

Introduction

Dr Ambedkar and the Dalits

Dalits, a Hindi term meaning ‘the oppressed’, describes the lowest members of the Hindu caste system who were previously known as Harijans, or Untouchables.¹ It is estimated that 160 million Dalits live in India,² and despite substantial national and international legal protections, they still suffer from discrimination on the basis of caste. The caste system is the oldest form of racial discrimination in the world. As a pure, theoretical structure it is composed of four main castes, or *varnas*: Brahmans (priests), Kshatriyas (warriors), Vaishyas (farmers) and Shudras (labourers or servants).³ This fourfold division has its origins in the Vedas, the ancient Hindu scriptures.⁴ Historically, the Dalits were considered to be outside this system. They undertook occupations that Indian society considered ritually polluting such as scavenging, sweeping or leatherworking.⁵ The concept of untouchability meant that Dalits were discriminated against in every aspect of

1 ‘Harijan’ was a term coined by Gandhi in an issue of *Young India* on 6 August 1931 to replace the term ‘Untouchables’. It means the people (*jan*) of god (*hari*). A 1993 letter from the Centre for Dalit Human Rights to the Rajasthan State Human Rights Commission, reproduced in the Indian national newspaper *The Hindu*, complained that the word ‘Harijan’ was: ‘derogatory, insulting and against the dignity of millions of Dalits and oppressed people in India’, and pointed out that ‘two decades back the then Union Home Minister had issued a circular to all the Government Departments banning the use of “Harijan” word in all official papers and functions’; *The Hindu*, 28 September 2003. The early governmental term was ‘Depressed Classes’, which was replaced by ‘Scheduled Castes’ in 1935, the term used in the 1950 Indian Constitution; Zelliott, E., ‘The Leadership of Babasaheb Ambedkar’, in Zelliott, E. (2001), *From Untouchable to Dalit: Essays on the Ambedkar Movement* (New Delhi: Manohar), 74 n.1. Since the 1980s, ‘Dalit’ has become the most acceptable term. All terms in this book will be used according to time period.

2 Hanchinamani, B. (2001), ‘Human Rights Abuses of Dalits in India’, *Human Rights Brief* 8, 15.

3 The spelling for the four *varna* categories varies considerably; the spelling used is that employed by Muir in his *Original Sanskrit Texts* (*infra*). Different spellings of the four *varnas* by other authors are reproduced in direct quotations. Muir’s text is not consistent – the word *Kshatriya* is sometimes spelt with two ‘t’s, as *Kshattriya*, although the latter appears infrequently.

4 Muir, J. (1858), *Original Sanskrit Texts on the Origin and Progress of the Religious Institutions of India*, vol. 1 (London: William and Norgate), 7.

5 Deliége, R. (1993), ‘The Myths of Origin of the Indian Untouchables’, *Man* 28:3, 535.

their social lives. They were prevented from entering temples, or using the same wells as higher caste Hindus.⁶

Dr B.R. Ambedkar,⁷ a Dalit of the Mahar caste, founded the Depressed Classes Federation in 1930 (re-launched in 1942 as the All-India Scheduled Caste Federation), in order to advance the cause of the Dalits. In the 1920s, he had become a well-known figure through his speeches, publications and support of such causes as temple entry. In 1927, he caused a sensation by burning a copy of *Manusmṛti*, the ancient law book that symbolised Hindu injustice to the Dalits.⁸ He would come to represent the voice of caste reform through secular, political and legislative means. The secular approach was opposed by Mahatma Gandhi, who believed in an evangelical approach to the uplift of the Untouchables. Gandhi wished to bring the Dalits into the fourfold model of the Vedas, integrating them into the fourth Shudra caste, and in this manner purify Hinduism. Gandhi thought that the caste system itself was not to be condemned, only its pernicious effects, such as untouchability. Ambedkar believed that the entire system should be destroyed.⁹

Ambedkar ensured that the problem of caste would become inextricably linked to India's independence. He was appointed Law Minister by Prime Minister Jawaharlal Nehru and subsequently Chairman of the Drafting Committee of the Constituent Assembly of India, which formed the government upon the granting of Independence on the 'appointed day', 15 August 1947.¹⁰ He was primarily responsible for the system of reservations in the 1950 Indian Constitution for what were termed the 'Scheduled Castes, Scheduled Tribes and Other Backward Classes'.¹¹ Those reservations have their origin in the Poona Pact, an agreement signed in 1932 between Gandhi and Ambedkar, following Gandhi's hunger strike in protest at the British government granting separate electorates to the Dalits. Ambedkar waited for 21 days while Gandhi fasted, before eventually conceding. In exchange for relinquishing separate electorates for the Dalits, Ambedkar required guarantees of special measures in employment, education and reserved

6 Junghare, I. (1988), 'Dr Ambedkar: The Hero of the Mahars, Ex-Untouchables of India', *Asian Folklore Studies* 47:1, 93–4.

7 For an account of Ambedkar's life, see Jaffrelot, C. (2004), *Dr Ambedkar and Untouchability: Analysing and Fighting Caste* (Delhi: Permanent Black). Jaffrelot highlights the dearth of studies on his life and work. He quotes Upendra Baxi, who described Ambedkar as 'a totally forgotten figure' (2). Similarly, Jaffrelot claims that 'his [Ambedkar's] ideas have been deliberately marginalised for years' (159).

8 Zelliott, E., supra n.1, 69.

9 Zelliott, E., 'Gandhi and Ambedkar: A Study in Leadership', supra n.1, 150.

10 Galanter, M. (1984), *Competing Equalities: Law and the Backward Classes in India* (Berkeley: University of California Press), 39.

11 The reservations system in the 1950 Indian Constitution discussed in Chapter 3 is a scheme of 'special measures' or 'affirmative action' which reserves seats in the legislature of every state and the lower house of the Union, as well as posts in government services and places in educational institutions.

seats. In return, the Poona Pact kept the Untouchables within the majority Hindu polity.¹²

The conference that ratified the Poona Pact in 1932 issued a resolution that was unanimously adopted:

This Conference resolves henceforth, amongst Hindus no-one shall be regarded as an Untouchable by reason of his birth, and that those who have been regarded hitherto will have the same right as other Hindus in regard to the use of public wells, public schools, public roads and all other public institutions. This right shall have statutory recognition ... it shall be the duty of all Hindu leaders to secure, by every legitimate and peaceful means, an early removal of all social disabilities now imposed by custom upon the so-called Untouchable class, including the bar on right of admission to temples.¹³

Consequently, untouchability was banned under article 17 of the 1950 Indian Constitution. Article 35 of the Constitution authorised Parliament to enact a law prescribing the punishment for violations of article 17, and it did so through the *Untouchability Offences Act 1955*.¹⁴ Furthermore, in accordance with the terms of the agreement, the Indian Constitution allows for a scheme of special measures in the form of reservations, designed to secure the uplift of the Scheduled Castes, Scheduled Tribes, and Other Backward Classes, by reserving a percentage of seats for members of these groups in legislative assemblies at state (*Vidhan Sabha*) and national level (*Lok Sabha*),¹⁵ as well as allowing for reserved places in educational institutions and in government posts.¹⁶

Yet the Dalits were raised and all but discarded as a political issue, while the circumstances of their living underwent no significant transformation.¹⁷

12 Galanter, M., supra n.10, 32.

13 Quoted in Rajagopalachari, C. (1937), *Plighted Word: Being an Account of the History of Untouchability Abolition and Temple Entry Bills* (Delhi: Servants of Untouchables Society), 1.

14 The Act was amended in 1976, and renamed the *Protection of Civil Liberties Act 1955*. In 1989, the *Scheduled Castes & the Scheduled Tribes (Prevention of Atrocities) Act 1989* was passed. The abolition of untouchability is also envisaged by article 15(2) of the 1950 Constitution, which forbids the denial of access to shops, public restaurants, hotels and places of entertainment or the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partially out of State funds or dedicated to the use of the general public.

15 Article 330 provides for reserved seats in the *Lok Sabha*, the House of the People or lower house of parliament of the Union, for the Scheduled Castes and Scheduled Tribes. Article 332 contains reservations for the Scheduled Castes and Scheduled Tribes in the Legislative Assembly of every State.

16 Reservations in educational institutions and in government posts may be made under articles 15(4) and 16(4).

17 Mendelsohn, O. and Vicziány, M. (1994), 'The Untouchables', in Baxi U. (ed.), *The Rights of Subordinated Peoples* (Oxford University Press), 64.

Ambedkar registered his lack of belief in the efficacy of India's constitutional reservation scheme by resigning from his position in the government in 1951, after serving just four years. He believed that there was little political will on the part of the caste Hindu majority to dismantle the caste system or effectively tackle caste-based discrimination. In 1955, months before his death, he led around two million Dalits into Buddhism in a mass conversion aimed at removing them from Hinduism and its crippling caste system.¹⁸ In the 50 years since, no comparable leader has emerged. The Dalits remain deeply subordinated; they are at the bottom of Hindu society, in terms of wealth, social status, and education. Their low status marks them off from the rest of society, and they continue to suffer caste-based discrimination.¹⁹

The Caste System

The caste system is believed to be nearly 3,000 years old.²⁰ The book will argue that caste is a unique feature of the Hindu religion,²¹ and as such, caste systems only exist in countries that practise Hinduism – with the exception of the phenomenon of caste among diaspora communities.²² There are two states that can be said to be Hindu states: India and Nepal. Thus the phenomenon of

18 See generally Miller, R. (1967), 'They Will Not Die Hindus: The Buddhist Conversion of Mahar Ex-Untouchables', *Asian Survey* 7:9, 637–44. The title refers to a statement made by Ambedkar at a conference in 1935: 'I was born a Hindu but I will not die a Hindu' (quoted at 641).

19 Mendelsohn, O. and Vicziany, M., supra n.17, 64.

20 Deshpande, A. (2000), 'Does Caste Still Define Disparity? A Look at Inequality in Kerala, India', *American Economic Review* 90:2, 322.

21 See further Chapter 1. On the nature of Hinduism, Manor observes: 'Hinduism differs from the world's other great religious and cultural traditions in that it is not univocal: it is not focused upon a single sacred text and a single god or historical figure. Muslims look to the Qur'an, the Prophet Muhammad and Allah; Jews to the Torah and the God of Abraham and Isaac; Christians to the Bible, Christ and the Trinity; Confucians to the 'old books' and 'to the peerless sage of ten thousand generations', and so on. By contrast the Hindu Vedas or sacred texts are numerous and varied, and Hindus worship a great variety of gods. Many village temples are devoted to one of the more prominent deities, but many also focus on divine figures that are known only locally. Different caste groups in the same locality may worship different gods'. Manor, J. (1996), 'Ethnicity and Politics in India', *Ethnicity and International Relations (Royal Institute of International Affairs)* 72:3, 464.

22 The UN Sub-Commission on the Promotion and Protection of Human Rights issued an Expanded Working Paper on Discrimination based on Work and Descent in July 2004, which specifically examined the question of diaspora communities whose original culture and traditions include aspects of inherited social exclusion, including caste. The Working Paper discussed principally the South Asian diaspora in the United Kingdom and the United States. UN Doc. E/CN.4/Sub.2/2004/31.

caste-based discrimination affects these two states primarily. States with large Hindu minorities also merit attention.²³ Although sociologists may differ as to a precise definition of caste and the parameters of its meaning, it is the religious element that differentiates the system from other forms of discrimination based on inherited status.

Ambedkar, in *The Annihilation of Caste* (1936), explained:

Caste has not the same social significance for non-Hindus as it has for Hindus ... Among non-Hindus, caste is only a practice, not a sacred institution ... Religion compels the Hindus to treat isolation and segregation of castes as a virtue ... Hindus observe caste not because they are inhuman or wrong-headed, but because they are deeply religious. People are not wrong in observing caste. In my view, what is wrong is their religion. Then the enemy is not the people who observe caste, but the Vedas that teach them the religion of caste ... Reformers working for the removal of untouchability including Gandhi do not understand that people will not change their conduct until they cease to believe in the sanctity of the Vedas on which their conduct is founded ... Caste has a divine basis. The observance of caste and untouchability is a religious duty.²⁴

Ambedkar was writing at a time when the term 'caste' was being applied to a range of situations, notably discrimination on the basis of skin colour. The book will argue that the word 'caste' should be reserved exclusively for describing the Hindu system, because 'it [the caste system] represents a divine, sacred or natural order of things'.²⁵ In order to annihilate caste, Ambedkar argued, 'you must therefore destroy the sacredness and divinity with which caste has become invested'.²⁶ The Vedas were in existence by 1500 BC.²⁷ The creation hymn the *Purusha sukta*,²⁸ which is found in the tenth book of the *Rig Veda*, is the oldest extant passage on the fourfold origin of the castes:

23 For example, the situation of caste in Bangladesh and Sri Lanka. However, there is a difference in scale between these states and India and Nepal that must be appreciated. Because they are not states with a majority Hindu population (Bangladesh is ten percent Hindu, while the Tamils in Sri Lanka constitute 18 per cent of the population), caste cannot be said to permeate all aspects of socio-economic life, as is the case in India and Nepal. The latter are the only predominantly Hindu states in the world and caste-based discrimination is systematic and endemic in these two countries.

24 Ambedkar, B. (1936), 'The Annihilation of Caste', in Rodrigues V. (ed.) (2002), *The Essential Writings of B.R. Ambedkar* (Oxford University Press), 285-290.

25 Sharma, A. (2000), *Classical Hindu Thought* (Oxford University Press), 134.

26 Ambedkar, B. (1936), 'The Annihilation of Caste', supra n.24, 291.

27 Sharma, A., supra n. 25, 192.

28 The Sanskrit word *Purusha* means man or mankind, *sukta* means well-remembered, or eloquent. Turner, R. (1966), *A Comparative Dictionary of the Indo-Aryan Languages* (Oxford University Press [reprinted 1973]), 469, entry 13546.

When they formed Purusha, into how many parts did they divide him? What was his mouth? What were his arms? What were called his thighs and feet? The Brahman was his mouth; the Rajanya [Kshatriya] was made his arms; that which was the Vaishya was his thighs; the Shudra sprang from his feet.²⁹

The debilitating effects of the caste system, including the practice of untouchability, were laid down by the *dharma* codifiers (*dharma* meaning ‘duty’),³⁰ and in subsequent religious tracts that drew their authority from, and found their justification in, the creation hymn of the Vedas. The Vedas contained no rules on purity, pollution, ceremony, marriage, inter-commensality, expulsion from a caste, or any of the innumerable associated practices that grew around the original fourfold division. These were studied as a complement to the rituals found in the Vedas: ‘the theory of the *varnas* provided the authors of the *dharma-sutras* with a framework within which they could lay down the precise duties of individuals according to their caste.’³¹ The *karma* doctrine perpetuated caste division and inequality, for it promised promotion within the system in the next life to those who observed the prescribed rules of *dharma* in this one.³²

The caste system itself is composed of an unknown number of groups called *jatis*, which are endogamous and observe their own rules of duty, drawing to various degrees from the ancient *dharma* codes, such as the *Manusmṛiti*.³³ *Jatis* represent the reality of caste division, and they do not fit evenly into the four Vedic categories or *varnas*, Brahman, Kshatriya, Vaishya and Shudra. Yet the

29 *Rig Veda*, Book 10, Verse 90; *Vajasaneyi Sanhita*, Book 31, Verses 1–16; *Atherva Veda*, Book 19, Verse 6.

30 Koller, J. (1972), ‘Dharma: An Expression of Universal Order’, *Philosophy East and West*, 22:2, 131: ‘as a social concept it refers to a moral code, natural and positive law, and also to various distinct duties of individuals’. See generally Kane, P. (1941 (reprinted 2000)), *History of Dharmashastra* (Poona: Bhandarkar Oriental Research Institute).

31 Lingat, R. (1973), *The Classical Law of India* (Berkeley: University of California Press), 29.

32 According to the doctrine of *karma*, ‘a person’s current incarnations and experiences are, at least in part, the fruit of past actions’. Milner, M. (1993), ‘Hindu Eschatology and the Indian Caste System: An Example of Structural Reversal’, *Journal of Asian Studies* 52:2, 298. Max Weber linked the *karma* doctrine to the operation of the caste system: ‘the idea of compensation was linked to the individual’s social fate in the societal organization and thereby to the caste order’. Weber, M. (1958), *The Religion of India* (New Delhi: Manoharlal), 119. Weber’s analysis has been criticised; see Milner, M., 299 n.4.

33 Pillai writes: ‘The caste system is upheld by the orthodox on the authority of the *dharmasastras* or *smṛtis* ... the often quoted one is *Manusmṛiti* ... this *smṛiti* was given out by Manu to a group of Brahmins, who approached him for “the sacred laws in their order, as they must be followed by all four castes.” Pillai, G. (1959), *Origin and Development of Caste* (Allahabad: Kitab Mahal), 71.

entire system of *jatis* is framed within these four corners.³⁴ Klass explains that ‘the Vedic system – which here means the classic *varna* system – remains the justificatory and explanatory shell. The caste system is clearly not the classic *varna* system, even though Hindus believe that castes have derived (or degenerated) from those *varnas*’.³⁵

The ‘Untouchables’ were traditionally considered to be *outcastes*, outside the system, below even the *Shudras* or servants, and were treated as polluted and unclean due to their ignorance of *dharma* ritual and resulting accumulation of impurity. The levels of punishment for transgression of caste boundaries in all aspects of social intercourse are extensively documented in the *dharma* codes.³⁶ Untouchability stems from the ranking of castes and sub-castes, ‘which is fixed neither by wealth nor education nor the ownership of land, but by the taking of water’.³⁷ Zinkin elaborates that water may be taken from equals and superiors, but not from inferiors. Untouchability differs in degree rather than in kind from other caste restrictions. Throughout the caste structure there are certain relations which cannot be had with inferiors. Marriage, for example, only takes place with a fellow subcaste member. For the Dalits these restrictions are extended. Not only does one not take water from them, they may not even take water from the same well. Not only does one not take food from them, they may not even eat in the same restaurant.³⁸

It is impossible to have a clear notion of what constitutes a caste. Every characteristic that can be identified can also be contradicted by the empirical reality of caste divisions. Zinkin writes that ‘it is much easier to say what caste is not than what caste is’.³⁹ The author proceeds to list what caste is not: it is not class, for in every caste there are educated and uneducated, rich and poor, well-born and ordinarily born; it is not skin colour, for an Untouchable is an Untouchable whether born fair or dark; it is not Aryan and non-Aryan, for the Aryans never penetrated into the South or East of India; it is not occupation, for although some occupations are overwhelmingly identified with particular castes, mostly

34 Deshpande writes that the evolution of *jati* distinctions has an economic origin: ‘As the economy grew more complex, the *varna* system metamorphosed into the *jati* (also translated as caste) system, with *jatis* sharing the same basic characteristics of the *varnas*. However, what makes the *jati* hierarchy complex is that (i) *jatis* are not exact subsets of *varnas* and (ii) there is considerable regional variation in the evolution of specific *jatis*’, Deshpande, A., *supra* n.20, 322.

35 Klass, M. (1980), *Caste: The Emergence of the South Asian Social System* (Philadelphia: Institute for the Study of Human Issues), ch. 3, ‘Divine Plan or Racial Antipathy?’, 63.

36 See generally Charsley, S. (1996), ‘Untouchable: What is in a Name?’, *Journal of the Royal Anthropological Institute* 2:1, 1–23.

37 Zinkin, T. (1962), *Caste Today* (Institute of Race Relations, Oxford University Press), 6.

38 *Ibid.*, 7–8.

39 *Ibid.*, 1.

artisans, the main occupation, agriculture, is open to all.⁴⁰ Panikkar, writing in 1933, summarised caste as ‘a comprehensive system of life, a religion rather than a changing social order, and the rigidity with which its rules are enforced would put to shame even the Great Inquisition’.⁴¹

Caste-based Discrimination in International Human Rights Law

The word ‘caste’ does not appear in any international human rights treaty. Consequently, when increasingly well-organised and vocal Dalit human rights organisations began successfully highlighting the widespread discrimination on the basis of caste still taking place in India and other areas of South Asia, and the failure of domestic policies to tackle the issue, there was a need to find a precise source of international legal obligations for the eradication of caste-based discrimination in these countries. That source is article 1(1) of the International Convention on the Elimination of All Forms of Racial Discrimination 1965 (ICERD),⁴² and in particular the word ‘descent’, one of the five grounds listed in the definition of racial discrimination.⁴³ Caste-based discrimination, the Committee on the Elimination of Racial Discrimination (CERD) confirmed in a series of Concluding Observations beginning with India’s State Report in 1996, is a form of descent-based discrimination and a form of racial discrimination, and falls within the purview of the Convention.⁴⁴

Since 1996, CERD has consistently sought to distinguish caste from descent, with the result that descent-based discrimination is viewed as a far wider problem than caste-based discrimination.⁴⁵ CERD has raised the issue of descent-based

40 Ibid., 1–3. Zinkin does not deny that generalisations can be made, for example with regard to class, most members of the upper classes are in fact the upper castes while most members of the lowest classes are in fact Untouchables.

41 Panikkar, K. (1933), *Caste and Democracy* (London: Hogarth Press), 9, quoted in Zinkin, *ibid.*, 4.

42 660 U.N.T.S. 195, entered into force 4 January 1969.

43 Article 1(1) of the ICERD defines racial discrimination as ‘any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin ...’.

44 See generally Thornberry, P. (2005), ‘The Convention on the Elimination of Racial Discrimination, Indigenous Peoples, and Caste/Descent-based Discrimination’ in Castellino, J. and Walsh, N. (eds), *International Law and Indigenous Peoples* (Leiden: Martinus Nijhoff), 17–53. Patrick Thornberry, as a member of CERD, was instrumental in drawing attention to the issue of caste-based discrimination in the context of India’s report, and in holding that caste fell within the remit of the Convention through the interpretation of the meaning of ‘descent’.

45 Thornberry writes: ‘The specific conception of descent-based discrimination in the Recommendation [CERD General Recommendation XXIX] is also clearly wider than caste but includes it ... This is important lest the Committee be seen to be picking on a particular State or States’, Thornberry, P., *ibid.*, 42.

discrimination in a number of State Reports, from a variety of regions, including Senegal, Mali, Ghana, Bangladesh and Japan, as well as India and Nepal, the South Asian countries traditionally associated with caste.

In August 2002, CERD issued General Recommendation XXIX on descent-based discrimination,⁴⁶ the result of a thematic discussion on the issue conducted by the Committee in the same month.⁴⁷ The thematic discussion took place on 9 August 2002, and highlights the extraordinary contribution of Dalit NGOs in bringing caste-based discrimination within the international human rights framework. There are however no summary records for the session, which involved two governments, India and Nepal, 23 separate interventions from members of the UN Sub-Commission on the Protection and Promotion of Human Rights and a joint statement from 32 NGOs.⁴⁸ In the Recommendation that emerged, caste is cited as a specific example of descent-based discrimination that is to be strongly condemned. A number of measures of a general nature to be undertaken by States Parties are included, notably the identification of:

those descent-based communities under their jurisdiction who suffer from discrimination, especially on the basis of caste and analogous systems of inherited status, and whose existence may be recognised on the basis of various factors, including: inability or restricted ability to alter inherited status; socially enforced restrictions on marriage outside the community; private and public segregation, including in housing and education, access to public spaces and places of worship, and public sources of food and water; limitation of freedom to renounce inherited occupations or degrading and hazardous work; subjection to dehumanising discourses of pollution or untouchability; and generalised lack of respect for their human dignity and equality.⁴⁹

In August 2000, the UN Sub-Commission on the Promotion and Protection of Human Rights passed resolution 2000/4 on Discrimination based on Work and Descent, which declared that discrimination based on work and descent is a form of discrimination prohibited by international human rights law.⁵⁰ In less than four years, the Sub-Commission has produced a working paper,⁵¹ and two expanded working papers. These working papers have found evidence of descent-based discrimination in a large number of countries, including Yemen, Somalia, Ethiopia, Pakistan, Burkina Faso and Micronesia, as well as those countries and regions already identified by CERD. In April 2005, the Commission on Human

46 UN Doc. A/57/18.

47 CERD/C/SR.1531.

48 Thornberry, P., *supra* n.44, 40 n.124.

49 UN Doc. A/57/18, 111.

50 UN Doc. E/CN.4/SUB.2/RES/2000/4, 11 August 2000.

51 UN Doc. E/CN.4/Sub.2/2001/16, 14 June 2001. The paper's focus was limited to Asian countries due to time restraints and lack of access to relevant materials, however, the author insisted in paragraph 49 that the problem is not limited to Asia alone, and that it exists in some parts of Africa and South America.

Rights appointed Yozo Yokota and Chin-Sung Chung as Special Rapporteurs with the task of preparing a comprehensive study on discrimination based on work and descent on the basis of the three working papers submitted on the issue.

At the international level, there appears to be some confusion as to the difference between caste and descent-based discrimination. The position on the meaning of caste has already been outlined, and in this regard, it is submitted that caste-based discrimination occurs systematically in two South Asian countries, India and Nepal. There is also the question of caste-based discrimination among diaspora communities, and among minority Hindu populations in states such as Sri Lanka and Bangladesh. It is beyond the scope of the book to explore all of these situations; only India will be studied in detail. Although Nepal will not be specifically examined, the conclusions reached will be of particular relevance to the Nepalese experience of caste. Nepal, according to its most recent State Report to CERD, is 85 per cent Hindu, and in contrast to India, was initially forthright in its documentation to the international treaty-monitoring bodies of the continuing presence of caste-based discrimination on its territory.⁵² There will be some examination of those reports. Nevertheless, the aim is to provide an overview of the caste system as it works in India, and the domestic and international laws that seek to combat it. The manner and method of the law in eradicating caste-based discrimination in India may provide a model for other states where the problem is not so widespread. However, states experiencing caste-based discrimination through diaspora or minority communities should take heed of the significant shortcomings in India's domestic legal provisions.

The First Form of Racial Discrimination

Caste-based discrimination is a form of racial discrimination. India strongly contested this in its representations to CERD in 1996,⁵³ and continues to do so; its most recent 2006 report to the Committee emphasised that 'the Government of India reiterates its position that "caste" cannot be equated with "race" or covered under "descent" under Article 1 of the Convention'.⁵⁴ It is therefore necessary to address the meaning of race and the broader meaning of racial discrimination to counter this contention. The distinction at work throughout the book is that race is not the same as racial discrimination. The definition of racial discrimination in

52 CERD/C/298/Add.1, Periodic Report – Nepal (1997) and CERD/C/337/Add.4, Periodic Report – Nepal (1999) and CERD/C/452Add.2, Periodic Report – Nepal (2003).

53 CERD/C/299/Add.3, Periodic Report – India, April 1996, paragraph 7: 'the term "caste" denotes a "social" and "class" distinction and is not based on race ... As conveyed to the Committee during the presentation of India's last periodic report, it is, therefore, submitted that the policies of the Indian Government relating to Scheduled Castes and Scheduled Tribes do not come under the purview of Article 1 of the Convention.'

54 CERD/C/IND/19, 29 March 2006, paragraph 16. The Committee has yet to publish its response to the report.

the ICERD makes a clear differentiation between racial discrimination and the narrower concept of race in article 1(1). Or, as Thornberry states:

it is an obvious point – but easily missed – that the umbrella term for the Convention is ‘racial discrimination’, not race. Thus, racial discrimination is given a stipulative meaning by the Convention: as precisely the five terms set out in Article 1, which means ‘race’ but four other terms as well. It is thus clear that the scope of the Convention is broader than ... notions of race, which in any case may express many usages.⁵⁵

Based on this legal understanding of the term, it is submitted that the Indian caste system is a form of racial discrimination. India strongly contests any link between racial discrimination and caste. An underlying rationale for its position is that the caste system *pre-dates* the development of racial theory. Chapter 2 will show that this is a correct assertion – racial thinking has its roots in the Spanish conquest of the New World, and did not gain widespread currency until natural historians and taxonomists of the nineteenth century sought to classify mankind into groups. Therefore it is argued that caste, in existence in 1500 BC, cannot be based on racial thinking if such thinking cannot be found documented before the fifteenth century.⁵⁶

This also leads to another conclusion: that Vedic India must be the *first* documented society where racial discrimination is evident; and as a result, the *Purusha sukta* in the *Rig Veda* can be considered the first extant written law of segregation. Logically discrimination on the basis of race, in the sense of skin colour, could be said to be a contemporary form of discrimination on the basis of caste. It is only our current terminology that dictates the reverse is the case. G.M. Tagore, writing in the nineteenth century, hinted that the caste system might lie at the source of inequality when he sought ‘the light that the discussion of the caste system throws upon the great ethnic problem of man’s origination’:⁵⁷

Whatever the future inquiries of philosophers may decide upon the problem, the discussion of the caste system in India evidently establishes some important positions. 1. That the civilization of the world has been developed, or rather has grown up as it were, under a hierarchy of castes ...⁵⁸

It has been suggested that the caste system was, in its ancient form, a division based on skin colour. It is argued that the original intention of the fourfold *varna*

55 Thornberry, P., *supra* n.44, 19.

56 For an example of this argument, see Pillai, G., *supra* n.33, 39–40.

57 Tagore, G. (1863), ‘On the Formation and Institution of the Caste System – The Aryan Polity’, *Transactions of the Ethnological Society of London* 2, 384.

58 *Ibid.*

system appears to have been to segregate the conquering tribes, the Sanskrit *Arya*, from the indigenous peoples, the *Dasyus*.⁵⁹

Burns summarises this position:

It is probable that the caste system of India, the exact origin of which is obscure, was founded on a diversity of race and perhaps of colour, and there seems to be no doubt that the depressed classes are remnants of conquered peoples. Many writers maintain that caste is due to the determination of Aryan conquerors to keep their white blood pure, and it is important to note that the word used for caste is the Sanskrit word *varna*, which means 'colour'. As a colour-line, however, caste seems to have worked very imperfectly, and the system has survived long after the diversity of race and colour which first evoked it has been obliterated.⁶⁰

The 'skin colour' divide as the rationale for the origin of the caste system is strongly contested,⁶¹ and the argument will be explored fully in Chapter 1. The conclusion reached is that this is a mistaken interpretation of the Vedas, and the reasons for this mistake are linked to the belief in separate racial types. Ambedkar's writings support the contention that the caste system was not originally based on skin colour differences. Irrespective of the original basis for the divide, there is overwhelming evidence from anthropological sources that the modern caste system is not a division based on skin colour.⁶² The caste system is specific to Hinduism, and its particular features must be identified and distinguished from divisions based on skin colour.

The book will not argue that caste is the same as race. The religious element in caste-based discrimination makes it a unique problem that has to be assessed in its own right. Yet the complex system of social stratification that is the modern caste system can still be viewed as a form of racial discrimination not based on

59 Tagore writes: 'the colonists ... called themselves ... *Arya*, which signifies pure and honourable men. The north-western part of India was called by the Brahmans *Aryavarta*, or the country of honourable men. The Brahmans designated themselves the *Aryas* in the Vedic period, in opposition to ... the barbarians ... and exercised their supremacy there as a ruling caste': Tagore, G., *ibid.*, 374. Tagore uses the phrase 'designated themselves', implying that the Brahmans were not necessarily the descendants of the pre-Vedic conquering tribes, but that they made themselves out to be so through their scriptures. There is also the understanding that *Arya* is a spiritual as well as an ethnological concept. In a later passage he states: 'Under the *Aryan* polity the Hindus were divided into four great classes... the Brahmans were the descendants of the *Aryan* race, and had the exclusive privilege of officiating at religious sacrifices, and of expounding the sacred books of the Hindus; I mean the Vedas' (376).

60 Burns, A. (1948), *Colour Prejudice* (London: George Allen and Unwin), 19.

61 See Sharma, A. *supra* n.25, Appendix IV and Klass, M., *supra* n.35, Chapter 3.

62 Sen, K. (1961), *Hinduism* (London: Penguin Books), 27. See also UN Doc. E/CN.4/1999/15, paragraphs 90-94, in which India, refuting CERD's contention that caste falls within its remit, stated that 'there is ample evidence of persons belonging to different castes having the same racial characteristics'.

skin colour, of which there are many other examples. The argument over whether the fourfold *varna* division was or was not based on skin colour is obsolete. Caste, as a system of social segregation that denies basic human rights on the basis of birth, is an ancient form of racial discrimination; indeed it can be described as the first form of racial discrimination. The archaeological evidence for this is set out in Wolpert's *A New History of India*:

In 1921, an archaeological dig in Harappa, India unearthed an ancient and unknown Indus city. The city, no greater than three and a half miles in circumference, had been protected by enormous brick ramparts. Outside the walled city, the archaeologists found workers' quarters or barracks similar to those occupied by most Dalit labourers at the time of the excavation. Radiocarbon tests of the stone and brick led many archaeologists and historians to extend the roots of urban Indian civilization as far back as 2300 B.C. More interestingly, the dig made many question whether Indian society was already socially stratified – whether specific social groups were already pushed to the tattered fringes of Indian society millennia ago. Although hidden from view for thousands of years, the ruins of Harappa reveal the extensive history of oppression in India.⁶³

Overview

There was a need from the beginning of the study to concentrate on the relative meaning of three key terms involved – caste, race and descent. There is a separate chapter on each term, giving their origin and meaning, and drawing the boundaries between them. The discussion takes place within a framework of international human rights law, in particular the ICERD, the principal source of concrete international legal obligations to tackle caste-based discrimination through the medium of descent-based discrimination. The book is composed of three parts of two chapters each. The problematic is established in Part 1, which examines the origin of caste and the origin of race. Part 2 assesses the legal solution to caste-based discrimination through the mechanism of the 1950 Indian Constitution; and to racial discrimination through the ICERD 1965. Finally Part 3 traces the recent movement to eliminate caste-based discrimination through international human rights law, in particular the measures against descent-based discrimination being led by the United Nations treaty-based and charter-based bodies, as well as the formulas for enhanced protection against caste prejudice being proposed by Dalit NGOs. A summary of the six chapters is as follows:

63 Wolpert, S. (2000), *A New History of India* (Oxford University Press, 6th edn), 14–15, cited in Eisenman, W. (2003), 'Eliminating Discriminatory Traditions Against Dalits: The Need for International Capacity-Building of the Indian Criminal Justice System', *Emory International Law Review* 17, 144.

Chapter 1: The Origin of Caste

This chapter explores the origin of caste from three perspectives. The first is the religious history of caste, which traces the Sanskrit texts that expounded the fourfold division of the castes. The *Purusha Sukta*, found in Book X of the *Rig Veda*, is the oldest religious passage on the fourfold origin of the castes. From this one point, the caste system has spread through the *dharma* codes to infiltrate every aspect of Hindu life: religious, social, political, economic and cultural. Nevertheless, the caste system is an explanatory concept channelled through the religious texts to justify a system of exploitation already in place. The second perspective is the sociological theories that have sought to isolate the framework that supports the caste system. The writers have been reasonably successful in charting the rationale behind the intricacies of caste. Its salient features have emerged, and have been summarised. Finally, the chapter sketches the twentieth century political movement of the Untouchables under the leadership of Ambedkar. The history of India's independence is bound up with the fight against its caste system. Ambedkar's struggle won the constitutional right to equality for the Dalits, incorporating both non-discrimination and special measures to combat the poverty and exclusion that was the result of being born in the lower *varnas*, or outside the fourfold system. The chapter also describes the negotiation of the Poona Pact in 1932 between Ambedkar and Gandhi, which ended the Untouchables as a political force. In exchange, they were given guarantees that in independent India, untouchability and caste-based discrimination would be outlawed, and that legislative reservations, and reservations in education and in government posts, would be enacted to secure their uplift. The Poona Pact was a social contract between Ambedkar and Gandhi, the former as the leader of the Untouchable minority, the latter as the leader of the caste Hindu majority.

The 1950 Constitution was to be the guarantee that the endemic discrimination on the basis of caste would end. Documentation from contemporary international human rights organisations indicates that this has not taken place.⁶⁴ It is difficult to avoid the conclusion that the Untouchables of yesterday and the Dalits of today have been betrayed by the majority, who have shown no desire to dismantle the caste system. Ambedkar's writings criticising the Indian National Congress and its contribution to the social decimation of the lowest caste groupings are still very much relevant, as is the story of the caste struggle in India in the 1920s, 30s and 40s.

64 There is a large number of Dalit human rights organisations whose websites offer ample evidence of the extent of caste-based discrimination in contemporary India. See, for example, the International Dalit Solidarity Network at <www.idsnet.org>. Human Rights Watch have produced two reports on caste-based discrimination, available at <www.humanrightswatch.org>. See also the South Asian Human Rights Documentation Centre, <www.sahrhc.org>. The best and most detailed website on the issue is the Indian organisation <www.ambedkar.org>.

Chapter 2: The Origin of Race

This is a critical treatment of the development of the notion of race, and the consequences of attributing to peoples arbitrary classifications that have no basis in biology or any other science. The fundamental characteristic of race that emerges is that it does not correspond to any verifiable reality. The development of race is charted, beginning with the theory of monogenism, that man is descended from a single ancestral pair, to polygenism and the belief in racial typologies. It studies the views and influence of Bartolomé de las Casas, the sixteenth century Christian missionary and defender of the rights of indigenous peoples in the New World, through to Arthur de Gobineau, Charles Darwin, the social Darwinists, and Nazi racial theories. It concludes with the emergence of the belief among twentieth century anthropologists that there is no such thing as race, and the debate that this has provoked.

The literature on race is vast, and the intention is to portray an overall image of the progression in thinking from theories of difference to the belief in immutable racial characteristics that gave rise to the concept of racial superiority. The indeterminacy of race meant that it engaged a large number of disciplines, rendering it difficult to subject to rigorous analysis. What is termed discrimination on the basis of race is discrimination on the basis of skin colour. No other criteria determine the race to which a person is assigned. Skin colour corresponds to an objective reality; race does not. Similarly caste corresponds to an objective reality, the Hindu social structure. The belief in objective biological races has supported the discriminatory treatment of peoples since the sixteenth century.

Chapter 3: The Indian Constitution and the Elimination of Caste-based Discrimination

Ambedkar was appointed Chairman of the Drafting Committee of the Constituent Assembly of India in 1947, and was responsible for its system of reservations for the uplift of what it terms the ‘Scheduled Castes, Scheduled Tribes and Other Backward Classes’. Article 17 of the Constitution expressly abolished untouchability; articles 330 and 332 provide reserved seats for Scheduled Castes and Scheduled Tribes in the legislative assembly of every state and in the lower house of the union; and a system of reservations in government posts and educational institutions are provided for under articles 15(4) and 16(4).

The chapter researches the Constituent Assembly debates of India, which took place from 1947–49, to provide the meaning behind these provisions. The debates are in stages, beginning with the Interim Report of the Advisory Committee on Fundamental Rights. They reveal the impetus behind, for example, the ban on untouchability. While some Assembly members expressed relief that this practice was finally illegal, there was also satisfaction that India would no longer be condemned in the eyes of the international community for its caste system and treatment of the Untouchables. One member notes that even South Africa was

critical of India's discriminatory social system. There is evidence therefore that the recent movement within international human rights law against caste-based discrimination may shame India into reform.

The complex workings of the reservation system are unwound through the examination of the Assembly debates, and subsequent caselaw from the Indian Supreme Court, which has played an important role in trying to interpret and supervise this enormous undertaking. The Indian Constitution contains a sophisticated and extensive body of affirmative action laws, and in itself is of interest to states engaging in similar enterprises. In the context of caste, the question is whether India has a real intention to eliminate the system and its discriminatory effects.

Chapter 4: The United Nations and the Elimination of Racial Discrimination

Chapter 4 looks at two developments, UNESCO's Four Statements on the Race Question, which appeared between 1950 and 1967,⁶⁵ and the 1965 ICERD. The UNESCO documents reproduce the debate on whether or not race corresponds to an objective reality; the first denied the existence of race, while the second retracted that denial. The third and fourth statements were drafted by biologists, as opposed to anthropologists, and drew differing conclusions. Similarly the Declaration on the Elimination of All Forms of Racial Discrimination 1963⁶⁶ denies the idea of racial difference while the debates on the Convention show an express retraction of that denial. The chapter tries to establish the link, if any, between these two sets of documents. Did the Four Statements have an impact upon the Declaration and Convention? Outside of these documents, the United Nations has not examined the question of race in any detail, whether through its legislative or educational organs. There is little commentary on whether UNESCO's work, the first time the UN engaged with race, is to be commended or ignored. The Statements contain some important propositions, for example that the term 'race' is redundant and should be replaced by 'ethnic group'. They are also blatantly contradictory, which makes it difficult to assess their contribution.

The *travaux préparatoires* of the Convention form the substantive body of this chapter, and the debates in the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, the Commission on Human Rights and the Third Committee of the General Assembly of the United Nations are examined under the relevant provisions of the Convention. The powers and workings of the Committee on the Elimination of Racial Discrimination are integral to the discussion. The Committee's role in raising international awareness of the issue of caste-based discrimination is a direct result of its expanding methodology and mandate. There is a surprisingly small amount of literature or commentary on the debates that informed the 1965 Convention. The chapter seeks

65 Com.69/II.27/A (Paris, 1969).

66 Y.U.N. 1964, p. 346. General Assembly Resolution 1904 (XVIII).

to provide a thorough understanding of the intention behind the Convention's provisions, by looking to the original contributions.

Chapter 5: A Legal History of Descent-based Discrimination

'Descent' is an obscure legal term. Despite its recent significance, no legal documentation has been produced which explains its precise meaning. The chapter seeks to discover its original meaning, and goes through three stages. The first is an outline of the recent movement within international human rights law on the elimination of descent-based discrimination. The beginning of that movement can be traced to CERD's concluding observations to India's 1996 State Report, in which India denied that caste was a form of racial discrimination, or that caste was covered by the 1965 Convention. The Committee replied that caste was a form of descent-based discrimination. This was followed up in its concluding observations to reports from Bangladesh, Japan, Mali, Senegal, and other countries from Asia and Africa, and culminated in General Recommendation XXIX on Discrimination based on Work and Descent in August 2002. Parallel to CERD's work, the UN Sub-Commission has published a number of working papers and expanded working papers beginning in August 2000, and appointed two Special Rapporteurs on Discrimination based on Work and Descent in April 2005. The Sub-Commission has also analysed descent-based discrimination amongst diaspora communities.

Descent, as already outlined, is one of the five grounds in the article 1(1) definition of racial discrimination in the ICERD. The chapter turns to the *travaux préparatoires* of the Convention to establish the meaning of the word, or its origin. It transpires that India introduced the word 'descent' as part of a broader amendment, but, quite remarkably, failed to offer any explanation as to its meaning. Even more remarkably, it appears none of the other participants either asked India to define the term or offered their own definition. In 1996, CERD established the link between caste and descent. The debates are examined in an attempt to glean some explanation for this word, but none is found. No other state party questions its inclusion in the final draft of the treaty.

Descent does appear as a ground for non-discrimination in one other legal source of particular relevance: article 16(2) of the Indian Constitution. Consequently it is to the Constituent Assembly debates of India (1947–49) that the chapter turns in search of the meaning of 'descent'. The resulting explanation from the Assembly debates shows that descent has no link to caste. The conclusion from this is that while CERD ought to be able to freely interpret the Convention to allow it to investigate all forms of racial discrimination, caste and descent must be distinguished, for the large number of countries being identified as suffering from descent-based discrimination must not serve to dilute the particular problem of caste and the unique religious structure which supports the system. While other countries may be experiencing discrimination due to, for example, myths of purity and pollution, as appears to be the case in West Africa, this is not of

the same scale as the Hindu caste system, and does not have religious support. To equate caste in India with descent-based discrimination in Mali or Yemen is to ignore the structural differences that account for the perpetuation of caste-based discrimination and its disastrous effects on 160 million people in India alone.

Chapter 6: Enhancing Protection against Caste-based Discrimination

The chapter asks what remedies human rights law can propose towards the elimination of caste-based discrimination. There has been an elaborate mechanism of special measures in place in the domestic legal framework of India for 50 years. Yet the failure of these provisions is apparent from the documented discrimination on the basis of caste that is still taking place in India.

The approach in this chapter is threefold. It begins by looking beyond the work of CERD and the UN Sub-Commission to the deliberations of the four other United Nations treaty-monitoring bodies who have engaged with the question of caste in their areas of expertise; the Human Rights Committee, the Committee on the Elimination of Discrimination against Women, the Committee on the Rights of the Child and the Committee on Economic, Social and Cultural Rights. There has been some robust interventions through the state reporting procedure on how India proposes tackling caste prejudice as it adversely affects women and children. In the area of civil and political rights, the Human Rights Committee has been less incisive in its probing of the Hindu caste system. This must be rectified, for there are major difficulties surrounding the administration of justice as a result of caste prejudice; this topic is briefly analysed using recent caselaw from the Indian Supreme Court. India has not reported under the Covenant on Economic and Social Rights in 20 years, and the Committee will have a crucial task when India next comes before it.

The second approach to enhancing protection is reform of the existing reservations system. The National Commission for Scheduled Castes and Scheduled Tribes in India, a constitutional body, has repeatedly recommended urgent action to remove deficiencies in the reservations mechanism. These recommendations reach into the three prongs of the special measures policy, legislative reservations, reservations in education and reservations in government posts. It is difficult to imagine that such reforms will be implemented when the Commission's own reports are ignored. The most recent National Commission report available to the public is from 1998. Subsequent reports are still pending Parliament's review before they can be released.

Finally, the question of caste-based discrimination in the private sphere looks at the Bhopal Declaration, a document that emerged from an all-India Dalit meeting in Madhya Pradesh in 2002. The Bhopal Declaration suggests some 21 points for tackling caste prejudice, that include the introduction of special measures in private enterprise. These measures could take the form of 'supplier diversity', whereby every government and private organisation would receive a certain proportion of their supplies from socially disadvantaged Dalit businesses.

Other measures in the document include the introduction of free higher education, allocation of land, and various social and economic initiatives designed to tackle the effects of caste-based discrimination that 50 years of constitutional reservations have failed to remove.

In 1955, a year before his death, Ambedkar expressed his disappointment with the implementation of reservations by calling for a mass conversion of Untouchables from Hinduism to Buddhism. This does not mean that the reservations system should be abandoned, but that other strategies are needed to complement their limited effect. Therefore, how shall CERD and the UN Sub-Commission proceed towards combating caste-based discrimination? The reality of discrimination against Dalits can be eroded through a combination of focusing on specific aspects of caste-based discrimination, the strategy that emerged in Bhopal, and an overall attack on the belief structure that supports caste. Despite its longevity, caste is susceptible to change.

Ambedkar wrote:

What the Hindus are being told is religion is not religion but is really law ... How can humanity endure this code of eternal laws? The misrepresentation that is caused by misnaming this law as religion must be removed ... The idea of law is associated with the idea of change and when people come to know that what is called religion is really law, they will be ready for a change, for people know and accept that law can be changed ...

The religion of rules may be replaced by a religion of principles, a new doctrine based on liberty, equality and fraternity.⁶⁷

There is a discernible yet gradual recognition of the contemporary reality of caste-based discrimination at the governmental level in India. In January 2007, 'Indian prime minister Manmohan Singh became the first leader of his country ... to compare the condition of low-caste Hindus with that of black South Africans under *apartheid*'.⁶⁸ Nevertheless opposition to intervention by the United Nations remains strong. Caste-based discrimination was considered to have been abolished in 1950 with the Indian Constitution. Recognition of continuing and pervasive caste inequities in the twenty-first century will lead to reform of existing laws, and the introduction of new measures designed to overturn the discriminatory effects of the system.

67 Ambedkar, B., 'The Annihilation of Caste', supra n.24, 299–301.

68 *The Guardian*, 19 January 2007. Mr Singh noted: 'Dalits have faced a unique discrimination in our society that is fundamentally different from the problems of minority groups in general. The only parallel to the practice of untouchability was *apartheid*.'