

# Caste Discrimination: A Twenty-First Century Challenge for UK Discrimination Law?<sup>1</sup>

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Discrimination based on caste affects at least 270 million people worldwide, mostly in South Asia. Caste as a system of social organisation has been exported from its regions of origin to diaspora communities such as the UK, yet despite the prohibition of caste-based discrimination in international human rights law caste is not recognised as a ground of discrimination in English law. The overhaul of its equality framework and the proposed new single equality act present the UK with an opportunity to align national legislation with international law obligations. The Government's decision not to include protection against caste discrimination in the new legislation leaves race and religion as the only possible legal 'homes' for caste. This article considers the argument for legal recognition of caste discrimination in the UK, the capacity of race and religion to subsume caste as a ground of discrimination, and the role and limitations of law in addressing 'new' forms of discrimination such as casteism.

## INTRODUCTION

There is no legal recognition of caste in UK law.<sup>2</sup> Discrimination on grounds of caste is not recognised as such in existing anti-discrimination legislation, and in criminal law casteist assault does not count as an aggravated offence, nor is hostility on grounds of caste recognised as an aggravating feature for sentence.<sup>3</sup> Yet for some groups and individuals within the UK caste exerts a divisive force, albeit one which is not readily acknowledged and which is largely invisible to the majority population.

In February 2005 the Labour government announced a two-stage overhaul of the UK's equality framework, leading to a new Single Equality Act.<sup>4</sup> The first

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- 1 This article was written with the support of a grant from the UK Arts and Humanities Research Council.
- 2 Caste discrimination is unfamiliar to many UK lawyers although the Privy Council and the Immigration Appeal Tribunal have long addressed questions of caste; see *R v Sabharwal* [1973] WL 40695. See also *MA (Galgale – Sab clan) Somalia CG* [2006] UKIAT 00073 where 'caste' was construed to include 'clan'.
- 3 Not all forms of recognised discrimination – for example age – count as an aggravating factor in English criminal law. Casteist assault is an under-researched issue; see W. Pavia, 'You get involved in a gang just to take your caste forward' *The Times* 11 October 2008.
- 4 See <http://archive.cabinetoffice.gov.uk/equalitiesreview/background.html> (last visited 13 May 2008). The Labour party committed to introduce a Single Equality Act in its 2005 General Election manifesto.

stage, the Equalities Review,<sup>5</sup> was completed in February 2007.<sup>6</sup> In October of the same year the Equality and Human Rights Commission (EHRC) was established under the Equality Act 2006.<sup>7</sup> The second stage, the Discrimination Law Review (DLR),<sup>8</sup> was intended to culminate in the drafting 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.<sup>9</sup> In June 2008 the government announced its intention to proceed with a Bill<sup>10</sup> with the publication of its key proposals,<sup>11</sup> followed in July 2008 with its response to the Consultation.<sup>12</sup>

The DLR provided an opportunity to ascertain the existence, forms and extent of caste discrimination in this country and to bring it within the new legislative framework. Although the consultation paper did not specifically address caste discrimination, the government 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 on grounds of caste, in the UK.'<sup>13</sup> The responses led the government to conclude:

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.<sup>14</sup>

The government's decision to exclude caste discrimination from the Bill runs contrary to the UK's obligation under international human rights law to include a prohibition of 'descent-based' discrimination – of which caste discrimination is a

5 The Equalities Review was mandated to investigate the causes of persistent discrimination and inequality in British society. See Interim Report for Consultation (London: The Equalities Review, 2006) at <http://archive.cabinetoffice.gov.uk/equalitiesreview/upload/assets/www.theequalitiesreview.org.uk/interimreport.pdf> (last visited 13 May 2008).

6 'Fairness and Freedom: The Final Report of the Equalities Review' (Norwich: HMSO, 2007).

7 Equality Act 2006, c 3; the EHRC merges the Commission for Racial Equality (CRE), the Equal Opportunities Commission and the Disability Rights Commission: see Equality Act 2006 Part 1 s 1, at <http://www.opsi.gov.uk/acts/acts2006/pdf/ukpga20060003.en.pdf> and <http://www.equalityhumanrights.com/> (last visited 13 May 2008).

8 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/about/dlrterms.ref.html> (last visited 13 May 2008). The remit is now with the Government Equalities Office; see <http://www.equalities.gov.uk> (last visited 1 October 2008).

9 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).

10 HC Deb vol 478 col 499 26 Jun 2008.

11 *Framework for a Fairer Future: The Equality Bill* Cm 7431 (2008).

12 *The Equality Bill – Government response to the Consultation* Cm 7454 (2008).

13 *ibid* 183.

14 *ibid* 177.

sub-category<sup>15</sup> – in domestic law.<sup>16</sup> Instead, the pre-review position will apply, namely that caste discrimination is unlawful only if considered a form of discrimination on other grounds, for example race or religion.

This article considers the absence of caste discrimination in UK discrimination law, against the backdrop of growing governmental and parliamentary concern with caste discrimination overseas<sup>17</sup> and United Nations (UN) condemnation of descent-based discrimination worldwide.<sup>18</sup> I argue that there is evidence of the existence of caste and casteism within South Asian communities in Britain (this is not the same, of course, as arguing that casteism is rampant nor that it is present at all times, in all circumstances, among all members of South Asian communities). I also contend that, on the basis of existing evidence, it is premature to conclude that caste discrimination is not a problem in this country. The government's decision not to legislate for caste discrimination raises the question of whether caste is subsumed within any other recognised ground of discrimination. Of the existing bases of discrimination only racial and religious grounds contend as possible legal 'homes' for caste; yet caste cannot be captured by racial grounds as currently formulated unless deemed a form of race or ethnicity (and probably eludes capture by indirect discrimination as a non-regulated form of discrimination); and religious discrimination law captures caste discrimination, if at all, in specific and limited circumstances only. I therefore argue for explicit protection against caste discrimination, which I suggest is best achieved by amending the definition of 'racial grounds' in the Race Relations Act 1976 (RRA)<sup>19</sup> to include a new sub-category of descent or caste. The second section of the article outlines the key features of caste and caste discrimination; the third section charts the international human rights law response to caste discrimination and its significance for countries with caste-affected diasporic communities such as the UK; section four argues that caste has been exported to the UK, and contrasts the readiness of parliamentary and governmental actors to address caste discrimination overseas with their apparent reluctance to engage with caste discrimination as a domestic issue; the fifth section critiques the UK's equality framework, arguing that existing provisions on racial and religious

15 See Committee on the Elimination of Racial Discrimination (CERD), concluding observations on India's ninth to fourteenth reports, 22 August 1996; UN Doc. CERD A/51/18 (1996), 352; CERD, general recommendation XXIX, 22 August 2002; UN Doc. A/57/18 (2002) 111. See also Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights (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.

16 See CERD, general recommendation XXIX, 22 August 20, *ibid*, Article 1(a)–1(c). See also CERD, concluding observations on the UK's sixteenth and seventeenth reports, 20 August 2003; UN Doc. CERD A/58/18 (2003), 544.

17 See eg HC Deb vol 439 col 371–390 WH, 22 Nov 2005, Caste Discrimination Overseas (Government Policy); HC Deb vol 460 col 25–46 WH, 8 May 2007, India (Caste System); HL Deb vol 690 col 1434–1436, 26 March 2007, India's Dalits.

18 See UN Sub-Commission, n 15, above. See also R. K. W. Goonesekere, working paper on the topic of discrimination based on work and descent, UN Sub-Commission; UN Doc. E/CN.4/Sub.2/2001/16, 14 June 2001, paras 8–44 and 49; A. Eide and Y. Yokota, expanded working paper on the topic of discrimination based on work and descent, UN Sub-Commission; UN Doc. E/CN.4/Sub.2/2003/24, 26 June 2003, paras 10–43.

19 Race Relations Act 1976, c 74 (London: HMSO, 1995).

discrimination can only account for caste discrimination if caste is equated with something other than itself, and that the absence of caste as a recognised ground of discrimination constitutes a gap in UK anti-discrimination provisions; section six considers possible solutions and puts forward proposals for the inclusion of caste discrimination in UK discrimination law.

## CONTEXT

This section identifies and explains the operative features of caste<sup>20</sup> as an ideological construct. Caste is primarily associated with South Asia where it has existed as a system of social stratification for over three thousand years<sup>21</sup> although communities suffering from discrimination based on descent, and work and descent – wider legal categories of which caste discrimination is a sub-category – exist worldwide.<sup>22</sup> However this article focuses on caste in the South Asian sense of the term. Discrimination, subordination and oppression on grounds of caste affect almost 167 million Dalits<sup>23</sup> – formerly known as ‘Untouchables’ – in India alone, where they amount to over sixteen per cent of the population.<sup>24</sup> UN human rights investigations indicate that caste and caste discrimination have been exported to the South Asian diaspora including the UK.<sup>25</sup> Britain’s South Asian population numbers over 2.3 million<sup>26</sup> including almost one million Muslims of Pakistani and Bangladeshi origin<sup>27</sup> and over one million people of Indian origin, of whom 467,000 are Hindu and 301,000 are Sikh. The size of the UK’s Dalit-

20 ‘Caste’, from the Portuguese *casta* meaning species, race or pure breed, was first used in India by Europeans in the sixteenth century to distinguish between ‘Moors’ (Muslims) and non-Muslims and to denote birth-groups or communities; see S. Bayly, *Caste, Society and Politics in Modern India from the Eighteenth Century to the Modern Age* (Cambridge: Cambridge University Press, 1998) 105–107. See also U. Sharma, *Caste* (New Delhi: Viva Books, 2002) 1 and M. Galanter, *Competing Equalities: Law and the Backward Classes in India* (Berkeley: University of California Press, 1984) 7.

21 See Bayly, *ibid* 28. See also G. S. Ghuriye, *Caste and Race in India* (Mumbai: Popular Prakashan Pvt Ltd, 1969).

22 See n 18 above.

23 Caste terminology is highly politicised. ‘Dalit’ is a South Asian term of self-identification in use since the 1970s, meaning ‘crushed’ or ‘broken’ in Marathi, a regional language of western India. Gandhi’s term ‘Harijan’ (‘children of God’) has largely fallen out of mainstream use as patronising and demeaning. The Indian constitutional, legal and administrative term for former ‘Untouchables’ is ‘Scheduled Castes’. I use the generic term ‘Dalit’ throughout this article, whilst recognising that it is not adopted by all members of former ‘Untouchable’ communities.

24 Census of India 2001, Scheduled Castes and Scheduled Tribes Population, at <http://www.censusindia.gov.in/Census.Data.2001/India.at.Glance/scst.aspx> (last visited 1 February 2008). The Scheduled Tribes, or *adivasis*, amount to a further eight per cent of the population and are similarly subject to extreme oppression and discrimination.

25 See Eide and Yokota, n 18 above, para 41. See also A. Eide and Y. Yokota, further expanded working paper on the topic of discrimination based on work and descent, UN Sub-Commission; UN Doc. E/CN.4/Sub.2/2004/31, 5 July 2004, paras 34–61.

26 2001 Census, Office for National Statistics (ONS), UK population by ethnic group, at <http://www.statistics.gov.uk/cci/nugget.asp?id=273> (last visited 13 May 2008). The category ‘Asian or Asian British’ includes Indian, Pakistani, Bangladeshi and Other Asian sub-categories.

27 2001 Census, ONS, ethnic group by religious composition, at <http://www.statistics.gov.uk/cci/nugget.asp?id=395> (last visited 13 May 2008). In total there are 1.6 million Muslims, over half a million Hindus, 336,000 Sikhs and almost 150,000 Buddhists in the UK; 2001 Census, UK population by religion, at <http://www.statistics.gov.uk/cci/nugget.asp?id=954> (last visited 13 May 2008).

origin population is uncertain but is estimated somewhere between 50,000 and 150,000 people.<sup>28</sup> As Galanter and Ballard show, whilst caste is not the only feature of South Asian social organization 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 compartmentalized social order caste remains significant as a mechanism for and source of social stratification, social exclusion and discrimination on the sub-continent and, it would seem, of relevance as a source of social division and discrimination in this country.<sup>29</sup>

Castes are closed, endogamous, hereditary-membership groups characterised by separation and ranked within a strict hierarchical framework.<sup>30</sup> Traditionally marriage between castes, commensality (the sharing of food and drink) and the taking of water from 'lower' castes is prohibited. Whilst I argue that religion as a protected category within existing discrimination law does not adequately account for caste, 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).<sup>31</sup> The first three groups comprise the so-called 'twice-born'<sup>32</sup> castes while the fourth group, the Shudras (over half the Indian population), are the 'low' castes (known in Indian constitutional, legal and administrative terminology as other backward classes or OBCs). Outside the *varna* system, comprising a fifth group at the very bottom of the social hierarchy, are the so-called Untouchables or Dalits. The four Hindu *varna* groupings and the Dalits are sub-divided into approximately three thousand closed endogamous groups or *jatis* – local or regional kinship groups, hierarchically ranked within a geographical locality and effectively the operational units of the caste system.<sup>33</sup> Unlike *varna*, the concept of *jati* is not exclusive to Hinduism but is found in all the major South Asian religious communities.<sup>34</sup> Amongst South Asian Muslims the term *biraderi*

28 Dalit Solidarity Network UK (DSN-UK), *No Escape: Caste Discrimination in the UK* (London: DSN-UK, 2006) 21. 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, which puts the UK's Dalit-origin population at 130,000.

29 See 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 and Galanter, n 20 above, 7–17.

30 See Galanter, *ibid*.

31 See G. Flood, *An Introduction to Hinduism* (Cambridge: Cambridge University Press, 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.

32 Referring to the ceremony by which male children are 're-born' or initiated into their caste duties.

33 See 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 and 17–18. See also 'Varna and Caste' in M. N. Srinivas, *Caste in Modern India* (London: Asia Publishing House, 1962) 63–69.

34 On Christianity see J. Tharamangalam, 'Caste Among Christians in India' in M. N. Srinivas (ed), *Caste: Its Twentieth Century Avatar* (Delhi: Penguin, 1996) 263–29; D. Mandelbaum, *Society in India, Volume 2: Change and Continuity* (Berkeley: University of California Press, 1970) 569–571; Eide and Yokota, n 25 above, para 46. On Sikhism see R. Ballard, 'Differentiation and Disjunction among the Sikhs' in Ballard (ed), n 29 above, 88–116, 91. On Jainism see M. Banks, 'Jain ways of being' in Ballard (ed), *ibid* 231–250. On Parsis (Indian Zoroastrians) as a caste-like group see J. Hinnells, 'Parsi Zoroastrians in London', in Ballard (ed), *ibid* 251–271.

denotes a not dissimilar system of endogamous, hierarchically ranked groups.<sup>35</sup> *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,<sup>36</sup> but is generally translated as kinship group or brotherhood, with implied descent from a common male ancestor<sup>37</sup> and entailing complex dynamics of support, reciprocity, obligation and control. The term caste thus subsumes two concepts, the broad Hindu concept of *varna* and the South Asian regional concept of *jati* (or *zat*); in everyday usage in Britain caste is used interchangeably for *varna* and *jati*, and sometimes *biraderi*. While there are only four *varnas*, the precise number of *jatis* is indeterminable as groups may merge or sub-divide. 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'.<sup>38</sup> Crucially, however, both *varna* and *jati* membership are permanent and hereditary, that is, determined by birth.<sup>39</sup> Unlike class, a key feature of caste is individual inability or restricted ability to alter one's inherited status;<sup>40</sup> 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'.<sup>41</sup>

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'.<sup>42</sup> Accordingly the markers identifying an individual's caste are not purely physical. *Jati* groupings are local or regional, not national; the local 'caste map' is a matter of local knowledge, especially in rural areas where seventy per cent of India's population live, and this knowledge travels with migration.<sup>43</sup> Markers for caste include place of origin

35 On caste in Islam see Z. Bhatti, 'Social Stratification Among Muslims in India' in M. Srinivas (ed), *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 and 115–135; I. Din, *The new British: the impact of culture and community on young Pakistanis* (Aldershot: Ashgate, 2006) 33–34, 136–139; A. Hussain, *The Four Tribes of Nottingham: The Story of Pakistanis and Kashmiris in Nottingham, England* (Karachi: Awami Publishers, 1999) 9–22.

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

37 Shaw, n 35 above, 141.

38 E. Nesbitt, *Intercultural Education: Ethnographic and Religious Approaches* (Brighton: Sussex Academic Press, 2004) 100. See also Bayly, n 20 above, 1–63.

39 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. See also A. Sharma, *Human Rights and Hinduism: A Conceptual Approach* (Delhi: Oxford University Press, 2004) 66–69 on Brahmin status as earned, not inherited.

40 See CERD, general recommendation XXIX, 22 August 2002, n 15 above, Article 1(a).

41 Paul Divakar, Convenor of the National Campaign on Dalit Human Rights, at <http://www.christian-aid.org.uk/world/where/asia/dalits/apartheid.htm> (last visited 1 February 2008).

42 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: The Education Dept, Govt of Maharashtra, 1991) 187. Dr B. R. Ambedkar (1891–1956) 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).

43 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 35 above, 125.

and residence, name (although names can be changed), current or ancestral occupation, education, skin colour, appearance,<sup>44</sup> body language and demeanour.<sup>45</sup> In the UK, while such markers may not have the same cultural resonance, name, ancestral occupation, place of origin, residence and religious affiliation are used to identify caste background. For Indians there is a further marker; the constitutional, legal and administrative term for Dalits in India is 'Scheduled Castes', meaning those formerly Untouchable castes, or 'Depressed Classes', listed in a Schedule to the Constitution.<sup>46</sup> Scheduled Caste (SC) status is established by a Caste Certificate issued by the authorities attesting to the bearer's membership of a Scheduled, or Untouchable, caste and entitling them to the benefit of affirmative action policies and other measures of upliftment and protection. Although context-specific, 'Scheduled Caste' has entered UK usage, for example in matrimonial websites.<sup>47</sup>

### Caste, Untouchability and social exclusion

Two features distinguish caste discrimination from other forms of discrimination on the basis of inherited status, firstly the concept of Untouchability and secondly its religious underpinnings. Dalits have traditionally been considered by the dominant castes to be irredeemably and permanently polluted, hence 'Untouchable', people with whom all physical and social contact is to be avoided for fear of defilement.<sup>48</sup> 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' occupations.<sup>49</sup> Materially, Untouchability has for centuries provided a convenient ideological justification for economic exploitation of a subjugated and divided labour force

44 Skin colour and appearance are not determinative. One cannot tell caste from 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* (Oxford: Oxford University Press, 1962) 1.

45 See 'Instant Indicators [of caste]', in National Human Rights Commission/National Council for Teacher Education (NCTE), *Addressing Discrimination based on Sex, Caste, Religion and Disability through Educational Interventions: A Handbook for Sensitising Teachers and Teacher Educators* (Delhi: NCTE, 2003) 69.

46 See Constitution of India, Article 341 and The Constitution (Scheduled Castes) Order 1950 (C.O. 19), at <http://lawmin.nic.in/ld/subord/rule3a.htm> (last visited 13 May 2008). Originally drawn up by the British in 1935, the Schedule lists those disadvantaged and socially excluded castes previously known as 'Depressed Classes', subsequently as 'Untouchables'; see E. Zelliott, *From Untouchable to Dalit: Essays on the Ambedkar Movement* (New Delhi: Manohar, 1995). See also O. Mendelsohn and M. Vicziany, *The Untouchables: Subordination, Poverty and the State in Modern India* (Cambridge: Cambridge University Press, 1998) 2–5.

47 See <http://www.asianunite.com/joinform.php> (last visited 14 September 2008).

48 See Mendelsohn and Vicziany, n 46 above, 7–8; Leslie, n 39 above, 2–40; M. Marriot, 'Varna and Jati' in S. Mittal and G. Thursby, *The Hindu World* (Abingdon: Routledge, 2004) 379–380. Hinduism also recognises temporary states of pollution eg related to birth, death, menstruation and childbirth; see Flood, n 31 above, 203–207, 219.

49 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).

deprived of control of the fruits of its labour.<sup>50</sup> The conceptualisation of Untouchability in corporeal terms as a 'property of the body'<sup>51</sup> and its supposedly inherited and immutable nature means that it cannot be shed by engagement in 'clean' work or by professional or economic advancement. Untouchability is both a cause of and a mechanism for social exclusion.<sup>52</sup> Despite the abolition of Untouchability and the criminalisation of Untouchability practices in the Constitution of India 1950<sup>53</sup> and constitutional and legislative prohibitions of discrimination on grounds of caste,<sup>54</sup> many Dalits in India are subject to severe socio-economic deprivation and exclusion and well-documented violations of their civil, political, economic and social rights,<sup>55</sup> their subordinated status maintained via the dual enforcement mechanisms of Untouchability practices and systemic violence or 'atrocities',<sup>56</sup> frequently of a highly gendered nature.<sup>57</sup> Whilst this level of caste-based institutionalised social exclusion, discrimination and violence is not replicated in Britain, the existence of casteism has been identified<sup>58</sup> albeit that its forms and scope have yet to be fully investigated.

### Caste and religion

Doctrinally caste is associated only with Hinduism<sup>59</sup> yet it has permeated other religions. In the UK as in the Indian sub-continent distinctions and discrimination on grounds of caste are found among South Asian adherents of Christianity<sup>60</sup> and

50 See B. R. Ambedkar, 'Annihilation of Caste' in V. Moon (ed), *BAWS Vol 1* (Bombay: The Education Dept, Govt of Maharashtra, 1989) 47. See also Mendelsohn and Vicziany, n 46 above, 7–8; Leslie, n 39 above, 29–30.

51 Flood, n 31 above, 219.

52 See Leslie, n 39 above, 29–30. See also Shah et al, n 49 above.

53 Constitution of India, Article 17 at <http://lawmin.nic.in/coi.htm> (last visited 13 May 2008). The Constitution abolishes Untouchability but not caste or the caste system.

54 See Constitution of India, Article 15 at <http://lawmin.nic.in/coi.htm> (last visited 13 May 2008). See also Protection of Civil Rights Act 1976 (originally the Untouchability (Offences) Act 1955), at <http://socialjustice.nic.in/schedule/pcr-act.pdf> (last visited 13 May 2008).

55 See Shah et al, n 49 above; S. Thorat and N. Kumar, B.R. Ambedkar: *Perspectives on Social Exclusion and Inclusive Policies* (New Delhi: Oxford University Press, 2008) 4.

56 The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989 defines and criminalises a range of acts as atrocities; <http://socialjustice.nic.in/schedule/poa-act.pdf> (last visited 13 May 2008). See 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).

57 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).

58 See Eide and Yokota, n 18 and n 25 above; Ballard, n 29 above; Shaw, n 35 above; Nesbitt, n 38 above; Din, n 35 above.

59 'Hindu' was originally a Persian term for the indigenous inhabitants of the Indus valley, subsequently used by the Muslims and then the British as a religious-cultural and geographical-cultural term to denote the non-Muslim inhabitants of 'Hindustan'. Hindu-ism, a nineteenth century term, describes 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 geographical-cultural connotations.

60 See n 34 above.



Islam, notwithstanding the absence of a doctrinal basis for caste in Islam,<sup>61</sup> and among the Sikhs despite Sikhism's doctrinal rejection of caste.<sup>62</sup> Hence despite its doctrinal and ideological basis in Hinduism, caste can no longer be said to be solely a Hindu phenomenon. Conversion from Hinduism to another religion purportedly offers emancipation from caste oppression but in reality caste status frequently accompanies the convert into his or her new religion<sup>63</sup> (thus South Asian Christians of 'Untouchable' origins are known as Dalit Christians, reflecting their own or their ancestors' pre-conversion caste status). Conversion to Buddhism has been a popular emancipatory strategy among Dalits following Ambedkar's 1956 conversion to that religion, chosen for its egalitarianism and its disavowal of caste as well as its Indian roots, but has proved an imperfect means of escaping caste oppression as 'Ambedkarite' Buddhists remain identified by many as ex-Untouchables.<sup>64</sup> 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 and the creation of distinct Dalit religious identities, for example the medieval Indian *bhakti* movement which challenged religious and ritual orthodoxy and the notion that Untouchables could not access the divine.<sup>65</sup> In Britain such groups include the Valmiki, Ravidasi and Ramdasi which by definition comprise individuals from diverse religious traditions, including Hinduism and Sikhism, with shared 'Untouchable' origins.<sup>66</sup>

Ambedkar identified the religious legitimisation of economic exploitation and social oppression and the concept of Untouchability – which he described as a notional '*cordon sanitaire*' separating the Untouchables from the rest of Indian society<sup>67</sup> – as the unique and distinguishing features of caste. In this section I have briefly outlined the key features of caste as an ideological construct and the means by which caste status may be identified. Caste is an oppressive socio-economic system which is legitimised by aspects of orthodox Hinduism yet which transcends religious affiliation. The following section charts the recognition by international human rights law of caste discrimination as a human rights violation and a form of racial discrimination.

## CASTE DISCRIMINATION AND INTERNATIONAL HUMAN RIGHTS LAW

Non-discrimination and equality before the law, articulated in Articles 1 and 2 of the Universal Declaration of Human Rights 1948 (UDHR),<sup>68</sup> is fundamental in the protection of human rights. This principle is elaborated internationally in

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61 See n 35 above.

62 See n 34 above.

63 See Zelliott, n 46 above, 126–127, 218–221.

64 *ibid*, Part III: Religion.

65 *ibid*, 270. See also Leslie, n 39 above, 53–64.

66 See Leslie, n 39 above, 33. See also Nesbitt, n 38 above, 7–9 and 98–112.

67 Ambedkar, n 42 above; Zelliott, n 46 above, 269.

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

legally-binding form in Article 26 of the International Covenant on Civil and Political Rights 1966 (ICCPR), to which the UK has been a party since 1976:

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.<sup>69</sup>

Caste discrimination is now considered a violation of international human rights law, as a sub-category of discrimination based on work and descent and as a form of descent-based racial discrimination as defined in the International Convention for the Elimination of Racial Discrimination 1965 (ICERD), to which the UK has been a party since 1969;<sup>70</sup> yet until the mid-1990s caste discrimination was conspicuous in international human rights discourse only by its absence. Caste is not included as a ground of discrimination in any international human rights instrument and until recently was not conceptualized as a violation of international human rights law. Few human rights lawyers outside caste-affected countries were aware of caste discrimination, its nature or extent. The peculiarity of caste – ‘an enigma to many people from outside India’<sup>71</sup> – eluded Western conceptualization, while governments of caste-affected States considered caste discrimination an internal matter beyond the purview of international concern. It was not until the mid-1990s that activists succeeded in bringing caste to the attention of the United Nations,<sup>72</sup> resulting in condemnation of caste discrimination as a human rights violation by both the Conventional and Charter-based mechanisms of the UN human rights regime. Two bodies have since been at the forefront of UN activity on caste discrimination, the former UN Sub-Commission for the Promotion and Protection of Human Rights (UN Sub-Commission, now the Human Rights Council Advisory Committee) and the UN Committee for the Elimination of Racial Discrimination (CERD), the monitoring body of ICERD.

## UN CERD

Article 2 of ICERD requires States Parties to prohibit and eliminate by all appropriate means, including legislation, racial discrimination in all its forms by any persons, group or organization. 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’ having the purposes or effects specified in the

69 Adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS 171.

70 Adopted 21 December 1965, entered into force 4 January 1969, 660 UNTS 195.

71 CERD member Mrs Sadiq Ali, CERD, Summary Records of the 598<sup>th</sup> to 625<sup>th</sup> meetings, 12 March 1984; UN Doc. CERD/C/SR.615, 16

72 See C. Bob, ‘Dalit Rights are Human Rights: Caste Discrimination, International Activism and the Construction of a New Human Rights Issue’ (2007) 29 *Human Rights Quarterly* 167–193. See also S. Thorat and Umakant (eds), *Caste, Race and Discrimination: Discourses in International Context* (Jaipur: Rawat Publications, 2004).

article. Racial discrimination is thus an ‘umbrella term’<sup>73</sup> covering discrimination on five grounds – race, colour, descent, or national or ethnic origin. In 1996 CERD categorically affirmed for the first time that caste discrimination falls within Article 1(1) of ICERD as a sub-category of discrimination on grounds of descent.<sup>74</sup> The context was CERD’s examination of India’s fourteenth state report in which India stated that it did not consider the situation of the Scheduled Castes to fall within the purview of Article 1(1).<sup>75</sup> India argued first that caste is based on social distinctions, not race, and secondly that although castes are systems based on descent since people are normally born into a particular caste, it was ‘obvious’ that the term descent in the Convention referred only to race.<sup>76</sup> CERD members appeared to accept that caste was not based on race but rejected India’s interpretation of descent as referring only to race,<sup>77</sup> stating in their concluding observations:

[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.<sup>78</sup>

In August 2002 CERD issued general recommendation XXIX in which it reiterated its 1996 interpretation of descent, confirming that descent ‘does not solely refer to “race” and has a meaning and application which complements the other prohibited grounds of discrimination’.<sup>79</sup> The general recommendation affirmed 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’ and condemned all descent-based discrimination, including caste discrimination, as a violation of the Convention. It calls on all States parties to identify the existence of such discrimination within their jurisdiction and to enact or amend legislation to outlaw all forms of descent-based discrimination.<sup>80</sup>

73 P. Thornberry, ‘Confronting Racial Discrimination: A CERD Perspective’ (2005) 5 *Human Rights Law Review* 239, 250.

74 CERD, concluding observations, 22 August 1996, n 15 above, 352.

75 CERD, fourteenth periodic report of States Parties due in 1996: India; UN Doc. CERD/C/299/Add.3, 29 April 1996, 7.

76 *ibid* 6–7. India had expressed this argument orally in 1986; see CERD, Summary Records of the 777<sup>th</sup> to 804<sup>th</sup> meetings; UN Doc. CERD/C/SR.777–804 (vol I), 30 November 1987, 60–61. In previous state reports India had regularly provided information on measures of upliftment for the Scheduled Castes and Scheduled Tribes; see eg fourth periodic report of India; UN Doc. CERD/C/R.90/Add.32, 27 July 1977.

77 CERD, Summary Records of the 1161<sup>st</sup> meeting, 7 August 1996; UN Doc. CERD/C/SR.1161, 1 November 1996, 20, 23 and 32.

78 CERD, concluding observations, 22 August 1996, n 15 above, 352. Descent was introduced by India during the drafting of ICERD into the original definition of racial discrimination to resolve disagreement over the term ‘national origin’. The ICERD *travaux préparatoires* are silent on the intended meaning of ‘descent’ and no discussion or debate on the term is recorded. India denies that descent was intended to include caste. On the origins of descent see D. Keane, ‘Descent: A Legal History’ (2005) Vol. II *International Journal of Minority and Group Rights* 93.

79 See CERD, general recommendation XXIX, 22 August 2002, n 15 above, Preamble.

80 *ibid*, Article 1.

## UN Sub-Commission for the Promotion and Protection of Human Rights

Caste discrimination has been conceptualised by the former UN Sub-Commission as a subset of a new legal category, 'discrimination based on work and descent'. In 2000, largely in response to activist lobbying prior to the 2001 UN World Conference against Racism, Xenophobia and other related forms of Intolerance (WCAR) – where activists sought, ultimately unsuccessfully, to secure official recognition of caste as a form of racism<sup>81</sup> – the UN Sub-Commission passed a Resolution declaring discrimination based on work and descent a form of discrimination prohibited by international human rights law.<sup>82</sup> The 'work and descent' terminology was adopted to encompass caste and similar systems of inherited status without focussing on any one State, thereby locating caste discrimination as a global human rights issue within a wider international human rights category.<sup>83</sup> An expert's report was commissioned which, although concentrating on South Asia, identified work and descent-based discrimination as a world-wide problem<sup>84</sup> and recommended further study of the human rights violations associated with it.<sup>85</sup> Subsequent reports 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.<sup>86</sup> In 2005 the former Commission on Human Rights appointed two UN Special Rapporteurs to investigate the phenomenon of discrimination based on work and descent, its nature and extent and to produce a set of Draft Principles and Guidelines for its effective elimination.<sup>87</sup> Together CERD and the former UN Sub-Commission have constructed a framework for the international legal conceptualisation of caste discrimination as a form of descent-based racial discrimination and as a sub-set of the new legal category of discrimination based on work and descent, broad categories which transcend any one country and within which caste discrimination is located as a distinct human rights violation but one of global concern.

### CASTE DISCRIMINATION – THE UK CONTEXT

#### Caste discrimination overseas

To the extent that caste discrimination is addressed in parliamentary and governmental circles in the UK it is as an 'overseas' rather than as a domestic

81 See n 72 above.

82 See UN Sub-Commission, n 15 above.

83 See n 72 above.

84 See Goonesekere, n 18 above, paras 7–8.

85 *ibid*, paras 49–50.

86 See Eide and Yokota, n 18 above, paras 5, 9, 57–58.

87 Commission on Human Rights, decision 2005/109 Discrimination based on work and descent, 19 April 2005, UN Doc. E/CN.4/DEC/2005/109. See Y. Yokota and C-S. Chung, preliminary report; UN Doc. E/CN.4/Sub.2/2005/30, 21 June 2005, and progress report containing draft principles and guidelines; UN Doc. A/HRC/Sub.1/58/CRP.2, 28 July 2006. At the time of writing a Human Rights Council decision on the Special Rapporteurs' mandate is pending, and the third and final report, although completed, is yet to be submitted to a UN body.

problem.<sup>88</sup> In the colonial era caste became seen as the pre-eminent feature of Indian social organisation encapsulating the ‘Otherness’ of the sub-continent;<sup>89</sup> the ‘new wave’ of British interest in caste has developed against the backdrop of India’s post-1991 neo-liberal economic reforms,<sup>90</sup> her position as an emerging economic power, and expanding British-India trade and business interaction.<sup>91</sup> Caste inequality in India is perceived as being out of step with modern ideas about human rights and a limitation on India’s economic development and global political aspirations. MPs have put down six Early Day Motions concerning India’s Dalits since 2000.<sup>92</sup> Since 2005, two House of Commons Adjournment debates and a House of Lords debate on caste discrimination have taken place.<sup>93</sup> Discrimination against Dalits has been addressed in Foreign and Commonwealth Office (FCO) Human Rights Reports<sup>94</sup> and also by the Home Office.<sup>95</sup> Government ministers have linked caste and contemporary slavery in the form of bonded labour (which in South Asia affects mostly Dalits).<sup>96</sup> In 2007 – the bicentenary of the abolition of the transatlantic slave trade – the House was reminded of William Wilberforce’s comparison between caste and slavery<sup>97</sup> in a parliamentary speech in 1813, in which Wilberforce condemned the caste system as ‘a detestable expedient for keeping the lower orders of the community bowed down in an abject state of hopeless and irremediable vassalage’ whose ‘cruel shackles . . . are never to be shaken.’<sup>98</sup> Two interrelated grounds are called on to justify this interest in caste discrimination overseas. The ‘business case’ emphasizes the threat to India’s social stability and economic growth – and by extension British business interests – which caste discrimination is perceived to pose.<sup>99</sup> The ‘moral case’ or ‘human rights case’ focuses on Untouchability and caste discrimination as a human rights violation.<sup>100</sup> Whichever is advanced – the ‘business case’ or the ‘human rights case’ – the role of Britain

88 See eg 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.

89 See Bayly, n 20 above. See also E. Said, *Orientalism: Western Conceptions of the Orient* (London: Routledge, 1978); R. Inden, *Imagining India* (Oxford: Blackwell, 1990).

90 See G. Das, *India Unbound* (New Delhi: Penguin Books India, 2000).

91 See Foreign and Commonwealth Office Country Profile: India, updated 22 Feb 2008, at <http://www.fco.gov.uk/en/about-the-fco/country-profiles/asia-oceania/india?profile=tradeInvestment&pg=6> (last visited 13 May 2008). See also ‘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.

92 See eg EDM 1604, Violence with Impunity Against Dalits in India, 5 June 2007, Stunnell, Andrew.

93 See n 17 above.

94 See FCO, Human Rights Annual Report 2005, 212 and Report 2006, 251 (Norwich: HMSO).

95 See ‘Country of Origin Information Report: India’; UK Home Office, Country of Origin Information Service, 31 January 2007, 7.01, at <http://www.homeoffice.gov.uk/rds/pdfs/07/india-130207.doc> (last visited 13 May 2008). See also Home Office Immigration and Nationality Directorate, Country Information and Policy Unit, ‘Women in India: Report of the fact finding mission to India 11–24 July 2004’, 3.24–3.34 on the situation of Dalit women in India.

96 See FCO News ‘Contemporary Slavery: Caste Discrimination and Bonded Labour’ 30 March 2007, <http://www.fco.gov.uk/en/newsroom/latest-news/?view=PressR&cid=1945162> (last visited 13 May 2008). See also HC Deb vol 439 col 390 22 November 2005.

97 HL Deb vol 690 col 1434 26 March 2007.

98 HC Deb vol 26 col 856 22 June 1813.

99 See House of Commons Foreign Affairs Committee, South Asia: Fourth Report of Session 2006–07 (London: The Stationery Office Ltd); HC 55 (2007) 260–262.

100 See Business and Human Rights Resource Centre at <http://www.business-humanrights.org/Home> (last visited 22 September 2008).

as a friend of India is stressed by the protagonists.<sup>101</sup> For British companies operating in India, caste surfaces primarily in the human resources and decision-making contexts, although British staff may be oblivious to its manifestations.<sup>102</sup> In 2006 the House of Commons Trade and Industry Committee described caste as ‘a trap for the unwary’,<sup>103</sup> advising UK companies not to break the letter or spirit of Indian law, to take note of the ‘Ambedkar Principles’<sup>104</sup> (a voluntary code of practice for foreign investors) and to look carefully at 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. 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.’<sup>105</sup> There is an obvious irony in governmental and parliamentary denunciations of caste discrimination in India, given the history of British colonialism and its contribution to the ‘construction’ of caste and its embedding in the administrative structures, the institutions of government and the laws and legal system of British India.<sup>106</sup> From 1858 onwards, when the Crown replaced the East India Company in governing India and embarked on the imposition of a British-style national legal system, only those family and religious matters within the personal sphere remained governed by indigenous law. Although the applicability of caste in most matters in British India courts was disallowed, the British policy of non-interference *vis-à-vis* caste customs and caste practices in personal law matters resulted in the courts upholding exclusionary practices on grounds of caste with respect to access to religious premises – including public premises<sup>107</sup> – through the

101 See Stephen Crabb MP, Conservative Party Human Rights Commission hearing in Parliament on the plight of the Dalits in India, 28 March 2007 at <http://www.conservativehumanrights.com/news/april07/04.04.07.dalitshearing.htm> (last visited 13 May 2008). See also HL Deb vol 690 col 1434–1436 26 March 2007.

102 See O. Morgan, ‘British “failing India’s lowest caste workers”’ *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); USA Dept of Commerce, ‘Doing Business in India’ at <http://www.buyusa.gov/india/en/motm.html#section5> (last visited 22 September 2008).

103 Trade and Investment Opportunities with India: Third Report of Session 2005–06, Volume I, n 91 above.

104 ‘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://www.dsnu.org/other/Ambedkar.Principles.UK.pdf> (last visited 13 May 2008).

105 ‘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.

106 See Bayly, n 20 above, 97–143. See also Nesbitt, n 38 above, 111. Note however Bayly’s insistence that caste was not simply a colonial ‘invention’; on this point see also Mendelsohn and Vizciany, n 46 above, and W. Menski, ‘The Indian Experience’ in B. Hepple and E. Szysszczak (eds), *Discrimination: The Limits of the Law* (London: Mansell, 1992) 302.

107 See M. Galanter, *Law and Society in Modern India* (Delhi: Oxford University Press, 1989) 18, 147, 147–151. 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 – although ‘exclusionary practices did not enjoy the same judicial support’ in regard to secular public facilities.

application of rules derived from orthodox Brahminical codes of behaviour which were erroneously treated as 'black letter' legal texts.<sup>108</sup>

### **Caste discrimination: a domestic issue?**

In 1916 Ambedkar described caste as 'a local 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.'<sup>109</sup> Proponents of caste discrimination legislation must establish the existence of a problem which discrimination law can remedy. This section will argue that the export to Britain of caste as a form of social organization brings with it new challenges for equality law in this country.

#### *Caste: A Lived Reality in the UK*

The export of caste structures and practices to Britain has attracted news coverage since the 1970s<sup>110</sup> while academic studies refer to the role of caste among South Asian communities in Britain,<sup>111</sup> and its export to the South Asian diaspora has been identified by UN human rights bodies.<sup>112</sup> Ballard's 1994 account of the settlement strategies of South Asian migrants in Britain shows how 'chain migration' has resulted in caste remaining 'a crucial feature of social organisation in almost every settlement.'<sup>113</sup> 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, indeed inter-caste competition for status has intensified.<sup>114</sup> The reason for this, he argued, 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.'<sup>115</sup> Leslie's 2003 study of Valmiki identity in Britain describes caste as affecting and internally dividing all South Asian communities in Britain.<sup>116</sup> 'Jatt Pride' websites and internet chat-rooms testify to the existence of caste prejudice among sections of South Asian youth (in this case, Jat Sikhs), many of whom have never lived in the sub-continent.<sup>117</sup> Nesbitt's 2004 work on ethnographic and religious approaches to intercultural education identifies caste as

108 See P. Olivelle, *The Law Code of Manu* (Oxford: Oxford University Press, 2004) xvi-xxiii, xxxviii-xxxix. See also Menski, n 106 above, 302, 304.

109 B. R. Ambedkar, 'Castes in India: Seminar Paper' Columbia University, NY, 9 May 1916 in *BAWS* vol 1, n 50 above, 6, citing V. Shridhar and A. M. Ketkar, *The History of Castes in India* (Ithaca, NY: Taylor & Carpenter, 1909) 4.

110 See 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; Pavia, n 3, above.

111 See M. Michaelson, 'The relevance of Caste among East African Gujaratis in Britain' (1979) 7 *New Community* 350; Ballard (ed), n 29 above; Leslie, n 39 above 64-73; Shaw, n 35 above; Din, n 35, above.

112 See Eide and Yokota, n 18 and n 25 above.

113 Ballard (ed), n 29 above, 11 and 25.

114 *ibid.*, 26.

115 *ibid.*

116 Leslie, n 39 above, 68.

117 See <http://www.jattworld.com/portal/modules/newbbplus/print.php?forum=1&topicid=2660> (last visited 13 May 2008).

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.<sup>118</sup>

Three studies published in 2006 attest to the reality of caste in Britain. A Joseph Rowntree Trust report looking at barriers to community participation among South Asians in Bradford, predominantly Pakistani Muslims, found a fractured and divided community characterized by divisions and power hierarchies based on caste and *biraderi* as well as region of origin, gender, sexuality and religious affiliation.<sup>119</sup> A study of British Hindu identity by the Hindu Forum of Britain (HFB), sponsored by the Department for Communities and Local Government, confirms the importance of caste as a form of social organisation and a source of sub-group identity among Hindus in Britain.<sup>120</sup> Although silent on the hierarchical nature of the *varna* system and those deemed to fall outside it – the Dalits – the study does identify caste as a meaningful aspect of contemporary British Hindu life, at least for some. Lastly, a 2006 report by a London-based non-governmental organisation, Dalit Solidarity Network UK (DSN-UK), on caste discrimination in the UK argues that discrimination on grounds of caste is part of the lived experience of many individuals of Dalit origin in this country.<sup>121</sup>

### *The Caste-Casteism Conundrum*

A fundamental ideological difference exists between those for whom caste is essentially non-invidious, associational and communitarian,<sup>122</sup> and those who believe caste as an institution is inherently exclusionary, inegalitarian and inseparable from casteism.<sup>123</sup> Personal experience of casteism in Britain has been voiced in oral testimonies<sup>124</sup>

118 See Nesbitt, n 38 above, 98.

119 H. Blakey, J. Pearce and G. Chesters, *Minorities within Minorities: Beneath the Surface of Community Participation* (York: Joseph Rowntree Foundation, 2006) 2.

120 R. Berkeley, *Connecting British Hindus: An Enquiry into the Identity and Public Engagement of Hindus in Britain* (Hindu Forum of Britain: London, 2006) 59. Research was conducted between January and April 2006. Over 120 people, primarily Hindus from faith-based community organisations, participated in focus groups. An online survey advertised through the HFB website, generating 680 responses, and telephone interviews with area experts, were also conducted.

121 See n 28 above. Research was conducted between September 2005 and January 2006 involving a questionnaire survey of 130 Dalit individuals and organisations across the UK and interviews with twenty-two 'key' individuals. *ibid*, 19.

122 The position espoused by Gandhi and earlier Hindu reformers, for whom Untouchability was a corruption of Hinduism and the *varna* system; see Bayly, n 20 above, 233–265; W. Radice (ed), *Swami Vivekananda and the Modernisation of Hinduism* (Delhi: Oxford University Press India, 1998); M. Galanter, n 20 above, 28–29; A. Sharma, n 39 above, 52–54.

123 The position espoused by Ambedkar, for whom caste, orthodox Hinduism and the Hindu social order were inextricably linked; see B. R. Ambedkar, 'Gandhism' in V. Moon (ed), n 42 above, 274–297 and V. Moon (ed), *Dr. Ambedkar The Principal Architect of the Constitution of India: BAW'S 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.

124 See S. Muman, 'Caste in Britain' in *Dalits in the New Millennium*, n 28 above, 76.



and through radio<sup>125</sup> and theatre.<sup>126</sup> Nesbitt's 1994 study of Valmikis in Coventry revealed significant experience in the UK of the social stigmatisation and discrimination experienced by this group in India.<sup>127</sup> In 2003 the UN experts on discrimination based on work and descent identified caste discrimination in diaspora communities as an issue demanding 'significant attention'<sup>128</sup> and in 2004 as continuing to affect diaspora communities (including the UK) 'whose original cultures and traditions include aspects of inherited social exclusion.'<sup>129</sup> While some respondents to the 2006 HFB survey saw *jati* and *varna* as 'an expression of tradition and positive familial and community links',<sup>130</sup> others referred to intra-community prejudice, division and barriers based on caste,<sup>131</sup> 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.'<sup>132</sup> In June 2008 the HFB, in a response<sup>133</sup> to the government's informal caste discrimination survey,<sup>134</sup> stated 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.<sup>135</sup>

Endogamy was identified by Ambedkar as the vehicle by which caste is maintained and replicated (and inter-caste marriage as the 'solvent of caste').<sup>136</sup> Marriage 'within caste' still appears to be the expected norm, at least among the older generation;<sup>137</sup> eighty-two per cent of respondents to the 2006 DSN-UK survey believed that South Asians tended to marry in their own caste.<sup>138</sup> Asian matrimonial websites continue to advertise candidates on the basis of caste and community alongside religion and other characteristics,<sup>139</sup> although inter-caste marriages also appear to be rising.<sup>140</sup> Caste has been identified as a factor in so-called honour crimes in Britain (marriages which transgress caste boundaries being

125 N. Puri, 'The Caste Divide', broadcast on BBC Radio 4, April 2003, transcript at <http://www.countercurrents.org/dalit-puri050704.htm> (last visited 13 May 2008).

126 See 'The Fifth Cup', a 2007 Casteawayarts production; Asians in Media online magazine, at <http://www.asiansinmedia.org/events/event.php/2969/index.html> and <http://www.casteawayarts.com>, (last visited 14 September 2008).

127 See E. Nesbitt, 'Valmikis in Coventry: The Revival and Reconstruction of a Community' in Ballard (ed), n 29 above, 118–119.

128 See Eide and Yokota, n 18 above, para 41.

129 Eide and Yokota, n 25 above, paras 34 and 42.

130 See n 120 above, 60.

131 *ibid* 59–60.

132 *ibid* 58.

133 R. Kallidai, *Caste in the UK: A Summary of the Consultation with the Hindu Community in Britain* (London: Hindu Forum of Britain, 2008). The response was based on 'a survey of a fairly representative Hindu sample of 245 persons and a focus group meeting attended by 30 organisations' *ibid*, Foreword.

134 See n 12 above.

135 See n 133 above, 14.

136 Ambedkar, n 50 above, 289.

137 See Nesbitt, n 38 above, 109–110; Shaw, n 35 above, 137; Din, n 35 above, 139–140; n 133 above, 14.

138 See n 28 above, 12.

139 See eg Jeevansathi.com at <http://www.jeevansathi.com/matrimonials/uk-matrimonial/> (last visited 13 May 2008).

140 See n 133 above, 17; Nesbitt, n 38 above, 106; J. Jacobson, *Islam in Transition: Religion and identity among British Pakistani youth* (London: Routledge, 1998) 90–93.

unacceptable to some families)<sup>141</sup> and also as a driver for forced marriage, where an individual is compelled to marry within caste.<sup>142</sup> Since July 2007 the Forced Marriage (Civil Protection) Act has empowered County and High Courts to make civil Protection Orders in respect of forced marriages.<sup>143</sup> Supporters of the legislation argue that forced marriage amounts to 'an abuse of human rights and a form of domestic violence which cannot be justified on religious or cultural grounds.'<sup>144</sup> Although endogamy practised by choice is not a matter for the law – unless the marriage contravenes law restricting marriages within prohibited degrees<sup>145</sup> – endogamous marriages involving force or coercion, defined in the 2007 Act as threats or other psychological means,<sup>146</sup> will be caught by the legislation.<sup>147</sup>

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.'<sup>148</sup> In contrast the HFB, while recognising the occurrence in schools and universities of caste-based insults, name-calling and derogatory remarks, considers such incidents rare and no more than 'a lighter form of bullying.'<sup>149</sup> Similar casteist behaviour in temples and community centres is characterised as 'ways of social interaction that could be improved, rather than actual discrimination about provision of goods and services at community centres.'<sup>150</sup> The extent of casteist bullying in regulated fields and whether it could be classified as discriminatory harassment (see below) merits further investigation.

### *The Caste Discrimination Conundrum*

Discrimination has both ordinary and legal meanings; behaviour termed discriminatory in ordinary language is not necessarily recognised legally as discrimina-

141 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; S. Cook, 'Caste Out' *The Guardian* 11 May 1991. See also the website of Karma Nirvana at <http://www.karmanirvana.org.uk/>.

142 Brandon and Hafez, *ibid.* Forced marriages must be distinguished from approved marriages and arranged marriages that are consensual. On forced marriage generally, see Southall Black Sisters, *Forced Marriage: An Abuse of Human Rights* (London: Southall Black Sisters, 2001).

143 Forced Marriage (Civil Protection) Act 2007, c 20, inserted as Part 4A of the Family Law Act 1996, c 27. A person (A) is forced into a marriage if another person (B) forces A to enter into a marriage (whether with B or another person) without A's free and full consent: Family Law Act 1996, Part 4A, s 63A(4). See also the website of the FCO/Home Office Forced Marriage Unit (FMU) at <http://www.fco.gov.uk/en/travelling-and-living-overseas/things-go-wrong/forced-marriage> (last visited 22 September 2008).

144 Baroness Scotland, cited in BBC News 7 June 2006, <http://news.bbc.co.uk/1/hi/uk/5054286.stm> (last visited 13 May 2008). See also HL Deb vol 688 col 1319–1367 (Forced Marriage (Civil Protection) Bill) 26 January 2007, 1357. Article 1 of the UN Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages 1962 provides 'no marriage shall be legally entered into without the full and free consent of both parties'. Treaty Series No 102/1970: Cm 4538. UK ratification 9 July 1970.

145 See UK Marriage Act 1949, Part I s 1 and Sched 1, Part 1; see also The Marriage Act 1949 (Remedial Order) 2007 (S.I. 438/2007).

146 Family Law Act 1996, Part 4A, s 63A (6).

147 The HFB endorses legal intervention in cases of forced marriage; see n 120 above, 15.

148 Nesbitt, n 38 above, 98, 107–109.

149 See n 133 above, 17–18.

150 *ibid.*

tion.<sup>151</sup> British discrimination law principally targets public conduct and its outcomes, irrespective of motivation; opinions and beliefs are not unlawful unless they give rise to prohibited conduct. To be classified as discrimination in legal terms, casteist behaviour must meet three criteria. First, caste must count as a prohibited ground of discrimination; secondly, the discriminatory behaviour must occur in a sphere of activity regulated by discrimination law (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); thirdly, the impugned behaviour must amount to a statutorily recognised form of discrimination. Legal regulation does not extend to discriminatory behaviour in the private sphere, and it is primarily the 'privacy barrier'<sup>152</sup> which is called up to exclude caste from the reach of discrimination law. Opponents of caste discrimination legislation argue that casteist behaviour is restricted to private associational preferences:

There is little evidence to suggest that there has been a concerted effort to wilfully keep people out of jobs, public appointments, schools, universities and goods and services because of their caste. The HFB survey revealed that most of the experience on caste (sic) stemmed from social interactions between people and while making personal choices.<sup>153</sup>

Yet the boundary between associational preferences and discrimination in regulated fields – for example between 'personal choices' in 'business networks'<sup>154</sup> and discrimination in the provision of goods and services – may not always be clear-cut. Furthermore, this boundary is not immutable but open to contestation (domestic violence being an example of 'private' behaviour brought into the ambit of the law).<sup>155</sup> The public-private distinction, and the boundaries between public and private spheres, have been challenged by feminist legal theorists (after all, what constitutes 'private' behaviour is itself a legal construct),<sup>156</sup> and the exclusion of 'private contact discrimination' from legal regulation remains a key criticism of liberal discrimination law.<sup>157</sup>

The government's primary argument against legal regulation of caste discrimination is the want of evidence of discrimination in regulated fields. In 2005, in response to CERD's recommendation that the UK include in domestic legislation a prohibition of descent-based discrimination,<sup>158</sup> the then Parliamentary Under-Secretary of State for the Home Office stated:

151 See N. Bamforth, M. Malik and C. O'Connell, *Discrimination Law: Theory and Context* (London: Sweet and Maxwell, 2008) 38–41.

152 *ibid.*, 857.

153 n 133 above, 16.

154 n 120 above, 12.

155 See K. Kelly, *Domestic Violence and the Politics of Privacy* (New York: Cornell University Press, 2003) 3–6; M. Burton, *Legal Responses to Domestic Violence* (Abingdon: Routledge-Cavendish, 2008); 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.

156 *ibid.* Privacy is nevertheless recognised as serving important functions; see Kelly, *ibid.*, 140–141.

157 n 151 above, 857.

158 See CERD, concluding observations on the UK's sixteenth and seventeenth reports, August 2003, n 16 above.

We have noted CERD's comments about caste based discrimination, but also that they have made no suggestion that this is a problem in the UK. *We have seen no evidence that there is a particular problem in the UK*, but would be happy to consider any that is put to us (italics added).<sup>159</sup>

In July 2008 the government again cited lack of evidence as the reason for its decision not to legislate for caste discrimination.<sup>160</sup> While existing research on caste discrimination in the UK is limited and has not focused sufficiently on discrimination in regulated fields,<sup>161</sup> this does not mean that such discrimination is non-existent. Rather, it might simply indicate that the relevant research has not been conducted – or that discrimination is hidden. The 2006 HFB report in its recommendations states '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 community*' (italics added).<sup>162</sup> The 2006 DSN-UK report includes two case studies of caste discrimination in employment (one in the public sector, neither of which led to legal intervention) and references to private sector workplace discrimination. One respondent commented that discrimination at work was usually discreet, not open, and that 'most of the businesses are small – if you complain, the person who will listen to your complaint is from the 'higher' caste . . . so no action is taken.'<sup>163</sup> At the time of writing there have been no reported cases in the UK involving caste discrimination allegations; lack of understanding of caste was cited as one reason for its invisibility by a trade union official involved in an unfair dismissal case in south London involving such allegations (the case was resolved internally).<sup>164</sup> 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. However, the applicant failed to establish a *prima facie* case of discrimination and the claim was dismissed on appeal.<sup>165</sup>

There is opposition from within the South Asian community to suggestions that caste discrimination occurs in the UK to the extent alleged by Dalit and Ambedkarite organisations, or indeed at all. The DSN-UK study was reportedly challenged as exaggerated by the late Piara Khabra, former MP for Ealing South-

159 Fiona Mactaggart MP, 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, 17, 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.

160 See n 12 above.

161 See eg n 28 above and n 133 above.

162 n 120 above, 12.

163 See n 28 above, 14–15.

164 Telephone interview with UK trade union official, 23 November 2006. Consistent with Manchester Metropolitan University's approval for my research, interviews were conducted and interview notes have been stored in accordance with the University's Guidelines on Good Research Practice. Interviewees were granted confidentiality and anonymity.

165 *Mazumder v University of Michigan* [2006] WL 2310822 (6th Cir.(Mich.)), [2006] Fed. App. 0570N. See also C. Rajghatta, 'Michigan Prof Caste Off By Fellow Desi' *Times Of India* 27 June 2003; S. Roy, 'Indian American Files Lawsuit Alleging Caste Bias' *Pacific News Service Civil Liberties Digest* 9 July 2003.

all.<sup>166</sup> The HFB contend that 'caste discrimination is not endemic in British society and there is no role for caste in the provision of education, employment or goods and services.'<sup>167</sup> The Hindu Council UK (HCUK) has declared itself 'not aware of caste discrimination here in the UK',<sup>168</sup> indeed, according to its Director the caste system has been 'demolished' in the UK in one generation by 'a change in socio-economic landscape.'<sup>169</sup> This comment underestimates the resilience of caste as an institution. Although studies suggest that the younger generation attaches less importance to caste than their parents, repudiation of caste<sup>170</sup> appears to vary according to sphere of activity, and the extent to which it is subject to class, religion, education and caste and regional background is unclear.<sup>171</sup> I conclude that, given the existence of caste and casteism in this country, it is premature and unsafe to assume that discrimination in regulated fields does not occur and that legal regulation of caste discrimination is therefore unjustified.

## UK DISCRIMINATION LAW AND CASTE

### The aims and limits of discrimination law

Discrimination in its non-legal sense means to differentiate or distinguish between. The purpose of discrimination law is to prohibit 'those distinctions that are regarded as *invidious*: for example those made on grounds of race, sex, sexual orientation, age, disability or religion'.<sup>172</sup> The primary liberal justification for discrimination law is the principle of equality<sup>173</sup> (a concept now understood in terms of equality of outcomes or results rather than simply equality of opportunity or formal equality).<sup>174</sup> British discrimination law is designed 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. From a liberal perspective, discrimination legislation is both a coercive tool and an educative device,<sup>175</sup> 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'.<sup>176</sup> Legal regulation of caste discrimination would serve both functions, redefining behaviour hitherto considered acceptable as

166 H. Muir, 'Caste divide is blighting Indian communities in UK, claims report' *The Guardian* 4 July 2006.

167 See n 133 above, 28.

168 R. P. Sharma, *The Caste System* (Hindu Council UK: London, 2008) 3.

169 J. Lakhani, 'Caste and Conversion' 14 May 2007, at <http://www.hinducounciluk.org/newsite/articledet.asp?rec=160> (last visited 13 May 2008).

170 See A. Brah, *Cartographies of Diaspora: Contesting Identities* (London: Routledge, 1996) 18.

171 See Nesbitt, n 38 above, 103–110; Din, n 35 above, 101–117; Jacobson, n 140 above, 85; N. Meer, 'The politics of voluntary and involuntary identities: are Muslims in Britain an ethnic, racial or religious minority?' (2008) 42 *Patterns of Prejudice* 61, 66.

172 See n 151 above, 18.

173 A. Lester and G. Bindman, *Race and Law* (London: Longman, 1972) 73. See also n 151 above, 167.

174 On the concept of equality and discrimination law see n 151 above, 166–194 and on liberalism and discrimination law see 194–232.

175 See Lester and Bindman, n 173 above, 85–87.

176 See Burton, n 155 above, 7.

socially unacceptable as well as actionable legally.<sup>177</sup> Actionable discrimination can assume four forms – direct and indirect discrimination, harassment and victimisation. Direct discrimination would apply to descent as a new sub-category of racial grounds, or to caste, if deemed to fall within racial grounds or religion, and occurs if on prohibited grounds a person is treated less favourably than other persons are or would be treated. Indirect discrimination on grounds of race or ethnic or national origins targets structural and institutional discrimination and occurs where, subject to a proportionality test, the effect of an apparently neutral provision, criterion or practice, equally applied, puts or would put members of a group defined by a protected ground, including the individual complainant, at a particular disadvantage compared to others.<sup>178</sup> Prior to the introduction of religious discrimination legislation, religious discrimination in certain circumstances was captured by indirect race discrimination.<sup>179</sup> In the absence of caste legislation, the classification of caste discrimination as indirect race discrimination is likely to be elusive; it would depend on the impact of the impugned provision, criterion or practice on, for example, South Asians and specifically on Dalits for reasons of caste. If caste is brought within the ambit of legislation, indirect discrimination provisions would automatically be available. Discriminatory behaviour may also amount to harassment, now an independent form of discrimination, defined in relation to race, ethnic or national origins and religion as engaging in unwanted conduct which has the purpose or effect of violating another's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for him, the test for which is partly subjective.<sup>180</sup> Religious harassment can occur in employment, and racial harassment in fields including employment, the provision of goods, facilities and services, vocational training and partnerships. Discriminatory harassment on racial or religious grounds may offer an as yet unexplored remedy to casteist bullying occurring in regulated fields.

Proposals to prohibit caste discrimination evoke a number of political and policy objections. Caste is a migrant group phenomenon. Legal regulation of caste discrimination may be perceived, fairly or unfairly, as targeting a specific minority population, or as interference by white policy-makers in minority religious and cultural matters. Recognition of an ever wider catalogue of protected characteristics risks over-extension of the law, resulting in a 'potential explosion'<sup>181</sup> or proliferation<sup>182</sup> of beneficiaries. Legislation might also have the unintended effect of reinforcing caste as an institution, perpetuating rather than dissolving caste iden-

177 See N. Lacey, 'From Individual to Group' in B. Hepple and E. Szyszczak (eds), n 106 above, cited in M. Connelly, *Townshend-Smith on Discrimination Law: Text, Cases and Materials* (London: Cavendish, 2004) 103.

178 Indirect discrimination on grounds of race, ethnic or national origins is 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.

179 See n 151 above, 962.

180 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.

181 Lacey, n 177 above, 118.

182 O. Fiss, '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, 748.

tities and encouraging a flood of claims. In India, some argue that affirmative action policies have contributed to the consolidation of caste identities as individuals seek the benefits of ‘Scheduled’ status;<sup>183</sup> but adoption of similar policies is not being proposed, casteism in this country is not *less* likely to disappear as a result of anti-discrimination legislation and the danger of mischievous or abusive claims is no greater than with other forms of discrimination. Bringing caste within the discrimination ‘tent’ would reflect international human rights law, while the ‘proliferation’ argument sits uneasily with Article 2 of the UDHR,<sup>184</sup> especially since UK discrimination law already protects characteristics not enumerated therein (for example age, disability and sexual orientation). Arguments from culture against regulating caste discrimination presuppose a cultural and social homogeneity within South Asian communities which is not supported by the evidence.<sup>185</sup> An extensive literature exists on the phenomenon of internal discrimination experienced by minorities within minorities, often invisible to the majority community or concealed by state policies of multicultural accommodation of wider minority group identity, norms and practices.<sup>186</sup> Whether state intervention is perceived as an attack on minority culture or religion depends on whose voices are considered as legitimately representative of the group in question, the extent to which intra-group diversity, power hierarchies and division are recognised<sup>187</sup> and the appetite of the wider minority group to negotiate solutions to internal challenges to its power hierarchies and dominant norms. The government’s ‘reification’ of faith communities and religion<sup>188</sup> has resulted in caste being seen exclusively through the lens of religion, specifically Hinduism. However, as I have shown, notwithstanding its doctrinal and ideological basis in orthodox Hinduism, caste in Britain is not exclusive to Hinduism and cannot be reduced to a set of ‘religious rites, beliefs or practices’ outside the remit of government comment or legal intervention.<sup>189</sup> It is for these reasons that I argue below that, bar one exception, religious discrimination law is neither a viable nor an appropriate tool for addressing caste discrimination. Finally, if caste discrimination legislation were

183 A rich literature exists on India’s ‘reservation’ policies. See L. Dudley Jenkins, *Identity and Identification in India: Defining the Disadvantaged* (London: RoutledgeCurzon, 2003); Galanter, n 20 above; Menski, n 106 above.

184 Article 2 UDHR defines discrimination as distinctions of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status; see n 68 above.

185 See n 119 above, 2. See also Ballard, n 29 above, 4 and n 35, n 38 and n 39 above.

186 See L. Volpp, ‘Feminism versus Multiculturalism’ (2001) 105 *Columbia Law Review* 1181; A. Shachar, ‘On Citizenship and Multicultural Vulnerability’ (2000) 28 *Political Theory* 64, 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: Cambridge University Press, 2004) 91–95; L. Green, ‘Internal Minorities and their Rights’ in W. Kymlicka (ed), *The Rights of Minority Cultures* (Oxford: Oxford University Press, 1995) 256–274. 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’; see n 5 above, 76.

187 Mahajan, *ibid* 91. See also A. Eisenberg, ‘Identity and liberal politics: the problem of minorities within minorities’ in Eisenberg and Spinner-Halev (eds), *ibid* 249–270.

188 See Nesbitt, n 38 above, 8.

189 See HC Deb vol 419 col 1603W 1 Apr 2004.

to be introduced, the question remains of how to incorporate caste into UK discrimination law. This question will be addressed in section six.

### Accommodating caste

UK discrimination law has developed in an ad-hoc fashion since the Race Relations Act 1965 made refusal of access to public spaces on racial grounds illegal. Since then, successive pieces of legislation have provided protection in different spheres of activity depending on the prohibited grounds (or ‘protected characteristic’) and type of discrimination in question. Discrimination is currently prohibited on six grounds – 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. Of these, only racial or religious grounds contend as possible legal homes for caste. The remainder of this section will examine the existing prohibitions of racial and religious discrimination and the problems, legal and strategic, with relying on these grounds to seek redress against caste-based discrimination.

### Caste and racial discrimination

Protection against racial discrimination in the UK is provided by the Race Relations Act 1976<sup>190</sup> (RRA) as amended by the Race Relations (Amendment) Act 2000<sup>191</sup> and the Race Relations Act 1976 (Amendment) Regulations 2003<sup>192</sup> which implement the Race Directive 2000.<sup>193</sup> The RRA repealed the 1965 and 1968 race relations legislation which prohibited direct discrimination on grounds of race, colour, national or ethnic origin.<sup>194</sup> Its purpose was to extend the scope of the 1968 legislation by introducing a prohibition of indirect discrimination – a concept imported from US civil rights legislation – and to strengthen its enforcement provisions.<sup>195</sup> The RRA prohibits direct<sup>196</sup> and indirect discrimination,<sup>197</sup> harassment<sup>198</sup> and victimisation.<sup>199</sup> By 1969 the UK was a party to ICERD which, as previously stated, in Article 1(1) defines racial discrimination as any distinction, exclusion, restriction or preference based on race, colour, descent or national or

190 n 19 above.

191 Race Relations (Amendment) Act 2000 c 34 (London: HMSO, 2000).

192 Race Relations Act 1976 (Amendment) Regulations 2003; SI 2003/1626 (London: HMSO, 2003).

193 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.

194 Proposals to amend the 1968 Race Relations Bill by prohibiting discrimination on the 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; see Lester and Bindman, n 173 above, 97.

195 *Racial Discrimination* White Paper Cm 6234 (1975) 25–27. See also n 151 above, 46–48.

196 RRA 1976, s 1(1)a.

197 See n 178 above.

198 See n 180 above.

199 RRA 1976, s 2(1).



ethnic origin. ICERD has not been incorporated into UK law. Instead, the RRA is the primary legislative means for implementing the UK's Convention obligations. Section 3(1) of the RRA defines 'racial grounds' as 'colour, race, nationality or ethnic or national origins'<sup>200</sup> – a definition which does not include the ICERD descent category. There is no reference to the international legal definition of racial discrimination in the 1975 White Paper *Racial Discrimination*, which simply states that the new Bill will contain a similar definition of the grounds of unlawful discrimination as found in the 1968 Act, save for widening 'national origins' to include nationality and citizenship.<sup>201</sup> Neither is there any reference to the international definition in the 1976 Parliamentary Committee debates on the interpretation clause of the draft legislation.<sup>202</sup>

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.<sup>203</sup> Crucially, however, the RRA does not contain the legal category – descent – which includes caste. Absent descent, application of the RRA to caste discrimination depends on whether caste falls into one of the existing section 3(1) categories. 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. However there has long been overlap in the usage and application of the terms race and caste.<sup>204</sup> More recently the theory, central to the colonial project, that caste has racial origins, was revived by Dalit activists seeking to bring caste under the ambit of ICERD based on the ideological similarities between racial and caste discrimination<sup>205</sup> and, in some cases, asserting biological racial distinctions between Dalits and non-Dalits.<sup>206</sup> Although attempts to secure official debate on caste discrimination at WCAR were unsuccessful, the question of caste discrimination as a form of *racial* discrimination was catapulted into the international human rights arena, culminating in CERD's 2002 general recommendation that caste falls within ICERD, under the descent limb. Discourses of ethnicity are also applied to caste. For these reasons the question of whether castes are groups defined by reference to race or ethnic origins for RRA purposes is considered below.

200 Nationality was introduced into s 3(1) of the RRA following the House of Lords decision in *Ealing London Borough Council v Race Relations Board* [1972] 1 All ER 105 (HL) that the word national in the term national origins meant national only in the sense of race, not nationality or citizenship.

201 *ibid.*

202 See 1975–1976 Race Relations Bill, HC Standing Committee A col 83–130 29 April – 4 May 1976.

203 See n 16 above.

204 See Bayly, n 20 above, 103–138; Ghuriye, n 21 above, 114–138. See also 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> (last visited 14 September 2008) on the semantic kinship between race and *casta*.

205 See Report of the WCAR Consultation, The Rockefeller Center, Bellagio, Italy, 24–28 January 2000; UN Doc. A/CONF.189/PC.1/10, 8 March 2000, 50.

206 See Bayly, n 20 above; see also V.T. Rajshekar, *Dalit: The Black Untouchables of India* (Atlanta: Clarity Press Inc, 1987) 5, 39; G. Shah et al, n 49 above, 23; Thorat and Umakant (eds), n 72 above; A. Pinto, 'UN Conference Against Racism: Is Caste Race?' *Economic and Political Weekly* 8 July 2001, 2817–2820; Bob, n 72 above.

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Race in common with the other RRA section 3 (1) categories is not defined and there is little RRA case law on the meaning of race,<sup>207</sup> a notoriously imprecise term. 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.<sup>208</sup> 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.<sup>209</sup> More recently, academic analysis of the constructed nature of race and the racialisation of new social groups has sparked debate about legal protection against emerging forms of racial discrimination such as cultural racism.<sup>210</sup>

According to Lord Fraser of Tullybelton in *Mandla v Dowell Lee*, the leading case on the definition of racial group under the RRA, 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), but 'must have used the word in some more popular sense'.<sup>211</sup> Race in the popular sense calls up wider markers such as culture, language and political and economic power, or lack of,<sup>212</sup> yet the term nevertheless continues to imply shared geographical origins and hereditary physical traits such as skin colour and physical appearance, irrespective of linguistic, cultural, national or religious factors.<sup>213</sup> Caste possesses some features associated with race in its wider sense, but this does not mean that caste is the same as race. In the nineteenth century scholars searching for a scientific explanation for the caste system failed to identify pan-Indian or regional phenotypical profiles of Untouchable groups.<sup>214</sup> Ambedkar dismissed arguments that castes constituted separate racial groups, either in the biological or the popular 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 the facts (*italics added*).<sup>215</sup>

207 Connolly, n 177 above, 139.

208 D. Ingram, *Rights, Democracy, and Fulfillment in the Era of Identity Politics: Principled Compromises in a Compromised World* (Lanham: Rowman and Littlefield Publishers, 2004) 54.

209 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.

210 See Meer, n 171 above, 61–81; see also n 151 above, 822–832.

211 *Mandla and another v Dowell-Lee and another* [1983] 1 All ER 1062, 1066.

212 See W. Felice, 'The UN CERD: Race, and Economic and Social Human Rights' (2002) 24 *Human Rights Quarterly* 205, 205–207.

213 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.

214 See Bayly, n 20 above, 126–138.

215 Ambedkar, n 50 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'.<sup>216</sup> Successive Indian state reports to CERD have also emphasised India's multi-racial, multi-cultural nature, maintaining 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 keep caste beyond the reach of international scrutiny as a form of racial discrimination.

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.<sup>217</sup> However the existence of such genetic affinities does not mean that caste groups are genetically homogenous or distinct; indeed, the opposite has been established:<sup>218</sup> there is 'no clear congruence of genetic and geographical or socio-cultural affinities' among caste groups.<sup>219</sup> Moreover, 'while genes may reflect social patterns, social status is not genetic'.<sup>220</sup> The argument that Dalits as a whole or individual caste groups can be distinguished from each other on biological or genetic grounds has not been tested in the UK courts. The issue was, however, 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.<sup>221</sup> Proving, the existence of sufficiently distinctive biological or genetic caste characteristics would be a complex, if not an impossible, task. Conversely, a popular rather than a scientific interpretation of race would make it no easier to persuade a court that South Asians of Dalit origin are a group defined by reference to race within the meaning of RRA section 3(1), as distinct from South Asians of non-Dalit origin, for the common denominator between those of Dalit origin is not race – whether in the biological sense of genetic ancestry, skin colour

216 *ibid* 49.

217 See M. Bamshad et al, 'Genetic Evidence on the Origins of Indian Caste Populations' (2001) 11 *Genome Research* 994; see also A. Basu et al, 'Ethnic India: A Genomic View, With Special Reference to Peopling and Structure' (2003) 13 *Genome Research* 2277.

218 See Basu et al, *ibid* 2284.

219 See Basu et al, *ibid* 2277. See also 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.

220 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, at <http://www.uwm.edu/Dept/21st/projects/GeneticDiversity/jorde.html> (last visited 13 May 2008).

221 See *GV Rao v LHV Prasad and Others*, dismissal of Special Leave Petition, 6 March 2000, at <http://judis.nic.in/supremecourt/WebForm2.aspx> (last visited 14 September 2008). See also J. Singh, 'Court Rules Out Caste Differences' *The Guardian* 7 March 2000.

or physical appearance, or in the wider, popular sense of culture, language or geographical origin – but caste. Victims of caste discrimination ‘are singled out not because of a difference in physical appearance or race, but by their membership in an endogamous social group that has been isolated socially and occupationally from other groups in the society’.<sup>222</sup> This is why the UN Sub-Commission has captured caste discrimination in the new legal category of discrimination based on work and descent, and why CERD has deemed caste a sub-category of descent rather than the more familiar – to Western minds – category of race: ‘the problem with most Western understandings of caste is precisely its peculiarity’ says Deepa Reddy, citing Dalit activist Prakash Louis.<sup>223</sup> As ‘chimerical categories’<sup>224</sup> caste and race are similar but distinct. While a successful argument that caste is subsumed within race in the RRA would benefit individual claimants, strategically such an approach would mask the specificities of caste and the importance, legally, of equating caste with nothing other than itself.<sup>225</sup>

### *Caste and Ethnic Origins*

We now turn to consider whether Dalits collectively or individual Dalit *jatis* constitute a group or groups defined by reference to ethnic origins within the meaning of the RRA. Like race, the meaning of ethnic origins or ethnicity is elusive but is understood in a culturally-oriented rather than a purely ‘racial’ or physical sense<sup>226</sup> as a term which ‘acknowledges the place of history, language and culture in the construction of subjectivity and identity’.<sup>227</sup> In *Mandla v Dowell Lee* the House of Lords held that the term ‘ethnic’ in section 3(1) of the RRA was to be construed relatively widely in a broad cultural-historic sense.<sup>228</sup> Lord Fraser, citing Richardson J in *King-Ansell v Police* (New Zealand),<sup>229</sup> 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 – firstly, a distinct, living and long shared history as a group and, secondly, 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 common geographical origins or descent, a common language (although not necessarily peculiar to the group), a common literature peculiar to the group, a common religion different from that of neighbouring groups or the surrounding community, and being a minority or an oppressed or dominant group within a larger community.<sup>230</sup> Applying these characteristics, the House of Lords found in *Mandla v Dowell Lee* that Sikhs were a group defined by reference to ethnic origins as they were drawn from a distinct cultural group

222 Goonesekere, n 18 above, para 7.

223 D. Reddy, ‘The Ethnicity of Caste’ (2005) 78 *Anthropological Quarterly* 543, 567.

224 S. Sabir, ‘Chimerical Categories: Caste, Race and Genetics’ (2003) 3 *Developing World Bioethics* 170.

225 See n 223 above, 572.

226 S. Poulter, *Ethnicity, Law and Human Rights* (Oxford: Clarendon Press, 1998) 4.

227 S. Hall, ‘New Ethnicities’ in J. Donald and A. Rattansi (eds), ‘Race’, *Culture and Difference* (London: Sage, 1992) 252–259, 257.

228 See n 211 above, 1067.

229 *King-Ansell v Police* [1979] 2 NZLR 531, 543.

230 See n 211 above, 1067.

even though they were not racially distinguishable from other people in the Punjab. Jews and Gypsies (in the narrow sense of Roma rather than the wider sense of new age travellers)<sup>231</sup> – but not Rastafarians<sup>232</sup> or Muslims<sup>233</sup> – have also been held to fall within the purview of ‘ethnic origins’.

Absent descent, could caste be included in ethnic origins? Ethnic origins is a potential legal home for new racialised groups<sup>234</sup> and the ethnicity of caste is a familiar topic among caste scholars. The question of whether Dalits could identify themselves or be identified by others as an ethnic group has also been raised within CERD.<sup>235</sup> There are however difficulties in characterising caste as ethnicity under the RRA, as well as strategic disadvantages to doing so. 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 single, homogenous group. For centuries, according to Mendelsohn and Vizciany, Dalits were ‘dispersed and highly fragmented congeries of subordinated communities’ separated from each other geographically, regionally, linguistically and culturally, without a common historical identity or a common history of resistance to oppression, the distinctions and hierarchies between Dalit *jatis* often as rigorously enforced as those between Dalit and non-Dalit *jatis*; it was not until the early twentieth century that Dalits emerged as a nationally identifiable political and social entity.<sup>236</sup> Although Dalits in India have become an increasingly important political category (from the emergence in the 1970s of the Dalit Panthers and the Dalit writers’ movement to the recent electoral success of the Bahujan Samaj Party<sup>237</sup> and its female Dalit leader Mayawati) there are still significant regional, linguistic, cultural and religious divisions between Dalits and it is unclear whether Dalits collectively could fulfil the *Mandla v Dowell Lee* criteria. In *Nyazi v Ryman*s Muslims were denied ethnic group status due to their linguistic, geographical and racial heterogeneity.<sup>238</sup> Conceivably individual Dalit *jatis* could fulfil the *Mandla v Dowell Lee* criteria, but it is submitted that collectively Dalits would struggle to demonstrate sufficient commonality of geography, language, religion and culture and a sufficiently distinct, long shared history *as a group*.

While a purposive interpretation of ethnic origins (or race) may capture groups subject to emerging forms of racism, there are problems in applying this approach to caste. Caste has flavours of both race and ethnicity but also important diver-

231 *CRE v Dutton* [1990] QB 783; [1989] 1 All ER 306; [1989] IRLR 8, CA.

232 *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 RRA, s 3(1).

233 *Nyazi v Ryman*s, 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.

234 See n 151 above, 822–832. See also Meer, n 171 above; K. Dobe and S. Chhokar, ‘Muslims, Ethnicity and the Law’ (2000) 4 *International Journal of Discrimination and the Law* 369–386.

235 CERD member Mr Prosper, CERD, Summary Records of the 1796<sup>th</sup> meeting, 2 March 2007; UN Doc CERD/C/SR.1796, 38.

236 Mendelsohn and Vicziany, n 46 above, 2.

237 The Bahujan Samaj Party (BSP) meaning ‘party of the majority’ was established in 1984 to represent ‘Dalit-Bahujans’ – a political term encompassing Dalits, Tribals and OBCs, together comprising around three-quarters of India’s population. See [www.bahujansamajparty.com/](http://www.bahujansamajparty.com/) (last visited 1 February 2008). See also Reddy, n 238 above.

238 See n 233, above. Meer critiques the ‘normative grammar of race’ for denying Muslims recognition as an ethnic group in law; see n 171 above, 67–71.

gences from these categories. It is difficult to envisage the basis on which a court could equate *varna* or *jati* (or *biraderi*) with race for RRA purposes. ‘Ethnicising’ caste under British law may have unintended consequences including the elevation of *jati* identities into separate ‘freestanding’ ethnic identities; whereas conceptualising caste discrimination as a form of descent-based racial discrimination involves acknowledgment but not reification of *jati* identity – although the distinction is perhaps a fine one. Yet in the absence of descent or a similar category, ethnic origins may be the only viable ground on which to base a claim of caste discrimination.

### *Caste and Religious Discrimination*

Article 9 of the European Convention on Human Rights (ECHR)<sup>239</sup> provides that everyone has an absolute right to freedom of thought, conscience and religion and a qualified right to manifestation of religion and belief. It prohibits interference with the individual right to religious freedom, that is, restriction or denial by the State (‘public authorities’ under the Human Rights Act 1998)<sup>240</sup> of the right to hold religious beliefs and, subject to qualification, to express and practise those beliefs. In contrast, religious discrimination law seeks to protect individuals from discriminatory conduct on grounds of religion or belief by public or private actors in specific spheres. For reasons of space I cannot consider here the potential conflict of rights between the manifestation of views (including casteist views) based on religious beliefs and anti-discrimination protection, or the overlap between Article 9 rights and caste discrimination, save to observe that, *prima facie*, interference on grounds of caste with the holding or manifestation of religious belief – for example denying access on caste grounds to public places of worship – falls within the ambit of Article 9.<sup>241</sup>

Proposals to include religion as a ground of discrimination in the RRA were debated in Parliament<sup>242</sup> but it was agreed that the purpose of the legislation was to combat racial discrimination, to introduce religion might have unintended and unexpected effects and that religious discrimination could be covered by separate legislation.<sup>243</sup> It was not until 2003 that legislation addressing discrimination on grounds of religion or belief was introduced. There are currently two instruments in force. The Employment Equality (Religion or Belief) Regulations 2003<sup>244</sup> implement the UK’s obligations under the religion and belief strand of the Employment Equality Directive 2000<sup>245</sup> prohibiting direct and indirect discrimination, victimisation and harassment on grounds of religion or belief in employ-

239 Treaty Series No 071/1953: Cm 8969. UK Ratification 8 March 1951.

240 Human Rights Act 1998, c 42, s 6.

241 On conflicts of rights see n 151 above, 953–954, 964; on the distinction between the Article 9 ECHR right to religious freedom and statutory prohibitions of religious discrimination see n 151 above, 866–874; See also N. Addison, *Religious Discrimination and Hatred Law* (London: Routledge-Cavendish, 2007) 12–26.

242 See n 202 above, cols 84–85, 29 April 1976.

243 *ibid*, 96–118.

244 See n 180, above.

245 Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation; OJ L 303/16, 2 December 2000.

ment and vocational training only. This protection is extended by Part 2 of the Equality Act 2006<sup>246</sup> which prohibits direct or indirect discrimination or victimisation on the grounds of religion or belief or lack of religion or belief in the provision of goods, facilities and services, education, the use and disposal of premises, and the exercise of public function (sections 44–52). In both instruments religion or belief means any religion or religious or philosophical belief, or lack of religion or belief.<sup>247</sup> Section 44 of the 2006 Act defines religion as any religion in line with Article 9 ECHR, and includes religions and religious beliefs ‘widely recognised in this country’ (including Rastafarianism, Baha’is, Zoroastrians and Jains), as well as denominations or sects within a religion.<sup>248</sup> The main limitation on what constitutes a religion is that it must have a clear structure and belief system,<sup>249</sup> this being ultimately a matter for the courts to decide.

Both the 2003 Regulations and the 2006 Act provide that direct discrimination occurs where, on grounds 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.<sup>250</sup> Direct discrimination can thus occur even if it is not B’s religion or belief but the religion or belief of another person (for example someone with B) which motivates the less favourable treatment by A, and regardless of whether A is of the same religion or belief as B, or, for Equality Act 2006 purposes, is mistaken as to B’s religion or belief.<sup>251</sup> Crucially, however, both pieces of legislation exclude from their ambit less favourable treatment of B which occurs *solely on grounds of A’s religion or belief*, for example ‘where A feels motivated to take particular action because of what his religion or belief requires’.<sup>252</sup> Discrimination on grounds of caste will fall within the ambit of religious discrimination legislation only if considered a form of discrimination on grounds of religion or belief. This depends on whether the courts consider a person’s ascribed caste status as ‘part of’ or integral to their religion or belief, or a characteristic distinct from religion or belief. Leslie contends that Dalits in Britain are ‘invariably defined by caste’ rather than by membership of a wider religious tradition, or else are ‘marginalised as a [caste-based] sub-category of the religious tradition in question’.<sup>253</sup> Nesbitt likewise argues that the experiences of young British Ravidasis ‘show how caste-based experience challenges simple attempts at classifying people as ‘Hindu’ or ‘Sikh’.<sup>254</sup> Subject to the exception discussed below, I argue that it is a mis-conceptualisation of caste to conflate caste status with religion, notwithstanding the fact that caste as an institution finds support in orthodox Hindu texts.

246 See n 7 above.

247 Equality Act 2006, s 44; Equality Act 2006, s 77(1)1 which replaces the original definition of religion or belief in reg 2(1) of the 2003 Regulations.

248 Explanatory Notes to the Equality Act 2006 (London: HMSO, 2006) para 170.

249 *ibid.*

250 Equality Act 2006, s 45 (1); Equality Act 2006, s 77(2) which replaces regulation 3(1)a of the 2003 Regulations.

251 Equality Act 2006, s 45(2).

252 See n 248 above, para 173. See also Equality Act 2006, s 45 (1) and Equality Act 2006, s 77(3) which deletes regulation 3(2) of the 2003 Regulations.

253 See Leslie, n 39 above, 69, 71, citing M. Jurgensmeyer, *Religion as social vision: the movement against untouchability in 20<sup>th</sup> century Punjab* (Berkeley: University of California Press, 1982) 92.

254 See Nesbitt, n 38 above, 98.

The following hypothetical scenarios illustrate my argument. 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 (it being possible under both the 2003 Regulations and the Equality Act 2006 to discriminate against members of the same religion as oneself).<sup>255</sup> 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 and that therefore this is a case of religious discrimination. I argue that this conflation of caste status and religious identity is erroneous. Discrimination on grounds of caste and discrimination on grounds of 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. 'Lower-caste Hindu' is an ascribed socio-religious status rather than a distinct religion or belief within the meaning of the current legislation.<sup>256</sup> 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 Hindus was highly controversial among some Hindus.<sup>257</sup> It is on grounds of caste rather than religion that Dalits have been and continue to be denied entry to temples and public places.<sup>258</sup> By collapsing religion and caste into each other the distinct nature of each is lost. Current legislation is not intended to capture, indeed specifically excludes, discriminatory behaviour triggered by A's own religious beliefs – for example, religious beliefs about caste or untouchability, or attitudes to women or homosexuality. Except in those cases (discussed below) where there is a conflation of caste status and religious identity, discrimination on grounds of caste status cannot be captured by current provisions on religious discrimination.

The conceptual distinction between caste and religion becomes apparent when B is a non-Hindu and caste and religion are doctrinally de-coupled. Discrimination by a Hindu (A) against a non-Hindu (B) on grounds of B's known or presumed caste cannot fall within the religious discrimination provisions, for it is clear that the trigger for A's casteist behaviour is not B's religion but B's caste. Such behaviour may be a product of A's own religious beliefs about caste but, as before, discrimination by A on grounds of A's religion or belief is explicitly excluded from the ambit of the current provisions. The above argument also applies to discrimi-

255 See Addison n 241 above, 64. I am grateful to Neil Addison for sharing his views on caste discrimination and religious discrimination law with me.

256 A similar 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 sub-set of racial grounds; see *Racial Discrimination White Paper*, n 195 above, 23.

257 See Galanter, n 20 above, 25–26. See also Ambedkar, 'Outside the Fold' in V. Moon (ed), *Unpublished Writings, BAWs Vol 5* (Bombay: The Education Dept, Govt of Maharashtra, 1989) 19–26.

258 See *Suntharalingham v Inspector of Police, Kankesanturai* [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. See also n 107 above.



nation on grounds of caste by a non-Hindu against another non-Hindu, whether or not members of the same religion. Discrimination on grounds of religion must be triggered by the religion or belief of the victim. Discrimination on grounds of caste cannot be conflated with discrimination on grounds of religion or belief where the victim is an adherent of a religion lacking any doctrinal link with caste and whose ascribed caste status cannot possibly be said to be 'part of' their religion.

The possible exception to the non-application of religious discrimination law to caste discrimination arises in relation to the religious groupings discussed in section 2 above, such as Valmikiis, Ravidasis and Ambedkarite Buddhists, where religious identity overlaps with caste. Leslie describes how the Valmikiis – 'Untouchables' of both Hindu and Sikh origin – have abandoned 'stigmatic' Hindu and Sikh *jati* names for the religious name 'Valmiki'.<sup>259</sup> If the Valmikiis or other caste-specific religious groupings are found to be distinct sects of Hinduism or Sikhism, or independent religions with clear structures and belief systems, caste discrimination against members of such groups, although motivated by caste origins rather than religious affiliation, could theoretically be captured by the religious discrimination provisions as caste and religious identity are sufficiently conflated. The strategic drawback is that using religious discrimination legislation 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.<sup>260</sup> Using religious discrimination law to address caste discrimination would thus create an arbitrary divide between protected and unprotected victims of caste discrimination.

### UK discrimination law and caste: conclusions

Existing conceptualisations of discrimination in UK law do not adequately embrace caste. Only in a limited number of circumstances can religious discrimination law capture caste discrimination. Only by 'racing' or 'ethnicising' caste can caste discrimination be caught by existing racial discrimination legislation. In 2003 CERD recommended the introduction in domestic law of a prohibition of descent-based discrimination, preferably in a single law providing equal protection from all forms of racial discrimination prohibited by ICERD.<sup>261</sup> 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.<sup>262</sup>

There is currently no legal prohibition of caste discrimination in the UK and hence no unambiguous legal redress against such discrimination, should it occur.

259 See Leslie, n 39 above, 69.

260 I am grateful to Professor Patrick Olivelle for this example.

261 See UN Doc CERD A/58/18 (2003), n 16 above, 534.

262 See *Racial Discrimination* White Paper, n 195 above, 23.

The final section suggests how this gap in the UK's equality framework could be remedied.

## TOWARDS A SOLUTION

India as the world's major caste-affected country has adopted a multi-pronged approach to caste discrimination. Protected individuals are identified by a Caste Certificate, obviating the need for a statutory definition of 'Untouchable'. British discrimination law, in contrast, protects individuals from discrimination on the basis of statutorily defined characteristics. In common with European Union discrimination law it adopts a comparative approach to protection against direct and indirect discrimination.<sup>263</sup> Both direct and indirect discrimination claimants must demonstrate possession of a protected characteristic. Direct discrimination claimants must also identify a suitable comparator, either real or hypothetical.

### A statutory definition of caste

The inclusion of caste in domestic discrimination legislation either as an independent ground of discrimination or as a sub-category of racial grounds necessitates a statutory definition. One solution is to import a definition from international human rights law. CERD and the former UN Sub-Commission for the Promotion and Protection of Human Rights have addressed caste discrimination as a subset of the wider legal categories of descent-based discrimination (a form of racial discrimination) and discrimination based on work and descent. Although not defined in ICERD, descent has been authoritatively interpreted by CERD as including caste and analogous systems of inherited status. The new legal category of discrimination based on work and descent has been provisionally defined by the UN Special Rapporteurs by reference to features such as present or ancestral occupation, family or community origin and other related factors which apply but which are not exclusive to caste.<sup>264</sup> Both categories encompass discrimination on various grounds, including caste. Work and descent captures the linkage between hereditary occupation, ascribed social status and discrimination. However, its exact scope is uncertain and it is not recognised in any binding legal instrument. In contrast, descent is an existing legal category in a binding international instrument to which the UK is party, and forms part of the legal definition of racial discrimination in other jurisdictions, for example Australia<sup>265</sup> and the State of Queensland (which adopts the formulation 'descent or ancestry').<sup>266</sup>

263 Although the comparator model has been questioned, the government has not proposed to change this approach; see 'A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain', n 10 above, para 1.3(a).

264 Yokota and Chung, progress report, n 87 above, 6.

265 See Racial Discrimination Act 1975, Act No 52 of 1975 as amended, s 9; [http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/29DCCB9139D4CCD8CA256F71004E4063/\\$file/RDA1975.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/29DCCB9139D4CCD8CA256F71004E4063/$file/RDA1975.pdf) (last visited 13 May 2008).

266 See Anti-Discrimination Act 1991, Act No 85 of 1991, s 4; <http://www.legislation.qld.gov.au/LEGISLTN/ACTS/1991/91AC085.pdf> (last visited 13 May 2008).

Hong Kong's Race Discrimination Bill also proposes a definition of racial discrimination taken from Article 1(1) of ICERD.<sup>267</sup> Amendment of racial grounds in section 3(1) of the RRA to include descent would bring caste discrimination within the ambit of the RRA, in compliance with the UK's obligations under ICERD. Although the existing section 3(1) sub-categories are not defined, descent could be given a statutory definition in accordance with CERD general recommendation XXIV, using the 'analogous systems' formulation.<sup>268</sup> This would speak to policy objections that descent could be called up to address other forms of inherited status discrimination such as class, potentially opening a claims flood-gate.<sup>269</sup> The meaning of caste discrimination as a form of descent-based discrimination could be addressed in Explanatory Notes detailing the common features of such discrimination in the UK and the factors by which it may be recognized, by reference to the general recommendation and as elaborated by the UN Special Rapporteurs.<sup>270</sup> The descent approach affirms caste discrimination as a form of racial discrimination while extending the possibility of legal redress to victims of other forms of analogous descent-based discrimination.

An alternative to the international category of descent is the adoption of the narrower category of caste, as a new sub-category of racial grounds or as an independent characteristic. This would require the formulation of a domestic, diasporic definition of caste discrimination as practised across religious communities, which blocks claims based on the wider descent ground. This could be achieved by defining caste by reference to the concepts of *varna*, *jati* (or *zat*) and possibly *biraderi*, in conjunction with Explanatory Notes elaborating the key features by which these systems and the discrimination to which they give rise may be recognised.

### Target group, comparator and exceptions: policy implications

The *relative* nature of the caste system means that discrimination may be practised not only by the 'highest' castes or only towards people of Dalit origin, but at any level of the hierarchy towards any person whom the discriminator considers to be of lower status. This raises an important policy issue. Although caste discrimination is predominantly experienced by Dalits, discriminatory behaviour between non-Dalits also occurs, albeit of a qualitatively different nature to the former. Discriminators may be at the 'top' of the caste hierarchy or just slightly higher in ranking than the victim. The scope of the protected group must therefore be defined. A wide approach extends protection to any victim of discrimination on caste grounds, irrespective of their relative caste or *jati* position. Such protection could be achieved by a prohibition of caste-based discrimination which captures

267 Hong Kong Legislative Council Bills Committee on Race Discrimination Bill, 'Definition of "Race"' LC Paper No CB(2) 963/06–07(02), at <http://www.legco.gov.hk/yr06-07/english/bc/bc52/papers/bc520129cb2-963-2-e.pdf> (last visited 13 May 2008). ICERD has applied to the Hong Kong Special Administrative Region since 1 July 1997.

268 See n 15 above.

269 I do not suggest that class discrimination is not real or significant; however the regulation of class discrimination on grounds of class is beyond the scope of this paper.

270 See Yokota and Chung, progress report, n 87 above, 7.

any discrimination by a person (A) against another person (B) on grounds of B's caste or *jati*. A narrower approach limits legal protection to Dalits only. Whichever approach is adopted, courts must be enabled to verify the claimant's caste identity (where in doubt or disputed) and the relative ranking of their caste group *vis a vis* the alleged discriminator. This may be via reliance on expert evidence, as in Immigration Appeal Tribunal hearings, or via specially trained tribunal members and judges or specialist 'panels'.

Discrimination on grounds of caste may occur on the basis of actual or presumed caste status, or association with a person known or thought to be of lower caste status. In the case of race and religion UK law currently prohibits direct discrimination on the basis of actual possession of a protected characteristic, or perceived possession ('perception') or association with a person possessing a protected characteristic ('association'). The advantage of incorporating descent or caste as a sub-category of racial grounds is that *prima facie* perception and association protection would apply. Perception and association protection should also apply to caste if formulated as an independent characteristic. Selection of the comparator in direct discrimination cases will depend on the how widely the protected group is defined. 'Descent' protects a person from discrimination on grounds of caste and analogous systems of inherited status. A possible comparator would be a person of 'higher' status within the system in question or a person outside the system. 'Caste' limits protection to discrimination on grounds of caste status, inviting as a comparator a person of South Asian heritage of 'higher' caste status, or a person not of South Asian heritage.

The question of exceptions also arises. British discrimination law provides for specific exceptions from the requirement not to discriminate where there are legitimate reasons to treat people differently. The RRA permits direct discrimination where a genuine and determining occupational requirement exists, as long as the employer can show that it is both necessary and proportionate to do so.<sup>271</sup> It also permits the existence of restricted-membership private clubs and associations for people of a particular nationality, race or ethnic or national group, although not colour.<sup>272</sup> If descent or caste are introduced as a sub-category of racial grounds, caste-based private membership associations would *prima facie* benefit from the restricted membership exception. The danger is that this might reinforce caste-consciousness and caste identity, providing a cover of legitimacy to social separation on grounds of caste – unless caste is excluded from the exception as is colour. Religious discrimination law also permits exceptions. Under the Equality Act 2006 faith schools,<sup>273</sup> organisations relating to religion or belief,<sup>274</sup> religion or belief-related charities,<sup>275</sup> membership requirements of religion or belief-related charities<sup>276</sup> and the provision of religion or belief-related education training and welfare<sup>277</sup> are all exempted from the non-discrimination requirement. The

271 See n 19 above, s 4A(2).

272 See n 19 above, s 26.

273 Equality Act 2006, c 3 Part 2, s 59.

274 *ibid* s 57.

275 *ibid* s 58.

276 *ibid* s 60.

277 *ibid* s 61.

Employment Equality (Religion or Belief) Regulations 2003 provide an occupational requirement exemption where, subject to proportionality, having regard to the nature of the employment or the context in which it is carried out, being of a particular religion or belief is a genuine and determining occupational requirement, whether or not the employer has an ethos based on religion or belief,<sup>278</sup> or where the employer does have an ethos based on religion or belief and being of a particular religion or belief is a genuine occupational requirement for the job.<sup>279</sup> The use of religious discrimination law in those cases where it is possible to conflate caste and religious identity (see above) would activate the exceptions whereby, in the name of religion, differential treatment on grounds of caste would be lawful.

## CONCLUSION

Caste discrimination is not recognised in the UK's existing equality framework. It is not expressly prohibited under discrimination legislation, and has not been taken up by mainstream equality actors as a domestic issue.<sup>280</sup> I suggest three factors account for the apparent reluctance of policy makers and equality actors to associate themselves with caste discrimination. These are, first, insufficient awareness and understanding of caste and discrimination on grounds of caste, compounded by the reluctance of victims to come forward and the absence hitherto of interest groups able to capture the attention of governmental and discrimination industry actors;<sup>281</sup> secondly, uncertainty as to whether a problem exists of the type which discrimination law can address; thirdly, the concern that caste is a 'Pandora's box' which once opened could have unintended political consequences. In order to address these concerns the commissioning and funding of independent research directed specifically to examining the question of caste discrimination in the UK, its forms and scope, and the implications of legislative change, is essential.

Article 14 of the European Convention on Human Rights, to which the UK has been a party since 1951,<sup>282</sup> provides protection from discrimination in the enjoyment of Convention rights on any ground 'such as sex, race, colour, language, religion, political or other opinion, national or *social origin*, association with a national minority, property, *birth or other status*' (italics added). Unlike ICCPR

278 See Employment Equality (Religion or Belief) Regulations 2003, n 180 above, reg 7(2)

279 *ibid*, reg 7(3).

280 Despite recognition as a form of racial discrimination under international human rights law since 1996, caste discrimination was not taken up by the former CRE and was not officially addressed in the CRE Race Convention 2006; see CRE, 'Race Convention 2006: A Catalyst for Change' at <http://www.raceconvention2006.com/downloads/CRE%20Brochure.pdf> (last visited 13 May 2008).

281 In contrast, Press For Change (PFC) has raised awareness of discrimination on grounds of gender re-assignment, and achieved legislative change, through pro-active use of domestic and European legal mechanisms. The transsexual population in the UK is smaller in number 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/> (last visited 13 May 2008).

282 n 239 above.

Article 26 this is not a free standing guarantee of equality.<sup>283</sup> It does mean, however, that difference in treatment in the enjoyment of any Convention right on any of the grounds listed, that cannot be objectively and reasonably justified, is prohibited. In the context of debate on a British Bill of Rights, any document purporting to provide a framework of ethical and normative values for the future must be informed by an understanding of *all* the obstacles to the enjoyment of fundamental rights.

CERD has already recommended that the UK introduce a domestic prohibition of descent-based discrimination. Existing legal conceptualisations of discrimination in the UK were not designed with caste discrimination in mind and cannot adequately capture it. The DLR acknowledged that discrimination law ‘needs to keep pace with and reflect the changes in our Society.’<sup>284</sup> 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’ – as long as this is both necessary and proportionate and only after any additional regulatory burden has been considered.<sup>285</sup> While legislation alone cannot ‘untwist the mind’<sup>286</sup> it can act as a disincentive to discriminatory behaviour, challenge the cultural consensus and provide legal redress for discrimination.<sup>287</sup> Bringing caste discrimination within the ambit of UK discrimination legislation would convey recognition of such discrimination as unacceptable and unlawful wherever it occurs. Amendment of section 3(1) of the RRA 1976 to include descent as a category of racial grounds would suffice to align domestic discrimination legislation with the UK’s international human rights law obligations and to provide the possibility of redress to those in the UK – however few in number – who might be subject to descent-based discrimination, including discrimination on grounds of caste.

283 Protocol 12 to the ECHR extends the Convention to provide a freestanding prohibition on discrimination beyond the limited guarantee in Article 14. The UK Government has not ratified the Protocol but ratification has been recommended by the Joint Committee on Human Rights.

284 See n 10 above, 15.

285 *ibid* 127.

286 See Ambedkar, n 42 above, 197.

287 See Lester and Bindman, n 173 above, 85–87. See also House of Lords debate on the Forced Marriage (Civil Protection) Bill, n 155 above.