

Capturing Caste in Law:
The Legal Regulation of Caste and Caste-Based Discrimination

Thesis submitted in accordance with the requirements of the University of Liverpool for
the degree of Doctor in Philosophy by Annapurna Deborah Waughray

April 2013

Capturing Caste in Law: The Legal Regulation of Caste and Caste-Based Discrimination

Annapurna Deborah Waughray

Abstract

As a system of hereditary social stratification, caste is associated primarily with South Asia, particularly India, but it also exists in South Asian diaspora communities including in the United Kingdom. Discrimination based on caste affects around 167 million Dalits – formerly ‘Untouchables’ – in India alone. In the United Kingdom it is estimated that there are at least 200,000 people of Dalit origin, possibly many more. Government-commissioned research suggests strongly that discrimination and harassment based on caste also exist in this country. This thesis discusses the legal regulation of caste discrimination in India, in international human rights law and in the United Kingdom. In order to contribute to an understanding of how caste can be conceptualised legally and how caste discrimination can be regulated legally, the thesis examines how the concept of caste and the phenomenon of discrimination and inequality on grounds of caste have been defined, constructed and addressed by law. It traces the evolution of the religious, social and legal rationales for caste discrimination, and conversely the evolution of legal remedies for its elimination. Caste is a complex social phenomenon; this thesis explains and addresses the legal challenges of capturing caste in national and international law and examines the advantages and limitations of existing legal analyses and frameworks for tackling discrimination based on caste. In India, caste discrimination and inequality persist, despite constitutional and legislative measures for their elimination; this thesis examines why this is the case, identifies the lessons learned from India’s experience and suggests ways in which India could extend and improve its legal and policy responses to caste discrimination. International human rights law engagement with caste discrimination dates from the mid-1990s. The thesis explains and analyses the prohibition of caste discrimination in international human rights law and the reasons for and implications of the refusal by India, the world’s largest caste-affected country, to accept the conceptualisation of caste discrimination as a form of internationally-prohibited racial discrimination. Other international law approaches to caste discrimination (for example minority rights) are also considered and assessed. A particular focus of the research is the legal regulation of caste discrimination in the United Kingdom. Hence, the thesis undertakes a detailed analysis of the capacity of domestic discrimination law to capture caste. The Equality Act 2010 provides for the introduction, by ministerial order, of a statutory prohibition of caste discrimination by adding caste to the definition of the protected characteristic of race, but reservations have been raised about the appropriateness of legislating for caste discrimination, and as at 1 April 2013 no such order had been made. This thesis challenges the reservations to caste discrimination legislation. It explains why existing discrimination law is inadequate to capture caste, and it argues in favour of an express statutory prohibition of caste discrimination in national law, in accordance with the UK’s international human rights law obligations, as an essential – although not the sole – element of a strategy to tackle such discrimination. In doing so, the thesis also reveals the role and contribution of domestic grassroots activism in securing legal change.

Contents

<i>List of Abbreviations</i>	x
<i>List of Treaties and Instruments</i>	xiv
<i>Table of Legislation</i>	xvi
<i>Table of Cases and Decisions</i>	xix
<i>Acknowledgments</i>	xxii

Introduction.....	1
-------------------	---

PART 1

Chapter 1	What is Caste?	15
1.1	Introductory concepts	15
1.1.1	Context and terminology	15
1.1.1.1	Caste	16
1.1.1.2	Descent	17
1.1.2	Varna, Jati and Biraderi	17
1.1.2.1	Varna.....	17
1.1.2.2	Dalits: outside the varna system	19
1.1.2.3	Use of Dalit in the thesis.....	20
1.1.2.4	Jati.....	21
1.1.2.5	Biraderi	22
1.1.3	Caste membership and mobility	22
1.1.4	Untouchability	23
1.1.4.1	Untouchability, pollution and stigma.....	23
1.1.4.2	‘Touch’ as a category.....	25
1.1.4.3	Untouchability, social exclusion and violence.....	26
1.1.4.4	Untouchability as separable from caste	27
1.1.4.5	Ambedkar, Untouchability, Hinduism and caste	28
1.1.5	Markers for caste	29
1.1.6	Caste and occupation	30
1.1.7	Caste and religion	31
1.1.8	Status differences among Dalits	33
1.1.9	Caste as a cross-cultural concept	34
1.1.10	Caste in the diaspora	36
1.2	Religious and historical origins of a caste society	36
1.2.1	Indo-Aryans, the <i>Rg Veda</i> and the origins of <i>varna</i>	36
1.2.1.1	Purusa-Sukta: the Creation Myth.....	38
1.2.2	Origins of <i>jati</i>	40
1.2.3	Hierarchy, heredity and endogamy	41
1.2.4	Origin of Untouchability.....	42

1.3	Sociological theories and interpretations of caste.....	43
1.3.1	Introduction.....	43
1.3.2	Colonialism and the origins of caste as a sociological concept	44
1.3.3	Racial theories of caste	45
1.3.3.1	Caste and genetics.....	47
1.3.4	Louis Dumont and his critics	48
1.3.5	Caste as orientalist invention	50
1.3.6	The ‘tenacity of caste’	51
1.4	Conclusion	52
Chapter 2	The Construction of Caste Inequality: A Religio-Legal History	54
2.1	Introduction.....	54
2.2	The Vedic period (c 1500 BC to 500 BC): <i>varna</i> , <i>dharma</i> and <i>karma</i>	55
2.2.1	The <i>varna</i> classificatory system.....	55
2.2.2	Dharma	56
2.2.3	Karma	57
2.2.4	Legal nature of the early Vedic texts	58
2.3	The later Vedic and classical period: <i>dharma</i> literature 500 BC–700 AD	59
2.3.1	Dharmasutras	60
2.3.2	Kautilya’s Arthasastra.....	61
2.3.3	Dharmasastras.....	61
2.3.3.1	Manusmṛti.....	62
2.3.4	Legal nature of the <i>Dharmasastras</i>	64
2.3.5	The feudal era: c. 800–1200 AD.....	65
2.4	Medieval/ Islamic India: c. 1206–1707	66
2.4.1	The wider setting	66
2.4.2	<i>Smṛti</i> commentarial texts and digests	68
2.5	British India, law and caste inequality 1600–1900.....	69
2.5.1	1600–1772	69
2.5.2	1772–1857: Company rule, Anglo-Hindu law and caste	71
2.5.3	1858–1900: the Crown and caste inequality	75
2.6	Nepal: the <i>Muluki Ain</i> (Nepali Royal Law Code) 1854.....	77
2.7	Caste reform: 1858–1947.....	79
2.8	Conclusion	84
Chapter 3	The Legal Regulation of Caste Discrimination in India: Lessons Learned.....	88
3.1	Introduction.....	88
3.2	Caste discrimination in India: contemporary context	89

3.2.1	Poverty and Untouchability	89
3.2.2	Occupational inequalities.....	90
3.2.3	Educational inequalities	91
3.2.4	Violence	92
3.3	Constitutional vision	93
3.4	Caste, equality and non-discrimination: legal framework	94
3.5	India: weaknesses and limitations.....	98
3.5.1	Overview.....	98
3.5.2	Reservations.....	99
3.5.3	‘Protective’ legislation.....	101
3.5.4	Scheduled Castes and religious restrictions	104
3.6	Lessons learned.....	105

PART 2

Chapter 4	Caste Discrimination and International Human Rights Law Standards: International Convention for the Elimination of All Forms of Racial Discrimination	110
4.1	Introduction.....	110
4.2	Caste in international human rights instruments: International Bill of Rights	113
4.2.1	Universal Declaration of Human Rights 1948 (UDHR).....	113
4.2.2	ICCPR 1966 and ICESCR 1966	116
4.3	Caste in ICERD: drafting and text	120
4.3.1	ICERD: context and background.....	120
4.3.1.1	UNGA Resolution 44(I) 1946 Treatment of Indians in South Africa.....	121
4.3.2	ICERD Article 1(1): Racial Discrimination	122
4.3.3	UN Declaration on the Elimination of Racial Discrimination 1963	123
4.3.4	ICERD and the meaning of descent.....	124
4.3.5	ICERD Articles 1(4) and 2(2): special measures.....	127
4.4	CERD and Caste: interpretation and practice	129
4.4.1	India	129
4.4.2	CERD.....	134
4.4.2.1	Competence to interpret.....	134
4.4.2.2	CERD: interpretative approach.....	135
4.4.2.3	CERD and the meaning of racial discrimination: General Recommendation No. 14 (1993).....	137
4.4.2.4	CERD and the meaning of racial segregation and apartheid: General Recommendation No. 19 (1995).....	138
4.4.2.5	CERD and the meaning of descent	139
4.4.2.6	CERD General Recommendation No. 29 (2002) on Article 1, paragraph 1 (descent).....	140
4.5	Descent	143

4.5.1	Origins of descent as a legal category.....	143
4.5.2	Descent in Indian jurisprudence post-1947.....	145
4.5.3	The international usage of descent.....	145
4.5.4	Domestic jurisdiction, sovereignty and caste.....	149
4.5.5	Beyond India and beyond caste: CERD and descent-based discrimination worldwide	150
4.6	Conclusion	154
Chapter 5	Caste Discrimination: Other International Human Rights Law Standards	156
5.1	India, caste discrimination and other human rights treaty bodies	156
5.2	UN Charter mechanisms	159
5.2.1	UN Sub-Commission for the Promotion and Protection of Human Rights: discrimination based on work and descent	159
5.2.2	UN Draft Principles and Guidelines for the effective elimination of discrimination based on work and descent	161
5.2.3	UN Special Procedures	164
5.2.3.1	UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance	164
5.2.3.2	Other UN Special Procedures	166
5.2.3.3	Competence of the UN Human Rights Council and its Special Procedures to consider caste discrimination	167
5.2.4	Universal Periodic Review	171
5.2.5	International Labour Organisation: discrimination on the basis of social origin.....	173
5.2.6	UN World Conference Against Racism, Racial Discrimination, Xenophobia and Other Related Forms of Intolerance (WCAR), 2001	174
5.2.7	Durban Review Conference 2009.....	177
5.2.8	Decade of Dalit Rights UN 2011-20, Conference 24-28 June 2011.....	178
5.3	Dalits, minority rights and the rights of indigenous peoples in international law	179
5.4	Conclusion	181
 PART 3		
Chapter 6	Caste in the UK.....	186
6.1	The South Asian presence in the UK.....	186
6.2	Dalits in the UK	188
6.2.1	Numbers and groupings.....	188
6.2.2	‘New’ Dalit organisations.....	192
6.3	Caste and caste discrimination in the UK.....	193
6.3.1	Migration and caste: the early days	193
6.3.2	‘Chain migration’ and caste.....	194
6.3.3	Survival of caste awareness: critical factors	195

6.3.4	Caste and caste discrimination in the UK: evidence up to 2009.....	196
6.3.5	Caste and marriage in the UK.....	200
6.3.6	Caste and education	201
6.3.7	Caste in the UK disputed	201
6.4	Official recognition of caste discrimination prior to the Equality Bill 2009	203
6.4.1	Caste discrimination as an overseas issue.....	203
6.4.2	Caste discrimination as a domestic issue	204
6.5	Conclusion	206
Chapter 7	Caste and British Discrimination Law prior to the Equality Act 2010.....	207
7.1	Introduction.....	207
7.2	UK discrimination law model.....	208
7.2.1	Purpose of discrimination law	208
7.2.2	Meaning of discrimination.....	208
7.2.3	Regulated fields and the ‘public-private’ divide.....	210
7.2.4	Discrimination: grounds-based approach	212
7.3	Caste and racial discrimination.....	213
7.3.1	Race Relations Act 1976.....	213
7.3.2	Absence of ‘descent’	214
7.3.3	Caste and race	215
7.3.4	Caste and ethnic origins	217
7.3.4.1	Content of ‘ethnic origins’	217
7.3.4.2	<i>Mandla v Dowell Lee</i> (1983): wide interpretation of ‘ethnic origins’	218
7.3.4.3	Caste and the <i>Mandla</i> criteria	220
7.3.4.4	Revisiting <i>Mandla</i> : <i>R (E) v Governing Body of JFS</i> (2009).....	221
7.3.4.5	Caste and <i>JFS</i>	222
7.4	Caste and discrimination based on religion or belief.....	224
7.4.1	Religion or belief as a ground of discrimination.....	224
7.4.1.1	Meaning of religion or belief	224
7.4.1.2	Meaning of direct discrimination based on religion or belief.....	226
7.4.2	Caste discrimination as religious discrimination	227
7.4.2.1	Caste and religion as distinct characteristics	227
7.4.2.2	Caste-specific religions.....	228
7.4.2.3	<i>Saini v All Saints Haque Centre & Others</i> (2009).....	229
7.4.2.4	<i>Sahota & Shergill v Shri Guru Ravidass Sabha Temple (Vancouver)</i> (2008)	230
7.4.3	Religion or belief as defence to discrimination	231
7.5	Conclusion	233

Chapter 8	Caste Discrimination and the Equality Act 2010.....	235
8.1	Introduction.....	235
8.2	Equalities Review and Discrimination Law Review	237
8.3	Equality Bill 2009.....	239
8.3.1	Organisation of the legislation	239
8.3.2	The ‘caste amendment’	240
8.4	Objections to the legal regulation of caste discrimination: lack of evidence.....	242
8.4.1	Context: evidence and policy.....	242
8.4.1.1	‘No evidence of a problem’	242
8.4.1.2	Evidence-Based Policymaking	243
8.4.1.3	Equality Bill consultation	244
8.4.2	Commons Committee Stage	245
8.4.3	ACDA Report: November 2009	247
8.4.4	Commons Report Stage and Third Reading	247
8.4.4.1	Commons Report Stage	247
8.4.4.2	Commons Third Reading.....	249
8.4.5	Enter the Equality and Human Rights Commission	249
8.4.6	Lords Second Reading	251
8.4.7	Lords Committee Stage	251
8.4.7.1	Lord Lester’s amendment: ‘descent’ as an additional limb of ‘race’	252
8.4.7.2	Lords Committee Stage: day one.....	253
8.5	Objections to the legal regulation of caste discrimination: caste covered by existing law	254
8.5.1	Government: caste discrimination already unlawful	254
8.5.2	ICERD, caste and UK discrimination law	255
8.5.2.1	Lord Lester and descent.....	255
8.5.2.2	Government reluctance to entertain new categories	257
8.5.2.3	EHRC: support for descent but opposition to caste	257
8.5.2.4	Race, caste and the Equality Act 2010.....	258
8.5.3	Leaving the matter to the courts.....	260
8.6	Objections to the legal regulation of caste discrimination: proliferation.....	261
8.6.1	‘Rationing’ protection.....	261
8.6.2	Caste as a new protected characteristic.....	262
8.6.3	New characteristic, new subset, or neither.....	264
8.6.3.1	Government objections to expanding the protected characteristics.....	264
8.6.3.2	The solution: subset rather than new characteristic	266
8.7	Meeting on Caste and the Equality Bill, House of Lords: 4 February 2010.....	267
8.7.1	Background.....	267
8.7.2	The research conundrum.....	268

8.7.3	Wording the provision	269
8.7.4	Dalits faced with a compromise.....	269
8.7.5	The twin-track approach	270
8.8	Finalising the Equality Act	271
8.8.1	Lords Report Stage and Third Reading	271
8.8.2	Consideration of Lords Amendments and Royal Assent.....	273
8.9	Political and ideological objections to the legal regulation of caste discrimination	274
8.9.1	The arguments outlined	274
8.9.2	Cultural intrusion and ‘privacy barrier’ arguments	275
8.9.3	Community cohesion	276
8.9.4	Caste discrimination legislation as anti-Hindu	279
8.10	Conclusion	280
Chapter 9	Caste Discrimination: Equality Act 2010 and Beyond.....	282
9.1	Introduction.....	282
9.2	NIESR study: ‘Caste discrimination and harassment in Great Britain’	284
9.2.1	Summary and findings	284
9.2.2	Caste discrimination in regulated fields.....	287
9.2.3	NIESR study: efficacy of existing responses.....	288
9.2.4	Limitations and criticisms of the NIESR study	288
9.3	NIESR study: Government response and Dalit activism	290
9.3.1	Government response: arguments consistent with the previous administration	291
9.3.2	Government response: new arguments	293
9.3.2.1	The Coalition equality agenda: reducing ‘red tape’ and costs	294
9.3.2.2	Regard for anti-legislation views	295
9.3.2.3	Government arguments assessed	297
9.3.3	Dalit activism subsequent to the NIESR study	299
9.3.4	Legal implications of the non-exercise of the s. 9(5)(a) power	302
9.4	Legal developments since the Equality Act 2010.....	303
9.4.1	<i>Begraj and Begraj v Heer Manak Solicitors and others</i>	303
9.4.1.1	Legal implications of <i>Begraj</i>	306
9.4.2	Legal implications of <i>Naveed v Aslam</i>	307
9.4.3	Enterprise and Regulatory Reform Bill 2012	308
9.4.3.1	ERRB: Lords Grand Committee.....	308
9.4.3.2	Towards a presumption in favour of legislation?	310
9.4.3.3	Lords Report Stage: day two	312
9.5	Factors bearing on the legal regulation of caste discrimination in domestic law	313
9.5.1	Domestic factors: legal	315
9.5.2	Domestic factors: socio-political	316

9.5.2.1	Caste and the multicultural conundrum	318
9.5.2.2	‘Community cohesion’ and ‘faith communities’	321
9.5.2.3	Caste and the ‘Hindu community’	322
9.5.3	International factors: legal	326
9.6	The legal regulation of caste in the UK: lessons learned	326
9.6.1	Legal arena.....	326
9.6.2	Social policy	331
9.6.3	Political arena	332
9.6.4	International policy	333
9.7	Conclusion	334
Chapter 10	Conclusions.....	336
	Bibliography	345

List of Abbreviations

AC	Appeal Cases
ACDA	Anti Caste Discrimination Alliance
AIR	All India Reporter
All ER	All England Law Reports
AWC	Allahabad Weekly Cases
BAWS	Babasaheb Ambedkar Writings and Speeches
BCCA	British Columbia Court of Appeal
BCHRT	British Columbia Human Rights Tribunal
CAD	Constituent Assembly Debates (India)
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984
CAT/C	UN Committee Against Torture
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women 1979
CEDAW/C	UN Committee for the Elimination of Discrimination Against Women
CERD	UN Committee for the Elimination of Racial Discrimination
CESCR	UN Committee on Economic, Social and Cultural Rights
CMLR	Common Market Law Reports
COI	Constitution of India 1950
CRC	Convention on the Rights of the Child 1989
CRC/C	UN Committee on the Rights of the Child
CRE	Commission for Racial Equality
CRPD	Convention on the Rights of Persons with Disabilities 2006
DCLD	Equal Opportunities Review and Discrimination Case Law Digest
DCLG	Department for Communities and Local Government
DPA	Draft Programme of Action (Durban)
DDPA	Durban Declaration and Programme of Action
DHE	Department of Higher Education (India)

DLR	Discrimination Law Review
DPGs	UN Draft Principles and Guidelines for the elimination of discrimination based on work and descent
DRC	Durban Review Conference
DSN-UK	Dalit Solidarity Network-UK
DWD	Discrimination based on work and descent
EAIA	Equality Act Impact Assessment
EAT	Employment Appeals Tribunal
ECOSOC	UN Economic and Social Council
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols 11 and 14, 1950
ECtHR	European Court of Human Rights
EHRC	Equality and Human Rights Commission
EHRR	European Human Rights Reports
EPW	Economic and Political Weekly (India)
EQA	Equality Act 2010
ET	Employment Tribunal
EU	European Union
EWCA	England and Wales Court of Appeal
EWHC	High Court of England and Wales
GEO	Government Equalities Office
GOI	Government of India
HFB	Hindu Forum of Britain
HC	House of Commons
HCUK	Hindu Council UK
HL	House of Lords
HRC	UN Human Rights Committee
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights 1966
ICERD	International Convention for the Elimination of All Forms of Racial Discrimination 1965
ICESCR	International Covenant on Economic, Social and Cultural Rights 1966

ICR	Industrial Cases Reports
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
IDSN	International Dalit Solidarity Network
ILO	International Labour Organisation
IRLR	Industrial Relations Law Reports
ISCR	India Supreme Court Reports
MHRD	Ministry of Human Resource Development (India)
MJSE	Ministry of Justice and Social Empowerment (India)
NCRB	National Crime Records Bureau (India)
NCSC	National Commission for Scheduled Castes (India)
NGO	Non-Governmental Organisation
NHRC	National Human Rights Commission (India)
NIESR	National Institute for Economic and Social Research
NZLR	New Zealand Law Reports
OBC	Other Backward Classes
OHCHR	Office of the UN High Commissioner for Human Rights
QB	Queen's Bench
SC	Scheduled Caste
SR	Summary Records
SRR	UN Special Rapporteur on Racism
ST	Scheduled Tribe
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights 1948
UKSC	United Kingdom Supreme Court
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNTS	United Nations Treaty Series
UPR	Universal Periodic Review
UKEAT	United Kingdom Employment Appeals Tribunal
VCLT	Vienna Convention on the Law of Treaties 1969
VODI	Voice of Dalit International

WCAR	UN World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, 2001
WLR	Weekly Law Reports

List of Treaties and Instruments

Charter of the United Nations, 24 October 1945. 1 UNTS XVI

Convention on the Prevention and Punishment of the Crime of Genocide 1948. Adopted 9 December 1948. In force 12 January 1951. 78 UNTS 277

Universal Declaration of Human Rights 1948. General Assembly Resolution 217 (III), 10 December 1948. A/RES/217 A (III)

European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 1950. Treaty Series No. 071/1953: Cm 8969

ILO Discrimination (Employment and Occupation) Convention 1958 (No. 111)

Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages. Adopted 10 December 1962. In force 9 December 1964. 521 UNTS 231

United Nations Declaration on the Elimination of Racial Discrimination 1963. General Assembly Resolution 1904 (XVIII), 20 November 1963. A/RES/18/1904

International Convention for the Elimination of All Forms of Racial Discrimination 1965. Adopted 21 December 1965. In force 4 January 1969. 660 UNTS 195

International Covenant on Economic Social and Cultural Rights. Adopted 16 December 1966. In force 3 January 1976. 999 UNTS 3

Vienna Convention on the Law of Treaties. Adopted 23 May 1969. In force 27 January 1980. 1155 UNTS 331

International Covenant on Civil and Political Rights. Adopted 16 December 1966. In force 23 March 1976. 999 UNTS 171

Convention for the Elimination of All Forms of Discrimination Against Women. Adopted 18 December 1979. In force 3 September 1981. 1249 UNTS 13

Convention Against Torture and and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984. Adopted 10 December 1984. In force 26 June 1987. 1465 UNTS 85

Convention on the Rights of the Child. Adopted 20 November 1989. In force 2 September 1990. 1577 UNTS 3

United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. General Assembly Resolution 47/ 135, 18 December 1992. A/RES/47/135

Convention on the Rights of Persons with Disabilities. Adopted 13 December 2006. In force 3 May 2008. 2515 UNTS 3

United Nations Declaration on the Rights of Indigenous Peoples. 2 October 2007.
A/RES/61/295

Treaty on the Functioning of the European Union (consolidated version 2012) OJ
2012/C 326/01

Table of Legislation

United Kingdom Statutes

Administration of Justice Regulation 1781

Caste Disabilities Removal Act 1850 Act XXI of 1850

Education and Inspections Act 2006 c 40

Equality Act 2006 c 3

Equality Act 2010 c 15

Family Law Act 1996 c 27

Forced Marriage (Civil Protection) Act 2007 c 20

Government of India Act 1833 3 & 4 Will. 4 c 85

Government of India Act 1858 21 & 22 Vict. c 106

Government of India Act 1935 26 Geo. 5 c 2

Human Rights Act 1998 c 42

Marriage Act 1949 c 76

Race Relations Act 1965 c 73

Race Relations Act 1968 c 71

Race Relations Act 1976 c 74

Race Relations (Amendment) Act 2000 c 34

Sex Discrimination Act 1975 c 65

United Kingdom Statutory Instruments

Employment Equality (Religion or Belief) Regulations 2003 SI 2003/1660

Employment Equality (Sexual Orientation) Regulations 2003 SI 2003/1661

Race Relations Act 1976 (Amendment) Regulations 2003 SI 2003/1626

Equality Act (Sexual Orientation) Regulations 2007 SI 2007/126

European Union

Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin OJ 2000/L180/22

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation OJ 2000/L303/1

Australia

Racial Discrimination Act 1975, Act No. 2 of 1975

Canada

British Columbia Human Rights Code 1996

India

Andhra Pradesh Devadasi (Prohibition of Dedication) Act 1988, Act No. 10 of 1988

Bonded Labour System (Abolition) Act 1976

Child Labour (Prohibition and Regulation) Act 1986

Constitution of India 1950 at www.lawmin.nic.in/coi.htm

Constitution (Scheduled Castes) Order 1950 (C.O. 19)

Scheduled Castes and Scheduled Tribes Orders (Amendment) Act 1956

Constitution (Forty-second) Amendment Act 1976

Constitution (Scheduled Castes) Orders (Amendment) Act 1990

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

Karnataka Devadasi (Prohibition of Dedication) Act 1992

Scheduled Castes and Scheduled Tribes Orders (Amendment) Act 1956

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989

Protection of Civil Rights Act (1955), Act No. 22 of 1955 (previously the Untouchability (Offences) Act 1955)

Sri Lanka

Prevention of Social Disabilities Act 1957 (Ceylon)

South Africa

Asiatic Land Tenure and Indian Representation Act 1946, No. 28

Table of Cases and Decisions

United Kingdom

Bull & Bull v Hall & Preddy [2012] EWCA Civ 83

CRE v Dutton [1990] QB 783

CRE v Precision Manufacturing Ltd (1991) Equal Opportunities Review, DCLD 12

Crown Suppliers v Dawkins [1993] ICR 517

Ealing London Borough Council v Race Relations Board [1972] 1 All ER 105

G (by his litigation friend) v The Head Teacher and Governors of St Gregory's Catholic Science College [2011] EWHC 1452

Garland v British Rail [1983] 2 AC 751

Grainger plc v Nicholson [2010] IRLR 4

Ladele v London Borough of Islington, Liberty intervening [2008] UKEAT/0453/08/RN, 127

Mandla (Sewa Singh) and Another v Dowell Lee and Others [1983] 2 AC 548

McFarlane v Relate Avon Ltd [2010] EWCA Civ 880

Mr J. Chandel & Another v All Saints Haque Centre & Others ET Case No. 1306296/2006 & Another (unreported)

Naweed v Aslam ET Case No. 1603968/ 2011 (unreported)

Nyazi v Rymans EAT Case No. 6/88 (unreported)

P v (1) S and (2) Cornwall County Council (1996) IRLR 347

Pepper v Hart [1993] AC 593

Saini v All Saints Haque Centre & Others [2009] 1 CMLR 38, 1060-1070; UKEAT/0227/08/ZT

Seide v. Gillette Industries [1980] IRLR 427

R (on the application of E) (Respondent) v The Governing Body of JFS and the Admissions Appeal Panel of JFS and others (Appellant) [2009] UKSC 15 (JFS).

R v R [1992] 1 AC 599.

Suntharalingham v Inspector of Police, Kankasanturai [1971] 3 WLR 896

India

Auditor General of India v G. Ananta Rajeswara Rao 1994 AIR 152

Balaji and Ors v State of Mysore (1963) AIR SC 649

Devadasan v Union of India AIR 1964 SC 179

Indra Sawhney v Union of India AIR 1993 SC 477

G.V. Rao v L.H.V. Prasad & Others, Supreme Court of India, dismissal of Special Leave Petition, 6 March 2000

Rashmi Dwivedi v State of U.P. and Ors (2002) 94 AWC 3065

Shrivastava v The State of Maharashtra Bombay High Court Criminal Application No. 2347 (2009)

State of Madras v Champakam Dorairajan AIR 1951 SC 226.

Urmila Ginda v Union of India AIR 1975 Del. 115

V. V. Giri v D. Suri Dora (1960) 1SCR 42

V. Sivamurthy v State of Andhra Pradesh & Ors. Supreme Court of India, Civil Appeal No.4210 (2003)

Yogender Pal Singh & Ors. v Union of India & Ors. 1987 AIR 1015

United States

Degraffenreid v General Motors 413 F. Supp. 142 (1976)

Korematsu v. United States 323 U.S. 214, 223-24 (1944)

Mazumder v. University of Michigan [2006] WL 2310822 (6th Cir. (Mich.))

Canada

Gurshiner Sahota & Sohan Shergill v Shri Guru Ravidass Sabha Temple (Vancouver) [2008] BCHRT 269

Marine Drive Golf Club v Buntain et al [2007] BCCA 17

New Zealand

King-Ansell v Police [1979] 2 NZLR 531

European Court of Human Rights

Campbell and Cosans v United Kingdom (1982) 4 EHRR 293

Tyrer v United Kingdom (1978) 2 EHRR 1

Wemhoff v Germany, Application 2122/64

Inter-American Court of Human Rights

Advisory Opinion on the Effect of Reservations on the Entry into Force of the American Convention, 22 International Legal Materials (1983) 37-50

International Court of Justice

Barcelona Traction Case, ICJ Reports 1970, 3

Advisory Opinion, Reservations to the Convention on Genocide, 28 May 1951, ICJ Reports 1951, 15-69

International Criminal Tribunal for Rwanda

Prosecutor v Akayesu Case ICTR-96-4-T

UN Human Rights Committee

Danning v The Netherlands, Communication No. 180/1984

Gueye v France, Communication No. 195/1985

Toonen v Australia, Communication No. 488/1992

UN Committee for the Elimination of Racial Discrimination

Stephen Hagan v Australia, Communication No. 26/2002

Acknowledgments

This PhD would not have been completed without the encouragement and support of a great many people. To everyone, I am very grateful.

First of all I want to thank my husband Julian Howison, without whose dedication, support, encouragement, involvement and help this would have been impossible; and my children Indra, Silas and Beatrix for their encouragement, tolerance and patience.

I am indebted to my supervisors Professor Dominic McGoldrick and Anne Morris at the University of Liverpool. I thank them both for their vision, wise guidance, advice, practical assistance and patience.

I thank my dear friends Rachel Cooper and Dr. Mark Robinson for their support, advice, help and encouragement in so many ways since the idea for this PhD was first conceived during a visit to them in New Delhi over a decade ago.

I thank also my friends and colleagues in the Law School at Manchester Metropolitan University, in particular Nick Dearden and Catherine Little for their discussion, support and encouragement; Dr. Stephen Whittle; Dr. Katherine Watson; Walter Cairns, Dr. Damian Mather, Dr. Kay Lalor, and Dominique Lauterburg.

I am very grateful to the staff at Manchester Metropolitan University Library for their professionalism, patience and helpfulness over the years.

Thanks to Susi Madron, who generously provided me with a fantastic space to write in the *Cycling for Softies* office in Manchester, and to Claire, Carmel and Sarah for their hospitality and encouragement.

I thank Manchester Metropolitan University Law School for financial support and for their accommodation.

I thank the *Modern Law Review* for awarding me a PhD Scholarship and the University of Liverpool for awarding me a fees scholarship.

Thanks to the members, past and present, of the Manchester Metropolitan University Ambedkar Memorial Committee for the opportunities that membership of the Committee has provided for discussion and learning. I am particularly grateful to the late Shekhar Bagul and to Burjor Avari.

I wish to thank Dr. Nuno Ferreira for his advice, help and support at critical moments; Dr. Ann Hynes for her invaluable comments and suggestions on various chapters; Dr. Nicole Weickgennant-Thiara for her comments on the early chapters; Dr. Aase Mygind Madsen; and all of them for their friendship.

I thank Professor Patrick Thornberry for his encouragement, kindness and advice; Professor Javaid Rehman for his support, encouragement and kindness from the early

days of my academic career; Professor Eleanor Zelliot, whose work and generosity is an inspiration, with whom I was privileged to spend time during her visit to Manchester to deliver the Ambedkar Memorial lecture and who generously sent me from America her spare copy of Marc Galanter's book; Dr. Chris Rivlin for asking important questions; in India, my family for looking after me during visits to lay the ground for this research, especially Saroj Waghrey, Rajan and Alka Chawla and Seema Madan in Hyderabad, and Anuja and Rajeev Waghre in Bangalore. I thank my uncle Honourable Sri Justice Upendralal Waghrey, retired Andhra Pradesh High Court Judge, who very kindly organised for us to meet and talk with his friend Honourable Sri Justice O. Chinnappa Reddy, retired Supreme Court Judge, in Hyderabad. I am very grateful for these conversations. In India I am also grateful for my contact with the following, whose generosity with their time, knowledge and ideas inspired me to embark on this research: in Pune, Medha Kotwal Lele at Aalochana, Dr. Jaya Sagade and Sathya Narayan at the Institute of Advanced Legal Studies, and the late Dr. Rajendra Vora; in Bangalore, Professor S. Japhet at the National Law School of India University and Advocate Ravivarma Kumar; in Mumbai, Mihir Desai, Professor Avatthi Ramaiah at the Tata Institute for Social Sciences and Professor D.N. Sandanshiv; in Delhi, the late Bhagwan Das, Vidya Bhushan Rawat, and Professor S.K. Thorat; in Gujarat, Manjula Pradeep of Navsarjan Trust; in Jaipur, P.L. Mimroth.

I also thank Santosh Das, Dr. Raj Chand, Meena Varma, Ravi Kumar, Lord Eric Avebury and Lord Lester of Herne Hill QC for all the vigorous discussion and exchange of ideas about caste discrimination in the UK. Lastly I thank my dear friends Helena Kettleborough, Sheila Seal and Ravinder Virdee for their ongoing encouragement, support and belief in me.

Introduction

Context of the research

Caste as a system of social stratification is around 3,000 years old.¹ It is associated predominantly with South Asia and its diaspora, in particular India, where it is deeply embedded. Discrimination, subordination and oppression on grounds of caste affect almost 167 million Dalits (formerly known as ‘Untouchables’) in India alone, where they number over sixteen per cent of the population.² Significantly, caste also exists among South Asian diaspora communities, including in the United Kingdom. Caste is distinguished from other forms of social stratification based on inherited status by its religious underpinnings in orthodox Hinduism and by the concept of ‘Untouchability’, by which certain humans are considered intrinsically, permanently and irredeemably polluted. Although doctrinally caste is associated only with Hinduism, distinctions and discrimination based on caste are found among South Asian adherents of Islam, Sikhism and Christianity notwithstanding the absence of a doctrinal basis for caste in these religions, so that it can no longer be said to be solely a Hindu religious phenomenon. Dalits in contemporary India continue to suffer from widespread discrimination and violations of their civil, political, economic and social rights, ranging from discriminatory and oppressive behaviour in the public, social and private spheres to severe deprivation and extreme violence. Amid ongoing debate about the nature of caste, institutionalised caste-based inequality persists in India despite constitutional and legislative prohibitions of caste discrimination and caste-based violence, the criminalisation of the practice of Untouchability, and

¹ S. Bayly, *Caste, Society and Politics in Modern India from the Eighteenth Century to the Modern Age* (Cambridge: Cambridge University Press (CUP), 1999) 13.

² Census of India 2001, Scheduled Castes and Scheduled Tribes Population, at http://www.censusindia.gov.in/Census_Data_2001/India_at_Glance/scst.aspx (visited 24 November 2012).

constitutional affirmative action policies in favour of Dalits. Moreover, the social and economic impact on Dalits of India's post-1991 economic liberalisation has been to reinforce rather than to overturn their historically subordinate social and economic position in the Hindu social order. The political equality for Dalits introduced on independence has not led to economic equality.³ Since the late 1990s, Dalit activists and their supporters have brought the existence of political, social and economic discrimination, exclusion, deprivation and mistreatment on grounds of caste in India and elsewhere to the attention of UN human rights bodies, the EU Parliament and the British Parliament. Using the language of human rights they have reframed caste discrimination as a domestic and international human rights issue. In the UN arena and in the UK their demand has been, *inter alia*, for the legal regulation of caste discrimination, while in India their demand has been for the implementation and enforcement of existing laws, and for new strategies and policies to remedy economic and social inequality. Given that caste is such a complicated phenomenon, it is not necessarily surprising that law, both national and international, has found it difficult to capture caste and to address discrimination on grounds thereon. This thesis is concerned with how we attempt to capture caste in law and how we deal with caste discrimination through law. The thesis critically examines a series of legal responses to, and legal frameworks for addressing, caste discrimination. It analyses the legal scope of these responses and frameworks, and their successes and shortcomings. It also makes recommendations for improvements in existing law, and offers suggestions for alternative strategies.

³ In January 1950, on the eve of the adoption of independent India's new Constitution, Dr. B.R. Ambedkar, Dalit activist, lawyer and chairman of the Constitution Drafting Committee, warned that the contradiction between the political equality introduced by the 1950 Constitution and the reality of entrenched economic and social inequalities posed a threat to India's democracy. This contradiction has not been resolved; Constituent Assembly Debates, 25 November 1949, cited in 'Dr Ambedkar: The Principal Architect of the Constitution of India', *Babasaheb Ambedkar Writings and Speeches*, Vol. 13 (Govt. of Maharashtra Education Dept., Mumbai, 1994) 1216.

The phenomenon of caste has been the subject of extensive academic examination and analysis by Western and South Asian anthropologists, historians, sociologists, political scientists and economists, as well as by scholars from disciplines such as religious studies, education, cultural studies and psychology. There is a vast body of scholarship on caste in modern India by scholars from a wide range of disciplines. However, caste and caste discrimination have attracted limited academic attention from lawyers.⁴ This thesis looks at caste and caste discrimination through the prism of law. It is concerned with the legal regulation of caste in Indian law, in international human rights law and in British law. To this end, the thesis provides an account of the evolution of legal conceptualisations and legal regulation of caste and caste discrimination over centuries in India, over decades in the UN and over three decades or so in the UK. A primary theme of the thesis is the difficulty of capturing caste in law. International lawyers have struggled and continue to struggle with this challenge. Now British lawyers are faced with the same challenge. Part of the original contribution of this thesis is its particular focus on the UK. A detailed analysis of the capacity of domestic discrimination law to address caste discrimination is undertaken. The thesis argues that existing discrimination law is inadequate to capture and address caste and discrimination on the basis thereof, and recommends *inter alia* the introduction of a statutory prohibition of caste discrimination. The Equality Act 2010 (EQA),⁵ in an enabling provision contained in s. 9(5)(a), envisages the introduction of such a prohibition at a future date, by adding caste to the definition of race. However, as at 1 April 2013, the enabling provision had not been activated. The thesis provides an account of the process and the

⁴ Exceptions include the work of B.R. Ambedkar, Upendra Baxi, Krishna Iyer, Marc Galanter, Patrick Thornberry, David Keane, Smita Narula and the present author; see Bibliography.

⁵ Equality Act 2010 c15; see http://www.opsi.gov.uk/acts/acts2010/pdf/ukpga_20100015_en.pdf

challenges of securing the enabling provision in the EQA, and analyses government deliberations following the enactment of the EQA on whether to bring the prohibition of caste discrimination fully into domestic legislation.

Research Questions

The thesis addresses four principal research questions. Firstly, how have the concept of caste and the phenomenon of discrimination and inequality on grounds of caste been defined, constructed and addressed by law? Secondly, what has been the historical evolution of caste discrimination, of religious, social and legal rationales for such discrimination *and* for its elimination and the evolution of legal remedies? Thirdly, what are the benefits and limitations of existing legal analyses of, and strategies for addressing, caste discrimination in India, in international law and in the UK? Fourthly, what have been the factors influencing, and the obstacles to, the development of new legal analyses and strategies for the elimination of caste discrimination? This thesis will consider what lessons can be learned from the answers to these questions, and will make recommendations for how policy may be shaped in the future. The research is thus both expository, in the sense of analysing existing legal frameworks – ‘the way the (legal) world is’ – and evaluative/critical, in the sense of providing an assessment of the (legal) world, appraising it from the point of view of coherence by reference to, for example, international human rights standards or domestic discrimination law, identifying shortfalls and offering suggestions for improvement.⁶

⁶ See R. Cryer, T. Hervey and B. Sokhi-Bulley, *Research Methodologies in EU and International Law* (Oxford: Hart, 2011) 9-10.

Conceptual and analytical approaches

The thesis approaches the problem of how caste can be captured in law and how we can deal with caste discrimination through law, holistically, from a number of perspectives or approaches rather than from just one perspective.⁷ Sometimes these perspectives or approaches are articulated explicitly, sometimes not. The thesis combines elements of doctrinal research (providing a systematic exposition, and critique, of the legal rules under examination) and what Pendleton describes as ‘problem, policy and law reform-based non-doctrinal research’.⁸ The research is socio-legal in nature, where ‘socio’ refers to the ‘interface with [the] context within which law exists’.⁹ It is interdisciplinary, incorporating knowledge and contributions from other disciplines. It examines and evaluates the interface and interlinkage between national and international legal orders (including the ‘added value’ of international law). The thesis straddles human rights law, minority rights, and national discrimination and criminal law as well as two geographical areas, namely India and the United Kingdom.

Chapters 1 and 2 outline the legal history of caste as a religio-legal construct, and caste discrimination as a form of legalised *inequality*, through a historico-socio-legal lens. After Indian independence in 1947 the expected decline of caste did not

⁷ Following Cryer, Harvey and Sokhi-Bulley, the terms ‘approach’ and ‘perspective’ are used synonymously; the terms ‘theory’, ‘theoretical base’ or ‘methodology’ could also be used; *ibid.*, 5. Cryer et al. observe that ‘in real life, legal research projects do not always adopt a pure version of just one theoretical or methodological perspective’; the various approaches are thus ‘not hermetically sealed, but fluid and negotiable’.

⁸ M. Pendleton, ‘Non-Empirical Discovery in Legal Scholarship – Choosing, Researching and Writing a Traditional Scholarly Article’ in M. McConville and W. Hong Chui (eds.), *Research Methods for Law* (Edinburgh: Edinburgh University Press, 2007) 159-180, 159. Pendleton interprets the term ‘research’ in the context of legal scholarship to cover ‘a whole range of investigative, analytical, critical, theoretical and/or synthesising intellectual activity by academic lawyers’; *ibid.*, 161.

⁹ R. Banakar and M. Travers, ‘Introduction’ in R. Banakar and M. Travers (eds.) *Theory and Method in Socio-Legal Research* (Oxford: Hart, 2005) ix-xvi, xii. Cryer et al. do not use the labels ‘socio-legal’ and ‘doctrinal’; instead, they identify two ‘main jurisprudential approaches’ – natural law and legal positivism – and three ‘extensions and negations’ – ‘modern’, ‘critical’ and ‘law and’ approaches; Cryer et al., n 6 above, 10-11. A human rights approach combines elements of both natural law and legal positivism.

happen, leading Dalit activists to raise their grievances before the UN human rights mechanisms using the language of human rights. By shifting the terms of the debate, caste discrimination was transformed into an international human rights issue. In particular, securing the ‘racial discrimination’ label for caste discrimination ensured that India would be required to account at the UN level, legally and politically, for its progress (or lack thereof) in eliminating such discrimination. Chapter 3 examines India’s successes and failures in using law to tackle caste discrimination through the lenses of (implicitly) human rights and social justice, while in Chapters 4 and 5 the conceptual approach is that of international human rights law. A social justice approach is one which illuminates the structural causes of inequality. Fraser identifies three dimensions to the concept of social justice: redistribution (meaning socio-economic redistribution, but beyond that access to resources more generally), recognition (meaning identifying and acknowledging the claims of historically marginalised, low-status groups suffering from institutionalised stigma, which may also involve the revaluing of devalued traits and the celebration, not the elimination, of group differences), and parity of participation (the right of individuals and groups to have their voices equally heard, which is at the core of Fraser’s conception of social justice).¹⁰ Throughout the thesis, elements of a social justice analysis can be detected. A human rights approach is an approach that is normatively based on international human rights standards. Rights discourse has been criticised for reducing the concept of rights to legal rights only, rather than viewing rights as

¹⁰ N. Fraser, ‘Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation’ in N. Fraser and A. Honneth, *Redistribution or Recognition? A Political-Philosophical Exchange* (London: Verso, 2003) 7-109, 7-11, 36; N. Fraser, *Scales of Justice: Reimagining Political Space in a Globalizing World* (New York: Columbia University Press, 2010). See also S. Fredman, ‘Combating Racism with Human Rights: The Right to Equality’ in S. Fredman (ed.), *Discrimination and Human Rights: The Case of Racism* (Oxford: OUP, 2001) 9-44, 15.

having a moral as well as a legal component.¹¹ However, human rights instruments *are* concerned with the moral dimension (for example, references to the notion of respect for human dignity and worth)¹² underpinned by the fundamental principles of equality and non-discrimination.¹³ Human rights provides an appropriate framework for looking at the legal regulation of caste discrimination precisely because, as Rabinder Singh points out, '[t]he idea that all human beings are equal is a very recent notion. For most of history people have been divided precisely in accordance with notions of inequality';¹⁴ it is only since 1945 that non-discrimination and equality have become fundamental normative elements of national, regional and international legal systems. Equality is a broad concept with a variety of meanings. Increasingly, freedom from discrimination is seen as one aspect of this concept – necessary but not sufficient for achieving equality.¹⁵ Chapters 6-9 examine the legal regulation of caste discrimination in the United Kingdom through the lenses of British discrimination law and human rights. In relation to caste, the concept of human dignity (described by Moon as 'at the core of the major human rights texts')¹⁶ is especially relevant. Shultziner and Rabinovici define human dignity (which they describe as the central value and legal concept underlying human rights) as self-worth, and violations of dignity in terms of humiliation and other threats and injuries to a person's positive

¹¹ See e.g. I. Robeyns, 'Rights, capabilities and human capital: three models of education', 4(1) *Theory and Research in Education* (2006) 69-84, 76.

¹² Thus the UDHR Preamble recognises the 'inherent dignity and the equal and inalienable rights of all members of the human family', while UDHR Article 1 asserts that 'all human beings are born free and equal in dignity and rights'.

¹³ 'Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitutes a basic principle in the protection of human rights'; CERD General Recommendation No.14, 22 March 1993.

¹⁴ R. Singh, 'Equality: The Neglected Virtue', 2 *European Human Rights Law Review* (2004) 141-157, 141. See also Fredman (2001), n 10 above, 14-15 on the ideal of equality as a 'relatively modern notion' and the selective, limited nature of the notion of equality as enshrined in early liberalism.

¹⁵ B. Hepple, *Equality: The New Legal Framework* (Oxford: Hart, 2011) 12. Thornberry describes the non-discrimination principle as 'a way of getting to equality in the enjoyment of human rights by addressing negative practices denying equality'; P. Thornberry, 'Confronting Racial Discrimination: A CERD Perspective', 5 *Human Rights Law Review* (2005) 239-268, 255.

¹⁶ G. Moon, 'Dignity Discourse in Discrimination Law: A Better Route to Equality?', 6 *European Human Rights Law Review* (2006) 610-649, 610.

self-worth.¹⁷ Respect for human dignity has been articulated as a human right in various jurisdictions,¹⁸ despite debate as to its legal content and justiciability.¹⁹ Thus, for example, the Equality and Human Rights Commission (EHRC) is charged *inter alia* with encouraging and supporting the development of a society in which there is respect for the dignity and worth of each individual.²⁰ Section 26(1) of the EQA defines one of the three forms of harassment in the EQA as unwanted conduct related to a relevant protected characteristic which has the purpose or effect of violating the complainant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the complainant. This thesis asserts the potential of harassment in the EQA as particularly relevant to caste discrimination, precisely because it defines violation of dignity, humiliation and degradation – key features of caste discrimination – as a civil wrong.

Methods

The research is qualitative (in the sense used by Dobinson and Johns, meaning non-numerical, whether or not involving empirical method)²¹ and largely desk-based, involving analysis of a wide range of primary and secondary documentary material from credible, authoritative and objective sources. India and the UK are treated as 'case studies' in a loose, layperson's sense – India as the world's largest and oldest caste-affected state and the UK as the first diaspora state where the introduction of a

¹⁷ D. Shultziner and I. Rabinovici, 'Human Dignity, Self-Worth and Humiliation: A Comparative Legal-Psychological Approach', 18 *Psychology, Public Policy and Law* (2012) 105-137.

¹⁸ Hepple, n 15 above, 15; S. Fredman, *Discrimination Law* (Oxford: OUP, 2011) 19-21; Moon, n 16 above.

¹⁹ Hepple, *ibid.* On dignity as a legal value see D. Feldman, 'Human Dignity as a Legal Value: Part 1', *Public Law* (1999) (winter) 682-702. On dignity discourse and dignity as a justiciable concept see Moon, *ibid.* Conversely, see C. McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights', 19(4) *European Journal of International Law* (2008) 655-724.

²⁰ Equality Act 2006 s. 3.

²¹ I. Dobinson and F. Johns, 'Qualitative Legal Research' in McConville and Hong Chui (eds.), n 8 above, 16-45.

statutory prohibition of caste discrimination in domestic law has been contemplated. Written sources consist of UN documents; UK and Indian legislation and case-law; government publications and official statistics from the UK and India; UK parliamentary records; India's Constituent Assembly Debates; press and other media material (relied on for its contemporaneous capture of events and the public mood, rather than its objectivity); material produced by non-governmental organisations and inter-governmental organisations (NGOs and IGOs) (so-called grey literature); correspondence produced by a variety of actors which may depict that actor's view of events; and the author's contemporaneous records of meetings and discussions. Government and NGO websites were also consulted. In addition, peer-reviewed academic journals and books were widely consulted.

Personal stance

As one of the few academic lawyers researching and writing on caste discrimination and its legal regulation in the UK, I have been involved directly in some of the most important domestic developments in this field since the early 2000s. This has given me access to sources such as contemporaneous documents, correspondence and materials, as well as opportunities for discussion and debate (for example as an expert speaker at meetings and conferences) and the sharing of views which have informed the thesis.²² I have endeavoured to approach all material in a professional and scholarly fashion, drawing on Feldman's definition of scholarship as 'an *action* informed by a distinctive *attitude of mind*' and legal scholarship as 'a conception which results from the application of the concept of scholarship to the special kinds

²² Note, however, that this was not participant observation research; for a definition see M. Denscombe, *The Good Research Guide* (Maidenhead: Open University Press, 2007) 217.

of problems that are discovered in the study of laws and legal systems'.²³ The problems 'may not necessarily all be legal but the focus for analysis is the law, whether... reasoning internal to the law or... law in context'.²⁴ Feldman's scholarship ideals include '(1) a commitment to employing methods of investigation and analysis best suited to satisfying [a] curiosity [about the world]; (2) self-conscious and reflective open-mindedness, so that one does not assume the desired result and adopt a procedure designed to verify it, or even pervert one's material to support a chosen conclusion; (3) the desire to publish the work for the illumination of students, fellow-scholars or the general public and to enable others to evaluate and criticise it'.²⁵ There is an argument that the 'ethical premises' underpinning scholarly research and writing should be transparent,²⁶ for example in this case the premise that caste discrimination, as a form of discrimination prohibited by international human rights law, should be subject to effective legal regulation domestically as well as internationally.

Overview of the thesis

The thesis is divided into three parts. Caste is complicated to understand and theorise. For this reason the thesis starts by explaining how it can be understood in sociological, historical, religious, cultural and ideological terms. Part 1 (Chapters 1-3) explores, in Chapters 1 and 2, the socio-historical framework of caste and introduces some of the issues relating to its complexity. The paradox of caste's persistence and tenacity is also addressed. Chapter 3 sets out the nature of caste discrimination in contemporary India, its political, social and economic features, and

²³ D. Feldman, 'The Nature of Legal Scholarship', 52(4) *Modern Law Review* (1989) 498-517, 502.

²⁴ E. Fisher and others, 'Maturity and Methodology: Starting a Debate about Environmental Law Scholarship', 21(2) *Journal of Environmental Law* (2009) 213-250, 216.

²⁵ See n 22 above, 503.

²⁶ See n 8 above, 164-165.

examines and critiques the legal responses introduced by India to combat it. Under British rule, limited inroads were made into dismantling inequality and discrimination based on caste by means of secular law, but these were piecemeal, timid, and contradictory, addressing certain aspects of caste inequality and discrimination while ignoring or even reinforcing others. The turning point came when India gained her independence from British rule in 1947. The Constitution of India 1950 (COI) abolished Untouchability and provided for the introduction of affirmative action policies for the ‘Scheduled Castes’ (the constitutional, legal and administrative term for Dalits in India). Domestic legislation followed, criminalising Untouchability, caste discrimination and caste-based hate crimes; yet, despite their progressive nature, these legal and policy measures have not succeeded in eliminating caste discrimination and oppression in India. The thesis examines why this is the case, identifies the lessons learned from India’s experience, and suggests possible strategies for the future. Chapter 3 also examines the contradictions inherent in India’s legal categorisation of the Dalits, specifically the religious restrictions on entry into the category, and argues why and how the law should be reformed to remove these contradictions.

Part 2 of the thesis (Chapters 4 and 5) focuses on the engagement of international human rights law with caste discrimination. It examines the internationalisation of caste and the ‘added value’ of this strategy for Dalit advocacy, given that positive provisions on caste in India’s constitution and domestic legislation were already in place. International law uses a ‘categories’ approach in order to combat discrimination and inequality, but caste does not appear as a category in any international human rights instrument. This has led to the subsuming of caste within categories which do not completely overlap with it, as well as the

interpretation of existing categories and the creation of new ones to cover caste and analogous systems of inherited status. Chapter 4 examines the conceptualisation of caste by the UN Committee for the Elimination of Racial Discrimination (CERD) as a form of discrimination based on descent and hence a form of racial discrimination prohibited by Article 1 of the International Convention for the Elimination of Racial Discrimination (ICERD).²⁷ CERD's interpretation of descent in ICERD as including 'forms of social stratification such as caste and analogous systems of inherited status'²⁸ is rejected by India because of the linkage between caste and racial discrimination that this entails. India, rather, considers caste to be an internal social problem falling outside the purview of ICERD, and has challenged CERD's authority to interpret the ICERD 'umbrella' as including caste.²⁹ Dalits have also pursued minority rights and indigenous people's approaches before UN forums, despite not readily meeting the internationally-agreed criteria for minorities or indigenous peoples. Chapter 5 provides a brief evaluation of the value of these approaches for Dalits,³⁰ as well as the engagement with caste issues of other treaties with wider grounds.

Since 2000, caste discrimination has also been conceptualised by the UN as a violation of international human rights law as a form of discrimination based on work and descent (DWD), a new legal category which includes but is not limited to caste. Given the reluctance of India to accept the conceptualisation of caste discrimination as a violation of ICERD, Dalit activists and advocacy organisations have recently argued for a 're-strategising of the Dalit stand' away from a 'caste as

²⁷ Adopted 21 December 1965. In force 4 January 1969. 660 UNTS 195. Indian ratification 3 December 1968. UK ratification 7 March 1969.

²⁸ CERD General Recommendation No. 29 (2002).

²⁹ Thornberry, n 15 above, 239, 250.

³⁰ A lengthier treatment of Dalit rights as minority rights in international law, as well as Dalits and minorities in Indian constitutional law, can be found in A. Waughray, 'Caste Discrimination and Minority Rights: The Case of India's Dalits', 17 *International Journal on Minority and Group Rights* (2010) 327-353.

racial discrimination’ perspective towards a discourse based on ‘descent and work-based discrimination and violence’.³¹ This discourse draws on the Draft Principles and Guidelines for the effective elimination of DWD, drawn up by two UN Special Rapporteurs on DWD and published by the UN Human Rights Council in 2009. However, the political reality is that not all states accept that existing normative frameworks apply to caste discrimination, or that caste discrimination is a legitimate area of international human rights concern, or that the prohibition of caste discrimination (or DWD) applies to them. From a practical perspective the challenge is to engage states such as India in acknowledging the legitimacy of UN involvement and to regard mechanisms such as ICERD and the DPGs not as a threat but as an opportunity to challenge caste discrimination. In the medium term the question remains whether a caste-specific international instrument is desirable on the grounds that caste constitutes a *sui generis* category which existing categorisations cannot adequately account for, and, if desirable, whether such an aim is realistic and realisable.

Part 3 of the thesis (Chapters 6-9) focuses on the UK and the challenge of capturing caste legally. Caste exists in the UK: this is not in dispute. Moreover, the evidence suggests strongly that caste discrimination and harassment, including of the type which would fall under the EQA, also exist.³² The cornerstone of the UK’s equality regime is now the EQA, which, as explained, provides for the introduction of a statutory prohibition of caste discrimination. However, as noted, as at 1 April 2013 such a prohibition had not been introduced, despite the recommendations to this effect of CERD and the UN Universal Periodic Review (UPR). This means that to

³¹ See Decade of Dalit Rights UN 2011-20, Strategy Building Conference, Report, 24-25 June 2011 at http://www.idsn.org/fileadmin/user_folder/pdf/New_files/UN/Report_DecadeDalitRights.pdf (visited 2 January 2013).

³² H. Metcalfe and H. Rolfe, *Caste Discrimination and Harassment in Great Britain* (London: Government Equalities Office, 2010) 14.

bring a claim of caste discrimination, claimants must argue that caste is subsumed within an existing protected characteristic such as race or religion or belief as currently defined. The limits of discrimination law (for example, the ‘categories’ approach) are well-known. Nonetheless, discrimination law is very effective when it works, as has been seen in relation to race, sex, disability, age, religion and, increasingly, sexual orientation. This thesis identifies and explores the limitations of race and religion or belief as categories for capturing caste and recommends the express extension of equality legislation to caste. Chapter 6 contextualises the problem, outlining the history of the Dalit presence in the UK, caste divisions and the discrimination encountered by Dalits at the hands of higher-caste South Asian migrants. Chapter 7 examines the British discrimination law model and analyses the shortcomings of the protected characteristics of race and religion or belief as ‘legal homes’ for caste. Chapter 8 analyses the debates during the passage of the Equality Bill through Parliament on the inclusion of an express prohibition of caste discrimination in the new legislation, which resulted in caste being introduced at the margins of that law. The legal and political arguments of government, parliamentarians and other actors against a statutory prohibition of caste discrimination, as well as the counterarguments, are dissected. Chapter 9 is concerned with legal and political developments since the enactment of the EQA in April 2010 until 1 April 2013. It provides an account of the efforts of Dalits and their supporters to secure a case-law prohibition of caste discrimination via a test case, as well as their continued campaign for the activation of s. 9(5)(a). It also offers a view of the role of activism in connecting UN human rights standards to national law, and in this way it links Dalit activism in the UK with the wider question of international legal and political responses to the elimination of caste discrimination.

Chapter 1

What is Caste?

Caste is a complex social phenomenon which has to be understood in sociological, historical, religious, cultural, psychological and ideological as well as legal terms. This chapter introduces the concept of caste and examines what is meant by caste, sociologically and legally. It identifies and explains the operative features of caste as an ideological construct, and describes the ways in which caste has been conceptualised, theorised and analysed as a sociological and legal phenomenon. Section 1 introduces the key concepts associated with caste as well as various elements and aspects of caste as a sociological and legal category. Section 2 sets out the religious and historical origins of a caste society, while Section 3 summarises the principal sociological theories and interpretations of caste.

1.1 Introductory concepts

1.1.1 Context and terminology

Caste is associated primarily with India, where it has existed as a system of social stratification for over three thousand years,¹ but it also occurs in other South Asian countries (Nepal, Pakistan, Bangladesh and Sri Lanka) and the South Asian diaspora, while communities suffering from discrimination based on descent and ‘work and descent’ – wider international legal categories of which caste discrimination is a sub-

¹ S. Bayly, *Caste, Society and Politics in Modern India from the Eighteenth Century to the Modern Age* (Cambridge: Cambridge University Press (CUP), 1999) 13; G. S. Ghurye, *Caste and Race in India* (Mumbai: Popular Prakashan Pvt. Ltd., 1969).

category – exist worldwide.² Discrimination, subordination and oppression on the grounds of caste affect almost 167 million Dalits – formerly known as ‘Untouchables’ – in India alone, where they amount to over 16 per cent of the population,³ while caste discrimination affects up to 200,000 people in the UK.⁴

1.1.1.1 Caste

The term ‘caste’ comes from the Portuguese *casta*, meaning species, race or pure breed. It was first used in India in the sixteenth century by the Portuguese to distinguish between ‘Moors’ (Muslims) and non-Muslims, and to denote the system of communities based on birth groups which the Europeans encountered in India.⁵ As Galanter and Ballard show, whilst caste is not the only feature of South Asian social organisation either in Britain or on the sub-continent – individuals have multiple overlapping affiliations of kinship, language, region and religion as well as caste – nevertheless in a traditionally highly compartmentalised social order, caste remains significant as a mechanism for and a source of social stratification, stigmatisation, social exclusion and discrimination on the sub-continent as well as the South Asian diaspora.⁶

² See A. Eide and Y. Yokota, expanded working paper on discrimination based on work and descent (DWD), UN Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights (UN Sub-Commission); UN Doc. E/CN.4/Sub.2/2003/24, 26 June 2003, paras. 10-43; Y. Yokota and C. Chung, final report on DWD; Human Rights Council; A/HRC/11/CRP.3, 18 May 2009. See also UN Sub-Commission, Resolution 2000/4 DWD, 11 August 2000; E/CN.4/Sub.2/2000/46, 23 November 2000, 25.

³ Census of India 2001, Scheduled Castes and Scheduled Tribes Population, at http://www.censusindia.gov.in/Census_Data_2001/India_at_Glance/scst.aspx (visited 24 November 2012).

⁴ H. Metcalfe and H. Rolfe, *Caste Discrimination and Harassment in Great Britain* (London: Government Equalities Office, 2010) 20.

⁵ Bayly (1999), n 1 above, 105-107; U. Sharma, *Caste* (New Delhi: Viva Books, 2002) 1; M. Galanter, *Competing Equalities: Law and the Backward Classes in India* (Berkeley and Los Angeles: University of California Press, 1984) 7.

⁶ R. Ballard, ‘The Emergence of Desh Pardesh’ in R. Ballard (ed.), *Desh Pardesh: The South Asian Presence in Britain* (London: Hurst & Co, 1994) 5-9; Galanter (1984), *ibid.*, 7-17; O. Mendelsohn and M. Vicziany, *The Untouchables: Subordination, Poverty and the State in Modern India* (Cambridge:

1.1.1.2 Descent

Descent is an international legal category which includes but is not limited to caste. Legal usage of the term originates in the 1833 Government of India Act, which prohibited discrimination against Indians ('natives') in employment with the British East India Company on grounds of religion, place of birth, descent or colour. Indians were distinguished from Europeans by virtue of their 'descent', meaning racial and ethnic origins. As a ground of discrimination, descent was included in the Government of India (GOI) Act 1935 and the Constitution of India (COI) 1950. In 1965, it was included (at India's behest) in the definition of racial discrimination in the UN International Convention for the Elimination of Racial Discrimination (ICERD),⁷ prompted in part by Indian concern to address discrimination against persons of Indian origin in apartheid South Africa. The UN Committee for the Elimination of Racial Discrimination (CERD) – ICERD's monitoring body⁸ – has affirmed that discrimination based on descent includes discrimination on the basis of caste and analogous systems of inherited status.⁹

1.1.2 Varna, Jati and Biraderi

1.1.2.1 Varna

Castes are closed, endogamous,¹⁰ hereditary-membership status groups characterised by separation and ranked within a strict hierarchical framework 'in which status is

CUP, 1998); S. Jodhka and G. Shah, 'Comparative Contexts of Discrimination: Caste and Untouchability in South Asia', *Economic and Political Weekly (EPW)*, 27 November 2010, 99-106.

⁷ Adopted 21 December 1965. In force 4 January 1969. 660 UNTS 195.

⁸ See <http://www2.ohchr.org/english/bodies/cerd/> (visited 31 July 2012).

⁹ CERD, General Recommendation No. 29 on Article 1, Paragraph 1 (Descent), 22 August 2002, UN Doc. A/57/18 (2002) 111.

¹⁰ Endogamy 'confines the ties of kinship and marriage within a small and defined group and thereby enables it to maintain clear social boundaries with other groups of the same kind'; A. Beteille, 'The Peculiar Tenacity of Caste', *EPW*, 31 March 2012, 41-48, 44.

usually privileged over power and wealth'.¹¹ According to the Explanatory Notes to the UK's Equality Act 2010,

[t]he term "caste" denotes a hereditary, endogamous (marrying within the group) community associated with a traditional occupation and ranked accordingly on a perceived scale of ritual purity. It is generally (but not exclusively) associated with South Asia, particularly India, and its diaspora. It can encompass the four classes (varnas) of Hindu tradition (the Brahmin, Kshatriya, Vaishya and Shudra communities); the thousands of regional Hindu, Sikh, Christian, Muslim or other religious groups known as jatis; and groups amongst South Asian Muslims called biradaris. Some jatis regarded as below the varna hierarchy (once termed "untouchable") are known as Dalit.¹²

Traditionally, marriage between castes and commensality (the sharing of food and drink), including the taking of water by so-called 'high' castes from 'lower' castes, is prohibited. Whilst caste is not purely a religious phenomenon, nevertheless religious sanction for the caste system can be found in orthodox Hindu creation mythology and its hierarchical division of society into four broad groups or *varnas* traditionally linked to occupation or social function – Brahmins (priests), Kshatriyas (warriors and rulers), Vaisyas (traders and artisans) and Shudras (serfs and labourers).¹³ The first three groups comprise the so-called 'twice-born'¹⁴ or *dvija* castes, while the fourth

¹¹ H. Gorrington and I. Rafanell, 'The Embodiment of Caste: Oppression, Protest and Social Change' 41 *Sociology* (2007) 97-114, 102. In the leading case of *Indra Sawhney v Union of India*, A.I.R.1993 SC 477 para. 82, the Indian Supreme Court defined caste as a socially homogenous class and also an occupational grouping, membership of which is involuntary and hereditary: 'Lowlier the hereditary occupation, lowlier the social standing of the class in the graded hierarchy.' Even where the individual does not follow that occupation, 'still the label remains and his identity is not changed'.

¹² Equality Act 2010 Explanatory Notes, 10 August 2010, para. 49, drafted by the Government Equalities Office (GEO) with the advice of the present author and others; see <http://www.legislation.gov.uk/ukpga/2010/15/notes/contents> (visited 2 December 2012).

¹³ G. Flood, *An Introduction to Hinduism* (Cambridge: CUP, 1998) 11-12, 48-49, 58-61. *Varna* means colour, referring not to skin colour or racial characteristics but to a system of colour symbolism reflecting the social hierarchy; *ibid.*, 59.

¹⁴ Male children of the three 'twice-born' castes are eligible to undergo *upanayana* (an initiation ceremony that confers twice-born status) where they are invested with a 'sacred thread' worn permanently across the body except when bathing. The sacred thread (*yajnopavita*) has 'largely become a hallmark of Brahmin-hood' and 'a mark of social status rather than of religious knowledge';

group, the Shudras (over half the Indian population), consists of the ‘low’ castes (known in Indian constitutional, legal and administrative terminology as ‘other backward classes’ or OBCs).¹⁵ Within the four-fold *varna* (‘*chaturvarna*’) system a distinction can thus be drawn between the three *dvija* groups on the one hand, and the non-*dvija* or Shudras on the other.

1.1.2.2 *Dalits: outside the varna system*

Outside the *varna* system, comprising a fifth group at the very bottom of the social hierarchy, are the Dalits, formerly known as Untouchables or ‘Depressed Classes’. A fundamental structural distinction thus exists between Dalits and ‘caste Hindus’. Dalit is a South Asian political term of self-identification first used by Jotirao Phule, the nineteenth-century campaigner against caste oppression.¹⁶ Meaning ‘crushed’ or ‘broken’ in Marathi, a regional language of western India, Dalit came into popular usage in India in the 1970s via the Dalit Panther Party and the Dalit literary movement in Maharashtra¹⁷ as a militant, assertive category,¹⁸ replacing Gandhi’s term Harijan (‘children of God’), which became widely seen as condescending and demeaning. Now commonly associated with Ambedkar,¹⁹ Dalit seeks to capture the

M. McGee, ‘Samskara’, in S. Mittal and G. Thursby (eds.), *The Hindu World* (Abingdon: Routledge, 2004) 332-356, 345.

¹⁵ The OBCs are less severely socially and educationally disadvantaged groups who do not suffer from the stigma of Untouchability.

¹⁶ E. Zelliot, ‘Dalit – new cultural context for an old Marathi word’ in E. Zelliot, *From Untouchable to Dalit: Essays on the Ambedkar Movement* (New Delhi: Manohar, 1998) 267-292, 271. On Phule see R. O’Hanlon, *Caste, Conflict and Ideology: Mahatma Jotirao Phule and Low Caste Protest in Nineteenth Century Western India* (Cambridge: CUP, 1985).

¹⁷ S. Paik, ‘Mahar-Dalit-Buddhist: The history and politics of naming in Maharashtra’, 45(2) *Contributions to Indian Sociology* (2011) 217-241, 218, fn 1, 228; Zelliot, *ibid*.

¹⁸ Paik, *ibid*.

¹⁹ Dr B.R. Ambedkar (1891-1956), lawyer, Dalit, and Chairman of independent India’s Constitution Drafting Committee, was one of India’s greatest political leaders and campaigners for the eradication of caste; see C. Jaffrelot, *Dr Ambedkar and Untouchability: Analysing and Fighting Caste* (New Delhi: Permanent Black, 2005). Ambedkar used the word Untouchable ‘for those castes lowest in the Hindu scale of pollution’; Zelliot, n 16 above, 74, fn 1. He also used the term Dalit, the first time being in his Journal ‘Outcaste India’ in 1928 ‘where he characterised being Dalit as the experience of

particular stigmatisation, exploitation, and economic, social, cultural, political and psychological domination of the Untouchables by the ‘upper’ castes.²⁰ ‘Dalit’ is not official terminology; in post-independence India the constitutional, legal and administrative term for Dalits is ‘Scheduled Castes’, meaning those formerly Untouchable castes listed in a Schedule to the Constitution.²¹ Scheduled Caste (SC) status is established by means of a Caste Certificate issued by the authorities attesting to the bearer’s membership of a Scheduled caste and entitling them to the benefit of constitutional affirmative action policies and other legal and administrative measures.²²

1.1.2.3 Use of Dalit in the thesis

In this thesis I use Dalit as a generic term while recognising that caste terminology is highly politicised. In India Dalit is adopted by many, but not all, people of so-called Untouchable origin,²³ whilst in Britain its use is less widespread. In both countries some reject Dalit, arguing that by reinforcing notions of ‘broken’ and ‘oppressed’, Dalit has become yet another denigrating label, alternatively that is primarily

deprivation, marginalisation and stigmatisation’; A. Rao, *The Caste Question* (Berkeley: University of California Press, 2009) 15.

²⁰ Paik, n 17 above, 228.

²¹ Constitution of India, Article 341, at <http://lawmin.nic.in/coi.htm> (visited 24 November 2012); The Constitution (Scheduled Castes) Order 1950 (C.O. 19), at <http://lawmin.nic.in/ld/subord/rule3a.htm> (visited 24 November 2012). Originally drawn up by the British in 1936, the Schedule lists those disadvantaged and socially excluded castes previously known as ‘Depressed Classes’, subsequently Untouchables; see Mendelsohn and Vicziany, n 6 above, 2-5. The term ‘SC’ is also used to connote former Untouchables in Pakistan and Bangladesh although the Schedule mechanism is not employed there; Jodhka and Shah, n 6 above, 100.

²² A similar mechanism is used to establish Scheduled Tribe (ST) and OBC status. Scheduled Tribes, numbering around 84 million, or 8.2% of India’s population, are a distinct social and legal category traditionally distinguished by tribal characteristics and cultural and spatial isolation from the mainstream population. Although external to the caste system and not defined by Untouchability or by religion, the STs also suffer severe discrimination and depredations; Galanter, n 5 above, 147-153; Census of India 2001, n 3 above. The constitutional term ‘Backward Classes’ is sometimes used both to denote the OBCs alone, and generically to denote the SCs, STs and OBCs combined; Galanter, n 5 above, 121.

²³ Dalit, alternatively Dalit-Bahujan (Bahujan meaning ‘majority’), is also used as a *political* umbrella term encompassing Scheduled Castes, Other Backward Classes and Scheduled Tribes, together comprising around three-quarters of India’s population.

associated with the new, middle class ‘Dalit elite’ rather than the masses.²⁴ Increasingly, in both countries, those who do not self-refer as Dalit may instead assert traditional caste names,²⁵ or they may self-identify by reference to religion, for example as Buddhists, Ravidassias or Valmikis. Conversely, Dalits may seek to hide rather than assert their caste identity while others reject caste-associated labels altogether.²⁶

1.1.2.4 *Jati*

While the *varna* system provides an overarching ideological framework for the organisation and classification of Hindu society and its members, in concrete terms social relations are governed by an individual’s membership of one of over four thousand closed groups or *jatis* – local or regional endogamous kinship groups, hierarchically ranked within a restricted geographical locality and effectively the operational units of the caste system.²⁷ Unlike *varna*, the concept of *jati* is not exclusive to Hinduism but is found in all the major South Asian religious communities.²⁸ The term ‘caste’ thus subsumes two concepts – the broad Hindu concept of *varna* and the South Asian regional concept of *jati*.

²⁴ C. Dogra, ‘The First Law: Sing my Name’, *Outlook India*, 11 July 2011.

²⁵ Including names, the use of which in India by a non-Scheduled Caste person to refer to a Scheduled Caste person would constitute a criminal offence; see The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989, section 3(1) x; Dogra, *ibid.*; ‘Abusing Dalit by Caste in Private not an Offence’, *Outlook India*, 15 October 2010, at <http://news.outlookindia.com/items.aspx?artid=697502> (visited 2 December 2012).

²⁶ See A. Waughray and N. Weickgennant Thiara, ‘Challenging Caste Discrimination in Britain with Literature and Law: An Interdisciplinary Study of British Dalit Writing’, forthcoming in 21(2) *Contemporary South Asia* (2013).

²⁷ The Anthropological Survey of India ‘People of India’ project has identified 4635 *jatis*: see http://www.ansi.gov.in/download/List_of_Communities.xls (visited 24 November 2012); D. Killingley, ‘Varna and Caste in Hindu Apologetic’ in D. Killingley (ed.), *The Sanskrit Tradition in the Modern World (2): Hindu Ritual and Society* (Newcastle upon Tyne: S.Y. Killingley, 1991) 7-11, 17-18. See also ‘Varna and Caste’ in M. N. Srinivas, *Caste in Modern India* (London: Asia Publishing House, 1962) 63-69.

²⁸ See J. Tharamangalam, ‘Caste Among Christians in India’ in M. N. Srinivas (ed.) *Caste: Its Twentieth Century Avatar* (New Delhi: Penguin, 1996) 263-29; D. Mandelbaum, *Society in India, Volume 2: Change and Continuity* (Berkeley and Los Angeles: University of California Press, 1970)

1.1.2.5 *Biraderi*

Amongst South Asian Muslims the term *biraderi* denotes a not dissimilar system of endogamous, hierarchically ranked groups.²⁹ *Biraderi* has a variety of meanings depending on context, from extended kinship group or *zat* (equivalent to *jati*) to a small group of intermarrying close kin,³⁰ but it is generally translated as kinship group or brotherhood, with implied descent from a common male ancestor³¹ and entailing complex dynamics of support, reciprocity, obligation and control. In Britain, caste is used interchangeably for *varna*, *jati* and, increasingly, *biraderi*.

1.1.3 Caste membership and mobility

While there are only four *varnas*, the precise number of *jatis* cannot be known, as *jati* groups may merge or sub-divide to form new groups.³² Similarly, while the ranking of the four Hindu *varnas* is fixed and immutable, the possibility of movement in *jati* ranking has always existed and there is 'not always agreement as to where a particular *jati* fits'.³³ Crucially, however, both individual *varna* and *jati* membership

569-571; A. Eide and Y. Yokota, further expanded working paper on DWD, UN Sub-Commission; UN Doc. E/CN.4/Sub.2/2004/31, 5 July 2004, para. 46. See also R. Ballard, 'Differentiation and Disjunction among the Sikhs' in Ballard (ed.), n 6 above, 88-116, 91; M. Banks, 'Jain ways of being' in Ballard (ed.), n 6 above, 231-250; J. Hinnells, 'Parsi Zoroastrians in London', in Ballard (ed.), n 6 above, 251-271.

²⁹ See Z. Bhatti, 'Social Stratification Among Muslims in India' in Srinivas (1996), *ibid.*, 244-262; I. Ahmad (ed.), *Caste and Social Stratification Among Muslims in India* (New Delhi: Manohar, 1978); A. Shaw, *Kinship and Continuity: Pakistani Families in Britain* (Abingdon: Routledge, 2000) 113-117, 115-135; I. Din, *The new British: the impact of culture and community on young Pakistanis* (Aldershot: Ashgate, 2006) 33-34, 136-139.

³⁰ See Shaw, *ibid.*, 111-112, 140; Din, *ibid.*, 110-116. Pakistani Muslim *zats* are ranked within three broad, hierarchical, categories: *ashraf* (noble), *zamindar* (landowning) and *kammi* (artisan); Shaw, *ibid.*, 114-115.

³¹ Shaw, *ibid.*, 141.

³² This arises *inter alia* from the adoption of new occupations by members of an existing caste, changes of custom, conversion (of Tribals) to Hinduism and migration to a new region; A. Macdonell, 'The Early History of Caste', 19(2) *American Historical Review* (1911) 230-244, 232-33.

³³ E. Nesbitt, *Intercultural Education: Ethnographic and Religious Approaches* (Brighton: Sussex Academic Press, 2004) 100. Macdonell cites the example of the Dravidian palanquin bearers 'who were promoted to the rank of a water-giving caste in order that thirsty high caste travellers might obtain a drink without leaving their palanquins'; Macdonell, *ibid.*, 232.

are permanent and hereditary, that is, determined by birth.³⁴ Unlike class, a key feature of caste is individual inability or restricted ability to alter one's inherited status;³⁵ social mobility is dependent on the re-ranking of the entire caste or *jati*: 'You are born into [your caste], you cannot choose your caste, buy it or graduate into a different caste'.³⁶ Exceptionally, individual *jati* mobility may sometimes occur in the context of inter-caste marriage or adoption – but this is not automatic.³⁷

1.1.4 Untouchability

1.1.4.1 *Untouchability, pollution and stigma*

Two features distinguish caste discrimination from other forms of discrimination based on inherited status; firstly its religious underpinnings and secondly the concept of Untouchability.³⁸ Dalits have traditionally been considered by dominant castes to

³⁴ For mythological exceptions to this rule see J. Leslie, *Authority and Meaning in Indian Religions: Hinduism and the Case of Valmiki* (Aldershot: Ashgate, 2003) 40-45. On Brahmin status as earned, not inherited, see A. Sharma, *Human Rights and Hinduism: A Conceptual Approach* (New Delhi: Oxford University Press (OUP), 2004) 66-69.

³⁵ CERD, n 9 above, Article 1(a).

³⁶ Paul Divakar, Convenor of the National Campaign on Dalit Human Rights, cited in A. Waughray, 'Caste Discrimination: A Twenty-First Century Challenge for UK Discrimination Law?', 72(2) *Modern Law Review* (2009) 182-219, 187; see *V. V. Giri v D. Suri Dora* (1960) 1SCR 42, cited in *Shrivastava v The State of Maharashtra*, Bombay High Court, Criminal Application No. 2347 (2009) para. 8: 'It is well-known that a person who belongs by birth to a depressed caste or tribe would find it very difficult, if not impossible, to attain the status of a higher caste amongst the Hindus by virtue of his volition, education, culture and status. The history of social reform for the last century and more has shown how difficult it is to break or even to relax the rigour of the inflexible and exclusive character of the caste system'.

³⁷ Galanter, n 5 above, 282-362; L. Dudley Jenkins, *Identity and Identification in India: Defining the Disadvantaged* (New York: RoutledgeCurzon, 2003) 31-39, 76-79. Traditionally it was assumed that a woman took her husband's social identity on marriage, but Indian courts have held that a Scheduled Caste woman's status does not change by virtue of her marriage to a higher caste man, nor does a 'Forward Caste' woman assume her husband's status on marriage to a Scheduled Caste man; see *Urmila Ginda v Union of India* A.I.R. 1975 Del. 115, cited in Galanter, n 5 above, 340; *Shrivastava v The State of Maharashtra*, *ibid.*, paras. 11-12.

³⁸ The nexus between Untouchability and humiliation is explored in many contemporary analyses of Untouchability; see G. Guru, 'Power of Touch', 23(25) *Frontline* (2006); V. Geetha, 'The Humiliations of Untouchability' in G. Guru (ed.), *Humiliation: Claims and Context* (New Delhi: OUP, 2011) 95-107; G. Alex, 'A Sense of Belonging and Exclusion: "Touchability" and "Untouchability" in Tamil Nadu', 73(4) *Ethos* (2008) 523-543; S. Sarukkai, 'Phenomenology of Untouchability', 44(37) *EPW*, 12 September 2009, 39-48; G. Guru, 'Archaeology of Untouchability', *EPW*, 12 September 2009, 49-56. On dignity, self-worth and humiliation see D. Shultziner and I. Rabnovici, 'Human Dignity, Self-Worth and Humiliation: A Comparative Legal-Psychological Approach', 18 *Psychology, Public Policy and Law* (2012) 105-137.

be irredeemably and permanently polluted, hence ‘Untouchable’, people with whom all physical and social contact is to be avoided for fear of defilement.³⁹ Ambedkar described the concept as a notional ‘*cordon sanitaire*’ separating the Untouchables from the rest of Indian society.⁴⁰ The concepts of pollution and Untouchability are ritual and religious in origin rather than hygiene-based, Untouchability deriving ostensibly from one’s own or one’s ancestors’ engagement in ritually ‘unclean’ occupations⁴¹ as a result of impure birth related to conduct in previous life. Despite the ritual and religious origin of this imagined ‘pollution’, the discrimination it engenders is circular; many Dalits are constrained to work in ritually polluting jobs which are also objectively dangerous, dirty and low paid, thereby reinforcing their Untouchable status. Despite its purely notional nature, caste is conceived as a physical attribute, hence permanent and immutable. The conceptualisation of Untouchability in corporeal terms as a ‘property of the body’⁴² and its supposedly inherited and immutable nature means that it cannot be shed by engagement in ‘clean’ work or by professional or economic advancement. Caste, argues Jaspal, is a

³⁹ See Mendelsohn and Vicziany, n 6 above; Leslie, n 34 above, 2-40; M. Marriot, ‘Varna and Jati’ in Mittal and Thursby (eds.), n 14 above, 379-382. Flood explains that ‘the scale of purity and pollution differentiates individuals from each other on the basis of caste and gender’ and that ‘certain classes of people are never able to be rid of the pollution which accrues to their bodies due to their social group’; Flood (1998), n 13 above, 219. Hinduism also recognises temporary states of pollution related to bodily functions such as menstruation, childbirth and death. Temporary pollution, including pollution caused by contact with Untouchables, can be overcome by the performance of appropriate rituals; Flood, *ibid.*, 203-207, 219.

⁴⁰ B. R. Ambedkar, ‘The Real Issue’ in V. Moon (ed.), *Dr. Babasaheb Ambedkar Writings and Speeches (BAWS) Vol. 9* (Bombay: The Education Dept., Govt. of Maharashtra, 1991) 181-198, 187. Indian sociologist M. N. Srinivas coined the term ‘pollution line’ to describe this boundary.

⁴¹ G. Shah, H. Mander, S. Thorat et al., *Untouchability in Rural India* (New Delhi: Sage, 2006) 106, 106-16. Ritually unclean occupations include those associated with animal carcasses or human death as well as objectively dirty and dangerous jobs such as cleaning sewage tanks and manual scavenging (the removal of human excrement by hand from dry latrines, unlawful in India yet still widespread); see G. Ramaswamy, *India Stinking: Manual Scavengers in Andhra Pradesh and Their Work* (Pondicherry: Navayana Publishing, 2005); A. Zaidi, “India’s Shame,” *Frontline*, 22 September 2006; “India: Manual scavenging, a shame on the nation,” Human Rights Council 9th Session, 25 August 2008, Asian Legal Resource Centre, at <http://www.alrc.net/doc/mainfile.php/hrc9/515/%20> (visited 16 December 2012).

⁴² Flood (1998), n 13 above, 219: ‘Apart from everyday pollution caused by the body and contact with polluting substances, there is a deeper level of purity and pollution which is regarded as a property of the body, a bodily substance. Brahmins have a pure bodily substance while the substance of their bodies means that Untouchables are in a permanent state of pollution’.

fundamentally psychological construct and the concept of stigma ‘vital [to] understanding how caste identity affects the lives of South Asians’;⁴³ the pervasive social stigmatisation of Dalits in the subcontinent and in the diaspora means that Dalits remain stigmatised, regardless of any increase in social mobility: ‘[C]aste essentialism ensures that Dalits’ dis-identification with the demeaning occupations traditionally associated with their group has had little or no impact on their position within the social hierarchy’.⁴⁴

1.1.4.2 ‘Touch’ as a category

Indian philosophy distinguishes between ‘contact’ - a quality which is present in both the toucher and the touched - and ‘touch’, which is not about contact (which is a relation), but is a quality that inheres in the object.⁴⁵ This means that an Untouchable person is untouchable – a ‘carrier of pollution’ – whether or not they come into contact with another person; the Untouchable can do nothing to ‘get rid’ of his/her Untouchability.⁴⁶ Thus, ‘*the real site of [U]ntouchability is the person who refuses to touch the untouchable*’.⁴⁷ According to Indian sociologist Gopal Guru, Untouchability is a unique form of discrimination which privileges the corporeal body of the dominant caste individual (the Touchable) as ‘sacred’ primarily in contrast to its logical counterpart, the ritually defiling or profane body (the ‘Untouchable’).⁴⁸ Paradoxically, writes Guru, this assigns a negative power to the

⁴³ R. Jaspal, ‘Caste, Social Stigma and Identity Processes’, 23(1) *Psychology and Developing Societies* (2011) 27-62, 28, 33. Davies talks of race in similar terms as being ‘firmly entrenched in our psyches, our institutions, our knowledge, and our social patterns’; M. Davies, *Asking the Law Question* (Sydney: Thomson Lawbook Co., 2008) 293.

⁴⁴ Jaspal, *ibid.*, 37; B. Natrajan and P. Greenough (eds.), *Against Stigma: Studies in Caste, Race and Justice since Durban* (Hyderabad: Orient Blackswan, 2009).

⁴⁵ Sarukkai, n 38 above, 41.

⁴⁶ Ambedkar, ‘The Real Issue’, n 40 above, 197.

⁴⁷ Sarukkai, n 38 above, 43 (emphasis in original).

⁴⁸ Guru (2006), n 38 above; G. Guru, ‘What it means to be an Indian Dalit: Dalit Responses to the Durban Conference’ in Natrajan and Greenough (eds.), n 44 above, 168-182.

Untouchable, whose Untouchability can become a ‘poison weapon’ for the Touchable; the Untouchable thus presents a ‘sociological danger’ which must be detected and controlled. Consequently, Untouchability in India is linked directly to the effective social, residential, educational and economic ‘quarantine’ of large sections of the population.⁴⁹ Kautalya – author of the ancient Hindu religio-legal text the *Arthashastra* – was ‘the first lawgiver to specify touch as a penal offence’.⁵⁰ Today, Guru identifies touch as the ‘primary category for caste relations’.⁵¹

1.1.4.3 Untouchability, social exclusion and violence

Untouchability is both a cause of and a mechanism for social exclusion.⁵² In India, it continues to manifest in practices such as the avoidance of physical touch or even physical proximity (for example, avoiding sitting next to a Dalit pupil or student in class), taboos on inter-dining and the taking of water from castes considered ‘polluting’, residential segregation,⁵³ taboos and restrictions on Dalits’ use of facilities such as roads, wells, bathing ghats (tanks), shops, restaurants, tea rooms,⁵⁴ and of certain modes of transport such as bicycles, restrictions on the clothing Dalits can wear, occupational segregation and restrictions on choice of occupation and the practice of endogamy.⁵⁵ Despite the abolition of Untouchability and its

⁴⁹See UN Doc. CERD/C/IND/CO/19, 5 May 2007, para. 13, on the *de facto* segregation of Dalits in India in a wide range of spheres.

⁵⁰ V. Jha, ‘Candala and the Origin of Untouchability’ in A. Parasher-Sen (ed.), *Subordinate and Marginal Groups in Early India* (New Delhi: OUP, 2004) 157-209, 162.

⁵¹ Guru (2009), n 38 above, 171.

⁵² See Leslie, n 34 above, 29-30; Shah et al., n 41 above.

⁵³ B. R. Ambedkar, ‘Outside the Fold’ in V. Moon (ed.), *BAWS Vol. 5* (Bombay: The Education Dept., Govt. of Maharashtra, 1989) 19-26, 21; Shah et al., n 41 above.

⁵⁴ For example the provision of separate cups, glasses and utensils for Dalits in roadside cafes (the ‘two-cup’ system), which they alone are expected to use; see Shah et al., n 41 above; D. Karthikeyan, ‘Madurai villages still practising the two-tumbler system’, *The Hindu*, 24 May 2012.

⁵⁵ Shah et al., n 41 above.

criminalisation in the Constitution of India 1950 and in subsequent legislation,⁵⁶ and constitutional and legislative prohibitions of discrimination on grounds of caste,⁵⁷ many Dalits in contemporary India are subject to severe socio-economic deprivation and exclusion and well-documented violations of their civil, political, economic and social rights,⁵⁸ their subordinated status maintained via the dual enforcement mechanisms of Untouchability practices and systemic violence or ‘atrocities’,⁵⁹ frequently of a highly gendered nature.⁶⁰ While this level of caste-based discrimination, social exclusion and violence is not replicated in Britain, evidence from government-commissioned research suggests the existence of caste-based discrimination and harassment in this country.⁶¹

1.1.4.4 *Untouchability as separable from caste*

A fundamental ideological distinction exists between those who believe caste is essentially non-invidious, associational and communitarian⁶² and those who believe caste as an institution is inherently exclusionary, inequalitarian and inseparable from

⁵⁶ Article 17, Constitution of India; Protection of Civil Rights Act 1955 (originally the Untouchability (Offences) Act 1955), at http://scstwelfare.bih.nic.in/docs/publications/PCR_ACT1955.pdf (visited 24 November 2012).

⁵⁷ Article 15, Constitution of India; Protection of Civil Rights Act 1955.

⁵⁸ Shah et al., n 41 above; S. Thorat and N. Kumar, *B.R. Ambedkar: Perspectives on Social Exclusion and Inclusive Policies* (New Delhi: OUP, 2008) 4.

⁵⁹ The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989 defines and criminalises a range of acts as ‘atrocities’ (hate crimes); <http://socialjustice.nic.in/poa-act.php?pageid=1> (visited 25 November 2012); K.B. Saxena, *Report on Prevention of Atrocities Against Scheduled Castes: Policy and Performance – Suggested Interventions for NHRC* (New Delhi: National Human Rights Commission, 2004).

⁶⁰ See A. Irudayam s.j, J. Mangubhai and J. Lee, *Dalit Women Speak Out: Violence against Dalit Women in India, Volume I* (New Delhi: National Campaign on Dalit Human Rights, 2006). Rao writes of the redefinition by caste radicals of ‘the social totality of caste as a form of historical violence’; see Rao, n 19 above, 6.

⁶¹ Metcalfe and Rolfe, n 4 above, vi.

⁶² The position espoused by Gandhi, for whom Untouchability was a corruption of Hinduism and the *varna* system; see Bayly, (1999) n 1 above, 233-265; W. Radice (ed.), *Swami Vivekananda and the Modernisation of Hinduism* (Delhi: OUP India, 1998); Galanter, n 5 above, 28-29; Sharma, n 34 above, 52-54.

caste-ism and, by extension, from discrimination on grounds thereof.⁶³ Article 17 of the Constitution of India 1950 abolishes Untouchability but not the caste system itself. This reflects a Gandhian view of Untouchability as an aberration of Hinduism and caste, but the caste system itself as non-objectionable or even positive if cleansed of Untouchability. J. H. Hutton, India's 1931 Census Commissioner, regarded 'the problem of Untouchability as quite separable from that of caste',⁶⁴ disputing that Untouchability was 'a necessary condition of the survival of Hinduism' or essential to the (caste) system.⁶⁵ As for the caste system itself, he warned of the difficulties and 'perhaps the dangers' of getting rid of it, saying that if 'carried out at a stroke', such an undertaking would 'wreck the edifice of Hindu society'.⁶⁶

1.1.4.5 Ambedkar, Untouchability, Hinduism and caste

Ambedkar considered Untouchability, Hinduism and caste to be inextricably linked, and caste (the 'four- *varna*' system) and Untouchability as India's 'two great social evils'.⁶⁷ Caste was divisive and antisocial; a Hindu's loyalty was to his caste,⁶⁸ while to the Untouchables,

[H]induism is a veritable chamber of horrors. The sanctity... of the *Vedas*, *Smrtis* and *Shastras*... the senseless law of status by birth are to the Untouchables veritable instruments of torture which Hinduism [has forged] against the Untouchables.⁶⁹

⁶³ The position espoused by Ambedkar, for whom caste, orthodox Hinduism, the Hindu social order and caste discrimination were inextricably linked; see B. R. Ambedkar, 'Gandhism' in V. Moon (ed.), *BAWS Vol. 9*, n 40 above, 274-297; V. Moon (ed.), *BAWS Vol. 13* (Bombay: The Education Dept., Govt. of Maharashtra, 1994) 1217. See also J. Donnelly, *Universal Human Rights in Theory and Practice* (New York: Cornell University Press, 2003) 81-84.

⁶⁴ J. Hutton, *Caste in India* (Bombay: OUP, 1963, 4th edition, first published 1946) xi.

⁶⁵ Hutton, *ibid.*, x.

⁶⁶ *Ibid.*

⁶⁷ B. R. Ambedkar, 'The Untouchables and the Pax Britannica' in V. Moon (ed.), *BAWS Vol. 12* (Bombay: The Education Dept., Govt. of Maharashtra, 1993) 77-147, 132.

⁶⁸ B. R. Ambedkar, 'Annihilation of Caste' in V. Moon (ed.), *BAWS Vol. 1* (Bombay: The Education Dept., Govt. of Maharashtra, 1989) 25-96, 56.

⁶⁹ Ambedkar, 'Gandhism', n 63 above, 296.

Hindus observe caste, he said, ‘not because they are inhuman or wrong-headed [but] because they are deeply religious’.⁷⁰ For Hindus, caste is a sacred institution, and ‘to ask people to give up their caste is to go contrary to their fundamental religious notions’⁷¹ – ‘a Hindu’s whole life is one anxious effort to preserve his caste’.⁷² Ambedkar’s crucial question was how to bring about the reform of the Hindu social order, how to abolish caste.⁷³ The answer lay in attacking its divine basis.⁷⁴ The difficulty is that caste is an economic as well as a religious system, one which ‘permits unmitigated economic exploitation without obligation’.⁷⁵ As to whether the Hindus would ‘agree to give up the economic and social advantages’ of Untouchability, he observed that ‘vested interests have never been known to have willingly divested themselves unless there was sufficient force to compel them’ – hence his fear that independence would leave the Untouchables at the mercy of the Hindus,⁷⁶ and his determination to secure Constitutional safeguards for the Untouchables when independence came.⁷⁷

1.1.5 Markers for caste

Caste has been endowed with a quasi-physical quality, yet it is not a physical attribute but rather ‘a notion... a state of the mind’.⁷⁸ Accordingly, the markers identifying an individual’s caste are not purely physical. *Jati* groupings are territorially defined, being local or regional, not national. The local ‘caste map’ is a

⁷⁰ Ambedkar, ‘Annihilation of Caste’, n 68 above, 68. Ambedkar used the term ‘Hindus’ to mean ‘caste Hindus’, from whom he distinguished the Untouchables.

⁷¹ Ambedkar, ‘Annihilation of Caste’, *ibid.*, 69.

⁷² Ambedkar, *ibid.*, 53.

⁷³ *Ibid.*, 67.

⁷⁴ *Ibid.*, 68, 69.

⁷⁵ Ambedkar, ‘The Real Issue’, n 40 above, 197.

⁷⁶ Ambedkar, ‘Outside the Fold’, n 53 above, 26.

⁷⁷ Ambedkar, ‘The Real Issue’, n 40 above, 196.

⁷⁸ Ambedkar, ‘Annihilation of Caste’, n 68 above, 68.

matter of local knowledge, especially in rural areas where seventy per cent of India's population live; moreover, this knowledge travels with migration.⁷⁹ Markers for caste include place of origin and residence (actual or ancestral), name (although names can be changed to obscure caste status), current or ancestral occupation, religion or religious practices, education, skin colour (although this is not determinative),⁸⁰ appearance, body language, demeanour, comportment and bodily expression.⁸¹ In the UK, while such markers may not have the same cultural resonance, name, ancestral occupation, place of origin, residence and religious affiliation and place of worship are used to identify caste background. For Indians there is a further marker – 'Scheduled Caste' membership (explained above). Although context-specific, 'Scheduled Caste' has entered diaspora usage, for example on matrimonial websites.⁸²

1.1.6 Caste and occupation

Despite the doctrinal association between caste and occupation, the link has never been watertight or so rigid that individuals could not – theoretically at least – give up a hereditary occupation or enjoy occupational mobility across caste boundaries.⁸³

⁷⁹ The same is true for Pakistanis: 'You can't hide your caste, because there is always someone from your area, and even if there is not, people make new friends. When they go to Pakistan, they visit their friends' homes and find out there'; Shaw, n 29 above, 125.

⁸⁰ One cannot deduce caste from skin colour, although generally most so-called 'upper castes' are fairer than most so-called 'lower caste' people of their region; see T. Zinkin, *Caste Today* (London: OUP, 1962) 1.

⁸¹ See 'Instant Indicators [of caste] in National Human Rights Commission / National Council for Teacher Education, *Addressing Discrimination based on Sex, Caste, Religion and Disability through Educational Interventions: A Handbook for Sensitising Teachers and Teacher Educators* (Delhi: NCTE, 2003) 69; Gorringe and Rafanell (2007), n 11 above, 97-114.

⁸² See, for example, <http://www.shaadi.com/matrimonials/indian-castes> (visited 24 November 2012); conversely see <http://www.tantriclub.co.uk/asian-dating-blog-caste-system-and-dating.php> (visited 24 November 2012).

⁸³ Gandhi believed that in earning a living (as opposed to personal acquisition of skills or knowledge associated with another *varna*), people should follow the hereditary occupation of the *varna* into which they were born, to promote social harmony and prevent class war; see Ambedkar, 'Gandhism', n 63 above, 277-278.

Yet, in the ‘closed economy’ of the village, Dalits were traditionally economically dependent on the upper castes as agricultural wage labourers or service providers, with little possibility of choice in employment. Post-independence affirmative action policies have enabled some Dalits to enter public employment (although few reach the highest echelons), and India’s post-1991 economic liberalisation has created some private sector opportunities. However, it remains the case that certain jobs, such as those considered ritually unclean, are carried out exclusively by Dalits.⁸⁴ Moreover, they often find themselves excluded from ‘high caste’ jobs, albeit now on grounds of ‘merit’ rather than overtly because of caste.⁸⁵

1.1.7 Caste and religion

Doctrinally, caste is associated only with Hinduism,⁸⁶ yet in the UK as in the Indian sub-continent distinctions and discrimination on grounds of caste are found among South Asian adherents of Christianity⁸⁷ and Islam,⁸⁸ notwithstanding the absence of a doctrinal basis for caste in Islam, and Christianity’s doctrinal espousal of

⁸⁴ See n 41, above.

⁸⁵ M. Panini, ‘The Political Economy of Caste’ in Srinivas (ed.) (1996), n 28 above, 28-68. See also Chapter 3 of this thesis.

⁸⁶ ‘Hindu’ was originally a Persian term for the indigenous inhabitants of the Indus valley, subsequently used by the Muslims and the British as a religio-cultural and geographical-cultural term to denote the non-Muslim inhabitants of Hindustan – although for the argument that ‘Hindu’ always had a distinctly religious, not just an ethno-geographical, meaning see D. Lorenzen, ‘Who Invented Hinduism?’, 41(4) *Comparative Studies in Society and History* (1999) 630-659, 634-635. *Hindu-ism* is a nineteenth-century term describing a ‘family’ of religious traditions encompassing Brahminical orthodoxy – the tradition most commonly thought of as Hinduism – and a multiplicity of regional or local traditions; see J. Lipner, *Hindus: Their Religious Beliefs and Practices* (London: Routledge, 1994) 6-9; G. Flood (ed.), *The Blackwell Companion to Hinduism* (Oxford: Blackwell, 2005) 2-4. ‘Hindu caste system’ therefore has both religious and cultural connotations.

⁸⁷ See n 28 above. See also J. Webster, ‘Who is a Dalit?’ in S. Michael (ed.), *Dalits in Modern India: Vision and Values* (New Delhi: Sage, 2007) 76-90; R. Fell McDermott, ‘From Hinduism to Christianity, from India to New York: Bondage and Exodus Experiences in the Lives of Indian Dalit Christians in the Diaspora’ in K. Jacobsen and S. Raj (eds.), *South Asian Christian Diaspora: Invisible Diaspora in Europe and North America* (Farnham: Ashgate, 2008) 223-248; R. Robinson and J. M. Kujur (eds.), *Margins of Faith: Dalit and Tribal Christianity in India* (New Delhi: Sage, 2010).

⁸⁸ See n 29 above.

egalitarianism; and among the Sikhs despite Sikhism's doctrinal rejection of caste.⁸⁹ Hence, despite its doctrinal and ideological basis in Hinduism, in practical terms caste cannot be said to be solely a Hindu phenomenon.⁹⁰ Conversion from Hinduism to another religion (Islam, Sikhism, Christianity, Buddhism) as a means of emancipation from caste oppression has a long history in India,⁹¹ but in reality caste status, in particular Dalit status, frequently accompanies the convert into his or her new religion.⁹² Caste categories are 'terminologically (and behaviourally) distinguished in all religious groups, with or without a religious designation appended (e.g. "high caste Muslim").'⁹³ South Asian Christians of Untouchable origins may be known – and may choose to self-identify – as Dalit Christians, reflecting their own or their ancestors' pre-conversion caste status, while discrimination based on caste among Christians in India and in the diaspora is well-documented.⁹⁴ Conversion to Buddhism has been a popular emancipatory strategy since Ambedkar's 1956 conversion (along with thousands of his followers) to that religion, chosen for its egalitarianism and its disavowal of caste as well as its Indic roots,⁹⁵ but this has proved an imperfect means of escaping caste oppression, since 'Ambedkarite' Buddhists (sometimes termed 'neo-Buddhists') are commonly

⁸⁹ See n 28 above. See also P. Judge, 'Punjabis in England: The Ad-Dharmi Experience', *EPW*, 3 August 2002; E. Nesbitt, 'Valmiki in Coventry: The Revival and Reconstruction of a Community' in Ballard (ed.), n 6 above, 117-141; K. Sato, 'Divisions among Sikh Communities in Britain and the Role of the Caste System: A Case Study of Four Gurdwaras in Multi-Ethnic Leicester', 19(1) *Journal of Punjab Studies* (2012) 1-25.

⁹⁰ See Jodhka & Shah, n 6 above.

⁹¹ See Zelliot, n 16 above, 191.

⁹² Zelliot, *ibid.*, 126-127, 218-221.

⁹³ G. Berreman, 'Social Categories and Social Interaction in Urban India', 74(3) *American Anthropologist* (1972) 567-586, 569.

⁹⁴ See n 87 above. See also P. Louis, 'Dalit Christians: Betrayed by State and Church', *EPW*, 21 April 2007, 1404-1408. Dalit Christian theology has been compared to Latin American 'Liberation Theology'; it has also contributed, along with Buddhism and Ad-Dharm, to the emergence of 'Dalitism' as a distinct philosophical belief and ideology which promotes a radical, humanistic, egalitarian, anti-caste and utopian social vision; P. Rajkumar, *Dalit Theology and Dalit Liberation: Problems, Paradigms and Possibilities* (Farnham: Ashgate, 2010); G. Omvedt, *Seeking Begumpura: The Social Vision of Anti-caste Intellectuals* (New Delhi: Navayana Publishing, 2008).

⁹⁵ See Zelliot, n 16 above, 207-208.

identified as ex-Untouchables. Yet, despite the cross-religious nature of contemporary caste and associated discrimination, the constitutional Scheduled Castes category in India is restricted to members of 'Indic' religions, i.e. Hindus (including Jains), Sikhs and Buddhists, while Muslim and Christian Dalits are denied SC status.⁹⁶

Conversion aside, religion has historically offered Dalits another means of escape from the psychological tyranny of caste oppression through devotion to a 'low caste' or caste-transcending religious figure or *sant* and the creation of distinct Dalit religious identities, for example the radical medieval Indian *bhakti* movement which challenged religious and ritual orthodoxy and the notion that Untouchables could not access the divine,⁹⁷ and the Ad-Dharm movement which emerged in north India in the 1920s.⁹⁸ Contemporary Ad-Dharm in India and the UK includes Valmiki and Ravidassias – religious groupings which by definition comprise individuals from diverse religious traditions, including Hinduism and Sikhism with shared 'Untouchable' origins.⁹⁹

1.1.8 Status differences among Dalits

Ambedkar identified the religious legitimisation of economic exploitation and social oppression, and the concept of Untouchability, as the unique and distinguishing

⁹⁶ See Chapter 3 of this thesis; A. Waughray, 'Caste Discrimination and Minority Rights: The Case of India's Dalits', 17 *International Journal on Minority and Group Rights* (2010) 327-353.

⁹⁷ Zelliot, n 16 above, 270; Omvedt, n 94 above; Leslie, n 34 above, 53-64; M. Wakaner, *Subalternity and Religion: The prehistory of Dalit empowerment in South Asia* (Abingdon: Routledge, 2010).

⁹⁸ M. Juergensmeyer, *Religion as Social Vision: The Movement against Untouchability in 20th-Century Punjab* (Berkeley: University of California Press, 1982). The *Adi* movements (*Adi* meaning 'original') of the 1920s (including Ad Dharm in north India and Adi Dravida in the south) claimed that the Untouchables were the original inhabitants of India, with inherent traditions of a casteless society based on notions of equality and unity.

⁹⁹ Leslie, n 34 above, 33; E. Nesbitt, "'My Dad's Hindu, my Mum's side are Sikhs': Issues in Religious Identity", University of Manchester, at <http://casas.org.uk/papers/pdfpapers/identity.pdf> (visited 3 December 2012).

features of caste. Yet despite Ambedkar's framing of Dalit experience in terms of a pan-Indian Dalit identity and despite the recent emergence of a discourse of transnational Dalit solidarity, Dalits do not constitute a homogenous category but are themselves internally hierarchically differentiated.¹⁰⁰ This appears to be linked to assertions of status superiority by more affluent or politically powerful Dalits, leading to 'intra-Dalit' or internal status-based inequalities and prohibitions.¹⁰¹ Intra-Dalit status differences may also be reinforced by Dalit 'origin myths' whereby certain Dalit castes attribute their present subjugated position to the (undeserved) loss of a historically higher status.¹⁰² Such myths commonly contest the position of Untouchables within the caste system but not necessarily the system itself – as seen, writes Mosse, in the 'bifurcation' by Untouchables of low status roles and the displacing of the most negative aspects of such roles onto yet lower status groups.¹⁰³

1.1.9 Caste as a cross-cultural concept

The question whether caste is a uniquely Indian social institution incomparable to, say, racism in the United States or class, or whether it is merely one among many versions of a universal social form involving societal inequality, has been much debated.¹⁰⁴ In other words, can caste be a cross-cultural concept? To what extent is it meaningful to talk about caste outside India (and the South Asian diaspora)? How

¹⁰⁰ A. Judge, 'Hierarchical Differentiation among Dalits', *EPW*, 12 July 2003, 2990-2991. Internal differentiation between Scheduled Castes was officially recognised by the State authorities in Punjab in 1997; S. Jodhka & A. Kumar, 'Internal Classification of Scheduled Castes: The Punjab Story', *EPW* 27 October 2007, 20-23; Zinkin, n 80 above, 8.

¹⁰¹ S. Folmer, 'Identity Politics among Dalits in Nepal', *Himalaya* XXVII (1-2) 2007, 41-53, 50.

¹⁰² See section 1.3.4 below.

¹⁰³ D. Mosse, 'Replication and Consensus among Indian Untouchable (Harijan) Castes: Comment', 29(2) *Man* (1994) 457-460, 459.

¹⁰⁴ See E. Leach, 'Caste, Class and Slavery: The Taxonomic Problem' in A. de Reuck and J. Knight (eds.), *Caste and Race: Comparative Approaches* (London: J & A. Churchill Ltd., 1967) 5-16, for whom caste and class were sociologically distinct. In contrast, Berreman and Bailey saw caste as a transferable social concept; see G. Berreman, *Caste and Other Inequities: Essays on Inequality* (Meerut: Folklore Institute, 1979); F. G. Bailey, *Caste and the Economic Frontier* (Manchester: Manchester University Press) 19640.

useful is caste as a tool of analysis independent of cultural context, ‘detached from any Indian anchorage’?¹⁰⁵ Until the late twentieth century this debate had largely focussed on the use of caste as an explanatory category for oppression in the US based on race and colour (although Hutton wrote of institutions analogous to caste in Africa, Japan and Burma in the 1940s).¹⁰⁶ American sociologist Oliver Cox argued that the fundamental bases of caste and the US racial divide are different, race being based on ‘physical identifiability’ and caste on cultural heritage.¹⁰⁷ The argument is that, unlike race relations in the USA, caste ‘commands a degree of collective consensus or at least compliance’ from low and high castes alike¹⁰⁸ (itself a contested argument, examined below). In the past fifteen years the question has been whether caste in South Asia (particularly India) can be subsumed, sociologically and/or legally, within wider universal concepts such as racial discrimination on grounds of descent or discrimination based on work and descent,¹⁰⁹ and whether ‘caste’ in the South Asian sense has any mileage as an explanatory category for analogous forms of inherited status discrimination outside South Asia and its diaspora (for example, Japan and parts of Africa).¹¹⁰ Recent developments in the UK have thrown up

¹⁰⁵ Sharma, n 5 above, 17; D. Keane, *Caste-Based Discrimination in International Human Rights Law* (Aldershot: Ashgate, 2007) 41-44.

¹⁰⁶ See L. Warner, ‘American Caste and Class’, 42(2) *American Journal of Sociology* (1936) 234-237; G. Berreman, ‘Caste in India and the United States’, 66(2) *American Journal of Sociology* (1960) 120-127; Hutton, n 64 above.

¹⁰⁷ O. Cox, ‘Race and Caste: A Distinction’, 50(5) *American Journal of Sociology* (1945) 360-368, 362.

¹⁰⁸ Sharma, n 5 above, 17, 47-58.

¹⁰⁹ See n 9 above on caste as a subset of descent-based racial discrimination. Discrimination based on work and descent is a new legal category which includes but is not limited to caste. ‘Work and descent’ was adopted by the UN in 2000 in order to locate caste discrimination within a wider international human rights category as a distinct human rights violation but one of global concern, thereby avoiding a specific focus on India and Indian caste; UN Sub-Commission, Resolution 2000/4, n 2 above. This strategy has not wholly succeeded – Dalit NGOs describe descent and ‘work and descent’ as the UN terms for caste, while India categorically rejects the characterisation of caste discrimination as a form of descent-based racial discrimination within the purview of ICERD and Japan disputes a similar characterisation *vis-à-vis* discrimination against its Burakumin minority; see Chapter 4 of this thesis.

¹¹⁰ See E. Obinna, ‘Contesting identity: the Osu caste system among Igbo of Nigeria’, 10(1) *African Identities* (2012) 111-121; T. Tamari, ‘The Development of Caste Systems in West Africa’, 32(2) *The Journal of African History* (1991) 221-250; E. Su-lan Reber, ‘Buraku Mondai in Japan: Historical and

another question: whether caste can have mileage as a legal as well as a sociological category in the diaspora context.

1.1.10 Caste in the diaspora

The South Asian diaspora exhibits examples of both the dissolution or near-dissolution of caste (sometimes, paradoxically, alongside the retention of caste names traditionally associated with the demarcation of caste status and continued adherence to ‘pollution ideologies once associated with caste hierarchies’)¹¹¹ and the persistence of caste and caste consciousness, including endogamy and caste-based discrimination.¹¹² The picture in individual countries appears to depend largely on the history and nature of South Asian migration to the country concerned. In those countries where caste persists, the question arises as to the nature and role of caste and the possibility – or desirability – of its dissolution.

1.2 **Religious and historical origins of a caste society**

1.2.1 Indo-Aryans, the *Rg Veda* and the origins of *varna*

The demise of the indigenous bronze-age Indus Valley (Harappan) civilisation in northern India, around 1700 BC, left the way open for the Indo-Aryans (*arya* meaning noble) – nomadic, tribal, Indo-European-speaking peoples from Eastern Europe and central Asia who had migrated first into Iran and Afghanistan from

Modern Perspectives and Directions for the Future’, 12 *Harvard Human Rights Journal* (1999) 297-360, 300, 302; T. Tomotsune, ‘Nakagami Kenji and the Buraku issue in post-war Japan’, 4(2) *Inter-Asia Cultural Studies* (2003). North Korea is one of the latest countries to be identified as having a hereditary, socio-political ranking system amounting to a caste system based on family background and occupation; “North Korea caste system ‘underpins human rights abuses’,” *The Telegraph*, 6 June 2012.

¹¹¹ S. Trink, ‘Cleanliness in a Caste-less Context: Collective Negotiations of Purity and Pollution among Indo-Fijian Hindus’, 22(1) *Anthropological Forum* (2012) 25-43.

¹¹² See n 89 above.

around 2000 BC, and thence into northern India, bringing with them the horse, iron weaponry and worship practices centred on priestly incantations and ritual sacrifices to the gods.¹¹³ Nineteenth-century European scholarship theorised an ‘Aryan invasion’ of northern India around 1500 BC, but current scholarly consensus is of a prolonged period of intermingling and acculturation of the Aryans and the Indus valley peoples, resulting in the emergence of the Indo-Aryans.¹¹⁴ *Arya* social identity was determined not racially or biologically, says the Indian historian Romila Thapar, but culturally – the Aryans were distinguished from non-Aryan indigenous groups, or *dasas/ dasyus* (initially ‘other’, later ‘slave’) and *mleccha* (foreigners or barbarians), by such characteristics as Aryan speech forms, belief systems and rituals.¹¹⁵ Although initially neither a fixed nor a homogenous category,¹¹⁶ what was fixed, says Thapar, was the notion of a dominant group ‘with the right to demand subservience from others’, a notion underpinned and legitimised by the ideology of *varna*. Subsequently, *Arya* became identified with membership of the dominant culture and superior social status, and *dasa* with subordinate status – irrespective of origins.¹¹⁷

¹¹³ Varying estimates of the span of the Indus Valley civilisation exist. It is now regarded as ‘an indigenous development among peoples of mixed origin and diverse racial types who had resided in the Indus Valley for centuries’; V. Jha, ‘Social Stratification in Ancient India: Some Reflections’, 19(3-4) *Social Scientist* (1991) 19-40, 32-33. Its demise is attributed to environmental changes and/or natural disaster; S. Wolpert, *A New History of India* (Oxford: OUP, 2000, 6th edition) 21-22; R. Thapar, *The Penguin History of Early India: From the Origins to AD 1300* (New Delhi: Penguin Books, 2003) 87. On the Aryans see P. Heehs, *Indian Religions: A Historical Reader of Spiritual Expression and Experience* (London: Hurst & Co., 2002) 40; Wolpert, *ibid.*, 4; L. Patton, ‘Veda and Upanishad’ in Mittal & Thursby (eds.), n 14 above, 37-51, 37.

¹¹⁴ Patton, *ibid.*, 38.

¹¹⁵ Thapar (2003), n 113 above, 136.

¹¹⁶ Thapar (2003), *ibid.*

¹¹⁷ *Ibid.*

The *Rg Veda* – India’s earliest surviving religious text – was composed orally by the Indo-Aryans sometime between 1500 and 900 BC,¹¹⁸ although not written down until around 600 BC.¹¹⁹ It is the earliest of four texts known collectively as the *Vedas*, *veda* meaning (sacred) knowledge in Sanskrit.¹²⁰ The *Rg Veda* consists of 1,028 poems or mantras (incantations)¹²¹ to the Aryan gods, grouped in ten books, or *mandalas*. The *Vedas* are considered divine revelation or *sruti*, meaning ‘revealed’ texts seen and heard by inspired ‘seers’ (*rsi*) who had insight into pre-existing cosmic truths. This knowledge was hereditary and was learned and transmitted entirely orally, in Sanskrit (the language which evolved from old Indo-Aryan).¹²² It was the role of the Aryan priests, or Brahmins, as ‘custodians of the *Veda*’¹²³ to memorise the Vedic hymns and officiate over sacrifices.

1.2.1.1 *Purusa-Sukta: the Creation Myth*

In the tenth and last book of the *Rg Veda*, in verses 11–16, is found, in hymn form, the creation myth of *Purusa*, the primordial or cosmic man, from whose sacrificed and dismembered body the gods created the cosmos and society, the latter divided into the four hierarchical, social classes or *varnas*:

When they divided the Man, into how many parts did they apportion him? What do they call his mouth, his two arms and thighs and feet?

¹¹⁸ Thapar (2003), *ibid.*, 111; Heehs, n 113 above, 40; S. Wolpert, *A New History of India* (Oxford: OUP 2009, 8th edition) 26.

¹¹⁹ Wolpert (2009), *ibid.*, 25. The *Vedas* share a cultural and linguistic source with the *Avesta*, the sacred text of India and Iran’s Zoroastrians (Parsees); see B. Avari, *India: The Ancient Past* (London: Routledge, 2007) 63; Thapar (2003), n 113 above, 108.

¹²⁰ M. Witzl, ‘Vedas and Upanishads’ in G. Flood (ed.), n 86 above, 68; Patton, n 113 above, 38; Flood (1998), n 13 above, 35. The *Vedas* share a common cultural and linguistic source with the *Avesta*, the sacred text of present-day Zoroastrians (Parsees) in Iran and India; B. Avari, *India: The Ancient Past* (London: Routledge, 2007) 63; Thapar (2003), n 113 above, 108.

¹²¹ W. Doniger, *The Hindus: an alternative history* (Oxford: OUP, 2010) 104.

¹²² Patton, n 113 above, 39.

¹²³ B. Holdrege, ‘Dharma’ in Mittal and Thursby (eds.), n 14 above, 213-248, 221.

His mouth became the Brahman; his arms were made into the Warrior, his thighs the People, and from his feet the Servants were born.¹²⁴

While the duties of the four social classes are not elaborated in the *Purusa* myth itself, and there is at this stage no mention of a fifth group outside the *varna* system,¹²⁵ the imagery is invoked in later texts, says Holdrege, to provide cosmic legitimisation for the division of labour between the *varnas*, and indeed for the hierarchical and immutable nature of the system.¹²⁶ The early Vedic texts introduce the key themes and concepts which later Hinduism expands on and develops, and which underpin classical Hindu law – the notion of the cosmic whole¹²⁷ as holistic, ordered, balanced and governed by the principle of *rta* or cosmic order (later, *dharma*), which ‘ensures the integrated functioning of the natural order, the divine order, human order and sacrificial order’.¹²⁸ *Purusa*’s head, naval and feet are correlated with the heavens, mid-regions and earth, and his mouth, arms, thighs, feet with four social classes (Brahmans, Kshatriyas, Vaishyas and Shudras).¹²⁹ The *Purusa* hymn is important because it presents hierarchical, hereditary social groups as part of the structure of the cosmos.¹³⁰ Doniger suggests another reason: it ranks kings below priests, whereas Buddhist literature puts kings at the top. Doniger describes this as ‘one of the earliest documented theocratic takeovers’; the *Purusa* myth, she suggests, may have been the ‘foundational myth’ of the Brahmin class.¹³¹

¹²⁴ W. Doniger (trans), *The Rig Veda* (London: Penguin Books, 1981) 31.

¹²⁵ V. Jha, ‘Stages in the History of Untouchables’, II(I) *Indian Historical Review* (1975) 14-31, 14.

¹²⁶ Holdrege, n 123 above, 218.

¹²⁷ W. Menski, *Comparative Law in a Global Context: The Legal Systems of Africa and Asia* (Cambridge: CUP, 2006) 205.

¹²⁸ Holdrege, n 123 above, 215.

¹²⁹ Holdrege, *ibid.*, 217.

¹³⁰ Flood (1998), n 13 above, 49.

¹³¹ Doniger (2010), n 121 above, 119.

At first the Vedic people distinguished only two classes or *varnas*, their own (the *arya*) and that of the people they conquered (*dasas* or *dasyu*). Although the ‘rigid hereditary system of the professions characteristic of the caste system was not yet in place’, by the end of the Vedic period the class system was in position. By now, the important social division was not into just two classes but four.¹³²

1.2.2 Origins of *jati*

While the origin of *varna* lies in the *Rg Veda*, the origin of *jati* is less easy to pinpoint. It is possible, says Thapar, that the genesis of the concept may have been the clan (with which *jati* has close parallels as a form of social organisation), and that the formation of *jatis* preceded *varna*.¹³³ Wolpert and Thapar suggest that the roots of the *jati* system may lie in India’s pre-Aryan past; floor plans in different quarters of the ancient Indus Valley city of Mohenjo-daro indicate a social hierarchy based on occupational status and fear of pollution through miscegenation or commensality.¹³⁴ Fear of contamination or pollution through drinking water, later associated with caste distinctions, may also have originated at this time.¹³⁵ In the later Aryan era, occupational specialisations are listed in *Brahmana* religious texts¹³⁶ which, as sacred books, confer a sanctity and significance to the work performed by different groups in society. But occupation alone cannot explain the emergence of a caste social order, which is as much about totem and taboo as about occupation. Wolpert

¹³² Doniger (2010), *ibid.*, 116-118.

¹³³ Thapar (2003), n 113 above, 63-64.

¹³⁴ Wolpert (2009), n 118 above, 14-16, 42. For a contrary view see Jha (2004) in Parasher-Sen (ed.), n 50 above, 206, n 277.

¹³⁵ Wolpert (2000), n 113 above, 16. Wolpert cites the discovery of fragments of clay drinking cups as a possible initiation of the later Indian habit of using cups only once for fear of pollution. See also R. Thapar, *The Penguin History of Early India from the Origins to AD 1300* (New Delhi: Penguin Books, 2003) 64. Speculation that religion underpinned Harappan social organisation is based on archaeological finds such as the Great Bath at Mohenjo Daro which, argue scholars, was probably used by priests for ritual washing (a familiar Hindu custom); Avari, n 120 above, 48-9.

¹³⁶ The *Brahmanas* are commentaries elaborating on the four *Vedas*; Heehs, n 113 above, 41.

suggests fear of losing power dictated marriage only within the limits of a trusted group, while tribal fears of losing ‘identity’, or racial fears of losing ‘purity’, contributed to the creation of a system of thousands of *jatis*.¹³⁷ Vivekanand Jha disputes that the *varna* system came to India with the Aryans, or that Untouchability originated with the Harappans. Rather, he argues, the four-fold *varna* system was an ‘indigenous development’ of the later Vedic period. However, Jha concurs that *varna* was ‘in essence exploitative in nature and content’ – sacrifices were ‘consciously designed to help rulers overcome internal conflicts and to make the Vaisya and the Shudra submissive’, and in this process the role of the Brahmins was crucial.¹³⁸

1.2.3 Hierarchy, heredity and endogamy

The chief characteristics of the caste social order as it emerged in India were hierarchy (inherent in the *varna-jati* system) and hereditary occupation, essential to maintaining a division of labour.¹³⁹ The ideological legitimisation of the system was its sanction by religion, while the principle of heredity was maintained by the twin practices of endogamy and commensality.¹⁴⁰ The control of women was central to the Brahminical social order.¹⁴¹ Endogamy (described by Ambedkar as the vehicle by which caste is maintained and replicated)¹⁴² and the subordination of women are closely linked.¹⁴³ Traditionally, marriages (especially among the upper castes) were arranged and girls were married very young, as arranged and child marriages were

¹³⁷ Wolpert (2009), n 118 above, 42.

¹³⁸ Jha (1991), n 113 above, 27-29.

¹³⁹ A. Parasher-Sen, ‘Introduction’ in Parasher-Sen (ed.), n 50 above, 1-80, 7.

¹⁴⁰ Parasher-Sen, *ibid.*

¹⁴¹ K. Visweswaran, ‘India in South Africa: Counter-Genealogies for a Subaltern Sociology?’ in Natrajan and Greenough (eds.), n 44 above, 326-374, 344-345.

¹⁴² See Ambedkar, ‘Annihilation of Caste’, n 68 above, 289.

¹⁴³ S. Jaiswal, ‘Studies in Early Indian Social History: Trends and Possibilities’, 6(1-2) *Indian Historical Review* (1979-80) 1-63, 5, cited in Parasher-Sen, n 139 above, 8.

easier to regulate according to the rules of caste.¹⁴⁴ Upper-caste restrictions on widow remarriage similarly served to maintain caste boundaries. While ideologies of chastity and caste purity regulated upper caste women and girls, Dalit women experienced the ‘expropriation of manual and sexual labour’,¹⁴⁵ including rape and sexual exploitation via the *devadasi* system and prostitution.

1.2.4 Origin of Untouchability

The *Rg Veda* does not mention Untouchability.¹⁴⁶ Hanumanthan argues that Untouchability is a ‘by-product’ of the *varna* system, which separates the three twice-born *varnas* from the once-born Shudras. It also separates those within the system – *savarnas* - from those outside the system, or *avarnas* (the Untouchables), identified as *Candalas* in the later Vedic texts.¹⁴⁷ *Candalas* may be Untouchable by birth/occupation or they may have become Untouchable through bad conduct. Buddhist and Jaina literature also refers to degraded castes (based on occupation or profession), leading Hanumanthan to attribute the growth of Untouchability to the various taboos which existed among ancient Indians, irrespective of religion.¹⁴⁸ Jha considers the *Candalas* were most likely one of the indigenous tribes known to the Aryans, living on the perimeters of Aryan settlements, with whom the process of assimilation had begun;¹⁴⁹ they do not appear in the *Rg Veda* but are mentioned in later Vedic literature. Jha argues that ‘ideology and force were both systematically

¹⁴⁴ Beteille (2012), n 10 above, 41-48, 45.

¹⁴⁵ A. Rao, ‘Introduction’ in A. Rao (ed.), *Gender and Caste* (New Delhi: Kali for Women, 2006) 1-47, 17-18; L. Dube, ‘Caste and Women’ in Rao (ed.), *ibid.*, 223-248.

¹⁴⁶ Jha (2004) in Parasher-Sen (ed.), n 50 above, 158.

¹⁴⁷ K. R. Hanumanthan, ‘Evolution of Untouchability in Tamil Nadu up to AD 1600’ in Parasher-Sen (ed.), n 50 above, 125-156, 126.

¹⁴⁸ Hanumanthan, *ibid.*

¹⁴⁹ Jha (2004) n 50 above, 157.

employed’ to slowly develop caste and Untouchability in India.¹⁵⁰ Those tribes with ‘poor material background fared badly in the unequal encounter with the Aryans’; these were the first peoples to become ‘tabooed and damned as Untouchables’, relegated to the ritually lowest social position.¹⁵¹

1.3 Sociological theories and interpretations of caste

1.3.1 Introduction

Sociological theories of caste¹⁵² have fallen traditionally into two broad categories, the ‘essentialist’ or idealist, which focuses on religious and ideological factors, portraying India as a timeless society of which caste is the defining and essential feature,¹⁵³ and the secular or materialist, focussing on socio-economic and political factors.¹⁵⁴ It is submitted that Ambedkar has succeeded best in capturing the complexities of caste as a multi-faceted, religious, economic and social phenomenon. Since the 1990s, public and academic debate on caste in India has shifted from the merits and de-merits of the various theories of caste, to the changing nature of caste – whether it is dissolving in the face of democracy, modernisation and economic liberalisation, whether ‘it is becoming more a political than a social category, or whether it remains as oppressive as it always has been’.¹⁵⁵ In the UK, caste has not been dissolved. Instead, caste consciousness persists in the maintenance of caste-based identities as social/cultural identities;¹⁵⁶ the question then arises whether it is

¹⁵⁰ Jha (1991), n 113 above, 29.

¹⁵¹ Jha (1991), *ibid.*, 29; Jha (2004), n 50 above, 159-60.

¹⁵² For an overview of sociological theories of caste see Sharma, n 5 above.

¹⁵³ Sharma, n 5 above, 6.

¹⁵⁴ S. K. Mitra, ‘Caste, democracy and the politics of community formation in India’ in U. Sharma & M. Searle-Chatterjee (eds.), *Contextualising Caste: Post-Dumontian Approaches* (Oxford: Blackwell, 1994).

¹⁵⁵ P. deSouza, ‘Humiliation in a Crematorium’ in Guru (ed.) (2011), n 38 above, 124-139, 137.

¹⁵⁶ Metcalfe and Rolfe, n 4 above.

possible for caste-based identities to be decoupled from the prejudice and discrimination of the caste system and to be egalitarian in practice.¹⁵⁷

1.3.2 Colonialism and the origins of caste as a sociological concept

Caste as a sociological concept, writes Sharma, originated in the systematic attempts by colonial administrators and scholars to explain, theorise and interpret caste, and to classify Indians by caste.¹⁵⁸ As a consequence, pre-existing caste norms, conventions and observances were ‘expanded and sharpened’ and caste language and ideology became incorporated into the structures of government, albeit that ‘Indians as much as Britons... took the initiative in this process’.¹⁵⁹ Nonetheless, until the mid-nineteenth century, caste was subsidiary to race in colonial analyses of Indian society.¹⁶⁰ One reason for the rise of caste as a sociological category, suggests Bayly, was the role of literate Brahmins who acted as interpreters of the Sastric texts which the British authorities treated as authoritative sources of native law. This privileged the Brahminical view ‘as the correct interpretation of Hindu culture and custom’,¹⁶¹ giving Brahmins unprecedented influence¹⁶² and a ‘larger than legitimate role in the conception of Indian society’.¹⁶³ Another reason was the launch in 1871–2 of the decennial All-India Census, which sought to collect systematic information about

¹⁵⁷ Judge, n 89 above.

¹⁵⁸ In attempting to classify their subjects by caste the British were following India’s previous colonial rulers, the Mughals, who categorised the Indian population on the basis of ‘essential’ characteristics such as skin colour; Bayly (1999), n 1 above, 104; Sharma, n 5 above, 9–10.

¹⁵⁹ Bayly (1999), *ibid.*, 4.

¹⁶⁰ S. Bayly, ‘Caste and ‘Race’ in the colonial ethnography of India’ in P. Robb (ed.) *The Concept of Race in South Asia* (New Delhi: OUP, 1997) 165–218, 168, 215.

¹⁶¹ D. Gupta, ‘Caste and Politics: Identity over System’, 34 *Annual Review of Anthropology* (2005) 409–427, 413.

¹⁶² Bayly (1999), n 1 above, 100.

¹⁶³ D. Gupta, ‘The certitudes of caste: When identity trumps hierarchy’, 38(1/2) *Contributions to Indian Sociology* (2004) v–xv, viii.

Indian society and the economy, *inter alia* by classifying all Indians by religion, caste or tribal community, occupation, age and sex.¹⁶⁴

1.3.3 Racial theories of caste

Initially, race was defined by the orientalist linguistically and culturally rather than in a physiological sense.¹⁶⁵ Caste, nation, tribe and race were used interchangeably to convey ties of affinity.¹⁶⁶ From the early nineteenth century, however, European ideas about race were influenced by the rise of ‘race science’ – evolutionary theories about the moral and biological characteristics of civilised (and degenerate) races or nations and the construction of global comparative schemes of racial ranking based on physiological ‘types’.¹⁶⁷ The idea that castes reflected *racial* differences was first mooted by Sir William Jones, the eighteenth-century scholar-official and translator, who proposed that Sanskrit and European languages were of common stock.¹⁶⁸ Colonial ideas of race as the basis of caste and the caste system were cemented by the colonial administrator H. H. Risley, the 1901 Census Commissioner.¹⁶⁹ Based on the interpretation of *varna* as colour in Hindu texts, he argued that the caste system was based on racial antagonism between light-skinned Aryan invaders and dark-skinned indigenous Dravidians.¹⁷⁰ Risley devised a hierarchical classification scheme based on anthropometric measurements which divided Indians into seven basic racial

¹⁶⁴ Bayly (1999), n 1 above, 124. For a history of the British India Census see B. Cohn, *An Anthropologist Among the Historians and Other Essays* (New Delhi: OUP, 2012) 231-247.

¹⁶⁵ Bayly (1997), n 160 above, 172, 173.

¹⁶⁶ Bayly (1997), *ibid.*, 175; Bayly (1999), n 1 above, 109.

¹⁶⁷ Bayly (1997), *ibid.*, 179, 214.

¹⁶⁸ C. Bates, ‘Race, Caste and Tribe in Central India: The Early Origins of Indian Anthropometry’ in Robb (ed.), n 160 above, 219-259, 233.

¹⁶⁹ See Cohn, n 164 above, 247; H. H. Risley, *The People of India* (1915, reprinted Delhi, Low Price Publications, 2003) 5.

¹⁷⁰ Risley, *ibid.*, 262, 275. See note 13 above on *varna* as meaning a system of colour symbolism reflecting the social hierarchy, not skin colour.

types,¹⁷¹ with Dravidians considered the most primitive and Indo-Aryans the most ethnologically advanced.¹⁷² Caste, he believed, was an evolutionary weapon adopted by the superior Aryans to preserve their purity of blood and racial stock from the perils of miscegenation with the darker indigenous populations, i.e. castes were races and the distinction between high and low castes was really a distinction between peoples of supposedly superior and inferior racial endowment.¹⁷³

The Indian ‘non-Brahmin movement’ of the early twentieth century also espoused a racial analysis of caste, arguing that Brahmins and non-Brahmins were different races with correspondingly divergent interests.¹⁷⁴ Ambedkar, however, dismissed arguments that castes constituted separate racial groups, either in the biological or the social sciences sense of the term:

[T]he caste system came into being long after the different races in India had commingled in *blood and culture*. To hold that distinctions of caste are really distinctions of race and to treat different castes as though they were so many different races is a gross perversion of facts (sic) (*italics added*).¹⁷⁵

¹⁷¹ Bates in Robb (ed.), n 160 above, 242; Risley, *ibid.*, 33- 34, 276.

¹⁷² Bayly (1999), n 1 above, 132. The idea that social divisions and groupings reflected innate racial characteristics of a moral and biological nature underpinned the notion of inherited criminality in the Criminal Tribes legislation, introduced in the late nineteenth century: see Bates, n 168 above, 248. The role of physiognomic differences in the construction of caste has been the subject of much debate and contestation; Robb argues that ‘though in India Untouchability and indeed other concepts of Otherness were pre-eminently matters of the body, yet they were concerned more fundamentally with conduct than physical characteristics’, noting further that ‘in many European theories of race too the alleged cultural and moral differences assumed greater importance than the physical ones’; Robb (ed.), n 160 above, 9-10.

¹⁷³ Bayly (1997), n 160 above, 169.

¹⁷⁴ A. Beteille, ‘Race and Descent as Social Categories in India’, 96(2) *Daedalus* (1967) 444-463, 458. In the 1940s, a separatist organisation, Dravida Kazhagam, campaigned for a Dravidian state in south India on the grounds that the Dravidians constituted a distinct race; *ibid.*, 459-460. On caste as racial see V.T. Rajshekar, *Dalit: The Black Untouchables of India* (Atlanta: Clarity Press, 1995); D. Reddy, ‘The Ethnicity of Caste’, 78(3) *Anthropological Quarterly* (2005) 543-584.

¹⁷⁵ Ambedkar, ‘Annihilation of Caste’, n 68 above, 48.

In this he pre-empted the position of later Indian governments on the ‘caste as race’ question, but for different reasons. Ambedkar’s objection was to biological arguments justifying the caste system as a mechanism for preserving the perceived racial and genetic purity – and superiority – of the dominant castes. He argued that ‘men (sic) of pure race exist nowhere’, that this was especially true of the people of India and that the caste system ‘does not demarcate racial division’ but is ‘a social division of people of the same race’.¹⁷⁶ Likewise India, before CERD, has maintained that the caste system is based on the ancient functional division of Indian society rather than racial distinctions, although this argument may be motivated less by ideological objections to notions of biological or genetic caste purity than by concern to shield caste from international scrutiny as a form of racial discrimination.

1.3.3.1 Caste and genetics

Recent research by population geneticists indicates that, broadly speaking, the so-called ‘upper castes’ show closer genetic affinities with West-Eurasian populations than do the so-called ‘lower castes’, who show greater affinity to Asian populations.¹⁷⁷ However, the existence of such genetic affinities does not mean that caste groups are genetically homogenous or distinct; indeed, the opposite has been established:¹⁷⁸ there is ‘no clear congruence of genetic and geographical or

¹⁷⁶ Ambedkar, *Ibid.* 49. See also Beteille (1967), n 174 above, 448-449: ‘No significant social unit in India – whether based on language, religion or caste – is racially homogenous... even tribal groups – generally assumed to be homogenous – show a great deal of internal variation when examined anthropometrically... ..in spite of rigid rules of endogamy, no meaningful social unit can be readily identified by its physical characteristics’.

¹⁷⁷ M. Bamshad et al., ‘Genetic Evidence on the Origins of Indian Caste Populations’, 11 *Genome Research* (2001) 994-1004; A. Basu et al., ‘Ethnic India: A Genomic View, With Special Reference to Peopling and Structure’ 13 *Genome Research* (2003) 2277-2290.

¹⁷⁸ Basu et al., *ibid.*, 2284.

sociocultural affinities' among caste groups.¹⁷⁹ Moreover, 'while genes may reflect social patterns, social status is not genetic'.¹⁸⁰ The argument that Dalits as a whole or individual caste groups can be distinguished from each other on biological or genetic grounds was addressed by the Supreme Court of India in 2000, when a scientist tried to sue his in-laws for luring him into marrying their daughter by claiming that they came from a high caste family, when in fact they were of low caste origins; the court rejected his argument that the caste origins of his wife could be scientifically proven.¹⁸¹

1.3.4 Louis Dumont and his critics

In 1966, Louis Dumont, a French anthropologist, devised a theory of caste based on what he believed to be the underlying ideological principles and values of Hindu civilisation.¹⁸² His influential book, *Homo Hierarchicus*, was a response to the ultra-empirical fieldwork studies of the 1950s and 1960s,¹⁸³ which he attacked as failing to grasp India's historic essence and unique difference from the West. Dumont identified a system of oppositions as the structure underlying the caste order,¹⁸⁴ and the opposition of the pure and the impure as the fundamental principle underlying

¹⁷⁹ Basu et al., *ibid.*; R. Tahkur et al., 'Mitochondrial DNA variation in ranked caste groups of Maharashtra (India) and its implications on genetic relationships and origins' (2003) Jul-Aug 30(4) *Annual of Human Biology* 443-454.

¹⁸⁰ L. Jorde, transcript of conference paper presented at Anthropology, Genetic Diversity and Ethics: A Workshop at the Center for Twentieth Century Studies, University of Wisconsin-Milwaukee, 12-13 Feb 1999, cited in Waughray (2009), n 36 above, 208.

¹⁸¹ See *G.V. Rao v L.H.V. Prasad & Others*, dismissal of Special Leave Petition, 6 March 2000, at <http://judis.nic.in/supremecourt/imgs1.aspx?filename=16497> (visited 22 February 2013). See also J. Singh, 'Court Rules out Caste Differences', *The Guardian*, 7 March 2000.

¹⁸² L. Dumont, *Homo Hierarchicus: The Caste System and Its Implications* (Chicago: University of Chicago Press, 1980). For a contemporaneous discussion of *Homo Hierarchicus* see 'Contributions to Indian Sociology' (1971) 1-81. See also Searle-Chatterjee and Sharma (eds.), n 154 above.

¹⁸³ Such as Bailey, n 104 above. These empirical studies were themselves a response to the text-based accounts of Indian society produced by the 'armchair' sociologists of nineteenth-century Europe.

¹⁸⁴ Dumont, n 182 above, 39.

caste (an idea articulated earlier by Indian historian S.V. Ketkar).¹⁸⁵ Dumont viewed caste as the essence of Indian society – a cohesive, integrated system, culturally and ideologically rooted in Hinduism where ‘each particular man in his place must contribute to the global order’¹⁸⁶ – in contrast to the atomised individualism of Western society. Despite its inherent hierarchy and inequality, Dumont argued that caste society was not exploitative because it was oriented to the collectivity rather than the individual; functionally, the system provided social cohesion.¹⁸⁷

Dumont’s model of caste society as a system of consensual interdependence has been widely criticised as ignoring the material (economic) basis of caste. ‘Materialists’ accuse Dumont and his supporters of failing to recognise the empirical realities of caste oppression;¹⁸⁸ caste is about power, ‘institutionalised inequality, guaranteed differential access to the valued things in life’.¹⁸⁹ Caste systems generate ‘enormous conflict’¹⁹⁰ and are maintained not by consensus or ideological acquiescence but through the threat or exercise of power.¹⁹¹ They are marked by mobility striving, whether in the form of status emulation (‘Sanskritisation’)¹⁹² or constant contestation. Many Dalits reject the religious criteria by which caste is ranked; caste

¹⁸⁵ Dumont, *ibid.*, 43. Ketkar identified endogamy and hierarchy as key characteristics of a system underpinned by theological doctrine (ideology), and purity and pollution as the chief principle upon which the entire system depends; S.V. Ketkar, *History of Caste in India* (Delhi: Low Price Publications, 2010, first published 1909) 27, 29, 116, 121. Dumont cites Celestin Bouglé, *Essais sur le régime des castes* (Cambridge: CUP, 1971, English trans., first published 1908), whose emphasis on the specifically Hindu/Indian nature of caste and its religious/ritual aspects, and his holistic analysis of caste as a consensual system based on shared moral and ritual principles, predates Dumont’s analysis by almost sixty years.

¹⁸⁶ Dumont, n 182 above, 9, 11.

¹⁸⁷ Dumont, *ibid.*, 105.

¹⁸⁸ See J. Menscher, ‘The caste system upside down, or the not-so-mysterious East’, 15(4) *Current Anthropology* (1974) 469-492; R. Delière, ‘Replication and Consensus: Untouchability, Caste and Ideology in India’, 27(1) *Man* (1992) 155-173; G. Berreman, ‘The Brahmannical View of Caste’, *Contributions to Indian Sociology* (1971) 16-23.

¹⁸⁹ Berreman (1979), n 104 above, 159.

¹⁹⁰ Mitra in Searle-Chatterjee and Sharma (eds.), n 154 above, 57.

¹⁹¹ G. Berreman, ‘Caste as Social Process’, 23(4) *Southwestern Journal of Anthropology* (1967) 351-370, 355-6; G. Berreman, ‘The Study of Caste Ranking in India’, 21(2) *Southwestern Journal of Anthropology* (1965) 115-129, 115; Gupta (2005), n 161 above, 413.

¹⁹² Mitra in Searle-Chatterjee and Sharma (eds.), n 154 above, 57.

members ‘may describe their position in the social hierarchy’, but this is not necessarily ‘a reflection of their own estimates of their social worth’.¹⁹³ Dalit legends and origin myths invariably portray Dalits as Brahmans or Kshatriyas in some earlier age, whose ‘mythic plunge’ to Untouchable status is explained not by ‘accretion of pollution... but rather because of some misfortune. Fate is the culprit’.¹⁹⁴ Nevertheless, scholars recognise that rejecting one’s place in the system is not the same as questioning the system itself.¹⁹⁵

1.3.5 Caste as orientalist invention¹⁹⁶

Scholars such as Nicholas Dirks and Ronald Inden have argued that the concept of caste and its perceived centrality in Indian life is a product of British rule.¹⁹⁷ In 1988, Dirks asserted that ‘[p]aradoxically, colonialism seems to have created much of what is now accepted as Indian “tradition,” including an autonomous caste structure with the Brahman clearly and unambiguously at the head’.¹⁹⁸ It has even been suggested that the ‘birth of caste’ is attributable solely to the colonial Census.¹⁹⁹ Other accounts, whilst acknowledging the role of colonialism in the ‘construction’ of caste as a pan-Indian concept, assert that the roots of caste go far deeper,²⁰⁰ and although

¹⁹³ Berreman (1965), n 191 above, 120.

¹⁹⁴ M. Juergensmeyer, ‘What if the Untouchables Don’t Believe in Untouchability?’, 12(1) *Bulletin of Concerned Asian Scholars* (1980) 23-28, 24.

¹⁹⁵ R. Deliège, ‘The Myths of Origin of the Indian Untouchable’, 28(3) *Man* (1993) 533-549, 534; D. Mosse, ‘Replication and Consensus among Indian Untouchable (Harijan) Castes: Comment’, 29(2) *Man* (1994) 457-460, 459.

¹⁹⁶ Edward Said coined the term ‘orientalism’ to describe a Western imperialist, Eurocentric, essentialising way of knowing, understanding, constructing and representing the oriental ‘Other’; E. Said, *Orientalism* (London: Penguin, 2003).

¹⁹⁷ N. Dirks, ‘The Invention of Caste: Civil Society in Colonial India’ in H. L. Seneviratne (ed.), *Identity, Consciousness and the Past: Forging of Caste and Community in India and Sri Lanka* (New Delhi: OUP, 1999) 120-135, 126; N. Dirks, *Castes of Mind: Colonialism and the Making of Modern India* (Permanent Black, New Delhi, 2002) 5; R. Inden, *Imagining India* (London: Hurst & Co, 2000).

¹⁹⁸ N. Dirks, ‘The invention of caste: civil society in colonial India’, 25 *Social Analysis* (1989) 42-52.

¹⁹⁹ P. Samarendra, ‘Census in Colonial India and the Birth of Caste’, *EPW*, 13 August 2011, 51-58.

²⁰⁰ Bayly (1999), n 1 above, 3-4.

the Untouchables as an entity were in one sense ‘constructed’ or ‘invented’ in the late colonial period, their subordination long predates the colonial era.²⁰¹

1.3.6 The ‘tenacity of caste’

A vast body of literature exists on the tenacity of caste in post-independence India²⁰² and the way in which it has survived and changed (particularly since India’s 1991 economic liberalisation), adapting to democracy and capitalism rather than disappearing. One narrative holds that the ‘historical fault lines’ of caste, tribe and religion have been aggravated in modern India’; a second, conversely, posits that the relevance of caste is now ‘mostly limited to selection of marriage partners and has little importance in shaping material inequalities’.²⁰³ Between these two poles lie analyses of caste as ethnic identity,²⁰⁴ caste as cultural identity, castes as social organisations or communities ‘in which people come together to promote collective interest’²⁰⁵ or castes as political alliances or groupings. Dipanker Gupta argues that caste *identities* have strengthened even as caste as a system has collapsed – a result of caste competition and caste-based political assertion consequent upon the breakdown of the closed village economy and the rise of democratic politics.²⁰⁶ Andre Beteille argues that despite the decline of caste in major areas of social life (e.g. rules relating to purity and pollution, commensality, marriage and the relation between caste and occupation), caste consciousness is kept alive by politicians, political parties and the media.²⁰⁷ Balmurli Natrajan warns against three portrayals of modern caste as ‘defanged’, i.e. ‘normal, positive and comforting’. These portrayals

²⁰¹ Mendelsohn and Vicziany, n 6 above, 2.

²⁰² Beteille (2012), n 10 above.

²⁰³ S. Desai and A. Dubey, ‘Caste in 21st-Century India: Competing Narratives’, *EPW*, 12 March 2011, 40-49, 40.

²⁰⁴ Reddy, n 174 above.

²⁰⁵ Mitra in Searle-Chatterjee and Sharma (eds.), n154 above, 67.

²⁰⁶ Gupta (2005), n 161 above, 409.

²⁰⁷ Beteille (2012), n 10 above, 48.

are (1) political: caste groups not as ‘hierarchized inequalities’ but as ‘modern interest groups in political competition adding to the vibrancy of civil society in India’s version of democracy’, (2) economic: caste as ‘valorised social capital’ enabling caste groups to engage productively in entrepreneurial activities and (3) cultural (‘ethnicised’ caste): caste groups ‘simply as communities of identity seeking recognition for their cultural differences in a multicultural society... that celebrates such difference’.²⁰⁸ Natrajan argues that these portrayals enable caste and casteism to ‘pass’ as normal, legitimate and ‘everyday’²⁰⁹ even as the educated middle classes express ‘increasing distaste’ for the values and ideology of caste.²¹⁰ Caste inequality, ‘far from being regarded as invidious, continues to be seen pervasively as normal, inevitable, even “natural”’.²¹¹ This ‘normalisation’ is what endows caste and casteism in India with its durability;²¹² it becomes associated only with its most abhorrent or violent manifestations, thus leaving everyday casteism unchallenged. Natrajan’s argument is that by camouflaging caste in positive terms as ‘cultural identity’ or ‘community’, ‘notions of culture and multiculturalism threaten to allow caste to exist with impunity’.²¹³ This argument is explored in Chapter 9 of this thesis in relation to caste and caste discrimination in the UK.

1.4 Conclusion

Not only does caste discrimination run contrary to fundamental human rights principles of non-discrimination and equal treatment, and not only has it shown itself

²⁰⁸ B. Natrajan, *The Culturalization of Caste in India: Identity and inequality in a multicultural age* (Routledge, Abingdon and New York, 2012) xii-xiii.

²⁰⁹ Natrajan, *ibid.*, xv.

²¹⁰ D. Quigley, ‘Is a theory of caste still possible?’ in Sharma and Searle-Chatterjee (eds.), n 154 above, 25-48, 37.

²¹¹ Quigley, *ibid.*

²¹² Natrajan, n 208 above, xv.

²¹³ Natrajan, *ibid.*, xix.

resistant to challenge, but also, as this chapter shows, caste itself is a slippery, elusive concept, difficult to define and categorise: ‘Attempting to draw sharp lines between “race,” “descent” and “caste” will not produce unambiguous results. There is an equal slippage of categories in much historical and contemporary writing on the caste question’.²¹⁴ As the understanding of terms such as caste, race and descent evolves and their meanings overlap, they become harder to disentangle. Cameron, discussing the merits of using the term Dalit for ‘a heterogeneous group of people that shares a history of being discriminated against socially, politically, economically and religiously by those who are unlike them in social status’,²¹⁵ observes that while there is agreement ‘on who the oppressors are’, there is disagreement ‘on what the basis of that oppression is (religious? political? economic?)’ and hence difficulty in agreeing ‘on means by which to eliminate the conditions of oppression’.²¹⁶ As Crispin Bates says, ‘before trying to establish “what is caste” we must first ask “who wants to define it?”’,²¹⁷ and, it could be added, ‘for what purpose?’ In attempting to understand and combat caste discrimination we must first understand how caste has survived for so long and who benefits therefrom. Chapter 2 shows that caste and caste discrimination have very deep roots that go back thousands of years and are bound up with the evolution of the Hindu religion, its philosophy, rituals, rules and codes of conduct. It examines the development of Dalit status as a religio-legal construct, concluding with Ambedkar’s efforts to use law both to ‘construct’ the Dalits as an oppressed minority/ identity group and to ‘deconstruct’ the oppression and discrimination from which they suffer. It is to this discussion that we now turn.

²¹⁴ P. Thornberry, ‘Race, Descent and Caste under the Convention on the Elimination of All Forms of Racial Discrimination’ in K. Nakano, M. Yutzis and R. Onoyama (eds.), *Peoples for Human Rights Vol. 9: Descent-Based Discrimination* (Tokyo: International Movement Against All Forms of Discrimination and Racism, 2004) 119-137, 122-3.

²¹⁵ M. Cameron, ‘Considering Dalits and Political Identity in Imagining a New Nepal’, *Himalaya* XXVII (1-2) (2007) 13-26, 14.

²¹⁶ Cameron, *ibid.*

²¹⁷ Bates, n 168 above, 257.

Chapter 2

The Construction of Caste Inequality: A Religio-Legal History

2.1 Introduction

This chapter explains the deep-rooted religio-legal rules underpinning contemporary caste discrimination which, it is submitted, underlie contemporary difficulties in enforcing caste discrimination legislation (in India) or introducing it (in the UK). It shows how caste distinctions and inequalities were constructed and maintained by law in pre-independence India and explains the Hindu concepts of *varna*, *dharma* and *karma* and their role in the construction of caste inequality. Furthermore, the chapter considers whether the rules contained in the classical Hindu religio-legal literature, known as *dharma* literature – many of which were directly concerned with laying down and enforcing caste distinctions and inequalities – represented ‘real law’ in India (at least for Hindus). The answer is important because British colonial administrators seized on Hindu religio-legal texts as the authoritative ‘law of the Hindus’, treating them as black letter legal codes.¹ The most important of these, the *Manusmṛiti* or ‘Law Code of Manu’, became synonymous with the legal construction and maintenance of caste discrimination.² The chapter also examines the relationship

¹ Plan for the Administration of Justice in Bengal 1772 (the ‘Judicial Plan’), drafted by Sir Warren Hastings, Governor-General of Bengal; codified in the Administration of Justice Regulation 1781, section 93; see J. M. Derrett, *Religion, Law and the State in India* (London: Faber and Faber, 1968) 289.

² See P. Olivelle, *The Law Code of Manu* (Oxford: OUP, 2004) xvi-xxiii, xxxviii-xxxix; W. Menski, ‘The Indian Experience and its Lessons for Britain’ in B. Hepple and E. Szyszczak (eds.) *Discrimination: The Limits of the Law* (London: Mansell, 1993) 300-343, 302, 304. In this essay Menski describes classical Hindu law as legitimising and promoting status inequality.

between caste and law in the Islamic period and appeals to law by Dalit activists in the ‘caste reform period’ of the late nineteenth and early twentieth centuries.

2.2 The Vedic period (c 1500 BC to 500 BC): *varna*, *dharma* and *karma*

2.2.1 The *varna* classificatory system

The Vedic period saw the emergence, initially in northern India and then in the south, of a caste social order characterised by hierarchy and hereditary occupation and related social status determined by birth³ – concepts inherent in the notion of *varna*, upon which, writes Smith, the later caste system is ‘ideologically dependent’.⁴ Central to Vedism was the principle of distinctions among the orders of reality (natural, divine and human)⁵ and the idea that the universe was composed of ‘interconnected, but also *hierarchically distinguished and ranked*, components’.⁶ Romila Thapar identifies three preconditions for a caste society: (1) recognised social disparities, (2) unequal access to economic resources and (3) the legitimisation of inequality through a theoretically irreversible hierarchy, itself based on a supernatural authority.⁷ The *varna* system, says Smith, allowed certain humans to ‘present what was an arbitrary status claim as natural and sacred; that is, social hierarchy was presented as inexorably part of the immutable and divinely given order of things’.⁸

³ A. Parasher-Sen, ‘Introduction’ in A. Parasher-Sen (ed.), *Subordinate and Marginal Groups in Early India* (New Delhi: OUP, 2004) 1-80, 7.

⁴ B. Smith, *Classifying the Universe: The Ancient Indian Varna System and the Origins of Caste* (New York: OUP, 1994) 8.

⁵ B. Holdrege, ‘Dharma’ in S. Mittal and G. Thursby (eds.) *The Hindu World* (Abingdon: Routledge, 2007) 213-248, 218.

⁶ Smith, n 4 above, vii (emphasis added).

⁷ R. Thapar, *The Penguin History of Early India: From the Origins to AD 1300* (New Delhi: Penguin Books, 2003) 63-64. Lingat posits that ‘it is probable that... hierarchy already existed as a fact’, and that ‘the “Brahminical theory” not only made it precise but also legitimised it... by deducing it from the Veda, presenting it as if it conformed to the natural order of things’; R. Lingat, *The Classical Law of India* (Oxford: OUP, 1973) 39.

⁸ Smith, n 4 above, 7.

2.2.2 Dharma

P.V. Kane defines *dharma* as

the privileges, duties and obligations of a man, his standard of conduct as a member of the Aryan community, as a member of one of the castes, as a person in a particular stage of life.⁹

Dharma is as much a socio-political as a religious concept. Described as a ‘pivotal category’ in ‘the history of Indic religions and cultures’, it is translated variously in English as law, religion, rules, duty, obligation, norm, righteousness, morality and justice.¹⁰ *Dharma* applies to all the elements of the cosmos – sun, water, plants, animals, humans – which must each follow their own particular *dharma* or *svadharma* (the right behaviour) in order to maintain cosmic balance; if an element ‘deviates from its own *dharma*... the balance is disturbed’.¹¹ Applied to the Universe, says Lingat, *dharma* ‘signifies the eternal laws which maintain the world’.¹² Applied to humans, an individual’s *dharma* is the way they should act or behave according to their status or *varna* and their stage of life (*asrama*).¹³

Originally limited to correct *ritual* action, from about 500 BC the term *dharma* underwent a ‘conceptual shift’ to cover not just sacrificial and ritual practices but also socio-cultural practices:¹⁴

[*Dharma*] now becomes enlarged and popularised to include all human actions. It is at first redefined as expectation of right ritual action for every Hindu, then expanded into the secular realm to include any appropriate action at any time.¹⁵

⁹ P.V. Kane, *History of Dharmasastra (Ancient and Medieval Religions and Civil Law)*, Vol. I (Poona: Bhandarkar Oriental Research Institute, 1930) 3. See also Lingat, n 7 above, 4.

¹⁰ Holdrege, n 5 above, 213; F. Edgerton, ‘Dominant Ideas in the Formation of Indian Culture’ 62(3) *Journal of the American Oriental Society* (1942) 151-56, 151; L. Rocher, ‘The Dharmasastras’ in G. Flood (ed.), *The Blackwell Companion to Hinduism* (Oxford: Blackwell, 2005) 102-115, 102.

¹¹ L. Rocher, ‘Hindu Conceptions of Law’, 29(6) *Hastings Law Journal* (1978) 1283 – 1305, 1285.

¹² Lingat, n 7 above, 3.

¹³ Hinduism identifies four life-stages: student, householder, forest-dweller and renouncer; see Holdrege, n 5 above, 222.

¹⁴ Holdrege, *ibid.*, 219-221.

This expansion of *dharma* from the purely ritual sphere to the realm of socio-cultural norms was a political response by the Vedic elite to alternative interpretations of *dharma* (e.g. by Buddhists and Jains) which were perceived to pose a threat to their power.¹⁶ A Brahminical philosophical school, *Purva Mimamsa*, grew up, dedicated to elaborating on the expansion of *dharma*. A new genre of literature – the *Dharmasutras* – was generated which reflected the new, expanded understanding of *dharma*.¹⁷ The underlying purpose was ‘to extend Vedic legitimation beyond the ritual realm into the socio-cultural domain and thereby transform the ideological framework of Brahminical culture from a discourse of ritual to a discourse of social power’.¹⁸ In the process, the concept of *dharma* – despite its supposedly transcendent nature – became bound ‘linguistically, ethnically, and culturally to a specific people: the Aryans’, who alone were designated as its authoritative exponents and as the custodians of the eternal language, Sanskrit, in which the *dharma* injunctions were recorded.¹⁹

2.2.3 Karma

Karma, meaning ‘action’, is the doctrine linking conduct in this life with consequences in future lives, and conduct in previous lives with personal circumstances in this life.²⁰ Circumstances in this life (e.g. human or animal, caste) result directly from deeds performed in a former life, while existence in future lives

¹⁵ W. Menski, *Comparative Law in a Global Context: The Legal Systems of Africa and Asia* (Cambridge: Cambridge University Press (CUP), 2006) 211-12.

¹⁶ W. Doniger, *The Hindus: an alternative history* (Oxford: OUP, 2010) 278, 308-309; Holdrege, n 5 above, 220.

¹⁷ Holdrege, *ibid.*, 220; P. Olivelle, ‘From the Rg Veda to Asoka: A Brief History of Dharma’; paper presented at University of California, Santa Barbara, Dept. of Religious Studies, 31 May 2000, cited in Holdrege, *ibid.*, 220.

¹⁸ Holdrege, *ibid.*, 221.

¹⁹ *Ibid.*, 221.

²⁰ See H. Tull, ‘Karma’ in Mittal & Thursby (eds.), n 5 above, 309-331, 318, 326.

is determined by deeds performed in this life. Central to orthodox Hinduism is the presupposition that individuals are not empirically equal at birth. Furthermore, inequality is the result of ‘freely chosen behaviour in this and previous lives’.²¹ It follows that a person’s caste in this life is entirely ‘of their own making’.²² Conformity with one’s *dharma* results in improvement in status in the next life, whereas non-conformity will lead to a worse status in future lives. This idea – that people ‘are fundamentally but not unfairly, unequal’²³ – is encapsulated in the concepts of *varna*, *dharma* and *karma*. In legal terms, from c. 500 BC, this notion was reflected textually in religious and moral precepts of an increasingly ‘juridical’ character contained in what is known as *dharma* literature, the most well-known text being the *Manusmriti* (see above).

2.2.4 Legal nature of the early Vedic texts

Early Vedic (Indo-Aryan) literature introduces the key themes and concepts which underpin classical Hindu law. This literature consists of the four main *Vedas* – *Rg Veda*, *Sama-Veda*, *Yajur-Veda* (in two versions, Black and White) and *Atharva-Veda*, each *Veda* comprising a *Samhita* (core) of ritual hymns and prayers, accompanied by *Brahmanas* which interpret the rituals in the *Samhitas* – *Aranyakas*, concerned with mysticism rather than ritual, and *Upanishads*, which raise advanced philosophical and spiritual questions.²⁴ As to whether these texts are ‘legal

²¹ H. Coward, ‘India’s Constitution and Traditional Presuppositions Regarding Human Nature’ in R. Baird (ed.) *Religion and Law in Independent India* (New Delhi: Manohar, 1993) 24.

²² R. Thapar, *Ancient Indian Social History: Some Interpretations* (Hyderabad: Orient Longman, 2009, first published 1978) 28.

²³ Coward, n 21 above, 23.

²⁴ L. Patton, ‘Veda and Upanishad’ in Mittal and Thursby (eds.), n 5 above, 37-51, 38; P. Heehs, *Indian Religions: A Historical Reader of Spiritual Expression and Experience* (London: Hurst & Co., 2002) 41, 57.

literature', Menski says they were not law books but ritual manuals²⁵ on the performance of sacrificial rituals by the Vedic priests or Brahmins.²⁶ Lingat, conversely, argues that the *Brahmanas*, *Aranyakas* and *Upanishads* (although not the *Samhitas*) contain numerous rules governing behaviour,²⁷ while for Derrett, they are the 'earliest surviving texts containing legal rules'.²⁸ Although the four *varnas* are mentioned by name only in the *Rg Veda*, other Vedic hymns distinguish between Aryans and non-Aryans or *dasyu* (later to become the Shudras), with the Aryas divided into three categories which, Lingat argues, are origins of the three superior *varnas*.²⁹ The *legal* relevance of the early Vedic texts lies first in the articulation of the concept of *varna*, whereby social hierarchy was presented as an inexorable part of the immutable and divinely given order of things and hence not open to challenge,³⁰ and secondly, the insight they provide into Vedic understanding of the Universe, in particular the concept of *dharma*, which in its widened form was integral to the development of classical Hindu law.

2.3 The later Vedic and classical period: *dharma* literature 500 BC–700 AD

The *Veda* corpus provided the ideological underpinnings for the development of classical Hindu law teachings on caste in the *dharma* literature.³¹ From the third century BC onwards, says Lingat, with the expansion of *dharma* and the formulation

²⁵ Menski (2006), n 15 above, 207, 204.

²⁶ Menski (2006), *ibid.*, 204-5.

²⁷ Lingat, n 7 above, 8.

²⁸ J. M. Derrett, *Dharmasastra and Juridical Literature* (Wiesbaden: Otto Harrassowitz, 1973) 7.

²⁹ 'The Iranian Aryans, closely associated with the Rig-Vedic Aryans, also practised a three-fold division of society consisting of priests, rulers and producers; B. Avari, *India: The Ancient Past* (London: Routledge, 2007) 74.

³⁰ Smith, n 4 above, 7.

³¹ Smith, *ibid.*, 28.

of the *dharma* literature, ‘there is the appearance of something resembling legislation’.³²

2.3.1 Dharmasutras

In addition to the *sruti* (‘revealed’) texts is a body of secondary sacred texts known as *smṛti* (meaning ‘remembered’ or ‘tradition’), composed by Vedic sages between the eighth and fourth centuries BC.³³ These texts include the epic poems the *Mahabharata* and the *Ramayana*, as well as the *Dharmasutras* (c 600 BC–200 BC), a set of codes concerned with ‘regulating and defining social relationships within and between groups’.³⁴ The *Dharmasutras* contain rules on duties, behaviour, domestic and dietary matters, family, social and sexual relationships, and lay down religio-penal sanctions (an embryonic form of criminal law).³⁵ The sources of law (*dharma*) are (1) the entire *Veda*, (2) tradition (*smṛti*) and (3) the conventions, practices and conduct of ‘good people’ (those who know the *Veda*); additionally, Lingat distinguishes between custom (‘habitual practices of a group’) as a source of law, although not as a source of *dharma*.³⁶ The notion of pollution in relation to certain social groups first appears in the *Dharmasutras*.³⁷ Nevertheless, says Lingat, the treatment of legal matters in the *Dharmasutras* is indirect, disorganised and unsystematic³⁸ – they contain ‘norms of correct behaviour and action’, says Olivelle, but they ‘do not tell us what people actually did’.³⁹

³² Lingat, n 7 above, 28.

³³ G. Flood, *An Introduction to Hinduism* (Cambridge: CUP, 1998) 54.

³⁴ Flood (1998), *ibid.*, 55; P. Olivelle, *Dharmasutras: The Law Codes of Ancient India* (New Delhi: OUP, 1999).

³⁵ Lingat, n 7 above, 68.

³⁶ Olivelle (2004), n 2 above, 23; Lingat, *ibid.*, 6, 14.

³⁷ Lingat, n 7 above, 52; see also V. Jha, ‘Stages in the History of Untouchables’, (1975) II (I) *Indian Historical Review* 14-31, 15.

³⁸ Lingat, n 7 above, 71, 73; Olivelle (2004), n 2 above, xx.

³⁹ Olivelle (2004), *ibid.*, xxi-xxii; Lingat, n7 above, 18.

2.3.2 Kautilya's Arthasasthra

This treatise by Kautilya, the chief minister of the emperor Chandragupta Maurya (321 BC–296 BC),⁴⁰ describes a society based on Vedic codes of conduct and a well-organised legal system with the king at the head, village tribunals in rural areas and law courts in urban centres,⁴¹ although the extent to which it reflects the actual administration of justice is uncertain.⁴² It explicitly addresses the maintenance of caste boundaries and the construction of caste inequality. It was the Shudra's duty to serve the twice-born.⁴³ Punishments were caste-based and unequal; the severity of the punishment increased the lower the caste of the offender and the higher the caste of the victim. A Shudra committing adultery with a Brahmin woman was to be 'burnt alive wound round in mats'; a Kshatriya should be fined the highest fine and a Vaisya deprived of all his property.⁴⁴ A man committing adultery with a low caste woman was to be branded and banished or degraded to the same caste.⁴⁵

2.3.3 Dharmasastras

Dharmasastra means 'the teaching or science of righteousness'.⁴⁶ The *Dharmasastras* contain legal and religious rules and a variety of dietary, hygienic and moral injunctions.⁴⁷ They differ from the *Sutras* in form and in content – they are

⁴⁰ See R. Shamasastri, *Kautilya's Arthasastra* (Mysore: Wesleyan Mission Press, 1923); Avari, n 29 above, 105.

⁴¹ N. Law, *Studies in Ancient Hindu Polity (based on the Arthasastra of Kautilya) Vol. I* (London: Longmans, Green & Co., 1914) 117.

⁴² We know that Megasthenes, Greek ambassador to the court of Chandragupta between 302-298 BC, observed the absence of statutes or written law books in Indian law courts and the regulation of everything from memory; H. Jones (ed.), *The Geography of Strabo* (Loeb Classical Library, Vol. 7, 1930) 86-89, cited in L. Rocher, 'Law Books in an Oral Culture', 137(2) *Proceedings of the American Philosophical Society* (1993) 254-267, 260.

⁴³ Shamasastri, n 40 above, 7.

⁴⁴ Shamasastri, *ibid.*, 236.

⁴⁵ *Ibid.*, 236.

⁴⁶ Derrett (1973), n 28 above, 2.

⁴⁷ Rocher (2005), n 10 above, 102.

composed in verse, include more emphasis on civil and criminal law⁴⁸ and, says Holdrege, crystallise and formalise in ‘law codes’ *dharmic* ritual and social obligations.⁴⁹

2.3.3.1 *Manusmṛti*

The oldest and most important *Dharmasastra* is the *Manavadharmasastra* (Mdh), or *Manusmṛti*, composed sometime between 200 BC and 200 AD,⁵⁰ a text which has become synonymous with caste and gender oppression.⁵¹ It consists of twelve books in the form of a dialogue between an exalted being or teacher, Manu, his pupil or disciple, Bhṛgu, and a group of others wishing to learn the law of *dharma* from him. Manu is presented as the son of the primeval Lawgiver, the Creator himself, the ‘Self-existent One’⁵² – a device intended, says Olivelle, to make the work more authoritative.⁵³ The *Purusa* myth is invoked twice in the first book⁵⁴ as legitimisation for the *varna* system and Aryan social order. For all social classes, but especially Brahmins (the custodians of the *Veda*), ‘proper conduct’ is declared ‘the highest Law’.⁵⁵ On caste, Manu is very clear that there are only four ‘classes’ (or *varnas*): ‘there is no fifth’.⁵⁶ Untouchables (*Candalas*) are consciously excluded from the *varna* system; unfit for association by Brahmins,⁵⁷ they are likened to a dog or a pig.⁵⁸ In a frequently quoted passage Manu declares:

⁴⁸ Holdrege, n 5 above, 223.

⁴⁹ Ibid., 222.

⁵⁰ Olivelle (2004), n 2 above, xxiii; Lingat, n 7 above, 93. Olivelle places the earlier extreme as the first century BC.

⁵¹ Olivelle (2004), *ibid.*, xvii. According to Olivelle, Manu is an eponym for an unknown author, probably a learned Brahmin from north India; *ibid.*, xxi-xxii.

⁵² Olivelle (2004), *ibid.*, xxiii-xxv.

⁵³ Ibid., xxi.

⁵⁴ *Mdh* 1.31 and 1.87-91; see Olivelle (2004), n 2 above.

⁵⁵ *Mdh* 1.107-108; *ibid.*

⁵⁶ *Mdh* 10.4; *ibid.*

⁵⁷ *Mdh* 4.79; *ibid.*

⁵⁸ *Mdh* 12.55; *ibid.*

[The *Candalas*] must live outside the village; their property consists of dogs and donkeys, their garments are the clothes of the dead; they eat in broken vessels; their ornaments are of iron, and they constantly roam about. A man who follows the Law should never seek any dealings with them. All their transactions shall be among themselves, and they must marry their own kind. They depend on others for their food, and it should be in a broken vessel. They must not go about in villages and towns at night, they may go around during the day to perform [tasks but must wear] distinguishing marks.⁵⁹

A similar enmity is directed towards Shudras, who must ‘render obedient service to distinguished Brahmin householders, for a pure, obedient, soft-spoken and humble Shudra obtains a higher birth’.⁶⁰ The Shudra’s role is to serve the Brahmin, from whom the Shudra is entitled to receive ‘leftover food, old clothes, grain that has been cast aside, and the old household items’, but he must not accumulate wealth.⁶¹ Punishments remained caste-based; the lower the offender’s caste, the harsher the punishment. For physically assaulting a superior person the low-born must lose the part of his body which caused the injury; if a low-born man attempts to occupy the same seat as a man of high rank he should be branded on the hip or buttocks; if he spits at him, his lips should be cut off; and so on.⁶² The ‘virulence in these injunctions’⁶³ reflects the very real threat, says Olivelle, which the lowest classes of society were perceived by the author of the text to pose to the social order and to Brahminical hegemony and privilege.⁶⁴

⁵⁹ *Mdh.*10.51-55; *ibid.*

⁶⁰ *Mdh.* 9.334-335; *ibid.*

⁶¹ *Mdh.* 10.123-125, 129; *ibid.*

⁶² *Mdh.* VIII.279-283; *ibid.*

⁶³ Kane, n 9 above, 97; Olivelle (2004), n 2 above, xlv.

⁶⁴ Olivelle (2004), *ibid.*

2.3.4 Legal nature of the *Dharmasastras*

Scholars are divided as to the legal nature of the *Dharmasastras*. Hinduism has been described as a ‘legal tradition’ and Hindu theologies as ‘pervaded by legal rules, legal categories and legal reasoning’.⁶⁵ As Davis observes, while law and religion have come to be defined ‘as separable and mutually exclusive categories, despite their interdependence in every part of Europe prior to the Enlightenment... in most parts of the world and in most times in history, religion and law were intimately connected and largely not distinguished from each other’.⁶⁶ Thus, the elements of Hindu law cannot ‘easily be disentangled’ or labelled as essentially religious or legal,⁶⁷ as it does not ‘sharply differentiate between positive law and morality’⁶⁸ – the Indian tradition, says Larivière ‘is simply more overt and bold about the theological underpinnings of its legal system’.⁶⁹ Larivière considers that the difference between the *Dharmasastras* and positive law in the Western sense has been overstated. Hindu law, says Michaels, does not aim at neutrality or consistency; on the contrary, classical Hindu law is the law ‘of castes and regions’,⁷⁰ i.e. it is relative to specific groups, times, places, castes and life stages.⁷¹ The *Dharmasastras* ‘were not law codes in the European sense of the word, nor were they legislation passed by an organ having legislative power’,⁷² but ‘if by positive law we mean law enacted by a properly constituted authority for the government of society’, they

⁶⁵ D. Davis, ‘Hinduism as a Legal Tradition’, 75(2) *Journal of the American Academy of Religion* (2007) 241-267, 241, 242.

⁶⁶ Davis *ibid.*, 260-261.

⁶⁷ Rocher (1978), n 11 above, 1286, 1289.

⁶⁸ A. Michaels, ‘The practice of classical Hindu law’ in T. Lubin, D. Davis and J. Krishnan (eds.), *Hinduism and Law: An Introduction* (Cambridge: CUP, 2010) 58-77, 77.

⁶⁹ R. Larivière, ‘Dharmasastra, Custom, “Real Law” and “Apocryphal” Smrtis’, 32 *Journal of Indian Philosophy* (2004) 611-62, 615.

⁷⁰ Michaels, n 68 above, 77.

⁷¹ *Ibid.*

⁷² Lingat, n 7 above, 141.

qualify because they are ‘based on the normative values... of specific groups’.⁷³ Corporate groups (merchants, traders, guilds, soldiers, pastoralists, farmers, castes and family lineages, as well as village affiliations and temples) were among the principal legal actors in early India.⁷⁴ Individuals would have been members of several groups simultaneously. These corporate associations administered a body of substantive laws to their own members.⁷⁵ We know, says Rocher, that the *dharma* texts recognise a wide variety of unwritten sources of *dharma*, including custom and the laws of ‘countries, castes, and families’ (as long as not opposed to the sacred texts).⁷⁶ On the one hand, Olivelle is correct to distinguish the *sastras* from modern-day legal codes⁷⁷ in the sense that the law on the ground was subject to any number of variables;⁷⁸ clearly, additional, ‘extra-sastric’, legal knowledge was required to actually judge lawsuits.⁷⁹ On the other hand, says Lariviere, although it is correct that the *Dharmasastras* were general guidelines rather than a legal template, nevertheless the *Dharmasastra* literature ‘represents in very definite terms the law of the land’.⁸⁰

2.3.5 The feudal era: c. 800–1200 AD

The period between c. 800 and 1200 AD witnessed the production of a vast array of commentaries and digests on the *dharma* texts, variously seeking to interpret, construe, explain, synthesise and codify (a process which continued into the nineteenth century).⁸¹ Derrett expresses no doubt as to the penetration of *sastric* rules

⁷³ Larivière, n 69 above, 613.

⁷⁴ D. Davis, ‘A Historical Overview of Hindu Law’ in Lubin et al. (eds.), n 68 above, 17-27, 17, 20-22.

⁷⁵ Davis (2010), *ibid.*, 19.

⁷⁶ Rocher (1978), n 11 above, 1298.

⁷⁷ Olivelle (2004), n 2 above, xl; Menski (2006), n 15 above, 215.

⁷⁸ ‘He who knows the Law should examine the *Laws of castes, regions, guilds and families*, and only then settle the Law specific to each’; *Mdh* 8.41 (emphasis added); Olivelle (2004), n 2 above.

⁷⁹ *Mdh* 8.1-3; Olivelle (2004), *ibid.*

⁸⁰ Lariviere, n 69 above, 623, 612.

⁸¹ Lingat, n 7 above, 107.

into actual legal usage during this period.⁸² Socially, during this period, while there was some relaxation of the *sastric* precepts on caste duties, Untouchability, says Derrett, was now defined – segregated dining occurred and *devadasis* were allotted a formal place in the system: in short, ‘everyone believed in caste’.⁸³ There was a growth in sectarianism and in group attempts at social ‘rearrangement’ to counter the impossibility of individual advancement. The law in practice fostered advance by *groups* rather than individual improvement: ‘[T]he public accepted the umbrella of the caste theory but within its shade attempted to rearrange the relative superiority of actual groups’.⁸⁴ Social groups (‘communities’) possessed the power of excommunication for religious or social (caste) offences, a power perceived as promoting group/social cohesion.⁸⁵ In practical terms, law was exercised by caste and community groups, which ‘legislated at their pleasure’, calling upon the king to sanction their decisions. The king was the final arbiter, the custodian and also the censor of customs, determining those repugnant to the *sastra*.⁸⁶

2.4 Medieval/ Islamic India: c. 1206–1707

2.4.1 The wider setting

Turkic Muslim incursions into India began in 1000. In 1526, the Mughal empire, which was to last for more than three hundred years, was established following the defeat of the Delhi Sultanate (founded in 1206).⁸⁷ As Menski indicates, the Muslim political centre did not have the numbers to impose Islamic law on India’s

⁸² Derrett (1968), n 1 above, 196.

⁸³ Derrett *ibid.*, 176, 178.

⁸⁴ *Ibid.*, 181.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*, 162.

⁸⁷ R. C. Majumdar (ed.), *The History and Culture of the Indian People, Vol. VI: The Delhi Sultanate* (Bombay: Bharatiya Vidya Bhavan, 1960) xxiii-xxv.

population, the vast majority of whom remained rural Hindus.⁸⁸ Islamic law applied fully to Muslims, but to Hindus its jurisdiction extended only to crime and ‘constitutional and fiscal administration’.⁸⁹ Although not equal to Muslims under Islamic law, non-Muslims were allowed to maintain their own institutions, forms of worship and personal (i.e. religious) law.⁹⁰ In addition, Hindus were free to settle disputes among themselves ‘according to their own laws and customs’⁹¹ (which differed according to caste and locality). Writes Menski, ‘the substance of Hindu law did not change as a result of Muslim domination’;⁹² simply, it operated as a personal law within the Mughal Empire rather than as the official law of a Hindu state.⁹³ During this period, as previously, loyalty was to family, group and caste rather than to the wider community, and not at all to the State.⁹⁴ *Sastric* injunctions – whose authority was independent of the State – were enforced by ‘a variety of moral, social and other sanctions,’⁹⁵ operating ‘in civil society as part of the general ideology of everyday life’.⁹⁶ Each village had a *panchayat* or tribunal which decided civil and criminal cases. In addition, each caste had its own caste *panchayat* issuing judgments and inflicting fines, public degradation or social exclusion by way of punishment.⁹⁷

⁸⁸ Menski (2006), n 15 above, 237.

⁸⁹ Derrett (1968), n 1 above, 229.

⁹⁰ See A. L. Srivastava, ‘Law and Legal Institutions’ in R. C. Majumdar (ed.), *The History and Culture of the Indian People, Vol. VII: The Mughal Empire* (Bombay: Bharatiya Vidya Bhavan, 1974) 537-554, 538-539.

⁹¹ Derrett (1968), n 1 above, 229. See also Majumdar (ed.) (1960), n 87 above, 456-459.

⁹² Menski (2006), n 15 above, 239.

⁹³ *Ibid.*, 237-8.

⁹⁴ M. Edwardes, *British India 1772-1947* (London: Sidgwick & Jackson, 1967) 2.

⁹⁵ R. Dhavan, ‘Dharmasastra and Modern Indian Society: A Preliminary Exploration’, 34(4) *Journal of the Indian Law Institute* (1992) 515-540, 516.

⁹⁶ *Ibid.*, 522, 519; Edwardes, n 94 above.

⁹⁷ Srivastava, n 90 above, 537-554, 550.

2.4.2 Smṛti commentarial texts and digests

During the Islamic period a large corpus of Brahminical commentaries and legal digests on the *smṛtis* was produced, which repeated the caste rules elaborated in the earlier *smṛti* literature.⁹⁸ Majumdar observes that the texts produced during this period often repeated discriminatory clauses on caste in *smṛti* penal law, upholding the principle of punishment for the same offence on an *ascending* scale, the lower the caste of the perpetrator.⁹⁹ However, even though *smṛti* law may have been accepted in theory, Majumdar also comments that local Hindu rulers were often ‘unable to put [these punishments] into effect for fear of rousing popular discontent’.¹⁰⁰ The degraded status of the despised classes is recapitulated.¹⁰¹ Between 1350 and 1700, a body of commentarial texts was produced on the topic of *Sudradharma* (the *dharma* of the *Shudra*)¹⁰² which, says Vajpeyi, reveals the importance of caste in pre-colonial India. The purpose of these texts was to assist courts in determining who was a *Shudra*.¹⁰³ The authors use language ‘both as a measure of lowliness and as a weapon of humiliation’ to ‘describe, police, revile, punish and exclude the *Sudra* from the realms of upper-caste privilege’.¹⁰⁴ From records of legal disputes from this period, involving twice-born groups and *Shudras*, it appears that ‘all the *Sudra* ever wants is not to be [a *Sudra*]’ but to be recognised instead as a ‘higher’ caste.¹⁰⁵ These texts, says Vajpeyi, show that the legal treatment of caste ‘was by no means the outcome

⁹⁸ Majumdar attributes the large number of such texts, and the systematisation of ‘the old social and religious law’, indirectly to the ‘menace’ posed to the indigenous culture by the Muslim invasions; Majumdar (ed.) (1974), n 90 above, 574.

⁹⁹ Majumdar (ed.) (1960), n 87 above, 580. The principle whereby punishment diminished the higher the caste of the perpetrator was also frequently repeated.

¹⁰⁰ Majumdar (ed.) (1960), *ibid.*

¹⁰¹ *Ibid.*, 581.

¹⁰² A. Vajpeyi, ‘*Sudradharma* and legal treatments of caste’ in Lubin et al. (eds.), n 68 above, 154–166. Vajpeyi’s spelling of *Sudra* is retained when citing directly from his work; otherwise, the spelling *Shudra* is used.

¹⁰³ *Ibid.*, 157.

¹⁰⁴ *Ibid.*, 158.

¹⁰⁵ *Ibid.*, 160.

exclusively of India's long engagement with the colonizing Other'.¹⁰⁶ The 'centrality of caste to pre-colonial intellectual life and legal practice' is also evidenced by the existence of 'caste experts' – specialist jurists and caste scholars – who were called upon to pronounce on legal matters involving caste and to adjudicate in caste disputes including, famously, the transformation of 'Shivaji, a Maratha chieftain... heretofore deemed a Sudra, into Chatrapati Shivaji, a Ksatriya king'.¹⁰⁷

2.5 British India, law and caste inequality 1600–1900

By the 1720s, the Mughal Empire was in decline. Between 1739 and 1762, Delhi was invaded by the Persian ruler Nadir Shah, northern India was repeatedly invaded by the Afghans and central India was attacked by the Marathas from the south. Chaos, anarchy and a breakdown in authority ensued, leaving the door open to the Europeans.

2.5.1 1600–1772

British rule in India originated in a Charter granted by Queen Elizabeth I in 1600 to a body of merchants conferring on them a monopoly of trade with the East. In 1709, this became the British East India Company. Trade for profit (albeit trade backed by military force) was the principal object of the East India Company.¹⁰⁸ What made it unique as a commercial body was not its administrative structure but the special legislative and judicial powers of a quasi-sovereign nature, essential to enable it to

¹⁰⁶ Ibid., 166.

¹⁰⁷ Ibid., 161-166, 163.

¹⁰⁸ H. Bhatia (ed.), *Origin and Development of Legal and Political System in India, Vol. II* (New Delhi: Deep and Deep Publications, 1976) viii; S. V. Desika Char (ed.), *Readings in the Constitutional History of India 1757-1947* (New Delhi: OUP, 1983) xxviii; B. Cohn, 'From Indian Status to British Contract' in *An Anthropologist Among the Historians and Other Essays* (New Delhi: OUP, 2012) 463-482, 463.

conduct trade at such long distances.¹⁰⁹ It exercised these powers in three autonomous ‘Presidencies’ at Calcutta, Madras and Bombay. The 1726 Charter Act established ‘Mayor’s Courts’ in each of the three Presidencies and vested the Company’s agents with legislative powers for the first time. At this stage British interest in India was still purely commercial.¹¹⁰ British (i.e. East India Company) victory against the Nawab of Bengal at the Battle of Plassey in 1757 ‘started the East India Company on its great career as a territorial ruler’.¹¹¹

When the British set foot in India, Muslim law was fairly uniform throughout the country, Hindu law less so. Hindu law was contained in the ancient *smṛti* treatises, in the *smṛti* commentaries and digests and in custom, mostly unwritten, which varied widely according to region. Accaryya notes that there were no laws relating to public and constitutional rights ‘because such rights did not exist’.¹¹² Under the British, a ‘haphazard’¹¹³ legislative system developed, based on the governments of the three Presidencies. English law applied in the Presidency towns and for British-born subjects in the ‘mofussil’ (rural) areas. Hindus and Muslims in the Presidency towns were governed by their own laws in relation to inheritance, succession, private contracts and matters relating to caste.¹¹⁴ As early as 1673, the authority of local *panchayats* over inter-caste disputes had been recognised, observes Bannerjee, and

¹⁰⁹ Desika Char (ed.) (1983), *ibid.*, xxvii.

¹¹⁰ S.V. Desika Char, *Centralised Legislation: A History of the Legislative System of British India from 1834 to 1861* (London: Asia Publishing House, 1963) 3, citing H. Cowell, *History and Constitution of the Courts and Legislative Authorities in India*, 6th Edition (Calcutta: Thacker, Spink & Co., 1936) 17.

¹¹¹ Desika Char (1963), *ibid.*, 3.

¹¹² B. K. Acharyya, *Codification in British India* (Calcutta: S.K. Banerji & Sons, 1914) 78-79, cited in Desika Char (1963), n 110 above, 19.

¹¹³ Desika Char (1963), *ibid.*, 12, 14.

¹¹⁴ Desika Char (1963), *ibid.*, 18.

judicial powers were gradually conferred on caste headmen,¹¹⁵ but in other matters English law applied. Outside the Presidency towns both Muslim and Hindu criminal law applied, resulting in a multiplicity of different provisions. In civil matters, later British policy of ‘non-intervention’ in caste matters was presaged by the policy of the East India Company Court of Directors:

‘[T]hat the Gent[ues] and other Natives be allowed to live in the full enjoyment of the privileges of their respective Casts, provided they do nothing to the prejudice of the English Government’.¹¹⁶

2.5.2 1772–1857: Company rule, Anglo-Hindu law and caste¹¹⁷

Between 1765 and 1858, over half of the territorial area of India was controlled directly by the East India Company (the Company) under a Charter renewed at intervals by the British Parliament (the remaining territory that the Company did not wish to control directly, or found difficult to conquer, being supervised by a system of indirect rule).¹¹⁸ Between 1773 and 1853, the Company’s Charter was renewed at twenty-yearly intervals. In 1858, the British Government assumed the running of the direct control areas (the Presidencies and Provinces) while continuing with indirect rule over the rest of India.¹¹⁹

In 1772, the Company, under Governor-General Warren Hastings, assumed direct control of Bengal. Hastings was reluctant to impose British law on Indians in the

¹¹⁵ A. Bannerjee, *English Law in India* (New Delhi: Abhinav Publications, 1984) 9. Cohn describes local areas, which he terms ‘little kingdoms’, as the basic jural units of India in the eighteenth and nineteenth centuries, in which the dominant caste controlled all castes beneath it. The jurisdiction of the caste *panchayats* fell entirely within the boundary of the little kingdom; B. Cohn, ‘Some Notes on Law and Change in North India’ in Cohn, n 108 above, 554-574, 555-556.

¹¹⁶ ‘The Court of Directors on the policy towards the native inhabitants of Madras, 17 February 1726’, cited in Desika Char (1983), n 108 above, 17.

¹¹⁷ See R. Rocher, ‘The creation of Anglo-Hindu law’ in Lubin et al. (eds.), n 68 above, 78-88, 78.

¹¹⁸ See P. Lawson, *The East India Company: A History* (London: Longman, 1987).

¹¹⁹ Even at the end of British rule in 1947 there were over 550 ‘princely states’ under indirect rule, Kashmir and Hyderabad being larger than France.

spheres of religion, caste, marriage and the family, for fear of provoking social unrest. However, if ‘native’ law was to be applied in these spheres, the question was where was Indian law to be found?¹²⁰ The answer was in the ‘personal laws’ of the Muslim and Hindu religious communities (‘personal laws’ because they are ‘based on personal, or ascriptive, status regardless of territorial location’).¹²¹ Thus, ‘Anglo-Hindu law’ was born, and Hastings declared that ‘in all suits regarding inheritance, marriage, caste and other religious usages or institutions, the laws of the *Koran* with respect to Mahomedans, and those of the *Shaster* with respect to Gentoos [Hindus], shall be invariably adhered to’.¹²² The ‘naive simplicity’¹²³ of this instruction overlooked the fact that neither Hindu nor Muslim law was contained only in the *sastras* or the *Koran* but was also to be found in legal literature and customs and usages which varied from caste to caste and region to region.¹²⁴ Initially, British India courts were assisted in the application of Hindu law by native ‘Law Officers’ (*pandits*), experts in the *sastras* who promoted the notion that, for Hindus, the *sastras* represented the law of the land as practised in classical India. In 1794, the *Manusmṛiti* was translated into English as the ‘Institutes of Hindu Law’, enabling British India courts to apply ‘Hindu law’ directly, bypassing the opinions of the *pandits* (of whom they had become increasingly suspicious) while simultaneously

¹²⁰ R. Rocher, n 117 above, 79.

¹²¹ R. Sturman, ‘Marriage and family in colonial Hindu law’ in Lubin et al. (eds.), n 68 above, 89-104, 90. Colonial Hindu law applied not just to those denominated ‘Hindu’ but also to Sikhs, Jains and Buddhists; *ibid.*, 90.

¹²² Letter of 15 August 1772, cited in Desika Char (1963), n 110 above, 20. These were the areas understood as being subject to *sastra* law, but they also coincided with the areas covered by English ecclesiastical law and family law; Derrett (1968), n 1 above, 233; M. Galanter, *Law and Society in Modern India* (Delhi: OUP, 1994) 144-145, n 9. See also R. Rocher, n 117 above, 78-79.

¹²³ Desika Char (1963), n 110 above, 21.

¹²⁴ Desika Char *ibid.*, 20-21.

confirming the impression that the *smṛti* literature had the status of ‘black letter’ law.¹²⁵

In the period to 1857, various English translations and digests of ‘Hindu’ law were produced to assist British judges; *pandits* continued to be used, but British courts also increasingly applied unwritten custom and established usage. Consistency in legal decisions, explains Rosane Rocher, was one of the primary aims of the colonial administration; consequently, a system of case law (a hallmark of English common law but alien to Hindu law) developed, alongside a greater willingness not only to apply but also to shape Hindu law by outlawing practices deemed unacceptable, even if sanctioned by the *sastra* texts.¹²⁶ British judges, says Rocher, were determined to distinguish between ‘what was religious and what was legal’.¹²⁷ Consequently, Anglo-Hindu law came to lose much of its ‘Hindu’ identity¹²⁸ and ‘Hindu law’ became reduced to ‘personal’ (i.e. religious) law.¹²⁹ Personal law – essentially family law – was conceptualised as a ‘separate legal domain’ operating ‘within the overarching jurisdiction of the State’ but supposedly ‘free from colonial intervention’.¹³⁰ As Galanter explains, under ‘personal law’ different rules were applied to members of different *varnas* – usually one rule for the Shudras and another for the three twice-born *varnas*.¹³¹ Thus, for the courts, a key issue was how

¹²⁵ Lingat, n 7 above, 136. A century later the *Manusmṛti* was dismissed as a source of law by Sir Henry Maine and the administrator-historian James H. Nelson (a District Judge in the Madras Presidency), among others, as a Brahminical fantasy which did not represent a set of rules ever actually administered in India but was a purely literary work which had no contact with reality; see Lingat, *ibid.*, 139; Lariviere, n 69 above, 626, fn 46.

¹²⁶ R. Rocher, n 117 above, 86-87. For example, the Caste Disabilities Removal Act 1850 declared unlawful the forfeiture of rights or property within territories under Company rule by reason of a person renouncing, or having been excluded from the communion of, any religion, or being deprived of caste.

¹²⁷ R. Rocher, *ibid.*, 87.

¹²⁸ *Ibid.*

¹²⁹ Sturman, n 121 above, 89.

¹³⁰ Sturman, *ibid.*, 91-92, 100. Family law in India remains separated along religious lines.

¹³¹ Galanter, n 122 above, 145.

to determine who was a Shudra.¹³² The colonial courts developed tests, based on Hindu textual law, to determine the *varna* standing of particular castes, within an overarching Hindu framework – a religious or ‘sacral’ view of caste which assumes that all groups within Hinduism can be subsumed within a *varna* and which locates Untouchability in the realm of the religious and ritual.¹³³ However, the courts accepted that textual law could be modified by custom. Where issues of caste (group) classification arose, caste groups pleaded ‘caste customs’ before the courts, seeking to associate themselves with a distinctive set of cultural traits which distinguished the caste as a ‘corporate body culturally distinct from its neighbours’. McCormack argues that most alleged ‘caste’ customs were actually regional, not caste-specific, customs. Nevertheless, ‘the courts accepted a presumption that for each “caste” there was one distinctive set of customs or “culture”’.¹³⁴ McCormack argues that modern caste organisation in India, specifically the ‘regional integration’ of castes and the notion of distinct ‘caste cultures’ (what Natrajan terms the ‘culturalisation’ of caste),¹³⁵ has been informed by the conceptualisation, in British India courts, of castes as distinct ‘corporate’ groups, each with their own distinct culture.¹³⁶

The British administration became increasingly unwilling to involve itself in claims concerning caste privileges and disabilities, which they characterised as religious

¹³² W. McCormack, ‘Caste and the British Administration of Hindu Law’, 1(1) *Journal of African and Asian Studies* (1966) 25-32, 29.

¹³³ M. Galanter, *Competing Equalities: Law and the Backward Classes in India* (Berkeley: University of California Press, 1984) 318; A. Rao, *The Caste Question: Dalits and the Politics of Modern India* (Berkeley: University of California Press, 2009) 4-7.

¹³⁴ McCormack, n 132 above, 29.

¹³⁵ See B. Natrajan, *The Culturalisation of Caste in India: Identity and Inequality in a Multicultural Age* (London: Routledge, 2012).

¹³⁶ McCormack, n 132 above, 27. McCormack explains how, in cases involving corporate actions by castes, the Bombay court applied precedents derived by analogy from the English law of clubs and religious sects; *ibid.*, 32.

matters,¹³⁷ resulting in a non-committal attitude to both the maintenance and modification of the caste structure.¹³⁸ Jurisdiction was abdicated to the caste *panchayats* whose decisions were allowed to stand with no interference, but equally no support, from the State.¹³⁹ Yet, the fact that personal law fell within the jurisdiction of colonial courts (despite constituting a ‘separate legal domain’) meant that inevitably there was State intervention in such matters.¹⁴⁰ For low castes, especially women, such intervention was often not to their legal advantage, e.g. ‘non-elite marriage forms’, which historically had recognised the economic contribution of women, were replaced by elite practices such as dowry marriage.¹⁴¹ Similarly, the 1860 Indian Penal Code criminalised lower caste customs such as divorce and remarriage (practices which were forbidden for high caste Hindu females) as bigamy or adultery.¹⁴²

2.5.3 1858–1900: the Crown and caste inequality

Company rule, and the remnants of the Mughal Empire, ended in 1858 with British victory over the Indian uprising of 1857–1858. By the Government of India Act 1858, all Company rights and territories in India were transferred directly to Crown control.¹⁴³ Codification and standardisation of law began, with the creation of the first Law Commission and the enactment of statutes such as the Indian Penal Code in 1860. At the same time the policy of non-interference with caste customs and

¹³⁷ Derrett (1968), n 1 above, 290.

¹³⁸ The Government of India Act 1833 prohibited discrimination in East India Company employment against Indians (natives) on grounds of descent (meaning race and ethnic origin), place of birth, religion or colour, but permitted the maintenance of caste disabilities; see Chapter 4 of this thesis.

¹³⁹ McCormack, n 132 above, 32; Galanter (1984), n 133 above, 20. See also Cohn, n 115 above.

¹⁴⁰ Sturman, n 121 above, 91.

¹⁴¹ Sturman, *ibid.*, 96.

¹⁴² *Ibid.*

¹⁴³ The 560 ‘princely states’, which had never been under Company control, remained autonomous on condition of support for the Crown; see S. Wolpert, *A New History of India* (Oxford: OUP 2009, 8th edition) 247.

religious law in personal and family matters continued.¹⁴⁴ In 1858, Queen Victoria proclaimed that that no Indians would be favoured or molested by reason of their religion or observances – suggesting that the caste-based discriminatory practices of the high castes would not be challenged.¹⁴⁵ Wolpert explains that ‘fears concerning “native” sensibilities to socio-religious changes’ resulted in an era of ‘socio-religious *laissez faire*’ and a ‘policy of indifference to the plight of women, [U]ntouchables and exploited children’, couched in terms of religious tolerance and equality¹⁴⁶ and driven by concern that ‘upsetting caste hierarchies amounted to interfering with the religious beliefs of Hindus’.¹⁴⁷ The ‘personal law’ sphere governed by classical Hindu legal concepts and doctrines was preserved alongside the developing body of national, secular law, a situation that carried over into the post-independence era. The use of caste in general civil, criminal and commercial cases was abandoned, *sastric* and customary law was supplanted by universally applicable law in all except the personal law fields and ‘British law did not recognize or try to maintain the caste order as such’.¹⁴⁸ Nonetheless, the law did recognise the autonomy of caste groups, and the courts did not intervene to prevent high castes enforcing their ‘prerogatives’ against lower castes by extra-judicial means, nor did they interfere with the disciplinary powers of caste tribunals.¹⁴⁹ ‘Exclusionary practices’ of caste groups regarding the use of religious premises were upheld by the courts, although not in regard to secular public facilities such as roads; but ‘even where the lower castes enjoyed rights that were formally enforceable’, they did not have the resources to

¹⁴⁴ Galanter (1984), n 133 above, 20.

¹⁴⁵ P.I. Anandan, ‘The Coronation and the Depressed Classes’, 24 *Hindustan Review* (1911) 529-32, 529, cited in Galanter (1984), n 133 above, 20, fn 6.

¹⁴⁶ Wolpert, n 143 above.

¹⁴⁷ D. Shyam Babu & C. B. Prasad, ‘Six Dalit Paradoxes’, *EPW*, 6 June 2009, 22-25, 23.

¹⁴⁸ Galanter (1984), n 133 above, 19.

¹⁴⁹ Galanter, *ibid.*, 20-21. Galanter cites cases where British India courts granted injunctions to restrain lower castes from entering temples, awarding damages in trespass to the person to higher castes for purification ceremonies necessitated by the ‘pollution’ caused by their presence; Galanter (1994), n 122 above, 147.

litigate to secure redress. Higher castes were thus able to use the legal system, or exploit its shortcomings, to protect their status, privileges and claims for precedence, while access to the law was effectively denied to the lower castes.¹⁵⁰

2.6 Nepal: the *Muluki Ain* (Nepali Royal Law Code) 1854

Contemporaneously with British attempts to codify Indian law, Nepal produced an express codification of caste *inequality* in a national, secular law code: the Nepali Royal Law Code 1854, or *Muluki Ain* (MA), composed at the behest of Prime Minister Rana, who had seized power in 1846. The MA was a national legal code, central to which was the concept of ascribed caste status.¹⁵¹ An exercise in legal (and social) control, it sought to impose national unity on a diverse and multi-ethnic society by laying down a hierarchical order based on caste. Regional laws were to discontinue and subjects punished ‘uniformly according to their guilt *and caste*’.¹⁵² The MA contains detailed rules on identification and deprivation of caste status; positioning within the caste hierarchy; inter-caste commensality, proximity and contact; Untouchability; purity rules, including transgression of the ‘water-line’ separating pure from impure castes, transfer of impurity and temporary impurity; and inter- and intra-caste social and sexual relations.

¹⁵⁰ Ghurye cites the example of a Mahar (Untouchable) boy refused admission in 1856 to a government school which was partly privately-funded, whose appeal to the Bombay Education Department was rejected because by admitting him the institution would be rendered practically useless to the great mass of natives, i.e. caste Hindus, who would be forced into association with him. It was only in 1932 that the government declared that no grants would be paid to any State-aided educational institutions which refused admission to depressed class children; Ghurye, *Caste and Race in India* (Bombay: Popular Prakashan, 1969, 5th edition) 275.

¹⁵¹ A. Hofer, *The Caste Hierarchy and the State in Nepal: A Study of the Muluki Ain of 1854* (Innsbruck: Universitätsverlag Wagner, 1979) 39.

¹⁵² *Ibid.*, 195.

While the Indian legal tradition required that the king respect not only *dharma* but also customary law ('the internal jurisdiction of local groups, castes, villages and guilds'), his power was subject to the spiritual power of the Brahmins,¹⁵³ whereas under the MA, customary law and religion were only applicable if they had become *ain* law. Whatever related to caste was subject to the executive and judicial powers of the State,¹⁵⁴ revealing a level of State involvement in and regulation of caste-related behaviour and events in an individual's daily life which reached deep into the private sphere.¹⁵⁵ Following Nepal's 1951 revolution, the MA was re-issued in 1955. Under the 1959 Constitution all citizens were equal before the law, and discrimination in public employment on grounds of religion, race, sex, caste and tribe was prohibited, but under both the re-issued MA and the 1959 Constitution social groups (meaning castes) were assured 'the right to self-determination with regard to religion, customs and social intercourse with other groups'. Discrimination against members of other social groups could thus be justified on grounds of protecting one's own religion and custom:¹⁵⁶ if an Untouchable entered a 'cult place' used hitherto only by Brahmins, such an act could be interpreted 'as an infringement of the Brahmin's religion and customs'.¹⁵⁷ Under the MA, caste was the chief factor determining an individual's juridical status; it 'interfered' in marriage, inheritance and occupation, in the relationship between patient and healer and between individual and the State. It is

¹⁵³ Ibid., 199.

¹⁵⁴ Ibid., 197.

¹⁵⁵ Ibid. Notwithstanding these extensive powers, a certain amount of local autonomy was granted to local population groups who followed their own traditions and customary law regulating marriage, inheritance, etc., while remote areas inaccessible to public administration remained little affected by the caste hierarchy of the MA.

¹⁵⁶ Ibid., 206.

¹⁵⁷ Ibid.

thus simply incorrect, says Hofer, to claim that caste in the sub-continent was a creation of British census compilers.¹⁵⁸

2.7 Caste reform: 1858–1947

With British rule came new opportunities for education and advancement, mostly for the Indian elite but also for a small fraction of the lower castes. New ideas were introduced by European and Indian intellectuals, European missionaries and Indian religious reformers. Alongside the growth of nationalism, nineteenth-century India saw the emergence of various reform issues in Indian society, including social issues such as caste, and the emergence of regional and region-wide caste organisations, Hindu reform groups and low caste ‘Non-Brahmin’ movements and organisations.¹⁵⁹ Initially, caste reform was associated with lower caste self-improvement and advancement, often measured in terms of improved status via the adoption of upper caste practices (ironically sometimes the very practices opposed by high caste social reformers, such as the ban on widow remarriage and child marriage) and the achievement of a more prestigious Census entry.¹⁶⁰ It was not until the end of the nineteenth century, writes Galanter, that ‘mainstream reformers saw caste hierarchy and inequality as problems in their own right’.¹⁶¹ Galanter identifies two approaches to the eradication of caste inequality, namely the ‘evangelical’ and the ‘secular’. The

¹⁵⁸ Ibid., 211. In 2011 Nepal introduced new legislation criminalising caste discrimination and Untouchability; see ‘Nepal: UN welcomes new law on caste-based discrimination’ at <http://www.un.org/apps/news/story.asp?newsid=38496>; see also Indian Institute of Dalit Studies, ‘Caste-based Discrimination in Nepal’, Working Paper Series Vol. 3, No. 8 (2009) at <http://www.dalitstudies.org.in/wp/0908.pdf> (both visited 2 April 2013).

¹⁵⁹ Galanter (1984), n 133 above, 22–23; E. Zelliot, *From Untouchable to Dalit: Essays on the Ambedkar Movement* (New Delhi: Manohar, 1998) 33–50; Rao, n 133 above, Chapter 1.

¹⁶⁰ Galanter (1984), *ibid.*, 23. European missionaries saw conversion as the solution to caste inequality.

¹⁶¹ Galanter (1984), *ibid.*, 24. From the 1870s, the caste reform movement used the label ‘Depressed Classes’ to refer to those at the bottom of the caste hierarchy; see S. Charsley, ‘Untouchable: What is in a Name?’, 23(1) *Journal of the Royal Anthropological Institute* (1996) 1–23, 6.

evangelical approach, personified by Gandhi, involved ‘the uplift of [U]ntouchables to higher Hindu standards and the penance of caste Hindus for [U]ntouchability, which is seen not as an integral part of Hinduism but as some external impurity. Uplifted [U]ntouchables and repentant Hindus will join together in a purified and redeemed Hinduism’.¹⁶² In contrast, the secular approach, personified in the first half of the twentieth century by Ambedkar, saw Untouchability as an integral part of Hinduism and stressed the denial of civil, economic and social rights to Untouchables, which it sought to combat by vigorous government (legal and policy) intervention achieved through political action.¹⁶³

The early twentieth century also saw the emergence of Untouchable ‘Adi’ movements (*Adi* meaning ‘first’ or ‘original’), first in south India and then in the north, the most well-known example being the north Indian Ad-Dharm Untouchable religious movement.¹⁶⁴ However, it was Ambedkar who was primarily responsible, in the two decades before independence, for the construction of the Untouchables as a pan-Indian social and political minority, distinct from the Hindus. While Gandhi urged voluntary private action on the part of caste Hindus to reject and combat Untouchability, Ambedkar advocated legal solutions in the form of legislative change and affirmative action quotas for the Untouchables *qua* minority group outside the Hindu fold, initially in the fields of political representation and employment and then, on independence, in political representation, public sector employment and education through the Constitution of independent India (of which

¹⁶² Ibid., 28.

¹⁶³ Ibid. In the nineteenth century these approaches – the evangelical and the secular – were exemplified respectively by the Hindu reformers of the Arya Samaj and by the radical low-caste leader Mahatma Jotirao Phule; see R. O’Hanlon, *Caste, Conflict and Ideology: Mahatma Jotirao Phule and low caste protest in nineteenth-century western India* (Cambridge: CUP, 1985); Rao, n 133 above, Chapter 1.

¹⁶⁴ See M. Juergensmeyer, *Religion as Social Vision: The Movement Against Untouchability in 20th-Century Punjab* (Berkeley: University of California Press, 1982).

he was ‘one of the principal architects’).¹⁶⁵ Until the early twentieth century, the Dalits were not conceptualised as a pan-Indian category, nor was the extent of their oppression a matter of public or national concern except to caste reform activists.¹⁶⁶ The rhetorical potential of the term ‘Untouchability’ – coined around 1909 to describe the particular, ritual discrimination suffered by the Dalits¹⁶⁷ – was identified by Ambedkar, who transformed the term Untouchable from a description into a name designating an all-India political identity and a new social and legal category.¹⁶⁸ In the two decades prior to independence, Ambedkar ensured that the concepts of ‘Untouchability’ and ‘Untouchable’ became ‘embedded in Indian understanding of the structure of their society’ and ultimately embodied in the Constitution of India (COI).¹⁶⁹

The term ‘Scheduled Castes’ originates in the Government of India Act 1935, which identified by means of an official list those socially-excluded castes – previously termed ‘Depressed Classes’ or ‘Untouchables’ – eligible for preferential electoral treatment under the Act.¹⁷⁰ The Schedule was incorporated into the COI and has remained in use ever since. COI Article 366(24) defines Scheduled Castes as those castes notified as such by Presidential Order pursuant to COI Article 341.¹⁷¹

¹⁶⁵ Galanter (1984) n 133 above, 37.

¹⁶⁶ See O. Mendelsohn and M. Vicziany, *The Untouchables: Subordination, Poverty and the State in Modern India* (Cambridge: CUP, 1998) 2. See also G. Omvedt, *Dalits and the Democratic Revolution: Dr Ambedkar and the Dalit Movement in Colonial India* (New Delhi: Sage, 1994); W. Radice (ed.), *Swami Vivekananda and the Modernisation of Hinduism* (New Delhi: OUP, 1999); Galanter (1984), n 133 above, 29-30.

¹⁶⁷ See Charsley, n 161 above, 7.

¹⁶⁸ Charsley, *ibid.*, 9. Although the existence of the Untouchables was not new, something new was constructed in the category of Untouchable; Mendelsohn and Vicziany, n 166 above, 21.

¹⁶⁹ Charsley, *ibid.*

¹⁷⁰ Galanter (1984), n 133 above, 130; L. Dudley Jenkins, *Identity and Identification in India; Defining the Disadvantaged* (New York: RoutledgeCurzon, 2003) 14.

¹⁷¹ See COI Articles 341(1) and (2); Constitution (Scheduled Castes) Order 1950 (C.O. 19) at <http://lawmin.nic.in/ld/subord/rule3a.htm> (visited 18 December 2012). Castes are scheduled by State; a caste may be ‘scheduled’ in one State but not in another, such that migrant workers who are scheduled in their home State may not be eligible for SC reservation benefits in their new State.

Thereafter, they can be de-listed only by Parliament.¹⁷² Currently, over eleven hundred castes are Scheduled.¹⁷³ Scheduled status is established by means of a Caste Certificate issued by the authorities, attesting to the bearer's membership of a Scheduled Caste.¹⁷⁴ The list has changed little since the original Schedule was drawn up by the British in 1936, the basis for inclusion in which was Untouchability – measured not according to 'secular' disadvantages such as poverty or illiteracy but according to the extent of social disabilities accruing from low social and ritual status in the traditional Hindu social hierarchy (although almost total synchronicity existed between ritual disabilities and socio-economic deprivation).¹⁷⁵ In 1931, the Census Commissioner, J.H. Hutton, attempted to specify the criteria by which Untouchable groups could be identified, but it proved impossible to devise an all-India test due to different regional practices.¹⁷⁶ The Constituent Assembly – the body charged with drafting independent India's new Constitution – abolished but did not define Untouchability.¹⁷⁷ However, the understanding was of a ritual, status-based characteristic grossly damaging both to the individual and to society, giving rise to a unique type of social stigma and discrimination which was distinct from discrimination on other grounds, for example religion.¹⁷⁸ Crucially, Untouchability was seen by the Constituent Assembly as a function of caste alone – an amendment

¹⁷² COI, Article 341(2).

¹⁷³ Ibid.

¹⁷⁴ A similar mechanism is used to establish ST and OBC status. Given the value of these benefits, a significant body of 'identity adjudication' jurisprudence has developed in India concerning claims to or disputes pertaining to Scheduled status; Dudley Jenkins, n 169 above.

¹⁷⁵ Galanter (1984), n 133 above, 122, 135.

¹⁷⁶ Galanter (1984), *ibid.*, 127-8. In 1932, Ambedkar pointed out the futility of insisting on the application of uniform tests for Untouchability across India, given that India was 'not a single homogenous country' but a continent; H. Narke (ed.), *BAWS Vol. 2* (Bombay: Education Dept., Govt. of Maharashtra, 2005), 491.

¹⁷⁷ See Constituent Assembly Debates of India (CAD) Vol. III, 29 April 1947 (New Delhi: Lok Sabha Secretariat); CAD Vol. VII, 29-30 November 1948, 664-669.

¹⁷⁸ Dr. Monomohon Das; CAD Vol. VII, 29 November 1948, 666.

by a Muslim member that “no-one shall on account of his *religion or caste* be treated or regarded as an ‘untouchable’” was rejected by the Assembly.¹⁷⁹

Ambedkar linked Untouchable emancipation from caste oppression with India’s emancipation from the British.¹⁸⁰ Central to his strategy was the assertion that the Untouchables were a minority group, ‘distinct and separate from the Hindus’,¹⁸¹ entitled to recognition ‘as a separate entity for political and constitutional purposes’.¹⁸² Gandhi, by contrast, insisted that the Untouchables should not be separated politically from the Hindu fold, a prospect which he viewed as damaging to Hindu unity and therefore to the nationalist movement and *swaraj* (the struggle for independence).¹⁸³ In 1946, the Constituent Assembly was established. Assembly members were to be elected from the three main ‘communities’ recognised by the British – Muslim, Sikh and ‘general’, the latter to include all persons who were not Muslims or Sikhs,¹⁸⁴ with an Advisory Committee on Minorities and Fundamental Rights (the ‘Minorities Committee’) to report on measures for the protection of minorities.¹⁸⁵ Ambedkar, concerned to ensure Untouchable representation in the Assembly and on the Minorities Committee as a separate political minority rather as a sub-group within the Hindus, sought, unsuccessfully, a declaration from the British that ‘minorities’ included the SCs. Clement Atlee, the British Prime Minister, wrote

¹⁷⁹ Mr. Ahmad; CAD Vol. VII, 29 November 1948, 669 (emphasis added).

¹⁸⁰ D. Keane, *Caste-Based Discrimination in International Human Rights Law* (Aldershot: Ashgate, 2007) 2.

¹⁸¹ B. R. Ambedkar, *What Congress and Gandhi Have Done To the Untouchables: BAWS Vol. 9* (Bombay: The Education Dept., Govt. of Maharashtra, 1991) 181. Galanter, in a footnote, notes that, as late as 1910, Hindu political opinion was still divided as to whether the Untouchables should ‘count’ as Hindus or not; Galanter (1984), n 133 above, 26, FN 24.

¹⁸² Ambedkar, *BAWS Vol. 9*, *ibid.*, 54.

¹⁸³ Ambedkar *ibid.*, 87. See also D. Nesiiah, *Discrimination With Reason?* (New Delhi: OUP, 1989) 44-45; Galanter (1984), n 133 above, 31-32; Zelliott, n 159 above, 166-7.

¹⁸⁴ B. Shiva Rao, *The Framing of India’s Constitution: Selected Documents, Vol. 1* (New Delhi: The Indian Institute of Public Administration, 1966) 209-24, 214.

¹⁸⁵ *Ibid.*, 216.

privately to Ambedkar, saying, “We ourselves consider the Scheduled Castes to be an important minority which should be represented on the Minority Advisory Committee,” but he was unwilling to dictate to the Assembly the composition of the Minorities Committee.¹⁸⁶ In the event, the SCs and STs, as well as Christians, Parsis, Anglo-Indians and women, were brought into the Constituent Assembly by Jawarharlal Nehru’s Congress Party – India’s biggest political party – under the ‘general’ category.¹⁸⁷ Ambedkar was duly elected to the Assembly and appointed to the Constitution’s Drafting Committee (of which he was elected Chair), the Minorities Committee, and the Minorities Sub-Committee. In 1935, Ambedkar had famously declared, ‘I was born in the Hindu religion; but I will not die in the Hindu religion’; twenty years later, in October 1956, two months before his death, he led a mass conversion of half a million Dalits to Buddhism in Nagpur, Maharashtra. Since then, ‘Ambedkarite Buddhist’ has become commonplace as a term of reference and self-reference with respect to Dalit converts to Buddhism.¹⁸⁸

2.8 Conclusion

In 1945, Ambedkar described the caste system as ‘a legal system maintained at the point of a bayonet’.¹⁸⁹ Historically, law has been used in India not only to define and categorise the Dalits but also to lay down the very parameters of their existence. It is only since 1950 that the principle of non-discrimination has applied *de jure* to the Dalits. Prior to 1950, the reverse was the case: Dalits were explicitly subject, *de jure*

¹⁸⁶ S. Ajnat (ed.), *Letters of Ambedkar* (Jalandhar: Bheem Patrika Publications, 1993) 154, 157.

¹⁸⁷ G. Austin, *The Indian Constitution: Cornerstone of a Nation* (New Delhi: OUP, 1966) 12. In January 1947, the Muslim League announced their withdrawal from the Assembly; Wolpert, n 143 above 361-3.

¹⁸⁸ Zelliott, n 159 above, 133-134, 136-140, 187-196, 207-211. Ambedkar had already developed a theory that the Untouchables were formerly Buddhists persecuted by Vedic Hindus. Conversion was thus a ‘return’ to Buddhism as an egalitarian, Indic religion and an escape from Untouchability.

¹⁸⁹ Ambedkar, *BAWS Vol. 9*, n 181 above, 289.

and *de facto*, to the principle of discrimination on grounds of caste.¹⁹⁰ ‘Inequality in India, as in most places, is a matter not merely of unequal distribution of material resources, but of ideas, values and meanings’.¹⁹¹ Writes Dhavan, the *sastra* corpus

was calculated to achieve what we might call a kind of in-egalitarian harmony between races and in support of a particular view of the relationship between various groups... As a testament on race relations, the *sastra* presents a hierarchical solution to the problems of race and group differentiation. Awkward though this may seem to our contemporary images of an egalitarian society, this hierarchical view was founded on a cosmological understanding of the order of things.¹⁹²

Dhavan’s argument is that the *sastra* in contemporary Hindu society comprises ‘a second order reservoir of ideas and beliefs’ which people draw on to make decisions and which influence how they view themselves and their relationship with others and things around them.¹⁹³ He argues that ‘too little attention is paid to the ideology of everyday life, which is concerned with what we believe and our reasons for action or inaction’.¹⁹⁴ The *sastras*, he argues, authoritatively pronounce on the relationship between persons *inter se* and the State, while diluting the difference between legal and moral obligation – they prescribe and settle the basis on which group life is to exist in civil society, yet they do not draw their authority from the State.¹⁹⁵ Dhavan goes on to argue that after Indian independence ‘it was assumed that the unit of interpretive concern was the individual who must, *prima facie*, be treated as equal to other individuals unless the purpose of the law suggested otherwise’, but this

¹⁹⁰ Menski (1993), n 2 above, 302.

¹⁹¹ M. Schwartz, ‘Indian Untouchable Texts of Resistance: Symbolic Domination and Historical Knowledge’ in H.L. Seneviratne (ed.), *Identity, Consciousness and the Past: Forging of Caste and Community in India and Sri Lanka* (New Delhi: OUP, 1999) 177.

¹⁹² R. Dhavan, ‘Dharmasastra and Modern Indian Society: A Preliminary Exploration’ 34(4) *Journal of the Indian Law Institute* (1992), 515-540, 519, 525 (emphasis added).

¹⁹³ *Ibid.*, 515.

¹⁹⁴ *Ibid.*, 516.

¹⁹⁵ *Ibid.*, 522.

fundamental principle, on which modern law was founded, was at variance with the *sastra*.¹⁹⁶ Yet, he says, the contemporary defence of Hinduism is not a defence of the *sastric* way of life but a more amorphous general defence of the faith which seeks to draw Hindus together. Thus, in India, arguments about affirmative action policies for Dalits 'are not based on religion but on the rational argument that [they are] unworkable, unfair, inequalitarian and contrary to public interest'.¹⁹⁷ It is submitted that many of these elements of Dhavan's analysis are also relevant to current discussions in the UK concerning the legal regulation of caste discrimination, the opponents of which make similar arguments to those explained by Dhavan, above.

The ideas and beliefs underlying caste and caste discrimination in Indian society are deeply rooted in traditions, rituals and rules that have developed over centuries, and they continue to play a role in the shaping of people's attitudes and behaviours in contemporary India, particularly in rural areas. Breaking down such deeply held beliefs and practices cannot be achieved solely by legal regulation; corresponding social and political action is also required.¹⁹⁸ Nevertheless, legal regulation *is* essential.¹⁹⁹ Before turning to examine the legal regulation of caste discrimination in the international and UK arenas we must first examine the legal regulation of caste and caste discrimination introduced by post-independence India in an attempt to eradicate caste discrimination and the practice of Untouchability, analysing in

¹⁹⁶ Ibid., 536. For a debate on human rights, Hinduism and *dharma* see S. Subedi, 'Are the Principles of Human Rights "Western" Ideas? An Analysis of the Claim of the "Asian" Concept of Human Rights from the Perspectives of Hinduism', 30 *California Western International Law Journal* (1999) 45-69; M. Ritter, 'Human Rights: The Universalist Controversy, A Response to Surya Subedi', 30 *California Western International Law Journal* (1999) 71-90.

¹⁹⁷ Dhavan, n 192 above, 539.

¹⁹⁸ See UN Special Rapporteur on Racism, Interim Report; UN Doc. A/66/313, 19 August 2011, paras. 68-76; Special Rapporteur on Racism, Report; UN Doc. A/HRC/17/40, 24 May 2011, paras. 86-92.

¹⁹⁹ Ibid.

particular what has and has not worked, in order to draw lessons for the UK. This is the focus of Chapter 3.

Chapter 3

The Legal Regulation of Caste Discrimination in India: Lessons Learned¹

3.1 Introduction

Like an octopus, caste has its tentacles in every aspect of Indian life. It bedevils carefully drawn plans of economic development. It defeats legislative effort to bring about social reform. It assumes a dominant role in power processes and imparts its distinctive flavour to Indian politics. Even the administrative and the academic elites are not free from its overpowering influence. So how can it be ignored as a social force?²

This description of caste in India, written in 1968, was echoed some thirty-five years later in Myron Weiner's observation that caste is still very much alive as a lived-in social reality, even though its ideological grip has somewhat weakened.³ In 1936, B.R. Ambedkar published his seminal essay 'The Annihilation of Caste',⁴ calling for an end to the caste system and the oppression associated with it, but sixty-five years since Indian independence⁵ and the adoption of a Constitution⁶ heralding a society free from poverty, inequality and discrimination, caste has not been annihilated in India, and neither has Untouchability despite its legal abolition.⁷ Far from becoming a caste-neutral or caste-less society, India - despite its huge diversity - remains a

¹ For a comprehensive discussion of caste discrimination in contemporary India, and strategies for its elimination, see A. Waughray, 'India and the Paradox of Caste Discrimination', 8 *European Yearbook of Minority Issues* (2009) 413-452.

2. C. S. Dube, *Foreword* in Y. Atal, *The Changing Frontiers of Caste* (New Delhi: National Publishing House, 1968) vii.

³ M. Weiner, 'The struggle for equality: caste in Indian politics' in A. Kohli (ed.), *The Success of India's Democracy* (Cambridge: Cambridge University Press (CUP), 2001) 193-225, 195.

⁴ B.R. Ambedkar, 'The Annihilation of Caste' in V. Moon (ed.), *Babasaheb Ambedkar Writings and Speeches (BAWS) Vol. 1* (Bombay: The Education Dept., Govt. of Maharashtra, 1989).

⁵ India became independent at midnight on 14-15 August 1947; D. Lapierre and L. Collins, *Freedom at Midnight* (New Delhi: Vikas Publishing House Pvt Ltd, 1997).

⁶ Constitution of India 1950 (COI), in force 26 January 1950. Full text available at <http://lawmin.nic.in/coi.htm> (visited 26 July 2012).

⁷ COI, Article 17.

society where caste matters. Paradoxically, says Weiner, ‘the movement for change is not a struggle to end caste [but] to use caste as an instrument of social change... [W]hat is emerging in India is a social and political system which institutionalises and transforms but does not abolish caste’.⁸ India is the world’s largest caste-affected country and has the oldest legal framework for addressing discrimination on grounds of caste, yet there is a glaring disconnect between India’s legal (and policy) framework and the *de facto* situation on the ground. This chapter explains and critiques India’s legal and policy framework for the elimination of discrimination on grounds of caste, identifies the weaknesses and limitations of India’s approach and suggests how these might be overcome in India and avoided elsewhere, e.g. the UK. In order to do this, the chapter first identifies and explains the contemporary context and manifestations of caste discrimination in India today.

3.2 Caste discrimination in India: contemporary context⁹

3.2.1 Poverty and Untouchability

In a country with huge numbers of poor by any international standards, India’s Dalits suffer disproportionately from socio-economic deprivation and economic exploitation.¹⁰ However, material poverty is not the only source of Dalits’ oppression; rather – despite regional, linguistic, cultural and religious differences –

⁸ Weiner, n 3 above, 196.

⁹ See Waughray (2009), n 1 above.

¹⁰ K. Parikh and R. Radadkhrishna (eds.) *India Development Report 2004-5* (New Delhi: OUP, 2005) 49; S. Alkire and M. Santos, ‘Acute Multidimensional Poverty: A New Index for Developing Countries’, Oxford Poverty & Human Development Initiative Working Paper No. 38, University of Oxford, July 2010, 13-17, 32, 43, 49. On the concept of economic citizenship see B. Harriss-White and A. Prakash, ‘Social Discrimination in India: A Case for Economic Citizenship’ (University of Oxford South Asia Work in Progress Research Papers No. 5 (2011-12) at <http://www.southasia.ox.ac.uk/south-asia-work-progress-research-papers> (visited 25 March 2013). On India’s poor see P. Sainath, *Everyone Loves a Good Drought: Stories from India’s Poorest Districts* (London: Review, 1996); H. Mander, *Unheard Voices: Stories of Forgotten Lives* (New Delhi: Penguin, 2001).

they are distinguished by a shared experience of Untouchability-based exclusion, discrimination and violence.¹¹ Although commentators argue that Untouchability has ‘changed character and lost intensity since independence’,¹² and despite a decline in some of the most blatant practices,¹³ a 2006 study of rural Untouchability in eleven States found ‘almost universal residential segregation in villages’¹⁴ and Untouchability practised in various forms in almost eighty per cent of the villages studied, despite its constitutional abolition. In urban areas higher-status Indians remain occupationally, residentially and socially separated from the lower castes.¹⁵

3.2.2 Occupational inequalities

Economic activity remains skewed along caste lines, with sharp disparities in occupational mobility, status and income between Dalits and the higher castes. Bonded labour, subsistence-level agricultural day labour and low-level or menial jobs (whether in the private or public sector) are all associated with the lowest castes, in particular Dalits, who struggle to accumulate the social and cultural capital necessary to compete on a level playing field.¹⁶ The view in modern corporate India

¹¹ O. Mendelsohn and M. Vicziany, *The Untouchables: Poverty, Subordination and the State in Modern India* (Cambridge: CUP, 1998) 12; B. R. Ambedkar, ‘Outside the Fold’ in V. Moon (ed.), *BAWS Vol. 5* (Bombay: The Education Dept., Govt. of Maharashtra, 1989) 19-26.

¹² Mendelsohn and Vicziany, *ibid.*, 36. See also G. Shah, ‘Dalit Politics: Has It Reached An Impasse?’ in N. Jayal and S. Pai (eds.), *Democratic Governance in India: Challenges of Poverty, Development and Identity* (New Delhi: Sage, 2001) 221-231, 227.

¹³ G. Shah, H. Mander, S. Thorat et al., *Untouchability in Rural India* (New Delhi: Sage, 2006) 166.

¹⁴ *Ibid.*, 67. See also B. Bhatia, ‘Dalit rebellion against untouchability in Chakwada, Rajasthan’, 40 *Contributions to Indian Sociology* (2006) 29-61.

¹⁵ Mendelsohn and Vicziany, n 11 above, 40-41; H. Gorrige and I. Rafanell, ‘The Embodiment of Caste: Oppression, Protest and Social Change’ 41 *Sociology* (2007) 97-114, 106-7.

¹⁶ S. Thorat and K. Newman, ‘Caste and Economic Discrimination: Causes, Consequences and Remedies’, *Economic and Political Weekly (EPW)*, 13 October 2007, 4121-24; S. Jodhka and K. Newman, ‘In the Name of Globalisation: Meritocracy, Productivity and the Hidden Language of Caste’, *EPW*, 13 October 2007, 4125-4132, 4127-8; T. Weisskopf, ‘Impact of Reservations on Admissions to Higher Education in India’, *EPW*, 25 September 2004, 4339-4349, 4344; M. Mohanty, ‘Social Inequality, Labour Market Dynamics and Reservation’, *EPW*, 2 September 2006, 3777-3789; S. Thorat and K. Newman, *Blocked by Caste: Economic Discrimination in Modern India* (New Delhi: OUP, 2012); A. Deshpande, *The Grammar of Caste: Economic Discrimination in Contemporary India* (New Delhi: OUP, 2011).

that recruitment is governed strictly by merit (itself a contested concept)¹⁷ is not borne out by the research:¹⁸ '[F]ar from disappearing as the economy modernises', argue Thorat and Newman, the formal, urban labour market shows 'serious evidence of continued discriminatory barriers even for highly qualified [D]alits'.¹⁹

3.2.3 Educational inequalities

Dalit secondary school enrolment rates are lower and drop-out rates higher than for the general population²⁰ (and the figures are worse for girls), due partly to the high direct costs of schooling and the need for Dalit children to work.²¹ Consequently, Dalit literacy levels remain below the national average²² and Dalits are significantly under-represented in the ranks of higher degree graduates,²³ forming around twelve per cent of the urban population but just 3.6 per cent of urban non-technical subject graduates and under two per cent of urban medical graduates.²⁴ Dalit children are more likely to attend State-run, poor quality, rural, non-English-medium schools, which means that they are less likely to meet college admissions requirements.²⁵ By 2000, the representation of Dalits in higher education was still only half their representation in the population as a whole; two-thirds of Dalit students are enrolled

¹⁷ S. Fredman, 'Reversing Discrimination', 113 *Law Quarterly Review* (1997) 575-600, 580.

¹⁸ S. Thorat and P. Attewell, 'The Legacy of Social Exclusion: A Correspondence Study of Job Discrimination in India', *EPW*, 13 October 2007, 4141-4145; Jodhka and Newman (2007), *ibid.*

¹⁹ Thorat and Newman (2007), n 16 above, 4123. See also D. Ajit, H. Donker and R. Saxena, 'Corporate Boards in India: Blocked by Caste?' *EPW*, 11 August 2012, 39-43; Thorat and Newman (2012), n 16 above; Deshpande, n 16 above; Shah (2001), n 12 above, 229.

²⁰ Government of India (GOI), Ministry of Human Resource Development (MHRD), Department of Higher Education (DHE), New Delhi; Selected Educational Statistics (SES) 2005-6, Gross Enrolment Rates.

²¹ GOI, National Commission for Scheduled Castes (NCSC), New Delhi, Report 2004-5, 16.

²² NCSC Report 2004-5, *ibid.*, 118.

²³ H. Jain and C. S. Venkata Ratnam, 'Affirmative Action in Employment for the Scheduled Castes and the Scheduled Tribes in India', 15(7) *International Journal of Manpower* (1994) 6-25, 22.

²⁴ S. Deshpande, 'Exclusive Inequalities' in S. Thorat and N. Kumar (eds.), *In Search of Inclusive Policy: Addressing Graded Inequality* (Jaipur: Rawat Publications, 2008) 323-24.

²⁵ R. Hasan and A. Mehta, 'Under-representation of Disadvantaged Classes in Colleges: What Do the Data Tell Us?', *EPW*, 2 September 2006, 3791-3796; Mohanty, n 16 above, 3788.

on low-prestige programmes and they are disproportionately under-represented in Masters' and PhD programmes.²⁶

3.2.4 Violence

Violence against Dalits ('atrocities')²⁷ is often committed with the knowledge and acquiescence, or at the hands, of the law enforcement agencies.²⁸ Non-governmental monitoring groups and statutory bodies link atrocities to greater competition between Dalits and higher castes for scarce resources such as land and water,²⁹ as well as with attempts by intermediate and higher caste groups to protect their status or to punish those perceived to have transgressed social boundaries.³⁰ Both the UN Committee for the Elimination of Racial Discrimination (CERD) and the UN Committee on Economic, Social and Cultural Rights (CESCR) have noted allegations of police failure to register, investigate and properly assist victims of atrocities and caste discrimination.³¹ Paradoxically, Untouchability offers no protection against caste-based sexual violence. Punitive or coercive violence against Dalits is often characterised by its highly gendered nature, with women and girls the deliberate targets of gendered Untouchability practices and sexual violence, and rape and

²⁶ Weisskopf (2004a), n 16 above, 4339.

²⁷ On violence against Dalits see K. B. Saxena, *Report on Prevention of Atrocities Against Scheduled Castes: Policy and Performance – Suggested Interventions and Initiatives for NHRC* (New Delhi: National Human Rights Commission, India, 2004); H. Gorringer, 'Banal Violence? The Everyday Underpinnings of Collective Violence', 13 *Identities: Global Studies in Culture and Power* (2006) 237-260. On the 'violence of Untouchability' see A. Rao, *The Caste Question: Dalits and the Politics of Modern India* (Berkeley: University of California Press, 2009).

²⁸ Saxena, *ibid.*, 47; Gorringer (2006), *ibid.*, 244; Human Rights Watch, *Broken People: Caste Violence Against India's Untouchables*, 1999, at <http://www.hrw.org/reports/1999/03/01/broken-people-0>; Human Rights Watch, *Caste Discrimination: A Global Concern*, 2001, at <http://www.hrw.org/news/2001/08/29/global-caste-discrimination> (both visited 16 December 2012).

²⁹ See Sakshi Human Rights Watch, Secunderabad, *Dalit Human Rights Monitor, Andhra Pradesh 2000-2003*, 3-4.

³⁰ Saxena, n 27 above, 1; A. Teltumbde, *Khairlanji: A Strange and Bitter Crop* (New Delhi: Navayana, 2008) 15-16; R. Kothari, 'Rise of the Dalits and the Renewed Debate on Caste', *EPW*, 25 June 1994, 1589-1594, 1593.

³¹ See CERD, concluding observations on India's fifteenth to nineteenth periodic reports; UN Doc. CERD/C/IND/CO/19, 5 May 2007, paras. 13, 14, 26; CESCR, concluding observations on India's second to fifth periodic reports; UN Doc. E/C.12/IND/CO/5, 8 August 2008, paras. 13, 14, 52, 53.

sexual torture are an integral element of retaliatory and punishment crimes against Dalit families.³²

3.3 Constitutional vision

The framers of India's 1950 Constitution aspired to achieve an end to poverty and a radical restructuring of Indian society.³³ The Constitution of India (COI) embodies a three-pronged strategy for the emancipation of the Dalits which owes much to the legal and political vision of Dr. Ambedkar, Chairman of the Constitution Drafting Committee, and his skills as a legal negotiator and draftsman. The first legal scholar to conceptualise caste and Untouchability-based exclusion as a civil and political *and* social and economic rights issue, as well as a socio-religious matter, Ambedkar transformed the Untouchables into a pan-Indian social and political entity and secured their status as a *sui generis* legal category.³⁴ The Constitutional framework consists of, firstly, legal protection from the ideology and practice of Untouchability and from inequality and discrimination in the social and economic fields; second, affirmative action provisions, known as reservations, in the spheres of political representation, government and public sector employment and higher education; and third, measures for socio-economic development. The purpose was to protect the Dalits from the imposition of Untouchability-based disabilities, compensate them for the historical injustices and disadvantages inflicted by Untouchability, increase their

³² See A. Irudayam s.j, J. Mangubhai and J. Lee, *Dalit Women Speak Out: Violence against Dalit Women in India, Volume I* (New Delhi: National Campaign on Dalit Human Rights, 2006); Saxena, n 27 above, 161.

³³ G. Austin, *The Indian Constitution: Cornerstone of a Nation* (New Delhi: OUP, 13th impression, 2008) 26-27.

³⁴ See A. Waughray, 'Caste Discrimination and Minority Rights: The Case of India's Dalits', 17 *International Journal on Minority and Group Rights* (2010) 327-353, 342-344; C. Jaffrelot, *Dr Ambedkar and Untouchability: Analysing and Fighting Caste* (New Delhi: Permanent Black, 2005); U. Baxi, 'Emancipation as Justice: Babasaheb Ambedkar's Legacy and Vision' in U. Baxi and B. Parekh (eds.), *Crisis and Change in Contemporary India* (New Delhi: Sage Publications, 1995) 122-149.

representation in the reserved fields and facilitate and promote their economic and social advancement.

3.4 Caste, equality and non-discrimination: legal framework

The COI establishes India as a ‘Sovereign, Socialist, Secular, Democratic Republic’.³⁵ Articles 14-31 COI guarantee to all citizens various individual fundamental rights, corresponding to civil and political rights. Social and economic rights are incorporated in Articles 39-51 as ‘Directive Principles of State Policy’ which must be applied by the State in making laws.³⁶ Article 14 guarantees equality before the law, while Article 15(1) prohibits discrimination by the State ‘against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them’. Article 17 abolishes Untouchability (although not the caste system *per se*) and criminalises its practice in any form. Articles 16(1) and 16(2), respectively, guarantee equality of opportunity and prohibit discrimination based on religion, race, caste, sex, descent, place of birth, or residence in public employment or State office. Article 15(2) provides that ‘[n]o citizen shall be subject, on grounds of religion, race, caste, sex or place of birth, to any disability, liability, restriction or condition with regard to access to shops, public restaurants, hotels or places of public entertainment, or the use of wells, tanks, bathing ghats, roads or places of public resort maintained out of State funds or for general public use’ – these being the major forms in which Untouchability is practised by private actors in the public sphere. India’s constitutional provisions relating to Untouchability are operationalised by criminal legislation. Caste-based crimes, including Untouchability offences, are punishable

³⁵ COI, Preamble. The words ‘Socialist, Secular’ were added after ‘Sovereign’ by the Constitution (Forty-second) Amendment Act 1976, S.2.

³⁶ COI, Article 37.

under the Indian Penal Code (IPC) and/or under special ‘hate crimes’ legislation. The Protection of Civil Rights Act 1955 (PCRA)³⁷ defines certain acts as offences if committed because of Untouchability, while the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989 (POAA or ‘Atrocities Act’) lists twenty-two ‘hate crimes’ where the victim (but not the perpetrator) is an SC/ST.³⁸ The very enactment of the POAA and the nature of the offences it prohibits is indicative of the persistence and severity of abuses suffered by Dalits in contemporary India.

Although commonly thought of as an American phenomenon, India’s affirmative action policies pre-date America’s policies by many decades.³⁹ The COI provides for special measures of affirmative action (‘reservations’) at national and regional levels by way of quotas in electoral seats, public sector and government employment and seats in higher education institutions to three historically disadvantaged and under-represented groups: Scheduled Castes (SCs) (the only group afflicted by Untouchability), Scheduled Tribes or STs (*adivasis*) and Other Backward Classes (OBCs).⁴⁰ Reservations in public employment and higher education in India originate

³⁷ Formerly the Untouchability (Offences) Act 1955, amended and renamed in 1976 to enlarge its scope and to strengthen its penal provisions; see <http://tribal.nic.in/writereaddata/linkimages/pcract955E2701676142.pdf> (visited 18 December 2012).

³⁸ See <http://socialjustice.nic.in/poa-act.php> (visited 18 December 2012).

³⁹ See T. Weisskopf, *Affirmative Action in the United States and India: A Comparative Perspective* (London: Routledge, 2004) 4; S. Fredman, *Comparative study of anti-discrimination and equality laws of the US, Canada, South Africa and India* (Luxembourg: European Commission, Directorate-General for Justice, 2012).

⁴⁰ The COI guarantees cultural, linguistic and educational rights (Articles 29 and 30) and freedom of religion (Articles 25-28). In 1992, a statutory body, the National Commission for Minorities (NCM), was established to ensure the development of minorities – defined by the National Commission for Minorities Act 1992 (NCMA) as ‘a community notified as such by the Central government’ – and to safeguard their rights. The minorities label has been accorded to religious minorities only. Five communities have been centrally notified as minorities – Muslims, Christians, Sikhs, Buddhists and Zoroastrians (Parsis) – notwithstanding the fact that Article 25 COI subsumes Sikhs and Buddhists as well as Jains within Hinduism (the majority religion). Religious, linguistic and cultural minorities do not benefit from reservations *qua* minorities (although some minorities may qualify for reservations as OBCs on grounds of social and educational backwardness); see Waughray (2010), n 34 above. In January 2012, the Indian government announced a 4.5% ‘minorities sub-quota’ within the 27% OBC quota, for OBCs who are also minorities (e.g. Muslims). The status of the sub-quota is uncertain; see

in special measures for non-Brahmins introduced by certain Princely States and Provinces in the early twentieth century,⁴¹ while reserved seats in the national and provincial legislatures originate in British concessions to Muslims at around the same time.⁴² The COI mandates reservations for SCs and STs (but not OBCs) in political representation at local, provincial and national level on the basis of their population share.⁴³ Article 15(4)⁴⁴ authorises (but does not mandate) the reservation of seats in State higher education institutions for SCs and STs and, since 2006, for OBCs⁴⁵ and in private educational institutions other than minority institutions covered by Article 30(1).⁴⁶ Article 16(4) authorises (but does not mandate) reserved posts in public sector (but not private sector) employment for SCs and STs in provincial and Central government services⁴⁷ and for OBCs in provincial and (since 1993) in Central services.⁴⁸ In the absence of a constitutional ceiling on reservations in higher education and public employment, case law has established a fifty per cent ceiling.⁴⁹ The quota for SCs is 17 per cent and for STs 7.5 per cent⁵⁰ (roughly their percentage

‘Supreme Court refuses to stay Andhra HC OBC sub-quota verdict again’, *Economic Times*, 14 June 2012; M. Ali, ‘Indian Muslim OBCs: Backwardness and Demand for Reservation’, *EPW*, 8 September 2012, 74-79.

⁴¹ Mendelsohn and Vicziany, n 11 above, 129-130.

⁴² Separate electorates were accorded to the Muslims by the British in 1909 on the basis of their identity as a separate religious community; M. Galanter, *Competing Equalities: Law and the Backward Classes in India* (Berkeley: University of California Press, 1984) 25; B. Shiva Rao, *The Framing of India's Constitution: A Study* (New Delhi: Indian Institute of Public Administration, 1968) 3.

⁴³ COI, Articles 330, 332, 243-D(1)(a), and 243-T(1).

⁴⁴ COI, Article 15(4) was inserted by the Constitution (First Amendment) Act 1951 S.2 following the Supreme Court's decision in *State of Madras v Champakam Dorairajan* (1951) AIR SC 226.

⁴⁵ Central Educational Institutions (Reservations in Admissions) Act 2006, enacted pursuant to the Constitution (Ninety-third) Amendment Act 2005.

⁴⁶ COI, Article 15(5), inserted by the Constitution (Ninety-third) Amendment Act 2005 S.2.

⁴⁷ COI, Articles 335 and 16(4).

⁴⁸ Prior to the Supreme Court decision in *Indra Sawhney v Union of India* (1992) AIR SC 477, States were free to grant State-wide backward class reservations in State sector employment at their discretion, but there were no Central OBC reservations.

⁴⁹ *Devadasan v Union of India* AIR 1964 SC 179; *Indra Sawhney v Union of India*, *ibid.* (1992); *Balaji and Ors v State of Mysore* (1963) AIR SC 649.

⁵⁰ Galanter (1984), n 42 above, 86.

of the overall population), and for OBCs 27 per cent, such that the combined reservation quota for the three categories does not exceed 50 per cent.⁵¹

Legislation has also been introduced to protect Dalits – the majority of whom work in the unorganised sector⁵² – from degrading and humiliating customs and employment practices, and from economic exploitation. The Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act 1993 prohibits manual scavenging and criminalises the employment of scavengers by public actors and has been adopted by most States and Union Territories⁵³ – yet, according to a recent academic study, there are still an estimated 1.2 million manual scavengers in India, many of whom are employed by local authorities and public bodies such as the railways.⁵⁴ Dalit girls are subject to the pseudo-religious practice of ritualised prostitution, known as *Devadasi* or *Jogini*, where pre-pubescents are dedicated to a temple or deity and condemned to a life of sexual exploitation as temple prostitutes.⁵⁵ *Devadasi* has been abolished in Karnataka and Andhra Pradesh,⁵⁶ but the practice persists. The Bonded Labour System (Abolition) Act 1976 abolishes and criminalises bonded labour, while the Child Labour (Prohibition and Regulation) Act 1986 prohibits child labour in certain employments and regulates it in others. These statutes do not specifically mention Dalits, but since the majority of bonded labourers and many child labourers are Dalits, the provisions are particularly relevant to them. The Minimum Wage Act 1948 prevents employers appropriating the fruits of labour

⁵¹ *Indra Sawhney*, n 48 above, 93. See also n 40 above.

⁵² GOI, Ministry Of Labour, New Delhi, Annual Report 2007-8, Chapter 8.

⁵³ GOI, Ministry of Social Justice and Empowerment (MSJE), Report 2009-10, 47, at <http://socialjustice.nic.in/ar10eng.php> (visited 18 December 2012).

⁵⁴ Shah et al., n 13 above, 107-109. In contrast, the MSJE puts the number of manual scavengers at 350,000 in January 2007 and 117,000 in 2009; MSJE, *ibid.*, 48.

⁵⁵ M-C. Torri, 'Abuse of Lower Castes in South India: The Institution of Devadasi', 11(2) *Journal of International Women's Studies* (2009) 31-48; B. Kidron, 'Devadasis are a cursed community', *The Guardian*, 21 January 2011; CERD, 5 May 2007, n 31 above, para. 18.

⁵⁶ Andhra Pradesh Devadasi (Prohibition of Dedication) Act 1988; Karnataka Devadasi (Prohibition of Dedication) Act 1992.

of the poor. Finally, laws have been introduced to reduce the concentration of productive assets and economic resources in the hands of the higher castes and to secure more equitable distribution of economic assets, for example through land reform and debt relief legislation.⁵⁷

3.5 India: weaknesses and limitations

3.5.1 Overview

Constitutional and legislative prohibitions of Untouchability and caste discrimination have enshrined formal equality, but nevertheless caste ‘continues to define access to food, jobs, education and marriage partners’.⁵⁸ The Constitution guarantees Dalits formal equality yet substantive (*de facto*) equality remains elusive. Since independence, observes one scholar, Dalits have become at one level more unified ‘and at the same time more stratified than [in] the past’.⁵⁹ Upward mobility (due to affirmative action in education and employment) has created hope of improvement which, combined with reservations in political representation, has created unprecedented political consciousness among the Dalits.⁶⁰ Nevertheless, a ‘vast majority’ of Dalits continue to suffer from discrimination and exclusion in the public and private spheres⁶¹ in the economic, occupational, educational and social fields, as well as from caste-based violence and gross human rights abuses.

⁵⁷ See Saxena, n 27 above, 17.

⁵⁸ G. Omvedt, ‘Caste System and Hinduism’, *EPW*, 13 March 2004, 1179-1180, 1179.

⁵⁹ Shah (2001), n 12 above, 227.

⁶⁰ *Ibid.*, 227, 229.

⁶¹ *Ibid.*, 221.

3.5.2 Reservations

Despite their longevity it is difficult to assess the impact of India's reservation policies. Although information on the numbers of Dalits in government and public employment is available, quantitative data on educational reservations is less readily available and qualitative data in both fields is lacking. Studies of take-up of reserved posts or seats, the experience of beneficiaries, the long-term impact of reservations on individual socio-economic mobility or on the families and communities of beneficiaries, or the broader social impact of the policies on reducing inequality and discrimination, are few; surprisingly, for a programme of such size, comprehensive monitoring and evaluation is largely absent beyond the collection by the authorities of basic-level statistics.⁶² In its 2009 General Recommendation (GR) on special measures, CERD recommended that special measures should be temporary, fair and proportionate, designed and implemented on the basis of the current need of the individuals and communities concerned, and should be continually monitored.⁶³ Whilst employment reservations have opened up coveted government and public sector jobs previously barred to Dalits, in Central services they remain clustered in lower level jobs and under-represented in senior posts.⁶⁴ Moreover, employment reservations are restricted to the shrinking public sector, representing only a fraction of India's total economic activity.⁶⁵

⁶² But see GOI, MJSE, Planning, Research, Evaluation and Monitoring (PREM) Division at <http://socialjustice.nic.in/aboutdivision5.php>; see also List of Research/Evaluation Studies for Scheduled Castes Development 2007-08, at <http://socialjustice.nic.in/listofresearchannevi.php>; Indian Institute of Dalit Studies, Completed Research Projects, at http://www.dalitstudies.org.in/index.php?option=com_content&view=article&id=101&Itemid=109 (all visited 19 December 2012).

⁶³ CERD GR. No. 32 (2009), The meaning and scope of special measures in the International Convention on the Elimination of All Forms of Racial Discrimination.

⁶⁴ NCSC Report, n 21 above, 36, 179-183.

⁶⁵ Of 459 million people employed in India, 26 million work in the organised sector (including public and government services) and 433 million in the unorganised sector; see GOI, Ministry Of Labour, New Delhi, Annual Report 2008, 77.

It is difficult to assess how much difference education reservations have made.⁶⁶ If, says Weisskopf, they are understood as a strategy to increase the representation of specific communities in elite occupations and decision-making positions – rather than a mechanism for improving educational opportunities for the disadvantaged – effectiveness must be judged on whether reservation beneficiaries complete their programmes and achieve successful careers;⁶⁷ however, studies of the performance of beneficiaries and their post-university careers are limited.

In contrast, commentators assert that political reservations have had ‘a profound effect on the Indian political landscape’.⁶⁸ In Uttar Pradesh (UP) the ‘representation of Dalits in bureaucracy, thanks to the reservation policy’⁶⁹ led in the 1980s to the emergence of the BSP (Bahujan Samaj Party, or ‘party of the majority’),⁷⁰ a Dalit-based political party whose leaders – beneficiaries of affirmative action – have become a new ‘counter-elite’ responsible for leading political mobilisation.⁷¹ In 2007, the BSP, under its female Dalit leader Mayawati, won a decisive electoral victory in the UP state elections, having previously held power three times in coalition governments in 1995, 1997 and 2003.⁷² Nevertheless, the success of north India’s Dalit ‘new politicians’ in improving the economic position of the Dalits and

⁶⁶ Weisskopf (2004a), n 16 above, 4340; Weisskopf (2004b), n 39 above.

⁶⁷ Weisskopf (2004a), n 16 above, 4347-4348; Mohanty, n 16 above, 3787.

⁶⁸ R. Pande, ‘Can Mandated Political Representation Increase Policy Influence for Disadvantaged Minorities? Theory and Evidence from India’, 93(4) *American Economic Review* (2003) 1132-1151, 1133, 1147.

⁶⁹ P. Kumar, ‘Dalits and the BSP in Uttar Pradesh: Issues and Challenges’, *EPW*, 3 April 1999, 822-826, 824.

⁷⁰ S. Pai, *Dalit Assertion and the Unfinished Democratic Revolution: The Bahujan Samaj Party in Uttar Pradesh* (New Delhi: Sage, 2002) xi-xii.

⁷¹ A. Varshney, ‘Is India Becoming More Democratic?’, 59(1) *Journal of Asian Studies* (2005) 3-25, 20.

⁷² See D. Gupta and Y. Kumar, ‘When the Caste Calculus Fails: Analysing the BSP’s Victory in UP’, 42(37) *EPW* (2007) 3388-3396; A. Teltumbde, ‘Uttar Pradesh: A ‘Mayawi’ Revolution’, *EPW*, 9 June 2007, 2147-2148; V. Kumar, ‘Behind the BSP Victory’, *EPW*, 15 June 2007, 2237-2239.

effecting a fundamental shift in traditional social relations is questioned by some scholars.⁷³ According to Weiner, for instance, the increase in Dalit bureaucrats and politicians has not led to more effective public policies for overcoming the immense poverty persisting in India which disproportionately affects their communities.⁷⁴ Meanwhile, CERD notes that in India generally, Dalits still find themselves denied the right to vote, and Dalit candidates, especially women, are frequently prevented from standing for election or, if elected, are pressured to resign.⁷⁵

The impact of reservations on Indian democracy, political development and social order is much debated. On the one hand the very scheme which was designed as part of a strategy to eliminate caste inequality by bringing Dalits ‘into the fold’ has played a major role in entrenching caste as a political as well as a social identity, and in institutionalising caste in the political system.⁷⁶ On the other hand, says Varshney, the political rise of the lower castes, deploying caste identity and a ‘reinvented’ caste history, is resulting in a ‘caste-based restructuration’ of power such that caste ‘can paradoxically be an instrument of equalisation and dignity’.⁷⁷

3.5.3 ‘Protective’ legislation

India’s legislation to tackle Untouchability and discrimination on grounds of caste – as with legislation on caste violence and caste hate crimes – imposes criminal sanctions on those who violate the law. Mendelsohn and Vicziany argue, based on

⁷³ For the ‘Dalit revolution’ perspective see C. Jaffrelot, *India’s Silent Revolution: The Rise of the Low Castes in North Indian Politics* (New Delhi: Permanent Black, 2003); S. Pai, ‘New Social and Political Movements of Dalits: A Study of Meerut District’, 34 *Contributions to Indian Sociology* (2000) 189-220. For a contrary perspective see C. Jeffrey, P. Jeffery and R. Jeffery, ‘Dalit Revolution? New Politicians in Uttar Pradesh, India’, 67(4) *Journal of Asian Studies* (2008) 1365-1396.

⁷⁴ Weiner, n 3 above, 211-213.

⁷⁵ CERD, 5 May 2007, n 31 above, para. 17.

⁷⁶ Weiner, n 3 above, 220.

⁷⁷ Varshney, n 71 above, 4, 19-20.

the widespread continuing discrimination against Dalits and the small number of cases registered by the police and disposed of by the courts, that ‘very few Indians have been directly affected’ by this legislation, and that the best that can be said is that ‘[legislation] has contributed to stripping away the legitimacy of Untouchability, but it is difficult to measure such an effect’.⁷⁸ Caste crimes suffer low conviction rates and high year-on-year pendency of cases.⁷⁹ In 2007, only fourteen thousand people were convicted of caste crimes out of forty-seven thousand whose trials were completed, leaving one hundred and eighty-six thousand whose trials remained pending.⁸⁰ India’s Ministry of Justice and Social Empowerment (MJSE) cites a conviction rate of just 12.8 per cent for PCRA crimes and 32.1 per cent for POAA cases for 2008.⁸¹ National and international human rights bodies, activists and scholars have repeatedly highlighted the poor enforcement of existing legislation, including in cases where atrocities have been committed by the law enforcement agencies themselves.⁸² The fundamental problem underlying this ‘culture of under-enforcement’ is that the legislation lacks cultural legitimacy – a huge gulf exists between the content of the legislation and the social values and attitudes of society at large. As Galanter has remarked, ‘the law goes counter to perceived self-interest and valued sentiments and deeply ingrained behavioural patterns’.⁸³ There is little

⁷⁸ Mendelsohn and Vicziany, n 11 above, 128, 145.

⁷⁹ GOI, National Crime Records Bureau (NCRB), ‘Crime in India 2007’, Crime Against Persons Belonging to SCs/ STs, Table 7.8, Percentage of Cases by Courts Disposed of for Crimes Committed against Scheduled Castes During 2007, at <http://ncrb.nic.in/cii2007/cii-2007/Table%207.8.pdf>; Disposal of Cases by Police and Courts, Table 4.12, Conviction Rate of IPC Crimes During 2007, at <http://ncrb.nic.in/cii2007/cii-2007/Table%204.12.pdf> (both visited 19 December 2012).

⁸⁰ GOI, NCRB, *Crime in India 2007*, Crime Against Persons Belonging to SCs/ STs, Table 7.19, Disposal of Persons by Courts Arrested for Committing Crimes Against Scheduled Castes During 2007, at <http://ncrb.nic.in/cii2007/cii-2007/Table%207.19.pdf> (visited 19 December 2012).

⁸¹ GOI, MJSE, Annual Report 2009-10, 41-42.

⁸² National Human Rights Commission (NHRC), *Report on Prevention of Atrocities Against Scheduled Castes: Policy and Performance: Suggested Interventions and Initiatives for NHRC* (NHRC, New Delhi, 2004) 47; S. Narula, ‘Equal by Law, Unequal by Caste: The “Untouchable” Condition in Critical Race Perspective’, 26(2) *Wisconsin International Law Journal* (2008), 255-343, 296; CERD, n 31 above, para. 26; Human Rights Watch (1999), n 28 above.

⁸³ M. Galanter, *Law and Society in Modern India* (New Delhi: OUP, 1994), 217.

cultural imperative to obey the law or to prosecute offenders.⁸⁴ CERD has noted ‘with concern’ the entrenched nature of ‘caste bias’ in India and the social acceptance of caste-based discrimination.⁸⁵

In addition to an absence of cultural consensus in favour of existing legislation, the current legislative approach itself is too narrow in focus. Ambedkar conceptualised Untouchability and caste discrimination in structural and institutional terms⁸⁶ (unlike Gandhi, for whom Untouchability was an individual religious and moral issue).⁸⁷ Yet, India’s existing legislative framework is ill-suited to addressing institutionalised, structural forms of discrimination. The PCRA and the POAA, as criminal statutes, focus legal attention on individual, worst-case manifestations of caste-based discrimination and violence. While it is important that such behaviour is punished, criminal law treats each instance of discrimination or violence as a single, disaggregated act committed by an individual offender or offenders, ‘shorn’ of its social and historical context. Moreover, conviction depends on the prosecution meeting the criminal standard of proof.⁸⁸ Recognising discrimination as problematic only in its most overt or violent manifestations⁸⁹ entails a dangerous ‘conceptual disconnection between extremism and the general culture’.⁹⁰ India lacks broader civil equality legislation designed to address ‘everyday’ acts of discrimination, for

⁸⁴ S. Thorat, ‘Oppression and Denial: Dalit Discrimination in the 1990s’, *EPW*, 9 February 2002, 572-578, 578.

⁸⁵ CERD, 5 May 2007, n 31 above, paras. 14, 27.

⁸⁶ ‘To say that [a form of discrimination] is “institutionalised” is to recognise that this systemic [discrimination] runs into and shapes the institutions governing society’: M. Davies, *Asking the Law Question* (Sydney: Thomson Law Book Co., 2008), 296-297.

⁸⁷ E. Zelliot, *From Untouchable to Dalit: Essays on the Ambedkar Movement* (New Delhi: Manohar, 1998).

⁸⁸ L. Lustgarten, *Legal Control of Racial Discrimination* (London: Macmillan Press, 1980) 8; J. Downing, “‘Hate Speech’ and “First Amendment Absolutism” Discourses in the US’, (10) *Discourse & Society* (1999), 175-189, 181.

⁸⁹ P. Essed, *Understanding Everyday Racism: An Interdisciplinary Theory* (Thousand Oaks, CA: Sage, 1991), 283, cited in Downing, *ibid.*, 181.

⁹⁰ Downing, n 88 above, 181.

example in recruitment, which fall outside the ambit of existing criminal law. Whereas criminal law gives control to the State to take action on behalf of the victim – whose role quickly becomes peripheral – civil anti-discrimination legislation can actively involve the victim in pursuing their case. Absent civil equality legislation to address discriminatory behaviour which falls short of the criminal threshold, the goal of challenging entrenched beliefs and promoting changed behaviour through legal means is unlikely to be realised.

3.5.4 Scheduled Castes and religious restrictions

Despite widespread recognition that the ideology and practice of caste exists in other religions, the constitutional framework treats it as a Hindu phenomenon. Under the Constitution (Scheduled Castes) Order 1950, only Hindus, Sikhs or Buddhists can be classified as SCs.⁹¹ As ‘minorities within minorities’, Muslim and Christian Dalits are widely recognised to suffer greater socio-economic and educational disadvantages than their non-Dalit co-religionists while suffering discrimination on grounds of caste at the hands of both the wider community and their co-religionists;⁹² yet, they are excluded on grounds of religion from the SC category and hence from accessing SC reservations. Lack of SC status also means that Muslim and Christian Dalits who are victims of atrocities cannot file complaints under the POAA, as the

⁹¹ ‘[N]o person who professes a religion different from the Hindu, the Sikh or the Buddhist religion shall be deemed to be a member of a Scheduled Caste’; see Constitution (Scheduled Castes) Order 1950 (C.O. 19) para. 3, at <http://lawmin.nic.in/ld/subord/rule3a.htm>, (visited 19 December 2012). Sikhs and Buddhists were originally excluded from the SC category (apart from Sikh members of four specific castes; CAD Vol. VIII, 25 May 1949, 272, 311). Sikhs were included in 1956 and Buddhists in 1990, on the grounds that these were indigenous religions, essentially variants of Hinduism; Scheduled Castes and Scheduled Tribes Orders (Amendment) Act 1956 and Constitution (Scheduled Castes) Orders (Amendment) Act 1990; <http://lawmin.nic.in/ld/subord/rule3a.htm> and <http://lawmin.nic.in/ld/subord/rule4a.htm> (visited 2 July 2010). The Constitution (Scheduled Tribes) Order 1950 (C.O. 22) is religion-neutral; it contains no provisions akin to C.O. 19 para. 3.

⁹² See S. Deshpande, *Dalits in the Muslim and Christian Communities: A Status Report on Current Social Scientific Knowledge* (New Delhi: GOI, National Commission for Minorities, 2008).

victim must be a member of a Scheduled Caste for the Act to be triggered.⁹³ This anomaly has led to national and international calls to open the SC category to Muslim and Christian Dalits and for the 1950 Order to be made religion-neutral.⁹⁴ In 2007, CERD recommended that eligibility for affirmative action benefits be extended to SC and ST converts to religions other than Sikhism or Buddhism,⁹⁵ while in 2009, the UN Special Rapporteur on the freedom of religion or belief highlighted as ‘problematic in terms of human rights standards’ the legal link between SC status and religious affiliation in her report on India.⁹⁶ Given that India has repeatedly insisted before CERD that caste is a social/class system, not a religious system,⁹⁷ it is submitted that it should accord SC status to Muslim and Christian Dalits without delay.⁹⁸

3.6 Lessons learned

Allott identifies four stages in the ‘business of producing a major social transformation through law’: (1) determine social (policy) goals, (2) consider what legal and administrative means to use to attain these goals, (3) introduce the legal and administrative programme and (4) monitor performance and rectify failures in effectiveness (this fourth stage ‘ought to follow but rarely does’, says Allott).⁹⁹ The success of a law genuinely intended to achieve a certain (social) end, says

⁹³ The Protection of Civil Rights Act 1955 prohibits specified acts committed based on Untouchability, with no requirement that the victim be Scheduled Caste; see GOI, *Report of the National Commission for Religious and Linguistic Minorities* (New Delhi: Ministry of Minority Affairs, 2007) 7.

⁹⁴ Deshpande, n 92 above, 81, 83.

⁹⁵ See CERD, 5 May 2007, n 31 above, para. 21.

⁹⁶ UN Doc. A/HRC/10/8/Add.3, summary and para. 28.

⁹⁷ See Mani (India); UN Doc. CERD/C/SR.141, 2 May 1973, 131; CERD/C/299/Add.3, 29 April 1996, para. 6.

⁹⁸ India’s difficulties with extending the SC net are political. Currently, reservations for all categories of beneficiaries cannot not exceed 50%. If Muslim and Christian Dalits are entitled to quota places from the existing SC allocation of 17.5%, there will be more competition for existing places, which existing beneficiaries are opposed to.

⁹⁹ A. Allott, *The Limits of Law* (London: Butterworths, 1980) 202.

Lustgarten, depends *inter alia* on whether it contains well-designed, effective enforcement procedures and whether adequate resources are allocated to bringing about the desired end.¹⁰⁰ The beneficiaries also need to be clearly definable and identifiable – although, as will be seen in later in this thesis, ‘category challenge’ is an inherent feature of the grounds-based or ‘protected categories’ approach to protection. India’s current legislative approach – criminalising the most overt and extreme manifestations of caste discrimination and violence – constitutes only a partial legal response to endemic, institutionalised discrimination and inequality. Its criminal legislation is not enforced; disinterest and/or unwillingness within State institutions must be recognised and tackled by regular, mandatory human rights training of law enforcement agents and the judiciary,¹⁰¹ coupled with education and awareness-raising among Dalits and the wider population.¹⁰² The progress of cases should be monitored by State or central monitoring commissions. Furthermore, civil anti-caste discrimination legislation is lacking. From a liberal perspective, civil equality law (if well-designed, implemented and enforced) would serve both as a coercive tool and an educative device,¹⁰³ providing concrete protection and redress for victims of discrimination whilst redefining behaviour hitherto considered acceptable as socially unacceptable as well as actionable legally.¹⁰⁴ A legal obligation on public bodies and agencies to have regard in the exercise of their functions to caste-based discrimination and disadvantage and the need to eliminate it, is required (such as the obligation imposed on public authorities in the UK by the

¹⁰⁰ Lustgarten, n 88 above, xii.

¹⁰¹ Special Rapporteur on racism, interim report to UNGA; UN Doc. A/66/313, 19 August 2011, paras. 71, 73.

¹⁰² Ibid., para. 75; Special Rapporteur on racism, report to HRC; UN Doc. A/HRC/17/40, para. 88.

¹⁰³ A. Lester and G. Bindman, *Race and Law* (Harmondsworth: Penguin, 1972) 85-87.

¹⁰⁴ N. Lacey, ‘From individual to group’ in B. Hepple and E. Szyszczak (eds.), *Discrimination: The Limits of the Law* (London: Mansell, 1993) 99-124.

‘public sector equality duty’ in section 149 of the Equality Act 2010); compliance should be monitored.

However, legislation alone is not sufficient to tackle deep-rooted social phenomena such as caste discrimination. The Indian experience shows that to produce effective social transformation, law must be accompanied by social policy, including education: a comprehensive approach is needed in order to compel social reform.¹⁰⁵ Detailed data collection and wide-ranging qualitative studies are necessary for the design of appropriate policy interventions – both law and policy must be adequately resourced, including (in the case of law) resources for enforcement. Legislative and policy programmes must be monitored for effectiveness, and effective mechanisms of government accountability must be introduced.

India’s reservations policy was originally conceived as a short-term, ten-year measure,¹⁰⁶ but it has been repeatedly extended, most recently in August 2009,¹⁰⁷ becoming the primary terrain and political focus of caste equality activity in India. The high political investment in reservations, and India’s continuing social and economic disparities, have until recently hindered development of a broader national ‘equality debate’. However, recent proposals include the creation of a national Equal Opportunities Commission (EOC), the introduction of a ‘Diversity Index’ to incentivise organisations and companies to measure and improve their ‘diversity

¹⁰⁵ Special Rapporteur on racism, interim report, n 101 above, paras. 68, 71. See also J. Goldston, ‘The Struggle for Roma Rights: Arguments that Have Worked’, 32(2) *Human Rights Quarterly* (2010) 311-35, 311.

¹⁰⁶ See Constituent Assembly Debates of India (CAD) Vol. VIII (New Delhi: Lok Sabha Secretariat) 331.

¹⁰⁷ See http://articles.timesofindia.indiatimes.com/2009-07-31/india/28212116_1_st-quota-constitutional-amendment-bill-109th-amendment; <http://news.outlookindia.com/items.aspx?artid=663866> (both visited 19 December 2012).

performance’¹⁰⁸ and the establishment of a national data bank and an autonomous assessment and monitoring authority to provide a source of reliable data on discriminated-against groups, as well as for the design and monitoring of policies, initiatives and programmes and for ensuring transparency.¹⁰⁹ As yet, however, these have not materialised.¹¹⁰

There is currently a huge gap in India between the legal status of Dalits and their sociological status.¹¹¹ Government policies ‘have granted Dalits the right to [legal] equality but not necessarily the right to be treated as equals’.¹¹² Legislation ‘guarantees Dalits the right to touch’ (for example, to enter temples, hotels and restaurants) but it cannot guarantee the right ‘to be touched’.¹¹³ It is submitted that the absence of a comprehensive, proactive approach to the eradication of caste discrimination which compels reform on the ground increases the likelihood of domestic social unrest, international political opprobrium (or at least embarrassment), and holds India back on the world economic and political stage.

In 1936, Ambedkar observed:

[U]nless you change your social order you can achieve little by way of progress [...] you cannot build on the foundation of caste. You cannot build up a nation, you cannot build up a

¹⁰⁸ *Social, Economic and Educational Status of the Muslim Community of India: A Report* (GOI, Prime Minister’s High Level Committee, Cabinet Secretariat, 2006) (‘Sachar Report’) at <http://www.minorityaffairs.gov.in/sachar> (visited 19 December 2012) 240, 242. See also *Report of the Expert Group on Diversity Index* (GOI, Ministry of Minority Affairs, 2008) at http://www.minorityaffairs.gov.in/sites/upload_files/moma/files/pdfs/di_expgrp.pdf and *Equal Opportunity Commission: what, why and how – Report by the Expert Group to examine and determine the structure and functions of an Equal Opportunity Commission* (GOI, Ministry of Minority Affairs, 2008) at <http://www.nls.ac.in/csseip/Files/Additional/EOC.pdf> (both visited 19 December 2012).

¹⁰⁹ Sachar Report, *ibid.*, 238.

¹¹⁰ ‘Equal Opportunity Push’, *The Telegraph (India)*, 8 June 2012 at http://www.telegraphindia.com/1120608/jsp/nation/story_15584314.jsp (visited 19 December 2012).

¹¹¹ On the distinction between legal and sociological status see J. Balkin, ‘The Constitution of Status’, 106 *Yale Law Journal* (1997), 2313-2374, 2324.

¹¹² V. Kumar, *India’s Roaring Revolution: Dalit Assertion and New Horizons* (New Delhi: Gagandeep, 2006) 19.

¹¹³ G. Guru, ‘Power of Touch’, *Frontline*, 16-29 December 2006.

morality. Anything that you will build on the foundations of caste will crack and will never be whole.¹¹⁴

In an interesting twist, Ambedkar's analysis was echoed over seventy-five years later by Bollywood actor and social activist Aamir Khan in a 2012 column in *The Hindu* newspaper in which he argued that India cannot be a superpower while Untouchability and discrimination based on caste exist; instead, what is required is to implement the vision of 'shared social good' laid down in India's Constitution:

Our forefathers [...] have laid down laws that tell us that discrimination based on caste and religion [is] illegal. Now, we have to find [a] place in our hearts to follow them. We also have to find [a] place in our hearts to accept that discrimination between people is against the very concept of humanity.¹¹⁵

This chapter has outlined and critiqued India's legal and policy framework for the elimination of caste discrimination, highlighting the problems with the SC category as well as the need for a holistic approach involving law and policies geared to effecting socio-cultural and economic change. This chapter concludes Part 1 of the thesis. We now turn to Part 2, which considers the 'internationalisation' of caste and the engagement of international human rights law with caste discrimination. We start with Chapter 4, which examines the conceptualisation of caste discrimination as a form of descent-based racial discrimination prohibited by Article 1 of the International Convention for the Elimination of Racial Discrimination.

¹¹⁴ B. R. Ambedkar, 'Annihilation of Caste' in V. Moon (ed.), *BAWS Vol. 1* (Bombay: The Education Dept., Govt. of Maharashtra, 1989) 25-96, 66.

¹¹⁵ A. Khan, 'Can't be a superpower as long as Untouchability exists', *The Hindu*, 9 July 2012; M. Thekaekara, 'Can Bollywood shatter India's caste system?', *New Internationalist Blog*, 13 July 2012, at <http://www.newint.org/blog/2012/07/13/bollywood-untouchable-force/> (visited 21 December 2012).

Chapter 4

Caste Discrimination and International Human Rights Law Standards: International Convention for the Elimination of All Forms of Racial Discrimination

4.1 Introduction

Until the mid-1990s, few human rights lawyers outside the traditionally caste-affected countries of South Asia were aware of caste discrimination, its nature or extent. The peculiarity of caste eluded Western conceptualisation,¹ while governments of traditionally caste-affected states treated caste discrimination as an internal, social matter. Caste discrimination was conspicuous in international human rights law discourse only by its absence. It was not until the latter part of the 1990s that Dalit activists and their supporters succeeded in bringing caste discrimination to the attention of the UN, resulting in its condemnation as a human rights violation by treaty and charter mechanisms alike.² Two bodies were at the forefront of this UN activity on caste discrimination: the former UN Sub-Commission for the Promotion and Protection of Human Rights (UN Sub-Commission, now replaced by the Human Rights Council Advisory Committee) and the UN Committee for the Elimination of Racial Discrimination (CERD),³ the monitoring body of the International Convention for the Elimination of All Forms of Racial Discrimination 1965 (ICERD).⁴

¹ Mrs. Sadiq Ali; UN Doc. CERD/C/SR.615, 12 March 1984, para.16.

² See C. Bob, 'Dalit Rights are Human Rights: Caste Discrimination, International Activism and the Construction of a New Human Rights Issue' 29(1) *Human Rights Quarterly* (2007) 167-193; S. Thorat and Umakant (eds.) *Caste, Race and Discrimination: Discourses in International Context* (Jaipur: Rawat Publications, 2004); J. Lerche, 'Transnational Advocacy Networks and Affirmative Action for Dalits in India', 39(2) *Development and Change* (2008) 239-261.

³ See <http://www2.ohchr.org/english/bodies/cerd/> (visited 31 July 2012).

⁴ Adopted 21 December 1965. In force 4 January 1969. 660 UNTS 195. As at 15 July 2012 ICERD has been ratified or acceded to by 175 states, including Pakistan (21 September 1966); India (3

The landscape of international human rights law in relation to caste discrimination, its development, implementation and enforcement, is broad and complex. Part 2 of this thesis, in Chapters 4 and 5, identifies and examines those aspects of international human rights law which contribute to an understanding of caste discrimination and its legal regulation in India and the UK. This chapter sets out the international legal framework for caste discrimination with a focus on ICERD, showing how the framework has been developed, and the challenges of conceptualising and problematising caste discrimination in international human rights law. The chapter also identifies and explains the major actors and debates, and in conjunction with Chapter 5 considers how international human rights law might develop in the future in relation to caste discrimination, descent-based discrimination and discrimination based on work and descent.

The principal difficulty in the conceptualisation of caste discrimination as a violation of international human rights law is the absence of caste as a category in any international human rights instrument. This has led to the subsuming of caste within categories which do not completely overlap with it, and the interpretation of existing categories and the creation of new ones to cover caste and analogous systems of inherited status. In the case of CERD this has resulted in objections from states such as India and Japan who do not accept this approach. Since 1996, caste discrimination has been affirmed by CERD as a form of descent-based racial discrimination under ICERD,⁵ and since 2000, by the UN Commission on Human Rights (now the Human Rights Council) and the UN Sub-Commission, as a subset of a new, wider legal

December 1968); United Kingdom (7 March 1969); Nepal (30 January 1971); Bangladesh (11 June 1979); Sri Lanka (18 February 1982).

⁵ Concluding Observations – India; CERD, Report; UN Doc. A/51/18 (1996), para. 352.

category, discrimination based on work and descent (DWD).⁶ Both categories – descent-based racial discrimination and DWD – include, but are not limited to, caste-based discrimination. Caste has been deemed to fall within the protected grounds of the UN International Covenant on Civil and Political Rights (ICCPR)⁷ and the UN International Covenant on Economic Social and Cultural Rights (ICESCR)⁸ while caste discrimination has been identified as an impediment to the enjoyment of rights under the ICCPR, the ICESCR, the UN Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW)⁹ and the UN Convention on the Rights of the Child (CRC).¹⁰ This chapter shows how adopting a dynamic approach to human rights treaty interpretation¹¹ has enabled treaty bodies to address caste discrimination within the parameters of existing human rights treaties. Chapter 5 considers how caste discrimination has also been addressed by the UN special procedures (in particular by successive Special Rapporteurs on Racism), by the Human Rights Council's Universal Periodic Review mechanism (UPR) and by the UN minority rights and indigenous people's mechanisms.

In 2007, a UN experts' study on the gaps in the existing international instruments to combat racism, racial discrimination, xenophobia and related intolerance concluded that, 'given the steps taken by CERD to extend the applicability of ICERD to descent-based communities', there were 'no substantive gaps as regards the protection of members of descent-based communities from racism, racial

⁶ UN Sub-Commission, Resolution 2000/4, Discrimination based on work and descent, 11 August 2000; UN Doc. E/CN.4/Sub.2/2000/46, 23 November 2000, 25.

⁷ Adopted 16 December 1966. In force 23 March 1976. 999 UNTS 171.

⁸ Adopted 16 December 1966. In force 3 January 1976. 999 UNTS 3.

⁹ Adopted 18 December 1979. In force 3 September 1981. 1249 UNTS 13.

¹⁰ Adopted 20 November 1989. In force 2 September 1990. 1577 UNTS 3.

¹¹ See CERD, Replies to the Office of the High Commissioner for Human Rights (OHCHR) Questionnaire; UN Doc. A/CONF.211/PC.2/CRP.5, 23 April 2008, 15, para. 9.

discrimination, xenophobia and related intolerance’.¹² In contrast, Navi Pillay, UN High Commissioner for Human Rights, is quoted as suggesting in 2009 that ‘there may well have to be a new international convention written to apply directly to caste’ on the basis that ‘the subject of caste has been hidden too long by obfuscation on the part of governments, not only in India, that have successfully argued in UN conferences that existing international conventions against human rights abuses do not apply’.¹³ This conundrum is explored further in this chapter.

4.2 Caste in international human rights instruments: International Bill of Rights

4.2.1 Universal Declaration of Human Rights 1948 (UDHR)

‘Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitutes a basic principle in the protection of human rights’.¹⁴ This principle applies to all human rights.¹⁵ Caste is not included as a ground of discrimination in any international human rights instrument, and until recently caste discrimination was not conceptualised as a violation of international human rights law. Nonetheless, caste has been present, implicitly and explicitly, in debates about categories from the very start of the post-1945 human rights movement, starting with the drafting of the UDHR.

The non-discrimination provision (Article 2) of the UDHR¹⁶ provides,

¹² Report on the study by the five experts on the content and scope of substantive gaps in the existing international instruments to combat racism, racial discrimination, xenophobia and related intolerance; UN Doc. A/HRC/4/WG.3/6, 27 August 2007, paras. 71-76, 76.

¹³ B. Crossette, ‘Putting Caste on Notice’, *The Nation*, 9 November 2009.

¹⁴ CERD, General Recommendation (GR) No. 14 (1993), Definition of discrimination (Art. 1, par. 1), para. 1.

¹⁵ S. Skogly, ‘Article 2’ in A. Eide & G. Alfredsson (eds.), *The Universal Declaration of Human Rights: A Commentary* (Oslo: Scandinavian University Press, 1992) 57-72, 71.

¹⁶ UN Doc. A/RES/217 A (III), 10 December 1948.

[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

While Article 2 UDHR thus limits the general principle of non-discrimination to the rights enshrined in the UDHR,¹⁷ the expression ‘such as’ was included at the behest of the Sub-Commission to indicate that the enumerated grounds of discrimination did not constitute an exhaustive list.¹⁸ The UDHR was drafted by a sub-committee of the UN Commission on Human Rights.¹⁹ The initial text of Article 2 prohibited discrimination in the enjoyment of UDHR rights on five grounds – race, sex, language, religion or political belief.²⁰ These were amended by the then UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities (subsequently the UN Sub-Commission for the Promotion and Protection of Human Rights) to ‘race, sex, language, religion, political or other opinion, property status, or national or social origin’.²¹ ‘Colour’ was not included, as the Sub-Commission considered it to be embodied in the word ‘race’;²² it was introduced into Article 2 at the behest of Minochecher Masani (India) and Hansa Mehta (India), Sub-Commission and Human Rights Commission members. Masani felt that discrimination on the basis of colour and race were not identical: ‘race and colour were two conceptions that did not necessarily cover one another’.²³ Masani was supported by Commission member Habib Malik (Lebanon), who agreed that ““race”

¹⁷ Skogly (1992), n 15 above.

¹⁸ UN Doc. E/CN.4/52, cited in Skogly (1992), n 15 above, 62.

¹⁹ See J. Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (Philadelphia: University of Pennsylvania Press, 1999).

²⁰ Morsink, *ibid.*, 93.

²¹ *Ibid.*

²² Morsink, *ibid.*, 102. See also Skogly (1992), n 15 above, 61.

²³ Morsink, *ibid.*; S. Skogly, ‘Article 2’ in A. Eide and G. Alfredsson (eds.) *The Universal Declaration of Human Rights: A Common Standard of Achievement* (The Hague: Martinus Nijhoff, 1999) 75-87, 78; Skogly (1992), *ibid.*

and “colour” did not mean the same thing, neither was the conception of colour included in the term “race”.”²⁴

The ‘national origin’ element of ‘national or social origin’ was proposed by the Sub-Commission’s Soviet member, explaining that the concept was to be interpreted ‘not in the sense of a citizen of a State but in the sense of national characteristics’ – which, argues Morsink, links it to race and colour.²⁵ The Commission’s acceptance of this ‘gloss’, he says, makes it ‘an authoritative interpretation’ of the term.²⁶ It was disagreement over the meaning of ‘national origin’ which led India, two decades later, to propose adding ‘descent’ to the definition of racial discrimination in ICERD. ‘Birth’ was added to the draft text of UDHR Article 2 in October 1948 by the General Assembly’s Third Committee, in lieu of the term ‘class’ proposed by the Soviet delegate, which was aimed ‘at the abolition of differences based on social conditions as well as the privileges enjoyed by certain groups in the economic and legal fields’.²⁷ Morsink writes that the substitution of birth for class was accepted by the Soviet delegate because it was agreed that the Russian word ‘*soslovie*’ – literally, ‘*etat*’ in French and ‘*estate*’ in English, in modern parlance ‘*naissance*’ in French and ‘*birth*’ in English –

referred to a legally-sanctioned inequality such as had existed in feudal Europe when different groups of people had, by reason of their birth, different rights and privileges. Although such inequalities no longer existed in most countries, there were still some remnants of that social structure left; *and the fight against those remnants should be continued by a definite statement in the draft declaration.*²⁸

²⁴ Morsink, n 19 above, 103.

²⁵ Ibid.

²⁶ Ibid., 104.

²⁷ Ibid., 114.

²⁸ Ibid. (emphasis added).

‘In other words’, says Morsink, ‘the meaning of... birth [in Article 2] is to prohibit discrimination on the basis of inherited legal, social and economic differences’.²⁹ On the inclusion of birth, Morsink mentions that Mohammed Habib (India) ‘said he “favoured the use of the word ‘caste’ rather than ‘birth’ as the latter was already implied in the Article”’. Later, A. Appadorai (India) explained ‘that “his delegation had only proposed the word ‘caste’ because it objected to the word ‘birth’. The words ‘other status’ and ‘social origin’ were sufficiently broad to cover the whole field”’.³⁰ Appadorai’s comment suggests that, even though caste was not explicitly included in the UDHR, it was understood to be covered by birth and social origin (subsequently included in the prohibited grounds of discrimination in the ICCPR and the ICESCR).³¹

4.2.2 ICCPR 1966 and ICESCR 1966

In the hierarchy of human rights norms the principle of non-discrimination, together with equality before the law and equal protection of the law without any discrimination, is considered a peremptory norm of *jus cogens*.³² It is elaborated internationally in legally-binding form in Article 26 ICCPR:

²⁹ Ibid.

³⁰ Ibid., 115. See also P. Prove, ‘Caste and the Universal Declaration of Human Rights’, Lutheran World Foundation, unpublished paper (2003), copy on file with author; P. Thornberry, ‘CERD, Indigenous Peoples and Caste/Descent-based Discrimination’ in J. Castellino and N. Walsh (eds.), *International Law and Indigenous Peoples* (Leiden: Martinus Nijhoff, 2005) 37, fn 107.

³¹ The interpretation of ‘birth’ as covering legally-sanctioned inequality resulting in differing rights and privileges by reason of birth accords with definitions of caste. The absence in the UDHR of an explicit reference to caste, says Dalit academic Thorat, is because at the time discrimination and racism were understood in the context of the decline and dismantling of European colonialism, and the internal struggles of discriminated groups within the different colonies in Africa and Asia were overshadowed by the wider anti-colonialism struggle; see Thorat and Umakant, n 2 above, xxix.

³² Human Rights Committee (HRC), General Comment (GC) No. 18 (1989), Non-discrimination, para. 1. See also HRC GC No. 31 (2004), The Nature of the General Legal Obligation Imposed on State Parties to the Covenant, para. 2: ‘The “rules concerning the basic rights of the human person” are *erga omnes* obligations and there is a United Nations Charter obligation to promote universal respect for, and observance of, human rights and fundamental freedoms’. See also Restatement of the Foreign Relations Law of the United States (Third), Part VII, Chapter 1, s 701, Reporters’ Note 3 (St Paul, Minnesota: American Law Institute, 1987) 155. On the historical significance and development

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

In contrast to Article 2 UDHR and Article 14 of the European Convention on Human Rights 1950 (which provides only an accessory right to non-discrimination), Article 26 contains both an independent right to equality and an autonomous, freestanding guarantee of non-discrimination, not limited only to ICCPR rights.³³ Subordinate provisions (rather than autonomous guarantees)³⁴ are found in Article 2(1) ICCPR and Article 2(2) ICESCR, which obligate States parties to guarantee the rights recognised in the Covenants without discrimination or distinction of any kind *such as* (in the case of the ICCPR) and *as to* (in the case of the ICESCR) race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.³⁵

Most non-discrimination provisions (including the UK's Equality Act 2010) prohibit discrimination on specified grounds. These grounds are 'suspect classifications',³⁶ and distinctions on these grounds will be *prima facie* discriminatory absent a

of the principle of equality, see M. Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, (Kehl: N. P. Engel, 2005, 2nd edition) 598-60.

³³ HRC GC No. 18, *ibid.*, para. 12. See also Nowak, *ibid.*, 604.

³⁴ M. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford: Clarendon, 1995) 178.

³⁵ Nowak, n 32 above, 604.

³⁶ 'Suspect classification' is a US judicial concept whereby certain groups are recognised as deserving special protection due to past discriminatory treatment and political powerlessness experienced by the group. There is no fixed definition of which groups merit suspect or quasi-suspect status, but the US Supreme Court has afforded suspect classification to groups which have experienced a history of purposeful unequal treatment, or which have been relegated to a position of political powerlessness; see *Korematsu v. United States*, 323 U.S. 214, 223-24 (1944). The principal suspect classifications in US law are race, nationality and alienage; see J. Watson, 'When No Place Is Home: Why the Homeless Deserve Suspect Classification', 88 *Iowa Law Review* (2003) 502-537, 508-511.

reasonable and objective justification.³⁷ The prohibited grounds of discrimination in Articles 2(1) and 26 ICCPR and Article 2(2) ICESCR replicate those in Article 2 UDHR. The lists are not exhaustive. The Human Rights Committee (HRC – the monitoring body of the ICCPR) treats the ‘other status’ category as a residual category which captures grounds not expressly listed in Article 26 ICCPR,³⁸ while the Committee on Economic, Social and Cultural Rights (CESCR – the monitoring body of the ICESCR) expressly treats the ‘other status’ category as open-ended.³⁹ Article 26 omits certain grounds of distinction now commonly accepted as deserving of scrutiny, for example sexual orientation, disability and age. Some of these non-enumerated grounds have been found by the HRC to constitute ‘other statuses’ for the purposes of admissibility of individual communications,⁴⁰ for example nationality⁴¹ and marital status,⁴² illustrating the HRC’s application of the living instrument principle to interpreting the ICCPR.⁴³ As regards which ‘other status’ grounds would be viewed as ‘important grounds’, i.e. ‘inherently more suspect and deserving of greater scrutiny’,⁴⁴ Joseph et al. identify the most common characteristic of an important ground as being that it ‘describes a group which has historically suffered from unjustifiable discrimination’.⁴⁵ Since 1997, caste discrimination and the caste system in India have been treated by the HRC as contributing to violations of ICCPR rights and as an impediment to its implementation, suggesting that caste is

³⁷ See Craven, n 34 above, 167; Nowak, n 32 above, 629.

³⁸ HRC GC No. 18, n 32 above, para. 7; Nowak, *ibid.*, 618.

³⁹ CESCR GC No. 20 (2009), Non-discrimination in economic, social and cultural rights, para. 15. This was not always the case; see Craven, n 34 above, 168.

⁴⁰ S. Joseph, J. Schulz and M. Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford: OUP, 2000) 530.

⁴¹ *Gueye v France* (195/85).

⁴² *Danning v The Netherlands* (180/84). The HRC has included sexual orientation in sex rather than as a sub-category of other status; *Toonen v Australia* (488/92) para. 8.7.

⁴³ Nowak, n 32 above, 628. The living instrument principle is a notion first introduced by the ECtHR in 1978 in *Tyrer v United Kingdom*. The European Court of Human Rights stated that the Convention ‘was a living instrument which... must be interpreted in the light of present-day conditions’; *Tyrer v United Kingdom*, Application 5856/72, Judgment 25 April 1978, para. 31.

⁴⁴ Joseph et al., n 40 above, 532.

⁴⁵ *Ibid.*

a status falling within the Article 26 ‘other status’ category attracting ICCPR non-discrimination protection.⁴⁶

The CESCR has long scrutinised differential treatment on grounds other than those enumerated in Article 2(2) ICESCR – for example age, disability, sexual orientation – indicating that it considers these to be additional grounds on which discrimination is prohibited.⁴⁷ The list in Article 2(2) is not exhaustive. Alongside the express grounds, CESCR has identified other (implied) grounds within the ‘other status’ category.⁴⁸ In its General Comment (GC) No. 20 on Article 2(2) ICESCR (2009), the CESCR explicitly recognised caste as falling within the ambit of the ICESCR–prohibited grounds of discrimination. Descent and caste are included in two express grounds (social origin and birth)⁴⁹ and as a sub-category of ‘economic and social situation status’ (an ‘other status’ category).⁵⁰

Thus, although caste is not itself an express ground in the international bill of rights, it is suggested that it was implicitly included in the birth and social origin categories in the UDHR. Moreover, caste is implicitly included in the birth, social origin and other status categories of the ICCPR, and since 2009 it has been explicitly included in the birth and social origin categories of the ICESCR as well as within the ‘other status’ implied ground of economic and social situation.

⁴⁶ Concluding Observations – India; CCPR, Report; A/52/40 (1997), paras. 420, 430.

⁴⁷ Craven, n 34 above, 170.

⁴⁸ CESCR GC No. 20, n 39 above.

⁴⁹ ‘The prohibited ground of birth also includes descent, especially on the basis of caste and analogous systems of inherited status’; CESCR GC No. 20, *ibid.*, para. 26; “‘Social origin’ refers to a person’s inherited social status, which is discussed more fully below in the context of “property” status, descent-based discrimination under “birth” and “economic and social status”; *ibid.*, para. 24.

⁵⁰ *Ibid.*, para. 24. ‘Individuals and groups of individuals must not be arbitrarily treated on account of belonging to a certain economic or social group or strata within society’; *ibid.*, para. 35.

4.3 Caste in ICERD: drafting and text

4.3.1 ICERD: context and background

ICERD was the first of the nine core UN human rights treaties to be adopted (in 1965) and to come into force (in 1969).⁵¹ It is also one of the most widely ratified treaties, with 175 ratifications as at 1 April 2013.⁵² The prohibition of racial discrimination is central to the development of international human rights law – the UN human rights regime ‘originated in the search for an effective response to racism and racial discrimination’⁵³ – and it has ‘a strong claim to the status of a peremptory norm of international law’.⁵⁴ Initially conceived as a response to anti-Semitic incidents in 1959-1960, ICERD also reflected the desire of newly independent countries emerging from colonial rule for an ‘international statement against apartheid and colonialism’.⁵⁵ Consequently, in the early days, ICERD was concerned primarily with decolonisation, apartheid and self-determination. For many states, racial discrimination was considered ‘integral to the colonial system, and by extension to the “internal colonialism” of apartheid South Africa and South West Africa’.⁵⁶ Discrimination was seen as a foreign policy issue; compliance with ICERD obligations primarily entailed public condemnation of the policies of such states.⁵⁷ By extension, many states were reluctant to acknowledge the existence of any racial discrimination ‘at home’.⁵⁸ According to former CERD member Banton, ‘most states

⁵¹ See n 3 above.

⁵² See http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en (visited 1 April 2013).

⁵³ K. Boyle & A. Baldaccini, ‘International Human Rights Approaches to Racism’ in S. Fredman (ed.), *Discrimination and Human Rights: The Case of Racism* (Oxford: OUP, 2001) 135-191, 141.

⁵⁴ P. Thornberry, ‘Confronting Racial Discrimination: A CERD Perspective’, 5(2) *Human Rights Law Review* (2005) 239-268, 240.

⁵⁵ D. Keane, *Caste-based Discrimination in International Human Rights Law* (Aldershot: Ashgate, 2007) 161, 168. Keane’s book was the first on this topic and hence seminal.

⁵⁶ Thornberry (2005), n 54 above, 241.

⁵⁷ Thornberry. *ibid.*

⁵⁸ ‘It has been a long labour to convince some States that racial discrimination is primarily a domestic issue’; Thornberry, *ibid.*

saw accession to the Convention as a matter of foreign policy. Many perceived it as a way of establishing their anti-apartheid credentials with but few implications for their internal affairs'.⁵⁹ As Banton remarked in 1996, '[h]ad the scope of [ICERD] been apparent to them at the outset, maybe fewer states would have acceded to it'.⁶⁰

4.3.1.1 UNGA Resolution 44(I) 1946 Treatment of Indians in South Africa

In 1946, India secured the adoption by the new UN General Assembly (UNGA) of Resolution 44(I) declaring that the treatment of Indians in South Africa 'should be in conformity with the international obligations under the agreements concluded between the two Governments and the relevant provisions of the [UN] Charter'.⁶¹ The resolution had been prompted by South Africa's enactment of the 1946 Asiatic Land Tenure and Indian Representation Act No. 28 (the 'Ghetto Act') restricting the property rights of Asians.⁶² India argued that South Africa's discriminatory treatment of its Indian population was in violation of the UN Charter.⁶³ Manu Bhagavan explains that India's leaders at that time envisioned the UN as a supranational body capable of acting beyond the limits of national sovereignty where human rights were at stake, its purpose to 'uphold and defend the fundamental rights and the common good of all humanity'.⁶⁴ In her memoirs, Laxmi Pandit (Indian representative to the UN and sister of Nehru, independent India's first prime minister) recounts that

⁵⁹ M. Banton, *International Action Against Racial Discrimination* (Oxford: OUP, 1996) 99, 305.

⁶⁰ Banton, *ibid.*, viii.

⁶¹ General Assembly Resolution (GAR) 44(1), Treatment of Indians in the Union of South Africa, 8 December 1946.

⁶² See J. Dugard, *Human Rights and the South African Legal Order* (Princeton: Princeton University Press, 1978) 80; International Commission of Jurists, *South Africa and the Rule of Law* (International Commission of Jurists, Geneva, 1960) 32; M. Cornell, 'The Statutory Background of Apartheid: A Chronological Survey of South African Legislation', 16(5) *The World Today* (1960) 181-194, 188.

⁶³ V. L. Pandit, *The Scope of Happiness: A Personal Memoir* (New York: Crown, 1979) 209.

⁶⁴ M. Bhagavan, 'A New Hope: India, the United Nations and the Making of the Universal Declaration of Human Rights', 44(2) *Modern Asian Studies* (2010) 311-347, 328. During the drafting of the UDHR India had proposed that the UN Security Council be afforded extensive powers to investigate alleged human rights violations and enforce redress within the framework of the UN; *ibid.*, 329; UN Doc E/CN.4/11, 2; 31 January 1947. India's proposal was not adopted.

during the UNGA debate on Resolution 44(I) South Africa ‘raised the plea of domestic jurisdiction under Article 2(7) of the Charter’ (similarly to India’s position some fifty years later in relation to the Dalits). Pandit’s response was that this was a moral, not simply a legal, issue. For India, South Africa’s actions were ‘primarily a challenge to our dignity and self-respect’:

India has resisted every attempt to divert the debate to a consideration of the legal aspects of the issue... what the world needs is not more charters, not more committees to define and courts of justice to interpret, *but a more willing implementation of the principles of the Charter by all governments.*⁶⁵

The adoption of Resolution 44(I) secured India’s status as a champion of anti-apartheid and anti-racism. In a revealing aside, Pandit adds (seemingly without irony) that the South African Law Minister apparently sought to ‘humiliate India by accusations that were *entirely irrelevant to the matter under discussion*... treatment of our Harijans (untouchables) was of course emphasized...’⁶⁶

4.3.2 ICERD Article 1(1): Racial Discrimination

Article 1(1) of ICERD defines racial discrimination as

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

⁶⁵ Pandit, n 63 above, 209 (emphasis added).

⁶⁶ Ibid., 210 (emphasis added).

Racial discrimination is thus an ‘umbrella term’⁶⁷ covering discrimination on five grounds – race, colour, descent, or national or ethnic origin⁶⁸ – but these grounds are not defined in the Convention. In its General Recommendation No. 14 (1993) on the definition of racial discrimination, CERD explained that a distinction based on the above grounds is contrary to ICERD if it has either the purpose or the effect of impairing particular rights and freedoms. A differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of ICERD, are legitimate or fall within the scope of ICERD Article 1(4). In determining whether an action has an effect contrary to ICERD, CERD will consider whether that action ‘has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin’.⁶⁹ In the absence of an express reference to caste as a ground of discrimination in ICERD, ‘descent’ was the vehicle by which caste entered international human rights discourse – an interpretation of descent which India, since 1996, has explicitly rejected.

4.3.3 UN Declaration on the Elimination of Racial Discrimination 1963

ICERD was preceded in 1963 by a Declaration on the Elimination of Racial Discrimination,⁷⁰ which prohibited discrimination on grounds of race, colour or ethnic origin. During the drafting of the Declaration, Indian and Pakistani delegates explained that their respective Constitutions prohibited discrimination based on

⁶⁷ Thornberry (2005), n 54 above, 239, 250.

⁶⁸ In a contemporaneous commentary on ICERD, Schwelb described the definition of racial discrimination in ICERD as a ‘composite concept’ requiring (i) a certain act or omission to take place, (ii) based on certain grounds and (iii) having a certain purpose or effect; E. Schwelb, ‘The International Convention on the Elimination of All Forms of Racial Discrimination’, 15 *International and Comparative Law Quarterly* (1966) 996-1068, 1001.

⁶⁹ CERD GR No. 14, n 14 above, para. 2.

⁷⁰ GAR 1904 (XVIII), 20 November 1963.

colour, religion and caste, as well as (in the case of India) race.⁷¹ In the general debate on manifestations of racial prejudice in the UNGA Third Committee, the Indian representative had argued for an expansive understanding of the concept of racial discrimination covering ‘*all manifestations of racial prejudice*’, arguing that ‘the youth of the world had to be taught that all forms of racism and discrimination were meaningless and dangerous’.⁷² India, he said, had legislation punishing any acts prejudicial to the maintenance of harmony between the different religions, racial and language groups, castes and communities, and would therefore ‘have no constitutional or legal difficulties in implementing such a convention’.⁷³ India also stressed that the goal of any convention should be *de facto* equality: ‘[T]he important thing was not to delve into the origins of discrimination but to rid the body politic of its ill-effects’.⁷⁴

4.3.4 ICERD and the meaning of descent

ICERD was prepared by the UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities in January 1964.⁷⁵ The original definition of racial discrimination contained four grounds – ‘race, colour, national or ethnic origin’.⁷⁶ It is widely known that descent was introduced into the definition in October 1965 in an amendment originally proposed by India⁷⁷ which was intended ‘to meet the objections raised by many delegations to the words “national origin”’.⁷⁸

⁷¹ India, UNGA Third Committee; UN Doc. A/C.3/SR.1215, 30 September 1963, para. 14; Pakistan, UNGA Third Committee, A/C/SR.1171, 2 November 1962, para. 6.

⁷² India, UNGA Third Committee; UN Doc. A/C.3/SR.1168, 31 October 1962, para. 29.

⁷³ Ibid., para. 31.

⁷⁴ Ibid., para.28.

⁷⁵ For a detailed account of the drafting of ICERD see Keane (2007), n 55 above, Chapter 4.

⁷⁶ UN Doc. A/5921, 16 June 1965, Annex, 2.

⁷⁷ UN Doc. A/C.3/L.1238, 15 October 1965.

⁷⁸ India, UNGA Third Committee; UN Doc. A/C.3/SR.1299, 11 October 1965, para. 29; India, UNGA Third Committee; A/C.3/SR.1304, 14 October 1965, para. 19.

India's amendment proposed to replace 'national origin' with 'descent' and 'place of origin'.⁷⁹ Four days later, this was withdrawn and replaced with an amendment proposed jointly by Ghana, India, Kuwait, Lebanon, Mauritania, Morocco, Nigeria, Poland and Senegal which omitted 'place of origin' but retained 'descent' and 'national origin'.⁸⁰ This second amendment was adopted unanimously in October 1965 to become Article 1(1) of the Convention.⁸¹

The meaning of 'national origin' was extensively debated in the Third Committee of the General Assembly.⁸² The United States representative distinguished national origin from nationality in that national origin relates to previous or ancestral nationality and geographical origins, covering people residing in foreign countries which were not the countries of their ancestors; ethnic origin, in contrast, relates to racial and cultural characteristics.⁸³ This interpretation of national origin was endorsed by the Ghanaian representative, who felt that these notions were 'adequately represented' by 'descent' and 'place of origin' in India's initial amendment.⁸⁴ The *travaux préparatoires* are silent on the intended meaning of 'descent', however, and no discussion or debate on this is recorded.⁸⁵ India denies that descent was intended to include caste.⁸⁶ CERD member Thornberry observes that descent is 'not employed in the key pre-ICERD texts on discrimination, and

⁷⁹ UN Doc. A/C.3/L.1216, 11 October 1965.

⁸⁰ See n 77 above.

⁸¹ UN Doc. A/6181, 18 December 1965, paras. 37, 41.

⁸² UN Doc. A/C.3/SR. 1304, n 78 above.

⁸³ UN Doc. A/C.3/SR.1304, *ibid.*, para. 23.

⁸⁴ Ghana, UNGA Third Committee; UN Doc. A/C.3/SR.1306, 15 October 1965, para. 12.

⁸⁵ There is a discrepancy between Article 1 of ICERD and Article 5 which guarantees the right of equality before the law 'without distinction as to race, colour, national or ethnic origin' but omits descent; see Keane (2007), n 55 above, 198, 199-201.

⁸⁶ See UN Press Release, 'Committee on Elimination of Racial Discrimination Considers Report of India', 26 February 2007; see also Intervention by the Solicitor-General of India on specific issues raised by CERD at the presentation of India's fifteenth to nineteenth report, 26 February 2007, paras. 32, 33; copy on file with author.

neither is caste'.⁸⁷ In his 1966 commentary on the then new Convention, Schwelb noted the absence of descent in any of the other international instruments or draft instruments dealing with related subjects and the lack of any indication of the distinction between the concept of descent and the concepts of national or ethnic origin.⁸⁸ Schwelb suggested that '[i]t is reasonable to assume that the term "descent" includes the notion of "caste" which is a prohibited ground of discrimination in Indian Constitutional Law (sic)... which, however, also uses the expression "descent" side-by-side with "caste"'.⁸⁹

There is an explanation for the conundrum identified above by Schwelb and Thornberry. 'Descent' originates in the Government of India Act 1833 in a provision introduced to prohibit discrimination against Indians ('natives') seeking employment in British India with the East India Company:

No Native of the said Territories [British India], nor any natural-born subject of His Majesty resident therein shall, by reason only of his Religion, Place of Birth, Descent, Colour, or any of them, be disabled from holding any Place, Office or Employment under the said Company.⁹⁰

The characteristics by which Indians were distinguished from Europeans, and hence the prohibited grounds of discrimination, were religion, place of birth, descent and colour. At the time ICERD was drafted, India's concerns were, first, the treatment of Indians (i.e. persons of Indian origin, irrespective of legal nationality) in the foreign

⁸⁷ P. Thornberry, 'Race, Descent and Caste under the Convention on the Elimination of All Forms of Racial Discrimination' in K. Nakano, M. Yutzis and R. Onoyama (eds.), *Peoples for Human Rights Vol. 9: Descent-Based Discrimination* (Tokyo: International Movement Against All Forms of Discrimination and Racism, 2004) 119-137, 124.

⁸⁸ Schwelb, n 68 above, 1002-1003.

⁸⁹ Ibid., 1003, fn 43.

⁹⁰ Section 87, Government of India Act 1833; see A. Lester & G. Bindman, *Race and Law* (Harmondsworth: Penguin Books, 1972) 384; S. Wolpert, *A New History of India, eighth edition* (Oxford: OUP, 2009) 219.

land of South Africa, and secondly, the legacy of colonialism whereby Indians had suffered racial discrimination in their own land.⁹¹ It is submitted that the terms ‘place of origin’ or ‘national origin’ and ‘descent’ were put forward by India in 1965 to meet these twin concerns. However, this does not mean that caste was not in the minds of the drafters of ICERD. That it was in the minds of the Indian delegates, at least, is evident from the debates on the provision which became Article 1(4) on special measures.

4.3.5 ICERD Articles 1(4) and 2(2): special measures

Article 2(2) ICERD provides that States parties shall, when the circumstances so warrant,

take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms.⁹²

Article 1(4) ICERD ensures that special measures taken in compliance with Article 2(2) shall not be deemed racial discrimination:

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

⁹¹ That these were India’s concerns is confirmed by statements made by India during CERD’s examination of India’s fifteenth to nineteenth report; see UN Doc. CERD/C/SR.1796, 2 March 2007, para. 7. ‘Person of Indian Origin’ (PIO) is the legal and administrative term in current usage in India denoting individuals of Indian stock born in India, or whose parents, grandparents or great-grandparents (or one of them) were of Indian stock and born in India, who do not hold Indian nationality; see <http://hclondon.in/pio.php> (visited 28 July 2012).

⁹² Article 2(2) continues, ‘These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved’.

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.⁹³

During discussions on the provision which was to become Article 1(4), the Scheduled Castes were clearly envisaged by the Indian representatives in the UNGA Third Committee, Saksena and Pant, as falling within its ambit.⁹⁴ Both delegates, whilst acknowledging that the Scheduled Castes were ‘of the same racial stock and ethnic origin as their fellow citizens’,⁹⁵ explicitly identified them as groups to which Article 1(4) would apply.⁹⁶ The provision, said Saksena, had been included in the draft Convention,

in order to provide for special and temporary measures to help certain groups of people, *including one in his country, who, though of the same racial stock and ethnic origin as their fellow citizens, had for centuries been relegated by the caste system to a miserable and downtrodden condition.*⁹⁷

Their concern was to ensure that India’s constitutional special measures, or affirmative action policies, for the Scheduled Castes would not be condemned as discriminatory under ICERD. It is difficult to read this as anything other than an assumption of the reach of ICERD to caste issues, at least as regards Article 1(4), in which case it is difficult to reconcile this with India’s subsequent insistence that the

⁹³ The notion that special measures in favour of specific disadvantaged groups should not be regarded as violating the basic principle of equality had been acknowledged explicitly during India’s Constituent Assembly debates; see Shah, Constituent Assembly Debates of India (CAD) Vol. VII, 29th November 1948 (New Delhi: Lok Sabha Secretariat) 655; also at <http://parliamentofindia.nic.in/ls/debates/vol7p15.htm> (visited 10 January 2013).

⁹⁴ India, UNGA Third Committee, 14 October 1965, n 78 above, para. 20.

⁹⁵ India, *ibid.*, 15 October 1965, n 84 above, para.25.

⁹⁶ India, *ibid.*, 14 October 1965, n 78 above, paras. 20, 33.

⁹⁷ India, *ibid.*, 15 October 1965, n 84 above, para. 25 (emphasis added).

definition of racial discrimination in Article 1(1) of ICERD cannot be interpreted as including caste.⁹⁸

Logically, India should have argued, both during the drafting of ICERD and later in its State Reports, that Article 1(4) had no application to its special measures for Scheduled Castes, on the grounds that caste was not covered by Article 1(1); however, it did not. Until 1987, its expressed position was that Scheduled Caste reservations fell within Article 1(4). By implication, caste must have been covered also by Article 1(1). Conversely, from 1987, India's position has been that caste does not fall within Article 1(1) and that information on the situation of the Scheduled Castes would be provided only as 'a matter of courtesy'.⁹⁹ As CERD member Van Boven observed in 1996, there was 'some discrepancy' between the contribution of the Indian delegation during the ICERD drafting process to Article 1(4) 'which advocated affirmative action' and India's subsequent attitude that caste is not covered by ICERD Article 1(1).¹⁰⁰

4.4 CERD and Caste: interpretation and practice

4.4.1 India

India has been a State party to ICERD since 1969.¹⁰¹ It has submitted nineteen periodic reports pursuant to Article 9 of ICERD, the first seven individually between 1970 and 1982, the eighth and ninth combined in 1986, the tenth to fourteenth

⁹⁸ Observes Thornberry, '[I]n the context of the convention as a whole and in the particular concept of special measures the redress of caste disabilities finds a place'; Thornberry (2004), n 87 above, 124.

⁹⁹ See, e.g. India's tenth to fourteenth periodic reports; UN Doc. CERD/C/299/Add.3, 29 April 1996, para. 7.

¹⁰⁰ UN Doc. CERD/C/SR.1162, 13 August 1996, para. 15.

¹⁰¹ Indian ratification 3 December 1968. In force 4 January 1969.

combined in 1996 and the fifteenth to nineteenth combined in 2006.¹⁰² India has repeatedly maintained that it has no racial discrimination at home.¹⁰³ Instead, successive Indian governments have identified the elimination of racial discrimination primarily with the fight against apartheid and the anti-colonial struggle.¹⁰⁴ From its initial report in 1970 until its combined eighth and ninth reports in 1986, successive Indian governments provided CERD with detailed information on India's special measures for the Scheduled Castes and Scheduled Tribes, which CERD repeatedly acknowledged as conforming with Article 1(4).¹⁰⁵ It was not until 1987, during CERD's examination of India's ninth report, that India first stated expressly that it did not consider caste to fall within ICERD Article 1(1). In its report India had stated that 'measures in favour of the scheduled castes and scheduled tribes are in conformity with Article 1(4) of the Convention',¹⁰⁶ but during examination India's representative stated that, in his view, 'Article 1 of the Convention did not apply to India' and that information in the report on Scheduled Castes had been provided solely in response to the many questions by CERD members on the issue of caste.¹⁰⁷

¹⁰² India – initial report; UN Doc. CERD/C/R.3/Add.3/Rev.1, 30 March 1970; second report; CERD/C/R.30/Add.4, 28 June 1972; third report; CERD/C/R.70/Add.29, 18 November 1974; fourth report; CERD/C/R.90/Add.32, 27 July 1977; fifth report; CERD/C/20/Add.34, 8 March 1979; sixth report; CERD/C/66/Add.33, 16 June 1981; seventh report; CERD/C/91/Add.26, 19 October 1982; eighth to ninth reports; CERD/C/149/Add.11, 4 September 1986; fourteenth report (1996), n 99 above; fifteenth to nineteenth reports; CERD/C/IND/19, 29 March 2006.

¹⁰³ See, e.g. India – fourteenth report (1996), *ibid.*, para.5; UN Doc. CERD/C/SR.1797, 26 March 2007, para. 16 (original in French); 'Committee on Elimination of Racial Discrimination Considers Report of India'; UN Press Release, 26 February 2007. India has adopted this position before other treaty bodies; in 1991, India stated before the HRC that 'although there were racial and religious minorities in India, the Indian people formed a composite whole racially, and hence the concept of ethnic minorities and ethnic majority did not apply'; CCPR A/46/40 (1991) para. 307.

¹⁰⁴ See e.g. India – fourteenth report (1996), *ibid.*, paras. 9, 13, 16, 19, 21, 22; India - nineteenth report (2006), n 102 above, paras. 53-56.

¹⁰⁵ See e.g. UN Doc. CERD/C/SR.33, 14 September 1970, 53; UN Doc. A/10018 (1975), para. 91; India, fifth report (1979), n 102 above, paras. 28, 45-47, 49; CERD, Concluding Observations – India; CERD, Report; A/34/18 (1979), para. 365; CERD/C/SR.535, 15 November 1983, para. 29; CERD/C/91. Add.26, 19 October 1986, paras. 15-16.

¹⁰⁶ India – ninth report (1986), n 102 above, para. 8.

¹⁰⁷ UN Doc. CERD/C/SR.797, 10 November 1987, para. 61.

India's first categorical written denial of the application of ICERD Article 1(1) to caste came in its tenth to fourteenth report in 1996, where it argued that caste denoted a social and class distinction and was not based on race but had its origins in the functional division of Indian society during ancient times.¹⁰⁸ It was 'obvious', said India, that the use of descent in ICERD clearly refers to race; given that the Scheduled Castes and Scheduled Tribes 'are unique to Indian society and its historical process', India's policies relating to the Scheduled Castes and Tribes therefore do not come under the purview of ICERD Article 1(1).¹⁰⁹ India's interpretation of descent was rejected categorically by CERD in 1996 during its examination of the report.¹¹⁰ The fact that castes and tribes were based on descent brought them strictly within the Convention, under the terms of Article 1.¹¹¹ If descent was the equivalent of race, it would not have been necessary to include both concepts in the Convention.¹¹² Although the concept of Scheduled Castes and Tribes was not based on race, it did have an ethnic connotation, and discrimination against members of those groups was therefore within the purview of Article 1.¹¹³ Even if caste denoted a social distinction and was not based on race, it was unacceptable to say that the serious discrimination against certain castes, especially the Untouchables, was not within the Committee's competence.¹¹⁴ In its concluding observations CERD stated that the term 'descent', in Article 1, did not refer solely to race, and affirmed that the situation of the Scheduled Castes and Tribes fell within the scope of the Convention.¹¹⁵ What CERD should have made absolutely clear, but did not, was that the concept of racial discrimination is wider than race, that descent

¹⁰⁸ India – fourteenth report (1996), n 99 above, para. 6.

¹⁰⁹ *Ibid.*, para 7.

¹¹⁰ UN Doc. CERD/C/SR.1162, 13 August 1996, para. 27.

¹¹¹ *Ibid.*, para. 22.

¹¹² UN Doc. CERD/C/SR.1161, 1 November 1996, para. 20.

¹¹³ *Ibid.*, para. 23.

¹¹⁴ *Ibid.*, paras. 20, 23, 32.

¹¹⁵ CERD, Concluding Observations – India (1996), n 5 above.

and race are not interchangeable but constitute complementary grounds of discrimination under Article 1(1) and that CERD considered caste to come within the descent limb – not the race limb – of racial discrimination. The issue was not whether the concepts of caste and race were synonymous; rather, it was that caste falls within a sub-category (descent) of *racial* discrimination as defined in ICERD Article 1(1).

Ten years later, in its fifteenth to nineteenth report, India reiterated ‘that “caste” cannot be equated with “race,” nor is it covered under “descent” under Article 1 of the Convention’.¹¹⁶ During CERD’s examination of India’s report in February 2007, India again reiterated its position that caste-based discrimination was an issue outside the purview of racial discrimination under Article 1(1) of ICERD.¹¹⁷ India’s Constitution drew a distinction between caste, race and descent, considering them as separate concepts – India’s government

had no doubt that the ordinary meaning of the term “racial discrimination” did not include caste. It was firmly accepted that the Indian caste system was not racial in origin. Caste was an institution unique to India, and had not entered into the considerations of those who drafted the Convention... [t]he term “descent” had a definite meaning in the Indian Constitution and occurred in reference to discrimination in public employment.¹¹⁸

On India’s proposal to include descent among the grounds of prohibited discrimination during the ICERD *travaux préparatoires*, India stated that it ‘had been based on concerns regarding discriminatory treatment against Indians in their own land while under colonial rule, and to persons of Indian descent in countries where they had settled in large numbers’; there was nothing that supported the

¹¹⁶ India – nineteenth report, n 102 above, para.16.

¹¹⁷ UN Doc. CERD/C/SR.1796, 2 March 2007, para. 3.

¹¹⁸ *Ibid.*, para. 7.

contention that descent was intended to include caste as an aspect of racial discrimination.¹¹⁹ Saksena's reference, during the drafting of ICERD, to the Scheduled Castes in the context of what was to become Article 1(4) was in the context of debates on exceptions to the general rule prohibiting racial discrimination:¹²⁰

It is... clear that the reference to the Scheduled Castes by the Indian Delegation during the Travaux Préparatoire (sic) of 1965 was for the limited purpose of protecting, in a future scenario, the constitutionally sanctioned special measures of 1950 for the historically disadvantaged Scheduled Castes. It had no relation to the definition of racial discrimination nor did it have anything to do with the word "descent." On the contrary, Mr. Saksena's assertion that the Scheduled Castes are of the same racial stock and ethnic origin as their fellow citizens puts the position beyond doubt or argument.¹²¹

Logically, however, if India's constitutional special measures for the Scheduled Castes had nothing to do with racial discrimination, there was no need to refer to them during the preparatory debates, and no need for protection for such measures 'in a future scenario' to be built in to ICERD. Put another way, Saksena's assertion in 1965, that Article 1(4) applied to India's system of reservations for the Scheduled Castes, makes no sense unless caste is included, expressly or impliedly, within the ambit of ICERD Article 1(1).¹²²

India challenged CERD's authority to interpret ICERD, as well as its interpretation of descent, arguing that CERD 'had first raised the issue of caste-based discrimination within the concept of discrimination based on descent over thirty

¹¹⁹ Ibid., para. 8.

¹²⁰ Intervention by Solicitor-General of India, n 86 above, para. 28.

¹²¹ Ibid., para.30; underlining in original.

¹²² India may have assumed that its need for Article 1(4) protection for its reservations regime would be short-lived because it believed that caste was a disappearing social institution and hence that the reservations regime would be of short duration.

years after its establishment',¹²³ and suggesting that CERD had 'redefined' – and therefore acted outwith - its mandate:

We believe that this Committee's core competence and *raison d'être* is in the area of combating racial discrimination and should be preserved. *A redefinition of its mandate would, in our view, result in loss of specificity* which should be avoided, since it can have unpredictable consequences.¹²⁴

Although India's domestic distinctions between caste, race and descent are not binding on CERD, and cannot relieve India of its obligations under ICERD, India asserted that all discussion on the concept of caste 'must be within the parameters set out by the [Indian] Constitution'; consequently, India was 'not in a position to accept reporting obligations on that issue under the Convention'.¹²⁵

4.4.2 CERD

4.4.2.1 Competence to interpret

By asserting in 1997 that India's interpretation of descent (as referring solely to race and hence inapplicable to caste) was 'unacceptable', CERD assumed an unequivocal authority to interpret ICERD. CERD's competence to interpret ICERD stems from Article 9 by which CERD is mandated to receive and consider State party reports on

¹²³ See n 118 above.

¹²⁴ India, Concluding Statement, CERD, 70th Session, consideration of India's nineteenth report, 26 February 2007, at <http://www2.ohchr.org/english/bodies/cerd/docs/statements/No.8India26Feb2007.pdf> (visited 29 December 2012).

¹²⁵ UN Doc. CERD/C/SR.1796, n 117 above, para. 3. India also rejects the application of ICERD to its Scheduled Tribes – despite CERD GR No. 23 reaffirming the application of ICERD to indigenous peoples – on the grounds that the Indian Government 'regarded the entire population of India at independence, with the departure of the colonizers, and their successors to be indigenous'; see 'Committee on Elimination of Racial Discrimination Considers Report of India', UN Press Release, 26 February 2007; CERD/C/SR.1797, 26 March 2007, para. 15 (original in French); J. Gilbert, 'Indigenous People's Human Rights in Africa: the Pragmatic Revolution of the African Commission on Human and People's Rights,' (60) *International & Comparative Law Quarterly* (2011) 245-270 for a discussion of the African Commission on Human Rights' decision in the 'Endorois' case that indigenous people's rights in international law are applicable to groups deemed 'indigenous peoples' in post-colonial contexts.

the legislative, judicial, administrative and other measures which they have adopted to give effect to ICERD and is empowered to make suggestions and General Recommendations on examination of the reports and information received from the States parties.

4.4.2.2 CERD: interpretative approach

The starting point for interpretation of treaties under international law is the Vienna Convention on the Law of Treaties 1969 (VCLT),¹²⁶ which sets out the general rule of treaty interpretation:

A treaty shall be interpreted in good faith in accordance with the *ordinary meaning* to be given to the terms of the treaty *in their context* and *in the light of its object and purpose*.¹²⁷

As a general principle of international law, a treaty in force is binding upon the parties and must be performed by them in good faith.¹²⁸ However, human rights treaties differ from traditional multilateral treaties in that their object and purpose is not the ‘exchange of reciprocal rights between a limited number of States’¹²⁹ or the protection or advancement of State interests¹³⁰ but ‘the protection of the basic rights of individual human beings irrespective of their nationality, against the State of their nationality and all other contracting states’.¹³¹ Thus, in interpreting human rights

¹²⁶ Adopted 22 May 1969. Entered into force 27 January 1980. 1155 UNTS 331.

¹²⁷ Article 31(1) VCLT (emphasis added). Article 32 VCLT provides that ‘context’ comprises, in addition to the text, any materials related to the conclusion of the treaty.

¹²⁸ Article 26 VCLT; M. Addo, *The Legal Nature of International Human Rights Law* (Lieden: Martinus Nijhoff, 2010) 215-240.

¹²⁹ Inter-American Court of Human Rights (IACtHR), Advisory Opinion on the Effect of Reservations on the Entry into Force of the American Convention (‘Effect of Reservations’), 22 *International Legal Materials* (1983) 37-50, para. 27; A. Orakhelashvili, ‘Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights’, 14(3) *European Journal of International Law* (2003) 529-568, 532.

¹³⁰ See ICJ, Advisory Opinion, Reservations to the Convention on Genocide, 28 May 1951, ICJ Reports 1951, 15-69, 23.

¹³¹ IACtHR, ‘Effect of Reservations’, n 129 above, para. 29. On the special character of human rights treaties see also HRC GC No. 24 (1994), Issues relating to reservations to the Covenant, para.18;

treaties, it is necessary ‘to seek the interpretation that is most appropriate in order to realise the aim and achieve the object of the treaty, *not that which would restrict to the greatest possible degree the obligations undertaken by the Parties*’.¹³² Moreover, the legal rights and obligations enshrined in human rights treaties are widely considered to be rights and obligations *erga omnes*.¹³³

Article 1 of ICERD ‘does not specify the groups which fall under its protection, nor does it define such terms as “race,” “descent” or “national or ethnic origin”’.¹³⁴ In common with other UN treaty bodies, CERD has adopted a dynamic or evolutive approach to interpreting ICERD, treating it as a living instrument.¹³⁵ From its initial focus on apartheid and racial segregation, CERD has addressed issues of ethnic discrimination (e.g. in Rwanda and the former Yugoslavia), discrimination against Roma,¹³⁶ indigenous people’s rights,¹³⁷ the right to self-determination¹³⁸ and, more recently, the rights of non-citizens¹³⁹ and descent-based discrimination and racial discrimination against people of African descent.¹⁴⁰ CERD has also taken into account the evolution of ‘racial discrimination’ from conceptualisations which emphasise biological features to contemporary forms of racial discrimination

Loizidou v Turkey, Application 15318/89, Judgment 18 December 1996, para. 43; S. Mullally, *Gender, Culture and Human Rights: Reclaiming Universalism* (Oxford: Hart, 2006) 95.

¹³² *Wemhoff v Germany*, Application 2122/64, Judgment 27 June 1968, 19, para. 8.

¹³³ *Barcelona Traction Case*, ICJ Reports (1970), para. 33. *Erga omnes* obligations are obligations owed to the international community as a whole; see also HRC GC No 31, n 32 above, para.2.

¹³⁴ Intergovernmental Working Group on the Effective Implementation of the Durban Declaration and Programme of Action (IGWG); views of CERD on the implementation of ICERD; UN Doc. E/CN.4/2004/WG.21/10.Add.1, 17 September 2004, para. 12.

¹³⁵ Communication No. 26/2002, *Stephen Hagan v Australia*, UN Doc. CERD/C/62/D/26/2002, para. 7.3. On the living instrument doctrine see n 43, above. On the core human rights treaties as living instruments see Committee on the Rights of the Child (CRC), GC No. 8 (2006), para. 20.

¹³⁶ CERD GR No. 27 (2000), *Discrimination against Roma*.

¹³⁷ CERD GR. No. 23 (1997), *Indigenous Peoples*.

¹³⁸ CERD GR. No. 21 (1996), *Right to self-determination*.

¹³⁹ CERD GR. No. 30 (2004), *Discrimination Against Non-Citizens*.

¹⁴⁰ CERD GR No. 29 (2002), Article 1, Paragraph 1 (Descent); CERD GR. No. 34 (2011), *Racial discrimination against people of African descent*.

justified by cultural differences¹⁴¹ and has interpreted the definition of racial discrimination in ICERD in order to address multiple or aggravated forms of racial discrimination.¹⁴² CERD has repeatedly clarified the meaning of the grounds enumerated in Article 1, in Concluding Observations and in various General Recommendations, emphasising that the concept of racial discrimination ‘is much broader than that perceived by many States which argue that there is no racial discrimination on their territory’¹⁴³ and expressing regret at the ‘limited understanding by many States parties regarding the meaning and scope of the definition of the concept of racial discrimination in Article 1 of the Convention... which may lead some States to deny or minimize the extent of racial discrimination in their territory’.¹⁴⁴ In relation to descent it has affirmed that ‘the term descent has its own meaning and is not to be confused with race or ethnic or national origin’.¹⁴⁵

4.4.2.3 CERD and the meaning of racial discrimination: General Recommendation No. 14 (1993)

As at the beginning of 2013, CERD had made thirty-four General Recommendations. GR No. 14 (1993) sets out CERD’s interpretation of the definition of discrimination in ICERD Article 1(1), discussed in section 3.2, above. A distinction is contrary to the Convention if it has either the purpose or the effect of impairing particular rights and freedoms. *‘In seeking to determine whether an action has an effect contrary to the Convention, [CERD] will look to see whether that action has an unjustifiable*

¹⁴¹ See Thornberry (2005), n 54 above.

¹⁴² Durban Review Conference Outcome Document, 24 April 2009, at <http://www.unhcr.org/refworld/docid/49f584682.html> (visited 28 December 2012), para. 35. See also Durban Review Conference, Preparatory Committee, CERD Replies to OHCHR questionnaire; UN Doc. A/CONF.211/PC.2/CRP.5, 23 April 2008, 15.

¹⁴³ CERD, Replies, *ibid.*, 12.

¹⁴⁴ *Ibid.*, 3.

¹⁴⁵ Concluding Observations – Japan; CERD, Report; UN Doc. A/56/18 (2001), para.166.

*disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin’.*¹⁴⁶

GR No. 14 was issued three years before CERD’s 1996 affirmation that caste is included in the descent limb of racial discrimination, reaffirmed in GR No. 29 (2002) (see below). As CERD member Thornberry pointed out in 2001 (in the context of CERD’s examination of Japan’s initial and second report), the expression ‘racial discrimination’ in Article 1(1) of ICERD

*covered different categories of discrimination, including that based on descent, in order to cover all cases and to apply to all countries no matter their specific cultural characteristics.*¹⁴⁷

Pursuant to GR No. 14, actions having an unjustifiable disparate impact on a group distinguished by caste will be contrary to ICERD.

4.4.2.4 CERD and the meaning of racial segregation and apartheid: General Recommendation No. 19 (1995)

CERD observed that while in some countries government policies created conditions of complete or partial racial segregation, partial segregation may also arise as an ‘unintended by-product’ of private actions:

In many cities residential patterns are influenced by group differences in income, which are sometimes combined with differences of race, colour, descent and national or ethnic origin, so that inhabitants can be stigmatised and individuals suffer a form of discrimination in which racial grounds are mixed with other grounds.¹⁴⁸

¹⁴⁶ CERD GR No. 14 (1993), n 14 above, para. 2 (emphasis added).

¹⁴⁷ CERD/C/SR.1444, 11 June 2001, para. 39 (emphasis added).

¹⁴⁸ CERD GR No.19 (1995), Racial segregation and apartheid (Art. 3), para. 3.

Racial segregation can thus arise ‘at home’, without any initiative or direct involvement by the public authorities. In its concluding observations in May 2007 on India’s fifteenth to nineteenth reports, CERD expressed concern at the persistence of *de facto* segregation of Dalits¹⁴⁹ and urged India to intensify its efforts to enforce legislation prohibiting and punishing Untouchability and to take effective measures against segregation.¹⁵⁰

4.4.2.5 CERD and the meaning of descent

In 1996, during its examination of India’s fifteenth to nineteenth reports, CERD categorically affirmed for the first time that caste discrimination falls within the definition of racial discrimination in Article 1(1) of ICERD as a sub-category of discrimination based on descent:

[T]he term descent mentioned in Article 1 of the Convention does not solely refer to race.

The Committee affirms that the situation of the scheduled castes and scheduled tribes falls within the scope of the Convention.¹⁵¹

Since 1996, CERD has repeatedly affirmed that caste discrimination falls under Article 1(1) as a form of discrimination based on descent, and that descent has its own distinct meaning and should not be ‘confused with race or ethnic or national origin’.¹⁵² Using ‘descent’, CERD has enquired into and commented on caste-based discriminatory practices in India,¹⁵³ Nepal,¹⁵⁴ Pakistan¹⁵⁵ and Bangladesh¹⁵⁶ and has

¹⁴⁹ Concluding Observations – India; UN Doc. CERD/C/IND/CO/19, 5 May 2007, para. 13.

¹⁵⁰ *Ibid.*, para. 14.

¹⁵¹ UN Doc. CERD/C/304/Add.13, 17 September 1996, para. 14.

¹⁵² CERD, Concluding Observations – Japan (2001), n 146 above; UN Doc. CERD/C/SR.1987, 4 March 2010, para. 10.

¹⁵³ CERD, Concluding Observations – India (1996), n 5 above. CERD, Concluding Observations – India (2007), n 149 above, paras. 8, 9, 13-15, 17, 18, 20-27.

¹⁵⁴ Concluding Observations – Nepal; UN Doc. CERD/C/64/CO/5, 28 April 2004, paras. 11, 12.

¹⁵⁵ Concluding Observations – Pakistan; UN Doc. CERD/C/PAK/CO/20, 16 March 2009, para. 12.

raised the issue of caste-based discrimination occurring in countries with a significant South Asian diaspora population, such as the UK.¹⁵⁷ CERD has also used ‘descent’ in its wider sense to enquire into discriminatory practices in countries outside South Asia (e.g. Japan and certain African states) based on analogous systems of inherited status, often related to inherited occupation.¹⁵⁸

4.4.2.6 CERD General Recommendation No. 29 (2002) on Article 1, paragraph 1 (descent)

In August 2002, CERD issued GR No. 29 on Article 1, paragraph 1 (descent),¹⁵⁹ in which it reiterated its interpretation of descent. The Preamble confirms ‘CERD’s consistent view... that the term “descent” in Article 1 paragraph 1 of the Convention does not refer solely to “race” and has a meaning and application which complements the other prohibited grounds of discrimination’;¹⁶⁰ ‘strongly reaffirms that discrimination based on “descent” includes discrimination against members of communities based on forms of social stratification such as caste and analogous systems of inherited status which nullify or impair their equal enjoyment of human rights’¹⁶¹ and ‘strongly condemn[s] descent-based discrimination, such as discrimination on the basis of caste and analogous systems of inherited status, as a violation of the Convention’. State parties are recommended to take steps to identify ‘descent-based communities under their jurisdiction... suffer[ing] from discrimination, especially on the basis of caste and analogous systems of inherited

¹⁵⁶ Concluding Observations – Bangladesh; UN Doc. CERD, Report (2001), n 145 above, para. 73.

¹⁵⁷ Concluding Observations – UK; UN Doc. CERD/C/63/CO/11, 10 December 2003, para. 25; Concluding Observations – UK; CERD/C/GBR/CO/18-20, 14 September 2011, para. 30.

¹⁵⁸ See section 4.5.5, below.

¹⁵⁹ CERD GR No. 29, n 140 above.

¹⁶⁰ CERD GR No. 29, *ibid.*, Preamble.

¹⁶¹ *Ibid.*

status’,¹⁶² *inter alia* to ‘review and enact or amend legislation in order to outlaw all forms of discrimination based on descent in accordance with the Convention’,¹⁶³ and to ‘resolutely implement legislation and other measures already in force’.¹⁶⁴

GR No 29 was partly a reaction to the 2001 UN World Conference against Racism, Racial Discrimination, Xenophobia and Other Related Forms of Intolerance (WCAR) in Durban,¹⁶⁵ where Dalit activists sought, ultimately unsuccessfully, to secure official recognition of caste as a form of racism, but in the process succeeded in internationalising caste discrimination as a ‘new’, global, human rights issue. It was preceded by a thematic discussion in CERD on discrimination based on descent.¹⁶⁶ It uses the wider terms ‘descent-based discrimination’, ‘members of descent-based communities’ and ‘analogous systems of inherited status’ to avoid focussing solely on caste discrimination or on specific states. As a basis of discrimination, the term ‘descent’ signified forms of inherited status, said CERD member Thornberry.¹⁶⁷ Caste systems, he argued, represented hierarchy, not equality; segregation, not integration; bondage, not freedom; and value determined at birth without regard for morality, achievement, intelligence or character.¹⁶⁸ The issue of descent was wider than the notion of caste – rather than trying to find a definition for

¹⁶² Ibid., para. 1.

¹⁶³ Ibid., para. 3.

¹⁶⁴ Ibid., para. 4.

¹⁶⁵ UN World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance – Declaration, at <http://www.un.org/WCAR/durban.pdf> (visited 28 December 2012). The aim of the WCAR was to ‘create a new world vision for the fight against racism in the twenty-first century’. Two previous UN world conferences against racism, in 1978 and 1983, had focussed primarily on apartheid in South Africa; see UNGAR 32/129, 16 December 1977; UNGAR 33/33, 14 November 1980. See also Chapter 5 of this thesis.

¹⁶⁶ UN Doc. CERD/C/SR.1531, 16 August 2002.

¹⁶⁷ Ibid., para. 11.

¹⁶⁸ Ibid., para. 13.

the concept, the GR sought to identify a set of indicators which would also be of assistance to governments.¹⁶⁹

General Comments and General Recommendations are not formally binding on States parties, but the status of the treaty-monitoring committees gives them ‘a special claim for attention’.¹⁷⁰ All treaty bodies with competence to adopt general comments or recommendations have used them to interpret the provisions of the treaties which they monitor, despite the absence of explicit authority to do so.¹⁷¹ Yet, ‘their reception in the world of practice’ is mixed.¹⁷² Governments, says Alston, have challenged them as ‘representing an unwarranted and unacceptable attempt to attribute to treaty provisions a meaning which they do not have’.¹⁷³ However, such challenges serve to draw attention to the relevant interpretation and ‘help to establish it as a benchmark against which alternative interpretations will be forced to compete at something of a disadvantage’.¹⁷⁴ Mechlem contends that states generally concur with treaty bodies on questions of interpretation and ‘rarely put forward their own interpretations of specific rights’.¹⁷⁵ Clearly this is not always the case. India claims that CERD’s interpretation of descent as covering caste amounts to ‘a redefinition of

¹⁶⁹ Ibid., para. 53.

¹⁷⁰ H. Steiner, ‘Individual claims in a world of massive violations: what role for the Human Rights Committee?’ in P. Alston and J. Crawford (eds.), *The Future of UN Human Rights Treaty Monitoring* (Cambridge: Cambridge University Press, 2000) 15-54, 52. See also P. Alston, ‘The Historical Origins of the Concept of “General Comments” in Human Rights Law’ in L. Boisson de Chazournes and V. Gowlland-Debbas (eds.), *The International Legal System in Quest of Equity and Universality* (The Hague: Martinus Nijhoff, 2001) 763-776, 764.

¹⁷¹ See Steiner (2000), *ibid.* See also I. Boerefijn, *The Reporting Procedure under the Covenant on Civil and Political Rights: Practice and Procedures of the Human Rights Committee* (Antwerp: Intersentia, 1999) 295, citing CCPR/C/133, Report on the informal meeting on procedures, para. 57.

¹⁷² Alston (2001), n 170 above.

¹⁷³ Alston (2001), *ibid.*, 764. HRC GC No. 24 (1994) on reservations provoked objections from the USA and the UK; see Mullally, n 131 above, 92.

¹⁷⁴ Alston (2001), *ibid.*, 765; Boerefijn, n 171 above, 300.

¹⁷⁵ K. Mechlem, ‘Treaty Bodies and the Interpretation of Human Rights’, 42(3) *Vanderbilt Journal of Transnational Law* (2009) 905-948, 920.

its mandate'.¹⁷⁶ By refusing to accept CERD's interpretation, India has refused to afford CERD exclusive competence to interpret ICERD and has asserted a right to an equal interpretive role. Japan has also rejected CERD's interpretation of descent and its application to Japan's Buraku people, a group which CERD has repeatedly identified as falling within the ambit of ICERD.¹⁷⁷

4.5 Descent

4.5.1 Origins of descent as a legal category

The term 'descent' was probably not intended (or at least not intended by India) at the time of its introduction into ICERD to include caste.¹⁷⁸ It appears in Article 16(2) of the Constitution of India 1950 (COI) – which lists the prohibited grounds of discrimination in relation to public sector or State employment – where it is enumerated separately from caste.¹⁷⁹ It was inserted in order to cover discrimination 'in the matter of distribution of offices and appointments in the State' on account of descent,¹⁸⁰ by which was meant discrimination 'on account of dynasty or family status'.¹⁸¹ As a social category in India, descent calls up notions of common ancestry, common blood and membership of closed, birth-status groups, whether based on

¹⁷⁶ India, Concluding Statement, CERD 70th session, 26 February 2007, para. 6, at <http://www2.ohchr.org/english/bodies/cerd/cerds70.htm> (visited 31 July 2012). Likewise, states have objected by reference to the doctrine of domestic jurisdiction where treaty bodies have asserted competence to determine the validity of reservations; Mullally, n 131 above, 92, 95.

¹⁷⁷ See UN Doc. CERD/C/JPN/Q/3-6/Add.1/Rev.1, 8 February 2010, paras. 9, 10; CERD/C/JPN/CO/3-6, 6 April 2010, para. 8. On the Buraku see R.K.W. Goonesekere, working paper on the topic of discrimination based on work and descent; E/CN.4/ Sub.2/2001/16, 14 June 2001, paras. 40-42.

¹⁷⁸ See D. Keane, 'Descent-based Discrimination in International Law: A Legal History' 11 *International Journal of Minority and Group Rights* (2005) 93-116; Keane (2007), n 55 above, 236-237.

¹⁷⁹ COI Article 16(2) provides, 'No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State'. Descent does not appear in COI Article 15(1) and (2) which respectively prohibit discrimination by the State and by public and private actors in legally-regulated spheres on grounds of religion, race, caste, sex and place of birth; see Chapter 3 of this thesis.

¹⁸⁰ Shri Raj Bahadur, CAD Vol. VII, n 93 above, 650.

¹⁸¹ Ibid. See also Keane (2007), n 55 above, 235.

caste, lineage affiliation, religion or language.¹⁸² As a legal category, descent is of British origin. As explained above, descent originates in s. 87 of the Government of India ('Charter') Act 1833,¹⁸³ the purpose of which was to prohibit racial and religious discrimination against Indians in employment under the East India Company (the forerunner in India of State employment), who at that time were employed almost exclusively in subordinate positions irrespective of ability or competence.¹⁸⁴ 'Descent' connoted geographical origins and racial ancestry.¹⁸⁵ It appears again, a century later, in s. 298(1) of the Government of India (GOI) Act 1935 – on which the Constitution of India 1950 was based – as a prohibited ground of discrimination in State employment, alongside religion, place of birth and colour.¹⁸⁶ The notion of descent as a characteristic distinct from caste is reinforced by s. 298(2)(b) of the 1935 Act, which qualifies the prohibition of discrimination in s. 298(1):

Nothing in this section shall affect the operation of any law which recognizes the existence of some *right, privilege or disability attaching to members of a community by virtue of some personal law or custom*.¹⁸⁷

The prohibition of discrimination on the basis of descent was thus subordinated in the GOI Act 1935 to any caste-based ('community') disabilities – or privileges – deriving from personal or customary law in force at the time. In other words, while discrimination *between Europeans and Indians* in the fields of employment, trade and business was prohibited by s. 298(1) of the 1935 Act on grounds of religion,

¹⁸² A. Beteille, 'Race and Descent as Social Categories in India', 96(2) *Daedalus* (1967) 444-463, 454.

¹⁸³ See n 90 above.

¹⁸⁴ Lester and Bindman, n 90 above, 384; they describe section 87 as 'the first British anti-discrimination law'; *ibid.*, 383.

¹⁸⁵ *Ibid.*, 390.

¹⁸⁶ See <http://www.legislation.gov.uk/ukpga/Geo5and1Edw8/26/2/> (visited 12 January 2013). The rubric to s. 298 reads 'Persons not to be subjected to disability by reason of race, religion, etc.'.

¹⁸⁷ GOI Act 1935 s. 298(2)(b); emphasis added.

place of birth, descent or colour, discrimination *between Indians* in the same fields on grounds of caste was explicitly exempted.

4.5.2 Descent in Indian jurisprudence post-1947

In the 1948 Constituent Assembly debates, the prohibition of discrimination based on descent in Article 16(2) was explained as meaning a prohibition, in the context of State employment, of nepotism, favouritism or preferential treatment for those from a particular family or dynastic background.¹⁸⁸ Indian case law since 1950 indicates that the term has been applied in the context of public sector employment to prohibit ‘hereditary’ appointments or appointments ‘by succession’.¹⁸⁹ *Prima facie* the appointment of a son, daughter, widow or near relative of a government employee to that employee’s post, for example where the employee has retired, or to a post in the same department because of a familial connection to the employee, would be tantamount to an appointment on the basis of descent and therefore violative of Article 16(2) – unless an exception applies, for example in the event of an employee’s death in service.¹⁹⁰ Descent in the Indian legal context has thus been a ‘chameleon’ term whose meaning and usage have evolved over time to meet changing legal and social needs.

4.5.3 The international usage of descent

Keane argues that descent is ultimately ‘a term of convenience’ which ‘allows international bodies to examine legitimate claims of continuing caste-based discrimination’, but ‘CERD should not pretend that descent originally meant caste

¹⁸⁸ Shri Raj Bahadur, CAD Vol. VII, n 93 above.

¹⁸⁹ *Yogender Pal Singh & Ors. vs. Union of India & Ors.*, 1987 AIR 1015.

¹⁹⁰ *V. Sivamurthy v State of Andhra Pradesh & Ors.*; Supreme Court of India, Civil Appeal No.4210 (2003); *Auditor General of India v G. Ananta Rajeswara Rao*, 1994 AIR 1521; *Rashmi Dwivedi v State of U.P. and Ors.* (2002) 94 AWC 3065.

when it did not'; it 'should recognize that it has re-interpreted the term'.¹⁹¹ This, argues Keane, would involve ending the description of discriminatory practices in certain African states as caste, while at the same time informing India 'that it does not believe that its caste structure is based on differences of skin colour', nor that caste is synonymous with race, '*but that this does not mean that caste is excluded from the purview of the ICERD*'.¹⁹² I agree with Keane that the cross-cultural application of the term caste is problematic; I suggest that the term 'analogous systems of inherited status', used by CERD in GR No. 29, is preferable outside the context of South Asia and its diaspora. However, I disagree that CERD has *re*-interpreted or *re*-crafted descent to cover caste; if this were the case, it would drastically weaken CERD's authority to examine caste-based discrimination under the rubric of descent. The living instrument doctrine does not extend to the introduction into the treaty of new or additional rights or obligations that the treaty drafters did not intend to include; rather, it enables the recognition of hitherto unidentified, latent rights or obligations implicit in the terms of the text. From the moment it first directed its attention to discrimination based on caste, CERD has maintained that, for the purposes of ICERD, caste discrimination is captured by the concept of discrimination based on descent. In February 2007, during CERD's examination of India's fifteenth to nineteenth reports, CERD member Thornberry explained,

[i]n international law, an *evolutionary interpretation* of terms was common practice; [CERD] had, over time, developed a broad interpretation of the term 'descent' and was of the view that the language contained in the Convention was adequate to capture the notion of caste-based discrimination. It was important to bear in mind the main purpose of investigating racial discrimination as practiced by institutions, individuals or organisations – namely, to

¹⁹¹ Keane (2007), n 55 above, 237.

¹⁹² Ibid. (emphasis added).

engage in public reflection and dialogue and thereby address deep-rooted social patterns of discrimination.¹⁹³

According to Thornberry, the ‘overwhelming evidence of oppression’ suffered by the Dalits as subjects of the caste system ‘could hardly escape the attention of CERD in the light of its duty to be faithful to the norms of the Convention’.¹⁹⁴ Descent, he argues, is the ‘closest descriptor’ for caste and analogous forms of social stratification; it has the ‘most open character, since all human beings have a descent’, and is

an appropriate term to act as a normative safety net for clear cases of group-based discrimination based on inherited characteristics which are not easily caught by other, narrower descriptors.¹⁹⁵

Keane argues that, even though CERD has *re*-interpreted descent, ‘this does not mean that caste is excluded from the purview of the ICERD’. This argument can only be correct if caste is covered by one or more of the other limbs of racial discrimination. A treaty body has no authority to *re*-interpret a treaty. If a characteristic is not included, either expressly, impliedly or latently, within the terms contained in the treaty, then it is excluded. The point is a fine one, but the logical outcome of the argument that caste was not originally included, expressly or impliedly, in the treaty, and that in order to address caste discrimination CERD has *re*-interpreted the treaty, is that caste is not covered by, and *therefore cannot be addressed under*, ICERD. This is the position taken by India.

¹⁹³ UN Doc. CERD/C/ SR.1796 (Thornberry), 2 March 2007, para. 36 (emphasis added).

¹⁹⁴ Thornberry (2004), n 87 above 119-137, 129.

¹⁹⁵ Thornberry (2004), *ibid.*, 122, 123.

In contrast, CERD has affirmed the place of caste discrimination within the framework of ICERD through the use of descent – an illustration, says Thornberry, of ‘the possibilities inherent in elaborating existing instruments on human rights to benefit particular communities, even in the absence of direct reference to the community in question’.¹⁹⁶ Both CERD and India have called up the ICERD *travaux preparatoires* in support of their interpretation of descent. Treaty interpretation, argues Klabbers, is ‘a highly political exercise, continuing the politics of negotiation after the treaty’s entry into force’.¹⁹⁷ *Travaux preparatoires* constitute a political and historical, as well as a legal, record,¹⁹⁸ yet they remain ‘an elusive concept’.¹⁹⁹ As Klabbers points out, the intentions of the drafters may not always be cognisable; indeed, there ‘may not be much of a common intention among treaty drafters’ and states may ‘enter into negotiations with various, possibly widely diverging goals in mind’.²⁰⁰ Invoking the *travaux preparatoires* may ‘introduc[e] a static element into a treaty’, generally considered undesirable in the context of human rights treaties, but which, for particular actors – usually states – may be a desirable outcome. Conversely, notes Klabbers, the *travaux preparatoires* may be invoked to show that the drafting history does not preclude a particular (often more teleological) interpretation of the text.²⁰¹ Either way, he argues, recourse to the *travaux preparatoires* is an acknowledgment of the political nature of treaties.

Faced with India and Japan’s recourse to the ICERD *travaux preparatoires* in support of their interpretations of descent, CERD has sought to emphasise the text of

¹⁹⁶ Ibid., 120.

¹⁹⁷ J. Klabbers, ‘International Legal Histories: The Declining Importance of *Travaux Preparatoires* in Treaty Interpretation?’, 50 *Netherlands International Law Review* (2003) 267-288, 271.

¹⁹⁸ However, the notion of historical records ‘as somehow representing something truthful and undisputable is highly deceptive’; Klabbers, *ibid.*, 286.

¹⁹⁹ Klabbers, *ibid.*, 276.

²⁰⁰ Ibid., 284.

²⁰¹ Ibid., 283.

ICERD and subsequent practice instead of the *travaux*. During CERD's examination of Japan's combined third to sixth reports in February 2010, CERD member Thornberry, referring to the debates in the *travaux préparatoires* on the substitution of descent for national origin,²⁰² stressed that the *travaux* 'were supplementary; the text of the Convention and subsequent practice should be used as the primary means of interpretation'.²⁰³

4.5.4 Domestic jurisdiction, sovereignty and caste

According to Eide and Alfredsson, during the drafting of the UDHR the Americans 'emphasised that the Declaration was not binding and that "the present treatment of Negroes in this country involves only issues which are matters 'essentially within the domestic jurisdiction' of the United States" – according to their interpretation of the Charter'.²⁰⁴ In similar fashion India has construed enquiry by CERD into caste issues as intervention in its internal affairs,²⁰⁵ its approach to caste discrimination being that it is essentially an internal matter, outside the scope of ICERD, and that there are sufficient laws in India to deal with it accordingly.²⁰⁶ In February 2007, before

²⁰² UN Doc. CERD/C/SR.1987, 4 March 2010, para. 10.

²⁰³ Ibid., (emphasis added).

²⁰⁴ A. Samnøy, 'The Origins of the Universal Declaration of Human Rights' in Eide & Alfredsson (eds.), n 23 above, 3-25, 9. In 1936, Dr. B.R. Ambedkar wrote to W.E. Du Bois, the Black American scholar and race activist, regarding 'the similarity between the position of the Untouchables in India and the position of the Blacks in America', adding '[t]he Blacks of America have filed a petition to the UNO. The Untouchables of India are thinking of following suit'; S. Thorat and Umakant, 'Introduction' in Thorat & Umakant, n 2 above, xxix.

²⁰⁵ UN Sub-Commission, Resolution 2004/17, Discrimination based on work and descent, 12 August 2004; UN Doc. E/CN.4/Sub.2/2004/48, 21 October 2004, 48; see Statement by India, 12 August 2004, at <http://www.indianet.nl/r040812.html> (visited 30 December 2012). India is not alone in its resistance to UN supervision; as regards factors limiting the impact of UN human rights treaties, '[t]here is ample evidence... that because governments guard jealously over their sovereignty, they resist international supervision and are reluctant to implement views and recommendations'; C. Heyns and Frans Viljoen, 'The Impact of the United Nations Human Rights Treaties on the Domestic Level', 23(2) *Human Rights Quarterly* (2001) 483-535, 517.

²⁰⁶ See, e.g. CERD/C/SR.1796, n 117 above, para. 3; see also Intervention by Solicitor-General of India, n 86 above, para. 2. India is accused by Dalit advocacy groups of branding Dalit activists as 'anti-national' and of 'seek[ing] to domesticate the problem as an internal affair'; Decade of Dalit Rights UN, Declaration, at

CERD, India stated that any dialogue and discussion with international bodies on caste discrimination issues must be ‘within the parameters of the Constitution’ and that therefore India was not in a position to accept reporting obligations under ICERD on the issue of caste discrimination.²⁰⁷

India also suggested that international scrutiny by CERD of caste discrimination may hinder domestic efforts to overcome the problem, referring to its ‘impressive array of constitutional, legal and administrative measures’ to ‘empower the Scheduled Castes’ which ‘enjoyed broad political consensus’.²⁰⁸ Given the ‘impressive gains’ since the Constitution, it was India’s concern that ‘nothing should be done to introduce elements *which can only detract from such endeavours*’.²⁰⁹ Moreover, there were ‘enormous political and social sensitivities involved’.²¹⁰ India’s position that its national Constitution must form the sole legal basis for addressing caste discrimination²¹¹ is in marked contrast to its argument in 1946 that South Africa’s ‘domestic jurisdiction’ defence of its discrimination against persons of Indian origin was morally as well as legally untenable.

4.5.5 Beyond India and beyond caste: CERD and descent-based discrimination worldwide

Nepal and Pakistan, as caste-affected countries within South Asia, have, unlike India, accepted (or at least not objected to) CERD’s interpretation of descent as including caste – and hence CERD’s authority to enquire about and to scrutinise measures

http://idsn.org/fileadmin/user_folder/pdf/New_files/UN/Printer_Friendly_Declaration_Decade_Dalit_Rights.pdf

(visited 2 January 2013).

²⁰⁷ India, Introductory Statement, CERD, 70th session, 23 February 2007, para. 8.

²⁰⁸ India, Concluding Statement, n 176 above, para. 2.

²⁰⁹ India, Concluding Statement, *ibid.*, para. 3, emphasis added.

²¹⁰ *Ibid.*

²¹¹ India, Introductory Statement, n 207 above, paras. 5-8.

taken in their countries to prevent, prohibit and eliminate caste-based discrimination.²¹² Yet, despite the existence of constitutional provisions in both countries prohibiting discrimination on grounds of caste,²¹³ and a constitutional provision in Nepal prohibiting and criminalising Untouchability,²¹⁴ CERD in its concluding observations to both countries has expressed concern about continuing *de facto* discrimination against Dalits on grounds of caste, including *de facto* residential and occupational segregation and social exclusion²¹⁵ and, in the case of Pakistan, the absence of legislation aimed at the prohibition of caste-based discrimination.²¹⁶ Bangladesh has not objected to CERD's position that caste falls within the scope of ICERD via descent, claiming in its seventh to eleventh reports in 2000²¹⁷ to take a 'broad view of its obligations under the Convention', including pursuing positive discrimination policies in favour of the disadvantaged.²¹⁸ Nevertheless, CERD recommended that Bangladesh include in its next report information about the enjoyment of the rights in Article 5 of ICERD by all groups, including castes.²¹⁹ Discrimination based on caste is prohibited under the Sri Lankan Constitution.²²⁰ During CERD's examination of its second report²²¹ in 1986, Sri Lanka acknowledged the existence of a caste system in the country, asserting that it was 'a racial phenomenon not based on any religious factor and was to be found among Tamils

²¹² See Concluding Observations – Nepal; CERD/C/64/CO/5, 26 April 2004, paras. 4, 5, 11, 12; Concluding Observations – Pakistan (2009), n 155 above, paras. 11, 12, 19, 21.

²¹³ Constitution of Pakistan 1973, Articles 26(1), 27(1); at <http://www.mofa.gov.pk/Publications/constitution.pdf>; Constitution of Nepal 1990, Articles 11(2), 11(3), at <http://www.supremecourt.gov.np/main.php?d=lawmaterial&f=constitution> (both visited 30 December 2012).

²¹⁴ Constitution of Nepal 1990, *ibid.*; Article 11(4).

²¹⁵ CERD, Concluding Observations – Nepal (2004), n 212 above, para. 12; CERD, Concluding Observations – Pakistan (2009), n 155 above, paras. 11, 12.

²¹⁶ CERD, Concluding Observations – Pakistan (2009), *ibid.*, para. 12.

²¹⁷ UN Doc. CERD/C/379/Add.1, 30 May 2000.

²¹⁸ *Ibid.*, para. 5.

²¹⁹ Concluding Observations – Bangladesh; CERD, Report (2001), n 145 above, para. 73.

²²⁰ Constitution of Sri Lanka 1978, Article 12; at <http://www.priu.gov.lk/Cons/1978Constitution/Introduction.htm> (visited 28 December 2012).

²²¹ Sri Lanka, second report; CERD/C/126/Add.2., 12 September 1985.

and Sinhalese’, but also that ‘no racial distinction could be made between the Sinhalese and Tamil communities’.²²² Nonetheless, Sri Lanka made no reference to caste in its subsequent reports in 1994 and 2000,²²³ and the issue was not raised by CERD in its examinations or concluding observations.

Outside South Asia, the existence of descent-based discrimination in its wider sense has been raised by CERD in concluding observations to Japan,²²⁴ Yemen,²²⁵ Nigeria,²²⁶ Madagascar,²²⁷ Mauritania,²²⁸ Senegal,²²⁹ Chad,²³⁰ Mali,²³¹ Ethiopia²³² and Ghana.²³³ Japan rejects the application of discrimination based on descent under ICERD to discrimination against ‘persons belonging to or descending from the Buraku community’.²³⁴ Japan’s argument is that CERD has misunderstood the meaning of descent in the application of ICERD. According to Japan in 2001, when descent (together with place of origin) was proposed as a replacement for national origin during the drafting of ICERD, it was not intended to cover social class or

²²² CERD, Report; UN Doc. A/42/18 (1987), para. 293.

²²³ Sri Lanka, third to sixth reports; CERD/C/234/Add.1, 13 September 1994; Sri Lanka, seventh to ninth reports; UN Doc. CERD/C/357/Add.3, 20 November 2000.

²²⁴ UN Doc. CERD/C/304/ADD.114, 27 April 2001, para. 8; CERD/C/JPN/CO/3-6, 6 April 2010, para. 8.

²²⁵ UN Doc. CERD/C/YEM/CO/16, 19 October 2006, paras. 8, 9, 15, 16; CERD/C/YEM/CO/17-18, 4 April 2011, para. 15.

²²⁶ UN Doc. CERD/C/NGA/CO/18, 27 March 2007, paras. 15, 18, 25.

²²⁷ UN Doc. CERD/C/65/CO/4, 10 December 2004, paras. 12, 17.

²²⁸ UN Doc. CERD/C/65/CO/5, 10 December 2004, para. 15.

²²⁹ Concluding Observations – Senegal; CERD, Report; UN Doc. A/57/18 (2002), para. 445.

²³⁰ UN Doc. CERD/C/TCD/CO/15, 21 September 2009, para. 15.

²³¹ Concluding Observations – Mali; CERD, Report (2002), n 229 above, para. 406.

²³² UN Doc. CERD/C/ETH/CO/7-16, 7 September 2009, para. 15.

²³³ UN Doc. CERD/C/62/CO/4, 2 June 2003, para. 22. A caste-like, hereditary system of social stratification has recently been identified in North Korea; R. Collins, *Marked for Life: Songbun – North Korea’s Social Classification System* (Washington DC: Committee for Human Rights in North Korea, 2012); ‘North Korea Caste System “underpins human rights abuses”’, *The Telegraph*, 6 June 2012.

²³⁴ Japan, third to sixth reports, Replies to List of Questions; UN Doc. CERD/C/JPN/Q/3-6/Add.1/Rev.1, 8 February 2010, para. 10. Historically, Japan’s Buraku people ‘were subjected to intense prejudice and discrimination, forbidden to marry or have physical contact with common people as such contact was seen as “polluting” the higher classes. They were an outcast population confined to living in hamlets, now officially classified as Dowa districts’; although their living standard has improved, ‘discrimination in marriage and employment continues’; see Goonesekere (2001), n 177 above.

social origin²³⁵ – it was proposed because of concern that ‘national origin’ could lead to a misunderstanding that the term includes the concept of ‘nationality’ (a concept based on legal status). In 2010, Japan reiterated its view, arguing that descent in ICERD was intended to ‘indicate a concept focusing on the *race or skin color* of a past generation, or the *national or ethnic origins* of a past generation’.²³⁶ In response, Thornberry reaffirmed CERD’s position that descent as a ground for discrimination ‘carried its own meaning, which was distinct from the other grounds set forth in the Convention’.²³⁷ In its concluding observations CERD reiterated that descent has a meaning and application ‘which complement the other prohibited grounds of discrimination’ and ‘that discrimination based on “descent” includes discrimination against members of communities based on forms of social stratification... and analogous systems of inherited status which nullify or impair their equal enjoyment of human rights’.²³⁸

CERD has also raised descent-based discrimination with the UK. In 2003, CERD – recalling that descent-based discrimination, including discrimination on the basis of caste and analogous systems of inherited status, is a violation of the Convention – recommended that the UK introduce a prohibition of descent-based discrimination in domestic legislation and invited information on the issue in the next periodic report.²³⁹ Unlike Japan and India, the UK has not objected to the inclusion of caste in the concept of descent, but nevertheless has resisted CERD’s call for legislative action. In its 2010 report, the UK noted CERD’s request for information but stated that it had ‘seen no firm evidence on whether caste-based discrimination in the fields

²³⁵ UN Doc. CERD/C/SR.1444, 11 June 2001, para. 28.

²³⁶ Japan, Replies to List of Questions, n 234 above, paras. 9, 10 (emphasis added).

²³⁷ UN Doc. CERD/C/SR.1987, 4 March 2010, para. 10.

²³⁸ CERD, Concluding Observations – Japan (2010), n 224 above, para. 8.

²³⁹ CERD, Concluding Observations – UK (2003), n 157 above.

covered by [ICERD] exists to any significant extent in the UK' and had therefore 'made a commitment to commission research into caste discrimination'.²⁴⁰ In its 2011 concluding observations, CERD noted the UK's assertion about lack of evidence of caste discrimination in regulated fields but pointed out that CERD had received contrary information that such discrimination did exist; it therefore recommended the government to invoke section 9(5)(a) of the EQA in order to 'provide remedies to victims of this form of discrimination'.²⁴¹

4.6 Conclusion

Caste discrimination has been targeted by CERD since 1996 as a subset of descent-based discrimination, and CERD has consistently taken a robust attitude towards states which have failed to fulfil their Convention obligations with regard to descent-based racial discrimination, including discrimination on the basis of caste and analogous systems of inherited status. CERD has repeatedly emphasised that descent is a wider category than merely caste, and that descent-based discrimination of different types affects a wide range of countries.²⁴² Yet, the capture of caste under ICERD via its characterisation as a subset of descent has affronted and been rejected by India, the world's largest caste-affected country and one of the early leaders of the international anti-racial discrimination movement. Japan has also challenged the use of descent to capture discrimination on the basis of inherited status. Turning to the UK, with its growing South Asian diaspora, and with evidence of the existence of

²⁴⁰ UN Doc. CERD/C/GBR/18-20, 13 August 2010, para. 42.

²⁴¹ CERD, Concluding Observations – UK (2011); n 157 above, para. 30. The UK's stance as at 1 April 2013 on the introduction of a statutory prohibition of caste discrimination is discussed in Chapter 9 of this thesis.

²⁴² See, e.g. CERD GR No. 34, n 140 above.

caste discrimination as a domestic issue, the absence of explicit caste discrimination legislation, drafted, implemented and enforced in accordance with ICERD obligations, risks leading to a greater international focus on the UK and its reluctance to deal with such discrimination. The UK's legal response to caste discrimination 'at home' forms the third part of this thesis. First, however, Chapter 5 examines the application of other international human rights law standards to caste discrimination.

Chapter 5

Caste Discrimination: Other International Human Rights Law Standards

5.1 India, caste discrimination and other human rights treaty bodies

This chapter examines the application of other international human rights law standards to the problem of caste discrimination. This first section summarises the engagement of other UN treaty bodies with caste discrimination in India¹. India is a party to the International Covenant on Civil and Political Rights (ICCPR);² the International Covenant on Economic, Social and Cultural Rights (ICESCR);³ the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW);⁴ the Convention on the Rights of the Child (CRC)⁵ and the Convention on the Rights of Persons with Disabilities (CRPD),⁶ in addition to the International Convention for the Elimination of All Forms of Racial Discrimination (ICERD). India has not objected to addressing, or answering questions on, caste discrimination before the Human Rights Committee (HRC), the Committee on Economic, Social

¹ For a compilation on UN human rights bodies and caste discrimination see International Dalit Solidarity Network (IDSN), *Caste Discrimination and UN Human Rights Bodies* (4/E, 2012) at http://idsn.org/fileadmin/user_folder/pdf/New_files/UN/UNcompilation.pdf (visited 2 January 2013).

² Adopted 16 December 1966. In force 23 March 1976. 999 UNTS 171. Indian ratification 10 April 1979. India has not ratified the ICCPR Optional Protocol allowing individual communications. State reports; UN Doc. CCPR/C/10/Add.8 (1983); CCPR/C/37/Add.13 (1989); CCPR/C/76/Add.6 (1996).

³ Adopted 16 December 1966. In force 3 January 1976. 993 UNTS 3. Indian ratification 10 April 1979. India has not ratified the ICESCR Optional Protocol allowing individual communications. State reports; UN Doc. E/1980/6/Add.34 (1983, Initial, Arts. 10-12); E/1988/5/Add.5 (1989, Initial, Arts. 13-15); E/1984/6/Add.13 (1985, Initial, Arts. 6-9); E/C.12/IND/5 (second to fifth, 2006). Until 1990, the ICESCR reporting procedure required three reports for three different sets of articles. From 1990, the procedure was consolidated; ECOSOC Resolution 1988/4, 24 May 1988.

⁴ Adopted 18 December 1979. In force 3 September 1981. 1249 UNTS 13. Indian ratification 9 July 1993. State reports; UN Doc. CEDAW/C/IND/1 (1999, Initial); CEDAW/C/IND/2-3 (2005, second and third); CEDAW/C/IND/SP.1 (2009, Special).

⁵ Adopted 20 November 1989. In force 2 September 1990. 1577 UNTS 3. Indian ratification 11 December 1992. State reports; UN Doc. CRC/C/28/Add.10 (1997, Initial); CRC/C/93/Add.5 (2001, second); CRC/C/IND/3-4 (2011, third and fourth). India has ratified Optional Protocols 1 and 2.

⁶ Adopted 13 December 2006. In force 3 May 2008. 2515 UNTS 3. Indian ratification 1 October 2007.

and Cultural Rights (CESCR), the Committee for the Elimination of Discrimination Against Women (CEDAW/C) or the Committee on the Rights of the Child (CRC/C), despite these bodies' characterisation of caste discrimination as an impediment to the enjoyment of treaty rights and, in the case of the HRC and the CESCR, the conceptualisation of caste as a characteristic attracting ICCPR and ICESCR non-discrimination protection. The accusation of *racial* discrimination entailed by the Committee for the Elimination of Racial Discrimination (CERD)'s conceptualisation of caste discrimination as a form of descent-based racial discrimination appears too much for India, given its history of colonisation and its subsequent role in the anti-colonialism, anti-apartheid and non-aligned movements. Approaches to caste discrimination via categories such as birth, social origin or social status appear to be more acceptable to India and hence perhaps more likely to result in concrete remedies.

The HRC, CESCR, CEDAW/C and CRC/C have all identified caste discrimination as an impediment to Indian implementation of the treaties they monitor.⁷ All four treaty bodies have highlighted the persistence of *de facto* caste discrimination; non-implementation and non-enforcement of legislation and lack of mechanisms to monitor enforcement;⁸ the need for greater efforts to eliminate discriminatory practices, including Untouchability and caste-motivated violence; and the need to prosecute those responsible, both State and private actors.⁹ CESCR General Comment (GC) No. 20 (2009) on non-discrimination in economic, social and cultural

⁷ See HRC, Report; UN Doc. A/52/40 (1997) para. 420; E/C.12/IND/CO/5 (2008) paras. 13, 14, 40, 53; CEDAW/C, Report; A/55/38 (2000) para. 52; CRC/C, Report; CRC/C/94, 3 March 2000, para. 41.

⁸ See, e.g. HRC, Report; UN Doc. A/52/40 (1997) paras. 420, 430; CCPR/C/79/Add.81, 4 August 1997, para. 15; CEDAW/C/IND/CO/3, 2 February 2007, paras. 28-29; CRC/C, Report, 3 March 2000, *ibid.*, para. 63; CRC/C/15/Add.228, 26 February 2004, para. 25.

⁹ See e.g. CRC/C, Report (2000), *ibid.*

rights explicitly locates caste within the ICESCR protected categories of social origin and birth, and implicitly within the ‘other status’ category of economic or social situation.¹⁰ This opens up opportunities for Dalit advocacy groups, as well as the CESCR itself, to make greater use of the ICESCR in challenging the persistence of caste discrimination in India. Likewise, Dalit groups could make greater use of the possibilities inherent in the ICCPR to challenge India on the persistence of *de facto* caste discrimination and the non-implementation of caste discrimination legislation. The CESCR has highlighted India’s lack of progress in combating bonded labour and the worst forms of child labour (which disproportionately affect Scheduled Caste children) and its failure to eliminate harmful traditional practices such as *devadasi*.¹¹ CRC/C has identified India’s caste system as compounding ‘poverty, illiteracy, child labour, child sexual exploitation and children living and/or working on the streets’.¹² CEDAW/C has repeatedly highlighted the intersectional nature of the discrimination suffered by Dalit women (including physical and sexual violence and the institution of *devadasi*).¹³ CRC/C has stressed the importance of comprehensive public education campaigns to prevent and combat caste-based discrimination¹⁴ and the need for disaggregated data relating to caste discrimination and violence.¹⁵

International scrutiny of caste discrimination by CERD as a form of descent-based racial discrimination has transformed caste discrimination from a domestic issue into

¹⁰ CESCR GC No. 20; UN Doc. E/C.12/GC/20, 2 July 2009, paras. 24, 26.

¹¹ See e.g. UN Doc. E/C.12/IND/CO/5, 8 August 2008, paras. 13, 14, 19, 25, 53. On the institution of *devadasi* see Chapter 3 of this thesis.

¹² See CRC/C, Report, 3 March 2000, n 7 above, para. 41. CRC GC No.7 (2005), Implementing child rights in early childhood, explicitly identifies caste as a prohibited ground of discrimination in the context of children’s right to non-discrimination; CRC/C/GC/7/Rev.1, 20 September 2006, para. 11(b)(iv).

¹³ CEDAW/C, Report, 2000, n 7 above, paras. 43, 68, 69, 74, 75; CEDAW/C/IND/CO/3, 2 February 2007, paras. 14, 15, 21, 26, 28, 29.

¹⁴ CRC/C, Report, 3 March 2000, n 7 above, para. 63; Concluding Observations – India; CRC/C/15/Add.228, 26 February 2004, para. 28.

¹⁵ CRC, Concluding Observations – India (2004), *ibid.*, para. 22.

an international human rights issue, but, as Chapter 4 explains, the framing of caste discrimination as a form of descent-based racial discrimination covered by ICERD is rejected by India. Human rights treaties with wider grounds, where caste discrimination can be framed as an impediment to the enjoyment of particular rights rather than as a form of racial discrimination *per se*, offer an alternative to ICERD as a means of challenging persistent *de facto* caste discrimination.

5.2 UN Charter mechanisms

5.2.1 UN Sub-Commission for the Promotion and Protection of Human Rights: discrimination based on work and descent

In 2000, caste discrimination was conceptualised by the former UN Sub-Commission for the Promotion and Protection of Human Rights (UN Sub-Commission) as a subset of a new legal category, ‘discrimination based on work and descent’ (DWD). In August 2000, against the backdrop of Dalit lobbying prior to the 2001 UN World Conference against Racism, Racial Discrimination, Xenophobia and Other Related Forms of Intolerance (WCAR) in Durban,¹⁶ the UN Sub-Commission passed Resolution 2000/4 declaring DWD a form of discrimination prohibited by international human rights law.¹⁷ The resolution contained no definition of this form of discrimination, instead affirming the non-discrimination provision in Article 2 of the UDHR as its legal source and observing that DWD ‘has historically been a feature of societies in different regions of the world and has affected a significant proportion overall of the world’s population’. The ‘work and descent’ terminology was adopted to encompass caste and similar systems of inherited status without

¹⁶ UN WCAR, Declaration, at <http://www.un.org/WCAR/durban.pdf> (visited 28 December 2012); see Chapter 4 of this thesis, n 166.

¹⁷ UN Sub-Commission, Resolution 2000/4, Discrimination based on work and descent (DWD), 11 August 2000; UN Doc. E/CN.4/Sub.2/2000/46, 23 November 2000, 25.

focussing on any one state, thereby locating caste discrimination as a global human rights issue within a wider international human rights category.

Resolution 2000/4 appointed R.K.W. Goonesekere to prepare a working paper on DWD, to identify affected communities, examine existing measures for the abolition of such discrimination and make recommendations for its effective elimination.¹⁸ Although focussed on South Asia, Goonesekere's report identified work and descent-based discrimination as a worldwide problem¹⁹ and recommended further study of the human rights violations associated therewith.²⁰ Subsequent working papers by Aisbjorn Eide and Yozo Yokota, in 2003 and 2004, detailed the extent of such discrimination outside South Asia, including in diaspora communities such as the UK, and urged greater national and international examination of the problem.²¹ In July 2004, the Sub-Commission appointed two Special Rapporteurs, Yozo Yokota and Chin-Sung Chung, to prepare, on the basis of the three existing working papers, a comprehensive study on DWD and to finalise a set of draft principles and guidelines for its effective elimination.²² India opposed their appointment, arguing that caste discrimination was 'a complex sociological issue' with its roots in the way Indian society had evolved since ancient times, which could not be resolved by

¹⁸ Ibid.

¹⁹ See R Goonesekere, working paper on the topic of DWD, UN Sub-Commission; UN Doc. E/CN.4/Sub.2/2001/16, 14 June 2001, paras. 7- 8.

²⁰ Ibid., paras. 49-50.

²¹ A. Eide and Y. Yokota, expanded working paper on DWD, UN Sub-Commission; UN Doc. E/CN.4/Sub.2/2003/24, 26 June 2003; Eide and Yokota, further expanded working paper , UN Sub-Commission; UN Doc. E/CN.4/Sub.2/2004/31, 5 July 2004. For an extended discussion of the Sub-Commission reports on DWD see D. Keane, *Caste-based Discrimination in International Human Rights Law* (Aldershot: Ashgate, 2007) 220-227.

²² UN Sub-Commission, Resolution 2004/17, DWD, 12 August 2004; UN Doc. E/CN.4/Sub.2/2004/48, 21 October 2004, 48. The appointment of the Special Rapporteurs was approved by the former UN Commission on Human Rights (UN Commission) in December 2005; UN Commission, Decision 2005/109; UN Doc. E/CN.4/2005/134 (Part I) (2005), 340.

‘simplistic prescriptions’.²³ India ‘did not seek inspiration or guidance from outside’ for the simple reason that corrective forces within the country were sufficiently robust; it would be a travesty, India stated, ‘*to treat this issue as a straightforward human rights question*’.²⁴ India argued that the proposal to appoint the Special Rapporteurs addressed an issue that was ‘covered by other bodies of the UN’ and that ‘both on account of duplication and its focus essentially on a specific country’, the proposal ‘*would breach the boundary of the Sub-Commission’s mandate*’.²⁵

5.2.2 UN Draft Principles and Guidelines for the effective elimination of discrimination based on work and descent

The Special Rapporteurs were mandated to investigate the phenomenon of DWD, its nature and extent, and to produce a set of Draft Principles and Guidelines (DPGs) for its effective elimination.²⁶ The definition of DWD in the DPGs is modelled on the ‘composite’ definition of racial discrimination in Article 1(1) of ICERD:

[A]ny distinction, exclusion, restriction, or preference based on inherited status such as caste, including present or ancestral occupation, family, community or social origin, name, birth place, place of residence, dialect and accent that has the purpose or effect of nullifying or impairing the recognition, enjoyment, or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural, or any other field of public life. This type of discrimination is typically associated with the notion of purity and pollution and practices of [U]ntouchability, and is deeply rooted in societies and cultures where this discrimination is practiced.²⁷

²³ Statement by India, 12 August 2004, at <http://www.indianet.nl/r040812.html> (visited 30 December 2012).

²⁴ Ibid.

²⁵ Ibid.

²⁶ See Y. Yokota and C. Chung, preliminary report; UN Doc. E/CN.4/Sub.2/2005/30, 21 June 2005 paras. 4-6.

²⁷ Final report containing draft principles and guidelines (DPGs) for the effective elimination of DWD; UN Doc. A/HRC/11/CRP.3, 18 May 2009, Chapter III, para. 2. See also preliminary report (2005), *ibid.*; progress report; UN Doc. A/HRC/Sub.1/58/CRP.2, 28 July 2006.

The DPGs provide a ‘guiding framework’ for the elimination of DWD,²⁸ reiterate that DWD is a form of discrimination prohibited by international human rights law and identify DWD as a major obstacle to achieving development.²⁹ They set out the obligations of states to combat segregation; ensure physical security and protection against violence; ensure access to justice and equal political participation; ensure equal employment opportunities and free choice of occupation; eradicate forced, bonded and child labour; ensure equal access to health care, a safe environment, adequate food, water, housing and education and to raise public awareness. Multiple/intersectional discrimination against women must be addressed specifically. The Guidelines are described as articulating specific measures to be taken by states and other actors in order to implement the Principles, thus providing a possible template for domestic legislation. Pursuant to Human Rights Council Decision 10/117 (27 March 2009) the Special Rapporteurs’ final report, including the DPGs, was published by the Human Rights Council in May 2009,³⁰ and the DPGs have been endorsed by the UN High Commissioner for Human Rights,³¹ the Office of the UN High Commissioner for Human Rights (OHCHR),³² the UN Special Rapporteur on contemporary forms of racism (SSR),³³ the European Union (EU)³⁴ and the

²⁸ Special Rapporteur on contemporary forms of racism (SRR), Interim Report; UN Doc. A/66/313, 19 August 2011, para. 41.

²⁹ See Final Report and DPGs on DWD, n 27 above, paras. 4, 5.

³⁰ See n 27 above.

³¹ See International Dalit Solidarity Network (IDSN), Report from Side Event on Draft UN Principles and Guidelines for the elimination of DWD, Geneva, 16 September 2009, at <http://idsn.org/international-advocacy/un/un-parallel-events/hrc12-side-event/> (visited 30 December 2012); N. Pillay, ‘Tearing Down the Wall of Caste’, *The Nation*, 19 October 2009. Pillay called on the Human Rights Council to promote DPGs which ‘complement existing international standards of non-discrimination’ and urged all states to ‘rally round and endorse these norms’. The OHCHR has identified countering caste discrimination in Asia and the Pacific as a thematic priority; OHCHR, Strategic Management Plan, 2010-11, 100-101 at <http://www.ohchr.org/Documents/Press/SMP2010-2011.pdf> (visited 30 December 2012).

³² Statement, Ms. M. Kran, OHCHR, Side Event, *ibid.*, at

<http://www.unhchr.ch/hurricane/hurricane.nsf/view01/30429B61FC0628ECC125764100390D4A?open=document> (visited 30 December 2012); IDSN Report, *ibid.*

³³ SRR, Statement, 64th Session, UNGA, 2 November 2009; see IDSN Compilation, n 1 above, 83.

Government of Nepal.³⁵ However, neither the report nor the DPGs have been endorsed formally by the HRC, nor has the HRC recommended that states, UN agencies and non-State actors make use of them.

Navi Pillay, UN High Commissioner for Human Rights, has suggested that a new international Convention applying directly to caste may be needed.³⁶ The question arises, whether the DPGs could form the basis of a Declaration on the elimination of DWD – and whether this would be desirable. There are practical and policy problems with developing a Declaration out of the DPGs. First, the definition of DWD, indeed the concept itself, lacks precision. The term is artificial, having been devised largely in order to avoid focussing on caste discrimination as the principal manifestation of such discrimination and India as the country most affected by it. The SSR has endorsed the DPGs, yet it is clear that the Special Rapporteur associates the ‘work and descent’ terminology principally with caste.³⁷ Second, there was little State input into the drafting of the DPGs: input was solicited from all UN member states as well as national human rights institutions, UN bodies and specialised agencies and NGOs, but only Japan, Columbia, Croatia, Germany and Mauritius responded.³⁸ The lack of input from the main South Asian caste-affected states, or from the main African states affected by descent-based discrimination, weakens the credibility and legitimacy of the DPGs. Third, it is questionable whether India would adopt a Declaration directed at the elimination of DWD unless the close conceptual linkage

³⁴ Statement, Swedish Presidency of the EU, Side Event, n 31 above, at http://idsn.org/fileadmin/user_folder/pdf/New_files/UN/Work_Descent.pdf (visited 30 December 2012); IDS Report, n 31 above.

³⁵ Statement, Government of Nepal, Side Event, *ibid.*, at http://idsn.org/fileadmin/user_folder/pdf/New_files/UN/HRC12Nepal_statement.pdf (visited 30 December 2012); IDS Report, *ibid.*

³⁶ B. Crossette, ‘Putting Caste on Notice’, *The Nation*, 9 November 2009.

³⁷ See, e.g. SRR, Statement (2009), n 33 above.

³⁸ See UN Doc. A/HRC/11/CRP.3, 18 May 2009, Introduction, para. 9.

between such discrimination and discrimination based on caste was significantly weakened. Nevertheless, Dalits and transnational advocacy networks are promoting the DPGs as a tool to encourage caste-specific anti-discrimination legislation and policy measures which provide ‘an international reference point for action’ and which can be applied in their existing format as a framework for the elimination of caste discrimination.³⁹

5.2.3 UN Special Procedures

Aside from the Special Rapporteurs on DWD, since the late 1990s, caste discrimination has been taken up by a number of UN Special Procedure mandate-holders, in particular the SSR.⁴⁰

5.2.3.1 *UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance*

Caste discrimination in India first came to the attention of the then mandate-holder, Glélé Ahanhanzo, in 1996.⁴¹ In 1999, Ahanhanzo identified the basic question as ‘whether the age-old caste system in India, which had produced several million untouchables, could be regarded as racial discrimination’ and hence was within his

³⁹ See IDSN, UN Principles and Guidelines at <http://idsn.org/international-advocacy/un/un-principles-guidelines/> (visited 15 August 2012); Decade of Dalit Rights UN 2011-20, Strategy Building Conference, Report, 24-25 June 2011 at http://www.idsn.org/fileadmin/user_folder/pdf/New_files/UN/Report_DecadeDalitRights.pdf (visited 2 January 2013).

⁴⁰ On UN Special Procedures see <http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx> (visited 14 August 2012). On UN Special Procedures and caste discrimination see n 1 above.

⁴¹ UN Doc. E/CN.4/1997/71, 16 January 1997, para. 127. The mandate of the SSR was created by the UN Human Rights Council in 2008; Human Rights Council resolution 7/34, 28 March 2008. It replaced the previous mandate of the same name created by the UN Commission on Human Rights in 1993; Commission resolution 1993/20; see <http://www.ohchr.org/EN/Issues/Racism/SRRacism/Pages/IndexSRRacism.aspx> (visited 2 January 2013).

The SSR requested to visit India in 2004, 2006 and 2008, but at the time of writing no visit has taken place; Working Group on the UPR, OHCHR compilation on India; A/HRC/WG.6/13/IND/2, 11 April 2012, 5.

mandate.⁴² He concluded that ‘specific attention should be given to the situation of the untouchables in India’ and that a field mission might be envisaged for that purpose, with the agreement of the Indian Government.⁴³ Since 2004, successive mandate-holders have repeatedly affirmed that caste discrimination falls within their mandate.⁴⁴ The legal – and political – basis for this stance is the position taken by CERD in its General Recommendation (GR) No. 29, namely that discrimination based on descent, as a form of racial discrimination prohibited by ICERD, includes discrimination against members of communities based on forms of social stratification such as caste and analogous systems of inherited status, so discrimination based on caste constitutes a form of descent-based racial discrimination.⁴⁵ By interpreting their mandate in alignment with CERD’s interpretation of descent-based racial discrimination, successive SSRs have affirmed the framing of caste discrimination in international law as a form of racial discrimination and hence caste as an aspect of a ‘most suspect’ classification. Discrimination based on caste and analogous systems of inherited status has been identified by the SSR as a manifestation of ‘societal’ structural racial discrimination;⁴⁶ states have been reminded of their obligation to recognise that discrimination based on descent – including DWD and discrimination based on caste and analogous systems of inherited status – is prohibited by ICERD and not to

⁴² UN Doc. E/CN.4/1999/15, 15 January 1999, para. 88.

⁴³ Ibid., para. 100.

⁴⁴ See, e.g. SSR, Report; E/CN.4/2004/18, 21 January 2004, para. 55; SSR, Interim Report; A/64/271, 10 August 2009, paras. 54-58, 67; SSR, Report; A/HRC/7/19, 20 February 2008, paras. 69-71; SSR, Report; A/HRC/11/36, 19 May 2009, paras. 17, 31; Durban Review Conference, Preparatory Committee; UN Doc. A/CONF.211/PC/WG.1/5, 31 July 2008, paras. 44-47; SRR, Report; A/HRC/17/40, 24 May 2011, paras. 26-30; SRR, Interim Report, 19 August 2011, n 28 above, paras. 10, 11, 38-42.

⁴⁵ See CERD GR No. 29 (2002), Article 1, Paragraph 1 (Descent); SRR, Interim Report, 19 August 2011, *ibid.*, para. 38.

⁴⁶ See SSR, Statement, Intergovernmental Working Group on the Effective Implementation of the Durban Declaration and Programme of Action, Thematic discussion on structural discrimination, 18 October 2010; SRR, Report; UN Doc. A/HRC/17/40, 24 May 2011, paras. 25-68; SRR, Interim Report, 19 August 2011, *ibid.*, paras. 10, 11.

sidestep the question of caste discrimination by claiming that it does not fall under the scope of ICERD.⁴⁷ Caste-based discrimination has been described as remaining ‘deplorably widespread and deeply rooted’,⁴⁸ so states have been urged to adopt a comprehensive, victim-centred approach to addressing the root causes of structural discrimination, including legislative and policy measures and investment in awareness-raising and education for State agents and the public.⁴⁹

5.2.3.2 *Other UN Special Procedures*

Caste discrimination has been taken up by other thematic Special Procedures as a root cause of violations of internationally-recognised rights, as well as an impediment to access to, and enjoyment of, a spectrum of human rights. Dalits in India, Nepal and Bangladesh have been identified by the Special Rapporteurs on contemporary forms of slavery;⁵⁰ adequate housing;⁵¹ the right to food;⁵² the right to education;⁵³ the situation of human rights defenders;⁵⁴ violence against women;⁵⁵ freedom of religion or belief;⁵⁶ the right of everyone to the enjoyment of the highest attainable standard of health;⁵⁷ the Independent Expert on water and sanitation⁵⁸ and

⁴⁷ SRR, Interim Report, 19 August 2011, *ibid.*, paras. 38,41.

⁴⁸ *Ibid.*, para. 41.

⁴⁹ SRR, Report; UN Doc. A/HRC/17/40, 24 May 2011, paras. 3, 88-90; SRR, Interim Report, 19 August 2011, *ibid.*, paras. 68-69, 71-75.

⁵⁰ UN Doc. A/HRC/15/20, paras. 69, 72, 99; A/HRC/15/20/Add.2, paras. 9, 10, 12, 17, 51; A/HRC/12/21, paras. 51, 53.

⁵¹ UN Doc. A/HRC/16/42/Add.2, paras. 34-39; A/HRC/13/20, paras. 16-18; A/HRC/10/7/ Add. 1, 17 February 2009, paras. 52, 54, 55; A/HRC/7/16, paras. 39, 75; A/HRC/7/16/Add.1, paras. 57, 58, 104; E/CN.4/2005/48, para. F.

⁵² UN Doc. A/HRC/16/40, para. 56; A/HRC/10/5/Add.1, paras. 53, 54; A/HRC/4/30, para. 34; E/CN.4/2006/44/Add.2, paras. 11, 43.

⁵³ UN Doc. E/CN.4/2006/45, 8 February 2006, paras. 80-85, 140.

⁵⁴ UN Doc. A/HRC/16/44/Add.1, paras. 1094, 1095, 1099, 1100; A/HRC/10/12, para. 74; A/HRC/10/12/Add.1; A/HRC/7/28/Add.1;

⁵⁵ See e.g. UN Doc. A/HRC/20/16, 23 May 2012, para. 39.

⁵⁶ UN Doc. A/HRC/10/8/Add.3, paras. 18, 19, 27, 28, 71.

⁵⁷ UN Doc. A/HRC/14/20/Add.2, para. 36,

⁵⁸ UN Doc. A/HRC/15/55, paras. 25, 26, 58, 5, 76, 125; A/HRC/12/24, paras. 53, 54.

the Independent Expert on human rights and extreme poverty,⁵⁹ as a vulnerable group whose access to and enjoyment of a range of human rights is compromised because of discrimination on the basis of caste, itself a violation of international human rights law. Within this group, Dalit women and girls are singled out as suffering from multiple, intersecting and aggravated forms of discrimination.⁶⁰ In 2007, the mandate of the UN Special Rapporteur on contemporary forms of slavery was created pursuant to Human Rights Council resolution 6/14, replacing the former UN Working Group on Contemporary Forms of Slavery.⁶¹ The principal focus of the mandate is those aspects of contemporary forms of slavery not covered by existing Human Rights Council mandates.⁶² The Special Rapporteur on slavery has repeatedly highlighted the ‘intrinsic link’ in Asian countries between caste discrimination and contemporary forms of slavery, such as domestic servitude and debt bondage,⁶³ identifying caste discrimination as a root cause of contemporary slavery.

5.2.3.3 Competence of the UN Human Rights Council and its Special Procedures to consider caste discrimination

India has charged both CERD and the former UN Sub-Commission with lack of competence to address caste discrimination.⁶⁴ Based on Alston, Morgan-Foster and

⁵⁹ UN Doc. A/HRC/15/ 55, paras. 25, 75, 76.

⁶⁰ See UN Doc. E/CN.4/2006/118, paras. 30, 31; E/CN.4/2006/45, paras. 80-85, 140; A/HRC/7/6/Add.1, paras. 23-25.

⁶¹ See <http://www.ohchr.org/EN/Issues/Slavery/SRSlavery/Pages/SRSlaveryIndex.aspx> (visited 2 January 2013). The international prohibition of slavery and forced or compulsory labour is expressed in UDHR Article 4 and in legally-binding form in ICCPR Article 8. ICESCR Article 6 guarantees the right of everyone ‘to the opportunity to gain his living by work which he freely chooses or accepts’.

⁶² See <http://www2.ohchr.org/english/issues/slavery/rapporteur/overview.htm>; UN Doc. A/HRC/9/20, 29 July 2008.

⁶³ See UN Doc. A/HRC/9/20, 28 July 2008, para. 11; A/HRC/12/21, 10 July 2009, para. 51; A/HRC/15/20, 18 June 2010, paras. 69, 72, 99.

⁶⁴ See India Statement, n 23 above.

Abresch's examination of a similar charge of 'mandate breach' by the USA and the UK against the Human Rights Council and its Special Procedures in relation to extrajudicial executions in armed conflicts,⁶⁵ we can identify three arguments on which India might rely:⁶⁶ (1) Charter bodies, procedures and mechanisms are restricted in focus; in the case of caste discrimination this focus excludes caste- and descent-based discrimination and precludes the creation of new mechanisms with this focus; (2) the development by Charter bodies and mechanisms of a consistent practice of examining caste discrimination does not thereby give them the competence to address the issue and (3) discrimination based on caste is an internal matter falling exclusively within India's domestic jurisdiction.

Regarding the first argument, Alston et al. point out that the role of the Human Rights Council and the former Commission on Human Rights is to further the UN Charter's general commitment to promoting and encouraging respect for human rights through a range of activities⁶⁷ irrespective of states' obligations under human rights treaties;⁶⁸ moreover, the Commission never treated the principal human rights treaties 'as self-limitations on its competence':⁶⁹

[T]he Commission – and now the Council – has always worked to fulfil its mandate by exercising a broad *droit de regard* over human rights abuses regardless of whether they violated the treaty obligations of any particular state.⁷⁰

⁶⁵ P. Alston, J. Morgan-Foster and W. Abresch, 'The Competence of the UN Human Rights Council and its Special Procedures in relation to Armed Conflicts: Extrajudicial Executions in the "War on Terror"', Section C, 19(1) *European Journal of International Law* (2008) 183-209.

⁶⁶ Alston et al. (2008), *ibid.*, 199-203.

⁶⁷ *Ibid.*, 200.

⁶⁸ *Ibid.*, 201.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

This *droit de regard*, they argue, ‘has been firmly established in customary international law’.⁷¹ The resolutions establishing the mandates of Special Procedures – one of the most important means by which the Council exercises its *droit de regard* – ‘have routinely laid out *droits de regard* that exceed the scope of the legal obligations even for those states that have ratified all relevant treaties’.⁷²

This greater breadth as compared to treaty bodies is a virtue of the system, which has permitted the Commission and Council to respond to abuses and protect victims even when they are not effectively covered by international human rights law.

Importantly,

the space between the Commission and Council’s *droits de regard* and the legal obligations of States has proven to be a fertile zone for normative development, pushing forward that aspect of the Commission and Council’s mandates and even resulting in the drafting of new normative instruments.⁷³

Special Procedure mandates are not ‘frozen in time’ but evolve in response to situations ‘which were not explicitly envisaged in the original resolution’, as also ‘the need to respond to new forms of violations’ and ‘increasing public demands for effective responses in specific contexts’.⁷⁴ Alston et al. argue that organic ‘mandate evolution’ is fully reported in the annual reports of the mandate-holders, which are subject to stakeholder debate, feedback and responses in the form of resolutions from the parent bodies, which in the ‘vast majority of cases’ explicitly endorse the

⁷¹ B. Simma and P. Alston, ‘The Sources of Human Rights Law: Custom, Jus Cogens, General Principles’, 12 *Australian Year Book of International Law* (1992) 82-108, 99, cited in Alston et al. (2008), *ibid.*

⁷² Alston et al. (2008), *ibid.*

⁷³ *Ibid.*, 202.

⁷⁴ *Ibid.*, (emphasis added).

developments reported and often also request the mandate-holder ‘to further develop or strengthen certain measures’.⁷⁵

Regarding the second argument, Alston et al argue that the domestic understanding of *ultra vires* (that a consistent pattern of *ultra vires* acts does not cure the original defect) cannot be applied to international law, because ‘an integral part of the international legal framework is its dynamic nature’.⁷⁶ Mandates are elaborated and refined by the Human Rights Council which reviews, accepts, discourages or rejects the interpretations proposed by successive mandate-holders.⁷⁷ As to the third argument, a fundamental feature of international human rights law is the special character of human rights treaties.⁷⁸ Historically marginalised groups can call up the language of human rights in order to transform domestic grievances into ‘internationally cognisable human rights claims’⁷⁹ subject to scrutiny at the international level. A basic premise of the international human rights regime is that the characterisation of an issue as an internal or domestic matter is not solely a matter for the state concerned – the fact that a particular state denies the application of the human rights label to a given issue, or resists international scrutiny of that issue, does not deprive the issue of its international character.

⁷⁵ Report of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions; UN Doc. A/62/265, 16 August 2007, para. 53.

⁷⁶ Alston et al. (2008), n 65 above, 203.

⁷⁷ Ibid., 206.

⁷⁸ See Chapter 4 of this thesis.

⁷⁹ C. Bob, ‘Dalit Rights are Human Rights: Caste Discrimination, International Activism and the Construction of a New Human Rights Issue’, 29(1) *Human Rights Quarterly* (2007) 167-193, 168.

5.2.4 Universal Periodic Review

Universal Periodic Review (UPR) is a mechanism created by the Human Rights Council in 2006 involving State-led reviews of the human rights records of all UN member states.⁸⁰ UPR has increased public attention on caste discrimination and the involvement of other states in the issue; however, there is an argument that it is only really useful with regard to countries which have taken a cooperative approach (such as Nepal and Pakistan).⁸¹ During the first UPR cycle (2008-11), forty-one observations and recommendations relating to caste discrimination were made in the outcome reports adopted by the UPR Working Group in relation to India, Pakistan, Sri Lanka, Mauritania, Madagascar and Nepal.⁸² During India's review in April 2008, two recommendations on caste discrimination were made during the interactive dialogue process, namely to maintain disaggregated data on caste discrimination and to strengthen human rights education in order to address effectively caste-based discrimination;⁸³ neither was accepted by India, which reiterated its position (as expressed to CERD in 2007) that 'while they recognize that caste-based discrimination exists in India, since the caste system, which is unique to India, is not racial in origin, caste-based discrimination cannot be considered a form of racial discrimination'.⁸⁴ At India's second review in May 2012, twelve states made oral statements on caste discrimination and the situation of the Dalits, and three

⁸⁰ See UN Doc. A/RES/60/251, 3 April 2006, para. 5(e). Reviews are conducted by the UPR Working Group, consisting of the 47 members of the Human Rights Council; however, any UN member state can take part in the discussion/dialogue with the reviewed states. Each state review is assisted by groups of three states ('troikas') who serve as rapporteurs. Following the review an outcome report ('Working Group Report') is prepared by the troika with the involvement of the state under review and assistance from the OHCHR, consisting of the questions, comments and recommendations made by states to the country under review, as well as the responses by the reviewed state; see <http://www.ohchr.org/EN/HRBodies/UPR/Pages/BasicFacts.aspx> (visited 2 January 2013).

⁸¹ See n 1 above, 10.

⁸² Ibid.

⁸³ UPR Working Group Report, India; UN Doc. A/HRC/8/26, 23 May 2008, 17.

⁸⁴ Ibid., para.74.

states submitted advance questions on caste discrimination and manual scavenging.⁸⁵ The Working Group Report contained nine recommendations specifically regarding caste discrimination and Scheduled Castes, including better enforcement of existing law,⁸⁶ the implementation of effective monitoring mechanisms for special measures (reservations), including the collection of data disaggregated by caste,⁸⁷ and the promotion of women's rights to choice of marriage independent of caste.⁸⁸ Recommendations were also made that India enact comprehensive anti-discrimination legislation and ensure adequate means of redress,⁸⁹ as well as to strengthen human rights training of teachers to end caste discrimination in schools.⁹⁰ These recommendations were not accepted by India.⁹¹ The UK was also reviewed in May 2012 for the second time, by coincidence on the same day as India.⁹² The Working Group recommended that the UK put in practice a national strategy to eliminate caste discrimination through the immediate adoption of the provision in the Equality Act 2010 which prohibits such discrimination, in conformity with its international human rights obligations.⁹³ The UK did not accept this recommendation,⁹⁴ but it has been drawn upon by Dalit advocacy groups in Britain in their campaign for a statutory prohibition of caste discrimination.⁹⁵

⁸⁵ See <http://www.ohchr.org/EN/HRBodies/UPR/Pages/MeetingsHighlightsSession13.aspx> (visited 14 August 2012).

⁸⁶ UPR Working Group Report; India; UN Doc. A/HRC/21/10, 9 July 2012, paras. 138.47, 138.72, 138.118.

⁸⁷ Ibid., paras. 138.71, 138.73, 138.75.

⁸⁸ Ibid., para. 138.87.

⁸⁹ Ibid., para. 138.53.

⁹⁰ Ibid., para. 138.163.

⁹¹ See UN Doc. A/HRC/21/10/Add.1, 17 September 2012.

⁹² See <http://www.ohchr.org/EN/HRBodies/UPR/Pages/GBSession13.aspx> (visited 2 January 2013).

⁹³ UPR Working Group Report; UK; UN Doc. A/HRC/21/9, 6 July 2012, para. 110/61. The domestic provision in question is s 9(5)(a) Equality Act 2010, which provides for caste to be added by Ministerial Order, at a future date, to the protected characteristic of race; see Chapters 8 and 9 of this thesis.

⁹⁴ 'Recommendations that do not enjoy the support of the United Kingdom are generally those where we are not able to commit to implementation at this stage, whether or not we agree with the principles behind the recommendation, or where we have recently reviewed our position on the issue in question; or where we reject the assertions being made'; UPR Working Group Report, Views on conclusions

5.2.5 International Labour Organisation: discrimination on the basis of social origin

The ILO is a tripartite UN agency working with governments, employers and workers of UN member states to promote decent work worldwide via the adoption of international standards (conventions and recommendations), enforced *inter alia* via a Committee of Experts on the Application of Conventions and Recommendations (CEACR), which is empowered to issue individual observations and direct requests to UN member states. ILO Discrimination (Employment and Occupation) Convention 1958 (No. 111) establishes as a core labour standard the principle of non-discrimination, defined in Article 1(1) as

any distinction, excision or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.⁹⁶

ILO jurisprudence and publications show that the ILO regards caste-based discrimination as falling within the ‘social origin’ category. Social origin discrimination arises, according to the ILO,

when an individual’s membership of a class, socio-occupational category or caste determines or influences his or her occupational situation either by denying access to certain jobs or activities or, on the contrary, by assigning that person to certain jobs... prejudices and preferences based on social origin may persist even where rigid stratification has disappeared.⁹⁷

and/or recommendations, voluntary commitments and replies presented by the state under review; UN Doc. A/HRC/21/9/Add.1, 17 September 2012, para. 6; Annex document, *ibid.*, 30. The UK’s position is examined in Chapter 9 of this thesis.

⁹⁵ See e.g. Anti-Caste Discrimination Alliance and others, ‘Joint Statement to the Coalition Government demanding that it brings into force clause 9(5)(a) of the Equality Act 2010’, 28 November 2012 (copy on file with author); see also Chapters 8 and 9 of this thesis.

⁹⁶ ILO Discrimination (Employment and Occupation) Convention 1958 (No. 111), at http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_INSTRUMENT_ID:312256 (visited 2 January 2013). Indian ratification, 3 June 1960.

⁹⁷ *Equality at Work: The Continuing Challenge – Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work* (Geneva: ILO, 2011) para. 167.

The ILO's 2011 Global Report on Equality at Work identifies caste-based discrimination as a form of discrimination on the basis of social origin, most widespread 'in the case of the Dalit population of South Asia'.⁹⁸ The Report observes that caste discrimination is manifested by 'limited access to certain types of jobs and wage gaps in comparison with other population groups. There are also considerable differences between castes in terms of educational attainment'. Moreover, 'social perceptions about certain castes limit employment opportunities and subject members of those castes to humiliation in their everyday lives and at work'.⁹⁹ CEACR has used the social origin category to address, via Individual Observations and Direct Requests, the persistence of caste discrimination in employment in India.¹⁰⁰ CEACR's use of the social origin category to address caste issues appears to have been accepted by India without challenge; the problem is not the label or category used, but India's repeated failure to provide the detailed information on Dalits and work-related issues that CEACR has repeatedly requested.

5.2.6 UN World Conference Against Racism, Racial Discrimination, Xenophobia and Other Related Forms of Intolerance (WCAR), 2001¹⁰¹

The WCAR agenda was based on a Draft Programme of Action (DPA) drawn up ahead of the conference.¹⁰² Dalits sought the inclusion of caste discrimination as a form of racism or racial discrimination in the DPA,¹⁰³ as specifically recommended

⁹⁸ Ibid., para. 168.

⁹⁹ Ibid., paras. 168-172.

¹⁰⁰ Since 2000, CEACR has published six Individual Observations concerning India and Convention 111; see, e.g. ILOLEX 062006IND111, para. 6; ILOLEX 062010IND111 on manual scavenging. Since 1990, CEACR has issued nine Individual Direct Requests to India concerning Convention 111 asking for information *inter alia* on the promotion of equal access of Dalits to employment and occupation and measures taken to assist the socio-economic development of the Scheduled Castes; see, e.g. ILOLEX092003IND111; ILOLEX 092006IND111.

¹⁰¹ On the WCAR see Chapter 4 of this thesis.

¹⁰² WCAR DPA; UN Doc. A/CONF.189/5, 22 August 2001.

¹⁰³ See C. Bob, n 79 above; D. E. Berg, 'Sovereignities, the World Conference against Racism 2001 and the Formation of a Dalit Human Rights Campaign', 20 *Questions de Recherche/Research in*

by the WCAR Bellagio Consultation in January 2000¹⁰⁴ but vehemently opposed by India, which gave four reasons for its opposition: (1) caste does not fall within the ambit of racism or racial discrimination because it does not denote race or a racial grouping, neither is it a sub-category of descent, because descent refers solely to racial descent; therefore, caste was not relevant to the conference;¹⁰⁵ (2) caste discrimination is an internal matter not susceptible to UN scrutiny; (3) India already has in place internal mechanisms for addressing caste-based discrimination and violence which are unparalleled in scale and scope and (4) India is doing everything possible to address the issue, but as a longstanding issue it would take time to resolve.¹⁰⁶ Conversely, India's National Human Rights Commission (NHRC) argued that the WCAR provided a 'singular opportunity' to the international community to deal 'openly and courageously' with issues of discrimination and inequality 'all over the world, in all of their variety, including the forms of discrimination that persist in India', observing that 'it is not so much the nomenclature of the form of discrimination that must engage our attention, but the fact of its persistence that must cause concern'.¹⁰⁷ Despite India's objections, Dalits succeeded in securing a 'work and descent' provision in the draft DPA, urging all governments to put in place 'constitutional, legislative and administrative measures, including appropriate forms of affirmative action... to prohibit and redress *discrimination on the basis of work*

Question (2007), Paris, Centre d'études et de recherches internationales, online at <http://www.ceri-sciences-po.org/publica/question/qdr20.pdf>. Caste discrimination was not addressed in either of the previous UN World Conferences on Racism (see Chapter 4 of this thesis) nor at the 1993 UN World Conference on Human Rights in Vienna, nor the 2000 UN Millennium Summit.

¹⁰⁴ UN Doc. A/CONF.189/PC.1/10, 8 March 2000, para. 50.

¹⁰⁵ See A. Beteille, 'Race and Caste' in S. Thorat and Umakant (eds.), *Caste, Race and Discrimination: Discourses in International Context* (Jaipur: Rawat, 2004) 49-52, first published in *The Hindu*, 10 March 2001.

¹⁰⁶ S. Sorabjee, 'The Official Position' in S. Thorat & Umakant (eds.), *ibid.*, 43-48.

¹⁰⁷ *The Hindu*, 5 September 2001; WCAR Plenary, 5 September 2001; Statement, Dr. Justice K. Ramaswamy, NHRC India, at <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/C0D479DFDCB0275941256AC00036375C?openDocument> (visited 2 January 2013).

and descent'.¹⁰⁸ Discussion of this provision and its inclusion in the Final Programme of Action was blocked by India, and caste discrimination does not appear in the Durban Declaration and Programme of Action (DDPA), the conference's outcome document.¹⁰⁹ However, Article 2 of the DDPA recognises that racism, racial discrimination, xenophobia and related intolerance occur on the grounds set out in ICERD Article 1(1), namely race, colour, descent or national or ethnic origin. Other provisions similarly recognise the problem of racism, discrimination and xenophobia based on descent.¹¹⁰

Although the DDPA contains no explicit references to caste discrimination, Dalit presence at the WCAR process directly contributed to the rapid 'internationalisation' of caste, which occurred at the end of the twentieth century.¹¹¹ The WCAR opened up international debate about whether discrimination based on caste was covered by racial discrimination as internationally defined.¹¹² The creation of a rebuttable presumption that caste discrimination is located within the international framework on racial discrimination has resulted in pressure being put on India and other caste-affected states, by UN bodies and mechanisms as well as by civil society organisations, to fulfil their international obligations on caste discrimination, as well as their domestic constitutional and legislative obligations. However, the framing of

¹⁰⁸ WCAR DPA, n 102 above, para. 73. See also P. Prove, 'Caste at the World Conference Against Racism' in Thorat and Umakant (eds.), n 105 above, 322-325.

¹⁰⁹ Durban Declaration and Programme of Action (DDPA), at <http://www.un.org/WCAR/durban.pdf> (visited 2 January 2013); Bob, n 79 above, 184-185; M. Thekaekara, 'What Next for India's Dalits?' in Thorat and Umakant (eds.), *ibid.*, 313-316.

¹¹⁰ See DDPA, *ibid.*, Articles 111, 171.

¹¹¹ Bob, n 79 above; J. Lerche, 'Transnational Advocacy Networks and Affirmative Action for Dalits in India', 39(2) *Development and Change* (2008) 239-261; C. Lennox, 'Reviewing Durban: Examining the Outputs and Review of the 2001 World Conference Against Racism', 27(2) *Netherlands Quarterly of Human Rights* (2009) 191-235.

¹¹² See SRR, Report; UN Doc. A/HRC/7/19, 20 February 2008, para. 70: '[Since the WCAR], the issue of discrimination on grounds of caste has been on the international agenda. Despite the objection of some member States, the main human rights bodies working in the arena of racism and discrimination have stated clearly that prohibition of this type of discrimination falls within the scope of existing instruments, in particular the [ICERD]'.

caste discrimination as a form of racial discrimination has provoked huge resistance from India. According to Indian sociologist Gopal Guru, the WCAR was a missed opportunity to ‘embark on and sustain a thoroughgoing critique of caste discrimination’ by revisiting the categories ‘through which discrimination is experienced and understood – colour in the case of race, but *touch* in the case of caste’.¹¹³

5.2.7 Durban Review Conference 2009

The Durban Review Conference (DRC) in April 2009 was convened ‘to assess and accelerate progress’ on implementation of measures adopted at the WCAR in 2001.¹¹⁴ Discrimination based on caste was referred to repeatedly in the preparatory sessions by CERD members and the UN Special Procedures, yet the DRC outcome document contains no explicit reference to caste discrimination or to discrimination based on work and descent.¹¹⁵ CERD members and the Special Rapporteur on racism believe that ICERD, if genuinely adhered to by states, constitutes a sufficient normative standard for overcoming caste discrimination. In 2007, the OHCHR circulated a questionnaire on contemporary manifestations of racism and measures and activities taken to implement the DDPA to a range of non-State actors, including UN bodies and specialised agencies, CERD and other human rights mechanisms, together with Special Procedures.¹¹⁶ In April 2008, in response to the OHCHR questionnaire, CERD observed that, ‘as is the case with all international normative

¹¹³ G. Guru, cited in K. Kannabiren, ‘Important Similarities, Strange Differences: Caste, Race and Durban’, *Economic and Political Weekly*, 10 July 2010, 38-41, 39.

¹¹⁴ UN Information Note, Durban Review Conference 2009, at http://www.un.org/durbanreview2009/pdf/InfoNote_04_BasicFacts_En.pdf (visited 2 January 2013).

¹¹⁵ See http://www.un.org/durbanreview2009/pdf/Durban_Review_outcome_document_En.pdf (visited 2 January 2013).

¹¹⁶ See <http://www.un.org/durbanreview2009/pdf/questionnaire1st.pdf> (visited 2 January 2013).

standards', ICERD 'is very useful and effective for States that genuinely wish to abide by it'. The key reasons, according to CERD, for states' failure to implement ICERD effectively are lack of political will and lack of a clear understanding of the meaning and scope of the definition of the concept of racial discrimination in Article 1(1) of ICERD, 'which may lead some States to deny or minimise the extent of racial discrimination in their territory'.¹¹⁷ In July 2008, in a joint Special Procedures response to the OHCHR questionnaire, the Special Rapporteur on Racism reiterated that in the absence of recognition by states that discrimination based on caste and other systems of inherited status constitutes a form of discrimination prohibited by [ICERD], '*it will not be possible to effectively address the serious human rights violations and discrimination suffered by individuals and groups on grounds of caste and other systems of inherited status*'. He stressed the responsibility of governments and political leaders for shaping public opinion 'towards fairer societies based on the equality of all human beings', complemented by 'meaningful legislative amendments to ensure equality and prohibit caste-based discrimination'.¹¹⁸

5.2.8 Decade of Dalit Rights UN 2011-20, Conference 24-28 June 2011

In 2011, a decade after the WCAR, Dalit activists and academics at an international strategy conference on Dalit rights summed up the strategy of linking caste and race as 'a dead-end'; instead, the way forward was 'by stressing that caste is not race but that caste-based discrimination is nevertheless a violation of international human rights law'.¹¹⁹ The preferred category endorsed by the conference was discrimination

¹¹⁷ UN Doc. A/CONF.211/PC.2/CRP.5, 23 April 2008, 3, 12.

¹¹⁸ UN Doc. A/CONF.211/PC/WG.1/5, 31 July 2008, paras. 45-47.

¹¹⁹ Decade of Dalit Rights UN, Conference Report, n 39 above.

based on work and descent.¹²⁰ The delegates argued for a re-strategising of the Dalit stand – ‘without in any way deflecting the stand taken by CERD’ – away from a ‘caste as racial discrimination’ perspective towards a discourse based on ‘descent and work-based discrimination and violence’.¹²¹ This is reflected in the Conference’s choice of the DWD terminology, and in the final Declaration which lists as an international objective to ‘move beyond the caste-race debate and apply a policy of human rights principles of non-discrimination, substantive equality and non-retrogression’.¹²² The Declaration calls for promotion of the ‘DWD agenda’ as a global and intersectional agenda, the creation of a UN Special Rapporteur or Working Group on DWD issues, a UN World Conference on DWD and the wide endorsement and implementation of the UN Principles and Guidelines on DWD.¹²³

5.3 Dalits, minority rights and the rights of indigenous peoples in international law¹²⁴

One of the first NGOs outside India to address caste discrimination was the UK-based Minority Rights Group.¹²⁵ Yet, as Castellino and Redondo observe, victims of caste discrimination ‘do not easily fit into the universally agreed category of a “minority”’,¹²⁶ and neither do they readily fit the international definition of an

¹²⁰ Ibid.

¹²¹ Decade of Dalit Rights, Declaration, at http://idsn.org/fileadmin/user_folder/pdf/New_files/UN/Printer_Friendly_Declaration_Decade_Dalit_Rights.pdf (visited 2 January 2013).

¹²² Ibid.

¹²³ The Declaration does not call for a new UN Convention on DWD, instead reiterating that DWD is already prohibited by international human rights law, including ICERD; *ibid*.

¹²⁴ For a lengthier treatment of Dalit rights as minority rights and indigenous people’s rights in international law see A. Waughray, ‘Caste Discrimination and Minority Rights: The Case of India’s Dalits’, 17 *International Journal on Minority and Group Rights* (2010) 327-353.

¹²⁵ See <http://www.minorityrights.org/5652/india/dalits.html>, visited on 24 May 2009; B. Joshi (ed.), *Untouchable! Voices of the Dalit Liberation Movement* (London: Zed Books, 1986).

¹²⁶ J. Castellino & E. Dominguez-Redondo, *Minority Rights in Asia: A Comparative Legal Analysis* (Oxford: OUP, 2006) 58. A core definition of ‘minority’, based on the 1977 definition by Francesco Capotorti, embraces non-dominant groups possessing stable ethnic, religious or linguistic

indigenous people.¹²⁷ Three observations can be made. First, although Dalits do not readily fulfil either the minority or indigenous people's criteria in international human rights law, nevertheless, from the mid-1990s, they have utilised minority and indigenous people's mechanisms to advance their claims at the UN. The minority approach has been more successful. In 2009, the UN Forum on Minority Issues¹²⁸ brought Dalits into the international minority category based on their status as a group protected by ICERD, stating that the term 'minorities', as used in the UN Minorities Declaration,¹²⁹ 'encompasses the persons and groups protected under the International Convention on the Elimination of All Forms of Racial Discrimination from discrimination based on race, colour, *descent (caste)*, national or ethnic origin, citizen or non-citizen'.¹³⁰ Secondly, this illustrates how ICERD status has acted as a 'passport' to the take-up of Dalit/caste issues by other UN mechanisms and procedures (another example being the take-up of caste discrimination by successive

characteristics that differ sharply from those of the rest of the population, which have been retained over time and which members of the group wish to preserve; F. Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* (New York: United Nations, 1981) 96; see also UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (Minorities Declaration) (1992); GA Res. 47/135 (1992).

¹²⁷ The key characteristics of the indigenous people's category are historical or traditional occupation of lands or territories; use of and control over resources; distinct cultural and religious traditions, customs and ceremonies and distinct histories, philosophies, languages and institutions; J. M. Cobo, *Study of the Problem of Discrimination Against Indigenous Populations*, 30 September 1983; UN Doc. E/CN.4 Sub.2 /1983/21/Add.8, para. 379; see also UN Declaration on the Rights of Indigenous Peoples (UNDRIP) 2007; A/Res/61/295. Regarding membership of the indigenous category, Article 33 UNDRIP emphasises self-identification. On the distinction between minority rights and indigenous people's rights see Working Paper on the relationship and distinction between the rights of persons belonging to minorities and those of indigenous peoples; E/CN.4/Sub.2/2000/10, 19 July 2000. Despite not constituting a coherent group defined by the characteristics listed above, aspects of the criteria relating to cultural and religious traditions overlap with the experience of some Dalit religious communities; see, e.g. R. Lamb, *Rapt in the Name: The Ramnamis, Ramnam, and Untouchable Religion in Central India* (Berkeley: State University of New York Press, 2002).

¹²⁸ UN Forum on Minority Issues, established by Human Rights Council Resolution 6/15, 28 September 2007; replaced the UN Working Group on Minorities established in 1995 pursuant to resolution 1995/24 of the former UN Commission on Human Rights and ECOSOC resolution 1995/31, and which reported annually from 1995 until 2006. The Forum's mandate is to identify and analyse best practices, challenges, opportunities and initiatives for the further implementation of the Declaration on Minorities;

<http://www2.ohchr.org/english/bodies/hrcouncil/minority/forum.htm> (visited 14 August 2012).

¹²⁹ See n 126 (above).

¹³⁰ Report of the Independent Expert on minority issues: Recommendations of the Forum on Minority Issues; UN Doc. A/HRC/10/11/Add.1, 5 March 2009, para. 2, FN 1 (emphasis added).

Special Rapporteurs on Racism). Thirdly, the UN Independent Expert on minority issues¹³¹ has emphasised the number of minority rights communications regarding violations of human rights that have as their root cause discrimination, racism or xenophobia against a minority group and its members. Often the minority rights component of such communications is hidden, so the wider context of issues arising out of the minority status of the victims may be neglected and even remain unaddressed.¹³² The nature of caste discrimination as a global human rights concern, due to its ‘unique, distinct and transnational nature’; the need to broaden the concepts of general human rights principles of non-discrimination, equality of opportunity and universality; the dynamic nature of human rights law and ‘rigid definitions’ as the antithesis of the concept of human rights and the ‘urgent need to move beyond the caste-race debate’, were highlighted at a UN Experts’ Workshop convened by the Independent Expert on minorities at the Decade of Dalit Rights conference in June 2011 (see above).¹³³

5.4 Conclusion

Despite persistent objections and opposition, primarily from India, caste discrimination has been incorporated under the ICERD umbrella as a form of descent-based racial discrimination and has also been framed as a violation of international human rights law, as a subset of a new, wider, legal category of discrimination based on work and descent. This category is not limited to caste but extends to analogous systems of inherited status and is applicable to countries other

¹³¹ See <http://www.ohchr.org/EN/Issues/Minorities/IEExpert/Pages/IEminorityissuesIndex.aspx> (visited 14 August 2012).

¹³² Report of the Independent Expert on minority issues; UN Doc. E/CN.4/2006/74, 6 January 2006, para. 47.

¹³³ UN Experts’ Brainstorming Workshop; UN Strategy Building Conference Report, n 39 above.

than India. Dalits have also accessed minority rights and indigenous people's mechanisms, and caste discrimination has been taken up by various UN Special Procedures and the UPR. Still, states with vested interests, notably India but also others such as Japan, continue to resist (1) the inclusion of caste within the UN human rights framework, contesting CERD's interpretation of descent in Article 1(1) of ICERD as covering caste and asserting that caste discrimination is an internal matter and (2) the application of descent to groups discriminated against on the basis of inherited status or origin, arguing that descent refers to racial and ethnic characteristics and was not intended to cover inherited status or social origin discrimination. Meanwhile, the UK, while not disputing the application of descent to caste discrimination, argues that there is insufficient evidence of such discrimination in the UK and/or that there is 'no consensus' on the need for legislation among 'affected communities', so there is no need to comply with CERD's recommendations to put in place legislative and policy measures to address descent-based discrimination, including caste discrimination.

Despite these problems, the UN regime's conceptualisation of caste discrimination as a violation of international human rights law, including the cognisance of caste discrimination by the monitoring bodies of wider human rights treaties to which countries like India and the UK are signatories, has three important effects. First, the creation of a rebuttable presumption that caste discrimination falls foul of international human rights standards, including the prohibition of racial discrimination, puts states under domestic and international legal and political pressure to act on the recommendations of the treaty bodies and UN mechanisms, if only to avoid political confrontation or embarrassment. This is important because

compliance with the recommendations of treaty bodies and charter mechanisms is as much a political as a ‘legal’ issue, as India explained to CERD in 1996: ‘[T]o confer a racial character on the caste system *would create considerable political problems which could not be the Committee’s intention*’.¹³⁴ Secondly, UN engagement with caste discrimination, particularly the promotion of tools, mechanisms and procedures, increases its visibility and boosts the morale and confidence of victims and activists to continue combating violations. Thirdly, the construction of an international legal framework for combating caste discrimination provides a template for new domestic legislation, e.g. in the UK, which in turn reinforces the conceptualisation of caste discrimination as a human rights and discrimination issue.

The Special Rapporteur on racism asserts that the legal framework on caste discrimination is ‘unambiguous’,¹³⁵ while a UN experts’ study on international instruments to combat racial discrimination decided that there are ‘no substantive gaps’ regarding the protection of members of descent-based communities from racial discrimination,¹³⁶ that the DPGs on DWD and the recommendations in CERD GR No. 29 would, if implemented, serve both to alleviate the problems resulting from discrimination based on descent and the development of existing standards and that inadequate implementation and lack of political will remain among the basic barriers impeding the elimination of descent-based discrimination.¹³⁷ CERD has reiterated that the concept of racial discrimination ‘is much broader than that perceived by many states which argue that there is no racial discrimination on their territory’¹³⁸

¹³⁴ UN Doc. CERD/C/SR.1162, 13 August 1996, para. 35 (emphasis added).

¹³⁵ SRR, Interim Report; A/64/271, 10 August 2009, para. 58.

¹³⁶ Report, Complementary International Standards; UN Doc. A/HRC/4.WG.3/6, 27 August 2007, para. 76.

¹³⁷ Ibid.

¹³⁸ See n 117 above, 11-15.

and that ‘shortcomings in the implementation by States of the Convention stem not only from a lack of political will, but also from a clear understanding by many State parties regarding the meaning and scope of the definition of the concept of racial discrimination’¹³⁹ (despite the meaning of the grounds in Article 1(1) of ICERD having been clarified by CERD in Concluding Observations and General Recommendations).

The political reality, however, is that not all states accept that existing normative frameworks apply to caste discrimination, or that caste discrimination is a legitimate international human rights issue, or that DWD and its prohibition applies to their state. Similar problems of equivocal and inconsistent State responses have been identified in relation to human rights violations based on sexual orientation and gender identity, with states refusing to acknowledge that this constitutes a legitimate area of international human rights concern.¹⁴⁰ The 2011 international strategy conference on Dalit rights (above) advocated the de-linking of caste and race/racial discrimination in favour of framing caste discrimination in the language of DWD as a global human rights concern. The challenge is therefore political as much as legal, namely to engage states such as India in acknowledging the legitimacy of UN involvement and, if they are ‘truly committed to social cohesion and eliminating bigotry and prejudice’, to regard mechanisms such as ICERD and the DPGs not as a threat but as an opportunity to challenge caste and DWD.¹⁴¹

¹³⁹ Ibid.

¹⁴⁰ M. O’Flaherty & J. Fisher, ‘Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles’, 8. *Human Rights Law Quarterly* (2008) 207-248, 227-228. The 2007 Yogyakarta Principles constitute ‘a coherent and comprehensive identification of the obligation of States to respect, protect and fulfil the human rights of all persons regardless of their sexual orientation or gender identity;’ *ibid.*, 207.

¹⁴¹ CERD member January-Bardill, CERD/C/SR.1796, 2 March 2007, paras. 47-50.

This chapter concludes Part 2 of the thesis. We now turn in Part 3 to consider the problems faced by British Dalits in their efforts to gain protection from caste discrimination under domestic equality law.

Chapter 6

Caste in the UK

6.1 The South Asian presence in the UK

This chapter argues that caste has played a role in the structure and maintenance of internal divisions among South Asian communities in the UK since the 1950s, moreover that caste in the UK has long been associated with discrimination despite insistence by some actors that neither caste nor caste discrimination exist in this country. There are over 2.3 million people of South Asian origin in the UK, according to the 2001 Census,¹ comprising over one million Pakistanis and Bangladeshis (92% of whom are Muslim) and over one million people of Indian origin, of whom 471,000 are Hindu and 307,000 are Sikh.² Large-scale South Asian migration to the UK took place primarily between the 1950s and 1970s in response to Britain's post-war labour shortage, although there has been a South Asian presence in the UK since the seventeenth century.³ Between 1961 and 2001, the

¹ Office for National Statistics (ONS), UK population by ethnic group, at <http://www.ons.gov.uk/ons/taxonomy/index.html?nscl=Identity> (visited 4 June 2012). The ONS uses the terms 'Asian' and 'Asian British' for people of South Asian origin. Asians and Asian British are categorised by the ONS as Indian, Pakistani, Bangladeshi and Other Asian; ONS, *Focus on Ethnicity*, March 2005, at <http://www.ons.gov.uk/ons/publications/index.html?pageSize=50&sortBy=none&sortDirection=none&newquery=ethnicity&content-type=publicationContentTypes> (visited 7 September 2012), 1.

² Census 2001, ONS, Largest ethno-religious groups, at <http://www.ons.gov.uk/ons/taxonomy/index.html?nscl=Identity> (visited 7 September 2012). In total there are 1.6 million Muslims, 558,000 Hindus, 336,000 Sikhs and almost 150,000 Buddhists in the UK (of which 51,000 are White British Buddhists and almost 37,000 are Chinese Buddhists); ONS, *Focus on Religion*, October 2004, at <http://www.ons.gov.uk/ons/rel/ethnicity/focus-on-religion/2004-edition/index.html> (visited 7 September 2012) 2.

³ R. Ballard, 'The Emergence of Desh Pardesh' in R. Ballard (ed.), *Desh Pardesh: The South Asian Presence in Britain* (London: Hurst & Co, 1994) 1-34, 5; R. Visram, *Asians in Britain: 400 Years of History* (London: Pluto Press, 2002); J. Brown, *Global South Asians: Introducing the Modern Diaspora* (Cambridge: Cambridge University Press (CUP), 2006).

percentage of South Asians in the UK population increased from 0.23% to 4%.⁴

Asians and Asian British now account for half of the UK's non-white population.⁵

South Asian immigration to the UK has exhibited two important features: (1) immigrants have come from a relatively small number of geographical areas, (2) but nevertheless are differentiated by language, region, caste and religion. The bulk of South Asian mass immigration to the UK has come from four main regions in the subcontinent – Punjab, which on Partition in 1947 was divided between Pakistan and India, Gujarat on the western coast of India, Sylhet in northern Bangladesh and, in Pakistan, Mirpur District in Azad ('free') Kashmir and the North West Frontier Province.⁶ According to Talbot and Thandi, 'by the end of the twentieth century Punjabis accounted for well over half of the UK's South Asian Diaspora community'.⁷ South Asian migrants have primarily been rural, peasant landowner-cultivators who have arrived not as lone, unconnected individuals but in 'cascading chains... of kinship and friendship'.⁸ This has given Britain's South Asian settlements

a far more parochial character than most outsiders are aware, for specific and highly localised castes, sects and kinship groups in the subcontinent have given rise to – and are now umbilically linked with – equally tightly structured British-based ethnic colonies.⁹

Britain's South Asian communities are not homogenous. Among South Asian Muslims (the largest religious group) almost half are Pakistanis,¹⁰ two-thirds of

⁴ Ballard, *ibid.*, 7; ONS, *Focus on Ethnicity*, n 2 above, 1.

⁵ ONS, *Focus on Ethnicity*, *ibid.*

⁶ Ballard, n 3 above, 10; A. Shaw, 'The Pakistani Community in Oxford' in Ballard (ed.), n 3 above, 35-57, 37.

⁷ I. Talbot & S. Thandi (eds.), *People on the Move: Punjabi Colonial and Post-Colonial Migration* (Oxford: OUP, 2004) xvi.

⁸ Ballard, n 3 above, 11.

⁹ Ballard, *ibid.*

¹⁰ ONS, *Focus on Religion*, n 1 above, 5. Pakistanis account for 43% of Asian Muslims in the UK.

whom originate from Mirpur District.¹¹ Bangladeshi Sylhetis are almost exclusively Muslim; of the Punjabis, under half are from India and these are mostly Sikhs, while Pakistani Punjabis are mostly Muslims but include ‘a small Christian minority, most of whom are of Untouchable descent’.¹² The Gujarati community is ‘fragmented by a large number of religious, sectarian and caste disjunctions’;¹³ moreover, many Gujaratis are ‘twice migrants’¹⁴ who arrived in the UK via a history of prior emigration to East Africa and the Middle East.¹⁵ Indo-Caribbeans constitute a separate group – they are the descendants of Indian indentured migrants to Britain’s West Indian colonies (such as Trinidad, Mauritius, British Guiana and Fiji) who worked as plantation labourers, later as agricultural workers or peasant farmers,¹⁶ or descendants of Indian indentured labour recruited to work in the French colonies following the abolition of slavery in 1848.¹⁷

6.2 Dalits in the UK

6.2.1 Numbers and groupings

There are no accurate figures for the number of South Asians of Dalit origin in the UK, as caste identity is not recorded in any official statistics. The size of the UK’s

¹¹ Ballard, n 3 above, 20; H. Blakey, J. Pearce and G. Chesters, *Minorities within Minorities: Beneath the Surface of Community Participation* (York: Joseph Rowntree Foundation, 2006) 34-35; R. Jones & G. Welhengama, *Ethnic Minorities in English Law* (Stoke on Trent: Trentham, 2000) 53.

¹² Ballard, n 3 above, 20. Sikh emigration also has a ‘compact’ geographical base, being originally mainly from villages in the Jalandhar Doaba (Indian Punjab); E. Nesbitt, “‘We are all equal’: Young British Punjabis’ and Gujaratis’ Perceptions of Caste”, 4(2) *International Journal of Punjab Studies* (1997) 201-218, 214.

¹³ Ballard, n 3 above, 20.

¹⁴ P. Bhachu, *The Twice Migrants* (London: Tavistock, 1986) cited in Ballard, n 3 above, 23.

¹⁵ Ballard, n 4 above, 20; Brown, n 3 above; C. Clarke, C. Peach & S. Vertovec (eds.), *South Asians Overseas: Migration and Ethnicity* (Cambridge: CUP, 1990); C. Bates (ed.), *Community, Empire and Migration* (Basingstoke: Palgrave, 2001).

¹⁶ S. Vertovec, ‘Oil boom and recession in Trinidad Indian villages’ in Clarke et al., (eds.), *ibid.*, 89-111, 89. Over 453,000 Indian indentured labourers went to Mauritius, almost 239,000 to British Guiana and almost 144,000 to Trinidad, the vast majority of whom were Hindus, with the lowest castes constituting the largest group; Brown, n 3 above, 30-31.

¹⁷ Singaravelou, ‘Indians in the French overseas departments: Guadeloupe, Martinique, Reunion’ in Clarke et al. (eds.), *ibid.*, 75-87, 75-76. Almost 200,000 indentured Indians migrated to the French islands between 1829 and 1924.

Dalit-origin population is hence uncertain but is estimated by Dalit organisations as anywhere between 50,000 and 200,000 people.¹⁸ It comprises members of caste-based religious groups such as Ravidassias,¹⁹ Valmikis and Ambedkarite Buddhists, Dalit Christians, secular Ambedkarites and Dalits of no religious or political affiliation.

Dalit presence in the UK dates from the 1950s and the first Punjabi immigrants, around 10% of whom were Scheduled Castes, especially Chamars (traditionally leatherworking castes).²⁰ Dalit immigrants had differing geographical origins and religious affinities and differing responses to caste discrimination and approaches to dealing with it. Many of the Punjabi Chamars were Ravidassias, adherents of Ad Dharm (meaning ‘original religion’), the north Indian Untouchable religious movement, and followers of the sixteenth-century poet-saint, or *sant*, Ravi Das.²¹ The Valmikis, also Ad Dharmis from north India,²² were devotees of the *sant* Bhagwan Valmiki and primarily from the Chuhra (sweeper/scavenger) castes.²³ By the 1950s, the distinction between these two Dalit groups – the mainly Ravidassia

¹⁸ *No Escape: Caste Discrimination in the UK* (London: Dalit Solidarity Network UK, 2006) 4. See also *Dalits in the New Millennium: Report of the Proceedings of the International Conference on Dalit Human Rights, 16-17 September 2000* (London: Voice of Dalit International, 2000) 1; *Hidden Apartheid – Voice of the Community: Caste and Caste Discrimination in the UK – A Scoping Study* (Anti Caste Discrimination Alliance (ACDA): Derby, 2009) 3, 6. In February 2013, Dalit organisations revised their estimate to 860,000; letter, Dalit organisations to Helen Grant MP, Minister for Women and Equalities, 14 February 2013; copy on file with author.

¹⁹ ACDA puts the numbers of Ravidassias in the UK at 175,000; *ibid.*, 2.

²⁰ M. Juergensmeyer, *Religion as Social Vision: The Movement against Untouchability in Twentieth-Century Punjab* (Berkeley: University of California Press, 1982) 12-13, 245-249; E-M. Hardtmann, *The Dalit Movement in India: Local Practices, Global Connections* (New Delhi: OUP, 2009) 161; E. Nesbitt, ‘Religion and identity: The Valmiki community in Coventry’, 16(2) *New Community* (1990) 261-274, 263. According to Juergensmeyer, many Punjabi Dalits were assisted in emigrating at this time by a Dalit civil servant in the Punjab passports office; Juergensmeyer, *ibid.*, 246.

²¹ Juergensmeyer, *ibid.*, 83-91.

²² J. Leslie, *Authority and Meaning in Indian Religions: Hinduism and the Case of Valmiki* (Aldershot: Ashgate, 2003) 47. See Leslie, Chapter 7, for a detailed contextualised discussion of the Valmikis.

²³ Leslie, *ibid.*, 49-50.

Chamars and the mainly Valmiki Churahs – had become a distinction between two separate religious groupings.²⁴

In addition to racial tensions between South Asian immigrants and the white majority, caste-based tensions existed between the Dalits and higher caste immigrants,²⁵ while tensions also existed between the Dalit groups themselves.²⁶ In 1956, Ravi Das *sabhas*²⁷ were established in Birmingham and Wolverhampton, forerunners to the establishment of Ravidassia temples. Ravidassias experienced ‘the same prejudice and caste-based discrimination as in India’ when they sought to worship at other (high caste) temples; consequently, ‘they decided to set up their own temple(s), run by and for the Ravidassia community’.²⁸ Meanwhile, in 1962, Ambedkarite Buddhists formed the Indian Buddhist Society and, in 1965, the Indian Republican Group of Great Britain.²⁹ Ambedkar Memorial Committees were established in Wolverhampton and London.³⁰ By the mid-1960s, there were several hundred active Ambedkarites in Britain,³¹ but the relationship between the Ravidassias and the Ambedkarites became increasingly strained, and according to Juergensmeyer, in 1965, the Ravidassias established the Indian Mutual Support and Social Association which specifically excluded the Ambedkarites.³² In 1968, the first Ravi Das temple was opened in Wolverhampton,³³ while in 1971 the Ad Dharm

²⁴ Leslie, *ibid.*, 60, 63.

²⁵ Nesbitt, ‘Valmikis in Coventry: The Revival and Reconstruction of a Community’ in Ballard, n 3 above, 117-141, 119, 127-128; Leslie, n 22 above, 67.

²⁶ Nesbitt (1994), *ibid.*, 123.

²⁷ *Sabha* means association, group, society; *Gurdwara* means temple.

²⁸ See <http://gururavidassbhawan.org/history/> (visited 2 July 2012).

²⁹ Juergensmeyer, n 20 above, 249.

³⁰ *Ibid.*

³¹ Hardtmann, n 20 above, 166.

³² Juergensmeyer, n 20 above, 250.

³³ *Ibid.*, 251.

Federation of the UK was established.³⁴ According to Hardtmann and Juergensmeyer, the Ravidassias and Ambedkarites differed in social vision and strategy. Ambedkarites sought a clean break from Hinduism and assimilation into ‘a wider egalitarian culture’, whereas Ravidassias sought to consolidate and unite behind a religious tradition with links to Hindu culture, albeit the radical, egalitarian ‘Sant’ tradition of Hinduism.³⁵ The Ad Dharm movement considered Untouchables the descendants of the original inhabitants of India, a theory rejected by Ambedkar.³⁶

For many years, Valmikis and Ravidassias – religious movements comprising people with shared ‘Untouchable’ origins, influenced by aspects of Sikh and Hindu tradition but which cannot be conflated with either mainstream Hinduism or Sikhism³⁷ – were active in their localities, focussed primarily on providing support and places of worship for their communities in the UK and maintaining links with their communities in India. They established their own associations and temples in response to the discrimination and exclusion which they experienced when they sought to attend the places of worship established by the dominant castes,³⁸ such that there now exists in the UK a plethora of temples and Gurdwaras distinguished on caste lines. There are twenty-four Ravidass Temples and Gurdwaras, including one in Scotland, under the auspices of the Shri Guru Ravidass Sabha UK.³⁹ Valmik

³⁴ Leslie, n 22 above, 66; Juergensmeyer, *ibid.*, 256.

³⁵ Juergensmeyer, *ibid.*, 250, 274; Hardtmann, n 20 above, 172-173.

³⁶ Leslie, n 22 above, 57.

³⁷ Nesbitt (1994), n 25 above, 123-124; E. Nesbitt, ‘Pitfalls in Religious Taxonomy: Hindus and Sikhs, Valmikis and Ravidasis’, 6(1) *Religion Today* (1990) 9-12; E. Nesbitt, ‘My Dad’s Hindu, my Mum’s side are Sikhs: Issues in Religious Identity’, University of Manchester, Faculty of Arts, 1991, at <http://www.casas.org.uk/papers/pdfpapers/identity.pdf> (visited 4 September 2012); Leslie, n 22 above, chapter 7.

³⁸ Nesbitt (1994), n 25 above; S. Singh Kalsi, *The Evolution of a Sikh Community in Britain* (Leeds: University of Leeds, Department of Theology and Religious Studies, 1992) 129-131.

³⁹ Shri Guru Ravidass temples are represented by the Shri Guru Ravidass Sabha UK; see <http://www.gururavidas.org/> and <http://www.shrigururavidasji.com/index.html>; <http://www.ravidassiauk.co.uk/>

Sabhas have been established in Southall, Birmingham, Bedford, Coventry, Oxford and Wolverhampton.⁴⁰ These groups are becoming increasingly visible due in part to the Ravidassias' campaign to be included as a separate religious group in the 2011 Census.⁴¹

6.2.2 'New' Dalit organisations

The 'internationalisation' of caste, which occurred from the 1990s onwards, and the concomitant development of transnational Dalit advocacy networks⁴² prompted the emergence in the UK of new Dalit organisations and solidarity networks concerned with Dalit rights, with a UK-focussed political and campaigning agenda. Dalit Solidarity Network UK (DSN-UK, founded in 1998 and affiliated to the International Dalit Solidarity Network (IDSN) based in Copenhagen), Voice of Dalit International (VODI, 1999), Caste-Watch UK (CWUK, 2004) and Anti-Caste Discrimination Alliance (ACDA, 2008) have adopted international discourses of human rights and equality in their efforts to engage in the domestic political process on an anti-caste discrimination and 'Dalit rights' agenda.

⁴⁰ See <http://www.valmikisabhas.org.uk/>; for Valmik Sabhas worldwide see <http://www.bhagwanvalmiki.com/sabha.htm> (visited 7 September 2012).

⁴¹ See <http://www.ravidassiauk.co.uk/content/new-identity-our-community> (visited 8 July 2012).

⁴² See C. Bob, 'Dalit Rights are Human Rights: Caste Discrimination, International Activism and the Construction of a New Human Rights Issue', 29(1) *Human Rights Quarterly* (2007) 167-193; J. Lerche, 'Transnational Advocacy Networks and Affirmative Action for Dalits in India', 39(2) *Development and Change* (2008) 239-261.

6.3 Caste and caste discrimination in the UK

6.3.1 Migration and caste: the early days

‘Caste exists in Britain: this is not in dispute’ affirmed the first government-commissioned report on caste discrimination in Britain in December 2010.⁴³ This statement is significant considering that for decades the existence of caste structures and practices in the UK was largely overlooked or even denied by many actors, both South Asian and non-South Asian. In 1916, Ambedkar described caste as ‘a local [i.e. Indian] problem but one capable of much wider mischief’, observing that ‘if Hindus migrate to other regions on earth, Indian caste would become a world problem’.⁴⁴ In the early days of mass migration to the UK, when numbers were small and the immigrants were predominantly single men, individuals came together in linguistic-regional groups (e.g. as Gujaratis) which operated as unified communities cutting across caste distinctions.⁴⁵ In 1963, Desai asserted that although caste distinctions were present in the UK they did not take the same oppressive form as in India, for example that the rules against eating together ‘[did] not apply in the United Kingdom’.⁴⁶ He did not suggest that this was due to a repudiation of caste and caste distinctions, rather that (at that time) there was ‘not a sufficient number of castes in the United Kingdom’ and castes were economically dependent on the host society,

⁴³ H. Metcalfe and H. Rolfe, *Caste Discrimination and Harassment in Great Britain* (London: Government Equalities Office, 2010) 14.

⁴⁴ B. R. Ambedkar, ‘Castes in India: Seminar Paper’, Columbia University, NY, 9 May 1916 in V. Moon (ed.), *Dr Babasaheb Ambedkar Writings and Speeches (BAWS) Vol. 1* (Bombay: The Education Dept., Govt. of Maharashtra, 1989) 6, citing V. Shridhar and A. M. Ketkar, *The History of Castes in India* (Ithaca, N.Y: Taylor & Carpenter, 1909) 4.

⁴⁵ R. Desai, *Indian Immigrants in Britain* (London: OUP, 1963) 14-16, 15; A. Shukra, ‘Caste, a personal perspective’ in M. Searle-Chatterjee and U. Sharma (eds.), *Contextualising Caste: Post-Dumontian Approaches* (Oxford: Blackwell, 1994) 169-178, 174. Sato reports mixed-caste Sikh congregations in Leicester in the early 1960s; K. Sato, ‘Divisions among Sikh communities in Britain and the Role of the Caste System: A Case Study of Four Gurdwaras in Multi-Ethnic Leicester’, 19(1) *Journal of Punjab Studies* (2012) 1-25, 8. See also P. Chuman, *British Untouchables: A Study of Dalit Identity and Education* (Farnham: Ashgate, 2011) 97.

⁴⁶ Desai, *ibid.*, 14.

not each other;⁴⁷ moreover, caste remained ‘very much alive’ in immigrants’ relationship with society back home in India.⁴⁸ Whether cross-caste linguistic-regional groupings were the norm experienced by Dalits, or whether they were excluded from such groupings, is hard to tell. Juergensmeyer comments that while, generally, life was better for Scheduled Castes in England, ‘in some ways it is disturbingly the same... the Jat Sikhs do not hesitate to remind the Chamars that they are still Chamars, even in England’.⁴⁹

6.3.2 ‘Chain migration’ and caste

As Britain increasingly became seen as a place to settle permanently, and with the arrival of wives and families, social, religious and cultural institutions – including the caste system – were re-established⁵⁰ and new axes of ‘community fission’ emerged alongside the existing linguistic-regional divisions.⁵¹ The importance of caste as one such axis was highlighted by Robinson, citing Michaelson’s analysis of caste identity in Britain as ‘institutionalised by the growth of associations and organisations for each of the major sub-castes... and by residential concentration’.⁵² Similarly, Ballard’s 1994 account of the settlement strategies of South Asian migrants in Britain argues that ‘chain migration’ – migrants with shared caste, language and region of origin joining ‘equally specific’ communities in Britain⁵³ – has resulted in

⁴⁷ Desai, *ibid.*, 15.

⁴⁸ *Ibid.*, 15-16.

⁴⁹ Juergensmeyer, n 20 above, 246-7; Nesbitt (1994), n 25 above, 118-119. Moldenhawer argues that instead of regarding migrants as agents moving between two or more bounded and separate worlds (as either ‘sojourners’ or ‘settlers’), their social worlds can be considered different locations of the same society; B. Moldenhawer, ‘Transnational Migrant Communities and Education Strategies Among Pakistani Youngsters in Denmark’, 31(1) *Journal of Ethnic and Migration Studies* (2005) 51-78, 58.

⁵⁰ Ballard, n 3 above, 15-18.

⁵¹ V. Robinson, *Transients and Settlers: Asians in Britain* (Oxford: Clarendon Press, 1986) 82; Chuman, n 45 above.

⁵² Robinson, *ibid.*, 82-83 citing M. Michaelson, ‘The Relevance of Caste Among East African Gujaratis in Britain’, 7(3) *Journal of Ethnic and Migration Studies* (1979) 350-60.

⁵³ Leslie, n 22 above, 65.

caste remaining ‘a crucial feature of social organisation in almost every settlement’.⁵⁴ Whilst stressing that the caste system is more fluid than many Western observers realise, Ballard observed that in Britain, as in urban India, despite the de-linking of caste and occupation, caste loyalties are as active as ever and inter-caste competition for status has indeed intensified.⁵⁵ The reason for this, argued Ballard, is that ‘the rules of endogamy are still just as strictly followed in the Diaspora as in the subcontinent. As a result, all kinship networks remain firmly caste-specific’.⁵⁶ Ironically, ‘[d]espite the lack of interest in caste [on the part of the majority society], *or perhaps because of it*, the old caste divisions persisted in the new locations’.⁵⁷

6.3.3 Survival of caste awareness: critical factors

Clarke, Peach and Vertovec contrast the Indo-Caribbeans – among whom the caste system is widely considered to have evolved into ethnicised groupings bearing caste or varna names which have lost their original Indian meaning, or to have ‘dissolved save for status attributions on the extreme ends of the Brahmin-Chamar scale’, or even to have lost its significance entirely – with the Indian ‘urban-based merchants and civil servants’ in Africa among whom ‘caste consciousness remained high even though a system of caste-based interaction and exchange ceased to function’.⁵⁸ They cite Kuper, who in 1961 argued that caste awareness can survive if members

⁵⁴ Ballard (ed.), n 3 above, 11, 25.

⁵⁵ Ibid., 26.

⁵⁶ Ibid.

⁵⁷ Leslie, n 22 above, 66 (emphasis added).

⁵⁸ Clarke et al. (eds.), n 15 above, 13. See also X. Trnka ‘Cleanliness in a caste-less context: collective negotiations of purity and pollution among Indo-Fijian Hindus’, 22(1) *Anthropological Forum* (2012) 25-43, 28.

(1) can maintain a ritual exclusiveness from the time they leave India (2) hold a privileged position in the economic organization and can avoid proletarianisation (3) retain ties with a protected caste nucleus in India (4) isolate their women from intimate cross-caste contact.⁵⁹

Such conditions, say Clarke et al., ‘apply equally for the South Asian migrants in the contemporary period’.⁶⁰ It is submitted that the historical, social and cultural particularities of mass South Asian migration to great Britain – ‘chain migration’, shared geographical origins, the retention of close ties with ‘home’, the persistence of endogamy, control of women’s sexuality through a variety of methods – mean that for a significant proportion of the UK’s South Asian population, Kuper’s criteria for the survival of caste consciousness and caste hierarchies are met.⁶¹ This has implications for understandings of ‘community cohesion’ (damage to community cohesion being an argument put forward *against* legislating for caste discrimination)⁶² and equality, and also for the choice of legal and policy measures to enhance formal and substantive equality and to combat caste discrimination in the UK.

6.3.4 Caste and caste discrimination in the UK: evidence up to 2009

From the 1970s onwards, caste in Britain attracted sporadic media coverage.⁶³

Academic studies of South Asian communities and identity in Britain refer to the role

⁵⁹ H. Kuper, *Indian People in Natal* (Durban: Natal University Press, 1961), 30, cited in Clarke et al. (eds.), n 15 above, 13.

⁶⁰ Clarke et al. (eds.), *ibid.*, 14.

⁶¹ As regards the avoidance of proletarianisation, Shukra refers to the best jobs in the engineering factories where he worked being ‘zealously monopolised by the Punjabi *Jats*’; n 45 above, 174.

⁶² The term ‘community’ can be seen being used interchangeably in India and the UK with caste and also with religion.

⁶³ D. Clark, ‘The Harijans of Britain’ *New Society* 26 June 1975; J. Kelly, ‘Apart and Hated?’ *The Times*, 6 July 1990; C. Aziz, ‘The Untouchables of London’s suburbs’ *The Independent*, 10 Jan 1991; S. Cook, ‘Caste Out’ *The Guardian*, 11 May 1991; D. Kennedy, ‘Forbidden love: no redress for couples divided by caste’, *The Times*, 5 July 2010.

of caste (or *biraderi* among British Muslims),⁶⁴ but there was relatively little research looking specifically at its nature and caste-based discriminatory practices. An important exception is Eleanor Nesbitt's work on attitudes to and perceptions of caste, religion and identity among Gujarati and Punjabi youth in Britain, particularly Ravidasis and Valmikis.⁶⁵ In the 1990s, Nesbitt highlighted the existence of caste and caste discrimination among Gujaratis and Punjabis in Britain.⁶⁶ Caste was 'an observable dynamic' among Sikhs in Britain;⁶⁷ Sikh and Hindu children, including children who had never lived in India, identified other children by their caste,⁶⁸ but for Ravidasis and Valmikis, such caste awareness was accompanied by experiences or fear of caste prejudice.⁶⁹ In 1994, a British-based Dalit suggested that caste was in some ways stronger in the UK than in India and that despite Britain's prevailing liberal democratic norms, casteism – particularly among schoolchildren – was worse than in the early days of South Asian migration, yet Dalits remained invisible to wider society. Consequently, he predicted that many Dalit children born and brought up in the UK would face a more confusing and hence psychologically more insidious kind of casteism.⁷⁰ Leslie, in her 2003 study of Valmiki, states that 'the importance of caste loyalties in the Diaspora cannot be overstressed'.⁷¹ She describes caste as affecting and internally dividing all South Asian communities in Britain.⁷² In the

⁶⁴ Michaelson, n 32 above; Ballard, n 3 above; Leslie, n 22 above, 64-73; A. Shaw, *Kinship and Continuity: Pakistani Families in Britain* (Abingdon: Routledge, 2000); I. Din, *The new British: the impact of culture and community on young Pakistanis* (Aldershot: Ashgate, 2006).

⁶⁵ See E. Nesbitt, 'Religion and Identity: the Valmiki community in Coventry', 16(2) *New Community* (1990), 261-274; Nesbitt, 'Pitfalls in Religious Taxonomy', (1990), n 37 above, 9-12; Nesbitt (1991), n 37 above; Nesbitt (1994), n 25 above; Nesbitt (1997), n 12 above.

⁶⁶ Ibid.

⁶⁷ Nesbitt (1997), n 12 above, 203. See also Singh Kalsi, n 38 above; Sato, n 45 above.

⁶⁸ E. Nesbitt, *Intercultural Education: Ethnographic and Religious Approaches* (Brighton: Sussex Academic Press, 2004) 107; Nesbitt (1997), n 12 above, 212.

⁶⁹ Nesbitt (1997), *ibid.*

⁷⁰ Shukra, n 45 above, 175-177.

⁷¹ Leslie, n 22 above, 68. Leslie's study was prompted by a dispute between Valmikis and Sikhs in 2000 in Birmingham concerning references to Valmiki in a Punjabi radio programme.

⁷² Leslie, n 22 above, 68.

context of ethnographic and religious approaches to intercultural education, Nesbitt in 2004 highlighted the importance of caste for South Asians as

part of the lived experience of many millions of Hindus and Sikhs in India and elsewhere.

*These millions include young people, parents, teachers and others involved in the UK education system, as well as in North America and other parts of the diaspora.*⁷³

Three studies in 2006 attested to the reality of caste in contemporary Britain.⁷⁴

Minorities within Minorities – looking at barriers to community participation among South Asians in Bradford, predominantly Pakistani Muslims – found a fractured and divided community characterised by divisions and power hierarchies based on caste and *biraderi* as well as region of origin, gender, sexuality and religious affiliation.⁷⁵

A report by DSN-UK, looking specifically at discrimination based on caste, argued that such discrimination was part of the lived experience of many individuals of Dalit origin in this country.⁷⁶ Lastly, a government-sponsored study of British Hindu identity, commissioned by the Hindu Forum of Britain (HFB) from the Runnymede Trust confirmed the importance of caste as a form of social organisation and a source of sub-group identity among Hindus in Britain.⁷⁷ Although silent on the hierarchical nature of the *varna* system and those deemed to fall outside it – the Dalits – the study did identify caste as a meaningful aspect of contemporary British Hindu life, at least for some. Moreover, its recommendations stated, ‘a key task for any Hindu leadership is to find ways of respecting traditions but *challenging discrimination based on family background, religious tradition or jaati (caste)* within a

⁷³ Nesbitt (2004), n 68 above, 98 (emphasis added).

⁷⁴ In Denmark, caste has been identified as a factor impacting on the education strategies of South Asian migrants; Moldenhawer, n 49 above, 51-78.

⁷⁵ Blakey et al., n 11 above, 2.

⁷⁶ DSN-UK, n 18 above, 14-15, 19.

⁷⁷ R. Berkeley, *Connecting British Hindus: An Enquiry into the Identity and Public Engagement of Hindus in Britain* (London: Hindu Forum of Britain, 2006) 59.

community'.⁷⁸ In 2009, ACDA published *Hidden Apartheid – Voice of the Community*, a study on caste discrimination conducted in collaboration with academics (including the present author).⁷⁹ It reported widespread experience by UK Dalits of caste discrimination occurring in spheres of activity covered by discrimination law, concern about lack of legislation to protect victims and significant experiences by children of inter-pupil verbal abuse or threatening behaviour.⁸⁰ Dhanda has examined young, urban Punjabi Dalits' experiences of maintaining and crossing caste boundaries in interpersonal relationships, in the Indian Punjab and in Britain. She asserted in 2009 that her UK interviewees had all experienced caste-related bullying in school via exclusion or, more commonly, name-calling, resulting in 'a reluctance to work in an all-Indian environment for fear of caste discrimination'.⁸¹ Paramjit Judge, researching Punjabis in the UK in 2002, found all aspects of the caste system in existence.⁸² In certain situations, he says, caste considerations were more important than race.⁸³ Alongside these studies, 'Jatt Pride' websites, internet chatrooms and the Bhangra music phenomenon testify to the existence of caste awareness and sometimes prejudice among sections of South Asian youth (in this case, Jatt Sikhs), many of whom have never lived on the sub-continent.⁸⁴

⁷⁸ Berkeley, *ibid.*, 12 (emphasis added).

⁷⁹ ACDA, n 20 above.

⁸⁰ *Ibid.*, 2.

⁸¹ M. Dhanda, 'Punjabi *Dalit* youth and dynamics of transitions in identity', 17(1) *Contemporary South Asia* (2009) 47-64, 57. This study involved only a very small number of UK interviewees (twelve).

⁸² P. Judge, 'Punjabis in England: The Ad-Dharimi Experience', *Economic and Political Weekly*, 3 August 2002, 3244-3250, 3247.

⁸³ Judge, *ibid.*, 3249.

⁸⁴ See <http://www.jattworld.com/> (visited 13 September 2012); D. Kennedy, 'Young generation keeps old identities alive with Bhangra music and tradition', *The Times* 5 July 2010; website of DJ Notorious Jatt <http://www.notorious-jatt.com/#/Home-01-00/> (visited 13 September 2012).

6.3.5 Caste and marriage in the UK

Caste continues to influence marriage in the UK. Endogamy was identified by Ambedkar as the vehicle by which caste is maintained and replicated – and inter-caste marriage as the ‘solvent of caste’.⁸⁵ In the UK, marriage ‘within caste’ still appears to be the expected or preferred norm, at least among the older generation but also for some younger people.⁸⁶ The preference for marriage within caste extends to Dalit castes.⁸⁷ Asian matrimonial websites in the UK continue to advertise candidates on the basis of caste and community alongside religion and other characteristics,⁸⁸ although inter-caste marriages also appear to be rising.⁸⁹ Caste has been identified as a factor in so-called ‘honour’ crimes in Britain (marriages or relationships which transgress caste boundaries being unacceptable to some families)⁹⁰ and also as a driver for forced marriage, where an individual is compelled to marry within caste.⁹¹ Although endogamy practised by choice is not a matter for the law – unless the marriage contravenes legislation restricting marriages within prohibited degrees⁹² – endogamous marriages involving force or coercion will be caught by the Forced Marriage (Civil Protection) Act 2007.⁹³

⁸⁵ Ambedkar, ‘The Annihilation of Caste’, in *BAWS Vol. 1* n 44 above, 289.

⁸⁶ Nesbitt (2004), n 68 above, 109-110; Shaw, n 64 above, 137; Din, n 64 above, 139-140; R. Kallidai, *Caste in the UK: A summary of the consultation with the Hindu community in Britain* (London: Hindu Forum of Britain, 2008) 14; Kennedy, n 84 above; DSN-UK, n 18 above, 12.

⁸⁷ Judge, n 82 above, 3248; Dhanda, n 81 above. See also <http://ravidassiamatrimonials.com/> (matrimonial website exclusively for Ravidassias, visited 13 September 2012).

⁸⁸ Jeevansathi.com at <http://www.jeevansathi.com/matrimonials/uk-matrimonial/> (visited 13 September 2012).

⁸⁹ See Kallidai, n 86 above, 17; Nesbitt (2004), n 67 above, 106; J. Jacobson, *Islam in Transition: Religion and identity among British Pakistani youth* (London: Routledge, 1998) 90-93.

⁹⁰ J. Brandon and S. Hafez, *Crimes of the Community: Honour-based violence in the UK* (London: Centre for Social Cohesion, 2008) 45-46; S. Bird, ‘Sister is stabbed to death for loving the wrong man’, *The Times*, 17 June 2006. See also Karma Nirvana at <http://www.karmanirvana.org.uk/> (visited 13 September 2012).

⁹¹ Brandon and Hafez, *ibid.*; Southall Black Sisters, *Forced Marriage: an abuse of human rights* (London: Southall Black Sisters, 2001). Forced marriage differs from approved marriage and consensual arranged marriage.

⁹² Marriage Act 1949, Part I s 1 and Sched. 1, Part 1; Marriage Act 1949 (Remedial Order) 2007 (S.I. 438/2007).

⁹³ Forced Marriage (Civil Protection) Act 2007 c 20, inserted as Part 4A s 63A(4) Family Law Act 1996 c 27. See also UN Convention on Consent to Marriage, Minimum Age for Marriage and

6.3.6 Caste and education

According to Nesbitt, caste in the context of education ‘impacts on pupils’ relationships and self-esteem in subtle and powerful ways’ and hence concerns ‘not only religious educationists but all who are concerned with the welfare of South Asian pupils’.⁹⁴ ACDA’s 2009 report highlighted experiences of caste discrimination in schools: forty-seven per cent of respondents reporting being treated differently or being on the receiving end of comments based on their caste,⁹⁵ while seven per cent claimed to have been subjected to verbal abuse and sixteen per cent to threatening behaviour, predominantly by other pupils but to a lesser extent by teaching staff.⁹⁶ In contrast, the HFB, while recognising the occurrence in schools and universities of caste-based insults, name-calling and derogatory remarks, dismissed such incidents as rare and no more than ‘a lighter form of bullying’.⁹⁷

6.3.7 Caste in the UK disputed

There has been opposition from certain actors within the South Asian community to suggestions that caste exists in the UK, let alone that caste discrimination occurs. The 2006 DSN-UK study was reportedly challenged as exaggerated by the late Piara Khabra, former MP for Ealing Southall.⁹⁸ The HFB contend that ‘caste discrimination is not endemic in British society and there is no role for caste in the

Registration of Marriages 1962, Article 1; Treaty Series No. 102/1970: Cm 4538; UK ratification 9 July 1970.

⁹⁴ Nesbitt (2004), n 68 above, 98, 107-109; Moldenhawer, n 49 above. See also P. Chuman, n 45 above.

⁹⁵ ACDA, *Hidden Apartheid*, n 18 above.

⁹⁶ ACDA, *ibid.*, 25.

⁹⁷ Kallidai, n 86 above, 17-18. Similarly, casteist behaviour in temples and community centres is characterised by the HFB as ‘ways of social interaction that could be improved, rather than actual discrimination about provision of goods and services at community centres’; *ibid.*

⁹⁸ H. Muir, ‘Caste divide is blighting Indian communities in UK, claims report’, *The Guardian*, 4 July 2006.

provision of education, employment or goods and services’.⁹⁹ The Hindu Council UK (HCUK) declared itself ‘not aware of caste discrimination here in the UK’;¹⁰⁰ indeed, according to its Director in 2007, the caste system itself had been ‘demolished’ in the UK in one generation by ‘a change in socio-economic landscape’.¹⁰¹ C.T. Kannan argued in 1978 that, just as the caste system in India had been ‘severely modified’,¹⁰² so in the UK ‘immigrant young people in particular and their parents in general’ were ‘not bothered about the caste system here’. Kannan did concede that ‘among the parental generation there may be a little awareness left of the caste tradition, *but these are never shown outside, and as a result free mixing is a general pattern in Britain*’.¹⁰³

Such comments underestimate the resilience of caste as an institution and fail to engage with the critical factors identified by Kuper as sustaining the caste system in the diaspora. Although studies suggest that the younger generation attaches less importance to caste than their parents, Nesbitt’s work shows nevertheless that young Gujaratis and Punjabis understand caste as a hereditary form of vertical hierarchical ranking *per* Dumont, and they are aware of the expectation of endogamy.¹⁰⁴ Repudiation of caste among the young appears to vary according to sphere of activity; and the extent to which it is subject to class, religion, education and caste

⁹⁹ Kallidai, n 86 above, 28.

¹⁰⁰ R.P. Sharma, *The Caste System* (London: Hindu Council UK, 2008) 3.

¹⁰¹ J. Lakhani, ‘Caste and Conversion’, 14 May 2007 at <http://www.hindujagruti.org/news/2128.html> (visited 7 September 2012).

¹⁰² C.T. Kannan, *Cultural Adaptation of Asian Immigrants: First and Second Generation* (Greenford, Middlesex: C.T. Kannan, 1978) 23.

¹⁰³ *Ibid.*, 156 (emphasis added).

¹⁰⁴ See Nesbitt (1997), n 12 above, 205-6.

and regional background is unclear.¹⁰⁵ Recent studies assert the continuance of caste consciousness – and discrimination – among Punjabis and Sikhs in Britain.¹⁰⁶

6.4 Official recognition of caste discrimination prior to the Equality Bill 2009

6.4.1 Caste discrimination as an overseas issue

To the extent that caste discrimination was addressed in parliamentary and government circles in the UK prior to the Equality Bill 2009, it was as an ‘overseas’ issue rather than a domestic problem.¹⁰⁷ The context was India’s emergence following its 1991 economic liberalisation as a global economic power, as well as expanding British-India trade and business interaction.¹⁰⁸ Caste inequality in India ‘was perceived as being out of step with modern ideas about human rights and a limitation on India’s economic development and global political aspirations’.¹⁰⁹ British concern with caste in India was explained on two grounds. The ‘business case’ emphasised the threat to India’s social stability and economic growth – and by extension British business interests – which caste discrimination was perceived to pose.¹¹⁰ The ‘moral case’, or ‘human rights case’, emphasised Untouchability and caste discrimination as a human rights violation.¹¹¹ In both cases the role of Britain

¹⁰⁵ See Dhanda, n 81 above; Judge, n 82 above; Din, n 64 above, 101-117; Jacobson, note 89 above, 85; N. Meer, ‘The politics of voluntary and involuntary identities: are Muslims in Britain an ethnic, racial or religious minority?’ 42(1) *Patterns of Prejudice* (2008) 61-81, 66.

¹⁰⁶ Sato, n 45 above, 17; Dhanda, n 81 above.

¹⁰⁷ See, e.g. T. Harrison et al., ‘A political introduction to India’, House of Commons Library, International Affairs and Defence Section, Research Paper 07/41 (2007) 43-47.

¹⁰⁸ See G. Das, *India Unbound* (New Delhi: Penguin Books India, 2000); Foreign and Commonwealth Office Country Profile: India at <http://www.ukti.gov.uk/export/countries/asiapacific/southasia/india.html> (visited 7 September 2012); ‘Trade and Investment Opportunities with India: Third Report of Session 2005–06, Volume I’; House of Commons Trade and Industry Committee, HC 881-I (2006) 21.

¹⁰⁹ A. Waughray, ‘Caste Discrimination: A Twenty-First-Century Challenge for UK Discrimination Law?’ 72(2) *Modern Law Review* (2009) 182-219, 194.

¹¹⁰ House of Commons Foreign Affairs Committee, South Asia: Fourth Report of Session 2006–07 (London: The Stationery Office Ltd); HC 55 (2007) 260-262.

¹¹¹ See, e.g. Early Day Motion 1604, Violence with Impunity Against Dalits in India, 5 June 2007, Stunnell, Andrew.

as a friend of India was stressed.¹¹² For British companies operating in India, caste surfaces primarily in human resources and decision-making, although British staff may be oblivious to its manifestations.¹¹³ In 2006, the House of Commons Trade and Industry Committee described caste as ‘a trap for the unwary’,¹¹⁴ advising UK companies not to break the letter or spirit of Indian law, to take note of the ‘Ambedkar Principles’¹¹⁵ (a voluntary code of practice for foreign investors) and to monitor their recruitment and employment policies in India. In response the government reiterated its support for the Ambedkar Principles and the commitment of the Department for International Development (DfID) to address caste-based discrimination through its various programmes.¹¹⁶ The government also urged UK businesses to comply with the laws of the countries in which they operate, noting that ‘discrimination on the grounds of caste is inconsistent with the standards that the UK applies and is illegal in India’.¹¹⁷

6.4.2 Caste discrimination as a domestic issue

The readiness of parliamentary and governmental actors from the late 1990s onwards to condemn caste discrimination in India was matched by reluctance to engage with

¹¹² HL Deb vol 690 col 1434 -1436 26 March 2007.

¹¹³ O. Morgan, ‘British “failing India’s lowest caste workers”’ *The Observer*, 24 June 2007; E. Wilson, ‘Managing Diversity: Caste and Gender Issues in Organisations in India’ in M. Davidson and S. Fielden (eds.), *Individual Diversity and Psychology in Organisations* (Oxford: Wiley, 2003) 149-172.

¹¹⁴ Trade and Investment Opportunities with India: Third Report of Session 2005–06, Volume I, House of Commons Trade and Industry Committee, HC 881-I (2006) 21.

¹¹⁵ The Ambedkar Principles: Employment and Additional Principles on Economic and Social Exclusion Formulated to Assist All Foreign Investors in South Asia to Address Caste Discrimination’, at <http://idsn.org/business-csr/ambedkar-principles/> (visited 7 September 2012).

¹¹⁶ E. Stott, House of Lords Library Note, ‘Government proposals for international development policy, including proposals on the situation of the Dalits’, LLN 2011/037, 28 November 2011.

¹¹⁷ Trade and Investment Opportunities with India: Government Response to the House of Commons Trade and Industry Committee’s Third Report of Session 2005–06, Fifteenth Special Report of Session 2005–06’, HC 1671 (2006) 29. There is an obvious irony in these denouncements of caste discrimination in India, given Britain’s contribution to the ‘construction’ of caste and its embedding in the administrative structures, law and legal system of British India; see Chapter 2 of this thesis.

it as a domestic issue. British Dalits and their supporters struggled to convince the political establishment of its existence closer to home.¹¹⁸ From 2000, personal experience of casteism in Britain was publicly voiced in oral testimonies,¹¹⁹ on radio¹²⁰ and through theatre.¹²¹ In 2004, the UN identified caste discrimination as continuing to affect diaspora communities (including the UK) ‘whose original cultures and traditions include aspects of inherited social exclusion’.¹²² In 2003, the UN Committee for the Elimination of Racial Discrimination (CERD) recommended that the UK introduce legislation prohibiting descent-based discrimination (including caste-based discrimination).¹²³ While some respondents cited in the 2006 HFB report saw *jati* and *varna* as ‘an expression of tradition and positive familial and community links’,¹²⁴ others referred to intra-community prejudice, division and barriers based on caste,¹²⁵ and the study highlights as a ‘particular issue for people of Hindu backgrounds’ the question of whether caste ‘operates to exclude people from full participation in Hindu communities’.¹²⁶ In 2008, the HFB asserted that while ‘most people in the UK do not experience caste discrimination, it could still be a purely cultural issue based on personal choices and social interaction in three broad areas’ – temples and community centres, schools and marriage.¹²⁷ Convincing the political establishment to recognise certain casteist behaviours as discrimination amenable to

¹¹⁸ Similarly, in the early 1970s, the UK’s Trades Union Congress (TUC) saw racial discrimination as an international rather than a domestic issue; race relations ‘was handled by the TUC’s International Committee, though clearly this was a home economic and manpower question’; I. MacDonald, *Race Relations and the Law* (London: Butterworths, 1977) 6. Many States Parties to ICERD initially saw racial discrimination in terms of foreign policy rather than as a domestic issue; see Chapter 4 of this thesis.

¹¹⁹ See S. Muman, ‘Caste in Britain’, *Report of the Proceedings of International Conference on Dalit Human Rights* (London: Voice of Dalit International, 2000) 71-79, 76.

¹²⁰ E.g. N. Puri, ‘The Caste Divide’, broadcast on BBC Radio 4, April 2003, transcript at <http://www.countercurrents.org/dalit-puri050704.htm> (visited 7 September 2012).

¹²¹ See <http://www.casteawayarts.com> (visited 7 September 2012).

¹²² UN Doc. E/CN.4/Sub.2/2004/31, para. 35.

¹²³ UN Doc. CERD A/58/18 (2003) para. 544.

¹²⁴ See Berkeley, n 76 above, 60.

¹²⁵ *Ibid.*, 59-60.

¹²⁶ *Ibid.*, 58.

¹²⁷ Kallidai, n 86 above, 14.

legal regulation, rather than as merely a cultural issue or ‘personal choices’, was to prove a huge challenge for Dalit activists.

6.5 Conclusion

This chapter shows that caste has been a feature of the South Asian presence in the UK since the 1950s, but remained largely hidden due in part to lack of interest in – and ignorance of – caste on the part of society at large. Caste-based tensions between Dalit and ‘higher caste’ communities resulted in the establishment, from the late 1960s onwards, of separate social and religious facilities distinguished on caste lines. Dalits too are divided amongst themselves, but the primary division remains between Dalits and higher castes. Unless these fractures within Britain’s South Asian communities are addressed as their population expands, further social disunity, tensions and frustrations will follow. In 2000, Dalits called explicitly for UK discrimination law ‘to be amended and brought up to date’ to address caste discrimination.¹²⁸ They argued that, in the context of ‘an ever-increasing Asian population in Britain’, caste discrimination was likely to play ‘a key role’ in the future. For these reasons, they argued, *‘British law will need to be brought into line with an emerging new social order in Britain’*.¹²⁹ The remaining chapters examine progress towards this goal.

¹²⁸ Muman, n 119 above, 78.

¹²⁹ Ibid., (emphasis added).

Chapter 7

Caste and British Discrimination Law Prior To the Equality Act 2010

7.1 Introduction

Prior to the Equality Act 2010 (EQA), British discrimination law had developed in an ad hoc fashion since the Race Relations Act 1965 (RRA). Successive pieces of legislation prohibited discrimination on various grounds (termed ‘protected characteristics’ in the EQA) – age, religion and belief (including lack of religion and belief), disability, racial grounds (defined as colour, race, nationality or ethnic and national origins), sex (including gender re-assignment and marital or civil partnership status, pregnancy and maternity) and sexual orientation.¹ Of these, only ‘racial grounds’ (replaced by ‘race’ in the EQA) or religion or belief contend as possible legal homes for caste. This chapter explains the limitations of these categories in relation to caste. It shows why race and religion or belief cannot adequately capture caste and hence can provide only a partial remedy for victims of caste discrimination. It also analyses the implications of successfully using race or religion or belief provisions for discrimination based on caste. The inadequacy of existing law for capturing caste is the defect of a discrimination law model which uses a fixed list of closed categories to identify the beneficiaries of protection – a point which has been made in relation to other categories previously excluded from the list, e.g. religion and sexual orientation.²

¹ See B. Hepple, *Equality: The New Legal Framework* (Oxford: Hart, 2011) 7-12.

² A. McColgan, ‘Reconfiguring discrimination law’, *Public Law* (Spr 2007) 74-94, 75; S. Fredman, *Discrimination Law* (Oxford: OUP, 2011) 73-92.

7.2 UK discrimination law model

7.2.1 Purpose of discrimination law

The primary liberal justification for discrimination law is the principle of equality,³ now understood in terms of substantive equality (embracing concepts such as equality of results or outcomes as well as respect for human dignity and worth) rather than simply equality of opportunity or formal equality.⁴ From a liberal perspective, discrimination legislation is both a coercive tool and an educative device,⁵ providing concrete protection and redress for victims of discrimination whilst playing an important political and symbolic role in the ‘shaping and expressing of social messages’.⁶ Legal regulation of discrimination serves both functions, redefining as socially unacceptable behaviour hitherto considered acceptable, as well as actionable legally.⁷

7.2.2 Meaning of discrimination

Discrimination in UK law has a narrow, technical meaning.⁸ In contrast to the language of UN documents, UK legislation ‘contains no general guarantee of equality and prohibits discrimination in a limited range of specific areas of activity. Outside these areas discrimination is lawful’.⁹ Domestic discrimination law is

³ A. Lester and G. Bindman, *Race and Law* (London: Longman, 1972) 73; N. Bamforth, M. Malik and C. O’Cinneide, *Discrimination Law: Theory and Context* (London: Sweet and Maxwell, 2008) 167.

⁴ On equality see Hepple, n 1 above, 12-26; Fredman, n 2 above, 4-33 on the legal principle of equality and conceptualisations of equality; on equality and discrimination law see Bamforth et al., *ibid.*, 166-194 and 194-232 on liberalism and discrimination law.

⁵ Lester and Bindman, n 3 above, 85-87.

⁶ M. Burton, *Legal Responses to Domestic Violence* (Abingdon: Routledge-Cavendish, 2008) 7. For discussion of the argument that ‘law will not itself be formative of the progressive argument’ see B. Hudson, ‘Beyond White Man’s Justice: Race, gender and justice in late modernity’, 10(1) *Theoretical Criminology* (2006) 29-47.

⁷ N. Lacey, ‘From individual to group’ in B. Hepple and E. Szyszczak (eds.), *Discrimination: The Limits of the Law* (London: Mansell, 1993) 99-124, 108.

⁸ Bamforth et al., n 3 above, 38-41.

⁹ J. Spencer and M. Spencer, ‘International law and discrimination’ in M. Sargeant (ed.), *Discrimination Law* (Harlow: Pearson, 2004) 46; but see Hepple, n 1 above, 1, 12-14, on the Equality

designed largely to respond with individual remedies to individual claims made on the basis of legally defined grounds, in relation to certain types of regulated behaviour and social goods,¹⁰ although the EQA Public Sector Equality Duty (PSED) extends this by imposing a proactive equality promotion duty on public bodies, while the Equalities and Human Rights Commission (EHRC), established by the Equality Act 2006, has a broad general duty to protect and promote equality, as well as enforcement powers to conduct inquiries and formal investigations into discriminatory practices by organisations.¹¹

To amount to unlawful discrimination, behaviour must meet three criteria. First, the behaviour must be because of a protected characteristic. Secondly, it must occur in a legally regulated field such as employment, the provision of goods, facilities and services, education and vocational training, management or disposal of premises or the exercise of public functions. Discriminatory behaviour occurring in non-regulated fields is outwith the law (e.g. ‘private sphere’ relations such as intimate social interactions or marriage). Thirdly, it must amount to a prohibited type of conduct (e.g. direct or indirect discrimination, harassment or victimisation). Behaviour which does not meet these criteria may be objectionable but it is not unlawful. In order to convince governmental and parliamentary actors of the need for an express prohibition of caste discrimination in the Equality Bill, British Dalits first

Act 2010 and the ‘unitary human rights perspective’ which shifts the focus from negative duties not to discriminate, to positive duties to advance equality, with discrimination law becoming an essential but not exclusive part of *equality* law. See also Fredman, n 2 above, chapter 3.

¹⁰ Bamforth et al., n 3 above, 18.

¹¹ Section 3 EQA sets out the general duty of the EHRC; s149 EQA requires public authorities in the exercise of their functions to have due regard to the need to eliminate prohibited discrimination, advance equality of opportunity and foster good relations; see Hepple, n 1 above, 12 on the general duty of the EHRC, 134-140 on the PSED, and 149-154 on EHRC enforcement powers; Fredman, n 2 above, 7-8 for a critique of s 149 EQA. In May 2012, the government announced a review of the PSED ‘to establish whether the Duty is operating as intended’; see <http://www.homeoffice.gov.uk/equalities/equality-act/equality-duty/equality-duty-review/terms-of-reference/> (visited 26 January 2013).

had to establish the existence of discrimination based on caste in regulated fields and, secondly, that existing grounds of discrimination did not cover, or did not fully cover, caste.

7.2.3 Regulated fields and the ‘public-private’ divide

Opponents of caste discrimination legislation argue that caste discrimination (if it exists at all) is not caught by discrimination law because it occurs only in non-regulated fields.¹² British discrimination law targets behaviour or conduct – the outcome of choices or preferences – in particular sectors only, irrespective of motivation; opinions, beliefs, preferences and choices are not unlawful unless they give rise to prohibited conduct or impacts.¹³ Legal regulation does not extend to discriminatory behaviour deemed to be in the private or intimate spheres, and it is the ‘privacy barrier’ which has been repeatedly called up to exclude caste from the reach of discrimination law.¹⁴

Nonetheless, the boundary between associational preferences and discrimination in regulated fields – for example between ‘personal choices’ in ‘business networks’ (the example given by the HFB)¹⁵ and discrimination in the provision of goods and services – may not always be clear-cut.¹⁶ Acceptance of a separation between public

¹² R. Kallidai, *Caste in the UK: A Summary of the Consultation with the Hindu Community in Britain* (London: Hindu Forum of Britain, 2008) 16.

¹³ Discrimination law recognises beliefs, choices and preferences as such in very limited circumstances only, by the granting of exemptions or exceptions. As an example, under the EQA, ‘religious beliefs are respected by means of exceptions to the general prohibition on gender reassignment discrimination in relation to the religious solemnisation of marriages’; Hepple, n 1 above, 113, 122-123.

¹⁴ Kallidai, n 12 above, 16.

¹⁵ R. Berkeley, *Connecting British Hindus: An Enquiry into the Identity and Public Engagement of Hindus in Britain* (London: Hindu Forum of Britain, 2006) 12; Kallidai, *ibid.*, 11.

¹⁶ Regarding Sikhs in the UK, Kalsi argues that endogamous groups organise both their social *and economic relationships* with one another ‘through idioms of ritual purity and avoidance behaviour’; S.

and private spheres is a predominant organising principle of liberal legal discourse, with the ‘private’ not considered to be a proper subject of State regulation;¹⁷ however, as critical theorists argue, the boundary between private and ‘non-private’ behaviour is not immutable but is open to contestation and legal revision (after all, the concept of ‘private’ behaviour is itself a socio-political-legal construct: ‘All struggles against oppression in the modern world begin by re-defining what had previously been considered “private,” non-public and non-political issues as matters of public concern...’).¹⁸ Over time the spheres deemed ‘private’ and beyond the reach of the law have shrunk, while those within the law’s ambit have increased. Examples of ‘private’ behaviour which have been brought within the ambit of the law include racial discrimination in private contractual relationships,¹⁹ domestic violence,²⁰ rape within marriage²¹ and forced marriage.²² The public-private distinction and the separation between public and private spheres have been challenged, particularly by feminist legal theorists,²³ while the exclusion of ‘private contact discrimination’ from legal regulation remains a key criticism of liberal discrimination law.²⁴

Singh Kalsi, ‘The Sikhs and Caste: A Study of the Sikh Community in Leeds and Bradford’, PhD thesis, University of Leeds, 1989, 71 (emphasis added).

¹⁷ M. Thornton, ‘The Cartography of Public and Private’ in M. Thornton (ed.), *Public and Private: Feminist Legal Debates* (Oxford: OUP, 1995) 2-16, 5; Preface, *ibid.*, xiii.

¹⁸ S. Benhabib, *Situating the Self: Gender, Community and Post-modernism in Contemporary Ethics* (Cambridge: Polity Press, 1992) 100, cited in Hudson, n 6 above, 35. Privacy is nevertheless recognised as serving important functions; K. Kelly, *Domestic Violence and the Politics of Privacy* (New York: Cornell University Press, 2003) 3-6; Burton, n 6 above, 140-141.

¹⁹ Race Relations Act 1968 c.71.

²⁰ Kelly, n 18 above; Burton, n 6 above; C. Smart, *Feminism and the Power of Law* (London: Routledge, 1989); E. Schneider, *Battered Women and Feminist Law-Making* (New Haven: Yale University Press, 2000) 87-97.

²¹ *R v R* [1992] 1 AC 599.

²² Forced Marriage (Civil Protection) Act 2007 c 20, inserted as Part 4A s 63A(4) Family Law Act 1996 c 27.

²³ See Smart, n 20 above; Thornton (ed.), n 17 above.

²⁴ Bamforth et al., note 3 above, 857.

7.2.4 Discrimination: grounds-based approach

The grounds-based approach to discrimination, whereby legislation affords protection from discrimination on specified grounds, is ‘common to many discrimination regimes’.²⁵ In UK (and EU) discrimination legislation the prohibited grounds are enumerated in a closed and exhaustive list (compared with the more open and general formulation in ICCPR Articles 2(1) and 26). This approach gives rise to ‘two obvious questions’ – which grounds are regulated and how are the grounds defined?²⁶ – as well as to calls to extend the list.²⁷ Although ‘there is no inherent reason why legal protection from discrimination is organised on the basis of categories’,²⁸ it is inevitable that such a model will give rise to demands for the list of grounds or categories to be extended by legislation, or for existing categories to be interpreted expansively as forms of discrimination not accommodated by existing categories or interpretations emerge.²⁹ As scholars have pointed out, categorisation is ‘not preordained’³⁰ but ‘may have been inevitable given the nature of political campaigns for discrimination law’.³¹ In some cases the addition of categories³² has been in response to the obligation to implement EU anti-discrimination law. Absent caste as a statutory protected characteristic in its own right or as a statutory subset of an existing characteristic, legal protection against caste discrimination depends on

²⁵ McColgan, n 2 above, 75. In contrast to the UK, section 15 of the 1982 Canadian Charter of Rights and Freedoms contains a non-exhaustive list of grounds; see G. Moon, ‘From equal treatment to appropriate treatment: what lessons can Canadian equality law on dignity and on reasonable accommodation teach the United Kingdom?’ 6 *European Human Rights Law Review* (2006) 695-721, 697. On discrimination grounds generally see Fredman, n 2 above, 110-143.

²⁶ McColgan, *ibid.*

²⁷ *Ibid.*

²⁸ I. Solanke, ‘Putting Race and Gender Together: A New Approach to Intersectionality’, 72(5) *Modern Law Review* (2009) 723-749, 723.

²⁹ McColgan, n 2 above, 75-76.

³⁰ McColgan, *ibid.*, 86.

³¹ Solanke, n 28 above, 723.

³² For example, religion or belief, sexual orientation.

establishing in the courts that caste is subsumed within an existing characteristic such as race or religion or belief.

7.3 Caste and racial discrimination

7.3.1 Race Relations Act 1976

Prior to the EQA, protection against racial discrimination was provided by the Race Relations Act 1976³³ (RRA), as amended by the Race Relations (Amendment) Act 2000³⁴ and the Race Relations Act 1976 (Amendment) Regulations 2003,³⁵ which implemented the EC Race Directive 2000.³⁶ The RRA introduced a prohibition of indirect discrimination (a concept imported from US civil rights legislation) and strengthened its enforcement provisions.³⁷ It prohibited direct³⁸ and indirect discrimination,³⁹ harassment⁴⁰ and victimisation⁴¹ on ‘racial grounds’⁴² or by reference to members of a ‘racial group’.⁴³ By 1969, the UK was a party to ICERD, which in Article 1(1) defines racial discrimination as any distinction, exclusion,

³³ Race Relations Act 1976, c 74 (London: HMSO, 1995) replacing the earlier legislation in 1965 and 1968.

³⁴ Race Relations (Amendment) Act 2000 c 34 (London: HMSO, 2000).

³⁵ Race Relations Act 1976 (Amendment) Regulations 2003; SI 2003/ 1626 (London: HMSO, 2003).

³⁶ Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; OJ L180/22, 7 July 2000. Recital 3 of the Directive refers to the right to equality before the law and protection against discrimination as a universal right recognised *inter alia* by ICERD, to which all EU member states are signatories.

³⁷ *Racial Discrimination* White Paper Cm 6234 (1975) 25-27. See Bamforth et al., note 3 above, 46-48. Proposals to amend the 1968 Race Relations Bill by prohibiting discrimination on the wide grounds in Article 2 UDHR were not debated because it was considered beyond the scope of that Bill, the purpose of which was to make provision with respect to *racial* discrimination only; Lester and Bindman, note 3 above, 97.

³⁸ S. 1(1)(a) RRA 1976.

³⁹ Indirect discrimination on grounds of race, ethnic or national origins was prohibited by RRA, S. 1(1A) for the purposes referred to in RRA, s 1(1B) and on grounds of colour and nationality by RRA, S. 1(1)b.

⁴⁰ RRA 1976, S. 3A prohibiting harassment on grounds of race, ethnic or national origins for the purposes referred to in s 1(1B); Employment Equality (Religion or Belief) Regulations 2003, reg 5; S.I. 2003/1660.

⁴¹ S. 2(1) RRA 1976.

⁴² S. 1(1)(a) RRA 1976.

⁴³ S. 1(1)(b) RRA 1976.

restriction or preference based on race, colour, *descent* or national or ethnic origin. ICERD was implemented by the RRA, which defined ‘racial grounds’ as ‘colour, race, nationality or ethnic or national origins’⁴⁴ – but not descent. There was no reference to the international legal definition of racial discrimination in the 1975 White Paper *Racial Discrimination*.⁴⁵ Neither was there any reference to the international definition in the 1976 Parliamentary Committee debates on the interpretation clause of the draft legislation.⁴⁶

7.3.2 Absence of ‘descent’

As a State Party to ICERD, the UK has an obligation to implement the Convention fully and in good faith, including a duty to prohibit and punish, within its jurisdiction, those forms of discrimination within its ambit. Absent descent, application of the RRA to caste discrimination depended on whether caste was deemed subsumed by race, colour, national or ethnic origins or nationality; this remains the case under the EQA. There is no link between caste and nationality or national origins, and the link between caste and colour is not sufficient to argue that people of Dalit origin are members of a group or groups defined by reference to this ground. Historically, however, there has long been overlap in the usage and application of race and caste.⁴⁷ Discourses of ethnicity are also applied to caste. For

⁴⁴ RRA s 3(1). Nationality was introduced following the House of Lords decision in *Ealing London Borough Council v Race Relations Board* [1972] 1 All ER 105 that the word ‘national’ in the term ‘national origins’ meant national only in the sense of race, not nationality or citizenship.

⁴⁵ *Ibid.*

⁴⁶ 1975-1976 Race Relations Bill, HC Standing Committee A col 83-130 29 April–4 May 1976. During the 2010 parliamentary debates on the Equality Bill, Lord Lester of Herne Hill QC explained that the RRA drafters had regard to the ICERD definition of racial discrimination, but did not include descent because it was assumed that the concept of ethnicity included the notion of descent and origins; Lord Lester, HL Deb vol 716 col 336-337, 11 Jan 2010.

⁴⁷ S. Bayly, *Caste, Society and Politics in Modern India from the Eighteenth Century to the Modern Age* (Cambridge: Cambridge University Press (CUP), 1999) 103-138; G.S. Ghurye, *Caste and Race in India* (Mumbai: Popular Prakashan Pvt Ltd, 1969). 114-138; P. Thornberry, ‘Race, Descent and Caste under the Convention on the Elimination of All Forms of Racial Discrimination’ in K. Nakano, M.

these reasons the question of whether castes are groups defined by reference to race or ethnic origins is considered below.

7.3.3 Caste and race

Race, in common with the other RRA sub-categories, was not defined and there is little RRA case law on the meaning of race,⁴⁸ a notoriously imprecise term. In 1980, Lustgarten observed that the only way in which the distinction between race and colour in the RRA formula made any sense was if race was understood as meaning ‘what might more appropriately have been called “ethnic group” – Scottish, Polish, West Indian and so forth’.⁴⁹ From the eighteenth century, Western ideas about race were dominated by ‘scientific’ arguments for race and racial difference as innate biological categories and for the biological superiority of white people, thereby underpinning the colonial project with its utilisation of ‘objective’ racial classifications to justify economic exploitation.⁵⁰ In the early twentieth century, new analyses emerged of race as a socio-political construct, a product of power relations, real in terms of its impact on people’s lives and sense of self ‘but devoid of inherent scientific meaning.’⁵¹ More recently, academic analysis of the constructed nature of race and the racialisation of new social groups has sparked debate about legal

Yutis and R. Onoyama (eds.), *Peoples for Human Rights Vol. 9: Descent-Based Discrimination* (Tokyo: International Movement Against All Forms of Discrimination and Racism, 2004) 119-137, 123; K. Kannabiren, ‘Race and Caste: A Response to Andre Beteille’, People’s Union for Civil Liberties, August 2001, at <http://www.pucl.org/reports/National/2001/beteille.htm> (visited 10 September 2012).

⁴⁸ Connolly, n 7 above, 139.

⁴⁹ L. Lustgarten, *Legal Control of Racial Discrimination* (London: MacMillan Press, 1980) 76.

⁵⁰ D. Ingram, *Rights, Democracy, and Fulfilment in the Era of Identity Politics: Principled Compromises in a Compromised World* (Lanham: Rowman and Littlefield Publishers, 2004) 54.

⁵¹ R. Frankenburg, *White Women, Race Matters: The Social Construction of Whiteness* (Minneapolis: University of Minnesota Press, 1993) 11, 11-13; R. Miles and M. Brown, *Racism* (London: Routledge, 2003) 39-50.

protection against emerging forms of racial discrimination such as cultural racism.⁵² According to Lord Fraser of Tullybelton in *Mandla v Dowell Lee* (1983), the leading case on the definition of racial group under the RRA (discussed below), Parliament cannot have intended that membership of a particular racial group should depend on scientific proof that a person possessed the relevant distinctive biological characteristics (assuming that such characteristics exist), as the practical difficulties of such proof would be prohibitive; moreover, within the human race, there are very few, if any, distinctions which are scientifically recognised as racial.⁵³ Race in the popular sense calls up wider markers such as culture, language and political and economic power, or lack of,⁵⁴ yet the term nevertheless also encompassed shared geographical origins and hereditary, immutable physical traits such as skin colour and physical or outward appearance, irrespective of linguistic, cultural, national or religious factors.⁵⁵ While caste possesses some features associated with race in its wider sense, this does not mean that it is the same as race.⁵⁶ In the nineteenth century, scholars searching for a scientific ‘racial’ explanation for the caste system failed to identify pan-Indian or regional phenotypical profiles of Untouchable groups.⁵⁷

⁵² N. Meer, ‘The politics of voluntary and involuntary identities: are Muslims in Britain an ethnic, racial or religious minority?’ 42 *Patterns of Prejudice* (2008) 61-81; Bamforth et al., n 3 above, 822-832.

⁵³ *Mandla and another v Dowell Lee and another* [1983] 1 All ER 1062, 1066; *Ealing London Borough Council v Race Relations Board* [1983] 2 AC 548, 561.

⁵⁴ W. Felice, ‘The UN Committee for the Elimination of Racial Discrimination: Race, and Economic and Social Human Rights’ 24(1) *Human Rights Quarterly* (2002) 205-236, 205-207.

⁵⁵ See for example *Prosecutor v Akayesu*, Case ICTR-96-4-T, Judgment, 2 September 1998, 514. The Stephen Lawrence Enquiry defined racism as consisting of conduct or words or practices which advantage or disadvantage people because of their colour, culture or ethnic origin; *The Stephen Lawrence Enquiry: Report of an Enquiry by Sir William MacPherson of Cluny* (London: HMSO, 1999) 6.4.

⁵⁶ See S. Sabir, ‘Chimerical Categories: Caste, Race and Genetics’ 3(2) *Developing World Bioethics* (2003) 170-177.

⁵⁷ Bayly, n 47 above, 126-138.

7.3.4 Caste and ethnic origins

7.3.4.1 *Content of 'ethnic origins'*

Like race, the meaning of ethnic origins or ethnicity is elusive, but the term is widely understood in a culturally-oriented rather than a purely physical sense⁵⁸ as '[acknowledging] the place of history, language and culture in the construction of subjectivity and identity'.⁵⁹ According to Capotorti in his landmark study on minorities, the UN Sub-Commission in its 1950 draft resolution on the definition of minorities decided to replace the word 'racial' with 'ethnic' in all references to minority groups described by ethnic origin, because so-called racial groupings were not based on scientific facts; the word 'ethnic' referred to all biological, cultural and historical characteristics, whereas 'racial' referred only to inherited physical characteristics'.⁶⁰ Reference was made to the 1948 Genocide Convention,⁶¹ wherein 'ethnic' had been used to cover cultural, physical and historical characteristics of a group.⁶² Reference was also made to a 1970 UN-sponsored research conference on race relations and the observation of one scholar that whereas 'in the most common usage race refers to aggregates of people based upon physical differences, particularly skin colour', ethnic groups 'may be defined as peoples who conceive of themselves as one kind by virtue of their common ancestry (real or imagined) who are united by emotional bonds, a common culture, and by concern with preservation of their group'.⁶³ Capotorti states that the substitution of 'ethnic minorities' for

⁵⁸ S. Poulter, *Ethnicity, Law and Human Rights* (Oxford: Clarendon Press, 1998) 4.

⁵⁹ S. Hall, 'New Ethnicities' in J. Donald and A. Rattansi (eds.) *'Race', Culture and Difference* (London: Sage, 1992) 252-259, 257.

⁶⁰ F. Capotorti, 'Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities' (New York: United Nations, 1991) 34.

⁶¹ Convention on the Prevention and Punishment of the Crime of Genocide 1948. Adopted 9 December 1948. In force 12 January 1951. 78 UNTS 277.

⁶² Capotorti, n 60 above, 34.

⁶³ R. Burkey, 'Discrimination and racial relations' in *Report on the International Research Conference on Race Relations, Aspen, Colorado, 7-9 June 1970*, 62, cited in Capotorti, n 60 above, 34.

‘racial minorities’ in Article 27 ICCPR ‘reflect[ed] a wish to use the broadest expression and to imply that racial and national minorities should therefore be regarded as included in the [wider] category of ethnic minorities’.⁶⁴

7.3.4.2 *Mandla v Dowell Lee (1983): wide interpretation of ‘ethnic origins’*

In *Mandla (Sewa Singh) and another v Dowell Lee and others*⁶⁵ (*Mandla*), a Sikh schoolboy brought a claim of indirect racial discrimination against an independent school which refused to admit him unless he complied with school uniform rules, which required him to remove his turban. The question facing the House of Lords was whether Sikhs were a racial group for the purposes of the RRA. It was not suggested that Sikhs were a group defined by reference to colour, race, nationality or national origins; in none of these respects were they distinguishable from other groups living, like most Sikhs, in the Punjab. The argument turned upon whether they were a group defined by ethnic origins. It was therefore necessary to ascertain the sense in which the word ‘ethnic’ was used in the RRA.⁶⁶ Lord Fraser rejected meanings which treated it as synonymous with race in the narrow, biological sense. While recognising that ethnic ‘conveyed a flavour of race’ he held that it could not have been used in the RRA ‘in a strictly racial or biological sense’ and that Parliament ‘must have used the word in some more popular sense’; indeed, ‘the word is used nowadays in an extended sense to include other characteristics which may be commonly thought of as being associated with common racial origin’. He therefore held that the term ‘ethnic’ was to be construed ‘relatively widely’ in a broad

⁶⁴ Capotorti, *ibid.*, 35.

⁶⁵ [1983] 2 AC 548.

⁶⁶ *Ibid.*, 560.

cultural/historic sense.⁶⁷ Citing Richardson J. in *King-Ansell v Police* (New Zealand),⁶⁸ Lord Fraser held that for a group to constitute an ethnic group it must regard itself and be regarded by others as a distinct community by virtue of certain characteristics, two of which are essential: (1) a distinct, living and long shared history as a group and (2) a cultural tradition of its own, including family and social customs, often but not necessarily associated with religious observance. Additional but non-essential characteristics include: (3) common geographical origins or descent; (4) a common language (although not necessarily peculiar to the group); (5) common literature peculiar to the group; (6) a common religion different from that of neighbouring groups or the surrounding community and (7) being a minority or an oppressed or dominant group within a larger community.⁶⁹ The House of Lords found that Sikhs were a group defined by reference to ethnic origins because they possessed ‘a sufficient combination of shared customs, beliefs, traditions and characteristics derived from a common or presumed common past’ such as to give them ‘an historically determined social identity in their own eyes and in the eyes of those outside the group’, even though they were not biologically distinguishable from other people in the Punjab.⁷⁰ Jews⁷¹ and Gypsies (in the narrow sense of Roma rather than the wider sense of New Age travellers)⁷² but not Rastafarians⁷³ or Muslims⁷⁴ have also been held to fall within the purview of ethnic origins.

⁶⁷ Ibid., 563.

⁶⁸ *King-Ansell v Police* [1979] 2 NZLR 531.

⁶⁹ *Mandla*, n 65 above, 562.

⁷⁰ Ibid., 564-565.

⁷¹ *Seide v. Gillette Industries* [1980] IRLR 427 (EAT).

⁷² *CRE v Dutton* [1990] QB 783; [1989] 1 All ER 306; [1989] IRLR 8, CA.

⁷³ *Crown Suppliers v Dawkins* [1993] ICR 517; the Court of Appeal, applying Lord Fraser’s test, held that Rastafarians lacked a sufficiently long-shared group history for the purposes of s 3(1) RRA.

⁷⁴ *Nyazi v Rymans*, EAT 6/88 (unreported); Muslims were held to be a group defined by reference to religion, not ethnic origins, and hence outside the purview of the RRA. Contrast *CRE v Precision Manufacturing Ltd* (1991) reported in *Equal Opportunities Review*, DCLD 12. On Muslims as an ethnic group see Meer, n 50 above; K. Dobe and S. Chhokar, ‘Muslims, Ethnicity and the Law’ 4 *International Journal of Discrimination and the Law* (2000) 369-386.

7.3.4.3 *Caste and the Mandla criteria*

The ethnicity of caste is a familiar topic among caste scholars, and the question of Dalits as an ethnic group has also been raised within CERD.⁷⁵ However, a fundamental element of caste is separateness of caste groups. Dalits in India are linked by a common experience of oppression and Untouchability but are not otherwise a culturally, linguistically or historically homogenous group – for centuries they were separated from each other geographically, regionally, linguistically and culturally, the distinctions and hierarchies between Dalit *jatis* sometimes enforced as rigorously as those between Dalit and non-Dalit *jatis*.⁷⁶ It was not until the early twentieth century that Dalits emerged as a nationally identifiable political and social entity. Although Dalits in India have become an increasingly important political category, it is not clear that collectively they could fulfil the *Mandla* criteria.⁷⁷ In *Nyazi v Ryman*s Muslims were denied ethnic group status due to their linguistic, geographical and racial heterogeneity.⁷⁸ It is submitted that while individual Dalit *jatis* could possibly fulfil the criteria, collectively Dalits would struggle to demonstrate sufficient commonality of geography, language, religion and culture and a sufficiently distinct, long shared history as a group.

⁷⁵ CERD member Mr Prosper, CERD, Summary Records, 1796th meeting, 2 March 2007; UN Doc CERD/C/SR.1796, 38.

⁷⁶ O. Mendelsohn and M. Vicziany, *The Untouchables: Subordination, Poverty and the State in Modern India* (Cambridge: CUP, 1998) 2.

⁷⁷ On the *Mandla* criteria and caste see K. MacPherson and K. Shaw, 'Is it time to legislate on caste?', *Employment Law Journal*, February 2012, 12-15, 14. On cultural tradition Delière argues (controversially) that the Untouchables [in India] 'know perfectly well that... they have no culture of their own'; R. Delière, 'Introduction: Is there still Untouchability in India?' in M. Aktor and R. Delière (eds.), *From Stigma to Assertion: Untouchability, Identity and Politics in Early and Modern India* (Copenhagen: Museum Tusculanum Press, 2010) 13-30, 28. For the converse argument see e.g. E. Zelliott, *From Untouchable to Dalit: Essays on the Ambedkar Movement* (New Delhi: Manohar, 1998).

⁷⁸ See *Nyazi v Ryman*s, n 74 above; Meer, n 52 above, 67-71.

7.3.4.4 *Revisiting Mandla: R (E) v Governing Body of JFS (2009)*

In *R (E) v Governing Body of JFS and the Admissions Appeal Panel of JFS* (2009)⁷⁹ the UK Supreme Court revisited the *Mandla* interpretation of ethnic origins. JFS (formerly the Jews' Free School) was a designated 'faith' school.⁸⁰ Such schools benefit from an exception to the obligation not to discriminate based on religion or belief in the admission and treatment of pupils.⁸¹ The JFS policy was to admit children who were recognised by the Office of the Chief Rabbi (OCR) as being Jewish. The extent of religious observance practised by a family was irrelevant. The only consideration was whether the child was, within the OCR's understanding of the Halakah (Jewish law), a Jew. The OCR recognised as Jewish those born of an Orthodox Jewish mother or grandmother, or those born of female converts whose conversion was recognised by an Orthodox synagogue. E challenged JFS's refusal to admit his son, M, to the school on the grounds that M did not satisfy the admission requirement of descent in the matrilineal line from a woman recognised by the OCR as Jewish. M's mother was an Italian Catholic convert who had converted in a Reform – not an Orthodox – synagogue. E alleged that the refusal constituted direct racial discrimination based on M's ethnic origins. JFS argued that the refusal to admit M was made purely on religious grounds. The question to be determined was whether in being denied admission to JFS, M was disadvantaged based on his ethnic origins.⁸² The court by five to four held that the JFS/ OCR matrilineal descent admission test focussed on genealogical descent; such a test was one based on ethnic origins. The reason M was denied admission was because of his mother's ethnic

⁷⁹ *R (on the application of E) (Respondent) v The Governing Body of JFS and the Admissions Appeal Panel of JFS and others (Appellant)* [2009] UKSC 15 (*JFS*).

⁸⁰ For the definition of 'faith' school see EQA Schedule 11 s 5(a)-(g).

⁸¹ See now EQA Schedule 11 s 5.

⁸² *JFS*, n 79 above; Lord Kerr, paras. 116, 117, 122; Lady Hale, para. 54.

origins, which were not halachically Jewish. Treating an individual less favourably because of his ancestry amounted to discrimination based on ethnic origin. The refusal to admit M constituted direct discrimination on racial grounds. The fact that the discrimination was based upon a devout, venerable and sincerely held religious belief or conviction could not excuse such conduct from liability under the law.⁸³

7.3.4.5 *Caste and JFS*

The Supreme Court in *JFS* held that the RRA did not only prohibit discrimination based on ethnic origin, as defined by the wide *Mandla* test, but also in the narrower, more traditional sense of a person's lineage or descent; indeed, prior to *Mandla*, a narrow test based on birth or descent would have been regarded as required in order for there to be discrimination based on ethnic origin.⁸⁴ The Court referred to statements in *Ealing*⁸⁵ that discrimination on account of race or ethnic or national origins involved consideration of a person's antecedents and that 'origin' signified a source, or someone or something, from which someone or something has descended.⁸⁶ In *JFS*, M was at a disadvantage because of his descent.⁸⁷ On the meaning of descent, Lord Mance referred, *obiter*, to the ICERD definition of racial discrimination and CERD's interpretation of descent as including 'descent-based communities... who suffer from discrimination.. .on the basis of caste and analogous systems of inherited status':

Whether or not "descent" embraces caste, the concepts of inherited status and a descent-based community both appear wide enough to cover the present situation. That in turn tends

⁸³ Lord Kerr, *ibid.*, paras. 113, 119, 120; Lord Phillips, *ibid.*, para. 35; Lady Hale, *ibid.*, paras. 54, 71.

⁸⁴ Lord Mance, *ibid.*, para. 82.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*, para. 89.

to argue for a wide understanding of the concept of discrimination on grounds of ‘ethnic origins’, although the point is a marginal one.⁸⁸

JFS opened up arguments that caste is subsumed within ethnic origins by virtue of the descent aspect of ‘ethnic’. In *Naveed v Aslam* the Employment Tribunal held that it was impossible for the claimant’s caste to fall under the existing definition of ethnic origins where the claimant and respondent were members of, but of different status within, the same caste where the possibility of movement within the caste was accepted by the claimant.⁸⁹ Whether the argument (that caste cannot fall under ethnic origins) can apply in different circumstances has yet to be determined by the courts. Caste has flavours of both race and ethnicity but also important divergences from these categories (for example, its sanctioning by religion). It remains unclear on what basis a court would equate *varna*, *jati* (or *biraderi*) with race *per se*. ‘Ethnicising’ caste under British law could lead to the elevation of *jati* identities into separate ‘freestanding’ ethnic identities – the antithesis of Ambedkar’s call for the ‘annihilation of caste’ – whereas conceptualising caste discrimination either as a form of descent-based discrimination or simply as itself involves acknowledgment but not reification of *jati* identity. These two legal approaches – treating caste (*jati*) as a form of ethnicity, conversely treating caste as itself, or as a form of descent – correspond broadly to the two divergent political strategies which have emerged in Dalits’ struggle against casteism in Britain. One strategy advocates the embracing and assertion by Dalits of caste (*jati*) identities, including caste-related religious identities (e.g. Ravidassia, Valmiki), as the means for resisting casteism. The other

⁸⁸ *Ibid.*, para. 81.

⁸⁹ *Naveed v Aslam*, ET Case No. 1603968/2011 (unreported), paras. 25-27.

rejects caste in its totality and, with it, caste identity.⁹⁰ Until the EQA is extended to cover caste or descent – for example by providing for caste to amount of itself to an aspect of race – lawyers must argue that caste is subsumed within race or ethnic origins or both.

7.4 Caste and discrimination based on religion or belief

7.4.1 Religion or belief as a ground of discrimination

7.4.1.1 Meaning of religion or belief

Proposals to include religion as a ground of discrimination in the RRA were debated but rejected in Parliament in 1976,⁹¹ and it was not until 2003 that religion or belief discrimination legislation was introduced in Britain.⁹² Prior to that, protection from religious discrimination was potentially covered by Articles 9 and 14 of the European Convention on Human Rights (ECHR).⁹³ From 2003, two instruments

⁹⁰ As Ansari observes, Untouchability is an imposed and denigratory mark of identity which, as a deeply discriminated group, the Dalits historically have sought to shed or escape from rather than preserve. Ambedkar fought for the eradication of Untouchability and the annihilation of caste - not for its preservation. As a social and political minority in India the Dalits constitute an 'involuntary association' (individuals ascribed by 'outside designation' to a minority group and stigmatised as inferior). However, as Dudley Jenkins points out, social categories – even those which are oppressive – may be appropriated by subordinated groups for their own strategic purposes as 'tools of empowerment'. Involuntary or 'negative' associations may thus be transformed into 'positive' associations; Spivak coined the term 'strategic essentialism' to describe the phenomenon whereby minority groups choose to present a simplified, essentialised identity for visibly political purposes; see I. Ansari (ed.), *Readings on Minorities: Perspectives and Documents Vol. 1* (New Delhi: Institute of Objective Studies, 1996) xviii; B. R. Ambedkar, 'The Annihilation of Caste' in V. Moon (ed.), *Babasaheb Ambedkar Writings and Speeches (BAWS) Vol. 1* (Govt of Maharashtra, Bombay, 1989); L. Dudley Jenkins, *Identity and Identification in India: Defining the Disadvantaged* (London: RoutledgeCurzon, 2003) 110; P. Thornberry, *International Law and the Rights of Minorities* (Oxford: Clarendon Press, 1991) 9-10; S. Morton, *Gayatri Chakravorty Spivak* (London: Routledge, 2003) 73-75.

⁹¹ See 1975-1976 Race Relations Bill, HC Standing Committee A cols 84-85, 96-118, 29 April 1976. An international instrument prohibiting both racial and religious discrimination was proposed when ICERD was drafted but it was agreed to focus only on racial discrimination; see D. Keane, *Caste-based Discrimination in International Human Rights Law* (Aldershot: Ashgate, 2007) 168-169.

⁹² C.f. Northern Ireland which, because of the political situation, had legislation outlawing discrimination on grounds of religion or political opinion from 1976 onwards.

⁹³ Treaty Series No. 071/1953: Cm 8969. UK Ratification 8 March 1951. On conflicts of rights see Bamforth et al., n 3 above, 953-954, 964. On the distinction between Article 9 ECHR right to religious freedom and the statutory prohibition of religious discrimination see Bamforth et al., n 3 above, 866-874.

were in force, the Employment Equality (Religion or Belief) Regulations 2003,⁹⁴ which implemented the UK's obligations under the religion and belief strand of the EC Employment Equality Directive 2000,⁹⁵ and Part 2 of the Equality Act 2006 (EA 2006).⁹⁶ Both instruments defined religion or belief as any religion or religious or philosophical belief, or lack of religion or belief.⁹⁷ 'Any religion' is a broad definition in line with Article 9 ECHR, including 'those religions widely recognised in this country' such as Rastafarianism, Baha'is, Zoroastrianism, Jainism and Buddhism, in addition to Judaism, Islam, Christianity and Hinduism, as well as denominations or sects within a religion (such as Protestants and Catholics within Christianity).⁹⁸ The main limitation is that the religion must have a clear structure and belief system⁹⁹ (this being ultimately a matter for the courts to decide). The definition of philosophical belief, and what constitutes a philosophical belief for the purposes of the legislation, was considered in a number of cases prior to the EQA.¹⁰⁰ *Grainger plc and ors v Nicholson* identified five criteria to be satisfied for a belief to qualify for protection: it must (1) be genuinely held; (2) be a belief and not an opinion or viewpoint based on information currently available; (3) concern a weighty and substantial aspect of human life and behaviour; (4) attain a certain level of cogency, seriousness, cohesion and importance and (5) be worthy of respect in a democratic society and not incompatible with human dignity and the fundamental

⁹⁴ Employment Equality (Religion or Belief) Regulations 2003; S.I. 2003/1660.

⁹⁵ Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation; OJ L 303/ 16, 2 December 2000.

⁹⁶ Equality Act 2006, c 3.

⁹⁷ EA 2006 s 44(a), s 44(b); EA 2006 s 77(1)1 which replaced the original definition of religion or belief in reg. 2(1) of the 2003 Regulations.

⁹⁸ Explanatory Notes to the Equality Act 2006 (Crown Copyright, 2006) para. 170.

⁹⁹ Ibid.; Explanatory Notes to the Equality Act 2010 (Crown Copyright, 2010) para. 51.

¹⁰⁰ See L. Vickers, 'Religious Discrimination in the Workplace: An Emerging Hierarchy?', 12(3) *Ecclesiastical Law Journal* (2009) 280-303, 282. Section 10(1) EQA retains the definition of religion as 'any religion' and section 10(2) EQA retains the definition of belief as 'any religious or philosophical belief'.

rights of others.¹⁰¹ These criteria are now contained in the EQA Explanatory Notes on belief.¹⁰²

7.4.1.2 *Meaning of direct discrimination based on religion or belief*

The 2003 Regulations (as amended) and the EA 2006 provided that direct discrimination occurs where, because of the religion or belief of B or of any other person except A (whether or not it is also A's religion or belief), A treats B less favourably than he treats or would treat others.¹⁰³ Direct discrimination could thus occur if it was not B's religion or belief but the religion or belief of another person which motivated the less favourable treatment by A – and regardless of whether A was of the same religion or belief as B.¹⁰⁴ The legislation excluded from the ambit of direct discrimination less favourable treatment of B occurring *solely based on A's religion or belief*, for example 'where A feels motivated to take particular action because of what his religion or belief requires'.¹⁰⁵ For religious discrimination to have occurred, the less favourable treatment of B must have occurred based on the actual or perceived religion or belief of B, or a person with B. Less favourable treatment of B motivated by A's own religious beliefs but unrelated to B's religion (or belief) would not amount to *religious* discrimination – although it might amount to discrimination on another ground, e.g. sexual orientation.

¹⁰¹ UKEAT/02/19/09. Grainger relied on *Campbell and Cosans v UK* (1982) 4 EHRR 293, para. 33. In *Grainger* a belief in climate change was found to be capable of being a protected belief.

¹⁰² Explanatory Notes to the Equality Act 2010, n 98 above, para. 52.

¹⁰³ Equality Act 2006 s 45 (1); Equality Act 2006 s 77(2) which replaced regulation 3(1)a of the 2003 Regulations.

¹⁰⁴ Equality Act 2006 s 45(2). The EQA retains association and perception discrimination in relation to religion or belief.

¹⁰⁵ Explanatory Notes to the Equality Act 2006, n 97 above, para. 173. See also Equality Act 2006 s 45 (1).

7.4.2 Caste discrimination as religious discrimination

7.4.2.1 *Caste and religion as distinct characteristics*

Caste discrimination is captured by religious discrimination provisions only if the victim's ascribed caste status is considered 'part of' or integral to their religion or belief. It is submitted that caste is a characteristic distinct from religion or belief and that it is misconceived to conflate caste status with religion, notwithstanding the fact that caste as an institution finds support in orthodox Hindu texts. In his book *Religious Discrimination and Hatred Law* Neil Addison argues that if a Hindu employer (A) refused to employ another Hindu of lower caste (B) and instead offered the job to a Hindu of higher caste (C), this would constitute unlawful religious discrimination against B even though A, B and C are all Hindus.¹⁰⁶ Although the reason for the discrimination by A is B's caste, Addison implies that in the case of Hindus, B's religion and ascribed caste status are synonymous rather than distinct characteristics, so this is a case of religious discrimination. It is submitted that this conflation of caste status and religious identity is erroneous, as discrimination based on caste and discrimination based on religion are not the same. By definition, *caste* discrimination is motivated by the known, perceived or assumed *caste status* of B, not the religion or belief to which B is known or thought to subscribe or belong. 'Low-caste Hindu' is an ascribed socio-religious status rather than a distinct religion or belief within the meaning of discrimination legislation.¹⁰⁷ Indeed, because of their caste, Dalits have not always been included in the Hindu fold; in the early twentieth century, the proposal that for political reasons the Untouchables should be counted as

¹⁰⁶ N. Addison, *Religious Discrimination and Hatred Law* (London: Routledge-Cavendish, 2007) 64. I am grateful to Neil Addison for sharing his views on caste discrimination and religious discrimination law with me. EQA s 24 provides that it is no defence to a claim of direct discrimination that the alleged discriminator shares the protected characteristic (in this case, religion) with the victim. Section 24 also covers discrimination based on association or perception.

¹⁰⁷ A similar mis-conceptualisation of caste status as a purely religious identity occurred during debates on the 1975 *Racial Discrimination* White Paper on the inclusion of religion as a subset of racial grounds; see *Racial Discrimination* White Paper, Cm 6234 (1975) 23.

Hindus was highly controversial among some Hindus.¹⁰⁸ It is on the basis of caste rather than religion that Dalits have been and continue to be denied entry to temples and public places.¹⁰⁹ By collapsing religion and caste into each other the distinct nature of each is lost.

7.4.2.2 *Caste-specific religions*

Only in cases involving caste-specific religious groups or movements (e.g. Valmiki, Ravidassias, Ambedkarite Buddhists), where religious identity overlaps completely with caste status, can discrimination based on caste be captured by provisions on religious discrimination. If caste-specific religious groups are found by the courts to be distinct sects within Hinduism or Sikhism, or alternatively independent religions with clear structures and belief systems, caste discrimination against members of such groups, although motivated by caste rather than religious affiliation, could be captured theoretically by religious discrimination provisions in the absence of caste-specific provisions, as caste and religious identity are sufficiently conflated.¹¹⁰ However, using religious discrimination provisions in such cases masks rather than exposes the casteist basis of the discrimination. For example, someone who discriminates against an Ambedkarite Buddhist may not discriminate against a Sri Lankan Buddhist, the underlying reason for the discrimination against the Ambedkarite Buddhist being caste, not Buddhism.¹¹¹ Using religious discrimination

¹⁰⁸ M. Galanter, *Competing Equalities: Law and the Backward Classes in India* (Berkeley: University of California Press, 1984), 25-26.

¹⁰⁹ See *Suntharalingam v Inspector of Police, Kankasanturai* [1971] 3 WLR. 896, on appeal to the Privy Council from the (then) Supreme Court of Ceylon, where the appellant appealed unsuccessfully against his conviction under the (Ceylonese) Prevention of Social Disabilities Act 1957 for preventing a 'low caste Hindu' from entering the inner courtyard of a temple by reason of his caste.

¹¹⁰ See A. Waughray, 'Caste Discrimination: A Twenty-First-Century Challenge for UK Discrimination Law?' 72(2) *Modern Law Review* (2009) 182-219, 214; H. Metcalfe and H. Rolfe, *Caste Discrimination and Harassment in Great Britain* (London: Government Equalities Office, 2010) 60.

¹¹¹ I am grateful to Professor Patrick Olivelle for this example.

provisions to address caste discrimination creates an arbitrary divide whereby victims of caste discrimination who are members of ‘low caste’ religious movements can call up a protected ground which is not available to non-members of such groupings.

7.4.2.3 *Saini v All Saints Haque Centre & Others (2009)*

Two reported cases illustrate the use of religious discrimination provisions by possible or alleged victims of caste discrimination in the absence of caste-specific provisions. In both cases the complainants were ‘high caste’ Hindus and the respondents were Ravidassias. In *Saini v All Saints Haque Centre & Others (2009)*¹¹² the Employment Appeals Tribunal (EAT) found that the respondents had subjected the claimant to discriminatory harassment based on religion. The case report notes that Ravidassias ‘form a distinct group with distinctive religious beliefs that distinguish them from both the Sikh and Hindu communities’.¹¹³ Caste was not brought up explicitly before the EAT, but in the earlier, unreported Employment Tribunal hearing, caste makes an appearance in a reference to an article referring to the discriminatory treatment meted out in parts of medieval India to lower castes such as Ravidassias by high caste Hindus.¹¹⁴ It is submitted that caste rather than religion (or possibly a combination of the two) was at the root of the dispute in *Saini*.

¹¹² [2009] 1 CMLR 38, 1060-1070; UKEAT/0227/08/ZT.

¹¹³ 2009] 1 CMLR 38, 1060-1070, para. 2.

¹¹⁴ *Mr J. Chandel & Anor v All Saints Haque Centre & Ors*, ET Case No. 1306296/ 2006 & Anor (unreported).

7.4.2.4 Sahota & Shergill v Shri Guru Ravidass Sabha Temple (Vancouver) (2008)¹¹⁵

This case involved a complaint brought before the British Columbia Human Rights Tribunal (BCHRT)¹¹⁶ by two higher caste Hindus alleging discrimination contrary to the British Columbia Human Rights Code 1996 (the Code)¹¹⁷ based on ancestry, race and religion in the provision of an accommodation, service or facility customarily available to the public by the Shri Guru Ravidass Sabha Temple of Vancouver (the Sabha). The Sabha had denied them membership because they were not Ravidassias of the Chamar caste (formerly an Untouchable caste). The complainants argued that discrimination on the basis of caste is religious, cultural and economic discrimination¹¹⁸ and that therefore the discrimination against them was *inter alia* discrimination based on religion (a form of discrimination covered by the Code whereas discrimination based on caste was not); specifically, they complained that they were refused membership because of their caste ‘and the religious background of the caste’.¹¹⁹

The respondents argued that membership of the Sabha was restricted to the Ravidassia community, whose interests the Sabha had been created to promote, and that Ravidassias were by definition members of the Chamar caste; furthermore, they posited that the Code did not apply to membership of the Sabha because it was a private, purely social, religious and cultural organisation.¹²⁰ The BCHRT concurred and dismissed the complaint as outside the jurisdiction of the Tribunal, finding that

¹¹⁵ *Gurshiner Sahota & Sohan Shergill v Shri Guru Ravidass Sabha Temple (Vancouver)* (Sahota) 2008 BCHRT 269.

¹¹⁶ See <http://www.bchrt.bc.ca/> (visited 2 February 2013).

¹¹⁷ See http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96210_01 (visited 2 February 2013).

¹¹⁸ *Sahota*, n 114 above, para. 24.

¹¹⁹ *Ibid.*, para. 5.

¹²⁰ *Ibid.*, para.16.

the organisation was a result of a private selection process based on attributes personal to the members,¹²¹ and as a purely private organisation it had chosen to restrict its membership to persons in the Ravidassi community and defined that community to include only those of the Chamar caste.¹²² The cases of *Saini* and *Sahota* both feature caste dimensions – *Saini* was brought under religious discrimination provisions, while in *Sahota* the complaint was of discrimination based on religion, race and ancestry. It is submitted that both cases would have been brought under caste discrimination provisions had they been in place.

7.4.3 Religion or belief as defence to discrimination

Article 9(2) ECHR provides that the right to manifest religion or belief ‘shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society’ for *inter alia* ‘the protection of the rights and freedoms of others’. British courts have emphasised the qualified nature of Article 9 protection and shown themselves unwilling to allow individuals to manifest their beliefs in a way which involves ‘discriminating on grounds which Parliament has provided to be unlawful’.¹²³ They have not allowed protection from discrimination based on religion or belief to be called up in defence of behaviour which, albeit motivated by religious belief, is itself discriminatory on grounds, for example, of ethnic origin¹²⁴ or sexual orientation.¹²⁵ In *JFS*, Munby J. explained that while ‘the civil courts must be slow to interfere in the life of any religious minority or to become involved in adjudicating on purely religious issues... it is important to realise that reliance on religious belief,

¹²¹ *Per Marine Drive Golf Club v Buntain et al.* (2007 BCCA 17); *ibid.*, para. 34.

¹²² *Ibid.*

¹²³ *Ladele v London Borough of Islington, Liberty intervening* [2008] UKEAT/0453/08/RN, 127.

¹²⁴ *JFS*, n 79 above.

¹²⁵ *Ladele v Borough of Islington* [2009] EWCA Civ 1357; *McFarlane v Relate Avon Ltd* [2010] EWCA Civ 880; *Bull & Bull v Hall & Preddy* [2012] EWCA Civ 83.

however conscientious the belief and however ancient and respectable the religion, can never of itself immunise the believer from the reach of the secular law. And invocation of religious belief does not necessarily provide a defence to what is otherwise a valid claim'.¹²⁶ It has been suggested that a hierarchy of protection is developing whereby religion or belief is protected to a lesser extent than other protected characteristics¹²⁷ and that the right to freely hold and express beliefs is illusory if 'citizens are not also free to conduct themselves in accordance with those beliefs'.¹²⁸ It has also been argued that the views of religious people should be subject to a 'reasonable accommodation' based on religious belief from general legislative provisions on discrimination, i.e. be tolerated to a certain extent even if out of step with equality law.¹²⁹ Aileen McColgan, in contrast, argues that it is a mistake to protect religion or belief in the same way as sex, race, sexual orientation and disability and warns against accommodation of practices or beliefs categorised as religious, because often they are problematic on equality grounds.¹³⁰

It follows from the above that the maintenance of 'caste boundaries' may be challenged where it occurs in a legally regulated sphere and if caste can be brought within a protected characteristic, in which case a defence that the maintenance of 'caste boundaries' is motivated by religious (or philosophical) belief would be unlikely to succeed.

¹²⁶ See *JFS*, n 79 above. See also *Ladele v Borough of Islington* [2009] EWCA Civ 1357; *McFarlane v Relate Avon Ltd* [2010] EWCA Civ 880; *Bull & Bull v Hall & Preddy* [2012] EWCA Civ 83.

¹²⁷ Vickers, n 99 above.

¹²⁸ L. West, 'These Judgments Restrict Freedom', *Church Times* Issue 7679, 21 May 2010.

¹²⁹ See R. Sandberg, 'The Right to Discriminate', 13(2) *Ecclesiastical Law Journal* (2011) 157-181; R. Sandberg, 'Laws and Religion: Unravelling *McFarlane v Avon Relate Ltd*', 12(3) *Ecclesiastical Law Journal* (2010) 361-370.

¹³⁰ A. McColgan, 'Class Wars? Religion and (In)equality in the workplace', 38(1) *Industrial Law Journal* (2009) 1-29, 1.

7.5 Conclusion

This chapter has examined the limitations of domestic discrimination law in relation to caste prior to the EQA 2010. The legal capture of caste, and discrimination based on caste, presents as much of a theoretical and practical problem to domestic discrimination lawyers as it does to international lawyers. UK discrimination law provides protection from discrimination occurring in specific sectors and in relation to particular grounds only. The ‘grounds-based’ approach to discrimination, whereby only specified characteristics are protected, is one of the fundamental concepts underpinning the UK’s anti-discrimination regime. This approach is vulnerable to two related pressures: first, calls to expand the list of protected characteristics by adding more characteristics, or by adding an open ‘other status’ category, or by making the list non-exhaustive, and secondly, calls for expansive approaches to interpreting the existing list.¹³¹ In the UK, the Sex Discrimination Act 1975 and the RRA ‘came under pressure to accommodate... challenges to discrimination which might more obviously have been categorised as relating to sexual orientation and religion’.¹³² Groups suffering from hitherto unrecognised forms of discrimination (such as caste discrimination) may be denied legal protection because they are not explicitly included in the list, or, says McColgan, because interpretive precedents ‘become ossified’ such that ‘the courts may be unwilling, or perceive themselves as unable, to shape interpretive outcomes so as to make legislation fit for current purpose’.¹³³ This chapter has explained why caste did not easily ‘fit’ into any of the pre-EQA grounds of discrimination. For the same reasons, the EQA-protected characteristics as defined as at 1 April 2013 still do not adequately embrace caste.

¹³¹ McColgan (2007), n 2 above, 75.

¹³² McColgan (2007), *ibid.*

¹³³ McColgan (2007), *ibid.*, 75-6; section 3 of the Human Rights Act 1998 has provided British courts with an additional interpretive tool.

Only in specific circumstances can religious discrimination provisions capture caste discrimination. Only by ‘racing’ or ‘ethnicising’ caste can caste discrimination be caught by race discrimination provisions. The 1975 Racial Discrimination White Paper stated:

To fail to provide a remedy against an injustice strikes at the rule of law. To abandon a whole group of people in society without legal redress against unfair discrimination is to leave them with no option but to find their own redress.¹³⁴

In 2003, and again in 2011, the UN Committee for the Elimination of Racial Discrimination (CERD) recommended that the UK introduce a domestic prohibition of descent-based discrimination (including caste-based discrimination).¹³⁵ Chapter 8 examines and analyses the debates during the passage of the Equality Bill through Parliament about whether to include an express prohibition of caste discrimination in domestic legislation and the process which led to the inclusion in the EQA of section 9(5)(a), which provides for caste to be added, at a future date, to the protected characteristic of race.

¹³⁴ See *Racial Discrimination White Paper*, n 37 above, 23.

¹³⁵ Concluding Observations – UK; UN Doc. CERD/C/63/CO/11, 10 December 2003, para. 25; Concluding Observations – UK; UN Doc. CERD/C/GBR/CO/18-20, 14 September 2011, para. 30

Chapter 8

Caste Discrimination and the Equality Act 2010

8.1 Introduction

The Equality Bill 2009 (the Bill), as introduced in April 2009, did not contain any mention of caste.¹ Four main objections to the legal regulation of caste discrimination were advanced at the time by governmental, parliamentary and other actors. These were (1) lack of evidence of a problem requiring a legislative solution; (2) caste discrimination is already covered by existing law; (3) ‘proliferation of the protectorate’ – unjustifiable extension of the list of protected characteristics based on which discrimination is prohibited – and (4) undesirable socio-political consequences, including negative impacts on community cohesion. This chapter traces the passage of the Bill through Parliament and presents and critiques these arguments, examining their strengths, inconsistencies and contradictions with a view to illustrating the problems faced by British Dalit communities in their efforts to gain protection from caste discrimination under equality law.

In 2001, the UN World Conference against Racism (WCAR) in Durban provided a springboard for the transformation of caste discrimination from domestic grievance into an international human rights issue.² From 2006 onwards, the prospect of an Equality Bill provided a rallying point for British Dalit organisations and activists, an opportunity to make the strategic and rhetorical shifts necessary to take their

¹ See

http://www.publications.parliament.uk/pa/cm200809/cmbills/085/09085_iw/09085_iw_en_1.htm (visited 28 September 2012).

² C. Bob, “‘Dalit Rights Are Human Rights’: Caste Discrimination, International Activism and the Construction of a New Human Rights Issue”, 29(1) *Human Rights Quarterly* (2007) 167-193.

grievances to the highest governmental level and a springboard for debate on the inclusion of caste in domestic discrimination legislation, in a context where a range of discrimination issues were being debated. The strategic projection of caste discrimination as a human rights and discrimination issue challenged the conceptualisation of caste as a purely social, cultural or religious matter. Critical to the campaign for domestic legal regulation of caste discrimination was, first, the organisational and advocacy skills, or resources, of key activists;³ secondly, the willingness of individuals to provide personal testimony of caste discrimination; thirdly, the willingness of Dalit organisations to work together; fourthly, the support of a handful of parliamentarians⁴ and academics; and finally, the role of national non-governmental organisations (NGOs) such as Anti Caste Discrimination Alliance (ACDA, formed in 2008), Dalit Solidarity Network UK (DSN-UK) and the National Secular Society, and transnational advocacy networks such as International Dalit Solidarity Network (IDSN).⁵ Two ‘key moments’ can be identified as turning points in the Dalits’ campaign for legal change. The first was the publication in November 2009 of a study on caste discrimination in the UK, written by ACDA in collaboration with four academics.⁶ This study proved instrumental in securing official acknowledgement that caste discrimination might exist in the UK. It argued that if further evidence was considered necessary, research should be commissioned by government. The second was a meeting on 4 February 2010 in the House of Lords on

³ It seems that a new generation of British-educated, professional Dalits has emerged possessing the skills and experience (‘resources’) to engage directly with the political establishment. In social movement discourse resources are defined as including the professional and educational background of movement personnel; C. Hilson ‘New social movements: the role of legal opportunity’ 9(2) *Journal of European Public Policy* (2002) 238-255, 240.

⁴ The key parliamentarians were Lynne Featherstone MP (Lib Dem); Rob Marris MP (Lab); Jeremy Corbyn MP (Lab); John O’Donnell MP (Lab); Evan Harris MP (Lib Dem); Lord Avebury (Lib Dem); Lord Lester (Lib Dem); Lord Harries (Lib Dem); Baroness Flather (Lib Dem).

⁵ See <http://idsn.org/front-page/> (visited 15 September 2012).

⁶ ACDA, *Hidden Apartheid – Voice of the Community: Caste and Caste Discrimination in the UK – A Scoping Study* (Derby: ACDA, 2009). The academics were Professor Stephen Whittle; Dr. Roger Green; Dr. Gurharpal Singh; the present author.

caste and the Equality Bill, called by Baroness Thornton, the government minister responsible for the passage of the Bill through the Lords, for the purpose of hearing from Dalit organisations, community representatives and individuals with direct experience of caste discrimination. At this meeting ‘behind the scenes’, government support (or at least non-opposition) was secured for an amendment to section 9 of the Bill, adding an enabling provision allowing for the future inclusion of caste in the definition of race.

The chapter proceeds with an examination of the Equality Review process, followed by an analysis of the first three of the four main objections to the regulation of caste discrimination as they developed at the time. There follows an account of the meeting on caste and the Equality Bill at the House of Lords on 4 February 2010. Finally, we look at the fourth objection.

8.2 Equalities Review and Discrimination Law Review

By the time the Labour Government came to power in 1997, reform of the UK’s anti-discrimination regime – ‘a tangle of acts and regulations whose variety [owed] little to principle and much to happenstance’⁷ – was long overdue. In February 2005, the government announced a two-stage overhaul of the UK’s equality framework, leading to a new, single, Equality Act.⁸ The first stage, the Equalities Review,⁹ was

⁷ A. McColgan *Discrimination Law: Text, Cases and Materials* (Oxford: Hart, 2005) 9.

⁸ See <http://archive.cabinetoffice.gov.uk/equalitiesreview/background.html> (visited 9 September 2012). The Labour Party committed to introduce a Single Equality Act in its 2005 General Election manifesto.

⁹ The Equalities Review was mandated to investigate the causes of persistent discrimination and inequality in British society; *Interim Report for Consultation* (London: The Equalities Review, 2006) at http://archive.cabinetoffice.gov.uk/equalitiesreview/upload/assets/www.theequalitiesreview.org.uk/interim_report.pdf (visited 9 September 2012).

completed in February 2007.¹⁰ In October 2007, the Equality and Human Rights Commission (EHRC) was established under the Equality Act 2006.¹¹ The second stage, the Discrimination Law Review (DLR),¹² was intended to culminate in the drafting of a single piece of new legislation to replace the plethora of existing anti-discrimination statutes and statutory instruments. A Consultation on the new legislation was launched in June 2007.¹³ In June 2008, the government announced its intention to proceed with a Bill¹⁴ with the publication of its key proposals,¹⁵ followed in July 2008 with its written response to the Consultation.¹⁶

The DLR provided an opportunity to ascertain the existence, forms and extent of caste discrimination in Great Britain and to bring it within the new legislative framework. The Consultation paper did not mention caste but – partly in response to a 2006 study by DSN-UK on caste discrimination in the UK¹⁷ – the government in August 2007 conducted ‘an informal survey of around 20 (sic) key stakeholders to determine whether they were aware of any evidence that individuals or communities had been discriminated against, based on caste, in the UK’.¹⁸ A Freedom of Information Act (FOIA) request subsequently revealed that the Department for

¹⁰ *Fairness and Freedom: The Final Report of the Equalities Review* (Norwich: HMSO, 2007).

¹¹ Equality Act 2006 c 3; the EHRC merged the Commission for Racial Equality (CRE), the Equal Opportunities Commission and the Disability Rights Commission; Equality Act 2006 Part 1 s 1, at <http://www.legislation.gov.uk/ukpga/2006/3/contents> and <http://www.equalityhumanrights.com/> (visited 13 September 2012).

¹² The Department of Trade and Industry was charged with developing a simpler, fairer legal framework, informed by the findings of the Equalities Review; see DLR Terms of Reference, at http://archive.cabinetoffice.gov.uk/equalitiesreview/reference_grp/rg_terms_ref.html (visited 15 September 2012). In 2007, the remit moved to the Government Equalities Office (GEO), a department created in October 2007 by Statutory Instrument; see <http://homeoffice.gov.uk/equalities/> (visited 15 September 2012).

¹³ ‘A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain – a consultation paper’ (London: HMSO, 2007).

¹⁴ HC Deb vol 478 col 499, 26 Jun 2008.

¹⁵ ‘Framework for a Fairer Future: The Equality Bill’ (Norwich: The Stationery Office, 2008).

¹⁶ *The Equality Bill – Government response to the Consultation* Cm 7454 (2008).

¹⁷ DSN-UK, *No Escape: Caste Discrimination in the UK* (London: DSN-UK, 2006); see Chapter 6 of this thesis.

¹⁸ Cm 7454 (2008), n 16 above, 177, 183-184.

Communities and Local Government (CLG) sent questionnaires on caste and caste discrimination on 15 August 2007 to twenty-three organisations (of which only two were Dalit groups), asking for replies by 29 August 2007, to which nineteen organisations responded.¹⁹ On the basis of these responses the government concluded:

We have decided... not to extend protection against caste discrimination. While recognising that caste discrimination is unacceptable, we have found no strong evidence of such discrimination in Britain, in the context of employment or the provision of goods, facilities or services. We would, however, consult the [EHRC] about monitoring the position.²⁰

8.3 Equality Bill 2009

8.3.1 Organisation of the legislation

The Bill was introduced in the House of Commons on 24 April 2009. It had two stated purposes: to harmonise and in some areas extend existing discrimination law and to ‘strengthen the law to support progress on equality’.²¹ As a ‘flagship bill’²² its successful passage through Parliament was of crucial political importance to the Labour Government of 1997-2010 in its final months in office. It received Royal Assent on 8 April 2010.²³ Its passage through Parliament occurred against the backdrop of an impending General Election of uncertain outcome and government anxiety to ensure that the Bill received Royal Assent before Parliament was

¹⁹ A. Ahmed (CLG), letter to P. Lal (ACDA), 2 July 2009, in *Hidden Apartheid*, n 6 above, 53-55.

²⁰ Cm 7454 (2008), n 16 above, 177. See also V. Keter, ‘Equality Bill: Bill 85 of 2008-9’, House of Commons Library Research Paper 09/42, 7 May 2009.

²¹ Keter, *ibid.*, 11.

²² *Ibid.*, 20.

²³ On the passage of a Bill see

http://www.parliament.uk/about/how/laws/passage_bill/coms_commons_first_reading.htm. The 2010 General Election was called on 6 April 2010 for 6 May 2010. Parliament was formally dissolved on 12 April 2010.

dissolved. Part 1 of the Equality Act 2010 (EQA)²⁴ imposed on certain public authorities a new (and controversial) public sector duty regarding socio-economic inequalities (which the subsequent Conservative-Liberal Democrat coalition government decided not to bring into force).²⁵ For present purposes the most important part of the EQA is Part 2, which establishes the key concepts on which the EQA is based, including protected characteristics and prohibited conduct (direct and indirect discrimination, harassment and victimisation). Nine protected characteristics are listed in Part 2 section 4 and elaborated in sections 5-11: age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race (which includes colour, nationality and ethnic or national origin); religion or belief; sex and sexual orientation. Dual discrimination (discrimination based on two protected characteristics), provided for in section 14, was not brought into force by the coalition government.²⁶

8.3.2 The ‘caste amendment’

At Lords’ Report stage on 2 March 2010, following debate, argument and negotiation involving government, parliamentarians, Dalit groups and other actors, an historic amendment was agreed. Lords Amendment 1, which became EQA s. 9(5)(a), was an enabling provision providing for caste to be added by ministerial order ‘as an aspect of’ the protected characteristic of race in clause 9.²⁷ The effect of this clause was to obviate the need for further primary legislation to bring caste within the EQA list of protected characteristics; rather, this could be achieved via

²⁴Equality Act 2010 c15; see http://www.opsi.gov.uk/acts/acts2010/pdf/ukpga_20100015_en.pdf.

²⁵ B. Hepple, *Equality: The New Legal Framework* (Oxford: Hart, 2011) 141-143.

²⁶ See *The Plan for Growth* (Dept. for Business, Innovation and Skills, March 2011) para. 2.51.

²⁷ HL Deb vol 717 col 1350 2 Mar 2010; Revised Marshalled List of Amendments to be Moved on Report as at 1 March 2010, at <http://www.publications.parliament.uk/pa/ld200910/ldbills/035/amend/ml035-ir.htm> (visited 28 September 2012).

secondary legislation. The amendment was tabled by the humanist Liberal Democrat peer Lord Avebury and was unopposed by the government. It was agreed in the House of Commons on 6 April 2010,²⁸ just two days before Royal Assent and six days before Parliament was dissolved. In bringing the concept of caste into domestic discrimination legislation for the first time, the ‘caste amendment’ was a huge achievement for Dalit activists. However, it was not the outcome originally hoped for. First, the goal of the Dalit organisations had been to secure an immediate, express prohibition of caste discrimination in the new legislation via the addition of caste as a new (tenth) protected characteristic. Instead, the amendment was a ‘halfway house’ providing government with a power to amend the legislation to cover caste at a future date, but not legislating immediately against caste discrimination. Secondly, caste was conceptualised not as a new characteristic but, in a novel formulation, ‘as an aspect of’ the existing protected characteristic of race. Government refusal to concede either on the need to legislate immediately or to add caste as a new, tenth strand of discrimination, coupled with pressure to secure the successful passage of the Bill through Parliament before dissolution, meant that Dalit groups had little option but to accept a compromise solution. Exercise of the power in s. 9(5)(a) was linked by the government to the outcome of independent research on caste discrimination which was commissioned in March 2010 and published in December 2010. As noted, four main objections to caste discrimination legislation were raised by government and other actors. Each of these is analysed in turn.

²⁸ HC Deb vol 508 col 942 6 Apr 2010.

8.4 Objections to the legal regulation of caste discrimination: lack of evidence

8.4.1 Context: evidence and policy

A key objection to proposals for the legal regulation of caste discrimination was lack of evidence. The arguments were (1) absence of any evidence of caste discrimination in the UK, (2) absence of evidence of caste discrimination in spheres regulated by discrimination law and (3) existence of evidence which was merely ‘anecdotal’ and hence insufficiently credible to justify a change in the law. These arguments were qualified by government assertions of willingness to consider any evidence that became available and to legislate, but only if there was ‘sufficient evidence of a real problem that can be rectified by discrimination legislation’.²⁹

8.4.1.1 ‘No evidence of a problem’

In 2004 and 2005, the government stated that, while it was happy to consider any evidence, it had seen no evidence that there was a particular problem with discriminatory practices against the Dalit community³⁰ or of descent-based discrimination.³¹ The government’s stance was to be inactive, or at best reactive. It was unwilling to commit resources to investigate proactively the existence of caste discrimination in the UK.

²⁹ HL Deb vol 716 col 345 11 Jan 2010.

³⁰ Fiona MacTaggart, Parliamentary Under-Secretary for the Home Office; HC Deb vol 419 col 1602-1603W 1Apr 2004.

³¹ CERD, concluding observations on the UK’s sixteenth and seventeenth reports; UN Doc. CERD A/58/18 (2003) para. 544; Fiona MacTaggart, Parliamentary Under-Secretary of State, Home Office, letter and Memorandum to the Joint Committee on Human Rights on the International Convention on the Elimination of all Forms of Racial Discrimination, 13 January 2005, reproduced in ‘The Convention on the Elimination of Racial Discrimination: Fourteenth Report of Session 2004–05’, Joint Committee on Human Rights; HL 88 (2005), HC 471 (2005) 42.

8.4.1.2 Evidence-Based Policymaking

The ‘evidence’ objection was premised on the principle that policymaking should be ‘evidence-based’ – an ideological position, central to the Labour Government’s political strategy,³² which asserted that policymaking should be driven by information and knowledge of ‘what works’.³³ Evidence-based policymaking (EBPM) is underpinned by normative assumptions such as the objective nature of information and knowledge and the scientific and rational nature of the EBPM approach. As Wells observes:

[t]he notion that policymaking should be ‘evidence-based’ rather than based on unsupported opinion is difficult to refute. However, it also poses a considerable number of normative questions, for instance, how should evidence be collected, what evidence should be used and how should that evidence be used?³⁴

Despite its claims to objectivity, says Wells, the term ‘EBPM’ is used in different ways in the policy and academic worlds and with ‘varying degrees of rigour’.³⁵ Marston and Watts also challenge its neutrality, pointing out that the idea that policy should be based on evidence is not new or particularly controversial, but ‘what can properly count as evidence in policymaking processes *is* contentious’. They identify a hierarchy of what counts as ‘valid knowledge’, with ‘lay forms of evidence’ being placed lower down the hierarchy.³⁶ They also draw attention to formal hierarchies in policy communities as ‘potentially important factors in framing policy problems and

³² P. Wells, ‘New Labour and Evidence-Based Policymaking: 1997-2007’, 1(1) *People, Place and Policy Online* (2007) 22-29, 23.

³³ D. Blunkett, Speech to the ESRC, 2 February 2002, cited in Wells (ibid.), 22.

³⁴ Wells, n 32 above, 23, citing W. Parsons, ‘From Muddling Through to Muddling Up – Evidence Based Policy Making and the Modernisation of British Government’, 17 (3) *Public Policy and Administration* (2002) 43-60.

³⁵ Wells, ibid.

³⁶ G. Marston and R. Watts, ‘Tampering with the Evidence: A Critical Appraisal of Evidence-Based Policymaking’, 3(3) *The Drawing Board: An Australian Review of Public Affairs* (2003) 143-163, 145.

solutions'. Furthermore, 'insiders', such as senior public servants and ministerial advisers, have greater authority in decision-making processes than members of the public, while policymakers 'make complex judgments about the sorts of institutional interests represented in the policymaking process'.³⁷ The Dalits' campaign challenged the assumptions underpinning EBPM by questioning what counts as evidence – which evidence is deemed to constitute the 'truth' and who is considered to be in a position to speak the truth or to judge what is or is not the 'truth'? Moreover, at what point does evidence cease to be 'merely anecdotal', and how much evidence is necessary to establish the existence of a problem requiring policy change and legislative solutions?

8.4.1.3 *Equality Bill consultation*

The Equality Bill consultation process was launched in June 2007. Various Dalit groups submitted written representations.³⁸ In July 2008, in its formal written response to the consultation, the government restated that it had found '*no strong evidence* of such discrimination in Britain, in the context of employment or the provision of goods, facilities or services'.³⁹ It would, however, consult the [EHRC] about monitoring the position.⁴⁰ This statement suggested that such discrimination might occur, but only in contexts beyond the reach of discrimination law and that the evidence was limited. The same document refers to the results of the government's August 2007 'informal survey' on caste discrimination. It asserted that there is no strong evidence of caste discrimination in the UK, in particular in fields regulated by

³⁷ Ibid., 146.

³⁸ See, e.g. DSN-UK, *Submission to the Equalities Review* (London: DSN-UK, 2006); DSN-UK, *Submission to the Discrimination Law Review 2007* (London: DSN-UK, 2007).

³⁹ Cm 7454 (2008), n 16 above, 177 (emphasis added).

⁴⁰ Ibid.

discrimination law, and to the extent that caste was a factor in individual decision-making, anecdotal evidence suggesting that this was a reflection of social or cultural considerations, e.g. choice of marriage partner – which is not a matter for discrimination law.⁴¹ This was a shift from the flat denials of 2003 and 2004, to an acknowledgment that caste discrimination might exist, but only in non-regulated fields, and in any case the evidence was weak. This position was elaborated as the Bill progressed through Parliament.

8.4.2 Commons Committee Stage

At Commons Committee sixth sitting,⁴² Lynne Featherstone MP (Lib Dem) – later to become Equalities Minister in the Conservative-Liberal Democrat coalition government which came to power in May 2010 – moved Amendment 111 to outlaw discrimination based on a person's caste by adding caste as a new protected characteristic to the list of characteristics in what became EQA s. 4.⁴³ She challenged the government's claim that it had found no evidence of caste discrimination, arguing that absence of evidence did not necessarily mean absence of discrimination. The Bill, she said, had been evolved largely on the basis of engagement with established lobby groups, which might not include those who experience caste discrimination. She asked what efforts had been made to seek evidence of such discrimination.⁴⁴ If the government were not persuaded of the existence of discrimination, she argued for

⁴¹ Ibid., 183-184.

⁴² Commons Committee Stage ran over twenty sittings between 2 June and 7 July 2009. Committee Stage involves line-by-line scrutiny by a Bill Committee (a smaller group of MPs), following which government may decide to introduce amendments at Report stage. See <http://www.publications.parliament.uk/pa/cm200809/cmpublic/cmpbequality.htm> for Equality Bill Committee, including debates and Bill Committee members (visited 6 February 2013).

⁴³ HC Equality Bill Committee Deb col 176 11 Jun 2009; amendment at <http://www.publications.parliament.uk/pa/cm200809/cmbills/085/amend/pbc0851106m.91-97.html> (visited 6 February 2013).

⁴⁴ Lynne Featherstone; HC Equality Bill Committee Deb col 177 11 Jun 2009.

the inclusion of an enabling clause to ‘protect against a future where we discover the evidence’, ‘rather than miss the opportunity of a generation to outlaw a potential form of discrimination that flies in the face of everything that the Bill tries to do’.⁴⁵ The government’s response was dismissive. According to Vera Baird QC, Solicitor-General, it was not ‘a claim’ but ‘the fact’ that there was no evidence of caste discrimination occurring in any regulated fields. Baird maintained that, while government was ‘always willing to consider whether there is a case for legislating on caste discrimination’, there was insufficient evidence to suggest ‘that caste discrimination is a significant problem domestically’ or to justify protecting against such discrimination:

[A]part from the odd piece of anecdotal evidence, none of which we have been able to drive down to a factual basis [there is] still no evidence... that the territory which can be covered by anti-discrimination legislation is impacted upon by caste at all.⁴⁶

She further stated that government would have been very willing to carry on from its August 2007 ‘scoping survey’ to a ‘real investigation if there was the evidence to justify such a step’. Officials from the CLG and the Government Equalities Office (GEO) (the Department sponsoring the Bill) were continuing to monitor the situation and to meet representatives of interested parties. She added: ‘[T]he concern was rightly raised, *but I hope that it has now been put to rest*’.⁴⁷ On assurance that government was actively monitoring the situation, Amendment 111 was withdrawn.

⁴⁵ Ibid. See also Mark Harper, *ibid.*, col 178.

⁴⁶ Vera Baird, *ibid.*, col 178.

⁴⁷ *Ibid.*, col 179 (emphasis added).

8.4.3 ACDA Report: November 2009

In November 2009, ACDA published *Hidden Apartheid – Voice of the Community*, described as a scoping study and based on research conducted between August and October 2009.⁴⁸ On the question whether caste discrimination occurred in the UK in fields covered by discrimination law, 58% of respondents (71% of whom self-identified as Dalits) claimed to have experienced it in a regulated field; 37% stated that this had occurred on several occasions.⁴⁹ 85% believed there was no legislation in place to protect victims of caste discrimination, while 28% said that as children (defined as under twelve years of age) they had been subjected to verbal abuse or threatening behaviour based on caste. The study received national and international publicity,⁵⁰ but the government dismissed the evidence as anecdotal and insufficiently credible to justify amending the Bill to add caste as a protected characteristic.⁵¹

8.4.4 Commons Report Stage and Third Reading

8.4.4.1 *Commons Report Stage*

By the time the Bill reached Commons Report stage,⁵² three new amendments on caste had been tabled.⁵³ Two added it as a new characteristic to the list of protected characteristics, both of which included a definition of ‘persons having the protected

⁴⁸ ACDA, *Hidden Apartheid*, n 6 above.

⁴⁹ *Ibid.*, 2.

⁵⁰ See, e.g. S. Jones, ‘Asian caste discrimination rife in UK, says report’ *The Guardian*, 11 Nov 2009; ‘Dalits facing caste discrimination in UK: study’, *The Indian Express*, 12 November 2009.

⁵¹ Contemporaneous notes of meeting attended by two Labour MPs, ACDA, the author and a government minister, 30 November 2009, on file with author. See also Baroness Thornton; HL Deb vol 717 col 1349 2 Mar 2010; Vera Baird; HC Deb vol 508 col 928 6 Apr 2010.

⁵² Commons Report stage and Third Reading took place on 2 December 2009; HC Deb vol 501 col 1111-1233 2 Dec 2009. At Report stage the government may introduce amendments; issues not voted on at Committee Stage are returned for discussion and the whole of the House may table further amendments.

⁵³ See <http://www.publications.parliament.uk/pa/cm200910/cmbills/005/amend/pbc0050212m.106-112.html> at (visited 30 September 2012).

characteristic of caste’.⁵⁴ The lengthier of these, moved by Jeremy Corbyn MP (Lab) and Rob Marris MP (Lab) and drafted by the author, was the first attempt to define caste for legislative purposes in the UK. Sub-clause (1) defined caste as including *jati* and *biraderi* (the draft commenced with *varna* but this was dropped as unnecessarily complex by the MPs moving the amendment) and a person having the protected characteristic of caste as a ‘member of a caste group found within a hierarchical group-based system of social stratification, where both membership and group and individual status are hereditary, ascribed and permanent’.⁵⁵ The third amendment was an ‘enabling’ provision for the characteristic of caste to be added to the legislation by ministerial order at a future date as a new protected characteristic.⁵⁶ The common feature of these amendments was the formulation of caste as a separate protected characteristic. It was government’s rejection of this approach which resulted, ultimately, in the subsuming of caste within the protected characteristic of race, as this chapter shows later.

Mark Harper (Con) was sceptical of the number of victims of caste discrimination cited by ACDA and queried whether their research was ‘robust’ enough to justify their claims.⁵⁷ Dr. Harris (Lib Dem) said that it was unsurprising that the government had found no problem with caste discrimination, because they only consulted nineteen organisations in August 2007, ‘a figure that is narrow by anyone’s terms,

⁵⁴ The shorter amendment read as follows: ‘In relation to the protected characteristic of caste (a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular caste (b) a reference to persons who share a protected characteristic is a reference to a person of the same caste’; new clause 10 – Caste, moved by Lynne Featherstone MP (Lib Dem), Dr Evan Harris MP (Lib Dem), Lynne Jones MP (Lab) and John McDonnell MP (Lab); HC Deb, n 54 above, 1176-1177.

⁵⁵ New clause 43 – Caste (No.3); HC Deb, *ibid.*, col 1178.

⁵⁶ New clause 30 – Caste (No.2), moved by John McDonnell MP (Lib Dem), Jeremy Corbyn MP (Lab), David Drew (Lab), Clare Short MP (Indep); HC Deb, *ibid.*, col 1177.

⁵⁷ Mark Harper; HC Deb, *ibid.*, col 1185-1186.

[and] all of which were organisations that condone the caste system'.⁵⁸ The need for evidence was challenged by Marris. Caste-based discrimination was wrong, and 'if we recognise it as such, we should legislate; we should not wait for the evidence'. He called for caste discrimination to 'form a tenth strand under the Bill',⁵⁹ and asked government to confirm that, if research demonstrated a problem of such discrimination in the UK, it would introduce legislation promptly.⁶⁰

8.4.4.2 *Commons Third Reading*

Moving the Bill for Third Reading on 2 December 2009, the Solicitor-General unexpectedly announced that caste discrimination could be banned, if there was need, 'through measures in the other place' if the research commissioned by government from the Equality and Human Rights Commission could be 'completed quickly'.⁶¹ The announcement that research had been commissioned from the EHRC was surprising given, first, the government's insistence that there was no evidence to justify expanding its 2007 'scoping survey' into a 'real investigation' and second, the lack of EHRC engagement hitherto in the growing public debate on the legal regulation of caste discrimination.

8.4.5 Enter the Equality and Human Rights Commission

In August 2009, a Freedom of Information Act (FOIA) request submitted by ACDA had revealed that, as at that date, no research had been carried out by government on

⁵⁸ Dr. Harris; HC Deb, *ibid.*, col 1196; Jeremy Corbyn; HC Deb, *ibid.*, col 1185.

⁵⁹ Rob Marris; HC Deb, *ibid.*, col 1203.

⁶⁰ Marris, *ibid.*

⁶¹ Vera Baird; HC Deb, *ibid.*, col 1226.

the issue of caste discrimination since the 2007 ‘scoping survey’.⁶² Following the Solicitor-General’s announcement, a further FOIA request asked the EHRC for details of the research she referred to and of any other research on caste commissioned by the Solicitor-General or any other government department in the past five years.⁶³ The EHRC responded thus:

The Commission has not been commissioned to carry out any research on caste and discrimination in the UK by the Solicitor-General or any Government Department in the last five years. The Commission is not currently undertaking work on this issue and is not currently proposing to undertake research on this issue in future. Consequently, we do not have a scope nor response time for such a research [].⁶⁴

The EHRC further stated that it understood caste discrimination to be discrimination based on descent, occurring in African communities as well as in the Hindu community, and that there was limited evidence as to its effects on equality of opportunity.⁶⁵ Like the former Commission for Racial Equality (CRE), the EHRC was reluctant to consider caste discrimination as a domestic issue.⁶⁶ Its position was contradictory. It believed there to be limited evidence of caste discrimination in regulated fields (despite by its own admission having carried out no research in the area) and it further believed that caste discrimination was already covered as a form of descent-based discrimination by existing law on race and religious discrimination. Nonetheless, it opposed a statutory prohibition of caste discrimination to reflect this

⁶² Letter, A. Ahmed (CLG) to P. Lal (ACDA), 14 August 2009; *Hidden Apartheid*, n 4 above, 57.

⁶³ Letter, P. Lal (ACDA) to EHRC, 5 December 2009; copy on file with author.

⁶⁴ Letter, O. Varney (EHRC) to P. Lal (ACDA), 6 January 2010; copy on file with author.

⁶⁵ Letter, 6 January 2010, *ibid*.

⁶⁶ Despite its recognition since 1996 as a form of racial discrimination in international human rights law, caste discrimination was not taken up by the CRE. In the 1990s and 2000s, calls for the legal regulation of caste discrimination in the UK failed to capture the attention of parliamentary and governmental actors and policymakers, or of discrimination and equality industry actors. Caste was not addressed at the CRE Race Convention 2006; see <http://webarchive.nationalarchives.gov.uk/20060820160817/cre.gov.uk/> (visited 30 September 2012).

position, because of unspecified ‘unintended impacts’ on unspecified ‘other groups’.⁶⁷

8.4.6 Lords Second Reading

At Lords Second Reading,⁶⁸ Baroness Flather (Lib Dem) argued that caste discrimination ‘blights people’s lives in the UK in the same way as all other discrimination’ and called for the Bill to tackle caste discrimination and ‘find a way to root out this dreadful practice in this country’.⁶⁹ The Right Reverend the Lord Harries of Pentregarth (former Bishop of Oxford) (Lib Dem) added that discrimination against transgender and transsexual people had been prohibited on the basis of no more compelling evidence.⁷⁰ The government reiterated that much of the ACDA study relied on ‘anecdotal evidence’, so further work was needed to test the study’s assertions.⁷¹

8.4.7 Lords Committee Stage

Prior to Lords Committee Stage,⁷² ACDA devoted considerable effort to briefing those peers willing to table, or support, amendments bringing caste discrimination into the Bill. Seven amendments were submitted by Lords Avebury and Harries and the Earl of Sandwich, to be moved in Committee.⁷³ Amendment 5 sought to add caste to the list of protected characteristics in clause 4. Amendment 17 – in similar

⁶⁷ Letter, 6 January 2010, n 64 above.

⁶⁸ Lords First Reading was on 3 December 2009 and Second Reading on 15 December 2009; HL Deb vol 715 col 842 3 Dec 2009; HL Deb vol 715 col 1404-1418; 1432-1516 15 Dec 2009.

⁶⁹ HL Deb vol 715 col 1458, 1460 15 Dec 2009.

⁷⁰ Lord Harries; HL Deb vol 715 col 1453 15 Dec 2009.

⁷¹ Baroness Royall; HL Deb vol 715 1514 15 Dec 2009 (emphasis added).

⁷² Lords Committee Stage ran over six sittings between 11 January and 9 February 2010.

⁷³ House of Lords, [Revised Marshalled List of Amendments to be Moved in Committee as at 8 January 2010](http://www.publications.parliament.uk/pa/ld200910/ldbills/020/amend/ml020-ir.htm), at <http://www.publications.parliament.uk/pa/ld200910/ldbills/020/amend/ml020-ir.htm> (visited 30 September 2012).

terms to the amendment tabled at Commons Report stage by Marris and Corbyn – sought to define caste as a new protected characteristic, but minus the references to *jati* and *biraderi*, which were considered unnecessarily legalistic.⁷⁴ Amendment 18 provided an enabling clause to be inserted allowing caste to be added to the list of protected characteristics in the future, by ministerial order.⁷⁵ Other amendments sought to include caste as a relevant protected characteristic for combined discrimination claims, indirect discrimination claims, to prohibit direct and indirect discrimination based on caste and to prohibit harassment based on caste.

8.4.7.1 Lord Lester's amendment: 'descent' as an additional limb of 'race'

In a significant development, an amendment was tabled by the Liberal Democrat human rights lawyer Lord Lester of Herne Hill QC (Amendment 16) which, instead of formulating caste as a new protected characteristic, sought to add descent to the definition of the protected characteristic of race in clause 9, so that the under the rubric of race the Bill would prohibit unlawful discrimination, harassment and victimisation based on descent as well as colour, nationality and ethnic or national origin.⁷⁶ The subsuming of descent within race represented a departure from the amendments seeking to add caste as a new protected characteristic and opened the way for the formulation which was eventually adopted, which provides for caste to be 'an aspect of' race.

⁷⁴ Amendment 17, new clause 'Caste', *ibid.*

⁷⁵ Amendment 18, new clause 'Caste: Responsibilities of Ministers of the Crown', *ibid.*

⁷⁶ Revised List of Amendments, n 73 above.

8.4.7.2 *Lords Committee Stage: day one*

On the first day of Lords Committee stage⁷⁷ a Joint Statement, signed by fourteen groups and organisations working with or representing Dalits, was submitted to the government calling on it to provide protection for victims and future victims of caste discrimination in the UK.⁷⁸ An extensive debate on caste took place, focussing particularly on the lack of evidence argument.⁷⁹ Lord Avebury, following the Solicitor-General's reference to government consultation with the Hindu Forum of Britain (HFB) and the Hindu Council UK (HCUK), argued that these organisations '[did] not speak for the lower castes and the Dalits'. The government had commissioned no research of its own at all.⁸⁰ It eventually became apparent that, contrary to the Solicitor-General's statement, no research had yet been commissioned, although the government stated its intention to do so.⁸¹ The government reiterated that it was not against legislating, but would not do so 'without sufficient evidence of a real problem that can be rectified by discrimination legislation'.⁸² Lord Lester challenged the preoccupation with research, arguing that even if there was just one case of caste discrimination, it should be unlawful because it was wrong in principle: 'All we have to do... is to make clear [in the Bill] that discrimination based on your ethnic descent is included, which covers a great deal of what we call caste discrimination.'⁸³ Why, he asked, was research needed 'into the scientific extent of the problem when all we are talking about is one or two words in the Bill?'⁸⁴ Baroness Thornton responded that Lord Lester was 'too much of an

⁷⁷ Lords Committee Stage ran over six sittings between 11 January - 9 February 2010.

⁷⁸ ACDA, Demonstration Flyer, 11 January 2010; Joint Statement, 11 January 2010 (copies on file with author).

⁷⁹ See e.g. Lord Harries, HL Deb vol 716 col 335 11 Jan 2010.

⁸⁰ Lord Avebury, *ibid.*, col 332.

⁸¹ Baroness Thornton, *ibid.*, col 344.

⁸² *Ibid.*, col 345.

⁸³ Lord Lester, *ibid.*, col 344.

⁸⁴ *Ibid.*

experienced lawyer to say that one or two words in a Bill are insignificant. These words are very significant'.⁸⁵ Lord Avebury lamented that time had been wasted⁸⁶ but nevertheless he was prepared to give the government 'the benefit of good faith' because he believed they were 'moving in the right direction', and he therefore withdrew his amendment (amendment 5).⁸⁷ The other amendments on caste – including Lord Lester's – were not moved.

8.5 Objections to the legal regulation of caste discrimination: caste covered by existing law

8.5.1 Government: caste discrimination already unlawful

At Commons Second Reading, Harriet Harman MP (Lab) (Leader of the House and Minister for Women and Equality) was asked whether it was possible that, under the Bill, 'discrimination by caste and descent would be absolutely illegal'.⁸⁸ The minister thought that such discrimination was already 'outwith the law'⁸⁹ – although she did not explain how. This was questioned by Patricia Hewitt MP (Lab), who pointed out that existing UK law is not as explicit as Australian law, which defines racial discrimination in identical terms to ICERD.⁹⁰ She cited the belief of Caste Watch UK 'that current law does not adequately protect those in South Asian, or indeed, other communities who find themselves discriminated against on those grounds'.⁹¹

⁸⁵ Baroness Thornton, *ibid.*, col 344.

⁸⁶ Lord Avebury, *ibid.*, col 348.

⁸⁷ *Ibid.*, col 348.

⁸⁸ Jeremy Corbyn; HC Deb vol 492 col 56211 May 2009.

⁸⁹ Harriet Harman, *ibid.*, col 562.

⁹⁰ Patricia Hewitt, *ibid.*, col 577; see Racial Discrimination Act 1975 (Australia), section 9(1).

⁹¹ Hewitt, *ibid.*

8.5.2 ICERD, caste and UK discrimination law

8.5.2.1 *Lord Lester and descent*

During Second Reading in the Lords on 15 December 2009, Lord Lester raised the possibility of addressing caste discrimination by reference to ICERD, arguing that race should be ‘interpreted and applied in accordance with ICERD, by which the UK is internationally bound’.⁹² Lord Wallace of Tankerness pointed out that if the definition of race in the Bill could include descent, ‘then possibly [ICERD] might cover the question of discrimination by caste’.⁹³ On 16 December 2009, the *JFS* judgment examined descent in the context of racial discrimination, opening the door to arguments that caste is subsumed within ethnic origins in UK discrimination law by virtue of the descent aspect of ‘ethnic’.⁹⁴ By the time the Bill reached Lords Committee stage, Lord Lester had tabled his amendment adding descent to the definition of race in the Bill,⁹⁵ stating ‘I believe that there is a problem [with transnational caste discrimination that applies in this country as well as elsewhere] and that it needs to be covered by a measure dealing with racial discrimination’.⁹⁶ Explaining the omission of descent in 1976 from the RRA definition of racial grounds, Lord Lester stated that the RRA drafters had regard to the definition in ICERD, which he described as the source of the phrase ‘colour, race or ethnic or national origins’ (with nationality being added later). Descent was not included but it was ‘perfectly plain’ that ‘ethnic descent was included within the concept of ethnicity because the concept of ethnicity is about your birthright, where you have come from and who your parents and grandparents were’, i.e. ‘what your origins

⁹² Lord Lester; HL Deb vol 715 col 1418 15 Dec 2009. This was presumably a reference to CERD’s interpretation of descent in ICERD as including caste.

⁹³ Lord Wallace, *ibid.*, col 1504-1505.

⁹⁴ *R (on the application of E) (Respondent) v The Governing Body of JFS and the Admissions Appeal Panel of JFS and others (Appellant)* [2009] UKSC 15; see Chapter 7 of this thesis.

⁹⁵ Revised List of Amendments, n 73 above.

⁹⁶ Lord Lester; HL Deb vol 716 col 336 11 Jan 2010.

were and what your descent was’.⁹⁷ Although the inclusion of descent in the RRA as a separate category was deemed unnecessary at the time, now, however, Lord Lester asked the government to clarify whether and to what extent it considered caste discrimination ‘capable of falling within the concept of race as it stands’.⁹⁸ Calling up the principle of the presumption of compatibility – whereby legislation which postdates the ratification of an unincorporated Treaty, where the meaning is ambiguous (i.e. capable of a meaning which either conforms or conflicts with the Treaty obligation), should be construed consistently with the Treaty if it is reasonably capable of bearing such a meaning⁹⁹ – he argued that if the question was to be litigated, English courts would necessarily have to have regard to ICERD and the descent category ‘because we are bound by that Convention and by an obligation to give effect in domestic law to the definition in the Convention’, in which case ‘why not make it clear in the Bill, either by including the word “caste” or “descent” so that we do not have to have litigation up to the Supreme Court to decide a fairly obvious question?’.¹⁰⁰ He argued that if caste is covered by ICERD through descent, if the UK is bound by ICERD and if ICERD must be taken into account by UK courts in interpreting domestic law, the government should make a *Pepper v Hart* statement¹⁰¹ to the effect that descent and (through descent) caste are subsumed within the ethnic origins aspect of race, in which case ‘there should be no problem’

⁹⁷ Ibid., col 336-337.

⁹⁸ Ibid., col 337.

⁹⁹ See *Garland v British Rail* [1983] 2 AC 751 (HL) 771A-C; S. Fatima, *Using International Law in Domestic Courts* (Oxford: Hart, 2005) 296-307.

¹⁰⁰ Lord Lester, n 96 above, cols 337-338.

¹⁰¹ Lord Lester, *ibid.*, col 338. In *Pepper v Hart* [1993] A.C. 593 the House of Lords held that (1) the rule whereby reference to parliamentary material is prohibited in questions of statutory interpretation would be overturned; (2) where legislation is obscure or ambiguous, reference to statements by a minister would be allowed, where such statements were sufficiently clear, and (3) this did not constitute a breach of parliamentary procedure and thus did not infringe the Bill of Rights 1688.

in embodying this understanding in statutory language and accepting either his own or Lord Avebury's amendment.¹⁰²

8.5.2.2 *Government reluctance to entertain new categories*

The government's view was that 'current discrimination law may already cover some aspects of caste discrimination where it can be shown that the active discrimination was grounded in race or religious discrimination' and that 'some victims of caste discrimination may already be able to seek redress under existing laws' – although 'the extent to which caste-related issues are covered by existing laws has not been tested in the courts'.¹⁰³ The argument was not entirely clear, but the government appeared to be saying that some cases of caste discrimination might be actionable under existing law, if subsumed by race or religious discrimination but not if based on caste as a *sui generis* ground of discrimination. This mirrored its position in 2004 that 'caste-based discrimination would be unlawful under current legislation *if it could also be argued that the discrimination was also based on colour, race, nationality or ethnic or national origin*'.¹⁰⁴

8.5.2.3 *EHRC: support for descent but opposition to caste*

By early January 2010, the EHRC's position was that caste discrimination was discrimination based on descent, which it believed was already covered by existing international, European and UK law on race and religious discrimination. As explained above, for reasons which were not clear, the EHRC considered that including a specific prohibition of *caste* discrimination 'may have unintended

¹⁰² Lord Lester, n 96 above, cols 338, 347.

¹⁰³ Baroness Thornton; HL Deb vol 716 col 344-345 11 Jan 2010.

¹⁰⁴ HC Deb vol 419 col 1602-3W 1 Apr 2004.

impacts on other groups’ (although it was not clear which groups the EHRC had in mind).¹⁰⁵ In its Lords Committee Stage Briefing the EHRC expressed its support for the amendment to include descent in the definition of race but its opposition to an express prohibition of caste discrimination, on the grounds that it considered ‘existing provisions [in the Bill] related to discrimination on the basis of religion or belief are sufficient to prohibit caste discrimination’.¹⁰⁶ The EHRC gave two reasons for supporting a descent amendment but not a caste amendment. First, it argued that caste discrimination was a form of descent-based discrimination as prohibited by ICERD, to which the UK is a signatory, and that – following *JFS* – descent fell under the definition of race in existing UK law within the ambit of ‘ethnic’ (although the point in *JFS* was obiter only); while descent was not expressly included in the definition of race in the Bill, race must be interpreted so as to prohibit discrimination based on descent. Descent was ‘also more consistent with international human rights law and jurisprudence’. Second, like the government, it argued that descent included caste but was also ‘broader, neutral and sufficiently flexible’ to include other (unspecified) ‘new and emerging characteristics on which discrimination may be based’. However, unlike the government, the EHRC saw this as an advantage, not a disadvantage.¹⁰⁷

8.5.2.4 *Race, caste and the Equality Act 2010*

ICERD prohibits *racial discrimination*, defined as discrimination based on race, colour, descent or national or ethnic origin. RRA 1976 prohibited discrimination on

¹⁰⁵ Letter, 6 January 2010, n 64 above.

¹⁰⁶ EHRC, *Lords Committee Stage Briefing*, 11 January 2010; <http://www.equalityhumanrights.com/legal-and-policy/equality-act/equality-bill-parliamentary-briefings/> (visited 28 September 2012).

¹⁰⁷ Ibid.

racial grounds, defined as discrimination based on race, colour, nationality or national or ethnic origin (but not descent). In both cases race is a subset of a wider umbrella category. In the case of the EQA, the *chapeau* is race, and s. 9(5)(a) provides for caste to be an aspect (i.e. a subset) of race. The EHRC's argument that ICERD prohibited caste discrimination as a form of descent discrimination was correct insofar as CERD has interpreted descent to include caste, but ICERD contains no express reference to caste and no express prohibition of caste-based discrimination. Under ICERD, descent is not a sub-category of race; instead, both descent and race are sub-categories of racial discrimination. Moreover, it is within the sub-category of descent rather than the sub-category of race (or ethnic origin) that CERD has addressed caste. Therefore, the EHRC's argument that under international law caste discrimination 'is descent-based discrimination which falls under the definition of "race"' was technically incorrect.

Although it was clear to the present author and others at the time that international human rights law regarded caste-based discrimination as a form of racial discrimination based on descent (rather than race), given the government's position and the time constraints, the pragmatic approach, expressed by certain parliamentarians, to obtaining an enabling provision on caste in the Bill was to accept the path of least resistance and to agree for caste to be subsumed as a subset of race, without entering into the international controversy and theoretical arguments about whether caste was or was not a form of racial discrimination as treated by CERD.

8.5.3 Leaving the matter to the courts

The logical consequence of the argument that caste was theoretically already covered by existing discrimination law was that a test case was required to establish the principle in the courts and thereby its practical deterrent effect. The first, and most high-profile, UK case involving caste discrimination allegations, *Begraj and Begraj v Heer Manak Solicitors and others*, came before the Employment Tribunal in August 2011. On 5 February 2013 the case collapsed after the judge recused herself. The case is discussed in Chapter 9. Reasons for the lack of cases alleging caste discrimination hitherto may include (1) lack of understanding of caste (cited by a trade union official involved in an unfair dismissal case in south London involving such allegations; the case was resolved internally)¹⁰⁸ or (2) the absence of express provisions, which deters complainants from coming forward and advisors from taking on cases, as there are no obvious grounds on which to base a claim; instead, claimants may seek to bring cases on other grounds such as religious discrimination, as occurred in the *Saini* and *Sahota* cases discussed in Chapter 7 of this thesis. This is a weakness of the individual rights model of legislation, where it is left to individuals deprived of their rights to enforce the law.

The difficulty in testing allegations of caste discrimination in the courts, ‘if there is no basis on which to do so’, was raised at Commons Report stage,¹⁰⁹ while at Lords Committee stage the absence of a ‘clear remedy in law’ was suggested as one reason

¹⁰⁸ Telephone interview with UK trade union official, 23 November 2006. Interviews were conducted and interview notes stored in accordance with Manchester Metropolitan University’s Guidelines on Good Research Practice. Interviewees were granted confidentiality and anonymity. In the United States a civil lawsuit alleging discrimination *inter alia* on grounds of caste was filed in 2003 by an engineering professor at the University of Michigan. The applicant failed to establish a *prima facie* case of discrimination and the claim was dismissed on appeal; *Mazumder v. University of Michigan* [2006] WL 2310822 (6th Cir.(Mich.)), [2006] Fed. App. 0570N; S. Roy, ‘Indian American Files Lawsuit Alleging Caste Bias’ *Pacific News Service Civil Liberties Digest*, 9 July 2003.

¹⁰⁹ Dr Harris; HC Deb vol 501 col 1196 2 Dec 2009.

why caste discrimination cases had not been brought to the attention of the ‘proper authorities’.¹¹⁰ Robin Allen QC argued that it would be unlikely for a caste discrimination case to be defended on the basis that caste-based distinctions were lawful and were outside existing law on race and religious discrimination.¹¹¹ Advisors ‘should be confident in characterising [caste discrimination] as merely (sic) a specific form of race and religious discrimination’, he suggested.¹¹² Yet, as Lord Avebury pointed out, ‘since there is no specific mention of caste in our law, it would be a chancy and expensive business for anybody to try this out in the courts’.¹¹³

*If we leave it to a marginalised people to come forward with legal cases that will establish their right to protection, that is not a policy that should be accepted by a Parliament that has always stood up for human rights.*¹¹⁴

While the Dalit organisations supported the idea of a test case to establish the application of existing law to caste discrimination, their primary demand was for caste to be included in legislation as a new protected characteristic.

8.6 Objections to the legal regulation of caste discrimination: proliferation

8.6.1 ‘Rationing’ protection

Grounds-based approaches to discrimination involve rationing protection from discrimination to members of groups defined along grounds-related lines.¹¹⁵ As

¹¹⁰ Lord Harries; HL Deb vol 716 col 334 11 Jan 2010.

¹¹¹ R. Allen, ‘Tackling Caste and Descent-Based Discrimination – Jews, Hindus and Others’, 38 *Discrimination Law Association Briefing* (November 2009) 10-12.

¹¹² *Ibid.*, 12.

¹¹³ Lord Avebury; HL Deb vol 717 col 1345 2 Mar 2010.

¹¹⁴ Lord Avebury; HL Deb vol 716 col 333 11 Jan 2010. Lord Avebury’s argument was vindicated in a case decided by the Employment Tribunal in November 2012, in which a complaint of caste-based racial (ethnic origins) discrimination did not succeed (1) because no order had yet been made extending s. 9 EQA so as to provide for caste to amount of itself to an aspect of race (2) because the complainant accepted that movement within the caste to which he and the respondents belonged was possible, hence the issue was one of status (or ‘class’) within the same caste; *Naveed v Aslam*, ET Case No. 1603968/2011 (unreported).

Chapter 7 explained, the grounds-based approach is vulnerable to calls to expand the ‘protectorate’ (those protected by reason of possessing a protected characteristic) by adding more characteristics or by making the list non-exhaustive, as well as to calls for expansive interpretation of the existing list.¹¹⁶ In the UK, for example, prior to 2003, sex and race discrimination legislation ‘came under pressure to accommodate’ discrimination based on sexual orientation and on religion – characteristics not protected at that time.¹¹⁷ As McColgan points out, ‘the categories to which things, or people, are assigned for the purposes of social or, indeed, legal organisation’ are not ‘preordained’.¹¹⁸

8.6.2 Caste as a new protected characteristic

One explanation for legislative and judicial reluctance to admit claims based on ‘new’ grounds is that this will lead to the ‘proliferation of the protectorate’¹¹⁹ – the creation of ever more classes of protected groups ‘governed only by the mathematical principles of permutation and combination’.¹²⁰ Proliferation was raised several times during the Bill’s passage through Parliament. At Commons Committee stage, Featherstone made the case for including caste as a new protected characteristic on introducing her Amendment to outlaw discrimination based on a person’s caste:

My understanding is that the caste system makes distinctions between different sections of society by dividing communities into rigid social groups determined by birth and/or

¹¹⁵ McColgan, ‘Reconfiguring Discrimination Law’, *Public Law* (2007) Spr, 74-94.

¹¹⁶ *Ibid.*, 75.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*, 86.

¹¹⁹ O. Fiss, ‘The Fate of an Idea Whose Time Has Come: Antidiscrimination Law in the Second Decade after *Brown v Board of Education*’, 41 *University of Chicago Law Review* (1974) 742-773, 748.

¹²⁰ *Degraffenreid v General Motors*, 413 F. Supp. 142 (1976), cited in McColgan, n 115 above, 80; N. Lacey, ‘From Individual to Group’ in B. Hepple and E. Szyszczak (eds.), *Discrimination: The Limits of the Law* (London: Mansell, 1992) 99-124, 118.

occupation. That type of behaviour is exactly what the Bill... seeks to outlaw, so we ought to give serious consideration to whether caste-based discrimination should be specifically outlawed by making caste a protected characteristic.¹²¹

The Solicitor-General retorted that the Amendment invited her to add caste to the list of characteristics ‘speculatively’, but she did not propose ‘to accede to that invitation’.¹²²

The case for adding caste was always going to be compounded by a lack of understanding, outside the sub-continent, of caste both as an ideological construct and as a *sui generis* ground of discrimination. Mark Harper MP (Con) implied that caste was a newly – gratuitously – invented characteristic:

Part of the point of the Bill is to codify and simplify the law. If we go through the population, pick out lots of different groups and invent a new protected characteristic for every single one of them, there is a danger that we will make the whole thing very complex.¹²³

He suggested that if evidence became available, caste could be subsumed within race, rather than create ‘yet another protected characteristic’.¹²⁴

At Commons Report stage, the proliferation argument resurfaced. As explained above, three amendments tabled at Report all sought to add caste as a new, separate and protected characteristic.¹²⁵ Harper’s comments illustrate the difficulty for many of the very concept of caste and discrimination based on caste and the inclination to seek to equate it with a more familiar characteristic rather than treating it as a hitherto unacknowledged ground of discrimination. Harper observed that ‘some had

¹²¹ Lynne Featherstone; HC Deb vol 493 col 177 11 Jun 2009.

¹²² Vera Baird, *ibid.*, col 178.

¹²³ Mark Harper: HC Deb vol 493 col 177-178 11 Jun 2009.

¹²⁴ *Ibid.*

¹²⁵ See n 53, above.

proposed a new protected characteristic and some propose adding caste discrimination to the race discrimination provisions’, before adding that it would help ‘*if they explained what other type of discrimination caste discrimination is most akin to*’. One of the central purposes of the Bill, he argued, was to bring together a number of strands of discrimination and simplify legislation on them so that it could be enforced more effectively in practice. There may be a good case for including caste as a protected characteristic, but there may also be a case for including a lot of other things. If there was a very large list of protected characteristics, this area of law would become ever more complex.¹²⁶

8.6.3 New characteristic, new subset, or neither

At Lords Committee Stage, amendments were tabled by Lords Avebury and Harries, to add caste as a new protected characteristic, and by Lord Lester, to add descent to race.¹²⁷ During the debate on caste as a new characteristic, Lord Mackay of Clashfern reminded the House that the intention of the legislation was to simplify and consolidate equality law and that any decision to extend the list of protected characteristics must be taken seriously. If there was a good case for caste and descent, they should be taken into consideration, but the list could not be extended indefinitely and other characteristics might also have a good case.¹²⁸

8.6.3.1 *Government objections to expanding the protected characteristics*

The government objected to Lord Lester’s descent amendment because it would add a new ground to the list. Moreover, through interpretation, descent could cover

¹²⁶ Mark Harper: HC Deb vol 501 col 1185 2 Dec 2009.

¹²⁷ See n 73, above.

¹²⁸ Lord Mackay; HL Deb vol 716 col 341 11 Jan 2010.

characteristics not hitherto considered for protection. It could ‘amount to a significant addition to the strand-based structure of equality law and, moreover, introduce *social or class-based elements* directly into protected characteristics’ and therefore ‘may be an unacceptably high-risk way of dealing with the issue without proper examination of all its implications’.¹²⁹ The government also opposed the inclusion of caste as a new characteristic on the grounds that ‘many people may not even know what caste means or have a different understanding of it as a concept’:

As anyone who is aware of the nature of caste will say, certain unique aspects of it mean that it is not simply a case of adding “caste” to a list of protected characteristics and anyone instantly knowing what it means.¹³⁰

Dismissing the wording of Amendment 17 (drafted by the author),¹³¹ Baroness Thornton argued that ‘the definition of caste requires great thought to ensure that it is correct and that the coverage is appropriate if we decided that caste should be a protected characteristic under discrimination legislation’. In particular, she objected to the description of caste status as permanent, arguing that ‘for a woman, it can change on marriage to someone of a different caste. The amendment would not cover such people’.¹³² This argument – that ‘caste is somehow more fluid than other protected categories’ – was dismissed as ‘specious’ by Cambridge academic Priyamvada Gopal: ‘Race is not a biologically fixed category either, but likewise a historically constructed and shaped construct’, yet it is ‘rightly seen as a category to be protected from discrimination’. Caste as a category, argued Gopal, is not ‘somehow less recognisable’ because a woman’s caste can (sometimes) change upon

¹²⁹ Baroness Thornton: HL Deb vol 716 col 345 11 Jan 2010 (emphasis added).

¹³⁰ Baroness Thornton, *ibid.*

¹³¹ See n 72 above.

¹³² Baroness Thornton, n 129 above. Alteration of caste status for women pursuant to inter-caste marriage is not automatic; see Chapter 1 of this thesis.

marriage.¹³³ The minister argued that there was insufficient time to arrive at what, to government, would be a suitable definition of caste as a new characteristic. For these reasons she was also opposed to committing (via an enabling power) to add caste as a new, separate and protected characteristic in the future.¹³⁴

8.6.3.2 *The solution: subset rather than new characteristic*

The idea of incorporating caste as a subset of another characteristic, rather than as a new protected ground, appears to have taken root following the debate at Lords Committee stage on 11 January 2010.¹³⁵ At the meeting of 4 February 2010, although the inclusion of caste as an independent characteristic was raised, debate coalesced around the formulation of descent (or caste) as a sub-category of race, a formulation which appeared to be attractive to the government and to some of the parliamentarians present. This was the approach adopted in the amendment tabled by Lord Avebury at Lords Report Stage. By the time the Commons came to consider the Lords' amendments, the government appeared to have abandoned any idea of adding caste as a new, protected ground – rather than 'inventing a new protected characteristic', categorisation of caste as a subset of another characteristic, and persons having the protected characteristic of caste as a 'subset of persons', was established as the acceptable solution, while race had emerged as the only viable 'legal home' for caste.¹³⁶

¹³³ P. Gopal, 'Dominating the Diaspora', *Himal Southasia*, April 2010, available at <http://himalmag.com/component/content/article/135-.html> (visited 30 September 2012).

¹³⁴ Baroness Thornton; HL Deb vol 716 col 345-346 11 Jan 2010.

¹³⁵ See n 76 above.

¹³⁶ See Mark Harper; HC Deb vol 508 col 931 6 Apr 2010; Vera Baird; HC Deb vol 508 col 927-928 6 Apr 2010.

8.7 Meeting on Caste and the Equality Bill, House of Lords: 4 February 2010

8.7.1 Background

On 4 February 2010, a ‘remarkable’ meeting on caste and the Equality Bill took place in the House of Lords.¹³⁷ This meeting, described by Lord Lester as recalling the early days of race relations legislation for its sense of passion and momentum,¹³⁸ marked a turning point in the government’s approach to the legal regulation of caste discrimination. It was called by Baroness Thornton, the Labour Minister steering the Bill through the Lords, who had been persuaded to listen to the views of Dalit organisations on caste discrimination legislation after reading documents (including an article by the present author) given to her by Lord Avebury.¹³⁹ The meeting was attended by representatives from sixteen organisations working with or representing Dalits in the UK;¹⁴⁰ Lord Avebury; Lord Lester QC; Lord Harries; Baroness Northover (Liberal Democrat); Rodney Bickerstaffe (General Secretary of the trade union UNISON); two of the academics who had collaborated with ACDA on *Voice of the Community*, including the present author; officials from the GEO; representatives from the Bill drafting team and individual victims of caste discrimination. The purpose of the meeting was for the government to hear direct testimony from individual victims and organisations dealing with caste discrimination, to hear arguments as to the inadequacy of existing law for caste discrimination and, if appropriate, to consider what form a provision in the Bill on caste discrimination might take.

¹³⁷ HL Deb vol 717 col 1346 2 Mar 2010. See also <http://ericavebury.blogspot.co.uk/2010/02/equality-bill-caste.html> (visited 30 September 2012).

¹³⁸ HL Deb vol 717 col 1346-1347 2 Mar 2010.

¹³⁹ These included A. Waughray, ‘Caste Discrimination: A Twenty-First-Century Challenge for UK Discrimination Law?’ 72(2) *Modern Law Review* (2009) 182-219; Joint statement; HL Deb vol 715 col 342 11 Jan 2010.

¹⁴⁰ The organisations included ACDA; CWUK; DSN-UK; Catholic Association for Racial Justice; Coalition Against Caste Discrimination; British Asian Christian Council; Asian Christian Association; VODI; Central Valmik Sabha International UK; Shri Guru Ravidass Temple (Coventry); Federation of Ambedkarite and Buddhist Organisations and International Humanist and Ethical Alliance.

8.7.2 The research conundrum

During the meeting the Dalit organisations questioned the need for further research. How much discrimination did victims need to demonstrate, they asked, in order to persuade the government that a legislative solution was required? The parliamentarians pointed out that no research was carried out before the 1965, 1968 and 1976 race discrimination legislation, nor indeed before the Race Relations (Amendment) Act 2000, and that it would be completely unacceptable if research was used as an excuse for a delay in acting. The government stated that it intended to commission ‘robust research’ to examine the nature and extent of caste discrimination in the UK in legally-regulated fields, to assess what public policy and legislation was already in place and, in the light of this information, to assess the implications for government policy of any mismatch between existing discrimination, policy and legislation, including identifying the necessary government response. Government representatives explained that the context of the Bill was a commitment that it should be evidence-based. The Commons debate on caste had been concerned with the lack of an evidence base, but an evidence base had been emerging, such that the government now accepted that a more substantial issue existed. It was unfortunate, given the stage of the Bill and the forthcoming General Election and dissolution of Parliament, that ACDA’s report had not been available in 2008, because the government research necessary to inform its response would not be available until after the election. Nevertheless, the government representatives assured the meeting that caste discrimination was ‘an issue whose time had come’, that those at the meeting were ‘pushing at an open door’, that government was

convinced by what it was hearing and that its response was a matter of ‘how’ not ‘whether’, and ‘when’ not ‘if’.¹⁴¹

8.7.3 Wording the provision

Regarding the form a provision on caste discrimination might take, the options of caste or descent as a new category, alternatively as a subset of race, were discussed. The author explained that under international law, descent was a wider legal category which included but was not limited to caste. Concern was then expressed that descent might be too inclusive a category and therefore caste would be preferable. Arguments were also made by some of those present that, technically, caste could be put under the definition of race, which already had multiple components, and that it would be consonant with the definition of race to include caste (or descent) as an expansion or a component thereof.¹⁴²

8.7.4 Dalits faced with a compromise

The goal of the Dalit organisations was an immediate and express prohibition of caste discrimination in the Bill. Against this backdrop, government representatives and parliamentarians emphasised the time constraints and the need to get the Bill through Parliament to avoid it going into ‘wash-up’.¹⁴³ The GEO representatives explained that it would be very difficult for government to table its own amendment at Lords Report stage in the time available, as the agreement of all the other ministries and departments would have to be sought. The alternative was for peers to

¹⁴¹ Author’s personal contemporaneous notes of meeting, 4 February 2010.

¹⁴² See Lord Lester’s amendment at Committee stage to add descent to the definition of ‘race’.

¹⁴³ A parliamentary mechanism whereby some Bills are allowed to complete their passage before the formal dissolution of Parliament. ‘Wash-up’ is the period of the last few days of a Parliament, after an election has been announced but before dissolution. During this period, Bills will only be passed if there is agreement between the parties. This means that opposition parties, particularly in the Lords, effectively have a veto.

table an amendment which was acceptable to – and therefore would not be opposed by – government. Given the overriding need to get the Bill through Parliament before the election, the question was what provision could be put into the Bill that (a) would not jeopardise the Bill’s progress and (b) would be compatible with the findings of the putative research? The government’s preferred solution was to include an enabling power allowing descent or caste to be added to the legislation at a later date by ministerial order, as a component of race, on completion of the research. The Dalit organisations were asked whether they would accept an amendment along these lines. It was suggested that this would be similar to s. 81(1) Equality Act 2006 which conferred a ministerial power to make regulations about discrimination or harassment based on sexual orientation once the legislation came into force.¹⁴⁴ It would be an acknowledgment that the Bill as currently drafted did not adequately cover caste, and, if the research indicated that there was a problem, the new government would, so it was implied, have no choice but to trigger the power. The inclusion of an enabling power was recommended to the Dalit groups by the government representatives and parliamentarians as the best they could expect, given the timing.¹⁴⁵

8.7.5 The twin-track approach

The organisations expressed concern about whether the power would actually be triggered if there was a change of government, so they were reluctant to sacrifice an amendment adding caste (or descent) directly to the Bill. A ‘twin-track’ approach was therefore mooted, whereby government would pursue both speedy consultation

¹⁴⁴ See <http://www.legislation.gov.uk/ukpga/2006/3/section/81> (visited 30 September 2012); Equality Act (Sexual Orientation) Regulations 2007; S.I. 2007 No. 1263.

¹⁴⁵ GEO informal list of key points from the meeting; email on file with author. The meeting was not officially minuted.

with ministries and departments regarding two government amendments – one to add caste to the Bill as a protected characteristic and the other to include a power to add caste by ministerial order at a future date. There was unanimity on the adoption of the twin-track approach. Immediately, however, the government representatives stressed that no guarantees could be given. If it was decided to include a power in the Bill to introduce caste at a later stage once the legislation was enacted, the necessary legislation would have to be prepared and issues such as the possible additional burdens on employers and the private sector would have to be addressed. Therefore, government ‘could not be specific about its response at Report stage’. In the event, the twin-track approach was dropped and government did not table its own amendment, instead ‘accepting’ (i.e. not opposing) the amendment at Lords Report stage providing a ministerial power to add caste as an aspect of race at a future date.

8.8 Finalising the Equality Act

8.8.1 Lords Report Stage and Third Reading

At Lords Report Stage on 2 March 2010, Lord Avebury moved Amendment 10, which provided for the definition of race in clause 9 of the Bill to be amended by ministerial order so as to provide for caste to be ‘an aspect of race’:

(5) A Minister of the Crown may by order

(a) amend this section [section 9] so as to provide for caste to be an aspect of race;

(b) amend this Act so as to provide for an exception to a provision of this Act to apply, or not to apply, to caste or to apply, or not to apply, to caste in specified circumstances.

(6) The power under section 205(4)(b), in its application to subsection (5), includes power to amend this Act.¹⁴⁶

¹⁴⁶ HL Deb vol 717 col 1345 2 Mar 2010.

The formulation ‘as an aspect of’ was suggested by the GEO.¹⁴⁷ Amendment 10 was accepted by the government as a ‘proportionate approach’ which would allow it ‘to act in an appropriate way in response to the research evidence and any subsequent public consultation’.¹⁴⁸ The government would consider whether exercising the power was a proportionate response, if and when the research showed evidence of caste discrimination in Great Britain.¹⁴⁹ The amendment was a disappointment to the Dalit organisations, who believed that the ACDA study contained ample evidence of a problem requiring a legislative solution and who wanted an amendment introducing an immediate and express prohibition of caste discrimination, with caste as a new protected characteristic. Lord Avebury described the amendment as an ‘intermediate solution’ whilst remaining optimistic that it would soon be ‘conclusively proved that caste discrimination occurs in the fields covered by the Bill’.¹⁵⁰ Final amendments were made to the Bill during the Third Reading in the Lords on 23 March 2010, whereupon the Bill was passed and returned to the Commons. Before that, however, the government announced at Report Stage that it had commissioned the National Institute for Economic and Social Research (NIESR) to conduct research on the nature, extent and severity of caste prejudice and discrimination in Britain and its associated implications for future government policy.¹⁵¹ The research would be ‘wide-ranging’ and ‘go beyond the relatively narrow area covered by discrimination law to examine caste-based prejudice and discrimination more broadly’.¹⁵² The outcome would come too late for inclusion in the Bill of a specific provision

¹⁴⁷ Baroness Thornton had previously described Lord Lester’s amendment to add descent to the protected characteristic of race in similar language as a proposal to add descent ‘as a further aspect’ of race; HL Deb vol 715 col 341 11 January 2010.

¹⁴⁸ HL Deb vol 717 col 1349 2 Mar 2010.

¹⁴⁹ Baroness Thornton; HL Deb vol 717 col 1346 2 Mar 2010.

¹⁵⁰ Lord Avebury; HL Deb vol 717 col 1350 2 Mar 2010.

¹⁵¹ HL Deb vol 717 col 1349 2 Mar 2010; see also <http://www.niesr.ac.uk/> (last visited on 30 March 2010).

¹⁵² Baroness Thornton; HL Deb vol 717 col 1349 2 Mar 2010.

prohibiting caste discrimination; however, Baroness Thornton reiterated that legislating immediately was not the only option – on the contrary, the government was unwilling to legislate unless evidence of caste discrimination was produced. In this way government's own delay in commissioning research provided a justification for not legislating immediately against caste discrimination.

8.8.2 Consideration of Lords Amendments and Royal Assent

Commons consideration of Lords amendments took place on 6 April 2010. The 'caste amendment' – now Lords Amendment 1 – was agreed by the House as s. 9(5)(a) of the new legislation. The Solicitor-General defended the government's handling of caste discrimination on the grounds that the ACDA report contained only a 'small amount of mainly anecdotal evidence', largely about discrimination in relation to personal or social situations outside the scope of discrimination law.¹⁵³ If the NIESR found evidence of caste discrimination, she said, it would be disclosed and discussed with all the stakeholders who had brought the issue to government's attention. She described Amendment 1 as 'a precautionary measure... because we do not yet know what the research will show'.¹⁵⁴ It was suggested that whoever formed a government after the election should look very clearly at the evidence and make a decision 'depending on whether there is evidence of harm'.¹⁵⁵ Two days later, on 8 April 2010, the Bill received Royal Assent.

¹⁵³ Vera Baird; HC Deb vol 508 col 928 6 Apr 2010.

¹⁵⁴ Ibid.

¹⁵⁵ Mark Harper, *ibid.*, col 931.

8.9 Political and ideological objections to the legal regulation of caste discrimination

During the passage of the Bill through Parliament, calls to prohibit caste discrimination evoked a number of ideological, political and policy objections on the part of government, parliamentarians and other actors, including Hindu organisations. These objections are identified and briefly explored in this section.

8.9.1 The arguments outlined

Government and parliamentarians argued that legislation would be damaging to community cohesion, that it was not government's role to interfere with religious or cultural practices unless unlawful and that regulation might have (unspecified) unintended impacts or unexpected effects on (unidentified) 'other groups'. These arguments relate to caste as a migrant group phenomenon. Caste legislation could be characterised as unfairly targeting a specific minority population (South Asians and Hindus) and as interference by (white) policymakers in minority religious and cultural matters ('cultural intrusion'). The principal Hindu organisations consulted by government – the Hindu Council UK (HCUK) and the Hindu Forum of Britain (HFB) – considered that proposals for caste discrimination legislation wrongly characterised as discrimination personal choices and associational preferences in spheres outside the ambit of discrimination law, denigrated Hinduism and presented Hindus as a 'problem' and amounted to an attack on the fundamental freedom of Hindus to retain their intra-group identities. For these groups, caste was a positive source of social or corporate identity and social cohesion. They argued that caste discrimination did not occur in the UK, at least not in fields regulated by

discrimination law, and that legislation was inappropriate, unnecessary, and an attack on Hinduism. These arguments are explored briefly below.

8.9.2 Cultural intrusion and ‘privacy barrier’ arguments

In 2004, in a statement reminiscent of the colonial policy of non-interference in ‘personal law’ matters, the government acknowledged criticisms ‘levelled at the Hindu caste system with regards to the treatment of Dalits’ but added ‘however, *it is not the role of Government to take a position on the rites, beliefs or practices of any particular religious faith, other than where these give rise to conflict with the law.*¹⁵⁶

During the Equality Bill debates the government affirmed this stance, stating that the HFB and the HCUK also considered legislation ‘the wrong option to cure what they primarily see as a cultural matter’.¹⁵⁷ The HFB, while stating that due to ‘cultural practices and tradition’, caste ‘can play a role in social interactions and personal choices like marriages, conversations and friendships’, asserted that there was no evidence that it was ‘endemic’ in British society, nor did it affect ‘the provision of education, employment or goods and services’.¹⁵⁸ Moreover, it was not for government ‘[to] interfere in personal choices and... social interaction’. Instead, community organisations should be empowered to ‘break any existing barriers to promote *further intra-community integration and cohesion*’.¹⁵⁹ Rather than becoming ‘directly involved in legislating caste in the UK’, government should ‘facilitate and encourage community organisations and individuals to play a greater role in building programmes of awareness and education’.¹⁶⁰

¹⁵⁶ HC Deb vol 419 col 1602W 1 April 2004 (emphasis added).

¹⁵⁷ Baroness Thornton; HL Deb vol 716 col 343 11 Jan 2010.

¹⁵⁸ R. Kallidai, *Caste in the UK: A Summary of the Consultation with the Hindu Community in Britain* (London: Hindu Forum of Britain, 2008) 28.

¹⁵⁹ *Ibid.*, 26.

¹⁶⁰ *Ibid.*, 27.

The HCUK defended the maintenance of caste distinctions in the private and social spheres using the language of fundamental rights:

Hindus too wish to preserve their core beliefs and identities. How can this not be allowed to extend to who they wish to socialise with or whom they choose as a life partner? *This is surely a fundamental freedom for each and every one of us*, one in which there is no harm *per se* and which enables Hindus to maintain their distinct identities while simultaneously enriching the diverse cultural milieu.¹⁶¹

As Chapter 7 explains, one may lawfully choose not to associate privately with certain people, even on prohibited grounds (although, as Jaoul points out, ‘even though who you marry and who you are willing to share your meal with is a private matter, the question of inter-dining can become a public issue leading to the institutionalisation of caste once it is introduced in public places’, for example workplace and school canteens).¹⁶² However, the HCUK’s statement appears to suggest that calls to include caste as a protected characteristic in domestic discrimination law are divisive and somehow opposed to the fundamental human right of Hindus to preserve their core beliefs and ‘distinct identities’.¹⁶³

8.9.3 Community cohesion

At Commons Committee stage, the government asserted that it was ‘socially divisive to have legislation against something that is not happening and is needed by no one’, it was ‘hardly going to contribute to community cohesion’ and the HFB and HCUK

¹⁶¹ R. P. Sharma, *The Caste System* (London: Hindu Council UK, 2008) 28.

¹⁶² N. Jaoul, ‘Multiculturalism and caste in Britain’, paper delivered at CasteWatch UK conference, Sandwell, 15 July 2007, unpublished; copy on file with author; see http://www.castewatchuk.org/sandwell_conference.htm; http://www.castewatchuk.org/conf07_1130.html.

¹⁶³ Dhanda describes ‘defending as freedom of choice the practice of keeping within caste borders’ as disingenuous; M. Dhanda, ‘Punjabi *Dalit* youth: social dynamics of transitions in identity’, 17(1) *Contemporary South Asia* (2009) 47-64, 57.

were ‘very sensible’ in opposing caste discrimination legislation ‘having, we are satisfied, conscientiously sought what we asked for’¹⁶⁴ (i.e. evidence of discrimination). The government did not specify whether by ‘community cohesion’ it meant *inter-* or *intra-*community cohesion (i.e. between South Asians and other communities, or internally within the South Asian community), but statements by government and Hindu organisations suggest the latter. In an exchange during day one of Lords Committee stage, Baroness Flather noted the claim by the National Hindu Students Forum that caste was not an issue in Britain, but she suggested that this was because it had no ‘non caste-Hindus’ among its members.¹⁶⁵ Baroness Thornton countered that the case for legislation on caste discrimination was ‘not so clear-cut that it universally unites the community it is alleged to affect’.¹⁶⁶ Among the organisations consulted by the government, she said there ‘was not a consensus’ on caste discrimination, while the HFB and the HCUK remained of the opinion that legislation was inappropriate.¹⁶⁷ Baroness Flather retorted that the HFB and the HCUK were formed by ‘the three upper castes’, who felt that ‘to consult them about caste discrimination is to cast aspersions on them, as if one is saying “you are the lot who are discriminating on the basis of caste.” They are not going to admit that they discriminate: no-one does’.¹⁶⁸

Government arguments that caste discrimination legislation would be divisive and damaging to community cohesion, and that the case for legislation did not enjoy universal support in ‘the community it is alleged to affect’, make sense only if it is

¹⁶⁴ Vera Baird; HC Equality Bill Committee Deb col 179 11 June 2009; see <http://www.publications.parliament.uk/pa/cm200809/cmpublic/cmpbequality.htm> (visited 6 February 2013).

¹⁶⁵ Baroness Flather; HL Deb vol 716 col 339 11 Jan 2010.

¹⁶⁶ Baroness Thornton, n 157 above.

¹⁶⁷ Ibid. The list of organisations consulted includes several Dalit organisations, all of them pro-legislation, in addition to the HFB and the HCUK.

¹⁶⁸ Baroness Flather; HL Deb vol 716 col 343 11 Jan 2010.

assumed that there is an underlying cultural and social homogeneity within the South Asian community – which is not supported by the evidence.¹⁶⁹ An extensive body of literature exists on the phenomenon of internal (intra-community) discrimination experienced by so-called minorities within minorities. Such discrimination is often invisible to the majority community or concealed by State policies of multicultural accommodation of wider minority group identity, norms and practices.¹⁷⁰ The problem of internal minorities was alluded to in the Equalities Review Interim Report (although not included in its Final Report), which noted that ‘analysis [of equality] by characteristics such as gender and ethnicity can conceal considerable variation within sub-groups’.¹⁷¹ As regards anti-legislation arguments based on culture and community cohesion, whether State intervention is perceived as an attack on minority culture or religion, or divisive, depends on whose voices are considered as representative of the group in question, the extent to which existing intra-group diversity (sub-groups), power hierarchies and division are acknowledged and recognised¹⁷² and the willingness of the wider minority group to countenance internal challenges to its power hierarchies and dominant norms.

¹⁶⁹ See H. Blakey, J. Pearce and G. Chesters, *Minorities within Minorities: Beneath the Surface of Community Participation* (York: Joseph Rowntree Foundation, 2006), 2; E. Nesbitt, *Intercultural Education: Ethnographic and Religious Approaches* (Brighton: Sussex Academic Press, 2004); J. Leslie, *Authority and Meaning in Indian Religions: Hinduism and the Case of Valmiki* (Aldershot: Ashgate, 2003); I. Din, *The new British: the impact of culture and community on young Pakistanis* (Aldershot: Ashgate, 2006).

¹⁷⁰ L. Volpp, ‘Feminism versus Multiculturalism’ 105 (5) *Columbia Law Review* (2001) 1181-1218; A. Shachar, ‘On Citizenship and Multicultural Vulnerability’, 28(1) *Political Theory* (2000) 64-89, 65-68; G. Mahajan, ‘Can intra-group equality co-exist with cultural diversity?’ in A. Eisenberg and J. Spinner-Halev (eds.), *Minorities Within Minorities: Equality, Rights and Diversity* (Cambridge: CUP, 2004) 91-95.

¹⁷¹ See n 9 above, 76.

¹⁷² Mahajan, n 170 above, 91; A. Eisenberg, ‘Identity and liberal politics: the problem of minorities within minorities’ in Eisenberg and Spinner-Halev (eds.), n 170 above, 249-270.

8.9.4 Caste discrimination legislation as anti-Hindu

The HFB and the HCUK linked efforts to outlaw caste discrimination to a Christian/Western anti-Hindu, pro-Christianity conspiracy. Many Dalit campaigners and organisations, according to the HFB, had ‘substantial backing from Christian groups’, the reason being that the majority of Indian converts to Christianity were Dalits, traditionally ‘the largest target group for evangelical groups operating in India’.¹⁷³ Caste, said the HCUK, ‘was used to justify Christian proselytising and domination over the Indian population by Europeans, an excuse that persists today’,¹⁷⁴ while Christian missionary attacks on the institution of caste and the ‘Brahmin priestly caste’ were ‘full-fledged anti-Brahmanism, *the Indian equivalent of anti-Semitism*’.¹⁷⁵ Support for caste discrimination legislation was thus characterised as anti-Hindu and discrimination against Hindus. This was highlighted at Lords Committee stage by Baroness Flather, who referred to an article in *Asian Voice* by the National Hindu Students Forum (an organisation ‘affiliated to the HFB’) which, she said, accused organisations working for Dalits of attacking Hinduism.¹⁷⁶

¹⁷³ Kallidai, n 158 above, 20.

¹⁷⁴ Sharma, n 161 above, 21. Religious conversion (especially conversion to Christianity) is a highly politicised and controversial phenomenon in India; several Indian States have enacted anti-conversion laws to restrict conversion, particularly targeting conversion by force or allurement of individuals or groups deemed vulnerable; see A. Misra, ‘The Missionary Position: Christianity and Politics of Religious Conversion in India’ 17 *Nationalism and Ethnic Politics* (2011) 361–381; S. Sarkar, ‘Conversions and Politics of Hindu Right’, *Economic and Political Weekly*, 26 June 1999, 1691–1700; L. Jenkins, ‘Legal Limits on Religious Conversion in India’, 71(2) *Law and Contemporary Problems* (2008) 110–127, 110; J. Huff, ‘Religious Freedom in India and Analysis of the Constitutionality of Anti-Conversion Laws’, 10(2) *Rutgers Journal of Law and Religion* (2009) 1–36.

¹⁷⁵ Sharma, *ibid*.

¹⁷⁶ Baroness Flather, n 168 above, col 339. This was a students’ forum, she said, and ‘we need to worry about this issue if the young are thinking like that’.

8.10 Conclusion

Caste presents a challenge to Britain's discrimination law framework. The concept of caste has yet to permeate mainstream social, political and legal discourse in the UK. This chapter shows that as debates on the Equality Bill progressed through 2009 and 2010, legislators remained unconvinced of the need for an immediate statutory prohibition of caste discrimination. There was also disagreement as to how to conceptualise caste legally. This chapter has shown the difficulties experienced by government, parliamentarians, equality actors and activists in their efforts to locate caste within existing classificatory categories which were not designed with caste in mind. The fact is that caste does not fit easily into any of the legal categories currently available under UK discrimination law. At different times, different actors advanced opposing and sometimes contradictory arguments regarding the most appropriate 'legal home' for caste. Moreover, for government, caste seemed to be a 'Pandora's box', the possibility of caste discrimination legislation generating unwelcome political tension and intra-community opposition – as anticipated by Dalit activists in 2000:

Asians are already victims of racism in Britain. There may be a curious effect whereby the indigenous community may use the Caste divisions amongst the Asians as a weapon of further oppression. The Asians could be accused of in-fighting and those Asians who are fighting against Racism may see their work being undermined by our outcry against Caste. Some thought ought to be given as to how best we can achieve our goals notwithstanding the fact there will certainly be a backlash at least from the conservative elements of the Indian community for placing Caste System (sic) in the public domain.¹⁷⁷

¹⁷⁷ S. Muman, 'Caste in Britain' in *Report of the Proceedings of International Conference on Dalit Human Rights* (London: Voice of Dalit International, 2000) 71-79, 78.

The Equality Bill presented an historic opportunity for British Dalits to secure a statutory prohibition of caste discrimination as a new protected characteristic in domestic law. While the EQA acknowledged caste as a potential ground of discrimination in the UK, it fell short of including an immediate, express prohibition of discrimination on this ground. Moreover, it envisaged caste as ‘an aspect of race’ rather than as a new characteristic. Yet, the inclusion of s. 9(5)(a) in the EQA was nevertheless a major advance for the Dalit groups and their supporters, and it represented an important stage in the ongoing development of British equality legislation. In May 2010, a Conservative-Liberal Democrat coalition government came to power, replacing the Labour Government which had overseen the enactment of the EQA. In December 2010, the research on caste discrimination in Britain, commissioned from the NIESR by the former Labour Government, was published by the GEO.¹⁷⁸ This research affirmed that caste indisputably exists in Britain, and it also found evidence suggesting the occurrence of caste discrimination and harassment, and identified legislation as the most useful response.¹⁷⁹ Yet, despite domestic and international calls since December 2010 for the ministerial power in s. 9(5)(a) EQA to be exercised so as to include an express statutory prohibition of caste discrimination in the legislation, as at 1 April 2013, the coalition government had not exercised the s. 9(5)(a) power. The thesis turns in Chapter 9 to an examination and assessment of developments following the enactment of the EQA in April 2010, concluding by arguing in favour of a statutory prohibition of caste discrimination in domestic law.

¹⁷⁸ H. Metcalfe and H. Rolfe, *Caste discrimination and harassment in Great Britain* (London: GEO, 2010).

¹⁷⁹ Metcalfe and Rolfe, *ibid.*, 14, 22, 63-65.

Chapter 9

Caste Discrimination: Equality Act 2010 and Beyond

9.1 Introduction

The Equality Act 2010 (EQA) received Royal Assent in April 2010,¹ a month before the Liberal-Democrat coalition government took office. On 1 October 2010, the majority of the EQA provisions came into force. In December 2010, ‘Caste discrimination and harassment in Great Britain’, the study commissioned from the National Institute for Economic and Social Research (NIESR) in April 2010 (NIESR study) by the then Labour Government, was published by the Government Equalities Office (GEO).² It had been implied by the government at the House of Lords meeting on Caste and the Equality Bill on 4 February 2010 (discussed in Chapter 8) that, if a ministerial power was inserted into the EQA to make caste an aspect of the protected characteristic of race, evidence of caste discrimination would trigger its exercise. Following publication of the NIESR study, Dalit groups called on the coalition government to exercise the ministerial power immediately.³ Over the next two years, no decision on the exercise of the s. 9(5)(a) power was made; the government’s repeated response was that it had ‘not ruled out legislative responses’, but needed time to consider the NIESR study fully to ensure that its response was ‘reasonable

¹ The EQA applies to England, Wales and Scotland but not to Northern Ireland: EQA 2010 s.217; B. Hepple, *Equality: The New Legal Framework* (Oxford: Hart, 2011) 7.

² H. Metcalfe and H. Rolfe, *Caste discrimination and harassment in Great Britain* (London: GEO, 2010).

³ Anti-Caste Discrimination Alliance (ACDA), Press Release ‘Evidence of caste discrimination and harassment in the UK confirmed in the independent research commissioned by Government’, 16 December 2010; copy on file with author; ‘Caste Discrimination in the UK – Joint Statement calling on the coalition government to enact clause 9(5)(a) of the Equality Act 2010’, 23 December 2010; copy on file with author.

and proportionate’.⁴ As of 1 April 2013, the government had yet to publish a written response to the NISER report; but on 1 March 2013 it announced that it had decided ‘not to exercise the caste power contained within the Equality Act 2010 at the present time – though we have no plans to remove the power from the Act, in case the position should change.’ Instead it had decided ‘to engage with affected communities’ by running an educational programme ‘to help tackle this complex and sensitive issue’.⁵ In August 2011, the first claim for unfair dismissal based on caste discrimination (*Begraj and Begraj v Heer Manak Solicitors and others*) came before the Birmingham Employment Tribunal, but in February 2013, the tribunal collapsed after the judge recused herself from the case; at the time of writing, the claimants were considering an appeal; while in November 2012 in a case before the Denbigh Employment Tribunal, a complaint of caste discrimination as a form of unlawful racial (ethnic origins) discrimination was rejected because the EQA had not yet been extended to cover caste as an aspect of race in itself, and because the claim concerned the claimant’s status within the same caste as the respondents, therefore his caste could not fall within the existing definition of ethnic origins.⁶ Meanwhile, a cross-party amendment to the Enterprise and Regulatory Reform Bill 2012 (ERRB), adding caste to the definition of race in EQA s. 9(1) was agreed by majority vote in the House of Lords on 4 March 2013. The Bill was returned to the House of Commons with amendments, to be considered on 16 April 2013.

This chapter evaluates the NISER study and the government’s response, government arguments for not invoking EQA s. 9(5)(a), the arguments of actors opposed to

⁴ Baroness Verma; HL Deb vol 723 col 1098-1100 22 December 2010.

⁵ Ministerial Written Statement, 1 March 2013, Caste; copy on file with author.

⁶ S. Jones, ‘Employment tribunal hearing first claim for caste discrimination collapses: Judge recuses herself after visit by police officers’, *The Guardian*, 14 February 2013; *Naveed v Aslam*, ET Case No. 1603968/2011 (unreported), discussed in section 4.2 below.

legislation, and the strategic response of Dalit organisations and advocacy groups. The chapter considers legal and political developments following the enactment of the EQA, including the implications of the *Begraj* case (which was widely reported in the media), the recommendations of the UN Committee for the Elimination of Racial Discrimination (CERD) in 2011 and the UN Universal Periodic Review (UPR) in 2012 to the UK on caste discrimination, and the implications of amendment of EQA s. 9 via the ERRB. The chapter identifies and examines the principal legal and socio-political factors, domestic and international, impacting on government decision-making on domestic legal regulation of caste discrimination. The chapter concludes with an assessment of the lessons learned from the attempt to secure legal regulation of caste discrimination in the domestic setting and the domestic and international implications of legal regulation, as well as with a number of policy recommendations for government and strategy suggestions for Dalit groups.

9.2 NIESR study: ‘Caste discrimination and harassment in Great Britain’

9.2.1 Summary and findings

‘*Caste discrimination and harassment in Great Britain*’ was the first government-funded study on caste discrimination as a domestic issue. The NIESR study had four objectives: to critically review evidence on the nature and extent of caste prejudice and discrimination in Britain; to develop a typology of caste discrimination and prejudice; to assess its nature and severity through primary research and to assess the need for a public policy response and the form this might take.⁷ The aim was to identify individuals who perceived themselves to have suffered from, and could provide an account of, caste discrimination in regulated fields. The definition of caste

⁷ ‘Research into caste systems and the existence and nature of caste prejudice and discrimination in Great Britain’, NIESR, March 2010 (copy on file with author).

used in the study was taken from the EQA Explanatory Notes (drafted by the GEO in consultation with the present author and others).⁸ The study was based on a literature review, discussions with ‘interested parties’ and experts (including the present author) and qualitative interviews with thirty-two individuals who believed they had suffered caste discrimination or harassment.⁹ It affirmed that caste indisputably exists in Britain.¹⁰ It also found that ‘caste discrimination and harassment is likely to occur in Britain’.¹¹ The study included evidence suggesting caste discrimination and harassment in respect of work and the provision of services,¹² evidence of caste-related inter-pupil bullying in schools, which was ‘likely to be addressed differently (and less adequately) than bullying related to protected strands’,¹³ and evidence suggesting caste discrimination and harassment falling outside the EQA in relation to voluntary work, demeaning behaviour and violence.¹⁴ The discrimination identified in the study was perpetrated by higher castes against lower castes.¹⁵ The study concluded that to reduce caste discrimination, the government could take educative or legislative approaches – either would be useful in the public sector, but non-legislative approaches were less likely to be effective in the private sector and would not assist where the authorities themselves are discriminating.¹⁶ The study concluded further that relying on the Indian [South Asian] community to take action to reduce

⁸ Equality Act 2010, Explanatory Notes (revised edition August 2010); Section 9, Race; para. 49; available at <http://www.legislation.gov.uk/ukpga/2010/15/notes/contents> (visited 16 February 2013); for full text see Chapter 1 of this thesis.

⁹ Metcalfe and Rolfe, n 2 above, 7, 9.

¹⁰ Metcalfe and Rolfe, n 2 above, 14. This finding was in itself significant; see Chapter 6 of this thesis.

¹¹ Metcalfe and Rolfe, *ibid.*, 63.

¹² *Ibid.*, 22.

¹³ *Ibid.*, 63. An educational institution may contravene the EQA if its handling of inter-pupil bullying is discriminatory, by treating bullying based on one protected characteristic less seriously than similar behaviour based on another protected characteristic, where the reason for the difference in treatment is a pupil’s protected characteristic. Additionally, the Education and Inspections Act 2006 s. 89(1)(b) imposes a duty on schools to encourage respect for others and in particular to prevent all forms of bullying among pupils.

¹⁴ *Ibid.*, vi.

¹⁵ *Ibid.*, vi, 18, 58.

¹⁶ *Ibid.*, 65, 66.

caste discrimination was problematic, and that EQA provisions on religious discrimination could not cover caste discrimination as effectively as caste-specific provisions would do.¹⁷ As in India, caste in Britain is not religion-specific,¹⁸ and moreover, 'rejection of caste and membership of a religion which rejects caste does not protect against being perceived as having a caste'.¹⁹ As for numbers, the study cited the 2001 Census figure of almost three million people of South Asian heritage in Britain and, in the absence of official statistics, reiterated existing estimates of 50,000-200,000 people of 'low caste' (Dalit) origin.²⁰ It was 'unable to identify any evidence on the extent of caste discrimination, nor any reliable estimates of the size of the low caste population, the population most likely to be subject to caste discrimination.'²¹ Only a 'major programme of research' could establish the percentage of the low caste population that experienced caste discrimination and the frequency of discrimination, or whether caste discrimination is 'dying out'.²² The consequences of caste discrimination were identified as reduced confidence and self-esteem, depression, anger, social isolation, reduced access to care and social provision and detrimental effects on employment (e.g. reduced career prospects) and education, as well as public consequences such as public violence and reduction in community cohesion (if the community is considered wider than a single caste).²³ Contradictory views were noted as to whether caste consciousness and caste discrimination in Britain were in decline, thus making legislation unnecessary;²⁴

¹⁷ Ibid., 61; 'Caste discrimination and harassment in Great Britain', GEO, Research Findings No. 2010/8, 1; available at <http://www.homeoffice.gov.uk/publications/equalities/research/caste-discrimination/caste-discrimination-summary?view=Binary> (visited 16 February 2013).

¹⁸ Metcalfe and Rolfe, n 2 above, 17.

¹⁹ Ibid.

²⁰ Ibid., 20.

²¹ Ibid., 63.

²² Ibid.

²³ Ibid., 61.

²⁴ Ibid., 60.

extensive research would be needed to establish whether there had been ‘a diminution in caste consciousness and discrimination, and the speed of decline’.²⁵

9.2.2 Caste discrimination in regulated fields

‘As with all discrimination’, said the study, caste discrimination in the workplace is often impossible to prove;²⁶ the ‘only real test would come through employment tribunal cases, an option not available when caste discrimination is not in itself unlawful. And, even then, it cannot be assumed that the tribunal will always get to the “truth”’.²⁷ Under-reporting of perceived caste discrimination was partly explained by lack of knowledge and understanding among non-South Asians.²⁸ Some victims did not challenge perceived discrimination and harassment because they would need to complain to the perpetrators or to people of a higher caste.²⁹ Evidence was found of caste-based pupil-on-pupil bullying and harassment in schools.³⁰ Schools and teachers’ understanding of casteism was perceived to be inadequate, and casteism was perceived as not being treated as seriously as racism by these institutions. In relation to the provision of services, evidence was found suggesting caste discrimination in social care and health care, but there were no case studies reporting humiliating treatment in shops.³¹

²⁵ Ibid., 60.

²⁶ Ibid., 47.

²⁷ Ibid., 48.

²⁸ Ibid., 48.

²⁹ Ibid., 48.

³⁰ Ibid., 28.

³¹ Ibid., 50, 52.

9.2.3 NIESR study: efficacy of existing responses

In the absence of caste-specific legislation, the responses available to alleged victims of caste discrimination were identified as: going to the authorities (police, employer, school, service provider); speaking to the perpetrators; doing nothing; bringing a claim based on existing law and taking the law into one's own hands (leading potentially to violence).³² In the case of wholly 'low caste' religious groups, where religious identity and low caste status completely overlap, individuals may be able to rely on existing religion or belief discrimination law.³³ This does not render caste discrimination laws redundant – religion and belief protection cannot cover all caste-based discrimination, as it is not available to Dalits of other religions or of no religion, and it would not cover cases where 'offensive caste language, but not religious language' is used.³⁴ 'if caste discrimination were seen as an issue which needed to be tackled and discrimination legislation was an appropriate means to achieve this, then reliance on religious discrimination legislation is inadequate'; without legislation specifically prohibiting caste discrimination, it would only be partially reduced by law.³⁵

9.2.4 Limitations and criticisms of the NIESR study

The study was criticised by the British Sikh Consultative Forum (BSCF) for failing to assess untested statements against 'practices in the wider community' and for failing to take into account 'cutting-edge real field research' on caste.³⁶ The National

³² Ibid., 63.

³³ Ibid., 60.

³⁴ Ibid., 60-61.

³⁵ Ibid., 61, 48.

³⁶ Letter, P. McGhan (Department for Communities and Local Government) to L. Pall (ACDA), 3 August 2011, in response to Freedom of Information Act Request dated 4 July 2011; Attachment D (email from BSCF to Lynne Featherstone MP, 11 January 2011); copy on file with author. The 'cutting-edge research' referred to in the BSCF's email to Lynne Featherstone was not identified.

Hindu Students' Forum (NHSF) argued that the study '[did] not show any evidence that caste discrimination is a widespread issue within the UK', was 'unable to inform on the size of the UK population belonging to the so-called "lower castes"', was based on only thirty-two subjects who alleged being subjected to caste discrimination and in nineteen cases was ambiguous about the presence of caste as an underlying motive.³⁷ An anti-legislation lobby meeting in March 2011 with government officials and representatives claimed the study lacked an in-depth examination of alleged caste discrimination, used out of date examples of caste discrimination and inadequate sampling methods, was one-sided for failing to consult adequately with Hindu groups, and gave conflicting messages (acknowledging that it was impossible to determine whether caste discrimination had occurred, yet recommending the introduction of specific caste legislation).³⁸

The study's authors themselves identified inherent problems with the methodological approach.³⁹ First, quantifying the extent of caste discrimination was 'outside the budget and timescale of the study'.⁴⁰ Secondly, it was 'impossible to identify caste discrimination with absolute certainty based on the statement of the person who feels they have suffered such discrimination; their perception may be erroneous and the information provided incomplete'.⁴¹ Nevertheless, it was possible to determine the likelihood of caste discrimination, on the basis of factors 'strongly suggestive' of caste discrimination.⁴² Thirdly, the methodological approach was reliant on individuals recognising that they had been discriminated against because of caste,

³⁷ Ibid., Attachment E (letter from NHSF to Theresa May MP, 2 March 2011).

³⁸ Letter, GEO to Lord Avebury, 19 January 2012 plus attachment; copy on file with author.

³⁹ Metcalfe and Rolfe, n 2 above, 11.

⁴⁰ Ibid.

⁴¹ Ibid. These issues also arise with other discrimination grounds.

⁴² Ibid.

being willing to talk about this issues and the presence of factors suggestive of caste discrimination.⁴³ Fourthly, reporting or discussing caste discrimination with a stranger may be seen as shameful; hence, ‘the evidence as to whether caste discrimination exists can only be drawn from the positive cases, i.e. where it seems likely that caste discrimination did occur’.⁴⁴ It is submitted that a further weakness was the small sample of alleged victims interviewed and the limited sources of interviewees.⁴⁵ Dalits in the UK constitute a ‘hidden population’ which is not easily accessible; in everyday life they may try to conceal their identity and may be reluctant to come forward to speak about caste and caste discrimination, especially to a stranger. No interviews were sought or conducted, for example, with workers in employment sectors or businesses which are wholly or predominantly South Asian. Discrimination may be institutional or systemic, and individuals may not be in a position to identify patterns of discrimination. Nevertheless, despite its weaknesses and limitations, the NIESR report is important because, as the first government-commissioned study, it provides independent evidence of the likely existence of caste discrimination in the UK which corroborates the findings of earlier studies by Dalit groups.

9.3 NIESR study: Government response and Dalit activism

This section identifies and evaluates the government’s response to the NISER study and the reasons given by government between 16 December 2010 and 1 April 2013

⁴³ Ibid.

⁴⁴ Ibid., 12.

⁴⁵ In contrast, an online survey for a 2007 Equalities Review report on discrimination against trans people yielded over 870 responses out of an estimated population pool of around 5,000 people; no face-to-face interview was involved, and anonymity was guaranteed; S. Whittle, *Engendered Penalties: Transgender and Transsexual People’s Experiences of Inequality and Discrimination* (London: Crown Copyright, 2007).

for not exercising the power in EQA s. 9(5)(a). It also examines Dalit activism during the same period.

9.3.1 Government response: arguments consistent with the previous administration

On 22 December 2010, Baroness Verma (the then government spokesperson for Women and Equalities) gave the government's most detailed public response yet to the study. Stressing that this was '*a different Government from the one who commissioned the research study*',⁴⁶ she stated that while the government had not ruled out legislative responses and that the law must 'play its part', law had not eradicated caste discrimination in India; consequently, individual attitudes needed to change and the only way to do that in the UK, 'if there is discrimination against people based on caste', was to deal with it through existing legislation.⁴⁷ She also suggested that unless the communities practising such discrimination dealt with the problem themselves through self-education, legislation would not help.⁴⁸

While it is correct that legislation is not the sole solution, the NIESR study was sceptical about leaving caste discrimination to be addressed solely within the Asian community or by educative measures alone;⁴⁹ moreover, it did not consider existing legislation sufficient to cover all cases of caste discrimination.⁵⁰ It is correct that legislation in India has not succeeded in eradicating caste discrimination but, it is suggested, this is not a reason for not introducing a statutory prohibition of caste discrimination in the UK. The limitations of India's anti-discrimination strategy and

⁴⁶ Baroness Verma; HL Deb vol 723 col 1099 22 Dec 2010.

⁴⁷ Ibid.

⁴⁸ Ibid., col 1100. The Baroness's position was in stark contrast to her strong support for legislation on forced marriage and female genital mutilation; Baroness Verma; HL Deb vol 723 col 1604-1609 13 Jan 2011.

⁴⁹ Metcalfe and Rolfe, n 2 above, 66.

⁵⁰ Ibid., 60, 65.

the lessons learned from India are discussed in Chapter 3 of this thesis. In contrast to India, Dalit organisations and their supporters in the UK pointed to the existence in this country of a strong rule of law culture and the influence of civil equality legislation on behaviour, citing the examples of changed attitudes on race and sex equality in areas covered by discrimination legislation.⁵¹ Liberal arguments for the usefulness of discrimination legislation, in particular its educational effect and the development of non-discrimination and anti-harassment policies resulting from discrimination legislation, were made forcefully by the NIESR.⁵²

Baroness Verma also called up the proliferation and community cohesion arguments discussed in Chapter 8. When asked about the contradiction of ‘support[ing] community cohesion by supporting discrimination’,⁵³ she stated:

As one who has always supported equality through integration, I think we need to come away from the idea that constantly supporting people to be separate is an easier form of dealing with the problem now.

The big picture should be that we can get on with our lives and treat people without having to worry that we will offend them in some way because of one issue or another. The law will not cover every possibility of discrimination, even if we are constantly legislating to bring in more and more groups to protect.⁵⁴

The suggestion that discrimination legislation supports ‘people to be separate’ and is somehow opposed to integration confuses domestic measures enabling minorities to preserve their distinct identities (associated in the UK with state policies of multiculturalism and which Hindu organisations support, at least for Hindus), with

⁵¹ Letter, Dalit organisations to Helen Grant MP, Minister for Women and Equalities, 14 February 2013; copy on file with author.

⁵² Metcalfe and Rolfe, n 2 above, 64.

⁵³ Baroness Falkner of Margravine; HL Deb vol 723 col 1100 22 Dec 2010.

⁵⁴ Baroness Verma; n 46 above (emphasis added).

anti-discrimination law designed to protect people from discrimination. Verma's statement also appeared to repudiate caste as a 'genuine' ground of discrimination and to imply that victims of caste discrimination are over-sensitive and too easily offended by casteist behaviour.

9.3.2 Government response: new arguments

In December 2010, Baroness Verma, while describing the NIESR study as 'a valuable guide' which 'shows where caste problems exist',⁵⁵ stated that the government would 'consider the report in the context of our own equality strategy', to ensure that its response was 'reasonable and proportionate, *bearing in mind that a lot of people will be affected by it if it is brought into legislation*'.⁵⁶ By May 2012, the government's position was that while the NIESR study identified evidence suggesting the existence of caste discrimination in the UK, the study also noted that it was 'impossible to determine categorically that discrimination within the meaning of the [Equality Act] has occurred'.⁵⁷ The government had therefore considered representations from both 'those who want the government to legislate and those who are opposed to such legislation'.⁵⁸ The government thus introduced arguments which differed from those advanced (publicly, at least) by the previous administration: (1) how legislation against caste discrimination sat with its equality and human rights agenda, including the regulatory burden and cost impact of legislation, and (2) the views of those opposed to legislation.

⁵⁵ Ibid.

⁵⁶ Ibid. (emphasis added).

⁵⁷ Lynne Featherstone; HC Deb vol 545 col 432-433W 21 May 2012.

⁵⁸ Ibid.

9.3.2.1 *The Coalition equality agenda: reducing 'red tape' and costs*

Pre-election, the Conservative Party described itself as being 'determined to fight prejudice and discrimination wherever it exists'.⁵⁹ At the same time, its 2010 election manifesto promised 'No to Bureaucracy' and an end to 'Big Government',⁶⁰ a key aim being to reduce what it saw as the regulatory burden on business ('red tape'). This was translated post-election into the 'Red Tape Challenge', a government website inviting individuals to identify legislation they wanted to see scrapped, saved or simplified.⁶¹ The potential cost of putting EQA s. 9(5)(a) into effect was advanced by government as one reason for not announcing a decision on the provision. The Equality Act Impact Assessment (EAIA) – published before the NIESR study – had advised that in relation to caste discrimination, the government could choose to do nothing (i.e. rely on existing law), legislate immediately or include an enabling power to add caste in the future as a subset of race.⁶² Doing nothing was rejected as potentially more costly than introducing legislation, because the lack of a test case and legal uncertainty meant that the cost of processing caste discrimination cases based on race or religious discrimination law might be greater than through a specific

⁵⁹ 'Contract for Equalities', Conservative Party Equalities Manifesto 2010, 2; available at http://www.conservatives.com/news/news_stories/2010/05/~media/Files/Downloadable%20Files/Manifesto/Equalities-Manifesto.ashx (visited 18 February 2013).

⁶⁰ Conservative Party Manifesto 2010; available at http://media.conservatives.s3.amazonaws.com/manifesto/cpmanifesto2010_easyread.pdf (visited 18 February 2013); see also A. Sparrow & P. Wintour, 'Coalition reconsidering Tory plan to scrap Human Rights Act', *The Guardian* 19 May 2010.

⁶¹ See <http://www.redtapechallenge.cabinetoffice.gov.uk/home/index/> (visited 18 February 2013). Controversially, 'Equalities' was one of the 'Spotlight Themes' of the Red Tape Challenge; see <http://www.redtapechallenge.cabinetoffice.gov.uk/themehome/equalities-act/> (visited 18 February 2013).

⁶² Equality Act Impact Assessment (EAIA), Final Version (London: GEO, 2010) 249-250. Impact Assessments assist policy-makers in identifying the need for legislative or other intervention and 'using the available evidence, in consultation with relevant stakeholders...explore proposals that best achieve the policy objectives while minimising the costs and burdens imposed in achieving the objectives'; Impact Assessment Guidance (London: Department for Business, Innovation and Skills, 2011) 4-5.

statutory route.⁶³ Legislating immediately was considered premature in the absence of independent evidence on the extent of discrimination and the numbers affected; moreover, adding caste to the definition of race would extend the public sector Equality Duty in EQA s. 149 to caste, which would ‘have an effect on public bodies, including government departments’.⁶⁴ An enabling power was considered the least risky option because it allowed a decision to be made in the light of available evidence as to whether ‘more than a very small number of people’ were affected by caste discrimination⁶⁵ and whether there was ‘a *real need* for caste discrimination to be prohibited by the EQA’, as well as to amend the EQA accordingly by means of secondary legislation.⁶⁶

9.3.2.2 *Regard for anti-legislation views*

Between December 2010 and March 2013, a recurring government argument was the need to have regard for the views of those opposed to caste discrimination legislation. In December 2010, Baroness Verma had referred to ‘consultations and meetings with *people right across the caste system to ensure that both sides of the argument [were] put*’.⁶⁷ In November 2011, she informed the House that during CERD’s examination in Geneva, in August 2011, of the UK’s 20th report submitted pursuant to Article 9 of the International Convention for the Elimination of Racial

⁶³ EAIA, *ibid.*, 250. In March 2011 the government announced it would not introduce the EQA dual discrimination provisions on grounds of cost; see ‘Plan for Growth’, at http://cdn.hm-treasury.gov.uk/2011budget_growth.pdf (visited 17 February 2013).

⁶⁴ EAIA, *ibid.*, 251. S. 149 EQA requires public bodies to have due regard to the need to eliminate discrimination, advance equality of opportunity, and foster good relations between groups when carrying out their activities. For a critique of s.149 see L. Vickers, ‘Promoting equality or fostering resentment? The public sector equality duty and religion or belief’, 31(1) *Legal Studies* (2011) 135-158, 156.

⁶⁵ EAIA, *ibid.*, 247.

⁶⁶ EAIA, *ibid.*, 245 (emphasis added). ACDA estimated 8,000 potential caste discrimination claims a year, of which 240 successful cases, compared to 129 successful race discrimination claims in 2008; ACDA, letter to Lynne Featherstone MP; 31 January 2011; copy on file with author.

⁶⁷ Baroness Verma; n 42 above (emphasis added).

Discrimination (ICERD), the UK delegation informed CERD that there was ‘*no consensus of opinion* with regards to the need for legislative protection against caste discrimination, *even among those communities potentially most affected by it*’ – ministers had been considering the NIESR report together with representations ‘both in favour of legislation and opposing it’, but had not yet made a final decision.⁶⁸ When asked which persons or organisations within the UK opposed bringing s. 9(5)(a) into force, Baroness Verma referred to a meeting on 15 March 2011, chaired by Lord Dholakia, attended by the Minister for Equalities and other government officials, at which the issue of caste legislation was discussed and various participants spoke in opposition to s. 9(5)(a); however, since this was ‘an independent meeting organised by concerned groups and individuals to lobby the government on the issue’, there was no government record of who participated or spoke.⁶⁹ It transpired that this was an anti-caste legislation lobby meeting organised by the Hindu Forum of Britain (of which Lord Dholakia is a patron), to which none of the Dalit organisations were invited and of which they were unaware.⁷⁰ The government’s assertion to CERD in Geneva in August 2011 (which Lord Avebury challenged as unjustified)⁷¹ was based on the opposition to caste discrimination legislation expressed at this meeting. By ‘communities potentially most affected’, the government meant not only those identified by the NIESR study as being most at risk of caste discrimination (i.e. Dalits) but also a wide range of Hindu and Sikh communities. The government’s argument was that these ‘wider communities’ did not agree on the need for legislation to address caste discrimination, and the introduction of such legislation, drafted as referring simply to ‘caste’ rather than to

⁶⁸ HL Deb vol 732 col WA239-240 23 Nov 2011 (emphasis added).

⁶⁹ HL Deb vol 733 col WA12 28 Nov 2011.

⁷⁰ Letter, Lord Avebury to Baroness Verma, 4 December 2011 (P1104126); copy on file with author.

⁷¹ Letter, Lord Avebury to Baroness Verma, 4 December 2011 (P1104122); copy on file with author.

any specific caste in particular, would have a ‘significant impact’ on these communities more generally; consensus of opinion in favour of legislation existed only among those communities most susceptible to being victims of caste discrimination or harassment.⁷² In July 2012, following the UN Human Rights Council’s examination of the UK under the UPR mechanism, the UPR Working Group recommended that the UK introduce a national strategy to eliminate caste discrimination through the immediate implementation of EQA s. 9(5)(a).⁷³ In its response, the government declared its non-support for the recommendation and reiterated that it was still considering the available evidence, including the NIESR study, together with ‘correspondence and representations put forward both by those who want the government to legislate *and those who are opposed to such legislation being introduced*’, before reaching any conclusion on whether to introduce a specific prohibition of caste discrimination in the EQA.⁷⁴

9.3.2.3 *Government arguments assessed*

Government’s argument that there was no consensus of opinion in favour of caste discrimination legislation and that the introduction of legislation was problematic because it could directly affect a wide range of Hindu and Sikh communities, not limited to those of any specific caste (i.e. that it would have wider coverage than simply alleged discrimination against Dalits by higher castes), was difficult to understand. Protection against race and sex discrimination, for example, is not restricted to the most likely victims of such discrimination but is available to anyone,

⁷² Letter, Baroness Verma to Lord Avebury, 2 February 2012; copy on file with author; letter, Lynne Featherstone to Baroness Prashar, 17 May 2012; copy on file with author.

⁷³ Report of the Working Group on the UPR (United Kingdom of Great Britain and Northern Ireland), UN Doc. A/HRC/21/9, 6 July 2012, para. 110.61.

⁷⁴ UN Doc. A/HRC/21/9/ Add.1, 17 September 2012, para. 21 and Annexe document, p. 30.

irrespective of sex or race, who is a victim of discrimination on these grounds. Theoretically, a ‘high caste’ person who believes they have suffered discrimination because of their caste could use caste discrimination legislation to seek redress. Further, it was extraordinary that the introduction of anti-discrimination legislation should be dependent on the views of those who, according to the NIESR study, were most likely to be the perpetrators of such discrimination (i.e. higher castes).⁷⁵ The purpose of anti-discrimination legislation is to safeguard the fundamental right to equality and non-discrimination, so for this reason the inclusion of equalities in the Red Tape Challenge was itself controversial. Unlike other (technical) legislation, where there may be good grounds for consulting those likely to be affected by its introduction, anti-discrimination legislation has moral, ethical and social policy dimensions. Its form should be discussed with those considered the most likely ‘primary beneficiaries’, but its introduction should not be contingent on the support of those identified by independent research as the most likely discriminators. During the parliamentary debates on the Equality Bill, parliamentarians argued that if caste-based discrimination is accepted as morally wrong, it should be legislated against without waiting for the evidence.⁷⁶ Lord Lester argued that ‘if there was just one case of an employer discriminating against a worker or would-be worker because of caste, should that not be unlawful just as if it was because of colour, being Jewish or anything else?’⁷⁷ The role of law as an educative device was also reiterated.⁷⁸ It was argued that including the term ‘caste’ in the Bill would itself ‘have a huge educational effect’.⁷⁹ In September 2012, in a letter to Dr. Hywel Francis MP, Chair

⁷⁵ See n 15 above.

⁷⁶ Rob Marris; HC Deb vol 501 col 1203 2 Dec 2009; The Earl of Sandwich; HL Deb vol 716 col 336 11 Jan 2010.

⁷⁷ Lord Lester; HL Deb vol 716 col 343 11 Jan 2010.

⁷⁸ Lord Wallace; HL Deb vol 715 col 1502 15 Dec 2009.

⁷⁹ Lord Harries; HL Deb vol 716 col 334 11 Jan 2010.

of the Joint Committee on Human Rights (JCHR), Lord McNally (Liberal Democrat Deputy Leader of the House of Lords, Minister and Government Spokesperson for the Ministry of Justice) repeated that there was ‘no consensus of opinion among the wider Hindu and Sikh communities’ on the need for legislation, citing the NIESR study that ‘proof either way [of the existence of caste discrimination] was impossible’⁸⁰ and questioning the usefulness of legislation for victims. This prompted the director of the NIESR study to write to him clarifying that the statement ‘proof either way was impossible’ was ‘a philosophical point over the nature of knowledge and proof’ and that ‘the evidence strongly suggests that caste discrimination and harassment, including of the type which would fall under the Equality Act, exists in Britain’.⁸¹

9.3.3 Dalit activism subsequent to the NIESR study

Following publication of the NIESR study, Dalit organisations and activists continued to lobby the government to introduce legislation against caste discrimination, arguing that ‘victims of caste discrimination should be accorded similar legal protection as that afforded to other British citizens experiencing discrimination in the UK’⁸² and that the government ‘should treat caste discrimination like any other form of unacceptable discrimination’.⁸³ They lobbied CERD in Geneva during its examination of the UK’s 20th report in August 2011, securing a recommendation in CERD’s Concluding Observations to the UK that the

⁸⁰ Baroness Thornton; HL Deb vol 742 col GC86 9 January 2013; letter, Lord McNally to Dr. Francis (JCHR) 20 September 2012; copy on file with author.

⁸¹ Baroness Thornton, *ibid.*; letter, H. Metcalfe (NIESR) to Lord McNally, 6 February 2013; copy on file with author.

⁸² ‘Evidence of Caste discrimination and harassment in the UK confirmed in independent research commissioned by Government’; ACDA Press Release, 16 December 2010; copy on file with author.

⁸³ ‘Caste Discrimination in the UK: Joint Statement calling on the Government to enact clause 9(5)a of the Equality Act 2010 (sic)’; 23 December 2010; copy on file with author.

government invoke EQA s. 9(5)(a).⁸⁴ They lobbied the UN Human Rights Council ahead of the UPR examination of the UK in May 2012, securing the aforementioned recommendation by the UPR Working Group for the immediate implementation of EQA s. 9(5)(a),⁸⁵ and they engaged with the All Party Parliamentary Group on Dalits (APPGD),⁸⁶ which in October 2012 met with John Wadham, General Counsel of the Equality and Human Rights Commission (EHRC), leading to an EHRC policy statement in support of ‘the enactment of s. 9(5)(a) Equality Act 2010’ (sic) – thus reversing the EHRC’s previous opposition to caste-specific legislation. The EHRC recommended that in light of ‘the findings of the government-commissioned NIESR paper on caste discrimination, legal protection under the Equality Act 2010 for those experiencing discrimination in Britain should be as comprehensive as possible’.⁸⁷

On 17 January 2011, ninety-one individuals, including the director of the NIESR study and the present author (as an invited expert), attended a meeting in the House of Lords, called by Lord Avebury and the Dalit groups and chaired by Lord Avebury, to put the case to Lynne Featherstone, then Minister for Women and Equalities, for invoking s. 9(5)(a). The minister declined to comment on the NIESR study and declined to indicate when, or even whether, the government would reach a decision on s. 9(5)(a), repeating simply that the government was ‘considering’ the NIESR

⁸⁴ CERD recalled its 2003 Concluding Observations recommending that the UK introduce a prohibition of descent-based discrimination into domestic law, and its General Recommendation No. 29 (2002) on descent, and recommended that the UK invoke EQA s. 9(5)(a) to ‘provide for “caste to be an aspect of race” in order to provide remedies to victims of this form of discrimination’; UN Doc. CERD/C/GBR/CO/18-20, 1 September 2011, para. 30.

⁸⁵ See UPR Working Group Report, n 73 above.

⁸⁶ All Party Parliamentary Groups are informal, cross-party interest groups run by and for Members of the House of Commons and House of Lords; they have no official status and are not accorded any powers or funding. The APPGD was formed in October 2010 to draw attention to discrimination against Dalits wherever it occurs and to support attempts to eliminate it; <http://www.publications.parliament.uk/pa/cm/cmallparty/register/dalits.htm> (visited 9 August 2012).

⁸⁷ See <http://www.equalityhumanrights.com/legal-and-policy/equality-act/commission-policy-statement-on-caste-discrimination/> (visited 26 October 2012).

report.⁸⁸ On 28 November 2012, a further conference took place in the House of Lords, also organised by the Dalit groups and Lord Avebury (again acting as Chair), to put the case to government for the power in s. 9(5)(a) to be exercised. By then, government responsibility for equalities had moved from the Home Office to the Department of Culture, Media and Sport (DCMS) under Maria Miller MP.⁸⁹ Speakers once again included the director of the NIESR study and the present author (as an invited expert) in addition to the director of the Northern Ireland Council for Ethnic Minorities, a policy officer from Liberty, an employment partner from the law firm Thomas Eggar, and Baroness Thornton, Shadow Spokesperson on Equalities. Stressing that the principle of equal treatment was at the heart of Britain's human rights framework, Liberty called for the immediate exercise of the s. 9(5)(a) power, while Baroness Thornton stated that on the basis of the NIESR evidence, had Labour been in power, s. 9(5)(a) would have been activated.⁹⁰ Lord Avebury suggested that government inaction was due to lobbying by high caste groups and that government arguments about lack of consensus on legislation were equivalent to not legislating on racial discrimination because white people may object.⁹¹ Following the conference, Lord Avebury sent a Joint Statement signed by thirty-six organisations to the Minister for Equalities stressing the 'moral importance of legislative equality for Dalits'.⁹² He also wrote to the prime minister berating the government for its inaction on caste discrimination and the blocking of progress by 'high caste persons' despite

⁸⁸ Meeting, 17 January 2011, unofficial transcript, copy on file with author; 'Joint Statement calling for enactment of clause 9(5)a of the Equality Act for caste to be an aspect of race', 17 January 2011, signed by twenty-three organisations; copy on file with author; letter, ACDA to Lynne Featherstone, 31 January 2011; copy on file with author.

⁸⁹ See <http://homeoffice.gov.uk/equalities/> and <http://www.culture.gov.uk/equalities/index.aspx> (both visited 19 February 2013).

⁹⁰ Meeting, 28 November 2012; author's contemporaneous personal notes.

⁹¹ Ibid.

⁹² Letter, Lord Avebury to Maria Miller MP, 29 November 2012; copy on file with author.

calls for action from the EHRC, Liberty and UN bodies.⁹³ Although no DCMS representative attended, the November 2012 conference together with the ECHR's policy shift served to increase the pressure on government to respond to demands for legal protection from caste discrimination and to explain the reasons for government inaction.⁹⁴

9.3.4 Legal implications of the non-exercise of the s. 9(5)(a) power

This subsection highlights briefly the legal implications should the s. 9(5)(a) power remain unexercised. It was suggested at the House of Lords meetings in January 2011 and November 2012 that a court might interpret the inclusion of s. 9(5)(a) in the EQA as meaning that Parliament intended to exclude caste from EQA protection unless and until the s. 9(5)(a) power was exercised, because it would not have included the power if it thought caste was already covered by other provisions; therefore, unless and until the power was invoked, claimants would be deprived of a remedy.⁹⁵ Parliamentary debates leading to the enactment of the EQA do not suggest that this was Parliament's intention – yet the absence of an order extending s. 9 EQA 'so as to provide for caste to amount of itself to an aspect of race' was one reason why an Employment Tribunal in the unreported case of *Naveed v Aslam* in November 2012 considered a claim of caste discrimination 'doomed to fail'.⁹⁶ Opposition by some parliamentarians to including an express prohibition of caste discrimination in the EQA was partly because they believed that caste discrimination *was* already covered by existing religious or race discrimination provisions (the

⁹³ Letter, Lord Avebury to the prime minister, 24 December 2012; copy on file with author.

⁹⁴ See S. Jones, 'Campaigners urge government to tackle caste discrimination in the UK: politicians and human rights groups say people from traditionally lower status Asian backgrounds need legal protection', *The Guardian*, 30 November 2012.

⁹⁵ Meeting, 17 January 2011, unofficial transcript; n 88 above; meeting, 28 November 2012, n 90 above.

⁹⁶ *Naveed v Aslam*, n 6 above.

ECHR's position in January 2010). The point of s. 9(5)(a) was to provide legal certainty so that claimants would not have to make complicated legal arguments. Conversely, the primary legal implication of the non-exercise of the s. 9(5)(a) power is the absence of legal certainty. The fact that as at 1 April 2013 s. 9(5)(a) had not been repealed leaves open the possibility that caste may yet be added as an aspect of race. The EAIA raised another issue, namely that 'someone with a legal interest in the exercise of the power may bring judicial review proceedings regarding the exercise or lack of exercise of the power'. As at 1 April 2013, this had not happened, but it remains a theoretical possibility.

9.4 Legal developments since the Equality Act 2010

Two developments following the enactment of the Equality Act 2010 are considered below. These are (1) two employment tribunal cases involving caste discrimination allegations, the first and most high profile being the *Begraj* case and (2) an amendment to the Enterprise Regulatory Reform Bill 2012 to secure a ministerial order adding caste to the definition of race in EQA s. 9(1).

9.4.1 *Begraj and Begraj v Heer Manak Solicitors and others*

In August 2011, Britain's first caste discrimination case, *Begraj and Begraj v Heer Manak Solicitors and others (Begraj)*, came before the Birmingham Employment Tribunal,⁹⁷ but on 14 February 2013, after more than thirty days of hearings and while substantive issues were still being heard, the judge, on an application by the

⁹⁷ A. Waughray, 'The New Apartheid?', *New Law Journal*, 6 January 2012, 19-21; K. McPherson and K. Shaw, 'Is it time to legislate on caste?', *Employment Law Journal*, February 2012 12-15; C. Churchard, 'Legal clarity needs on caste discrimination, say law experts', *People Management*, 19 August 2011.

respondents, recused herself from the case because of the possibility of an appearance of bias. At the time of writing, the claimants' lawyers were considering an appeal.⁹⁸ Amardeep and Vijay Begraj had claimed unfair dismissal, caste discrimination and race and religious discrimination. In addition Amardeep Begraj had claimed sex discrimination. The case tested the question whether discrimination or harassment based on caste was prohibited under existing provisions on race and religion or belief.⁹⁹ Vijay Begraj was a Dalit, and at the time the claim was lodged he did not assert membership of a religion which correlates directly to caste status.¹⁰⁰ His wife, Amardeep, was from a higher caste Jat Sikh background, as were their mutual (former) employers, Heer Manak Solicitors. The couple alleged that they suffered discrimination following their inter-caste marriage (which occurred during the course of their employment with the respondents and of which the respondents disapproved). In the absence of a caste as a statutory protected characteristic they argued that the discrimination they suffered was because of race, or religion or belief. In relation to religion or belief, it could have been argued that a belief that one is free to marry whoever one wishes, irrespective of caste considerations, constitutes a protected belief which satisfies the *Grainger* test.¹⁰¹ In relation to race it has been argued that the use of 'includes' in the EQA definition of race indicates that the definition is not exhaustive and that it is therefore open to a tribunal to find that caste is an aspect of race, 'even if it does not strictly fall within colour, nationality, ethnic or national origins' (although this was not the outcome in *Naveed*).¹⁰² Since *Begraj* pre-dated the EQA, the claimants had to argue that caste fell within race or ethnic

⁹⁸ See Jones, n 6 above.

⁹⁹ The relevant legislation at the time the facts arose was the Race Relations Act 1976 (RRA) and the Employment Equality (Religion or Belief) Regulations 2003; SI No. 2003/1660.

¹⁰⁰ He subsequently asserted Valmiki identity.

¹⁰¹ See Chapter 8 of this thesis.

¹⁰² McPherson and Shaw, n 97 above, 13. *Naveed v Aslam*, n 6 above.

origins under the RRA. Possible arguments were that caste falls within ethnic origins following *R (on the application of E) v Governing Body of JFS and Ors* which, as Chapter 7 of this thesis explains, opened up arguments that caste is subsumed within ethnic origins by virtue of the latter involving consideration of a person's antecedents or descent.¹⁰³ The High Court, in 2011, held that cultural, family and social conditions or customs, as well as being a minority group within a larger community, can be a 'part of ethnicity' within the meaning of the EQA.¹⁰⁴ The EQA implements the EU 'Race Directive' implementing the principle of equal treatment irrespective of racial or ethnic origin,¹⁰⁵ which in Recital 3 refers to protection against discrimination for all persons as a universal right recognised *inter alia* in the International Convention for the Elimination of Racial Discrimination (ICERD).¹⁰⁶ Race and ethnic origin are not defined in the Directive, but the reference to ICERD suggests that the Directive seeks to give effect to the principle of non-discrimination as understood in international law, particularly ICERD. It was therefore open to the tribunal to refer to the Court of Justice of the EU for a preliminary ruling under Article 267 TFEU the question whether race and/or ethnic origin in the Race Directive (and hence in the EQA) are to be interpreted as including caste.¹⁰⁷

¹⁰³ *R (on the application of E) (Respondent) v The Governing Body of JFS and the Admissions Appeal Panel of JFS and others (Appellant)* [2009] UKSC 15; see Chapter 7 of this thesis.

¹⁰⁴ *G (by his litigation friend) v The Head Teacher and Governors of St Gregory's Catholic Science College* [2011] EWHC 1452, paras. 40-41.

¹⁰⁵ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons, irrespective of racial or ethnic origin.

¹⁰⁶ Recitals contain the statement of reasons for the act and its aims and objectives rather than normative provisions. They do not have an independent legal value but can be used to determine the nature of a provision; see *Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of legislation within the Community institutions*, available at <http://eur-lex.europa.eu/en/techleg/index.htm> (visited 19 February 2013); T. Klimas and J. Vaiciukaite, 'The Law of Recitals in European Community Legislation', 15(1) *ILSA Journal of International and Comparative Law* (2008) 1-33.

¹⁰⁷ Article 267 TFEU: 'Where such a question is raised before any court or tribunal of a Member State, that court may, if it considers that a decision on the question is necessary to enable it to give judgment, require the Court of Justice to give a ruling thereon'. See, for example, *P v (1) S and (2) Cornwall County Council* (1996) IRLR 347.

9.4.1.1 *Legal implications of Begraj*

Despite its collapse, the *Begraj* case illustrated the gap in British discrimination law vis-à-vis caste. Only in certain cases can existing provisions on religion or belief discrimination capture caste discrimination. Only by ‘racing’ or ‘ethnicising’ caste could caste discrimination be caught by existing race discrimination provisions. A successful argument that caste is captured by race or ethnic origins would have benefitted the individual claimants in *Begraj* and would have been a huge step towards acknowledging both the existence of caste discrimination in the UK and its unacceptability – and this should not be underestimated. There are however a number of dangers. Such an approach would have masked the specificities of caste, while ‘ethnicising’ caste may have unintended consequences, including entrenching the notion of caste as an identity category/identity label in the UK and the elevation of *jati* identities into ‘freestanding’ ethnic identities.¹⁰⁸ Paradoxically, a finding in *Begraj* that caste was captured by existing provisions on race/ethnic origins might have strengthened the government’s argument, domestically and before UN bodies, that a statutory prohibition of caste discrimination was unnecessary because it can be dealt with through existing law. Such an argument should be resisted, as an Employment Tribunal decision is not binding precedent. In the absence of legislation, unless religious discrimination provisions can be used, claimants must argue that caste is captured by race/ethnic origins with the associated time and costs implications for all parties (including the courts). Consistency of outcome is not guaranteed and the principle will remain precarious unless and until a binding precedent is established; even a binding precedent can be overturned. It is possible that a successful argument for caste as a subset of race/ethnic origins might, in time,

¹⁰⁸ See A. Waughray, ‘Caste Discrimination: A Twenty-First-Century Challenge for UK Discrimination Law?’ 72(2) *Modern Law Review* (2009) 182-219.

result in a body of case law emerging such that caste will simply become treated in Britain as another aspect of race, both sociologically and in law. Nevertheless, a statutory prohibition of caste discrimination will simplify the process of dealing with caste discrimination claims (and hence reduce costs). It will provide legal certainty and it will send a public policy message that caste discrimination is socially unacceptable and actionable legally. Securing a statutory prohibition of caste discrimination should therefore be pursued as an aim, regardless of whether an appeal is lodged in *Begraj* and regardless of the outcome of future cases. The question of what form a statutory prohibition should take – caste as a subset of race as in s. 9(5)(a), or caste or descent as a new, separate characteristic, or descent as a subset of race – is discussed in section 9.6 below. Finally, the very fact that a claim of caste discrimination went before a tribunal might provide encouragement to future claimants. Conversely, the collapse of *Begraj* before reaching judgment on the merits, combined with the negative financial and psychological consequences of this for the claimants, may act as a deterrent.

9.4.2 Legal implications of *Naveed v Aslam*

In November 2012 the Employment Tribunal found that the complaint of racial discrimination in the form of discrimination based on caste was ‘doomed to fail’ for two reasons (1) because no order has yet been made extending s. 9 of the EQA so as to provide for caste to amount of itself to an aspect of race; (2) it was ‘quite impossible’ for the claimant’s caste to fall under the existing definition of ethnic origins because he accepted the possibility of movement within the Arain caste to which both he and the respondents belonged, therefore it was his *status* (i.e. class) within the same caste as the respondents which led to his alleged (mis)treatment.

Hence there was no liability for *racial* discrimination. Whether the parties in fact belonged to different *jatis* or sub-castes within the major Arain caste or *biraderi* is unclear.¹⁰⁹ What *Naveed* illustrates is (1) the difficulty of bringing a caste discrimination claim in the absence of a statutory prohibition, compounded by the fact that the non-exercise of the EQA s. 9(5)(a) power is itself open to contradictory interpretations; (2) that legislation must be coupled with education, training and guidance on caste and caste discrimination for employers, advice workers, lawyers, the judiciary and the police.

9.4.3 Enterprise and Regulatory Reform Bill 2012

9.4.3.1 *ERRB: Lords Grand Committee*

The Enterprise and Regulatory Reform Bill 2012 (ERRB) was intended *inter alia* to ‘cut unnecessary red tape for businesses’ by repealing ‘unnecessary legislation’.¹¹⁰ Ironically it provided a vehicle to re-ignite parliamentary debate about the legal regulation of caste discrimination. At Lords Grand Committee stage on 9 January 2013,¹¹¹ a novel amendment was moved by Baroness Thornton (Labour), Lord Harries of Pentregarth (Liberal Democrat), Lord Avebury (Liberal Democrat) and Lord Crisp (a cross-bencher) to add caste to the definition of race in EQA s. 9(1).¹¹² Parliamentarians supporting the amendment argued that the need for caste

¹⁰⁹ On the Arain see A. Shaw, *Kinship and Continuity: Pakistani Families in Britain* (London: Routledge, 2000), chapter 4.

¹¹⁰ See <http://www.publications.parliament.uk/pa/bills/lbill/2012-2013/0083/amend/am083-e.htm> and <https://www.gov.uk/government/news/the-queens-speech-2012> (both visited 16 February 2013). The Bill was presented in the House of Commons on 23 May 2012; see HC Deb vol 545 col 1171 23 May 2012.

¹¹¹ Lords Committee stage ran over ten sittings between 3 December 2012 and 31 January 2013; see <http://services.parliament.uk/bills/2012-13/enterpriseandregulatoryreform/stages.html> (visited 19 February 2013).

¹¹² Sixth Marshallled List of Amendments to be Moved in Grand Committee as at 8 January 2013, available at <http://www.publications.parliament.uk/pa/bills/lbill/2012-2013/0045/amend/ml045-vi.htm> (visited 18 February 2013).

discrimination legislation was clear.¹¹³ As to the reasons for government inaction, Lord Harries suggested these were (1) a general reluctance to legislate given the major educational problem (2) pressure from India and (3) opposition from those primarily responsible for discrimination.¹¹⁴ As for (1) and (2), good law, he said, was a ‘major tool of education’, and he personally had seen no pressure coming from India. As for (3), he described as ‘absurd’ the government’s recurring argument that there was no consensus on the need for legislation ‘among those communities potentially most affected’, comparing it to arguing against abolishing apartheid in South Africa ‘because other people in the country might be affected by the legislation’.¹¹⁵ Lord Avebury added that while legislation might not ‘stamp out the societal roots of racism, misogyny or homophobia’, it was the ‘main tool for dealing with the overt manifestations of prejudice and a powerful signal of society’s disapproval of the underlying ingrained attitudes of hatred and prejudice against the other’.¹¹⁶ Moreover, it would be ‘grossly illogical’ to forego the use of a weapon (i.e. law) against caste discrimination which has proved effective in the case of all the other protected characteristics; consequently, there would have to be some reason of principle as to why caste should be treated differently from those other characteristics, and in his view there was none.¹¹⁷ Lord Deben (Con) argued that it was impossible for the government to build a case that caste discrimination was different from any other forms of discrimination, as there was an overwhelming majority of parliamentarians in both Houses, he said, who felt that caste should not be treated any differently from race or sexual orientation.¹¹⁸ Baroness Stowell, for

¹¹³ Baroness Thornton; HL Deb vol 742 col GC86 9 January 2013.

¹¹⁴ Lord Harries, *ibid.*, cols GC87-GC88.

¹¹⁵ *Ibid.*, col GC88.

¹¹⁶ Lord Avebury, *ibid.*, col GC90.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*, col GC92-93.

the government, insisted government was ‘not resisting legislation in deference to high caste views’ but was ‘concerned that legislation would be a disproportionate response’ – the prohibition of discrimination against Romany Gypsies and Irish Travellers, she said, had come about through case law not legislation.¹¹⁹ She also questioned (again) the extent of caste discrimination, at which Lord Avebury pointed to gender reassignment which was introduced as a statutory protected characteristic despite the small number of people covered.¹²⁰ The debate concluded without a vote.

9.4.3.2 Towards a presumption in favour of legislation?

Following a direct appeal by Baroness Thornton during the Lords Grand Committee debate to the Equalities Minister to meet with Dalit organisations and activists,¹²¹ a meeting took place on 6 February 2013 between Helen Grant, junior Minister for Women and Equalities, Baroness Northover and five representatives of Dalit organisations. Lord Avebury, Baroness Thornton and three GEO officials were also in attendance. This was the first meeting between the government and Dalit organisations since publication of the NIESR study, despite the Dalits’ repeated requests. Afterwards, a joint letter was sent to the minister by the groups present, stressing the consensus among Dalit organisations on the need for legislative protection from caste discrimination and providing further information on the likely numbers affected, examples of approaches to caste discrimination in other countries, the condemnation of caste discrimination in international human rights law and examples of how EQA protection would help tackle caste discrimination in

¹¹⁹ Ibid., col GC93-94.

¹²⁰ Ibid., col GC95.

¹²¹ Ibid., col GC87.

Britain.¹²² The letter argued that lack of legal redress for caste discrimination goes against all principles of equality and non-discrimination. To the Dalit groups the meeting appeared to mark a step towards a presumption in favour of legislation, but on 1 March 2013, the minister issued a Ministerial Written Statement announcing that the government had decided ‘not to exercise the caste power’ (sic) at the present time.¹²³ Instead, government announced the appointment of the organisation Talk For A Change ‘to engage with affected communities to run an educational programme to help tackle this complex and sensitive issue’ with a view to ‘find[ing] practical solutions to the problems and harm that caste-based prejudice can cause’.¹²⁴ The government also requested the EHRC to ‘examine... the nature of caste prejudice and harassment as evidenced by existing studies, and the extent to which this problem is likely to be addressed by either legislative or other solutions’ and to publish its findings later in 2013.¹²⁵ In a letter to the Anti-Caste Discrimination Alliance (ACDA) on the same day, the minister declared herself unconvinced that introducing caste-specific legislation was the best or most proportionate way of tackling the issue, choosing instead to take action via ‘an educational initiative’ – despite the NIESR’s contrary finding.¹²⁶ Coterminous with the minister’s statement, the EHRC issued a statement appearing to contradict its position in October 2012, agreeing that caste was ‘an extremely complex area’ with limited relevant case law and empirical research, and that it would ‘look at the existing evidence and provide

¹²² Letter, Dalit organisations to Helen Grant MP, Minister for Women and Equalities, 14 February 2013; copy on file with author.

¹²³ See n 5 above.

¹²⁴ Ibid. “Talk For A Change” ‘works towards the reduction of harmful conflict in communities and helps transform conflictual situations’; see <http://www.talkforachange.co.uk/> (visited 6 March 2013).

¹²⁵ See n 121, above.

¹²⁶ Letter, Helen Grant MP to ACDA, 1 March 2013; copy on file with author.

expert analysis on the extent to which the problem was likely to be addressed, by either legislative or other solutions’.¹²⁷

9.4.3.3 Lords Report Stage: day two

At Lords Report stage on 4 March 2013,¹²⁸ an amendment to the ERRB to add caste to the definition of race in EQA s. 9(1) as s. 9(1)(d) was moved by Lord Harries of Pentregarth.¹²⁹ Following intensive lobbying, Dalit organisations secured cross-party, cross-bench support for the amendment and organised a demonstration (‘Unite for Dignity’) outside Parliament on the day of the debate. The amendment was agreed by a resounding majority.¹³⁰ Those in favour argued that refusal to provide a legal remedy for caste discrimination, far from protecting community cohesion, was a recipe for lack of integration and poorer community relations; that it made no sense that other unacceptable discrimination was covered by the law, but not discrimination based on caste;¹³¹ that absence of consensus was not used as an argument for blocking legislation protecting other discriminated groups; that the real reason was not that education would work better than legislation, or that legislation was disproportionate, but that the government had been swayed by the opposition to legislation of some Hindus and Sikhs, who wrongly believed that legislation was designed to label them as persecuting Dalits,¹³² and that legislation – as noted by the Race Relations Board in 1967 – was essential as an unequivocal declaration of public

¹²⁷ EHRC News: ‘Tackling Caste Discrimination’, 1 March 2013, at <http://www.equalityhumanrights.com/news/2013/march/news-tackling-caste-discrimination/> (visited 6 March 2013).

¹²⁸ Lords Report stage ran over four sittings between 26 February 2013 and 11 March 2013; see n 110, above.

¹²⁹ See <http://www.publications.parliament.uk/pa/bills/lbill/2012-2013/0083/amend/am083-e.htm> (visited 9 February 2013).

¹³⁰ HL Deb vol 743 cols 1295-1319 4 March 2013.

¹³¹ Lord Deben; *ibid.*, cols 1297-1299.

¹³² Lord Avebury; *ibid.*, cols 1299-1302.

policy, to provide protection and redress, to provide legal certainty and for its educative side-effects.¹³³

9.5 Factors bearing on the legal regulation of caste discrimination in domestic law

This thesis has sought to draw out the multiplicity of factors bearing upon caste discrimination and its legal regulation in India and the UK, as well as in international human rights law. Figure 1, below, provides a model for bringing together those factors in the domestic and international arenas impacting both negatively and positively, for and against, the legal regulation of caste discrimination in the UK. These factors are discussed below.

¹³³ Lord Lester QC; *ibid*, col 1308.

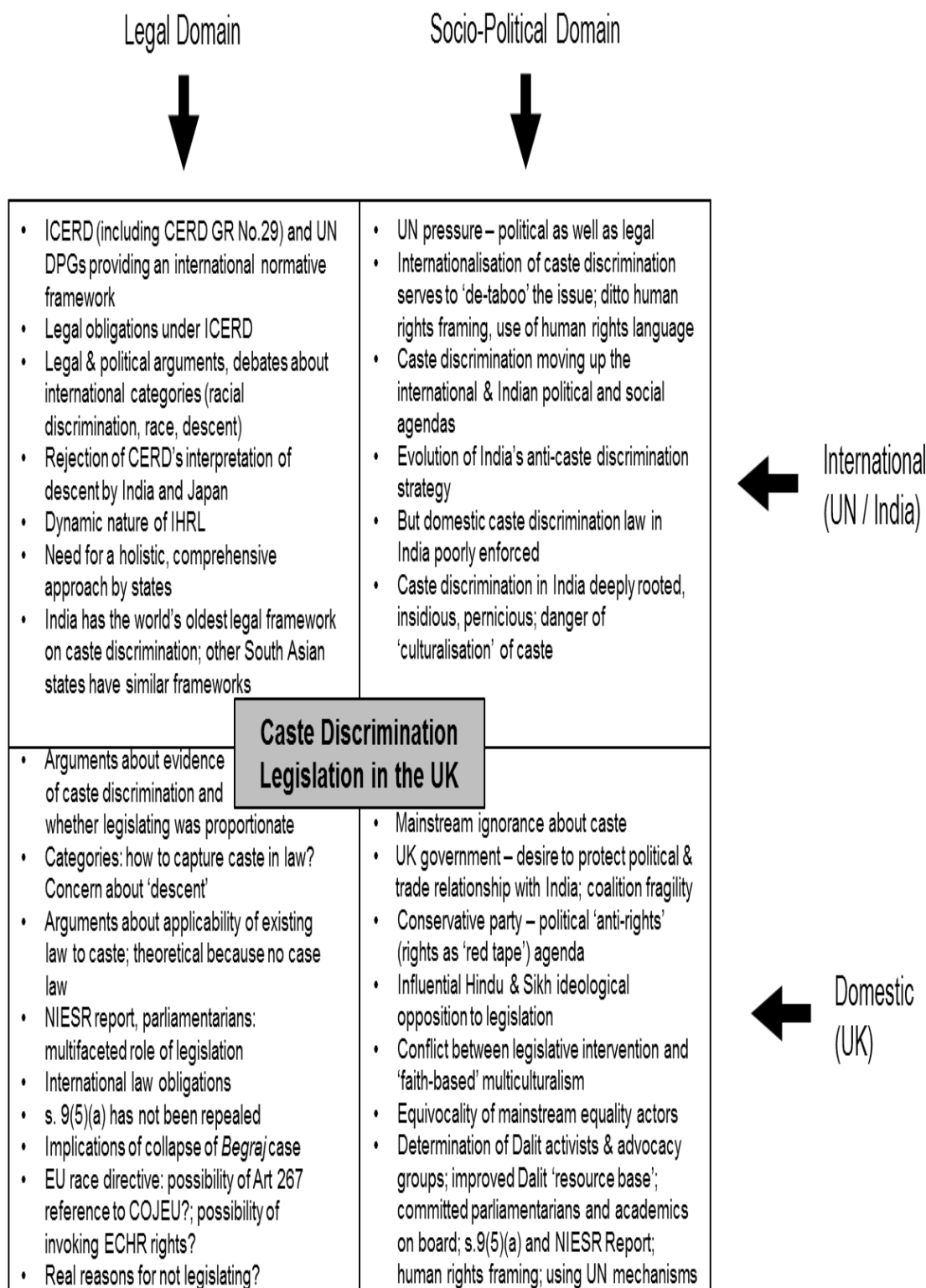


Figure 1: Analysis of factors impacting the legal regulation of caste discrimination in the UK

9.5.1 Domestic factors: legal

The prospect of a single Equality Act created the ‘opportunity space’ for Dalit activists and their supporters to advance demands for a statutory prohibition of caste discrimination within the context of a broader national debate about rights and equality. That said, throughout the Equality Bill debates, the legal categorisation of caste – the capture of caste in law – presented a problem. The formulation of race in the EQA is not on all fours with the formulation of racial discrimination in ICERD. Although the government has not challenged CERD’s use of descent to address caste under ICERD, Parliament chose ‘caste’, not descent, to capture caste in domestic law; but it chose to create caste as a subset of race rather than as a separate new category. Descent was considered too broad, risking the possibility of claims of discrimination based on social class, while the creation of a tenth protected characteristic was politically unacceptable.¹³⁴ Internationally, Dalit activists and advocacy groups have sought to keep caste away from racial discrimination and descent, in favour of the new category of discrimination based on work and descent. UK parliamentarians appeared less squeamish about the term ‘caste’, and about linking caste with race, but they did not endorse an immediate statutory prohibition of caste discrimination, and government has not brought in the legislation, despite the recommendations of CERD and the UN UPR, arguing that it is not convinced that legislation is the best way of dealing with the problem. This thesis supports a pragmatic approach, namely the immediate implementation of EQA s. 9(5(a), thus making caste an aspect of race in domestic law, as well as considering separating out caste from race in the medium term based on its unique nature.

¹³⁴ See Chapter 8 of this thesis.

9.5.2 Domestic factors: socio-political

In addition to the concerns voiced explicitly by the government about legislation, it is submitted that there are other, underlying, socio-political factors impacting on government's decision as to whether to legislate. Firstly, in the context of recession in Western economies, competition amongst Western nations to establish a 'special relationship' with India is intense. India is the UK's largest non-EU market. Furthermore, India is the third largest investor in the UK, and of the 1,200 Indian companies in the EU, seven hundred are in the UK, with Tata being one of the UK's largest manufacturing employers.¹³⁵ It would therefore be unsurprising if the UK government were anxious about alienating the Indian business and political establishment by introducing caste discrimination legislation in the UK.¹³⁶

Secondly, for many years British Dalits struggled to make their case. There are a number of reasons for this. Dalits are an 'invisible community' in the UK.¹³⁷ Among South Asians in Britain, writes a UK-based Dalit, the issue of caste has been marginalised and denied politically and intellectually. For the wider community, Dalits did not even exist in the UK; their history, culture and traditions are not covered in the textbooks: 'There are Hindus, Sikhs, Jains, but no Dalits'.¹³⁸ Moreover, he writes, non-Dalits tended to be dominant among South Asians in Britain, monopolising 'all the jobs that require interfacing with the host English community'.¹³⁹ The Dalit cause is not well-understood by the mainstream British public. Historically, Dalits have had only limited access to key political actors and

¹³⁵ <http://ukinindia.fco.gov.uk/en/about-us/working-with-india/india-uk-relations/>

¹³⁶ 'In the first such legislative move anywhere in the world, and much to the embarrassment of India's official position, the British House of Lords has passed a law that treats caste as "an aspect of race"': M. Mitta, 'UK bill links caste to race, India red-faced', *Times of India*, 31 March 2010.

¹³⁷ A. Shukra, 'Caste, a personal perspective' in M. Searle-Chatterjee and U. Sharma, *Contextualising Caste: Post-Dumontian Approaches* (Oxford: Blackwell, 1994) 169-178, 170.

¹³⁸ Shukra, *ibid.*, 177.

¹³⁹ Shukra, *ibid.*, 170.

decision-makers. In contrast, organisations opposed to caste discrimination legislation, such as the HFB and the HCUK, have long benefitted from close links with senior parliamentarians such as Lord Dholakia (patron of the HFB) and Baroness Verma,¹⁴⁰ who as South Asians can call up a familiarity with caste but who as non-Dalits may not conceptualise caste discrimination in Britain as a form of discrimination requiring the same legal treatment as other forms of discrimination (despite its being unlawful in India). In the past, Dalit groups have been insufficiently united – as with other social movements they have suffered from ideological divisions and factionalism, and the campaign for caste discrimination legislation suffers from an apparent lack of involvement among women and young Dalits. Nevertheless, Dalit organisations were remarkably united, and focussed, in their campaign for the inclusion of EQA s. 9(5)(a) and for its activation.

Thirdly, for many years caste discrimination was not taken up by mainstream equality actors.¹⁴¹ The EHRC supported the inclusion of descent in the EQA but was opposed to the inclusion of caste, arguing that caste discrimination was covered by existing provisions.¹⁴² It declared itself willing to support a suitable case to test this proposition¹⁴³ but declined to support the *Begraj* case. Various factors may account for the reluctance of equality actors to associate themselves with efforts to secure legal regulation of caste discrimination. First, insufficient awareness and understanding of caste and discrimination based on caste; second, the reluctance of victims to come forward; and third, the historical inability of small, voluntary

¹⁴⁰ Baroness Verma was the keynote speaker at the HFB AGM on 17 June 2012; see <http://www.hfb.org.uk/Default.aspx?SID=45&cID=508&ctID=43&lID=0> (visited 10 August 2012).

¹⁴¹ A search in 2012, using the terms ‘caste’ and ‘Dalits’ on the Liberty Human Rights website, produced no results; see <http://www.liberty-human-rights.org.uk/search.php?q=caste> (visited 10 August 2012). The CRE declined to engage with caste discrimination, despite its categorisation in international human rights law as a form of racial discrimination; see Chapter 6 of this thesis.

¹⁴² See Chapter 8 of this thesis.

¹⁴³ Letter, T. Phillips (EHRC) to L. Pal (ACDA); 3 October 2011; copy on file with author.

associations and interest groups to capture the attention of discrimination industry actors.¹⁴⁴

Lastly, the political cost of introducing caste discrimination legislation may have been seen as too high by government. During the first two years of coalition there was pressure to present a united front, especially given the unpopularity of many coalition policies. As such, there may have been a fear of losing South Asian votes. There has been consistent strong opposition to caste legislation by Hindu and Sikh organisations who argue that legislation will reinforce or even create afresh long-abandoned caste distinctions and discrimination; that legislation will result in people having no choice but to be labelled by caste despite the disinterest in caste identity other than among the elderly; and that there is no valid evidence of the existence of caste discrimination in spheres covered by equality law.¹⁴⁵

9.5.2.1 Caste and the multicultural conundrum

The following subsections posit a link between state policies on multiculturalism and ‘faith communities’, and government reluctance to legislate for caste discrimination. In 1972, Anthony (now Lord) Lester and Geoffrey Bindman warned that, in a society which is plural culturally as well as racially, cultural diversity may create tensions similar to those arising from racial differences. While ‘some of the problems of cultural diversity can be safely left to solve themselves’, not all can: ‘cultural

¹⁴⁴ In contrast, Press For Change (PFC) has raised awareness of discrimination on grounds of gender re-assignment, and achieved legislative change, through proactive use of domestic and European legal mechanisms. The transsexual population in the UK is less than the likely Dalit-origin population, yet PFC has ensured that discrimination against transsexuals is, rightly, now addressed by domestic legislation as well as by the European Court of Human Rights. See <http://www.pfc.org.uk/> (visited 19 February 2013).

¹⁴⁵ ‘Anti Caste Legislation Committee’ Briefing Paper, 2 April 2013; copy on file with author.

tolerance must not become a cloak for oppression and injustice within the immigrant communities themselves'.¹⁴⁶ Jaoul argues that British multiculturalism has favoured the development of a British form of caste discrimination which,

even though it is a by-product of caste in India, needs to be dealt with as a British phenomenon that has much to do with existing British policies and that therefore needs to be addressed by British law on discrimination.¹⁴⁷

Jaoul criticises 'the British multicultural approach' for accepting that 'caste taboos are part of Hindu religion and that the State has no right in interfering in such internal matters'.¹⁴⁸ Further, because multicultural policies 'boast of being progressive and anti-racist', they give a 'new legitimacy' to tolerance of casteism in British society. However, says Jaoul, modern multiculturalism cannot be blamed alone – the British Raj incorporated caste as a convenient building block of the colonial order because it provided an indigenous, religious sanctification to inequality and 'could be an effective warrant of social order in a country divided in a multitude of castes and communities'.¹⁴⁹

¹⁴⁶ A. Lester and G. Bindman, *Race and Law* (Harmondsworth: Penguin, 1972) 18 (emphasis added).

¹⁴⁷ N. Jaoul, 'Multiculturalism and caste in Britain', paper delivered at CasteWatch UK conference, Sandwell, 15 July 2007, unpublished; copy on file with author; see http://castewatchuk.org/archives/castewatch-orig/conf07_1130.html (visited 19 February 2013).

¹⁴⁸ Liberal multiculturalism as it developed in the 1970s and 1980s in the UK was underpinned by the principle of universal individual rights and individual citizenship in the public sphere alongside tolerance in private of 'particularistic cultural practices'; S. Hall, 'Conclusions: the multicultural question' in B. Hesse (ed.), *Un/Settled Multiculturalisms: Diasporas, Entanglements, Transruptions* (London: Zed Books, 2000) 209-41, 210. On the contested meanings of the term "multiculturalism" see D. McGoldrick, 'Multiculturalism and its Discontents', 5(1) *Human Rights Law Review* (2005) 27-56, 31-39; A. Xanthakis, 'Multiculturalism and International Law: Discussing Universal Standards', 23(1) *Human Rights Quarterly* (2010) 21-48, 23; B. Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (Basingstoke: Palgrave MacMillan, 2006) 2-11.

¹⁴⁹ Jaoul, n 147 above.

Thus,

[t]he kind of governance based on the mediation of community leadership that is advocated by multiculturalists can... be traced back to the colonial techniques to rule India by taking advantage of its cultural diversity.¹⁵⁰

For Patel, the problem lies more in the shift in state social policy in the late 1990s from liberal multiculturalism to ‘faith-based multiculturalism’,¹⁵¹ bolstered by the inclusion of religion as a category for the first time in the 2001 Census, alongside ‘increasing self-identification in terms of religion [and] demands that the public space should recognise religious claims and religious differences’.¹⁵² Ethnic minority communities became reframed as ‘faith communities’¹⁵³ and religion emerged as the ‘main badge’ of minority identity¹⁵⁴ (the movement from ‘race to religion’).¹⁵⁵ Underpinning this approach is the idea of religion as a ‘common value’.¹⁵⁶ However, this is not necessarily positive or benign. According to Patel, it has provided an opportunity for certain “‘faith groups” to use the terrain of multiculturalism to further an authoritarian and patriarchal agenda’ which poses a threat to human rights.¹⁵⁷ The danger, argues Kundnani, is a ‘tokenistic and unthinking approach to minority representation’, whereby – in the case of South Asian communities – ‘under the guise of multiculturalism, leaders of communalist [sectarian] groups can easily

¹⁵⁰ Jaoul, *ibid.*,

¹⁵¹ P. Patel, ‘Asian Women’s Struggles for Human Rights in the UK’, 16 *Feminist Legal Studies* (2008) 9-36.

¹⁵² G. Singh, *The Adab ‘Respect’ Programme: A Perspective on Muslim-Sikh Relations in the UK and Causes of Tensions and Mistrust between the two Communities* (London: Faith Matters, 2010) 34.

¹⁵³ J. Zavos, ‘Negotiating Multiculturalism: Religion and the Organisation of Hindu Identity in Contemporary Britain’, 35(6) *Journal of Ethnic and Migration Studies* (2009) 881-900, 890.

¹⁵⁴ Patel, n 151 above, 11, 14-15.

¹⁵⁵ C. Allen, ‘From race to religion: the new face of discrimination’, in T. Abbas (ed.), *Muslim Britain: Communities Under Pressure* (London: Zed Books, 2005) 49-65, cited in Zavos, n 153 above, 882.

¹⁵⁶ Zavos, *ibid.*, 890.

¹⁵⁷ Patel, n 151 above, 15; Zavos, *ibid.*

become accepted as authentic representatives of Asian “culture”. As a result, he claims, the most reactionary elements in the community are given undue influence.¹⁵⁸

9.5.2.2 ‘Community cohesion’ and ‘faith communities’

‘Community cohesion’ (damage to which was cited by both the Labour and Coalition Governments as a reason for not legislating against caste discrimination) was the Labour Government’s policy response to the 2001 civil disturbances in northern England¹⁵⁹ – widely understood as resulting from a decline in, or a lack of, social (or community) cohesion.¹⁶⁰ The main theme of community cohesion was that cultural pluralism and integration were compatible.¹⁶¹ Religion was central to this vision – ethnic minority communities, re-labelled ‘faith communities’, were identified as ‘important sources of social capital’ with a key role to play in issues such as urban regeneration and tackling antisocial behaviour.¹⁶² However, social or community cohesion in caste societies, historically, has meant intra-caste or intra-group cohesion or solidarity, rather than inter-caste or inter-group cohesion. The terms ‘community’ and ‘caste’ are often used interchangeably in India; and Ambedkar described caste as an antisocial, divisive, anti-cohesive force.¹⁶³

¹⁵⁸ A. Kundnani, ‘Racism, Religion and Communalism’, 44(2) *Race and Class* (2002) 71-80, 79. For a discussion of the relationship between multiculturalism and international law standards see Xanthakis, n 148 above.

¹⁵⁹ C. Worley, “‘It’s not about race. It’s about the community’: New Labour and “community cohesion””, 25 *Critical Social Policy* (2005) 483-496, 483.

¹⁶⁰ *Ibid.*, 485.

¹⁶¹ D. McGhee, ‘Moving to “our” common ground – a critical examination of community cohesion discourse in twenty-first-century Britain’, 51(3) *Sociological Review* (2003) 376-404, 387; Local Government Association (LGA), *The Local Government Association’s Guidance on Community Cohesion* (London: LGA, 2002); D. Robinson, ‘The Search for Community Cohesion: Key Themes and Dominant Concepts of the Public Policy Agenda’, 42(8) *Urban Studies* (2005) 1411-1427.

¹⁶² See Patel, n 151 above; Kundnani, n 158 above, 79; Zavos, n 153 above.

¹⁶³ B.R. Ambedkar, ‘Annihilation of Caste’ in V. Moon (ed.), *Babasaheb Ambedkar Writings and Speeches Vol. 1* (Bombay: Education Dept., Govt. of Maharashtra, 1989) 25-96, 50-52, 56.

9.5.2.3 *Caste and the 'Hindu community'*

British Hindu organisations opposed to caste discrimination legislation have sought to present the 'Hindu community' as a 'clearly articulated group' and themselves as its representatives. But there are problems with this approach. The 'Christian theological model', says Searle-Chatterjee, addresses religion as 'a separable and definable phenomenon which has crystallised into six or so distinct "major" faiths'.¹⁶⁴ Within this 'world religions' paradigm, Hinduism is seen as a distinct religion and 'Hindu' as a distinct and 'bounded' religious identity, 'to which other identities of class, caste, gender, etc. are subordinate'.¹⁶⁵ However, scholars suggest that such a view of Hinduism is neither historically, geographically or culturally accurate.¹⁶⁶ Searle-Chatterjee explains that in the [Indian] sub-continent, it was not religion but caste 'which more frequently provided a basis for identification, even though the institution of caste was, historically, more fluid and segmental than the British realised. *It is not surprising that in Britain many Indian organisations, including 'religious' ones, are caste-based*'.¹⁶⁷ The word 'Hindu', says Searle-Chatterjee, is used 'with very different meanings at different levels of the caste system'; 'lower' castes have traditionally used 'Hindu' to refer to 'upper' castes but not to themselves, while 'high' castes often used it 'to refer to those who were seen as truly Indian', that is, 'not having any religious link or allegiance to "foreign" traditions' (such as Christianity).¹⁶⁸ Lack of awareness of popular religious practices on the subcontinent, argues Searle-Chatterjee, combined with the idea that religions

¹⁶⁴ M. Searle-Chatterjee, "'World religions" and "ethnic groups": do these paradigms lend themselves to the cause of Hindu nationalism?', 23(3) *Ethnic and Racial Studies* (2000) 497-515, 500.

¹⁶⁵ *Ibid.*, 498.

¹⁶⁶ On the 'vagueness of the term Hindoo' and the 'blurred boundary between Hinduism and animism' encountered by British India administrators see J. Zavos, *The Emergence of Hindu Nationalism in India* (New Delhi: OUP, 2000) 74-77. For a contrary argument see D. Lorenzen, 'Who Invented Hinduism?', *Society for Comparative Study of Society and History* (1999) 630-659.

¹⁶⁷ Searle-Chatterjee (2000), n 164 above, 519-500 (emphasis added).

¹⁶⁸ *Ibid.*, 504. See also M. Searle-Chatterjee, 'Caste, religion and other identities' in M. Searle-Chatterjee and U. Sharma (eds.), *Contextualising Caste* (Oxford: Blackwell, 1994) 147-168, 159-162.

are ‘bounded unities’, has resulted in the use of ‘Hindu’ as an identity label in the UK.¹⁶⁹ This has made it possible for organisations such as the HFB to ‘construct a monolithic “Hindu” voice and community in the UK’,¹⁷⁰ despite the deeply contested nature of the word ‘Hindu’, and to promote themselves as the institutional face of a homogenised Hinduism, representative of all Hindus in the UK,¹⁷¹ thereby enabling them – along with certain other minority religious organizations – to exert ‘an unprecedented influence on State policy towards minorities’.¹⁷² Furthermore, Searle-Chatterjee argues that Western academic accounts of Hindus in Britain promote a monolithic picture of Hinduism ‘suffused uncritically’ with positive images¹⁷³ – partly due to sensitivity to accusations of ethnocentricity or racism, and partly to a prevailing view that ‘religion, in any form, is primarily benign and positive, with socially integrative functions’.¹⁷⁴ The result, she writes, is that ‘many kinds of social and cultural contradictions disappear from [Western academic] writing [on Hinduism]’.¹⁷⁵ Kundnani argues that the reputation of Hinduism as inherently tolerant, humane and peaceful has meant that fundamentalists within UK Hindu communities often escape scrutiny. For too long, he claims, communalism (sectarianism) in British Asian communities has escaped discussion, while fundamentalism is a charge levelled only at ‘other sections’ of the Asian community (i.e. Muslims).¹⁷⁶ Concurring, Priyamvada Gopal argues that

[i]n the current climate of a national preoccupation with Islam... British Hindu and Sikh communities have become even less accountable for some of the more unsavoury features of their collective existence. This has been particularly so as some of their high-profile

¹⁶⁹ Searle-Chatterjee (2000), n 164 above, 503, 506.

¹⁷⁰ Patel, n 151 above, 17.

¹⁷¹ Ibid., 16-17; the tagline of the HCUK’s website is ‘A unified Hindu voice’.

¹⁷² Ibid., 15.

¹⁷³ Searle-Chatterjee (2000), n 164 above, 507.

¹⁷⁴ Ibid., 509.

¹⁷⁵ Ibid., 508.

¹⁷⁶ Kundnani, n 158 above, 71. See also C. Bhatt, ‘Dharmo rakshati rakshitah: Hindutva movements in the UK’, 23(3) *Ethnic and Racial Studies* (2000) 559-593.

spokespeople have made concerted attempts to distance both communities from Muslims, arguing that they are better assimilated and make a more positive contribution to the “host” community.¹⁷⁷

There is an associated issue. Chetan Bhatt is particularly critical of what he calls the ‘disingenuous humanism’ of Hindutva discourse. According to Bhatt, an ‘important attempt’ is being made by Hindutva organisations in the West to rearticulate the concept of *dharma* as a universal human philosophy, a natural law for the whole of humanity’, inherently tolerant and open.¹⁷⁸ In this conceptualisation of Hinduism, *varna* is considered an essential aspect of natural law which recognises equality of soul but also hierarchical classification based on personal qualities, whereas *jati* is conceived as a ‘false system of classification and division that was imposed by foreign imperialists’.¹⁷⁹ Hindutva is a right-wing, xenophobic, religio-political ideology propagated and promoted by the Hindu Nationalist movement in India, whose agenda, argue some scholars, is reflected in certain aspects of Hinduism in the UK.¹⁸⁰ The movement consists of three organisations based in India,¹⁸¹ which in the UK, says Zavos, ‘present themselves as cultural and social organisations and downplay their political agenda’, emphasising cultural and charitable work and

¹⁷⁷ P. Gopal, ‘Dominating the Diaspora’, *Himal Southasia*, April 2010, at <http://www.himalmag.com/read.php?id=4431> (visited on 1 June 2010); Kundnani, n 157 above, 72.

¹⁷⁸ C. Bhatt, *Hindu Nationalism: Origins, Ideologies and Modern Myths* (Oxford: Berg, 2001) 568-570.

¹⁷⁹ Ibid., 587.

¹⁸⁰ On Hindu nationalism see J. Zavos, *The Emergence of Hindu Nationalism in India* (New Delhi, OUP, 2000); C. Jaffrelot (ed.), *Hindu Nationalism: A Reader* (Princeton, Princeton University Press, 2007); Bhatt, *ibid.* Shani describes Hindu nationalism as ‘ethno-Hinduism’, illustrated by its hostility to ‘outsiders’ and to adherents of ‘non-Indic’ religions such as Islam and Christianity; O. Shani, *Communalism, Caste and Hindu Nationalism: The Violence in Gujarat* (Cambridge: Cambridge University Press, 2007).

¹⁸¹ Known collectively as the Sangh Parivar (family). The umbrella political organisation is Rashtriya Swayamsevak Sangh (RSS or National Volunteer Corps, modelled on Mussolini’s Brownshirts, with a presence in 150 countries); Bharatiya Janata Party (BJP), a political party, and Vishwa Hindu Parishad (VHP), a cultural organisation which has a strong presence in the UK.

distancing themselves from [right-wing Hindu] organisations in India.¹⁸² Parita Mukta concurs that the tenets of Hindu nationalism, which she argues are problematic for minorities, ‘are being disseminated and made acceptable within British politics’:

[Three points must be made]. One is the construction of a monolithic (and seemingly innocent) “religious” community which British politicians support in the name of cultural plurality and diversity. Second is the lack of political attentiveness to global formations which are anti-democratic in their thrust towards minorities in the homeland. Thus, the limited and contingent exigencies of the politics of multiculturalism (within Britain) have not been able to embrace a vision which takes account of international human rights. The darker side of “multiculturalism” in Britain is both exclusivist and supportive of a genocidal VHP in India. Thirdly, the prominent space carved out by Hindutva forces within British politics overrides the significance of democratic movements and impulses which organize outside the boundaries of religion and caste.¹⁸³

An examination of Hindu nationalist rhetoric and caste tensions in Britain is outside the scope of this thesis; rather, the purpose of the preceding section is to draw attention to an issue which, it is submitted, is relevant for an understanding of caste and caste discrimination in this country and which therefore merits further investigation.¹⁸⁴

¹⁸² J. Zavos, ‘Situating Hindu nationalism in the UK: Vishwa Hindu Parishad and the development of British Hindu Identity’, 48(1) *Commonwealth & Comparative Politics* (2010) 2-22, 3-4.

¹⁸³ P. Mukta, ‘The public face of Hindu nationalism’ 23(3) *Ethnic and Racial Studies* (2000) 442-466, 453. See also S. Narula, ‘Overlooked Danger: The Security and Rights Implications of Hindu Nationalism in India’, 16 *Harvard Human Rights Journal* (2003) 41-68; F. Raj, ‘More dangerous than shariah: Hindutva’, *Washington Times*, 8 September 2011.

¹⁸⁴ See Shani, n 179 above.

9.5.3 International factors: legal

At the same time as transnational Dalit advocacy networks were reorienting the framing of caste discrimination towards discrimination based on work and descent and away from CERD and racial discrimination,¹⁸⁵ British Dalits were basing their campaign for domestic legislative reform on the rights contained in ICERD. Recommendations to the UK to introduce legislation prohibiting descent-based and caste-based discrimination were made by CERD in 2003 and again in 2011, when the addition of caste ‘as an aspect of race’, as envisaged by EQA s. 9(5)(a), was recommended.¹⁸⁶ In 2012, the UPR Working Group recommended immediate implementation of EQA s. 9(5)(a).¹⁸⁷ These UN recommendations were heavily relied on by British Dalit activists and their supporters in their campaign for domestic legislative reform.

We now turn, in the light of all the above, to lessons learned, and legal, social and political recommendations on the legal regulation of caste in the UK.

9.6 The legal regulation of caste in the UK: lessons learned

9.6.1 Legal arena

As UK citizens, British Dalits are entitled to protection from discrimination based on caste – a principle recognised in India since 1950 (even if not fully realised). Moreover, Dalits are entitled to core basic rights, namely equality of treatment and equality of opportunity to lead an unimpaired and peaceful life. Caste discrimination is a social problem which has moved from one social system (in India) to another (in

¹⁸⁵ See Chapter 5 of this thesis.

¹⁸⁶ See n 84 above.

¹⁸⁷ See n 73 above.

the UK). This thesis argues that domestic legislation is an essential (albeit not the sole) element in addressing caste discrimination in the UK. Caste-specific legislation has been criticised because of the alleged difficulty of proving the occurrence of caste discrimination, but this has not prevented the development of legislation covering discrimination on other grounds. It has also been criticised on grounds of cost, despite the Equality Act Impact Assessment advice that the lack of a specific statutory route for processing caste discrimination cases might be more costly (because of legal uncertainty) than introducing legislation. Although there would be initial ‘familiarisation’ costs, this thesis submits that as the concepts of caste, and discrimination based on caste, become more familiar, the costs associated with unfamiliarity will diminish. Discrimination legislation not only provides a vital route to redress but also serves a wider educational purpose, reducing the acceptability of such discrimination. This is particularly necessary for caste discrimination, because the vast majority of the population is currently almost entirely ignorant of caste issues. Legislation provides recognition of the problem and sends an important public policy message:

[It] creates the climate in which employers, service providers and others will take the line of least resistance, i.e. comply with the law rather than with their own prejudices... In other words legislation provides a valuable encouragement and support for those in a position to discriminate, but it also creates a broader educational climate.¹⁸⁸

Legislation would push employers, educators and providers of goods and services to develop non-discrimination and anti-harassment policies, which would in turn reduce

¹⁸⁸ Lord Lester; meeting, 17 January 2011, n 88 above. This is not a new argument; in 1966, during parliamentary debates on the Race Relations Act 1965 (Amendment) Bill, Maurice Orbach MP argued that legislation not only provides a means of redress but ‘serves to set standards of decent human behaviour to which the citizen can conform’; the effect of legislation is to ‘prevent habits of discrimination by actively promoting equality of treatment’, and that ‘the dignity of the individual is struck at’ whether ‘a score, 200, or 2000’ people suffer this kind of discrimination; HC Deb vol 738 cols 897-905 16 December 1966.

the acceptability of caste discrimination and harassment, and lead to greater understanding of the issues amongst the non-Asian population. As a consequence, this would render such discrimination more visible, making it easier for victims to raise the problem.¹⁸⁹ Arguably, this could be achieved through education; certainly, policies to combat caste discrimination could be introduced in the public sector without legislation. However, the NIESR study argued that without legislation it is questionable whether such policies would be properly implemented, and without legislation the private sector ‘would be largely untouched’.¹⁹⁰ Legislation is a necessary but not sufficient condition for achieving rights and equalities; nevertheless, ‘a change in culture affecting people’s hearts and minds depends upon having legislation in place in the first place’.¹⁹¹ The NIESR study suggests that extending anti-discrimination legislation to cover caste specifically, and extending criminal law to address caste-motivated harassment and violence, would be a more effective approach than education in terms of providing redress to victims. A particularly valuable feature of the EAQ in relation to caste – and hence a good reason for bringing caste expressly under the EQA ‘umbrella’ – are the provisions on harassment. The EQA in s. 26 covers three types of harassment; s. 26(1) covers unwanted conduct related to a relevant protected characteristic which has the purpose or effect of violating the complainant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the complainant. It is submitted that this provision may prove to be particularly useful for targeting casteist behaviour.

¹⁸⁹ Hilary Metcalfe; meeting, 17 January 2011, *ibid.*

¹⁹⁰ *Ibid.*; see also Research Findings, n 17 above.

¹⁹¹ Lord Lester, meeting, 17 January 2011, n 88 above.

This thesis argues that education (in the workplace and among the community) and legislation are *both* required, moreover that both civil and criminal legislation are necessary; the problems with India's reliance solely on criminal legislation to address caste discrimination have been addressed in Chapter 3 of this thesis. While welcoming the government's proposed community educational programme on caste and caste discrimination, this thesis endorses the introduction of a statutory prohibition of caste discrimination alongside the educational route. Adding caste to the definition of the protected characteristic of race in EQA s 9(1) is a pragmatic solution. It is submitted that there is a growing presumption in favour of a statutory prohibition via this means - the alternative to which is to amend the EQA by adding caste as a new, tenth, protected characteristic. The inadequacy of existing domestic categories available for caste, and the fact that they are not aligned with international human rights law, has been shown elsewhere. It is submitted that the domestic categorisation of caste should be revisited. The UK could follow ICERD and create a new category of descent, including but not limited to caste, or a new category of caste, rather than subsuming caste within race. However, while recommending that the UK introduce a prohibition of descent-based discrimination in domestic law, CERD appears to be agnostic as to how this is achieved; in 2011, CERD recommended the exercise of the power in EQA s. 9(5)(a) to make caste an aspect of race – not the introduction of differently-formulated legislation.¹⁹²

In addition, the EHRC should be required and enabled (in terms of resources) to support test cases on caste discrimination. Resources should also be provided (for example through the GEO) for legal education, training and familiarisation on caste

¹⁹² See n 84 above.

for the judiciary, law enforcement agents, the legal profession, law students, advice centre workers and trades union representatives. Government departments (e.g. the GEO) and national human rights bodies (e.g. the EHRC) should provide information on caste discrimination on their websites, and responsibility for raising awareness of caste discrimination should be allocated to an identified department. As regards the UK's international law obligations, not only should the UK ensure that its domestic legislation is compliant with ICERD but it should also cooperate with CERD by complying fully with CERD's recommendations on descent-based discrimination. The UK should also engage with the UN Draft Principles and Guidelines on Discrimination based on Work and Descent.¹⁹³ As regards multiculturalism and international human rights law generally, the UK must ensure that in accommodating cultural diversity in accordance with international law,¹⁹⁴ where cultural practices are violative of the core rights of others, culture (or religion) should not be available as a defence to discrimination, nor as a shield to scrutiny. In terms of international human rights law and the impact of international human rights treaties 'on the ground', scholars have argued that 'the success or failure of any international human rights system should be evaluated in accordance with its impact on human rights practices on the domestic level'.¹⁹⁵ Heyns and Viljoen argue that it is difficult to establish a direct causal link between the UN treaty system and domestic legislative or policy reforms, while Grugel and Peruzzotti posit that (in relation to children's rights) non-State actors have largely been unsuccessful in using the Geneva mechanisms to bring

¹⁹³ See Chapter 5 of this thesis.

¹⁹⁴ International instruments 'stress the need for equal respect to every culture, be it the national, sub-national, or regional, and urge states to protect such cultural loyalties. Also, States are strongly encouraged to take positive measures in order to ensure the effective protection of sub-national groups and their cultures'; see Xanthakis, n 148 above, 47.

¹⁹⁵ C. Heyns and F. Viljoen, 'The Impact of the United Nations Human Rights Treaties on the Domestic Level', 23(2) *Human Rights Quarterly* (2001) 483-535, 483; R. Goodman and D. Jinks, 'Measuring the Effects of Human Rights Treaties', 14(1) *European Journal of International Law* (2003) 171-183, 171.

about change.¹⁹⁶ In contrast, in British Dalits' campaign for legislative reform, the ICERD regime and the 'Geneva mechanisms' proved to be key tools. The value of the ICERD regime as a tool for the promotion of a domestic agenda on Dalit rights in other diaspora states therefore merits further research.

9.6.2 Social policy

In the arena of social policy, the *process* of achieving social change is as important as securing legislation and case law. There is insufficient knowledge among the wider UK population about caste and forms of caste discrimination in the diaspora. Education and awareness-raising among the wider population – as also among the judiciary, police and critical services – is essential. Of particular importance is education in schools and among the young about caste and caste discrimination. The importance of caste-aware teaching in religious education was highlighted by Nesbitt.¹⁹⁷ Extra-curricular means of educating the young about caste discrimination should be supported. The research by ACDA and the NIESR highlighted the existence of inter-student, caste-related harassment and bullying in schools and universities, which needs to be addressed at the institutional level. The government must develop a focus on caste and engage proactively with UK citizens of Dalit heritage through positive engagement with Dalit groups. It is important that Dalit voices on caste discrimination are taken seriously, especially those of women and the young. An Advisory Committee – including young people – could be established to facilitate proactive engagement with Dalits, but it must also be understood that Dalits are a heterogeneous category. High-level acknowledgement of the issue would

¹⁹⁶ J. Grugel and E. Peruzzotti, 'Claiming Rights Under Global Governance: Children's Rights in Argentina', 13 *Global Governance* (2007) 199-216, 203.

¹⁹⁷ See E. Nesbitt, *Intercultural Education: Ethnographic and Religious Approaches* (Brighton: Sussex Academic Press, 2004); Chapter 6 of this thesis.

generate greater awareness of discrimination against Dalits and afford the issue greater credibility and legitimacy with the public at large.

9.6.3 Political arena

The UK's policies on multiculturalism call for re-examination – a more sophisticated approach needs to be taken by government to minorities, especially religious minorities. An understanding of the internal workings and structures of minority groups needs to be developed, instead of looking at minority groups as homogenous entities, while decisions should be made and policies developed in full knowledge and understanding of the internal workings of minority groups. The policy focus on religion as the 'main badge' of minority identity has contributed to a predominantly 'religious rites and practices' conceptualisation of caste and caste discrimination in the UK,¹⁹⁸ in contrast to the UN framing of caste discrimination as a discrimination and human rights issue.¹⁹⁹ Hence, it was primarily the views of mainstream minority religious groups which were sought on the legal regulation of caste discrimination, but in the context of an ideology of hierarchy, their views were not necessarily the same as the views of those on the receiving end of caste discrimination. Government and its representatives need to develop a greater critical awareness of the relationships between religious and political organisations and actors overseas, as well as UK organisations and actors. In the context of multiculturalism the question arises whether Hindu caste groups should be treated as 'cultural groups' from an international human rights law cultural rights perspective.²⁰⁰ Chapter 2 of this thesis

¹⁹⁸ See HC Deb vol 419 col 1603W 1 Apr 2004.

¹⁹⁹ The Government's August 2007 'scoping study' focussed on religious groups, predominantly Hindu although some Sikh and Muslim groups were also consulted. The HFB and the HCUK were treated as the two largest stakeholders in the field, and the 'best and most appropriate' in terms of representative organisations; HC Deb vol 493 col 179 11 June 2009.

²⁰⁰ Xanthakis, n 148 above, 47.

showed that the notion of castes (*jatis*) as distinct ‘cultural groups’ was argued by caste groups wishing to protect caste-related rights and privileges before colonial courts in British India, while Chapter 1 of this thesis considered Natrajan’s argument against treating castes as ‘cultural communities’. Where protection is demanded for an aspect of ‘culture’ or ‘core identity’ which is violative of the core rights of others, this should be questioned.

9.6.4 International policy

In terms of international policy, the government should demand that British businesses in India and other caste-affected states comply with the Ambedkar Principles²⁰¹ and with UK discrimination law on caste (whether statute or case law). Compliance should be monitored. In addition, UK businesses in India should be encouraged to adopt British equal opportunities approaches to caste, and the government should provide or fund familiarisation, training and advice on caste as necessary, rewarding those businesses which comply. Indian businesses and investors operating in the UK should be monitored for compliance with Indian law on caste discrimination, and they should also be required to comply with relevant UK discrimination law and with equal opportunities best practice. Supplier diversity (using Dalit suppliers, along the lines called for in India’s Bhopal Declaration 2002)²⁰² should be encouraged and rewarded. In relation to India generally, the UK government should adopt an open approach to caste discrimination, acknowledge that it is a problem in the UK as well as India (and elsewhere) and be open about the

²⁰¹ See above, Chapter 6 section 6.4.1.

²⁰² The Bhopal Declaration alluded for economic and social citizenship for Dalits and Tribals; see <http://www.ambedkar.org/News/TASKFORCERECOMMENDATIONS1312003.PDF> (visited 13 April 2013).

need for global solutions; in other words, stop treating caste discrimination as if it were a taboo issue. A more robust approach to caste discrimination and to India should be adopted, including political and diplomatic pressure on India to implement its ICERD obligations on caste. A bi- or multi-lateral government-level working group on caste discrimination should be established, so that other countries can learn from India – which could position itself as the most experienced state in measures to eradicate caste discrimination – and India can learn from others’ equal opportunities and anti-discrimination practice. The UK government should mainstream caste discrimination through all its political, diplomatic, aid and trade relations with India and other caste-affected states, and it should make trade and aid conditional on action on caste discrimination.

9.7 Conclusion

The UK can learn much from India’s successes and failures in using law to address caste discrimination. In order to deal with the discrimination associated with a social phenomenon such as caste, a holistic strategy including legislation, education and social policy measures is required. A wider rights-based approach should be adopted, consistent with the turn towards a proactive approach to rights and equality as signalled by the EQA, in contrast to the pre-EQA narrower, anti-discrimination approach. The existing prohibited grounds of discrimination in British law were not designed with caste discrimination in mind and do not capture it adequately. Only in a limited number of cases can religious discrimination provisions capture caste discrimination. Only by ‘racing’ or ‘ethnicising’ caste can caste discrimination be caught by race as currently defined. In 1975, the racial discrimination White Paper stated:

To fail to provide a remedy against an injustice strikes at the rule of law. To abandon a whole group of people in society without legal redress against unfair discrimination is to leave them with no option but to find their own redress.²⁰³

In 2007, the Discrimination Law Review acknowledged that discrimination law ‘needs to keep pace with and reflect the changes in our Society’.²⁰⁴ To this end, its Consultation Paper accepted that it is necessary to review who is protected from discrimination and to consider the case for updating the grounds or personal characteristics protected under discrimination law ‘in order to ensure that the law remains a dynamic reflection of our society’s attitudes’ – where this is both necessary and proportionate and once any additional regulatory burden has been considered.²⁰⁵ While legislation alone cannot ‘untwist the mind’,²⁰⁶ it can act as a disincentive to discriminatory behaviour, challenge the cultural consensus and provide legal redress for discrimination.²⁰⁷ Caste discrimination has been found to exist in this country but is yet to be brought within the ambit of discrimination legislation. To do so would acknowledge such discrimination as unacceptable and unlawful, wherever it occurs. This thesis submits that there is a growing presumption in favour of legislation and that a statutory prohibition of caste discrimination may be introduced in this country, perhaps even in the lifetime of the present Parliament. Until this happens, British Dalits are obliged to continue their campaign to secure the possibility of legal redress for those in the UK – however few in number – who are or might be subject to caste discrimination.

²⁰³ See *Racial Discrimination White Paper*, Cm 6234 (1975) 23.

²⁰⁴ See *A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain – A Consultation Paper* (London: Department for Communities and Local Government, 2007) 15.

²⁰⁵ *Ibid.*, 127.

²⁰⁶ See B.R. Ambedkar, ‘The Real Issue’ in V. Moon (ed.), *What Congress and Gandhi Have Done To The Untouchables: Dr Babasaheb Ambedkar Writings and Speeches (BAWS) Vol. 9* (Bombay: Education Dept., Govt. of Maharashtra, 1991) 197.

²⁰⁷ See Lester and Bindman, n 146 above, 85-87.

Chapter 10

Conclusions

The Persistence of Caste

As this thesis has explained, caste is a unique form of hereditary social stratification associated primarily with South Asia and its diaspora.¹ It has existed for over three thousand years, and is complex, deep-rooted and difficult to understand and to theorise. It is distinguished by its religious underpinnings in orthodox Hinduism and by the concept of Untouchability. Central to orthodox Hinduism is the presupposition that individuals are not empirically equal at birth, that inequality is the result of freely chosen behaviour in this life and previous lives and hence that a person's caste in this life is of their own making. Classical Hindu law was instrumental in constructing and maintaining the ideology of caste and its normative framework, which naturalises a hierarchical system of 'graded inequality' entailing rights for the 'higher castes' and civil, political, social and economic disabilities and discrimination for the 'lower castes'. The lot of the Dalits is Untouchability, the ultimate denial of rights and dignity. Although doctrinal support for caste exists only in Hinduism, caste and discrimination based thereon exist among South Asian adherents of Sikhism, Islam and Christianity as well as Hinduism. In India, Dalits have been kept 'outside the fold' by the exercise by the dominant castes of social, economic and political power, both individual and systemic. Caste-based discrimination, marginalisation and exclusion have been a reality for thousands of years in India and other parts of South Asia. More recently, in Britain, caste

¹ See above, Chapter 1; Chapter 2 sections 2.1-2.3; Chapter 3 sections 3.1-3.2.

discrimination was identified in 2010 in government-commissioned research as strongly likely to exist in the country.²

Caste in India

In 1945, Ambedkar described the caste system as ‘a legal system maintained at the point of a bayonet’.³ On gaining independence in 1947, India legally abolished Untouchability and criminalised its practice, and introduced Constitutional affirmative action policies in favour of Dalits in political representation, public employment and higher education.⁴ Yet, *de facto*, Dalits in India continue to suffer from Untouchability and caste-related social, economic, occupational and educational inequality and discrimination and violence.⁵ This thesis has sought to explain why that is the case. India needs to take the suffering of the Dalits seriously. The gap between their legal status and sociological status is vast. Casteism remains entrenched ideologically, materially, and psychologically. Furthermore, caste in contemporary India has become institutionalised as a tool of political mobilisation, even as a depoliticised, benign view of caste as cultural or ethnic identity is promoted. India’s reliance on criminal legislation to address caste discrimination has proved insufficient and flawed.⁶ Criminal law is not designed to address institutional or systemic discrimination – it suggests that casteist behaviour is ‘abnormal’ or ‘exceptional’ rather than ‘everyday’. Moreover, enforcement is weak; frequently, those responsible for enforcement of the law are themselves perpetrators. Alongside criminal law, India needs civil anti-discrimination legislation to provide remedies for

² See above, Chapter 9.

³ B.R. Ambedkar, ‘What Congress and Gandhi have done to the Untouchables’ in V. Moon (ed.), *Babasaheb Ambedkar Writings and Speeches Vol. 9* (Bombay: Education Dept., Govt. of Maharashtra, 1991) 1-387, 289.

⁴ See above, Chapter 3 sections 3.3 and 3.4.

⁵ See above, Chapter 3 section 3.2.

⁶ See above, Chapter 3 section 3.5.

discrimination falling short of the criminal threshold, together with economic initiatives and a large-scale public education programme designed to tackle deep-rooted, entrenched attitudes. India has the world's oldest and most extensive measures on caste discrimination.⁷ Rather than seeing UN mechanisms as a threat, India should use these as tools to hone its policies and practices and to disseminate its experience worldwide. Criminal law aside, since 1950, reservations have been the principal vehicle for achieving caste equality, to the exclusion of a broader debate on equality, its meaning, and how to achieve it. However, despite being the world's oldest and most extensive affirmative action scheme, the effectiveness of India's reservations policy has never been adequately monitored. India could use CERD General Recommendation No. 32 (on special measures) as a template for a monitoring regime which could be developed as a 'best practice' model for other countries. A wide-ranging debate at all levels of civil society needs to be initiated on caste, Untouchability and caste discrimination, and on the kind of society India wants to be in the twenty-first century.

Capturing Caste

As Chapters 2-9 have evidenced, caste is an elusive concept, difficult to define and categorise legally. A key theme that emerges from this thesis is the challenge of capturing caste in law. It appears in no international instrument and has proved very difficult to capture under conventional international grounds of discrimination. Following Independence, India's failure to dismantle Untouchability and discrimination based on caste using domestic law led to Dalits taking their grievances to UN human rights bodies. In 1996, in response to the realities of caste

⁷ See above, Chapter 3 sections 3.3 and 3.4.

discrimination in India, CERD addressed caste discrimination under ‘descent’ in Article 1(1) of the International Convention for the Elimination of Racial Discrimination (ICERD), thereby classifying it as a form of racial discrimination. In 2002, CERD affirmed ‘descent’ as including caste and ‘analogous systems of inherited status’.⁸ India, however, has consistently rejected CERD’s linkage of caste and racial discrimination via descent. Descent is also rejected by Japan as a category for capturing discrimination against its Burakumin population.⁹ Discrimination based on work and descent (DWD) offers an alternative to the CERD racial discrimination/descent approach, but India opposed the appointment in 2005 of the UN Special Rapporteurs on DWD – on the grounds that caste was really the intended target of scrutiny – and has not engaged with the UN Draft Principles and Guidelines (DPGs) on DWD. India has not opposed the identification of caste by other international human rights bodies as an impediment to the enjoyment of other rights, but it has resisted international scrutiny of caste discrimination via descent, arguing that caste is a domestic issue which is being addressed by domestic measures.¹⁰ The question is therefore whether caste can really be caught by existing categories, or whether it requires a separate international category. For now, India seems unlikely to support a caste-specific instrument (such as a Declaration). However, in the long term a caste-specific instrument may prove more effective in targeting caste than using proxies such as descent or work and descent. Meanwhile, international human rights law imposes clear obligations to prohibit descent-based discrimination (including caste discrimination) and it also prohibits DWD. Dalit activists and transnational advocacy groups, stressing the distinct, transnational and global nature of caste discrimination, have argued for a re-strategising of the Dalit stand – ‘without

⁸ See above, Chapter 4 sections 4.4.2.5 and 4.4.2.6.

⁹ See above, Chapter 4 section 4.5.5.

¹⁰ See above, Chapter 4 section 4.5.4.

in any way deflecting the stand taken by CERD’ – away from a ‘caste as racial discrimination’ perspective towards a discourse based on ‘descent and work-based discrimination and violence’.¹¹ Their call for the adoption of a broad, human rights-based approach to the eradication of caste discrimination echoes Ambedkar’s analysis six decades earlier of the need for a holistic strategy involving legislation, affirmative action, economic and social policies, and education. However, there are practical and policy problems with the DWD approach.¹² First, the concept and definition of DWD lacks precision. The term is artificial, having been devised largely in order to avoid focussing on caste discrimination as the principal manifestation of such discrimination and India as the country most affected by it. Secondly, the lack of input from South Asian caste-affected states, or from African states affected by DWD, weakens the credibility and legitimacy of the DPGs. Thirdly, a Declaration directed at the elimination of DWD is unlikely to secure Indian support unless the close conceptual linkage between DWD and caste discrimination is removed. Nevertheless, Dalits and transnational advocacy networks are promoting the UN DPGs as a tool which provides ‘an international reference point for action’ and which can be applied in their existing format as a framework for the elimination of caste discrimination. In the meantime, the issue of caste discrimination needs to be mainstreamed into all UN bodies and agencies, similar to the UN strategy for combating discrimination based on sexual orientation and gender identity.

Caste in the United Kingdom

The United Kingdom may become the first non-South Asian country to introduce in domestic legislation a statutory prohibition of caste discrimination and harassment.

¹¹ See above, Chapter 5 section 5.2.8.

¹² See above, Chapter 5 section 5.2.2.

Unlike India, the UK has not challenged ICERD's categorisation of caste discrimination as a form of descent-based racial discrimination. The Equality Act 2010 (EQA) provides in s. 9(5)(a) for caste to be added by ministerial order, at a future date, to the definition of the protected characteristic of race. However, as at 1 April 2013 no such order had been made despite recommendations to this effect by CERD and the UN UPR – neither of which questioned the UK's putative categorisation of caste as a subset of race. Various reasons explain government reluctance to legislate: disagreement as to the existence of discrimination of the type covered by the EQA and as to the numbers affected; the argument that caste discrimination is already prohibited under existing law on religious and racial discrimination; the influence of actors opposed to legislation, who have argued that it is a disproportionate response to a non-existent problem, and belief that the introduction of statutory protection runs counter to the government's ideological imperative to reduce public and private sector 'legislative burden'.¹³ This thesis shows that caste discrimination is not captured adequately by existing religious discrimination provisions, while its capture by existing provisions on ethnic origins or race is uncertain and could result in the elevation of *jati* identities into separate, 'freestanding' ethnic identities – the antithesis of Ambedkar's call for the 'annihilation of caste'.¹⁴ The thesis has recommended the introduction of statutory protection against caste discrimination and harassment in domestic law.¹⁵ Activation of EQA s. 9(5)(a) represents a pragmatic solution, but in the medium term the separation of caste from race should be considered on the grounds of caste's unique nature. The alleged difficulty in proving discrimination (in the case of caste) did not prevent the development of legislation covering discrimination on other grounds. The

¹³ See above, Chapter 8 sections 8.4-8.6, section 8.9; Chapter 9 section 9.5.

¹⁴ See above, Chapter 7, section 7.3.4.5.

¹⁵ See above, Chapter 9 sections 9.4.1.1, 9.5.1, 9.6.1.

government must take the issue of caste discrimination seriously. First, allowing deep-rooted, caste-based factionalism and fracture to persist among a growing South Asian population is damaging to intra- and inter-community cohesion and stores up long-term problems for the future. Secondly, caste discrimination is unlawful under international human rights law; the UK's international obligations require it to be addressed. Thirdly, legislation sends a message that this type of discrimination is not acceptable socially or legally. On 1 March 2013 – over over two years since the publication of the NIESR research - the government announced its decision not to tackle caste discrimination through legislation at the present time but through an education programme instead, having been less than transparent about the reasons for its delay in making a decision sooner (evidenced by Dalit groups' extensive resort to the Freedom of Information Act).¹⁶

Moving Forward

An important question is whether the problem to be addressed is caste *per se*, or simply caste discrimination; moreover, whether the two can in fact be separated. In the UK it is too early to tell whether the assertion of Dalit identity (in particular Dalit religious identities) in the context of Dalit political mobilisation will inadvertently reinforce caste and/or the discrimination associated with caste divisions; or whether caste can – or should – be retained as an aspect of cultural diversity de-coupled from discrimination.¹⁷ Further research is needed on this issue. Recent (unpublished) research claims that the younger generation of British Dalits, while supporting the legal prohibition of caste discrimination in the UK, 'are less affected by ascriptions of caste inferiority because they identify less with caste hierarchy', even

¹⁶ See, for example, Chapter 8 section 8.2, section 8.4.5; Chapter 9, section 9.2.4, above.

¹⁷ See above, Chapter 7 section 7.3.4.5.

‘embrace[ing] caste difference and assert[ing] a separate identity, freed from the yoke of inferiority.’¹⁸ Older research suggests that notions of caste hierarchy, Untouchability and inferiority underpin caste-based bullying among the young, for example in schools.¹⁹ Further research is required on the complex relationship between caste identity and caste discrimination in the UK, as well as on the forms and extent of caste discrimination and its increase, decline or diversification. Regardless of whether domestic law is amended to prohibit caste discrimination, British Dalits must become involved in awareness-raising, education and training for young people in schools and universities, for employers, in the workplace, in the justice system and for the general public. If domestic law is amended, the Public Sector Equality Duty in s. 149 EQA 2010 would apply to caste, requiring public bodies to exercise greater sophistication in dealing with South Asian minority groups by not treating such groups as homogenous, undifferentiated entities. Dalit groups must also grapple with the paradox of promoting caste (*jati*) identities in the name of challenging caste discrimination.

The Limits of Law

Law is one of the primary means by which states and the international community address and seek to rectify discrimination and inequality. Non-discrimination and equality have become fundamental normative elements of national, regional and international legal systems. This research highlights the difficulty of capturing caste in international and domestic law, and has suggested some solutions. It also highlights the dynamic relationship between universal human rights standards and

¹⁸ M. Dhanda. ‘Held back by in-fighting: the fraught struggles for recognition of Dalits in Wolverhampton’; paper presented at the international conference ‘The Internationalisation of Dalit and Adivasi Activism’, University of London, 26 June 2012. Unpublished.

¹⁹ See above, Chapter 6.

domestic protection from human rights violations, and the importance of connecting UN standards to national law, especially where national law has not succeeded in eradicating deep-rooted forms of discrimination, marginalisation and exclusion. The thesis calls for creative, holistic responses to the problem of caste discrimination, driven by a human rights approach, which include yet go beyond legislative reform. Finally, the thesis highlights the importance of activism in securing legal, political and social change. There has been a great deal of focus on transnational advocacy networks in recent years, but the case of the British Dalits shows that domestic, grassroots activism by determined activists on a low budget but with the right skills and strategy can succeed in putting the issue of caste into the political and legal mainstream.

Bibliography

Books

Abbas, T. (2005), *Muslim Britain: Communities under Pressure* (London: Zed Books)

Acharyya, B.K. (1914), *Codification in British India* (Calcutta: S.K. Banerji & Sons)

Addison, N. (2007), *Religious Discrimination and Hatred Law* (London: Routledge-Cavendish)

Addo, M. (2010), *The Legal Nature of International Human Rights Law* (The Hague: Martinus Nijhoff Publishers)

Ahmed, I. (1978), *Caste and Social Stratification Among Muslims in India* (New Delhi: Manohar)

Ajnat, S. (ed.) (1993), *Letters of Ambedkar* (Jalandhar: Bheem Patrika Publications)

Aktor, M. & Deliège, R. (eds.) (2010), *From Stigma to Assertion: Untouchability, Identity and Politics in Early Modern India* (Copenhagen: Museum Tusculanum Press)

Allott, A. (1980), *The Limits of Law* (London: Butterworths)

Alston, P. & Crawford, J. (eds.) (2000), *The Future of UN Human Rights Treaty Monitoring* (Cambridge: Cambridge University Press)

Ansari, I. (ed.), *Readings on Minorities: Perspectives and Documents Vol. I* (New Delhi: Institute of Objective Studies)

Ansari, I. (ed.) (2002), *Readings on Minorities: Perspectives and Documents Vol. II* (New Delhi: Institute of Objective Studies)

Atal, Y. (1968), *The Changing Frontiers of Caste* (New Delhi: National Publishing House)

Austin, G. (1966), *The Indian Constitution: Cornerstone of a Nation* (New Delhi: Thirteenth Impression 2008, Oxford University Press)

Austin, G. (1999), *Working a Democratic Constitution: The Indian Experience* (New Delhi: Oxford University Press)

Avari, B. (2007), *India: The Ancient Past: A History of the Indian Sub-Continent from c.7000 BC to AD 1200* (Abingdon: Routledge)

Bailey, F. G. (1964), *Caste and the Economic Frontier* (Manchester: Manchester University Press)

Baird, R. (ed.) (1993), *Religion and Law in Independent India* (New Delhi: Manohar)

- Ballard, R. (ed.) (1994), *Desh Pardesh: The South Asian Presence in Britain* (London: Hurst & Co)
- Bamforth, N., Malik, M. & O'Cinneide, C. (2008), *Discrimination Law: Theory and Context* (London: Sweet and Maxwell)
- Banakar, R. & Travers, M. (eds.) (2005), *Theory and Method in Socio-Legal Research* (Portland: Hart)
- Bannerjee, A. (1984), *English Law in India* (New Delhi: Abhinav Publications)
- Banerjee-Dube, I. (ed.) (2008), *Caste in History* (New Delhi: Oxford University Press)
- Banton, M. (1994), *Discrimination* (Buckingham: Open University Press)
- Banton, M. (1996), *International Action Against Racial Discrimination* (Oxford: Oxford University Press)
- Banton, M. (1997), *Ethnic and Racial Consciousness* (London: Longman)
- Baxi, U. (2002), *The Future of Human Rights* (New Delhi: Oxford University Press)
- Baxi, U. (1982), *The Crisis of the Indian Legal System* (New Delhi: Vikas Publishing House Pvt. Ltd.)
- Baxi, U. (ed.) (1988), *Law and Poverty: Critical Essays* (Bombay: N.M. Tripathi Pvt. Ltd.)
- Baxi, U. & Parekh, B. (eds.) (1995), *Crisis and Change in Contemporary India* (New Delhi: Sage)
- Bayly, S. (1999), *Caste, Society and Politics in India from the Eighteenth Century to the Modern Age* (Cambridge: Cambridge University Press)
- Benhabib, S. (1992), *Situating the Self: Gender, Community and Post-modernism in Contemporary Ethics* (Cambridge: Polity Press)
- Bererman, G. (1979), *Caste and Other Inequalities: Essays on Inequality* (Meerut: Folklore Institute)
- Beteille, A. (1983), *The Idea of Natural Inequality and Other Essays* (New Delhi: Oxford University Press)
- Beteille, A. (1996), *Caste, Class and Power: Changing Patterns of Stratification in a Tanjore Village* (New Delhi: Oxford University Press)
- Bhachu, P. (1986), *The Twice Migrants* (London: Tavistock)
- Bhagavan, M. & Feldhaus, A. (eds.) (2008), *Claiming Power from Below: Dalits and the Subaltern Question in India* (New Delhi: Oxford University Press)
- Bhagavan, M. & Feldhaus, A. (eds.) (2008), *Speaking Truth to Power: Religion, Caste and the Subaltern Question in India* (New Delhi: Oxford University Press)

- Bhatia (ed.) (1976), *Origin and Development of Legal and Political System in India, Vol. II* (New Delhi: Deep and Deep Publications)
- Bhatt, C. (2001), *Hindu Nationalism: Origins, Ideologies and Modern Myths* (Oxford: Berg)
- Boerefijn, I. (1999), *The Reporting Procedure Under the Covenant on Civil and Political Rights: Practice and Procedures of the Human Rights Committee* (Antwerp: Intersentia)
- Boisson de Chazournes, L. & Gowlland-Debbas, V. (eds.) (2001) *The International Legal System in Quest of Equity and Universality* (The Hague: Martinus Nijhoff)
- Bouglé, C. (1971), *Essais sur le régime des castes* (English translation. First published 1908, Cambridge: Cambridge University Press)
- Brass, P.R. (1994), *The Politics of India Since Independence* (Reprint 1995, Cambridge: Cambridge University Press)
- Brown, J. (2006), *Global South Asians: Introducing the Modern Diaspora* (Cambridge: Cambridge University Press)
- Burton, M. (2008), *Legal Responses to Domestic Violence* (Abingdon: Routledge-Cavendish)
- Castellino, J. & Dominguez-Redondo, E. (2006), *Minority Rights in Asia: A Comparative Analysis* (New Delhi: Oxford University Press)
- Castellino, J. & Walsh, N. (eds.) (2005), *International Law and Indigenous Peoples* (Leiden: Martinus Nijhoff Publishers)
- Chinnappa Reddy, O. (1993), *Religion, Caste and the Threat to Secularism* (Thiruvananthapuram: Kerala University Press)
- Chinnappa Reddy, O. (2008), *The Court and Constitution of India: Summits and Shallows* (New Delhi: Oxford University Press)
- Chuman P., (2011) *British Untouchables: A Study of Dalit Identity and Education* (Farnham: Ashgate)
- Clarke, C., Peach, C. & Vertovec, S. (eds.) (1990), *South Asians Overseas: Migration and Ethnicity* (Cambridge: Cambridge University Press)
- Cohn, B. (2012), *An Anthropologist Among the Historians and Other Essays* (First published 1987. New Delhi: Oxford University Press)
- Coupland, R. (1968), *The Indian Problem 1833-1935* (First published 1942, Oxford: Oxford University Press)
- Cowell, H. (1936), *History and Constitution of the Courts and Legislative Authorities in India*, 6th Edition (Calcutta: Thacker, Spink & Co.)
- Craven, M. (1995), *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford: Clarendon)

- Cryer, R., Hervey, T. & Sokhi-Bulley, B. (2011), *Research Methodologies in EU and International Law* (Oxford: Blackwell)
- Das, B. (1980), *Thus Spoke Ambedkar* (Bangalore: Ambedkar Memorial Society)
- Das Basu, D. (2009), *Introduction to the Constitution of India*, 20th Edition (New Delhi: LexisNexis Butterworths)
- Das, G. (2000), *India Unbound* (New Delhi: Penguin Books India)
- Davidson, M. & Fielden, S. (eds.) (2003), *Individual Diversity and Psychology in Organisations* (Oxford: Wiley)
- Davies, M. (2008), *Asking the Law Question* (Pymont NSW: Thomson Lawbook Co.)
- Denscombe, M. (2007), *The Good Research Guide* (Maidenhead: Open University Press)
- de Reuck, A. & Knight, J. (eds.) (1967), *Caste and Race: Comparative Approaches* (London: J. & A. Churchill Ltd.)
- Derrett, J.D.M. (1968), *Religion, Law and the State in India* (London: Faber & Faber)
- Derrett, J.D.M. (1973), *Dharmasastra and Juridical Literature* (Wiesbaden: Otto Harrassowitz)
- Desai, R. (1963), *Indian Immigrants in Britain* (Oxford: Oxford University Press)
- Deshpande, A. (2011), *The Grammar of Caste: Economic Discrimination in Contemporary India* (New Delhi: Oxford University Press)
- Desika Char, S.V. (1963), *Centralised Legislation: A History of the Legislative System of British India from 1843 to 1861* (London: Asia Publishing House)
- Desika Char, S.V. (1983), *Readings in the Constitutional History of India 1957-1947* (New Delhi: Oxford University Press)
- Desika Char, S.V. (1997), *Hinduism and Islam in India: Caste, Religion and Society From Antiquity to Early Modern Times* (Princeton: Markus Wiener Publishers)
- Dhagamwar, V. (2006), *Role and Image of the Law in India: The Tribal Experience* (New Delhi: Sage)
- Din, I. (2006), *The New British: The Impact of Culture And Community On Young Pakistanis* (Aldershot: Ashgate)
- Dinstein, Y. & Tabory, M. (eds.) (1992), *The Protection of Minorities and Human Rights* (Norwell: Kluwer Academic Publishers)
- Diop, C.A. (1974), *The African Origin of Civilisation: Myth or Reality?* (Chicago: Lawrence Hill & Co.)

- Dirks, N.B. (2002), *Castes of Mind: Colonialism and the Making of Modern India* (New Delhi: Permanent Black)
- Donald, J. & Rattansi, A. (eds.) (1992), *'Race', Culture and Difference* (London: Sage)
- Doniger, W. (trans.) (1981), *The Rig Veda* (London: Penguin Books)
- Doniger, W. (2010), *The Hindus: An Alternative History* (Oxford: Oxford University Press)
- Donnelly, J. (2003), *Universal Human Rights in Theory and Practice* (New York: Cornell University Press)
- Douglas, M. (2002), *Purity and Danger* (First published 1966. London: Routledge).
- Dudley Jenkins, L. (2003), *Identity and Identification in India; Defining the Disadvantaged* (New York: RoutledgeCurzon)
- Dugard, J. (1978), *Human Rights and the South African Legal Order* (Princeton: Princeton University Press)
- Dumont, L. (1980), *Homo Hierarchicus: The Caste System and its Implications* (Chicago: University of Chicago Press)
- Edwardes, M. (1967), *British India 1772-1947* (London: Sidgwick & Jackson)
- Eide, A. & Alfredsson, G. (1992), *The Universal Declaration of Human Rights: A Commentary* (Oslo: Scandinavian University Press)
- Eide, A. & Alfredsson, G. (1999), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (The Hague: Martinus Nijhoff Publishers)
- Eisenberg, A. & Spinner-Haley, J. (eds.) (2004), *Minorities within Minorities: Equality, Rights and Diversity* (Cambridge: Cambridge University Press)
- Essed, P. (1991), *Understanding Everyday Racism: An Interdisciplinary Theory* (Thousand Oaks, California: Sage)
- Fatima, S. (2005), *Using International Law in Domestic Courts* (Oxford: Hart)
- Flood, G. (1998), *An Introduction to Hinduism* (Cambridge: Cambridge University Press)
- Flood, G. (ed.) (2005), *The Blackwell Companion to Hinduism* (Oxford: Blackwell)
- Fottrell, D. & Bowring, B. (eds.) (1991), *Minority and Group Rights in the New Millennium* (The Hague: Martinus Nijhoff Publishers)
- Frankenburg, R. (1993), *White Women, Race Matters: The Social Construction of Whiteness* (Minneapolis: University of Minnesota Press)
- Fraser, N. (2010), *Scales of Justice: Reimagining Political Space in a Globalised World* (New York: Columbia University Press)

- Fraser, N. & Honneth, A. (2003), *Redistribution or Recognition? A Political-Philosophical Exchange* (London: Verso)
- Fredman, S. (ed.) (2001), *Discrimination and Human Rights: The Case of Racism* (Oxford: Oxford University Press)
- Fredman, S. (2011), *Discrimination Law* (Oxford: Oxford University Press)
- Fuller, C.J. (ed.) (1997), *Caste Today* (New Delhi: Oxford University Press)
- Galanter, M. (1984), *Competing Equalities: Law and the Backward Classes in India* (Berkeley: University of California Press)
- Galanter, M. (1994), *Law and Society in Modern India* (First published 1989, New Delhi; Berkeley: University of California Press)
- Ganguly, S., Diamond, L. & Plattner, M. (eds.) (2007), *The State of India's Democracy* (Baltimore: The John Hopkins University Press)
- Gellner, D. & Quigley, D. (1999), *Contested Hierarchies: A Collaborative Ethnography of Caste Among the Newars of the Kathmandu Valley, Nepal* (New Delhi: Oxford University Press)
- Ghuriye, G.S. (1969), *Caste and Race in India* (Mumbai: Popular Prakashan Pvt. Ltd.)
- Gonsalves, C. & Agrawal, G. (2005), *Dalits and the Law* (New Delhi: Human Rights Law Network)
- Gupta D. (ed.) (2004), *Caste in Question: Identity or Hierarchy?* (New Delhi: Sage)
- Guru G (ed.) (2011), *Humiliation: Claims and Context* (First published 2009. New Delhi: Oxford University Press)
- Haksar, V. (2001), *Rights, Communities and Disobedience: Liberalism and Gandhi* (New Delhi: Oxford University Press)
- Hanumanthan, K.R. (1979), *Untouchability: A Historical Study up to 1500 (with special reference to Tamil Nadu)* (Madurai: Koodal Publishers)
- Hardtmann, E.-M. (2009), *The Dalit Movement in India: Local Practices, Global Connections* (New Delhi: Oxford University Press)
- Hasan, Z. (2009), *Politics of Inclusion: Castes, Minorities and Affirmative Action* (New Delhi: Oxford University Press)
- Hasan, Z., Sridhara, E. & Sudarshan, R. (eds.) (2004), *India's Living Constitution: Ideas, Practices, Controversies* (New Delhi: Permanent Black)
- Heehs, P. (ed.) (2002), *A Historical Reader of Spiritual Expression and Experience* (London: Hurst & Co.)
- Hepple, B. (2011), *Equality: The New Legal Framework* (Oxford: Hart)

- Hepple, B. & Szyszczak, E. (eds.) (1993), *Discrimination: The Limits of the Law* (London: Mansell)
- Hess, B. (2000), *Un/Settled Multiculturalisms: Diasporas, Entanglements, Transruptions* (London: Zed Books)
- Hofer, A. (1979), *The Caste Hierarchy and the State in Nepal: A Study of the Muluki Ain of 1854* (Innsbruck: Universitätsverlag Wagner)
- Hutton, J.H. (1946), *Caste in India: Its Nature, Function and Origins* (Cambridge: Cambridge University Press)
- Ilaiah, K. (2002), *Why I Am Not a Hindu: A Sudra Critique of Hindutva Philosophy, Culture and Political Economy* (Calcutta: Popular Prakashan Pvt. Ltd.)
- Ilaiah, K. (2004), *Buffalo Nationalism: A Critique of Spiritual Fascism* (Kolkata: Samya)
- Inden, R.B. (2000), *Imagining India* (London: Hurst & Co.)
- Ingram, D. (2004), *Rights, Democracy and Fulfilment in the Era of Identity Politics: Principled Compromises in a Compromised World* (Lanham: Rowman and Littlefield Publishers)
- Iyer, V.R. Krishna (1989), *Social Democracy and Dalit Egalité: Ambedkar Memorial Lectures 1986-87* (Madras: University of Madras)
- Iyer, V.R. Krishna (1990), *Dr Ambedkar and the Dalit Future* (New Delhi: B.R. Publishing Corporation)
- Iyer, V.R. Krishna (1991), *Ambedkar Centenary: Social Justice and the Undone Vast* (New Delhi: B.R. Publishing Corporation)
- Iyer, V.R. Krishna (1999), *The Dialectics and Dynamics of Human Rights In India, Yesterday, Today and Tomorrow* (Calcutta: Eastern Law House)
- Jacobsen, K. & Raj, S. (2008), *South Asian Christian Diaspora: Invisible Diaspora in Europe and North America* (Farnham: Ashgate)
- Jacobson, J. (2004), *Islam in Transition: Religion and Identity Among British Pakistani Youth* (Abingdon: Routledge)
- Jaffrelot, C. (1999), *The Hindu Nationalist Movement and Indian Politics 1925 to the 1990s* (New Delhi: Penguin)
- Jaffrelot, C. (2003), *India's Silent Revolution: The Rise of the Low Castes in North Indian Politics* (New Delhi: Permanent Black)
- Jaffrelot, C. (2005), *Dr. Ambedkar and Untouchability: Analysing and Fighting Caste* (New Delhi: Permanent Black)
- Jaffrelot, C. (2007), *Hindu Nationalism: A Reader* (Princeton: Princeton University Press)

- Jayal, N.G. & Pai, S. (2001), *Democratic Governance in India: Challenges of Poverty, Development and Identity* (New Delhi: Sage)
- Jones, H. (1930), *The Geography of Strabo (Vol. 7)* (Reprint, Loeb Classical Library. Cambridge, Mass: Harvard University Press)
- Jones, R. & Welhengama, G. (2000), *Ethnic Minorities in English Law* (Stoke-on-Trent: Trentham)
- Joseph, S., Schulz, J. & Castan, M. (2000), *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford: Oxford University Press)
- Joshi, B. (ed.) (1986), *Untouchable: Voices of the Dalit Liberation Movement* (London: Zed Books)
- Juergensmeyer, M. (1982), *Religion as Social Vision: The Movement Against Untouchability in 20th Century Punjab* (Berkeley: University of California Press)
- Kannan, C.T. (1978), *Cultural Adaptation of Asian Immigrants: First and Second Generation* (Greenford, Middlesex: C.T. Kannan)
- Kane, P.V. (1930), *History of Dharmasastra (Ancient and Medieval Religion and Civil Law) Vol. 1* (Poona: Bhandarkar Oriental Research Institute)
- Keane, D. (2007), *Caste-based Discrimination in International Human Rights Law* (Aldershot: Ashgate)
- Kelly, K. (2003), *Domestic Violence and the Politics of Privacy* (New York: Cornell University Press)
- Ketkar, S.V. & Sridhar, V. (2010), *History of Caste in India* (First published 1909, Delhi: Low Price Publications)
- Killingley, D. (ed.) (1991), *The Sanskrit Tradition in the Modern World (2): Hindu Ritual and Society* (Newcastle-upon-Tyne: S.Y. Killingley)
- Klass, M. (1980), *Caste: The Emergence of the South Asian Social System* (Philadelphia: Institute for the Study of Human Issues)
- Kohli, A. (ed.) (2001), *The Success of India's Democracy* (Cambridge: Cambridge University Press)
- Kolenda, P. (1985), *Caste in Contemporary India: Beyond Organic Solidarity* (Prospect Heights: Waveland Press)
- Kosambi, D.D. (2009), *The Culture and Civilisation of Ancient India in Historical Outline* (Noida: Vikas Publishing House Pvt. Ltd.)
- Kothari, R. (ed.) (1995), *Caste in Indian Politics* (Hyderabad: Orient Longman)
- Kumar, V. (2006), *India's Roaring Revolution: Dalit Assertion and New Horizons* (New Delhi: Gagandeep)

- Kumar, C. Raj & Chockalingam, K. (eds.) (2007), *Human Rights, Justice and Constitutional Empowerment* (New Delhi: Oxford University Press)
- Kumar, V.S. (2008), *Social Justice and the Politics of Reservation in India* (New Delhi: Mittal Publications)
- Kuper, H. (1961), *Indian People in Natal* (Durban: Natal University Press)
- Lamb, R. (2002), *Rapt in the Name: The Ramnamis, Ramnam, and Untouchable Religion in Central India* (Berkeley: State University of New York Press)
- Landry, D. & Maclean, G. (1996), *The Spivak Reader* (London: E.C. Routledge)
- Lapierre, D. & Collins, L. (1997), *Freedom at Midnight* (New Delhi: Vikas Publishing House Pvt. Ltd.)
- Larson, G. (ed.) (2001), *Religion and Personal Law in India: A Call to Judgment* (Bloomington, USA: Indiana University Press)
- Law, N. (1914), *Studies in Ancient Hindu Polity Vol. I* (London: Longmans, Green & Co.)
- Lawson, P. (1987), *The East India Company: A History* (London: Longman)
- Leach, E.R. (ed.) (1971), *Aspects of Caste in South India, Ceylon and North-West Pakistan* (Cambridge: Cambridge University Press)
- Leslie, J. (2003), *Authority and Meaning in Indian Religions: Hinduism and the Case of Valmiki* (Aldershot: Ashgate)
- Lester, A. and Bindman, G. (1972), *Race and Law* (London: Penguin/Longman)
- Lingat, R. (2004), *The Classical Law of India* (First published 1973. Oxford: Oxford University Press)
- Lipner, J. (1994), *Hindus: Their Religious Beliefs and Practices* (London: Routledge)
- Lok Sabha Secretariat (2000), *50th Anniversary of the Republic of India* (New Delhi: Lok Sabha Secretariat)
- Lubin, T., Davis, D. & Krishnan, J. (eds.) (2010), *Hinduism and Law: An Introduction* (Cambridge: Cambridge University Press)
- Lustgarten, L. (1980), *Legal Control of Racial Discrimination* (London: MacMillan Press)
- Lynch, O.M. (1969), *The Politics of Untouchability: Social Mobility and Social Change in a City of India* (New York: Columbia University Press)
- MacCormick, N. (1978), *Legal Reasoning and Legal Theory* (Oxford: Oxford University Press)
- MacDonald, I. (1977), *Race Relations and the Law* (London: Butterworths)

- MacKinnon, C. (1987), *Feminism Unmodified: Discourses on Life and the Law* (Cambridge, Mass: Harvard University Press)
- Mahar, M.J. (ed.) (1972), *The Untouchables in Contemporary India* (Tucson: University of Arizona Press)
- Majeed, A. (2002), *Nation and Minorities: India's Plural Society and Its Constituents* (New Delhi: Centre for Federal Studies, Jamia Hamdard University, New Delhi & Kanishka Publishers)
- Majumdar R. C. (ed.) (1960), *The History and Culture of the Indian People: Vol. VI The Delhi Sultanate* (Bombay: Bharatiya Vidya Bhavan)
- Majumdar, R.C. (ed.) (1974) *The History and Culture of the Indian People: Vol. VII The Mughal Empire* (Bombay: Bharatiya Vidya Bhavan)
- Mandelbaum, D. (1970), *Society in India, Vol. 2: Change and Continuity* (Berkeley: University of California Press)
- Mander, H. (2001), *Unheard Voices: Stories of Forgotten Lives* (New Delhi: Penguin)
- McColgan, A. (2005), *Discrimination Law: Texts, Cases and Materials* (Oxford: Hart)
- McConville, M. & Hong Chui, W. (eds.) (2007), *Research Methods for Law* (Edinburgh: Edinburgh University Press)
- Mendelsohn, O. & Baxi, U. (eds.) (1994), *The Rights of Subordinated Peoples* (Oxford; Oxford University Press)
- Mendelsohn, O. & Vicziany, M. (1998), *The Untouchables: Subordination and Poverty and the State in Modern India* (Cambridge: Cambridge University Press)
- Menon, D. (1994), *Caste, Nationalism and Communism in South India: Malabar 1900-1948* (Cambridge: Cambridge University Press)
- Menon, N. (2004), *Recovering Subversion: Feminist Politics Beyond the Law* (New Delhi: Permanent Black)
- Menski, W. (2006), *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (Cambridge: Cambridge University Press)
- Michael, S.M. (ed.) (2007), *Dalits in Modern India: Vision and Values* (New Delhi: Sage)
- Mitra, S.K. (2006), *The Puzzle of India's Governance: Culture, Context and Comparative Theory* (London: Routledge)
- Mittal, S. & Thursby, G. (eds.) (2007), *The Hindu World* (Abingdon: Routledge)
- Moffat, M. (1979), *An Untouchable Community of South India* (Princeton: Princeton University Press)

- Moon, V. (ed.) (1979), *Dr. Babasaheb Ambedkar Writings and Speeches, Vol. 1* (Bombay: Education Dept., Govt. of Maharashtra)
- Moon, V. (ed.) (1989), *Dr. Babasaheb Ambedkar Writings and Speeches, Vol. 5* (Bombay: Education Dept., Govt. of Maharashtra)
- Moon, V. (ed.) (1991), *Dr. Babasaheb Ambedkar Writings and Speeches, Vol. 9* (Bombay: Education Dept., Govt. of Maharashtra)
- Moon, V. (ed.) (1993), *Dr. Babasaheb Ambedkar Writings and Speeches, Vol. 12* (Bombay: Education Dept., Govt. of Maharashtra)
- Moon, V. (ed.) (1994), *Dr. Babasaheb Ambedkar Writings and Speeches, Vol. 13* (Bombay: Education Dept., Govt. of Maharashtra)
- Morsink, J. (1999), *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (Philadelphia: University of Pennsylvania Press)
- Morton, S. (2003), *Gayatri Chakravorty Spivak* (Abingdon: Routledge)
- Mullally, S. (2006), *Gender, Culture and Human Rights* (Oxford: Hart)
- Nakano, K., Yutzis, M. & Onoyama, R. (eds.) (2004), *Peoples for Human Rights Vol. 9: Descent-Based Discrimination* (Tokyo: International Movement Against All Forms of Discrimination and Racism)
- Narke, H. (ed.) (2005), *Dr. Babasaheb Ambedkar Writings and Speeches Vol. 2* (Bombay: Education Dept., Govt. of Maharashtra)
- Natrajan, B. and Greenough, P. (eds.) (2009), *Against Stigma: Studies in Caste, Race and Justice Since Durban* (Hyderabad: Orient Blackswan)
- Natrajan, B. (2010), *The Culturalization of Caste in India: Identity and Inequality In A Multicultural Age* (Abingdon: Routledge)
- Nesbitt, E. (2004), *Intercultural Education: Ethnographic and Religious Approaches* (Brighton: Sussex Academic Press)
- Nesiah, D. (2000), *Discrimination with Reason? The Policy of Reservations in the United States, India and Malaysia* (New Delhi: Oxford University Press)
- Nirmal, C.J. (2000), *Human Rights in India: Historical, Social and Political Perspectives* (New Delhi: Oxford University Press)
- Noorani, A.G. (2006), *Constitutional Questions and Citizens' Rights* (New Delhi: Oxford University Press)
- Nowak, M. (2005), *UN Covenant on Civil and Political Rights: CCPR Commentary* (Kehl: N.P. Engel)
- O'Hanlon, R. (1985), *Caste, Conflict and Ideology: Mahatma Jotirao Phule and low caste protest in the nineteenth-century western India* (Cambridge: Cambridge University Press)

- Olivelle, P. (1999), *Dharmasutras: The Law Codes of Ancient India* (New Delhi: Oxford University Press)
- Olivelle, P. (2004), *The Law Code of Manu* (Oxford: Oxford University Press)
- Olivelle, P. (2005), *Manu's Code of Law: A Critical Edition and Translation of the Manava-Dharmasastra* (Oxford: Oxford University Press)
- Omvedt, G. (1994), *Dalits and the Democratic Revolution: Dr Ambedkar and the Dalit Movement in Colonial India* (New Delhi: Sage)
- Omvedt, G. (2004), *Ambedkar: Towards An Enlightened India* (New Delhi: Penguin Books)
- Omvedt, G. (2006), *Dalit Visions: The Anti-Caste Movement and the Construction of an Indian Identity* (New Delhi: Orient Longman)
- Omvedt, G. (2008), *Seeking Begumpura: The Social Vision of Anti-Caste Intellectuals* (New Delhi: Navayana Publishing)
- Pai, S. (2002), *Dalit Assertion and the Unfinished Democratic Revolution: The Bahujan Samaj Party in Uttar Pradesh* (New Delhi: Sage)
- Pakhiddey, B. (2001), *The Emancipation of the Dalits* (New Delhi: Dr Ambedkar Mission Foundation)
- Pandit, V.L. (1979), *The Scope of Happiness: A Personal Memoir* (New York: Crown)
- Parasher-Sen, A. (ed.) (2004), *Subordinate and Marginal Groups in Early India* (New Delhi: Oxford University Press)
- Parekh, B. (2006), *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (Basingstoke: Palgrave MacMillan)
- Parikh, K. & Radadkrishna, R. (eds.) (2005), *India Development Report 2004-5* (New Delhi: Oxford University Press)
- Pentassuglia, G. (2002), *Minorities in International Law* (Strasbourg: Council of Europe)
- Poulter, S. (1998), *Ethnicity, Law and Human Rights: The English Experience* (Oxford: Clarendon Press)
- Prasad, B. (2001), *The Ideas and Men Behind the Indian Constitution: Selections from the Constituent Assembly Debates 1946-49* (New Delhi: Konark Publishers Pvt. Ltd.)
- Puniyani, R. (ed.) (2005), *Religion, Power and Violence* (New Delhi: Sage)
- Quigley, D. (1999), *The Interpretation of Caste* (New Delhi: Oxford University Press)
- Radice, W. (ed.) (1999), *Swami Vivekananda and the Modernisation of Hinduism* (New Delhi: Oxford University Press)

- Rajkumar, P. (2010), *Dalit Theology and Dalit Liberation: Problems, Paradigms and Possibilities* (Aldershot: Ashgate)
- Rajshekar, V.T. (1995), *Dalits: The Black Untouchables of India* (Atlanta: Clarity Press)
- Rajshekar, V.T. (2004), *Caste: A Nation Within the Nation – Recipe for a Bloodless Revolution* (Bangalore: Books for Change)
- Ramaiah, A. (2007), *Laws for Dalit Rights and Dignity* (Jaipur: Rawat Publications)
- Ramaswamy, G. (2005), *India Stinking: Manual Scavengers in Andhra Pradesh and Their Work* (Pondicherry: Navayana Publishing)
- Rao, A. (ed.) (1996), *Readings on Minorities: Perspectives and Documents Vol. II* (New Delhi: Institute of Objective Studies)
- Rao, A. (ed.) (2006), *Gender and Caste* (New Delhi: Kali for Women)
- Rao, A. (2009), *The Caste Question: Dalits and the Politics of Modern India* (Berkeley: University of California Press)
- Rege, S. (2006), *Writing Caste/Writing Gender: Narrating Dalit Women's Testimonies* (New Delhi: Zubaan)
- Rehman, J. (2000), *The Weaknesses in the International Protection of Minority Rights* (The Hague: Kluwer Law International)
- Risley, H.H. (2003), *The People of India* (Reprint, first published in 1915, New Delhi: Low Price Publications)
- Robb, P. (ed.) (1997), *The Concept of Race in South Asia* (New Delhi: Oxford University Press)
- Robb, P. (1999), *Dalit Movements and the Meaning of Labour in India* (New Delhi: Oxford University Press)
- Robinson, V. (1986), *Transients and Settlers: Asians in Britain* (Oxford: Clarendon Press)
- Robinson, R. and Kujur, J.M. (eds.) (2010), *Margins of Faith: Dalit and Tribal Christianity in India* (New Delhi: Sage)
- Rodrigues, V. (ed.) (2002), *The Essential Writings of B.R. Ambedkar* (New Delhi: Oxford University Press)
- Said, E. (2003), *Orientalism* (London: Penguin)
- Sainath, P. (1996), *Everyone Loves a Good Drought: Stories From India's Poorest Districts* (London: Review)
- Saksena, H.S. (1981), *Safeguards for Scheduled Castes and Tribes: Founding Fathers' Views – An Exploration of the Constituent Assembly Debates* (New Delhi: Uppal Publishing House)

- Sargeant, M. (ed.) (2004), *Discrimination Law* (Harlow: Pearson Education Ltd.)
- Sathe, S.P. (2002), *Judicial Activism in India: Transgressing Borders and Enforcing Limits* (New Delhi: Oxford University Press)
- Scheinin, M. & Toivanen, R. (eds.) (2004), *Rethinking Non-Discrimination and Minority Rights* (Berlin: German Institute for Human Rights)
- Scheper Hughes, N. (1992), *Death Without Weeping: The Violence of Everyday Life in Brazil* (Berkeley: University of California Press)
- Schneider, E. (2000), *Battered Women and Feminist Law-Making* (New Haven: Yale University Press)
- Scott, J.C. (1985), *Weapons of the Weak: Everyday Forms of Peasant Resistance* (New Haven: Yale University Press)
- Searle-Chatterjee, M. & Sharma, U. (1994), *Contextualising Caste: Post-Dumontian Approaches* (Oxford: Blackwell Publishers)
- Seneviratne, H.I. (ed.) (1999), *Identity, Consciousness and the Past: Forging of Caste and Community in India and Sri Lanka* (New Delhi: Oxford University Press)
- Shah, G. (ed.) (2001), *Dalit Identity and Politics* (New Delhi: Sage)
- Shah, G. (2002), *Caste and Democratic Politics in India* (New Delhi: Permanent Black)
- Shah, G., Mander, H., Thorat, S. et al. (2006), *Untouchability in Rural India* (New Delhi: Sage)
- Shamasastri, R. (1923), *Kautilya's Arthashastra* (Mysore: Wesleyan Mission Press)
- Shani, O. (2007), *Communalism, Caste and Hindu Nationalism: The Violence in Gujarat* (Cambridge: Cambridge University Press)
- Sharma, A. (2003), *Hinduism and Human Rights: A Conceptual Approach* (New Delhi: Oxford University Press)
- Sharma, B.A.V. & Madhusudhan, Reddy (1982), *Reservation Policy in India* (New Delhi: Light & Life Publishers)
- Sharma, G. (2004), *Human Rights and Social Justice* (New Delhi: Deep & Deep Publications Pvt. Ltd.)
- Sharma, K.L. (ed.) (2005), *Caste and Class in India* (Jaipur: Rawat Publications)
- Sharma, U. (2002), *Caste* (New Delhi: `Viva Books)
- Shaw, A. (2000), *Kinship and Continuity: Pakistani Families in Britain* (Abingdon: Routledge)
- Shiva Rao, B. (1966), *The Framing of India's Constitution, Select Documents Vol. 1* (New Delhi: The Indian Institute of Public Administration)

- Shiva Rao, B. (1968), *The Framing of India's Constitution: A Study* (New Delhi: The Indian Institute of Public Administration)
- Shridhar, V. & Ketkar, A.M. (1909), *The History of Castes in India* (Ithica, N.Y: Taylor and Carpenter)
- Simmonds, N. (2007), *Law as a Moral Idea* (Oxford: Oxford University Press)
- Singh Kalsi, S. (1989), *The Sikhs and Caste: A Study of the Sikh Community in Leeds and Bradford. PhD Thesis, University of Leeds* (Leeds: University of Leeds)
- Singh Kalsi, S. (1992), *The Evolution of a Sikh Community in Britain* (Leeds: University of Leeds, Department of Theology and Religious Studies)
- Smart, C. (1989), *Feminism and the Power of Law* (London: Routledge)
- Smith, B. (1994), *Classifying the Universe: The Ancient Indian Varna System and the Origins of Caste* (New York: Oxford University Press)
- Smith, B. (1994), *Classifying the Universe* (New York: Oxford University Press)
- Srinivas, M.N. (1962), *Caste in Modern India and Other Essays* (London: Asia Publishing House)
- Srinivas, M.N. (ed.) (1996), *Caste: Its Twentieth Century Avatar* (New Delhi: Penguin)
- Srinivas, M.N. (2002), *Collected Essays* (New Delhi: Oxford University Press)
- Teltumbde, A. (2008), *Khairlanji: A Strange and Bitter Crop* (New Delhi: Navayana Publishing)
- Thalbot, I. & Thandi, S. (eds.) (2004), *People on the Move: Punjabi Colonial and Post-Colonial Migration* (Oxford: Oxford University Press)
- Thapar, R. (1992), *Interpreting Early India* (New Delhi: Oxford University Press)
- Thapar, R. (2002), *A History of India Vol. I* (First published 1966. New Delhi: Penguin Books)
- Thapar, R. (2002), *The Penguin History of Early India from the Origins to AD 1300* (New Delhi: Penguin Books)
- Thapar, R. (2009), *Ancient Indian Social History: Some Interpretations* (Reprint, first published 1978. Hyderabad: Orient BlackSwan/Orient Longman)
- Thorat, S. & Umakant (eds.) (2004), *Caste, Race and Discrimination: Discourses in an International Context* (New Delhi/Jaipur: Rawat/Indian Institute of Dalit Studies)
- Thorat, S. & Kumar, N. (eds.) (2008), *In Search of Inclusive Policy: Addressing Graded Inequality* (Jaipur: Rawat)
- Thorat S. & Kumar, N. (eds.) (2008), *B.R. Ambedkar: Perspectives on Social Exclusion and Inclusive Policies* (New Delhi: Oxford University Press)
- Thorat, S. (2009), *Dalits in India: Search for a Common Destiny* (New Delhi: Sage)

- Thorat, S. & Newman, K. (2011), *Blocked by Caste: Economic Discrimination in Modern India* (New Delhi: Oxford University Press)
- Thornberry, P. (1991), *International Law and the Rights of Minorities* (Oxford: Clarendon Press)
- Thornberry, P. (2002), *Indigenous Peoples and Human Rights* (Manchester: Manchester University Press)
- Thornton, M. (1995), *Public and Private: Feminist Legal Debates* (Oxford: Oxford University Press)
- Varshney, A. (ed.) (2004), *India and the Politics of Developing Countries: Essays in Memory of Myron Weiner* (New Delhi: Sage)
- Verma, S.K. & Kusum (eds.) (2000), *Fifty Years of the Supreme Court of India: Its Grasp and Reach* (New Delhi: Oxford University Press)
- Visram, R. (2002), *Asians in Britain: 400 Years of History* (London: Pluto Press)
- Wakaner, C. (2010), *Subalternity and Religion: The Prehistory of Dalit Empowerment in South Asia* (Abingdon: Routledge)
- Weisskopf, T. (2004), *Affirmative Action in the United States and India: A Comparative Perspective* (London: Routledge)
- Weller, M. (ed.) (2005), *The Rights of Minorities: A Commentary on the European Framework Convention for the Protection of National Minorities* (Cambridge: Cambridge University Press)
- Williams A. (2004), *EU Human Rights Policies: A Study in Irony* (Oxford: Oxford University Press)
- Wolpert, S. (2000), *A New History of India* (6th Edition) (Oxford: Oxford University Press)
- Wolpert, S. (2009), *A New History of India* (8th Edition) (Oxford: Oxford University Press)
- Zavos, J. (2000), *The Emergence of Hindu Nationalism in India* (New Delhi: Oxford University Press)
- Zelliot, E. (1998), *From Untouchable to Dalit: Essays on the Ambedkar Movement* (New Delhi: Manohar)
- Zinkin, T. (1964), *India* (Oxford: Oxford University Press)
- Zinkin, T. (1962), *Caste Today* (London: Oxford University Press)

Journal Articles

- Ajit, H., Donker, H. and Saxena, R., Corporate Boards in India: Blocked by Caste? (2012) *Economic and Political Weekly* 11 August 2012 39-43

- Alex, G., A Sense of Belonging and Exclusion: “Touchability” and “Untouchability” in Tamil Nadu (2008) 73(4) *Ethos* 523-543
- Ali, M., Indian Muslim OBCs: Backwardness and Demand for Reservation (2012) *Economic and Political Weekly* 8 September 2012 74-79.
- Allen, R., Tackling caste and descent-based discrimination – Jews, Hindus and others (2009) 38 *Discrimination Law Association Briefings* 10-12
- Alston, P. and Simma, B., The Sources of Human Rights Law: Custom, Jus Cogens, General Principles (1992) 12 *Australian Year Book of International Law* 82-108
- Alston, P., Morgan-Foster, J. and Abresch, W., The Competence of the UN Human Rights Council and its Special Procedures in Relation to Armed Conflicts: Extrajudicial Executions in the ‘War on Terror’ (2008) 19(1) *European Journal of International Law* 183-209
- Anandan, P.I., The Coronation and the Depressed Classes (1911) 24 *Hindustan Review* 529-532
- Balkin, J., The Constitution of Status (1997) 106 *Yale Law Journal* 2313-2374
- Bamshad, M. et al., Genetic Evidence on the Origins of Indian Caste Populations (2001) 11 *Genome Research* 994-1004
- Bandyopadhyay, S., Transfer of Power and the Crisis of Dalit Politics in India 1945-47 (2000) 34(4) *Modern Asian Studies* 893-942
- Barnard, A., Kalahari revisionism, Vienna and the ‘indigenous peoples’ debate (2006) 14(1) *Social Anthropology* (2006) 1-16
- Basu et al., Ethnic India: A Genomic View, With Special Reference to Peopling and Structure (2003) 13 *Genome Research* 2277-2290
- Baxi, U., “The Little Done, the Vast Undone” – Some Reflections on Reading Granville Austin’s The Indian Constitution (1967) (9) *Journal of the Indian Law Institute* 323-430
- Berg, D.E., Sovereignties, the World Conference Against Racism 2001 and the Formation of a Dalit Human Rights Campaign (2001) 20 *Questions de Recherche/Research Questions* 2-66
- Berreman G., Caste and India in the United States (1960) 66(2) *American Journal of Sociology* 120-127
- Berreman, G., The Study of Caste Ranking in India (1965) 21(2) *South Western Journal of Anthropology* 115-129
- Berreman, G., Caste as Social Process (1967) 23(4) *South Western Journal of Anthropology* 351-370
- Berreman, G., The Brahminical View of Caste in ‘On the Nature of Caste in India: A Review Symposium’ (1971) 5 *Contributions to Indian Sociology* 16-23

- Berreman, G., Social Categories and Social Interaction in Urban India (1972) 74(3) *American Anthropologist* 567-586
- Beteille, A., Race and Descent as Social Categories in India (1967) 96(2) *Daedalus* 444-463
- Beteille, A., Homo Hierarchicus, Homo Equalis (1979) 13(4) *Modern Asian Studies* 529-548
- Beteille, A., Classes and Communities (2007) *Economic and Political Weekly* 17 March 2007 945-952
- Beteille, A., The Peculiar Tenacity of Caste (2012) *Economic and Political Weekly* 31 March 2012 41-48
- Bhangavan, M., A New Hope: India, the United Nations and the Making of the Universal Declaration of Human Rights (2010) 44(2) *Modern Asian Studies* 311-347
- Bhatia, B., Dalit Rebellion against Untouchability in Chakwada Rajasthan (2006) 40 *Contributions to Indian Sociology* 29-61
- Bhatt, C., Dharmo Rakshati Rakshitah: Hindutva Movements in the UK (2000) 23(3) *Ethnic and Racial Studies* 559-593
- Bob, C., "Dalit Rights are Human Rights": Caste Discrimination, International Activism, and the Construction of a New Human Rights Issue (2007) 29(1) *Human Rights Quarterly* 167-193
- Brewer, R., Conrad, C. and King, M., Complexities and Potential Of Theorising Gender, Caste, Race and Class, (2002) 8(2) *Feminist Economics* 3-18
- Cameron, M., Considering Dalits and Political Identity in Imagining a New Nepal (2007) *Himalaya* XXVII
- Charlesworth, H., Feminist Methods in International Law (2004) 36 *Studies in Transnational Legal Policy* 159-183
- Charsley, S., Untouchable: What is in a Name? (1996) 2(1) *Journal of the Royal Anthropological Institute* 1-23
- Chowdhry, P., First Our Jobs, Then Our Girls: The Dominant Caste Perceptions on the 'Rising' Dalits (2009) 43(2) *Modern Asian Studies* 437-479
- Churchard, C., "Legal clarity needed on caste discrimination," say law experts (2011) *People Management* 19 August 2011
- Clark, D., The Harijans of Britain (1975) *New Society* 26 June 1975
- Contursi, J., Political Theology: Text and Practice in a Dalit Panther Community (1993) 52(2) *The Journal of Asian Studies* 320-339
- Cornell, M., The Statutory Background of Apartheid: Chronological Survey of South African Legislation (1960) 16(5) *The World Today* 181-194

- Cover, R., Nomos and Narrative (1983) 97(4) *Harvard Law Review* 4-68
- Cox, O., Race and Caste: A Distinction (1945) 50(5) *American Journal of Sociology* 360-3
- Das, V. and Singh Uberoi J., Elementary Structure of Caste, The in 'On the Nature of Caste in India: A Review Symposium' (1971) 5 *Contributions to Indian Sociology* 33-43
- Davis, D., Hinduism as a Legal Tradition (2007) 75(2) *Journal of the American Academy of Religion* 241-267
- Deliège, R., The Myths of Origin of the Indian Untouchables (1993) NS 28(3) *Man* 533-549
- Deliège, R., Replication and Consensus: Untouchability, Caste and Ideology in India (1992) 27(1) *Man* 155-173
- Deliège, R., Replication and Consensus Among Indian Untouchable (Harijan) Castes (1994) 29(2) *Man* 457-461
- Desai, S. and Dubey, A., Caste in 21st Century India: Competing Narratives (2011) *Economic and Political Weekly* 12 March 2011 40-49
- Deshpande, A., Does Caste Still Define Disparity? A Look at Inequality in Kerala, India (2000) 90(2) *American Economic Review* 322-325
- Deshpande, A., Overlapping Identities under Liberalisation: Gender and Caste in India (2007) 55(4) *Economic Development and Cultural Change* 735-760
- Deshpande, A., Assets vs. Autonomy? The Changing Face of the Caste-Gender Overlap in India (2002) 8(2) *Feminist Economics* 19-35
- Dhanda, M., Punjabi Dalit Youth: Social Dynamics of Transitions in Identity (2009) 17(1) *Contemporary South Asia* 47-64
- Dhavan, R., Dharmasastra and Modern Indian Society: A Preliminary Exploration (1992) 34(4) *Journal of the Indian Law Institute* 515-540
- Dirks, N., The invention of caste: civil society in colonial India (1989) 25 *Social Analysis* 42-52
- Dobe K. and Chhokar S., Muslims, Ethnicity and the Law (2000) 4 *International Journal of Discrimination and the Law* 369-386
- Downing, J., "Hate Speech" and "First Amendment Absolutism" Discourses in the US (1999) (1) *Discourse and Society* 175-198
- Dudley Jenkins, L., Becoming Backward: Preferential Policies and Religious Minorities in India (2001) 39(2) *Commonwealth and Comparative Politics* 32-50
- Dudley Jenkins, L., Race, Caste and Justice: Social Science Categories and Anti-Discrimination Policies in India and the United States (2004) 36(3) *Connecticut Law Review* 747-785

- Dudley Jenkins, L., Diversity and the Constitution in India: What is Religious Freedom? (2009) 57 *Drake Law Review* 913-941
- Dumont L., On Putative Hierarchy and Some Allergies To It in 'On the Nature of Caste in India: A Review Symposium' (1971) N5 *Contributions to Indian Sociology* 58-78
- Eisenman, W., Eliminating Discrimination Against Dalits: The Local Need for International Capacity-Building of the Indian Criminal Justice System (2003) 17(1) *Emory International Law Review* 133-185
- Egerton, F., Dominant Ideas in the Formation of Indian Culture (1942) 62(3) *Journal of the American Oriental Society* 151-6
- Felice, W., UN Committee on the Elimination of All Forms of Racial Discrimination: Race and Economic and Social Human Rights (2002) 24(1) *Human Rights Quarterly* 205-236
- Fiss, O., The Fate of an Idea Whose Time Has Come: Antidiscrimination Law in the Second Decade after *Brown v Board of Education* (1974) 41 *University of Chicago Law Review* 742-773
- Folmer, S., Identity Politics Among Dalits in Nepal (2007) *Himalaya* XXVII (1-2) 41-53
- Fredman, S., Reversing Discrimination (1997) 113 *Law Quarterly Review* 575-600
- Gazdar, H., Class, Caste or Race: Veils over Social Oppression in Pakistan (2007) *Economic and Political Weekly* 13 January 2007 86-88
- Gellner, D., Caste, Ethnicity and Inequality in Nepal (2007) 42 (20) *Economic and Political Weekly*, 19 May 2007 1823-1828
- Gilbert, J., Indigenous People's Human Rights in Africa: the Pragmatic Revolution of the African Commission on Human and People's Rights (2011) (60) *International and Comparative Law Quarterly* 245-270
- Grinsell, S., Caste and the Problem of Social Reform in Indian Equality Law (2010) 35 *Yale Journal of International Law* 199-336
- Goldston, J., The Struggle for Roma Rights: Arguments that have worked (2010) 32(2) *Human Rights Quarterly* 311-35
- Goodman, R. and Jinks, D., Measuring the Effects of Human Rights Treaties (2003) 14(1) *European Journal of International Law* 171-183
- Gopal, P., Dominating the Diaspora (2010) *Himal Southasia* (April 2010)
- Gorringe, H., 'You build your house, we'll build ours': The Attractions and Pitfalls of Dalit Identity Politics (2005) 11(6) *Social Identities: Journal for the Study of Race, Nation and Culture* 653-672
- Gorringe, H., Banal Violence? The Everyday Underpinnings of Collective Violence (2006) 13 *Identities: Global Studies in Culture and Power* 237-260

- Gorringe, H. and Rafanell, I., The Embodiment of Caste: Oppression, Protest and Social Change (2007) 41(1) *Sociology* 97-114
- Grugel, J. and Peruzzotti, E., Claiming Rights Under Global Governance: Children's Rights in Argentina (2007) 13 *Global Governance* 199-216
- Gudavarthy, A., Gandhi, Dalits and Feminists: Recovering the Convergence (2008) *Economic and Political Weekly* 31 May 2008 83-90
- Gupta, D., The Certitudes of Caste: When Identity Trumps Hierarchy (2004) 38(1/2) *Contributions to Indian Sociology* v-xv
- Gupta, D., Caste and Politics: Identity over System (2005) 34 *Annual Review of Anthropology* 409-427
- Gupta, D. and Kumar, Y., When the Caste Calculus Fails: Analysing the BSP's Victory in UP (2007) *Economic and Political Weekly* 18 August 2007 2288-3396
- Guru, G., Power of Touch (2006) *Frontline* 16-29 December 2006
- Guru, G., Archaeology of Untouchability (2009) *Economic and Political Weekly* 12 September 2009 49-56
- Habib, I., Kosambi, Marxism and Indian History (2008) *Economic and Political Weekly* 26 July 2008 85-88
- Hasan, R. and Mehta, A., Under-Representation of Disadvantaged Classes in Colleges: What Do the Data Tell Us? (2006) *Economic and Political Weekly* 2 September 2006 3791-3796
- Heesterman, J., Priesthood and the Brahman in 'On the Nature of Caste in India: A Review Symposium' (1971) N5 *Contributions to Indian Sociology* 43-47
- Heyns, C. and Viljoen, F., The Impact of the United Nations Human Rights Treaties on the Domestic Level (2001) 23(2) *Human Rights Quarterly* 483-535
- Hilson, C., New Social Movements: The Role of Legal Opportunity (2002) 9(2) *Journal of European Public Policy* 238-255
- Hudson, B., Beyond White Man's Justice: Race, Gender and Justice in Late Modernity (2006) 10(1) *Theoretical Criminology* 29-47
- Huff, J., Religious Freedom in India and Analysis of the Constitutionality of Anti-Conversion Laws (2009) 10(2) *Rutgers Journal of Law and Religion* 1-36
- Inden, R., Orientalist Constructions of India (1986) 20(3) *Modern Asian Studies* 401-446
- Jain, H. and Venkata Ratnam, C.S., Affirmative Action in Employment for the Scheduled Castes and the Scheduled Tribes in India (1994) 15(7) *International Journal of Manpower* 6-25
- Jaiswal, S., Studies in Early Indian Social History: Trends and Possibilities (1979-80) 6(1-2) *Indian Historical Review* 1-63

- Jaoul, N., The 'Righteous Anger' of the Powerless: Investigating Dalit Outrage over Caste Violence (2008) *South Asia Multidisciplinary Academic Journal* (Special Issue) (2008)
- Jaspal, R., Caste, Social Stigma and Identity Processes (2001) 23(1) *Psychology and Developing Societies* 27-62
- Jayaram, N., Metamorphosis of Caste among Trinidad Hindus (2006) 40(2) *Contributions to Indian Sociology* 143-173
- Jeffrey, C., Jefferey, P and Jeffery, R., Dalit Revolution? New Politicians in Uttar Pradesh India (2008) 67(4) *Journal of Asian Studies* 1365-1396
- Jenkins, L., Legal Limits on Religious Conversion in India (2008) 72(2) *Law and Contemporary Problems* 110-127
- Jha, V., Stages in the History of Untouchables (1975) II(I) *Indian Historical Review* 14-31
- Jha, V., Social Stratification in Ancient India: Some Reflections (1991) 13(3-4) *Social Sciences* 19-40
- Jodhka, S. and Kumar, A., Internal Classification of Scheduled Castes: The Punjab Story (2007) *Economic and Political Weekly* 27 October 2007 20-23
- Jodhka, S. and Newman, K., In the name of Globalisation: Meritocracy, Productivity and the Hidden Language of Caste (2007) *Economic and Political Weekly* 13 October 2007 4125-4132
- Jodhka, S. and Shah, G., Comparative Contexts of Discrimination: Caste and Untouchability in South Asia (2010) *Economic and Political Weekly* 27 November 2010 99-106
- Judge, P., Hierarchical Differentiation Among Dalits (2003) *Economic and Political Weekly* 12 July 2003 2990-2991
- Judge, P., Punjabis in England: The Ad-Dharmi Experience (2002) *Economic and Political Weekly* 3 August 2002 3244-3250
- Juegensmeyer, M., What if the Untouchables Don't Believe in Untouchability? (1980) 12(1) *Bulletin of Concerned Asian Scholars* 23-28
- Kannabiren, K.G., Important Similarities, Strange Differences: Caste, Race and Durban (2010) *Economic and Political Weekly* 10 July 2010 38-41
- Keane, D., Descent-based Discrimination in International Law: A Legal History (2005) 12(1) *International Journal on Minority and Group Rights* 93-116
- Khare, R.S., A Theory of 'Pure' Hierarchy in 'On the Nature of Caste in India: A Review Symposium' (1971) N5 *Contributions to Indian Sociology* 27-33
- Klabbers, J., International Legal Histories: The Declining Importance of Travaux Préparatoires In Treaty Interpretation? (2003) 50 *Netherlands International Law Review* 267-288

- Klimas, T. and Vaiciukaite, J., The Law of Recitals in European Community Legislation (2008) 15(1) *ILSA Journal of International and Comparative Law* 1-33
- Kodoth, P., Gender, Caste and Matchmaking in Kerala: A Rationale for Dowry (2008) *Development and Change* 39(2) 263-283
- Kothari, R., Rise of the Dalits and the Renewed Debate on Caste (1994) *Economic and Political Weekly* 25 June 1994 1589-1594
- Krishnaswamy, S. and Khosla, M., Reading *A.K. Thakur v Union of India*: Legal Effect and Significance (2008) *Economic and Political Weekly* 19 July 2008 53-60
- Kumar, P., Dalits and the BSP in Uttar Pradesh: Issues and Challenges (1999) *Economic and Political Weekly* 3 April 1999 822-826
- Kumar, V., Behind the BSP Victory (2007) *Economic and Political Weekly* 15 June 2007 2237-2239
- Kundnani, A., Racism, Religion and Communalism (2002) 44(2) *Race and Class* 71-80
- Kuper, A., The Return of the Native (2003) 44(3) *Current Anthropology* 389-402
- Lariviere, R., Dharmasastra, Custom, "Real Law: and "Apocryphal" Smritis (2004) 32 *Journal of Indian Philosophy* 611-662
- Leach, E., Esprit in Homo Hierarchicus in 'On the Nature of Caste in India: A Review Symposium' (1971) N5 *Contributions to Indian Sociology* 13-16
- Lennox, C., Reviewing Durban: Examining the Outputs and Review of the 2001 World Conference Against Racism (2009) 27(2) *Netherlands Quarterly of Human Rights* 191-235
- Lerche, J., Transnational Advocacy Networks and Affirmative Action for Dalits in India (2008) *Development and Change* 39(2) 239-261
- Lillibridge, N., The Promise of Equality: A Comparative Analysis of the Constitutional Guarantees of Equality in India and the United States (2005) 13 *William and Mary Bill of Rights Journal* 1301-1340
- Lindgren Alves, J., Race and Religion in the United Nations Committee on the Elimination of Racial Discrimination (2008) 42 *University of San Francisco Law Review* 941-982
- Lorenzen, D., Who Invented Hinduism? (1999) 41(4) *Comparative Studies in Society and History* 630-659
- Louis, P., Dalit Christians: Betrayed by State and Church (2007) *Economic and Political Weekly* 21 April 2007 1404-1408
- Lustgarten, L., The Grounds of Discrimination under the Race Relations Act 1976 in the United Kingdom (1979) 28 *International and Comparative Law Quarterly* 221-240

- MacDonell, A.A., The Early History of Caste (1911) 19(2) *American Historical Review* 230-244
- MacKinnon, C., Marxism, Feminism and the State: Toward Feminist Jurisprudence (1983) 8(4) *Signs* 635-658
- MacKinnon, C., Marxism, method and the State: An Agenda for Theory (1982) 7(3) *Signs* 515-544
- Madan, T.N., On the Nature of Caste in India: A Review Symposium on Louis Dumont's *Homo Hierarchicus* (1971) N5 *Contributions to Indian Sociology* 1-13
- Marchetti, E., Intersectional Race and Gender Analyses: Why Legal Processes Just Don't Get It (2008) 17(2) *Social Legal Studies* 155-174
- Marston, G. and Watts, R., Tampering with the Evidence: A Critical Appraisal of Evidence-Based Policy-Making (2003) 3(3) *The Drawing Board: An Australian Review of Public Affairs* 143-163
- McColgan, A., Class Wars? Religion and (In)equality in the Workplace (2009) 38(1) *Industrial Law Journal* 1-29
- McColgan, A., Reconfiguring Discrimination Law (Spring 2007) *Public Law* 74-94
- McColgan, A., Cracking the comparator problem: discrimination, 'equal' treatment and the role of comparisons (2006) 6 *European Human Rights Law Review* 650-667
- McCormack, W., Caste and the British Administration of Hindu Law (1966) 1(1) *Journal of African and Asian Studies* 25-32
- McGhee, D., Moving to "our" common ground – a critical examination of community cohesion discourse in twenty-first century Britain (2003) 51(3) *Sociological Review* 376-404
- McGoldrick, D., Multiculturalism and its Discontents (2005) 5(1) *Human Rights Law Review* 27-56
- McPherson, K. and Shaw, K., Is it time to legislate on caste? (2012) *Employment Law Journal* February 2012 12-15
- Mechlem, K., Treaty Bodies and the Interpretation of Human Rights (2009) 42(3) *Vanderbilt Journal of Transnational Law* 905-948
- Meer, N., Politics of voluntary and involuntary identities: are Muslims in Britain an ethnic, racial or religious minority?, The (2008) 42(1) *Patterns of Prejudice* 61-81
- Menon N., Caste on the International Stage (2011) *Economic and Political Weekly* 15 January 2011 15-18
- Menscher, J., The Caste System Upside Down, or The Not-So-Mysterious East (1974) 15(4) *Current Anthropology* 469-493
- Meron, T., The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination (1985) 79 *American Journal of International Law* 283-318

- Michaelson, M., The Relevance of Caste Among East African Gujaratis in Britain (1979) 7(3) *Journal of Ethnic and Migration Studies* 350-360
- Misra, A., The Missionary Position: Christianity and Politics of Religious Conversion in India (2011) 17 *Nationalism and Ethnic Politics* 361–381
- Mohanty, M., Social Inequality, Labour Market Dynamics and Reservation (2006) *Economic and Political Weekly* 2 September 2006 3777-3789
- Moldernhawer, B., Transnational Migrant Communities and Education Strategies among Pakistani Youngsters in Denmark (2005) 31(1) *Journal of Ethnic and Migration Studies* 51-78
- Moller Okin, S., Gender Inequality and Cultural Differences (1994) 22(5) *Political Theory* 5-24
- Moon, G., From equal treatment to appropriate treatment: what lessons can Canadian equality law on dignity and on reasonable accommodation teach the United Kingdom? (2006) 6 *European Human Rights Law Review* 695-721
- Mosse, D., Replication and Consensus Among Indian Untouchable (Harijan) Castes (1994) 29(2) *Man* 457-461
- Mukta, P., The Public Face of Hindu Nationalism (2000) 23(3) *Ethnic and Racial Studies* 442-466
- Narayan, B., Demarginalisation and History: Dalit Re-invention of the Past (2008) 28(2) *South Asia Research* 169-184
- Narula, S., Overlooked Danger: The Security and Rights Implications of Hindu Nationalism in India (2003) 16 *Harvard Human Rights Journal* 41-68
- Narula, S., Equal by Law, Unequal by Caste: The ‘Untouchable’ Condition in Critical Race Perspective (2008) 26(2) *Wisconsin International Law Journal* 255-343
- Nesbitt, E., Pitfalls in Religious Taxonomy: Hindus and Sikhs, Valmiki and Ravidasis (1990) 6(1) *Religion Today* 9-12
- Nesbitt, E., Religion and Identity: The Valmiki Community in Coventry (1990) 16(2) *New Community* 261-274
- Nesbitt, E., “We are all equal”: Young British Punjabis’ and Gujaratis’ Perceptions of Caste (1997) 4(2) *International Journal of Punjab Studies* 201-218
- Obinna, E., Contesting identity: the Osu caste system among Igbo of Nigeria (2012) 10(1) *African Identities* 111-121
- O’Flaherty, M. and Fisher, J., Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles (2008) 8 *Human Rights Law Quarterly* 207-248
- Omvedt, G., Caste System and Hinduism (2004) *Economic and Political Weekly* 13 March 2004 1179-1180

- Orakhelashvili, A., Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights (2003) 14(3) *European Journal of International Law* 529-568
- Pager, S., Anti-Subordination of Whom? What India's Answer Tells Us About the Meaning of Equality in Affirmative Action (2007) 41 *University of California Davis Law Review* 289-355
- Paik, S., Mahar-Dalit-Buddhism: The history and politics of naming in Maharashtra (2011) 45(2) *Contributions to Indian Sociology* 217-241
- Pai, S., New Social and Political Movements of Dalits: A Study of Meerut District (2000) 34 *Contributions to Indian Sociology* 189-220
- Palshikar, S., Challenges before the Reservation Discourse (2008) *Economic and Political Weekly* 26 April 2008, 8-11
- Pande, R., Can Mandated Political Representation Increase Policy Influence for Disadvantaged Minorities? Theory and Evidence from India (2006) 93(4) *American Economic Review* 1132-1151
- Pande, R., Gender, Poverty and Globalisation in India (2007) 50(2) *Development* 134-140
- Panini, M.N., Caste, Race and Human Rights (2001) *Economic and Political Weekly* 1 September 2001 3344-3346
- Parsons, W., From Muddling Through to Muddling Up – Evidence-Based Policy-Making and the Modernisation of British Government (2002) 17(3) *Public Policy and Administration* 43-60
- Patel, P., Faith in the State? Asian Women's Struggles for Human Rights in the UK (2008) 16 *Feminist Legal Studies* 9-36
- Peach, C., South Asian Migration and Settlement in Great Britain, 1951-2001 (2006) 15(2) *Contemporary South Asia* 133-146
- Pentassuglia, G., Evolving Protection of Minority Groups: Global Challenges and the Role of International Jurisprudence (2009) 11 *International Community Law Review* 185-218
- Permutt, S., The Manual Scavenging Problem: A Case for the Supreme Court of India (2011) 20 *Cardozo Journal of International and Comparative Law* 277-311
- Pinto, A., UN Conference Against Racism: Is Caste Race? (2001) *Economic and Political Weekly* 3628 July 2001, 2817-2820
- Pinto, A., Caste Discrimination and the UN (2002) *Economic and Political Weekly* 28 September 2002 3988-3990
- Ramaiah, A., Identifying Other Backward Classes (1992) *Economic and Political Weekly* 6 June 1992 1203-1207
- Reber, E., Buraku Mondai in Japan: Historical and Modern Perspectives and Directions for the Future (1999) 12 *Harvard Human Rights Journal* 297-359

- Reddy, D., The Ethnicity of Caste (2005) 78(3) *Anthropological Quarterly* 543-584
- Reitman, O., Multiculturalism and feminism: Incompatibility, compatibility or synonymy? (2005) 5(2) *Ethnicities* 216-247
- Ritter, M., Human Rights: The Universalist Controversy, A Response to Surya Subedi (1999) 30 *California Western International Law Journal* 71-90
- Rizvi, G., Emergent India: Globalisation, Democracy and Social Justice (2007) 62 *International Journal* 753-768
- Rocher, L., Hindu Conceptions of Law (1978) 29(6) *Hastings Law Journal* 1283-1305
- Rocher, L., Law Books in an Oral Culture (1993) 137(2) *Proceedings of the American Philosophical Society* 254-267
- Robinson, D., The Search for Community Cohesion: Key Themes and Dominant Concepts of the Public Policy Agenda (2005) 42(8) *Urban Studies* 1411-1427
- Roy, K., Kosambi and Questions of Caste (2008) *Economic and Political Weekly*, 26 July 2008 78-84
- Sabir, S., Chimerical Categories: Caste, Race and Genetics (2003) 3(2) *Developing World Bioethics* 170-177
- Samarendra, P., Census in Colonial India and the Birth of Caste (2011) *Economic and Political Weekly* 13 August 2011 51-58
- Sandberg, R., Laws and Religion: Unravelling *McFarlane v Avon Relate Ltd.* (2010) 12(3) *Ecclesiastical Law Journal* 361-70
- Sandberg, R., The Right to Discriminate (2011) 13(2) *Ecclesiastical Law Journal* 157-181
- Sato, K., Divisions among Sikh Communities in Britain and the Role of the Caste System: A Case Study of Four Gurdwaras in Multi-Ethnic Leicester (2012) 19(1) *Journal of Punjab Studies* 1-25
- Sarkar, S., Conversions and Politics of Hindu Right (1999) *Economic and Political Weekly* 26 June 1999 1691-1700
- Sarkin, J. & Koenig M., Ending Caste Discrimination in India: Human Rights and the Responsibility to Protect (R2P) Individuals and Groups from Discrimination at the Domestic and International Levels (2011) 41 *George Washington International Law Review* 541-576
- Sarukkai, S., Phenomenology of Untouchability (2009) *Economic and Political Weekly* 12 September 2009 39-48
- Schwelb, E., The International Convention on the Elimination of all Forms of Racial Discrimination (1966) 15 *International and Comparative Law Quarterly* 996-1068

- Searle-Chatterjee, M., World Religions and 'Ethnic Groups': do these paradigms lend themselves to the cause of Hindu nationalism? (2000) 23(3) *Ethnic and Racial Studies* 497-515
- Shachar, A., On Citizenship and Multicultural Vulnerability (2000) 28(1) *Political Theory* 64-89
- Shah, P., Thinking Beyond Religion: Legal Pluralism in Britain's South Asian Diaspora (2006) 8(3) *Australian Journal of Asian Law* 237-260
- Shaikh, J., Who Needs Identity? Dalit Studies and the Politics of Recognition: Review Essay (2012) 11(3) *India Review* 200-208
- Sheth, D.L., Caste in the Mirror of Race (2001) *Seminar* 508 December 2001 50-55
- Shultziner, D. and Rabnovici, I., Human Dignity, Self-Worth and Humiliation: A Comparative Legal-Psychological Approach (2012) 18 *Psychology, Public Policy and Law* 105-137
- Shyam Babu, D. and Prasad, C.B., Six Dalit Paradoxes (2009) *Economic and Political Weekly* 6 June 2009 22-25
- Singer, M., Modernisation or Traditionalisation in 'On the Nature of Caste in India: A Review Symposium' (1971) N5 *Contributions to Indian Sociology* 50-57
- Singh, M.P., *Ashoka Thakur v Union of India*: A Divided Verdict on an Undivided Social Justice Measure (2008) 1 *National University of Juridical Sciences Law Review* 193-218
- Singh, R. and Ziyauddin, Manual Scavenging As Social Exclusion: A Case Study (2009) *Economic and Political Weekly* 27 June 2009 521-523
- Sinha, B., Gender Disparity in Education Amongst the Scheduled Castes and Tribes in Selected States in India (2005) 53(3) *Indian Economic Journal* 131-144
- Smith, P., Going Global: The Transnational Politics of the Dalit Movement (2008) 5(1) *Globalisations* 13-33
- Solanke, I., Putting Race and Gender Together: A New Approach to Intersectionality (2009) *Modern Law Review* 72(5) 723-749
- Solomon, T., Problems in Drafting Legislation Against Racist Activities (1994) 1(1) *Australian Journal of Human Rights* 265-84
- Still, C., Dalit Women in the Social Justice Revolution in India (2008) *Public Policy Research* June-August 2008 93-96
- Subedi, S., Are the Principles of Human Rights "Western" Ideas? An Analysis of the Claim of the "Asian" Concept of Human Rights from the Perspectives of Hinduism (1999) *California Western International Law Journal* 45-69
- Syverudi, K., The Caste System and Best Practices in Legal Education (2002) 1 *Journal of the Association of Legal Writing Directors* 12-20

- Tahkur, R. et al., Mitochondrial DNA variation in ranked caste groups of Maharashtra (India) and its implications on genetic relationships and origins (2003) Jul-Aug 30(4) *Annual of Human Biology* 443-454
- Tagore, G. M., On the Formation and Institution of the Caste System – the Aryan Polity (1863) 2 *Transactions of the Ethnological Society of London* 384
- Tamari, T., The Development of Caste Systems in West Africa (1991) 32(2) *The Journal of African History* 221-250
- Teltumbde, A., Uttar Pradesh: A ‘Mayawi’ Revolution (2007) *Economic and Political Weekly* 9 June 2007 2147-2148
- Teltumbde, A., High Court’s Verdict on Khairlanji: Justice Diminished (2010) *Economic and Political Weekly* 7 August 2010 10-11
- Thapar, R., Imagined Religious Communities? Ancient History and the Modern Search for a Hindu Identity (1989) 23(2) *Modern Asian Studies* 209-231
- Thapar, R., Early Indian History and the Legacy of DD Kosambi (2008) *Economic and Political Weekly* 26 July 2008 43-51
- Thorat, S., Oppression and Denial: Dalit Discrimination in the 1990s (2002) *Economic and Political Weekly* 9 February 2002 572-578
- Thorat, S. and Attewell, P., The Legacy of Social Exclusion: A Correspondence Study of Job Discrimination in India (2007) *Economic and Political Weekly* 13 October 2007 4141-4145
- Thorat, S. and Mahamallik M., Chronic Poverty and Socially Disadvantaged Groups: Causes and Remedies (2007) 38/39 (4/1) *Margin* 41-53
- Thorat, S. and Newman, K., Caste and Economic Discrimination: Causes, Consequences and Remedies (2007) *Economic and Political Weekly* 13 October 2007 4121-4124
- Thornberry, P., Confronting Racial Discrimination: A CERD Perspective (2005) 5(2) *Human Rights Law Review* 239-269
- Tomotsune, T., Nakagami Kenji and the Buraku Issue in Post-War Japan (2003) 4(2) *Inter-Asia Cultural Studies* 220-231
- Torri, M-C., Abuse of Lower Castes in South India: The Institution of Devadasi (2009) 11(2) *Journal of International Women’s Studies* 31-48
- Trinka, S., Cleanliness in a Caste-less Context: Collective Negotiations of Purity and Pollution among Indo-Fijian Hindus (2012) 22(1) *Anthropological Forum* 25-43
- Tripathi, S., India’s Creeping Caste Entitlements (2007) *Far Eastern Economic Review* 49-52
- Varn Chandola, M., Affirmative Action in India and the United States: the Untouchable and Black Experience (1993) 3 *Ind. International and Comparative Law Journal* 101-133

- Varshney, A., Is India Becoming More Democratic? (2005) 59(1) *Journal of Asian Studies* 3-25
- Verma, A.K., Subalterns in Uttar Pradesh: A New Trajectory (2010) *Economic and Political Weekly* 27 November 2010 11-14
- Vickers, L., Religious Discrimination in the Workplace: An Emerging Hierarchy? (2009) 12(3) *Ecclesiastical Law Journal* 280-303
- Vickers, L., Promoting equality or fostering resentment? The public sector equality duty and religion or belief (2011) 31(1) *Legal Studies* 135-158
- Viswanathan, S. and Ramakrishnan, V., At a Crossroads (2006) *Frontline*, 29 December 2006
- Volpp, L., Feminism versus Multiculturalism (2001) 101(5) *Columbia Law Review* 1182-1218
- von Fuhrer-Haimendorf, C., Tribes and Hindu Society in 'On the Nature of Caste in India: A Review Symposium' (1971) N5 *Contributions to Indian Sociology* 24-27
- Waldrop, A., Dalit Politics in India and the New Meaning of Caste (2004) *Forum for Development Studies* 31 (2), 275-306
- Wankhede, G., Affirmative Actions and the Scheduled Castes: Access to Higher Education in India (2006) 5 *Advances in Education in Diverse Communities: Research, Policy and Praxis* 329-342
- Warner, L., American Caste and Class (1936) 42(2) *American Journal of Sociology* 234-237
- Watson, J., When No Place Is Home: Why the Homeless Deserve Suspect Classification (2003) 88 *Iowa Law Review* 515-533
- Waughray, A., The New Apartheid? (2012) *New Law Journal* 6 Jan 2012 19-21
- Waughray, A., India and the Paradox of Caste Discrimination (2009) 8 *European Yearbook of Minority Issues* 413-452
- Waughray, A., Caste Discrimination: A 21st Century Challenge for UK Discrimination Law? (2009) 72(2) *Modern Law Review* 182-219
- Waughray, A., Caste Discrimination and Minority Rights: The Case of India's Dalits (2010) 17 *International Journal on Minority and Group Rights* 327-353
- Waughray, A. and Weickgenannt Thiara, N., Challenging Caste Discrimination in Britain with Literature and Law: An Interdisciplinary Study of British Dalit Writing (2013, forthcoming) *Contemporary South Asia*
- Weisskopf, T., Impact of Reservations on Admissions to Higher Education in India (2006) *Economic and Political Weekly* 25 September 2004 4339-4349
- Wells, P., New Labour and evidence-based policy-making: 1997-2007 (2007) 1(1) *People, Place and Policy Online* 22-29

Werbner, P., Islamophobia: Incitement to religious hatred – legislating for a new fear? (2005) 21(1) *Anthropology Today* 5-9

Worley, C., “It’s not about race. It’s about the community”: New Labour and “community cohesion” (2005) 25 *Critical Social Policy* 483-496

Wyatt, A., Dalit Christians and Identity Politics in India (1998) 30(4) *Bulletin of Concerned Asian Scholars* 16-23

Xanthakis, A., Multiculturalism and International Law: Discussing Universal Standards (2010) 23(1) *Human Rights Quarterly* 21-48

Zaidi, A., India’s Shame (2006) *Frontline* 22 September 2006

Zavos, J., Stamp it out! Disciplining the image of Hinduism in a multicultural milieu (2008) 16(3) *Contemporary South Asia* 323-337

Zavos, J., Negotiating Multiculturalism: Religion and the Organisation of Hindu Identity in Contemporary Britain (2009) 35(6) *Journal of Ethnic and Migration Studies* 881-900

Zavos, J., Situating Hindu Nationalism in the UK: Vishwa Hindu Parishad and the Development of British Hindu Identity (2010) 48(1) *Commonwealth and Comparative Politics* 2-22

Chapters in Books

Allen, C. (2005), ‘From Race to Religion: the new face of discrimination’ in Abbas, T. (2005), *Muslim Britain: Communities Under Pressure* (London: Zed Books)

Alston, P. (2001), ‘The Historical Origins of the Concept of “General Comments” in Human Rights Law’ in Boisson de Chazournes, L. & Gowlland-Debbas, V. (eds.) (2001), *The International Legal System in Question of Equity and Universality* (The Hague: Martinus Nijhoff Publishing)

Ambedkar, B.R. (1989), ‘Annihilation of Caste’ in Moon, V. (ed.) (1989), *Dr. Babasaheb Ambedkar Writings and Speeches, Vol. 1* (Bombay: Education Dept., Govt. of Maharashtra)

Ambedkar, B.R. (1989), ‘Castes in India: Seminar Paper’ in Moon, V. (ed.) (1989), *Dr. Babasaheb Ambedkar Writings and Speeches, Vol. 1* (Reprint, Bombay: Education Dept., Govt. of Maharashtra)

Ambedkar, B.R. (1989), ‘Outside the Fold’ in Moon, V. (ed.) (1989), *Dr. Babasaheb Ambedkar Writings and Speeches, Vol. 5* (Bombay: Education Dept., Govt. of Maharashtra)

Ambedkar, B.R. (1991), ‘The Real Issue’ in Moon, V. (ed.) (1991), *Dr. Babasaheb Ambedkar Writings and Speeches, Vol. 9* (Bombay: Education Dept., Govt. of Maharashtra)

Ambedkar, B.R. (1991), 'What Congress and Gandhi Have Done to Untouchables' in Moon, V. (ed.) (1991), *Dr. Babasaheb Ambedkar Writings and Speeches, Vol. 9* (Bombay: Education Dept., Govt. of Maharashtra)

Ambedkar, B.R. (1993), 'The Untouchables and the Pax Britannica' in Moon, V. (ed.) (1993), *Dr. Babasaheb Ambedkar Writings and Speeches, Vol. 12* (Bombay: Education Dept., Govt. of Maharashtra)

Ambedkar, B.R. (1994), 'Gandhism' in Moon, V. (ed.) (1994), *Dr. Babasaheb Ambedkar Writings and Speeches, Vol. 13* (Bombay: Education Dept., Govt. of Maharashtra)

Ballard, R. (1994), 'Differentiation and Disjunction among the Sikhs' in Ballard, R. (ed.) (1994), *Desh Pardesh: The South Asian Presence in Britain* (London: Hurst & Co.)

Ballard, R. (1994), 'The Emergence of Desh Pardesh' in Ballard, R. (ed.) (1994), *Desh Pardesh: The South Asian Presence in Britain* (London: Hurst & Co.)

Banks, M. (1994), 'Jain ways of being' in Ballard, R. (ed.) (1994), *Desh Pardesh: The South Asian Presence in Britain* (London: Hurst & Co.)

Bates, C. (1997), 'Race, Caste and Tribe in Central India: The Early Origins of Indian Anthropometry' in Robb. P (ed.) (1997), *The Concept of Race in South Asia* (New Delhi: Oxford University Press)

Baxi, U. (1995), 'Emancipation as Justice: Babasaheb Ambedkar's Legacy and Vision' in Baxi, U. & Parekh, B. (eds.) (1995), *Crisis and Change in Contemporary India* (New Delhi: Sage Publications)

Bayly, S. (1997), 'Caste and "Race" in the colonial ethnography of India' in Robb. P (ed.) (1997), *The Concept of Race in South Asia* (New Delhi: Oxford University Press)

Beteille, A. (2004), 'Race and Caste' in Thorat, S & Umakant (eds.) (2004), *Caste, Race and Discrimination: Discourses in International Context* (New Delhi/Jaipur: Rawat)

Bhatty, Z. (1996), 'Social Stratification Among Muslims in India' in Srinivas, M.N. (ed.) (1996), *Caste: Its Twentieth Century Avatar* (New Delhi: Penguin)

Boyle, K. & Baldaccini, A. (2001), 'International Human Rights Approaches to Racism' in Fredman, S. (ed.) (2001), *Discrimination and Human Rights: The Case of Racism* (Oxford: Oxford University Press)

Chandhoke, N. (2004), 'Individual and Group Rights: A View From India' in Hasan Z., Sridhara E. & Sudarshan R. (eds.) (2004), *India's Living Constitution: Ideas, Practices and Controversies* (New Delhi: Permanent Black)

Coward, H. (1993), 'India's Constitution and Traditional Presuppositions Regarding Human Nature' in Baird, R. (ed.) (1993), *Religion and the Law in Independent India* (New Delhi: Manohar)

- Davis, D. (2010), 'A Historical Overview of Hindu Law' in Lubin, T., Davis, D. and Krishnan, J. (eds.) (2010), *Hinduism and Law: An Introduction* (Cambridge: Cambridge University Press)
- Deliège, R. (2010), 'Introduction: Is there still Untouchability in India?' in Aktor, M. & Deliège, R. (eds.) (2010), *From Stigma to Assertion: Untouchability, Identity and Politics in Early and Modern India* (Copenhagen: Museum Tusculanum Press)
- Deshpande, S. (2008), 'Exclusive Inequalities' in Thorat, S. & Kumar, N (eds.) (2008), *In Search of Inclusive Policy: Addressing Graded Inequality* (Jaipur: Rawat Publications)
- deSouza, P. (2011), 'Humiliation in a Crematorium' in Guru, G. (ed.) (2011), *Humiliation: Claims and Context* (New Delhi: Oxford University Press India)
- Dirks, N. (1999), 'The Invention of Caste: Civil Society in Colonial India' in Seneviratne, H.L. (ed.) (1999), *Identity, Consciousness and the Past: Forging of Caste and Community in India and Sri Lanka* (New Delhi: Oxford University Press)
- Dube, C.S. (1968), 'Foreword' in Atal, Y. (1968), *The Changing Frontiers of Caste* (New Delhi: National Publishing House)
- Eisenberg, A. (2004), 'Identity and liberal politics: the problem of minorities within minorities' in Eisenberg, A. & Spinner-Haley, J. (eds.) (2004), *Minorities within Minorities: Equality, Rights and Racial Diversity* (Cambridge: Cambridge University Press)
- Fell McDermott, R. (2008), 'From Hinduism to Christianity, from India to New York: Bondage and Exodus Experiences in the Lives of Indian Dalit Christians in the Diaspora' in Jacobson, J. & Raj, S. (eds.) (2008), *South Asian Christian Diaspora: Invisible Diaspora in Europe and North America* (Farnham: Ashgate)
- Geetha, V. (2011) 'The Humiliation of Untouchability' in G. Guru (ed.) (2011), *Humiliation: Claims and Context* (New Delhi: Oxford University Press)
- Guru, G. (2009), 'What it means to be an Indian Dalit: Dalit Responses to the Durban Conference' in Natrajan & Greenough (eds.) (2009), *Against Stigma: Studies in Caste, Race and Justice Since Durban* (Hyderabad: Orient Blackswan)
- Hall, S. (1992), 'New Ethnicities' in Donald, J. & Rattansi A. (eds.) (1992), *Race, Culture and Difference* (London: Sage)
- Hall, S. (2000), 'Conclusions: the multicultural question' in Hess, B. (ed.) (2000), *Un/Settled Multiculturalisms: Diasporas, Entanglements, Transruptions* (London: Zed Books)
- Hanumanthan, K.R. (2004), 'Evolution of Untouchability in Tamil Nadu up to AD 1600' in Parasher-Sen (ed.) (2004), *Subordinate and Marginal Groups in Early India* (New Delhi: Oxford University Press)
- Hinnells, J. (1994), 'Parsi Zoroastrians in London' in Ballard, R. (ed.) (1994), *Desh Pardesh: The South Asian Presence in Britain* (London: Hurst & Co.)

- Holdrege, B. (2007), 'Dharma' in Mittal, S. & Thursby, G. (eds.) (2007), *The Hindu World* (Abingdon: Routledge)
- Jha, V. (2004), 'Candala and the Origin of Untouchability' in Parasher-Sen (ed.) (2004), *Subordinate and Marginal Groups in Early India* (New Delhi: Oxford University Press)
- Killingley, D. (1991), 'Varna and Caste in Hindu Apologetic' in Killingley, D. (ed.) (1991), *The Sanskritic Tradition in the Modern World (2): Hindu Ritual and Society* (Newcastle upon Tyne: S.Y. Killingley)
- Lacey, N. (1993), 'From individual to group' in Hepple, B. & Szyszczak, E. (eds.) (1993), *Discrimination: The Limits of the Law* (London: Mansell)
- Leach, E. (1967) 'The Taxonomic Problem' in de Reuck, A. & Knight, J. (eds.) (1967), *Caste and Race: Comparative Approaches* (London: J. & A. Churchill Ltd.)
- Mahajan, G. (2004), 'Can intra-group equality co-exist with cultural diversity?' in Eisenberg, A. & Spinner- Haley, J. (eds.) (2004), *Minorities with Minorities: Equality, Rights and Racial Diversity* (Cambridge: Cambridge University Press)
- Marriot, M. (2007), 'Varna and Jati' in Mittal, S. & Thursby, G. (eds.) (2007), *The Hindu World* (Abingdon: Routledge)
- Menski, W. (1993), 'The Indian Experience and Its Lessons for Britain' in Hepple, B. & Szyszczak, E. (eds.) (1993), *Discrimination: The Limits of the Law* (London: Mansell)
- McGee, M. (2007), 'Samskara' in Mittal, S. & Thursby, G. (eds.) (2007), *The Hindu World* (Abingdon: Routledge)
- Michaels, A. (2010), 'The practices of classical Hindu law' in Lubin, T., Davis, D. and Krishnan, J. (eds.) (2010), *Hinduism and Law: An Introduction* (Cambridge: Cambridge University Press)
- Mitra, S.K. (1994), 'Caste, democracy and the politics of community formation in India' in Sharma, U. & Searle-Chatterjee, M (eds.) (1994), *Contextualising Caste: Post-Dumontian Approaches* (Oxford: Blackwell)
- Nesbitt, E. (1994), 'Valmiki in Coventry: The Revival and Reconstruction of a Community' in Ballard, R. (ed.) (1994), *Desh Pardesh: The South Asian Presence in Britain* (London: Hurst & Co.)
- Panini, M. (1996), 'The Political Economy of Caste' in Srinivas, M.N. (ed.) (1996), *Caste: Its Twentieth Century Avatar* (New Delhi: Penguin)
- Parasher-Sen, A. (2004), 'Introduction' in Parasher-Sen (ed.) (2004), *Subordinate and Marginal Groups in Early India* (New Delhi: Oxford University Press)
- Patton, L. (2007), 'Veda and Upanishad' in Mittal, S. & Thursby, G. (eds.) (2007), *The Hindu World* (Abingdon: Routledge)

- Prove, P. (2004), 'Caste at the World Conference Against Racism' in Thorat, S. & Umakant (eds.) (2004), *Caste, Race and Discrimination: Discourses in International Context* (New Delhi/Jaipur: Rawat)
- Quigley, D. (1994), 'Is a theory of caste still possible' in Sharma, U. & Searle-Chatterjee, M (eds.) (1994), *Contextualising Caste: Post-Dumontian Approaches* (Oxford: Blackwell)
- Rao, A. (2006), 'Introduction' in Rao, A. (ed.) (2006), *Gender and Caste* (New Delhi: Kali for Women)
- Rocher, R. (2010), 'The Creation of Anglo-Hindu Law' in Lubin, T., Davis, D. and Krishnan, J. (eds.) (2010), *Hinduism and Law: An Introduction* (Cambridge: Cambridge University Press)
- Rocher, L. (2005), 'The Dharmasatras' in Flood, G. (ed.) (2005), *The Blackwell Companion to Hinduism* (Oxford: Blackwell)
- Sabwerwal, S. (2004), 'Civilisation, Constitution, Democracy' in Hasan Z., Sridhara E. & Sudarshan R. (eds.) (2004), *India's Living Constitution: Ideas, Practices and Controversies* (New Delhi: Permanent Black)
- Samnov, A. (1999), 'The Origins of the Universal Declaration of Human Rights' in Eide, A. & Alfredsson, G. (eds.) (1999), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (The Hague: Martinus Nijhoff Publishing)
- Schwartz, M. (1999), 'Indian Untouchable Texts of Resistance: Symbolic Domination and Historical Knowledge' in Seneviratne, H.L. (ed.) (1999), *Identity, Consciousness and the Past: Forging of Caste and Community in India and Sri Lanka* (New Delhi: Oxford University Press)
- Searle-Chatterjee, M. (1994), 'Caste, Religion and other identities' in Searle-Chatterjee, M. & Sharma, U. (eds.) (1994), *Contextualising Caste: Post-Dumontian Approaches* (Oxford: Blackwell)
- Singaravelou, P. (1990), 'Indians in the French overseas departments: Guadeloupe, Martinique, Reunion' in Clarke, C., Peach, C. & Vertovec, S. (eds.) (1990), *South Asians Overseas: Migration and Ethnicity* (Cambridge: Cambridge University Press)
- Shah, G. (2001), 'Dalit Politics: Has It Reached An Impasse?' in Jayal, N. & Pai, S. (eds.) (2001), *Democratic Governance in India: Challenges of Poverty, Development and Identity* (New Delhi: Sage)
- Shaw, A. (1994), 'The Pakistani Community in Oxford' in Ballard, R. (ed.) (1994), *Desh Pardesh: The South Asian Presence in Britain* (London: Hurst & Co.)
- Shukra, A. (1994), 'Caste, a personal perspective' in Searle-Chatterjee, M. & Sharma, U. (eds.) (1994), *Contextualising Caste: Post-Dumontian Approaches* (London: Oxford University Press)
- Skogly, S. (1992), 'Article 2' in Eide, A. & Alfredsson, G. (eds.) (1992), *The Universal Declaration of Human Rights: A Commentary* (Oslo: Scandinavian University Press)

- Skogly, S. (1999), 'Article 2' in Eide, A. & Alfredsson, G. (eds.) (1999), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (The Hague: Martinus Nijhoff Publishing)
- Sorabjee, S.J. (2004), 'The Official Position' in Thorat, S. & Umakant (eds.) (2004), *Caste, Race and Discrimination: Discourses in International Context* (New Delhi/Jaipur: Rawat)
- Spencer, J. & Spencer, M. (2004), 'International Law and Discrimination' in Sargeant, M. (ed.) (2004), *Discrimination Law* (Harlow: Pearson)
- Srinivas, M.N. (1962), 'Varna and Caste' in Srinivas, M. N. (ed.) (1962), *Caste in Modern India* (London: Asia Publishing House)
- Srivastava, A. (1974), 'Law and Legal Institutions' in Majumdar R. C. (ed.) (1974), *The History and Culture of the Indian People: Vol VII The Mughal Empire* (Bombay: Bharatiya Vidya Bhavan)
- Steiner, H. (2000), 'Individual claims in a world of massive violations: what role for the Human Rights Committee?' in Alston, P. & Crawford, J. (eds.) (2000), *The Future of UN Human Rights Treaty Monitoring* (Cambridge: Cambridge University Press)
- Sturman, R. (2010), 'Marriage and family in colonial Hindu law' in Lubin, T., Davis, D. and Krishnan, J. (eds.) (2010), *Hinduism and Law: An Introduction* (Cambridge: Cambridge University Press)
- Tharamangalam, J. (1996), 'Caste Among Christians in India' in Srinivas, M. N. (ed.) (1996), *Caste: Its Twentieth Century Avatar* (New Delhi: Penguin)
- Thekaekara, M.M. (2004), 'What Next for India's Dalits' in Thorat, S. & Umakant (eds.) (2004), *Caste, Race and Discrimination: Discourses in International Context* (New Delhi/Jaipur: Rawat)
- Thorat, S. & Umakant (2004), 'Introduction' in Thorat S. & Umakant (eds.) (2004), *Caste, Race and Discrimination: Discourses in International Context* (New Delhi: Rawat/ Indian Institute of Dalit Studies)
- Thornberry, P. (2004), 'Race, Descent and Caste under the Convention on the Elimination of All Forms of Racial Discrimination' in Nakano, K, Yutzis, M. & Onoyana, R. (eds.) (2004), *Peoples for Human Rights Vol. 9: Descent-Based Discrimination* (Tokyo: International Movement Against All Forms of Discrimination and Racism)
- Thornberry, P. (2005), 'CERD, Indigenous Peoples and Caste/Descent-based Discrimination' in Castellino, J. and Walsh, N (eds.) (2005), *International Law and Indigenous Peoples* (Leiden: Martinus Nijhoff Publishing)
- Thornton, M. (1995), 'The Cartography of Public and Private' in Thornton, M. (ed.) (1995), *Public and Private: Feminist Legal Debates* (Oxford: Oxford University Press)
- Tull, H. (2007), 'Karma' in Mittal, S. & Thursby, G. (eds.) (2007), *The Hindu World* (Abingdon: Routledge)

- Vajpeyi, A. (2010), 'Sudradharma and legal treatments of caste' in Lubin, T., Davis, D. and Krishnan, J. (eds.) (2010), *Hinduism and Law: An Introduction* (Cambridge: Cambridge University Press)
- Vertovec, S. (1990), 'Oil boom and recession in Trinidad Indian villages' in Clarke, C., Peach, C. & Vertovec, S. (eds.) (1990), *South Asians Overseas: Migration and Ethnicity* (Cambridge: Cambridge University Press)
- Visweswaran (2009), 'India in South Africa: Counter-Genealogies for a Subaltern Sociology?' in Natrajan & Greenough (eds.) (2009), *Against Stigma: Studies in Caste, Race and Justice Since Durban* (Hyderabad: Orient Blackswan)
- Webster, J. (2007), 'Who is a Dalit?' in Michael, S. (ed.) (2007), *Dalits in Modern India: Vision and Values* (New Delhi: Sage)
- Weiner, M. (2001), 'The struggle for equality: caste in Indian politics' in Kohli, A. (ed.) (2001), *The Success of India's Democracy* (Cambridge: Cambridge University Press)
- Wilson, E. (2003), 'Managing Diversity: Caste and Gender Issues in Organisations in India' in Davidson, M. & Fielden, S. (eds.) (2003), *Individual Diversity and Psychology in Organisations* (Oxford: Wiley)
- Witzl, M. (2005), 'Vedas and Upanishads' in G. Flood (ed.) (2005), *The Blackwell Companion to Hinduism* (Oxford: Blackwell)
- Zelliot, E. (1998), 'Dalit – new cultural context for an old Marathi world' in Zelliot, E. (ed.) (1998), *From Untouchable to Dalit: Essays on the Ambedkar Movement* (New Delhi: Manohar)

Reports and Newspaper Articles

- Anti-Caste Discrimination Alliance (2009), *Hidden Apartheid – Voice of the Community: Caste and Caste Discrimination in the UK – A Scoping Study* (ACDA, Derby)
- Berkeley, R. (Hindu Forum of Britain) (2006), *Connecting British Hindus: An Enquiry into the Identity and Public Engagement of Hindus in Britain* (Hindu Forum of Britain, London)
- Blakey, H., Pearce, J. & Chesters, G. (2006), *Minorities within Minorities: Beneath the Surface of Community Participation* (Joseph Rowntree Foundation, York)
- Brandon, J. & Hafez, S. (2008), *Crimes of the Community: Honour-based violence in the UK* (Centre for Social Cohesion, London)
- Burkey, R. (1970), 'Discrimination and racial relations' in *Report on the International Research Conference on Race Relations, Aspen, Colorado, 7-9 June 1970* (Aspen, Colorado)
- Church Times* (2010) West, L., 'These Judgments Restrict Freedoms' 21 May 2010

Dalit Solidarity Network UK (2006), *No Escape: Caste Discrimination in the UK* (Dalit Solidarity Network UK, London)

Dalit Solidarity Network UK (2006), 'Submission to the Equalities Review' (Dalit Solidarity Network UK, London)

Dalit Solidarity Network UK (2007), 'Submission to the Discrimination Law Review' (Dalit Solidarity Network UK, London)

Deshpande, S. (2008), *Dalits in the Muslim and Christian Communities: A Status Report on Current Social Scientific Knowledge* (Government of India, National Commission for Minorities, New Delhi)

Economic Times (2012), 'Supreme Court refuses to stay Andhra HC OBC sub-quota verdict again' 14 June 2012

Government of India, National Crime Records Bureau, *Crime in India 2007*, Crime Against Persons Belonging to SCs/ STs, Table 7.8, Percentage of Cases by Courts Disposed of for Crimes Committed against Scheduled Castes During 2007, at <http://ncrb.nic.in/cii2007/cii-2007/Table%207.8.pdf>; Disposal of Cases by Police and Courts, Table 4.12, Conviction Rate of IPC Crimes During 2007, at <http://ncrb.nic.in/cii2007/cii-2007/Table%204.12.pdf> (both visited 19 December 2012).

Government of India, Ministry of Minority Affairs (2007), *Report of the National Commission for Religious and Linguistic Minorities* (Government of India, New Delhi)

Government of India, National Commission for Scheduled Castes (2005), *Annual Report 2004-5* (Government of India, New Delhi)

Government of India, Ministry of Labour (2008), *Annual Report 2008* (Government of India, New Delhi)

Government of India, Ministry of Minority Affairs (2008), *Report of the Expert Group on Diversity Index* (Government of India, New Delhi)

Government of India, Ministry of Minority Affairs (2008), *Equal Opportunity Commission: what, why and how – Report by the Expert Group to examine and determine the structure and functions of an Equal Opportunity Commission* (Government of India, New Delhi)

Government of India, Ministry of Social Justice and Empowerment (2009) *Annual Report 2009-10* (Government of India, New Delhi)

Harrison, T. et al. (2007), *A Political Introduction to India*, House of Commons Library Research Paper 07/41 (House of Commons, London)

House of Commons Trade and Industry Committee (2006), *Trade and Investment Opportunities with India: Fifteenth Special Report of Session 2005-2006* (House of Commons Trade and Industry Committee, London)

House of Commons Trade and Industry Committee (2006) *Trade and Investment Opportunities with India: Third Report of Session 2005-2006* (House of Commons Trade and Industry Committee, Vol. 1, London)

House of Commons Foreign Affairs Committee (2007), *South Asia: Fourth Report of Session 2006-2007* (The Stationary Office Ltd., London)

Human Rights Watch (1999), *Broken People: Caste Violence Against India's Untouchables* at <http://www.hrw.org/reports/1999/03/01/broken-people-0>

Human Rights Watch (2001), *Caste Discrimination: A Global Concern* at <http://www.hrw.org/news/2001/08/29/global-caste-discrimination>

International Dalit Solidarity Network (2009), *Report from Side Event on Draft UN Principles and Guidelines for the Elimination of Discrimination based on Work and Descent* at <http://idsn.org/international-advocacy/un/un-parallel-events/hrc12-side-event/>

International Dalit Solidarity Network (2012), *Caste Discrimination and UN Human Rights Bodies* at http://idsn.org/fileadmin/user_folder/pdf/New_files/UN/UNcompilation.pdf

International Dalit Solidarity Network, *Decade of Dalit Rights UN 2011-20, Strategy Building Conference, Report* at http://www.idsn.org/fileadmin/user_folder/pdf/New_files/UN/Report_DecadeDalitRights.pdf

International Dalit Solidarity Network, *Decade of Dalit Rights, Declaration* at http://idsn.org/fileadmin/user_folder/pdf/New_files/UN/Printer_Friendly_Declaration_Decade_Dalit_Rights.pdf

International Dalit Solidarity Network, *The Ambedkar Principles: Employment and Additional Principles on Economic and Social Exclusion Formulated to Assist All Foreign Investors in South Asia to Address Caste Discrimination* at <http://idsn.org/business-csr/ambedkar-principles/>

International Dalit Solidarity Network, 'UN Principles and Guidelines' at <http://idsn.org/international-advocacy/un/un-principles-guidelines/>

International Labor Organization (2011), *Equality at Work: The Continuing Challenge – Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work* (ILO, Geneva)

Joint Committee on Human Rights (2005), *The Convention on the Elimination of All Forms of Racial Discrimination: Fourteenth Report of Session 2004-05*

Kallidai, R. (Hindu Forum of Britain) (2008), *Caste in the UK: A Summary of the Consultation with the Hindu Community in Britain* (Hindu Forum of Britain, London)

Keter, V. (2009), *Equality Bill: Bill 85 of 2008-9*, House of Commons Library Research Paper 09/42 (House of Commons, London)

- Local Government Association (2002), 'The Local Government Association's Guidance on Community Cohesion' (LGA, London)
- Metcalf, H. and Rolfe, H. (UK Government Equalities Office) (2010), *Caste Discrimination and Harassment in Great Britain* (Government Equalities Office, London)
- National Council for Teacher Education (2003), *Addressing Discrimination based on Sex, Caste and Religion and Disability Through Educational Intervention: A Handbook for Sensitising Teachers and Teacher Education* (NCTE, New Delhi)
- Outlook India* (2010), 'Abusing Dalit by Caste in Private Not an Offence' 15 October 2010
- Outlook India* (2011) Dogra, C., 'The First Law: Sing my Name' 11 July 2011
- Roy, S. (2003) 'Indian American Files Lawsuit Alleging Caste Bias' *Pacific News Service Civil Liberties Digest*, 9 July 2003
- Sachar, R. (Government of India) (2006) *Social, Economic and Educational Status of the Muslim Community of India: A Report* (Government of India, New Delhi)
- Sakshi Human Rights Watch (2003), *Dalit Human Rights Monitor, Ahdhra Pradesh 2000-2003* (Sakshi Human Rights Watch, Secunderabad)
- Saxena, K.B. (2004), *Report on Prevention of Atrocities Against Scheduled Castes: Policy and Performance: Suggested Interventions and Initiatives for National Human Rights Commission* (Government of India, National Human Rights Commission, New Delhi)
- Sharma R.P. (2008), *The Caste System* (London: Hindu Council UK, 2008)
- Southall Black Sisters (2001), *Forced Marriage: an abuse of human rights* (Southall Black Sisters, London)
- The Guardian* (1991), Cook, S., 'Caste Out' 11 May 1991
- The Guardian* (2000), Singh, J., 'Court Rules Out Caste Differences' 7 March 2000
- The Guardian* (2006), Muir, H., 'Caste divide is blighting Indian communities in UK, claims report' 4 July 2006
- The Guardian* (2009), Jones, S., 'Asian caste discrimination rife in UK, says report' 11 November 2009
- The Guardian* (2010), Sparrow, A. and Wintour, P., 'Coalition reconsidering Tory plan to scrap Human Rights Act' 19 May 2010
- The Guardian* (2011), Kidron, B., 'Devadasis are a cursed community' 21 January 2011
- The Guardian* (2012), Jones, S., 'Campaigners urge government to tackle caste discrimination in the UK: politicians and human rights groups say people from traditionally lower status Asian backgrounds need legal protection' 30 November 2012

- The Guardian* (2013), Jones, S., 'Employment tribunal hearing first claim for caste discrimination collapses: Judge recuses herself after visit by police officers' 14 February 2013
- The Hindu* (2012) Karthikeyan, D., 'Madurai Villages Still Practising the Two-Tumbler System' 24 May 2012
- The Hindu* (2012), Khan, A., 'Can't be a superpower as long as Untouchability exists' 9 July 2012
- The Independent* (1991), Aziz, C., 'The Untouchables of London's suburbs' 10 January 1991
- The Indian Express* (2009), 'Dalits facing caste discrimination in UK: study' 12 November 2009
- The Nation* (2009), Crossette, B., 'Putting Caste on Notice' 9 November 2009
- The Nation* (2009), Pilay, N., 'Tearing Down the Walls of Caste' 19 October 2009
- The Observer* (2007), Morgan, O., 'British "failing India's lowest caste workers"' 24 June 2007
- The Telegraph* (2012), 'North Korea caste system "underpins human rights abuses"' 6 June 2012
- The Telegraph* (2012), 'Equal Opportunity Push' 8 June 2012
- The Times* (1990), Kelly, J., 'Apart and Hated' 6 July 1990
- The Times* (2006), Bird, S., 'Sister is stabbed to death for loving the wrong man' 17 June 2006
- The Times* (2010), Kennedy, D., 'Forbidden Love: no redress for couples divided by caste' 5 July 2010
- The Times* (2010), Kennedy, D., 'Young generation keeps old identities alive with Bhangra music and tradition' 5 July 2010
- Times of India* (2010), Mitra, M., 'UK bill links caste to race, India red-faced' 31 March 2010
- Washington Times* (2011), Raj, F., 'More dangerous than shariah: Hindutva' 8 September 2011
- UK Government (1999), *The Stephen Lawrence Enquiry: Report of an Enquiry by Sir William McPherson of Cluny* (HMSO, London)
- UK Government (2006), *Interim Report for Consultation* (The Equalities Review, London) at http://archive.cabinetoffice.gov.uk/equalitiesreview/upload/assets/www.theequalitiesreview.org.uk/interim_report.pdf
- UK Government (2007), *A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain – A Consultation Paper* (HMSO, London)

UK Government (2007), *Fairness and Freedom: The Final Report of the Equalities Review* (HMSO, Norwich)

UK Government (2008), *Framework for a Fairer Future: The Equality Bill* (HMSO, Norwich)

UK Government (2008), *The Equality Bill – Government Response to the Consultation*, CM 7454

UK Government, Department for Business Innovation and Skills (2011), 'The Plan for Growth' (HM Treasury, London)

Voice of Dalit International, (2000), *Dalits in the New Millennium: Report of the Proceedings of the International Conference on Dalit Human Rights, 16-17 September 2000* (Voice of Dalit International, London)

Whittle, S. (Equalities Review) (2007), *Engendered Penalties: Transgender and Transsexual People's Experiences of Inequality and Discrimination* (Crown Copyright, London)

Other

Alkire, S. & Santos, M. (2010), *Acute Multidimensional Poverty: A New Index for Developing Countries*, Oxford Poverty & Human Development Initiative Working Paper No. 38 (University of Oxford Press, Oxford)

American Law Institute (1987), 'Restatement of the Foreign Relations Law of the United States' (Third), Part VII, Chapter 1, s 701, Reporters' Note 3 (American Law Institute, St Paul, Minnesota)

Anti-Caste Discrimination Alliance (2010), *Demonstration Flyer, Joint Statement* (copy on file with author) 11 January 2010

Anti-Caste Discrimination Alliance, Press Release (2010), *Evidence of Caste Discrimination and harassment in the UK confirmed in independent research commissioned by Government* (copy on file with author) 16 December 2010

Anti-Caste Discrimination Alliance and others (2010), *Caste Discrimination in the UK – Joint Statement calling on the coalition government to enact clause 9(5)(a) of the Equality Act 2010* 23 December 2010 (copy on file with author)

Anti-Caste Discrimination Alliance and others (2011), *Joint Statement calling for enactment of clause 9(5)(a) of the Equality Act 2010 for caste to be an aspect of race* 17 January 2011 (copy on file with author)

Anti-Caste Discrimination Alliance and others (2012), *Joint Statement to the Coalition Government demanding that it brings into force clause 9(5)(a) of the Equality Act 2010*, 28 November 2012

Anti-Caste Legislation Committee Briefing Paper (2013), 2 April 2013 (copy on file with author)

Asian Legal Resource Centre, India: *Manual scavenging, a shame on the nation*, Human Rights Council 9th Session, www.alrc.net

Bhagwanvalmiki.com at <http://www.bhagwanvalmiki.com/sabha.htm>

Bates, C., (1995), 'Race, Caste and Tribes in Central India: The Early Origins of Indian Anthropometry', *Edinburgh Papers in South Asian Studies* Number 3

Avebury, Lord E., (2010) Blogpost, *Equality Bill – Caste* at <http://ericavebury.blogspot.co.uk/2010/02/equality-bill-caste.html>

British Columbia Human Rights Code at http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96210_01

British Columbia Human Rights Tribunal at <http://www.bchrt.bc.ca>

British High Commission New Delhi, India-UK Relations at <http://ukinindia.fco.gov.uk/en/about-us/working-with-india/india-uk-relations>

Caste Away Arts at <http://casteawayarts.com>

Conservative Party UK (2010), *Contract for Equalities, Conservative Party Equalities Manifesto* at http://www.conservatives.com/news/news_stories/2010/05/~/_media/Files/Downloadable%20Files/Manifesto/Equalities-Manifesto.ashx

Conservative Party UK (2010), *Conservative Party Manifesto* at http://media.conservatives.s3.amazonaws.com/manifesto/cpmanifesto2010_easyread.pdf

Constituent Assembly Debates of India (1947), CAD Vol. III 29 April 1947

Council of Valmik Sabhas, United Kingdom at <http://www.valmikisabhas.org.uk>

Countercurrents (2003), Puri, N., *The Caste Divide*, Broadcast on BBC Radio 4 April 2003 at <http://www.countercurrents.org/dalit-puri050704.htm>

Decade of Dalit Rights UN, Declaration (2011), at http://idsn.org/fileadmin/user_folder/pdf/New_files/UN/Printer_Friendly_Declaration_Decade_Dalit_Rights.pdf (visited 2 January 2013)

Dhanda, M., (2012), 'Held back by in-fighting: the fraught struggles for recognition of Dalits in Wolverhampton'; paper presented at the international conference 'The Internationalisation of Dalit and Adivasi Activism', University of London, 26 June 2012. Unpublished

Durban Review Conference (2009), *Durban Review Conference Outcome Document* at <http://www.unhcr.org/refworld/docid/49f584682.html> 24 April 2009

Equality Act Impact Assessment, Final Version (2010) (Government Equalities Office, London)

Equality and Human Rights Commission at <http://www.equalityhumanrights.com>

Equality and Human Rights Commission (2012), *Commission policy statement on caste discrimination* at <http://www.equalityhumanrights.com/legal-and-policy/equality-act/commission-policy-statement-on-caste-discrimination> (visited 1 April 2013)

Equality and Human Rights Commission (2010), *Lords Committee Stage Briefing* at <http://www.equalityhumanrights.com/legal-and-policy/equality-act/equality-bill-parliamentary-briefings> 11 January 2010

Explanatory Notes to the Equality Act 2006 (Crown Copyright, 2006)

Explanatory Notes to the Equality Act 2010 (Crown Copyright, 2010)

European Union (2003), *Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of legislation within the Community institutions* at <http://eur-lex.europa.eu/en/techleg/index.htm>

Government of India (2001), Census of India at www.censusindia.gov.in

Government of India, Ministry of Human Resource Development, Department of Higher Education (2005), *Selected Educational Statistics 2005-6, Gross Enrolment Rates*

Government of India, MJSE, Planning, Research, Evaluation and Monitoring Division at <http://socialjustice.nic.in/aboutdivision5.php>

Government of Nepal (1990) Constitution of Nepal at <http://www.supremecourt.gov.np/main.php?d=lawmaterial&f=constitution>

Government of Pakistan (1973) Constitution of Pakistan at <http://www.mofa.gov.pk/Publications/constitution.pdf>

Government of Sri Lanka (1978) Constitution of Sri Lanka at <http://www.priu.gov.lk/Cons/1978Constitution/Introduction.htm>

GuruRavidassBhawan.org, History at <http://gururavidassbhawan.org/history>

Harriss-White, B. and Prakash, A., (2011-12) 'Social Discrimination in India: A Case for Economic Citizenship', University of Oxford South Asia Work in Progress Research Papers No. 5

Himal Southasia (2010), Gopal, P., *Dominating the Diaspora* at <http://himalmag.com/component/content/article/135-.html> 01 April 2010

Hindu Forum of Britain (2012), Results of AGM at <http://www.hfb.org.uk/Default.aspx?sID=45&cID=508&ctID=43&lID=0> 26 June 2012

Hindujagruti.org, Caste and Conversion at <http://www.hindujagruti.org/news/2128.html>

House of Commons (2007), Stunnell, A., *Early Day Motion 1604, Violence with Impunity Against Dalits in India* 5 June 2007

House of Commons (1976), 1975-1976 Race Relations Bill, HC Standing Committee A col 83-130, 29 April-4 May 1976

House of Commons (2009), Equality Bill Committee Debate col 176 at <http://www.publications.parliament.uk/pa/cm200809/cmbills/085/amend/psc0851106m.91-97.html> 11 June 2009

House of Commons (1966) Debate vol 738 16 December 1966

House of Commons (2004) Debate vol 419 1 April 2004

House of Commons (2008) Debate vol 478 26 June 2008

House of Commons (2009) Debate vol 492 11 May 2009

House of Commons (2009) Debate vol 493 11 June 2009

House of Commons (2009) Debate vol 501 2 December 2009

House of Commons (2010) Debate vol 508 6 April 2010

House of Commons (2012) Debate vol 545 1 May 2012

House of Commons (2009) Consideration of Equality Bill as at 2 Dec 2009 at <http://www.publications.parliament.uk/pa/cm200910/cmbills/005/amend/psc0050212m.106-112.html>

House of Commons Equality Bill Committee (2009) Debate col 179 at <http://www.publications.parliament.uk/pa/cm200809/cmppublic/cmpbequality.htm> 11 June 2009

House of Commons Library Note (2011), Stott, E., *Government proposals for international development policy, including proposals on the situation of the Dalits* LNN 2001/037, 28 November 2011

House of Lords (2007) Debate vol 690 26 March 2007

House of Lords (2009) Debate vol 715 15 December 2009

House of Lords (2010) Debate vol 716 11 January 2010

House of Lords (2010) Debate vol 717 2 March 2010

House of Lords (2010) Debate vol 723 22 December 2010

House of Lords (2011) Debate vol 732 23 November 2011

House of Lords (2011) Debate vol 733 28 November 2011

House of Lords (2013) Debate vol 742 9 January 2013

House of Lords (2013) Debate vol 743 4 March 2013

House of Lords (2010) Revised Marshalled List of Amendments to be Moved in Committee as at 8 January 2010 at <http://www.publications.parliament.uk/pa/ld200910/ldbills/020/amend/ml020-ir.htm>

House of Lords (2010) Revised Marshalled List of Amendments to be Moved on Report as at 1 March 2010 at <http://www.publications.parliament.uk/pa/ld200910/ldbills/035/amend/ml035-ir.htm>

House of Lords (2013) Sixth Marshalled List of Amendments to be Moved in Grand Committee as at 8 January 2013 at <http://www.publications.parliament.uk/pa/bills/lbill/2012-2013/0045/amend/ml045-vi.htm>

Indian Institute of Dalit Studies (2009), *Caste-based Discrimination in Nepal*, Working Paper Series Vol. 3, No. 8 (2009) at <http://www.dalitstudies.org.in/wp/0908.pdf>

Indian Institute of Dalit Studies, Completed Research Projects at http://www.dalitstudies.org.in/index.php?option=com_content&view=article&id=101&Itemid=109

International Dalit Solidarity Network at <http://idsn.org/front-page>

JattWorld.com, Homepage at <http://www.jattworld.com/online>

Jaoul, N., (2007) 'Multiculturalism and caste in Britain'; paper presented at the CasteWatch UK conference, Sandwell, 15 July 2007. Unpublished. See http://www.castewatchuk.org/sandwell_conference.htm and http://www.castewatchuk.org/conf07_1130.html

Jeevansathi.com at <http://www.jeevansathi.com/matrimonials/uk-matrimonial>

Jorde, I., (1999) Transcript of conference paper presented at Anthropology, Genetic Diversity and Ethics: A Workshop at the Center for Twentieth Century Studies, University of Wisconsin-Milwaukee, 12-13 Feb 1999

Kannabiren, K. (People's Union for Civil Liberties) (2001), 'Race and Caste: A Response to Andre Beteille' at <http://www.pucl.org/reports/National/2001/beteille.htm>

Karma Nirvana at www.karmanirvana.co.uk

Letter (2009), Ahmed, A. (CLG), Letter to P. Lal (ACDA) (Copy on file with author) 14 August 2009

Letter (2009), Lal, P. (ACDA), Letter EHRC (Copy on file with author) 5 December 2009

Letter (2010), Varney, O. (EHRC), Letter to P. Lal (ACDA) (Copy on file with author) 6 January 2010

Letter (2011), British Sikh Consultative Forum, Email to Lynne Featherstone MP (copy on file with author) 11 January 2011

Letter (2011), McGhan, P. (Department for Communities and Local Government), Letter to L. Pall (ACDA) (copy on file with author) 3 August 2011

Letter (2011), Phillips, T. (EHRC), Letter to L. Pal (ACDA) (copy on file with author) 31 October 2011

Letter (2011), Lord Avebury, Letter to Baroness Verma (copy on file with author) 4 December 2011 (P1104122)

Letter (2011), Lord Avebury, Letter to Baroness Verma (copy on file with author) 4 December 2011 (P1104126)

Letter (2012), Government Equalities Office, Letter to Lord Avebury (copy on file with author) 19 January 2012

Letter (2012), Baroness Verma, Letter to Lord Avebury (copy on file with author) 2 February 2012

Letter (2011), ACDA, Letter to Lynne Featherstone MP (copy on file with author) 31 January 2011

Letter (2012), Lord McNally, Letter to Dr Francis (JCHR) (copy on file with author) 20 September 2012

Letter (2012), Lord Avebury to Maria Miller MP (copy on file with author) 29 November 2012

Letter (2012) Lord Avebury, Letter to the Prime Minister (copy on file with author) 24 December 2012

Letter (2013) Metcalfe, H. (NIESR), Letter to Lord McNally (copy on file with author) 6 February 2013

Letter (2013) Dalit organisations to Helen Grant MP, Minister for Women and Equalities, 14 February 2013 (copy on file with author)

Letter (2013) Helen Grant MP to ACDA, 1 March 2013 (copy on file with author)

Liberty, Search Results at <http://www.liberty-human-rights.org.uk/search.php?q=caste>

Muman, S. (2000), 'Caste in Britain' in *Dalits in the New Millennium: Report of the Proceedings of the International Conference on Dalit Human Rights 16-17 September 2000* (Voice of Dalit International, London)

National Archives, Commission for Racial Equality at <http://webarchive.nationalarchives.gov.uk/20060820160817/cre.gov.uk>

National Institute of Economic and Social Research (2010), 'Research into caste systems and the existence and nature of caste prejudice and discrimination in Britain' (copy on file with author)

Nesbitt, E., (1991) "'My Dad's Hindu, my Mum's side are Sikhs': Issues in Religious Identity", University of Manchester, Centre for Applied South Asian Studies at <http://casas.org.uk/papers/pdfpapers/identity.pdf>

Thekaekara, M., (2012), *Can Bollywood shatter India's caste system?* New Internationalist Blog, at <http://www.newint.org/blog/2012/07/13/bollywood-untouchable-force> 13 July 2012

Notorious Jatt at <http://www.notorious-jatt.com/#/Home-01-00>

Office of the United Nations High Commissioner for Human Rights, Committee on Eliminating Racial Discrimination at www2.ohchr.org/english/bodies/cerd

Olivelle, P., (2000) *From the Rg-Veda to Asoka: A Brief History of Dharma*; ; conference paper presented at the University of California, Santa Barbara Dept. of Religious Studies, 31 May 2000. Unpublished

Press for Change at www.pfc.org.uk

Prove, P., (2003), 'Caste and the Universal Declaration of Human Rights', *Lutheran World Foundation*. Unpublished paper (copy on file with author)

Racial Discrimination White Paper, Cm 6234 (1975)

Rajgopal, B., (2004), 'Limits of Law in Counter-Hegemonic Globalisation: The Indian Supreme Court and the Narmada Valley Struggle', *JNU CSLG Working Paper Series* 04/04

Ramaswamy, Dr. Justice K., National Human Rights Commission (India), Statement (2001) at <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/C0D479DFDCB0275941256AC00036375C?opendocument> (visited 2 January 2013)

Ravidassiauk.co.uk at <http://www.ravidassiauk.co.uk/content/new-identity-our-community>

Ravidassmatrimonials (Also <http://ravidassmatrimonials.com>)

Shaadi.com, Caste Matrimonial Sites at www.shadi.com/matrimonials/indian-castes

Shri Guru Ravi Dass Sabha at <http://www.gururavidas.org>

Shri Guru Ravidas Ji (<http://www.shrigururavidasji.com/index.html>)

Stott, E., (2011) House of Lords Library Note, 'Government proposals for international development policy, including proposals on the situation of the Dalits', LLN 2011/037, 28 November 2011

Tantriclub.co.uk, To C-A-S-T-E aspersions or not at www.tantriclub.co.uk/asian-dating-blog-caste-system-and-dating.php

The Anthropological Survey of India, People of India Project at www.ansi.gov.in

UK Government, DLR Terms of Reference at http://archive.cabinetoffice.gov.uk/equalitiesreview/reference_grp/rg_terms_ref.html

UK Government, Equality Bill Committee, Debates and Bill Committee Members at <http://www.publications.parliament.uk/pa/cm200809/cmpublic/cmpbequality.htm>

UK Government Equalities Office, 'Caste Discrimination and Harassment in Great Britain', Research Findings No 2010/8 at <http://www.homeoffice.gov.uk/publications/equalities/research/caste-discrimination/caste-discrimination-summary?view=Binary>

UK Government (2012), The Queen's Speech 2012 at <https://www.gov.uk/government/news/the-queens-speech-2012>

UK Government Cabinet Office at <http://www.redtapechallenge.cabinetoffice.gov.uk/home/index>

UK Government Cabinet Office, Spotlight Themes at <http://www.redtapechallenge.cabinetoffice.gov.uk/themehome/equalities-act>

UK Government, Department for Business Innovation and Skills (2011), Impact Assessment Guidance

UK Government, Home Office, Equality Duty Review, Terms of Reference at <http://www.homeoffice.gov.uk/equalities/equality-act/equality-duty/equality-duty-review/terms-of-reference>

UK Government, Home Office, Equalities Move to Department for Culture, Media and Sport at <http://homeoffice.gov.uk/equalities>

UK Government, Office of National Statistics (2001), Census 2001, Largest ethno-religious groups at <http://www.ons.gov.uk/ons/taxonomy/index.html?nscl=Identity>

UK Government, Office of National Statistics (2005), *Focus on Ethnicity* at <http://www.ons.gov.uk/ons/publications/index.html?pageSize=50&sortBy=none&sortDirection=none&newquery=ethnicity&content-type=publicationContentTypes> 01 March 2005

UK Government, Office of National Statistics (2004), *Focus on Religion* at <http://www.ons.gov.uk/ons/rel/ethnicity/focus-on-religion/2004-edition/index.html> 01 October 2004

UK Government, Office of National Statistics, UK Population by Ethnic Group at <http://www.ons.gov.uk/ons/taxonomy/index.html?nscl=Identity>

UK Government, Treasury (2011), Plan for Growth at http://cdn.hmtreasury.gov.uk/2011budget_growth.pdf

UK Parliament at http://www.parliament.uk/about/how/laws/passage_bill/coms_commons_first_reading.htm

UK Parliament, Register of All Party Parliamentary Groups at <http://www.publications.parliament.uk/pa/cm/cmallparty/register/dalits.htm>

UK Parliament (2013), Enterprise and Regulatory Reform Bill, Amendments to be moved on Report at <http://www.publications.parliament.uk/pa/bills/lbill/2012-2013/0083/amend/am083-e.htm>

UK Parliament (2013), Enterprise and Regulatory Reform Bill, Sixth Marshalled List of Amendments to be Moved in Grand Committee at <http://www.publications.parliament.uk/pa/bills/lbill/2012-2013/0045/amend/ml045-vi.htm>

UK Parliament (2012), Bill Stages – Enterprise and Regulatory Reform Bill 2012-2013 at <http://services.parliament.uk/bills/2012-13/enterpriseandregulatoryreform/stages.html>

UK Trade and Investment, Foreign and Commonwealth Office Country Profile: India at <http://www.ukti.gov.uk/export/countries/asiapacific/southasia/india.html>

UN Press Release (2007), ‘Committee on Elimination of Racial Discrimination Considers Report of India’, 26 February 2007

UN News (2011); ‘Nepal: UN welcomes new law on caste-based discrimination’ at <http://www.un.org/apps/news/story.asp?newsid=38496>;

World Directory of Minorities and Indigenous Peoples at <http://www.minorityrights.org/5652/india/dalits.html>

United Nations Documents

General Assembly (GA) Resolution 44(1), Treatment of Indians in the Union of South Africa, 8 December 1946

Declaration on the Elimination of Racial Discrimination, GA Resolution 1904 (XVIII), 20 November 1963

Caportorti, F. (1981), United Nations Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities (UN, New York)

Cobo, J.R.M. (1983), Study of the Problem of Discrimination Against Indigenous Populations, 30 September 1983; UN Doc. E/CN.4 Sub.2 /1983/21/Add.8 (1983)

UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992); GA Res. 47/135 (1992)

Special Rapporteur on Racism, Report (1997); UN Doc. E/CN.4/1997/71, 16 January 1997

Special Rapporteur on Racism, Report (1999); UN Doc. UN Doc. E/CN.4/1999/15, 15 January 1999

Eide, A. and Daes, E.I. (2000), Working Paper on the relationship and distinction between the rights of persons belonging to minorities and those of indigenous peoples (2000); UN Doc. E/CN.4/Sub.2/2000/10, 19 July 2000

World Conference Against Racism Racial Discrimination, Xenophobia and Other Related Forms of Intolerance, Bellagio Consultation (2000); UN Doc. A/CONF.189/PC.1/10, 8 March 2000

UN Sub-Commission on the Promotion and Protection of Human Rights; Resolution 2000/4 on discrimination based on work and descent, 11 August 2000; UN Doc. E/CN.4/Sub.2/2000/46, 23 November 2000

World Conference Against Racism Racial Discrimination, Xenophobia and Other Related Forms of Intolerance, Draft Programme Of Action (2001); UN Doc. A/CONF.189/5, 22 August 2001

R.K.W. Goonesekere (2001), UN Sub-Commission on the Promotion and Protection of Human Rights, working paper on discrimination based on work and descent; UN Doc. E/CN.4/ Sub.2/2001/16, 14 June 2001

Eide, A. and Yokota, Y. (2003), UN Sub-Commission on the Promotion and Protection of Human Rights; expanded working paper on discrimination based on work and descent; UN Doc. E/CN.4/Sub.2/2003/24, 26 June 2003

Special Rapporteur on Racism, Report (2004); E/CN.4/2004/18, 21 January 2004

Eide, A. and Yokota, Y. (2004), UN Sub-Commission on the Promotion and Protection of Human Rights; further expanded working paper on discrimination based on work and descent; UN Doc. E/CN.4/Sub.2/2004/31, 5 July 2004

UN Sub-Commission on the Promotion and Protection of Human Rights; Resolution 2004/17, Discrimination based on work and descent, 12 August 2004; UN Doc. E/CN.4/Sub.2/2004/48, 21 October 2004

UN Commission on Human Rights, Decision 2005/109; UN Doc. E/CN.4/2005/134 (Part I) (2005)

Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Report (2005); UN Doc. E/CN.4/2005/48, 3 March 2005

Yokota, Y. and Chung, C. (2005), Preliminary Report on discrimination based on work and descent; UN Doc. E/CN.4/Sub.2/2005/30, 21 June 2005

Independent Expert on minority issues, Report (2006); UN Doc. E/CN.4/2006/74, 6 January 2006

Special Rapporteur on the right to education, Report (2006); UN Doc. E/CN.4/2006/45, 8 February 2006

Yokota, Y. and Chung, C. (2006); Progress Report on discrimination based on work and descent; UN Doc. A/HRC/Sub.1/58/CRP.2, 28 July 2006

UN Declaration on the Rights of Indigenous Peoples (2007); UN Doc. A/Res/61/295.

Special Rapporteur on the right to food, Report (2007); UN Doc. A/HRC/4/30, 19 January 2007

Special Rapporteur on extrajudicial, summary or arbitrary executions, Report (2007); UN Doc. A/62/265, 16 August 2007

Report on the study by the five experts on the content and scope of substantive gaps in the existing international instruments to combat racism, racial discrimination, xenophobia and related intolerance ('Report on Complementary International Standards') (2007); UN Doc. A/HRC/4/WG.3/6, 27 August 2007

OHCHR questionnaire on contemporary manifestations of racism and measures and activities taken to implement the DDPA (2007) at <http://www.un.org/durbanreview2009/pdf/questionnaire1st.pdf> (visited 2 January 2013)

Special Rapporteur on the situation of human rights defenders, Report (2008); UN Doc. A/HRC/7/28, 31 January 2008

Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Report (2008); UN Doc. A/HRC/7/16, 13 February 2008

Special Rapporteur on Racism, Report (2008); UN Doc. A/HRC/7/19, 20 February 2008

Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Report (2008); UN Doc. A/HRC/7/16/Add.1, 4 March 2008

Durban Review Conference, Preparatory Committee, CERD Replies to OHCHR questionnaire (2008); UN Doc. A/CONF.211/PC.2/CRP.5, 23 April 2008

Durban Review Conference, Preparatory Committee, Joint Special Procedures Response to OHCHR questionnaire (2008); UN Doc. A/CONF.211/PC/WG.1/5, 31 July 2008

Universal Periodic Review Working Group Report, India (2008); UN Doc. A/HRC/8/26, 23 May 2008

UN Information Note, Durban Review Conference 2009, at http://www.un.org/durbanreview2009/pdf/InfoNote_04_BasicFacts_En.pdf (visited 2 January 2013)

Durban Review Outcome Document at http://www.un.org/durbanreview2009/pdf/Durban_Review_outcome_document_En.pdf (visited 2 January 2013)

Special Rapporteur on freedom of religion or belief (2009); Country visit report on India; UN Doc. A/HRC/10/8/Add.3, 26 January 2009

Special Rapporteur on the right to food, Report (2009); UN Doc. A/HRC/10/5/Add.2, 4 February 2009

Special Rapporteur on the situation of human rights defenders, Report (2009); UN Doc. A/HRC/10/12, 12 February 2009

Special Rapporteur on the right to adequate housing, Report (2009); UN Doc. A/HRC/10/7/ Add. 1, 17 February 2009

Special Rapporteur on the situation of human rights defenders, Report (2009); UN Doc. A/HRC/10/12/Add.1, 4 March 2009

Independent Expert on minority issues, Report (Recommendations of the Forum on Minority Issues) (2009); UN Doc. A/HRC/10/11/Add.1, 5 March 2009

Yokota, Y. and Chung, C. (2009), Final Report on discrimination based on work and descent; Human Rights Council; UN Doc. A/HRC/11/CRP.3, 18 May 2009

Special Rapporteur on Racism, Report (2009); UN Doc. A/HRC/11/36, 19 May 2009

Special Rapporteur on contemporary forms of slavery, including its causes and consequences, Report (2009); UN Doc. A/HRC/12/21, 10 July 2009

Special Rapporteur on Racism, Interim Report (2009); UN Doc. A/64/271, 10 August 2009

Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Report (2009); UN Doc. A/HRC/13/20, 18 December 2009

Intergovernmental Working Group on the Effective Implementation of the Durban Declaration and Programme of Action, Thematic discussion on structural discrimination (2010) *in* UN Special Rapporteur on Racism, Report (2011); UN Doc. A/ HRC/17/40, 24 May 2011

Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Report (2010); UN Doc. A/HRC/14/20/Add.2, 15 April 2010

Special Rapporteur on contemporary forms of slavery, including its causes and consequences, Report (2010); UN Doc. A/HRC/15/20, 28 June 2010

Independent expert on the question of human rights and extreme poverty and Independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation, Joint Report (2010); UN Doc. UN Doc. A/HRC/15/55, 22 July 2010

Special Rapporteur on contemporary forms of slavery, including its causes and consequences, Report (2010); UN Doc. A/HRC/15/20/Add.2, 24 August 2010

Study of the Human Rights Council Advisory Committee on discrimination in the context of the right to food (2011); UN Doc. A/HRC/16/40, 16 February 2011

Special Rapporteur on the situation of human rights defenders, Report (2011); UN Doc. A/HRC/16/44/Add.1, 28 February 2011

Special Rapporteur on Racism, Report (2011); UN Doc. A/ HRC/17/40, 24 May 2011

Special Rapporteur on Racism (2011), Interim Report; UN Doc. A/66/313, 19 August 2011

UN Information Note (2009), Durban Review Conference (2009) at http://www.un.org/durbanreview2009/pdf/InfoNote_04_BasicFacts_En.pdf (visited 2 January 2013)

Special Rapporteur on Violence Against Women, Report (2012); UN Doc. A/HRC/20/16, 23 May 2012

Special Rapporteur on Racism (2011), Report; UN Doc. A/HRC/17/40, 24 May 2011

Special Rapporteur on Racism (2011); Interim Report to UNGA; UN Doc. A/66/313, 19 August 2011

Universal Periodic Review Working Group Report, India (2012); UN Doc. A/HRC/21/10, 9 July 2012

Universal Periodic Review Working Group Report Report, United Kingdom (2012); UN Doc. A/HRC/21/9, 6 July 2012

Universal Periodic Review Working Group Report, Views on conclusions and/or recommendations, voluntary commitments and replies presented by the state under review (United Kingdom) (2012); UN Doc. A/HRC/21/9/Add.1, 17 September 2012

Special Rapporteur on the situation of human rights defenders, Report (2012); UN Doc. A/HRC/22/47/Add.1, 13 December 2012

Committee for the Elimination of Racial Discrimination (CERD)

Thematic Discussion on Discrimination Based on Descent (2002); UN Doc. CERD/C/SR.1531, 16 August 2002

UN Press Release (2007), 'Committee on Elimination of Racial Discrimination Considers Report of India', 26 February 2007

Intergovernmental Working Group on the Effective Implementation of the Durban Declaration and Programme of Action (IGWG); views of CERD on the

implementation of ICERD (2004); UN Doc. E/CN.4/2004/WG.21/10.Add.1, 17 September 2004

Replies to the Office of the High Commissioner for Human Rights (OHCHR) Questionnaire; UN Doc. A/CONF.211/PC.2/CRP.5, 23 April 2008

Selected State Reports to CERD

Bangladesh: Eleventh report (2000); UN Doc. CERD/C/379/Add.1, 30 May 2000

Concluding observations – Bangladesh (2001); UN Doc. A/56/18 (2001)

India: Initial report (1970); UN Doc. CERD/C/R.3/Add.3/Rev.1, 30 March 1970

India: Second report (1972); UN Doc. CERD/C/R.30/Add.4, 28 June 1972

India: Third report (1974); UN Doc. CERD/C/R.70/Add.29, 18 November 1974

India: Fourth report (1977); UN Doc. CERD/C/R.90/Add.32, 27 July 1977

India: Fifth report (1979); UN Doc. CERD/C/20/Add.34, 8 March 1979

India: Sixth report (1981); UN Doc. CERD/C/66/Add.33, 16 June 1981

India: Seventh report (1982); UN Doc. CERD/C/91/Add.26, 19 October 1982

India: Eighth to ninth reports (1986); UN Doc. CERD/C/149/Add.11, 4 September 1986

India: Tenth to fourteenth periodic reports (1996); UN Doc. CERD/C/299/Add.3, 29 April 1996

India: Fifteenth to nineteenth reports (2006); UN Doc. CERD/C/IND/19, 29 March 2006

India, Introductory Statement, CERD, 70th session, 23 February 2007

Intervention by the Solicitor-General of India on specific issues raised by CERD at the presentation of India's fifteenth to nineteenth report, 26 February 2007; copy on file with author

India, Concluding Statement, CERD, 70th Session, consideration of India's nineteenth report, 26 February 2007, at <http://www2.ohchr.org/english/bodies/cerd/docs/statements/No.8India26Feb2007.pdf>

Concluding observations – India (1979); UN Doc. A/34/18 (1979)

Concluding observations – India (1996); CERD; Report; UN Doc. A/51/18 (1996)

Concluding observations – India (2007); UN Doc. CERD/C/IND/CO/19, 5 May 2007

Sri Lanka: Second report (1985); UN Doc. CERD/C/126/Add.2., 12 September 1985

Sri Lanka: Third to sixth reports (1994); UN Doc. CERD/C/234/Add.1, 13 September 1994

Sri Lanka: Seventh to ninth reports (2000); UN Doc. CERD/C/357/Add.3, 20 November 2000

United Kingdom: Eighteenth to twentieth reports (2010); UN Doc. CERD/C/GBR/18-20, 13 August 2010

Concluding observations – UK (2003); UN Doc. CERD/C/63/CO/11, 10 December 2003

Concluding observations – UK (2011); UN Doc. CERD/C/GBR/CO/18-20, 14 September 2011

Concluding observations – Japan (2001); UN Doc. A/56/18 (2001)

Concluding observations – Japan (2001); UN Doc. CERD/C/304/ADD.114, 27 April 2001

Concluding observations – Senegal (2002); CERD, Report; UN Doc. A/57/18 (2002)

Concluding observations – Mali (2002); CERD, Report; UN Doc. A/57/18 (2002)

Concluding observations – Ghana (2003); UN Doc. CERD/C/62/CO/4, 2 June 2003

Concluding observations - Nepal (2004); UN Doc. CERD/C/64/CO/5, 26 April 2004

Concluding observations – Madagascar (2004); UN Doc. CERD/C/65/CO/4, 10 December 2004

Concluding observations – Mauritania (2004); UN Doc. CERD/C/65/CO/5, 10 December 2004

Concluding observations - Yemen (2006); UN Doc. CERD/C/YEM/CO/16, 19 October 2006

Concluding observations – Nigeria (2007); UN Doc. CERD/C/NGA/CO/18, 27 March 2007

Concluding observations – Pakistan (2009); UN Doc. CERD/C/PAK/CO/20, 16 March 2009

Concluding observations – Ethiopia (2009); UN Doc. CERD/C/ETH/CO/7-16, 7 September 2009

Concluding observations – Chad (2009); UN Doc. CERD/C/TCD/CO/15, 21 September 2009

Japan, third to sixth reports, Replies to List of Questions (2010); UN Doc. CERD/C/JPN/Q/3-6/Add.1/Rev.1, 8 February 2010

Concluding observations – Japan (2010); UN Doc. CERD/C/JPN/CO/3-6, 6 April 2010

Concluding observations – Yemen (2011); UN Doc. CERD/C/YEM/CO/17-18, 4 April 2011

CERD General Recommendations

General Recommendation No.14 (1993), Definition of discrimination, 22 March 1993

General Recommendation No.19 (1995), Racial segregation and apartheid (Art. 3), 18 August 1995

General Recommendation No.21 (1996), Right to self-determination, 23 August 1996

General Recommendation No.23 (1997), Indigenous Peoples, 18 August 1997

General Recommendation No.27 (2000), Discrimination against Roma, 16 August 2000

General Recommendation No. 29 (2002), Article 1, Paragraph 1 (Descent), 22 August 2002

General Recommendation No.30 (2004), Discrimination Against Non-Citizens, 1 October 2004

General Recommendation No.32 (2009), The meaning and scope of special measures, 24 September 2009; UN Doc. CERD/C/GC/32

General Recommendation No.34 (2011), Racial discrimination against people of African descent, 3 October 2011: UN Doc. CERD/C/GC/34

Other Treaty-monitoring Bodies

Human Rights Committee

India: Initial report (1983); UN Doc. CCPR/C/10/Add.8 (1983)

India: Second report (1989); UN Doc. CCPR/C/37/Add.13 (1989)

India: Third report (1996); UN Doc. CCPR/C/76/Add.6 (1996)

Concluding observations – India (1997); UN Doc. A/52/40 (1997)

General Comment No.18 (1989), Non-discrimination, 10 November 1989

General Comment No.31 (2004), The Nature of the General Legal Obligation Imposed on State Parties to the Covenant, 26 May 2004; UN Doc. CCPR/C/21/Rev.1/Add. 13

Committee on Economic, Social and Cultural Rights

India: Initial report (Arts.10-12) (1983); UN Doc. E/1980/6/Add.34 (1983)

India: Initial report (Arts.13-15) (1989); UN Doc. E/1988/5/Add.5 (1989)

India: Second to fifth reports (2006); UN Doc. E/C.12/IND/5 (2006)

Concluding observations – India (2008); UN Doc. E/C.12/IND/CO/5, 8 August 2008

General Comment No.20 (2009), Non-discrimination in economic, social and cultural rights, 2 July 2009; UN Doc. E/C.12/GC/20

Committee on the Elimination of Discrimination Against Women

India: Initial report (1999); UN Doc. CEDAW/C/IND/1 (1999)

India: Second and third reports (2005); UN Doc. CEDAW/C/IND/2-3

India: Special report (2009); UN Doc. CEDAW/C/IND/SP.1

Committee on the Rights of the Child

India: Initial report (1997); UN Doc. CRC/C/28/Add.10 (1997)

India: Second report (2001); UN Doc. CRC/C/93/Add.5 (2001)

India: Third and fourth reports (2011); UN Doc. CRC/C/IND/3-4 (2011)

Concluding observations – India (2004); CRC/C/15/Add.228, 26 February 2004

General Comment No.7 (2005), Implementing child rights in early childhood, 20 September 2006; UN Doc. CRC/C/GC/7/Rev.1

General Comment No.8 (2006), The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment, 2 March 2007: UN Doc. CRC/C/GC/8