistent with the Paris Principles including in relation to adequate guarantees of independence and autonomy. Similarly, the NHRC lacks sufficient financial and human resources to effectively discharge its mandate. For example, the NHRC has been unable to recruit new staff for more than two years and 55 per cent of its staffing positions remain unfilled. Furthermore, despite its stated policy on inclusive recruitment, the number of *Dalit* staff in the NHRC remains very low. As of May 2011, only 9 of the 128 staff members are *Dalits*, and all of them are at assistant or a lower level.

Despite a number of reports issued by the NHRC, the Government has paid little attention to the recommendations made. In the decade since the NHRC was established, only 9 per cent of its recommendations were implemented.<sup>194</sup> In 2011 the Government took the step of directing ministries to implement NHRC recommendations and, according to a Government report, as of May 2011, 28 per cent of NHRC recommendations issued in 2011 were implemented, which represents a notable improvement and a cause for optimism. However, the recommendations implemented are those relating to providing compensation to victims only. No NHRC recommendations concerning the initiation of prosecution against alleged perpetrators have been implemented.

### National Women Commission

The National Women Commission (NWC), initially established through an executive decision of the Government in 2002, subsequently became a statutory body following the NWC Act of 2007. With five Commissioners, the NWC has a legal mandate which includes monitoring and investigating cases of violence against women, providing legal aid to women, monitoring the reporting obligations of the Government under the CEDAW and coordinating with the Government and other agencies for mainstreaming the gender perspective in national development policies and programmes.

Although the NWC currently does not have any specific mandate or programme dedicated to *Dalit* women and girls, it nevertheless plays an important role in the protection and promotion of their rights. The Commission has undertaken third party interventions in relation to emblematic *Dalit* women cases, including a case concerning the gang rape of a *Dalit* policewoman and a series of witchcraft-related assault allegations against *Dalits*, with a view to ensure the protection of the rights of the victims. By identifying specific programmes, and providing special attention to *Dalit* women and girls during the implementation of its programmes and studies, the Commission has the potential to play a more comprehensive role towards ensuring the enjoyment of their rights.

<sup>194</sup> NHRC, *Summary report of NHRC recommendations upon complaints in a decade: 2000-2010* (November 2010).





# 6 Encouraging Developments

## 6. 1 The role of the State and legislature

Despite the shortcomings identified in this report, it has been widely recognised that Nepal has made significant progress in acknowledging and taking steps to address caste-based discrimination and untouchability, and is leading in the South Asian region where caste-based discrimination is common place. This progress includes the Government's declaration of an "untouchability free" State; the establishment of the NDC; the criminalization of caste-based discrimination; the representation of 49 *Dalits* members in the Constituent Assembly following the 2008 election; the outlawing of and liberation of the *Haliya* bonded labourers; and inclusion of discrimination against *Dalits* in the Interim Constitution of 2007. These developments were acknowledged by a local non-governmental organization called the Preparatory Committee for the Durban Review Conference in April 2009, which highlighted the fact the Nepal has strongly committed "to challenge and root out the heinous crime of caste-based discrimination" and offered "crucial leadership to governments of the region in respect of the *Dalit* issue".<sup>195</sup>

During the Human Rights Council's Universal Periodic Review of Nepal in January 2011, the Government accepted all of the recommendations concerning caste-based discrimination, most notably the recommendation to pass new legislation prohibiting practice of caste-based



■ A Dalit police officer recruited under a quota system to increase Dalit representation in law enforcement.

<sup>195</sup> Statement by Civil Society Coordination Committee at Durban Review Conference, 20-24 April 2009, Geneva.

discrimination and untouchability. This acceptance was promptly followed by the passing of the Untouchability Act on 25 May 2011. Caste-based discrimination and untouchability is also being addressed in the drafting of the new constitution. The Preliminary Draft Text of the Constituent Assembly Committee on Fundamental Rights and Directive Principles provides stronger constitutional protection against caste-based discrimination and untouchability. The draft removes the clause which limited the prohibition to discrimination in “any public place, or public religious places”, and broadens the scope to a prohibition to all private as well as public places. The draft constitution also adds a specific article on the rights of the *Dalit* community.

The Untouchability Monitoring Centre was established in Kathmandu in July 2011 by the Ministry of Home Affairs following a Prime Ministerial decision. The centre has a mandate to monitor incidents of caste-based discrimination in the three districts of the Kathmandu valley (Bhaktapur, Kathmandu and Lalitpur), to provide support to victims of caste-based discrimination and untouchability in accessing justice and to coordinate with the police and national human rights institutions in relation to initiating criminal action against perpetrators. At the time of writing this report, this centre was in the process of being established and awaiting sufficient resources to fulfil its mandate.

## 6.2 The role of the judiciary

Although a small number of cases have been prosecuted for crimes of caste-based discrimination and untouchability, there have been some important examples of district and appellate courts which have issued significant verdicts of guilt for the perpetrators and given suitable custodial sentences. Of greatest significance are two landmark verdicts issued by the Baitadi District Court, which are considered significant for several reasons. Firstly, these are the first instances where a court has not only found perpetrators guilty on the basis of caste-based discrimination but have also sentenced the perpetrators to periods of imprisonment of up to two years. Furthermore, in relation to each case the respective judges – different judges on each occasion – cited international human rights law, both the ICERD and the Universal Declaration of Human Rights, in their written verdicts. In one of the cases the presiding judge noted that “Discrimination based on the principle of caste supremacy is [...] morally unacceptable, socially unjust and dangerous.”

Baitadi is a remote district in the Far Western region of Nepal, where traditional caste discriminatory practices remain common, with the accompanying societal power structures. In this context, the stances taken by the judges are particularly praiseworthy. The NDC, the NHRC and OHCHR have publicly applauded both verdicts and the courts’ efforts to uphold international human rights law and the Interim Constitution of Nepal. It should be noted that despite the activism of the judges, the perpetrators in both cases have yet to serve their sentences, due in large part to the inaction of the local police.





■ A Judge of the Baitadi District Court: the Judge issued a groundbreaking decision on caste-based discrimination, sentencing the perpetrator to a prison term.

### Box 6.1: The landmark verdicts of the Baitadi District Court

In 2009 and 2010 the Baitadi District Court issued verdicts on caste-based discrimination charges that were of particular note. In the first case in 2009, 12 *Dalits* were physically assaulted and their properties looted by non-*Dalits* for having refused to participate in traditional practices, including by not eating sacrificed buffalo meat at the temple – a customary role assigned to *Dalits*. While the police initially encouraged the victims to accept “mediation” rather than to initiate a criminal case, following advocacy by local civil society organizations, support by OHCHR, a complaint was registered on charges of caste-based discrimination and untouchability. The district court sentenced the main perpetrator to two years imprisonment and a fine of 20,000 Nepali rupees, and another perpetrator to three months imprisonment and a fine of 5,000 Nepali rupees. The decision was later upheld by the appellate court.

In the second case in 2010, two *Dalits*, a bridegroom and his father, were assaulted by a large group of non-*Dalits* during wedding ceremony, allegedly for undertaking practices that are traditionally only undertaken by non-*Dalits*, including the groom riding a horse during the ceremony. As with the earlier case the police initially refused to register the complaint on a number of occasions and insisted again that the issue should be “mediated”. However, after repeated attempts the case was successfully registered on caste-based discrimination and untouchability charges. The district court again found the perpetrators guilty of caste-based discrimination and gave a prison sentence him of one year’s imprisonment and a fine of 5,000 Nepali rupees.

## 6.3 The role of civil society

Since the signing of the Comprehensive Peace Agreement, an increasing number of *Dalit* civil society organizations are working on issues related to the promotion of *Dalit* rights and efforts for the elimination of caste-based discrimination.<sup>196</sup> OHCHR has observed stronger and more inclusive civil society networks emerging to monitor the Government's compliance with international law and implementation of national legislation, protecting persons from caste-based discrimination and untouchability practices. These include the Caste Discrimination Elimination Network (CDEN), a group of 23 civil society organizations in Baitadi district, and the Caste and Gender Discrimination Eradication Network in the Kanchanpur district. Amongst other things, the networks actively raise awareness on *Dalits'* rights at the village development community level. During the *Dashain* and *Tihar* festivals, the CDEN also conducted human rights monitoring to both help prevent violence and identify continuing discrimination practices at Hindus temples.

These networks have engaged in strong advocacy at the international level, influencing the deliberations and conclusions of international human rights bodies. In April 2009, a group of representatives of different civil society organizations and the NDC participated in the Durban Review Conference, including by organizing side events. The coordinator of a group of Nepali civil society organizations called the Durban Review Conference Follow-Up Committee (DRCF) also made two statements, one to the Preparatory Committee and another during the main Durban Review Conference. In September 2010, the DRCF also convened a follow-up workshop for local development officers, representatives of civil society organizations and representatives of marginalized communities of the Far Western region on the Durban Declaration and Programme of Action and the recommendations of the Durban Review Conference Outcome Document relevant to caste-based discrimination.<sup>197</sup>

Three coalitions submitted a joint report for the review of Nepal under the Universal Periodic Review mechanism.<sup>198</sup> Most of the concerns and recommendations in the joint report were addressed during the review. This included calling on the Government of Nepal to adopt relevant legislation and policies, such as the then draft bill on caste-based discrimination and untouchability in compliance with international standards, and to ensure that cases of caste-based

<sup>196</sup> These include the Dalit NGO Federation (DNF), Nepal National Dalit Social Welfare Organization (NND-SWO), Feminist Dalit Organization (FEDO), Dalit Welfare Organization (DWO), Lawyers National Campaign against Untouchability (LANCAW), Jana Uthhan Pratishthan (JUP), Jagaran Media Center (JMC), Social Awareness for Education (SAFE), Equality Development Center (EDC) as well as International Dalit Solidarity Network (IDSN).

<sup>197</sup> The Durban Declaration and Programme of Action, adopted by consensus at the World Conference Against Racism held in Durban, South Africa, in 2001, is a comprehensive framework for addressing racism, xenophobia, racial discrimination and related intolerance. The Durban Review Conference took place in Geneva, Switzerland in 2009 to evaluate progress towards the goals under the Durban Declaration, and adopted the Outcome Document. For more information see section 3.2 above.

<sup>198</sup> Nepal NGO Coalition for UPR, Women's Coalition and the Durban Review Follow-up Committee. *Nepal NGO Coalition Submission to input into Nepal's review under the Universal Periodic Review mechanism* (2010).



■ A Dalit civil society activist discussing caste-based discrimination issues with Dalit villagers.

discrimination are reported, investigated, perpetrators prosecuted and victims compensated.

The impact of the work of these networks is becoming increasingly visible. One example is the verdicts of the Baitadi District Court in 2009 and 2010, as highlighted above. Both verdicts followed concerted advocacy by the CDEN and the NDC. The CDEN accompanied the victims in filing the First Information Report and ensuring that the police categorized the crime as caste-based discrimination and untouchability. They also provided practical and financial assistance to the victims during the long court proceedings. Another example is the decline in incidents of caste-based discrimination and untouchability during the cultural festivals in the district. Following a series of violent incidents of caste-based discrimination during the festivals in 2007 and 2008, the CDEN undertook concerted advocacy campaigns to try and address the principal issues. This included organising consultations that brought together *Dalit* communities, representatives of local Hindu temples, political party representatives and others to discuss issues such as the disposal of buffalo carcasses – traditionally considered to be the role of *Dalits* – and agree on solutions. In 2009 the CDEN brokered the issuance of a document whereby the political parties and the District Administration Office in Baitadi district committed that, during the autumn *Dashain* festivals, no *Dalits* would be subjected to performing the practice of disposing of buffalo carcasses, and that those who sacrificed animals at the local temples would be responsible for taking care of carcasses by themselves. According to the CDEN, no such caste-based discrimination incidents were reported in the district during the *Dashain* and *Tihar* festivals in 2009 and 2010.<sup>199</sup>

<sup>199</sup> OHCHR provided support to CDEN in 2009 and 2010 for monitoring practices of discrimination such as obstruction of *Dalits* entering temples, forcing *Dalits* to eat rotten buffalo meat and forcing them to clean buffalo carcasses during the *Dashain* and *Tihar* festivals. During the two years when the network conducted monitoring at different temples in the district, there were no incidents reported during *Dashain* and *Tihar* festival.





# 7 Conclusions

This report identifies several areas of progress that have been achieved in ensuring access to justice for victims of caste-based discrimination and untouchability. In particular, the recent criminalization of practices of caste-based discrimination and untouchability has provided a framework for combating these violations. Furthermore, the ground-breaking decisions of the Baitadi District Court, and the Government's establishment of the NDC, give cause for optimism. Nonetheless it remains apparent that *Dalit* communities across Nepal still face numerous obstacles in their ability to access justice for crimes of caste-based discrimination and untouchability. This in turn contributes to the continuation of these discriminatory practices and perpetuates a cycle of marginalization, exclusion and poverty with the potential to further undermine Nepal's fragile stability.

A series of factors continue to undermine access to justice for victims of caste-based discrimination and untouchability, exacerbated by entrenched traditions. These include substantive gaps in the law, and its weak implementation such as a lack of proportionate sentencing by judges and the failure to implement verdicts when delivered. In turn, the absence of appropriate compensation or reparation deters victims from seeking justice when confronted by the significant cost of legal proceedings. The police frequently do not treat these crimes as serious and consequently fail to follow proper procedures and fulfil their legal obligations. This is exacerbated by the passive role of District Government Attorneys at the local level. OHCHR's monitoring has found that the police systematically encourage victims to resolve cases through *ad hoc* "mediation" processes, rather than through the criminal justice process mandated by law, even though mediation places victims of caste-based discrimination, particularly women, at a significant disadvantage. Effective mechanisms do not exist to hold state officials to account and, despite their significant mandated potential to ensure access to justice, national human rights institutions are unable to play a fully effective role in this regard.

For *Dalit* communities, these obstacles are magnified by entrenched structural and societal discrimination faced on a daily basis. Limited economic resources, vulnerability to physical assault, absence of political representation and a lack of faith in the justice system create hesitation to seek justice for cases of discrimination. Furthermore, economic dependency on non-*Dalit* communities serves as a further disincentive to seek justice for fear of jeopardising livelihood, as does a general lack of awareness of the law and the available legal procedures.

Much more needs to be done to make access to justice a reality for *Dalit* communities, across all four components of access to justice. The Nepal Government has a responsibility to take a holistic approach to the issue by involving the police, the judiciary, schools, civil society, and others in their efforts. Law enforcement plays the most critical role in ensuring justice for





*Dalits*, by being the first point of contact with the justice system for those subjected to caste-based discrimination, by bearing the responsibility to protect those at risk, by conducting proper investigations of incidents and by determining that an alleged perpetrator is charged under the crime of caste-based discrimination and untouchability. To ensure that the police fulfil this crucial role, it is important to have clear guidance and procedures for identifying, registering and investigating caste-based discrimination cases, and accountability mechanisms to ensure that officers fulfil their legal duties. District Government Attorneys and courts also play a crucial role in ensuring the criminal justice process proceeds in a timely and appropriate manner, and in the best interests of the victim, with appropriate penalties for offenders. Furthermore, national human rights institutions can also strengthen law enforcement by providing appropriate guidance and proactively intervening in cases. Strengthening law enforcement, and increased public trust in the criminal justice system, would significantly improve the rule of law in the country.

Such a holistic approach should further encompass measures to address other factors that prevent *Dalits* from accessing justice, such as increased awareness raising of the new Untouchability Act, enhanced education, employment opportunities and targeted support for the most vulnerable *Dalit* groups. The immediate provision of long promised rehabilitation packages to the *Badi* and *Haliya* is of particular importance. Direct support is required to lift these groups out of a cycle of poverty endured for generations, and to ensure their social and economic reintegration. The Government must also promote skills and development

opportunities for *Dalits*, as well as explore further the use of special measures such as quotas, to ensure the education of *Dalits* and the proportionate representation of *Dalits* in all public bodies.

OHCHR suggests that further studies be undertaken in certain areas identified in this report with the aim of deepening knowledge of challenges and the most effective solutions for enhancing access to justice for caste-based discrimination. These areas include issues related to the administration of justice in Nepal, particularly in relation to the availability of legal aid and the extensive use of informal “mediation” processes for criminal cases. Of particular interest is the impact of these practices on groups that are socially marginalised and made vulnerable by caste-based discrimination. Furthermore, in recent years OHCHR has observed an increasing number of cases of physical assaults against women who were alleged to have been practising “witchcraft”, many of whom are *Dalits*. The caste-based motivations behind such crimes would benefit from further examination within the broader context of violence against women.





प्रधान कार्यपालिका, संघीय रिजर्व अफिस  
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सिंहगढ़ राज्य, सिंगापूर, सिंगापूर  
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# 8 Recommendations

OHCHR offers the following recommendations to the Government of Nepal, the Nepal Police, the judiciary, national human rights institutions, civil society organizations, political parties and international donors and organizations:

## To the Government of Nepal

OHCHR makes the following recommendations, in line with the Government's obligations under national and international human rights law and the commitments made during the Universal Periodic Review process in 2011:

- Widely disseminate the 2011 Untouchability Act, including the necessary guidelines and the procedures for victims to claim redress under the Act, amongst the *Dalit* community, law enforcement officials as well as the general public.
- Draft the required directives, rules and procedures for the effective implementation of the 2011 Untouchability Act, including clear instructions to the police to register First Information Reports concerning alleged incidents of caste-based discrimination and untouchability.
- Provide adequate training on prevention, investigation and prosecution of cases involving caste-based discrimination and untouchability under the 2011 Untouchability Act to the police, District Government Attorneys, other law enforcement officials and the judiciary.
- Establish an external oversight mechanism (such as an independent police complaints commission or a special investigative unit) to receive and investigate complaints from the victims or the public in relation to the action or inaction of the police in such cases. This mechanism should be able to take disciplinary measures against police officers who fail to register complaints of caste-based discrimination and untouchability, or who fail to investigate such allegations. This should include police officers who resort to *ad hoc* "mediations" rather than initiating criminal procedures to address such allegations.
- Adopt measures and procedures to support and protect victims, witnesses and their family members throughout the investigation and prosecution of cases of caste-based discrimination and untouchability. In addition, ensure the swift adoption of the draft bill on victims and witness protection, in line with international human rights standards and best practices. Ensure that adequate resources are allocated for the police to fulfil its obligation under section 15(3) of the State Cases Regulation to bear the costs of witness to court proceedings.



- Establish district branches of the Untouchability Monitoring Centre, prioritising remote and rural areas where caste-based discrimination and untouchability remain more common, such as districts of the Far Western region and the Terai.
- Adopt concrete measures to ensure the effective implementation of Supreme Court decisions, and the recommendations of the NHRC and other national human rights institutions, in relation to cases of caste-based discrimination and untouchability.
- Promptly adopt the draft NDC bill, amended to be in compliance with the Paris Principles, and provide adequate resources that allow the NDC to effectively fulfil its roles and responsibilities as specified under the bill.
- Implement the 2009 ordinance on ensuring adequate representation of *Dalits* and other marginalised groups in the public service and security forces, including positions at decision-making levels.
- Include a programme to ensure general awareness on issues of caste-based discrimination and untouchability as part of the national education curriculum.

### To the Nepal Police

- Ensure the prompt registration of First Information Reports and thorough and impartial investigations, for all allegations of caste-based discrimination and untouchability. In addition, promptly implement all court decisions finding perpetrators guilty of caste-based discrimination and untouchability, including through properly serving arrest warrants.
- In coordination with the Ministry of Home Affairs, provide training to police officials at central and district levels on the 2011 Untouchability Act and its components, and their roles and responsibilities under the Act.
- Take appropriate disciplinary action in response to police officials failing to conduct their duties, referring the case to appropriate mechanisms in cases where penal action is required.

### To the Office of the Attorney General

- Raise awareness amongst District Government Attorneys of the 2011 Untouchability Act and of the relevant Supreme Court decisions on cases of caste-based discrimination and untouchability.
- Issue written directives to the District Government Attorneys to: (i) take a more proactive role in supervising police investigations and decisions related to charges of caste-based discrimination and untouchability; and (ii) ensure the full and meaningful participation of victims in judicial proceedings, including through the timely

notification of hearings and other relevant dates, and the availability of protection measures against any threats or intimidation.

- Provide adequate training to District Government Attorneys on relevant prevention measures, and the investigation and prosecution of cases of caste-based discrimination and untouchability.

### **To the Judiciary**

- Continue to exercise oversight to ensure that police officers comply with their responsibilities to register and investigate cases of caste-based discrimination and untouchability.
- Provide adequate training to judges of the district and appellate courts on the 2011 Untouchability Act as well as on the relevant national and international standards regarding caste-based discrimination and untouchability.
- Ensure the full and meaningful participation of the victims in judicial proceedings.

### **To the National Human Rights Institutions**

*To all national human rights institutions*

- Conduct awareness-raising activities on the 2011 Untouchability Act for rights holders, duty bearers and the general public.
- Monitor the implementation of the 2011 Untouchability Act through the documentation of disaggregated data on complaints received and the steps taken by the police and the judiciary in relation to such cases, in coordination with the Attorney General's office as appropriate.
- The NHRC, the NDC and the NWC should closely cooperate, and undertake joint activities and programmes, to promote access to justice for victims of caste-based discrimination and untouchability.
- Support the advocacy and protection efforts of human rights defenders and civil society organizations, both at national and grass-root levels, incorporating lessons learned into the development of strategies to address caste-based discrimination and untouchability.
- Strengthen cooperation with regional and international stakeholders working towards eliminating caste-based discrimination and untouchability, promoting the exchange of lessons learned and best practices.

*To the NDC*

- As specifically mandated by articles 5(3) and 5(4) of the 2011 Untouchability Act, undertake a proactive role to support victims in their efforts to access justice, including in the filing of First Information Reports. In this regard, establish a dedicated branch to receive complaints from victims and to directly liaise with the police.
- Closely cooperate with the new Untouchability Monitoring Centre in Kathmandu (and with other centres should they be established), District Police Offices and District Government Attorney Offices to facilitate access to justice for victims.

*To the NHRC*

- Promptly investigate complaints of caste-based discrimination and untouchability through its established regional offices and sub-offices, supporting access to justice for the victims.

**To Political Parties**

- All political parties should commit to stop any interference in cases of caste-based discrimination, unless undertaken through appropriate cooperation with the criminal justice system. Parties must not engage in activities to encourage victims of caste-based discrimination, and the police, to resolve such cases through *ad hoc* “mediation” processes, rather than the legitimate criminal justice mechanism.

**To Civil Society Organizations**

- Develop mutually supportive protection and advocacy efforts of *Dalit* and non-*Dalit* civil society and human rights defenders on access to justice for victims at central and grass-root level.
- Undertake activities to challenge caste perceptions, to promote equality and to discourage the mediation of cases involving caste-based discrimination.

**To the International Donor Community and United Nations Agencies**

- Continue to support national stakeholders in their advocacy efforts and targeted initiatives to ensure legal empowerment and access to justice in their programming.
- Follow-up on the commitments made by the Government of Nepal during its Universal Periodic Review, offering financial support and technical assistance as appropriate.







# 9 Annex: Caste-based Discrimination and Untouchability (Offence and Punishment) Act, 2011

## Act no 4 of the year 2068\*

### Act made to provide for provisions on caste-based discrimination and untouchability offence and punishment

**Preamble:** Whereas, acknowledging the principle that each person is equal in terms of rights and human dignity, it is expedient to provide timely provisions to protect the right of each person to live with equality, freedom and human dignity by creating an environment where no untouchability and discrimination prevails on the ground of caste, ethnicity, descent, community or occupation in the name of custom, tradition, religion, culture, ritual or any other name, to make punishable the acts of untouchability, exclusion, restriction expulsion, contempt or any other discriminatory act that is against humanity, to provide restitution (compensation) to the victim of such acts, to keep intact the national unity by strengthening the relationship subsisting among members of the general public, and to create an egalitarian society.

Now, therefore, be it enacted by the Constituent Assembly in the capacity of the Legislature-Parliament pursuant to Article 83 of the Interim Constitution of Nepal, 2007.

#### 1. Short title and Commencement:

- (1) This Act shall be called "Caste-based Discrimination and Untouchability (Offence and Punishment) Act, 2011".
- (2) This Act shall be enforced throughout Nepal and also applicable to Nepalese citizens residing outside Nepal having committed an offence pursuant to this Act against Nepalese citizens.
- (3) This Act shall come in to force immediately.

\* Under the Nepali calendar. Corresponds to 2011.

## 2. Definition:

Unless the subject or context otherwise requires, in this Act:

- (a) "Caste-based discrimination and untouchability" means the acts as referred to in Section 4.
- (b) "Offence" means acts as referred to in Section 3.
- (c) "Public place" means place used for public purpose such as governmental or non-governmental office, education or industrial institution, ancient monument, memorial, resting place, tap, well, pond, dais, road or passage way, vehicle of public transportation, graveyard, garden, religious site of any kind, and/or this term includes any other place where products or services are sold or distributed publicly.
- (d) "Public Service" means governmental or non-governmental office, public institution, transport, industrial or educational institute, company, firm, shop, hotel, resort, lodge, restaurant, cafe, film hall or theatre, and this term also includes any service or facility to be provided by any government or non-government agency for public use or benefit.
- (e) "Public occasion" means publicly organized feast or party, worship ceremony, religious offering, birth ceremony, naming ceremony, marriage ceremony, death ritual and religious, social or cultural ceremony of any kind.
- (f) "Individual holding a public post" means person holding the post where he/she is authorized by the constitution or other prevailing laws or the decision or order of the concerned body or authority, to exercise public authority or to fulfill public duty or obligation and this term also includes any incumbent official or employee holding any position in public organization.
- (g) "Prescribed or as prescribed" means prescribed or as prescribed in the rule framed under this Act.

## 3. Not to practice caste-based discrimination and untouchability:

- (1) No one shall commit or cause to commit caste-based discrimination and untouchability.
- (2) No one shall aid, abet or provoke anyone to commit caste-based discrimination or untouchability, or shall attempt to commit such acts.
- (3) If anyone commits an act pursuant to sub-sections (1) or (2), he/she shall be deemed to have committed an offence pursuant to this Act.

**4. Shall be deemed to have committed caste-based discrimination and untouchability:**

- (1) If anyone commits or causes to commit any act as referred to in this section on the ground of custom, tradition, religion, culture, rituals, caste, ethnicity, descent community or occupation, he/she shall be deemed to have committed caste-based discrimination and untouchability.
- (2) No one shall, on the ground of tradition, custom, religion, culture, cultural practices, caste, ethnicity, descent, community or occupation, commit or cause to commit any of the following acts in any public or private place against a person subjecting him or her to caste-based discrimination or untouchability:
  - (a) To prevent, control, restrict or prohibit anyone in any way from entering, attending or participating, or
  - (b) To expel anyone individually or collectively from public place or public occasion or to commit social exclusion or discrimination of any kind or to impose restriction on such act or to demonstrate any other kind of intolerant behavior.
- (3) No one shall, on the ground of caste, ethnicity, descent, community or occupation, deprive a person of using or enjoying public service.
- (4) No one shall, on the ground of caste, ethnicity, descent, community or occupation, deprive a person of organizing a public event or carrying out any activity organized publicly.
- (5) No one shall instigate or provoke a person to commit an act that causes caste-based discrimination or untouchability or abet a person to commit such acts, or knowingly participate in such acts.
- (6) No one shall, on the ground of caste, ethnicity, descent, community or occupation, prohibit or prevent a person from taking up any profession or business or compel a person to take on any occupation or business.
- (7) No one shall, on the ground of caste, ethnicity, descent, community or occupation, deprive or cause to deprive a person from performing any religious acts.
- (8) No one shall, on the ground of caste, ethnicity, descent, community or occupation, prevent or cause to prevent a person from producing, selling or distributing any goods, services or facilities.
- (9) No one shall, while producing, selling or distributing any goods, services or facility, produce sell or distribute any goods, services or facility only for a particular caste or ethnicity.
- (10) No one shall, on the ground of caste or ethnicity, exclude any member of family or



prevent him/her from entering the house or evict him/her from the house or village, or compel him/her to leave the house or village.

- (11) No one shall, on the ground of caste ethnicity, descent or community, prevent a person of marriageable age pursuant to prevailing law from an inter-caste marriage to which they consent or prevent the naming ceremony of a child born from such marriage, or compel or cause to compel the divorce of persons in an inter-caste marriage.
- (12) No one shall, by dissemination, publication or exhibition of audio visual materials, articles, pictures, figures, cartoons, posters, books or literature or by any other means, denote hierarchical supremacy of a person belonging to a particular caste or ethnicity or commit an act that justifies social discrimination on the ground of caste or ethnicity or transmit the views based on caste supremacy or hatred or use derogatory words or indicate thereof, by his/her conduct gesture or behavior, or instigate or abet or cause to do so in any way that promotes caste-based discrimination.
- (13) No one shall on the ground of caste, ethnicity, decent or community, deny a person work or dismiss a person from employment or discriminate in remuneration or cause to do so.

## 5. Complaint:

- (1) A person who finds that someone has committed or is going to commit an offence as referred to in section 4, may lodge a complaint in nearby police office as prescribed.
- (2) Notwithstanding anything contained in sub-section (1), if a person commits an offence as referred to in section 4 outside Nepal, the complaint has to be lodged with the nearest police office of the district where the plaintiff resides or where the defendant resides.
- (3) If the concerned police office fails to register the complaint submitted pursuant to sub-section (1) or (2) or fails to precede with the complaint as per prevailing law, the concerned person may complain, in prescribed manner to the National Dalit Commission or local body.
- (4) The National Dalit Commission or local body shall forward the complaint received pursuant to sub-section (3) to the concerned police office in prescribed manner.
- (5) After receiving the complaint pursuant to sub-section (4), the concerned police office shall make an inquiry into the complaint and shall initiate necessary proceeding on such complaint as per prevailing law.

## **6. Cooperation may be sought in the investigation of the case:**

While making investigation of any case under this Act, the investigating authority may seek cooperation as per necessity from *Dalit* community, local leaders, civil society or representative of organization working for the rights and empowerment of victims of caste-based discrimination and untouchability.

## **7. Penalty:**

- (1) The following penalty shall be imposed on the person who commits the following offence:
  - (a) Whosoever commits an offence pursuant to sub-section (2), (3), (4), (5), (6) or (7) of section 4 shall be liable to the punishment of imprisonment for a term ranging from three months to three years, or a fine ranging from one thousand rupees to twenty-five thousand, or both.
  - (b) Whosoever commits an offence pursuant to sub-section (8), (9), (10), (11), (12) or (13) of section 4 shall be liable to imprisonment for a term ranging from one month to one year, or to a fine ranging from five hundred rupees to ten thousand rupees, or both.
  - (c) Whosoever aids, abets or instigates a person to commit caste-based discrimination or untouchability or to attempt such act shall be liable to half of the punishment prescribed to the principal offender.
- (2) If a person holding a public post commits an offence pursuant to subsection (1) he/she shall be liable to the punishment of an additional fifty per cent in addition to the punishment as mentioned in that subsection.

## **8. Penalty to person causing hindrance or obstruction:**

If a person hinders or obstructs the inquiry or investigation of an offence punishable under this Act, the court may, on the basis of the report of the investigating authority impose him/her half of the punishment prescribed to the offender.

## **9. Restitution:**

- (1) If a person is convicted of the offence pursuant to this Act, the court may order the offender to provide restitution to the victim of a sum ranging from twenty-five thousand to one hundred thousand rupees.
- (2) Besides the restitution pursuant to sub-section (1), if the offender is found to have made harm or loss to the victim, the court may, on the basis of such harm or loss, order the offender to provide for the medical treatment costs or reasonable costs of additional damage or harm caused to the victim.

**10. Limitation to file case:**

A case shall have to be filed for the offence pursuant to this Act within three months from the commission of the offence.

**11. Government of Nepal to be plaintiff:**

The Government of Nepal shall be plaintiff in the case filed pursuant to this Act and such case shall be deemed to be included in the schedule 1 of the State Cases Act, 1992.

**12. Summary procedure to be followed:**

Any case pursuant to this Act shall be proceeded with and disposed of by following the procedure as provided in the Summary Procedure Act, 1972.

**13. Penalty to be imposed as per prevailing law:**

If an act considered as an offence pursuant to this Act is also an offence pursuant to other prevailing laws, nothing written in this Act shall be deemed to restrict in taking action as per prevailing laws for such offences.

**14. To be in accordance with this law:**

For the matters mentioned in this Act, this Act shall prevail while other matters shall be governed by other prevailing laws.

**15. Duty to extend cooperation:**

It shall be the duty of all concerned to cooperate in the investigation of the case under this Act.

**16. Power to frame rules:**

The Government of Nepal may frame necessary rules to implement the objectives of this Act.

**17 Repeal:**

Section 10A of the chapter of miscellaneous of the Civil Code (*Muluki Ain*) is hereby repealed.

*Date of Authentication: 1 June 2011*







UNITED NATIONS  
**HUMAN RIGHTS**  
OFFICE OF THE HIGH COMMISSIONER  
*Nepal*