

Speak Up...

Stop Discrimination!

NDC and OHCHR-Nepal

Observations on the Untouchability Bill



GOVERNMENT OF NEPAL
NATIONAL DALIT COMMISSION
NEPAL



UNITED NATIONS
HUMAN RIGHTS
OFFICE OF THE HIGH COMMISSIONER
NEPAL

Published in 2010 by
National Dalit Commission of Nepal
The Office of the High Commissioner for Human Rights in Nepal
© OHCHR-Nepal, NDC - 2010
Printed - December 2010 (2000 copies)

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I. Introduction

The water source was on her land, yet she was prohibited from using it. When she dared, she was attacked with an axe. *Just because she was a Dalit.*

Practices of caste-based discrimination and untouchability are illegal in Nepal. However, in many parts of the country, Dalits - the so-called lowest caste within the Hindu caste hierarchy - are still considered to be and treated as “untouchable”, unable to enjoy the same rights and freedoms as other groups in society. Despite the illegality of such practices, cultural barriers, structural poverty and inadequate action by state authorities prevent victims from accessing justice. Furthermore, the lack of an appropriate legal framework to properly address the issue of discrimination, and to punish those who discriminate based on caste, is a further impediment to progress.

Against this reality, the submission of the draft *Caste-based Discrimination and Untouchability Crime Elimination and Punishment Act* to the Legislature-Parliament provides an opportunity to improve the legislative framework and fight discriminatory practices. This document assesses the draft bill and offers specific recommendations to policy makers and others, particularly on how to ensure its consistency with international human rights standards and best practices. If the current shortcomings are addressed, the proposed law could become a pivotal instrument in tackling the long-standing issue of caste-based discrimination and untouchability in the country.

II. The context of caste-based discrimination

The practices of caste-based discrimination and untouchability entail segregation between Dalits and other communities, as well as among Dalits themselves. According to traditional beliefs, Dalits are considered

to be “impure” and are stigmatised as “untouchable” to other castes. In the nineteenth century, untouchability was actually codified in law, stratifying Nepali society in a hierarchical system with Dalits at the bottom.

Although this anachronistic legislation has been since amended, the practices continue, violating human rights of many Nepalis, in particular in less-developed and more remote areas. Dalits are being denied access to vital resources, such as public water taps, as well as temples, restaurants and other public places. Occupational segregation impedes access to employment, with Dalits restricted to traditionally assigned occupations, including road-sweeping, leatherwork and even forced sex work. Despite the Government’s commitment to abolish such practices, many Dalits remain trapped in bonded labour relationships. Those who oppose discriminatory practices face the risk of being ostracised or boycotted or becoming victims of violence. In this regard, OHCHR and the National Dalit Commission have verified through monitoring and reporting incidents of physical assault, arson, forced displacement, sexual violence and labour exploitation. There are several instances where Dalits have been severely injured and hospitalised, simply on account of their Dalit identity.

III. International obligations

The Government of Nepal is obligated to take measures to prohibit caste-based discrimination and untouchability under international human rights law. Non-discrimination and equality are core international human rights principles, binding on all states. A number of international human rights instruments, including the International Covenant on Civil and Political Rights, require Nepal to respect and protect the right to equality and non-discrimination of all persons within its territory “*without distinction of any kind*”.

Furthermore, under the International Convention on the Elimination of All Forms of Racial Discrimination, to which Nepal is a State party since 1971, the Government is obligated to prohibit discrimination based on descent, which includes caste-based discrimination, as a form of “racial

discrimination”. The Convention further obligates the Government to take all appropriate measures, including: enacting legislation to outlaw all forms of discrimination; preventing, prohibiting and eliminating practices of segregation in housing, education and employment; and securing the right to access for everyone to any place or service intended for use by the general public.

More specifically, under the Convention, the Government is obligated to criminalise all acts of caste-based discrimination, including the dissemination of ideas based on caste superiority or hatred. The Convention further obligates the Government to ensure a remedy and reparations for victims, regardless of whether the perpetrator is a private individual or a state official. Significantly, the victims should also have the right to participate in the criminal or other similar procedures against the perpetrators with adequate protection against any form of intimidation or reprisals.

IV. National legislation and existing gaps

The current Nepali legislation meets international obligation to a certain extent. The Interim Constitution guarantees the right to equality, providing that there shall be no discrimination against any citizens based on caste, and further prohibits untouchability in any form, establishing liability of the perpetrator and entitling the victim to compensation. The Interim Constitution also prohibits denial of access to, or use of, any public places, goods or services on the basis of caste, and the encouragement of caste superiority. In addition to the Interim Constitution, the Civil Code (*Muluki Ain*) criminalises “discriminatory behaviour of untouchability” along with “boycotts or restrictions against any person on the basis of caste”, penalising such acts with imprisonment and/or fine.

However, the current legislation has proved inadequate and ineffective to actually curb discriminatory practices. The lack of a proper definition of what constitutes “caste-based discrimination” or “untouchability” makes prosecution difficult, and to a certain extent explains the authorities’ reluctance to do so. Partly because of the vagueness of the

provision in the Civil Code, police and other government officials rarely investigate such acts as crimes and seek instead to settle cases outside of the criminal justice system, often through informal ‘mediations’. Furthermore, the penalties do not correspond with the seriousness of offences and the 35 day limit to register a case is far too short. Significantly, the provisions of the Civil Code do not provide any compensation for victims in contradiction of constitutional requirements.

V. Analysis of the draft bill

The submission in July 2009 of the draft *Caste-based Discrimination and Untouchability Crime Elimination and Punishment Act* to the Legislative-Parliament seems to indicate the Government’s will to address this issue. OHCHR welcomes this initiative as a step towards fulfilling Nepal’s international legal obligations to eliminate caste-based discrimination. The current draft has some significant strength, including the following:

- Penalising the practice of caste-based discrimination and untouchability in many areas, including access to public places and facilities, provision of goods and services and in employment;
- Criminalising incitement to commit caste-based discrimination and the promotion of impediments to inclusion;
- Ensuring confidentiality of information received during investigations, and allowing the police to be assisted by civil society organisations when investigating incidents of caste-based discrimination;
- Providing increased punishments for public officials found responsible of discrimination;
- Requiring the perpetrator to provide compensation to the victim, including provision for medical treatment or additional expenses to cover damages; and
- Expediting criminal proceedings under the Summary Procedure Act.

However, many areas of the bill require improvement for the law to have the desired impact. The following are key shortcomings that should be addressed to strengthen the current bill:

1. *Codifying international legal commitments* - The bill's preamble does not adequately stress the Government's obligations under international human rights law or the relevant rights as expressed in the Interim Constitution. The preamble must reflect the Convention on the Elimination of All Forms of Racial Discrimination and the constitutional guarantees.
2. *Defining caste-based discrimination* - The draft fails to define the terms "caste-based discrimination" and "untouchability". To ensure prosecution and punishment for such offences, it is essential to define them. The definition should cover all forms of discriminatory practices, whether in public or private places.
3. *Classifying offences* - Acts considered to amount to caste-based discrimination must be fully listed, together with an indication of the seriousness of each act. The draft bill should categorise the offences and their relative level of seriousness.
4. *Clarifying duties of law enforcement officers registering complaints* - The draft bill fails to provide guidance that obligates a police officer to immediately act upon a submitted complaint. Given the current reality where hesitation by the police contributes to inadequate prosecutions, the bill should set out the detailed roles and responsibilities of law enforcement officers, including:
 - Automatic initiation of criminal investigation when the police is informed by any sources of any offences under the bill;
 - Immediate attendance at the scene when the police receive information that an offence is imminent, in progress or has occurred;
 - Prompt investigation and recording of any complaint in detail to aid competent and impartial prosecutions;

- Advising the victim of his or her rights in a language understood by the victim; and
 - Provision for the protection of victims, their families and witnesses.
5. *Providing appropriate sanctions* - The provisions for punishment in the draft bill fail to correspond to seriousness of each offence. Punishment for aiding and abetting is not provided. Aggravating circumstances of offences under the bill are not provided, except where public officials are involved. The draft bill should ensure that the punishment is proportionate to the severity of offence, injury and/or loss suffered by the victim. Furthermore, where other criminal offences are committed in the context of caste-based discrimination, the context should be considered an aggravating circumstance with additional penalties.
6. *Extending statute of limitations* - The proposed 90 day statute of limitation is longer than the general 35 day limitation for other crimes, but remains inadequate. Considering the seriousness of offences, as well as challenges in filing a complaint on time (including lack of awareness of legal procedures, geographical distance and expenses to reach the nearest police office), it should be extended to at least one year.
7. *Setting out positive obligations of the Government* - Considering the nature of the offences and going beyond a typical criminal legislation, this bill should contain positive duties of the Government to tackle caste-based discrimination. These should include the requirement to educate the police and communities about the legislation, its enforcement and the illegal nature of discriminatory practices.

VI. Conclusions and recommendations

Given the prevalence of practices of caste-based discrimination and untouchability in Nepal, and the implications on the enjoyment of human rights by many, the submission of the bill is a positive step forward. However, as described, it requires strengthening to be a genuine tool to curb discriminatory practices. OHCHR and the National Dalit Commission offer the following recommendations to relevant stakeholders to ensure improved legislation that will contribute to ending caste-based discrimination and untouchability:

To the Legislative-Parliament and the Government:

- Publicise the details of the bill to seek the views of the general public on its contents, as provided under the *Constituent Assembly (Legislative Functions) Rules*.
- Organise a wider consultation with the Dalit community, civil society and other stakeholders on the draft bill.
- Revise the bill in line with national and international obligations, and in light of consultations, prior to its adoption.

To civil society organisations:

- Coordinate advocacy and lobbying to ensure the revision and, thereupon, passage of the bill.

To the international community:

- Support the Government and civil society in their efforts for the swift passage of the bill following its revision and the wider public consultation.
- Provide technical as well as financial assistance to effectively implement the legislation after it comes into force.

To all actors:

- Upon the enactment of the legislation, work together to raise awareness among rights holders and duty bearers on its contents.

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