CASTE-BASED DISCRIMINATION IN INTERNATIONAL HUMAN RIGHTS LAW

To Dr Bhimrao Ramji Ambedkar (1893–1956)

Caste-based Discrimination in International Human Rights Law

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List of Abbreviations

CERD	Committee on the Elimination of Racial Discrimination
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
INC	Indian National Congress
OBC	Other Backward Classes
SC	Scheduled Castes
ST	Scheduled Tribes
UNESCO	United Nations Educational, Scientific and Cultural Organization

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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

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[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; Zelliot, 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 study 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] Deliège, 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 *Manusmrti*, 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 Ambedker, after Gandhi went on 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,

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[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] Zelliot, E., supra n.1, 69.

[9] Zelliot, 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 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 in educational institutions.

and reserved 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]

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

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[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 Vicziany, 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 of 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

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[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:

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[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] Ibid., 192.

[28] The Sanksrit word *Purusha* means man or mankind, *sukta* means well-recited, 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 *Manusmrti*.[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

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[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 *smrtis* … the often quoted one is *Manusmriti* … this *smriti* was given out by Manu to a group of Brahmans, 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 divisons. 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

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[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

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[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 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 Rights appointed Yozo

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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.

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

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[52] CERD/C/298/Add.1, Periodic Report – Nepal, July 1997 and CERD/C/337/Add.4, Periodic Report – Nepal, May 1999.

[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 reponse 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*

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55 Thornberry, P., supra n.44, p.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

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[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 officating 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 III 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:

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[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.

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[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.idsn.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.sahrdc.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 will 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 1963[66] 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

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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 a remarkably 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 had 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 the 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 inequailites 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.

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[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*.'

PART 1

Chapter 1

The Origin of Caste

Introduction

Shridhar Venkatesh Ketkar, in his 1909 text *The History of Caste in India*, held:

> The expression 'origin of caste' can have no meaning. The theory of four classes (*varnas*) in society has its origin; sharp lines between various layers of society have their origin; ascendancy of the priests and their exclusiveness have their origin; association of purity and impurity to various objects also has its origin … we should better use the plural form, 'origins of caste'; this expression would have some meaning. It is the duty of the historian of caste to take into account all the complexities which make the caste system, and to go into the origin and history of every one of them.[1]

Dr B.R. Ambedkar referred to Ketkar's comments in his 1917 essay *Castes in India: Their Origin, Mechanism and Development*, when he wrote:

> Some are puzzled as to whether there can be such a thing as the origin of caste and suggest … we should better use the plural form, 'origins of caste'. As for myself, I do not feel puzzled by the origin of caste in India for, as I have established before, endogamy is the only characteristic of caste and when I say *origin of caste* I mean *the origin of the mechanism for endogamy*.[2]

Ambedkar's statement, that endogamy, or the prohibition (or absence) of intermarriage, is the only characteristic that is peculiar to caste, would inform his writings on the subject for the next 20 years. In *The Annihilation of Caste* (1936), he would state that the only question to be considered is how to abolish caste. To which he answered: 'I am convinced that the real remedy is inter-marriage.'[3]

This chapter will explore the origin of caste in India from three perspectives. The first is the religious history of caste, which traces the original Hindu texts, the Vedas, which expounded the fourfold division of the castes. The second

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1 Ketkar, S. (1909), *History of Caste in India* (New Delhi: Low Price Publications), 18.

2 Ambedkar, B. (1916), *Castes in India, their Origin, Mechanism and Development*, in Valerian Rodrigues (ed.) (2002), *The Essential Writings of B.R. Ambedkar* (Oxford: Oxford University Press), 252.

3 Ambedkar, B. (1936), *The Annihilation of Caste*, in Rodrigues (ed.), ibid., 288.

section outlines the sociological theory that has sought to give a definite shape to caste. It will assess early descriptions of caste to later structuralist attempts to explain the system in terms of binary oppositions, notably that of purity and pollution, as well as the doctrine of *karma* which supports the maintenance of caste divisions even among the lowest groupings. Finally, the political history of caste reform is examined, from the early social reformers to the critical role played by Ambedkar in ensuring that the problem of caste would become inextricably linked to India's independence.

As Ketkar warned, the caste system is an extraordinarily complex social system with infinite factors in its shaping. The chapter will seek to isolate some of its greater features, in order to highlight that the Hindu caste structure is unique, religiously sanctioned and tenacious in its grip on the mores of Hindu society. In this sense, it will be distinguished from other related concepts, such as that of 'race', though it should be stressed that the caste system must still be considered to constitute a form of racial discrimination. The process of identifying the specific features of caste, particularly in relation to race, is undertaken with a view to understanding what supports the system, in order to move effectively towards its eradication. Caste is inherently discriminatory, and it cannot be tackled without criticising and removing the entire system itself. Ambedkar will emerge from the chapter as having best understood what sustains the caste system, and most effectively tackled its virulent effects, such as the blight of untouchability, and the social, economic and educational destitution of the lowest castes.

The Religious History of Caste

The Vedas

There were four original castes, separately created by Brahma: Brahmans, Kshatriyas, Vaishyas and Shudras. This fourfold division has its origin in the Vedas, the sacred books of the Hindus, and one of the 'most ancient books in the library of mankind'.[4] They are admitted by all the adherents of the Hindu system to be the primary and infallible authority on the origin of the castes.[5] The word 'veda' is derived from the root 'vid' which means 'to know' – thus the word 'veda' means knowledge, and the Vedas are the Books of Knowledge. The Vedas were transmitted orally, and 'to consider them as books only after they were written out or printed would to a great extent distort if not destroy the perspective'.[6] They

[4] Müller, F. (1891), *Vedic Hymns* (Delhi: Motilal Barnarsidass), 31, quoted in Sharma, A. (2000), *Classical Hindu Thought* (Oxford: Oxford University Press), 191.

[5] Muir, J. (1858), *Original Sanskrit Texts on the Origin and Progress of the Religious Institutions of India*, vol. 1 (London: William and Norgate), 5.

[6] Sharma, A., supra n.4, 191–2. The Vedas were in existence by 1500 BC though not written out until much later.

are four in number: the *Rig Veda*, or Wisdom found in the Hymns of Praise; the *Sama Veda*, or Wisdom found in the Songs; the *Yajur Veda* or Wisdom found in the Sacrificial Formulas; and the *Atharva Veda* or Wisdom found in the Magic Formulas; with each Veda divided into four parts:[7] the *Mantras*, or hymnic formulas; the *Brahmana* or commentaries on ritual; the *Aranyaka* or 'forest texts' reflecting a hermetic ideal; and the *Upanisads* or philosophical texts.[8]

Of the four Vedas, the *Rig Veda* is unquestionably the oldest part of the literature and the most important. Its content is largely hymns in praise of the powers of nature personified as gods.[9] It consists of a collection of 1,28 hymns divided into 10 books (*Mandalas*). The last book, the tenth, exhibits the growth of religious philosophy and contains the Creation hymn in which we find the oldest passage on the fourfold origin of the castes. The hymn, known as the *Purusha Sukta*, is also found in the later texts, the *Vajasaneyi Sanhita* of the *Yajur Veda*, and the *Atharva Veda*,[10] and reads:

> 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 was made his arms; that which was the Vaishya was his thighs; the Shudra sprang from his feet.[11]

In the following verse, the moon is produced from his mind, the sun from his eye, the wind from his breath, the atmosphere from his navel and the sky from his head. Sharma notes that:

> the fundamental argument involved here is that the caste system represents a divine, sacred or natural order of things … If the universe – and along with it, the caste system – is created by God then it is divine.[12]

Or, according to P.V. Kane: 'the composer of the hymn regarded the division of society into four classes to be very ancient and to be as natural and God-ordained as the sun and moon.'[13]

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[7] Sometimes the Vedas are considered three rather than four in number, and are divided into three or two rather than four parts. The fourth Veda, the *Atharva Veda*, was added at a later date.

[8] Sharma, A., supra n.4, 194.

[9] Ibid., 196. For example, *Agni* or god of Fire, *Indra* or god of Thunder, *Varuna* or god of Sky, *Surya* or god of Sun.

[10] Muir, J., supra n.5, 7.

[11] *Rig Veda*, Book X, Verse 90, *Vajasaneyi Sanhita*, Book XXXI, Verses 1–16, *Atherva Veda*, Book XIX, Verse 6; the 1858 translations by J. Muir will be followed in all passages directly quoting from the original Sanskrit texts.

[12] Sharma, A., supra n.4, 134.

[13] Kane, P. (1941; reprinted 2000), *History of Dharmashastra*, vol. 2 (Poona: Bhandarkar Oriental Research Institute), 33 n.1.

The sacred literature of Hinduism falls roughly into two categories. The first is *shruti* which means 'hearing' and denotes that which has been revealed directly by God. This category comprises the four Vedas. The *Purusha Sukta* in the *Rig Veda* is the only Vedic passage which refers to the four castes by name.[14] In all other contexts, the word *varna* is used, literally, 'colour'.[15]

Nagarajan describes the *Purusha Sukta* as an 'interpolation', in order to convey the idea that the hymn was a later addition to the Vedic texts to give divine sanction to what was essentially an unequal socio-economic division already in existence:

> The Vedic hymns had been composed before the *varna* scheme was implemented. The Vedic society was not organised on the basis of *varnas*. The *Purusha sukta* might have been a later interpolation intended to secure Vedic sanction for that scheme.[16]

The four *varnas* correspond to an economic structure:

> When the import of the mystic allegory of *Rig Veda* X.90 is grasped, we find that it promotes the concept of a social order wherein only a small section would be required to engage in agrarian work in order to maintain itself and the rest of the society … the scheme by which three *varnas* were being maintained by the fourth.[17]

Nagarajan questions the divinity of such an order: 'The interpolations [the *Purusha sukta*] were intended to assert Vedic and 'divine' sanction for a man-made classification.'[18]

The Dharma-codes

The Vedas are followed later by epic poems along with the *Puranas* and philosophical and legal writings, designated by the term *smrti* or 'memory',[19] considered 'revelations only in a secondary or limited sense'.[20] They are technically

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[14] Lingat, R. (1973), *The Classical Law of India* (Berkeley, CA: University of California Press), 34.

[15] Ibid., 29 and 34. Turner translates *varna* as 'colour, appearance, class'; Turner, R. (1966; reprinted 1973), *A Comparative Dictionary of the Indo-Aryan Languages* (Oxford: Oxford University Press), 661, entry 11338.

[16] Nagarajan, V. (1994), *Origins of Hindu Social System* (Nagpur: Dattsons), 16. Pillai makes a similar point in his discussion of Max Müller's work: 'In the opinion of Max Müller, the hymn *Purusha Sukta* is a later addition to the Vedic text. His opinion is based on internal evidence. The hymn contains words such as *Grishma* for the hot season and *Vasanta* for the spring, and he considers them as foreign to the Vedic vocabulary.' Pillai, G. (1959), *Origin and Development of Caste* (Allahabad: Kitab Mahal), 12.

[17] Ibid., 103.

[18] Ibid., 121.

[19] Turner, R., supra n.15, 801, entry 13867.

[20] Hinnells, J. and Sharpe, E. (1972), *Hinduism* (Birmingham: Oriel Press), 28.

inferior to the Vedas, whose knowledge is restricted to members of the highest castes. However, Muir notes that 'according to the Hindus, the teaching of the Puranas on any point is conclusive'.[21] The two great epics of India, the *Ramayana* and the *Mahabharata* are included in this second category, and have been described as 'the cherished heritage of the whole Hindu world' and 'the basis of its thought and its moral and ethical ideas'.[22]

Robert Lingat's study of the classical laws of India focused on the concept of *dharma*, or 'duty',[23] which was traditionally studied as a complement to the rituals found in the Vedas. The relevant distinction is that found between Vedic revelations and the *smrti* or memory of the later texts of the post-Vedic period. The *dharma-sutras*[24] represent the first phase of the written expression of *smrti*.[25] 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.[26] They based their hierarchy of functions and duties on the hierarchy of social groups designated in the *Rig Veda*. The plurality of ethical principles, or *dharmas*, dominated Hindu morals.[27] They are stated in great detail in the *Laws of Manu*, or *Manusmrti*. Nagarajan explains the Manu institution as follows:

> Manu was the designation of the head of a socio-cultural institution created during the later Vedic era. It lasted for about two centuries … each Manu had a tenure of about twelve years.[28]

The link between the Vedas and the post-Vedic *dharma*-codifiers was expressly highlighted by the influential Manu Vaivasvata, the seventh Manu, who alluded to the *Purusha sukta* in Book I verse 87 of his Code, the *Manusmrti*: 'To protect this whole creation the resplendent one determined separate works (*karmani*) for those produced from his mouth, arms, thighs and feet.'[29] Lipner observes: 'again and again in Hindu texts, which seek to express normative socio-religious values or to preserve or reinstate Hindu *dharma*, this ancient Vedic verse is invoked.'[30]

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21 Muir, J., supra n.5, 5.

22 Swami Vivekananda, quoted in Hinnells, J. and Sharpe, E., supra n.20, 28.

23 Although Ambedkar writes '*dharma* means commands and prohibitions'. Ambedkar, B., supra n.2, 298.

24 The Sanskrit word s*utra* means 'thread' or 'cord'. Turner, R., supra n.15, 781, entry 13561.

25 Lingat, R., supra n.14, 29.

26 Ibid.

27 Hinnells, J. and Sharpe, E., supra n.20, 123. See also Nagajaran, V., supra n.16, 33: 'The post-Vedic epoch was dominated by the concept of *dharma*.'

28 Nagajaran, ibid., 31.

29 Manu.I.87.

30 Lipner, J. (1994), *Hindus: Their Religious Beliefs and Practices* (London and New York: Routledge), 88.

The distinction between *varna* and *jati* is relevant to the relationship between the Vedas and the codes of *dharma*. The *varnas* are not, properly speaking, castes.[31] The *dharma-sutras* invariably use the word *jati*[32] when they want to indicate the actual castes. There are only four *varnas*, while there are an unlimited number of castes or *jatis*. Galanter defines a *jati* as:

> an endogamous group bearing a common name and claiming a common origin, membership in which is hereditary, linked to one or more traditional occupations, imposing on its members certain obligations and restrictions in matters of social intercourse, and having more or less a determinate position in a hierarchical scale of ranks.[33]

It is impossible to reduce the proliferation of castes in modern India to the simple framework of the fourfold theory found in the *Rig Veda*. While *varna* essentially represents a theoretical division of Hindu society into Brahmans, Kshatriyas, Vaishyas and Shudras, *jati* is a practical one. Shridavar Ketkar points to the work of Emile Senart, *Les Castes dans l'Inde*,[34] which 'brought for the first time to the attention of the European world the fact that a caste [i.e. *jati*]

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[31] Lingat, R., supra n.14, 32.

[32] The Sanskrit word *jati* means 'position fixed by birth'. Turner, R., supra n.15, 285, entry 5187.

[33] Galanter, M. (1984), *Competing Equalities; Law and the Backward Classes in India* (Berkeley, CA: University of California Press), 7. Andre Beteille's definition of a *jati* is 'a small and named group of persons characterized by endogamy, hereditary membership, and a specific style of life which sometimes includes the pursuit by tradition of a particular occupation and is usually associated with a more or less distinct ritual status in a hierarchical system'; Beteille, A. (1996), *Caste, Class and Power: Changing Patterns of Stratification in a Tanjore Village* (Delhi: Oxford University Press), 46. Beteille's work has been criticised by Chandra Bhan Prasad in his *Dalit Diary*): 'Beteille is credited to have expounded fundamental ideas and concepts to fathom the complexities of the Indian social structure. Inequality, for him, is a common phenomenon in every society, and it cannot be done away with … Beteille's is a typical case of non-ethical intellectualism which treats knowledge as a private property meant for the satisfaction of private emotional needs'; Prasad, C. (2004), *Dalit Diary 1999–2003* (Pondicherry: Navayana), 8–9.

[34] Senart, E. (1896), *Les Castes dans l'Inde: Les faits et le système* (Paris: Leroux), 158 and 180: 'La caste, est un organisme de sa nature circonscrit et séparatiste. La classe et la caste ne se correspondent ni par l'étendue, ni par les caractères, ni par les tendances natives. Chacune, parmi les castes mêmes qui se rattachent à une seule classe, est nettement distinguée de ses congénères; elle s'en isole avec une âpreté que ne désarme aucun souci d'une unité supérieure. La classe sert des ambitions politiques ; la caste obéit à des scrupules étroits, à des coutumes traditionnelles, tout au plus à certaines influences locales, qui n'ont d'ordinaire aucun rapport avec les intérêts de classe. Avant tout, la caste s'attache à sauvegarder une intégrité dont la préoccupation se montre ombrageuse jusque chez les plus humbles.'

and a *varna* are not identical'.[35] All the *dharma-sutras*, writes Lingat, 'confine themselves to sanctioning within an authoritative formula the imperative force … of the rules which distinguish the different *jatis*, the real castes, from each other'.[36] These specific rules governing caste duties always defer to the original authority of the Vedas.[37] Lipner describes *jati* and *varna* as 'representative terms for the actual and the ideal'.[38] Anthropologists have confirmed the view that the field-reality is represented by *jati* rather than *varna*, which has led some scholars to observe that Hindus, in these matters, have been more conservative than their scriptures.[39] The fourfold origin of the castes features prominently in the *dharmic* literature. Lipner notes:

> a great deal of formal *dharma* literature may be regarded as the attempt of the orthodox to elaborate this verse in terms of what they regard as the ideal life-style. It lies at the heart of the bitter debates between modern social reformers and conservative revivalists.[40]

Following the *Purusha sukta*, the next reference to the creation of castes, which named the four divisions, came from the fifth chapter of the second book of the *Bhagavata Purana*: 'the Brahman [was] the mouth of Purusha, the Kshatriya his arms: the Vaishya sprang from his thighs and the Shudra from the feet of Bhagavan.'[41] In another passage, a similar idea is found: 'The Brahman is his mouth: he is Kshatriya-armed, that great one, Vaishya-thighed; and has the black caste abiding in his feet.'[42]

In Book 3 of the same Purana, there is another description, which is, according to Muir, more in accordance with the ordinary representation, and assigns duties to the each of the four castes:

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[35] Ketkar, S., supra n.1, 14 n.6. Senart's insistence on the fact that caste is essentially a Hindu phenomenon was the pivot of his argument (257). See also Bouglé, C. (1935), *Essai sur le Régime des Castes* (Paris: Les Presses universitaires de France), reproduced in Bouglé, C. (1971), *Essays on the Caste System* (Cambridge: Cambridge University Press), *avant-propos*.

[36] Lingat, R., supra n.14, 38.

[37] The authors of the *dharma-sutras*, such as the Codes of Manu, were keenly preoccupied with notions of purity and impurity, and enumerate multiple sources of impurity and the means by which one may purify oneself. These texts also contain the ceremony of excommunication from a caste, various classifications of faults, and myriad prescribed actions for the correct fulfilment of duty – an analysis of these classical laws is beyond the scope of this chapter.

[38] Lipner, J., supra n.30, 112. He continues: 'In theory the four *varnas* are affirmed; in practice it is not always easy to relate a particular *jati* to the *varna* hierarchy' (113).

[39] Sharma, A., supra n.4, 133.

[40] Lipner, J., supra n.30, 88.

[41] *Bhagavata Purana*, Book 2, Chapter 5, Verses 34–8.

[42] *Bhagavata Purana*, Book 2, Chapter 1, Verse 37.

> From the mouth of Purusha, O son of Kuru, came the Veda (Brahma); and the Brahman who, owing to his production from the same organ, became the chief and preceptor of the castes. From his arms came protection (Kshatriya): the Kshatriya devoted himself to that duty, and being formed from Purusha, defends the castes against the injuries of their enemies. The arts, which afford subsistence to the world, sprang from the thighs of the Lord: and thence was produced the Vaishya, who provided the maintenance of mankind. From the feet of Bhagavan sprang service for the fulfilment of duty: from it was formerly produced the Shudra, with whose occupation Hari is well pleased. These castes by fulfilling their own duties, worship Hari their preceptor; for they have been produced, with their occupations, to purify themselves by faith.[43]

Therefore, to the Brahmans, or priests, belong the sacerdotal function and a monopoly on religious teaching; the Khsattriyas come after the Brahmans and are the warriors or kings; the Vaishyas or merchants secure the economic life of the country; and the duty of the Shudras is to serve the superior *varnas*.[44] The occupations specifically assigned to the four *varnas* are 'not simple professions but rather social functions … each *varna* is equally necessary to social order'.[45] While it is the Brahman's privilege to study and teach the Vedas, it is also his duty. The *varnas* are complementary, and a Shudra fulfils his social duty if he accomplishes his allotted task, however humble it may be. As a recompense, there is the prospect of being reborn into a higher caste. The punishment for neglect of duty is rebirth in an inferior caste.[46]

The *dharma* codifiers reinforced the exalted status of the Brahmans.[47] Manu Swayambhuva's account of the origin and duties of the castes (the *Institutes* of Manu) is described in Book I by Bhrigu, for Manu had committed to Bhrigu the task of communicating the law.[48] Bhrigu writes in verse 87 that: 'For the preservation of this whole creation, that glorious being ordained separate duties for those who sprang from his mouth, his arms, his thighs and his feet.'[49] He then states the position of the Brahmans: 'Since the Brahmans sprang forth from the most excellent organ; since he was firstborn and possesses the Veda, he is by right the chief of this whole creation.'[50]

But just as there is a hierarchy amongst men, so a hierarchy amongst Brahmans is also outlined:

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43 *Bhagavata Purana*, Book 3, Chapter 6, Verses 30–34.

44 Lingat, R., supra n.14, 31. The author quotes variously from Guatama, Baudhayana and Manu in support of the division outlined above.

45 Ibid., 32.

46 Guatama, Book 11, Verses 29-30; Apastamba, Book 2 Chapter 5, Verse I, lines 10-11. Ibid.

47 Lipner, J., supra n.30, 89.

48 Muir, J., supra n.5, 17.

49 Manu.1.87.

50 Manu.1.93.

> Of intelligent beings, men are the most excellent; of men, Brahmans; of Brahmans, the learned; of the learned, those who know their duty; of those who know it, they who do it; and of those who do it, the men who are skilled in the Vedas.[51]

There are several further examples of the origin of castes, some conflicting with the often cited account which gives them a fourfold descent from Purusha – for example, the *Mahabharata* contains a passage in Book I where the whole of the castes are said to have sprung from Manu, who was himself one of the sons of Vivaswat (the sun).[52] Muir comments:

> the sacred books of the Hindus contain no uniform and uncontroverted account of the origin of castes; but, on the contrary, present the greatest varieties of opinion on the subject. Explanations mystical, mythical, etymological, and critical, are all in turn attempted: and the freest scope is given by the writers to fanciful and arbitrary conjecture.[53]

Nevertheless, primacy is given to the fourfold origin of the *Rig Veda* found in the mystical statement from the *Purusha Sukta*, that the forefathers of the three superior castes formed three of the members of Purusha's body, while the servile class issued from his feet. Muir writes:

> the oldest extant passage in which the castes are connected with the different parts of the creator's body, seems to have given rise to all the subsequent representations to the same effect in later works.[54]

Varna (Colour) and Race

In the *Santi Parva* of the *Mahabharata*,[55] a remarkable description of the formation of living beings is recounted. Bharadwaja, a sage, beholding the great Rishi (sage, or divinely inspired poet) Bhrigu sitting upon the peak of Kailasa, asks him a number of questions:

> If the caste (*varna*) of the four castes is distinguished by their colour (*varna*), then we perceive in all the castes a confusion of caste [or colour]. Desire, anger, fear, cupidity,

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[51] Manu.1.96–7.

[52] *Mahabharata*.1.57. See also *Mahabharata*, Adi Parva, Sect.75, verse 3138 *et seqq*.: 'Brahmans, Kshatriyas, and the rest of men were sprung from Manu... Of these the Brahmans descended from Manu were the guardians of the Veda.'

[53] Muir, J., supra n.5, 42.

[54] Ibid.

[55] Muir describes the *Mahabharata*, a legendary epic poem, as made up of very heterogenous elements, the products of different ages, and representing widely different dogmatical tendencies, which have been thrown together by the successive compilers or editors of the work without any regard to their mutual inconsistency. A work so vast could scarcely have been the result of any other process. Muir, J., supra n.5, 38.

> grief, anxiety, hunger, fatigue, prevail over all; by what, then, is caste distinguished? [They have in common] all the bodily secretions, with phlegm, bile and blood; and the bodies of them all decay: there are innumerable kinds of things moving and stationary: how is the class of all these different classes of creatures determined?

Bhrigu replies:

> There is no distinction of castes; this whole world is from Brahma; for having been formerly created by him, it became separated into castes in consequence of works. Those red-limbed Brahmans [twice-born][56] who were fond of sensual pleasure … and who had forsaken their duties, fell into the condition of Kshatriyas. The yellow Brahmans [twice-born] who derived their livelihood from cows and agriculture, and did not practice their duties, fell into the state of Vaishyas. The Brahmans [twice-born] who were black, and had lost their purity, who were addicted to violence and lying, who were covetous and subsisted by all kinds of work, fell into the position of Shudras. Being thus separated by these, their works, the Brahmans [twice-born] became of other castes … thus these four castes, whose speech is from Brahma were formerly instituted by Brahma; but by their cupidity, fell into ignorance … The Veda [Brahma] was created the chief of all things: those who do not know it are no Brahmans. He who is unclean, is addicted constantly to all kinds of food, performs all kinds of work, has abandoned the Veda, and is destitute of pure observances – is called a Shudra. And this is the mark of a Shudra, and it is not found in a twice-born man: the Shudra will be a Shudra, but the Brahman not a Brahman.[57]

Although at the beginning of this passage, the four castes are connected with four different colours, it is subsequently declared by Bhrigu that there is no distinction (*visesha*) of castes; and that even the Shudras are spoken of as having been originally 'twice-born', though they subsequently fell from their primeval condition.[58] Muir remarks that the meaning of the last sentence is not very apparent.[59]

Roth distinguishes between the first three and the fourth *varna*. The position in which the three highest castes in the developed Brahmanical system, Brahmans, Kshatriyas and Vaishyas, stood to each other was that they differed only in the extent of their prerogatives, the Kshatriya being in some respects less favoured than the Brahman, and the Vaishya again less favoured than the Kshatriya. With the fourth caste, the Shudras, the case was quite different. They are not admitted

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[56] Lipner explains: 'The first three *varnas* are regarded as "twice-born". The first birth is physical; the second birth spiritual, the result of initiation into Vedic study generally during childhood, which renders the initiate eligible to practise Vedic and Veda-based ritual and to be sanctified by religiously sanctioned rites of passage. The *Apastamba Dharma sutra* says: "The teacher gives birth to the student through knowledge. That is the best birth" (1.1.1.15–16)'; Lipner, J., supra n.30, 90.

[57] *Mahabharata*, Santi Parva, Sect.188 and 189, verses 6930 et seqq.

[58] Muir, J., supra n.5, 41.

[59] Ibid., 39.

to sacrifice, to the study of the Vedas, or to investiture with the sacred cord. From this Roth concludes that the three highest castes stood in a closer connection with each other, either of descent or of culture, than any of them did to the fourth. The Indian body politic, moreover, was complete without the Shudras. The Brahmans and Kshatriyas were the rulers, while the Vaishyas formed the mass of the people. This is confirmed by their name, 'Vaishya', derived from 'Vis', a word which in the Vedas designates the general community, especially considered as the possessor of the pure *Aryan* worship and culture, in contradistinction to all 'barbarian races'. The fourth caste, the Shudras, Roth considers to have been made up of a 'race' subdued by the Brahmanical conquerors, whether that 'race' may have been a branch of the *Aryan* stock which immigrated at an earlier period into India, or an autochthonous Indian tribe.[60]

There is support for Roth's views in the text of the *Rig Veda* itself, which employs the terminology of '*Aryans*' and '*Dasyus*', the latter being the conquered indigenous tribe referred to: 'He destroyed the *Dasyus* and protected the *Aryan* colour [*varna*].'[61] Lipner states:

> Varna generally refers to the appearance of something (its form and colour) and we find the term used with significance in the Rig Veda to differentiate the Vedic Indians, who called themselves 'noble ones' (aryas) from the indigenous peoples they encountered.[62]

Lingat writes of 'a real aversion only between the three higher *varnas* taken together, i.e. the twice-born, and the Shudras. The latter do indeed constitute the impure caste, contact with which and even, in some cases, mere sight of whom taints'.[63] The Shudra cannot speak or hear the sacred word. The *dharmasutra* of *Gautama* instructs: 'If he intentionally hears the recitation of the Veda, let his ears be filled with melted zinc or lac. If he recites the Vedic texts, let his tongue be cut off.'[64] While *Apastamba* states: 'The Shudra who assumes an equal place (with that of a member of a superior *varna*) in speech, on the road, a bed or a chair, shall be flogged.'[65]

Lipner looks for reasons why the *Dasyus* or indigenous tribes are to be despised, and points to the relevant passages of the *Rig Veda* which describe how, according to the text, they speak and worship differently (*Rig Veda* 7.6.3, 7.21.5) and, crucially, they look different – *Rig Veda* 5.29.10 possibly refers to 'noseless' (*anasah*) or snub-nosed *Dasyus*. Which leads him to conclude: 'Thus it

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[60] Roth, 'Brahma und die Brahman', *Journal of the German Oriental Society* (*Zeitschrift der Deutschen Morgenlandischen Gesellschaft*) 1, 81–4; cited in Muir, J., supra n.5, 150–51.

[61] *Rig Veda* 3.34.9.

[62] Lipner, J., supra n.30, 89. Lipner gives the example of *Rig Veda* 3.34.9. Ibid.

[63] Lingat, R., supra n.14, 40.

[64] Gautama 12.4–6. Ibid.

[65] Apastamba 2.10.27.15, and Guatama 12.7.cf.*M*. Ibid.

appears that in the beginning *varna* was a term which had racial, indeed racist, connotations.'[66]

Furthermore, Lipner deduces that 'they were generally drawn from the ranks of colonised *Harappans* and other indigenous peoples (the *Dasas* and *Dasyus* of the Vedic hymns)', and continues: 'Shudras were dubbed non-*Aryans* in the *dharma* codes; this gives some credence to the view that originally the majority [of the Shudras] came from the indigenous peoples of the subcontinent.'[67]

Lingat, when pointing out that the *Purusha sukta* was the only passage in the Vedas which specifically uses the terms Brahmans, Kshatriyas, Vaishyas and Shudras, writes:

> In all other contexts the Veda uses the word varna in a sense analogous to race: arya-varna, the 'Aryan race', is opposed to dasa-varna, the enemy race, those who are also called the Dasyu, the men with black skins.[68]

In an appendix to his text *Hinduism and Human Rights*, Arvind Sharma explores the relationship between the caste system and race.[69] He begins by stating that 'all Hindus were of one race, if subdivided into various castes' for 'the consequence of explaining *jati* by inter-marriage among the *varnas* made them all one "blood"'.[70] This picture, he argues, was radically changed by Western Indology, central to whose depiction of India was the fact of an *Aryan* invasion of India, which pushed the *Dravidians* deep into the south. Hinduism as a social organisation was presented as an attempt by the numerically inferior *Aryans* to maintain their dominance over the earlier inhabitants. In this 'regnant view in modern scholarship', the fact that the *Rig Veda* describes the *aryavarna* as fair and the *dasavarna* as dark 'seemed to clinch the issue'; while the fact that the caste system itself was described as a system of *varna* (or colour) 'seemed to clinch the issue even more'.[71] Therefore:

> This is how the caste system, which in the Hindu mind had no racial component to it, acquired one through the labours of modern Western Indology. And this racial origin of the caste system has now led to the suggestion that it was/is a form of racism.[72]

Sharma's defence against the accusation that caste represents a system of racial division is found in a text by Ambedkar entitled *Who were the Shudras?* Ambedkar's crucial point was that the caste system 'was not a conflict of race'

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66 Lipner, J., supra n.30, 89.
67 Ibid., 91 and n.25.
68 Lingat, R., supra n.14, 34.
69 Sharma, A., supra n.4, Appendix IV, 178–90.
70 Ibid., 179.
71 Ibid., 180.
72 Ibid., 181.

but 'a conflict which had arisen on account of difference of religions'.[73] Sharma summarises Ambedkar's seven points contradicting the claim that *Aryas* and *Dasyus* were racially distinct. Ambedkar was writing at a time when the concept of race was widely accepted. Indeed, Ambedkar points to evidence from the discredited 'cephalic index', or head and nose measurements, to determine that there were no distinctions of race between the two groups, as quoted by Sharma in defence of his thesis.[74] Of much more relevance is the evidence from the Vedas which Ambedkar points to, which relates how a *Dasyu* could become an *Arya*; the argument being that such a change could not happen were the difference racial rather than cultic. Sharma disagrees with the notion of *varna* being equated with skin colour, but does not offer another explanation as to why the *Rig Veda* assigns four divisions on the basis of colour. He reveals his reasons for arguing against caste being seen as a racially discriminatory system when he writes:

> the worst-off people under the system … might be inclined to endorse the racial origin of the caste system thus presented as it maximizes the clout they could gain from victimhood which is so effective a position to be in, in a liberal polity such as that of present-day India, which has constitutionalized affirmative action for the former Untouchables. The equation of caste with race, in other words whether true or not, would serve their political interests, as it would double their claim to victimhood and consequently to compensation.[75]

There are compelling arguments to distinguish 'caste' from 'race' but this is not one of them. Of more importance is the need to identify the uniqueness of the caste system, and the elements that have sustained it for thousands of years, in order to move towards its eradication. Sharma is ignoring the distinction between race and racial discrimination; the caste system is a form of racial discrimination that must be analysed in its own right, outside of critiques of race relations that have taken place in other countries, due to its religious support. Furthermore, the concept of 'race' is obsolete, and the debate about whether there are or were biological differences between the Shudras and the three twice-born *varnas* is irrelevant. Ambedkar was writing at a time when race was widely adhered to as a significant factor in the historical and cultural achievements of a people, and would have been at pains to emphasise that his own people, the Dalits, were the biological equal of the Brahmans and upper-castes who had subjugated them for centuries.

Morton Klass makes a vital contribution on this question by exploring other possible meanings of the word 'colour'. He begins by setting out the argument that skin colour was the original basis for caste divisions:

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[73] Ambedkar, B., *Who were the Shudras?*, quoted in Sharma, A., ibid., 183.

[74] Ibid., 182. See Chapter 2 on the use by anthropologists such as Johann Blumenbach of the 'cephalic index' in distinguishing races.

[75] Ibid., 181.

> like so many writers who translate 'varna' as 'colour', Dutt[76] believes that the 'colour' referred to is skin colour … and he concludes that the varnas were thus 'racial' categories, reflecting differences in skin colour found among the South Asian population at the time the original hymn was composed.[77]

Having expressed a general scepticism as to the many theories of the origin of caste, he confesses to 'a particular bewilderment at the popularity of the 'racial antipathy" explanation', finding that it lacks consistency with regard to the *varna* colours indicated in the texts. While the four colour divisions, Brahman – white, Kshatriya – red, Vaishya – yellow and Shudra – black, correspond to supposed 'racial' divisions of human species used in the nineteenth century, he asks; could they still be applicable to ancient India? Is it possible for Brahmans to be described as 'white', and identified with Europeans, while Shudras are identified with Africans? He continues:

> And if consistency is truly our aim, what are we to make of 'yellow' Vaisyas? Was this division of ancient Vedic society of East Asian (or 'Mongoloid') derivation? Most peculiar of all are the 'red' Kshatriyas. Are these noble warriors of Vedic times truly descendants of immigrants from aboriginal North or South America?[78]

The point being made is a very interesting one. Klass is drawing attention to a tendency to equate 'colour' with 'skin colour', yet it seems beyond possibility that the original fourfold division of ancient peoples in India would have corresponded to nineteenth century anthropological typographies of mankind. He proceeds to offer another meaning of *varna*:

> certainly a reasonable alternative explanation, solely on the basis of the information given, is that varna colours do not refer to complexion or supposed skin colour, but rather to some kind of spiritual coloration, or aura. Kshatriya were a martial folk, and their spiritual colour, like that of the Roman war god Mars, was red, a colour many people identify with blood and therefore with violence. The Vaishyas, according to Manu, were concerned, among other things, with 'trade and commerce and usury' and so is it not unreasonable that yellow, the colour of gold, is associated with them?

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[76] Dutt, N. (1931), *Origin and Growth of Caste in India* (London: Trench and Trubner), 21: 'That the colour question was at the root of the *varna* system is apparent from the meaning of the word *varna* (complexion) … we see that the development of the intercaste marriage restrictions was primarily due to the racial differences between the white conquerors and the black natives and the desire of the former to preserve their purity of blood.'

[77] 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?', 40.

[78] Ibid.

> … And, in the same vein, Brahmans would be white of soul because of their purity …[79]

Disavowing any possibility of proving his assertions, Klass maintains that the 'skin colour' theory of *varna*, like his theory, is also equally impossible to prove. Furthermore, he views the equation of *varna* with skin colour as somehow *necessary* to its adherents, and wonders 'why should those who prefer this explanation care whether it originally meant colour of skin, colour of soul, or even colour of traditional garment?'[80]

He subsequently makes the crucial link between race and caste. The rationale behind the original 'skin colour' divide theory, he believes, is that if it were correct, it would prove that mankind, in Vedic times, could be divided into races. It was a theory that appealed to those who wished to promote the idea of separate races. He states:

> many of those who have advanced this argument have no interest in Purusha, his reputed sacrifice, or indeed in the Vedas or in the writings of Manu, except insofar as any of these provide indications of 'racial' confrontation … [and] can be interpreted as evidence that in Vedic times the population could be divided into groups exhibiting marked differences of skin colour. And, on the basis of such evidence, they conclude that there were distinct 'races' in Vedic India.[81]

Klass concludes that his interpretation does not conflict with the Vedic account of the origin of caste, for it renders *varna* as a spiritual concept, in accordance with the divine sacrifice of Purusha represented in the hymn. Differentiating the two explanations, he states: 'For *varna* as skin colour belongs with the *racial* explanation of caste, not with the classic Hindu *religious* explanation.'[82]

Theories and Interpretations of Caste

Early Writings on Caste

The word 'caste', derived from the Latin word 'castus' meaning pure, or chaste, is of Spanish and Portuguese origin. The Spanish were the first to use it ('casta'), but its Indian application is from the Portuguese who so applied it in the middle of the fifteenth century.[83] According to Ketkar, 'the Portuguese used this word to denote the Indian institution, as they thought such a system was intended

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79 Ibid., 40–41.
80 Ibid., 41.
81 Ibid., 42.
82 Ibid., 41.
83 Ketkar, S., supra n.1, 12.

to keep purity of blood'.[84] The *Fardle of Facions* by Johannes Boemus (1555), considered the first scientific approach to ethnology in English, which sought to describe 'the anciente maners, customes and lawes of the peoples enhabiting the two partes of the earth, called Africke and Asie' according to its subtitle, said of the Nabatheens: 'Their caste is wittye in winning of substaunce, but greater in kepinge it.'[85] Boemus was describing what he called 'Arabiens', rather than the inhabitants of India, who were distinguished according to caste by the Anglican chaplain Henry Lord in *A Discoverie of the Sect of the Banians* (1630): 'The Banians [Hindus] kill nothing and there are thirtie and odd severall casts of these.'[86] Lord presented in his text the first cogent account of the origin of the castes in English. Lorenzen, in his analysis of Lord's description, writes:

> Next Lord claims that the 'Banians' have a social system based on descent from the four sons of Pourous and Parcoutee named Brammon, Cuttery, Shuddery, and Wyse [Brahman, Kshatriya, Shudra and Vaishya]. This account, however confused, seems to be indirectly based on the sacrifice of the primeval Purusa in the Rig-Veda hymn x.90. Although Lord inverts the names of Vaishya and Shudra, his description of the division of labour among these four varnas is otherwise more or less accurate.[87]

Nathaniel Brassey Halhed documented his impressions of caste, and in the context of the *Purusha sukta*, he states:

> The Hindoos do not suppose that these several parts of the Creator, assigned for their production, are a symbolical token or description of the respective duties of their stations; but the several qualifications of each cast, and the enjoined exercise of those

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[84] Ibid., 13.

[85] Boemus, J. (1555), *The Fardle of Facions*, trans. Waterman, W. (London: Henry Sutton), ch. I, 'Of Asie and the Peoples Moste Famous Therin'. The people described, the Nabatheens, were considered 'the beste husbandes, and thriftiest sparers'. Available at University of Adelaide digital library, <http://etext.library.adelaide.edu.au/h/hakluyt/voyages/boemus/>.

[86] Lord, H. (1630), *A Discoverie of the Sect of the Banians. Containing their History, Law, Liturgie, Casts, Customs, and Ceremonies. Gathered from their Brahmanes, Teachers of that Sect: As the particulars were comprized in the Booke of their Law, called the Shaster: Together with a display of their Manners, both in times past, and at this present* (London: T.&R. Cotes). Lord stayed at the East India Company factory ['factory' being used in the old historical sense of a trading house, rather than its modern use of a place where things are made, which was not current until the late eighteenth century] at Surat in Gujarat in the early seventeenth century, and claimed to have gone through the Banians' Bible, or 'Shaster' with the help of interpreters. Cited in Lorenzon, D., infra, 645.

[87] Lorenzon, D. (1999), 'Who Invented Hinduism?', *Comparative Studies in Society and History* 41:4, 645. Lorenzon's use of the word 'descent' is interesting in light of the future association between caste and descent under the International Convention on the Elimination of the Elimination of All Forms of Racial Discrimination – see Chapter 5.

> qualifications, are the natural and unavoidable result of the presiding function in each of the members of their first parent.[88]

He subsequently lists the duties of 'these four great tribes', which he names the Bramin, the Chehteree, the Bice and the Sooder, which 'comprehend the first grand divisions of a well-regulated state'.[89]

For Alexander Dow, the 'cast' also represented a 'tribe': 'it is indeed contrary to the inviolable laws of the Hindoos, that any person should move from an inferior cast into a higher tribe'; and as a result, 'in their appearance, they seem four different nations, than members of the same community'.[90]

The proliferation of colonial writings from this period led some historians to put forward the claim that Hinduism was constructed or invented by British colonial administrators and scholars in the nineteenth century.[91] The related claim that the caste system was in some sense also invented by the British colonial authorities, was put forward in the following quotation by Nicholas Dirks: 'Colonialism seems to have created much of what is now accepted as Indian "tradition", including an autonomous caste structure with the Brahman clearly and unambiguously at the head.'[92] To which Purushottom Agrawal responded: 'We Indians may well have been denied the capacity to solve our own problems, but are we so incapable that we could not even create them on our own?'[93]

Lorenzon, answering the claim that Hinduism was invented by the British, writes:

> Caste, like Hinduism, undoubtedly responded to the British conquest with significant changes, but neither institution was so radically transformed during the colonial period

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[88] Halhed, N., reproduced in Marshall, P. (ed.) (1970), *The British Discovery of Hinduism in the Eighteenth Century* (Cambridge: Cambridge University Press), 165.

[89] Ibid.

[90] Dow, A., reproduced in Marshall, P. (ed.), ibid., 115.

[91] Lorenzon, D., supra n.87, 630. For examples of this argument, see: Dalmia, V. and von Steitencron, H. (eds) (1995), *Representing Hinduism: The Construction of Religious Traditions and National Identity* (New Delhi: Sage Publications); Fuller, C. (1992), *The Camphor Flame: Popular Hinduism and Society in India* (Princeton, NJ: Princeton University Press); Smith, W. (1962), *The Meaning and End of Religion* (Minneapolis, MN: Fortress Press); cited in Lorenzon, ibid., 630

[92] Dirks, N. (1992), 'Castes of Mind', *Representations* 37, 61. See also Dirks, N. (1989), 'The Invention of Caste: Civil Society in Colonial India', *Social Analysis* 25, 42–52. According to Dharampal-Frick: 'The compelling need for a defining feature of Indian society has not only been responsible for the use of the term "caste", but also for according it seminal importance … Consequently, the intellectual reservoir from which organizing principles have been drawn were, needless to say, Eurocentric.' Dharampal-Frick, G., 'Shifting Categories in the Discourse on Caste: Some Historical Observations', in Dalmia, V. and von Steitencron, H. (eds), ibid., 82.

[93] Quoted in Lorenzon, D., supra n.87, 654.

that it makes any sense, even in terms of a transformation of pre-existing institutions or concepts, to claim that the British invented them.[94]

In the context of colonial writings, the emergence of ethnological race theory in the mid-nineteenth century unquestionably had a strong impact on caste ideology. Race theorists such as H.H. Risley saw caste as an elemental force in Indian life. These ethnologists divided Indians into hierarchical ethnological classifications. Risley divided Indians into seven racial types, from the dark-skinned *Dravidians* to the fair-skinned *Aryans*, the most ethnologically advanced. Risley claimed to have discovered an unchanging law of caste, whereby 'the social status of … a particular group varies in inverse ratio to the mean relative width of their noses'.[95] He was the Commissioner for the 1901 Census of India and honorary director of the Ethnological Survey of the Indian Empire. Risley advocated detailed local kinship studies, and claimed that certain tribal populations were undergoing what in the 1960s came to be known as 'Sankritisation',[96] where they take on the attributes of a conventional ranked Hindu *jati*.[97] The Victorian race theorists saw caste as an evolutionary weapon designed by the *Aryan* descendants who devised conventions of purity and exclusion as a means of maintaining the purity of their blood and race.[98] The belief that race was the paramount factor in the analysis of caste stems from these writings.[99]

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[94] Ibid.

[95] Risley, H., *Report 1*, Census of India 1901, 498. He continues: 'If we take a series of castes in Bengal, Bihar, the United Provinces of Agra and Oudh, or Madras, and arrange them in the order of the average nasal index, so that the caste with the finest nose shall be at the top, and that with the coarsest at the bottom of the list, it will be found that this order substantially corresponds with the accepted order of social precedence.' Available at LaTrobe University, Digital Colonial Documents: <http://www.chaf.lib.latrobe.edu.au/dcd/census1901.htm>.

[96] The existence of such a process is being challenged. Chandra Bhan Parasad, in his *Dalit Diary*, states: 'Nowhere, and at no time, did the "lower" castes imitate the otherwordly orientation and tiresome rituals of the brahmans … For instance, dalits have never been found showing interest in learning Sanskrit or the Vedas. Their demand for equal treatment is guided more by secular considerations than by religious ones'; Prasad, C., supra n.33, 8.

[97] Risley, H. (1886), 'Primitive Marriage in Bengal', *Asiatic Quarterly Review* 2, 71–96. On the process of Hinduisation or Sanskritisation, see also Weber, M. (1958), *The Religion of India* (New Delhi: Manoharlal), 14.

[98] Bayly, S. (1999), *Caste, Society and Politics in India* (Cambridge: Cambridge University Press), 137.

[99] Ibid., 138.

Outside the Indian Context: American Caste and Class

Since Samuel Purchase introduced the word 'caste' in the sense of one of the hereditary classes of India in his *Pilgrimage* (1613),[100] the word has found many applications outside of the Indian context. Being but vaguely understood, it was, for example, loosely applied to the hereditary classes of Europe, who kept themselves socially distinct.[101] The manners of Alfred Lord Tennyson's *Lady Clara Vere de Vere* (1842) 'had not that repose/Which stamps the caste of Vere de Vere …'.

The extension of the term 'caste' to stratification based on skin colour in the Southern states of the United States of America was a far more enduring application of the term outside the Indian context. The theory found its most authoritative expression in Lloyd Warner's 'American Caste and Class', which appeared in the *American Journal of Sociology* in 1936. 'The social organization of the Deep South consists of two different kinds of social stratification', Warner wrote: 'There is not only a caste system, but there is also a class structure.'[102] He defines a caste organisation as one where marriage between two or more groups is not sanctioned and where there is no opportunity for members of the lower groups to rise into the upper groups, or of the members of the upper to fall into the lower ones. The difference between the mutable class and immutable caste is expressed as follows: 'the Negro who has moved or been born into the uppermost group … is superior to the lower whites in class, but inferior in caste.'[103]

Warner's thesis was supported by Ashley Montagu, who wrote in the journal *Social Forces*:

> The caste system in India represents but one form of caste relations, other forms of caste relations prevail elsewhere in the world, and it only adds to the confusion to make such arbitrary claims as that the Indian caste system is the type which must be exemplified by all other caste systems if these latter are to be recognised at all.[104]

Montagu's assertion is based on his belief in the non-existence of race as a biological concept:

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[100] Purchase, S. (1613), *Purchase his Pilgrimage or Relations of the World and the Religions Observed in All Ages and Places Discovered, from the Creation unto this Present* (London: William Stansby), quoted in *Chambers Dictionary of Etymology* (Edinburgh: H.W. Wilson, 1988).

[101] Ketkar, S., supra n.1, 12.

[102] Warner, W. Lloyd (1936), 'American Caste and Class', *American Journal of Sociology* 42:2, 234.

[103] Ibid., 236.

[104] Montagu, A. (1947), 'The Nature of Race Relations', *Social Forces* 25:3, 339–40.

> so-called minority groups, particularly the Negro in the United States, are treated as if they were members of an inferior caste … race relations are not biological relations but social relations … We simply call our caste system, which is made up for the most part of our fears and anxieties, race relations.[105]

Oliver Cox provided a detailed analysis of the specific features of the Indian caste system in 'Race and Caste: A Distinction', which appeared in the *American Journal of Sociology* in 1945 as a direct rebuttal to Warner's essay. Cox outlined the salient characteristics of the Indian caste structure:

> As distinguished from a bipartite interracial adjustment, the caste system is ancient, provincial, culturally oriented, hierarchical in structure, status conscious, nonconflictive, nonpathological, occupationally limited, lacking in aspiration and progressiveness, hypergamous, endogamous and static.[106]

Cox assumes for the purposes of his argument that Brahmanic-Indian society represents the only developed caste system in the world.[107] He sees 'the ocular evidence of physical differentiation' as forming the crucial basis of race relations: 'when we refer to such groups as Chamars, Baniyas, Telis, Doms, Brahmans, Kayasthas or Jolahas, no sense of physical distinction need be aroused.'[108] More significantly, he distinguishes between conflict and rivalry, the former characterising race relations, the latter caste relations: 'Race conflict is directed either against or toward the maintenance of the entire order of the races. On the other hand, caste rivalry never brings the caste system into question.'[109]

This is an important observation. The perpetuation of the caste system depends upon the complicity of its subject castes, which are in a position of simultaneous superiority and inferiority in relation to other castes. Cox further stresses the religious authorisation of the caste system: 'The position of high-Caste Hindus is guaranteed to them in Hindu society; but in America there is no such fundamental guarantee for whites. In the caste system there is social peace with the order; it is blessed in the most sacred books of the Hindus.'[110] The consequence of this 'blessing' is that while: 'whites *wrongfully* take the position of excluding groups

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[105] Ibid., 340.

[106] Cox, O. (1945), 'Race and Caste: A Distinction', *The American Journal of Sociology*, 50:5, 360.

[107] Ibid.

[108] Ibid., 362. Cox also draws attention to the functional aspect of the caste system. Races are not identified with any particular occupation, whereas in Brahmanic India each caste is expected to have an occupation, 'not unlike … a colony of bees' (361). Ketkar highlights the fact that Darwin applied the word "caste" 'to difference classes of social insects'. In the *Origin of the Species*, the castes are connected together by finely graduated varieties. Ketkar, S., supra n.1, 13 n.5.

[109] Cox, supra n.106, 364.

[110] Ibid., 365.

from participating freely in the common culture … castes *rightfully* exclude outsiders from participating in their *dharma*.'[111]

In a conference on the topic of caste and race which took place in London in 1967, Edmund Leach noted:

> In contemporary literature we meet the word 'caste' in two quite different contexts. On the one hand it is a word used without any particular geographical limitation to denote a type of class system in which hierarchy is very sharply defined and in which the boundaries between the different layers of the hierarchy are rigidly fixed. A 'ruling class' may be described as a caste when the fact of class endogamy is strikingly obvious and when the inheritance of privilege has become narrowly restricted to members of that 'caste' … Obvious examples are the colour bar situation in the Southern states of the United States and in South Africa … The other use of the word 'caste' is to define the system of social organization found in traditional India and surviving to a large extent to the present day. I myself consider that, as sociologists, we shall be advised to restrict the use of the term 'caste' to the Indian phenomenon only'.[112]

Louis Dumont drew a similar conclusion:

> It was only natural that the 'something in common' between the Indian caste system and the American 'colour bar' should have attracted attention. The question is whether putting them under the same class-heading helps research or hinders it. I believe that it tends to hinder, at the least, a fundamental kind of research …[113]

S.J. Tambiah stated in the general discussion among the conference delegates that he preferred 'to look upon Indian caste and American race relations as quite distinctive social phenomena'. He pointed to the *varna* system in support of his statement:

> Caste embodies ideas of relative purity and impurity; it is an integrated exchange system of occupational skills and ritual services; it distributes power in a particular manner; it is a way of controlling and restricting marriage; at its highest levels it is associated with philosophical ideas which are not represented in race relations.[114]

Jack Balkin offers a contemporary analysis of the use of 'caste' in the North American context, stemming from constitutional caselaw.[115] He concludes:

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[111] Ibid., 368.

[112] Leach, E. (1967), 'Caste, Class and Slavery', in de Reuck, A. and Knight, J. (eds), *Caste and Race: Comparative Approaches* (London: J.&A. Churchill), 8.

[113] Dumont, L. (1967), 'Caste: A Phenomenon of Social Structure or an Aspect of Indian Culture?', in de Reuck, A. and Knight, J., ibid., 29.

[114] Tambiah, S. (1967), 'A Comparative Approach to Caste and Race: Discussion', in de Reuck, A. and Knight, J., ibid., 327.

[115] In particular, the 1896 US Supreme court case *Plessy v. Ferguson* 163 U.S. at 559, where Justice Harlan (dissenting) remarked that 'there is no caste here'.

'American constitutional theorists' romance with "caste" as an explanatory category needs serious reappraisal … social stratification in the United States does not really match the technical definition of caste ….caste is at best an effective hyperbole.'[116]

There is a broad consensus among academics that while 'caste' is sometimes used as a descriptive term for a hierarchical society where endogamy is at least taboo, if not forbidden, it should be reserved in its sociological and anthropological sense to delineate the Hindu social structure based on the authority of the *Vedas*. This is due to the fact that, irrespective of the temporary existence of laws against inter-racial marriage which have at one time been in evidence in both the American and South African systems, in general endogamy in these cases is a tendency or a feature rather than a principle. The mechanism for endogamy in the Hindu context is found in the *Vedas* and the *dharma* codes. These religious texts ensure the perpetual separation of the castes and provide a spiritual justification for the caste system. There is no caste system outside of Hinduism.

Purity and Pollution

Two opposing theories of caste, termed the 'materialist' and the 'idealist', are reflected in the works of F.G. Bailey and Louis Dumont. While Bailey argues that the true basis for distinction between those of high and low caste is the deferential access to political and economic resources,[117] thereby ignoring the influence of the *Vedas*, Dumont rejects this approach, and combines empirical observations with an analysis of the sacred scriptures.[118] Materialists argue that the underlying feature of the caste system is inequality. The system is a support mechanism for more basic material inequalities. Therefore high castes are generally wealthier than low castes – 'the system of purity and impurity through which caste systems are expressed is simply a means of legitimating and obscuring the true nature of social divisions'.[119] Idealists argue that the materialist viewpoint does not explain certain empirical truths in relation to caste. They believe that caste is a product of religious beliefs that transcend material inequalities. Dumont, in *Homo Hierarchicus* (1966) points to 'the hierarchical disjunction between status and power as the fundamental characteristic of the caste system'.[120] Dumont identifies the principle of hierarchy in the caste system as the opposition of the

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[116] Balkin, J. (1997), 'The Constitution of Status', *Yale Law Journal* 106, 2358.

[117] See generally Bailey, F. (1956), *Caste and the Economic Frontier. A Village in Highland Orissa* (Manchester: Manchester University Press).

[118] See generally Dumont, L. (1970), *Homo Hierarchicus: The Caste System and its Implications* (Chicago, IL: University of Chicago Press).

[119] Quigley, D. (1993), *The Interpretation of Caste* (Oxford: Oxford University Press), 2-3.

[120] Dumont, L., supra n.118, 232.

pure and the impure;[121] distinction of purity, rather than material power, is the foundation of status.[122]

Dumont's theory is seeking to address the question why the Brahmans, or priests, stand at the top of the caste hierarchy, above others who are more politically and economically powerful. It is this disjunction and its expression through the opposition of the pure and the impure that Dumont sees as the fundamental characteristic of the caste system. He points out that it is not the cause of caste distinctions, but rather the form, the means by which Hindus understand their own society.[123] Under Dumont's scheme, the Brahmans are at the top of the hierarchical structure because they are inherently purer than those below them. At the bottom, and in opposition to the Brahmans, are the Dalits, who are inherently polluted.[124] Their presence complements that of the Brahmans, for without impure castes, there can be no pure castes. The origins of untouchability are unknown; it is not dealt with in classical Hindu learning. Their low state is created by the caste hierarchy.[125] Untouchables have been identified as unclean Shudras;[126] however, they have more popularly been designated as *outcastes*, that is, outside the classical fourfold *varna* divisions.

His theory was framed according to the structuralist cognitive principles outlined by the French anthropologist Claude Lévi-Strauss, who believed that social systems are underpinned by identifiable systems of values and concepts, which take the form of binary oppositions.[127] Dumont identified the binary opposition purity/pollution as the recurring core principle of the Indian caste system, and the first in a sequence of conceptual opposing categories that he observed both in everyday life and in the Vedic texts. The system is not a disguised reflection of material differences, as proposed by Bailey. Purity and pollution are nested oppositions, in the sense that each one relies on the other for its existence: 'the execution of impure tasks by some is necessary to the maintenance of purity for others',[128] and 'the hierarchy of purity cloaks, among other differences, its

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[121] Ibid., 30.

[122] Quigley, D., supra n.119, 56.

[123] Dumont, L., supra n.118, 30, quoted in Quigley, D., ibid., 45.

[124] Bayly, S., supra n.98, 20.

[125] Galanter, M., supra n.33, 13.

[126] Ibid.

[127] Lévi-Strauss, C. (1964), *Le Cru et le Cuit* (Paris: Plon). In this text, translated as 'The Raw and the Cooked', Lévi-Strauss explains how myths provide basic structures of understanding cultural relations. These relations appear as binary oppositions, in the sense that what is 'raw' is opposed to what is 'cooked'. The 'raw' is associated with nature while the 'cooked' is associated with culture. For a critique of 'structuralism' and 'post-structuralism' in legal theory, involving *inter alia* deconstruction, or the reversal of hierarchies within binary or 'nested' oppositions, see Balkin, J. (1987), 'Deconstructive Practice and Legal Theory', *Yale Law Journal* 96, 743.

[128] Dumont, L., supra n.118, 55.

own contrary'.[129] Underlying the hierarchy from the pure to the impure is the explanatory principle provided by the Vedas:

> There is indeed in India a hierarchy other than that of the pure and impure, namely, the traditional hierarchy of the four *varnas* … the highest is that of the Brahmans or priests, below them the Kshatriyas or warriors, then the Vaishyas, in modern usage mainly merchants, and finally the Shudras, the servants or have-nots.[130]

Kolenda, tracing the 'seven types of hierarchy in *Homo Hierarchicus*', observes: 'One should see the caste system as one of relations between castes or sub-sections of castes (elements), and relations between the castes and the whole – that is, in relation to the dominant principle of the system.'[131] In an essay which explored the question whether caste is a phenomenon of social structure or an aspect of Indian culture, Dumont noted: 'the opposition of pure and impure may be the only possible form of this abstract hierarchy; the system of castes (*jati*) thus has its roots in the system of the four *varnas* – a relation which has scarcely been noticed as yet.'[132]

Dumont's theory has gained wide acclaim, but it is difficult to understand why this is so. The importance of the four *varnas* to the system of *jatis* had not 'scarcely been noticed' as he claimed, unless he meant the statement to apply only to Western sociologists. Ambedkar in particular, as well as Gandhi, had written extensively on the relationship between the caste system and the fourfold *varna* division, the former believing that the *varna* system must be destroyed if the caste system is to be destroyed, the latter believing in a purified *varna* system as a means of removing untouchability.[133] In drawing attention to the *varna* system that supports the purity/pollution opposition, Dumont was merely describing a distinction found in the politics of India in the early twentieth century, immediately prior to and following independence, where evangelical reformists such as Gandhi sought to uphold the *varna* system while denouncing the rhetoric of pollution that kept the lowest castes or *jatis* subordinated. This in turn was challenged in the writings of Ambedkar, who denounced *varna* as wilfully as he denounced *jati*. According to Kolenda, Dumont admitted that the relationship between castes and *varna* is 'complex', but rejected assertions that the classifications of *varnas*

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[129] Ibid., 78: 'Here we have an example of the complementarity between that which encompasses and that which is encompassed, a complementarity which may seem a contradiction to the observer.'

[130] Ibid., 66–7.

[131] Kolenda, P. (1976), 'Seven Types of Hierarchy in *Homo Hierarchicus*', *Journal of Asian Studies* 35:4, 591.

[132] Dumont, L., supra n.113, 34.

[133] See generally Ambedkar, B. (1936), *The Annihilation of Caste*, supra n.2, and Gandhi, M. (1954), *The Removal of Untouchability* (Ahmedabad: Navjivan Publishing).

was merely a survival unrelated to contemporary society.[134] Such assertions were never made by Indian writers.

Furthermore Dumont was not the first to emphasise the importance of purity and pollution to the Indian caste system. Célestin Bouglé, in his 1935 *Essai sur le Régime des Castes*, stated that 'social precedence' in India was determined by 'relative purity and impurity'.[135] Shridhar Ketkar, writing in 1909, said that 'a caste should define its relation with another caste, in so far as the latter is pure or impure',[136] and more emphatically: 'the chief principle on which the entire system depends is that of purity and pollution.'[137]

Karma

The concepts of purity and pollution are explained and justified by the traditional Hindu notion of *karma*. All Hindus accept two basic principles; the *samsara* belief in the transmigration of the soul, and the related *karma* doctrine of compensation. In their very interrelatedness, they are said to represent the existing social, that is to say caste, system.[138] Max Weber states that there are two principles that are characteristic of Brahman rationalism. First, it was believed that each single ethically relevant act has inevitable consequences for the fate of the actor, hence that no consequence can be lost; the doctrine of *karma*.[139] Secondly, the idea of compensation was linked to the individual's social fate in the societal organisation and thereby to the caste order.[140] These two principles deny the idea of the 'accident of birth' so critical to western social reformists. The caste Hindu views the individual as born into the caste merited by past actions and conduct. Faced, for example, with the condition of the Dalits, he would believe that they have a great many sins from past lives to redeem in this one. The reverse of this is that a member of an impure caste thinks primarily of how to better his future life according to caste ritual, as in this life it is impossible to move up in the caste order. The salvation doctrine of Hinduism promises the humble artisan or sweeper rebirth as a Brahman, Kshatriya or Vaishya, according to present caste rank, if he prescribes by these rituals and traditions, leading an exemplary life

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[134] Kolenda, P., supra n.131, 585.

[135] Bouglé, C., supra n.35, 39.

[136] Ketkar, S., supra n.1, 23, and 25: 'The harder the rules of ceremonial purity, the more easily they are broken. The more extravagant the notions of purity are, the more easily is the purity defiled. The castes are good in proportion to the hardness of the ceremonial rules of purity of the people they can touch without polluting them … castes could be graded accordingly.'

[137] Ibid., 121, and 122: 'purity is the pivot on which the entire system turns.'

[138] Weber, M., supra n.97, 118.

[139] Smart defines *karma* as: 'the law which governs the effects of deeds both in this life and in subsequent lives within the operation of rebirth and reincarnation'. Smart, N. (1998), *The World's Religions* (Cambridge: Cambridge University Press), 81.

[140] Weber, M., supra n.97, 119.

of dutiful service and observance of ritual.[141] *Karma* has been described as: 'the basis, indeed the justification, for the caste structure of Hindu society which is intrinsic to Hinduism as a religious, philosophical and social system.'[142]

Spiritual betterment is the result of doing properly the things traditionally done by persons of one's station.[143] The lowest castes have the most to gain through ritual correctness. Hinduism did not join occupational stability to teachings of the moral nature of the person's vocational stability and humble modesty, but to the person's personal interest in salvation.

In the eighth century Sanskrit play *Mrichchkatika* (The Little Clay Cart), the king's brother-in-law asks his slave to kill the damsel Vasantasena, to which he replies:

> Beat me if you will. Kill me if you will. I cannot do what ought not to be done. Fate has already punished me with servitude, for the misdeeds of a former life, and I will not incur the penalty of being born again a slave.[144]

The Political History of Caste Reform

Indian Social Reformers

The Government of India Act 1858 transferred the government of India from the East India Company to the Crown.[145] The establishment of a nationwide legal system brought a general movement of disputes from *jati* and village tribunals into the government's courts.[146] The courts espoused a norm of equality, and the use of caste in civil, criminal and commercial law was quickly discredited. The courts were willing to uphold exclusionary practices in relation to religious premises, but caste groups did not receive judicial support for the exclusive use of secular facilities such as schools, wells and roads. There remained, however, a

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[141] Ibid., 121.

[142] Funk (1998), 'Traditional Orthodox Hindu Jurisprudence: Justifying *Dharma* and *Danda*', *Southern University Law Review* 15, 172, quoted in Redmond, T. (2001), 'Hinduism, Human Rights and the Barbarian Mind', *Trinity College Law Review* 4, 85.

[143] Galanter, M., supra n.33, 11.

[144] King Shudraka, *Mrichchkarika*, quoted in Ketkar, S., supra n.1, 115, n.5. In the drama, the trial of Charudatta, a Brahman, takes place. The judge informs the king that Charudatta is guilty of murder, but being a Brahman, is not, in accordance with Manu's injunction, fit to be killed. In this special case, the king refused to show mercy to Charudatta and sentenced him to death. (Ketkar, 125, n.1)

[145] Basu, D. (2001), *Introduction to the Constitution of India* (New Delhi: Prentice Hall of India), 11.

[146] Galanter, M., supra n.33, 19.

notable strong reluctance to breach caste rules.[147] When in 1856, a Mahar boy was denied access to a government school, the Bombay Education Department stated that 'it would not be right for a single individual, the only Mahar who had ever come forward to beg for admission into a school attended only by pupils of caste, to … [make] the institution practically useless to the great mass of natives'.[148] He appealed to the Government of India at Calcutta, but his petition was not granted on the grounds that opposition from higher castes was too strong.[149]

The emergence of social theorists and individual rights doctrines, and the growing Indian anglophone intelligentsia, began to exert a strong influence on caste theory amongst Indian thinkers from the mid-nineteenth century. The Indian Social Reformer, a liberal anglophone journal, debated whether hierarchical *jati* and *varna* principles were an inherent and desirable feature of Indian society. The contributors included such diverse figures as the Gujarati Brahman seer and social activist Swami Dayananda Saraswati (1824–83), founder of the *Arya Samaj*, or Aryan Society in 1875,[150] Swami Vivekananda, founder of the *Ramakrishna* Movement in 1897, and M.G. Ranade, a leader of the National Social Conference. Saraswati, while defining the basis of Hindu society as *varna vayavastha* (caste order), placed the emphasis on knowledge of the sacred Vedas. Nobody was to be barred from reading and studying the ancient scriptures by virtue of their birth; and consequently, those who had attained spiritual purity through learning, irrespective of their caste, occupied the highest position in the hierarchical structure envisioned by the *Arya Samaj*.[151]

The Indian Social Reformer carried articles on a wide range of issues, including the claims of Brahmans to possess unique sacred knowledge, marriage and sexual propriety, and the case of the Untouchables. Despite the divergent backgrounds

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[147] John Bannigan states: 'The British in India at first tried to make their law public and territorial and to apply it to all Indians and Europeans alike. Finding this impracticable, they passed a Declaratory Act in 1780 in which Parliament laid down the principle that Hindu law and usage should be applied to Hindus while the laws and customs of Islam should be applied to Moslems. In general Britain followed the policy of interfering as little as possible with Indian religious laws and customs. In some instances, however, under British rule, the provisions of the Shastras (Hindu law codes) and of the Koran were altered and relaxed by statutes'; Bannigan, J. (1952), 'The Hindu Code Bill', *Far Eastern Survey* [American Institute of Pacific Relations] 21:17, 173–4.

[148] Zelliott, E. (1969), *Dr Ambedkar and the Mahar Movement* (University of Pennsylvania), 47.

[149] Zelliot, E., 'Mahar and Non-Brahman Movements in Maharashtra', in Zelliot, E. (2001), *From Untouchable to Dalit: Essays on the Ambedkar Movement* (New Delhi: Manohar, New Delhi), 38.

[150] Gokhale, B. (1964), 'Swami Vivekenanda and Indian Nationalism', *Journal of Bible and Religion* 32:1 36.

[151] Saraswati, Swami D. (1975), *Light of Truth, or an English Translation of the Satyarth Prakash*, trans. Bharadwaja, C. (New Delhi: Saraswati)), cited in Bayly, S., supra n.98, 151.

of the contributors, they all reached a consensus on a number of key points. All of the writers exalted ideals of purity, hierarchy and moral community as being truly virtuous and truly Indian. While some of the contributors argued for modern reforms, such as education for women or the uplift of the Untouchables, they wanted these reforms to take place within traditional caste forms and values.[152]

By the 1930s, caste was considered a central fact of social and spiritual life. Extreme Hindu nationalists such as Shiv Kaul believed that Hinduism was a faith of science, power and modernity, and caste was a defining feature of Hindu ethnicity, morality and even biology.[153] He argued that: 'Some of the most rational modern countries have perforce infused faith where reason was supreme so as to accelerate the reconstruction of society. Thus we see Bolshevism, Fascism and Nazism in their fullest force.'[154]

His authoritarian views can be contrasted with thinkers like the Bengali poet Rabindranath Tagore, who saw divinely mandated caste institutions as underpinning a more communitarian society, involving the free interplay of local communities or *jatis*. However, beyond the Indian Social Reformer, not all commentators agreed that caste was beneficial to the modern Hindu. India's aspiring nation-builders were deeply divided over the issue, and by the end of the nineteenth century, three views of caste emerged from these debates. First, the incubus view saw caste in all its forms as a divisive and pernicious force, and a negation of nationhood. Second, the golden chain view, in whch caste as *varna* was considered an ideology of spiritual orders and moral affinities, and a potential basis for national regeneration. Thirdly, the idealised corporation view, with caste as *jati*, or a concrete ethnographic fact of Indian life, a source of historic national strengths and organised self-improvement or uplift.[155]

The incubus view was supported by 'Reformists' such as the National Social Conference, founded in 1897 by the Bombay High Court judge M.G. Ranade and R. Raghmathu Rao. Its followers were taken from the ranks of academics, jurists and other intelligentsia. One of its chief aims was to campaign against caste.[156] In 1909, the National Social Conference endorsed the uplift of what it called the Depressed Classes, or Untouchables.[157] In the debates surrounding caste,

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[152] Bayly, S., ibid.

[153] Kaul, S. (1937), *Wake Up Hindus (A Plea for Mass Religion) Aryanism* (Lahore: Kaul), ch. III, cited in Bayly, S., ibid., 152–3. According to Bayly, Kaul was a 'leading proponent of the Aryan Hindu regeneration', who was familiar with European writings portraying history as a struggle between greater and lesser nations and races with the lesser marked for extinction. The terms Hindu and Hinduism designated the qualities of history, blood and 'race genius' in addition to faith and spirituality.

[154] Kaul, S., ibid., 95; cited in Bayly, S., ibid., 153.

[155] Ibid., 154.

[156] Ibid., 155.

[157] It was the same year, 1909, that the problem of the lowest castes was for the first time conceptualised under the rubric of 'untouchability' – a general term which saw the problem in light of its pan-Indian dimension. Use of the English term 'Untouchable' can

this had always been the most contentious area. The adherents of the National Social Conference regarded the position of the depressed classes as an obstacle to the political and moral regeneration of the nation. The Reformists risked being branded as enemies of the Hindu faith, and therefore of the nation, and they countered this by passing a resolution in the same year calling on their supporters to seek out converts to other faiths such as Islam, Sikhism and Christianity, and return them to a reformed Hindu system, where the rigid rules of caste regarding the treatment of impure and degraded peoples had been relaxed or removed.[158] They justified their goals through reference to the *Santan Dharm* (the eternal religion) of the Vedas, rather than European notions of modernity.

The Reformists were attacked by figures such as the radical Maharashtrian B.G. Tilak, who was an extremist member of the Indian National Congress. He was in the vanguard of several militant public agitations for *purna swaraj* (home rule), and was bitterly opposed to caste reform, for he saw nationhood as an expression of collective moral, spiritual and racial essences.[159]

The golden chain view, supported by militants such as Tilak but also by less extreme figures, regarded caste in its pure form as essential to Hindu nationhood. Its leading proponent was Jogendra Nath Bhattachraya, who stated that caste in the form of the fourfold *varna* scheme was a 'golden chain' which Hindus had 'willingly placed on their necks, and which fixed them to only that which is noble and praiseworthy'.[160] Caste was seen as uniting India against foreign domination. Similarly, Swami Vivekananda endorsed a revived Hindu faith that would elevate national pride, and while condemning the treatment of Untouchables, he echoed Western ethnographical theorists in arguing that differences in character result from differences in *varna*:

> Look at the apple. The best specimens have been produced by crossing, but once crossed, we try to keep that variety intact … Caste is a natural order; I can perform one duty in social life and you another; you can govern a country, and I can mend a pair of old shoes, but that is no reason why you are greater than I, for can you mend my shoes? … Caste is good. That is the only natural way of solving life.[161]

When the Hindu nation-builders began to focus on the issue of the depressed classes, they did so in language that reflected an idealised opposition between

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also be traced to 1909. The Maharajah of Baroda in his remarks to the Depressed Classes Mission of Bombay on 18 October 1909, uses the term and provides an explanation for his audience: See Galanter, M., supra n.33, 25.

[158] Bayly, S., supra n.98, 158–61.

[159] Ibid., 156.

[160] Bhattacharya, J. (1896), *Hindu Castes and Sects (*Calcutta: Seagull, reprinted Munshiram Manohorlal Publishers, 1995), 7.

[161] Vivekananada, Swami (1989), *Complete Works* (Calcutta: Advaita Ashrama), 54 and 245–6.

pure and impure, and cleanliness and uncleanliness.[162] In 1895, the National Social Conference adopted a resolution calling for the uplift of the nation's ritually impure and pariah peoples. The success of Muslim, Sikh and Christian proselytisers in attracting converts from the depressed Hindu classes was highlighted by the NSC, through figures such as G.K. Gokhale, and campaigns of reconversion began. Depressed Classes Missions were set up, and like their social service counterparts in Victorian Britain, they focused on fighting drink, vice and uncleanliness amongst the depressed classes. The result was that Untouchables came to be subjected to tests of social purity. K. Ranga Rao, Secretary of the Mangalore Depressed Classes Mission, linked his work to a puritanical form of Hindu nationalism. He ascribed to Brahmanical standards of propriety and purity, and, combined with race theory, concluded that the Untouchables were degrading the Hindu race genius. He stated:

> It is not so much the ill treatment of the higher castes, but your own faults that have been the cause of your poverty and degradation ... Your habits of drunkenness, and your utter disregard for education, have made you a poor, degraded and despised people.[163]

The Indian National Congress, Gandhi and the Evangelical Approach to the Uplift of the Untouchables

In 1885, the Indian National Congress was formed. It was to attach great importance to the emerging language of universal rights, but it considered reform of social practice to be an issue for each community group. In his presidential address to the second meeting of the INC in 1886, Dadabhai Naoroji explained why social reform was not part of the Congress programme:

> How can this gathering of all classes discuss the social reforms needed in each individual class? What do any of us know of the internal home life … of any class but our own? … A National Congress must confine itself to questions in which the entire nation has a direct participation, and it must leave the adjustments of social reforms and other class questions to class Congresses.[164]

Nevertheless, attention was being paid to the issue of caste-based discrimination. In Kolhapur in 1902, the ruler adopted one of the earliest examples of official caste-based reservations when he decreed that 50 per cent of all administrative vacancies were to be filled by those of non-Brahman birth.[165] The decennial all-India Census recorded the castes of university students, and discovered that they

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[162] Bayly, S., supra n.98, 179.

[163] Rao, K., *Indian Social Reformer* 18 October 1908, 78.

[164] Naoroji, D. (n.d.), *Speeches and Writings of Dadabhai Naoroji (*Madras: Caxton), 8.

[165] Bayly, S., supra n.98, 242.

were nearly all from Brahman backgrounds. Non-Brahmanism began to emerge as a political force, and in Madras, the Justice Party was created with the aid of colonial officials. Under the 1919 dyarchy Constitution, the Justice Party formed the first Indian Ministry.

By the time of the passing of the Government of India Act 1935, Indians had recognised that caste was fundamental to the electoral process. The 1882 Ripon Reforms[166] and the 1909 Morley-Minto Reforms[167] had been defined on the basis of community rather than a 'one person-one vote' principle.[168] In 1906, a deputation of Muslim notables petitioned the Viceroy to safeguard Muslim interests in the forthcoming electoral regime by reserving seats for separate Muslim electorates; the Morley-Minto Reforms provided these separate electorates.[169] The granting of separate electorates to Muslims, according to Zelliott,

> brought the idea of communal electorates for minorities to the forefront in the minds of all communities which feared for their submersion in a government run by the

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[166] Lord Ripon was Viceroy of India from 1880–84. See Moore, R. (1967), 'The Twilight of the Whigs and the Reform of the Indian Councils: 1886–1892', *The Historical Journal* 10:3, 401: 'Lord Ripon, the apostle of Gladstonian liberalism in India, carried the process of decentralisation further and gave it an emphatically democratic purpose. In a resolution of 1882, he urged 'the extension of local self-government … not primarily with a view to improvement in administration … [but] chiefly … as an instrument of political and popular education.' He called upon the provincial authorities to 'foster sedulously the small beginnings of the independent political life'... Ripon also pressed upon Hartigan, when the latter was secretary of state, the desirability of allowing municipal authorities, some of which contained elected members, to elect Indians to central and provincial legislatures. The proposals were regarded as premature and they were rejected.'

[167] The Morley-Minto reforms sought to institute constitutional changes conceding larger representation and power to Indians. See Moore, R. (1967), 'John Morley's Acid Test: India, 1906–1910', *Pacific Affairs* 40:3/4, 333–40. Moore describes the reforms as 'not large'; 'Eight years after their implementation Montagu and Chelmsford justly described the reforms as "essentially of an evolutionary character", a "change of degree and not of kind". In essence the reforms increased significantly the association of Indians with government without conceding any responsibility to them' (334). See further Wolpert, S. (1967), *Morley and India, 1906–1910* (Berkeley, CA: University of California Press). Wolpert dismisses the phrase 'Morley-Minto reforms' as 'a cliché of Indian history' and a 'misleading misnomer' (130). Wolpert quotes Morley's own statement, that 'if it could be said that this chapter of reforms led directly or necessarily up to the establishment of a Parliamentary system in India, I, for one, would have nothing at all to do with it' (153). Yet he acknowledges the reforms did 'mark the gradual thaw of decentralisation and devolution of British power towards the goal of parliamentary self-government for India' (1), and views Morley's statement as possible clever political tactics in presenting a progressive bill to a conservative House of Lords; quoted in Moore, ibid., 335–6. On Minto, see Wasti, S. (1964), *Lord Minto and the Indian National Movement, 1905–1910* (Oxford: Clarendon Press).

[168] Bayly, S., supra n.98, 239.

[169] Galanter, M., supra n.33, 25.

> dominant caste Hindu community. The granting … also made numbers important. Whether the vast numbers of Untouchables were truly Hindu and to be counted as such, or not, became an important question for the first time.[170]

The 1931 Karachi Resolution,[171] a major document in the nationalist freedom struggle, outlined the INC's commitment to democratic ideals and economic development as expressed by the party's leading proponent of secular nationalism, Jawaharlal Nehru; the document prefigured the 1950 Constitution's commitment to casteless egalitarianism.[172] The Resolution committed Congress to a programme of fundamental rights in the future republican India, which included:

> (vi) no disability to attach to any citizen by reason of his or her … caste … in regard to public employment, office of power or honours, and in any exercise of any trade or calling. (vii) equal rights of all citizens in regard to public roads, wells, schools and other places of public resort.[173]

The INC had issued its first declaration on caste in its 1917 *Resolution on Untouchability*, under pressure from such bodies as the Depressed Classes Conference, chaired by the reformist Congressman N.G. Chandawarkar. The Resolution called for justice for members of the Depressed Classes. However, this reversal of the INC's long-standing policy of excluding social reform from its programme was brought about by concern surrounding Hindu numbers. The Morley-Minto Reforms were followed by suggestions from the 1911 Census Commissioner that the Untouchables (then still widely known as the Depressed Classes) should be enumerated as a group separate from the Hindus, a suggestion promptly endorsed by the Muslim League.[174] The 1917 document was mild and hesitant:

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[170] Zelliott, E., supra n.148, 141.

[171] The 1931 Karachi Resolution also contained a list of Basic or Fundamental Rights, the 'Fundamental Rights of the People', including equality between the sexes; see Som, R. (1994), 'Jawaharlal Nehru and the Hindu Code: A Victory of Symbol over Substance?', *Modern Asian Studies* 28:1, 165. Som observes that the Resolution was passed 'without any great opposition', because 'the rights were on paper and their realization remained in the unforeseeable future' (169). She draws a link between the passing of the 1931 Karachi Resolution without protest, and the ultimate rejection of the Hindu Code Bill 1947, which would have represented a realisation of equal rights for women in India; see below, n.229.

[172] Bayly, S., supra n.98, 244.

[173] All India Congress Committee, 'INC 1930–1934: Being the Resolutions Passed by the Congress', 66.

[174] It was reported in the *Indian Review* that 'Since the recent [Morley-Minto] Reform Measures, the Mahomedans have been loud in declaring that, properly speaking, the outcastes are beyond the pale of Hinduism, and therefore their strength should not go to swell the numerical force of the Hindus'; *Indian Review*, September 1910.

> The Congress urges upon the people of India the necessity, justice and righteousness of removing all disabilities imposed by custom upon the Depressed Classes, the disabilities being of a most vexatious and oppressive character, subjecting those classes to considerable hardship and inconvenience.[175]

The INC's *Resolution on Untouchability* omitted a crucial word from the original document submitted by Chandawarkar's Depressed Classes Mission, which specified 'disabilities imposed by *religion* and custom'.[176]

The *Resolution on Untouchability* was followed by the 1920 *Resolution on Non-Cooperation*, a document that sought to unite Hindus and Muslims ahead of the first all-India campaign of national protest, which took place in 1921–22. The removal of the disabilities of the Depressed Classes was said in the document to be a nationalist priority. Both documents reveal the INC's belief in a religious solution to caste-based discrimination. In the 1920 *Resolution on Non-Cooperation*, the INC invested the 'religious heads' with primary responsibility for the reform of Hinduism so as to improve the situation of the Depressed Classes. There was no emphasis on legislation or other secular means of ridding Indian society of untouchability.[177]

By the 1920s, the need to remove the practice of untouchability was critical to India's political destiny.[178] The question that remained was how this was to be done. Galanter outlines the two polar approaches taken: the evangelical and the secular. The evangelical approach sought to uplift the Untouchables to higher standards of purity. Uplifted Untouchables would join with repentant Hindus in a purified and reformed Hinduism. By contrast the secular approach stressed the importance of civil, political, economic and social rights, and sought to enforce them through government legislation and political action. The system of graded inequalities inherent in caste would be removed through equal rights of citizenship.[179]

Throughout the 1920s, Gandhi, leader of the INC since 1916, sought religious solutions to the situation of the Depressed Classes. Special ashrams (teaching and spiritual centres) were set up for members of the serf-like Gujarat field-labouring population known as Dublas. Gandhians encouraged them to take on a new name – the Adivasi, or 'original people'. This rapidly became the preferred Gandhian term for groups that had previously been called 'tribals' or 'aboriginals'. In the ashrams, bhajan hymns were used to try to encourage temperance, vegetarianism

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[175] Natarjan, D. (1972), *Extracts from the All-India Census Reports on Literacy* (New Delhi: Office of the Registrar General, Ministry of Home Affairs), quoted in Galanter, M., supra n.33, 26.

[176] Quoted in Galanter, M., ibid.

[177] Zelliott, E. (1988), 'Congress and the Untouchables, 1917–1950', in Sisson, R. and Wolpert, S. (eds), *Congress and Indian Nationalism: The Pre-Independence Phase* (Berkeley, CA and Los Angeles: University of California Press), 182–97.

[178] Galanter, M., supra n.33, 29.

[179] Ibid.

and cleanliness amongst the Adivasi. Temple entry campaigns at Vaikom in 1924 and at two Maharashtra temples in 1929–30 were initially seen as tests of low-caste advancement and given support.[180]

Gandhi soon lost faith in these campaigns due to their violent nature.[181] He denounced untouchability in his writings, claiming that judgement would be pronounced on Hinduism if the stain of untouchability were not removed. Eight years later, to the distress of such prominent nationalists as the Bengali litterateur Rabindranath Tagore, Gandhi publicly described an earthquake in Bihar in 1934 as divine retribution for the sin of untouchability.[182] He sought to replace the term 'Untouchable' with 'Harijan', or 'child of god'. This was a reflection of his insistence on a religious solution to the problem. Since the 1970s, campaigners have sought to replace 'Harijan' with the term 'Dalit', or 'the oppressed'.[183] Another preferred Gandhian term was Bhangi, a Gujarati caste name for a domestic waste remover. The term was used in order to invoke the image of a humble sweeper as an archetype of all of India's depressed classes. He wrote:

> A Bhangi does for society what a mother does for her baby. A mother washes her baby of the dirt and insures his health … The Brahman's duty is to look after the sanitation of the soul, the Bhangi's that of the body of society.[184]

In 1932, Gandhi founded the *Harijan Sevak Sangh* (Servants of Untouchables Society), which operated in much the same way as the Depressed Classes Missions of the previous century, focusing on instilling clean habits, and weaning the Harijans from toddy-drinking, carrion-eating and unseemly sexual indulgences.[185] Gandhi repeatedly stressed that the Harijan movement was not a political

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[180] Early legislation protecting Dalit rights had a strong emphasis on temple entry, for example, the Bombay Harijan Temple Entry Act, 1943 and the Bombay Harijan (Removal of Civil Disabilities) Act, 1947; the United Provinces Removal of Social Disabilities Act 1947; in Kerala the Temple Entry Proclamation 1936 by the Maharaja of Travancore and later the Madras Removal of Civil Disabilities Act 1938 and the Travancore-Cochin Temple Entry (Removal of Disabilities) Act 1950. Information about these acts are available in the 1969 *Report of the Committee on Untouchability, Economic and Educational Development of the Scheduled Castes and Connected Documents* (New Delhi: Department of Social Welfare, Government of India). Cited in Castellino, J. (2006), 'Minority Rights in India', in Castellino, J. and Dominguez-Redondo, E. (eds), *Minority Rights in Asia: A Comparative Legal Analysis* (Oxford: Oxford University Press).

[181] Bayly, S., supra n.98, 248.

[182] Iyer, R. (ed.) (1986–87), *The Moral and Political Writings of Mahatma Gandhi* (Oxford: Oxford University Press), vol. 1, 486.

[183] According to Ambedkar, 'there is no meaning in adopting a name like … Harijan. The stench of the old name will stick to the new and you will be forced to change your name continually'. Quoted in Zelliot, E., 'Chokhamela and Eknath', supra n.149, 12.

[184] Gandhi, M. (1954), *The Removal of Untouchability* (Ahmedabad: Navjeevan), 215.

[185] Iyer, R. (ed.), supra n.182, vol. 1, 427.

movement but a movement to purify Hinduism and Hindu society.[186] The idealised Bhangi was supposed to be an exemplar of the virtues that the *Harijan Sevak Sangh* promoted; the society was concerned with spiritual redemption rather than political and social uplift.[187] The *Harijan Sevak Sangh* was also criticised for its composition; its board was made up entirely of non-Harijans.[188]

These moves were opposed by Harijans and their representatives such as Jagjivan Ram, who objected to what he called 'give-up-meat-and-wine-and-develop-cleanliness lectures' addressed to the Untouchables by high class social reformers. He wrote that having perpetrated unparalleled atrocities on those who were once their equal in culture and attainments, and having degraded them into servile sub-humans, these campaigns only added insult to injury.[189]

Gandhi believed in the principle of *varnashramadharma*, or the divine ordered division of society into four groups defined according to duty. He stated that *varna* 'is no man-made institution but the law of life universally governing the human family'.[190] He believed that untouchability was sinful, but that:

> In accepting the fourfold division, I am simply accepting the laws of Nature, taking for granted what is inherent in human nature, and the law of heredity … The fact that a human being is born only in the human species shows that some characteristics, i.e. caste, are determined by birth.[191]

He saw the solution to the problem of untouchability in voluntary private action within a purified *varna*. He advocated the removal of the fifth division, untouchability, and the restoration of the Harijans to their rightful position as Shudras.[192] He did not deny that human beings are born with free will, and he believed that they could uplift themselves socially and spiritually. However, he wrote that it is: 'not possible in one birth entirely to undo the results of our past doings, and in the light of it, it is in every way right and proper to regard him as a Brahman who is born of Brahman parents.'[193]

He added that the *varna* system was 'ethical as well as economic'.[194] The beauty of the caste system is that 'it does not base itself upon distinctions of wealth and

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[186] Chandra, B. (1988), *India's Struggle for Independence, 1857–1947* (New Delhi: Penguin), 295.

[187] Bayly, S., supra n.98, 250.

[188] Galanter, M., supra n.33, 34. Ambedkar was named to the board of the *Harijan Sevak Sangh* but resigned when he felt his views were not being considered; Zelliot, E., 'The Mahars of Maharashtra', supra n.149, 105.

[189] Ram, J. (1980), *Caste Challenges in India* (Delhi: Vision Books), 45.

[190] Iyer, R. (ed.), supra n.182, vol. 3, 562.

[191] Gandhi, M., *Young India*, 21 January 1926, in Iyer, R. (ed.), supra n.182, vol. 2, 22.

[192] Galanter, M., supra n.33, 29.

[193] Iyer, R. (ed.), supra n.182, Vol. 2, 22.

[194] Ibid., Vol. 2, 601.

possessions'.[195] He echoed Swami Vivekanadi, stating that: 'all *varnas* are equal, for the community depends no less on one than another.'[196] Therefore, 'one born a scavenger must earn his livelihood by being a scavenger … For a scavenger is as worthy of his hire as a lawyer or your President. That, according to me, is Hinduism'.[197] He declared himself 'opposed to all those who are out to destroy the caste system'.[198]

Dr B.R. Ambedkar and the Secular Approach to the Uplift of the Untouchables

Dr B.R. Ambedkar, India's first Western-educated and professionally qualified Untouchable,[199] 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 Untouchables through secular, political and legislative means. By the late 1920s, he had become a well-known figure through his speeches, publications, and support of such causes as temple entry.[200] In *The Annihilation of Caste* (1936) and *What Congress and Gandhi have done to the Untouchables* (1945), he bitterly denounced Gandhi and the INC. On the view of caste as a 'golden chain', he stated:

> The effects of caste on the ethics of the Hindus is simply deplorable. Caste has killed public spirit. Caste has destroyed the sense of public clarity. Caste has made public opinion impossible. A Hindu's public is his caste. His responsibility is only to his caste. His loyalty is restricted only to his caste. Virtue has become caste-ridden and

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[195] Gandhi, M., 'Caste v. Class', quoted in Gupta, S. (1985), *The Scheduled Castes in Modern Indian Politics; Their Emergence as a Political Power* (New Delhi: Munshiram Manoharlal Publishers), 72.

[196] Iyer, R. (ed.), supra n.182, vol. 3, 562.

[197] *Harijan*, 6 March 1937, quoted in Zelliot, E., 'Gandhi and Ambedkar: A Study in Leadership', supra n.149, 154.

[198] Gandhi, M., *Nava-Jivan* (reprinted in *Gandh Sikshan* No.18), quoted in Ambedkar, B. (1946), *What Congress and Gandhi have done to the Untouchables*, supra n.2, 152.

[199] He completed a PhD at Columbia University under the sociologists Alexander Goldenweiser and E.R.A. Saligman. Upon his return to India, he joined the Bombay bar and served as a provincial legislator. For a biography of Ambedkar, see Keer, D. (1954), *Dr Ambedkar: Life and Mission* (Bombay: Popular Prakashan). For a more recent appraisal, see Jaffrelot, C. (2004), *Dr Ambedkar and Untouchability: Analysing and Fighting Caste* (Delhi: Permanent Black). Jaffrelot lists all available Ambedkar biographies, including those published in vernacular languages; 167 n.4.

[200] However, he recognised the limits of such movements. In a letter to B.K. Gaikwad (3 March 1934), he wrote: 'I started temple entry *satyagraha* only because I felt that that was the best way of energizing the Depressed Classes and making them conscious of their position. As I believe I have achieved that, therefore I have no more use for temple entry. I want the Depressed Classes to concentrate their energy and resources on politics and education.' Quoted in Zelliot, E., 'The Mahars of Maharashtra', supra n.149, 103.

morality has become caste-bound. There is no sympathy to the deserving. There is no appreciation of the meritorious.[201]

In 1927, he caused a sensation by burning a copy of *Manusmrti*, the ancient law book that symbolised Hindu injustice to the Untouchables.[202] Accusations that he wanted to destroy Hinduism itself followed this act, for his programme had always expressed an impulse towards separation from Hindu society.[203] In *The Annihilation of Caste* (1936), he wrote: 'What is called Religion by the Hindus is nothing but a multitude of commands and prohibitions … I have no hesitation in saying that such a religion must be destroyed.'[204]

In a celebrated address in 1930, Ambedkar caused another sensation by describing Indian Untouchables as the 'slaves of slaves', because they were victims of both colonial and caste rule. For the unclean, he stated, Hinduism itself was a form of imperialism: 'The British have an Empire. So have the Hindus. For is not Hinduism a form of imperialism and not the Untouchables a subject race owing their allegiance and servitude to their Hindu master?'[205]

The 1935 Government of India Act trebled the size of the electorate. The Untouchables and Backward Classes were said to amount to between 50,000,000 and 60,000,000 of an electorate of 350,000,000; and in 1930, Ambedkar had come to the fore with a key demand of separate electorates for the Untouchables. It was feared that this move might actually overturn the Hindu electoral majority in many parts of British India, especially in Bengal and the Punjab. It also undermined Congress's claim to represent the entire Hindu nation, which called for the Harijans to subordinate their cause to that of the nation's unity.

The battle for separate electorates for the Untouchables began in 1928, when the persistent demand for reforms, attended with the dislocation caused by the Non-cooperation movement, led the British to appoint a Statutory Commission under Sir John Simon, as envisioned by section 84A of the Government of India Act 1919.[206] Ambedkar appeared before the Commission, and demanded reserved seats for Untouchables in legislative bodies, special educational concessions, and recruitment to government posts, all of which were substantially approved by the Commission in its Report.[207] The Report was ultimately rejected, and the British convened the first Round Table Conference in London in 1930. The INC, claiming it alone represented Indian Hindu opinion, and in line with its Civil Disobedience Campaign, refused to participate.[208] Ambedkar was appointed a

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[201] Ambedkar, B., *The Annihilation of Caste*, supra n.2, 275.

[202] Zelliot, E., 'The Mahars of Maharashtra', supra n.149, 100.

[203] Galanter, M., supra n.33, 30.

[204] Ambedkar, B., 'The Annihilation of Caste', supra n.2, 298-299.

[205] Quoted in Shankardass, R. (1982), 'The First Congress Raj' (Delhi: Macmillian India), 244, in Bayly, S., supra n.98, 262 n.65.

[206] Basu, D., supra n.145, 8.

[207] Zelliott, E., 'Dr Ambedkar and the Mahar Movement', supra n.149, 170–72.

[208] Galanter, M., supra n.33, 30.

delegate to the Conference, and he described his nomination as meaning: 'that the Untouchables were regarded not merely as a separate element from the Hindus but also of such importance as to have the right to be consulted in the framing of a constitution for India.'[209]

In the absence of any representatives from the INC, he made his crucial demand for separate electorates, as well as laws against discrimination, a special department for the Depressed Classes, and recruitment to government services. From this time on, 'separate electorates' was the battle-cry of the Untouchables under Ambedkar's leadership until Independence.[210]

The call for separate electorates for the Untouchables was bitterly contested by Gandhi at the Second Round Table Conference, following the relaxing of the INC's Civil Disobedience Campaign. He stated, 'I claim myself in my own person to represent the vast mass of the Untouchables',[211] and, while grudgingly conceding separate electorates to Sikhs, Muslims, Christians and Anglo-Indians, he declared the demand for separate electorates for the Depressed Classes to be 'the unkindest cut of all', and vowed to resist it with his life.[212] The delegates authorised the British Prime Minister, Ramsay MacDonald, to make a binding award upon all parties. The subsequent Communal Award, announced on 17 August 1932, granted separate electorates to the Depressed Classes in areas where they were concentrated, as well as regular votes in the general electorate.[213]

Gandhi proceeded to carry out his vow, and began fasting until death unless the separate Depressed Classes electorates were revoked. Jaffrelot notes:

> Ambedkar was the only Indian politician whom Gandhi contested by resorting to a fast. He did this precisely because he knew Ambedkar would not respond by resorting to violence. In a speech to the Second Round Table Conference, Gandhi had said, 'I

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[209] Ambedkar, B., *What Congress and Gandhi have done to the Untouchables*, quoted in Zelliot, E., 'The Mahars of Maharashtra', supra n.149, 102.

[210] Zelliott, E., ibid., 103. Zelliot points out that shortly before the Round Table conferences, Ambedkar had stated that he would be satisfied with joint electorates provided there were reserved seats for the Untouchables. He had first demanded separate electorates in 1919, but before the Simon Commission in 1928, he did not issue this demand. 'Perhaps because Gandhi would not even concede that reserved seats for the Untouchables were necessary', she writes, 'Ambedkar came out strongly for separate electorates for the Depressed Classes and held his position through the three Round Table sessions'.

[211] This claim was subsequently denounced in Ambedkar's newspaper *Janata*: 'The greatest presumption on Gandhi's part at the Round Table Conference was that he claimed that he represented the depressed classes and not Dr Ambedkar … Leadership cannot be imposed, it must be accepted by those on whose behalf it is claimed.' Shivatarkar, S., *Janata* 9 January 1932, quoted in Zelliot, E., 'The Mahars of Maharashtra', supra n.149, 104.

[212] Zelliot, E., ibid., 181.

[213] Misra, J. (2000), 'Ambedkar's Contribution to Dalit Upliftment', in Ranga, M. (ed.), *B.R. Ambedkar, Life, Work and Relevance* (New Delhi: Manohar), 107.

have the highest regard for Dr Ambedkar. He has every right to be bitter. That he does not break our heads is an act of self-restraint on his part'.[214]

Gandhi argued that separate electorates would represent a permanent schism in Hinduism, and perpetuate the stigma of untouchability by making it impossible for them to be assimilated into the Hindu mainstream. The INC's main fear was that the great Hindu base of Congress support would be weakened. The British refused to alter the declaration of the Award that followed the Round Table Conference without the consent of the parties affected. Therefore Ambedkar was subjected to immense pressure while Gandhi fasted, and faced with the death of the great Mahatma, he relinquished the separate electorates in exchange for a system of reserved seats after 21 days. The agreement reached in 1932, signed between Gandhi and three representatives of the Untouchables, Ambedkar, M.C. Rajah and P. Baloo,[215] was called the Poona (or Yeravda) Pact and it is the basis for the system of reservations for the Untouchables.

This arrangement, essentially a victory for Ambedkar, did not allow for separate electorates but instead reserved a proportion of seats for Untouchable candidates in the form of a Communal Award. It provided Untouchables with 148

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[214] Jaffrelot, C., supra n.199, 65. Or as Upendra Baxi remarks, 'in 1932 Gandhi "gambled" on Ambedkar's self-restraint and won'. Baxi, U. (2000), 'Emancipation as Justice: Legacy and Vision of Dr Ambedkar', in K.C. Yadav (ed.), *From Periphery to Centre Stage: Ambedkar, Ambedkarism and Dalit Future* (Delhi: Manohar), 61, quoted in Jaffrelot, ibid.

[215] For an interesting description of P. Baloo, see Guha, R. (1998), 'Cricket and Politics in Colonial India', *Past and Present* 161, 155–90. In Section 4 of the paper, entitled 'Caste and Conflict', Guha describes how the third representative at Poona, P. Baloo, has not been identified by historians of the Poona Pact, 'possibly because they cannot'. It seems that Baloo was a famous cricketer with the Hindu Gymkhana in Bombay, and a *Chamaar*, a member of the leather-working caste close to the bottom of Hindu society. He was the first public figure to emerge from the ranks of the Untouchables. Guha writes that 'Ambedkar himself had looked at the solid frame of the Untouchable bowler with pride'. The paper notes how the Brahmans 'played with Baloo on the cricket field but would not dine with him off it'. During the game's ritual 'tea interval', Baloo was made to stand outside the pavilion, at a distance from his team-mates, and served tea in a disposable cup. Following victory in 1906 over a European side, the *Indian Social Reformer* praised 'Hindu sportsmen of Poona and Bombay [who] have shown in different degrees that, where national interest required, equal opportunity must be given to all of any caste …'. The final prejudice to be removed by Baloo was the refusal of the all-caste cricket team to appoint him captain. Guha writes: 'Equal opportunity in team selection some Hindus could stomach, but not the appointment of an Untouchable as the captain on the field of play of an all-caste cricket team, an appointment which would symbolically represent the upturning of the caste hierarchy' (171). It was not until 1920 that Baloo was finally made captain. His younger brother Vithal captained the side three years later. Guha observes: 'The game of cricket … can provide valuable insights into the history of modern India, in particular to the three overarching themes of that history: those of race, caste and religion' (157).

seats in the parliament, instead of the 78 separately elected members provided for in the original Communal Award.[216] However, the Pact also kept the Untouchables within the Hindu political grouping, allowing the INC to safeguard its claim to represent all of India. Ranga observes that Gandhi's speech at the Second Round Table Conference 'was not so much from a stance as "national" leader, but as a Hindu, and as one who was adamant that Untouchables should be treated as part of Hinduism'.[217] Thus Gandhi remarked to Ambedkar that 'In accepting the Poona Pact you accept the position that you are Hindus'.[218]

Ambedkar spoke afterwards of the events that led to the Poona Pact with great bitterness: 'to my mind there is no doubt that this Gandhi age is the dark age of India. It is an age in which people instead of looking for their ideals in the future are returning to antiquity.'[219]

His opponents were equally dismayed with the agreement. Subhas Chandra Bose, in his memoirs on the fast, writes that in the international sphere, it served to advertise to a 'disproportionate degree' the issue of the depressed classes:

> Hitherto the world had known only one issue relating to India, the political issue – India's grievance against England. Now the leader of the Nationalist movement himself announced to the world that there was another issue – of such vital importance to India that he was prepared to stake his life for it.[220]

The writer continues by recounting how, 'In September 1932, the whole of Europe was told that the Mahatma was fasting because he was against granting certain rights to the Untouchables'.[221] The feeling of international condemnation for India's treatment of the Untouchables would eventually inform the Constituent Assembly's approval of the ban on untouchability.[222]

Ambedkar considered Gandhi an enemy of the Untouchables from the time of the Round Table Conference until Gandhi's death in 1948.[223] Zelliot describes how the conflict between the two leaders can be defined in several ways:

> Ambedkar's insistence on the *rights* of the Depressed Classes versus Gandhi's stress upon the *duty* of the caste Hindus to do penance; Ambedkar's complete rejection of caste versus Gandhi's defence of *chaturvarna* (the idealized four-caste system with no untouchability) as necessary to Hinduism; Ambedkar's rational democratic liberalism versus Gandhi's appeals to traditional modes of thought; and the inevitable clash

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216 Galanter, M., supra n.33, 32.

217 Ranga, M. (ed.), supra n.213, 85.

218 Quoted in Jaffrelot, C., supra n. 199, 67.

219 Ambedkar, B., quoted in Ranga, M., supra n.213, 85.

220 Bose, S. (1997), *Collected Works*, Vol. 2: *The Indian Struggle, 1920–1942* (Delhi: Oxford University Press), 276.

221 Ibid.

222 See further Chapter 3.

223 Zelliot, E., 'Buddhism and Politics in Maharashtra', supra n.149, 133.

between the aggressive demands of a minority leader and the slower, broader-based and somewhat paternalistic extension of rights by the majority group reformer.[224]

Under the Communal Award, the colonial authorities set up the intricate process of 'scheduling' for the new caste-based constituencies in 1936. Its aim was to identify and list every so-called depressed community or *jati* in each province where the 1935 Act applied so as to work out how many special candidates' seats to reserve for the tribals and Untouchables in its provincial legislatures.[225] In keeping with Nehru's vision of a secular and egalitarian nation, the Constitution of India was founded in 1950 on the concept of fundamental rights.

Gandhi, for decades the embodiment of the evangelical approach of repentance and personal growth, eventually acknowledged the need for external controls and adopted all the planks of the secular reform platform championed by Ambedkar.[226] The change came during World War II, when Gandhi was imprisoned along with other Congress leaders for obstructing the war effort. He stopped defending *varna*, arguing instead for a casteless Hindu society as the only means of eradicating untouchability. Furthermore, he envisioned a constitutional ban on untouchability. When Independence came in 1947, it was widely accepted that caste would have no place in independent India, and that efforts would be made to redress the imbalances caused by historical inequalities in the Hindu social system. The exclusion of Dalits from public amenities and places of worship were made statutory offences. Ambedkar was appointed Law Minister by Prime Minister Nehru, and subsequently Chairman of the Drafting Committee of the Constituent Assembly, which had formed the government upon the granting of Independence on the 'appointed day', 15 August 1947. He was therefore one of the principal architects of the 1950 Constitution, and its provisions for a system of reservations for what it terms the 'Scheduled Castes, Scheduled Tribes and Other Backward Classes', which will be examined in Chapter 3.

The Independence Period and the End of the Untouchables as a Political Force

The alliance between Ambedkar and the INC in 1947, with his appointment as Law Minister, was unexpected given Ambedkar's consistently expressed belief in a separate political identity for the Untouchables.[227] This belief was emphatically expressed in his text *What Congress and Gandhi have done for the Untouchables*, published two years earlier in 1945. Zelliot describes the INC's incorporation of

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[224] Ibid.

[225] Bayly, S., supra n.98, 263.

[226] Galanter, M., supra n.33, 40.

[227] See Bandyopadhyay, S. (2000), 'Transfer of Power and the Crisis of Dalit Politics in India, 1945-47', *Modern Asian Studies* 34:4, 893–942. This article employs extensive documentation from the National Archives of India in Delhi to describe the period 1945–47, and the factors which saw the end of the Untouchable movement as a political force in India and its merger with the dominant INC majority.

Ambedkar as 'a triumph of the Congress integrationist politics'.[228] The alliance would last just four years, and Ambedkar resigned from the Cabinet in 1951 when Congress members refused to support his Hindu Code Bill,[229] which 'he desired even more' than the Constitution.[230] The Bill was an attempt to transform effectively the hierarchical relations embodied in the Hindu family and the caste system.[231]

The nature of Untouchable politics lies at the heart of Ambedkar's decision to join the Congress in 1947. The pan-Indian Untouchable movement began at an organised level in 1926 at the All India Depressed Classes Leaders' Conference, held at Nagpore, where the All India Depressed Classes Association was formed with Rao Bahadur M.C. Rajah as its first president. Two years later, Ambedkar was proposed for the presidency of the Association, but failed to attend the conference, where Rajah was again elected president. Following failed proposals to have two presidents, Ambedkar resigned from the Association to set up his own All India Depressed Classes Congress in Nagpore as a rival organisation.

There was never a consensus among the Depressed Classes on the issue of separate electorates, as claimed by Ambedkar at the Round Table Conference. Rajah favoured joint electorates with the Hindus, with provision of reservation of seats. He persuaded his supporters to accept the provisions of the Poona Pact,[232] leaving Ambedkar with little choice but to accept the compromise on joint electorates. Rajah joined the subsequent campaign to rid India of untouchability by becoming a member of the executive council of Gandhi's *Harijan Sevak Sangh*, but would gradually become disillusioned with the INC and what he believed were the sychophants surrounding Gandhi 'who behaved well in his presence, but

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[228] Zelliot, E., 'Congress and the Untouchables: 1917-1959', supra n.149, 193–4.

[229] Introducing the Code in the Constituent Assembly, Ambedkar pointed out that the main aim of the Bill was 'to codify the rules of Hindu law which are scattered in innumerable decisions of the High Courts and the Privy Council, which form a bewildering motley to the common man'. Quoted in Som, R., supra n.171, 171. Ambedkar introduced several important changes in the Bill including equal property rights for women, abolition of customary law and specification of grounds for divorce. Som continues: 'The reintroduction of the Bill in the Constituent Assembly with the major changes, created a most interesting situation. The founding fathers of the Constitution, who, a short while ago had passed the Constitution and accepted without discussion the principles of equality and absence of discrimination between the sexes, now in a total volte face opposed tooth and nail the Hindu Code Bill. Their opposition opened up the Pandora's Box of age-old superstitions, complexes, patriarchal feelings and deep-rooted prejudices running along caste, class, religious and regional lines … Finally, in September 1951, B.R. Ambedkar resigned, a frustrated, ill and broken man.'

[230] Zelliot, E., 'Buddhism and Politics in Maharashtra', supra n.149, 136.

[231] Rodrigues, V., supra n.2, Introduction, 15.

[232] M.C. Rajah to Gandhi, 12 March 1937, M.C. Rajah Papers, Nehru Memorial Museum and Library (New Delhi). Quoted in Bandyopadhyay, S., supra n.227, 898.

quickly forgot their promises and obligations when away from him'.[233] In 1942 when Ambedkar re-launched his movement as the All India Scheduled Castes Federation, Rajah joined. Its constitution stated that the Scheduled Castes were 'distinct and separate from the Hindus',[234] endorsing Ambedkar's stance at the Round Table Conference.

The Federation did not command the unified voice of the Untouchables. The INC had set up its own All India Depressed Classed League in 1935, with Jagjivan Ram as president, as a political front to mobilise Untouchable voters to win the reserved seats provided by the Government of India Act 1935. The 'pro-Hindu' leaders represented by Ram were in their turn condemned by the provincial organisation, the Punjab Provincial Depressed Classes Association, who expressed its confidence in the leadership of Ambedkar and Rajah in a letter to the Governor General and wrote that the Scheduled Castes 'were racially and culturally different from all'.[235]

When the Cripps Mission visited India in 1942, Sir Stafford Cripps extended an invitation to Ambedkar and Rajah to meet with him as 'all India representatives of the Depressed Classes', which put a seal of legitimacy on Ambedkar's Federation as the true representatives of the Untouchables. This caused the Working Committee of the League to meet on 2 April 1942, with Jagjivan Ram in the chair, to put on record their displeasure. They adopted a memorandum proclaiming the League as 'the only representative body of the Depressed Classes'. The document continued:

> As the Depressed Classes religiously and culturally have become one with the Hindus, any effort to drive a wedge between the so-called caste-Hindus and the Depressed Classes will prove injurious to both of them … Therefore the League strongly condemns the move of those persons who want to encourage separatist mentality among a section of the Depressed Classes …[236]

Ambedkar and his Federation were recognised as the legitimate representatives of the Untouchables; but four years later this position would be reversed. When they met Sir Staffrord Cripps on 30 March 1942, Ambedkar realised that the Mission was not going to protect the interests of the Untouchables. He described the Cripps proposals as 'a defeatist surrender to the Congress' which would place

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[233] M.C. Rajah to Gandhi, 17 October 1938. Ibid., 899. In particular, a Temple Entry Bill moved by Rajah in 1938 failed to get the support of the Congress premier, Rajagopalachari, who asked him to withdraw it.

[234] Ambedkar, B. (reprinted 1972), *Emancipation of the Untouchables* (Bombay: Thacker and Co.), 16.

[235] President, Punjab Provincial Depressed Classes Association to Governor General, 6 April 1942, India Office Records: L/P&J/10/14. Bandyopadhyay, S., supra n.227, 902.

[236] Memorandum of the All India Depressed Classes League, 4 April 1942, India Office Records: L/P&J/10/14. Ibid.

the Untouchables 'under an unmitigated system of Hindu rule'.[237] The proposals provided two plans for the protection of the minorities: a treaty provision, based on the Irish model, or a Constituent Assembly. Ambedkar thought the former incompatible with the idea of dominion status and with regard to the latter, in a joint electorate, it would not be difficult for the Hindus to have their own nominees elected in all of the seats reserved for the Scheduled Castes in the provincial assemblies, thereby controlling the 15 seats in the Constituent Assembly due to the Depressed Classes. The Cripps proposals would eventually fail, but, as Ambedkar feared, the colonial authorities were gradually shifting their patronage away from his Depressed Classes Federation and towards the INC as the representatives of the Untouchables. The Secretary of State, in correspondence with the Viceroy, wrote:

> The fundamental weakness of the Scheduled Castes is that they are neither one thing nor the other. If they had the courage to turn Christian or Moslem en bloc it would be easier to legislate for them. But so long as they remain a part of the Hindu system, with no separate religion or basis of organisation as such, and continue to regard themselves as Hindus, it does look as if their only chance of betterment lay, not on the political side, but on gradually winning their way socially in the Hindu community.[238]

Bandyopadhyay writes that, at this point, the colonial authority was defining political identity on the basis of religion, and was endorsing the Gandhian position that the salvation of the Untouchables lay in their religious integration into Hindu society.[239] British withdrawal from India was becoming a certainty, and Ambedkar was striving to ensure that the Untouchables' interests would be protected under a new constitution. The Secretary of State, in a telegram to the Viceroy, emphasised that: 'the offer of unqualified freedom after the war would be conditional on the framing of a constitution, agreed to by all the main elements of India's national life, including the "Depressed Classes".'[240]

Yet replying to a letter from Ambedkar, Gandhi reminded him that he considered untouchability to be a question of religious and social reform which did not require a political solution. This intransigent stance was reciprocated by Ambedkar, who declared at a Depressed Classes meeting in Hyderabad that the Scheduled Castes were not part of the Hindu community, but constituted a 'different nation'. His aim, writes Bandyopadhyay, 'was to get the Scheduled Castes recognized as a *third necessary party* for any serious negotiations for the transfer

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[237] B.R. Ambedkar and M.C. Rajah to Sir Stafford Cripps, 1 April 1942, in Nicholas Mansergh (ed.) (1970), *The Transfer of Power 1942–7* (London: HMSO), Vol.1, 603. Ibid., 903.

[238] Secretary of State to Viceroy, 8 February 1943, India Office Records: L/P&J/8/865, ibid., 904.

[239] Ibid.

[240] Telegram from Secretary of State to Viceroy, 4 August 1944, Wavell Collection Vol. 3, p.32, India Office Library Mss.Eur.D.977. Ibid., 905.

of power'.[241] The new constitution must be tripartite in which equal authority was vested in the Hindus, the Muslims and the Scheduled Castes.

The crisis came in the elections of 1945–46, when the Congress ousted Ambedkar's Federation in almost all of the reserved seats throughout India; of 151 seats, the INC took 149, with two going to Federation candidates. Factors which influenced the outcome included the high property qualifications which excluded the majority of the Untouchables, the joint electorate system, and the vast funds available to the Congress, but the result was primarily due to 'a near total lack of organization' within Ambedkar's Federation, which did not even field a single candidate for 129 out of the 151 reserved seats. Some years later, a Federation member would describe the organisation as a 'tattered one', and would write to Ambedkar: 'Practically there is nothing except your name, but for which we would have been nowhere.'[242] The result was reflected in the composition of the Constituent Assembly, elected by the provincial legislatures, which had 31 Scheduled Caste members of the 296 members, 29 of whom were Congress nominees.[243] The only representative of the Federation elected to the Constituent Assembly was Ambedkar himself.

The Cabinet Mission of 1946 agreed to the request of the Congress president to meet the representatives of the 'Congress Scheduled Castes', including Jagjivan Ram, who emphasised the position that 'the Scheduled Caste masses considered themselves Hindus' and that 'their main disability was not religious or social, but economic', with which the Cabinet Mission agreed.[244] The Secretary to the Viceroy confirmed the departure in the British position:

> we should do only harm in the long run by trying to insist now on separate electorates for the Scheduled Castes as demanded by the Ambedkarites. The treatment to be accorded to the minorities must be left to the Constituent Assembly … [245]

The Statement of the Cabinet Mission, presented by the British Prime Minister Clement Attlee to parliament in May 1946, recognised only three main communities in India; General, Moslem and Sikh. The interests of the smaller minorities, including the Scheduled Castes, would be protected by an Advisory Committee on the rights of citizens, minorities and tribal and excluded areas.[246] Sir Stafford Cripps described the two claimants to represent the Depressed Classes to the House of Commons, stressing that while the Congress-affiliated organisation represented 'the whole country', 'Dr Ambedkar's organisation …

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[241] Ibid., 906.

[242] Unsigned letter to B.R. Ambedkar, 15 January 1952, Dr B.R. Ambedkar Papers, National Archives of India (Delhi). Ibid., 914.

[243] Ibid., 918.

[244] Meeting between the Cabinet delegation and Mr Jagjivan Ram, Mr Radhanath Das and Mr Prithvi Singh Azad, 8 April 1946. Ibid., 920.

[245] Note by G.E.B. Abell, 8 June 1946, India Office Records 3/1/131. Ibid., 921.

[246] India Office Records, L/P&J/10/23. Ibid., 905.

was somewhat local in its character'.[247] This was a remarkable fall for a man considered the unquestioned leader of the Untouchables in the aftermath of the Poona Pact in 1932: as one commentator wrote at that time, 'I think we may accept Dr Ambedkar as the most important leader and accredited spokesman of the depressed classes'.[248] In the House of Lords, the Secretary of State observed that 'owing to the operation of what is known as the Poona Pact, they [Ambedkar's Federation] have been almost entirely excluded from the provincial assemblies', and could not gain representation in the Constituent Assembly. The proposed Advisory Committee on Minorities would, he hoped, provide the Scheduled Castes with reasonable opportunities for the representation of both organisations.[249]

Ambedkar, after an initial response that culminated in the launching of a passive resistance movement in July 1946, eventually settled for reconciliation with Congress as the only means of advancing his cause. Finally, when Bengal was partitioned and Ambedkar lost his seat in the Constituent Assembly, the Congress offered him the seat from Bombay vacated by Dr Jayakar in April 1947. His subsequent appointment as Chairman of the Drafting Committee of the Constitution completed the rapprochement. He would resign in 1951 over irreconcilable differences on the Hindu Code Bill, which met strong opposition from orthodox Hindus who eventually sabotaged the programme.[250] He would declare of his four years with the Congress: 'I remained independent while in the Congress government … earth and stone are two different things and they can never mix together.'[251]

He resigned because he felt that, apart from reservations and the constitutional prohibition on untouchability, no other tangible steps had been taken for the protection of the Scheduled Castes. 'Had there been any possibility of getting our grievances redressed in Congress, I would not have left the organisation', he stated at a meeting in Ludhiana.[252] In a speech delivered on a tour of Punjab, he said of the Congress government that the condition of the Scheduled Castes had deteriorated under its regime. The reservation was only for ten years, and when it would be gone, the caste Hindus would again call the Scheduled Castes 'Chamars and Bhangis'.

Bandyopadhyay concludes of the independence period:

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[247] Sir Stafford Cripps, House of Commons, 18 July 1946, File No. 51/2/1946, National Archives of India (Delhi). Ibid., 921.

[248] John Coatman, in a speech before the East India Association in 1932, published in *Asiatic Review* Vol.29 (London, 1933), quoted in Zelliot, E., 'The Mahars of Maharashtra', supra n.149, 105.

[249] Lords Debate on India: Text of Secretary of State's Speech, File No. 51/2/1946, National Archives of India (Delhi). Quoted in Bandyopadhyay, S., supra n.227, 921–2.

[250] Rodrigues, V., supra n.2, Introduction, 16.

[251] Quoted in Bandyopadhyay, S., supra n.226, 937.

[252] Ibid.

> the main thrust of the transfer of power process was to depoliticize caste and push it into the social or religious domain … [W]hen the dominant mood of the people and all other political parties was to achieve and enjoy the long-awaited freedom, any concern for citizens' rights in a future state needed to be blended with anti-colonialism, in order to capture the popular imagination. It was here that the dalit Federation failed and the result was the elimination of what Ambedkar imagined to be a viable third force in the troubled Indian politics of the 1940s.[253]

Conclusion

Caste is a system unique to Hinduism. The first section has traced the Hindu texts which contain the first decree on the separation of the castes. The relationship between the four *varnas* of the *Purusha sukta* and the modern *jatis* has been explored. The *dharma* codes are the bridge between the Vedas and the everyday duties of the castes, and are the source of caste-based discrimination. The *dharma* codes find their authority in the Vedas. These scriptures are not found anywhere else where it is claimed that 'caste' relations exist, and the American context in particular has been explored. The problem of caste, and its expression in endogamy, exclusion, social disability and dehumanising discourse of pollution, begins with these religious texts.

Whether caste has a racial origin or not is also relevant to the discussion of the *Vedas*. Klass has proposed that translating *varna* as 'colour' is not the same as skin colour. He signals a religious interpretation that views the colours of the four *varnas* as spiritual rather than physiognomic qualities. Equating *varna* with skin colour is an attempt to establish the existence of races in Vedic India, and is a false interpretation. The salient point is that the caste system is a form of racial discrimination, given that race differences have never existed in the biological sense, for it excludes and discriminates on the basis of innate, immutable differences. This is a fact, irrespective of how narrowly or broadly race is defined. Caste has many features which are wholly unique to its undertaking, and to state that caste relations and race relations are the same is to ignore its particular workings. This will not advance the eradication of the caste system, for it fails to appreciate how it is that the system has sustained itself for centuries, long before European and United States' colonists set up the machinery of racial discrimination on the basis of skin colour.

The religious justification of caste is immensely powerful, and must be so acknowledged. Ambedkar appreciated this when he ceremonially burned a copy of the *Manusmrti* in 1927. The conflict between Gandhi and Ambedkar is remarkable in that it represents a compelling example of two different approaches to the eradication of caste-based discrimination – Gandhi sought to purify the caste system of untouchability, while maintaining its structure – and Ambedkar sought its annihilation. As Zelliot notes,

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[253] Ibid., 940 and 942.

> Ambedkar saw advancement for the Untouchables in terms of using political means to achieve social and economic equality with the highest classes in a modern society, while Gandhi held to a more traditional concept of the *varna* system, cleansed of untouchability, in which Untouchables would be Shudras and their unclean work made honourable.[254]

Gandhi's sincerity must be questioned, given that his primary objective was the maintenance of a unified Hindu body politic. This objective motivated his actions toward the uplift of what he termed 'Harijans'. He did not condemn the caste system itself. He believed that the ideal fourfold *varna* division was an integral part of India's spiritual well-being. He would only retract such views in the late 1940s, when it was evident that independent India would be a secular rather than a Hindu nation.

Gandhi's efforts to 'cleanse' Hinduism failed, and the question must be asked whether Hinduism maintains a capacity to reform itself. Ambedkar believed that with sufficient secular protections, the Untouchables, or Scheduled Castes, could stay within Hinduism, shielded by the Constitution from its most brutal social effects. This was a position he did not believe in earlier in his life; criticism of Hinduism became a flat rejection in 1935 at a conference at Yeola, when he stated: 'I was born in the Hindu religion; but I will not die in the Hindu religion.'[255]

When disillusion followed the triumph of the constitutional provisions for the Scheduled Castes, and disenchantment and anger replaced cooperation in his relationship with the dominant Congress, he returned to his earlier sentiment and prepared his followers for conversion. Twenty-one years after the initial announcement, in October 1956, just months before his death, he converted to Buddhism, bringing millions of his followers with him, and reviving a religion long dead in India.[256] Thereby the architect of the constitutional reservations expressed his lack of faith in their ability to deliver the societal changes needed to bring equality to the lowest castes.

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[254] Zelliot, E., 'The Mahars of Maharashtra', supra n.149, 105.

[255] Quoted in Zelliot, E., 'Buddhism and Politics in Maharashtra', ibid., 133.

[256] See Jaffrelot, C., supra n.199, 119–42. After his death, Ambedkar was to be worshipped as a *bodhisattva*, an embodiment of Buddha (137). Jaffrolot writes in relation to the impact of conversion: 'Conversion, the last strategy of emancipation implemented by Ambedkar … has not been a panacea. The choice of Buddhism by millions of Dalits helped them to become mentally emancipated from Brahmin domination but its sociological impact has been negligible' (141).

Chapter 2

The Origin of Race

Introduction

The study of human 'races' dates to antiquity.[1] An ancient reference to discrimination on the basis of skin colour, 'though possibly dictated by political reasons rather than by race prejudice' according to Comas, is found in a column raised by order of Pharaoh Sesostris III (1887–49 BC) above the second cataract of the Nile:

> Southern Boundary. Raised in the eighth year of the reign of Sesostris III, King of Upper and Lower Egypt, to whom be life throughout all ages. No Negro shall cross this boundary by water or by land, by ship or with his flocks save for the purpose of trade or to make purchases in some post. Negroes so crossing shall be treated with hospitality but no Negroes shall hereafter forever proceed by ship below the point of Heh.[2]

Herodutus (fifth century BC) gives the name, geographic location, customs and physical appearance of a great number of peoples spread around the Mediterranean.[3] The Roman empire was in contact with Africans, Indians and East Asians by trade, and the Roman naturalist Pliny the Elder (first century AD) equated physical differences between Africans and North Europeans with the direct effect of climate.[4] Yet awareness of difference did not seem to translate into prejudice based on skin colour in the ancient world. Cromer, writing in 1910, did not think there was 'any distinct indication that colour antipathy existed to any marked extent in the ancient world' and conjectured that 'antipathy based on differences of colour is a plant of comparatively recent growth'.[5]

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1 Cavalli-Sforza, L., Menozzi, P. and Piazza, A. (1994), *The History and Geography of Human Genes* (Princeton, NJ: Princeton University Press), 16.

2 Comas, J. (1958), *Racial Myths* (Paris: UNESCO), 8.

3 Cavalli-Sforza, L., Menozzi, P. and Piazza, A., supra n.1, 16.

4 Comas, supra n.2, 8. Pliny wrote: 'Africans are 'burnt by the heat of the heavenly body near them, and are born with a scorched appearance, with curly beard and hair'; while in the north, being far from the sun, "the races have white frosty skins, with yellow hair that hangs straight".'

5 Cromer, E.B., Earl of (1910), *Ancient and Modern Imperialism* (New York: Longmarts, Green and Co.), 140, quoted in Burns, A. (1948), *Colour Prejudice* (London: George Allen and Unwin), 18.

Burns notes that 'it would be a mistake to consider … that colour prejudice and a contempt for other races are short-comings peculiar to the whites'.[6] His examples include the attitude of the Japanese to the Ainu, as well as towards the Dutch merchants who traded with them; Arab Muslim attitudes towards black Muslims; the statement of Ibn Batuta, the Arab traveller of the fourteenth century, that 'he regretted visiting the country of the Negroes because of their … contempt for the whites'; and the Hindu caste system.[7]

The earliest references to the word 'race' in English appeared in the poem *The Dance of the Sevin Deidly Sins* by William Dunbar in 1508,[8] and in Foxe's *Book of Martyrs* in 1570;[9] however, Poliakov points out that: 'the great key-words, mestizo, mulatto, Negro, Indian and caste originated in the Iberian peninsula, and from there they spread abroad, in common probably with the word "race" itself.'[10]

The beginning of African colonisation and the discovery of America and the trans-Pacific sea route to India caused 'a considerable increase in race and colour prejudice'.[11] Arnoldsson notes that 'the economic, social and racial problems which were created by the conquest of the New World still exist'.[12] The conclusion is that there was no true concept of race or racial discrimination prior to the fifteenth century.[13] Before that time, according to Toynbee (writing in 1935), 'instead of dividing mankind, as we do, into White people and Coloured people, our forefathers divided it into Christians and Heathens'.[14] Race prejudice developed into a regular doctrinal system during the eighteenth and nineteenth centuries.[15]

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6 Burns, A., ibid., 32.

7 Ibid., 32–7.

8 Quoted in Banton, M. (1987), *Racial Theories* (Cambridge University Press), 1: 'And flatteris in to menis facis; And bakbyttaris of sindry races, To ley that had delyte.' The quotation refers to the followers of the sin of Envy.

9 Quoted in Banton, M. (1988), *Racial Consciousness* (London: Longman), 16: the reference is to 'the race and stocke of Abraham'.

10 Poliakov, L. (1974), *The Aryan Myth: A History of Racist and Nationalist Ideas in Europe*, trans. Edmund Howard (Brighton: Sussex University Press), 136.

11 Comas, J., supra n.2, 9.

12 Arnoldsson, S., *La Conquista Espanola*, 9-10, quoted in Hanke, L. (1964), 'More Heat and Some Light on the Spanish Struggle for Justice', *Hispanic American Historical Review* 44:3, 293.

13 Comas, J., supra n.2, 9.

14 Toynbee, A. (1935), *A Study of History* (Oxford University Press), vol. 1, 223, quoted in Burns, A., supra n.5, 18. Therefore: 'race-feeling did not come into existence until the last quarter of the fifteenth century'. Toynbee seems to 'prefer' religious prejudice, arguing 'we are bound to confess that their [our forefathers] dichotomy was better than ours … because a human being's religion is a vastly more important and significant factor in his life than the colour of his skin (and) … because the gulf between religions, unlike the gulf between races, is not impassable'.

15 Comas, J., supra n.2, 10.

Two dominant views have consistently prevailed in the multidisciplinary literature explaining human diversity. The first, monogenism, was the notion of race as lineage, where it was argued that all humans descended from a single ancestral pair, and had diversified from there, with change being caused by environmental factors. The second, polygenism, viewed race as type, whereby racial differences had existed from an early period when different stocks had been created by a god or by a natural catastrophe.[16] Alfred Wallace summarised the argument, having asked: 'is man of one or many species?'

> To this question we immediately obtain distinct answers diametrically opposed to each other: the one party positively maintaining that man is a *species* and is essentially *one* – that all differences are but local and temporary variations, produced by the different physical and moral conditions by which he is surrounded; the other party maintaining with equal confidence that man is a genus of *many species*, each of which is practically unchangeable.[17]

The discovery of the 'New World' and its inhabitants opened the monogenic account advanced in the Book of Genesis up to sustained attack. The Biblical genealogies struggled to account for these peoples, and alternative polygenist genealogies were proposed. In the age of rationalism and enlightenment, these attacks on the Biblical notion of a single human race descended from Adam and Eve claimed the status of purely 'scientific' doctrine. Doubts were expressed before this period, but they lacked the veneer of rational enquiry. The Spanish monk Thomas Scotus expressed the 'pre-Adamite' belief in an eternal, uncreated world: 'There were men before Adam', he declared, 'Adam was made by these men, whence it follows that the world has existed from all time and that it was inhabited by men from all time'.[18]

Monogenists in Europe continued to defend their viewpoint by reference to the Bible, while polygenists drew up hierarchical classifications of races, which were ascribed separate origins, based on descriptions of the peoples encountered by the early colonists. Darwin's theory of evolution changed the terms of the debate – and in *The Descent of Man* (1871), he sketched a secular monogenist theory that comprehensively underlined the one true scientific fact: that all humans belong to a single species and must derive from a single ancestral pair.[19] Yet the notion of race did not disappear with Darwin's thesis. His own belief in the division of the human species into superior and inferior races informed the *Descent*. In particular,

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[16] Banton, M., supra n.9, 65.

[17] Wallace, A. (1864), 'The Origin of Human Races and the Antiquity of Man deduced from the Theory of Natural Selection', *Journal of the Anthropological Society* 2, 158–70, reproduced in Biddiss, M. (1979) (ed.), *Images of Race* (Leicester: Leicester University Press), 39.

[18] Quoted in Poliakov, L., supra n.10, 131.

[19] Darwin, C. (1871; reprinted 1981), *The Descent of Man, and Selection in Relation to Sex* (Princeton, NJ: Princeton University Press), ch. 7: 'On the Races of Man', 214–50.

he used the concept of a sub-species to designate race, which he did not subject to the same meticulous examination as he did the concept of a species.

He wrote in Chapter 7, 'On the Races of Man', that:

> There is, however, no doubt that the various races, when carefully compared and measured, differ much from each other … Their mental characteristics are likewise very distinct; chiefly as it would appear in their emotional, but partly in their intellectual, faculties.[20]

Parallel to the inquiries made in the fields of natural history, biology, zoology and anthropology, many metaphysical pronouncements as to the origin, meaning or ranking of the races have been proposed. The nineteenth century German philosopher-physician, Carl Gustav Carus, wrote that the existence of varieties of men, some fairer and some darker, was a reflection of the degree of 'their interior illumination'.[21] He equated this with the variable illumination of the external world, and concluded that the four great races must be the races of dawn (yellow), day (white), sunset (red) and night (black). He extended the symbolism to relate these races to bodily organs – the Yellows represented the stomach, the Whites the brain, the Red Indians the lungs, and the Blacks the genitals.[22]

Another strain that emerged in the nineteenth century was the notion that the white race represented the male and the black race represented the female. Gustav Klemm described the theory as follows: 'humanity in its entirety is, like man, one being which is divided into two parts each necessary to the other, the active and the passive part, the male and the female'.[23] Klemm describes how passive humanity, 'pliant through weakness and tolerant through idleness', had been conquered by active humanity, identifiable by 'their love of freedom, their great courage, their awareness of their human dignity and of their human rights, by their sense of poetry and their love of power'.[24] Klemm delineated the feminine, passive race as including the coloured people, and the Slavs, while the active race included the

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[20] Darwin, C., ibid., 216.

[21] Carus, C. (undated), *Die Frage nach Entstehung und Gliederung der Menschheit vom Standpunkte gegenwärtiger Forschung*, quoted in Poliakov, L., supra n.10, 250. Carus was developing the ideas of Oken, L. (1811), *Lehrbuch der Naturphilosophie*, who held that the human races were characterised by a symbolism connected with the elements. The black race was terrestrial, the white race luminous, the Mongols were symbolised by air, and the Amerindians by water.

[22] Carus, C. (1853), *Symbolik der menschlichen Gestalt*, quoted in Poliakov, L., supra n.10, 366. Similarly, as we have seen, the origin of the four castes in the Hindu religion are attributed to the bodily organs of the Hindu god, Purusha.

[23] Klemm, G. (1843), *Allgemeine Kultur-Geschichte der Menschheit*, vol. 1 (Leipzig), 195–6, quoted in Leon Poliakov, supra n.10, 252.

[24] Ibid., 253.

Germanic tribes, and the Latins. In the nineteenth century, the theory was widely adhered to, and became the cornerstone of anthropology in that period.[25]

Race never had any biological foundation. It was used synonymously with variety, species, and sub-species, and could fit in at any taxonomic level. Ultimately, it was an umbrella term to describe difference, with a hidden assumption that such difference was biological.

In this chapter the development of racial theory is traced, from the initial Biblical monogenic view, outlined in the first section, which was supported by the early natural historians, and defended vigorously by Bartolomé de las Casas, the 'Protector of the Indians', to the polygenic account examined in the second section, which gained momentum from the colonisation of the 'New World'. Through writers such as Arthur de Gobineau, race came to be seen as accounting for all historical change. The third section looks at the impact of Charles Darwin's treatment of the question of the descent of man, which proved that there could not exist different species of humans – his findings were appropriated, nevertheless, to create the 'Social Darwinist' and eugenics movements. The final section briefly outlines the Nazi racial theories which would skew Darwinism, polygenism and eugenics to fit their mythological beliefs in an Aryan race. The emergence of the view in twentieth century anthropology that there is no such thing as race concludes the section. In the absence of any scientific basis for the concept, and in light of its torrid history, this chapter will seek an answer to the question of what is the contemporary meaning of race.

Monogenism: Race as Lineage

Influence of the Book of Genesis

The Book of Genesis in the King James Bible contains two relevant accounts of how all of mankind is descended from a single pair. The first, the story of the Garden of Eden, holds that all humans are descended from Adam and Eve. Genesis recounts that the Lord destroyed all of the descendants of Adam, except Noah, his wife, his sons, and their wives, and after the Great Flood, mankind issued from this group. This second Biblical 'origin of man' can be distinguished from the first in that it attempts to account for the varieties between the peoples of the world by specifying how Noah's three sons came to populate different parts of the Earth. The story of Shem, Ham and Japheth has played a significant role in prompting theories of inequality between peoples, in particular the curse placed

[25] Ibid. The masculine/feminine dichotomy has also been fancifully used to explain racial prejudice. Burns recounts the view that 'women … [are] almost always more prejudiced than men in their attitude toward coloured persons … It has even been suggested to me that a white woman's instinctive feeling against racial intercourse may be proof of the deep-seated, biological origin of racial prejudice'; Burns, A., supra n.5, 28–9.

on Canaan, the son of Ham.[26] The story, as recounted in Genesis, is as follows: The Lord, seeing how wicked everyone on earth was and how evil their thoughts were all the time,[27] decided to put an end to all mankind, with the exception of Noah, who had no faults and was the only good man of his time.[28] Noah had three sons, Shem, Ham and Japheth. The Lord sent a flood to wipe out his creation, sparing Noah, his wife, his sons, and their wives. These three sons of Noah became the ancestors of all the people on earth.[29] Noah was the first man to plant a vineyard,[30] and after he drank some of the wine, he became drunk, and lay naked in his tent. When Ham, the father of Canaan, saw that his father was naked, he went out and told his two brothers. Then Shem and Japheth took a robe and held it behind them on their shoulders. They walked backward into the tent and covered their father, keeping their faces turned away so as not to see him naked. When Noah was sober again and learnt what his youngest son had done to him, he said 'A curse on Canaan! He will be a slave to his brothers',[31] and 'Cannan will be the slave of Shem … Canaan will be the slave of Japheth'.[32] Genesis subsequently describes the migration of the sons of Shem, Japheth and Ham to different parts of the world, the cursed son of Ham being the ancestor of the peoples of Egypt and Libya.[33]

This Biblical account underpinned the beliefs of monogenist natural historians, who saw the story of Shem, Ham and Japheth as accounting for diversity and difference within the species, which was descended from one common ancestor. The story of the curse on Ham's children provided Biblical authority to the classification of the three peoples, and the curse would be seen as a sign of inferiority in the descendants of Ham. That the term 'race' would come to designate the descendants of Noah's three sons is a reflection of the ability of the term to fit in at almost any syntactical level to denote a grouping of peoples based on physically observable characteristics.

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[26] There are other excerpts from the Bible that hint at colour prejudice. In Numbers 12:1: 'Miriam and Aaron [his sister and brother] spake against Moses because of the Ethiopian woman whom he had married: for he had married an Ethiopian woman'; in Chapter 1 of the Song of Solomon: 'I am very dark, but comely, O daughters of Jerusalem, like the tents of Kedar, like the curtains of Solomon, Do not gaze at me because I am swarthy, because the sun has scorched me … ' (verses 5 and 6), cited in Burns, A., supra n.5, 18–19. Burns describes the Song of Solomon passages as reading 'very much like an apology'.

[27] Genesis 6:5.

[28] Genesis 6:9–10.

[29] Genesis 9:18.

[30] Genesis 9:20–21.

[31] Genesis 9:22–5.

[32] Genesis 9:26–7.

[33] Genesis 10:6.

In *The Natural History of Man* (1848), James Cowles Prichard, a monogenist on the authority of the Scriptures,[34] would espouse the classic tripartite division between the Hamite or 'Egyptian' race, the Semitic or 'Syro-Arabian' race, and the Japhetic or 'Aryan' race, though he did not ascribe any moral superiority to one of these groupings.[35] Over two hundred years earlier, Hugo Grotius wrote that all Noah's descendants were to be found in the New World, although he did not specify their respective lineages.[36] In 1666, Professor Georgius Hornius of Leyden wrote in *Arca Noae, sive historia imperiorum et regnorum* that of the descendants of Noah, the Japhethites became Whites, the Semites became Yellows, and the Hamites became Negroes.[37] In 1870, the First Vatican Council presented a petition 'begging the Pope to speed the hour when, thanks to missionary zeal, the anathema would be removed from the descendants of Ham',[38] a request which Pope Pius IX refused.

Bartolomé de las Casas

'Generally speaking', according to Comas, 'there was no true racial prejudice before the fifteenth century, since before then the division of mankind was not so much into antagonistic races as into "Christians and infidels"'.[39] Hanke adds: 'The expansion of Europe to Africa, America, and the East changed all this and thus the story of Spanish experience has a value for those who would understand race issues on the world scene.'[40]

The Spanish conquistadors of the fifteenth and sixteenth centuries, when they encountered the Indians of the New World, wondered through what lineage they were connected to the common father, Adam; the Aztec Emperor Moctezuma confirmed to Cortès that they were not descended from a 'second Adam' in America.[41] Scholars attempted to fit them in to the Biblical narrative, and Arias Montano, a respected thinker of the period, concluded that they were

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[34] Prichard, J. (1848), *The Natural History of Man: Comprising Inquiries into the Modifying Influence of Physical and Moral Agencies on the Different Tribes of the Human Family* (London: Hippolyte Bailliere), vol. 1, ch. 2: 'The Sacred Scriptures … declare that it pleased the Almighty Creator to make of one blood all the nations of the earth, and that all mankind are the offspring of common parents.'

[35] Ibid.

[36] Poliakov, L., supra n.10, 142.

[37] Ibid., 143.

[38] Quoted in Poliakov, L., ibid., 378, n.209.

[39] Comas, J., supra n.2, 9. Comas views this as 'a much more humane differentiation, since the chasm between religions can be bridged while the biological racial barrier is impassable'. Toynbee (see above, n.14) expressed a similar sentiment.

[40] Hanke, L. (1959), *Aristotle and the American Indians* (London: Hollis and Carter), ix.

[41] Poliakov, L., supra n.10, 137.

the descendants of Shem.[42] The Jesuits in Spain, who controlled education as well as the evangelisation of overseas territories, preferred to link the Indians with Japheth.[43] José de Acosta, the Jesuit provincial of Peru, wrote in *Natural and Moral History of the Indies* (1590) that all men proceeded from one single man, Adam, and concluded that the Indians must have reached America by a land route. Poliakov points out that Acosta 'discovered the existence of the Bering Straits by deduction'.[44]

The Spanish expansion into America was 'the first time … in the modern world we see an attempt to stigmatize a whole race as inferior'.[45] The Dominican friar Bartolomé de las Casas spent 50 years challenging the conduct of the Spanish towards the Indians in the New World, and graphically described their plight in his *Brevísima Relación de la Destrucción de las Indias* (Very Brief Account of the Destruction of the Indies) (1540–42),[46] which helped secure the passage of the reforming New Laws in 1542. Designated 'Protector of the Indians' in 1516, his applied theological viewpoint held that the Indians were rational, and were capable of receiving the faith. They were not, as the conquistadors called them, 'beasts who talked'.[47] In *Del Unico Modo de Atraer a Todos los Pueblos a la Verdadera Religión* (The Only Method of Attracting All People to the True Faith), written in the 1530s, Las Casas concluded that the conversion of rational, free men could only be done through peaceful means, by 'persuading the understanding … and by attracting the will'.[48] The ideas of Las Casas and the Dominicans led Pope Paul III to issue *Sublimus Deus* in 1537 on the enslavement and evangelisation

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42 Ibid.

43 Ibid.

44 Ibid., 138.

45 Hanke, L., supra n.40, x. In a later passage Hanke describes the Spanish conquest as the 'first widespread meeting of races in modern times' (10).

46 Las Casas, B. (1552), *Brevísima Relación de la Destrucción de las Indias (*Sevilla: Sebastián Trugillo), reproduced in Sanderlin, G. (ed. and trans.) (1971), *Bartolomé de las Casas: A Selection of His Writings* (New York: Alfred A. Knopf), 164. The *Very Brief Account of the Destruction of the Indies* (written in 1542 and published in 1552) is a chronicle, and its title was an adaptation of the phrase used by medieval writers to describe the Moslem conquest of Spain, or 'the Destruction of Spain'. The chronicle was enhanced in 1598 by lurid illustrations of Spanish cruelty by the Dutch artist Theodore de Bry. In a particularly memorable piece describing the passage of the Spaniards over the island of Cuba, a very high prince and lord named Hatuey flees with his people to escape the Christians. When finally caught and tied to a stake to be burned, a Franciscan friar speaks to him about God and tells him that he would go to heaven if he would believe what he was being told. After thinking a little, Hatuey asks the friar whether the Christians went to heaven, and the friar answers that they did. According to Las Casas, 'The prince at once said, without any more thought, that he did not wish to go there, but rather to hell so as not to be where Spaniards were'.

47 Las Casas, B. , *Obras Escogidas*, in Sanderlin, G., ibid., Introduction, 19.

48 Las Casas, B. , *Del Unico Modo de Atraer a Todos los Pueblos a la Verdadera Religión*, in Sanderlin, G., ibid., 157.

of Indians. The Papal Bull considered that 'the Indians are truly men' and that they are 'capable of understanding the Catholic Faith'. It criticised those who believed that 'the Indians of the West and South … should be treated as dumb brutes created for our service'.[49]

There was a clear purpose to the writings of Las Casas, who sought an end to the system of *encomiendas* – tracts of land given to Spanish settlers who, in return for instructing the Indians in Christian doctrine, had the right to their forced labour in the mines and fields. Las Casas achieved this with the promulgation of the New Laws in 1542, some aspects of which, including the censure on the inheritance of *encomiendas*, succumbed to pressure from the settlers and were reformed in 1545. The laws governing Spanish action in the New World began with the Laws of Burgos in 1512, which regulated the labour of the Indians and their Christianisation.

In order to allow conquests to proceed according to just and Christian principles, a juridical declaration known as the Requirement was adopted in 1513, which had to be read formally to Indians before launching hostilities.[50] On its content, Las Casas stated he didn't know whether to laugh or weep upon reading it.[51] The Requirement recounts the donation of the lands to the kings of Spain by the papacy, whose overlordship had to be acknowledged by the Indians. They also had to allow the faith to be preached to them. The result of failure to submit was, according to the document, as follows:

> We shall take you and your wives and your children, and shall make slaves of them, and as such shall sell and dispose of them, as their Highnesses may command; and we shall take away your goods, and shall do all the harm and damage that we can, as to vassals that do not obey.[52]

Las Casas continued to press for changes to the system, and presented his arguments in the 'great debate' with Juan Ginés de Sepulvéda that took place before the Council of the Indies in Valladolid in 1550. The central issue was the justice of waging war against the Indians.[53] In 1549, the Council of the Indies had advised the king that the dangers both to the Indians and to the king's conscience which the conquests incurred were so great that no new expedition ought to be

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[49] *Sublimus Deus*, 29 May 1537. Available at Papal Encyclicals online: <http://www.papalencyclicals.net/Paul03/p3subli.htm>. The Bull continues: 'the said Indians and all other people who may later be discovered by Christians, are by no means to be deprived of their liberty or the possession of their property.'

[50] Hanke, L., supra n.40, 16.

[51] Ibid., 41.

[52] Quoted in Hanke, L., ibid., 16.

[53] The disputants were to debate the motion: 'is it lawful for the king of Spain to wage war on the Indians before preaching the faith to them in order to subject them to this rule, so that afterwards they may be more easily instructed in the faith?'; quoted in Hanke, L., ibid., 38.

licensed until a meeting of theologians had decided how such conquests may be justly conducted.[54] While acknowledging the laws that had been enacted to regulate the conquests, the Council held:

> we feel certain that these laws have not been obeyed … The greed of those who undertake conquests and the timidity and humility of the Indians is such that we are not certain whether any instruction will be obeyed. It would be fitting for Your Majesty to order a meeting of learned men, theologians, and jurists, with others according to your pleasure …[55]

The two protagonists appeared before the Council separately. The enslavement of the Indians had found its authority in the writing of Aristotle, whose doctrine of natural slavery held that one part of mankind is set aside by nature to be slaves, in the service of masters born for a life of virtue.[56] Sepulvéda summarised his work, *Democritus Alter*, and argued that the Indians' vices justified war against them and that they were an inferior race needing Spanish tutelage – 'slaves by nature', in the words of Aristotle's *Politics*, which Sepulvéda had translated.[57] Aristotle had believed that 'some things are so divided right from birth, some to rule, some to be ruled … It is clear then that by nature some are free, others slaves, and that for these it is both just and expedient that they should serve as slaves'.[58]

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[54] Hanke, L., ibid., 36. 'Probably never before or since has a mighty emperor – and in 1550 Charles V, Holy Roman Emperor, was the strongest ruler in Europe with a great overseas empire besides – ordered his conquests to cease until it was decided if they were just' (37).

[55] Quoted in Hanke, L., ibid., 36, and 38: 'Charles V summoned the "Council of the Fourteen" to sit in judgment. Among the judges were such outstanding theologians as Domingo de Soto, Melchor Cano and Bernardino de Arevalo, as well as veteran members of the Council of Castile and of the Council of the Indies, and such experienced officials as Gregorio Lopez, the glossator of the well-known edition of the Spanish law code known as the *Siete Partidas*. Unfortunately, the great Dominican Francisco de Vitoria, considered by many the most able theologian of the century, had died in 1546. Had he lived, the Emperor might well have named him a member of the group and another classic work from his pen might have resulted. We might also have known whether Las Casas or Sepulvéda more faithfully followed Vitoria's doctrine, a point upon which much argument has been expended.'

[56] Ibid., p.13.

[57] Sanderlin, G., supra n.46, Introduction, 19. In 1848, Alexander Von Humboldt would write in *Cosmos: A Sketch of the Physical Description of the Universe*: 'The very cheerless, and in recent times too often discussed, doctrine of the unequal rights of men to freedom, and of slavery as an institution in conformity with nature, is unhappily found most systematically developed in Aristotle's 'Politica', i. 3,5,6'; quoted in Poliakov, L., supra n.10, 174.

[58] Aristotle (1992), *The Politics* (Penguin Classics), Book 1 ch. 5, 'Slavery as Part of a Universal Natural Pattern', 67–9. The 'slave by nature' is defined by Aristotle as 'he that can and therefore does belong to another, and he that participates in reason so far as to recognise it but not so as to possess it'.

The first specific American application of the Aristotelian doctrine of natural slavery was made in 1519 when Juan Quevedo, Bishop of Darien, clashed with Las Casas at Barcelona before Emperor Charles V. Las Casas enunciated his basic defence on behalf of the Indians which would inform his opinion throughout his life: '[The] Christian relation is suitable for all and may be adapted to all the nations of the world, and all alike may receive it; and no one may be deprived of his liberty, nor may he be enslaved on the excuse that he is a natural slave, as it would appear that the reverend bishop [of Darien] advocates.'[59] Similarly, in Valladolid, Las Casas defended the Indians' rationality and liberty.[60] He never diverged from the view he had originally stated years before, and detailed in *Del Unico Modo de Atraer a Todos los Pueblos a la Verdadera Religión*.

By contrast, Sepulvéda's real doctrine has long been in doubt, and he always claimed that he was misunderstood.[61] His presentation used the Socratic dialogue technique to underline why the Indians were to be considered natural slaves, the participants being 'Leopoldo' and 'Democritus'. Democritus holds that Indians in America have a natural rudeness and inferiority and therefore ought to be classed as *servi a natura* and should serve their lords, the Spaniards. Leopoldo questions this position:

> But how can this be? innocently asks Leopoldo... Aren't all men born free, according to the doctrines of jurists? Have they been joking all the time? No, replies Sepulvéda through the mouth of Democrates, the jurists refer to another kind of slavery which had its origin in the strength of men, on the law of nations, and at times in civil law. Natural slavery is a different thing.[62]

Hanke sympathises with the struggle required on the part of both participants in the debate to get to the heart of the matter. Las Casas had denounced Aristotle in the 1519 Barcelona controversy, when he described 'the Philosopher' as 'a gentile burning in Hell'.[63] He could not attack Aristotle directly in 1550 because, as a member of the Dominican Order (he joined in 1523), he would have met opposition to such a strategy among his brothers. Instead, he denounced Sepulvéda for misunderstanding Aristotle. This was an appropriate argumentative position given that Aristotle himself had several conceptions of the meaning of a 'natural slave'; in *Nicomachean Ethics* he states that his idea of the slave in no way implies inferiority or inequality due to race or status.[64]

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59 Hanke, L., supra n.40, 16–17.

60 Sanderlin, G., supra n.46, Introduction, 19.

61 Hanke, L., supra n.40, 42.

62 Ibid., 44. 'Philosophers, he [Sepulvéda/Democritus] explains, use the term slaves to denote persons of both inborn rudeness and of inhuman and barbarous customs. Those who suffer from these defects are by their nature slaves.'

63 Ibid., 17.

64 Rifkin, L. (1953), 'Aristotle on Equality: A Criticism of A.J. Carlyle's Theory', 14 *Journal of the History of Ideas* 14:2, 279, cited in Hanke, L., ibid., 56.

No formal verdict was ever reached on the debate, but the generally accepted outcome was that the majority favoured Las Casas.[65] Charles V, already so troubled by Las Casas that he had ordered an end to all conquests in the New World in 1550 until the debate had been heard, never revoked the elements of the New Laws which forbade slavery, and conquests of the old type were proscribed.[66] The main proposals of Las Casas were put into legal form, including his ideas on peaceful preaching, and prohibitions on the waging of unjust wars.[67] The Valladolid debate caused the ultimate polarisation of Spanish historiography between historians who condemned Spain or exalted her contributions to the American Indians. Future scholars would link the writings of Sepulvéda to broader movements of racial intolerance. Marcelino Pelayo wrote in 1892:

> Sepulvéda, a classical scholar described in Italy as a Hellenist or Alexandrine, treated the [Indian] problem with all the crudity of pure Aristotelianism as expounded in the *Politics*, showing himself, with more or less theoretical circumlocution, as a supporter of the theory of natural slavery. His thought in this respect does not differ much from that of those modern empirical and positivistic sociologists who believe the extermination of inferior races an inevitable result of the struggle for existence.[68]

In 1945, the Guatemalan writer Rafael Martinez coupled Sepulvéda's name with Hitler as a proponent of repugnant racial doctrines.[69] Others have been more forgiving, considering Sepulvéda merely 'behind the times',[70] and characterising the struggle as being between humanism on the part of Sepulvéda and humanitarianism on the part of Las Casas.

Hanke writes that the problem discussed at Valladolid over four centuries ago 'epitomized the problem for generations of men'. Citing the Universal Declaration of Human Rights, and its proclamation that all men are born free and equal in dignity and rights, he notes that the decision of the Council of the Indies not to stigmatise the American Indians as natural slaves, according to the dictates of Aristotle, is a milestone on the road towards a civilisation based on the dignity of all men.[71]

In a direct riposte to Hanke's interpretation of the debate, O'Gorman writes:

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[65] Although both claimed to have won over the adjudicators, Las Casas stating that the decision was favourable to his viewpoint, Sepulvéda writing to a friend that the judges 'thought it right and lawful that the barbarians of the New World should be brought under the dominion of the Christians'; Hanke, L., supra n.40, 74.

[66] Sanderlin, G., supra n.46, 19.

[67] Hanke, L., supra n.40, 83.

[68] Quoted in Hanke, L., ibid., 94.

[69] Martinez, R. (1945), *De Aristoteles a Hitler*, cited in Hanke, L., ibid., 95.

[70] Carro, V., *La Ciencia Tomista*, cited in Hanke, L., ibid.

[71] Hanke, L., ibid., 116.

> upon examining the historical reality studied by Hanke, I certainly see, like him, a struggle to reach a definition of the just standard in regard to certain concrete problems of Spain's enterprise in the Indies. But I do not see, as he does, that only one of the contending parties should be the spokesman of truth. I see rather that both sides, be they called Las Casas or Sepulvéda, fight to make justice prevail, as each understands it; and that if there is a struggle it is not because … justice is on one side and injustice on the other, but rather because justice is on both sides, which is the circumstance which gives the controversy the great historical significance which in fact it possesses.[72]

O'Gorman believes that Las Casas developed a theory of the essential equality of all men 'in order to rescue his Indians from the snares of the Aristotelian-Christian concept'.[73] He makes an interesting distinction between the types of equality both men are seeking to support. In the case of Las Casas, he is positing equality on the basis of nature, a natural equality of all men, a concept that was alien to fifteenth century Christian doctrine. Sepulvéda was writing in support of Christian truth as it was understood at the time, which crucially lacked a concept of human equality. The argument of Las Casas was rooted in the physical rather than the metaphysical, but because he was a Dominican monk, it is assumed that his arguments were based on Christian doctrine; 'students of Las Casas have allowed themselves to be deceived by the monk's habit of their hero'.[74]

Therefore:

> They have been carried away by their enthusiasm in encountering in Las Casas a voice who speaks for the equality of human beings in terms with which they themselves are familiar, and they have failed to observe that in reality they are listening to the voice of Voltaire, Hume and Rousseau, and not the voice of Christianity. Las Casas … always believed that his words rested upon God, and this blindness of Las Casas has been inherited by his modern interpreters … If we do not forget … that the essence of the debate was a clash between two concepts of man and not merely between two ideas of the American Indian, then we can do justice to men like Sepulvéda who fought for Christian truth as it was understood in their time … and we can also do justice to men like Las Casas who fought for Christian truth as it would be understood in the future … This explains why neither ideal triumphed in their own time, why both sides believed that they had won (as pointed out by Hanke) and why posterity has erected statues to Las Casas and condemned Sepulvéda.[75]

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[72] O'Gorman, E. (1949), 'Lewis Hanke on the Spanish Struggle for Justice in the Conquest of America', *Hispanic American Historical Review* 29:4, 565.

[73] Ibid., 567. 'Las Casas' intentions are clear: If the Indians are human, which no-one denies, and if all men by ontological definition are equal, the Indians, therefore, could hardly be slaves by nature since other men are not so … The equality of Las Casas is in embryonic form the equality of the philosophers of the Enlightenment.'

[74] Ibid., 568.

[75] Ibid.

Pennington emphasises Las Casas' reliance on canonical, or legal texts. He writes that: 'it was not only with emotion and humanitarian ideals that Las Casas tried to alleviate the plight of the Indians, but also with the logic of the law.'[76] By constructing his argument using legal rather than theological authority, he was able to defend the Indians on the centuries-old authority of the law. In a work of later years, *De Thesauris in Peru* (1565), he cited canonical legal maxims to counteract the Aristotelian doctrine. He quoted the legal maxim which originated in the private law of the Romans, *Quod omnes tangit debet ab omnibus approbari*; what touches all must be approved by all.[77] Las Casas reasoned that the pope could not grant the Spanish king *dominium* in the New World without the consent of the Indians.[78]

The *Apologetica Historia Sumaria* (Apologetic History), finished in 1559, captures the egalitarian philosophy of Las Casas, and his belief that all of mankind was part of a single race. It defends the rationality of the Indians and argues that all men are equal in their human dignity and in their potential for development through education.[79] It was a pioneering study in anthropology, containing detailed descriptions of the Indians' lands, social and political organisation, religion and customs. Using Aristotelian standards, Las Casas compared the Indians' culture to that of Christian nations and found it not to be inferior.[80] In Chapter 48 of the Apologética historia, Las Casas wrote:

> From these examples, ancient and modern, it clearly appears that there are no races in the world … who cannot be persuaded and brought to a good order and way of life … The reasons for this truth is – and Cicero sets it down in De Legibus, Book I[81] – that all the races of the world are men, and of all men and of each individual there is but one definition, and that is that they are rational. All have understanding and will and free choice, as all are made in the image and likeness of God.[82]

He continues:

> Thus the entire human race is one; all men are alike with respect to their creation and the things of nature, and none is born already taught.[83]

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[76] Pennington, K. (1970), 'Bartolome de las Casas and the Tradition of Medieval Law', *Church History* 39:2, 161.

[77] Ibid., 157.

[78] Ibid., 157–8. 'All he [the Pope] gave to the Spanish was the right to preach the faith' (159).

[79] Sanderlin, G., supra n.46, 200.

[80] Ibid., Introduction, 22.

[81] Chapter 48 of the 'Apologética historia sumaria' contains an extensive extract from Cicero, which states *inter-alia* that: 'there is no human being … [who] cannot attain to virtue … the whole human race is bound together in unity' (ibid., 201).

[82] Las Casas, B. (1559), *Apologética historia sumaria*, in Sanderlin, G., ibid., 200.

[83] Ibid.

Natural History

While taxonomic ideas go back mostly to Aristotle,[84] serious attempts at classification of human races had to wait for substantial geographic knowledge.[85] This became common only in the eighteenth century, when interest in the classification of animals and plants was already flourishing.[86] The early natural historians sought a system for classifying organisms that would reflect the divine order and help understand God's creation. John Ray urged 'men of University standing' to 'contemplate the beauteous works of nature and honour the infinite wisdom and goodness of God', in the preface to his *Catalogue of Cambridge Plants* in 1660.[87] A central tenet of the 'natural theology' approach was that God had created a set number of animals and plants, and Ray wrote in 1693 that 'the true number of species in nature is fixed and limited and, as we may reasonably believe, constant and unchangeable from the first creation to the present day';[88] 'all animals … are generated by animal parents of the same species as themselves.'[89] The idea that all plants and animals were linked together by descent, forming a great unbroken chain, was captured in the adage *natura non facit saltus*, or 'nature does not make leaps', an idea first recorded in 1613 in Jacques Tissot's *Discours veritable de la vie du Géant Theutobocus*.[90] Natural theology held that God's creation was perfect, excluding the possibility of extinct species. Therefore the discovery of the fossils of extinct shellfish troubled Ray on two grounds. He did not believe that God would create a species of animals or plants which could subsequently be lost to the world, and furthermore these fossils pointed to a much older world than that accounted for in the Bible.

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[84] Two thousand years before, Aristotle divided the living world into two groups. One contained those with red blood, which he called the Enaima, and the other contained those whose blood is not red, called the Anaima. The inclusion of Man as an animal among the Enaima was particularly striking, for men did not regard themselves as animals at that time. Savory, T., Joselin, F. and Walton, J. (1943), *Seven Biologists* (Oxford University Press), 9.

[85] Cavalli-Sforza, L., Menozzi, P. and Piazza, A., supra n.1, 16.

[86] Ibid, 17.

[87] Ray, J. (1660), *Catalogue of Cambridge Plants*, in Raven, C. (1986), *John Ray, Naturalist: His Life and Works*' (Cambridge Science Classics), 27.

[88] Ray, J. (1693), *The Wisdom of God Manifested in the Works of Creation*, in Banton, M., supra n.8, 2.

[89] Ray, J. (1693), *The Wisdom of God Manifested in the Works of Creation*, in Raven, C. (1953), *Natural Religion and Christian Theology* (Cambridge: Cambridge University Press), 469.

[90] Tissot, J. (1613), 'Discours Veritable de la Vie du Géant Theutobocus', cited in Jones, A. (2005), 'The Immanent Break', *Critical Sense* (Berkeley), n.54, available at <http://criticalsense.berkeley.edu/jones.pdf>. Tissot was applying an axiom from physics to natural history. The phrase was applied to the law in 1886, when Coke wrote that *Natura non facit saltus, ita nec lex*, or 'law, like nature, does not proceed by leaps'.

The Swedish natural historian, Carl Linnaeus, known as the 'father of taxonomy' due primarily to the binomial nomenclature classificatory system he proposed in *Systemae Naturae*[91] in 1758, also held that 'all living things, plants, animals, and even mankind themselves, form one chain of universal being from the beginning to the end of the world'.[92] Linnaeus, like Ray, asserted that no species could ever be destroyed, and wrote that invariability of species is the condition for order in nature. In later years he would relent a little, accepting that new genera might arise through hybridisation, but this did not change his fundamental stance that there were no new species. New discoveries had potentially always been present, and stemmed from an original species which God had created in the Garden of Eden. 'Nature does not make any leaps', he wrote in 1751 in *Philosophia Botanica in qua explicantur Fundamenta Botanica*, 'all plants show an affinity with those around them, according to their geographical location'.[93]

The tenth edition of *Systema Naturae* (1758), the first application of binomial taxonomy in zoology, contains the oldest animal names still valid today. The edition also divided the human species, *Homo sapiens,*[94] into one nocturnal variety, *Homo sylvestris* (man of the woods); and six diurnal varieties, *Homo americanus* (red, choleric), *Homo europaeus* (white, ruddy), *Homo asiaticus* (yellow, melancholic), *Homo afer* (black, phlegmatic), *Homo ferus* (four footed, mute), *Homo monstrosus* (deviant forms from several regions).[95] Linnaeus viewed humans as forming one species with several varieties, the principal four of which are distinguished by continent, colour and characteristics. With this ordering,

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[91] The full title is *Systemae Naturae*: *Creationis telluris est gloria Dei ex opere Naturae per Hominem solum*, meaning 'The Earth's creation is the glory of God, as seen from the works of Nature by Man alone'. First published in 1735, Linnaeus continually revised the study in the course of his lifetime.

[92] Quoted in Banton, M., supra n.8, 3.

[93] Linnaeus, C. (1751), *Philosophia Botanica in qua explicantur Fundamenta Botanica* (Stockholm: Godofr Kiesewetter), section 77. In the last edition of *Systema Naturae*, Linnaeus left out the statement that no new species can arise.

[94] Linnaeus introduced a five level system, kingdom→class>→order→genus→ species. Mankind is described by this system as follows – the kingdom *animalia* contains the class *vertebrate* which contains the order *primates* which contains the genus *homo* which contains the species *sapiens*. This innovation followed the binomial nomenclature system he had introduced in an earlier work entitled *Museum Teeisnianum* (1753), but which was used consistently for the first time in the tenth edition of *Systema Naturae.* The binomial nomenclature system classified species by designating one Latin name to indicate the genus and one Latin name to indicate the species, for example *Homo sapiens*, or *Tyrannosaurus rex.* Before Linnaeus's system, a species was identified by giving a description, in Latin, of its most important points. Thus the species of buttercup, named *Ranunculus bulbosus* by Linnaeus, was formerly named *Ranunculus calycibus retroflexis, pedinculis fulcatus, caule erecto, foliis composites.* Born Carl von Linné, he gave himself the binomial nomenclature, Carl Linnaeus.

[95] Banton, M., supra n.8, 4.

Linnaeus became 'the first scientist who found a place in the natural order for human beings'.[96]

In 1775, the German anatomist Johann Blumenbach, considered the father of physical anthropology, published the first edition of *De generis humani varietate native* (On the Natural Varieties of Mankind), which contained his characterisation of five varieties of the human race. His subdivision, like that of Linnaeus, was in accordance with the continents and the colour of the skin and hair. However, he also introduced notations on variations in the shape of the skull and face.[97] Blumenbach called his five varieties of the human species the Caucasian, the Mongolian, the Ethiopian, the American and the Malayan.[98]

Such categories were necessarily arbitrary, and constituted broad descriptions of peoples based on geographical regions rather than biologically independent populations. Darwin would later show in *The Descent of Man* how any number of categories can be proposed, all equally valid, and thereby all equally invalid.[99] Yet the core terms proposed by Blumenbach would survive in anthropological literature, and polygenist writers would infer that the varieties conformed to scientific, biological, natural, or unchanging differences or types.

Having identified and classified the varieties of the human species, the next step was to provide an explanation for these differences in man. For those that recognised that there was only one human species, the varieties were thought to arise from the influence of environmental factors such as climate and diet. Geoffroy Saint-Hilaire, a French morphologist, proclaimed in his 1833 study, *Influence du Monde Ambiant pour Modifier les Formes Animaux*, that:

> The external world is all-powerful in alteration of the form of organized bodies...these [modifications] are inherited, and they influence all the rest of the organization of the animal, because if these modifications lead to injurious effects, the animals which

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[96] Retzius, G. (1909), 'The So-called North European Race of Mankind: A Review of, and Views on, the Development of Some Anthropological Questions', *The Journal of the Royal Anthropological Institute of Great Britain and Ireland*, 39, 279.

[97] Blumenbach had a large collection of skulls at his anatomical museum in Göttingen, described in the study *Decas Collectionis Suae Craniorum Diversarum Gentium Illustrate* (1790-1820). He took into consideration the shape of the skull, and its sincipital aspect (its length and breadth), what he called *norma vertacilis*, and what was later termed the 'cephalic index'. Blumenbach was the first to make a serious study of the form of the crania of the different 'races', a practice continued by other anatomists such as Anders Retzius (who invented the 'cephalic index'), who focused his research on the ratio of length of head to breadth. This branch of research became known as craniology. The measurement enjoyed tremendous success in physical anthropology for a century, until the advent of multivariate analysis and genetic markers after World War II. See Cavalli-Sforza, L., Menozzi, P. and Piazza, A., supra n.1, 17.

[98] Cavalli-Sforza, L., Menozzi, P. and Piazza, A., ibid.

[99] Darwin, C., supra n.19, 226–7.

> exhibit them perish and are replaced by others of a somewhat different form, a form changed so as to be adapted to the new environment.[100]

Buffon, in *Histoire Naturelle* (1749), also had an environmental view of human variation, stating that mankind,

> underwent diverse changes, from the influence of the climate, from the difference of food, and of the mode of living, from epidemical distempers, as also from the intermixture, varied *ad infinitum*, of individuals more or less resembling each other.[101]

The process by which the environment would cause organic change in humans was more difficult to identify. Blumenbach sought to explain why acquired characteristics, such as small feet as the result of footbinding, were not handed down to descendants, while organic characteristics, such as speech defects, could be transmitted to the next generation. His answer was a process he called 'degeneration' which acted by 'diverting the formative force from its accustomed path'.[102] Agents of degeneration included the climate. In explaining the reasoning behind the term 'Caucasian', Blumenbach made reference to this process:

> I gave to that variety the name of the Caucasian mountains because it is in that region that the finest race of men is to be found … the skin of the Georgians is white and this colour seems to have belonged originally to the human race, but it can easily degenerate to a blackish hue.[103]

Darwin would refute the belief in an environmental cause of variation, stating:

> the external characteristic differences between the races of man cannot be accounted for in a satisfactory manner by the direct action of the conditions of life; the differences between the races of man, as in colour, hairiness, form of features, etc., are of a kind which might have been expected to come under the influence of sexual selection.[104]

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[100] University of California Museum of Paleontology, *Etienne Geoffry Saint Hilaire*, <http://www.ucmp.berkeley.edu/history/hilaire.html>.

[101] Quoted in Banton, M., supra n.8, 5.

[102] Ibid., 6.

[103] Quoted in Poliakov, L., supra n.10, 173.

[104] Quoted in Cavalli-Sforza, L., Menozzi, P. and Piazza, A., supra n.1, 17. The authors add that 'It is noteworthy and unfortunate that very little research has been done in humans on the evolutionary consequences of the choice of mates … [While] the magnitude of short-term environmental effects is well-documented, and there also exist slow environmental changes … We believe that the major breakthrough in the study of human variation has been the introduction of genetic markers, which are strictly inherited and basically immune to the problem of rapid changes induced by the environment … The nature and dynamics of the major forces that mould the frequencies of genetic markers are well understood: natural selection (including also sexual selection), mutation, migration and chance' (17–18).

Polygenism: Race as Type

The Early Polygenists

John Atkins, an English doctor and one of the earliest proponents of the polygenist theory, stated in *A Voyage to Guinea* (1723) that 'I am persuaded the black and white Race have, *ab origine*, sprung from different coloured Parents'.[105] Similarly, the Scottish philosopher Lord Kames emphasised skin colour as an indicator of separate origins: 'The colour of the Negroes, as above observed, affords a strong presumption of their being a different species from the Whites.'[106] A defining feature of the polygenist theory was its conflict with Christian teaching; this was recognised by Atkins, who described his views as 'a little Heterodox';[107] and when Voltaire expressed his belief that 'whites … Negroes … the yellow races … are not descended from the same man' in *Traité de Métaphysique* (1734), he did so as a former pupil of the Jesuits rebelling against their teaching.[108]

Georges Cuvier, the most important biologist in France under Napoleon, was strictly a monogenist, but his introduction of the notion of 'type' became one of the foundations of the polygenic school of thought. He established extinction as an indisputable fact, through his studies documenting the existence of large mammals, such as the Irish elk and the giant ground sloth, which resembled no living species. Scholarship before Cuvier had refused to recognise that God may have destroyed some of his creation. The concept of biological type was vital to Cuvier – he did not believe that the various species shaded into one another. He considered genera and species to be examples of types, which formed discrete morphologically stable units.[109]

In seeking an explanation for the extinction of species, Cuvier proposed that periodic revolutions or catastrophes had befallen the Earth, each one destroying a certain number of species. He began fitting mankind into this schema by proposing that *Homo sapiens* could be divided into three subspecies, Caucasian, Mongolian and Ethiopian. Each of these three was further subdivided on geographical, linguistic and physical grounds. Cuvier was a Protestant who held that all men were descended from Adam – the three major races or subspecies originated by escaping in different directions after the last catastrophe, and had developed in isolation from each other.[110] He did not necessarily equate this catastrophe with

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[105] Atkins, J. (1723), *A Voyage to Guinea*, quoted in Jordan, W. (1968), *White over Black* (Chapel Hill, NC: University of North Carolina Press), 17.

[106] Kames (1796), *Sketches of the History of Man*, quoted in Poliakov, L., supra n.10, 177.

[107] Quoted in Jordan, W., supra n.105, 17.

[108] Poliakov, L., supra n.10, 175. Voltaire stated his belief in polygenism, whatever might be said by 'a man dressed in a long black cassock'.

[109] Banton, M., supra n.8, 28.

[110] Ibid., 29.

the Biblical Flood;[111] however, Poliakov notes: 'it is perhaps out of deference to the Bible that he split mankind into three great races, the white, the yellow and the black. Nevertheless, religious belief no longer stopped a growing number of writers from choosing the theory of polygenism.'[112]

In *Le Règne Animal* (1817), Cuvier wrote: 'While there seems to be only one human species since all of its individual members can join together and produce fertile offspring, there are certain hereditary traits which constitute what are called "*races*".'[113] In this statement, Cuvier is equating 'race' with 'variety' – he is stating that there is only one human species, based on the criteria proposed by Buffon in the second volume of his *Histoire naturelle* (1749), that two animals belong to the same species 'if by means of copulation they perpetuate themselves and preserve the likeness of the species',[114] but that there are varieties within that species which he called 'races'. Banton points out that in the first English translation of the work, which was published in 1827, the translator replaced the final word 'races' with 'varieties';[115] the next translated edition, from 1831, used the word 'races' as Cuvier had done in the French.[116]

The substitution of 'race' for 'variety' is significant in the history of the development of racial typologies. The three 'races' identified by Cuvier (Caucasian, Mongolian and Ethiopian), were hierarchically arranged with Caucasians at the top. Differences in culture and mental quality were attributed to differences in physique. The word 'race' had suddenly blurred the important distinction between different species and varieties of the same species,[117] which meant that racial types could be introduced at any taxonomic level. Banton states: 'his [Cuvier's] use of

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[111] That link was explicitly made by the 'last of the great diluvialists', the Reverend William Buckland (1820), who proposed in *Vindiciae Geologicae, or the Connexion of Geology with Religion Explained* (London: W. Pickering), that the most recent revolution was the Biblical flood.

[112] Poliakov, L., supra n.10, 220. Bory de Saint-Vincent would claim in *L'homme (homo), Essai Zooligique sur le Genre Humain* that 'Revelation … nowhere proscribes that we are to believe exclusively in Adam and Eve'.

[113] 'Quoique l'espèce humaine paraisse unique, puisque tous les individus peuvent se mêler indistinctement, et produire des individus féconds, on y remarque de certaines conformations héréditaires qui constituent ce qu'on nomme des *races*'; quoted in Banton, M., supra n.8, 29 (my translation).

[114] Ibid., 5. Thus a horse and a donkey are separate species because the product of their mating, a mule or hinny, is sterile. John Ray was the first to propose such a definition of a species.

[115] Cuvier, G. (1827), *The Animal Kingdom: Arranged in Conformity with its Organization* (London: George Whittaker), in Banton, M., supra n.8, 29.

[116] Banton, M., ibid.

[117] Ambedkar wrote in *The Annihilation of Caste* (1936): 'even scientists who believe in purity of races do not assert that the different races constitute different species of men. They are only varieties of one and the same species'; Ambedkar, B.R. (1936), *The Annihilation of Caste*, in Rodrigues, V. (ed.) (2002), *The Essential Writings of B.R. Ambedkar* (Oxford University Press), 265.

a concept of type made it easier for his successors to discuss natural differences without facing up to questions about whether these were differences at the level of species, genus or variety.'[118]

The typological theory that had its genesis in Cuvier's writings asserted that variations in humans were the expression of differences between underlying types of a relatively permanent kind. In *Types of Mankind* (1854), Nott and Gliddon argued that the races of mankind occupied distinct zoological provinces and did not originate from a single pair. Louis Agassiz, a Swiss professor of natural history, contributed a 'Sketch of the Natural Provinces of the Animal World and their Relation to the Different Types of Man' to the book, which divided the world into eight provinces, and sought to show 'that the differences existing between the races of men are of the same kind as the differences observed between the different families, genera and species of monkeys or other animals'.[119] If the use of fertility as the indicator of different species was abandoned, it would facilitate the view that humans could form separate species, rather than constituting one species descended from a single ancestral pair. Nott included in Part 1 an article entitled 'The Mulatto a Hybrid – Probable Extermination of the Two Races if the Whites and Blacks are allowed to Intermarry', arguing, based on his observations in South Carolina, that 'mulattoes' did not live as long as members of the parent races.[120] The word 'race' was used interchangeably with 'type'; for example, Nott stated that 'races were created in each zoological province, and therefore all primitive types must be of equal antiquity'. Here, 'race' was being employed in the sense of a pure and permanent type, whereby 'the principal physical characters of a people may be preserved throughout a long series of ages, in a great part of the population, despite climate, mixture of races, invasion of foreigners … a type can outlive its language, history, religion, customs and recollections'.[121] The concept of pure races or pure types would subsequently underpin the Nazi racial theories of the twentieth century.

The typological doctrine of zoological provinces outlined in *Types of Mankind* did not allow for superiority of one type or race over another – each type was suited to its own province, and was superior within its own area. Nevertheless, Nott held that 'the higher castes of what are termed Caucasian races, are influenced by several causes in a greater degree than other races. To them have been assigned,

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[118] Banton, M., supra n.8, 32.

[119] Ibid., 40.

[120] According to Poliakov: 'The word "mulatto" is derived from mule, and mulattos are therefore half-breeds who until the nineteenth century were commonly thought to be sterile'; Poliakov, L., supra n.10, 135.

[121] Banton, M., supra n.8, 41–2.

in all ages, the largest brains[122] and the most powerful intellect'.[123] Part 2 of the *Types of Mankind* sought to attack the monogenist belief in a single ancestral pair, and Gliddon analysed the tenth chapter of the Book of Genesis, which describes Noah's descendants, using Hebrew translations, rather than the Latin and Greek translations authorised by King James.

'Race is Everything'

Robert Knox states in his preface to the *The Races of Men: A Philosophical Enquiry into the Influence of Race over the Destinies of Nations* (1862):

> That the race in human affairs is everything, is simply a fact, the most remarkable, the most comprehensive, which philosophy has ever announced. Race is everything: literature, science, art – in a word, civilization depends on it.[124]

This sentiment, similarly expressed by Lamartine, 'races are the great secret of history and of morals',[125] and Taine, '[race is] the first and richest of the factors from which historical events derive',[126] was systematically described by Comte Arthur de Gobineau, who sidestepped the question of the origin of the species and the monogenist/polygenist debate to focus solely on an indefinite and undefined concept of race as the most important agent of historical change.

Arthur de Gobineau opened Chapter 10 of Book 1 of his *Essai sur l'Inégalité des Races Humaines* (1853) by outlining his understanding of the word 'race'.[127] He stated that a number of observers had declared that the human families are so marked by differences that they cannot have the same original identity. For them, he continued, there is not just one species, there are three, or four, or even more, producing perfectly distinct generations, which have merged to form hybrids. In Chapter 11, he set out the 'solid scientific stronghold of the unitarians [monogenists]'; the ease with which the different branches of the human family create hybrids and the fertility of these hybrids.[128] He wrote that he was constrained by scientific authority and a religious interpretation of the origin of

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[122] Samuel Morton, a doctor from Philadephia, published a book entitled *Crania Americana* in 1839, which measured the skulls of the races as classified by Blumenbach. His results found that whites had the biggest brains, and blacks the smallest. He thus attributed differences in brain size to differences in capacity for civilisation.

[123] Quoted in Banton, M., supra n.8, 43.

[124] Knox, R. (1862), *The Races of Men: A Philosophical Enquiry into the Influence of Race over the Destinies of Nations* (London: H. Renshaw), Preface, 1.

[125] Quoted in Poliakov, L., supra n.10, 230.

[126] Ibid.

[127] De Gobineau, A. (1983), *Essai sur l'Inégalité des Races Humaines* (Paris: Gallimard), Livre I ch. 10: 'Certains anatomistes attribuent à l'humanité des origins multiples', et ch. 11: 'Les differences ethniques sont permanents'.

[128] Ibid., ch. 11.

mankind that he could not attack, forcing him to leave aside his vehement doubts regarding the question of the primordial unity.[129]

He therefore refused to frame his discussion of race in terms of the debate between monogenists and polygenists, and asked whether it may be possible that, independently of an original unity, there may not exist radical and far-reaching differences, both physical and moral, between human races. His approach caused Poliakov to describe him as 'a monogenist in theory and a polygenist in practice'.[130] He identified racial types as central to his argument: 'We cannot fail to perceive that the question of the permanence of types is the key to the discussion here.'[131] Gobineau believed that if the types are absolutely fixed, hereditary and permanent, then in spite of climate and the passage of time, mankind is no less completely split into separate parts than it would be if the specific differences were due to a real divergence of origin. Regardless of whether one believes in the unity or multiplicity of the origin of the species, he concluded, the different families are today perfectly separated since no external influence can make them resemble each other, assimilate or merge together.[132]

He claimed to have found that the existing races constituted separate branches of one, or many, lost, primitive stocks. These races, differing between themselves in exterior form and the proportion of bodily features such as the limbs, skull structure and complexion, only lose their principal traits to the powerful influence of the crossing of blood.[133] This permanence of generic characters suffices to produce radical effects of unlikeness and inequality. Gobineau summarised his position:

> Given the difficulties presented by the interpretation, however liberal, of the Bible, and the objection founded on the law on hybrids [which holds that the power of producing fertile hybrids or offspring is the strongest mark of a distinct species], it is impossible to pronounce categorically in favour of a multiplicity of origin for the human species. We must therefore be content with assigning a lower cause to these trenchant varieties, the principal characteristics of which are undoubtedly their permanence, which can only be lost through the crossing of blood.[134]

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[129] Ibid.

[130] Poliakov, L., supra n.10, 234.

[131] De Gobineau, A., supra n.127, Livre 1 ch. 1: '[O]n n'aura pas manqué de s'apercevoir que la question de permanence des types est, ici, la clef de la discussion.'

[132] Ibid.

[133] Similarly, Cabanis had written 50 years previously in 1802 in *Rapports du Physique et du Moral de l'Homme*: 'Si les races humaines ne se mêlaient pas continuellement, tout semble prouver que les conditions physiques propres à chacune se perpétueraient par la génération, en sorte que les hommes de chaque époque représenteraient exactement à cet égard les homes des temps antérieurs.'

[134] De Gobineau, A., supra n.127, Book 1, ch. 11.

He concludes the chapter by stating that the unassailable permanence of these forms and features confirm the 'eternal separation of the races'.[135]

In Chapter 16 of Book 1, Gobineau distinguishes three distinct types, the black, the yellow and the white, which form the three constituent elements of the human race. He describes the characteristics of each type, and asserts that if they had remained strictly separate, the supremacy would have always been in the hands of the white races, for the white race originally possessed the monopoly of beauty, intelligence and strength.[136] He believes that all civilisations derive from the white race, and he closes the chapter, and the first book of the *Essai*, by detailing the 10 great human civilisations. No 'black race' is seen as the initiator of a civilisation, and no spontaneous civilisation is to be found among the 'yellow races'; for example, Egypt and China are described as Aryan colonies of India.[137] Gobineau found that there was some benefit to be gained in mixing the three types – the world of art and great literature coming from the mixture of blood – but while he conceded that the small had been raised, he countered that the great had been lowered by the same process.[138] He concludes Chapter 16 with a convoluted passage:

> If the mixing of blood is therefore, to a certain extent, favourable to the mass of humanity, if it raises and ennobles it, it is only at the expense of humanity itself, since it lowers, abases, irritates and humiliates, decapitates the most noble elements, and even when one wants to admit that it is better to transform the myriad of tiny persons into mediocre men than to conserve the race of princes whose blood, subdivided, impoverished, and adulterated, becomes the dishonoured element of a similar metamorphosis, there still remains that tragedy that the mixing of blood cannot stop; that mediocre men unite in new mediocrities, and from such unions is born a confusion which, similar to that of Babel, leads society to nothingness from which no power can save it.[139]

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[135] Ibid.

[136] Ibid., ch. 16: 'Récapitulation; Caractères Respectifs des Trois Grandes Races; Effets Sociaux des Mélanges; Supériorité du Type Blanc et, dans ce Type, de la Famille Ariane': 'La race blanche possédait originairement le monopole de la beauté, de l'intelligence et de la force.'

[137] Ibid. 'J'ai dit que les grandes civilisations humaines ne sont qu'au nombre de dix et que toutes sont issus de l'initiative de la race blanche.'

[138] 'Les petits ont été élevés. Malheureusement les grands, du meme coup, ont été abaissés (…).' Jean Boissel, editor of the Gallimard publication of Gobineau's Oeuvres, notes that this statement represents '[Une] nouvelle expression de l'auteur sur la *fatalité* biologique de l'égalisation universelle, dont le corollaire est la disparition des *élites* originelles'; Notes et variants, ibid., 1337.

[139] Ibid., ch. 16: 'Si donc les mélanges sont, dans une certaine limite, favorables à la masse de l'humanité, la relèvent et l'ennoblissent, ce n'est qu'aux dépens de cette humanité même, puisqu'ils l'abaissent, l'énervent, l'humilient, l'étêtent dans ses plus nobles éléments, et quand bien même on voudrait admettre que mieux vaut transformer en hommes médiocres des myriades d'êtres infimes que de conserver des races de princes dont le sang,

Chapter 4 of Book 1 is concerned with a process Gobineau terms 'degeneration'. The word 'degenerate' (*dégénéré*), he explained, applies to a people, and signifies that the people no longer have the intrinsic value they possessed before, because they no longer have the same blood in their veins, due to successive alliances which have gradually modified their value. From an ethnical point of view, he continued, 'degenerate man' is a different product from the heroes of the great ages.[140] The essence of a nation alters gradually, and this *décadence*[141] results in the end of civilisations, for they are no longer in the same hands. This led Gobineau to ask: 'Are there, between the human races, different intrinsic values and can these differences be appreciated?'[142] He closes the chapter by advancing the answer, *a prioiri*: 'that perceptible differences exist in the relative value of the human races.'[143]

Race and Evolution

Charles Darwin

In their introduction to Charles Darwin's *The Descent of Man, and Selection in Relation to Sex* (1871), John Bonner and Robert May observe: 'For his period he is remarkably objective on the matter of race.'[144] Chapter 7 of *The Descent of Man*, entitled 'On the Races of Man', indeed uses 'everyday terminology to convey precise

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subdivisé, appauvri, frelaté, deviant l'élément déshonoré d'une semblable metamorphose, il restait encore ce malheur que les mélanges ne s'arrêtent pas; que les homes médiocres … s'unissent à de nouvelles médiocrités, et que ces marriages … naît une confusion qui, pareille à celle de Babel, aboutit à la plus complète impuissance, et mène les societés au néant auquel rien ne peut remédier.'

[140] Ibid., ch. 4: 'De Ce Qu'on Doit Entendre par le Mot "Dégénération"; Du Mélange des Principes Ethniques, et Comment les Sociétés se Forment et se Défont'; 'Je pense donc que le mot *dégénéré* s'appliquant à un peuple, doit signifier et signifie que ce peuple n'a plus la valeur intrinsèque qu'autrefois il possédait, parce qu'il n'a plus dans ses veines le même sang, dont les alliages successifs ont graduellement modifié la valeur; autrement dit, qu'avec le même nom, il n'a pas conservé la même race que ses fondateurs; (…) celui qu'on appelle l'homme *dégénéré*, est un produit différent, au point de vue ethnique, du héros des grandes époques. (…) Il mourra définitivement, et sa civilisation avec lui, le jour où l'élément ethnique primordial se trouvera tellement subdivisé et noyé dans ces apports de races étrangères'.

[141] On the meaning of 'décadence' as used by Gobineau, see generally Carter, A. (1958), *The Idea of Decadence in French Literature, 1830–1900* (Toronto: University of Toronto Press).

[142] Arthur de Gobineau, supra n.127, ch. 4: 'Y-a-t-il entre les races humaines des différences de valeur intrinsèque réelement sérieuses, et ces différences sont-elles possibles à apprecier?'

[143] Ibid.: 'qu'il existe des differences sensibles dans la valeur relative des races humaines.'

[144] Darwin, C., supra n.19, Introduction by Bonner, J. and May, R., xvi.

and definite meanings, with elegance and clarity', as signalled in Bonner and May's introduction.[145] Darwin's work, *On the Origin of the Species by Means of Natural Selection*, published 12 years earlier, did not apply his theory to the human species. In *The Descent of Man*, however, he carefully examines whether the different races constitute different species in light of the process of natural selection.

Darwin begins Chapter 7 by stating that it is not his intention to describe the several so-called races, but to conduct an inquiry into the value of the differences between them from a classificatory point of view, in terms of their origin. In determining whether two or more allied forms ought to be ranked as species or varieties, naturalists are guided by the amount of differences between them, and whether these differences are constant, for constancy of character is what is chiefly valued and sought after by naturalists.[146] With regard to the amount of difference between the races, he warns that we must make some allowance for what he terms our 'nice powers of discrimination' gained by the long habit of observing ourselves – we are clearly much influenced in our judgement by the mere colour of the skin and hair.[147] Darwin first considers the arguments in favour of classing the races of man as distinct species, and then those against.

His dialectical inquiry, conducted through the eyes of a hypothetical naturalist, can be summarised as follows, using Darwin's own terminology:

If a naturalist, who had never before seen such beings, were to compare a Negro, Hottentot, Australian or Mongolian, he would at once perceive that they differed in a multitude of characters, and would assuredly declare that they were as good species as many to which he had been in the habit of fixing names. He will have been in some degree influenced by the enormous range of man, which is a great anomaly in the class of mammals. He would be deeply impressed with the fact, first noticed by Agassiz, that the different races of man are distributed over the world in the same zoological provinces. The fact of the races of man being infested by parasites, which appear to be specifically distinct, might fairly be urged as an argument that the races themselves ought to be classed as distinct species. The supposed naturalist having proceeded thus far in his investigation, would next inquire whether the races of man, when crossed, were in any degree sterile. It has often been said that when mulattoes intermarry they produce few children; on the other hand, Dr. Bachman of Charlestown positively asserts that he has known mullato families who have intermarried for generations and have continued on an average as fertile as either pure whites or pure blacks.[148]

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[145] Ibid.

[146] Ibid., 214.

[147] Ibid., 214–17. It is probable that in this context Darwin was employing an older meaning of the word 'nice'. *Chambers Dictionary of Etymology* gives both 'foolish or ignorant' (the earliest meaning of the word in English) and 'precise' or 'exact' (dating from the 1500s). *Chambers Dictionary of Etymology*, Barnhart, R. (ed.) (1988) (New York: Chambers).

[148] Ibid., 217–21, and 224.

Continuing to present the case that the different races constitute different species, Darwin next sketches the argument put forward, *inter alia*, by Comte Arthur de Gobineau:

> Even if it should hereafter be proved that all the races of men were perfectly fertile together, he who was inclined from other reasons to rank them as distinct species, might with justice argue that fertility and sterility are not safe criterions of specific distinctness. It may be justly argued that the perfect fertility of the intercrossed races of man, if established, would not absolutely preclude us from ranking them as distinct species. After carefully studying the evidence I have come to the conclusion that no general rules of this kind can be trusted. Thus with mankind the offspring of distinct races resemble in all respects the offspring of true species and varieties.[149]

Having summarised the thesis that the races constitute distinct species, Darwin turns to its antithesis, which, using his own words, ran as follows:

> On the other side of the question, if the supposed naturalist were to enquire whether the forms of man remained distinct like other species when mingled together in large numbers in the same country, he would immediately discover that this was by no means the case. In many parts of the same continent he would meet with the most complex crosses between Negroes, Indians and Europeans; and such triple crosses afford the severest test, judging from the vegetable kingdom, of the mutual fertility of the parent forms. Hence the races of man are not sufficiently distinct to co-exist without fusion; which in all ordinary cases affords the usual test of specific distinctness.[150]

> The distinctive characters of every race of man are highly variable. It may be doubted whether any character can be named which is distinctive of a race and is constant. All naturalists have learnt how rash it is to attempt to define species by the aid of inconstant characters. But the most weighty of all the arguments against treating the races of man as distinct species, is that they graduate into each other, independently in many cases, of their having intercrossed.[151]

Darwin had stressed in the beginning of his inquiry the importance of constancy of character, 'what is chiefly valued and sought after' by naturalists.[152] He presents his conclusions in the synthesis, and captures the essential flaw in all attempts to classify the races of man:

> Man has been studied more carefully than any other organic being, and yet there is the greatest possible diversity amongst capable judges whether he should be classed as a single species or race, or as two (Virey), as three (Jacquinot), as four (Kant), five (Blumenbach), six (Buffon), seven (Hunter), eight (Agassiz), eleven (Pickering), fifteen

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149 Ibid., 222–3.
150 Ibid., 224–5.
151 Ibid., 225–6.
152 Ibid., 214.

> (Bory St. Vincent), sixteen (Desmoulins), twenty-two (Morton), sixty (Crawford), or as sixty-three, according to Burke. The naturalist will end by uniting all the forms which graduate into each other as a single species; for he will say to himself that he has no right to give names to objects which he cannot define.[153]

Finally, Darwin predicts the demise of the debate between the monogenists and polygenists upon the universal acceptance of his theory of evolution:

> The question whether mankind consists of one or several species has been much agitated by anthropologists, who are divided into two schools of monogenists and polygenists. Those who do not admit the principle of evolution, must look at species either as separate creations or in some manner distinct entities. Those naturalists who admit the principle of evolution will feel no doubt that all the races of man are descended from a single primitive stock. Most of our races have been formed, not intentionally from a selected pair, but unconsciously by the preservation of many individuals which have varied, however slightly, in some useful or desired manner. When the principles of evolution are generally accepted, as they surely will be before long, the dispute between the monogenists and polygenists will die a silent and unobserved death.[154]

Darwin's closely reasoned rejection of the polygenist position that different races represented different species did not prevent him from applying the concept of a subspecies to race: 'Some naturalists have lately employed the term "sub-species" to designate forms which possess many of the characteristics of true species, but which hardly deserve so high a rank. Now if we reflect on the weighty arguments, given above, for raising the races of man to the dignity of species … the term 'sub-species' might here be used with much propriety.'[155] In a later passage, and wholly at odds with the conclusion reached by the hypothetical naturalist, he describes it as: 'almost a matter of indifference whether the so-called races of man … are ranked as species or sub-species; but the latter term appears more appropriate.'[156] 'But from long habit', Darwin wrote, 'the term "race" will perhaps always be employed'.[157]

'Social Darwinism' and Eugenics

Social Darwinism,[158] 'the application of the idea of evolution to a higher social type on the basis of social competition between "fit" and "unfit" groups and

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[153] Ibid., 226–7.

[154] Ibid., 228–, and 235–6.

[155] Ibid., 227–8.

[156] Ibid., 235.

[157] Ibid., 228.

[158] Burns refers to the same movement as 'Political Darwinism'. 'De Gobineau's theory of racial superiority, fortified by the conclusions of Darwin, has developed into what has been called "Political Darwinism"'; Burns, A., supra n.5, 77.

individuals',[159] focuses on the idea of 'survival of the fittest'. In this sense, it owes more to Herbert Spencer, the British philosopher who coined the term 'survival of the fittest' in an article on population theory in 1852.[160] Writing on the history of the idea of Social Darwinism, Cleays finds that:

> what was most distinctive about much (though not all) Social Darwinism was its concern not with 'race' as such in the loose sense of a term of general classification but with a new definition of race directly attached to skin colour, in which ideas of racial hierarchy and supremacy were wedded to earlier notions of 'fitness'.[161]

Race was now assumed to be a determinate, independent factor in human evolution. Earlier distinctions between European and non-European peoples had paid greater heed to the effects of climate on behaviour than to racial differences *per se*. A biologically rather than an environmentally-centred racial discourse became increasingly popular by the mid-eighteenth century. The language of race hardened considerably as a result.[162]

In the mid-1860s, Darwin himself came increasingly to hope that the optimal outcome of human natural selection would be the triumph of 'the intellectual and moral' races over the 'lower and more degraded ones'.[163] Social Darwinism saw the evolutionary struggle as taking place not just between individuals, but also between groups.[164] Alfred Wallace, in his application of the theory of 'natural selection' to the specific question of the origin of human races, described 'the same great law of '*the preservation of favoured races in the struggle for life*' which leads to the inevitable extinction of all those low and mentally undeveloped populations with which Europeans come in contact'.[165] He concluded that 'the higher … must displace the lower and more degraded races; and the power of "natural selection" … must ever lead to the more perfect adaptation of man's

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[159] Claeys, G. (2000), 'The Survival of the Fittest and the Origins of Social Darwinism', *Journal of the History of Ideas* 61:2, 229.

[160] Spencer, H. (1852), 'A Theory of Population Deduced from the General Law of Animal Fertility,' *Westminster Review*, 1, 501. Darwin would write to Alfred Wallace, the co-discoverer of the theory of natural selection, that 'I fully agree with all that you say on the advantages of H. Spencer's excellent expression of "the survival of the fittest"'. *The Life and Letters of Charles Darwin* (London: John Murray, 1888), vol. 3, 45–6. Spencer is also responsible for popularising the term 'evolution'.

[161] Claeys, G., supra n.159, 237.

[162] Ibid.

[163] Ibid.

[164] Glover, J. (1998), 'Eugenics and Human Rights', in Burley, J. (ed.), *The Genetic Revolution and Human Rights* (Oxford: Oxford University Press), 112

[165] Wallace, A., quoted in Biddiss, M., supra n.17, 49. Wallace directly credits Herbert Spencer with providing the inspiration for his paper – 'The general idea and argument for this paper I believe to be new. It was, however, the perusal of Mr Herbert Spencer's works, especially *Social Statics*, that suggested it to me, and at the same time furnished me with some of the applications' (54).

higher faculties to the conditions of surrounding nature, and to the exigencies of the social state'.[166] However, nowhere was this shift toward devaluing individual human life more evident than in the eugenics movement, which claimed that its principles were simply applied Darwinian science.[167]

Sir Francis Galton coined the term 'eugenics' in *Inquiries into Human Faculty and its Development* in 1883 to describe 'the science of improving stock … to give the more suitable races or strains of blood a better chance of prevailing over the less suitable'.[168] The subject of race, Galton wrote, should be 'a permanent topic of consideration',[169] given that 'the very foundation and outcome of the human mind is dependent on race'.[170] He described the process of eugenics as 'the cultivation of race',[171] where it is 'the essential notion of a race that there should be some ideal typical form … The easiest direction in which a race can be improved is towards that central type'.[172]

Galton was Darwin's cousin, and the theory of evolution underpinned his writing; as a consequence, eugenics has gained the reputation as 'a movement that proceeded directly from Darwin to Hitler'.[173] Galton wrote, 'Man has already furthered evolution very considerably, half unconsciously and for his own personal advantages; but he has not yet risen to the conviction that it is his religious duty to do so deliberately and systematically'.[174] In a review of Galton's work in *Nature* magazine in 1883, George Romanes wrote that 'if the idea of promoting evolution could become generally, or even largely, invested with a feeling of obligation, the prospects of the race would be greatly brightened. The most important field of human activity under such circumstances would obviously be that of improving the race by selection'.[175]

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[166] Wallace, A., ibid., 53.

[167] Weikart, R. (2002), 'Darwinism and Death: Devaluing Human Life in Germany 1859–1920', *Journal of the History of Ideas* 63:2, 327.

[168] Galton, F. (1883), *Inquiries into Human Faculty and its Development* (London: MacMillan), 17, n. 1. Galton derived the term from the Greek *eugenes*, meaning 'good in stock'.

[169] Ibid., 214.

[170] Ibid., 217.

[171] Ibid., 17, n.1.

[172] Ibid., 10.

[173] Zenderland, L. (2000), 'What was Eugenics?', in Buchanen, A., Brock, D., Daniels N. and Wikler, D. (eds), *From Chance to Choice: Genetics and Justice* (Cambridge: Cambridge University Press), 29.

[174] Galton, F., supra n.168, 198.

[175] Romanes, G. (1883), 'Human Faculty and its Development', *Nature*, 98.

Eugenics movements and societies were created in Germany, England, and the United States,[176] which often combined eugenic interests with a focus on race.[177] In Sweden and Denmark, eugenics would form part of the political platforms of left-wing parties, who believed in using natural and social science for the common good.[178] Social Democrats in Sweden believed that the modernisation and rational ordering of society into a welfare state left little room for the inferior and the deficient, and the government sought to identify and sterilise these citizens, who were for the most part women and itinerants.[179] While socialists such as the Swedish eugenists denied any commonality with Nazi policies of the same era, the eugenics movement as a whole did not survive the revelations of what the Nazis had done in its name.[180]

Race in the Twentieth Century

Nazi Racial Theories

One of the central tenets of Nazi Germany was racial purity, and from the early eugenics programmes to the genocide of the Jewish and other populations of Europe, a macabre combination of 'scientific' experimentation, mythologising and extermination of the innocent, race was the common factor. 'Germany', Alfred Rosenberg wrote in *The Myth of the Twentieth Century* (1930), 'will be race and national state'.[181]

The first statutory definition of a non-Aryan[182] was enacted in Nazi Germany on 11 April 1933.[183] After defining people of 'non-Aryan' descent in its April 1933 decree, the Nazis created the Reich Genealogical Office *(Reichssippenamt)*

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[176] The Racial Hygiene Society was founded in Berlin in 1905; the English Eugenics Society was founded in 1907, with Galton elected honorary president; and the American Eugenics Society was founded in 1923.

[177] Roll-Hansen, N., 'The Progress of Eugenics: Growth of Knowledge and Change in Ideology', quoted in Buchanen, A., Brock, D., Daniels N. and Wikler, D. (eds), supra n.173, 33.

[178] Ibid., 35.

[179] Ibid.

[180] Fredrickson, G. (2002), *Racism, A Short History* (Princeton, NJ: Princeton University Press), 128.

[181] Rosenberg, A. (1930), *The Myth of the Twentieth Century* (Munich), Book 3, ch. 6.

[182] It has been said that the word 'Aryan' or 'Arian' is a linguistic expression forced by the philologists into the domain of ethnology, where it has no place or meaning. Burns, A., supra n.5, 77, n.1.

[183] Scales-Trent, J. (2001), 'Racial Purity Laws in the United States and Nazi Germany: The Targeting Process', *Human Rights Quarterly* 23:2, 261.

to clarify questions of descent in close cases.[184] A 1933 ruling that required the dismissal of Jewish employees, explained: 'it is not religion but race that is decisive. Christianized Jews are thus equally affected.'[185] The Law for the Protection of the Hereditary Health of the German People required the registration of all members of 'alien races'.[186] At the Nuremberg party rally in September 1935, the Nazis promulgated the *Law for the Protection of German Blood and Honour* which prohibited race defilement (*Rassenschande*), such as marriage between Jews and Germans.[187]

National Socialism was 'applied biology' according to Fritz Lenz, one of the leading Nazi authorities on racial hygiene.[188] A medical programme of euthanasia and forcible sterilisation instituted in 1934 for eugenic purposes victimised about one percent of the entire German population, some four hundred thousand people in the Greater German Reich, most of them prior to the outbreak of the war in 1939. It involved an elaborate apparatus of laws and procedures, genetic health courts and appeal tribunals, and formed part of the process of ensuring a racially-defined healthy people.[189] As Marrus notes, 'eugenic thought was widespread, even mainstream, during the 1930s when the Nazis were consolidating their hold on Germany. Following the First World War eugenics was an international movement … Racial categories and racial hygiene were part of the contemporary discourse'.[190]

The eugenic programme of laws of sterilisation, euthanasia of the unfit, and eventually the Holocaust were designed around improving the degenerated condition of the German stock.[191] In concordance with these measures, the *Lebensborn* breeding programme was initiated, while the system of Genetic Courts passed judgment on the fitness of those thought to harbour defective

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[184] Ibid., 277.

[185] Ibid., 265.

[186] Ibid., 267.

[187] Ibid., 272. Italy would follow suit with Mussolini's racial legislation of 1938, which was preceded by the *Manifesto del razza* (Manifesto on Race), issued on 14 July 1938 by a group of Italian university professors, which contended that the Italian people were of Aryan origin and that Jews did not belong to the Italian race. Luconi, S. (2004), 'Il Griddo della Stirpe and Mussolini's 1938 Racial Legislation', *Shofar* 22:4, 67. According to Comas, 'Mussolini said in 1932: "There are no pure races and there is no anti-Semitism in Italy" … In 1936 the German-Italian alliance forced him to begin an anti-Jewish campaign … The Fascist manifesto of 14 July 1938 proclaims: :There is a pure Italian race. The question of race in Italy should be dealt with from a purely biological angle independent of philosophical or religious considerations"'; Comas, J., supra n.2, 28.

[188] Quoted in Marrus, M. (1999), 'The Nuremberg Doctors' Trial in Historical Context', *Bulletin of the History of Medicine* 73:1, 113.

[189] Ibid., 116.

[190] Ibid., 120.

[191] Buchanen, A., Brock, D., Daniels, N. and Wikler, D. (eds), supra n.173, 37.

genes.[192] The German eugenic programme was distinctive in it scale, ferocity, racial orientation and demands for absolute submission by the individual to the interests of the group.[193]

The Nazi eugenic programme was underpinned by an ideology, informed by two centuries of racial theorising, whose greatest proponent was Alfred Rosenberg. The International Military Tribunal at Nuremberg described him as 'the Party's ideologist' in its judgment.[194] In his introduction to *The Myth of the Twentieth Century*, the work that provided National Socialism with a definitive theory of history as a function of race, Rosenberg wrote: 'the values of the racial soul, which stand as driving forces behind this new image of the world, have not yet become a living consciousness. Soul means race seen from within.'[195] He believed in an 'ancient Indian principle of law from prehistoric Nordic times' that read: 'Law and Unlaw do not walk around and say: We are this. Law is what Aryan men discover to be right.'[196] Rosenberg perceived five races, all of which revealed perceptibly different types. It was beyond question for him that the true culture-bearer for Europe was in the first place the Nordic race.[197] Significantly, he held that 'if a German renewal attempts to realise the values of our soul in a vital sense, then it must also preserve and strengthen the physical prerequisites of these values. Race protection, race breeding, and race hygiene are thus unavoidable requirements of a new time. Racial breeding signifies, above all, the protection of the Nordic racial component of our people in the sense of our deepest research. A German state has as its first duty the creation of laws. These must correspond to our basic requirements'.[198] Rosenberg further detailed the eugenics programme to be enacted – 'Marriages between Germans and Jews must be forbidden' and 'the rights of citizenship must not be a gift at birth … that the Jews lose their rights of citizenship and must be subject to a new law appropriate to them, is self evident'.[199] 'There is yet hope', Rosenberg believed, 'if the insane principle of the equality and equal rights of all races and religions is one day finally given up'.[200]

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[192] Ibid., 38.

[193] Ibid..

[194] Judgment of the International Military Tribunal for the Trial of the German Major War Criminals, Nuremberg, 30 September and 1 October 1946 (London: HMSO, Cmd.6964, Reprinted 1966), 94–6.

[195] Rosenberg, A., supra n.181, Introduction.

[196] Ibid., Book 3, ch. 4.

[197] Ibid. Rosenberg held that a Nordic ideal of racial beauty was an organic prerequisite upon which all future European art and aesthetics must be based (Book 2, ch. 1).

[198] Ibid., Book 3, ch. 4.

[199] Ibid. Subsequently in Chapter 6, Rosenberg writes of 'the Jewish antirace'.

[200] Ibid., Book 3, ch. 6.

Man's Most Dangerous Myth

In the early twentieth century, anthropologists began promoting the idea within the wider academic community that the identified races were not inherently unequal.[201] Towards the middle of the century, this egalitarian viewpoint had given way to the belief amongst a number of physical anthropologists that races do not exist at all. This was significant given that 'race is, to a large extent, the special creation of the anthropologist'.[202] In 1942, while the horror of racial theory in practice was unfolding in Europe, Ashley Montagu published his best-known work, *Man's Most Dangerous Myth: The Fallacy of Race*', which opened with the line: 'The idea of "race" represents one of the greatest errors, if not the greatest error, of our time, and the most tragic.'[203]

Montagu did not maintain the position indicated in the title. He framed his notion of race in biological terms, resulting in a surprising position: 'In the biological sense there do, of course, exist races of mankind. That is to say, mankind may be regarded as being comprised of a small number of groups which as such are often physically sufficiently distinguishable from one another to justify their being classified as separate races.'[204] His understanding of race is confined to the definitional parameters imposed by a biological reading of the term: 'In biology a race is defined as a subdivision of a species which inherits physical characteristics distinguishing it from other populations of the species. In this sense there are a number of human races.'[205]

Montagu recognised four distinctive stocks or divisions of mankind: the Negroid or black, the Archaic white or Australoid, the Caucasoid or white and the Mongolian stocks.[206] Yet in a subsequent discussion of the work of Johann Blumenbach, he highlights how the German 'clearly recognized and unequivocally stated the fact that all classifications of the so-called varieties of mankind are arbitrary'.[207] Two contradictory excerpts from Blumenbach's *On the Natural Variety of Mankind* show how the first physical anthropologist criticised the process of classification while engaged in this very act: 'Although there seems to be a great difference between widely separated nations … when the matter is thoroughly considered, you see that all do so run into one another, and that one variety of mankind does so sensibly pass into the other, that you cannot mark the limits between them'; 'Still, it will be found serviceable to the memory to have constituted certain classes into which the men of our planet

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[201] Lieberman, L. (1968), 'The Debate over Race: A Study in the Sociology of Knowledge', *Phylon* 29:2, 127.

[202] Montagu, A. (1942), *Man's Most Dangerous Myth: The Fallacy of Race* (New York: Columbia University Press), 27.

[203] Ibid., 1.

[204] Ibid., 3.

[205] Ibid.

[206] Ibid., 5.

[207] Ibid., 13.

may be divided.'[208] Montagu gives both quotations, and embarks upon a similar contradictory exercise.[209]

The four large groups of mankind are referred to as divisions rather than as races, and the varieties of men that form these divisions as ethnic groups.[210] Montagu defines an ethnic group as representing 'part of a species population in the process of undergoing genetic differentiation' and as comprising 'the single species Homo sapiens which individually maintain their differences, physical and cultural, by means of isolating mechanisms such as geographic and social barriers'.[211] The advantage of the term 'ethnic group', he argues, is that it eliminates all emphases on physical factors or differences, revealing the problem as entirely a social one. The term 'race' should be discarded entirely and replaced by the term 'ethnic group'.[212]

The proposal to substitute 'ethnic group' for 'race' was first put forward in 1935 by Julian Huxley and A.C. Haddon, who criticised mistaken racial doctrines and thought that 'ethnic group' should instead be used when discussing the social aspect, because the adjective 'ethnic' more clearly indicated a concern with social differences.[213] The United Nations Educational, Scientific and Cultural Organisation's (UNESCO) first Statement on Race, published in 1950, stated that 'it would be better when speaking of human races to drop the term 'race' altogether and speak of ethnic groups'.[214] The Statement, drafted by Montagu, would be criticised in a second Statement on the Nature of Race and Race Differences released one year later.[215]

Do race and ethnicity represent very different concepts? A possible difference between them is that race has been developed as an exclusive criterion built on arbitrary classifications of populations, with the intention of drawing hierarchical rankings of these groupings. Ethnicity, by contrast, could be said to be based on shared culture and heritage, and should be considered an inclusive term through which groups identify themselves, and are identified by others. The suggestion to substitute ethnicity for race could thus be an erroneous one, due to the particular semantic position occupied by ethnicity. It should be noted, however, that ethnicity is as indeterminate as race. Neither concept has any basis in biology, for there are no biological differences between ethnic groups or racial groups that have been found to be constant.

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[208] Blumenbach, J., quoted in Montagu, A., ibid., 13.

[209] Ibid., 12 and 13, and 46: 'no satisfactory classification of the varieties of mankind has been devised, and it is greatly to be doubted whether such classification is possible.'

[210] Ibid., 5.

[211] Ibid., 43.

[212] Ibid., 72–3.

[213] Huxley, J. and Haddon, A. (1935), *We Europeans: A Survey of Racial Problems* (London: Johnathon Cape), quoted in Banton, M., supra n.8, Preface, xi–xii.

[214] UNESCO, Statement on Race 1950, Com.69/II.27/A (Paris 1969), para. 6.

[215] The UNESCO documents are analysed in Chapter 4, in the context of an examination of race and the United Nations.

Splitters and Lumpers

Montagu's text sparked a debate within anthropology on whether races exist, and with increased understanding of genetics, the terms of this debate became quite narrow, with the result that by the 1960s the argument was over gradations of gene frequencies. In this context, the anthropologists who did not believe in race were known as lumpers,[216] while those who maintained that races exist were known as splitters.[217] Both sides accepted the same definition of race, as a population that can be distinguished from other populations on the basis of gene frequencies.[218] This definition is derived from William Boyd's textbook *Genetics and the Races of Man* (1950), which states:

> The difficulty we experience in trying to classify man, or any other species, into races is quite different from the problem of classifying organisms into species. Races were more or less genetically open systems, whereas species … were genetically closed systems.[219]

'Race', according to Boyd, 'was a population which differs significantly from other human populations in regard to the frequency of one or more of the genes it possesses'.[220] The difference between the splitters and lumpers appeared to be over the spatial gradations of these gene frequencies, known as 'clines'. The lumpers believe that these gradations are not intergradations but rather overlapping gradations with no identifiable boundaries, while the splitters believe that these gradations were intergradations between races.[221] Their debates were captured in the US journal *Current Anthropology* between the years 1962 and 1964.

C. Loring Brace, a lumper, argued that boundaries between what have been called races are completely arbitrary, depending primarily upon the wishes of the classifier.[222] He was supported by Frank Livingstone, who held: 'there are no races, there are only clines.'[223] On the other side, M.T. Newman found that 'There are valid races but biology is only beginning to properly discern and define

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[216] Montagu, A., supra n.202; Livingstone, F. (1962), 'On the Non-existence of Human Races', *Current Anthropology* 3; Brace, C. (1964), 'On the Race Concept', *Current Anthropology* 5.

[217] Coon, C., Garn, S. and Birdsell, J. (1950), *Races* (Springfield, IL: C.C. Thomas); Dobzhansky, T. (1965), *Mankind Evolving* (New Haven, CT: Yale University Press).

[218] Lieberman, L. and Reynolds, L. (1978), 'The Debate over Race Revisited: An Empirical Investigation', *Phylon* 39:4, 334.

[219] Boyd, W. (1950), *Genetics and the Races of Man* (Boston, MA: Little Brown), 198.

[220] Ibid., 207.

[221] Lieberman, L. and Reynolds, L., supra n.218, 334.

[222] Brace, C., supra n.216, 313.

[223] Livingstone, F., supra n.216, 279.

them'.[224] In *Race, Science and Humanity*,[225] Ashley Montagu wrote: 'How many times will it have to be reiterated that human beings are not races … None of the findings of physical or cultural anthropology … can in any way affect this principle', while Theodosius Dobzhansky countered:

> a scientist … cannot and should not refrain from recording the facts which he discovers, but he had better see to it that the language he uses to describe the facts does not invite misrepresentation. To say that we have discovered that races of man do not exist is such an invitation. It is far better to find out, and to explain to others, the real nature of the observable phenomenon which is, and will continue to be, called 'race'.[226]

A contemporary re-appraisal of the divide within anthropology concedes that real population histories are exceedingly complex over long time intervals, and with the current set of tools and methods, only their most general features can be revealed.[227] Complex population histories must usually be reduced to simple models. Currently, two such models of human origin feature prominently in anthropological literature – the 'out of Africa' and 'multiregional evolution' models. The 'out of Africa' hypothesis, or 'Garden of Eden' hypothesis as it is also known, holds that modern humans appeared in a subpopulation of *Homo erectus* and spread continuously over much of the Old World via population growth. The 'multiregional evolution' hypothesis posits that modern humans evolved directly from archaic forms in several different locations in the Old World. The difference between these models is essentially the result of demographic assertions about the size of the past human population.[228] They are 'contemporary versions of the long-standing debate in anthropology between splitters and lumpers'.[229] 'The underlying theme of this debate', according to Lieberman, 'has always been the equality or inequality of different populations'.[230]

In *Biological Aspects of the Racial Question*, Jean Hiernaux explains how a large number of anthropologists define a race as a population differing from others

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[224] Newman, M. (1963), 'Geographic and Microgeographic Races', *Current Anthropology* 4, 189.

[225] Montagu, A. (1963), *Race, Science and Humanity* (Princeton, NJ: Princeton University Press), 144–5.

[226] Dobzhansky, T. (1963), 'Comment', *Current Anthropology* 4, 197.

[227] Sherry, S., Batzer, M. and Harpending, H. (1998), 'Modeling the Genetic Architecture of Modern Populations', *Annual Review of Anthropology* 27, 154.

[228] Ibid. Upright bipedal hominids occupied much of the Old World from maybe 1.5 to 0.5 Mya. During this time there was a succession of forms from *Homo erectus* to *Homo antecessor* to *Homo sapiens.* About 40,000 years ago, in the Levant, modern humans replaced archaics after a period of co-existence of perhaps 50 millennia, and in just a few millennia. It is difficult to establish a clear description of the human evolutionary process because the limited number of fossils leave gaps in the record. Anatomically modern humans do not make their appearance in the fossil record until the Late Pleistocene.

[229] Ibid., 154.

[230] Lieberman, L., supra n.201, 141.

by the frequency of certain genes; each population then constitutes a race, and this term is no longer classificatory.[231] Banton writes that with the development of population genetics, 'the word race became redundant. Populations were defined by the procedures of the research workers themselves in drawing samples'.[232] Hiernaux finds it unfortunate that the same word should be used sometimes to describe the unit-populations and sometimes the groups in which these units are classified. He then stresses: 'an increasing number of anthropobiologists are giving up any form of classification which seems to them to be of minor usefulness in comparison with the risk of encouraging false generalisations.'[233]

The debate was never resolved, but in the past 30 years the belief that race is a social construct has dominated. In 1972, an article by the Harvard geneticist Dr Richard Lewontin proved that most human genetic variation can be found within any 'race' and that the difference between an African and a European may be no greater than the difference between any two Europeans.[234] His findings have been demonstrated to be correct using improved techniques of detecting genetic variety, and an international consensus that race is a social construct took root in the past thirty years.

That consensus was recently challenged in an opinion piece in the *New York Times* on 14 March 2005, written by the evolutionary developmental biologist Professor Armand Marie Leroi.[235] His criticism centres on the fact that human physical variation is correlated, and that genetic variations show similar correlations. Leroi begins by outlining the developments within genetics that support the social construct theory, and quotes Dr Craig Ventner, the first to map the human genome, who stated that 'race is a social concept, not a scientific one'.[236] Leroi summarises the findings of Lewontin's 1972 article, agreeing with the facts, but stating that his reasoning was wrong: 'he [Lewontin] looked at only one gene at a time and failed to see races.' According to Leroi, if many variable genes are considered simultaneously, and sorted on the basis of genetic similarity, the groups that emerge are native to Europe, East Asia, Africa, America and Australasia, the major races of traditional anthropology.[237] He concedes that the five groupings may be further subdivided, and predicts that while this has not yet taken place with precision, the world's population will eventually be attributed racial origins from 10, 100 or perhaps 1,000 groups through the study of genes.

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[231] Hiernaux, J. (1969), 'Biological Aspects of the Racial Question' (Paris: UNESCO), COM.69/II.27/A, 11.

[232] Banton, M., supra n.8, 95.

[233] Hiernaux, J., supra n.231, 12.

[234] Lewontin, R. (1972), 'The Apportionment of Human Diversity', *Evolutionary Biology* 6, 381.

[235] Leroi, A., 'A Family Tree in Every Gene', *New York Times*, 14 March 2005.

[236] Ibid.

[237] In support of his argument, Leroi cites a 2002 study by scientists at the University of Southern California and Stanford that found that the five groups that emerged on the basis of genetic similarity were the five races of traditional anthropology.

The current classification is not fundamental – it is just 'the easiest way to divide things up'. Leroi criticises what he views as the hypocritical approach of those who believe that race is a social construct:

> one of the more painful spectacles of modern science is that of human geneticists piously disavowing the existence of race even as they investigate the genetic relationships between 'ethnic groups'. Given the problematic, even vicious, history of the word 'race', the use of euphemisms is understandable. But it hardly aids understanding, for the term 'ethnic group' conflates all the possible ways in which people differ from each other.[238]

He lists the advantages of recognising race, including the medical benefits, for it is argued that different races are prone to different diseases.[239] Furthermore, such recognition would 'remove the disjunction in which the government and the public alike defiantly embrace categories that many, perhaps most, scholars and scientists say do not exist'. Finally, it would give us reason to value and protect some of the world's most marginalised people.[240]

Leroi has generated renewed debate on the question, prompting the Social Science Research Council of the United States for example to commission a number of papers in response to his contentions.[241] In an article entitled *Confusions about Human Races*, Lewontin revisits his arguments to address claims that 'racial categories represent not arbitrary socially and historically defined groups but objective biological divisions based on genetic differences',[242] and writes that Leroi's opinion piece illustrates the classical confusions about the reality of racial categories. He states that 85 percent of all human genetic variation occurs within local populations; that half of the remaining 15 per cent is between local populations within classically defined human 'races', such as the Japanese and the Koreans; and that the remaining 6–10 per cent of total human variation is between the classically defined geographical 'races'. In addition, while it is indeed possible to combine the information from covarying traits into weighted averages (technically known as 'principal components' of variation), the 'correlation' spoken of by Leroi, the results have not borne out the claims for racial divisions:

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238 Leroi, A., supra n.235.

239 In autumn 2005, the journal *Nature Genetics* devoted a supplement to the question of whether human races exist or not due to the fact that American health agencies are using categories of race to identify policies to best protect the public.

240 Leroi, A., supra n.235.

241 The web forum, entitled 'Is Race Real?', can be read at <http://raceandgenomics.ssrc.org>. The contributors are drawn from a range of disciplines, including biology, anthropology, biological anthropology, molecular anthropology, African and American studies, epidemiology, zoology and sociology.

242 Lewontin, R. (2005), 'Confusions about Human Races' (electronic article), available at <http://raceandgenomics.ssrc.org/Lewontin>.

> The geographical maps of principal component values … show continuous variation over the whole world with no sharp boundaries and with no greater similarity occurring between Western and Eastern Europeans than between Europeans and Africans![243]

Leroi is 'inconsistent and shifting' in his concept of race, according to Lewontin, and the claim that racial categories are of considerable medical use is refuted on the ground that ancestry, which is often lost within an overall racial grouping, is the important factor in determining susceptibility to disease. Historically, he notes, the notion of race was imported into biology from social practice. The classification was at all times 'ill-defined and idiosyncratic', but has survived due to 'constant pressure from social and political practice and the coincidence of racial, cultural and social class divisions reinforcing the social reality of race, to maintain "race" as a human classification'.[244]

Leroi traces the idea that gene variations should be studied in terms of correlations to a study published in 2003 by the Cambridge University statistician, A.W.F. Edwards.[245] In his paper, Edwards depicts 'Lewontin's fallacy' as ignoring 'the fact that most of the information that distinguishes populations is hidden in the correlation structure of the data and not simply in the variation of the individual factors'.[246] While stating that there is nothing wrong with Lewontin's statistical analysis of variation, his belief that this analysis is relevant to classification is criticised:

> It is not true that 'racial classification is … of virtually no genetic or taxonomic significance.' It is not true, as *Nature* claimed, that 'two random individuals from any one group are almost as different as any two random individuals from the entire world', and it is not true, as the *New Scientist* claimed, that 'two individuals are different because they are individuals, not because they belong to different races' and that 'you can't predict someone's race by their genes.' Such statements might only be true if all the characters studied were independent, which they are not.[247]

The position mapped by Edwards and supported by Leroi is not sustained by Cavalli-Sforza, Menozzi and Piazza in their book *The History and Geography of Human Genes* (1994), a work described as the first genetic atlas of the world, and which Edwards' paper labels 'magisterial'.[248] Describing the 'Scientific Failure of the Concept of Human Races', the authors begin by stating that: 'the classification into races has proved to be a futile exercise for reasons that were already clear to

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[243] Ibid.

[244] Ibid.

[245] Edwards, A. (2003), 'Human Genetic Diversity: Lewontin's Fallacy', *Bioessays* 25:8, 798. Edwards expresses in the Epilogue the belief that 'this article could, and perhaps should, have been written soon after 1974'.

[246] Ibid., 798.

[247] Ibid., 801.

[248] Ibid.

Darwin.'[249] They underline Darwin's thesis against racial classification, pointing out that modern taxonomists define some three to sixty races, reflecting the extremely unstable nature of the concept. 'In fact', they write, 'the analysis we carry out in chapter 2 [the 'Genetic History of World Populations'] for purposes of evolutionary study shows that the level at which we stop our classification is completely arbitrary'.[250]

That arbitrariness is also present in the 'clusters' of populations identified by Cavalli-Sforza, Menozzi and Piazza, which may be equivalent to the 'correlations' highlighted by Leroi and Edwards. Yet these 'clusters' are not linked to races:

> By means of painstaking multivariate analysis, we can identify 'clusters' of populations and order them in a hierarchy that we believe represents the history of fissions in the expansion to the whole world of anatomically modern humans. At no level can clusters be identified with races, since every level of clustering would determine a different partition and there is no biological reason to prefer a particular one. The successive levels of clustering follow each other in a regular sequence, and there is no discontinuity that might tempt us to consider a certain level as a reasonable, though arbitrary, threshold for race distinction.[251]

Therefore:

> From a scientific point of view, the concept of race has failed to obtain any consensus: none is likely, given the gradual variation in existence … the major stereotypes, all based on skin colour, hair colour and form, and facial traits, reflect superficial differences that are not confirmed by deeper analysis with more reliable genetic traits.[252]

Why can human populations not be classed into genetic categories that correspond to races?

> The evolutionary explanation is simple … most polymorphisms observed in humans antedate the separation into continents … the geographic differentiation of humans is recent, having taken perhaps one-third or less the time the species has been in existence. There has therefore been too little time for the accumulation of a substantial divergence.[253]

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[249] Cavalli-Sforza, L., Menozzi, P. and Piazza, A., supra n.1, 19.

[250] Ibid.

[251] Ibid.

[252] Ibid.

[253] Ibid. Most polymorphisms observed in humans antedate the separation into continents.

Conclusion

Burns states:

> It seems probable that race and colour prejudice must always have existed to some degree, being no more than the original family and tribal instinct which binds together those with similar interests in a defensive or offensive alliance against strangers. As one tribe, or collection of tribes, grew stronger and overcame others the tendency would be to look down upon the vanquished … At a later date, in order to justify the aggression of the stronger 'white' nations, the theory of racial inferiority was advanced.[254]

Emphasising the distinction between family or tribal instinct and biologically determined theories of racial difference, he continues:

> the writings of Gobineau, Darwin and Mendel emphasised the importance of natural selection and heredity, and revived … theories of racial superiority and inferiority. It is perhaps not a coincidence that within a generation Africa was partitioned between the European powers, in order that the blessings of civilization might be imparted to the 'inferior' inhabitants of that continent.[255]

The Commission on Race Relations in World Perspective came to a similar conclusion:

> 'Racial Problems' arise when ideas of racial difference become interwoven with the struggles of groups.[256]

This chapter has sketched the prevailing opinions in the historical development of the concept of race from a range of disciplines which have attempted to theorise and prove the significance of race in human affairs. The idea of race has survived centuries of physical and metaphysical inquiry due to its indeterminate nature. It has been attributed religious, physiological, biological, anthropological, taxonomical, cultural and historical meaning. It is a concept that has always influenced and sometimes dominated academic discourse in Europe since the sixteenth century. Identification led to classification, with little attempt at neutrality or objectivity. Racial discourse has always contained an innate language of superiority and inferiority, reflecting the belief in the innate superiority and inferiority of arbitrarily identified races.

There has never been any proof that race exists as a biological fact. Biology was sufficiently developed in the nineteenth century for almost every racial theorist,

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254 Burns, A., supra n.5, 147.

255 Ibid., 148.

256 The Commission on Race Relations in World Perspective, quoted in Conant, M. (1955), *Race Issues on the World Scene (A Report on the Conference on Race Relations in World Perspective)* (Honolulu: University of Hawaii Press), 4.

even Arthur de Gobineau, to recognise that there was no biological foundation to the concept of race. The only biological fact is that mankind is one species, *Homo sapiens*. Different races do not constitute different species. From a taxonomic point of view, it is impossible to name peoples as constituting a subspecies, or any other subdivision of a species, for there are no elements that have been found to be constant which would justify such a classification. Darwin noted in *The Descent of Man*, quoted above, that: 'It may be doubted whether any character can be named which is distinctive of a race and is constant.'[257] Cavalli-Sforza, Menozzi and Piazza have supported Darwin's insight.

Yet is it evident that Darwin still believed in categories of race, and its inevitable consequence, superior and inferior races. Such reasoning is apparent in the works of almost every writer on race; when eventually Montagu proclaimed that races did not exist, he nonetheless continued to subdivide mankind into four arbitrarily designated racial provinces. He did not believe in a hierarchical ranking of race, but he still seemed to proclaim its existence. Is it important to condemn the very concept of race? Or should condemnation be reserved only for the belief in superior and inferior races?

The consequences of designating different peoples as races have been catastrophic. The Nazi regime, inspired and fed by a hardened language of race, masked its cruelty by appearing as an ideological struggle for racial, and thus artistic and cultural, beauty and nobility. Through eugenic programmes, the tying together of race and scientific endeavour that had begun in the previous century was carried through to its absurd apex. Race took on a cold meaning, devoid of any human attribute, in its calculation of what is 'good' and what is 'diseased' in society. That artistic and cultural merit were racially determined, and that they could as such be controlled through biology and medicine, was the illogical conclusion to an illogical concept. World War II showed that using race to describe and designate humans is an inhuman act. It strips people of their identity and worth. It cannot continue, no matter what the guise.

There is still uncertainty in anthropological and legal circles with regard to the relative meanings of race and ethnicity. Lieberman criticises Montagu's proposal to substitute ethnicity for race because it ignores the semantic position of 'ethnic' within the sociological lexicon as a description of groups who are unified by non-biological characteristics.[258] This critique ignores the fact that race is also a non-biological concept. Ethnicity is a concept that is determined through two processes, self-identification by the group concerned, and identification by others. Perhaps it is more useful to point to a 'theory of boundaries' where ethnic groups result from inclusive processes and racial groups from exclusive processes – ideas about race have been mostly used to exclude people from privilege while ideas about shared ethnicity have been mostly used to create bonds.[259] Substituting 'ethnic group' for

[257] Darwin, C., supra n.19, 225.
[258] Lieberman, L., supra n.201, 139.
[259] Banton, M., supra n.8, 125.

'race' would only serve to destroy this distinction. This is just one interpretation of the contemporary meaning of 'ethnicity', which is evolving as a term.

The biological significance of race has diminished, but doctrines of inherent superiority and inferiority persist. Such doctrines have found new guises, such as the 'ethnic cleansing' campaigns in the former Yugoslavia in the 1990s. This does not mean that race is no longer significant. It has no biological meaning, but it continues to have meaning in the social context. Its significance is confined to its use as an umbrella term to depict doctrines of exclusion that are based on the inherent inferiority or impurity of designated groups. In this sense, it is important to distinguish between race and racial discrimination. Caste-based discrimination is a form of racial discrimination. Discrimination on the basis of skin colour, or nationality, or ethnicity, are also forms of racial discrimination. Racial discrimination has never been about physiological differences, but about mythical beliefs in pure types. It is not to be solely equated with skin colour,[260] as the history of anti-semitism[261] and the genocide of World War II have shown. The fourfold *varna* system that regulates the Indian caste system is based on a concept of purity and impurity, and inherent superiority and inferiority, and can be viewed as a system of racial discrimination.

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Chapters 1 and 2 have traced the origins of caste and race. The following two chapters explore the legal solutions to caste-based discrimination and racial discrimination respectively.

The 1950 Indian Constitution and the debates in the Constituent Assembly which forged the document are the subject of Chapter 3. The constitutional provisions sought to establish the principle of non-discrimination on the basis of caste, and reinforce it through affirmative action measures in the form of reservations.

Chapter 4 relates how the international movement towards the elimination of all forms of racial discrimination began in 1950 and 1951, when UNESCO attempted to analyse the meaning of race. The documents produced were contradictory; the first denied the existence of race, which was countered in the second.[262] Faced with a dilemma, the United Nations had to tackle the clear problems still being caused by race, while avoiding engagement with the contentious debate as to the existence of race. It did so by concentrating on racial discrimination rather than the concept of race itself.

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[260] According to Burns: 'racial prejudice and colour prejudice are not the same'. Burns, A., supra n.5, 15, n.1.

[261] For an exhaustive treatment of this subject, see Poliakov, L. (1972–76), *The History of Anti-Semitism*, vols 1–4 (New York: Vanguard Press).

[262] Statement on Race 1950 COM.69/II.27/A (Paris: UNESCO, 1969) and Statement on the Nature of Race and Race Differences 1951, COM.69/II.27/A (Paris: UNESCO, 1969).

PART 2

Chapter 3

The Indian Constitution and the Elimination of Caste-based Discrimination

Introduction

When independence came to India, Ambedkar was appointed Law Minister by Prime Minister Nehru, and subsequently Chairman of the Drafting Committee of the Constituent Assembly which had formed the government upon the granting of independence on the 'appointed day', 15 August 1947. He was one of the principal architects of the 1950 Constitution, and its provisions for a system of reservations for what the Constitution termed the 'Scheduled Castes, Scheduled Tribes, and Other Backward Classes', which sought to redress the imbalances caused by historical inequalities in the Hindu social system.

The Fundamental Rights section of the Indian Constitution upholds equality before the law and equal protection of the law. Articles 14–16, taken together, enshrine the principle of equality and non-discrimination.[1] While the principle is generally stated in article 14, articles 15 and 16 involve particular aspects of equality. Article 14 reads:

> The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

Article 15 prohibits discrimination against any citizen in any matter at the disposal of the state on any of the specified grounds, namely religion, race, caste, sex or place of birth – it applies with respect to access to shops, public restaurants, or use of wells and roads.[2] Article 16 is concerned only with employment under

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[1] Basu, D. (2001), *Introduction to the Constitution of India* (New Delhi: Prentice Hall of India), 91.

[2] Article 15, Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth:

(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(2) No citizen shall, on ground only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to –

the state,[3] paragraph 1 of which holds that there shall be equality of opportunity for all matters relating to employment or appointment to any office under the state.[4]

Untouchability is expressly forbidden under article 17. It states: 'Untouchability is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of untouchability shall be an offence punishable in accordance with the law.'

In concordance with article 46 of the Directive Principles, the Indian Constitution did not just guarantee formal equal treatment; to promote the advancement of the untouchables, tribals, and other socially and educationally backward classes, it provided for special measures or affirmative action on their behalf. The Constitution enshrines *de jure* equality: all persons are recognised on a

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(a) access to shops, public restaurants, hotels and places of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained whole or partly out of State funds or dedicated to the use of general public.

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

(4) Nothing in this article or in clause (2) or article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

[3] Basu, D., supra n.1, 91.

[4] Article 16, Equality of opportunity in matters of public employment:

(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment.

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

(4A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

formal level as legally equal and are to be treated equally. This is juxtaposed with an allowance for unequal treatment to achieve *de facto* equality. The Constitution provides for special measures for those who are unequal, notably the Scheduled Castes, the Scheduled Tribes, and Other Backward Classes.[5]

Article 330 specifically 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. These reservations are the only ones specifically enacted by the Constitution. Other provisions contain authorisations empowering the state to make special provision for the Scheduled Castes, Scheduled Tribes and Other Backward Classes.[6]

The Constitution authorises special measures in the fields of government employment as well as legislative representation. Discrimination in government employment is prohibited under article 16(1). In addition, article 16(4) allows the state to make 'any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State'. Articles 15(1) and (2) forbid discrimination on the grounds of religion or caste, while article 15(4) allows states to make 'special provision for the advancement of any socially and educationally backward classes of citizens, or for the Scheduled Castes and Scheduled Tribes'. Paragraph 4 was inserted into article 15 under the First Constitutional Amendment Act following the 1951 Supreme Court decision in *Madras v. Champakam Dorairajan.*[7]

The constitutional amendment also states that nothing in article 29(2) shall prevent the state from making special provision for the Scheduled Castes. This clause holds that no citizen shall be denied admission into any educational institution on grounds only of religion, race, caste or language. Therefore, article 15(4) allows the states to make reservations in educational institutions for the advancement of the Scheduled Castes, Scheduled Tribes, and Other Backward Classes.

This chapter will begin by analysing the article 17 ban on untouchability and the article 46 Directive Principles of State Policy. These provisions are the foundation for India's reservations policy, and underpin the Constitution's aim of the elimination of caste-based discrimination. They represent a legal and

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5 Scheduled Castes – articles 15, 16, 46, 335, 341. Scheduled Tribes – articles 15, 16, 335, 342. Other Backward Classes – articles 15, 16, 46.

6 Galanter, M. (1984), *Competing Equalities; Law and the Backward Classes in India (*Berkeley, CA: University of California Press), 375. Galanter notes: 'Indeed, the general principle of compensatory discrimination is established as a Directive Principle, but the specific provisions authorising it are framed as exceptions to more general Fundamental Rights. This arrangement expresses the tension between the broad purposes to be achieved and the commitment to confine the device and make it comport with other constitutional commitments, notably that of formal equality.'

7 *Madras v. Champakam Dorairajan,* AIR 1951 SC 226.

moral compass for the realisation of an egalitarian society. Section 2 will examine the categories to whom reservations apply. The meaning of Scheduled Castes, Scheduled Tribes and Other Backward Classes will be explored, including the boundaries between these groups. The issue of conversion is also examined; whether converting from Hinduism results in a loss of entitlement to reservations has become a crucial question, given that, if so, the reservations system could act as a means of keeping Dalits within Hinduism, thus maintaining the existing caste structure.

The Indian constitutional reservations system is divided into three main categories, discussed respectively in the third, fourth and fifth sections. The first category, described in the third section, comprises legislative reservations, in the *Lok Sabha*, or lower house of Parliament of the Union, and *Vidhan Sabhas*, or state assemblies, under articles 330 and 332, as well as reservations in the decentralised *panchayats* under article 243D. The fourth section looks at reservations in educational institutions under article 15(4), while the fifth details reservations in government employment under article 16(4).

These provisions represent the three prongs of affirmative action measures in the Indian Constitution, which have their roots in the Poona Pact of 1932, as described in Chapter 1. The reservations are the result of the historical *détente* reached between Gandhi and Ambedkar in Poona, whereby Gandhi agreed to end his fast in exchange for the relinquishing of separate electorates for the Untouchables. Ambedkar sought to ensure that the Untouchables' interests would be safeguarded within a majority Hindu polity, and the Pact he negotiated, in return for ceding his demand for separate electorates, outlines the three processes by which this was to be achieved; reservations in the provincial and central legislatures, in appointment to government posts, and in education.

The Poona Pact of 24 September 1932 reads:

> 1. There shall be seats reserved for the Depressed Classes out of general electorate seats in the provincial legislatures … 2. Election to these seats shall be by joint electorates … 4. In the Central legislature 18 percent of the seats allotted to the general electorate for British India in the said legislature shall be reserved for the Depressed Classes … 8. There shall be no disabilities attached to any one on the ground of his being a member of the Depressed Classes in regard to … appointment to the public services. Every endeavour shall be made to ensure a fair representation of the Depressed Classes in these respects, subject to such educational qualifications as may be laid down for appointment to the Public Services. 9. In every province out of the educational grant an adequate sum shall be earmarked for providing educational facilities to the members of the Depressed Classes.[8]

[8] Reproduced in Ambedkar, B. (1945), *What Congress and Gandhi have done to the Untouchables* (Bombay: Thacker and Co.), ch. 3: 'A Mean Deal – Congress Refuses to Part with Power'.

Of the three categories of special measures in the Poona Pact, educational concessions would not find their way into the 1950 Constitution. As stated above, provision for reservations in education would enter in the form of a constitutional amendment one year after the enactment of the Constitution. The debates in the Constituent Assembly reveal that Ambedkar expressly opposed constitutional reservations in education – the debate forms part of the analysis of the fourth section.

Article 17 and Article 46

Article 17, the Constitutional Ban on Untouchability

For the furtherance of social equality,[9] untouchability is expressly forbidden under article 17 of the Fundamental Rights section of the Constitution. It states: 'Untouchability is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of untouchability shall be an offence punishable in accordance with the law.'

The Constituent Assembly debates of India 1947–49, reveal the impetus behind the constitutional ban on untouchability. The Advisory Committee on Fundamental Rights, of which Ambedkar was a member, was appointed by the resolution of the Constituent Assembly of 24 January 1947. The Committee's Interim Report on Fundamental Rights set forth the key justiciable provisions that would form the body of the Fundamental Rights section of the Indian Constitution. Untouchability was abolished in clause 6 of the Interim Report, adopted on 29 April 1947, which read: '"Untouchability" in any form is abolished and the imposition of any disability on that account shall be an offence.'[10]

Untouchability was not defined in the Interim Report on Fundamental Rights. In the discussion on clause 1, the definitions section of the Interim Report, several members raised the question of enumerating a precise meaning of untouchability. Srijut Rohini Kumar Chaudhury proposed an amendment to clause 1, the second part of which proposed defining untouchability: 'Sir, in the fundamental rights, it has been laid down that untouchability in any form should be an offence punishable by law. That being so it is necessary that the offence should be properly defined. As it stands, the word untouchability is very vague.'[11] Dhirendra Nath Datta supported the amendment: 'A magistrate or a judge dealing with offences shall have to look to the definition … untouchability means different things in

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[9] Basu, D., supra n.1, 95.

[10] Constituent Assembly Debates (reprinted 1999), Official Reports (New Delhi: Lok Sabha Secretariat), vol. 3, Book 1, 29 April 1947, 434.

[11] Ibid., 413.

different areas … I strongly feel that unless there is a definition, it cannot be dealt with as an offence.'[12]

The President drew the Assembly's attention to clause 24, which stated: 'The Union legislature shall make laws to give effect to those provisions of this part which require such legislation and to prescribe punishment for those acts which are declared to be offences in this part and are not already punishable', and the amendment was withdrawn.[13] Clause 24 would become article 35 of the 1950 Constitution, and in accordance with this provision, the *Untouchability Offences Act 1955* was passed. The Act was amended in 1976, and renamed the *Protection of Civil Liberties Act 1955*. Certain acts were declared as offences, such as refusing admission to any person to public institutions, such as hospitals or schools,[14] or preventing any person from offering prayers in any place of public worship.[15] The 1976 amendment added offences such as insulting a member of a Scheduled Caste on the ground of untouchability, preaching untouchability, directly or indirectly, or justifying untouchability on historical or philosophical grounds, or on the ground of tradition of the caste system.[16] In the *Asiad Project Workers* case,[17] the Supreme Court found that the fundamental rights under article 17 are available against private individuals and it is the constitutional duty of the state to take necessary steps to see that these fundamental rights are not violated.[18]

The legislation was strengthened further with the passage of the *Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989*.[19] The Act theoretically creates courts for speedier trials and imposes harsher penalties for these crimes, but has yet to be implemented in many states. According to Castellino, 'few cases of these atrocities seek remedy before the courts, a vast majority remaining unreported; rather there are instances where atrocities committed

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[12] Ibid., 414.

[13] Ibid.

[14] *Protection of Civil Liberties Act 1955*, section 5(a). 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] *Protection of Civil Liberties Act 1955*, section 3(b).

[16] *Protection of Civil Liberties Act 1955*, section 7(c) (i) and (ii.)

[17] *Peoples Union for Democratic Rights v. Union of India,* AIR 1982 SC 1473.

[18] Pandey, J. (2001), *Constitutional Law of India* (Allahabad: Central Law Agency), 149.

[19] 'An act to prevent the commission of offences of atrocities against the members of the Scheduled Castes and the Scheduled Tribes, to provide for Special Courts for the trial of such offences and for the relief and rehabilitation of the victims of such offences and for matters connected therewith or incidental thereto.'

against the community are celebrated by other sections of society'.[20] The author quotes the findings of India's National Commission for Scheduled Castes and Scheduled Tribes, that 'even after fifty years of Independence, Untouchability has not been abolished as provided in Article 17 of the Constitution and incidents continue to be reported'.[21]

The debates on draft article 11, which would become the article 17 ban on untouchability, took place on 29 November 1948. They reveal concern amongst the members of the Constituent Assembly that the practice of untouchability brought shame upon India in the eyes of the international community. Shri V.I. Muniswamy Pillai pointed out: 'the very clause about untouchability and its abolition goes a long way to show to the world that the unfortunate communities that are called "untouchables" will find solace when this Constitution comes into effect.'[22]

Manomohon Das cited 'the sake of sustaining our goodwill and reputation beyond the boundaries of India'[23] as one of the reasons the Assembly must accept the clause. Shrimati Dakshayani Velayudhan noted that: 'Even people in South Africa were chastising us because we were having this practice here,'[24] and observed that the ban on untouchability would mean 'that our delegates abroad will not have to hang their heads in shame if somebody raises such a question in an organisation of an international nature'.[25]

This concern was accompanied by a desire to alleviate the suffering of the Untouchables. Therefore Shri Pillai spoke of 'the sting of untouchability', 'the tyranny of the so-called caste Hindus', and how 'under the device of caste distinction a certain section of people have been brought under the rope of

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[20] Castellino, J. (2006), 'Minority Rights in India', in Castellino, J. and Dominguez-Redondo, E. (eds), *Minority Rights in Asia: A Comparative Legal Analysis* (Oxford: Oxford University Press). The author notes: 'The majority of the States have failed to set up Special Courts under the *Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989*. As of 2 February 2003, exclusive Special Courts have been set up only in Andhra Pradesh (12), Bihar (11), Chhatisgarh (07), Gujarat (10), Karnataka (06), Madhya Pradesh (29), Rajasthan (17), Tamil Nadu (04), Uttar Pradesh (40) and Uttranchal (01). The remaining states and Union Territories have notified the existing Courts of Sessions as Special Courts for the trial of offences under the Act. As the courts in India are already over-burdened with 3.5 million and 40 thousand cases at the High Courts level in 2002, according to the report of the Parliamentary Standing Committee on Home Affairs, designation of the Court of Sessions as Special Courts helps little and further adds to judicial delay in India. See ACHR Features (A weekly service of the Asian Centre for Human Rights), "Spanners in the Draft National Policy on Tribals", ACHRF 22/2004, 11 August 2004.'

[21] National Commission for Scheduled Castes and Scheduled Tribes, Fourth Report: 1996–1997 and 1997–1998 (New Delhi: New Government of India Press), 232; ibid.

[22] Constituent Assembly Debates, supra n.10, vol. 7, Book 2, 29 November 1948, 665.

[23] Ibid., 666.

[24] Ibid., 667.

[25] Ibid., 668.

untouchability'.[26] Das said that 'This clause does not propose to give any special privileges and safeguards to some minority community, but it proposes to save one-sixth of the Indian population from perpetual subjugation and despair'.[27] He highlighted the role of Ambedkar, and stated: 'it is he who has finally dealt the death blow to this custom of untouchability, of which he himself was a victim in his younger days.'[28] Shrimati Velayudhan added: 'we cannot expect a Constitution without a clause relating to untouchability because the Chairman of the Drafting Committee himself belongs to the untouchable community.'[29]

With the words *Mahatma Gandhi ki Jai* (long live Mahatma Gandhi) resounding in the Assembly, draft article 11, which would become article 17 in the final text, was added to the Constitution.[30] Gandhi had been assassinated nine months previously, and the cries were a tribute to what they believed was his thirty-year effort to remove the practice of untouchability from Indian society. Zelliot, however, remarks:

> the irony of the moment was lost on those present – a legalistic measure was taken in the name of Gandhi who had no use for legal means, coupled with the lack of recognition for Ambedkar, the Untouchable who had drafted the measure and who had bitterly fought Gandhi to secure legalistic solutions to the problem of untouchability.[31]

The ban on untouchablity was criticised at the early drafting stage for being a superficial solution to the deeper problem of the caste system. The Constituent Assembly debates show some support from members of the Advisory Committee on Fundamental Rights for the abolition of the caste system as the only means for effectively eradicating untouchability. On 29 April 1947, Promotha Ranjan Thakur, commenting on the Advisory Committee's Interim Report on Fundamental Rights, stated:

> I do not understand how you can abolish untouchability without abolishing the very caste system. Untouchability is nothing but the symptom of the disease, namely, the caste system. It exists as a matter of caste system. I do not understand how this, in its present form, can be allowed to stand in the list of fundamental rights. I think the House should consider the point seriously. Unless we do away with the caste system altogether there is no use tinkering with the problem of untouchability superficially. I have nothing more to say. I hope the House will consider my suggestion seriously.[32]

Dhirendra Nath Datta concurred:

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[26] Ibid., 665.
[27] Ibid., 666.
[28] Ibid.
[29] Ibid., 667.
[30] Ibid., 669.
[31] Zelliot, E. (2001), 'Gandhi and Ambedkar: A Study in Leadership', in Zelliot, E., *From Untouchable to Dalit: Essays on the Ambedkar Movement* (New Delhi: Manohar), 150.
[32] Constituent Assembly Debates, supra n.10, vol. 3, Book 1, 29 April 1947, 403.

> I also feel with my friend Mr. Thakur that the root cause of untouchability, namely, the caste system in Hindu society, should be abolished altogether. Unless the caste system is abolished, untouchability will persist in some form or other.[33]

The argument did not re-surface in the debates on draft article 11 that took place on 29 November 1948. However Saksena quotes a wide-ranging speech by Shri Raj Bahadur made in the Assembly in the course of the discussion on draft article 286, which would become article 320 in the final text, a clause that deals with recruitment to public service commissions. Shri Bahadur attacked the limitations of the system of constitutional reservations, echoing the dissenting views expressed by Thakur and Datta in the Advisory Committee on Fundamental Rights. He stated, *inter alia*:

> It appears to me that clause 4 of article 286 is only a painful reminder to us of the cancer from which our body-politic has suffered for a long time – I mean to refer to the curse of the caste system … I would submit that we should rather go to the root of the evil. The remedy for the evil does not lie in providing a few jobs or posts in services of the states to persons living in rural areas or persons living in urban areas. The remedy perhaps lies elsewhere. We can, however, trace the causes of these injustices or inequities to the evil of the caste system, that has resulted in our degeneration morally and politically, the evil that has resulted in creating so many watertight compartments, the evil that has created other evils like untouchability … to ask for representation, however, on a class or caste basis in the services is to remedy the disease only superficially. But we have got to cure the disease from its very roots.[34]

Article 46, the Directive Principles of Social Policy

Article 46 of the Constitution, a Directive Principle of State Policy, requires that:

> The State shall promote with special care the educational and economic interest of the weaker sections of the people, and in particular, of the Scheduled Castes and Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

The Directive Principles were 'borrowed from the Constitution of Ireland'[35] or *Bunreacht na hÉireann* (1937), which lists the 'Directive Principles of Social Policy' in its article 45.[36] This provision was reproduced in article 38 of the 1950 Indian Constitution, with what O'Normain describes as 'the commendable exception

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[33] Ibid., 414.

[34] 23 August 1949; quoted in Saksena, H. (1981), *Safeguards for Scheduled Castes and Scheduled Tribes: Founding Fathers' Views, An Exploration of the Constituent Assembly Debates* (New Delhi: Uppal Publishing House), 434-435.

[35] Pandey, J., supra n.18, 343.

[36] Article 45.1 of the Irish Constitution reads: 'The state shall strive to promote the welfare of the whole people by securing and protecting as effectively as it may a social order in which justice and charity shall inform all the institutions of national life.'

of the words "and charity", perhaps in deference to Oscar Wilde's dictum that "charity begetteth a number of sins", or merely because of the ambiguity of the term'.[37] O'Normain remarks of the Irish Constitution: 'Perhaps this Constitution's greatest claim to future fame will depend on the extraordinary influence which its Directive Principles had on the Constitution of India'.[38]

Article 45 of the Irish constitution stressed: 'the principles of social policy set forth in this article are intended for the general guidance of the *Oireachtas* [parliament] exclusively, and shall not be cognizable by any court under any of the provisions of this Constitution.' The Indian Constitution followed this formula in its article 37: 'The provisions contained in this part shall not be enforced by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws.' On the decision to render the Directive Principles non-justiciable, Howard points to the influence of the Irish model:

> in the Constitution of India, fundamental rights and directive principles appear as distinct entities, as the leaders of the independence movement had treated the state's positive and negative obligations as being in effect a common programme for action. But the Indian National Congress, founded in 1885, had a long-standing relation with the Irish, whom the nationalists in India saw as having lived under comparable colonial conditions. When India's Constituent Assembly, which settled down to work in 1947, turned to the positive aspects of the social revolution, a few members wanted to make the directive principles justiciable. So strong was the Irish example, however, that the Assembly set down the directive principles, while being 'fundamental to the governance of the country', as non-justiciable.[39]

Ambedkar explained the importance of the Directive Principles to the Constituent Assembly: 'the directive principles have a great value, for they lay down that our ideal is *economic democracy*.'[40] Yet their role has yet to be fully ascertained, and there are divergent views as to their effectiveness. Ireland has had a similar experience, with their non-justiciable status limiting their use.[41]

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[37] O'Normain, C. (1952), 'The Influence of Irish Political Thought on the Indian Constitution', *Indian Yearbook of International Affairs* 1, 160.

[38] Ibid., 157. He also mentions Burma.

[39] Howard, A. (1996), 'The Indeterminacy of Constitutions', *Wake Forest Law Review* 31, 408–9.

[40] Quoted in Pandey, J., supra n.18, 344. Article 39(b) reads: 'That the ownership and control of the material resources of the community are so distributed … as best to subserve the common good'. The corresponding provision of the Irish Constitution (article 45.2.2) uses 'may be' instead of the unequivocal 'are'. O'Normain writes that the word 'subserves' has 'a delightful seventeenth century flavour about it. Indeed Milton's: 'Not Made to Rule, But to subserve where wisdom bears command' might, with advantage, replace the whole of Eire 45, or India 38'; O'Normain, C., supra n.37, 160-161.

[41] See further Hogan, G. (2001), 'Directive Principles, Socioeconomic Rights and the Constitution', *Irish Jurist* 36, 174.

The potential for the development of the Directive Principles marks a possible future path, and authority for the enhancement of protections against caste-based discrimination may be attributed to article 46. This will depend on whether the relevant institutions view the Directive Principles as 'a veritable dustbin of sentiment',[42] as described by Krishnamacahri; or, according to Markandan, the 'very soul' of the Indian Constitution.[43]

Who Qualifies?

Scheduled Castes, Scheduled Tribes and Other Backward Classes

The system of reservations applies to three main categories of groups: the Scheduled Castes, the Scheduled Tribes, and Other Backward Classes.[44] Scheduled Castes refers to that category of citizens previously known as 'Untouchables', 'Harijans', and now, 'Dalits'. Scheduled Tribes are known by their tribal culture and geographic location. Other Backward Classes is a wide-ranging term denoting those citizens who are low in the social hierarchy, but who do not belong to a Scheduled Caste. This group also includes tribal and nomadic groups, and converts to non-Hindu religions from the Scheduled Castes, as well as the former Criminal Tribes.[45] It is estimated that the Scheduled Castes and Scheduled Tribes represent around one quarter of the total population of India.[46]

These three categories are not defined in the Constitution. The President of India is empowered to draw up a list of the Scheduled Castes and Scheduled Tribes in consultation with the governor of each state, subject to revision by Parliament, under articles 341 and 342. The Constitution provides for the appointment of a

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[42] Quoted in Hardgrave, R. (1968), 'Directive Principles in the Indian Constitution' (Book Review), *Journal of the American Oriental Society* 88:3, 653.

[43] Markandan, K. (1966), *Directive Principles in the Indian Constitution* (Bombay: Allied Publishers), Introduction, vii.

[44] Also included were the Anglo-Indians, defined in article 366(2). The Special Officer for Scheduled Castes and Scheduled Tribes was to investigate into and report on the working of the safeguards relating to the Anglo-Indian community under article 338(3). This provision has been repealed by the *65th Constitutional Amendment Act 1990*. The temporary provisions for reservation for Anglo-Indians in certain services of the Union under article 336, and for special educational grants under article 337, have already expired.

[45] In 1871, the British Government of India 'notified' certain tribes as criminals and passed the *Criminal Tribes Act*. They became 'former' Criminal Tribes in 1952 when the *Criminal Tribes Act*, in its 1924 amended version, was repealed. They were no longer to be called 'criminal' but 'denotified' tribes. They were placed under the aegis of Habitual Offenders' Acts by state governments from 1959; the *Habitual Offenders Act* was itself a relic of the British colonial period.

[46] Basu, D., supra n.1, 396, n.7.

Commission to investigate the conditions of the backward classes under article 340.

The first such Commission was appointed in 1953, with three aims: to determine the tests by which any particular class or group of people can be called backward; to prepare a list of such backward communities for the whole of India; and to examine the difficulties of backward classes and to recommend steps to be taken for their amelioration.[47] The tests proposed by the Commission in its 1955 Report were deemed to be too vague, and subsequently, the government resorted to the lists prepared by the state governments to determine the members of the Backward Classes. In 1980, a Second Backward Classes Commission was appointed under the Chairmanship of B.P. Mandal (known as the 'Mandal Commission'), and its report was published in December 1980. On the basis of this report, the government reserved 27 per cent of posts in government service. This was challenged as being unconstitutional in *Indra Sawney v. Union of India*.[48] The Supreme Court rejected the challenge; the case is discussed in Section 5 below, in the context of reservations of government posts. The Court did not enumerate the backward classes in the case, but it did direct the government to set up a Commission in the light of the principles laid out by the Court.[49] The result was the passing of the *National Commission for Backward Classes Act 1993*.[50]

In relation to the backward classes, the Supreme Court of India has been careful to avoid basing its characterisation of such classes on the basis of caste alone, thereby distinguishing 'Other Backward Classes' from 'Scheduled Castes'. In *Balaji v. State of Mysore*,[51] in the context of article 15 reservations in educational institutions, the challenge resulted from the Mysore Government's division of the reserved seats in the Medical and Engineering Colleges into Backward Classes (28 per cent), More Backward Classes (20 per cent), Scheduled Castes and Scheduled Tribes (18 per cent). Thus 68 per cent of the seats in the College were reserved. The Court found that the subclassification between Backward Classes and More Backward Classes was not justified under article 15(4). Backwardness as envisaged by article 15(4) must be both social and educational, and cannot be either social or educational. Caste cannot therefore be the sole test of backwardness, although it can be a relevant factor.[52] Poverty, occupation, and place of habitation, for example, are also relevant factors. The Mysore Government's order applied only on the basis of caste. It treated caste and class as synonymous, and this is not the case.[53]

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47 Ibid., 394–5. The first Chairman of the Backward Classes Commission was Kaka Saheb Kalelkar.

48 AIR 1993 SC 477.

49 Basu, D., supra n.1, 395.

50 The Act came into force on 1 January 1993, and in August of that year, a five-member Commission was constituted with Justice R.N. Prasad as Chairman.

51 AIR 1963 SC 649; *Chitralekha v. State of Mysore,* AIR 1964 SC 1823.

52 Pandey, J., supra n.18, 112.

53 Ibid., 113.

That caste could not be the sole factor in determining what groups are socially and educationally backward was raised in several other cases. The Supreme Court ruled in *A. Periakaruppan v. State of Tamil Nadu*[54] that the classification of backward classes on the basis of castes is within the purview of article 15(4) provided these castes are shown to be socially and educationally backward. However, once a class is considered backward, it does not follow that it will always continue to be so. Such an approach, the Court held, would defeat the purpose of the reservation system.[55] It reiterated its position in *State of A.P. v. U.S.V. Balaram*,[56] where it found that caste could not be the sole test for backwardness. Nevertheless if an entire caste were found to be socially and educationally backward its inclusion in a list of backward classes would not violate article 15(4).

Similarly, in *K.S. Jayasree v. State of Kerala*,[57] the state's ruling that any family earning over a certain amount could not qualify as backward, and therefore were not eligible for reserved seats in medical colleges, was upheld by the Court which stated that caste in itself is not the sole test of backwardness, just as poverty in itself is not the sole test of backwardness. Both, however, are relevant factors.

In *State of U.P. v. Pradeep Tandon*,[58] the reservation of seats for students at Medical Colleges on the grounds that they came from Rural, Hill and Uttarakhand Areas, was held to be unconstitutional. The Supreme Court objected to the category 'Rural Areas'; the citizens of the Hill and Uttarakhand Areas were socially and educationally backward but the same could not be said of all citizens of rural areas. The same distinction was overruled in *Suneel Jatley v. State of Haryana*,[59] whereby the state's position that rural students were entitled to reservations, and urban students were not, was deemed to be irrational and arbitrary.

Conversion

In *Principal Guntur Medical College v. Y. Roham Rao*,[60] the Supreme Court held that a Christian convert originally belonging to a Scheduled Caste could not be eligible for a reserved place in the Medical College unless he reconverted and was reaccepted into the caste.[61] The issue was raised again in *Soosai v Union of India*,[62] where the Supreme Court determined that a person who converts to another religion loses Scheduled Caste status. There are far-reaching consequences to this question, given that in 1955 Ambedkar caused some three and a half million of his

54 AIR 1971 SC 2303.
55 Pandey, J., supra n.18, 113.
56 AIR 1972 SC 1875.
57 AIR 1976 SC 2381.
58 AIR 1975 SC 563.
59 (1984) 4 SCC 296.
60 (1976) 3 SCC 411.
61 Pandey, J., supra n.18, 117.
62 AIR 1986 SCC 733.

followers to convert to Buddhism, thereby removing them from the caste system. A rule against conversion could serve as an incentive to the Scheduled Castes not to convert to another religion, or they will lose the opportunities provided by reservations in elections, in education and in government posts. Reservations could be perceived as perpetuating the caste system.

The UN Commission on Human Rights noted, in the context of the implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion 1981, that when a Dalit converts to a non-Hindu religion, compensatory state measures are withdrawn. The UN Special Rapporteur on Freedom of Religion or Belief highlighted, in his 1997 Report to the Commission following a visit to India, 'an active lobby of converted Dalits … protesting against the withdrawal of State measures benefiting untouchables … when they convert to a non-Hindu religion; they consider that this practice constitutes an obstacle to conversions'.[63] The Report quotes the Secretary of the Ministry of Law in Delhi, who 'pointed out that the conversion of a Hindu untouchable to another religion gives rise to the loss, not of rights, but of privileges'.[64]

Eisenman writes:

> Compensatory measures are therefore conditioned, for many Dalits, on their continued observance of a religion that has historically stressed their inherent inferiority from caste-Hindus … The clear effect of such a withdrawal policy is to deter Dalits from converting from Hinduism.[65]

Castellino points out that the 1950 Constitution makes a distinction as to the meaning of 'Hindu' in its freedom of religion clause.[66] Article 25(2)(b) provides for 'social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus'. The provision is accompanied by an explanation:

> In sub-Clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jain or Buddhist

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[63] Amor, A. (1997), *Visit to India*, Report submitted by Special Rapporteur on Freedom of Religion or Belief in accordance with Commission on Human Rights resolution 1996/23, UN Doc. E/CN.4/1997/91/Add.1, paragraph 60. Nevertheless, the Special Rapporteur does not recommend the removal of this bar to conversion. The Report also describes 'the iniquitous system of castes, legally abolished but maintained in practice' (paragraph 24).

[64] Ibid., para. 61.

[65] 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, 150–51.

[66] Castellino, J., supra n.20.

religion, and the reference to Hindu religious institutions shall be construed accordingly.[67]

The 'active lobby' in the Special Rapporteur on Freedom of Religion or Belief's report on India was concerned with 'untouchables converted to Christianity',[68] and not converts to Buddhism. In *Soosai v Union of India*, the Court differentiated between conversion to Buddhism, Sikhism or Jainism and conversion to Christianity or Islam.[69] Furthermore, an official government circular clarifying Scheduled Caste/Scheduled Tribe status states: '(iv) if the person claims to be a Scheduled Caste, he should profess either the Hindu or the Sikh religion.'[70] The clause has a footnote, which states: 'Buddhism included by Constitution (Scheduled Caste) Orders (Amendment) Act 1990.'[71] The provision for inclusion of Dalit Sikhs in the list of the Scheduled Castes was passed in 1956. In May 1990, Prime Minister V.P. Singh brought Dalits who converted to Buddhism into the list of Scheduled Castes. He made representations to Parliament that this change of religion, from Hindu to Buddhist, had not altered their social, economic or educational conditions. The Constitutional amendment holds: 'Notwithstanding anything contained in paragraph 2, no person who professes a religion different from the Hindu, the Sikh or the Buddhist religion shall be deemed to be a member of a Scheduled Caste.'[72] Therefore Dalit converts to Buddhism, Jainism or Sikhism still qualify for reservations; converts to Islam or Christianity or any other religion lose their entitlement to reservations.

There is a strong logic to the distinction. Ambedkar opted for Buddhism because of its egalitarian philosophy, but also because it did not represent a complete break with Hinduism. The day before his conversion, he described his action as 'the least harmful way for the country' which 'will not harm the tradition of the culture and history of this land'.[73] This is because, as Jaffrelot states, 'Ambedkar's Buddhism became integrated, almost in the form of a sect, into Hinduism'.[74] Similarly, although conversions were 'tacitly, if not explicitly, disapproved by the leaders of Congress', many of them were 'relieved at the choice of Buddhism rather than Islam or Christianity'.[75] The Hindu nationalist leader,

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67 Article 25(2)(b), Explanation II.

68 Report submitted by Abdelfattah Amor, Special Rapporteur, supra n.63, paragraph 60.

69 Castellino, J., supra n.20.

70 Quoted in Castellino, J., ibid.

71 Ibid. The 1990 Act is an amendment to the original *Constitution (Scheduled Caste) Order 1950*, which holds that 'no person who professes a religion different from the Hindu religion shall be deemed to be a Scheduled Caste' (paragraph 3).

72 *Constitution (Scheduled Caste) Orders (Amendment) Act 1990*.

73 Quoted in Jaffrelot, C. (2004), *Dr Ambedkar and Untouchability: Analysing and Fighting Caste* (Delhi: Permanent Black), 137.

74 Ibid.

75 Ibid., 136.

V. Savarkar, believed that the action did not involve a change of religion at all: 'One is glad, however, that even while recoiling from the traditional Hindu social order, he [Ambedkar] chose another essentially Indian way which, like Sikhism, Brahmoism and the Arya Samaj, is only a variant of Hinduism.'[76]

Jaffrelot remarks that this statement highlights the limitations of Ambedkar's conversion to Buddhism.[77] The maintenance of reservations entitlements for Ambedkarite Buddhists, and the exclusion of converts to Christianity and Islam, is a legislative reflection of this.

Legislative Reservations

Reservations in the Lok Sabha and Vidhan Sabhas

Article 330 provides for the reservation of seats in the *Lok Sabha*, or lower house of the Union, for the Scheduled Castes and Scheduled Tribes.[78] The number of seats reserved in any state or Union Territory for such Castes and Tribes is determined according to the population.[79] Article 332 provides for the reservation of seats in the *Vidhan Sabhas*, or Legislative Assemblies of every state, except the tribal areas of Assam,[80] Nagaland and Meghalaya. There are no reserved seats in the upper houses of either state or Union assemblies.

The provisions do not grant separate electorates for the Scheduled Castes, Scheduled Tribes and Other Backward Classes. The nominees must be members of the specified groups, however the entire electorate may then choose a candidate.[81] Article 325 acts as a barrier to the setting up of separate electorates by prohibiting the exclusion of any person from the electoral roll on the grounds of religion, race or caste.

The legislative reservation scheme is temporary. According to article 334, article 332 reservations in state legislatures were to cease in January 2000, on the expiration of 50 years from the commencement of the Constitution. Article 330 reservations were proscribed initially for a period of only ten years. This period was extended to twenty years by the 8th Constitutional Amendment Act in 1959, and an extension has been added by the amendment procedure every 10 years,

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[76] Quoted in Jaffrelot, C., ibid.

[77] Ibid.

[78] The reservations do not extend to the Other Backward Classes.

[79] Pandey, J., supra n.18, 616.

[80] The 51st Constitutional Amendment provides that reservation of seats in the Assam Assembly for Scheduled Tribes will be made from the whole of the state except the autonomous District of Assam. There are reserved seats in the Assam Assembly for candidates from the autonomous District, as well as the Scheduled Castes and Scheduled Tribes. Ibid., 616.

[81] Galanter, M., supra n.6, 45.

the most recent being the 79th Amendment Act 1999, which extended the period to 60 years, due to expire in 2009.[82]

Scheduled Caste and Scheduled Tribe candidates may also contest any of the seats that are not constitutionally reserved,[83] but there have been relatively few successes.[84] The presence of members of the Scheduled Castes and Scheduled Tribes in the legislatures is largely accounted for by the reservation scheme.

The Delimitation Commission undertakes the selection of constituencies fielding candidates for reserved seats. A key difference between the Scheduled Castes and Scheduled Tribes is concentration of population. The Scheduled Tribes are concentrated in certain geographic areas, whereas the Scheduled Castes are dispersed throughout the country. This frequently provokes objections in relation to the delimitation of constituencies for Scheduled Caste candidates. The Commission is governed by the *Delimitation Act 1972*. With respect to the Scheduled Tribes, population concentration is the sole factor to be taken into account.[85]

The *Delimitation Act*, in the case of the Scheduled Castes, instructs the Commission to reserve seats 'in different parts of the state and … in those areas where the proportion of their population to the total is comparatively large'.[86] The Commission, having established the areas with the highest concentration of Scheduled Castes, usually not more than 20 per cent, and having reserved seats in those areas, must follow the second criterion of dispersal of the reserved seats in the state in question. This results in reserved seats for Scheduled Caste candidates in areas with a relatively low proportion of Scheduled Caste members in relation to the total population. The bulk of these constituencies contain only between 10 and 30 per cent Scheduled Caste voters.[87]

Hence, there are usually objections and opposition to the designation of a constituency as reserved for Scheduled Caste candidates. These objections can be voiced to the Commission, but they are rarely changed. Proposals for the rotation of reserved constituencies have also been rejected.[88] The courts cannot intervene in the process under article 329 of the Constitution, once the Commission is following the provisions of the *Delimitation Act*.[89] In *Mastanaiah*

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[82] Basu, D., supra n.1, 394.

[83] *V.V. Giri v. D.S. Dora* AIR 1959 SC 1318.

[84] Galanter, M., supra n.6, 49. For example, in the first six *Lok Sabhas*, only a handful of candidates from Scheduled Castes or Scheduled Tribes filled unreserved seats.

[85] Delimitation Act 1972, Section 9(1)(d).

[86] Delimitation Act 1972, Section 9(1)(c).

[87] Galanter, M., supra n.6, 48.

[88] Ibid., 49.

[89] Article 329(a) of the Constitution: 'The validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under Article 327 or 328; Shall not be called into question in any court.'

v. Delimitation Commissioner,[90] the Court rejected the claim that there was a duty on the Commission to relocate a reserved constituency due to there being a higher percentage of Scheduled Caste members in an adjoining area.

There is no reservation system in place for election to the upper houses of parliament, at state or national level, which in both cases is indirect. Election to the national *Rajya Sabha* is through proportional representation by the members of the state legislatures, and election to the *Vidhan Parishads*, or upper houses of the state legislatures, is through a combined election from the lower house, special qualified constituencies and governmental nomination.[91] There is no reservation with regard to political appointments, but there is a convention that at least one ministerial post be given to a candidate from the Scheduled Castes, at both national and state level.

The reservation system is the primary reason for the presence of members of the Scheduled Castes and Scheduled Tribes in the state and national legislatures. Its removal would not necessarily imply that their numbers would be reduced to the low levels that succeed in being elected to non-reserved seats. The geographical concentration of the Scheduled Tribes would almost certainly ensure that they would be represented, albeit at a significantly lower level than is the case under the current reservation system. The same cannot be said of the SCs, whose dispersal would make it extremely difficult for potential candidates.[92] As to the quality of representation, the absence of separate electorates means that the candidates elected to the reserved seats are responsible to a constituency made up overwhelmingly of non-members of their groups, especially with regard to the Scheduled Castes.[93]

One important aspect of the reserved seats in the legislatures is that they are not self-liquidating, as is the case with positions in educational establishments and government posts, examined below. The reservations with regard to positions in educational establishments and government posts act as a minimum guarantee. If candidates from the Scheduled Castes and Scheduled Tribes fill these places on merit alone, the number of positions reserved for them drops correspondingly. This is not the case with the seats in the state and union legislatures, which are held by the Scheduled Castes and Scheduled Tribes in addition to any gains made by these groups in the general, non-reserved electorates. They can also be differentiated in that they are subject to a constitutional time limit, which has been extended every decade. The debates surrounding the periodic renewal of the reserved seats have revealed that they are perceived as being the cornerstone of India's special measures policy.[94] The presence of Scheduled Castes and Scheduled Tribes in

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[90] A.I.R. 1969 A.P. 1.

[91] Galanter, M., supra n.6, 49. There is not an upper Legislative Assembly in every state.

[92] Ibid., 50.

[93] Ibid., 51.

[94] Ibid., 55.

the legislatures has helped promote related policies in education and government posts, as well as ensuring the decennial continuation of the reserved seat policy.

Reserved seats must be distinguished from the other aspects of India's constitutional special measures provisions in that they do not form part of the Fundamental Rights section. They appear in Part XVI, under the rubric 'Special Provisions Relating to Certain Classes', and are beyond the remit of the courts under article 329, who are barred from interfering in either their allocation, or the delimitation process. In this area, the courts cannot assess the working of the reserved seats policy. The impact of the courts in shaping India's reservation policy is tempered, and if they act to confine the preference policy in employment and education, the reserved seats in the legislatures can lend it more impetus.[95]

Panchayats

A *panchayat* is a traditional Hindu village governing body which reflects an idealised belief in a decentralised system of governance by village rule. Granville Austin describes the situation in India prior to independence as involving two revolutions, the national and the social, which had been running parallel in India in the period following World War I.[96] With independence, the national revolution would be completed, but the social revolution, epitomised by such movements as the fight against untouchability, would continue. The Constituent Assembly's task was to draft a constitution that would underpin the conditions required to enact a social revolution, without which, according to Nehru, 'all our paper constitutions will become useless and purposeless'.[97]

An important issue for effecting this revolution was whether the political institutions should be central and directly elected, or decentralised and indirectly elected. The Constituent Assembly was required to choose between a parliamentary Euro-American model, composed of an executive, a legislative and a judiciary, or an Indian model of village rule through a system of *panchayats*. Both, it was recognised, would be democratic. The strongest supporter of the village-based system, perceived by its advocates as reflective of the true pre-colonial Indian life, was Gandhi. He submitted two plans to the committee within the Indian National Congress (INC) charged with revising the party's constitution. The second became known as 'Gandhi's Testament', for it was presented on the day of his murder in January 1948. It called for the disbanding of the Congress, labelled a 'parliamentary machine', so that it could be turned into a social service organisation based on a nationwide network of *panchayats*.[98]

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[95] Ibid.

[96] Austin, G. (2002), *The Indian Constitution: Cornerstone of a Nation* (Oxford: Oxford University Press), 26.

[97] Quoted in Austin, G., ibid., 27.

[98] Ibid., 28.

The new constitution of the INC established Primary Congress *Panchayats* in villages as the basic organisational unit of the party,[99] but the committee charged with its drafting maintained the central structure of the party, and effectively rejected Gandhi's proposal, believing that the party could not abandon its political role. Nevertheless, Gandhi's ideas continued to be promoted, and proponents argued that his network of *panchayats* was not inconsistent with organised government, provided it was based on the villages. Shriman Narayan Agarwal in his text *Gandhian Constitution for Free India*, proposed that the primary political unit be the village *panchayat*, maintained by a hierarchy of indirectly elected bodies, and governed by the *All-India Panchayat*, whose president would be the head of state.[100] Agarwal sought to decentralise and keep government to a minimum, thereby increasing individual responsibility and, fundamentally, doing away with the need for political parties. India would be returned to a primarily agricultural, rural society.[101]

The alternative available to the Constituent Assembly was a constitution based on the Euro-American tradition, providing for a centralised directly-elected government. The Assembly members had to decide whether a traditional or non-traditional system would bring about the required social revolution. It took them over two and a half years to produce a draft constitution, and their decision to propose a parliamentary, federal constitutional regime for India meant that Gandhi's ideal of village governance, while not completely rejected, would not form the basis of the Indian polity. In the draft Constitution of November 1948, *panchayats* featured only as a Directive Principle of State Policy. While most members of the Assembly would have been in favour of a strong role for village *panchayats*, they would not have supported a decentralised, indirectly-elected regime.[102]

The Assembly members may have intended to omit all reference to *panchayats*. The subsequent draft Constitution produced by mid-February of 1948 made no mention of them. A prominent critic of this omission was Rajendra Prasad, President of the Constituent Assembly.[103] He believed that the Constitution should begin with the village and go up to the Centre. His suggestion, whereby adult franchise would be utilised only for the village *panchayat* and the *panchayats* would then form an electoral college electing representatives to the provinces and the Centre, was rejected. Other members had also submitted amendments to the draft with regard to *panchayats* which, while not calling for the indirect system

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[99] Constitution of the Indian National Congress, 1948, 1, quoted in Austin, G., ibid., 30.

[100] Quoted in Austin, G., ibid., 30–31.

[101] Ibid.

[102] Ibid., 32.

[103] Prasad was one of only two members of the Assembly who did not play the dual role of Assembly member and minister of the Union Government. All ministers had to be members of the Assembly, which also functioned as the legislature, however, as President, Prasad did not take part in the Legislative proceedings of the Assembly. Ibid., 15–16.

of government supported by Prasad, supported a degree of autonomy in the form of local self-government. The amendments applied to the non-justiciable Directive Principles, and they sought to place a duty on the state to encourage the development of *panchayats* below the level of the provincial governments. This did not represent support for an alternative Gandhian constitutional philosophy. The demand was not political, but administrative.[104] Politically, Indian cooperative federalism would still operate from the provincial government level upwards. On 22 November 1948, K. Santhanam moved the party's official amendment, which was adopted by the Assembly, and article 40 was written into the Constitution: 'The State shall take steps to organize village *panchayats* and endow them with such powers and authority as may be necessary to enable them to function as units of self government.'

State governments after 1950 undertook the development of *panchayats*, with the Union Government's Ministry of Community Development acting as coordinator, but the network was not considered successful. In 1992, the 73rd Constitutional Amendment Act[105] inserted two new parts into the Constitution relating to *panchayats* and urban local bodies, Parts IX and IXA. They represent a constitutional guarantee for *panchayats* in rural and urban areas, including regular elections, devolution of financial and administrative powers, and reservation of seats on the *panchayats* for SCs, STs and women.[106]

Part IX of the Constitution outlines a three-tier system of *panchayats*, at village level, district level, and an intermediate level. The members are chosen by direct election from an electoral roll of those registered in the village in the area of the *panchayat*. In this manner it is envisaged that grass-roots democracy will be introduced.

Article 243D provides that seats are to be reserved for the Scheduled Castes and Scheduled Tribes. The reservation is in proportion to their population. Such seats may be allotted by rotation to different constituencies in a *panchayat*. Of the seats reserved for the Scheduled Castes and Scheduled Tribes, at least one third must be reserved for women members of these groups. These reserved seats may also be rotated. At least one third of the total number of seats in the *panchayat* is reserved for women. A state may make provision for similar reservation for Scheduled Castes, Scheduled Tribes and women for the offices of Chairpersons in the *panchayats* at village and other levels. The reservation of the office of Chairperson must also be in proportion to the population of Scheduled Castes and Scheduled Tribes in the state. The legislature of a state is empowered to

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[104] Ibid., 35–7.

[105] The Rajiv Gandhi Government introduced the *Panchayati Raj* Bills in the *Lok Sabha* for the first time in 1989, but failed to get the support of the required majority in the *Rajya Sabha*. The states objected to what they viewed as a direct encroachment on their autonomy in certain provisions of the Bills. They were referred to a Select Committee, and after modifications, were re-introduced in the *Lok Sabha* and passed on 23 December 1992. Pandey, J., supra n.18, 528.

[106] Ibid.

reserve the office of Chairperson or seats in a *panchayat* to members of the Backward Classes.

The provisions are temporary. Article 334 limits the time period of their application to sixty years from the adoption of the Constitution. They are due to expire on 24 January 2010. Under article 243-O, the courts have no jurisdiction to examine the validity of a law relating to the delimitation of constituencies or the allotment of seats made under article 243-K. Only an election petition, governed by the laws of the state legislature, can act as a challenge to an election to a position on a *panchayat*.[107]

Panchayats reflect a Gandhian ideal of village rule which did not highlight the function of the village in the oppressive mechanism of caste. When Ambedkar formed the All India Depressed Classes Federation in 1942, two resolutions were passed: the first condemned the Cripps proposals as a betrayal of the interests of the Scheduled Castes, as discussed in Chapter 1; the second made a radical call for constitutional provision for the transfer of Scheduled Castes to separate Scheduled Caste villages. It read:

> After long and mature deliberation [the conference came] to the conclusion that a radical change must be made in the village system, now prevalent in India and which is the parent of all the ills from which the Scheduled Castes are suffering for many centuries at the hands of the Hindus.[108]

In his introduction to the Draft Constitution in the Constituent Assembly on 4 November 1948, Ambedkar attacked those who wished to see India governed through *panchayats*:

> Another criticism against the Draft Constitution is that no part of it represents the ancient polity of India. It is said that the new Constitution should have been drafted on the ancient Hindu model of a State and that instead of incorporating Western theories the new Constitution should have been raised and built upon village *Panchayats* and District *Panchayats*. They do not want any Central or Provincial Governments. They just want India to contain so many village Governments. The love of the intellectual Indians for the village community is of course infinite if not pathetic (*laughter*).[109]

Ambedkar described the idealised village as follows: 'what is the village but a sink of localism, a den of ignorance, narrow-mindedness and communalism?

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[107] Basu, D., supra n.1, 276.

[108] Report of the Depressed Classes Conference (G.T. Meshram, Nagpur, 1942), quoted in Zelliot, E., 'The Mahars of Maharashtra', supra n.31, 109.

[109] Ambedkar, B., in *The Essential Writings of B.R. Ambedkar*, Valerian Rodrigues (ed.) (2002) (Oxford: Oxford University Press, 2002), 485; Introduction to the Draft Constitution of India, Constituent Assembly Debates, 4 November 1948.

I am glad that the Draft Constitution has discarded the village and adopted the individual as its unit.'[110]

In his text *Outside the Fold*, written following the discussion on village *panchayats* in the Constituent Assembly in 1948, and published posthumously in 1989, Ambedkar recalled the angry speeches made in the Constituent Assembly in support of the recognition of the Indian village as the base of the constitutional pyramid. 'From the point of view of the Untouchables', he wrote, 'there could not have been a greater calamity. Thank God the Constituent Assembly did not adopt it.'[111] He traced the belief that the Indian village is an ideal form of social organisation to a civil servant of the East India Company, Charles Metcalfe, who penned a depiction of the villages in romanticised terms.[112]

Ambedkar sought to present a realistic picture of society as one finds it in an Indian village. He began: 'The Indian village is not a single social unit. It consists of castes.'[113] He describes the population as being divided into two sections, Touchables and Untouchables, the former being the majority, the latter the minority who must live in separate quarters. Socially, the Touchables occupy the position of a ruling race, while the Untouchables occupy the position of a subject race. The terms of associated life in an Indian village are based on a code of the Touchables which lays down the acts of omissions and commissions which the Touchables treat as offences. Ambedkar lists some fifteen as examples.[114] Next come the duties which the Code requires members of the Untouchables to perform for the Touchables.[115] Their sources of living are precarious and fleeting, and the only security they are granted is the right to beg for food. He concludes: 'The Untouchables must not insist on rights. They should pray for mercy and favour

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[110] Ibid., 486.

[111] Ibid., 323.

[112] Metcalfe wrote: 'The village communities are little republics, having nearly everything they want within themselves … This union of the village communities, each one forming a little state in itself, has, I conceive, contributed more than any other cause to the preservation of the people of India'; ibid., 324.

[113] Ibid., 325.

[114] Ibid., 325–6. They include: '3. The Untouchables must observe the rule of distance pollution or shadow of pollution … 4. It is an offence for a member of the Untouchable community to acquire wealth, such as land or cattle. 5. It is an offence for a member of the Untouchable community to build a house with a tiled roof. 6. It is an offence for a member of the Untouchable community to put on a clean dress, wear shoes … 13. It is an offence for a member of the Untouchable community, if he happens to come into villages on a sacred day … to go about speaking, on the ground that their breath is held to foul the air … 15. An Untouchable must conform to the status of an inferior and he must wear the marks of his inferiority for the public to know and identify him as such.'

[115] Ibid., 326–7: 'To realize the significance of these duties, it is important to note why they have come into being. Every Hindu in the village regards himself as a superior person above the Untouchables. As an overlord, he feels it absolutely essential to maintain his prestige. This prestige he cannot maintain unless he has at his command a retinue to dance attendance upon him.'

and rest content with what is offered … The Untouchables have no rights. They are there only to wait, serve and submit … This is the Village Republic of which the Hindus are so proud.'[116]

Reservations in Education

The 1947 Interim Report on Fundamental Rights held in its clause 4:

> (1) The State shall make no discrimination against any citizen on grounds of religion, race, caste or sex, and (2): There shall be no discrimination against any citizen on any ground of religion, race, caste or sex in regard to – (a) access to trading establishments including public restaurants and hotels (b) the use of wells, tanks, roads and places of public resort maintained wholly or in part out of public funds or dedicated to the use of the general public: Provided that nothing contained in this clause shall prevent separate provision being made for women and children.[117]

Sardar Vallabhbhai Patel explained that the provision was 'a non-discriminatory clause which is provided in almost all constitutions … The first clause is about State obligation; the second clause deals with many matters which have nothing to do with the State such as public restaurants'.[118] A number of amendments were proposed, and almost all rejected, which sought to make small changes to the detail of the provision. One member, P.S. Deshmukh, had a more general objection:

> In drafting such a long clause we are throwing a shadow of untouchability over the whole Constitution of India. In this particular clause, I submit to the House, if we merely say that – 'the State shall not permit any discrimination against any citizen on grounds only of religion, race, caste or sex', it should be quite sufficient … I think, therefore, that the whole of the second part should be omitted.[119]

He did not enter his suggestion as a formal amendment, and it was not voted upon. Clause 4, therefore, was seen as comprehensive in its protections, in that 'it would cover cases of private institutions as well as State institutions'.[120]

When the provision came before the Assembly again on 29 November 1948 in the form of draft article 9, Deshmukh's sentiment was expressed by Professor Shibban Lal Saksena, who wished that only the first three lines of the clause remained and the rest were omitted. 'By adding the sub-clause', he found, 'we

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[116] Ibid., 330 and 331: 'They have no rights because they are outside the village republic and because they are outside the so-called republic, they are outside the Hindu fold.'

[117] Constituent Assembly Debates, supra n.10, vol. 3, Book 1, 29 April 1947, 426.

[118] Ibid.

[119] Ibid., 427.

[120] Ibid., 432.

are really subtracting from the generality of the first clause.'[121] He argued that the sub-clause about the use of wells, tanks, roads etc. was not worthy of finding a place in the constitution, for such disabilities were merely transitory and will vanish with time. He stated: 'But if it becomes permanently incorporated in the constitution people in other parts of the world will despise us for the existence of such discrimination in the past.'[122]

In addition, the first three lines, he believed, should be maintained as a Directive Principle of State Policy rather than a fundamental right.

Draft article 9 contained no sub-clause on making special provision for Scheduled Castes and Scheduled Tribes. The clause as it stood held that nothing in the article shall prevent the state from making any special provision for women and children. Professor Shah moved an amendment, No.323, in the Assembly to this effect: 'That at the end of clause (2) of article 9, the following be added: "or for Scheduled Castes or backward tribes, for their advantage, safeguard or betterment".'[123]

He explained his amendment as being in favour of particular classes which, owing to an unfortunate legacy of the past, suffer from disabilities, and may require special treatment, especially in the field of education. 'In regard to the scheduled castes and backward tribes, it is an open secret that they have been neglected in the past … They need and must be given, for some time to come at any rate, special treatment in regard to education.'[124] Such special treatment is required, he argued, 'if equality is not to be equality of name only or on paper only, but equality of fact'.[125]

Ambedkar addressed Professor's Shah's amendment, rejecting it on the following basis:

> With regard to the amendment moved by Professor Shah, the object of which is to add 'Scheduled Castes' and 'Scheduled Tribes' along with women and children, I am afraid it may just have the opposite effect. The object all of us have in mind is that the Scheduled Castes and Scheduled Tribes should not be segregated from the general public. For instance, none of us, I think, would like that a separate school should be established for the Scheduled Castes when there is a general school in the village open to the children of the entire community. If these words are added, it will probably give a handle for a State to say, 'Well, we are making special provision for the Scheduled Castes'. To my mind they can safely say so by taking shelter under the Article if it is amended in the manner the Professor wants it. I therefore think that it is not a desirable amendment.[126]

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121 Ibid., vol. 7, Book 2, 29 November 1948, 659.
122 Ibid.
123 Ibid., 655.
124 Ibid.
125 Ibid., 656.
126 Ibid., 661.

Ambedkar's stance is difficult to comprehend, given that the lack of education for Dalits had always been one of his primary concerns. In 1928 when he appeared before the Simon Commission, he demanded educational concessions for the untouchables as well as reserved seats in separate electorates. The demand also formed part of the Poona Pact, which he negotiated in 1932: '9. In every province out of the educational grant an adequate sum shall be earmarked for providing educational facilities to the members of the Depressed Classes.'[127]

His writing drew attention to the complete prohibition of the education of the Shudras and the Untouchables, and the severe sanctions attached to violation of that prohibiton, as dictated by the *dharma* codes unique to India:

> But India is the only country where the intellectual class, namely the Brahmans, not only made education their monopoly but declared acquisition of education by the lower classes a crime punishable by cutting off of the tongue or by the pouring of molten lead in the ear of the offender.[128]

Given the historical religious ban on education for Shudras and Dalits, there was a compelling case for special measures in education to form part of the constitutional reservations. Ambedkar's resistance to Professor Shah's proposal is not consistent with his earlier push for educational concessions for the Dalits, and his belief in legislative measures to uplift his people. His concern, that such measures would lead to separate schools for the Scheduled Castes, must have been a very real one.

A distinction ought to be made between the different levels of education. Thus, Professor Shah's amendment proposed adding SCs and STs after women and children; which Ambedkar appears to interpret as suggesting that special provision be made for SC and ST children in the realm of education. Ambedkar's concern is that this would lead to the exclusion of Dalit children from primary schools. This danger is not apparent with regard to third level education. It is submitted that reservations in third level institutes do not raise the dangers outlined by Ambedkar, and contribute towards the eradication of *de facto* discrimination in providing more representation of Dalit students.[129]

Professor Shah's amendment was not carried. Draft article 9 would become article 15 of the Constitution, and made no reference to the educational uplift of the Scheduled Castes and Tribes. In 1955, the First Constitutional Amendment would insert a fourth paragraph into article 15, essentially incorporating Professor Shah's amendment into the Constitution, and allowing states to make special

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[127] The Poona Pact of 24 September 1932, reproduced in Ambedkar, B., supra n.8.

[128] Ambedkar, B., 'Class, Caste and Democracy', in Rodrigues, V., supra n.109, 146.

[129] International human rights law on special measures also safeguards against such developments. Article 1(4) of the International Convention on the Elimination of All Forms of Racial Discrimination 1965 may be cited in this regard: 'Special measures … shall not be deemed racial discrimination provided, however, that such measures do not lead to the maintenance of separate rights for different racial groups'.

provision for the advancement of any socially and educationally backward classes of citizens, or for the Scheduled Castes and Tribes. This fourth paragraph would read: 'Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.'

Paragraph 4 was inserted into article 15 under the First Constitutional Amendment Act following the 1951 Supreme Court decision in *Madras v. Champakam Dorairajan*.[130] The case challenged the Madras Government for reserving seats in state Medical and Engineering Colleges for different communities in certain proportions on the basis of religion, race and caste. The state defended the law, citing article 46 of the Directive Principles of State Policy, which requires the promotion of social justice for all sections of the people. The Supreme Court ruled against the state, holding that Directive Principles of State Policy cannot override Fundamental Rights; the law classified students on the basis of caste and religion irrespective of merit, and was unconstitutional.

In response, the first Constitutional Amendment Act was passed, amending both articles 15 and article 29(2). Article 29(2) states that 'No citizen shall be denied admission into any educational institution maintained by the state or receiving aid out of state funds on grounds only of religion, race, caste, language or any of them'. Therefore, article 15(4) allows the state to make reservations in educational institutions, or grant them free concessions, for the advancement of the Scheduled Castes, Scheduled Tribes and Other Backward Classes,[131] as originally envisioned by Professor Shah in the Constituent Assembly in 1948. Furthermore, it has been held that a Scheduled Caste or Scheduled Tribe candidate selected for admission to a course on the basis of merit as a general candidate should not be treated as a reserved candidate.[132]

The provisions made in article 15(4) are enabling provisions and do not impose any obligation on the state to take any special action.[133] In *Balaji v. State of Mysore*,[134] the Supreme Court ruled that the Amendment merely conferred discretion to act if necessary by way of making special provision for backward classes. However, this discretion must be exercised in light of article 46 of the Constitution, which directs the state to promote the educational and economic interests of the weaker sections of the people.

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[130] *Madras v. Champakam Dorairajan,* AIR 1951 SC 226.

[131] See *Chitraleka v. State of Mysore*, A. 1964 S.C. 1823, 1827.

[132] *P.G.I. of Medical Education & Research v. K.L. Narasimhan (*1997) 6 S.C.C. 283, paragraph 5.

[133] Pandey, J., supra n.18, 112.

[134] AIR 1963 SC 649; *Chitralekha v. State of Mysore,* AIR 1964 SC 1823.

Reservations in Public Employment

Article 16(4)

The 1947 Interim Report on Fundamental Rights held in its clause 5:

> There shall be equality of opportunity for all citizens in matters of public employment and in the exercise or carrying on of any occupation, trade, business or profession.
>
> Nothing herein contained shall prevent the State from making provision for reservations in favour of classes who, in the opinion of the State, are not adequately represented in the public services.
>
> No citizen shall on grounds only of religion, race, caste, sex, descent, place of birth or any of them be ineligible for public office or be prohibited from acquiring, holding or disposing of property or exercising or carrying on any occupation, trade, business or profession within the Union.[135]

Clause 5 became draft article 10, which was debated in the Assembly on 30 November 1948. Draft article 10 added the adjective 'backward' to the noun 'class', which had not appeared in the Interim Report, in its sub-clause 3:

> Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.[136]

Shri Lokanath Misra found the sub-clause 'unnecessary because it puts a premium on backwardness and inefficiency'.[137] There was much questioning of the term amongst the members, who sought an answer as to the precise meaning of 'backward'. Shri Damodar Swarup Seth described reservations of posts or appointments in services for the backward classes as the negation of efficiency and good government. He warned: 'it is not easy to define precisely the term backward; nor is it easy to find a suitable criterion for testing the backwardness of a community or class.'[138] Pandit Hirday Nath Kunzru pointed out that 'the word 'backward' is not defined anywhere in the Constitution'.[139] Finally, Aziz Ahmad Khan proposed: 'That in clause 3 of article 10 the word 'backward' be omitted.'[140]

The proposal was designed to reinforce the protection of minorities, in particular religious minorities, who were not considered 'backward'. If the article

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[135] Constituent Assembly Debates, supra n.10, vol. 3, Book 1, 30 April 1947, 445.
[136] Ibid., vol. 7, Book 2, 30 November 1948, 672.
[137] Ibid., 673.
[138] Ibid., 679.
[139] Ibid.
[140] Ibid., 681.

was not amended, Khan argued, 'there will be doubts and misgivings among the minorities that they are being ignored … if the Sikhs, the Muslims, the Christians and similar other groups living in the country have educational and other requisite qualifications, then their claims should not be overlooked'.[141]

T.T. Krishnamachari thought that the word 'has fallen from heaven like manna and snatched by the Drafting Committee in all their wisdom'.[142] He continued:

> May I ask who are the backward classes of citizens? It does not apply to a Scheduled caste or any particular community … Who is going to give the ultimate award? Perhaps the Supreme Court. It will have to find out what the intention of the framers was as to who should come under the category of backward classes. It does not say 'caste'. It says 'class'. Is it a class which is based on grounds of economic status or on grounds of literacy or on grounds of birth? What is it?[143]

Ambedkar sought to answer the points raised in the Assembly on the meaning of the new term. He began by looking at the rationale behind the use of the word, and explained that the word 'backward' was designed to reconcile three points of view:

> The first is that there shall be equality of opportunity for all citizens … if this principle is to be operative … there ought to be no reservations of any sort for any class or community at all, that all citizens, if they are qualified, should be placed on the same footing of equality so far as the public services are concerned. That is the second point of view we have. Then we have quite a massive opinion which insists that, although theoretically it is good to have the principle that there shall be equality of opportunity, there must at the same time be a provision for the entry of certain communities which have so far been outside the administration.[144]

A feature of the reconciliation envisaged by Ambedkar was that:

> if the reservation is to be consistent with sub-clause (1) of article 10, [it] must be confined to a minority of seats. It is only then that the first principle could find its place in the Constitution and [be] effective in operation. If honourable Members understand this position that we have to safeguard two things, namely, the principle of equality of opportunity and at the same time satisfy the demand of communities which have not had so far representation in the State, then, I am sure they will agree that unless you use some such qualifying phrase as 'backward' the exception made in favour of reservation will ultimately eat up the rule altogether. Nothing of the rule will remain. That I think, if I may say so, is the justification why the Drafting Committee undertook on its own shoulders the responsibility of introducing the word 'backward' which, I

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141 Ibid., 682.
142 Ibid., 699.
143 Ibid.
144 Ibid., 701.

> admit, did not originally find a place in the fundamental right in the way in which it was passed by this Assembly.[145]

With regard to the 'non-backward' minorities raised by Khan, Ambedkar highlighted draft article 296 where it was laid down that provision would be made for such minorities. Finally he addressed the definitional question:

> Somebody asked me: 'What is a backward community?' Well, I think any one who reads the language of the draft itself will find that we have left it to be determined by each local Government. A backward community is a community which is backward in the opinion of the Government. My honourable friend, Mt. T. T. Krishnamachari asked me whether this rule will be justiciable. It is rather difficult to give a dogmatic answer. Personally, I think it would be a justiciable matter. If the local Government included in this category of reservations such a large number of seats; I think one could very well go to the Federal Court and the Supreme Court and say that the reservation is of such a magnitude that the rule regarding equality of opportunity has been destroyed and the court will then come to the conclusion whether the local Government or the state Government has acted in a reasonable and prudent manner.[146]

Ambedkar's reasons for the inclusion of the adjective 'backward' emphasise the need to define the reservations system within an egalitarian framework that supports, first, equal treatment of equals, and second, unequal treatment of unequals. His explanation is not entirely clear – he states that the aim of the provision is the reconciliation of three points of view, but appears to enunciate just two. The first is formal equality, where the Scheduled Castes, Scheduled Tribes and Other Backward Classes would be placed on an equal footing with the majority, and no discrimination against certain communities in the appointment of government posts, on grounds of caste for example, would be allowed. He names this form of constitutional protection 'equality of opportunity'; the equal treatment of equals. But there must, along with formal equal treatment, be provision for the entry of certain communities which have so far been outside the administration. In this regard, the Scheduled Castes, Scheduled Tribes and Other Backward Classess are in an unequal position, and must be treated unequally; hence the need for reservations in government appointments. This is the second aim. The third aim is that this unequal treatment, or reservation, cannot be of such an extent that it would override formal equal treatment, and it is with this aim in mind that he introduced the qualifying word 'backward', which, to paraphrase Ambedkar, prevents the exception made in favour of reservation ultimately eating up the rule altogether. This would, as Ambedkar predicted, be determined by the Supreme Court to be 50 per cent. Over 50 per cent of a state's citizens could

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145 Ibid., 702.
146 Ibid.

not be classed as backward, for the phrase necessarily implies a numerical limit, whereby the eligible classes must constitute a minority.[147]

Draft article 10 would form article 16 of the Constitution. Article 16(4) enables the state to make provision for the reservation of posts in government in favour of any backward class of citizens that, in the opinion of the state, is not adequately represented in the services of the state. In the 1963 case of *Balaji v. State of Mysore*,[148] the Supreme Court stated that there:

> can be no doubt that the Constitution-makers assumed … that while making adequate reservation under article 16(4) care would be taken not to provide for unreasonable, excessive or extravagant reservation … Therefore, like the special provision improperly made under article 15(4), reservation made under article 16(4) beyond the permissible and legitimate limits would be liable to be challenged as a fraud of the Constitution.[149]

The Court held that the state could not include those castes whose average student population per thousand was above or near to the state average. The problem with the Mysore Government's order was that, under it, 90 per cent of the population of the state was considered backward. The Court felt that the special provision should be less than 50 per cent. How much less depended on the relevant circumstances in each case. Sathe notes that reservations must be in proportion to the totality of opportunities available to the people in general. The Court therefore applied the proportionality test in deciding whether so much reservation was desirable against the total perspective of the right to equality.[150] This question would find its *denouement* in the *Mandal Commission* case, a decision which reflects the extraordinary complexity that the meaning of the 'backward classes' ultimately generated.

The Mandal Commission case; Indra Sawney v. Union of India

Reddy J of the Supreme Court described the *Mandal Commission* case in the following terms: The questions arising herein are not only of great moment

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[147] See Castellino, J., supra n.20. The author treats Dalits as a minority group in India for the purposes of his analysis, even though the 1950 Indian Constitution expressly distinguishes between minorities, defined on a linguistic and religious basis, and the Scheduled Castes, Scheduled Tribes and Other Backward Classes. See also *T.M.A. Pai Foundation and Others v State of Karnataka and Others,* SOL Case No. 599 (2002), paragraph 167; Khare J stated that 'the expression "minorities" has been used in Article 30 [of the Constitution] in two senses – one based on religion and the other on basis of language' (quoted in Castellino).

[148] A. 1963 S.C. 647.

[149] Ibid., 664.

[150] Sathe, S. (2002), *Judicial Activism in India* (Oxford: Oxford University Press), 132.

and consequence, they are also extremely delicate and sensitive. They represent complex problems of Indian society, wrapped and presented to us as constitutional and legal questions.[151] On 13 August 1990, the Prime Minister of the Janta Dal Government of India, Sri V.P. Singh, issued the Office Memoranda (called OM) reserving 27 per cent of seats in government services for the backward classes on the basis of the recommendations of the Mandal Commission. The Commission had been appointed under article 340 of the Constitution to investigate the conditions of the Backward Classes.[152] It sparked a violent anti-reservation movement, with some members of the higher classes immolating themselves in protest against the extension of reservations to the backward classes.[153] The validity of the OM was challenged in the Supreme Court before a five-Judge bench, which issued a stay on its execution. In 1991, the Janta Government collapsed, and the INC came to power under Sri P.V. Narsimha Rao. Congress issued its own OM on 25 September 1991. There were two key changes to the original 1990 OM: first, it introduced an economic criterion into the determination of backwardness by giving preference to poorer sections in the 27 per cent quota;[154] and secondly it reserved another 10 per cent of vacancies for other Socially and Educationally Backward Classes, meaning the economically backward sections of higher castes. The case was referred by the five-judge Supreme Court to a special nine-judge Constitutional Bench of the Supreme Court in view of the importance of the matter, and in order to finally settle the legal position of reservations in several earlier Supreme Court judgments which had not spoken with one voice on the complex issues involved.[155]

The Supreme Court held that the reservations were constitutionally valid provided that they did not include what it termed the 'creamy layer' of socially

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[151] Jeevan Reddy J., *Indra Sawney v. Union of India*, AIR 1993 SC 477, 518.

[152] The Mandal Commission had submitted its report in 1980, which identified as many as 3,743 castes as socially and educationally backward classes. The Janta government collapsed in the meantime due to internal dissensions and the Congress Party headed by Indira Gandhi came to power. The Congress party did not begin to implement the Mandal Commission Report until 1989, and it was defeated by the Janta Dal in the same year, who promised to implement the Report as promised to the electorate. Accordingly Prime Minister Singh issued the OM which threw the nation into turmoil. Pandey, J., supra n.18, 131.

[153] See the concurring judgment of Justice Pandian in *Indra Sawney*: 'It is heart-rending that some youths … in the prime of their lives went to the extent of even self-immolating themselves (…)'

[154] The Union Government ultimately failed to submit the economic criterion as mentioned in its 1991 OM despite several adjournments of the Supreme Court.

[155] Pandey, J., supra n.18, 132. The judgment delivered was by 6:3 majority, and held that the two impugned OM's were valid and enforceable but subject to the conditions outlined above. The minority struck down the two OM's as unconstitutional, and also found the Mandal Report to be unconstitutional. The majority did not express any opinion on the correctness or adequacy of the Mandal Report.

advanced persons. The reservations were confined to initial appointments and did not extend to promotions, and the total reservation must not exceed 50 per cent (although the Court did envisage certain exceptional circumstances whereby the limit might be exceeded). The 10 per cent reservation in favour of economically backward sections of higher classes introduced by the INC was struck down.[156]

The Court examined the scope of article 16(4), and sought to clarify its previous interpretations. There are many elements to the decision, but the fundamental points made by Ambedkar before the Constituent Assembly in relation to the concept of the 'backward classes' are supported by the judgment. Its main findings may be summarised in eight points as follows:

1) A caste can be and often is a social class, and if it is backward socially, it is a backward class for the purposes of article 16 paragraph 4. There are also socially backward classes amongst non-Hindus, Muslims, Christians and Sikhs, and these classes are entitled to reservations. There is no set procedure for the identification of backward classes, nor is it desirable for the Court to identify one. It is for the appointed authority to identify such classes. Identification can be done with reference to castes along with other identification groups, classes, and sections of the people. Caste must be considered along with other criteria as the test of backwardness. Caste alone cannot be taken into consideration for the identification of backward classes.[157]
2) Article 16(4) is not an exception to article 16(1) but an independent clause. The decision of the Court in *State of Kerala v. N.M. Thomas*[158] was approved, and the decision in *Balaji*, where the Court ruled that article 16(4) was an exception to article 16(1),[159] was overruled. Article 16(1) is a facet of the doctrine of equality enshrined in article 14 and permits reasonable classification just as article 14 does.[160]
   i) The backward classes of citizens contemplated in article 16(4) are not the same as the 'socially and educationally' backward classes referred

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[156] Kuldip Singh J and Sahai J supported the provision in their dissenting judgments.

[157] Pandey, J., supra n.18, 132–3.

[158] AIR 1976 SC 490; (1976) 2 SCC 310. The case involved the promotion of clerks from a lower to a higher division. In order to qualify for promotion, the clerks were required to pass a departmental test within two years, under Rule 133-A framed by the Kerala Government. The Rule allowed the government to exempt members of the Scheduled Castes and Scheduled Tribes from passing the test for two extra years. The exemption was challenged, but upheld by the Supreme Court, who found that it was reasonable in relation to the object of providing equal opportunities for all citizens. The Rule was upheld in accordance with the Court's interpretation that it was of a temporary nature – the Scheduled Castes and Scheduled Tribes would still have to pass the test, however, they were granted two more years in which to do so.

[159] AIR 1963 SC 649, 651.

[160] Pandey, J., supra n.18, 133.

to in article 15(4). The former is a much wider category. The 'backward class of citizens' envisaged by article 16(4) includes Scheduled Castes, Scheduled Tribes, and all other backward classes of citizens including the socially and educationally backward classes. Certain classes may not qualify for reservations under article 15(4) but may qualify under article 16(4). The Court overruled its decision in *Balaji* on this point, for it had ruled in that case that the Scheduled Castes, Scheduled Tribes and socially and educationally backward classes of article 15(4) were the same as the backward classes of article 16(4).[161]

ii) In the process of identification of the backward classes, the 'creamy layer', the socially advanced amongst these classes, must be excluded. The Court directed that within four months of the decision, a Commission be set up by the government charged with, *inter alia,* the identification of the relevant socio-economic criteria that would result in the exclusion of socially advanced persons, the 'creamy layer'. The criteria should not be merely economic, unless the economic advancement is of such a level that it precludes social backwardness.[162]

iii) The Court found that article 16(4) allows the sub-division of the backward classes into more and less backward. It overruled the decision in *Balaji* where it declared such sub-division to be unconstitutional. The Court stated that such sub-division was necessary to prevent the advanced sections of the backward classes taking all the benefits of the reservations.

iv) The Court reiterated its position that the purpose of article 16(4) is not economic uplift or alleviation of poverty. It is designed to give a share in state power to those who have remained out of it on account of their social, and therefore economic and educational, backwardness.[163]

v) If a member of the Scheduled Castes or Scheduled Tribes is chosen on the basis of open competition, this will not result in a reduction of the reserved seats.[164]

vi) The Court upheld its decision in the *State of Kerala v. N.M. Thomas*[165] and *Devadason v. Union of India*,[166] cases, and overturned the ruling in *Balaji*, by confirming that the maximum limit of reservation, besides

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[161] Ibid. On this point, the Constituent Assembly debates can offer no assistance, since article 15(4) was introduced under the first Constitutional Amendment in 1955.

[162] Ibid., 134. In accordance with the Supreme Court decision, the Union Government appointed an expert committee known as the Justice Ram Nandan Committee to identify the 'creamy layer' among the backward classes. The Committee reported on 16 March 1993. On 26 March 1993, the Bill setting up the National Commission for Backward Classes was passed.

[163] Ibid.

[164] Ibid., 134–5.

[165] AIR 1976 SC 490.

[166] AIR 1964 SC 179.

certain exceptional circumstances,[167] is 50 per cent. In support of its ruling on this matter, the Court relied on the speech made by Ambedkar to the Constituent Assembly, in which he noted that 'reservation must be confined to a minority of seats'.[168]

The findings of the Supreme Court in the *Mandal Commission* case on the issue of the 50 per cent rule, as well as on promotions, have since been overturned through two amendments to article 16(4) of the Constitution. In the 1964 case *Devadason v. Union of India*,[169] the Supreme Court had considered the scope of article 16(4), particularly in relation to the 'carry-forward rule'. The rule provided that if the quota of reserved posts for a given year was not filled, the balance would be carried forward to the next. The rule was struck down in *Devadason* by the Supreme Court, which deemed it unconstitutional, on the ground that the power vested in government under article 16(4) could not be exercised so as to deny reasonable equality of opportunity in matters of public employment for members of classes other than backward.[170] The Court stated that each year must be considered by itself, and reservation for the backward classes should not interfere unduly with the legitimate claims of other communities. The reservation ought to be less than 50 per cent (the operation of the 'carry-forward rule' had resulted in 68 per cent of positions being reserved).[171]

In *A.B.S.K. Sangh (Rly) v. Union of India*,[172] the Court reinstated the 'carry-forward rule' as it applied to quotas exceeding 50 per cent of the available positions. The reservation quota in the case before the Court, taking into account the previous year's unfilled positions, was 64.4 per cent. The Court stated that the quota was not constrained to 50 per cent, and that this figure was only for the guidance of judges. Some excess will not affect the reservation, for only substantial excess will void it. The Court considered the reservation of 64.4 per cent not to

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[167] These extraordinary situations would apply to those living in remote areas of the country, such as Nagaland and Tripura. The Court urged extreme caution in such cases, and stressed the need for particular conditions requiring different treatment.

[168] Quoted above, supra n.145.

[169] AIR 1964 SC 179.

[170] Pandey, J., supra n.18, 129.

[171] *Indra Sawney v. Union of India*, AIR 1993 SC 477. The decision in *Devadason* ignores the fact that the 'carry-forward rule' is self-liquidating, in that it depends upon the fact that the chances of success for the backward in one year are increased commensurately with their lack of success in the previous years, and vice versa. An increase in the effectiveness of reservation in one year decreases the number of reserved seats the following year. Therefore arguments based on ensuring the efficiency of administration carry less weight with regard to the rule than they would in a situation such as that before the court in *Balaji,* for the application of the rule does not result in an increase in reservation beyond an acceptable level. see Galanter, M., supra n.6, 410.

[172] (1981) 1 SCC 246.

be excessive.[173] Therefore, reservations in excess of 50 per cent are permitted, but subject to judicial approval. The *Mandal Commission* case had upheld the decision in *Devadason* in finding that the 'carry-forward rule' was valid, provided it did not result in reservations exceeding the 50 per cent limit.

However, article 16(4-B), inserted following the 81st Constitution Amendment Act 2000, ends the 50 per cent limit imposed by the Supreme Court in the *Mandal Commission* case. The amendment effectively reinstates the 'carry-forward rule' as it initially applied, and allows unfilled vacancies of previous years to be reserved over and above the 50 per cent ceiling.[174]

The Court ruled in the *Mandal Commission* case that reservations under article 16(4) do not apply in relation to promotions, overturning its decisions in *A.B.S.K. Sangh (Rly) v. Union of India*,[175] *General Manager, Southern Rly v. Rangachari*,[176] *Comptroller and Auditor General of India v. K.S. Jagannathan*,[177] and *State of Punjab v. Hira Lal*.[178] Article 16(4-A), inserted under the 77th Constitutional Amendment Act 1995, overturned this finding. It provides that: 'Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion to any class or classes of posts … in favour of the Scheduled Castes and Scheduled Tribes'.

The decision of the Supreme Court in the *Mandal Commission* case has been bypassed on these questions.[179] The *Mandal Commission* case involved only the Backward Classes, and the Central Government took the view that the Scheduled Castes and Scheduled Tribes were not affected by the decision.[180] In *Union of India v. Virpal Singh*,[181] the Court attempted to reinstate its position with regard to promotions, by holding that caste criterion for promotion violated article 16(4) of the Constitution. The decision was followed in the case of *Ajit Singh Januja v. State of Punjab*,[182] where the Court also ruled that provision for reservation was an enabling provision, not a Fundamental Right. However, in *Ashok Kumar Gupta*

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[173] Pathak J. dissented from the majority; he found the 50 per cent rule to be fair and reasonable, but said that in view of the majority decision in *Thomas,* he was bound to uphold the impugned rule as valid.

[174] See further *Brochure on Reservation and Concessions for SC, ST, OBC etc.* (2004) (Delhi: Nabhi), Chapter 12, 237–52.

[175] 1981 1 SCC 246.

[176] AIR 1962 SC 36.

[177] 1986 2 SCC 679.

[178] 1970 3 SCC 567.

[179] The amendment also bypassed the *Mandal Commission* case by allowing more than 50 per cent reservation in Tamil Nadu to be protected from being challenged in court by including the law in the Ninth Schedule of the Constitution.

[180] Pandey, J., supra n.18, 125. The amendment thus applies only to the Scheduled Castes and Scheduled Tribes.

[181] (1995) 6 SCC 684.

[182] (1996) 2 SCC 775.

v. State of U.P.,[183] the Supreme Court held that article 16(4-A) had converted reservation into a Fundamental Right.[184]

The decision exemplifies the nuanced approach of the Indian Supreme Court to the interpretation of the constitutional special measures provisions. Criticism of affirmative action provisions have often concentrated on the failure of such measures to distinguish between privileged members of the beneficiary groups and those under-privileged members who need the measures the most. The first UN Special Rapporteur on Affirmative Action, Marc Bossuyt, examined this argument in his final report:

> The two-class theory … raises the question of who truly benefits from preferential policies. It appears that it is the most fortunate segment of the groups designated as beneficiaries who seem to get the most out of affirmative action measures … Beneficiaries of affirmative action programmes tend to be the wealthier and least-deprived members of a group … the minority members who benefit from such programmes are likely to come from the top of the minority or female distribution. Affirmative preference may well shift the social burden from one group to another.[185]

In the *Mandal Commission* case, as outlined in points (iv) and (v) above, the Court tackled this problem in two ways. First, by stipulating the exclusion of the 'creamy layer' or socially advanced amongst these classes, and second, by allowing a sub-division between more and less backward. The majority of the judges deemed this necessary to prevent the advanced sections of the backward classes taking all the benefits of the reservations.

Finally, in the *Mandal Commission* case, as described in point (ii) above, article 16(4) was held not to be an exception to article 16(1) but an independent clause. In *State of Kerala v. N.M. Thomas*,[186] the court held that it was permissible to give preferential treatment to Scheduled Castes and Scheduled Tribes under article 16(1). This moved the constitutional protection for special measures and the reservation of posts for backward classes outside the exception contained in article 16(4), and represented a new interpretation of article 16(1).[187]

Galanter finds that the radical re-conceptualisation of article 16(1) is achieved in *Thomas* at the cost of an unimaginatively narrow reading of what common

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[183] (1997) 5 SCC 201.

[184] See also *Commissioner of Commercial Taxes, Hyderabad v. G. Sethumadhava Rao* AIR 1951 SC 226.

[185] Bossuyt, M. (2002), *Final Report of the Special Rapporteur on Affirmative Action*, UN Doc. E/CN.4/Sub.2/2002/21, paragraphs 11 and 12, and n.7: 'a forced transfer of benefits from those least able to afford it to those least in need of it.'

[186] AIR 1976 SC 490.

[187] Pandey, J., supra n.18, 130. The appeal was decided after the onset of Indira Gandhi's Emergency Rule, and the decision was announced on 19 September 1975, at the end of three months of emergency rule and at the height of optimism that the ruling heralded an 'egalitarian breakthrough'; Galanter, M., supra n.6, 384.

sense would view as the more relevant constitutional provision, article 16(4).[188] The ultimate significance of *Thomas*, he writes, is not the enlargement of state authority to confer preferential treatment. Rather there is the acknowledgement of a Fundamental Right to substantive equality and the possibility of affirmative litigation by disadvantaged groups to force the state to fulfil its responsibilities. Therefore, he argues, the result represents an ironic reversal; instead of conferring power on the state, and loosening judicial restraints, it could allow for the imposition of a new and onerous accountability on the government, mediated through the courts.[189] This would not be in the interests of the Scheduled Castes, Scheduled Tribes and Other Backward Classes, for it would mean that 'compensatory discrimination' would apply, as a Fundamental Right, to all the disadvantaged, instead of applying only to the weaker sections of the population as outlined in *Balaji*.[190] The reservation policy could collapse into a diffuse, largely symbolic, generalised egalitarianism.[191]

Galanter's use of the phrase 'compensatory discrimination' throughout his description of the Indian constitutional reservations system is incorrect in relation to the meaning of 'discrimination' in international law.[192] 'Compensatory discrimination' and 'positive discrimination' are terms that are still used in domestic legal systems, and there is much evidence that in the Indian context, the government continues to describe its constitutional special measures programme as 'positive discrimination'.[193] This is not the case with the Supreme Court of India. It is submitted that the word 'discrimination' should be reserved exclusively for cases of wrongly unequal treatment, and should not be used in the context of a reservations or special measures policy, at either domestic or international level. Bossuyt underlines this point:

> While in the minds of some the concept of 'affirmative action' is also covered by the term 'positive discrimination', it is of the utmost importance to stress that the latter term makes no sense. In accordance with the now general practice of using the term 'discrimination' exclusively to designate 'arbitrary', 'unjust' or 'illegitimate distinctions', the term 'positive discrimination' is a *contradictio in terminis*: either the distinction in question is justified and legitimate, because not arbitrary, and cannot be called

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[188] Ibid., 389.

[189] Ibid., 394.

[190] *Balaji v. State of Mysore,* AIR 1963 SC 649, 651.

[191] Galanter, M., supra n.6, 393–5. He qualifies the comment by stating that this remains just a possible result of the decision.

[192] On this point, see McKean, W. (1970), 'The Meaning of Discrimination in International and Municipal Law', *British Yearbook of International Law* 44, 186.

[193] In its 1996 State Report to the Committee on the Elimination of Racial Discrimination, India described the reservations systems for the Scheduled Castes and Scheduled Tribes as 'measures of positive discrimination'. Periodic Report – India (1996), CERD/C/299/Add.3, para. 6.

'discrimination', or the distinction in question is unjustified or illegitimate, because arbitrary, and should not be labelled 'positive'.[194]

Using the precise meaning of 'discrimination' as an exclusively negative, pejorative, wrongly unequal act, which is the case in international law, would mean that the reservations of article 16(4) would not constitute discrimination, whether labelled positive or not. They would not represent a violation of the equality rule in article 16(1). The point was affirmed in the *Mandal Commission* case, where it was found that article 16(4) is not an exception to article 16(1), but an independent clause.

Conclusion

Nehru once remarked: 'We cannot have equality because in trying to attain equality we come up against some principles of equality.'[195] In this sentence, Nehru captures the conceptual difficulties associated with reservations. The sentiment is nevertheless an erroneous one. Reservations in favour of the Scheduled Castes, Scheduled Tribes and Other Backward Classess are not against principles of equality – they are its vindication. The aim of India's constitutional provisions is equality, as distinguished from equal treatment. Vierdag stresses that equality in this sense means economic, social and cultural equality, rather than the formal equality that is the primary feature of most legal systems.[196] It rests on an understanding of equality as incorporating both equality of treatment and inequality of treatment. It distinguishes between the nature of the treatment and the result of the treatment. The legal technique of using unequal treatment to achieve equality as a result implies favourable treatment for those who are socially, economically or culturally deprived. It also implies unfavourable treatment for those who are not.[197]

Sathe notes that it is clear that in an unequal society, without special measures, there would not be any equality.[198] In *Hariharen Pillai v. State of Kerala,* the High Court described articles 15(4) and 16(4) as giving 'meaning and content to the equality guaranteed by articles 14, 15, 16 and 29'.[199] The Court stated that 'in a country like India, where large sections of the people are backward socially, economically, educationally and politically, these declarations and guarantees

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[194] Bossuyt, M., supra n.185, para. 5.

[195] Nehru, J., Parliamentary Debates, vol. 12–13 (Part 2), Col. 9617, 29 May 1951.

[196] Vierdag, E. (1973), *The Concept of Discrimination in International Law* (The Hague: Martinus Nijhoff), 17–18.

[197] Ibid.

[198] Sathe, S., supra n.150, 95.

[199] *Hariharen Pillai v. State of Kerala* AIR 1968 Ker.42, 47.

would be meaningless unless provision is also made for the uplift of such backward classes who are in no position to compete with the more advanced classes'.[200]

The Supreme Court stated in *Triloki Nath Tiku v. State of Jammu and Kashmir*:

> in order to give a real opportunity to the backward classes to compete with the better placed people … article 16(4) is included in the Constitution. The predominant concept underlying article 16 is equality of opportunity in the matter of employment; and without detriment to said concept, the State is enabled to make reservations in favour of backward classes to give a practical content to the concept of equality.[201]

In the Court's decision in *Viswanath v. Government of Mysore*, Hegde J remarked: 'Advantages secured due to historical reasons cannot be considered as fundamental rights guaranteed by the constitution. The nation's interest will be best served … if the backward classes are helped to march forward and take their places in line with the advanced sections of the people.'[202] Similarly, in *Balaji*, Gajendragadkar J held: 'unless the educational and economic interests of the weaker sections of the people are promoted quickly and liberally, the ideal of establishing social and economic equality will not be attained.'[203]

In general, the judiciary's support for the constitutional reservations policy is tempered with the need to achieve a balance. In *Balaji*, Gajengragadkar J stated: 'The interests of the weaker sections of society … have to be adjusted with the interests of the community as a whole.'[204] At times, members have expressed opposition to reservations. In a dissenting judgment in *Thomas*, Gupta J. warned that article 16(1) 'speaks of equality of opportunity, not opportunity to achieve equality'.[205] The balancing process can be further complicated by the conflict in the Constitution between individual fundamental rights and group rights for the Scheduled Castes, Scheduled Tribes and Other Backward Classes, in the form of reservations. While the Constitution confers Fundamental Rights on individuals, the Scheduled Castes, Scheduled Tribes and Other Backward Classes as groups must be advanced. Therefore reservations involve tension between individuals and groups as objects of state policy.[206]

Overall, the philosophy of the Court is overwhelmingly in favour of reservations as an essential component of equality. The Court's decision in the *Mandal Commission* case illustrates its commitment to enforcing a sophisticated reservations policy in India that seeks out those most in need. The decision in

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[200] Ibid., 48.

[201] *Triloki Nath Tiku v. State of Jammu and Kashmir* A.I.R. [1967] SC 1283, 1285, quoted in Galanter, M., supra n.6, 379.

[202] AIR 1964 Mys. 132, 136.

[203] *Balaji v. State of Mysore*, AIR 1963 SC 649, 661.

[204] Ibid., 663.

[205] *State of Kerala v. N.M. Thomas,* AIR 1976 SC 490, 543.

[206] Galanter, M., supra n.6, 381.

Balaji made the crucial point that special measures are not solely for the purpose of advancing the backward. The claims of the backward classes do not run counter to the interests of the wider public; they are the means of forwarding the public interest in an egalitarian society.[207]

The 1950 Constitution of India bears the indelible imprint of the Chairman of the Drafting Committee, Ambedkar. The reservations therein are the most advanced in the world, and represent the fulfilment of his political movement towards legislative and secular solutions to the problem of caste-based discrimination and untouchability. Like all constitutions, it is a product of its specific historical circumstances, which must be understood in order to appreciate the more particular aspects of its provisions, including reservations. That policy was forged in 1932 in the negotiations that resulted in the Poona Pact, where it was agreed that in order to keep the Untouchables within Hinduism, legislative provision would have to be made for their economic and social uplift. Such provisions were essential in the interests of justice; but they were also part of an agreement between India's caste Hindu majority and its Dalit minority, whereby the latter offered its support to a unified front leading up to Independence in exchange for a promise of fundamental change in its social conditions, enforced by law, in the newly independent nation. Ambedkar, following the failed negotiations on the Hindu Code Bill in 1951, felt that this agreement had been breached, and resigned from his position in the Cabinet. He subsequently led his followers into Buddhism. The Hindu Code Bill differed from the Constitution in that it was an attack on the caste system itself, rather than its corollary, untouchability.[208] The fact that the Constitution did not condemn the structure of caste, but only caste-based discrimination, meant that practices relating to untouchability, pollution and degradation continued, and appear to continue today. Dalits have turned to the international community to provide assistance in combating the debilitating effects of caste, through the mechanism of international human rights law.

Reservations have contributed enormously to the uplift of the Scheduled Castes, Scheduled Tribes and Other Backward Classes; but reform of the caste system must continue, and must be addressed at a more fundamental level than its discriminatory effects. The chapter has sought to present the debates that underpin the 1950 Constitution, and in so doing, has highlighted dissenting voices which have pointed out that untouchability is but a symptom of caste; that reservations do not tackle the caste system itself; and that the root of inequality in India is the caste system, which was not abolished in 1950.

The need to enhance protection against caste-based discrimination, beyond the constitutional provisions, led the United Nations treaty-based and charter-based bodies to explore caste-based discrimination in contemporary Indian society.

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[207] *Balaji v. State of Mysore*, AIR 1963 SC 649, 662.

[208] According to Rodrigues: 'The Bill was an attempt to effectively transform the hierarchical relations embodied in the Hindu family and the caste system'; Rodrigues, V., supra n.109, Introduction, 15.

Human rights law has developed a body of measures designed to eradicate caste, which are examined in Chapters 5 and 6. This movement is subsumed within the greater fight against racial discrimination, caste being unequivocally perceived as a form of racial discrimination within the United Nations. The primary vehicle for eradicating all forms of racial discrimination, including caste, the International Convention on the Elimination of All Forms of Racial Discrimination 1965, is the subject of the following chapter.

Chapter 4

The United Nations and the Elimination of Racial Discrimination

Introduction

The approach taken by the United Nations on the nature and meaning of 'race' can be traced to four documents broadly outlining the views of sociologists, physical anthropologists, geneticists and biologists: the United Nations Educational Scientific and Cultural Organisation's (UNESCO) Four Statements on the Race Question.[1] The four documents are studied in the first section of this chapter. From the first in 1950 to the fourth in 1967, they reflect divergent views on the meaning of race, and the difficulty in gaining consensus on the parameters of race given the concept's ability to straddle several disciplines. The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), adopted for signature on 21 December 1965,[2] makes no mention of the UNESCO statements. Its preamble draws attention to the Convention against Discrimination in Education adopted by UNESCO in 1960, but no reference is given to any of the conclusions of the 'experts on race' assembled by UNESCO in Paris and Moscow, despite the latter being contemporaneous to the drafting of the Convention.

The influence of the four statements on the development of the ICERD is implicitly found in the text of the preamble to the Convention. The UN Declaration on the Elimination of All Forms of Racial Discrimination, adopted in November 1963,[3] and the ICERD, adopted in December 1965, made no attempt to examine the meaning of 'race' in scientific or biological terms, focusing only on discrimination as the consequence of racial prejudice.

The difficulties in reaching consensus on the issue of race in the UNESCO documents can be seen in the differing positions found in the respective preambles to the 1963 Declaration and 1965 Convention. The first underlines the signatories' condemnation of doctrines of racial differentiation or superiority; the second

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[1] UNESCO (1969), *Four Statements on the Race Question*, Com.69/II.27/A (Paris: UNESCO). The four statements were prepared by groups of experts brought together by UNESCO in 1950, 1951, 1964 and 1967, as part of its programme to make known the scientific facts of race and to combat racial prejudice.

[2] 660 U.N.T.S. 195, General Assembly Resolution 2106 A (XX); entered into force on 4 January 1969 in accordance with its article 19.

[3] Y.U.N. 1964, 346, General Assembly Resolution 1904 (XVIII).

condemns only doctrines of racial superiority, effectively denying the belief expressed in the Declaration that race does not exist in the scientific or biological sense. Similarly, UNESCO's first Statement on Race 1950 denied that there was any such concept as race in the biological sense, while the second Statement on the Nature of Race and Race Differences 1951 reversed this position. This chapter will examine the preparatory debates to the adoption of the ICERD in the Sub-Commission on the Prevention of Discrimination and Protection of Minorities,[4] the Commission on Human Rights,[5] and the Third Committee of the General Assembly,[6] which reveal the impetus behind the changed wording in the Convention's preamble, and reflect the problems experienced by UNESCO in reaching consensus on the biological meaning of race.

The ICERD was the first major piece of international legislation in the drafting of which the newly independent states participated and played a leading and decisive role.[7] The Convention is binding on over 170 states,[8] representing about 85 percent of the world's population.[9] The Committee on the Elimination of Racial Discrimination, established by article 8 of the Convention, was the first international treaty-monitoring body of its kind. Not a single dissenting vote was registered to the provisions of these articles at the time of drafting.[10] As observed

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[4] Report of the 16th session of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities (13–31 January 1964), UN Doc. E/CN.4/873.

[5] Report of the 20th Session of the Commission on Human Rights (17 February – 18 March 1964), Economic and Social Council Official Records, UN Doc. E/3873.

[6] Report of the 20th session of the Third Committee of the General Assembly of the United Nations (11 October–15 December 1965), Agenda Item 58, UN Doc. A/6181. The General Assembly, at its 1336th meeting on 24 September 1965, allocated to the Third Committee the item on the Convention. The Third Committee devoted 43 meetings to it. The report of the Third Committee was submitted to the General Assembly on 21 December 1965. One amendment to the report, proposed by a large group of African and Asian countries, was accepted – the inclusion of a clause on reservations (UN Doc. A/L.479). An amendment to article 4 proposed by five Latin American countries was rejected.

[7] Schwelb, E. (1966), 'The International Convention on the Elimination of All Forms of Racial Discrimination', *International and Comparative Law Quarterly* 15, 1057.

[8] Table of Ratifications, Office of the United Nations High Commissioner for Human Rights, available at <www.unhchr.ch>.

[9] Partsch, K. (1992), 'The Committee on the Elimination of Racial Discrimination', in Alston, P. (ed.), *The United Nations and Human Rights: A Critical Appraisal* (Oxford: Oxford University Press), 364. CERD was the most widely ratified of the core international human rights treaties until ratification of the Convention on the Rights of the Child in 1993.

[10] Schwelb, E., supra n.7, 1058. Schwelb points out that the articles governing the establishment and functions of the Committee were also approved by the Soviet Union and its allies, which had maintained for two decades that machinery of this kind infringed national sovereignty and was contrary to the UN Charter.

by the French delegate at the conclusion of the drafting process, no convention of equal scope or significance had ever been adopted before.[11] The impetus for the Convention came from the desire of the United Nations, backed by strong political support from African, Asian and other developing states, to put an immediate end to discrimination against black and other non-white persons.[12] In particular, the Convention was viewed as an international statement against apartheid and colonialism.[13] At the end of the twentieth session of the General Assembly in 1965, the representative of Ghana, the first former British colony in Africa to achieve independence, would comment that 'this was its finest hour'.[14]

The wording of the ICERD and the rationale revealed by the preparatory *travaux* for its definitional and substantive provisions will be examined in detail in the second section of this chapter. The Convention has been described as representing 'the most comprehensive and unambiguous codification in treaty form of the idea of the equality of races'.[15] This idea has permeated the law-making and standard-setting of the United Nations since its inception.[16] The Committee on the Elimination of Racial Discrimination would describe the Convention at the first World Conference to Combat Racism and Racial Discrimination, held in Geneva in 1978, as: 'the international community's only tool for combating racial discrimination which is at one and the same time universal in reach, comprehensive in scope, legally binding in character, and equipped with built-in measures of implementation.'[17]

The role played by racial theories in the nineteenth and twentieth centuries, from colonisation to genocide in World War II, ensured international consensus

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[11] UN Doc. A/C.3/SR.1345 (France).

[12] See Boyle, K. and Baldaccini A. (2001), 'International Human Rights Approaches to Racism', in Fredman, S. (ed.) *Discrimination and Human Rights* (Oxford: Oxford University Press (Academy of European Law)), 153.

[13] Farrior, S. (1999), 'The Neglected Pillar: The "Teaching Tolerance" Provision of the International Convention on the Elimination of All Forms of Racial Discrimination', *International Law Students Association Journal of International and Comparative Law* 5, 291.

[14] UN Doc. A/PV.1406, quoted in Schwelb, E., supra n.7, 1003.

[15] Ibid., 1057.

[16] The idea would find particularly strong expression in the International Convention on the Suppression and Punishment of the Crime of '*Apartheid*', 30 November 1973, 13 I.L.M. 50. In its article 1(1), the Convention declared policies and practices of racial segregation and discrimination, as defined in article 2, to be not simply a violation of human rights, but also a crime against humanity and a violation of principles of international law, in particular the purposes and principles of the Charter of the United Nations. Such policies, article 1(1) reads, constitute a serious threat to international peace and security.

[17] Statement by the Committee on the Elimination of Racial Discrimination at the 1978 World Conference to Combat Racism and Racial Discrimination, 33 UN GAOR Supp. (No. 18) at 108, 109, UN Doc. A/33/18. Quoted in Meron, T. (1985), 'The Meaning and Reach of the International Convention on the Elimination of All Forms of Racist Discrimination', *American Journal of International Law* 79, 283.

for a treaty whose overarching aim, the elimination of all forms of racial discrimination, was urgently required. Yet the near-universal support for its provisions belies certain flaws in its drafting, which Meron describes:

> Several crucial provisions of the Convention suffer from deficient drafting. Some of these deficiencies result from the fact that the definition of racial discrimination was not adjusted to the operative provisions after the latter were drafted. The speed with which the Convention was considered and adopted, the robustness of the political forces that pushed its formulation and adoption, and perhaps a certain impatience with the niceties of legal drafting are among the factors that underlie some of the problems.[18]

There is significant tension between the understanding of racial discrimination put forward in the Convention's definition and the broader goal of social and economic equality implied in particular in its article 5. Commentators have argued that the rights which article 5 enumerates must be fully respected, but the prevailing opinion, supported by the pronouncements of the Committee, is that the provision serves only to prohibit racial discrimination with regard to their enjoyment.[19]

The role of the Committee will be scrutinised in Section 3, from the original functions it was assigned by the Convention's provisions, to the evolving jurisprudence stemming from its concluding observations, general recommendations and caselaw under the article 14 individual communications procedure. Attention will be drawn to the recent movement toward group rights, and in the thematic discussions that have taken place on the protection of Roma, descent-based groups and non-citizens, all of which resulted in the issuing of a general recommendation in support of the extension of the Convention's provisions to groups as well as individuals, in the context of the elimination of racial discrimination.

Four Statements on the Race Question

At the conference for the establishment of UNESCO immediately following the end of World War II, the diplomats included in the preamble of the new organisation's constitution the belief that:

> The great and terrible war which has now ended was a war made possible by the denial of democratic principles of the dignity, equality and mutual respect for men, and by the propagation, in their place, through ignorance and prejudice, of the doctrine of the inequality of men and races.[20]

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[18] Ibid., 309 and 291.

[19] Boyle, K. and Baldaccini, A., supra n.12, 153.

[20] UNESCO, Conference for the Establishment of the United Nations Educational, Scientific and Cultural Organisation, ECO/CONF./29, 16 November 1945, 93, quoted in Lauren, P. (1983), 'First Principles of Racial Equality: History and Diplomacy of Human Rights Provisions in the United Nations Charter', *Human Rights Quarterly* 5, 1.

In 1948, ECOSOC requested that UNESCO develop a programme to disseminate scientific facts that would counter commonly held racial prejudices.[21] UNESCO's Four Statements on the Race Question[22] hold a particular position in the development of the international community's response to racism and racial discrimination as the first documents released by the United Nations dealing solely with the concept of race. All four begin by stating the monogenist viewpoint that all men belong to the same species, *Homo sapiens*, and are derived from a common stock. They also all express an egalitarian philosophy, rejecting the view that human groups differ in their innate mental characteristics. However, the first Statement on Race 1950 was attributed to sociologists (although it had as its rapporteur and principal drafter the anthropologist Ashley Montagu), and the second Statement on the Nature of Race and Race Differences 1951, while recognising the 'good effect' of the first Statement, held that the first discussion: 'did not carry the authority of just those groups within whose special province fall the biological problems of race, namely the physical anthropologists and geneticists … [and] was not supported by many authorities in these two fields.'[23]

The third statement, Proposals on the Biological Aspects of Race 1964, was intended to bring up to date and complete the Statement on the Nature of Race and Race Differences 1951, and in particular to formulate the biological part of a statement foreseen for 1966.[24] The Statement on Race and Racial Prejudice duly appeared in 1967, with its emphasis on 'racism', a key concept introduced by the biologists into the 1964 Proposals.

Despite their clear similarities, the four statements are divided documents that reflect the disciplines and beliefs of their authors. In this sense, they mirror the development of the concept of 'race' over three centuries, detailed in Chapter 2, and the confused understanding of the term that results from the fact that it holds different meanings both between sociologists, physical anthropologists, geneticists and biologists, and within each of these disciplines. The United Nations would frame its 'race Convention' in terms of the established legal concept of discrimination,[25] and the tenets of the four statements – even those features common to all – would remain outside the Convention.

The first Statement on Race 1950 affirms that mankind is one, but that differences exist due to the operation of evolutionary factors.[26] 'From the biological standpoint', it reads, 'the species *Homo sapiens* is made up of a number

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[21] ECOSOC Res.116 (VI) B(iii).

[22] UNESCO, supra n.1.

[23] Ibid., Statement on the Nature of Race and Race Differences (Paris, 1951). According to Dunn, L. (rapporteur): 'it was chiefly sociologists who gave their opinions and framed the "Statement on Race".'

[24] Ibid., Proposals on the Biological Aspects of Race (Moscow, 1964), Introduction.

[25] On the concept of discrimination in international law, see Vierdag, E. (1973), *The Concept of Discrimination in International Law* (The Hague: Martinus Nijhoff).

[26] UNESCO, supra n.1, Statement on Race (Paris, 1950), para. 1.

of populations, each one of which differs from the others in the frequency of one or more genes'.[27] Therefore a race, from a biological standpoint, is defined as 'one of the group of populations constituting the species *Homo sapiens*' – to most people, however, 'a race is any group of people whom they choose to describe as a race'.[28] The document argues that: 'Because serious errors of this kind are habitually committed when the term "race" is used in popular parlance, it would be better when speaking of human races to drop the term "race" altogether and speak of ethnic groups.'[29]

The proposition to substitute 'ethnic group' for 'race' bears the imprint of the Statement's rapporteur, Ashley Montagu, as does the description contained in paragraph 7 on the groups of mankind:

> Human races can be and have been differently classified by different anthropologists, but at the present time most anthropologists agree on classifying the greater part of the present-day mankind into three major divisions as follows; (a) the Mongoloid division; (b) the Negroid division; and (c) the Caucasoid division.[30]

Finally, the Statement notes that 'the biological fact of race and the myth of race should be distinguished. For all practical social purposes race is not so much a biological phenomenon as a social myth'.[31]

The second Statement on the Nature of Race and Race Differences 1951, while careful to point out that 'the chief conclusions of the first statement were sustained', disagreed with its fundamental proposition that race was a social myth, lacking in any biological foundation.[32] The introductory passage describes how the drafters were 'careful to avoid dogmatic definitions of race' and 'equally careful to avoid saying that, because races were all variable and many of them graded into each other, therefore races did not exist'.[33] The justification for the avoidance of such a position was that:

> The physical anthropologists and the man in the street both know that races exist; the former, from the scientifically recognizable and measurable congeries of traits which he uses in classifying the varieties of man; the latter from the immediate evidence of his senses when he sees an African, a European, an Asiatic and an American Indian together.[34]

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[27] Ibid., para. 2.
[28] Ibid., paras 4 and 5.
[29] Ibid., para. 6.
[30] Ibid., para. 7.
[31] Ibid., para. 14.
[32] Ibid., Statement on the Nature of Race and Race Differences (Paris, 1951), Introduction. Ashley Montagu is also listed as being among the drafters of this text, but the rapporteur was L.C. Dunn, a zoologist.
[33] Ibid., Introduction.
[34] Ibid.

What emerges in the two documents is the old divide in physical anthropology between 'splitters' and 'lumpers',[35] coupled with attempts at classification that have marked the discipline since Johann Blumenbach proposed his five varieties – the first Statement recognising three, the second, enumerating at least four in the quote above, and later in the text pointing to 'at least three large units which may be called major groups (in French *grand-races*)'.[36] The drafters of the second Statement 'agreed to reserve race as the word to be used for anthropological classification of groups' and 'a classificatory device providing a zoological frame within which the various groups of mankind may be arranged and by means of which studies of evolutionary processes can be facilitated'.[37]

While the first statement sought to define race 'from a biological standpoint' and the second concerned itself with 'the biological problems of race',[38] they were both written mainly by physical anthropologists and zoologists, and it was not until 1964 that UNESCO assembled a group of biologists in Moscow to establish the nature of race from their point of view. The Proposals on the Biological Aspects of Race 1964 held that 'nearly all classifications recognize at least three major stocks', however: 'these classifications, whatever they are, cannot claim to classify mankind into clearcut categories; moreover, on account of the complexities of human history, it is difficult to determine the place of certain groups within these racial classifications.'[39]

The Proposals pointed to 'many anthropologists, [who] while stressing the importance of human variation, believe that the scientific interest of these classifications is limited'.[40] The document found that biological differences between human beings are due to differences in hereditary constitution and to the influence of the environment on genetic potential, but general adaptability to the most diverse environments is in man more pronounced than his adaptation to specific environments. The biological data given in the Proposals,

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[35] An editorial that appeared in October 1950 in the anthropological journal *Man* noted in relation to the first Statement: 'its main thesis – that there is no biological foundation for racial prejudices – is essentially a statement in physical anthropology.' The editorial also describes how a number of its readers had drafted a letter to *The Times* newspaper, sent on 24 July 1950, expressing the authors' views on the controversial character of some of the Statement, including 'the too simplified statement that "race is less a biological phenomenon than a social myth" … and the concluding statement that man is born with biological drives towards universal brotherhood and co-operation, to which surely very few anthropologists anywhere would yet venture to commit themselves'; Editorial (1950), 'UNESCO on Race', *Man* 50, 138.

[36] UNESCO, supra n.1, Statement on the Nature of Race and Race Differences (Paris, 1951), para. 4.

[37] Ibid., Introduction and para. 1.

[38] Ibid., Statement on Race (Paris, 1950), para. 1 and Statement on the Nature of Race and Race Differences (Paris, 1951), Introduction.

[39] Ibid., Proposals on the Biological Aspects of Race (Moscow, 1964), para. 5.

[40] Ibid.

> stand in open contradiction to the tenets of racism. Racist theories can in no way pretend to have any foundation and the anthropologists should endeavour to prevent the results of their researches from being used in such a biased way that they would serve non-scientific ends.[41]

The introduction of the word 'racism' by the biologists shifted the tone of the statements, and became the central concern of the final Statement on Race and Racial Prejudice 1967. 'Racism continues to haunt the world', it noted, and in terms of its effect: 'Racism stultifies the development of those who suffer from it, perverts those who apply it, divides nations within themselves, aggravates international conflict and threatens world peace.'[42]

It further held that:

> The division of the human species into 'races' is partly conventional and partly arbitrary … Many anthropologists stress the importance of human variation, but believe that 'racial' divisions have limited scientific interest and may even carry the risk of inviting abusive generalization.[43]

It states in paragraph 4 that 'human problems arising from so-called "race" relations are social in origin rather than biological'. This can be compared with the 1964 Proposals, which had read: 'the concept of race is purely biological'.[44] The Statement is making the clear distinction between race and race relations – the former being a biological concept, the latter social. This was necessary for the wording of the 1964 Proposals was somewhat imperfect, in that from an overall reading its drafters clearly did not endorse the concept of race, and strongly rejected the anthropological classifications enumerated in the preceding statements of the previous decade – stating only that humans vary, and this has a biological foundation. Perhaps a better wording would have been to state that the concept of *what is known as* race is purely biological.

The 1967 Statement highlights discrimination, and paragraph 11(c) notes: 'Discrimination deprives a group of equal treatment and presents that group as a problem. The group then tends to be blamed for its own condition, leading to further elaboration of racist theory.'[45] Corrective measures (affirmative action) are proposed, and in paragraph 17 it states: 'Law is among the most important means of ensuring equality between individuals and one of the most effective means of fighting racism.'

Viewing the statements as two pairs, there is a clear divide between the first set and second set of statements, in terms of the time period between them, the disciplines of the authors, the context of their drafting, and the theme of their

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41 Ibid., para. 13.
42 Ibid., Statement on Race and Racial Prejudice (Paris, 1967), paras 1 and 2.
43 Ibid., para. 3(b).
44 Ibid., Proposals on the Biological Aspects of Race (Moscow, 1964), para. 12.
45 Ibid., Statement on Race and Racial Prejudice (Paris, 1967), para. 11(c).

contents. The second set, written by biologists in a period when the *Apartheid* regime in South Africa was of primary concern to the international community, and against the backdrop of the drafting and adoption of the ICERD, rejected the taxonomic divisions of the physical anthropologists who had drafted the first set, and framed the authors' belief in a biological explanation of individual human variety that was outside the classificatory meaning of the word 'race', as applied to groups. In addition, the second set of statements signalled the concept of racism, and linked it to that of law, which the UN General Assembly had recognised as the best tool to combat racism as expressed through racially discriminatory laws.

The 1967 Statement on Race and Racial Prejudice formed the basis of the resulting UNESCO Declaration on Race and Racial Prejudice of 1978.[46] The document was widely supported, being adopted unanimously by acclamation. It is considered to have become part of the international law of human rights, being a comprehensive international instrument that deals with the protection of cultural and group identity and the value of diversity.[47] In article 1 of the Declaration, it is stated that all individuals and groups have the right to be different, to consider themselves as different and to be regarded as such. The right to be different should not, however, serve as a pretext for racial prejudice, nor justify discriminatory practices, nor provide a ground for the policy of *apartheid*. Article 9, paragraph 2, requires that:

> particular attention should be paid to racial or ethnic groups which are socially or economically disadvantaged, so as to afford them, on a completely equal footing and without discrimination or restriction, the protection of the laws and regulations and the advantages of the social measures in force, in particular in regard to housing, employment and health and to facilitate their social and occupational advancement, especially through education.[48]

In this regard, the Declaration focuses on the social and economic aspects of racial discrimination. This focus had been stressed by some delegates in the course of the debates on the draft ICERD. Banton points out that in later debates within the General Assembly over the adoption of the ICERD, the representative of the USSR presented 'the most comprehensive and coherent conception' of the nature of racial discrimination, noting in a statement to the General Assembly that 'so long as the economic and social conditions that give rise to racism persisted in certain states, manifestations of racial discrimination were only to

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[46] UNESCO, Declaration on Race and Racial Prejudice, 27 November 1978.

[47] Bossuyt, M. (2002), *Final Report of the Special Rapporteur on Affirmative Action*, UN Doc. E/CN.4/Sub.2/2002/21, para. 62.

[48] The provision requires that: 'Special measures must be taken to ensure equality in dignity and rights for individuals and groups wherever necessary.'

be expected'.[49] The treaty, and debates preceding its adoption, are the focus of the following section.

The International Convention on the Elimination of All Forms of Racial Discrimination

The movement toward international legislation against racial and religious discrimination began as a response to a growing number of anti-Semitic incidents that took place in the winter of 1959 and 1960, known as the 'swastika epidemic',[50] and gained momentum through the support of developing countries.[51] In the course of the debates in the Third Committee of the General Assembly on these 'manifestations of racial prejudice and religious intolerance', a convention on the elimination of racial discrimination was proposed,[52] which received widespread support.[53] The issues of racial and religious discrimination were split, however,

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[49] Banton, M. (1996), *International Action against Racial Discrimination* (Oxford: Oxford University Press), 58.

[50] The Sub-Commission unanimously adopted a resolution in the wake of the 'swastika epidemic', which held: 'Deeply concerned by the manifestations of anti-Semitism and other forms of racial and national hatred and religious and racial prejudices of a similar nature, which have occurred in various countries, reminiscent of the crimes and outrages committed by Nazis prior to and during World War II … Condemns these manifestations as violations of principles embodied in the Charter of the United Nations and in the Universal Declaration of Human Rights'; UN Doc. E/CN.4/Sub.2/206. The Resolution also requested the Secretary-General to obtain information and comments on these manifestations from States Members of the UN. In their responses, many States drew attention to the outbreak of graffiti and desecration of Jewish cemeteries that had spontaneously erupted in December 1959 and January 1960 – no evidence of coordination behind these manifestations ever emerged. The countries affected included Austria, Belgium, Brazil, Canada, Costa Rica, Denmark, Ireland, Italy, New Zealand, Norway, Spain, Sweden, the United Kingdom, the United States and in particular Germany, which resulted in the Federal Government of Germany issuing a White Paper on 17 February 1960 on manifestations of anti-Semitism, annexed to the Secretary General's Report. For a description of the 'swastika epidemic', see Ehrlich, H. (1962), 'The Swastika Epidemic of 1959–1960: Anti-Semitism and Community Characteristics', *Social Problems* 9:3, 264–72.

[51] Lerner, N. (1991), *Group Rights and Discrimination in International Law* (Dordrecht: Martinus Nijhoff), 46.

[52] UN Doc. A/C.3/L.1006/Rev.1.

[53] Leflerova (Czechoslovakia) stated that her delegation was prepared to support and co-sponsor the draft resolution calling for the preparation of a draft convention, and outlined the form such a document should take: 'Such a convention should include a definition of racial hatred and discrimination that included all forms of preaching racial superiority or incitement to racial hatred; an obligation on the contracting states to prevent, within their territories, any manifestation of hatred based on race or colour;

resulting in the Third Committee issuing two separate Resolutions, 1780 (XVII) and 1781 (XVII),[54] calling for the preparation of draft declarations and conventions dealing separately with racial discrimination and religious intolerance.[55]

The decision to separate religious intolerance from racial discrimination was largely the result of Arab opposition to coverage of religious discrimination. They felt that an inclusion of a reference to anti-Semitism could be read as recognition of the state of Israel.[56] In addition, Soviet and Eastern European countries viewed racial discrimination as being significantly more important than religious discrimination.[57] With the decision to separate the instruments, it was understood that the draft declaration and convention on racial discrimination would receive priority.

Rousseau (Mali) introduced on behalf of several sponsors a draft resolution on the preparation of a declaration and a covenant on the elimination of religious discrimination,[58] on the grounds that her delegation objected to the inclusion of the question of religious intolerance in any convention on racial discrimination.[59] Maamouri (Tunisia) echoed this stance:

> the most important matter before the Committee had been the question of eliminating racial discrimination, which affected a large part of mankind. He therefore welcomed the fact that the questions of racial discrimination and religious intolerance had now been made the subject of separate draft resolutions … he hoped that priority would be given to the preparation of the draft declaration and convention on the elimination of racial discrimination.[60]

The 1963 Declaration on the Elimination of All Forms of Racial Discrimination, which contained 11 articles (but, due to its declaratory nature, no

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an obligation on the contracting States to make the incitement or manifestation of racial hatred a criminal offence; and an obligation on the contracting States to carry out, within a specified time limit, all the legislative, administrative and other measures required for the implementation of the convention'; UN Doc. A/C.3/SR.1165.

[54] 'Preparation of a draft declaration and a draft convention on the elimination of all forms of racial discrimination'; UN Doc. A/5217, General Assembly resolution 1780 (XVII), 7 December 1962.

[55] On the history of the draft religion convention, and the ultimate failure to enact a binding treaty in the area of religious intolerance, see Keane, D. (2006), 'Addressing the Aggravated Meeting Points of Race and Religion', *Maryland Law Journal of Race, Religion, Gender and Class*, section 2 – 'The Death of the Religion Convention'.

[56] Lerner, N. (1970), *The UN Convention on the Elimination of All Forms of Racial Discrimination: A Commentary* (Leyden: A.W. Sijthoff), 82.

[57] Schwelb, E., supra n.7, 999.

[58] UN Doc. A/C.3/L.1016.

[59] UN Doc. A/C.3/SR.1173. The resolution, as amended verbally, was adopted unanimously.

[60] UN Doc. A/C.3/SR.1173.

definition of 'racial discrimination'), was proclaimed on 20 November 1963.[61] It was followed by the preparation of a Convention of ten articles and a preamble by the Sub-Commission on the Prevention of Discrimination and Protection of Minorities in January 1964,[62] submitted to the Commission on Human Rights, who adopted the substantive articles and dealt with additional documentation. This was in turn submitted to the General Assembly in the form of Resolution 1015B by the Economic and Social Council in July 1964, along with a draft article on implementation and the text of an additional article on anti-Semitism proposed by the US in the Commission on Human Rights, and shadowed by a sub-amendment submitted by the USSR.[63]

The US representative in the Commission had initially proposed attaching a prohibition of anti-Semitism to article 3, which condemns racial segregation and apartheid. The proposal was subsequently changed to the form of a separate article, whereby states parties would 'condemn anti-Semitism and … take action as appropriate for its speedy eradication in the territories subject to their jurisdiction'.[64] The representative argued that the Convention would be incomplete if it failed to take cognisance of a planned programme of annihilation which had wiped out a third of the Jews in the world.[65]

The sub-amendment from the USSR to the Commission read that states parties would condemn 'Nazism, including all its new manifestations (neo-Nazism), genocide, anti-Semitism, as also other forms of racial discrimination'.[66] Introducing the proposal, the Soviet representative stated:

> all the members of the Commission agreed that anti-Semitism, in all its manifestations, past and present, was a repugnant form of racial discrimination … anti-Semitism was only one of the manifestations of racial discrimination and of the causes of genocide committed by the Nazis. A separate article on anti-Semitism would, of course, be merely an elaboration of the definition in article 1.[67]

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[61] Y.U.N (1964), 346, General Assembly Resolution 1904 (XVIII), 20 November 1963. The Declaration was adopted in the Third Committee by 89 votes to 0, with 17 abstentions, which were all the result of objections on the basis of the Declaration's conflict with the right to freedom of expression. The position of the abstaining states is reflected in the statement by Shields (Ireland) at the drafting stage, who 'regretted that article 9 of the draft Declaration had been amended in such a way as to interfere with the freedoms of expression and association and thus make it impossible for him to support the draft Declaration as a whole. He did not believe that one human right should be safeguarded at the expense of others … Despite his inability to vote for the document, he fully recognised its great moral influence and value'. UN Doc. A/C.3/SR.1245.

[62] UN Doc. E/CN.4/873.

[63] Lerner, N., supra n.56, 78.

[64] UN Doc. E/CN.4/L.701.

[65] UN Doc. E/CN.4/SR.807.

[66] UN Doc. E/CN.4/L.710.

[67] UN Doc. E/CN.4/SR.807.

While there was support within the Commission for the United States amendment, there was a preference for the new article 'to contain a reasonable number of examples of discrimination to its singling out of anti-Semitism only'.[68] Rather than attempt a draft article, the US proposal and USSR amendment were passed to the General Assembly for consideration by its Third Committee in the 1965 session.[69]

In the Third Committee, the atmosphere changed significantly from that of the Commission, which had been close to reaching a broad consensus on the US and USSR proposals regarding anti-Semitism and Nazism. The Arab delegations in particular were dissatisfied with the specific reference to anti-Semitism. Baroody (Saudi Arabia) 'objected … to the Brazilian and US amendment which would condemn anti-Semitism'.[70] The Hungarian representative, Beck, put forward the erroneous belief that anti-Semitism should not be regarded as a form of racial discrimination.[71] The main shift came in the position of the Soviet Union which moved another amendment to the US-Brazilian proposal, considerably different to the text they had proposed in the Commission. The new Soviet amendment, articulated by Chkhikvadze, equated Zionism and colonialism with anti-Semitism, Nazism and neo-Nazism,[72] causing the Israeli representative to describe it as tantamount to substituting the victims for the perpetrators.[73]

Irrespective of the furore created by the Soviet amendment, the proposed article on anti-Semitism had not enjoyed broad support in the Third Committee. Delegates expressed the view that the Convention should be a timeless one, applicable without any qualification to every kind of racial discrimination.[74] Most believed that to single out certain forms of racial discrimination to the exclusion of others would be inappropriate.[75] The representative of Ghana noted that 'all forms of racial discrimination' would cover anti-Semitism and Nazism,[76] and

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[68] UN Doc. E/CN.4/SR.808 (Lebanon).

[69] UN Doc. A/C.3/L.1211. In the Third Committee, Brazil joined the United States in proposing the draft article.

[70] UN Doc. A/C.3/SR.1300.

[71] UN Doc. A/C.3/SR.1301: 'as Judaism was primarily a religion, it would be more appropriate to refer to anti-Semitism in the context of the discussion of religious intolerance.'

[72] UN Doc. A/C.3/SR.1302: 'Nazism and fascism were quite as dangerous as apartheid, and Zionism as anti-Semitism … Either the draft Convention must confine itself to a general prohibition and condemnation of all forms and manifestations of racial discrimination, or it must enumerate the various forms.'

[73] UN Doc. A/C.3/SR.1302.

[74] UN Doc. A/C.3/SR.1313.

[75] UN Doc. A/C.3/SR.1311, as expressed by Kirwan (Ireland). Combal (France) 'considered it unfortunate that a general text like the one drawn up by the Commission on Human Rights should be complicated by the mention of particular forms of racial discrimination'.

[76] UN Doc. A/C.3/SR.1313.

there was a general consensus that, as expressed by the United Kingdom delegate Gaitskell, anti-Semitism was 'a particularly virulent and persistent form of racial discrimination'.[77]

A proposal by Greece and Hungary in the Third Committee not to include any reference to specific forms of racial discrimination in the draft Convention was approved by a large majority in a roll-call vote,[78] and the proposed article on anti-Semitism was excluded.[79] On 21 December 1965, the Convention was adopted in the General Assembly in plenary session by 106 votes to none, with only Mexico abstaining.[80] Mexico abstained from voting on the draft Convention as a whole because it objected to the reservations clause,[81] but it subsequently announced that it was giving its affirmative vote to the Convention.[82]

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[77] UN Doc. A/C.3/SR.1313. Two years later, UNESCO would mention anti-Semitism as an example of racism in its Statement on Race and Racial Prejudice 1967.

[78] UN Doc. A/C.3/SR.1312–82 votes to 12, with 10 abstentions. Lerner notes that 'as a result of the vote, the following amendments could not be considered: The Brazil-USA amendment condemning anti-Semitism; the Soviet sub-amendment condemning not only anti-Semitism but also Zionism, Nazism and neo-Nazism; the Bolivian sub-amendment deleting the word 'Zionism' from the Russian amendment, and Polish and Czech amendments, specifying Nazism and facism'. He describes the result of 'the obvious purely political Soviet manoeuvre' that equated Zionism with Nazism as creating a situation in which 'a big majority vote prevented the incorporation of the article on anti-Semitism'; Lerner, N., supra n.56, 82.

[79] The Commission on Human Rights decided to include in the draft Convention on the Elimination of All Forms of Religious Intolerance, an express reference to anti-Semitism in its article V: 'prejudices, as, for example, anti-Semitism and other manifestations which lead to religious intolerance and to discrimination on the ground of religion or belief.' Commission on Human Rights, Report on the 22nd Session, UN Doc. E/4184. The Third Committee, in its 1967 meeting, decided against such a reference.

[80] UN Doc. A/PV.1406, General Assembly Resolution 2106 A (XX).

[81] UN Doc. A/PV.1406. Lamptey (Ghana) introduced an amendment (A/L.479) in the plenary session of the General Assembly 'because, to many delegates gathered here, the absence of a reservations clause from the draft Convention is a major flaw that could conceivably nullify the effect of the Convention *ab initio*'. To which Cabrera (Mexico) stated: 'my delegation feels obliged to vote against this amendment; and if it is adopted, we shall have to abstain from voting on the draft Convention as a whole.' The first paragraph of the amendment was adopted by 62 votes to 18, with 27 abstentions, and the second, which rules a reservation incompatible with the Convention if two-thirds of states parties object to it, was passed by 73 votes to 13, with 15 abstentions.

[82] UN Doc. A/PV.1406. 'The Mexican delegation subsequently informed the Secretariat that it would like Mexico to be included in the list of delegations voting in favour of draft resolution A'. That Mexico's objection to the reservations clause was strong enough to cause it to withhold giving its affirmative vote to the entire treaty is an indication of the perceived negative impact such a clause could have had on the effective implementation of the Convention. Of the international treaties contemporary to the ICERD, Lerner notes that no clause on reservations is contained in the Covenants on Human Rights adopted in 1966, nor was there one in the ILO Convention on Discrimination in Respect

The ICERD is divided into a preamble and three parts. Part I sets out the definition of racial discrimination in article 1, including a clause on the compatibility of affirmative action measures with the definition set forth, and the non-applicability of the Convention to states' laws on citizenship. It also provides the substantive fundamental obligations of states parties to the Convention in articles 2 to 7. Part II details the monitoring mechanisms of the Convention. The Committee on the Elimination of Racial Discrimination is established under article 8, and the procedure of periodic state reports to the Committee under article 9. Inter-state complaints can be received under article 11.[83] States may make a declaration under article 14 recognising the competence of the Committee to receive and consider communications from individuals or groups of individuals claiming to be victims of a violation by that state party of the rights set forth in the Convention.

Part III deals with the rules of accession and ratification, but also contains a strict provision on reservations which, *inter alia*, considers reservations incompatible with the Convention if two-thirds of the states parties to the Convention object. The controversial nature of the reservations clause has already been indicated in relation to the Mexican abstention from the final vote on the draft Convention.

The Third Committee had decided not to include a reservations clause in the draft Convention,[84] but this was reversed by the General Assembly in plenary meeting when it adopted an amendment moved by a number of African and Asian states, which became article 20 of the Convention.[85] The provision was adopted in the Assembly on 21 December 1965, the day the Convention was adopted. The delegate from Ghana, who introduced the amendment, stated that the lack of such a clause 'could conceivably nullify the effect of the Convention *ab initio*'.[86]

Article 20(1) provides that the Secretary-General shall receive and circulate to all states parties reservations made by states at the time of ratification or accession. Ninety days were allowed for states to notify the Secretary-General in the case of an objection to a reservation. Paragraph 2 states that a reservation incompatible with the object and purpose of the Convention will not be permitted. The ICERD expressly regulates the question of reservations by including the 'object and purpose' criterion, which the International Court of Justice (ICJ) had used

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of Employment and Occupation 1958. Article 9 of the UNESCO Convention against Discrimination in Education 1960 holds that reservations to the Convention are not permitted. Lerner, N., supra n.56, 103.

[83] This procedure has never been used. See Leckie, S. (1988), 'The Inter-State Complaint Procedure in International Human Rights Law: Hopeful Prospects or Wishful Thinking?', *Human Rights Quarterly* 10, 249.

[84] UN Doc. A/C.3/SR.1368. McDonald (Canada) had proposed deleting the entire reservations clause (clause VI), which was accepted by the Third Committee by 25 votes to 19, with 34 abstentions. A/C.3/L.1237 (oral amendment).

[85] UN Doc. A/L/479; A/PV.1406.

[86] UN Doc. A/PV.1406.

in deciding the admissibility of reservations to the Genocide Convention in its Advisory Opinion of 1951,[87] and which was transposed into article 19(c) of the Vienna Convention on the Law of Treaties (1969) as the test for treaties which contain no provisions regarding reservations.[88] The ICERD also does not permit reservations that inhibit the operation of any of the bodies established by the Convention in article 20(2). This permits reservations against the settlement of disputes by the ICJ referred to it under article 22, for it is not a body established by the Convention. Consequently a number of states have entered reservations excluding the jurisdiction of the ICJ, rendering article 22 the most reserved provision in the Convention.[89]

Paragraph 2 also allows for a reservation to be considered incompatible or inhibitive if two-thirds of the states parties to the Convention object to it. Schwelb describes this provision as liberal, allowing flexibility in the matter of reservations, for it vests the decision on the admissibility of a reservation in the states parties themselves.[90]

On the issue of the legality of reservations to the ICERD, Schabas observes:

> The Committee on the Elimination of Racial Discrimination has explicitly refused to assume the role of judging the legality of reservations, although this is perhaps justifiable because of a specific regime for objections within the treaty itself … Nevertheless, given that the Convention provides for individual petitions, should not an individual who files a communication be entitled to contest the legality of a reservation?[91]

Preamble to the Convention

The Sub-Commission had before it three texts for the preamble, presented by Abram (USA),[92] Calvocoressi (UK),[93] and, jointly, Ivanov (USSR) and Ketrynski (Poland).[94] Several amendments to the various drafts were submitted and

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[87] Advisory Opinion on *Reservations to the Convention on the Prevention of Genocide* (1951) *ICJ Reports* 15.

[88] Article 19, Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331. The provision states: 'A State may, when signing … a treaty, formulate a reservation unless: … (c) … the reservation is incompatible with the object and purpose of the treaty.' The 'object and purpose' test is also found in article 31, which reads: 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'

[89] See CERD/C/60/Rev.3 (1999).

[90] Schwelb, E., supra n.7, 1056.

[91] Schabas, W. (1995), 'Reservations to Human Rights Treaties: Time for Innovation and Reform', *Canadian Yearbook of International Law* 32, 68–9 and n.135.

[92] UN Doc. E/CN.4/Sub.2/L.308.

[93] UN Doc. E/CN.4/Sub.2/L.309.

[94] UN Doc. E/CN.4/Sub.2/L.314.

incorporated into a joint draft submitted by Calvocoressi and Capotorti (Italy),[95] which after the adoption of further amendments became the final text.[96] Having made mention of the Charter, the Universal Declaration of Human Rights, the ILO, UNESCO, and the Declaration on the Elimination of Racial Discrimination, the Sub-Commission's text continued: '*Convinced* that any doctrine based on racial differentiation or superiority is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for racial discrimination in theory or practice.'[97]

Abram proposed an important amendment to the wording of this clause which was rejected by the other Sub-Commission members in the course of the discussion on the preamble. He suggested instead: '*Convinced* that any doctrine of superiority based on racial discrimination is scientifically false.'[98]

Some members felt that Abram's wording was an endorsement of the 'separate but equal' doctrine, in that it did not condemn racial differentiation as such, but only doctrines of racial superiority. The Chairman of the Sub-Commission, Santa Cruz (Chile) recalled that the original wording of the draft was based on the conclusion of the group of experts assembled by UNESCO, for whom the concept of race was scientifically false since there were no basic biological differences between racial or ethnic groups.[99] Bouquin (France) found that Abram's amended wording improved the text and recalled that the UNESCO experts did not conclude that there were no differences between races but that racial differences implied neither superiority nor inferiority.[100] Abram's amendment was rejected in the Sub-Commission, but his view was to be later adopted in the Commission.

When the 1963 Declaration on the Elimination of Racial Discrimination was being passed, this question had also been a source of difficulty. Paragraph 5 of the Declaration's preamble reads: '*Considering* that any doctrine of racial differentiation or superiority is scientifically false ….'

When this paragraph of the Declaration reached the Third Committee,[101] Means (United States) asked for a separate vote on the words 'differentiation or'.[102] After a roll call vote, the words were retained by 35 votes to 19, with 45 abstentions. As a result, the 1963 Declaration and the draft submitted by the

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[95] UN Doc. E/CN.4/Sub.2/L.313.

[96] UN Doc. E/CN.4/Sub.2/L.317.

[97] UN Doc. E/CN.4/873.

[98] UN Doc. E/CN.4/873, para. 39: the proposal was rejected by 5 votes to 3, with 5 abstentions.

[99] Quoted in Lerner, N., supra n.56, 32.

[100] Ibid. The statements of Santa Cruz and Bouquin do not appear in the Sub-Commission records for the meeting (UN Doc. E/CN.4/873). The fuller account of the proceedings found in Natan Lerner's text is due to the fact that he attended the session as a member of the World Jewish Congress, which had consultative status at the meetings.

[101] UN Doc. A/C.3/SR.1222.

[102] UN Doc. A/C.3/L.1092.

Sub-Commission to the Commission on Human Rights both condemn in their preamble doctrines of racial differentiation or racial superiority.

The wording of the preamble in the Convention would differ from that of the Declaration when an amendment proposed by Lebanon in the Commission on Human Rights to paragraph 5 of the Commission's text (paragraph 6 in the final draft),[103] that the words 'based on racial differentiation or of superiority' be replaced by the words 'of superiority based on racial differentiation' was adopted unanimously, reversing the stand taken by the Sub-Commission.[104] The explanation for the change found in the records of the Commission session is not illuminating:

> There was general agreement with the Lebanese amendment to replace the passage in the Sub-Commission's text … since this was a more correct statement. Moreover, the amendment would bring the other languages in line with the Spanish version which was the original language of the text.[105]

There was no objection to the changed wording in the Third Committee, for none of the delegates appeared to notice the significant change in the draft preamble stemming from the Lebanese amendment. For example, Garcia (Philippines), stated: 'His delegation … could approve those amendments which did not introduce any significant changes, such as the Lebanese amendments'.[106] Consequently the preamble to the Convention states: '*Convinced* that any doctrine of superiority based on racial differentiation is scientifically false ….'

The result of the Lebanese amendment is that the Convention does not condemn doctrines of racial differentiation, and consequently, the Convention does not condemn the biological concept of race. This departure from the position expressed by the signatories to the Declaration is similar to the difference between the first and second UNESCO statements on race, the second of which refused to deny the existence of the concept of race in line with its predecessor, and condemning only the notion of racial superiority. Lerner, who was present at the Commission discussion, observes that: 'the text, as adopted by the Convention, is the result of an amendment unanimously accepted by the Commission on Human Rights, in line with a remark made by the UNESCO representative.'[107]

Lerner's reference to the UNESCO representative is interesting. The split in thinking portrayed by the four statements has already been outlined, and it would seem that the representative present at the debates in the Commission on the draft Convention, and who clearly influenced its wording, was a 'splitter' who believed in the existence of race as a scientific reality.

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[103] UN Doc. E/CN.4/L.682.
[104] UN Doc. E/CN.4/874.
[105] UN Doc. E/CN.4/874, para. 53.
[106] UN Doc. A/C.3/1301.
[107] Lerner, N., supra n.56, 35.

In the course of the debate in the Sub-Commission, Saario (Finland) remarked: 'While, as UNESCO had shown, there was no such thing as race, the term "race" would have to be used in the draft convention.'[108] The Sub-Commission's draft was perhaps influenced by UNESCO's first Statement on Race 1950, which indeed denies the existence of race, but Saario could not have foreseen that ultimately the Convention would be influenced by the second Statement on the Nature of Race and Race Differences 1951. As a result, the Convention in its preamble tacitly supports the concept of the existence of separate races, while condemning any doctrine of superiority between them.

A brief but salient discussion took place on this question in the Commission on Human Rights in 1950, in the course of the preparation of the draft International Covenant on Civil and Political Rights. A Lebanese amendment to draft article 20 on non-discrimination, which would appear in the ICCPR as article 26, faced a sub-amendment from the Chilean delegate Valenzuela, who stated that: 'he had voted against the Lebanese amendment because it contained a disparaging reference to race and colour. The Chilean delegation would continue its fight for the deletion of those words by the General Assembly.'[109]

Echoing Ashley Montagu's approach, the Chilean amendment proposed using the words 'ethnic origin' instead of race and colour. Chang (China) thought the Chilean amendment was academic because:

> the term 'ethnic origin' would convey but little to the common man … In signing the Charter and in proclaiming the Declaration many nations had solemnly given sanction to the words 'race' and 'colour', which although not scientific terms, were clearly understood throughout the world. On the other hand, 'ethnic origin', which included the notion of language and religion, was too broad and confusing.[110]

Valenzuela (Chile) could not understand the Chinese representative's objections to his amendment, and continued:

> The terms 'race' and 'colour' were false. The race theory, which was wholly without scientific basis, was most harmful. The Chilean delegation, having in mind the problems which might arise in the future, intended to press for a vote on its amendment. It believed that public opinion should be educated. It believed that the Commission would achieve greater progress by adopting the words 'ethnic origin' than by retaining the unscientific terms 'race' and 'colour'.[111]

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[108] UN Doc. E/CN.4/Sub.2/SR.411.

[109] UN Doc. E/CN.4/SR.175, 10 May 1950.

[110] UN Doc. E/CN.4/SR.175. Chang later stated that: 'he had no doubt of the sincere desire of the representative of Chile to wipe out racial discrimination. In referring to the Chilean amendment as academic, he had voiced his opinion of the proposal, which he felt was inappropriate at that stage since it departed from the wording of the United Nations Charter and the Universal Declaration of Human Rights.'

[111] Ibid.

Azkoul (Lebanon) also opposed the Chilean amendment, on the basis that race and colour were biological concepts: 'If the term "ethnic origin" was the equivalent of "race" and "colour", it was unwise because it admitted the existence of a biological difference … race was but one aspect of ethnic origin.'[112]

The Chilean amendment was put to the vote in two parts, firstly to replace 'race' with 'ethnic origin', and secondly to replace 'colour' with 'ethnic origin' – both were defeated, the first by nine votes to four, with two abstentions, the second by nine votes to three, with three abstentions. It is interesting to note that one delegation, unnamed, supported the removal of 'race' while opposing the removal of 'colour'.

Mendez (Phillippines) explained his delegation's abstention on the grounds that:

> although he appreciated its motives, he felt that discrimination because of race and colour were stubborn realities which the Commission must face. Moreover, the expression 'ethnic origin' might be broader in scope than 'race and colour' and should therefore be given further study.[113]

Nisot (Belgium) said that he had voted in favour of the Chilean amendment because:

> he was convinced that it was inopportune to give new sanction to terminology which was regarded as humiliating by one section of humanity. He regarded the expression 'coloured peoples' as inadmissible.[114]

The Chilean amendment is more far-reaching and fundamental in its critique than any discussion which took place in the course of the drafting of the ICERD. The direct attack on the concept of 'race', including attaching the label 'unscientific', can be contrasted with the near unquestioning acceptance of the term by the delegates who drafted the ICERD at all levels, with the exception of the discussion that took place in the Sub-Commission in response to Abram's proposed amendment to its draft preamble. Despite Valenzuela's promise, there is no evidence of a subsequent fight for the deletion of the term 'race' by the General Assembly, and the pragmatic approach outlined in response to the amendment by the Philippino delegate, whereby the stubborn realities of race and colour must be faced by the Commission, was the path chosen in the Convention. Nevertheless, the clear evidence that the ICERD does not condemn the notion of 'race' and racial difference is an anomaly that should be corrected by the Committee.

In relation to Nisot's comments, it is submitted that while 'coloured peoples' is prejudiced and anachronistic, the ground 'colour', as in skin colour, is not in itself objectionable, for it can be said to apply to all peoples, rather than just one

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[112] Ibid.
[113] Ibid.
[114] Ibid.

section. Banks highlights the growing importance of discrimination on the basis of skin colour, or 'colourism', in the United States, writing that: 'I expect future colorism claims that challenge employment practices favoring light- over dark-skinned members of the same race.'[115] Defining colourism as being both 'inter' and 'intra' racial, or 'discrimination based on skin tone, whether practiced by blacks, whites or non-whites', the author predicts that: 'In the twenty-first century, discrimination cases are less likely to be of the traditional transracial type and more likely to be about gradations in physical characteristics among members of ostensibly the same racialized group.'[116]

In the international sphere, ignoring the term 'race' in favour of 'skin colour' would both accept the reality of this form of discrimination and remove the undercurrent of biological difference between perceived groups associated with the term 'race'. If this could be said to be so, then perhaps the correct position in the drafting of the ICCPR was that of the delegation who voted for one half of the Chilean amendment.

Article 1: The Definition of 'Racial Discrimination'

The text submitted to the Sub-Commission by Abram defined racial discrimination as any 'distinction, exclusion or preference made on the basis of race, colour or ethnic origin, and in the case of states composed of different nationalities or persons of different national origin, discrimination based on such differences'.[117] Calvocoressi's text proposed adding the word 'limitation'.[118] Ivanov and Ketrzynski's definition contained the phrase 'which has the purpose or effect of nullifying or impairing equality in granting or practising human rights and freedoms in political, economic, social, cultural or any other field of public life', and added the ground 'national origin'.[119] A final draft prepared by a working group of the Sub-Commission[120] would in general contain the words of the final text adopted by the General Assembly, with the exception that it did not refer to 'descent', and a reference to 'the rights set forth *inter alia* in the Universal Declaration of Human Rights' would be removed when the draft came before the Commission, the result of a Lebanese oral amendment. An Indian amendment in the Third Committee to the draft definition included the word 'descent' in the list of grounds.[121]

The term 'racial discrimination' is defined in the Convention as:

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[115] Banks, T. (2000), 'Colorism: A Darker Shade of Pale', *UCLA Law Review* 47, 1724 and 1734.

[116] Ibid., 1711-1712.

[117] UN Doc. E/CN.4/Sub.2/L.308.

[118] UN Doc. E/CN.4/Sub.2/L.309.

[119] UN Doc. E/CN.4/Sub.2/L.314.

[120] UN Doc. E/CN.4/Sub.2/L.319.

[121] UN Doc. A/C.3/L.1216, UN Doc. A/C.3/SR.1304.

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

This is a 'composite concept'[122] in which there are four acts that are considered discriminatory – any distinction, exclusion, restriction or preference. Two further conditions must be met if these four acts are to be considered discriminatory – they must be based on race, colour, descent, or national or ethnic origin, and they must have the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms.

There was no definition of 'racial discrimination' in article 1 of the 1963 Declaration on the Elimination of All Forms of Racial Discrimination, which refers to discrimination on the grounds of race, colour or ethnic origin, due to its declaratory status. Therefore the Convention definition followed the approach of the International Labour Organisation's (ILO) Discrimination (Employment and Occupation) Convention No. 111 (1958) and the UNESCO Convention against Discrimination in Education 1960. Article 1(a) of the ILO Convention No. 111 defined discrimination as: 'any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation'; and UNESCO defined discrimination in education as: 'any distinction, exclusion limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education.'

The five grounds, race, colour, descent, or national or ethnic origin, serve to distinguish 'race' from the broader concept of 'racial discrimination'. In relation to race, the ICERD seeks to combat the manifestations or effects of racism beyond any scientific discourse on the meaning of race. The first two UNESCO statements had failed to show that there was no such thing as race, and the *Proposals on the Biological Aspects of Race* were released in 1964, one year after the Declaration on the Elimination of All Forms of Racial Discrimination in 1963. Aware of the difficulties in interpreting the meaning of the word therefore, the Convention offers five terms instead of one within which to describe racial discrimination. The potential meaning of 'colour' has already been indicated, and the meaning of 'descent', including its interpretation by CERD in General Recommendation XXIX in August 2002,[123] is a key concept in relation to caste-based discrimination, and will be discussed in the following chapter.

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[122] Schwelb, E., supra n.7, 1001.

[123] UN Doc. A/57/18.

The meaning of 'nationality', as covered by the term 'national or ethnic origin' in article 1(1), 'created difficulties of definition from the outset', according to the representative of Ecuador in the Commission during its consideration of the draft Convention.[124] Schwelb outlines the cause of the difficulties, which stem from the dual nature of 'nationality', as a politico-legal term denoting membership of a state and as a historico-biological term denoting membership of a nation, the latter being of a non-legal nature and belonging to the field of sociology and ethnography.[125]

In the Third Committee, the representative from Hungary gave the example of persons who may be full citizens of a state but display a different 'nationality' in the sense of speaking another language, or maintaining different cultural traditions.[126] The representative of the United States, attempting to distinguish 'nationality' from 'national origin' and 'ethnic origin', said that 'national origin differed from nationality in that national origin related to the past – the previous nationality or geographical region of the individual or of his ancestors – while nationality related to the present status'. Schwelb notes that the representative appeared in this statement to be using 'nationality' in the politico-legal sense rather than the historico-biological or ethnographic sense.[127] The representative continued: 'national origin was narrower in scope than ethnic origin; the latter was associated with racial and cultural characteristics and inclusion of a reference to it would not necessarily cover the case of persons residing in foreign countries where their national origins were not respected.'[128] For the practical purposes of the interpretation of the Convention, Schwelb writes that 'the three terms, descent, national origin and ethnic origin, among them cover distinctions both on the ground of present or previous nationality in the ethnographical sense and on the ground of previous nationality in the politico-legal sense of citizenship'.[129]

The 'purpose or effect' of the racially discriminatory acts are two separate concepts. The term 'purpose' is subjective, and covers the discriminatory nature or intention of the act, while 'effect' is objective, and looks only at the consequences of the act, irrespective of the intention involved.[130]

The draft definition of racial discrimination prepared by the Sub-Commission at its 1964 session had, in addition to the phrase 'human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life', the extra phrase 'set forth *inter alia* in the Universal Declaration of Human Rights'.[131] While considering the draft in the Commission, the United Kingdom

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[124] UN Doc. E/CN.4/SR.783.

[125] Weis, P. (1956), *Nationality and Statelessness in International Law* (London: Stevens and Sons), 3, quoted in Schwelb, E., supra n.7, 1006.

[126] UN Doc. A/C.3/SR.1304.

[127] Schwelb, E., supra n.7, 1007.

[128] UN Doc. A/C.3/SR 1304.

[129] Schwelb, E., supra n.7, 1007.

[130] Lerner, N., supra n.51, 49.

[131] UN Doc. E/CN.4/Sub.2/L.319.

representative proposed deleting the phrase '*inter alia*', arguing that the Convention should name other instruments in addition to the Universal Declaration if it wished to invoke them.[132] The objection was to 'slovenly drafting' in a legal text through usage of a phrase such as '*inter alia*', rather than to enlarging the scope of the Convention.[133] This was rejected by the Commission, which argued that the Convention should also be applicable to rights not set forth in the Universal Declaration. The Commission reached a compromise by deleting the whole phrase 'set forth *inter alia* in the Universal Declaration of Human Rights'.[134] As a result, the Convention is not restricted in its application to the rights contained in the Universal Declaration, as confirmed by article 5(f) for example, which guarantees 'the right of access to any place or service intended for use by the general public such as transport, hotels, restaurants, cafés, theatres and parks', no equivalent of which can be found in the Universal Declaration. Article 1(1) of the ICERD extends to all human rights and fundamental freedoms, whatever their source.[135]

CERD has issued several interpretative general recommendations on the meaning of article 1(1). General Recommendation XXIX on descent-based discrimination has already been mentioned. General Recommendations VIII,[136] XIV[137] and XXIV[138] all examine aspects of article 1(1), and are directly related to the state reporting procedure, for which they act as guidelines. General Recommendation XIV, on the definition of discrimination in article 1(1), emphasises in its paragraph 1 that: 'Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitutes a basic principle in the protection of human rights.' Paragraph 3 of the Recommendation draws an important link between article 1(1) and article 5: 'Article 1, paragraph 1, of the Convention also refers to the political, economic, social and cultural fields; the related rights and freedoms are set up in article 5.'

The provision is evidence of the Committee's overall belief that the primary goal of the Convention is the elimination of social and economic inequality that stems from racial discrimination. The prohibition on racial discrimination, according to General Recommendation XIV, is directly linked to the granting of social and economic rights as detailed in article 5 of the Convention. The Committee is moving the Convention away from a narrow formulation of non-discrimination on the basis of race or any of the five grounds, or 'equality before the law', to a wider aim of social, economic and cultural equality, or 'equality in

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132 UN Doc. E/CN.4/L.689, UN Doc. E/CN.4/SR.784.

133 UN Doc. E/CN.4/SR.784.

134 UN Doc. E/CN.4/SR.786 – the result of a Lebanese oral amendment.

135 Meron, T., supra n.17, 283.

136 'Identification with a Particular Racial or Ethnic Group' (1990), UN Doc. A/45/18.

137 'Definition of Discrimination' (1993), UN Doc. A/48/18.

138 'Reporting of Persons belonging to Different Races, National/Ethnic Groups, or Indigenous Peoples' (1999), UN Doc. A/54/18.

the law', through the elimination of social and economic discrimination on the basis of race and the other grounds.

Article 1(2) provides that the Convention shall not apply to distinctions, exclusions, restrictions or preferences made between citizens and non-citizens. This means that while the Convention applies to aliens or foreigners, states parties are allowed to make certain distinctions on the fact that a person is or is not a citizen of that state. Such distinctions cannot, however, be made on the ground of race, colour, descent, or national or ethnic origin. This is borne out in the text of articles 5 and 6; under article 5, states must guarantee 'the right of everyone' to equality before the law; that this includes non-citizens as well as citizens is indicated by the fact that the Indian representative proposed its deletion in his country's second amendment to the draft, arguing that 'states should be free to decide for themselves whether the Convention's provisions should be afforded to aliens and non-nationals'.[139] The phrase remained, however, and is supported in article 6 by reference to the requirement that states assure 'to everyone within their jurisdiction' effective protection and remedies against any acts of racial discrimination.

General Recommendation XI represented the Committee's views on the issue of non-citizens.[140] It held:

> The Committee has noted that article 1, paragraph 2, has on occasion been interpreted as absolving states parties from any obligation to report on matters relating to legislation on foreigners. The Committee therefore affirms that states parties are under an obligation to report fully upon legislation on foreigners and its implementation.[141]

General Recommendation XI was replaced in 2005 by General Recommendation XXX, on 'Discrimination against Non-Citizens', which states in its paragraph 3:

> Article 5 of the Convention incorporates the obligation of states parties to prohibit and eliminate racial discrimination in the enjoyment of civil, political, economic, social and cultural rights. Although some of these rights, such as the right to participate in elections, to vote and to stand for election, may be confined to citizens, human rights are, in principle, to be enjoyed by all persons. States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognized under international law.[142]

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[139] UN Doc. A/C.3/SR.1299.

[140] 'Non-citizens' (1993), UN Doc. A/46/18.

[141] Ibid., para. 2. Paragraph 3 'further affirms that article 1, para. 2, must not be interpreted to detract in any way from the rights and freedoms recognized and enunciated in other instruments, especially the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.'

[142] General Recommendation XXX (2004), 'Discrimination against Non-Citizens', para. 3.

Article 1(3), that 'Nothing in this Convention may be interpreted as affecting in any way the legal provisions of states parties concerning nationality, citizenship or naturalisation, provided that such provisions do not discriminate against any nationality', allows states parties to distinguish citizens from naturalised persons.[143] The draft Convention proposed by the Sub-Commission had defined racial discrimination in its article 1 as meaning 'any distinction, exclusion, restriction or preference based on race, colour, [national] or ethnic origin (…)'.[144] The word 'national' was kept in the draft text by only ten votes to nine with one abstention,[145] and the Commission subsequently decided to reconsider the result – the word 'national' was placed in square brackets, and the representatives were asked to consult their governments with respect to its inclusion.[146] In many countries, naturalised citizens do not enjoy the same rights as nationals, and while the word 'national' was eventually retained in the Convention, article 1(3) ensures that legal provisions concerning naturalisation are exempted from its reach.

Articles 1(4) and 2(2): Special Measures

The second paragraph of the draft article 1 prepared by the Sub-Commission dealt with measures giving preference to certain racial groups, in a shorter wording than that of paragraph 4 of the final text approved by the General Assembly.[147] There was some difficulty in the Commission in relation to the second paragraph of article 1, in particular the need to ensure that special measures were not maintained indefinitely. The use of the word 'under-developed' caused problems for many members of the Commission, which re-surfaced in the Third Committee. An amendment by the Democratic Republic of the Congo and Ethiopia to delete paragraph 2 of article 1 was rejected, and the provision was passed following an oral amendment from India and Ethiopia which proposed replacing the phrase 'development or protection of certain under-developed racial groups' by the words 'advancement of certain racial or ethnic groups'.[148]

In the Sub-Commission, Mudawi (Sudan) suggested in his amendment to draft article 2 an additional paragraph on special concrete measures in order to secure adequate development or protection of individuals belonging to 'under-

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[143] Schwelb, E., supra n.7, 1010.

[144] UN Doc. E/CN.4/873.

[145] UN Doc. E/CN.4/SR.786.

[146] UN Doc. E/CN.4/SR.809.

[147] UN Doc. E/CN.4/Sub.2/L.319: 'Measures giving preference to certain racial groups for the sole purpose of securing adequate development or protection of individuals belonging to them should not be deemed racial discrimination, provided however that such measures do not, as a consequence, lead to the maintenance of unequal or separate rights for different racial groups.'

[148] Quoted in Lerner, N., supra n.56, 41.

developed racial groups'.[149] A separate vote on 'under-developed' was taken in the Commission at the request of the representative of the Philippines, resulting in it being retained. A new discussion took place in the Third Committee, in which Aguta (Nigeria) suggested replacing the 'under-developed' with 'under-privileged'.[150] A nine-state amendment saw the Convention adopt the phrase 'the adequate development and protection of certain racial groups' in its article 2(2).

Article 1(4) holds:

> special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination provided that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups, and that they shall not be continued after the objectives for which they were taken have been achieved.

Therefore the Convention supports systems of affirmative action, deemed special measures, and the idea that those who are in an unequal situation are entitled to be treated according to the extent of that inequality; differential treatment is not a violation of the equality principle but its vindication.[151] Equality of result (*de facto* equality) rather than formal equality (*de jure* equality) is the principal objective of the Convention.[152]

In the 1963 Declaration on the Elimination of All Forms of Racial Discrimination, there was only one affirmative action provision, article 2(3). It read:

> Special concrete measures shall be taken in appropriate circumstances in order to secure adequate development or protection of individuals belonging to certain racial groups with the object of ensuring the full enjoyment by such individuals of human rights and fundamental freedoms. These measures shall in no circumstances have as a consequence the maintenance of unequal or separate rights for different racial groups.

The difference in wording is the result of debate surrounding the issue of group rights. Articles 1(4) and 2(2) call for the adequate advancement of racial or ethnic 'groups or individuals', rather than the 1963 'protection of individuals belonging to certain racial groups'. Some representatives felt that the aim of the Convention

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[149] UN Doc. E/CN.4/Sub.2/L.328. The amendment was adopted by 6 votes to 4, with 4 abstentions.

[150] UN Doc. A/C.3/SR.1301.

[151] 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), 6.

[152] Meron, T., supra n.17, 287.

should be to ensure the advancement of individuals belonging to such groups, as iterated by the Declaration. It was decided, however, that the Convention should protect groups as well as individuals.[153] The recent focus by the Committee on the protection of group rights, through general recommendations and the individual communications procedure under article 14, will be discussed below.

Article 2(2) requires that:

> States parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights.

Article 1(4) is concerned only with the point that special measures, or affirmative action, do not constitute racial discrimination. It can be seen as an enabling provision, allowing states to take such measures under article 2(2). While article 1(4) is theoretical, article 2(2) is practical. In the former, the juxtaposition of special measures with the principle of non-discrimination underpinning the Convention is justified as being necessary 'in order to ensure … equal enjoyment of human rights'. By contrast the latter requires states to enact such special measures in the social, economic and cultural fields, when the circumstances so warrant. Article 1(4) places no obligation on states parties to implement special measures; it holds only that such measures do not violate the Convention. Article 2(2), however, places a positive obligation on states parties, inasmuch as it can be determined that the circumstances in a state party may warrant such action, and a number of states have entered reservations to this provision.[154]

The distinction was captured by the Indian representative in the Third Committee, who explained:

> article 1 defined racial discrimination, paragraph 4 made an exception for cases where some states had taken steps to redress the injustices done in the past to a certain section of the people, by providing for special measures to secure their advancement, and thus bring about a levelling of the social order. Article 2 was of a mandatory nature. It called upon states which did not demonstrate the same goodwill to assist the less-favoured elements of their population in raising themselves to the level of the more developed groups. Article 2 gave states a certain amount of latitude, since it stated that the measures in question were to be taken 'when the circumstances warrant this'.[155]

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[153] Lerner, N., supra n.51, 164.

[154] See also Bossuyt, M. supra n.47, para. 60: 'The reason that the Convention deals twice with the same problem is that while article 1 defines discrimination and its paragraph 4 refers to a case in which the application of different treatment should not be deemed discriminatory, article 2 relates to duties which are imposed by the Convention on states parties; both insist upon the temporary character of the special measures, a reaction that was inspired by the then existing system of apartheid.'

[155] UN Doc. A/C.3/SR.1308.

Meron describes the 'certain amount of latitude' referred to by the Indian delegate which article 2(2) affords states as a 'considerable measure of discretion'.[156] He emphasises the definitional problems that beset the application of the provision, whereby if a group is not identifiable as ethnically discrete, it is not entitled to the special measures protection of article 2(2). The Committee has created safeguards against this, and under General Recommendation VIII, the Committee:

> Having considered reports from states parties concerning information about the ways in which individuals are identified as being members of a particular racial or ethnic groups or groups, is of the opinion that such identification shall, if no justification exists to the contrary, be based upon self-identification by the individual concerned.[157]

Nevertheless, Meron argues that states' obligations to resort to affirmative measures should be determined by the group's degree of access to political and economic resources rather than by overemphasis on the anthropological analysis of the group's relationship to the rest of the population.[158] In addition, if a reporting state does not furnish the Committee with any details of its ethnic composition in its report, then it is difficult for the Committee to determine if 'the circumstances warrant' the enactment of special measures.[159] Article 2(2) refers specifically to ensuring the adequate development and protection of certain racial groups in the social, economic and cultural fields, and must be perceived as a guiding provision in the Convention's overarching aim of *de facto* social and economic equality between groups defined on the basis of race, colour, descent, or national or ethnic origin, rather than *de jure* non-discrimination on the basis of race or any of the other grounds. While it is weak in its formulation, the Committee has sought precise demographic information from reporting states, in order to press the need for corrective measures in the social and economic spheres, if the information proves that the circumstances warrant such action.

The Committee has emphasised the need for affirmative action through its concluding observations to a number of state reports. In 2001, the United States of America was urged to take all appropriate measures, including special measures according to article 2 paragraph 2 of the Convention, to ensure the right of everyone, without discrimination as to race, colour, or national or ethnic

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[156] Meron, T., supra n.17, 307.

[157] General Recommendation VIII (1990), 'Identification with a Particular Racial or Ethnic Group', UN Doc. A/45/18.

[158] Theodor Meron, supra n.17, p.307.

[159] However, both General Recommendation IV (1973), 'On the Demographic Composition of the Population', UN Doc. A/9018, and General Recommendation XXIV (1999), 'Reporting of Persons belonging to Different Races, National/Ethnic Groups, or Indigenous Peoples', UN Doc. A/54/18, stress the need to include such information in the state reports.

origin, to the enjoyment of the rights contained in article 5 of the Convention.[160] The position taken by the United States in its report, that the provisions of the Convention permit but do not require States parties to adopt affirmative action measures to ensure the adequate development and protection of certain racial, ethnic or national groups, was noted with concern by the Committee. It was emphasised that the adoption of special measures by states parties when the circumstances so warrant, such as in the case of persistent disparities, is an obligation stemming from article 2 paragraph 2 of the Convention.[161]

In its Concluding Observations to State Reports in recent years, CERD has highlighted the need to introduce or strengthen special measures to combat inequality in many reporting states.[162] While CERD's formulations are of an exhoratory tone, from the number of reporting states being asked to implement such policies, it may be surmised that CERD is increasingly viewing the implementation of special measures as a Convention requirement.

Article 2(1): Fundamental Obligations

The Sub-Commission selected a text prepared by Calvocoressi and Capotorti as the basis for its discussion of article 2.[163] A revised text resulted from this discussion,[164] to which several amendments were proposed in the Commission on Human Rights. In the Third Committee, 17 Latin American states suggested adding that 'Each state party undertakes not to sponsor, defend or support racial discrimination by any persons or organisations', which was adopted.

The obligations in the Convention are outlined in general in article 2(1), and in more detail in articles 3 to 7. In the Third Committee of the General Assembly, the phrases 'promoting understanding among all races' and 'to encourage, where appropriate, integrationist multi-racial organisations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division' were included.[165] These 'promotional' provisions overlap with article 7, which requires states parties to adopt:

> immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial

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[160] UN Doc. A/56/18, para. 398.

[161] Ibid., para. 399.

[162] See, for example, Concluding Observations – Guatemala (2006), CERD/C/GTM/CO/11, paragaph 12; Concluding Observations – Mongolia (2006), CERD/C/MNG/CO/18, para. 15; Concluding Observations – Norway (2006), CERD/C/NOR/CO/18, para. 17.

[163] UN Doc. E/CN.4/Sub.2/L.324.

[164] UN Doc. E/CN.4/Sub.2/L.324/Rev.1. 'Each contracting State undertakes to prohibit racial discrimination and to carry out by all possible measures a policy of eliminating it in all its forms, since racial discrimination is an infringement of the rights and an offence to the dignity of the human person and a denial of the rules of international law.'

[165] UN Doc. A/C.3/L.1217; UN Doc. A/6181.

discrimination, and to promoting understanding, tolerance and friendship among nations and racial or ethnic groups.[166]

The direct obligations in article 2(1) are given in paragraphs (a) to (d), and in particular, article 2(1)(d), described by Schwelb as 'the most important and far-reaching of all substantive provisions of the Convention'.[167] Article 2(1)(d) reads: 'Each state party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization.'

The United Kingdom proposed an amendment to this provision, that states parties 'adopt all necessary measures, including legislation if appropriate, for the purpose of bringing to an end all discrimination by any person, group or organisation,'[168] thereby removing the verb 'to prohibit'. The Commission rejected this, stating: 'the United Kingdom text would prolong the struggle against discrimination indefinitely and would provide a number of loopholes'.[169] The United Kingdom's offer to insert the words 'speedily' or 'without delay'[170] did not render the amendment any more acceptable to the Commission; however, Ghana succeeded in inserting the phrase 'as required by circumstances'.[171] The final text of paragraph 2(1)(d) '[went] beyond any existing international instrument or draft instrument in the field'.[172]

Article 3: Apartheid

The text drafted by the Sub-Commission, on the basis of a preliminary text proposed by Abram on the lines of article 5 of the Declaration,[173] did not differ substantially from the final text. Under article 3 of the Convention, states parties particularly condemn racial segregation and *apartheid* and undertake to prevent, prohibit and eradicate all practices of this nature in territories under

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[166] On article 7, see Farrior, S., supra n.13. The author writes that it is 'particularly disheartening that article 7 has been virtually ignored by commentators and states alike'. She stresses the importance of the provision, evident from a CERD document from which she drew her title, that describes articles 4 and 7 as 'the pillars on which the Convention rests', and the aims of the Convention as 'prevention rather than cure … particularly in Article 7, through teaching, information, education and acculturation, to combat prejudices which lead to racial discrimination and to promote understanding, tolerance and friendship among nations and racial or ethnic groups' (295).

[167] Schwelb, E., supra n.7, 1017.

[168] UN Doc. E/CN.4/L.689; UN Doc. E/3873.

[169] UN Doc. E/CN.4/SR.787.

[170] UN Doc. E/CN.4/SR.788.

[171] UN Doc. A/C.3/SR.1308.

[172] Schwelb, E., supra n.7, 1018.

[173] UN Doc. E/CN.4/Sub.2/L.308.

their jurisdiction. The reference to *apartheid* was directed exclusively to the Government of South Africa,[174] who did not participate in the debate or in any of the roll call votes relating to the Convention, in the Third Committee or in plenary.[175] The Third Committee had taken a decision not to include in the Convention any reference to specific forms of discrimination; however, it retained the particular reference to apartheid because 'it differed from other forms [of racial discrimination] in that it was the official policy of a State Member of the United Nations'.[176] The point is reinforced in the Preamble to the Convention, which cites the states parties' alarm at 'governmental policies' still in evidence in some parts of the world which are based on 'racial superiority or hatred such as policies of *apartheid*, segregation or separation'.

Article 3 led Committee members to argue that they could request from states information on their relations with South Africa. General Recommendation III welcomed the submission of such information from states 'which choose to do so',[177] and subsequently the Committee asked all states parties to include in their reports information on the status of their relations with the racist regime of southern Africa.[178] In an important widening of the scope of the provision in 1995, the Committee issued General Recommendation IXX stating that the reference to *apartheid* may have been directed exclusively at South Africa, 'but the article as adopted prohibits all forms of racial segregation in all countries'.[179]

Following from article 3 of the ICERD, the International Convention on the Suppression and Punishment of the Crime of *Apartheid*,[180] adopted and

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[174] UN Doc. A/C.5/SR.1313. See also para. 1 of General Recommendation IXX on 'Racial Segregation and *Apartheid*': 'The reference to *apartheid* may have been directed exclusively to South Africa, but … '

[175] Schwelb, E., supra n.7, 1021. In the debate on the Declaration on the Elimination of Racial Discrimination, Van Schalkwyk (South Africa) 'denied accusations that the South African government's policies were based on a concept of superiority of one race over others … His delegation had under the circumstances concluded that it was not possible for it to join in a constructive discussion of the draft Declaration although it felt that it could have made an honest and helpful contribution. It also regretted that the Declaration had been drafted with one or two specific situations in mind … for those reasons, and not because it was in favour of racial discrimination, the South African delegation could not participate in the detailed study of the draft Declaration'; UN Doc. A/C.3/1218, 2 October 1963. South Africa signed the ICERD on 3 October 1994, and the Convention came into force on 1 January 1999.

[176] UN Doc. A/C.3/SR.1313.

[177] General Recommendation VI (1972), UN Doc. A/8718.

[178] UN Doc. A/10018.

[179] See Banton, M., supra n.49, 159–60 and 201–2. The draft Recommendation was introduced by Michael Banton in 1993, and passed on the third attempt.

[180] *Supra* n.16. The Geneva Conference on Humanitarian Law, which adopted Additional Protocol One of 1977 as an addition to the Geneva Convention of 1949, added the provision that 'apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination, shall be regarded as grave

opened for signature in 1973, would reflect the international consensus that *apartheid* was a criminal offence against humanity.[181] The 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity had listed apartheid as a crime against humanity in its article 1 to which 'no statutory limitation shall apply … irrespective of the date of … commission'.[182] The *Apartheid* Convention has been criticised for being 'drafted too hastily and without adequate legal assistance'; neither the International Law Commission nor the Sixth Committee of the General Assembly had any part in the drafting process.[183]

Article 4: Propaganda

> States condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination.[184]

Article 4(a) requires states parties to declare an offence punishable by law all dissemination of ideas based on racial superiority, and declare illegal organisations which promote and incite racial discrimination. Participation in such organisations shall be recognised as an offence punishable by law.

The Convention's prohibition on incitement to hatred was problematic due to the conflict between the provision and the established civil right of freedom of expression. Discussions in the Sub-Commission resulted in a revised text from Cuevas Cancino (Mexico) and Ingles (Philippines) which condemned

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breaches of the protocol … [when] committed wilfully and in violation of the [Geneva] Conventions or the Protocol'. Protocol Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of International Armed Conflicts, art. 85, 8 June 1977, 1125 U.N.T.S. 3, 42.

[181] Hinds, L. (1999), 'The Gross Violations of Human Rights of the Apartheid Regime under International Law', *Rutgers Race and Law Review* 1, 253.

[182] 754 U.N.T.S. 74, 11 November 1970.

[183] McKean, W. (1983), *Equality and Discrimination under International Law*, Oxford University Press, 115.

[184] Article 4 has received the second-highest number of reservations and declarations from states parties, after article 22. However, the degree to which the state party will abide by its reservation or declaration varies. For example, Italy's country rapporteur noted in 1995 how 'the Government of Italy was to be congratulated on its recent legislative reforms, which went a long way towards removing the need for Italy's reservation to article 4 of the Convention'. CERD/C/SR.1077, para. 11. On the other hand, in 2001 the Committee emphasised its concern about the United States' far-reaching reservations, understandings and declarations, entered at the time of ratification of the Convention. The Committee was 'particularly concerned about the implication of the state party's reservation on the implementation of article 4 of the Convention'; A/56/18, para. 391.

all propaganda and organisations which justify or promote racial hatred and discrimination and urged the penalisation of all incitement to racial discrimination resulting in or likely to cause acts of violence.[185] In the Commission, Costa Rica proposed inserting a clause relating to freedom of expression which was supported by the United States.

Numerous amendments to the text adopted by the Commission arose in the Third Committee. In order to balance the conflicting rights at issue, the Nordic countries, Denmark, Finland, Iceland, Norway and Sweden, proposed an amendment whereby article 4 would frame its obligations having 'due regard' to the rights set forth in article 5 of the Convention.[186] Article 5(d)(viii) and (ix) are concerned with freedom of opinion and expression, however, only in the context of the elimination of racial discrimination. The French delegation pointed this out, and proposed instead that 'due regard' should also be had to the Universal Declaration of Human Rights.[187] The closing phrase of article 4 reads: 'with due regard to the principles embodied in the Universal Declaration of Human Rights[188] and the rights expressly set forth in article 5 of this Convention.'

When the Third Committee's draft was submitted to the General Assembly for its consideration, the Argentine representative, supported by four other Latin American states, introduced an amendment that sought to delete in sub-paragraph (a) the words 'dissemination of ideas based on racial superiority or hatred'. Explaining his amendment, the delegate stated that the sponsors did not wish to condemn 'the fact that a scientist might publish a document pointing out differences among races'.[189] The amendment was defeated, with 54 against, 25 in favour and 23 abstentions. Lerner writes:

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[185] UN Doc. E/CN.4/Sub.2/L.330/Rev.1.

[186] UN Doc. A/C.3/L.1245. The US proposed inserting the phrase 'with due regard to the fundamental right of freedom of expression'. UN Doc. A/C.3/L.1242.

[187] UN Doc. A/C.3/SR.1315.

[188] The representative of India 'questioned the juridical value of inserting a reference to the Universal Declaration of Human Rights … inasmuch as a declaration was not a binding instrument'. UN Doc. A/C.3/SR.1316. On this point, Schwelb remarks that 'Irrespective of the correctness or otherwise of the sweeping statement that a declaration, i.e. every declaration, is and remains "non-binding", it stands to reason that if an originally "non-binding" declaration is made part of a "binding" treaty it loses for the purposes of that treaty its "non-binding" character'; Schwelb, E., supra n.7, 1024, n.138. India's position may be contrasted with that of the Netherlands, which found itself 'happy to note that the increasing respect which the norms of the Universal Declaration commanded in international juridical thinking was reflected in the unprecedented mention made of them in such an instrument'; UN Doc. A/C.3/SR.1318. The Universal Declaration of Human Rights is also cited in the Preamble to the Convention and in article 7.

[189] UN Doc. A/PV.1406. Lerner notes: 'The use of the word hatred caused many difficulties and the point was made that, being only a feeling, a state of mind, it was impossible to deal effectively with racial hatred'; Lerner, N., supra n.56, 59.

> in all the debates it was made clear that the Convention should not be interpreted as objecting to the dissemination of scientific ideas that deal with the problem of race … It should not be forgotten, however, that in the past many books and papers aimed at disseminating racial hatred adopted the external form of 'scientific' books or studies.[190]

There are three possible interpretations of the 'due regard' clause of article 4, according to Partsch:[191]

(i) State parties are not authorised to take any action which would in any way limit or impair the relevant human rights referred to in the clause;
(ii) State parties must strike a balance between fundamental freedoms and the duties under the ICERD taking into account that the relevant guarantees are not absolute but subject to certain limitations authorised in the relevant instruments;
(iii) State parties may not invoke the protection of civil rights as a reason to avoid enacting legislation to implement the ICERD.

Partsch quotes the Special Rapporteur for the Committee's study on article 4 as stating that 'it is clear that a balance must be struck between article 4(a) of the Convention and the right to free speech'.[192] He concurs, and would support the second interpretation. The Mexican expert in the Sub-Commission, Cuevas Cancino, had expressed a similar interpretation when he noted that a common denominator, 'the standard which must guide states, regardless of their structural differences', will have to be found.[193]

In *Jersild v. Denmark* (1994),[194] the first hate speech case to reach the European Court of Human Rights, the balancing process indicated by Partsch was illustrated when both the applicant and the respondent government invoked article 4 of the ICERD in defending their respective positions. Under the European Convention on Human Rights, states parties are not required to prohibit hate speech, however article 10 governing freedom of expression has been interpreted as permitting states to prohibit such expression. In *Jersild*, the Court concluded that the limitation on the applicant's freedom of expression was not 'necessary in a democratic society'; in particular, the means were disproportionate to the aim of protecting the reputation or rights of others.

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[190] Ibid., 60.

[191] Partsch, K. (1992), 'Racial Speech and Human Rights: Article 4 of the CERD' in Coliver, S. (ed.), *Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination* (London: Article 19), 24.

[192] CERD Study (1985), UN Doc. A/CONF.119/10, 25.

[193] UN Doc. E/CN.4/Sub.2/SR.1418.

[194] [1994] 19 EHRR 1. Before *Jersild*, the European Commission had dismissed every hate speech case that had come before it as being inadmissible, on the ground that restrictions on hate speech are permissible limitations on the right to freedom of expression under article 10 of the European Convention on Human Rights.

The Danish Government's argument, as interpreted by the Court, was that 'article 10 of the European Convention on Human Rights should not be interpreted in such a way as to limit, derogate from or destroy the right to protection against racial discrimination under the UN Convention'.[195] The applicant's argument rested on the need for a fair balance between the 'protection of the reputation or rights of others' and his right to impart information, a balance envisaged in article 4 of the UN Convention to the effect that 'due regard' should be had to 'the principles in the Universal Declaration of Human Rights and the rights … in article 5 of [the UN] Convention'. The Court noted that the clause had been introduced at the drafting stage because of concern among a number of states that the requirement in article 4(a), that '[states parties] shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred', was too sweeping and could give rise to difficulties with regard to other human rights, in particular the right to freedom of opinion and expression.[196]

The applicant pointed out that the Committee of Ministers of the Council of Europe, when urging member states to ratify the UN Convention, had proposed that they add an interpretative statement to their instrument of ratification, which would, *inter alia*, stress that respect was also due for the rights laid down in the European Convention.[197]

The Court stated that:

> the object and purpose pursued by the UN Convention are of great weight in determining whether the applicant's conviction which – as the government have stressed – was based on a provision enacted in order to ensure Denmark's compliance with the UN Convention, was necessary within the meaning of article 10 paragraph 2 … Denmark's obligations under article 10 must be interpreted … so as to be reconcilable with its obligations under the UN Convention. In this respect it is not for the Court to interpret the 'due regard' clause in article 4 of the UN Convention which is open to various constructions. The Court is, however, of the opinion that its interpretation of article 10 of the European Convention in the present case is compatible with Denmark's obligations under the UN Convention.[198]

In the dissenting opinion of Judges Golcuklu, Russo and Valticos, the ICERD cannot be ignored when the European Convention is being implemented. It must guide the decisions of the Court. 'While appreciating that some judges attach particular importance to freedom of expression … we cannot accept that this freedom should extend to encouraging racial hatred'.[199]

That CERD has consistently taken a similar stance in regard to states' obligations under article 4 is reflected in its General Recommendations, in

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[195] Ibid., para. 27.
[196] Ibid., para. 28.
[197] Resolution (68) 30 adopted by the Ministers' Deputies on 31 October 1968, Ibid.
[198] Ibid., para. 30.
[199] Ibid.

particular Nos. I,[200] VII[201] and XV,[202] the last, coming in 1993, being the most strident in its calls for the protection of ethnic groups from racist speech:

> When the International Convention on the Elimination of All Forms of Racial Discrimination was being adopted, article 4 was regarded as central to the struggle against racial discrimination. At that time, there was a widespread fear of the revival of authoritarian ideologies. The proscription of the dissemination of ideas of racial superiority, and of organized activity likely to incite persons to racial violence, was properly regarded as crucial. Since that time, the Committee has received evidence of organized violence based on ethnic origin and the political exploitation of ethnic difference. As a result, implementation of article 4 is now of increased importance.[203]

The Recommendation, rather than repeating the formula of the previous two pronouncements, which reiterated that due regard must be had to the principles of the Universal Declaration and the rights set forth in article 5 ICERD, instead stressed the belief that:

> In the opinion of the Committee, the prohibition of the dissemination of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression … The citizen's exercise of this right [to freedom of expression] carries special duties and responsibilities, specified in article 29, paragraph 2, of the Universal Declaration, among which the obligation not to disseminate racist ideas is of particular importance.[204]

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[200] General Recommendation I (1972), 'States Parties' Obligations': 'the Committee found that the legislation of a number of states parties did not include the provisions envisaged in article 4 (a) and (b) of the Convention … The Committee accordingly recommends that the states parties whose legislation was deficient in this respect should consider, in accordance with their national legislative procedures, the question of supplementing their legislation with provisions conforming to the requirements of article 4(a) and 4(b) of the Convention.'

[201] General Recommendation VII, 'Legislation to Eradicate Racial Discrimination' (1985), UN Doc. A/40/18: 'The Committee … recalling that, in accordance with the first paragraph of article 4, states parties "undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination", with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of the Convention (…) Recommends that those states parties whose legislation does not satisfy the provisions of article 4 (a) and (b) of the Convention take the necessary steps with a view to satisfying the mandatory requirements of that article … '

[202] General Recommendation XV (1993), 'Organized Violence based on Ethnic Origin', UN Doc. A/48/18.

[203] Ibid., para. 1.

[204] Ibid., para. 4.

Article 5: The Corpus of Rights

All of the drafts before the Sub-Commission contained clauses relating to the obligation of states to prohibit and eliminate racial discrimination in the enjoyment of various rights. Abram's draft articles IV, V and VI listed these rights,[205] while article III of Calvocoressi's draft contained a short enumeration of these rights.[206] Ivanov and Ketrzynski elaborated on these rights in their article 2, paragraphs (d) to (l). The various proposals were collected into a single draft which was unanimously adopted.[207] The Commission did not add or remove substantially from the Sub-Commission's text. A joint amendment by France and Poland to the introductory paragraph was unanimously adopted, and this amendment now forms the *chapeau* of the Convention's article 5. Czechoslovakia in the Third Committee proposed adding the word 'national' before the words 'or ethnic origin' in the introductory paragraph, which was also adopted by a majority. Article 5[208] contains a non-exhaustive list of civil and political rights in

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[205] UN Doc. E/CN.4/Sub.2/L.308.

[206] UN Doc. E/CN.4/Sub.2/L.309. Calvocoressi's draft referred to discrimination rather than racial discrimination; article III para. 2: 'Everyone, without discrimination, shall have the right: (a) to equality before the law: (b) to security of person against bodily harm: (c) to equal access to any place intended for use by the general public.'

[207] UN Doc. E/CN.4/Sub.2/L.334.

[208] Article 5 of the ICERD reads: 'In compliance with the fundamental obligations laid down in article 2 of this Convention, states parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(a) The right to equal treatment before the tribunals and all other organs administering justice;
(b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;
(c) Political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;
(d) Other civil rights, in particular:
    (i) The right to freedom of movement and residence within the border of the State;
    (ii) The right to leave any country, including one's own, and to return to one's country;
    (iii) The right to nationality;
    (iv) The right to marriage and choice of spouse;
    (v) The right to own property alone as well as in association with others;
    (vi) The right to inherit;
    (vii) The right to freedom of thought, conscience and religion;

paragraphs (a) to (d), and economic, social and cultural rights in paragraphs (e) and (f), comparable in its scope to the International Bill of Human Rights.[209]

The obligations of the states parties appear not to refer to the granting of these rights, but only to admitting no racial discrimination in their enjoyment to the extent that they were guaranteed in the domestic law of the states parties.[210] In the consideration of the draft Convention by the Commission on Human Rights in 1964,[211] Van Boven of the Netherlands said in relation to draft article V (now article 5) that 'the difficulties which arose for some delegations were largely due to the fact that their national legislation did not enable them fully to guarantee the rights listed in article V. But the purpose of the article was not to proclaim that the rights which it enumerated must be fully respected but merely to prohibit racial discrimination with regard to their enjoyment'.[212]

Yet there is some support from the debates in the Third Committee on the draft Convention, as prepared by the Commission on Human Rights and submitted by the Economic and Social Council, for the view that the list of human rights contained in draft article V does not serve only to prohibit racial discrimination in the rights enumerated.[213] The provision may be interpreted as acting both to grant certain rights and guarantee freedom from racial discrimination in the exercise of those rights.[214] Partsch, in his study of the civil and political rights of article 5, looked at the declarations and reservations entered by states parties with the result that 'a great many of the interpretative statements formulated

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(viii) The right to freedom of opinion and expression;
(ix) The right to freedom of peaceful assembly and association;

(e) Economic, social and cultural rights, in particular:
(i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;
(ii) The right to form and join trade unions;
(iii) The right to housing;
(iv) right to public health, medical care, social security and social services;
(v) The right to education and training;
(vi) The right to equal participation in cultural activities;

(f) The right of access to any place or service intended for use by the general public, such as transport hotels, restaurants, cafes, theatres and parks.'

[209] Buergenthal, T. (1977), 'Implementing the UN Racial Convention', *Texas International Law Journal* 12, 209.

[210] Boyle, K. and Baldaccini, A., supra n.12, 153.

[211] UN Doc. E/CN.4/SR.873.

[212] UN Doc. E/CN.4/SR.796, quoted in Partsch, K. (1979), 'Elimination of Racial Discrimination in the Enjoyment of Civil and Political Rights: A Study of Article 5, subparagraphs (a) to (d), of the International Convention on the Elimination of All Forms of Racial Discrimination', *Texas International Law Journal* 14, 205–6.

[213] Ibid., 206.

[214] Ibid., 210. This was the formula put forward by McDonald (Canada) in the Third Committee. UN Doc. A/C.3/SR.1309. No delegation objected to his interpretation.

by states parties adhered to an interpretation which attributed a substantive character to the list of constitutional guarantees contained in article 5 rather than viewing the list as merely indicative of the field of application of the rule of non-discrimination'.[215]

There is some incongruence between the article 1(1) definition and article 5, in the latter's detailed list of rights,[216] and in the scope of its application.

The *chapeau* of article 5 of the Convention holds that:

> In compliance with the fundamental obligations laid down in article 2 of this Convention, states parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights.

Article 5 lists four grounds and makes no mention of the ground 'descent', which appears only in article 1(1). A proposed amendment from the Czechoslovak delegate in the Third Committee of the General Assembly to include 'descent' in article 5 was rejected without explanation,[217] even though the amendment succeeded in adding 'national origin'. Partsch, writing on the civil and political rights of article 5, found: 'As it is unclear which situations the word ["descent"] was intended to cover, unlike the concepts of "national or ethnic origin", there does not seem to be any substantial difference from the list of criteria in article 1 paragraph 1.'[218]

This was a valid statement in 1979, when Partsch, a CERD member, wrote his analysis of article 5 before the issue of 'descent-based discrimination' arose in the context of caste-based discrimination, and the denial by India in its 1996

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[215] Ibid., 214. The discussions within CERD on this issue are also examined in this article. CERD found it impossible to reach a consensus, and was split between an extremely wide, an extremely narrow, and an intermediate concept of article 5. Report of the Committee on the Elimination of Racial Discrimination (1973), UN Doc. A/9018.

[216] A notable omission from article 1(1)'s 'political, economic, social, cultural or any other field of public life' is any reference to civil rights. Schwelb notes that the preparatory work does not throw any light on the reason why "civil rights" were omitted from the definition, or whether it was intentional; Schwelb, E., supra n.7, 1005. Article 5 contains a category expressly designated as 'other civil rights', including freedom of movement, freedom of thought, conscience, religion, peaceful assembly and association, and while such rights could arguably be incorporated within the phrase 'any other field of public life', article 5 also lists the right to marriage, the right to inherit, and the right to freedom of thought and conscience, which could never be said to come within the public sphere. In the context of the Convention, Schwelb writes that in the light of its objects and purposes, there can be no doubt that in these conflicts between the definition contained in article 1(1) and the operative provisions of article 5, the latter prevail (1006).

[217] UN Doc. A/C.3/SR.1309, paras 3–5. Cited in Patrick Thornberry, supra n.151, 38, n.111.

[218] Partsch, K., supra n.212, 198.

state report that the Convention applied to the issue of caste. CERD's General Recommendation XXIX on Descent-based Discrimination, issued in August 2002, has re-conceptualised the meaning of 'descent' in conjunction with the working paper and expanded working papers on discrimination based on work and descent from the UN Sub-Commission on the Promotion and Protection of Human Rights.

The omission could not be said to result in the exclusion of 'descent'-based groups from the application of article 5. This conclusion is justified on the basis of *realpolitik*; CERD interprets article 5 of the Convention as applying to 'descent'-based groups in its examination of State Reports, and, given its authority to formulate the reach of the Convention, article 5 rights may not therefore be denied to those groups on a technical legal basis.

In relation to the reach of article 5, CERD, in its General Recommendation XX issued in 1995, said that the provision, 'apart from requiring a guarantee that the exercise of human rights shall be free from racial discrimination, does not of itself create civil, political, economic, social or cultural rights, but assumes the existence and recognition of these rights. The Convention obliges states to prohibit and eliminate racial discrimination in the enjoyment of such human rights'.[219]

In 1973, the Committee had attempted to examine the meaning and scope of article 5, which resulted in three prevailing views in its report to the General Assembly,[220] outlined by Partsch, who was present at the discussion as a CERD member. The first, the 'extremely wide concept', was based on the assumption that article 5 established the rights enumerated in its subparagraph (a) to (f) as legal obligations, and failure to comply with these obligations would mean failure to comply with the Convention.[221] The 'extremely narrow concept' was that the sole purpose of article 5 was to establish the obligation of states parties to ensure that there was no racial discrimination. The rights were enumerated only in order to determine the field of application of this principle.[222] The 'intermediate concept' held that article 5 contained two concepts, the prohibition and elimination of racial discrimination in line with article 2, and the guarantee of the right to equality in compliance with article 1. The Committee, in discharging its functions under article 9, was authorised to examine any restriction or abolition of the guarantees of human rights in article 5 in order to ascertain whether any form of racial discrimination had motivated such an act or followed it.[223]

The Committee could not reach a consensus on which interpretation of article 5 to uphold. There were strong objections to both the extremely wide

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[219] General Recommendation XX (1996), 'Non-discriminatory Implementation of Rights and Freedoms (Art.5)' UN Doc. A/51/18, para. 1.

[220] Report of the Committee on the Elimination of Racial Discrimination (1973), 28 UN GAOR Supp.(No.18) 1 at 12-20, UN Doc. A/9018. The discussion took place over three days, following a proposal by Sayegh, rapporteur.

[221] Ibid., 12, in Partsch, K., supra n.212, 216.

[222] Ibid.

[223] Ibid.

and extremely narrow views, but this did not result in an endorsement of the intermediate view. General Recommendation XX would imply that the Committee has fixed on the intermediate view. Paragraph 1, quoted above, stresses that article 5 does not of itself create civil and political and economic and social rights but obliges states to prohibit and eliminate racial discrimination in the enjoyment of such human rights. Paragraph 2 holds:

> Whenever a state imposes a restriction upon one of the rights listed in article 5 of the Convention which applies ostensibly to all within its jurisdiction, it must ensure that neither in purpose nor effect is the restriction incompatible with article 1 of the Convention as an integral part of international human rights standards.[224]

The Committee can examine whether a restriction on an article 5 right may have an adverse effect on ethnic groups through the state reporting procedure, as indicated by the intermediate view in the 1973 discussion. The Committee 'assumes the existence and recognition of these rights'.[225]

The Committee's assumption of the existence of the article 5 rights is noted by Meron, who observes that while it is widely acknowledged that the catalogue of human rights in article 5 does not create those rights but merely obligates a state party to prevent racial discrimination in the exercise of those that it has recognised, the provision:

> could have been drafted in a manner that clearly defined this limitation. But a more explicit formulation would have emphasized the liberty of states to deny some of the rights listed, which would possibly have weakened the authority of the Universal Declaration of Human Rights, on which the catalogue is based, and undermined the status of some rights as customary law.[226]

Among the rights found in the catalogue of rights in article 5, he finds one to be of 'particular relevance': the guarantee under article 5(f) of equality before the law in 'the right of access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafes, theatres and parks'.[227] Article 3 of the Declaration on the Elimination of All Forms of Racial Discrimination had proclaimed that 'everyone shall have equal access to any place or facility intended for use by the general public'. Article II(k) of the draft convention proposed in the Sub-Commission by Ivanov and Ketrzynski held: 'to admit no racial discrimination in access to all kinds of transport, recreation and public facilities, including restaurants, hotels, cinemas, parks, cafes etc.',[228] resulting in a

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[224] General Recommendation XX (1996), 'Non-discriminatory Implementation of Rights and Freedoms (Art.5)', UN Doc. A/51/18, para. 1.

[225] Ibid.

[226] Meron, T., supra n.17, 294.

[227] Ibid., 293.

[228] UN Doc. E/CN.4/Sub.2/L.314.

Sub-Commission working group producing a draft text, article v(f), which would be unchanged in the Convention, forbidding racial discrimination in: 'Access to any place or service intended for use by the general public such as transport, hotels, restaurants, cafes, theatres, parks.'[229]

Meron uses article 5(f) to illustrate the wide sweep of the Convention from the public into the private sphere, and cites examples of Committee inquiries into the rental of private apartments, or admission into private clubs.[230] Capotorti has noted in the Sub-Commission that the enunciation of public places and services should not be interpreted in a restrictive way, as indicated by the use of the words 'such as'.[231] There is no equivalent provision to article 5(f) in the International Bill of Rights or in any other human rights treaty, and it is a far-reaching right of particular relevance in the context of descent-based discrimination, where denial of access to public places such as wells was an historical symbol of untouchability and caste-based oppression.

The Committee on the Elimination of Racial Discrimination

Article 8(1) of the Convention establishes the Committee on the Elimination of Racial Discrimination (CERD), consisting of eighteen experts of 'high moral standing' elected by states parties from among their nationals, who 'serve in their personal capacity'. Venezuela proposed removing the requirement that states parties may only nominate their own nationals, but this was rejected.[232] The Committee's main functions, outlined in articles 9, 11, and 14, are to examine reports received from states parties, and report annually, through the Secretary General, to the General Assembly of the United Nations and make suggestions and general recommendations based on the examination of the reports and information received from states parties (article 9); to receive and consider communications from a state party that another state party is not giving effect to the provisions of the Convention (article 11); and to receive and consider communications from individuals within the jurisdiction of a state party claiming to be victims of a violation of the rights set forth in the Convention by that state party (article 14).

Under article 9(2), the Committee submits an annual report to the Secretary General and makes suggestions and general recommendations based on the examination of the reports. States that are members of the United Nations but are not party to the Convention have the right to participate in the examination of the Committee's reports, suggestions and recommendations. The draft of the Convention stated initially that, 'such suggestions and general recommendations

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[229] UN Doc. E/CN.4/Sub.2/L.334.
[230] Meron, T., supra n.17, 293.
[231] UN Doc. E/CN.4/Sub.2/SR.425.
[232] UN Doc. A/C.3/SR.1352.

shall only be reported to the General Assembly after prior consultation with the states parties concerned'.[233] The requirement of consultation was removed in a revised draft.[234] Article 9(2) does not specify to whom the suggestions and general recommendations are to be made, but the wording implies that they may be made not to the General Assembly, but to the states parties. To the General Assembly, such suggestions and general recommendations may only be reported.[235]

This is a reflection of the legal status of the Committee, which was not intended to be an organ of the United Nations.[236] Tanzania proposed an amendment whereby the expenses of the Committee would be borne by the United Nations, which was defeated along with a further amendment proposing that the Committee's name should be the 'United Nations Committee on the Elimination of Racial Discrimination'.[237] As the Committee is not an organ of the United Nations in the technical sense of the word,[238] it reports through the Secretary General to the General Assembly rather than addressing the Assembly directly in its suggestions and general recommendations.

Committee members who are nationals of a reporting state do not normally participate in the consideration of their own state's reports. Nevertheless in 1996, the members from China and India were so perturbed about the observations on their states' reports that they wished to voice their dissent, and the Committee found an acceptable way of recording this.[239]

Articles 11-13 provide for a system whereby one state may notify the Committee if another state party is not giving effect to the provisions of the Convention. The original draft of article 11 referred to interstate 'complaints' but in the Third Committee Mexico proposed substituting the word 'complaints' with

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[233] UN Doc. A/C.3/4.1274.

[234] UN Doc. A/C.3/4.1293.

[235] Schwelb, E., supra n.7, 1036.

[236] Ibid., 1035.

[237] UN Doc. A/C.3/SR.1352.

[238] Lerner, N., supra n.56, 96.

[239] CERD/C/SR.1179, paras 60-91. See the comments of Michael Banton, then Chairman of the Committee, in Banton, M. (2000), 'Decision-taking in the Committee on the Elimination of Racial Discrimination', in Alston, P. and Crawford, J. (eds.), *The Future of United Nations Human Rights Treaty-monitoring* (Cambridge University Press), 67. See also the Report of CERD to the General Assembly (1996), UN Doc. A/51/18, para. 21: 'In connection with the elaboration and adoption of concluding observations of the Committee on some reports, individual members of the Committee made the following statements: Sadiq Ali (India) disassociated herself from the concluding observations on India because she felt them totally unbalanced and Zou wished to disassociate herself from some of the concluding observations on the People's Republic of China, which she believed were based upon factually incorrect premises.'

'communications', which was adopted for its more inclusive and less adversarial tone.[240] The procedure applies to all the states parties to the Convention.[241]

No state party to the Convention has initiated a communication about another state party under article 11. Several reports have been submitted under article 9 claiming that the state party was being obstructed in fulfilling its Convention obligations by another state not party to the Convention. In 1983, the case of the occupation of the Northern part of Cyprus by Turkey, a non-state party, prompted the Committee to express its hope 'that the unacceptable state of affairs in Cyprus, due to the foreign occupation of part of its territory, will finally be brought to an end', a decision which two Committee members dissociated themselves from on the grounds that it 'dealt with matters outside the scope of the Committee's competence'.[242] Such reports were also received from Jordan, Syria and Egypt in relation to the occupation by Israel of their territories, when Israel was not a party at that time to the Convention. When Israel subsequently signed and ratified the Convention, Syria was unwilling to initiate a procedure under article 11, but maintained its complaint in its reports, a position that some Committee members refused to accept under article 9,[243] while others found it relevant on the basis of political, moral or ethical concerns.[244] Further examples of 'disguised inter-state disputes' between states parties and other states, whether party or not to the Convention, can be found in the article 9 reports.[245]

Article 14, under which states parties may make a declaration recognising the competence of the Committee to receive and consider 'communications' from individuals, did not become operative until 1982, taking significantly longer than its counterpart, the Optional Protocol to the CCPR, to gather the ten state declarations necessary before the provision became effective. CERD drafted rules of procedure in 1982, based on the approach of the Human Rights Committee. Under article 14(1), groups of individuals as well as individuals may present communications to the Committee. The identity of the petitioner is not revealed to the state party without express consent.[246] CERD is not barred from receiving communications which are being considered by another international body.[247]

The Italian delegate remarked in the Third Committee that the use of the word 'communication' and not of the word 'petition' was not merely a verbal precaution, as the proposed treatment for such communications was 'very moderate'.[248]

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[240] UN Doc. A/6181 (1965), paras 118–20.

[241] This may be compared with, for example, the interstate complaints procedure in article 41(1) of the ICCPR which applies only to those states parties which specifically recognise the relevant competence of the Human Rights Committee.

[242] UN Doc. A/38/18 (1983), para. 96, quoted in Partsch, K., supra n.9, 361.

[243] CERD/C/SR.507 and 508 (1981).

[244] CERD/C/SR.661 and 662 (1984).

[245] Buergenthal, T., supra n.209, 211.

[246] Article 14(6)(a).

[247] Partsch, K., supra n.9, 363.

[248] UN Doc. A/C.3/SR.1357.

Nevertheless, the provision was achieved with difficulty,[249] and it was necessary, as the representative of Ghana pointed out, to reconcile 'the sincere wish of many delegations to use the right of petition and communication as an effective weapon against discrimination' with the fact that many states 'were jealous of their sovereignty and were reluctant to acknowledge that right'.[250]

Since article 14 became operative, the Committee has received a number of petitions which have contributed to a growing body of jurisprudence. The respondent states have so far been composed only of the Scandinavian countries, the Netherlands, Slovakia, Serbia and Montenegro, France and Australia, which would suggest that even though a large number of states parties have made a declaration under article 14,[251] the procedure is still relatively unknown.

In a case taken against Slovakia, the communication received was from Anna Koptova,[252] director of a Roma organisation, whose rights had not been directly infringed. The case concerned two resolutions passed by the municipalities of Nagov and Rokytovce in the Slovak Republic, which forbade Romany families from settling there, and stated that: 'in case the Roma would forcefully move into the settlement, they would be, with the help of all citizens, evicted from the settlement.'[253]

Although neither resolution had been specifically applied to her, the author stated that she was a victim of violations of articles 2(1)(a), 2(1)(c), 3, 4(c), 5(d)(i) and 6 of the Convention, for the purposes of article 14(1), for both resolutions may be reasonably understood by the author (as indeed by all Roma in Slovakia) to apply to her.[254] Significantly, she further argued that:

> in assessing her 'victim' status, the Committee should also take into consideration jurisprudence of the European Court of Human Rights which entitles individuals to contend that a law violates their rights by itself, in the absence of an individual measure of implementation, if they run the risk of being directly affected by it.[255]

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[249] Lerner, N., supra n.56, 90.

[250] UN Doc. A/C.3/SR.1355.

[251] In addition to Denmark, Norway and Sweden, and Australia, France, the Netherlands and Slovakia, all of whom have had petitions filed against them, the following states parties have made a declaration under article 14: Austria, Azerbaijan, Belgium, Brazil, Bulgaria, Chile, Costa Rica, Cyprus, Czech Republic, Ecuador, Finland, France, Germany, Hungary, Iceland, Ireland, Italia, Liechtenstein, Luxembourg, Malta, México, Monaco, Peru, Poland, Portugal, Republic of Korea, Romania, Russian Federation, Senegal, Serbia and Montenegro, South Africa, Spain, Sweden, Switzerland, Former Yugoslav Republic of Macedonia, Ukraine, Uruguay and Venezuel; Office of the High Commissioner for Human Rights, <www.unhchr.ch>.

[252] Communication No.13/1998, CERD/C/57/D/13/1998.

[253] Ibid., Resolution No.21 of the Municipal Council of Rokytovce, 8 June 1997.

[254] Ibid., paras 3.1 and 3.2.

[255] Ibid., para. 3.3, and in 3.4: 'Even though the author does not now and did not previously reside in the affected municipalities, she is among the class of persons defined by the challenged resolutions who are adversely affected by them.'

The Committee held that: 'it was of the view, contrary to the state party, that the author could be considered a "victim" within the meaning of article 14, paragraph 1, of the Convention, since she belonged to a group of the population directly targeted by the resolutions in question.'[256] It found that there had been a violation of article 5(d)(i) of the Convention.[257] The decision is a reflection of the Committee's growing interest in the protection of group rights. The recent development of the practice of holding thematic discussions on topics which affect groups rather than individuals, resulting in the issuing of a general recommendation, reveals the Committee's belief in the progressive enforcement of states' obligations to protect vulnerable groups rather than specific instances of racial discrimination against individuals. Such discussions do not focus on a particular state, but rather on a particular phenomenon of racial discrimination being suffered by a group.

General Recommendation XXVII addressed the issue of discrimination against the Roma, and several of its proposed measures were for the protection of the Roma communally, rather than individually. For example, paragraph 46 proposes that states parties 'take the necessary steps, including special measures, to secure equal opportunities for the participation of Roma minorities or groups in all central and local governmental bodies'.[258] General Recommendation XXIX examined the question of descent-based discrimination, and its paragraph 21 recommends that states parties 'take the necessary steps to secure equal access to the justice system for all members of descent-based communities, including by providing legal aid, facilitating of group claims and encouraging non-governmental organizations to defend community rights'.[259] General Recommendation XXX on discrimination against non-citizens describes in its preamble how 'human rights violations against members of such groups occur widely', and encourages states parties to take 'resolute action to counter any tendency to target, stigmatize, stereotype or profile … members of "non-citizen" population groups'.[260]

The progression is highlighted when contrasted with the drafting of article 5 in the Sub-Commission, when the Soviet expert Ivanov proposed having the right proclaimed to actual participation by racial, national and ethnic groups in legislative and executive bodies. The amendment was withdrawn when the majority

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[256] Ibid., para. 6.5.

[257] Ibid., para. 10.1. Article 5(d)(i) guarantees the right, without distinction as to race, colour, or national or ethnic origin, to freedom of movement and residence within the border of the State.

[258] General Recommendation XXVII (2000), 'Discrimination against Roma', UN Doc. A/55/18 annex V, para. 41.

[259] General Recommendation XXIX (2002), 'Article 1 paragraph 1 of the Convention (Descent)', UN Doc. A/57/18. The Recommendation makes repeated references to 'descent-based groups'.

[260] General Recommendation XXX (2005), 'Discrimination against Non Citizens', preamble and para. 12.

of the experts stated their opposition to a reference to groups, on the basis that the Convention should protect only individual rights and not group rights.[261]

Conclusion

Through the UNESCO documents, and the Declaration and Convention on the Elimination of All Forms of Racial Discrimination, the United Nations has taken a determined approach to eradicate the phenomenon of racism. Yet all of these documents betray the confusion and uncertainty in effectively undermining the doctrine of the existence of a biological concept of race. The first UNESCO Statement on Race denied its existence, but the second reversed this position. The UNESCO experiment had already failed it would seem, for the first Statement denied the existence of race while proclaiming that there were indeed three identifiable races, in accordance with the philosophy of its principal draftsman and rapporteur, Ashley Montagu. The Declaration on the Elimination of All Forms of Racial Discrimination 1963 condemned doctrines of racial differentiation, but, as a result of a specific move against such a formulation in the drafting of the treaty, the Convention condemned only doctrines of superiority based on racial differentiation. The debates at all levels, and notably around article 4 on propaganda, reveal that delegates did not wish to condemn the fact that a scientist might publish a document supporting a belief in differences between races. This is acceptable in the sense that a private or state actor may propose such ideas. It is, however, entirely unacceptable that the Convention itself would not expressly or implicitly deny this belief. There is no biological foundation for race, yet the International Convention on the Elimination of All Forms of Racial Discrimination fails to acknowledge this. The doubts surrounding the issue have been effectively examined in the second set of UNESCO statements, and in the UNESCO Declaration on Race and Racial Prejudice of 1978, the findings of which must be incorporated in an interpretative statement by the CERD Committee which authoritatively denounces and condemns the belief in the biological existence of race, particularly in view of the drafting history of the Convention's Preamble. At the Durban World Conference against Racism, the representative of Belgium stated on behalf of the European Union:

> The Member States of the European Union consider that the acceptance of any formulation implying the existence of separate human 'races' could be interpreted as a retrograde step as it risks denying the unity of humanity. Nor is acceptance of such a formula necessary in order to identify or combat racial discrimination … This

[261] Quoted in Lerner, N., supra n.56, 68.

does not imply the denial of 'race' as a ground for discrimination and the denial of manifestations of racism or racial discrimination.[262]

The International Convention on the Elimination of All Forms of Racial Discrimination has succeeded in framing the international community's abhorrence of doctrines of racial inequality through its focus on eliminating the effects of such thinking through human rights law. It is now established in international law that the prohibition of racial discrimination exists independently of the general obligation to respect human rights, and is part of *jus cogens*.[263]

A review of the first 45 state reports has shown that more than half the states in question emphatically denied that any form of racial discrimination existed on their territories.[264] Many states initially viewed the Convention as an instrument designed solely to combat racial discrimination by 'whites' against 'blacks'.[265] The Committee has unequivocally rejected this position and the 'double standard' implicit in it.[266] CERD has overseen the identification of racially discriminatory practices in the states parties to the Convention, and has recommended and reviewed the adoption of legislative measures to combat such discrimination. This work is reflected in the enhanced quality and sophistication of the state reports, and the mechanisms being enacted against racial discrimination. Buergenthal notes that the Committee's formal interpretative rulings are yielding a growing body of law on the meaning of the Convention which, in the absence of a contrary ruling by the International Court of Justice,[267] become the most authoritative precedent on the subject.[268]

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[262] Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, A/CONF.189/12, 104–5, quoted in Thornberry, P., supra n.151, 20.

[263] Boyle, K. and Baldaccini, A., supra n.12, 144. The authors give the example of the US (Third) Restatement of the Foreign Relations Law (1986), Section 702, n.11, which recognises that racial discrimination constitutes a violation of peremptory norms of customary international law. Schabas, in the context of reservations, discusses whether racial discrimination is to be considered a norm of *jus cogens*: 'In its objection to the reservation made by the Arab Republic of Yemen to the ICERD, Canada declared that "the principle of non-discrimination is generally accepted and recognized in international law and is therefore binding on all states", although it did not use the term *jus cogens*.' Schabas, W., supra n.91, 50. Jaichand quotes Judge Tanaka in concluding that: 'a treaty providing for racial discrimination would constitute a violation of *jus cogens*'; Jaichand, V. (1988), 'South Africa and Racial Discrimination', *Notre Dame Journal of Legislation* 15:1, 42.

[264] Banton, M., supra n.49, 106.

[265] Buergenthal, T., supra n.209, 218.

[266] *Ibid.*

[267] Article 22 gives jurisdiction over the settlement of disputes between the states parties relating to the interpretation or application of the Convention to the International Court of Justice, which is the ultimate arbiter of the meaning of the Convention.

[268] Buergenthal, T., supra n.209, 207.

It has been noted by Boyle and Baldaccini that perhaps the largest gap to be filled in the interpretative work of CERD concerns the definition of racial discrimination in article 1 of the Convention.[269] Given that tackling *apartheid* was a priority of the Convention, they believe that CERD has shied away from any comment on the definition.[270] However, in the post-*apartheid* world, there is a need for clarification of the scope of the Convention's protections, and in particular, a need to bring out the distinction between discrimination based on skin colour and other differences, including religion,[271] which attract hostility and discrimination.[272] A renewed emphasis on equality would allow international human rights law to link the goal of eliminating racial discrimination with the efforts to eliminate other forms of group discrimination.[273]

The commentators' description of racial discrimination as group discrimination is a reflection of the new approach to the interpretation of the Convention that is being led by the Committee. This shift in focus can accommodate an appreciation of the economic and social conditions that give rise to racism, and states parties must be urged to address these conditions as part of their article 5 obligations. Under article 5 there is less scope allowed to states than there is under the affirmative action provisions, which leave states parties judge when 'the circumstances so warrant' their implementation. In *Koptova*, the Committee found that the state party had failed to guarantee an article 5(d)(i) right to freedom of movement for an ethnic group, the Roma. As more cases come to the Committee's attention through increased awareness of the availability of the article 14 procedure in a large number of states, the Committee may find that ethnic groups are being denied the social and economic rights of articles 5(e) and (f), and urge the respondent state to move towards a situation of *de facto* equality between ethnic groups in the granting of these rights. The particular instance of article 5(f), which guarantees freedom from racial discrimination in the enjoyment of a right of access to public places such as restaurants, cafes and parks, can be cited in evidence of the broad reach of article 5, and its importance in the context of caste-based discrimination.

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Chapters 3 and 4 have examined the response to caste-based discrimination and racial discrimination. It is significant that both responses are somewhat dated – the Indian Constitution is from 1950, and the Convention was opened for signature in 1965. Yet CERD has rejected a narrow construction of the Convention's

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269 Boyle, K. and Baldaccini, A., supra n.12, 172.

270 Ibid.

271 On the concept of 'aggravated discrimination', or discrimination on the basis of race and religion, see Keane, D., supra n.55.

272 Boyle, K. and Baldaccini, A., supra n.12, 172 and 189.

273 Ibid., 189.

meaning as the fight against racial discrimination has increased in sophistication. The Indian government, by contrast, has relied on the provisions of 1950 which are urgently in need of internal reform, as well as complementary measures. As a result, there was a need for a renewed focus on caste that fused the domestic Dalit struggle with the elimination of racial discrimination on the international level. CERD had been pointing towards social and economic equality as a means of eliminating racial discrimination. It was vital that the problem of caste-based discrimination be included within this movement.

In August 2002, CERD issued General Recommendation XXIX on Descent-based Discrimination, which *inter alia* affirmed that caste-based discrimination was a form of descent-based discrimination within the meaning of article 1(1) of the Convention. General Recommendation XXIX was the first document to begin the work of interpreting the definition of racial discrimination in article 1(1), by elaborating on the meaning of 'descent'. Since UNESCO's Four Statements on the Race Question, no attempt had been made by an international body to interpret the key words of the Convention; race, colour, descent, and national or ethnic origin.

Chapter 5 explores the legal history of descent-based discrimination. Chapter 6 will present a combination of domestic and international initiatives that advocate a rights-based approach to enhancing protection against caste-based discrimination in the public and private spheres.

There is much that the international bodies can learn from the Dalit groups who are proving imaginative and resourceful in their proposals for eradicating caste. Both chapters are concerned with the precise role of human rights law in the caste struggle, and the contribution that the United Nations can make towards eradicating this unique form of racial discrimination. It will be shown that the question of how to eliminate caste extends beyond the boundaries of this particular problem.

PART 3

Chapter 5

A Legal History of Descent-based Discrimination

Introduction[1]

The word 'caste' does not appear in any international human rights treaty.[2] Consequently, when increasingly well-organised and vocal Dalit human rights organisations began successfully highlighting the continuing widespread discrimination on the basis of caste 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.[3] That source is article 1(1) of the International Convention on the Elimination of All Forms of Racial Discrimination 1965 (ICERD), and in particular the word 'descent', one of the five grounds listed in the definition of racial discrimination.[4] Caste-based discrimination, the Committee

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[1] This chapter is a reproduction of an earlier article; see Keane, D. (2005), 'Descent-based Discrimination in International Law: A Legal History', *International Journal on Minority and Group Rights* 12, 93. The author would like to acknowledge the kind permission received from Koninklijke Brill N.V. to re-publish the text of this article.

[2] In the 100th meeting of the Third Committee of the General Assembly, India proposed inserting the word 'caste' into the text of article 2 of the Universal Declaration of Human Rights because it 'objected to the word "birth"'. The words 'other status' and 'social origin' were found by the delegation to be sufficiently broad, and it did not therefore insist upon its proposal; 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), 37, n.107.

[3] India opposed the inclusion of the term in the Durban Declaration and Programme of Action, and 'caste' was excluded from the final text at the World Conference against Racism in 2002, although India was the only state vocally opposed to its inclusion. South Asian Human Rights Documentation Centre, Submission to the 61st session of the Committee on the Elimination of Racial Discrimination on the Thematic Discussion on Discrimination on the ground of Descent, 8–9 August 2002, and Thornberry, P., ibid., 39, n.119.

[4] 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'.

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 so a form of racial discrimination, and falls within the purview of the Convention.

Since 1996, the Committee 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. CERD has raised the issue of descent-based discrimination in a number of State Reports from a variety of regions, including Bangladesh, Senegal, Mali, Ghana and Japan, as well as India and Nepal, the South Asian countries traditionally associated with caste.[5] In August 2002, CERD issued General Recommendation XXIX on descent-based discrimination, the result of a thematic discussion conducted by the Committee in the same month.[6]

In August 2000, the UN Sub-Commission on 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. In less than four years, the Sub-Commission has produced a working paper and two expanded working papers, culminating in the appointment of two Special Rapporteurs on Discrimination based on Work and Descent, Yozo Yokota and Chung Chin-Sung, who have released an intitial report,[7] and are formulating a set of principles and guidelines. The 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 addition, the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance has indicated his intention to focus on the issue of descent-based discrimination in the next period of his mandate.[8]

This chapter traces the legal history of the word 'descent'. The ICERD is the only international treaty in which 'descent' appears as a prohibited ground for discriminatory treatment, and no other United Nations convention or covenant lists it as one of the grounds in their non-discrimination clauses.[9] Its meaning,

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[5] Thornberry, P., supra n.2, 39.

[6] CERD/C/SR.1531. The thematic discussion took place on 9 August 2002; there are no summary records for the session, which involved 23 separate interventions from members of the UN Sub-Commission on the Protection and Promotion of Human Right, NGO's (one of which was a joint statement from 32 NGOs), and two governments – India and Nepal; Thornberry, P., ibid., 40, n.124.

[7] UN Doc. A/HRC/Sub.1/58/CRO.2.

[8] UN Doc. E/CN.4/Sub.2/2004/31, para. 73.

[9] While 'descent' does not appear as a ground in any other international non-discrimination clause, it is not unique in the corpus of human rights law – Article 1(1)(b) of ILO Convention 169 on Indigenous and Tribal Peoples covers indigenous status on the grounds, *inter alia*, of 'descent from the populations which inhabited the country'; Thornberry, P., supra n. 2, 37, n.107.

therefore, appears to rely on the *travaux préparatoires* of the ICERD. The *travaux* reveal that 'descent' first appeared as part of an amendment proposed by India in October 1965 to the definition of racial discrimination as drafted by the Commission on Human Rights. This crucial intervention led CERD to interpret, in the absence of any express explanation of its meaning during the course of the debates on the definition in the Third Committee of the General Assembly from the Indian delegation, that discrimination on the basis of descent was intended to cover discrimination on the basis of caste. The Indian contribution to the debates on subsequent provisions of the Convention reveal that India was concerned with the relationship between caste and the Convention, but that the concern was for its constitutional system of affirmative action and the need to ensure that this would not represent racial discrimination under article 1. At no point does the delegation point to a link between caste and descent.[10]

It is submitted that it would be unusual for India to expressly introduce the concept of caste into the Convention, given that it firmly believed, and still does on the evidence of its State Reports,[11] that caste-based discrimination was eradicated by the provisions of its 1950 Constitution. That India has always been synonymous with caste in the eyes of the international community was one of the major driving forces behind the protections enacted in the Constitution, notably the article 17 ban on untouchability, and it would be unlikely that it would introduce caste into the Convention because it believed such discrimination was taking place in other states party to the Convention.[12] This would point to another meaning behind the word 'descent', which, if left unidentified, could leave the recent movement towards the eradication of descent-based discrimination vulnerable to the accusation of mis-interpretation of a key term of the Convention.

'Descent' does appear as a ground for non-discrimination in another legal document integral to the present discussion – the 1950 Indian Constitution. The list of grounds in article 16(2) of the Fundamental Rights section includes descent. It reads: 'No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of any employment or office under the State.'

The Constituent Assembly debates of India, which took place from 1947–49, provide an answer as to what was behind the word 'descent' when it appeared in article 16 of the Indian Constitution, and when it reappeared in 1965 in the Indian amendment to the definition of racial discrimination in article 1(1). Given

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[10] UN Doc. A/C.3/SR.1299–1374.

[11] India's 2006 report to the Committee reiterated the position made in its last report in 1996, that 'caste' cannot be equated with 'race' or covered under 'descent' under Article 1 of the Convention. CERD/C/IND/19, 29 March 2006, para. 16.

[12] According to Pillai, writing in 1959: 'It has become impossible to think of India except in terms of caste;' Pillai, G. (1959), *The Origin and Development of Caste* (Allahabad: Kitab Mahal), Preface.

the obscurity of the word in legal texts, it is argued that this must be the correct source of its meaning.

What emerges is an entirely different meaning from that first put forward by CERD in 1996. How this affects the current interpretation of the meaning of descent is a hermeneutical question, answered by underlining the authority of CERD to dynamically interpret the terms of the Convention, and the necessity of affording the Committee the freedom to do so. The historical meaning of descent nevertheless reflects the uncertainty behind this ambiguous term, which may have served to deflect attention from the phenomenon it was initially employed to combat – caste-based discrimination.

This chapter is divided into three sections; the first examines the current interpretations of descent, by the Sub-Commission and CERD; the second looks at the drafting of the ICERD; and the third consists of an analysis of the Constituent Assembly debates of India.

Current Interpretations of Descent

CERD

> The term 'descent' implied one generation inheriting from another specific characteristics that were positively or negatively evaluated by society. The resulting stratification of some societies had led to the emergence of groups of people who are excluded from the rest of society and regarded as 'untouchable'.[13]

In its consolidated 10th–14th Periodic Report, submitted under article 9 of the ICERD in 1996, India argued that caste-based discrimination did not fall within the definition of discrimination contained in article 1 paragraph 1 of the Convention. The Indian Government contended that: 'the term "caste" denotes a "social" and "class" distinction and is not based on race. It has its origins in the functional division of Indian society during ancient times.'[14] India outlined its interpretation of article 1(1) of the Convention, raising the issue of the meaning of 'descent', if only to deny its applicability to the situation of the Scheduled Castes:

> Article 1 of the Convention includes in the definition of racial discrimination the term 'descent'. Both castes and tribes are systems based on 'descent' since people are normally born into a particular caste or a particular tribe. It is obvious, however, that the use of the term 'descent' in the Convention clearly refers to 'race'. Communities which fall under the definition of Scheduled Castes and Scheduled Tribes are unique to Indian society and its historical process. As conveyed to the Committee during the

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[13] CERD member Rodriguez, Thematic Discussion on Discrimination based on Descent, 16 August 2002, CERD/C/SR.1531, para. 18.

[14] Periodic Report – India (1996), CERD/C/299/Add.3, para. 6.

> 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.[15]

India was emphatic in its most recent report, submitted in 2006:

> 'race' and 'caste' are mentioned separately in the Indian Constitution as prohibited grounds of discrimination. Therefore they cannot be considered to be interchangeable or synonymous. If the concept of caste was included in race, there was no reason to mention them separately. Therefore, as in the last Report, information pertaining to Scheduled Castes and Scheduled Tribes or issues related to this group has not been provided in the present Report. As a matter of courtesy to the members of the Committee, if it so desires, the Government of India would be happy to provide information relating to Scheduled Castes and Scheduled Tribes to them though not as a reporting obligation under CERD.[16]

The Committee has not yet published its response to the 2006 report. In its consideration of India's 1996 report, one CERD member noted that India's previous report, its ninth periodic report,[17] had provided information on the development and protection of Scheduled Castes and had therefore clearly recognised that the Convention was applicable to the situation in India. He added: 'when the Convention had been drafted, the delegation of India at that time had made a valuable contribution to the same article 1, particularly subsection 4 which advocated affirmative action, and article 2(2), which was along the same lines. There seemed to be some discrepancy between that historical contribution and the attitude that was being taken in the report.'[18] CERD member Chigovera fully endorsed the point, 'and the fact that castes and tribes were based on descent', he argued, 'brought them strictly within the Convention, under the terms of article 1.'[19] The Committee regretted in its Concluding Observations that the report and the delegation claimed that the situation of the Scheduled Castes and Scheduled Tribes did not fall within the scope of the Convention. It stated that: 'the 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.'[20] It emphasised its great concern

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[15] Ibid., para. 7.

[16] Periodic Report – India (2006), CERD/C/IND/19, para. 17. In this excerpt, India is again failing to make a correct distinction between 'race' and 'racial discrimination'.

[17] Periodic Report – India (1987), CERD/C/149/Add.11.

[18] Van Boven, CERD/C/SR.1162, para. 15.

[19] Chigovera, CERD/C/SR.1162, para. 22. In reply, Singh of India stated: 'Constitutionally, the concept of race was distinct from caste. Engaged as it was in the task of eliminating all vestiges of caste discrimination, India could not accept another distinction. To confer a racial character on the caste system would create considerable political problems' (para. 35).

[20] Concluding Observations – India (1996), CERD/C/304/Add.13, para. 14.

that within the discussion of the report, there was no inclination on the side of the state party to reconsider its position. The 10 years since has not seen a change in India's stance.

The Committee maintained this position in March 2001, when in its Concluding Observations on Japan's Periodic Report, it noted that contrary to the state party's contentions, discrimination based on descent contained in article 1 of the Convention 'has its own meaning and is not to be confused with race or national origin.'[21] The Committee recommended that the state party ensure that all groups including the Burakumin community are protected against discrimination and afforded full enjoyment of the civil, political, economic, social and cultural rights contained in article 5 of the Convention.[22] Japan stated in response that it did not share the Committee's interpretation of descent.[23] Similarly, while reviewing Bangladesh's Report in the same month, the Committee reaffirmed that 'the term descent does not solely refer to race or ethnic or national origin and [it] is of the view that the situation of castes falls within the scope of the Convention'.[24]

The Committee raised the issue of caste and descent in several State Reports outside of Asia. In 2001, it noted with concern the continuing legacy in Senegal of aspects of a caste-based system, despite its having been banned by law.[25] In its Concluding Observations to the State Report from Mali, the Committee bore in mind the explanations provided by the delegation concerning the practice of *sinangouya* and the relative nature of the caste system, which does not hinder social mobility in Mali. It nonethless requested information on the approach the state party intended to take regarding the persistence of the consequences of a traditional caste system that could give rise to descent-based discrimination.[26] In its consideration of the Report submitted by Ghana, the Committee asked whether descent-based discrimination exists in Ghana, and drew the attention of the state party to its General Recommendation XXIX on the matter.[27]

In August 2002, CERD issued General Recommendation XXIX on descent-based discrimination.[28] The Recommendation was the result of a thematic discussion on descent-based discrimination conducted by the Committee in the same month,[29] and with regard to style, and the sequence of sections, was modelled

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[21] Concluding Observations – Japan (2001), CERD/C/58/Misc.17/Rev.3, para. 8.

[22] Ibid.

[23] Comments of States Parties on the Concluding Observations of the Committee, UN Doc. A/56/18, para. 2.

[24] Concluding Observations – Bangladesh (2001), CERD/C/58/Misc.26/Rev.3, para. 11.

[25] Concluding Observations – Senegal (2002), UN Doc. A/57/18, para. 445.

[26] Concluding Observations – Mali (2002), UN Doc. A/57/18, para. 391.

[27] Concluding Observations – Ghana (2003), CERD/C/62/CO/4, para. 22.

[28] General Recommendation XXIX, 'Article 1 paragraph 1 of the Convention (Descent)', UN Doc. A/57/18, 111–17.

[29] CERD/C/SR.1531.

on General Recommendation XXVII on discrimination against the Roma, the first thematic discussion undertaken by the Committee.[30]

The Recommendation does not offer a definition of descent-based discrimination.[31] The preamble points to a wider understanding of descent-based discrimination that includes, but is not limited to, caste-based discrimination.[32] Caste is cited as a specific example of descent-based discrimination that is to be strongly condemned; nevertheless, the Recommendation concentrates on descent, and not on caste. It does not seek to directly attack caste as a social and religious structure, or to single out any particular country for condemnation, maintaining as its objective the elimination of the broader concept of descent-based discrimination.[33] It argues that descent-based discrimination is a form of discrimination that extends beyond states that are traditionally associated with caste.

A number of measures of a general nature to be undertaken by states parties are included in the Recommendation, 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 some or all of the following: 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.[34]

The approach is designed to facilitate states in beginning the process of investigation as to whether some or all of the factors listed apply in their country, and if so, whether this signals the existence of descent-based discrimination. A precise definition may have served only to discourage this process. This is reflected in the tone of the language in the preamble, which invites states to recognise descent-based discrimination, rather than condemning them for not having done so.[35] This tone is maintained in the document's recommendation that states parties, as appropriate for their particular circumstances, adopt some or all of

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30 Thornberry, P., supra n.2, 42.

31 Thornberry notes that 'it may now be said that, if not defined, descent-based discrimination has at least been conceptualised in General Recommendation XXIX'; ibid., 44.

32 'Strongly reaffirming 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.'

33 Thornberry, P., supra n.2, 41.

34 General Recommendation XXIX, supra n.28, para. 1.

35 Thornberry, P., supra n.2, 42.

the proposed measures. It commends those states that have identified and taken measures to eliminate descent-based discrimination and remedy its consequences, and strongly encourages those states who have yet done so to recognise and address this phenomenon.[36]

As part of the general measures, the Recommendation proposes the adoption of special measures in favour of descent-based groups and communities in order to ensure their enjoyment of human rights and fundamental freedoms, in particular concerning access to public functions, employment and education. It also asks states to consider the incorporation of an explicit prohibition of descent-based discrimination in the national constitution.

The UN Sub-Commission on the Promotion and Protection of Human Rights

In August 2000, the UN Sub-Commission passed resolution 2000/4 on Discrimination based on Work and Descent.[37] The resolution declared that discrimination based on work and descent is a form of discrimination prohibited by international human rights law,[38] and requested that governments ensure that all necessary constitutional, legislative and administrative measures, including appropriate forms of affirmative action, be put in place to prohibit and redress discrimination on the basis of work and descent.[39] The resolution also entrusted the Sub-Commission expert, Goonsekere, with the task of preparing a working paper on the topic. The aim of the paper was the identification of communities in which descent-based discrimination occurs, the examination of existing constitutional, legislative and administrative measures for the abolition of such discrimination and the proposal of concrete recommendations for the effective elimination of such discrimination.

The working paper was presented to the Sub-Commission in June 2001.[40] This paper, and the ensuing debate amongst Sub-Commission experts that followed, marked the first time that caste-based and descent-based discrimination were discussed as a major source of human rights violations worldwide by a UN human rights body.[41] The paper stated that, like other forms of discrimination, any distinction, exclusion, restriction or preference based on work and descent

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36 General Recommendation XXIX, supra n.28, preamble.

37 UN Doc. E/CN.4/SUB.2/RES/2000/4.

38 Ibid., para. 1.

39 Ibid., para. 2.

40 UN Doc. E/CN.4/Sub.2/2001/16. 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.

41 Human Rights Watch (2001), *Caste Discrimination: A Global Concern, A Report for the United Nations Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance*. CERD is not considered a UN human rights body.

contravenes the spirit and letter of international human rights law.[42] Furthermore, discrimination based on descent manifests itself most notably in caste-based distinctions.[43] Victims of descent are singled out, not because of a difference in physical appearance or race, but rather by their membership in an endogamous social group that has been isolated socially and occupationally from other groups in the society. The paper was not meant to be an exhaustive review, but rather presented itself as an introduction that sought to demonstrate that there is a serious problem of human rights violations arising from work and descent.[44]

The Expanded Working Paper on Discrimination based on Work and Descent, published in June 2003 and written by Eide and Yokoto, was to be read together with Goonsekere's original working paper.[45] It quoted Goonsekere, who had noted that the focus of the working paper had been countries in Asia. At the time the resolution was discussed in the Sub-Commission it was mentioned that the problem was not limited to Asia alone and that it existed in some parts of Africa and perhaps in South America. The expanded working paper therefore examined the situation in West Africa, North-East Africa, Somalia, and Yemen. It concluded:

> the prevalence of discrimination based on work and descent is more widespread than might have been envisaged at the outset of this process … This form of discrimination is distinct, in its combination of causal factors and expressions, from other forms of discrimination examined in the history of the Sub-Commission.[46]

The authors offered an initial analysis of what appear to be the main points of similarity in the causes and expressions of marginalisation affecting these diverse communities, divided into causal and consequential factors. Under causal factors, descent was seen as a defining criterion for the ascription of marginalised status and associated discrimination. Membership of the marginalised group is acquired by birth into that group or by descent from that lineage. The marginalised status so acquired cannot be removed by individual merit or achievement, though it may, depending upon the social circumstances, be concealed if one's lineage is not known, since the status is not generally or exclusively associated with observable physical characteristics.[47]

The second principal causal factor was work or occupation. In each case, the marginalised status and associated discrimination is strongly associated with the occupations or traditional occupational roles of the groups concerned. Those occupations (or traditional occupational roles) are typically regarded by

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[42] Supra n.40, para. 3.

[43] Ibid. The paper also found that it manifests itself notably through tribal-based distinctions.

[44] Ibid., para. 50.

[45] UN Doc. E/CN.4/Sub.2/2003/24, para. 5.

[46] Ibid., paras 57 and 58.

[47] Ibid., para. 45.

other members of the society as dirty and/or menial. The effect is sometimes residual, since the members of the marginalised groups may not in fact continue to carry out those particular kinds of work. In some cases the marginalisation/discrimination is associated with a ritual or religious role involving dangerous occult 'power'. Even where the original occupational roles no longer exist, the marginalisation caused by association with stigmatised traditional occupations may lead – as a consequence – to members of the affected groups being relegated to the most menial jobs, whether or not those jobs are related to the original occupational roles.[48]

Endogamous isolation was the precursor of group membership by birth, and so can be seen as a cause of this form of marginalisation/discrimination. However, it is also and more usually seen as a consequence, with the social proscription of intermarriage with the marginalised groups.[49]

The notion of pollution (if not always of its polar opposite, purity) was a very common feature of attitudes towards the communities concerned. This is often associated with beliefs regarding the physical dirtiness or ritually polluting nature of the ascribed functional roles of these communities, and hence can be seen as a consequence as well as a cause of this form of discrimination. The members of such communities are generally regarded as themselves being sources of potential pollution to others. In other cases, the attitude is related instead to beliefs regarding the potential danger to others of the occult 'power' wielded by members of the communities concerned, especially where their ascribed roles have ritual or religious significance, particularly when associated with death or burial.[50]

In most of the cases described, some form of hierarchical ranking is explicit or implicit in the social structure concerned. This may take the form of the complex rank relationships of the *jatis* of India, or the simple division between 'pure' or 'non-pure' and 'impure' in some African groups.[51] However, the authors note that even in the hierarchical ranking of the caste system of India, rank relationships between individual *jatis* may not always be clear and may even change over time. The hierarchical consequences implied by the pure/impure division in some other societies may often be ambiguous and ambivalent.[52]

While in the case of the caste system of South Asia, there is a strong association with Vedic prescriptions in Hinduism, it is less clear in other cases whether there is a link between religious traditions and descent-based discrimination. In the case of discrimination against the Burakumin of Japan, associations have been made with Shinto beliefs concerning purity and impurity, and with Buddhist

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[48] Ibid., para. 46.

[49] Ibid., para. 47.

[50] Ibid., para. 48.

[51] Todd, D. (1977), 'Caste in Africa?' *Africa: Journal of the International African Institutes* 47:4, 389–412; ibid., para. 16.

[52] Ibid., para. 49.

precepts and practices. In the cases of the marginalised African groups described in the expanded working paper, the sanction or justification is based on myths involving, for example, food transgressions or other ancestral wrongdoing or misfortune, and related to the present or former ritual or religious functions of the groups concerned.[53]

In many cases, popular beliefs ascribe to the groups concerned a different 'racial' or ethnic origin from that of the dominant community (though this ascription is in most cases very dubious). Typically, such beliefs regard the marginalised groups as being descended from conquered or absorbed peoples. The Dalits of India are believed to be remnants of the Dravidians displaced in the Aryan invasions. The *akhdam* of Yemen are believed to be of Abyssinian origin. Some of the groups such as endogamous craft specialist groups of Africa or the Korean theory of Burakumin origins are based on a belief that they were originally migrants. Other beliefs emphasise a different 'racial' or ethnic lineage.[54] The consequences of the endogamous and social isolation of the affected communities include social segregation, especially in intermarriage, commensality, and access to public places and services, poverty and violence.

In common with the CERD Committee, the Sub-Commission found that the concept of 'caste' and discrimination related to caste are obviously relevant in the context of work and descent. However, the authors noted that the meaning and application of the term 'caste' is highly contested. While there is no doubt that social institutions, to whom the term 'caste' is applicable, fall under the term 'descent', and that therefore discrimination arising from such social institutions falls under the definition of 'racial discrimination', the term 'descent' is wider and can encompass other situations.[55]

The main purpose of the paper is to identify communities, other than those traditionally referred to as 'castes' in the South Asian context, who continue to experience discrimination based on work and descent. The paper examines the situation in West Africa, North-East Africa, Somalia and Yemen. The paper describes, *inter alia*, the metalworkers (or 'blacksmiths'), potters, musicians/bards (or '*griots*'), leatherworkers, weavers, barbers and others in West Africa; the Sub-Commission experts write that often they are considered by the non-specialist majority as being 'dirty' or 'impure', though the functions they perform are often highly valued or even regarded as indispensable.[56]

In North-East Africa, the Sub-Commission examined the case of the Dime people of south-west Ethiopia, who had been highlighted for their division into ranked castes, with the chief and priests castes being considered pure, commoners non-pure and ritual servants, hunters, smiths and tanners impure.[57] Membership

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53 Ibid., para. 50.
54 Ibid., para. 51.
55 Ibid., para. 7.
56 Ibid., para. 13.
57 Todd, D., supra n.51; ibid..

of these groups or castes is by birth, and they are ideologically endogamous. Endogamy is most strictly observed against the impure groups. The two pure groups are considered to have privileged access to the gods and spirits. The polluting propensity of the impure groups is quite marked, with the passage of a blacksmith through a field being sufficient to pollute the crop.[58]

The *akhdam*[59] of Yemen are believed to number approximately 200,000. Their origins are popularly traced to Abyssinian soldiers who invaded Ethiopia in the sixth century. The typical *akhdam* occupational roles are the most menial and dirtiest tasks, including garbage collection, street sweeping, and cleaning toilets and drains. They are often referred to generally as 'sweepers'. Most researchers are unable to explain why the exclusion of the *akhdam* has been carried on from one generation to another; they believe that this is not based on racial discrimination. There are other Yemenis of African descent, including descendants of slaves, that are fully integrated in Yemeni society. Nonetheless, social and economic exclusion of the *akhdam* seems to continue as a hereditary trait.[60]

The second Expanded Working Paper on Discrimination based on Work and Descent, submitted to the Sub-Commission by Eide and Yokota in July 2004, examined the question of diaspora communities whose original culture and traditions include aspects of inherited social exclusion.[61] Ambedkar had signalled the potential problems that would be caused by the caste system amongst diaspora Indian communities in a 1916 essay:

> The caste problem is a vast one…It is a local problem, but one capable of much wider mischief, for as long as caste in India does exist, Hindus will hardly intermarry or have

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[58] Ibid., para. 16.

[59] The term *akhdam* means 'servants', and is derogatory; however the Human Rights Committee have noted that 'no neutral alternatives exist' for the term. Concluding Observations – Yemen (2003), E/C.12/1/Add.92, para. 8; see also para. 27. In its Concluding Observations to Yemen's 2006 Report, CERD criticised the state for failing to account for the *akhdam* in its Report. It stated: 'The Committee takes note of the discrepancy between the assessment of the State party, according to which Yemeni society is ethnically homogenous, and credible information the Committee has received regarding descent-based and/or culturally distinguishable groups including the Al-Akhdam.' Concluding Observations – Yemen (2006), CERD/C/YEM/CO/16, para. 8. In extremely strong terms, the Committee stated it was 'deeply concerned at the persistent reports of de facto discrimination against descent-based, culturally distinct communities, among others, the Al-Akhdam', and, citing General Recommendation XXIX, urged the state to enact 'special measures' in order to 'eliminate discrimination against members of marginalized and vulnerable descent-based groups' (para. 15).

[60] Hashem, M. (1996), *Goals for Social Integration and Realities of Social Exclusions in the Republic of Yemen* (Geneva: International Institute for Labour Studies); ibid., para. 34.

[61] Ibid., para. 35.

any social intercourse with outsiders; and if Hindus migrate to other regions on earth, Indian caste would become a world problem.[62]

The Sub-Commission's examination mainly focused on the South-Asian diaspora in the United States and in the United Kingdom. Discrimination was most common, it was found, in the social prohibition of intermarriage between castes, the strongest stigma being against intermarriage with members of the former 'untouchable' community.[63] Similarly, in the US, it was reported to be easier to marry outside one's race than outside one's caste,[64] and in Canada, most marriages tended to take place within caste groups.[65] The Report found discrimination amongst the South Asian diaspora in relation to commensality, temple worship, employment, politics, and in the media, based on caste divisions.

The question, raised in the first expanded working paper, of whether ethnic minorities such as the Roma/Sinti/Travellers are discriminated against not simply on the ground of their national or ethnic origin but also because of the work they engage in was addressed in the paper. While these communities share in general terms some of the common consequences of discrimination based on work and descent, the authors found that they do not seem to have the same causal factors, such as the notion of pollution/purity, hierarchical ranking and religious sanction and myths. They are essentially discriminated against because of racism.[66]

The paper sets out a Proposed Framework for a Draft Set of Principles and Guidelines for the Elimination of Discrimination based on Work and Descent.[67] While the Sub-Commission's mandate includes cooperation and collaboration on the Proposed Framework with CERD, the ILO and UNESCO, this did not take place due to time constraints.[68] The Proposed Framework comprises three principles and ten guidelines. The principles, stated to be a minimum, are:

(a) Discrimination based on work and descent is a form of discrimination prohibited by international human rights law, including the ICERD. The basis of this prohibition could be further explicated;
(b) Discrimination based on work and descent is a human rights problem deeply rooted in societies and cultures in many parts of the world. Therefore guidelines must not only address governments and the international community, but also local authorities and private sector entities (…);

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[62] Ambedkar, B.R. (1916), 'Castes in India, their Origin, Mechanism and Development', in Rodrigues, V. (ed.) (2002), *The Essential Writings of B.R. Ambedkar* (Oxford University Press), 242.

[63] UN Doc. E/CN.4/Sub.2/2004/31, paras 37 and 38.

[64] Ibid., para. 39.

[65] Ibid., para. 40.

[66] Ibid., para. 68.

[67] Ibid., Part III.

[68] Ibid., para. 72.

(c) As the people discriminated against are usually minorities, marginalised and politically, economically and socially powerless, the cooperation of the international community, including of development agencies and international financial institutions, is indispensable.[69]

The experts recommended that the Sub-Commission appoint a Special Rapporteur with the task of preparing a study on the elimination of discrimination based on work and descent, focusing on the finalisation of a draft set of principles and guidelines on the elimination of discrimination based on work and descent, in cooperation with relevant international human rights treaty bodies and United Nations organs, agencies and mandates.[70]

In its conclusions, the paper notes that the elimination of discrimination based on work and descent is an important global human rights challenge. National responses to the issue are best developed in India, though implementation remains a critical concern.[71] In India, some of the longest-standing and most extensive affirmative action measures ever developed have been applied to this problem. However, concerns persist about the effectiveness and impact of these measures.[72]

The second Expanded Working Paper was endorsed by the Sub-Commission in its resolution 2004/17 which, *inter alia*, appointed 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.

The process of elaborating on the meaning of descent continues, particularly in the work of the Sub-Commission and the examination by CERD of State Reports. Already a reasonably clear picture of the United Nations charter and treaty-based bodies' view on the parameters and meaning of descent-based discrimination has emerged from these documents. The work of CERD and the Sub-Commission is concentrated on forms of discrimination, commonly associated with caste, which nevertheless are also taking place outside the paradigmatic Hindu Brahmanical structure.

The question of whether or not such discriminatory structures can indeed be labelled 'caste' is one that neither CERD nor the Sub-Commission are attempting to answer. The term 'descent' facilitates this approach – its history implies an association with the Indian caste system, but the vagueness of the term allows it to be applied outside the South Asian context. That history will form the substance of the following two sections, which seek to discover what was behind the word 'descent' when it appeared in an Indian amendment to draft article 1(1) of the ICERD in 1964. The first Principle proposed in the expanded working paper expresses the desirability for the basis of the prohibition on discrimination

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69 Ibid., para. 77.
70 Ibid., para. 86(a).
71 Ibid., para. 78.
72 Ibid., para. 79.

based on descent in international human rights law to be further explicated. The ICERD is highlighted in this context, for it is the only international legal source. We thus turn to its preparatory debates.

Travaux Préparatoires to the ICERD

Article 1(1) of the draft International Convention on the Elimination of All Forms of Racial Discrimination, submitted to the Economic and Social Council by the Sub-Commission on the Prevention of Discrimination and Protection of Minorities in 1964, defined racial discrimination as follows:

> In this Convention the expression 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, [national] or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. [In this paragraph the expression 'national origin' does not cover the status of any person as a citizen of a given State.][73]

In the Third Committee of the General Assembly, India proposed the following amendment to Resolution 1904 (XVIII):[74]

> *Replace the first paragraph by the following*:
>
> Article 1: 'In this Convention the term racial discrimination shall mean any distinction, exclusion restriction or preference based on race, colour, descent, place of origin or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social or any other field of public life.'[75]

This Indian amendment added the word 'descent' into the Convention, as one of the prohibited grounds. Introducing his delegation's amendments in the Third Committee, Pant of India said that the amendment relating to article 1 was intended to meet the objections raised by many delegations to the words 'national origin'.[76] He recalled that the Indian Constitution guaranteed equality

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[73] UN Doc. E/CN.4/873, 30 July 1964, Y.U.N. (1964), 346. The word 'national' was kept in the draft text by only 10 votes to nine with one abstention. UN Doc. E/CN.4/SR.786. The Commission on Human Rights subsequently decided to reconsider the result – the word 'national' was placed in square brackets, and the representatives were asked to consult their governments with respect to its inclusion. UN Doc. E/CN.4/SR.809.

[74] UN Declaration on the Elimination of All Forms of Racial Discrimination, Y.U.N. (1964), 346.

[75] UN Doc. A/C.3/L.1216.

[76] UN Doc. A/C.3/SR.1299, 11 October 1965, para. 29.

to all Indian nationals, without discrimination of any kind. Article 15(2) related more particularly to freedom of access to public places; article 16(2) prohibited discrimination in employment; article 17 abolished untouchability in all its forms. That form of discrimination, which was peculiar to India, had already been condemned by the 1950 Constitution. Lastly, the Constitution provided for special treatment for the underprivileged groups of India, a special form of discrimination designed to undo the wrong done to these groups in the past.[77]

Saksena of India similarly pointed out that the difficulty confronting the Committee in connection with article 1 was the lack of agreement on the meaning of the word 'national' in the text of article 1, as drafted by the Sub-Commission on Prevention of Discrimination and Protection of Minorities. His delegation had submitted an amendment in an attempt to overcome the difficulty.[78]

The Indian amendment was taken over into a joint amendment, which in due course was unanimously approved – the suggestion to replace 'national origin' with 'place of origin' did not survive.[79] The word 'descent' in the Indian amendment, however, remained, yet no contribution was offered from the Indian delegation as to its possible meaning.

Draft article 1(2) dealt with special measures under the Convention. It read:

> Special measures taken for the sole purpose of securing adequate development or protection of certain under-developed racial groups or individuals belonging to them in order to ensure to such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objective for which they were taken have been achieved.[80]

Mauritania, Nigeria and Uganda proposed an amendment: the word 'under-developed' would be replaced by the word 'under-privileged'.[81] Pant of India stated:

> his delegation understood the word 'privileges' to mean the existence of special rights for some particular section of the community, and denial of the same to others. In legal terms, 'privileges' was the negation of equality before the law. Therefore, the word 'under-privileged' would be inappropriate in a legal document such as the one before the Committee. The situation in India was that the 'scheduled castes', to whom article 1 paragraph 2 would apply, were not under-privileged, as like any other citizen they enjoyed equality before law. In addition, they had been granted some extra facilities,

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77 Ibid., para. 28.

78 UN Doc. A/C.3/SR.1301, 12 October 1965, para. 19.

79 UN Doc. A/C.3/L.1216 and L.1238; UN Doc. A/6181, paras 33, 37 and 41(a).

80 UN Doc. E/CN.4/873, Y.U.N. (1964), 346.

81 UN Doc. A/C.3/L.1225. Article 1 para. 2, 2nd line: 'After the words "of certain" replace the word "under-developed" by the word "under-privileged".'

> for the purpose of securing their adequate development and for levelling of the social order.[82]

Saksena echoed his colleague's statement:

> Paragraph 2 of the article had been included in the draft Convention in order to provide for special and temporary measures to help certain groups of people, including one in his own country, who though of the same racial stock and ethnic origin as their fellow citizens, had for centuries been relegated by the caste system to a miserable and downtrodden condition. While it was true that the members of that group had been underprivileged in the sense that they had been denied the rights and privileges enjoyed by others, they had also been under-developed, not because of any lack within themselves, but because they had for centuries been denied those advantages that were essential for the full development of the human personality. When India had gained its independence in 1947, it had set about removing that social canker. It had given the members of that group complete equality before the law and had passed constitutional and legal enactments to do away with all social and legal barriers to their advancement. They had not been sufficient, however, and they had also been given special rights with a view to raising their educational, social and economic status.[83]

Pant summarised his delegation's views on the special measures of articles 1 and 2:

> article 1 defined racial discrimination. Paragraph 4 made an exception for cases where some States had taken steps to redress the injustices done in the past to a certain section of the people, by providing for special measures to secure their advancement, and thus bring about a levelling of the social order. Article 2 was of a mandatory nature. It called upon States which did not demonstrate the same goodwill to assist the less-favoured elements of their population in raising themselves to the level of the more developed groups. Article 2 gave States a certain amount of latitude, since it stated that the measures in question were to be taken 'when the circumstances warrant this'.[84]

At the conclusion of the drafting process, Saksena remarked that his delegation especially welcomed the adoption of the Convention,

> because the Indian people were partisans of racial and religious harmony and India itself had traditionally been a melting pot of human beings of almost every race. After achieving independence, his country had consistently pursued, both nationally and internationally, a policy of racial harmony and its Constitution already included the basic principles of the Convention, as well as provisions for judicial remedy of violations. One of the first attempts to combat racial discrimination had been made by the Indian leader, Mahatma Gandhi, from 1907 to 1914 in South Africa, that citadel

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82 UN Doc. A/C.3/SR.1301, 12 October 1965, para. 20.
83 UN Doc. A/C.3/SR.1306, 15 October 1965, para. 25.
84 UN Doc. A/C.3/SR.1308, 18 October 1965, para. 7.

of racial discrimination. He was glad that Gandhi's vision was now embodied in a legal document adopted unanimously by the United Nations.[85]

He concluded: 'Article 1 contained as precise a definition of racial discrimination as it was possible to find.'[86] This is ironic given the difficulty India would encounter in the interpretation of article 1(1) to include caste.

There are two clear areas of concern that emerge from the Indian amendment to draft article 1(1) and contribution at the drafting stage of the ICERD. The first is the issue of 'national origin', which the amendment was designed to resolve – it did not succeed in its aim of removing the word 'national' from article 1(1). This was the only stated reason for the submitted amendment to the definition of racial discrimination, which was subsequently passed, but the significance of the introduction of the word 'descent' that also formed part of the amendment, and indeed would appear to be its only material result, was never alluded to in the debates. It is difficult to imagine that the Indian delegates would have made no reference whatsoever to the term if there were a correlation between descent and caste – and their reticence on this point would seem to underline that no link existed between the two.

The delegation was clearly concerned with promoting the constitutional system of reservations in place in India, and their relationship to the special measures of the Convention. The delegates elaborated on the meaning of the special measures provided for under the draft Convention, and all citation of the Scheduled Castes refer to this. At no point was any link drawn between the Scheduled Castes and the word 'descent' that formed part of the amendment to article 1(1). All inferences as to the applicability of the draft Convention to the caste system focus on the compatibility of a reservations system such as is provided for in the 1950 Indian Constitution with the draft article 1(2) on special measures, and the need for such a system in certain circumstances provided for under article 2. That India had already completed the process envisioned in article 2, and was indeed justifiably holding its system up as a model for other states parties to the draft Convention, can be inferred from the contributions of both delegates quoted above.

India's concerns are perhaps revealed by its incorrect usage of the word 'discrimination'. Pant in the debates in the Third Committee describes how the Indian Constitution provided for 'special treatment for the underprivileged groups of India, a special form of discrimination designed to undo the wrong done to these groups in the past.'[87] His usage of the word 'discrimination' in the sense described is erroneous in the context of the draft Convention, given that discrimination has a particular pejorative meaning in international law. It does not mean any distinction or differentiation but only arbitrary, invidious

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85 UN Doc. A/C.3/SR.1374, 15 December 1965, para. 23.
86 Ibid., para. 22.
87 UN Doc. A/C.3/SR.1299, 11 October 1965, para. 28.

or unjustified distinctions.[88] Similarly, in its 1996 and 2006 State Reports, India described the reservations systems for the Scheduled Castes and Scheduled Tribes as measures of 'positive discrimination'.[89] All references to caste in the course of the debates stem from the concern that the constitutional reservations in favour of the Scheduled Castes do not constitute discrimination within the terms of the draft Convention ,as a result of the provisions on special measures. That caste would come to fall under the rubric of descent, on the basis of the word having being introduced in an Indian amendment, would undoubtedly have been a source of some surprise to the delegates. A further surprise to the delegates would have been the Committee's findings in 1996 that discrimination, in the sense of wrongly unequal treatment caused by the persistence of the caste system, was taking place in India in violation of article 1(1) of the Convention. At the drafting stage India's only concern had been that the constitutional system of what they termed 'positive discrimination' may be viewed as discrimination within the terms of the Convention.

What, therefore, did 'descent' mean? As noted in the previous chapter, there is an interesting inconsistency in the *chapeau* of article 5 of the Convention, which holds that: 'States Parties undertake to prohibit and to eliminate racial discrimination in all its forms…without distinction as to race, colour or national or ethnic origin'. Article 5 makes no mention of the ground 'descent', which appears only in article 1(1). In the Third Committee, the representative of Czechoslovakia, Sekaninova, proposed including 'descent' in article 5 to render it congruent with article 1, but the Austrian delegate, Villgratner, 'asked the representative of Czechoslovakia not to insist on the inclusion of the word 'descent' in the introductory paragraph', without giving any specific reason.[90] Sekaninova agreed to change her delegation's amendment accordingly.[91] The non-appearance of descent in article 5 led commentators to believe that, as a consequence, it had no particular meaning. CERD member Partsch, in his commentary on article 5 ICERD, observes that: 'As it is unclear which situations the word was intended to

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[88] The point was made in a discussion in the UN Commission for Human Rights, whereby the Ukranian delegate successfully argued for the removal of the word 'arbitrary' from the phrase 'arbitrary discrimination' in the draft that became article 7 of the Universal Declaration of Human Rights on the basis that although the word 'discrimination' can also have a neutral or positive meaning, where 'discrimination' is synonymous with differentiation, discernment, or distinction, in the international legal context, it is always used only in the restricted sense of an unjustified or arbitrary distinction; UN Doc. E/CN.4/SR.52, 8–13. See further McKean, W. (1970), 'The Meaning of Discrimination in International and Municipal Law', *British Yearbook of International Law* 44, 177. See also the comments of Bossuyt, M., supra ch. 3, n.194.

[89] Periodic Report – India (1996), CERD/C/299/Add.3, para. 6 and Periodic Report – India (2006), CERD/C/IND/19, para. 100.

[90] UN Doc. A/C.3/SR.1309, paras 3–5.

[91] Quoted in Thornberry, P., supra n.2, 38, n.111.

cover, unlike the concepts of "national or ethnic origin", there does not seem to be any substantial difference from the list of criteria in article 1 paragraph 1.'[92]

Partsch cites Schwelb, who wrote in 1966 at the time of the drafting of the Convention that: 'the record gives no indication of the situations the word was intended to cover which would be distinct from the concepts of national or ethnic origin.'[93] Schwelb continues in a footnote to this point that 'It is reasonable to assume that the term "descent" includes the notion of "caste"'.[94] This is perhaps the first time the link between caste and descent was drawn. Significantly, Schwelb does not allow himself to make this link without adding a qualification: '(It is reasonable to assume that the term "descent" includes the notion of "caste") which is a prohibited ground of discrimination in Indian Constitutional Law (Art.15) … which, however, also uses the expression "descent" side-by-side with "caste" (Art.16)'.[95]

Is the fact that the two terms appear side-by-side evidence that they must be attributed two separate meanings?[96] It is necessary to look to the Constituent Assembly Debates of India to find the intention behind the meaning of descent as it appears in article 16(2) of the Indian Constitution, and whether it is to be distinguished from caste.

The Constituent Assembly Debates of India, 1947–1949

A general prohibition on discrimination is found in article 15(1) of the Constitution: 'The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.' Article 16(2) of the 1950 Indian Constitution states: 'No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of any employment or office under the State.'

The Constituent Assembly debates of India span 12 volumes and represent a redoubtable corpus of law forming the framework to the longest constitution in the world. The Advisory Committee on Fundamental Rights, which counted Ambedkar as a member, was appointed by the resolution of the Constituent Assembly of 24 January 1947.

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92 Partsch, K. (1979), 'Elimination of Racial Discrimination in the Enjoyment of Civil and Political Rights: A Study of Article 5, subparagraphs (a) to (d), of the International Convention on the Elimination of All Forms of Racial Discrimination', *Texas International Law Journal* 14, 198

93 Schwelb, E. (1966), 'The International Convention on the Elimination of All Forms of Racial Discrimination', *International and Comparative Law Quarterly* 15, 1003.

94 Ibid., 1003, n.43.

95 Ibid.

96 India made this argument in its 2006 Report to make the point that 'caste' and 'race' could not be synonymous, given they were articulated separately in the Constitution. Quoted above, supra n.16.

The Committee's Interim Report on Fundamental Rights set forth the key justiciable provisions that would form the body of the Fundamental Rights section of the Indian Constitution. The rights of equality were set forth in clauses 4 and 5 of the Interim Report, and untouchability was abolished in clause 6.

Clause 5, debated in the Constituent Assembly on 30 April 1947, proclaimed equality of opportunity for all citizens in matters of public employment. Its third sub-clause stated: 'No citizen shall on grounds only of religion, race, caste, sex, descent, place of birth or any of them be ineligible for public office.'[97]

Clause 4, a general non-discrimination clause, contained an almost identical list of grounds with the exception that it lacked the grounds 'place of birth' and 'descent': 'The State shall make no discrimination against any citizen on grounds of religion, race, caste or sex.'[98] The members of the Assembly elaborate on each of these four terms in the course of the debates on clause 4. Following the debate on clause 4 and its provisions, clause 5 is passed over for further consideration, while clause 6 on untouchability is discussed.

When the members return to clause 5, the list of grounds in its third sub-clause, containing the four previously discussed terms, plus 'place of birth' and 'descent', is almost entirely passed over. No explanation of the meaning of the two additional grounds is given. There is only one reference to the sub-clause, from Das in relation to Afghan Princes in India, banished by the Afghan government and in league with the British Government of India, and whether they would be eligible for official employment.[99] He makes no mention of 'descent' or 'place of birth' in this regard. The members adopted Clause 5, as variously amended, and moved on to Clause 7 without ever commenting on the two additional grounds.

Clause 5 of the Interim Report on Fundamental Rights corresponds to article 10 of the draft Constitution, which in turn would become article 16 of the 1950 Constitution. Following the debates on draft article 9, draft article 10 was again passed over and the members moved on to discuss draft article 11, the abolition of untouchability.[100]

The members returned to draft article 10 on 30 November 1948, when it was debated in the Constituent Assembly. Clause 2 of draft article 10 now read: 'Every citizen shall be eligible for office under the State irrespective of his religion, race, caste, sex, descent or place of birth.'[101]

Shri Jaspat Roy Kapoor suggested adding the words 'or residence' after 'place of birth'.[102] Following a discussion in which the precise meaning of 'place of

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97 Constituent Assembly Debates (reprinted 1999), Official Reports (New Delhi: Lok Sabha Secretariat), vol. 3, Book 1, 30 April 1947, 445.

98 Ibid., 29 April 1947, 426; clause 4(1).

99 Ibid., 30 April 1947, 447.

100 Ibid., vol. 7, Book 2, 29 November 1948, 664.

101 Ibid., 30 November 1948, 674.

102 Ibid., 676.

birth' was drawn out, the amendment was accepted, and the members turned to draft article 12.

In two rounds of debates, while every other ground had been discussed, no explanation had been offered, nor was any reference made, to the ground 'descent'. If we, however, turn back to the debate on draft article 9, which corresponds to clause 4 of the Interim Report on Fundamental Rights, and would eventually form the general prohibition on discrimination in article 15 of the 1950 Constitution, an extraordinary oversight is revealed. Draft article 9 contained four grounds for non-discrimination: religion, race, caste, or sex. On 29 November 1948, the provision was debated in the Assembly, and Syed Abdur Rouf moved an amendment for the absent Prabhu Dayal.

Amendment No.280 ran as follows: 'That in Article 9, after the word "sex" wherever it occurs, the words "place of birth" be inserted.'[103] Syed Abdur Rouf subsequently explained the meaning behind the proposal:

> The intention of the article is to prohibit discrimination against citizens. We have prohibited discrimination on grounds of 'religion, race, caste or sex'. But I am afraid, Sir, the evil elements who might attempt to make discrimination against citizens will do so not on the ground of religion, race, caste or sex … In my opinion attempts may be made to make discrimination against citizens on the ground of place of birth.[104]

When the Vice-President opened the article for general discussion, Shri Raj Bahadur made a crucial intervention:

> Sir, as you announced today in this House that amendments Nos. 280, 282 and 279 would be taken up for discussion, I studied them again and a new meaning, which did not occur to me previously, disclosed itself to me. In amendment No.280 which was moved by Friend Syed Abdur Rouf, the words used are 'place of birth', whereas in the amendment that was to be moved by Mr Prabhu Dayal, the word 'descent' also occurs. It is unfortunate that that amendment of Mr Prabhu Dayal has not been moved. Even so, when we study the article we observe that whereas discrimination is sought to be eliminated on other grounds, nothing has been said about the discrimination on the basis of descent, on the basis of privileges enjoyed by some on account of their dynastic or family status.[105]

Shri Bahadur proposed a solution to remedy the omission:

> I, therefore, suggest an amendment to amendment No.280, to the effect that the words 'place of' be deleted, from the words sought to be inserted in the article by the amendment No.280. It is clear that the words 'place of' occurring before the word 'birth' have restricted and limited the meaning of the whole Amendment to the 'place of residence' only. Therefore, if the words 'place of' are deleted, we may achieve a double

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[103] Ibid., 29 November 1948, 650.
[104] Ibid., 650–51.
[105] Ibid., 656.

objective. Firstly that the word 'birth' when it occurs in the context of the whole article would imply not only residence, but also 'descent', and as such the purpose which was contemplated by the mover of the amendment shall be satisfied.[106]

The Vice-President remonstrated:

this would be a general discussion but you are putting forward your amendments; I can hardly allow that. You can speak upon the whole clause and incidentally refer to your amendment. Kindly excuse me if I ask you to carry out my wish and speak generally.[107]

Shri Bhadur continued:

Yes, sir. What occurs to me is this. We have seen it in the past and even at present, in the matter of distribution of offices and appointments in the State or in the matter of rights and privileges enjoyed on the basis of property etc., that there has been some discrimination on account of 'descent'; on account of dynasty or family status as also on account of factors of an allied nature. It is my humble submission that when we are here to forge our constitution, we should eliminate all sorts of distinctions arising on the basis not only of religion, caste, sex etc. but also on the basis of family and descent. While I agree that the purpose and the idea that is covered by amendment No.280 is necessary, I would also suggest that something must be put in this article which may obviate all possibilities of, and eliminate all chances of discrimination, favouritism, or nepotism, on the basis or birth or descent. It is common experience, rather it is a kind of grievance with most of us that in the distribution of offices and appointments of the State and also in the services, some discrimination is observed on the basis of birth and descent. We see it in the recruitment to the Air Force, and to some extent in the army or elsewhere in the services of Government. It is a grievance with us that people who are better placed and who happen to be born with a silver spoon in their mouth get better chances than those born in mud huts or cottages in the villages. All must, however, have equal chances.

There is to be a provision in the Constitution to the effect that there shall be Raj Pramukhs and not Governors, in the States and the States' Union and in this we observe there would be discrimination again on the basis of birth or descent, on the basis of one's being a prince or a member of a royal family or not. That sort of discrimination also should be eliminated. In fact all such discrimination should be eliminated.[108]

No other member expressed an opinion on Shri Bahadur's intervention. Ambedkar, addressing the amendments, accepted amendment No. 280 moved by Rouf adding the words 'place of birth'. When asked to give his views about amendments which had not been moved, he regretted that he 'cannot give opinions regarding amendments which have not been moved'.[109]

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106 Ibid.
107 Ibid.
108 Ibid., 656–7.
109 Ibid., 660.

Despite forming part of the original amendment No. 280, the word 'descent' did not appear as a ground in article 15 of the Indian Constitution. It remained in article 16, but no explanation as to its meaning in the course of the debates on that provision was ever offered. Shri Bahadur's explanation remains the only one in the text of the debates. It may be noted in particular that the explanation offered by Shri Bahadur links the concept of discrimination on the basis of descent to employment. Article 15 did not deal exclusively with non-discrimination in employment, and it would appear to be appropriate that descent would form one of the grounds under article 16, which is aimed specifically at non-discrimination in employment.

Conclusion

The origin of the concept of descent-based discrimination may be traced to January–April 1947, with the drafting of the Interim Report on Fundamental Rights by the Fundamental Rights Committee of the Constituent Assembly of India, and 29 November 1948, when it was first discussed and explained as a legal concept. There would seem to be no public records of the minutes of the meetings of the Interim Committee on Fundamental Rights, the group who introduced the notion of descent as a ground for non-discrimination into clause 5 of their charter in 1947. With the exception of Shri Bahadur's intervention, the lack of any comment or explanation as to its meaning through three rounds of debates in the Constituent Assembly of India and subsequently in the General Assembly of the United Nations is quite remarkable, given that it forms one of only seven grounds in the non-discrimination clauses of the former, and one of only five in the ICERD.

There can be little doubt that the concept of descent did not refer to caste, as confirmed by Shri Bahadur in the Constituent Assembly of India. Descent appears in article 16(2) of the Indian constitution alongside caste, and must be distinguished from it. Saksena, the representative of India present at the drafting of the ICERD, was a 'founding father' of the Indian nation and a member of the Constituent Assembly. He would have been aware that the ground 'descent' stems from the list of grounds in article 16(2) of the Indian Constitution. Indeed, Shri Bahadur's comments in the Constituent Assembly in 1948 seem to have been factored in to the Indian amendment to article 1(1) of the ICERD. The amendment contained the grounds 'descent' and 'place of origin', which mirror 'descent' and 'place of birth' in article 16(2) of the Indian Constitution.

The recent movement towards the eradication of descent-based discrimination was aimed primarily at attacking the discriminatory consequences of caste. It is vital that now that CERD and the UN Sub-Commission have begun the process of unravelling caste, clarity of purpose informs that process at every stage. There are legal and conceptual difficulties with the current approach to the issue. While CERD and the Sub-Commission have been careful to stress that they are avoiding

applying the term 'caste' to regions outside South Asia, there is evidence from the Concluding Observations of the former and working papers of the latter that this is in fact what is taking place.[110]

It is submitted that caste should only be used to refer to the particular Hindu system. The recent movement towards the eradication of descent-based discrimination in an ever-increasing number of countries may serve only to obscure the particular features of caste that make it unique, and, despite sixty years of the Indian Constitution, tenacious in its grip on the social mores of India and the South Asian Hindu population and its significant diaspora.

This chapter has shown that descent was unrelated to caste when it was introduced into article 1(1) of the ICERD. Nevertheless, CERD is entitled to interpret the provisions of the Convention in a manner that allows the treaty to engage with all forms of racial discrimination. India's State Reports reveal a government that is exasperated with the equation of caste with race. This is an understandable position. Caste is not based on differences in skin colour, and CERD has not explained the broader meaning of racial discrimination, instead designating caste to be a form of descent-based discrimination. India appears unimpressed with this legal sophistry, again with some justification; descent never meant caste.

CERD needs to stress that designating caste as a form of racial discrimination does not imply that caste is synonymous with race. Caste can be quite different to race, which it clearly is, and still be a form of racial discrimination. CERD and the UN Sub-Commission need to focus on caste as a particular form of racial discrimination. They should do so under the rubric of descent, but they must not lose sight of the elimination of caste-based discrimination in the global movement against descent-based discrimination; they must be careful to avoid conflating the Hindu caste structure with discriminatory practices in regions outside South Asia.

Ultimately, descent is a term of convenience. It allows international human rights bodies to examine legitimate claims of continuing caste-based discrimination. CERD should not pretend that descent originally meant caste, when it did not. It should recognise that it has re-interpreted the term. It should compartmentalise the struggle against caste-based discrimination within the movement against descent-based discrimination. This would mean, for example, ending the description of discriminatory practices in certain African states as caste. Finally it should inform India that it does not believe its caste structure is based on differences of skin colour – but that this does not mean that caste is excluded from the purview of the ICERD.

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[110] See Section I above, supra nn.25 and 26, where CERD indicated the presence of caste systems in Senegal and Mali in its Concluding Observations.

Chapter 6

Enhancing Protection against Caste-based Discrimination

Introduction

The elimination of caste-based discrimination will require moving beyond the constitutional reservations system of the 1950 Indian Constitution. In the first section, this chapter looks outside the work of CERD to the examination of caste by other human rights treaty-monitoring bodies, and the recommendations they have proposed for its eradication. On the international level, addressing the problem of caste-based discrimination will entail a coordinated effort between the United Nations treaty-based and charter-based bodies. India is susceptible to international condemnation of the practice of caste. There must be sustained criticism of the practice in each field of reference, civil and political rights, economic and social rights, racial discrimination, the rights of women and the rights of children. Combined with the emphasis placed on caste-based discrimination in the Hindu states by the Special Rapporteurs on Discrimination based on Work and Descent, as well as the Special Rapporteur on Racism, this will provide invaluable impetus to the Dalit struggle.

This section also briefly highlights the role of the justice system in sustaining caste prejudice. There is evidence that the police and courts must be reformed to reflect 50 years of official intolerance of caste division in India. Caste-based discrimination is being sustained by police action, and evidence of such thinking in judicial decision-making is widespread. The discussion is conducted in the context of the Human Rights Committee's examination of India's state report, and the proposal to set up a field mission in India under the United Nations High Commissioner for Human Rights is mooted.

Next, this chapter offers an assessment of the reservations system in India, and why it has failed to adequately ameliorate the conditions of the Scheduled Castes. The achievements of 50 years of special measures in the Indian Constitution will be critically audited, in order to isolate the unquestionable benefits of the system from its failings. These failings are internal, in the practical running of the system, and external, in the sense that reservations cannot resolve all of the discriminatory effects of the caste system.

Therefore, the final section looks outside reservations to proposed solutions to caste-based discrimination in the private sphere. In particular, the proposals of the Bhopal Declaration, a document that emerged following an all-India

meeting of Dalit groups held under the aegis of the government of Madhya Pardesh, are assessed. The Bhopal Declaration moves the resolution of caste-based discrimination firmly into the area of social and economic rights, and proposes solutions that are novel and far-reaching.

This chapter is necessarily speculative, and seeks to present an amalgamation of the variety of solutions that are being proposed. The reality is that caste-based discrimination has not been eliminated by constitutional reservations. It is of interest to other states to examine how India proposes to progress, having already undertaken the legal route of affirmative action measures on a scale beyond that practiced by most states in their legal institutions. The overall emphasis is on a coordinated effort between domestic and international legal bodies to highlight, probe, suggest, and review measures stemming from national and international bodies. The shift in emphasis from constitutional safeguards in the public sphere to a type of affirmative action in the private sphere is an important tactical manoeuvre that is being performed by Dalit groups – it is possible that this is the first time such a movement towards reservations in the private sphere has taken place. Perhaps it is for the human rights treaty-monitoring bodies to encourage other states to adopt such tactics; but first it is important to gauge their success in India.

Caste and the Human Rights Treaty Bodies

The human rights treaty-monitoring bodies have engaged with the issue of caste, especially since 1996, when CERD stated that caste-based discrimination was a form of descent-based discrimination in the context of India's state report. The following section looks at the response to the reports received from the South Asian countries that support a caste system by four committees: 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; and assesses their contribution to the identification of caste-based discrimination as a major source of human rights violations. The section also examines what remedies the Committees have proposed towards the elimination of caste-based discrimination. The final subsection on caste and justice examines the specific problem of caste prejudice in the police and in the judiciary.

The Human Rights Committee

India ratified the International Covenant on Civil and Political Rights (ICCPR) on 10 April 1979. The Covenant protects against discrimination of any kind in its article 26, including discrimination based on 'social origin'. In 1997, the Human Rights Committee (HRC) found that India was violating its obligations under the ICCPR through its treatment of the Dalits. It noted:

> with concern that despite measures taken by the government, members of the Scheduled Castes and Scheduled Tribes, as well as so-called backward classes and ethnic and national minorities continue to endure severe social discrimination and to suffer disproportionately from many violations of their rights under the Covenant, including *inter-alia* inter-caste violence, bonded labour and discrimination of all kinds. It regrets that the *de facto* perpetuation of the caste system entrenches social differences and contributes to these violations.[1]

The HRC recommended that India adopt further measures including educational programmes at the national and state levels to combat all forms of discrimination against these vulnerable groups, in accordance with article 2(1) and article 26 of the Covenant.[2]

The HRC has also briefly commented on caste in Nepal in 1994 under article 26 of the Covenant: 'The Committee … is particularly disturbed by the fact that the principle of non-discrimination and equality of rights suffers serious violations in practice and deplores inadequacies in the implementation of the prohibition of the system of castes.'[3]

The HRC must continue to condemn caste-based discrimination under article 26 of the Covenant through the state reporting procedure. Since 1997, the Committee has not had the occasion to review a report from India or Nepal, and at the time of its consideration of India's 1997 report, the international movement against caste-based discrimination was relatively young. When such an occasion does arise, the Committee must complement the work of the other treaty-monitoring bodies and the UN Sub-Commission on the Promotion and Protection of Human Rights by identifying caste as a major source of the denial of civil and political rights, despite formal non-discrimination laws.

The Committee ought to identify and condemn in particular the violation of the right to 'equal protection of the law' in India under article 26 of the Covenant. Since the 1990s, violence against Dalits in India has escalated dramatically in response to growing Dalit rights movements. Between 1995 and 1997, a total of 90,925 cases were registered with police nationwide as crimes and atrocities against Scheduled Castes.[4] The UN Sub-Commission's Working Paper on Work and Descent-based Discrimination noted that: 'the atrocities committed – murder, rape, mutilation, arson etc. – are not only isolated acts but could even be acts of mass savagery committed by militia groups employed by the higher castes.'[5]

India's National Commission for Scheduled Castes and Scheduled Tribes has reported that these cases normally fall into one of three categories; cases

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1 Concluding Observations – India (1997), CCPR/C/79/Add.81, para. 15.

2 Ibid., para. 13.

3 Concluding Observations – Nepal (1994), CCPR/C/79/Add.72, para. 7.

4 Human Rights Watch (2001), *Caste Discrimination: A Global Concern, A Report for the United Nations Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, 20.

5 UN Doc. E/CN.4/Sub.2/2001/16, para. 26.

relating to the practice of 'untouchability' and attempts to defy the social order; cases relating to land disputes and demands for minimum wages; and cases of atrocities by police and forest officials. Caste Hindus and non-Dalits are able to wield a considerable amount of leverage over local police, district administrations and even state governments.[6] This leverage significantly hinders the effective implementation of the statutory provisions of the *Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989*.

The manipulation of the 1989 Act, and the failure to prosecute atrocities against Dalits under its terms, is illustrated in the Supreme Court case of *State of Kerala v. Appu Balu*, where the court found: 'More than 75% of the cases under the [Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) 1989] Act are ending in acquittal at all levels.'[7]

In its August 2000 Resolution, the UN Sub-Commission on the Protection and Promotion of Human Rights urged governments to ensure:

> appropriate legal penalties and sanctions, including criminal sanctions, are prescribed for and applied to all persons or entities within the jurisdiction of the Governments concerned who may be found to have engaged in practices of discrimination on the basis of work and descent.[8]

The constitutional and statutory bodies in India, such as the National Commission for Scheduled Castes and Scheduled Tribes,[9] and the National Human Rights Commission,[10] have repeatedly confirmed the failure of her constitutional and statutory laws designed to protect the Dalits. The UN Sub-Commission's Working Paper on Work and Descent-based Discrimination highlighted this, and stated: 'The laws are there, but there is a clear lack of will on the part of law enforcement officers to take action owing to caste prejudice on their part or deference shown to higher-caste perpetrators.'[11]

It is expected of the Committee that it will recognise the prevalence of caste, particularly in India and Nepal, to a much greater extent than it did in 1994 and 1997, given the growing documentary evidence pointing to caste as a permanent source of discrimination and denial of civil and political rights. Article 26 is being systematically violated in those states parties to the Covenant.

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6 Human Rights Watch (1999), *Broken People: Caste Violence against India's Untouchables*, 4.

7 *State of Kerala v. Appu Balu*, 1993 Cr. L.J. 1029.

8 UN Doc. E/CN.4/SUB.2/RES/2000/4, para. 3.

9 Set up under Article 332 of the Constitution.

10 Set up under Section 3 subsection 1 of the Protection of Human Rights Act 1993.

11 UN Doc. E/CN.4/Sub.2/2001/16, para. 26.

The Committee on the Elimination of Discrimination against Women

The Committee on the Elimination of Discrimination against Women (CEDAW) considered, in India's Periodic Report in February 2000, that 'such social practices as the caste system … present major obstacles to the implementation of the Convention'.[12] It also noted that discrimination against women who belong to particular castes or ethnic or religious groups was also manifest in extreme forms of physical and sexual violence and harassment. The Indian government was urged to 'implement existing legislation prohibiting such practices as … caste-based discrimination'.[13] The Committee was concerned with the continuing discrimination, including violence, suffered by women of the Dalit community, despite the passage of the *Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989*. It also urged the Government to prevent discrimination against Dalit women and prohibit the *devadasi* system.[14]

In response to Nepal's report, the Committee expressed concern that:

> traditional customs and practices detrimental to women and girls, such as child marriage, dowry, polygamy, *deuki* (a tradition of dedicating girls to a god or goddess, who become 'temple prostitutes', which persists, despite the prohibition of the practice by the Children's Act) *badi* (the ethnic practice of forcing young girls to become prostitutes) and discriminatory practices that derive from the caste system are still prevalent.[15]

The Report of the Task Force set up to monitor the implementation of the Bhopal Declaration[16] in the state of Madhya Pradesh in India contains a chapter on 'Women and Child Development' that recommends 'the inclusion of a gender component in all the development initiatives arising out of the Bhopal Declaration'.[17] As an example of this, the Task Force calls on India to 'make it mandatory that 50 percent of all the benefits in all initiatives go to SC/ST women'.[18] CEDAW could play a crucial role in urging India to adopt such far-reaching measures, and in ensuring compliance. The Committee should recommend the extension of this initiative to Nepal.

CEDAW must lead the way in the fight against the practice of manual scavenging, because the practice particularly affects women. There is no mention of this practice in its analysis of either India's or Nepal's report. According to government statistics in India, an estimated one million Dalits are manual scavengers, a majority of them women, who clear human waste from public

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12 Concluding Observations – India (2000), UN Doc. A/55/38, para. 52.
13 Ibid., paras 68–9.
14 Ibid., paras 74–5.
15 Concluding Observations – Nepal (1999), UN Doc. A/54/38, para. 153.
16 See below, Section 3.
17 Report of the Task Force on the Bhopal Declaration, infra n.111, 45.
18 Ibid.

latrines and dispose of dead animals; unofficial estimates are much higher.[19] The practice has been outlawed through the *Employment of Manual Scavengers Act 1993*, but its provisions have not been effectively implemented. The handling of human waste is a caste-based occupation. For the implementation of the Act, the National Commission for *Safai Karamcharis* was appointed. In its 1997 Report, the Commission found that manual scavengers are 'totally cut off from the mainstream of progress and are still subjected to the worst kind of oppression and indignities'.[20] The Committee must monitor the reports of the Commission and require India to implement its recommendations as a matter of urgency. The National Commission for *Safai Karamcharis* must induct at least one representative from the manual scavenging community as a full-time member.[21]

The Committee on the Rights of the Child

The Committee on the Rights of the Child (CRC), in its examination of India's 2000 Report, was concerned at the existence of caste-based discrimination and discrimination against tribal groups, despite these practices being prohibited under the law.[22] The Committee noted that:

> the existence of traditional customs (i.e. the caste system), and societal attitudes (e.g. towards tribal groups) is an obstacle to efforts to combat discrimination, and compounds, *inter-alia*, poverty, illiteracy, child labour, child sexual exploitation, and children living and/or working on the streets.[23]

It found that insufficient efforts had been made to implement legislation and decisions of the courts and the commissions (the Scheduled Castes and Scheduled Tribes Commission, the National Human Rights Commission and the National Commission for Women), and to facilitate the work of such institutions with respect to children's rights.

In accordance with article 17 of the Indian Constitution and article 2 of the Convention on the Rights of the Child,[24] the Committee recommended that India take steps to ensure states abolish the discriminatory practice of 'untouchability',

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19 Human Rights Watch, supra n.4, 12

20 Quoted in UN Doc. E/CN.4/Sub.2/2001/16, para. 22(d).

21 Report of the Task Force on the Bhopal Declaration, infra n.111, 78.

22 Concluding Observations – India (2000), CRC/C/15/Add.115, para. 30.

23 Ibid., para. 9.

24 Article 2 of the Convention on the Rights of the Child states:

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

prevent caste and tribe-motivated abuse, and prosecute State and private actors who are responsible for such practices or abuses. Moreover, in compliance with article 46 of the Constitution, India is encouraged to implement affirmative measures to advance and protect these groups. The Committee recommended the full implementation of the *Scheduled Tribes and Scheduled Castes (Prevention of Atrocities) Act 1989*, the 1995 Rules, and the *Employment of Manual Scavengers Act 1993*. In line with CEDAW, the Committee stressed the importance of the equal enjoyment by members of these groups of the rights in the Convention, including access to health care, education, work and public places and services, such as wells.[25] The Committee stated its concern regarding the disparities in terms of access to education, attendance at primary and secondary levels and drop-out rates between different states, rural and urban areas, boys and girls, the affluent and the poor, and children belonging to Scheduled Castes and Tribes.[26]

In 2004, India was again before the Committee. In light of article 2 of the Convention, the Committee highlighted the widely disparate levels of enjoyment of the rights in the Convention by girls, children living in certain states, rural areas and slums, and children belonging to certain castes and tribal and indigenous groups. It recommended that concerted efforts at all levels be taken to address social inequalities by reviewing and reorienting policies, including increasing budgetary allocations for programmes targeting the most vulnerable groups.[27]

In paragraph 27, it held:

> The Committee is deeply concerned at persistent and significant social discrimination against children belonging to Scheduled Castes and Tribes and other tribal groups, reflected, inter alia, by the many violations of the 1989 Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, the low number of such violations dealt with by the courts, and the fact that a majority of the states have failed to set up the special courts provided for under this Act.[28]

In response to this concern, the Committee wrote in strong terms that a concerted effort is required on the part of the Indian government. It should be noted that the language is almost identical to that employed in 2000, reflecting India's reluctance to comply with her Convention obligations:

> The Committee recommends that the State party, in accordance with article 17 of its Constitution and article 2 of the Convention, take all necessary steps to abolish

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2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

[25] Supra n.22, para. 31.
[26] Ibid., para. 56.
[27] Concluding Observations – India (2004), CRC/C/15/Add.28, paras 25 and 26.
[28] Ibid., para. 27.

> the discriminatory practice of 'untouchability', prevent caste- and tribe-motivated abuse, and prosecute State and private actors who are responsible for such practices or abuses. Moreover, in compliance with article 46 of the Constitution, the State party is encouraged to implement, *inter alia*, special measures to advance and protect these groups. The Committee recommends the full implementation of the 1989 Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, the 1995 Scheduled Castes and Scheduled Tribes Rules (Prevention of Atrocities) and the Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993. The Committee encourages the State party to continue its efforts to carry out comprehensive public education campaigns to prevent and combat caste-based discrimination with a view to changing social attitudes, by involving, *inter alia*, religious leaders.[29]

In its recent examination of Nepal's Report in June 2005, the Committee noted 'the existence of many traditional beliefs and customs and the caste system' all of which impede progress to the full realisation of children's rights under the Convention.[30] It referred to the work of CERD in identifying and condemning caste-based discrimination in Nepal, and applied this to the situation of Dalit children:

> With reference, *inter alia*, to the concerns of the Committee on the Elimination of Racial Discrimination (CERD/C/64/CO/5, 12 March 2004) regarding the persistent *de facto* caste-based discrimination against Dalits in education, employment, marriage, access to public places including water sources and places of worship, the Committee expresses serious concern about the harmful effects of this prevailing form of discrimination on the physical, psychological and emotional well-being of the Dalit children in the State party.[31]

Under the heading 'Harmful Traditional Practices', the Committee noted with concern that certain harmful traditional practices continue to prevail in the State party, most notably the caste system and traditions such as the *Deuki*, *Kumari*, *Jhuma*, *Badi*, *Kamlari* and *Chaupadi*, causing extreme insecurity, health hazards and cruelty to girls. It recommended that the state party, as a matter of urgency, take necessary measures to eradicate all traditional practices harmful to the physical and psychological well-being of children.[32] The Committee condemned the high levels of prevailing poverty and the sexual exploitation of children of the lower castes.[33]

The CRC is to be commended for its work in highlighting the caste structures in India and Nepal as a significant factor in the denial of child rights, and issuing robust recommendations towards the elimination of caste-based discrimination.

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[29] Ibid., para. 28.

[30] Concluding Observations – Nepal (2005), CRC/C/15/Add.261, 3 June 2005, para. 9.

[31] Ibid., para. 36.

[32] Ibid., paras 67 and 68.

[33] Ibid., paras 71 and 87.

In particular, the effects of caste on Dalit children, notably poverty, sexual exploitation and degradation, should reinforce the fact that caste is to be deplored at all levels of the United Nations. The caste structures in South Asia must be eradicated if the most basic human rights of Dalits and their children are to be protected.

The CRC must lead the way in the fight against the practice of bonded labour, because of the devastating effects the practice has on children. The Committee failed to highlight bonded labour in India or Nepal in its concluding observations to their state reports. An estimated 40 million people in India, among them some 15 million children, are working in order to pay off debts as bonded labourers.[34] In India, the *Bonded Labour System (Abolition) Act 1976* defined bonded labour[35] and abolished all agreements and obligations arising out of the bonded labour system, but relatively few bonded labourers have been identified and released under the terms of the Act.[36]

According to reported studies, 86.6 percent of bonded labourers come from Scheduled Castes and Scheduled Tribes.[37] Several cases concerning bonded labour have come before the Indian Supreme Court under the 1976 Act. While a remedy for bonded labour was provided in the Act, it was not until social action groups challenged its occurrence in civil society that the legislation began to take effect.[38] Journalists and public service organisations, rather than the labourers (most of whom were unaware their situation was in violation of law) moved the Court to repeal this 'structurally entrenched problem'.[39] Ahuja classifies the cases under

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[34] Human Rights Watch, supra n.4, 13.

[35] Section 2(g) of the *Bonded Labour System (Abolition) Act 1976* considers a person to be in bonded labour when the following conditions are satisfied: (i) in consideration of an advance obtained by him or by any of his lineal descendants (whether or not such advance is evidenced by any document) and in consideration of the interest, if any, due on such advance or (ii) in pursuance of any customary social obligation, or (iii) in pursuance of an obligation devolving on him by succession, or (iv) for any economic consideration received by him or by any of his lineal ascendants or descendants, or (v) by reason of his birth in any particular caste of community, he would – (1) render, by himself, or through any member of his family, or any person dependent on him, labour or service to the creditor, for a specified period or for an unspecified period, either through wages or for nominal wages, or; (2) forfeit the freedom of employment or other means of livelihood for a specified period or for an unspecified period, or; (3) forfeit the right to move freely throughout the territory of India, or (4) forfeit the right to appropriate or sell at market value any of his property or product of his labour or the labour of a member of his family or any person dependent upon him.

[36] Human Rights Watch, supra n.4, 13.

[37] Ahuja, S. (1997), *People, Law and Justice: Casebook on Public Interest Litigation* (Hyderabad: Orient Longman), 300, quoted in Castellino, J. (2006), 'Minority Rights in India', in Castellino, J. and Dominguez-Redondo, E. (eds) (2006), *Minority Rights in Asia: a Comparative Legal Analysis* (Oxford: Oxford University Press).

[38] Ibid.

[39] Ibid.

this heading within three categories: cases taken by the *Bandhua Mukti Morcha* (Bonded Labourers Freedom Association),[40] those instigated by NGO volunteers Vivek and Vidyulata Pandit by writing directly to the Supreme Court,[41] and those originating in Raipur district (Chattisgarh in Eastern India).[42] These cases have been remarkable in shedding light on this age-old phenomenon, and in revealing the potential of the Supreme Court as an effective remedy.[43]

The Committee on Economic, Social and Cultural Rights

India has submitted only one periodic report to the Committee on Economic, Social and Cultural Rights (CESCR), and that was almost 20 years ago, on 16 December 1985.[44] Its second, third and fourth reports are overdue, the fourth since 30 June 2001.[45]

In September 2001, the Committee considered Nepal's initial report on the implementation of the Covenant on Economic, Social and Cultural Rights. In its concluding observations, the Committee expressed its concern: 'at the high number of women and girls being trafficked for prostitution. The Committee also regrets the continuation of polygamy and the practices of dowry, *Deuki* and prostitution among the *Bedi* caste, particularly in rural areas.'[46] The Committee urged the State party to enact or enforce legislation prohibiting such customary practices.[47]

The Committee did not engage with the effects of caste on the social and economic rights of Dalits in Nepal to the extent that other treaty-monitoring bodies have in their fields of concern. The overdue report of India will represent an important opportunity for the CESCR to bring the question of caste-based discrimination into the realm of economic and social rights, which has already been identified in such documents as the Bhopal Declaration (discussed below)

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[40] *Bandhua Mukti Morcha v State of Tamil Nadu*, 1986 (Supp) SCC 541; *Bandhua Mukti Morcha v Union of India & Ors. (*Haryana Mines I), AIR 1984 SC 802/(1984) 4 SCC 161, 1991 (1) SCALE 79 [295], AIR 1992 SC 38; *Bandhua Mukti Morcha, through Chairman, Swami Agnivesh v State of Haryana & Ors* (Haryana Mines II), 1983 (1) SCALE 121 [543]; Ibid.

[41] *Vivek Pandit v State of Maharashtra* W P No. 1503 of 1984; *Vivek Pandit v State of Makarashtra* W P No. 1504 of 1984; ibid.

[42] *Chattisgarh Krishak Mazdoor Sangh v State of MP and others* W P No. 13300 of 1983; *Upendra & Ors. V State of MP & Anr* WP (Civil/Cri) No 1071 of 1986 among others; ibid.

[43] Ibid.

[44] State Report: E/1984/6/Add.13. Concluding Observations of the Committee: E/1986/WG.1/SR.20; 24. See the United Nations Treaty-bodies Database, at: <http://www.unhchr.ch/tbs/doc.nsf/RepStatfrset?OpenFrameSet>.

[45] Ibid.

[46] Concluding Observations – Nepal (2001), E/C.12/1/Add.66, para. 18.

[47] Ibid., para. 43.

as representing an important stage in the movement towards breaking down the Hindu caste structure. Such developments must inform the Committee's analysis of India's future report, and its concluding observations should engage with the question of how the caste system and its discriminatory effects violate the rights protected in the Covenant in a comprehensive manner, drawing from the work of Dalit NGOs and the other treaty-monitoring committees.

Caste and Justice

In 1996, in an addendum to its response to India's third periodic report, the Human Rights Committee noted India's resolve to translate into reality the enjoyment of rights by its people, as evident from the Constitution and the laws as well as the effectiveness of the machinery it provides for enforcement of the rights.[48] Highlighting 'the elaborate and stringent provisions to safeguard the fundamental rights of all individuals'[49] under the Constitution, the Human Rights Committee ultimately characterised India's approach to protecting human rights as 'holistic'.[50] The Supreme Court contributed strongly to this climate, and 'in its concern to enhance protection and enforcement of human rights, [it had] developed a highly advanced public law regime which goes far beyond many other democratic countries.'[51] The reservations system was held up as an exemplary practice in the fight against discrimination:

> Integral to this holistic approach has been [the] Government's policy of affirmative action to create an effective environment for the exercise of human rights by certain vulnerable sectors of society who, as a result of socio-historical distortions, have been socially or economically disadvantaged.[52]

In response to the failure of the Constitution and its legislative progeny to eliminate the ancient practice of untouchability, the Human Rights Committee excused many human rights violations as the product of the country's 'extensive territorial domain, the vastness of its population and the complex social structure.' The Committee concluded that violations 'may sometimes occur despite best efforts.'[53]

Eisenman views the Human Rights Committee's comments as evidence that, in India: 'The standard of good governance, here defined as "a stable law and

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[48] Addendum to Third Periodic Reports of State Parties Due in 1992 – India (1996), CCPR/C/76/Add.6.

[49] Ibid., para. 64.

[50] Ibid., para. 12.

[51] Ibid., para. 9.

[52] Ibid., para. 16.

[53] Ibid., para. 3.

order environment where rule of law prevails" and where human rights can be exercised freely, is embodied in the national laws of India.'[54] Yet:

> The Constitution, despite all its promise and special protections, was never expected to change Indian society immediately. Indeed, any development of anti-discrimination laws is bound to encounter much socio-political retaliation from dominant groups who feel threatened by sudden changes in traditional power structures. Discriminatory traditions against Dalits span the Indian landscape … discrimination and traditional biases thrive in the rural areas of India. Where secularization has advanced slowly and traditional Hindu norms are still significant, discrimination is widespread.[55]

In particular, he identifies the police as failing to reflect equality in their daily maintenance of law and order, to the extent that 'the police force has acquired the reputation as being the prime instrument of lawlessness in India'.[56] The Dalit experience with police brutality has shown that, 'operating with complete impunity, the local police are able to defy anti-discrimination laws and decimate innocent Dalits'.[57]

The judiciary has also failed to uphold the constitutional guarantees of equality, and mirrors the same biases as the police. Eisenman states: 'Dalits seem to be recognized by the judicial system only as criminals, as threats. When they appear before the courts as victims of abuse, Dalits are often treated with indifference by local judges.'[58] He illustrates the point by reference to the 1992 Supreme Court case *Karnataka v. Ingale*.

In *Karnataka v. Ingale*,[59] the Indian state charged five individuals with violating the Prevention of Atrocities Act. At the trial, four witnesses testified that the defendants had threatened Dalits with a gun in order to stop them from taking water from a well. The defendants told the Dalits that they had no right to take water, because they were Untouchables.[60] They were convicted, but on appeal in the High Court, the judge acquitted all of the defendants after he had rejected the testimony of four Dalit witnesses.[61] The High Court judge's refusal to believe Dalit testimony was described by Justice Ramaswamy in the Supreme Court as a 'patent error'. He recognised that judges – in their capacity to enforce laws penalising

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[54] 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, 153.

[55] Ibid., 157.

[56] Ibid., 161, and on 162: 'the police demonstrate their religious and political motivations in their actions and on the record books.'

[57] Ibid., 166.

[58] Ibid., 167.

[59] *State of Karnataka v. Ingale* (1992) 3 S.C.R. 284, 298 (Ramaswamy, J., concurring).

[60] Ibid., 289.

[61] Ibid., 285.

the practice of untouchability in any form – are nevertheless being swayed by the centuries of dehumanising traditions that bear behind the Constitution.[62] He stated that the High Court judge had '[fallen] into the trap of traditional mould and found doubt where none exists' in atrocities cases.[63] Blaming 'apathy and lack of proper perspectives', Justice Ramaswamy ultimately expressed hope that the judiciary would be able to fulfill its purpose under the Constitution: '[The] judiciary does not forsake the ideals enshrined in the Constitution, but [must] make them meaningful and make the people ... realise and enjoy the rights' that they are guaranteed by law.[64]

This kind of discrepancy between national laws and the 'ground reality' of human rights has come to occupy the attention of the international human rights movement.[65] Now, more than 50 years after the Universal Declaration of Human Rights, the translation of international human rights standards into national laws is no longer a key issue.[66] Since more and more states have incorporated human rights norms into constitutional and statutory provisions, the international human rights movement has begun to look beyond 'international standard-setting' and move closer to the victim.[67] Eisenman appeals to the Organisation of the High Commissioner for Human Rights to establish an international field presence in India that is specifically designed to ameliorate the condition of Dalits as part of this movement.[68] This would require an invitation from India to the High Commissioner;[69] which would mean conceding to India that her internal mechanisms are adequate in addressing untouchability.[70] The work would lie in convincing India of the need to give effect to domestic provisions, especially within the criminal justice system, and assisting her in doing so. The difficulty is that the 'Indian government continues to operate under the assumption that it has done all in its power to eliminate discriminatory traditions against Dalits'.[71]

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62 Ibid., 305.

63 Ibid., 307.

64 Ibid., 292 and 306.

65 Eisenman, W., supra n.54, 170.

66 Anaya, S. (1996), *Indigenous Peoples in International Law* (Oxford: Oxford University Press), 135, quoted in Eisenman, W., ibid.

67 Martin, I. (1999), 'Closer to the Victim: United Nations Human Rights Field Operations', in Danieli, Y. et al. (eds), *Universal Declaration of Human Rights: Fifty Years and Beyond* (1999), 85. Martin makes the general proposition that, for the victim of human rights violations everywhere, the work of the United Nations has been remote; cited in Eisenman, W., ibid.

68 Eisenman, W., ibid.

69 Martin, I., supra n.67, 93, cited in Eisenman, W., ibid.

70 Eisenman, W., ibid., 182.

71 Ibid., 184.

Eradicating Caste in India: The Public Sphere

In its concluding observations to India's 1996 state report, the CERD Committee drew attention to the failure of the constitutional safeguards to protect the Scheduled Castes and Scheduled Tribes from discrimination and bring about substantial improvements in their social condition:

> It is noted that although constitutional provisions and legal texts exist to abolish untouchability and to protect the members of the scheduled castes and tribes, and although social and educational policies have been adopted to improve the situation of members of scheduled castes and tribes and to protect them from abuses, widespread discrimination against them and the relative impunity of those who abuse them point to the limited effect of these measures.[72]

India's National Commission for Scheduled Castes and Scheduled Tribes has drawn a similar conclusion: 'Each and every act of development … reviewed for judging the condition of the SCs/STs shows that their position today in rural India and urban slums had not improved substantially even after fifty years.'[73]

Why is the system not working? A recent assessment of constitutional reservations in India notes that while the Other Backward Classes have been at the centre of the debate surrounding reservations, particularly in the context of the Mandal Report, there has been a relative lack of controversy over reservations for the Scheduled Castes and Scheduled Tribes.[74] Mendelsohn views this lack of controversy as evidence of the reservation system's failure, for it has not generated the animus of a more successful programme.[75] The following section examines two issues. First, to what extent have the constitutional provisions for legislative reservations, reservations in education and reservations in public employment in India contributed to the uplift of the Scheduled Castes? Secondly, why, after 50 years of reservations, does caste-based discrimination continue to ensure that the Scheduled Castes remain bottom in terms of social and economic status?

There are structural problems with the operation of the reservations policy. Dalits have failed to unite as a single political force since Independence. The electoral potential of the Scheduled Caste vote is recognised by all the political parties, who seek those votes in electoral campaigns, but sideline Dalit issues once elected to office. There is little incentive to see that the reservations system

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[72] Concluding Observations – India, CERD/C/304/Add.13, para. 23.

[73] National Commission for Scheduled Castes and Scheduled Tribes, Annual Report 1993–94 (New Delhi: Government of India Press), 1.

[74] *Reservations in India*, ch. III: 'An Assessment of Reservations', available at <www.ambedkar.org>. The website does not attribute any date or authorship to this 'online book'.

[75] Mendelsohn, M. (1986), 'A Harijan Elite? The Lives of Some Untouchable Politicians', *Economic and Political Weekly*, 21:12, quoted in *Reservations in India*, ibid.

is implemented effectively. Consequently, it has developed into a bureaucratic structure with major inefficiencies.[76]

An example of such inefficiencies is the question of false certificates. The cornerstone of the system is the official list, or schedule, that gave the 'Scheduled Castes' and 'Scheduled Tribes' their name. The certificate that every Scheduled Caste member must have to qualify for reserved employment or educational benefits, or hold reserved legislative seats, becomes very important and valuable. Eighteen different officials are authorised to issue certificates, applying complex rules.[77] Inevitably corruption in the issuing of certificates is a serious problem. This has been recognised in an official government publication on the operation of the reservations system.[78] Given that there is also a lack of Scheduled Caste candidates for government posts and places in educational institutions at the higher levels, and the interest employers and schools have in filling such positions, there can be no doubt that caste Hindus with false Scheduled Caste certificates are squeezing out real Scheduled Caste members.[79] This problem is as old as the reservation system itself, but has considerably worsened to the extent that 'False Certificates' has its own chapter in the two most recent reports of the National Commission for Scheduled Castes and Scheduled Tribes.[80] The detailed proposals issued by the Commission have been ignored – the appearance is that few in government really care.[81]

Article 338 of the 1950 Constitution of India requires a special officer to monitor safeguards for the Scheduled Castes. The National Commission for Scheduled Castes and Scheduled Tribes was created in 1978 following a constitutional amendment, when two government organisations that had been operating concurrently were merged. The Commission has very recently bifurcated into two separate Commissions, the National Commission for Scheduled Castes and the National Commission for Scheduled Tribes; the move is not yet complete. The Commission is understaffed, and in 1992, six of 17 field-office directors' posts were abolished; including Hyderabad in Andhra Pradesh and Patna in Bihar,

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[76] Ibid., 50.

[77] These are listed in the government publication, *Brochure on Reservation and Other Concessions for SC, ST, OBC etc.* (2004) (Delhi: Nabhi), ch. 4, 24.

[78] *Reservations in India*, supra n.74: 'It has been brought to the notice of the government that there are cases in which candidates have produced false certificates as belonging to Scheduled Castes/Scheduled Tribes and secured Central Government jobs against vacancies reserved for SCs/STs' (40).

[79] Mendelsohn, O., supra n.75, 53, quoted in *Reservations in India*, supra n.74.

[80] National Commission for Scheduled Castes and Scheduled Tribes, Annual Report: 1994–95 and 1995–96 (Delhi: Government of India Press), 192 and National Commission for Scheduled Castes and Scheduled Tribes, Annual Report, 1996–97 and 1997–98 (Delhi: Government of India Press), 213.

[81] Mendelsohn, O., supra n.75, 53–4, quoted in *Reservations in India*, supra n.74.

where atrocities against Scheduled Castes have been widely documented.[82] Even the central head post has been left vacant.[83]

The collection of information, statistics and data on the operation of the reservations system in a timely and complete manner is difficult, for there is a general lack of priority given to Scheduled Caste issues. For example, the government of the state of Tamil Nadu did not collect any data on reservations until 1992.[84] At the central level, Commission reports are not reviewed by Parliament until months or years after they are written. In 1964, the 'long gap between presentation of [the annual] Report to the President and its placing before Parliament' was noted with regret by the Commissioner, Anil Chanda. Thirty years later, the Commissioner, B.D. Sharma, wrote: 'Even if a Report is presented it remains shelved for months and years together without any action being taken on it. Even when the Parliament finds time … there is hardly any discussion on the contents of the report and the formality is over in no time.'[85] 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.[86]

Legislative Reservations

An analysis of the reservation of seats for Scheduled Caste candidates in the *Lok Sabha* or Union legislature indicates that all the reserved seats were filled, with two states, Maharashtr and Andhra Pradesh, having a Scheduled Caste Member of Parliament (MP) from a non-reserved constituency. There may not always be substance to the positions attained through reservation. A look at the portfolios and posts held within the thirteenth *Lok Sabha* reveals that out of a total of

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[82] An article in *The Irish* 'the arrest of the founder of an upper-caste, outlawed farmers' army in eastern India's poorest state, Bihar, which was responsible for the deaths of over 500 Dalits … There have been around three dozen massacres of which the worst was the December 1997 attack in which 61 Dalits were hacked to death in the Jehanabad district south of Patna … Even today, Dalits are treated like Pariahs in Bihar, confined to village ghettos. Any attempt by them to drink water at public wells or pray in temples in upper-caste rural areas often result in ostracism or some other public humiliation'; Bedi, R., 'Letter from India', *The Irish Times*, 2 September 2002.

[83] Report of the Commissioner for Scheduled Castes and Scheduled Tribes, 30th Report, 109: 'No successor has been appointed creating a Constitutional vacuum. I do not know how long this will continue. This is another incident of constitutional violation concerning the safeguars of the SCs and STs which I have been repeatedly asserting'; quoted in *Reservations in India*, supra n.74, 55.

[84] Radhakrishnan, P. (2002), 'Sensitising Officials on Dalits and Reservations', *Economic and Political Weekly*, 16 February 2002, 653, quoted in *Reservations in India*, ibid.

[85] Report of the Commissioner for Scheduled Castes and Scheduled Tribes, 30th Report, 9, quoted in *Reservations in India*, ibid..

[86] *Reservations in India*, ibid., 56.

forty *Lok Sabha* committees, five are chaired by Scheduled Caste members, with one Scheduled Caste member accounting for three of these groups.[87] Galanter, commenting on the limited influence of Scheduled Caste MPs once elected, writes:

> Anything less than respectful attention to their problems, even if only lip service, is virtually unknown. Overt hostility to these groups is taboo in legislative and many other public forums. But there is evidence that SC and ST are not accepted politically. Very few members of these groups are nominated for non-reserved seats, and only a tiny number are elected.[88]

In the case of female Scheduled Caste MPs, their high educational qualifications might be an indication of an inherent disadvantage in their ability to seek political influence. Compared to just under 75 per cent for all women in the *Lok Sabha*, 100 per cent of the Scheduled Caste women have a third level degree. Therefore, in order to obtain office, and overcome the hurdles of caste and gender, Scheduled Caste women need to be even more qualified than non-Scheduled Caste women.[89] This resonates with what has been dubbed the 'creamy layer' effect.

The reservations policy has become a political tool, with all major parties supporting the policy and seeking its extension.[90] Opposing reservations is considered 'electoral suicide'.[91] The Bharatiya Janata Party (BJP), a Hindu nationalist party seeking to perpetuate a 'Brahmanical Social Order' in which upper castes dominate, has facilitated support for reservations in its efforts to widen its appeal. Its election manifesto contained sections on 'Commitment to the Welfare of the SCs and STs' and 'Untouchability: A Crime against Humanity' as well as calling for 'a befitting national memorial in honour of Dr. Babasaheb Ambedkar'.[92]

Scheduled Castes make up 16.4 per cent of the Indian population, distributed evenly across India. On average, Scheduled Castes make up 23.1 per cent of the

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[87] Ibid. Ganti Balayogi, an MP from Andhra Pradesh, headed three groups, Rules, General Purposes and Business Advisory, before his death in a helicopter crash. He was also the first SC to be appointed Speaker of the house.

[88] Galanter, M. (1984), *Competing Equalities; Law and the Backward Classes in India* (Berkeley, CA: University of California Press), 549. Galanter is writing in the 1980s, but the lack of any current comprehensive analysis on the part of the Indian government on the operation of the reservations system means that we are forced to refer to older studies.

[89] *Reservations in India*, supra n.74, 56.

[90] In 1996, four major parties – the Indian National Congress (INC), BJP, Janta Dal and CPI(M) all endorsed reservations, in 'Policies of Political Parties based on their Election Manifesto 1996'.

[91] Bayly, S. (1999), *Caste, Society and Politics in India* (Cambridge: Cambridge University Press), 303.

[92] 'Our Social Philosophy', BJP manifesto, <http://www.bjp.org/manifes/chap9.htm>

population in reserved constituencies.[93] The reality of India's first-past-the-post electoral system ensures that candidates in reserved constituencies do not depend upon Scheduled Caste support for victory. Dalit representatives who are elected do not always derive their main support from Scheduled Castes, but from caste Hindu constituents. Scheduled Caste MPs in reserved seats show more loyalty to their parties than to their Dalit constituents. They have less of an incentive to fight for Scheduled Caste interests than they would if Ambedkar's vision of separate electorates had existed.[94]

Reservations in Education

In education, 15 per cent of places in universities and colleges are reserved for Scheduled Caste candidates. Enrolment statistics show that 13 per cent of these are filled, which is under the quota and the proportion of Scheduled Castes to the total population. The system must still be considered very successful in assisting members of Scheduled Castes in attaining degrees, for since 1978, the number of Scheduled Caste candidates in higher education has nearly doubled. By contrast, the number of Scheduled Castes in teaching and non-teaching posts in central universities is low. Out of eight categories delineated by the National Commission for Scheduled Castes and Scheduled Tribes, the reservation quota is met in just one, the lowest grouping in terms of rank and pay. Universities are not instituting reservations in their employment practice for there are no legally binding provisions requiring them to do so.[95] At universities, upper-castes occupy 90 percent of the teaching posts in the social sciences and 94 per cent in the sciences, while Dalit representation is only 1.2 and 0.5 per cent respectively.[96]

The literacy levels of the Dalit population are much lower than that of the general population. The all-India literacy rate for Scheduled Castes is 29.7 per cent for men and 18.05 per cent for women, while the general literacy rate in India is 63.8 per cent for men and 39.42 per cent for women.[97] This is despite the constitutional provision promising free, compulsory, primary education for all children up to the age of fourteen, with special care and consideration to be given to promote the educational progress of the Scheduled Castes.[98] The literacy gap between Dalits and the rest of the population fell a scant 0.39 per cent

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[93] McMillan, A. (2001), 'Scheduled Caste Voting and the BJP', presented at American Political Science Association Annual Meeting, quoted in *Reservations in India*, supra n.74, 66-67.

[94] *Reservations in India*, ibid., 67.

[95] Ibid., 46–7.

[96] National Campaign for Dalit Human Rights (1999), *Black Papers: Broken Promises and Dalits Betrayed* (New Delhi: National Campaign on Dalit Human Rights), quoted in Human Rights Watch, supra n.4, 17.

[97] Quoted in the 1999 Report of the UN Special Rapporteur on Racism, UN Doc. E/CN.4/1999/15, para. 98.

[98] Articles 45 and 46.

between 1961 and 1991.[99] This gap was also noted by the UN Sub-Commission on Human Rights in its Working Paper on Discrimination based on Work and Descent.[100] A majority of Dalit students are enrolled in vernacular schools and are at a strong disadvantage in the job market, compared with those who learn in English-speaking schools. According to the National Commission for Scheduled Castes and Scheduled Tribes, Dalits have a high drop-out rate. The 1996–97 and 1997–98 Report records the national drop-out rate for Dalit children at 49.35 per cent at primary level, and 77.65 per cent at secondary level.[101]

Reservations in Public Employment

Reservations in government posts may be divided into four classes (I–IV), the first representing the elite and highest-paid level, such as the Indian Foreign Service and the Indian Administrative Service, the last being composed of low-skilled and low-income posts. There has been a general rise in Scheduled Caste representation in all four categories. The Scheduled Caste presence in Class I posts has increased tenfold under the reservations system, from 1.18 per cent in 1959 to 10.12 per cent in 1995. Similarly representation of Scheduled Castes in Class II is approximately ten times higher, while by contrast the lowest level, Class IV, which initially had more Scheduled Caste employees in 1959 than any of the other three classes, has had a slower rate of increase.[102]

There are certain realities that detract from this success. Scheduled Caste representation in the Classes I and II, after over 50 years, still falls short of the reservations quota of 15 per cent for Scheduled Castes, while the less prestigious and lower-paid Class III and IV posts are amply filled. In 1970 the quota was lower, at 12.5 per cent, yet only Class IV posts were filled. Certain posts, in science and technology for example, are exempt from the reservations programme.[103]

The National Commission for Scheduled Castes and Scheduled Tribes 1996–97 and 1997–98 Report states that overall more than 88 per cent of posts in the public sector remain unfulfilled, as well as 45 per cent of positions in state banks. A closer examination of the caste composition of government services (and institutes of education and other services), reveals what Dalit activists call an 'unacknowledged reservation policy' for upper-castes, particularly Brahmans, built into the system. Though they represent only 5 per cent of the population, Brahmans comprise 70 per cent of the Class I officers in government services.[104]

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[99] Human Rights Watch, supra n.4, 13.

[100] UN Doc. E/CN.4/Sub.2/2001/16, para. 24.

[101] National Commission for Scheduled Castes and Scheduled Tribes, *Highlights of the Report for the Years 1996–97 and 1997–98* (Delhi: Government of India Press).

[102] *Reservations in India*, supra n.74.

[103] Ibid.

[104] National Campaign for Dalit Human Rights, supra n.96.

Critics of reservations have often asserted that the policy has had disproportionate effects, benefiting only the most forward of the Scheduled Castes – those already in a better position to take advantage of reservations – and facilitating the emergence of a Scheduled Caste 'elite'. Mendelsohn describes the emergence of a 'Harijan elite' which is moving further and further away from the rest of the Scheduled Caste population, politically, socially and economically.[105] Over half of Scheduled Castes are employed in the agricultural sector, primarily as landless agricultural labourers, where 86 per cent of Dalit households are landless or near landless.[106]

The reservations system, despite its flaws, has undoubtedly made a vital contribution to Dalit opportunity and uplift. It is a remarkable and commendable system that exceeds any other affirmative action programme in the world, in terms of scale and ambition. It plays a vital role in providing representation, and improved education and employment prospects for India's lowest castes. Furthermore:

> the system has become such a mainstay in India, involving a significant portion of the population, that it is doubtful that the dismantling of the system is even feasible. No politician will risk trying to roll back these 'temporary' measures.[107]

It is imperative that reforms are introduced to ensure an effective operation of the system. Such reforms, which have been proposed on an annual basis by the National Commission for Scheduled Castes and Scheduled Tribes, will depend on political will, which is lacking given the delays in reviewing and implementing the Commission's reports and recommendations. In enacting the 1950 Constitution, India showed the world that she was serious in her commitment to combat caste-based discrimination and uplift the Scheduled Castes. Implementing the recommendations of her own statutory bodies, and rejuvenating the reservations system, would make a similar statement.

Eradicating Caste in India: The Private Sphere

The reservations system will continue to form an important part of the movement towards the eradication of caste-based discrimination in India. Yet it may not be the only means of solving the problems of the Scheduled Castes. Reservations apply only to the public sector, and not the private sector. In January 2002, the Madhya Pradesh government sponsored an all-India meeting of Dalits in Bhopal. The conference resulted in the release of the Bhopal Declaration, a 21point document highlighting the lack of progress of Scheduled Castes in the 50 years

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105 Mendelsohn, O., supra n.75.
106 Human Rights Watch, supra n.6, 28.
107 *Reservations in India*, supra n.74, 73.

since Independence, and calling for economic reforms beyond the established system. The Chief Minister of Madhya Pradesh, Digvijay Singh, stated in his conference paper:

> While the Dalit movement must strive to achieve complete fulfillment of the quota, we at the same time must understand the limited role reservation in government jobs has in SC-STs progress and emancipation. Unless we have understood it, it would be difficult to mould the direction of the movement toward the desired goal.[108]

In his address to the nation on the eve of Republic Day, the President of India, Shri K.R. Narayanan, stated:

> Recently a conference was held in Bhopal of Dalit and tribal intellectuals and activists. They issued a Declaration called the Bhopal Declaration … [which] emphasises the importance, in the present era of privatisation, of providing for representation for these deprived classes, not only in Government and public institutions but in private corporations and enterprises which benefit from Government funds and facilities. Indeed in the present economic system and of the future, it is necessary for the private sector to adopt social policies that are progressive and more egalitarian for these deprived classes to be uplifted from their state of deprivation and inequality and given the rights of citizens.[109]

The Bhopal Declaration represents the belief that the growth of capitalism, the private sector and the middle class in India is the key to breaking down the caste system. It is a 'blueprint for the full-blooded participation of Dalits in capitalist entrepreneurship', and seeks to create 'a capitalist class from the country's quarter of a billion Scheduled Castes and Scheduled Tribes.'[110] Its preamble states a belief in 'Babasaheb Dr B.R. Ambedkar's ideal of Social Democracy', and recognises 'that the social consensus over the Dalit cause – reluctantly agreed upon at the time of Independence – has by and large broken down'.[111] The signatories declare themselves 'convinced also that the national psyche and public discourse in the country accepts uncritically the rigid hierarchy and discrimination caused by caste and thereby denies that caste is a major source of prejudice and brutal violence'.[112]

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[108] 'Digvijay's Dalit Gambit', *Indian Express*, 15 January 2002, quoted in *Reservations in India*, ibid., 76.

[109] Narayanan, K. (25 January 2002), Address to the Nation, available at <http://meaindia.nic.in/event/2002/01/25event01.htm>.

[110] Ilaiah, K. (2002), Peoples Union for Civil Liberties, *The Bhopal Declaration – Text and Commentary*, available at <http://www.pucl.org/Topics/Dalit-tribal/2002/bhopal.htm>.

[111] The Bhopal Declaration, 12-13 January 2002, Preamble. The text of the Declaration and Task Force Report is available at <www.ambedkar.org>. The website also offers an excellent discussion on the topic 'Reservations in the Private Sector'.

[112] Ibid.

The Declaration attempts to go beyond government reservations by 'democratising capital':

> Democratise capital so as to ensure proportionate share for SCs and STs. Make budgetary allocation for SCs and STs to enable them to enter the market economy with adequate investment resources, and develop their capacities and skills for such market enterprises.[113]

It calls for every government and private organisation to implement: 'Supplier Diversity from socially disadvantaged business and Dealership Diversity in all goods and services.'[114] In addition, the document recommends ensuring that each Dalit family owns enough cultivable land for socio-economic well-being; compulsory free and high quality education for all Dalits; making the reservation quota applicable in all public and private educational institutions; recognising Scheduled Caste and Scheduled Tribe women as a distinct category among women; full implementation, in letter and spirit, of the *Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act 1989* and Rules (1995); eliminating the humiliating practice of manual scavenging; placing annual debates on the report of the National Commission for Scheduled Castes and Scheduled Tribes on a statutory footing at state and union level; and implementing a policy of reservation for Scheduled Castes and Scheduled Tribes at all levels within the judiciary.[115]

The Declaration met with some immediate results. The Chief Minister of Madhya Pradesh, Digvijay Singh, announced that the state would introduce Supplier Diversity from the ensuing financial year 2002–2003 where 30 per cent of government purchases would be made from Scheduled Caste and Scheduled Tribe traders and businessmen, starting with the Department of Scheduled Caste and Scheduled Tribe Welfare.

A Task Force under Digvijay Singh's chairmanship was set up to make recommendations on the implementation of the Declaration to the government of Madhya Pradesh. Its recommendations included: extending the supplier diversity programme to all the government departments of Madhya Pradesh; goods and services purchased by the state should be in proportion to the Scheduled Caste/Scheduled Tribe enterprises controlling them; Scheduled Castes and Scheduled Tribes must have a share in the workforce in proportion to their population; the State should build an environment for wider acceptance of affirmative action in partnership with the industry and corporate sector; a special law should be enacted so that the schemes of the financial institutions are redesigned to ensure that a minimum credit in proportion to Scheduled Caste/Scheduled Tribe population flows to these categories; Multi National Corporations and the United Nations organs should follow diversity policies that favour Scheduled Castes/Scheduled

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[113] Ibid., point 6.
[114] Ibid., point 15.
[115] Ibid., points 1, 9, 10, 11, 12, 17, 18 and 20 respectively.

Tribes; and Dalits should be assisted in entering sectors hitherto closed to them, including the media, the mainstream cultural arena and the private sector in general.[116] Each Scheduled Caste/Scheduled Tribe landless family should be provided with a minimum of five acres of agricultural land.[117]

In education, the Task Force highlighted 'drop outs' as the biggest challenge, which can be as high as 80 percent at high school-level. Acute poverty was determined to be the decisive factor. The Task Force noted a 'very peculiar correlation' between the age of dropping out and India's cropping pattern. Most children dropped out at 14, when they can be hired as a child labourer. It was recommended that compensation should be paid to Scheduled Caste/Scheduled Tribe families at this time to enable their children attend school. In addition, the education of the Scheduled Castes and Scheduled Tribes was being 'sacrificed at the altar of merit'. A rational system should be devised to determine merit whereby students from a particular socio-economic background are allowed compete among themselves in entrance or competitive examinations. Fellowships should be assigned to Scheduled Caste/Scheduled Tribe students to enable them undertake third level and doctorate studies, with a view to filling up lectureship positions.[118]

In employment, it was recommended that a special drive be undertaken to fill up the backlog in the reservation quota. The state should send a strong recommendation to the Central Government on the implementation of reservations for Scheduled Castes/Scheduled Tribes at all levels of the judiciary.[119]

Furthermore, *Scheduled Caste/Scheduled Tribe (Prevention of Atrocities) Act 1989* and Rules 1995 must be implemented in spirit and action, as called for in the Declaration.[120] The government's financial commitment to the development of the community should match the magnitude of the problem. It should be mandatory by law for both the Centre and states that they set aside a minimum of funds proportionate to the population of Scheduled Castes and Scheduled Tribes for their development.[121]

Criticism of the Bhopal Declaration from Dalit activists has pointed out that the document fails to account for the origins of the caste system, rendering it difficult for it to make an effective contribution towards its eradication. Subramaniam writes:

> The Bhopal Declaration in its long preamble avoids any historical analysis of the conditions which have created and sustained the oppression of the dalits. While noting that the dalits have gained little from the post independence developments it does not

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116 Ibid., 53-59.
117 Ibid., 49.
118 Ibid., 63–4 and 66.
119 Ibid., 71.
120 Ibid., 75–9.
121 Ibid., 81 and 83.

> go into the causes. This neglect of history allows its authors to come up with patently dubious formulations.[122]

The author is concerned that the discrimination being experienced by the Scheduled Castes in the public sector is already being reproduced in the private sector, and does not see the resolution to caste-based discrimination in the growth of private business in India:

> This perspective of emancipation of the vast masses of dalits and tribals through the development of capitalist enterprises only paves the way for further stratification and disintegration of the dalits and tribals as distinct social actors. We already know that the reservation policy, far from assisting in emancipating the disadvantaged social groups as a whole has only helped to create an elite among them with its own distinct interests and compromises with the powers that be. The document does not specify the kind of enterprises which are most suited to the needs of the dalits. Indeed it is silent on setting up cooperative enterprises and seems to privilege the usual kind of capitalist enterprises.[123]

Subramaniam stresses that he is not against setting up or supporting private Dalit enterprise, but wishes only that such support is not regarded as the solution to caste inequality. He sees the Dalit movement in general as forming part of a wider movement against poverty and inequality. Since the Bhopal Declaration does not seek to reform the institutions that have perpetuated caste-based discrimination in India, or poverty as a global reality, its effect must be limited:

> We are not arguing against the setting up of dalit capitalist enterprises; indeed such enterprises would help to undercut the upper caste monopoly over capital. But this cannot be regarded an effective remedy for the mass of the dalits who will continue to be condemned to slave for the upper castes. Nor are we arguing against preparing the dalits to enter the market with effective buying and selling power. But the central question before the dalit movement will remain whether it can see its emancipation in the path of capitalist development or in the path of joining forces of workers who are fighting the capitalist system to establish a commonwealth of labour.[124]

Whether or not one agrees with the socialist philosophy that informs this criticism, the writer makes an important point on the relationship between the state and the Dalits that the Declaration is perhaps ignoring in its aspirations to dismantle the caste system by transforming the Dalits into a viable market force in India:

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[122] Subramaniam, C. (2002), 'The Bhopal Declaration and a Tribal Fishworker's Cooperative', *Revolutionary Decomcracy* 8:1, available at <http://www.revolutionary democracy.org/rdv8n1/bhopal.htm>.

[123] Ibid.

[124] Ibid.

> Its primary emphasis lies on persuading the state to implement the agenda. What forms of struggle and organisation the dalits should undertake, who can be their allies and whom they should win over etc. etc. are left unstated. This leaves just the state as the ally of the dalit movement. It does not take much imagination to see the flaw in this line of thinking since in most cases the dalits and tribals stand in direct opposition to the state.[125]

The point is relevant given that only the state of Madhya Pradesh, with the support of its Chief Minister, Digvijay Singh, has implemented any part of the Declaration. The document is aspirational, and represents a series of guiding principles that are not legally binding. Nevertheless, some of the ideas that have been put forward are commendable, and as noted by the commentator above, it may represent one aspect of the way forward to a fairer society in India. The Conference at Bhopal and resultant Declaration draws an important link between the protection of economic and social rights and caste-based discrimination. The Bhopal Declaration, with its desire to see minimum economic standards for Dalits in the private sphere as well as the public sphere, has the potential to progress beyond its current status as a guiding instrument in the negotiations between the Dalit minority and the caste Hindu majority in India. This progression must take place in concordance with measures in other aspects of the Indian polity if caste-based discrimination is to be eradicated.

Conclusion

The solutions outlined above represent a composite package of measures that would operate as an overall movement towards the eradication of the Hindu caste system. The three prongs of the strategy – reform of the reservations system; application of supplier diversity and other innovations proposed by the Bhopal Declaration across India; and coordinated condemnation of caste and supervision of reforms in the relevant domains of the human rights treaty and charter-based bodies – would reinforce each other and erode entrenched caste-based thinking. Nevertheless, while the international community may provide the spark to reinvigorate the Indian government's willingness to tackle caste, it must firstly be acknowledged that, currently, despite the evidence of the Constitution, that willingness is not there.

There is undoubtedly an incongruity between India's admirable system of non-discrimination laws and reservations, both constitutional and statutory, and the testimony of Dalit human rights organisations of the continuing presence of caste-based discrimination. This leaves the human rights treaty and charter-based bodies in a quandary; how to frame recommendations for the amelioration of the situation of the Dalits through human rights law in India, when much of the

[125] Ibid.

mechanisms for the restoration of equality are already in place. They also occupy the privileged position of being constitutional safeguards, which lends moral as well as legal weight. It is difficult to understand why the Indian government would be reluctant to tackle caste-based discrimination, if it is still occurring, when it has already shown such willingness to do so in the basic law of the state.

It is the particular history of those reservations, and the caste struggle itself, that answers the question as to why India may not be willing to implement her far-reaching domestic provisions, to the extent that caste would become an anachronism. Ambedkar ensured that the 'Untouchables' of the 1930s were a political unit, and his threat to enact a permanent schism within Hinduism was enough of a bargaining tool with which to extract the non-discrimination laws and reservations from the caste Hindu majority. The changed political climate following Independence has removed the possibility of an 'Untouchable' movement re-emerging, which would threaten the unity of Indian Hindus. Ambedkar was the Chairman of the Constituent Assembly of India, and his mark is indelibly printed upon the text in the form of the provisions for the uplift of the Scheduled Castes, Scheduled Tribes and Other Backward Classes. It is unsurprising that, following his departure from politics in 1951, and death in 1955, Indian politicians have not shown the same enthusiasm for the removal of caste-based discrimination.

It is imperative that the United Nations organs make allowance for this fundamental point – India's extraordinary reservations system was drafted by an 'Untouchable'. Its implementation will not be pursued with the same vigour, and while the laws should be lauded, they should also be viewed in their historical context.

In 1946, Ambedkar asked:

> Will the governing classes in India, having captured the machinery of the State, undertake a programme for the reform of the social order as distinguished from a programme of social amelioration?[126]

Reform of the social order will require courageous restructuring of the reservations system, as repeatedly recommended by the National Commission for Scheduled Castes and Scheduled Tribes, and implementation of key provisions of the agreement reached at Bhopal. Although it is difficult to envision a priority in the measures proposed at Bhopal, some of the recommendations can be viewed as essential if any progress is to be made. First, the Indian government must consider extending the reservations system to the judiciary as a matter of urgency. Secondly, the landless status of many Dalits means that serious consideration must be given to the allocation of land as a first step in the social integration of the Scheduled

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[126] Ambedkar, B. (1946), 'What Congress and Gandhi have done to the Untouchables', in Rodrigues, V. (ed.) (2002), *The Essential Writings of B.R. Ambedkar* (Oxford: Oxford University Press), 144.

Castes and Scheduled Tribes. Thirdly, the principle of supplier diversity should be supported. Fourthly, in regard to education, a rational system should be devised to determine merit whereby students from a particular socio-economic background are allowed compete among themselves in entrance examinations. Finally, Scheduled Caste and Scheduled Tribe women must be considered as a separate category requiring special measures in both public and private spheres.

Implementing these reforms would allow the Indian government to keep the promise expressed in article 46 of the Constitution, in the form of a directive principle of state policy, to 'promote with special care the educational and economic interest of the weaker sections of the people, and in particular, the Scheduled Castes and Scheduled Tribes, and … protect them from social injustice and all forms of exploitation'.

If the political will to enact relevant measures is not being shown on the part of India, then it is for the United Nations bodies to point out that her international obligations to eliminate caste-based discrimination as a form of descent-based discrimination require her to do so.

Conclusion

The First Form of Racial Discrimination

Caste and Race

The *Vedas*, the sacred books of the Hindus, have been in existence since 1500 BC, which makes the caste system at least 3,500 years old. It is the 'longest living social hierarchy in the world',[1] the first and oldest known form of systematic discrimination on the basis of birth, which in modern times has been labelled 'racial discrimination'. The biological concept of race is much younger than the religious concept of caste, with the first documented use in English of the word 'race' occurring 500 years ago. The word 'discrimination' is also relatively young – becoming prevalent in American English, which is largely responsible for its current wide usage, from the middle of the eighteenth century.[2] Pillai traces race distinctions directly to the influence of Linnaeus and the eighteenth century taxonomists, and finds that the caste system cannot be considered racial discrimination, given that the concept of race distinctions did not exist when the caste system was constructed:

> Inferiority based on colour does not appear to have had its existence before the days of Negro slavery. There was no colour bar between the Queen of Sheba and King Solomon about 1,000 B.C. The slavery in Greece or Rome does not appear to have had anything to do with the colour bar. When Seleucos gave a daughter in marriage to Chandra Gupta in the third century B.C. there was no colour bar. But since the days of Linnaeus, the colour theory has been that the superiority of the European civilization so far advanced is attributed to their white colour … The apologists of caste distinctions found a good argument in the colour enunciated by Linnaeus.[3]

Pillai reasons that as a result the caste system cannot be considered racial discrimination. Another conclusion, however, is that caste was the first form of racial discrimination, the first system that viewed superiority and inferiority of human beings as an immutable fact. It is worth recalling Ashley Montagu's

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[1] 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, 151.

[2] *Chambers Dictionary of Etymology* (1988), Barnhart, R. (ed.) (New York: Chambers). Discrimination in the sense of making distinctions prejudicial to people of a different race or colour is first recorded in American English in 1866.

[3] Pillai, G. (1959), *Origin and Development of Caste* (Allahabad: Kitab Mahal), 39–40.

sentiment in relation to the 'colour bar' in the United States, quoted in Chapter 1, that 'We simply call our caste system, which is made up for the most part of our fears and anxieties, race relations'.[4] Montagu was arguing for no distinction to be made between race and caste. This is overly simplistic, but the quotation does capture the idea that discrimination on the basis of skin colour and discrimination on the basis of caste are both forms of racial discrimination. The caste system has the distinction of being the oldest.

This book has not argued that race is the same as caste. Discrimination on the basis of race and on the basis of caste are not the same; the religious justification and the lack of identifiable physiognomic differences between the modern caste groups being the essential differences. The book has instead distinguished between racial discrimination and race. Racial discrimination is broader than race, and its legal definition includes several forms of discrimination not based on skin colour, such as discrimination on the basis of national origin, as well as caste-based discrimination.

Morton Klass has highlighted the important distinction between the *racial* explanation of caste and the *religious* explanation of caste.[5] He has used this distinction to assert that the four *varnas* or 'colours' in the *Purusha sukta* designated spiritual rather than skin colour differences. It is submitted that this is the correct approach. The growth of the belief in racial typologies has been extensively documented in Chapter 2. It seems likely that the categories of four castes, represented as the colours white, red, yellow and black, led many commentators to equate the Vedic *varnas* with the four racial groups broadly categorised from the time of Linnaeus.

Klass makes this link, and drawing attention to 'the findings of modern genetics and … the essential meaninglessness of concepts such as "racial purity"',[6] blames the belief that 'the human species was clearly and demonstrably subdivided into "races"' for perpetuating the theory that the fourfold *varna* division was originally based on skin colour.[7] He emphasises the assumptions of racial theorists such as Arthur de Gobineau in fuelling the explanation that the caste system was designed to stop inter-marriage between '*Aryans*' and '*Dravidians*' and thereby maintain the *Aryans*' purity of blood.[8] The assumption that caste groups maintain purity of descent is directly related to the concept of racial types:

> The confusion deriving from the assumption that the Indian rules of endogamy imply 'purity of descent' has been compounded by the intermingling of the European notion of 'racial purity' with the Hindu concern about 'religious purity'. Are castes 'pure' then,

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4 Montagu, M. (1947), 'The Nature of Race Relations', *Social Forces* 25:3, 340.

5 Klass, M. (1980), *Caste: The Emergence of the South Asian Social System* (Philadelphia, PA: Institute for the Study of Human Issues), ch. 3: Divine Plan or Racial Antipathy?, 41.

6 Ibid., 48.

7 Ibid., 47.

8 Ibid.

> in any terms that make sense to the modern biologist? Can they really be studied, as some are still doing, as genetic isolates – or are they simply social constructs, like the 'black' and 'white' so-called 'races' of the United States, without meaningful genetic boundaries?[9]

Similarly, Ambedkar's writings repeatedly emphasise that caste is a religious problem. He believed caste was being used as a tool by racial theorists to present an ancient Indian world of pure types, as explained by Jaffrelot: 'For Ambedkar, such Western writers opted for race as the root cause of the "problem of caste" because they were "themselves impregnated by colour prejudices".'[10]

In *The Annihilation of Caste* (1936), he stated:

> Some have dug a biological trench in defence of the caste system. It is said that the object of caste was to preserve purity of race and purity of blood. Now ethnologists are of opinion that men of pure race exist nowhere and that there has been mixture of all races in all parts of the world … To hold that distinctions of castes are really distinctions of race and to treat different castes as though they were so many different races is a gross perversion of facts.[11]

There has been some discussion on the link between caste and race within the United Nations bodies. Gélé-Ahanhanzo, the then UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, in a report submitted in January 1999 pursuant to Resolution 1997/73 of the Commission on Human Rights, describes the 'basic question' as 'whether the age-old caste system in India, which had produced several million untouchables, could be regarded as racial discrimination'.[12] The Special Rapporteur was informed of the situation of the Untouchables in India in communications from three organisations.[13] He communicated these allegations to the Indian authorities, who replied on 30 September 1997. In substance, the Indian Government rejected the allegations that it tolerated untouchability and closed its eyes to the human rights violations of protected castes. The reply contained a list of the measures taken to curb discrimination between castes. It maintained also that a practice that is so old could not be eliminated rapidly.[14]

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[9] Ibid., ch. 2: Intimations of Caste, 29.

[10] Ambedkar, B. (1916), *Castes in India, Their Mechanisms, Genesis and Development*, in Jaffrelot, C. (2004), *Dr Ambedkar and Untouchability: Analysing and Fighting Caste* (Delhi: Permanent Black), 32.

[11] Ambedkar, B. (1936), *The Annihilation of Caste*, in Rodrigues, V. (ed.) (2002), *The Essential Writings of B.R. Ambedkar* (Oxford: Oxford University Press), 265.

[12] Report by Gélé-Ahanhanzo, Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance (1999), UN Doc. E/CN.4/1999/15, paras 88–9.

[13] UN Doc. E/CN.4/1997/71. They were the Ambedkar Centre for Justice and Peace, the World Council of Churches and the Dalit Liberation Education Trust.

[14] Supra n.12, para. 58.

The Special Rapporteur stated that, in view of the discrepancy between the facts alleged and the reply of the Indian Government, he would like to visit India to make an evaluation. The results were reported in January 1999.

The 1999 Report noted that in its appearances before CERD and its communications to the Special Rapporteur, the Indian Government had consistently held that the caste system is not a hierarchical system based on race. He outlined the Indian Government's position, taken from its communication of 30 September 1997:

> The fusion of…diverse racial elements over centuries has meant that Indian society is neither racially nor ethnically homogenous. Categorical distinctions of 'race' or 'national or ethnic origin' have ceased to exist and race itself as an issue does not impinge on the consciousness or outlook of Indian citizens in their social relations. Today India is a mosaic of different groups who seek identification in terms of language, religion, caste or even regional characteristics, rather than race, colour or ethnic origin.
>
> The term 'caste' denotes a 'social' and 'class' distinction and is not based on race. It has its origins in the functional division of Indian society. A hierarchical arrangement is the principle characteristic of this social institution in which certain privileges or disabilities are enjoined on its members from birth and are not supposed to change during a person's lifetime. Each caste group is functionally dependent on the other caste groups and has a well-defined role in a social set-up based on a symbolic relationship between persons belonging to different castes. Racial hierarchy appears as an aberrant adjunct to the main structure of society, while the multi-segmented and intricately ranked social grouping of castes has been the central principle of a functional organization of Hindu society. Further, there is ample evidence of persons belonging to different castes having the same racial characteristics.
>
> Communities which fall under the category of 'Scheduled Castes' are unique in India and its historical process. They comprise persons who were excluded from the caste system and subjected to severe discrimination in ancient India. These persons were treated as 'untouchables' and social and physical contact with them was shunned by the dominant castes.
>
> 'Race' has thus never been a factor in the process of identification and determination of the communities which constitute Scheduled Castes. Persons who belong to the Scheduled Caste communities are today considered different from others because of their social, economic and educational backwardness, not because they belong to a separate 'race'.[15]

Consistent with its position in the Special Rapporteur's Report, the Indian government opposed the inclusion of the term 'caste' in the Durban Declaration and Programme of Action.[16] The Attorney General of India, Soli Sorabjee, described 'misconceived attempts by some NGOs to equate racism with caste-

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[15] UN Doc. E/CN.4/1999/15, paras 90–94.

[16] South Asian Human Rights Documentation Centre (SAHRDC), Submission to the 61st session of the Committee on the Elimination of Racial Discrimination on the Thematic Discussion on Discrimination on the Ground of Descent, 8–9 August 2002.

based discrimination that is based on birth and occupation and has nothing to do with the race of a person', in a letter to the *Times of India*.[17] 'Caste' was excluded from the final text at the World Conference against Racism, held in Durban in 2002, although India was the only state vocally opposed to its inclusion.[18]

The Special Rapporteur did not specifically answer his own 'basic question' put forward in the introduction. His conclusion, that the situation of the Untouchables merited particular attention, did not extend to defining the discrimination against them as racial discrimination, or indeed racism, although he did defer to the CERD Committee on this point. The Report implicitly supported the belief that caste-based discrimination is a form of racial discrimination, as expressed by CERD. It is submitted that he did not commit himself in the Report because clearly, caste is different from race. The features of caste that require it to be distinguished from race have been detailed. Yet this ought not to have prevented him from making a correct distinction between race and the legal concept of racial discrimination, and consequently concluding that caste-based discrimination is a form of racial discrimination.

Racial discrimination is broader than race. To employ the definition in the ICERD, it covers discriminatory action based on five grounds, only one of which is 'race'. As Thornberry states, 'the umbrella term of the Convention is "racial discrimination", not "race" … "racial discrimination" is given a stipulative meaning by the Convention: as precisely the five terms set out in Article 1, which mentions "race" but four other terms as well.'[19]

The caste system is a racially discriminatory system as it is a system whereby one is born into an immutable position of inequality that ignores individual human worth and dignity. It does not imply observable physical differences between the castes, such as skin colour. In contrast to the Indian position, Nepal has described its caste system in its state reports to CERD as constituting racial discrimination:

> However, racial discrimination in the society, especially in rural areas, is still in existence. So-called untouchables cannot even enter the houses of the people of so-called higher and middle-class castes. On the one hand, they are socially suppressed by the upper classes and, on the other hand, they suffer from poverty; the intensity of poverty seems to be higher in socially backward people.[20]

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[17] *Times of India*, 4 March 2001.

[18] SAHRDC, supra n.16.

[19] 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) (2005), *International Law and Indigenous Peoples* (Leiden: Martinus Nijhoff), 19.

[20] Periodic Report – Nepal (1999), CERD/C/337/Add.4, paras 38–9.

The work of CERD in tandem with the UN Sub-Commission on the Promotion and Protection of Human Rights in documenting caste-based discrimination has resulted in an unambiguous position within the United Nations treaty-monitoring bodies and charter-based bodies that caste-based discrimination is a form of racial discrimination. The current Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Forms of Intolerance, Doudou Diène, has made it clear that he considers caste-based discrimination to fall within his remit.[21] In his Annual Report to the Commission on Human Rights, he signalled the need for 'the recognition and treatment of the discriminatory significance of the problem of castes, in close cooperation with the countries concerned'.[22] He has requested an invitation to visit India on a prospective mission. India has yet to accede to his request.[23]

Caste and Genocide

The importance of the question of identification and the criteria for deciding whether a group constitutes a racial group is illustrated in the context of genocide. The genocide scholarship provides an interesting frame of reference for a discussion on the legal meaning of 'racial' and how it is determined whether groups conform to 'racial' criteria. The 1948 Convention on the Punishment and Prevention of Genocide defines genocide in its article 2 as 'intent to destroy, in whole or in part, a national, ethnical, racial or religious group'. If, in a hypothetical situation, one caste group intended to destroy, in whole or in part, another caste group, would it constitute genocide? Does an affirmative answer hinge on the requirement that a caste group would be considered a 'race'?

The International Criminal Tribunal for the former Yugoslavia (ICTY) has engaged with the meaning of 'racial' and 'ethnical' and the indications required to establish whether or not groups fall within the ambit of the Convention definition.[24] In *Prosecutor v. Jelesic*, the Tribunal noted:

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[21] See UN Doc. E/CN.4/2005/18/Add.1, paras 17–19. In this appendix to his 2005 Annual Report to the Commission on Human Rights, Diène documents having sent a letter of allegation jointly with the Special Rapporteur on Violence against Women to the Indian Government, concerning a group of 200 people who attacked a Dalit settlement in the Kalapatti village of the Coimbatore district, Tamil Nadu, on 16 May 2004.

[22] UN Doc. E/CN.4/2004/18, 3. Caste was one of four issues that the Special Rapporteur believed warranted especial consideration (along with immigration, anti-Semitism and Islamophobia; para. 2).

[23] UN Doc. E/CN.4/2005/18, para. 3.

[24] The International Criminal Tribunal for Rwanda has engaged with the meaning of 'ethnical'. It adopted a subjective approach to the question of 'ethnicity' in *Kayishema and Ruzindana* (Case No. ICTR-95-1-T, Judgment, 21 May 1999), when it found that an ethnic group could be 'a group identified as such by others, including perpetrators of the crimes' (para. 98).

> to attempt to define a national, ethnical or racial group today using objective and scientifically irreproachable criteria would be a perilous exercise whose result would not necessarily correspond to the perception of the persons concerned by such categorisation. Therefore, it is more appropriate to evaluate the status of a national, ethnical or racial group from the point of view of those persons who wish to single that group out from the rest of the community. The Trial Chamber consequently elects to evaluate membership in a national, ethnical or racial group using a subjective criterion. It is the stigmatisation of a group as a distinct national, ethnical or racial unit by the community which allows it to be determined whether a targeted population constitutes a national, ethnical or racial group in the eyes of the alleged perpetrators.[25]

This subjective approach is limited, for the law cannot allow the crime to be defined by the perpetrator alone.[26] The Genocide Convention requires that the group also have an objective existence. In *Jelesic*, the Tribunal noted this objective requirement: 'The preparatory work of the [Genocide] Convention demonstrates that a wish was expressed to limit the field of application of the Convention to protecting "stable" groups objectively defined and to which individuals belong regardless of their own desires.'[27]

It is submitted in answer to the hypothetical question posed that intent to destroy a caste group in whole or in part would constitute genocide. There would not be a requirement that the caste group be considered a 'race'. As the excerpts from *Jelesic* show, the *legal* concept of a 'racial' group for the purposes of the Convention definition involves the interplay of subjective and objective elements. The combination of subjective factors, including stigmatisation of castes as distinct groups resulting in severe discrimination, and an objective stability, found in the rigid structure that has forbidden endogamy for 3,000 years, would seem to imply that caste groups would fall within the sweep of article 2 of the 1948 Genocide Convention. The four terms, as they appear in the Genocide Convention, are social constructs, not scientific expressions.[28] According to Schabas, 'they overlap, and help to define each other, operating much as four corner posts that delimit an area within which a myriad of groups covered by the Convention find protection'.[29] Attempts by the Tribunals to provide an individual meaning for each term have been criticised.[30]

It seems that a caste group would conform to this understanding of a 'racial' group, in the legal sense rather than in any scientific sense, and would certainly fall within the four corner posts of the definition. The extensive treatment of caste in

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[25] *Prosecutor v. Jelesic* (Case No. IT-95-10-T), Judgement, 14 December 1999, para. 70.

[26] Schabas, W. (2000), *Genocide in International Law* (Cambridge University Press), 110.

[27] *Prosecutor v. Jelesic*, supra note 25, para. 69.

[28] Schabas, W., supra n.26, 111–12.

[29] Ibid.

[30] Ibid.

Indian literature may suggest as much. In Mulk Raj Anand's novel *Untouchable* (1935), the author, tracing the reactions of the character Havildar Charat Singh towards the 'Untouchable' scavenger and hero of the tale, Bakha, describes how: 'Charat Singh was feeling kind, though he did not relax the grin which symbolised six thousand years of racial and class superiority.'[31]

Caste is Unique to Hinduism

Caste is unique to Hinduism which deems it a sacred institution, and is found among the majority in two states, India and Nepal, and among minority Hindu populations in South Asia.[32] It has its origin in the *Vedas*, the ancient Hindu texts. The *dharma* codes are the bridge between the Vedas, from which they derive their authority and the everyday duties of the castes; they are the source of caste-based discrimination.

While the study has concentrated on India as the paradigmatic example of caste, the three Nepalese State reports to CERD, from 1997, 1999 and 2003, contain a detailed description of the caste system and the difficulties faced in eradicating this form of discrimination. CERD in turn have welcomed 'the frankness and self-critical approach of the Nepalese delegation'.[33] Nepal's 1990 Constitution contains a formal declaration that Nepal is a Hindu Kingdom.[34] The most recent report notes that 'Nepal legally prohibited all forms of discrimination long ago, but vestiges of caste-based discrimination still persist in Nepalese society'.[35] Importantly, the Nepalese reports confirm that the caste system has its origin in Hinduism, and that this religious origin of caste ensures that the system is entrenched in every aspect of the Nepalese social structure. In 2003, Nepal emphasised:

> Hinduism as the main ideology of the rulers in the different historical periods of Nepal and the legalization of Hindu ethos in 1854 has established Hindu caste system as a deeply rooted element of Nepalese social structure. It is so much so that the originally

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[31] Anand, M. (first published 1935), *Untouchable* (Penguin Classics), 16.

[32] The caste system has also been exported through diaspora communities emanating from these countries.

[33] Concluding Observations – Nepal (1998), CERD/C/304/Add.61, para. 10.

[34] Article 4(1): 'Nepal is a multiethnic, multilingual, democratic, independent, indivisible, sovereign Hindu and Constitutional Monarchical Kingdom'. The former 1962 '*panchayat* Constitution' omitted any characterization of the state in religious terms. According to Manzione: 'The later Constitution included the provision over serious objection by representatives on the drafting committee on the grounds that a country proclaiming freedom of religion as a basic tenet should not specify a state religion'; Manzione, L. (2001), 'Human Rights in the Kingdom of Nepal: Do They Only Exist on Paper?', *Brooklyn Journal of International Law* 27, 204.

[35] Periodic Report – Nepal (2003), CERD/C/452/Add.2, Executive Summary.

> non-caste ethnic groups today often define themselves in terms of caste. The Laws of Manu (Ca. fifth century A.D.) is considered the source of all subsequent codes and laws pertaining to the caste system. It is also believed that the consolidation of laws began as early as 1500 B.C.[36]

The 1997 Report similarly attributes the existence of the caste structure to the unification of the country as a Hindustan:

> in the 18th century, the country was unified and ordained as a true Hindustan of four *jats* (castes) and thirty-six classes … Socially, the caste system, which has its origin in Hinduism, still operates in Nepal.[37]

There follows a description of caste and the laws enacted to combat caste-based discrimination. The 2003 Report notes that medieval and modern rulers drew heavily from the Laws of *Manu*, and present the classical four-tier hierarchy as giving rise to a corresponding economic hierarchy, with the result that 'today's Dalits occupy the lowest socio-cultural and economic status among all the categories of people in Nepalese society';[38] Dalits (traditionally defined as untouchable, low caste people and estimated to be around 4.5 million) still occupy the bottom rung of the economic hierarchy.[39] In contrast with India, Nepal is willing to acknowledge shortcomings in legislative provisions designed to eradicate caste-based discrimination:

> Despite…constitutional and legislative measures undertaken by HMG of Nepal, casteism is still widespread in Nepalese society. The ideology of caste still operates, for the large segments of the population, as a basis for social relations. The Dalits are vulnerable to caste-based discrimination mostly in the rural areas of the country … Casteism is a major social problem that still makes the Dalits vulnerable to attitudinal discrimination in society. Strong legal measures under the Constitution are taken against any individual or groups practising such discrimination. Nevertheless, due to the high level of illiteracy, lack of legal awareness, the legacy of past caste-based traditions, social and economic inequalities among caste and ethnic groups, the lack of effective implementation and execution of legal provisions against caste-based discrimination, etc. casteism continues to be practised in many parts of the country.[40]

There are serious factual inaccuracies in some of the Nepalese reports that were not commented upon by CERD. It is possible that these inaccuracies are

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36 Periodic Report – Nepal (2003), CERD/C/452/Add.2, para. 25.
37 Periodic Report – Nepal (1997), CERD/C/298/Add.1, para. 17.
38 Periodic Report – Nepal (2003), CERD/C/452/Add.2, para. 25.
39 Ibid., para. 38.
40 Ibid., paras 61 and 75.

due to errors in translation.[41] The introduction of the Old Legal Code (*Purano Mulki Ain*) in 1854 updated King Jayasthiti's laws,[42] not just those relating to caste, and extended them to the whole of modern Nepal, which was larger than King Jayasthiti's kingdom.[43] Burghart directly equates the 1854 Code and its imposition of a caste system with the desire to awaken a national Hindu consciousness in Nepal:

> The attempt to create a national religious consciousness is more difficult to date, but presumably goes back to the promulgation of Jang Bahadur Rana's legal code in 1854, in which a national caste system was ordered.[44]

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[41] For example, para. 21 of the 1999 Report, which describes the origins of the Nepalese caste system, refers to the 'late' King Jayasthiti Malla in the 1930s. Yet the Shah dynasty have been Kings of Nepal from the late eighteenth century to the present day. During the first half of the twentieth century real power lay with the Rana dynasty, who ruled successively as prime ministers from 1857 to their overthrow in 1950. King Jayasthiti was not a twentieth century monarch, but ruled Nepal more than 500 years earlier, towards the end of the fourteenth century, from 1380 to 1394. A very substantial monarch, King Jayasthiti established his kingdom around Kathmandu which became the capital, and produced Nepal's first codified classification of the castes, as well as other major legal reforms, as para. 21 indicates. Some of these were codified under the title *Manab Naya Sastra*, which has been translated as 'Legal Rules for Human Justice'. A possible explanation for the apparent errors of para. 21 is that the translation or transcription of the State Report is incorrect. It is suggested that 'Human Behavioural Science', the title of the legal code given in the State Report, is a literal but less than accurate translation of *Manab Naya Sastra*. It is further suggested that the reference to 'in the 1930s' should read 'in the 1390s', when King Jayasthiti was alive, ruling, and producing and codifying his legal reforms. On the history of caste in Nepal, see Bhattarai, B., Mainali, M., Ghimere, J. and Upadhyay, A. (1999), *Impunity in Nepal – An Exploratory Study* (Nepal: Asia Foundatio), 7, available at <http://www.asiafoundation.org/pdf/nepal_impunity.pdf>.

[42] Dahal, D., Gurung, Y., Acharya, B., Hemchuri, K. and Swarnakar, D. (2002), *National Dalit Strategy Report*, Part 1, *Situational Analysis of Dalits in Nepal, Final Report*, Submitted to Action-Aid Nepal, CARE Nepal and Save the Children US, prepared for National Planning Commission HMG/Nepal (Kathmandu: HMG Nepal), 6, available at <http://www.carenepal.org/Care_nepal_Library/Strategy/175_PDF/fulldoc%20i.pdf>.

[43] This code organised Nepali caste groups into four categories: *Taghadari* (castes wearing sacred thread); *Matwali* (liquor-consuming castes); *Pani nacalne choi chtto halnu naparne* (castes polluting water only); and *Pani nacalne choi chtto halnu parne* (untouchable castes). According to Sharma, this Code embodied distinct features, including supremacy of Hindu values and caste as the social mobility. Breach of the Code was either severely punished, or led to excommunication or demotion within the caste hierarchy; Sharma, P. (1977), *Caste, Social Mobility and Sanskritization in a Tribal Hindu Society: Situation of the Lowest Status Caste and Tribal Communities in Nepal* (Tokyo: Institute for the Study of Languages and Cultures of Africa and Asia), 99.

[44] Burghart, R. (1995), 'The Category "Hindu" in the Political Discourse of Nepal', in Dalmia, V. and Von Steitencron, H. (eds.), *Representing Hinduism: The Construction of Religious Traditions and National Identity* (Delhi: Sage Publications), 138, and on 139:

The case of Sri Lanka also draws attention to the link between caste and Hinduism. In its 2001 Working Paper on Discrimination based on Work and Descent, the UN Sub-Commission examined whether there was descent-based discrimination:

> In Sri Lanka there are two caste systems, one for the Sinhalese and the other for the Tamils. Although they both have their origin in India, the Sinhalese caste system is not linked to the Hindu *varna* … The caste system was a secular hierarchy. The stratification took into account as many caste and sub-caste groups as there were feudal services and functions or temple services to perform in a disputed hierarchical order. There were no non-untouchables in the Indian sense. Social distance was practised but the notion of pollution hardly existed.[45]

As Ryan concludes: 'The absence of the Hindu concept had rendered the Sinhalese caste system mild and humanitarian when judged by Indian standards.'[46] The Working Paper states as a result: 'Discrimination based on descent and work may not have disappeared, but there are no signs that it is a problem.'[47]

The link between caste and Hinduism is inextricable. There is much Nepal can draw from the Indian experience, particularly as it embarks upon a stated project of special measures for Dalits. There is much that India can learn from the Nepalese attitude, whereby a *prima facie* recognition of the problem to the international committees has engendered a positive approach to the eradication of caste. India should emulate the Nepalese attitude, and accept the continuing reality of caste-based discrimination despite historical legal protections.

Is Caste a *Sui Generis* Category?

Chapter 5 has challenged the growing movement against descent-based discrimination in the United Nations, which has seen the issue of caste subsumed within a global fight to eradicate descent-based discrimination. The movement against descent-based discrimination must not lose sight of its original intention, to eradicate the ancient, entrenched practice of caste in the Hindu states, India and Nepal, and among minority Hindu communities in South Asia. The chapter

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'The 1990 Constitution, however, continued to define Nepal as a "Hindu constitutional monarchical kingdom", if for no better reason than that the dominant power on the subcontinent was not one.'

45 UN Doc. E/CN.4/Sub.2/2001/16, para. 28. However: 'the Tamils have high and low caste groups which show a stronger concept of pollution and social distance. At the bottom of the caste hierarchy are three castes of untouchables who suffer social disadvantage more than others' (para. 32).

46 Ryan, B. (1953), *Caste in Modern Ceylon* (New Brunswick, NJ: Rutgers University Press), 17, quoted in UN Doc. E/CN.4/Sub.2/2001/16, ibid.

47 Ibid., para. 35.

has shown how, in the *travaux préparatoires* to the ICERD, the word 'descent', which was introduced by India into the Convention, did not originally refer to the caste system. The point is an academic one, but it was made to highlight the need to distinguish caste from descent. As stated in the Introduction, there is a structural difference that must be appreciated by the United Nations treaty and charter-based bodies. This difference is that the caste system, uniquely, has religious support in the sacred texts of the Hindus, resulting in large-scale caste-based discrimination, causing widespread poverty and degradation.

This need to distinguish caste from descent does not deny the wider questions raised by the story of India's caste struggle. Indeed, it emphasises the broader relevance of the caste question to the legal understanding of racial discrimination. There is a problematic that the discussion of caste-based discrimination in international human rights law has raised that goes beyond the parameters of Hinduism and the Dalits. It is a question for human rights law itself. The United Nations has been concerned primarily with standard-setting in the area of racial discrimination. There has been a clear strategy to the work of the Committee, involving three steps: first, recognition or identification of the problem; second, introduction and enforcement of robust laws of non-discrimination, which comport to the criteria laid out in the General Recommendations; and, finally, a movement towards affirmative action, that would bring a desired shift from *de jure* to *de facto* equality.

The Committee's history of engagement with states parties reflects this approach. A review of the first 45 state reports has shown that more than half the states in question emphatically denied that any form of racial discrimination existed on their territories,[48] with many states initially viewing the Convention as an instrument designed solely to combat racial discrimination by 'whites' against 'blacks'.[49] In 1972, Madagascar, having received a communication from the Committee outlining the required format for state reports, wrote in its Report that: 'the Malagasy Government considers that the detailed questionnaire in the aforementioned communication is intended for countries in which either *de facto* or *de jure* racial discrimination exists.'[50] In response, the Committee issued General Recommendation II, which held that the communication was 'addressed to all states parties without distinction, whether or not racial discrimination exists in their respective territories'.[51] Following the issuing of the Recommendation, the number of states making assertions similar to that of

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[48] Banton, M. (1996), *International Action against Racial Discrimination* (Oxford: Oxford University Press), 106.

[49] Buergenthal, T. (1977), 'Implementing the UN Racial Convention', *Texas International Law Journal* 12, 218.

[50] Ibid., 190.

[51] General Recommendation II (1972), Decision 4(V).

Madagascar, that no racial discrimination existed on their territories, dropped accordingly.[52]

The last 30 years of state reporting have seen the Committee concentrate on the second and third steps. This entails setting the standard for provisions against racial discrimination, and raising the requirement from formal non-discrimination on the basis of race, colour, descent, or national or ethnic origin, to affirmative action measures designed to bring about economic and social equality, as well as civil and political equality between groups. The first Special Rapporteur on Affirmative Action, Marc Bossuyt, describes the process in his Final Report. He notes that where the non-discrimination principle removes factors such as race, sex and nationality from the society's decision-making processes, affirmative action seeks to ensure full and substantive equality by taking those factors into account.[53] Consequently, not every different treatment is prohibited – only those treatments that result in discrimination, it being universally accepted that the term 'discrimination' has to be reserved for arbitrary and unlawful differences in treatment.[54] Affirmative action is no exception to the principle of non-discrimination. Rather, it is the principle of non-discrimination that establishes limits to each affirmative action.[55]

The difficulty this approach raises in the Indian context has already been signalled. India's 1950 Constitution appears to go beyond the accepted legal path that CERD has forged in its quest to eliminate all forms of racial discrimination. It is the next stage that is uncertain. This is why it is so important to distinguish caste from descent; many of the groups viewed as descent-based groups, such as the *Griots* of Senegal or the *Akdham* of Yemen, have not been identified in their respective states as suffering any form of discrimination. General Recommendation XXIX seeks first of all to push states towards *identifying* descent-based groups within their territories: it requests of states parties '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'.[56]

Despite the hostility shown to CERD's probing of the caste system, India is far beyond the identification process with regard to the Dalits. Indeed, in relation to the entire concept of 'special measures', as affirmative action is labelled in international human rights law, India has been to the fore. According to Marc Bossuyt's Final Report, the first mention of 'special measures' was made by the Government of India during the drafting of the International

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[52] Buergenthal, T., supra n.49, 190. By 1976, only one state, Bolivia, seemed to be making the claim that no racial discrimination existed on its territories. The Bolivian representative agreed with the Committee that: 'his government had not fulfilled all its obligations and must submit a more detailed report'; quoted in Buergenthal, n.24.

[53] UN Doc. E/CN.4/Sub.2/2002/21, para. 83.

[54] Ibid., para. 91.

[55] Ibid., para. 113.

[56] UN Doc. A/57/18, 111.

Covenant on Economic, Social and Cultural Rights.[57] India suggested that an explanatory paragraph should be included in the text of article 2 of the Covenant, specifying:

> Special measures for the advancement of any socially and educationally backward sections of society shall not be construed as distinctions under this article. Alternatively, the Committee might wish to insert in its report a statement, which would make that interpretation clear.[58]

The representative of India pointed out that the implementation of the principles of non-discrimination raised certain problems in the case of the particularly backward groups still to be found in many underdeveloped countries. In his country, the delegate stated, the Constitution and the laws provided for special measures for the social and cultural betterment of such groups. Measures of that kind were essential for the achievement of true social equality in highly heterogeneous societies.[59] India is far beyond implementing non-discrimination norms and affirmative action measures, and recommending such an approach, like the identification process, is no longer relevant. What is the next step?

The two Special Rapporteurs on Discrimination based on Work and Descent are not just concerned with caste. Similarly the treaty-monitoring bodies are committed to the elimination of descent-based discrimination, in all its forms. These bodies can focus on identification and standard-setting, in tracing the problem of descent-based discrimination as a global phenomenon. However, again, it is imperative to remember that tackling the Indian caste system is the origin of the movement against descent-based discrimination. What measures can be brought in, that would move beyond the legal protections that Ambedkar wrought from the caste Hindu majority in the early twentieth century?

Implementation and reform of the existing reservations system are an issue, and this has been addressed in Chapter 6. Beyond this, moving into the private sphere to tackle discrimination is an important innovation. If the successful elements of the Bhopal Declaration could be distilled, then this could become a model for reducing the reality of racial discrimination in other states. Most states have sophisticated laws on non-discrimination on the basis of race. Some states have affirmative action measures. No states have gone further; yet poverty and exclusion can be divided upon the basis of race, colour, descent and national or ethnic origin, to the extent that those groups at the bottom illustrate that there is a reality of racial discrimination in the world. Social and economic equality requires more than non-discrimination, and requires innovation with regard to special measures. It is a challenge for human rights law, and combatting caste-based discrimination calls for renewed thinking and a new step to be taken that

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57 UN Doc. E/CN.4/Sub.2/2002/21, para. 17.
58 UN Doc. A/C.3/SR.1182, para. 17.
59 UN Doc. A/C.3/SR.1183, paras 12 and 29.

stretches the boundaries of human rights law remedies. Caste may have been the first form of racial discrimination – it should become the test for our ability to rid the world of this disease.

The strategies employed beyond the existing mechanisms are the next step in the elimination of racial discrimination. They apply to caste, and to all other forms of racial discrimination. The particular elements that sustain such discrimination must be constantly reassessed. That reassessment in India by Dalit NGOs has led to the conclusion that the enforcement of social and economic rights is the next direction that the Dalit struggle must take. They recommend extending special measures to the private sphere. They believe that policies such as supplier diversity, in addition to progressive educational policies and reservation in such crucial areas as the judiciary will yield considerable benefits. They have also isolated the particular problems of the Scheduled Castes, such as their landless status. This should be supported within human rights law, and extended to other situations of *de facto* racial discrimination. The ability of special measures in the private sphere to tackle racial discrimination is being tested in one state in India; the international community needs to take note of the results.

The progressive steps towards the elimination of racial discrimination have been highlighted: identification; non-discrimination; affirmative action; and finally enhanced protection, involving a push towards social and economic equality between groups. These are common to all forms of racial discrimination. However, enhanced protection must be focussed on the root of the particular problem. Belief structures must be unravelled. A belief in biological difference underlies discrimination on the basis of skin colour. The classification of mankind into biological races must cease if the belief in a natural superiority and inferiority of peoples is to end. In regard to caste, the system is primarily a religious belief structure. Its discriminatory elements have their genesis in the religious texts of Hinduism. Writing on the international movement against racial discrimination, Michael Banton notes:

> In Europe and America the relations between groups distinguished by race or ethnic origin have often had a legal basis. There were treaties between states and sometimes between immigrant and indigenous peoples. The enslavement of Africans and Indians in the New World was authorized by law. In the Asian states, by contrast, there were many forms of group inequality authorized by custom and religious belief, most notably the Hindu caste system, which were never rationalized in legal form.[60]

Ambedkar showed his awareness of this when he singled out the nature of Hindu proscriptions on caste and labelled them laws that are capable of reform. We will leave to him the final word on how to annihilate caste.

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[60] Banton, M. supra n.48, 277.

Final Word

In *The Annihilation of Caste* (1936), Ambedkar wrote: 'The only question that remains to be considered is – *How to bring about reform of the Hindu social order? How to abolish caste?* This is a question of supreme importance.'[61] His analysis concentrates on the Hindu religion, as contained in the *Vedas* and the *Smritis*. Describing these texts as 'a multitude of commands and prohibitions', he links the *dharma* codes to the concept of law:

> To put it in plain language, what the Hindus call religion is really Law or at best legalized class-ethics. Frankly, I refuse to call this code of ordinances, as religion … The objectionable part is that this code has been invested with the character of finality and fixity…how can humanity endure this code of eternal laws, without being cramped and without being crippled? I have no hesitation in saying that such a religion must be destroyed.[62]

This theme emerged in a chapter entitled 'Gandhism' in a later text, *What Congress and Gandhi Have Done for the Untouchables* (1946), in which Ambedkar stated: 'the caste system is a legal system maintained at the point of a bayonet.'[63] The consequence of 'misnaming this law as religion' is the loss of the possibility of reform. The *dharma* codes have been described as 'the classical law of India',[64] and as legal prescriptions, ought to be open to change to remove their discriminatory elements. In calling for the destruction of 'such a religion', Ambedkar was not referring to the Hindu religion in general; he was referring specifically to the caste structure that has subordinated the Dalits for millennia, what he calls 'the Religion of Rules': 'While I condemn a Religion of Rules, I must not be understood to hold the opinion that there is no necessity for a religion.'[65] Ambedkar's conversion strategy has been shown to be less divisive than it may seem. The strand of Buddhism he avows is designed not to remove the Dalits from the caste Hindus altogether; rather it is designed to remove only the caste differences between them.

He observes that every profession in India is regulated, except that of the priesthood. All other professions must observe a 'special code of morals', but the priestly class 'is subject to neither law nor morality'.[66] He calls for 'a new

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[61] Ambedkar, B.R. (1936), *The Annihilation of Caste*, in Rodrigues, V., supra n.11, 288.

[62] Ibid., 298–9.

[63] Ambedkar, B.R. (1946), *What Congress and Gandhi have done to the Untouchables*, ibid., 164.

[64] See Lingat, R. (1973), *The Classical Law of India* (Berkeley, CA: University of California Press).

[65] Ambedkar, B.R. (1936), *The Annihilation of Caste*, in Rodrigues, V., supra n.11, 300.

[66] Ibid., 301.

doctrinal basis to your religion – a basis that will be in consonance with Liberty, Equality and Fraternity, in short, with Democracy'[67]Ambedkar urges Hindus towards reform, 'if not in my way, then in your way',. and concludes: 'I am sorry, I will not be with you. I have decided to change'.[68]

[67] Ibid.
[68] Ibid., 304.

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