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Research report 91

Caste in Britain: Socio-legal Review

Meena Dhanda, Annapurna Waughray, David Keane,
David Mosse, Roger Green and Stephen Whittle

University of Wolverhampton
Manchester Metropolitan University
Middlesex University
SOAS, University of London
Goldsmiths, University of London

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Research Team
Equality and Human Rights Commission
Arndale House
The Arndale Centre
Manchester
M4 3AQ

Email: research@equalityhumanrights.com

Telephone: 0161 829 8100

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Dr Meena Dhanda (University of Wolverhampton)
Dr Annapurna Waughray (Manchester Metropolitan University)

Executive summary

Background and aims of the project

In April 2013, the Enterprise and Regulatory Reform Act was enacted. Section 97 of the Act requires government to introduce a statutory prohibition of caste discrimination into British equality law by making caste ‘an aspect of’ the protected characteristic of race in the Equality Act 2010. In light of this, the Equality and Human Rights Commission (EHRC) contracted a team of academics drawn from different research institutions to conduct an independent study in two parts:

- a review of existing socio-legal research on British equality law and caste; and
- two supporting events (for experts and stakeholders).

This report (Dhanda et al, 2014a) details the findings from the first part of the study and is best read alongside the report of the experts’ seminar and stakeholders’ workshop (Dhanda et al, 2014b).

Methodology

The review of socio-legal research was conducted between October and December 2013. Desk research was undertaken to provide a detailed review of existing legal research literature on caste and the law in Britain and internationally. As well as academic works, this included ‘grey’ literature. Case reports, court and tribunal judgments, legislation (including commentaries and explanatory notes), and academic commentaries on legislation and caselaw were also reviewed.

The material gathered was analysed and used to inform both this report and to prepare the questions for participants invited to attend the experts’ seminar and the later stakeholders’ workshop (see Dhanda et al, 2014b). The deliberations at these events, together with the subsequent discussions with legal experts and the written statements from the seminar, fed into this review.

Main findings

The meaning of caste and its manifestations in Britain

Caste is a form of identity that is used as a basis for social differentiation and usually involves inequality. It is generally accepted that caste is acquired by birth and sustained by endogamy, in which marriage is restricted to individuals of the same caste. Caste has considerable fluidity and also a global reach. In Britain, caste is positively a form of association and social capital among communities of South Asian

origin, but negatively a form of social separation, distinction and ranking. In predominant usage in Britain, caste is used interchangeably for *varna*, *jati*, and *biradari*. The most typical usage, though, is of caste as *jati*.

Varna, the four-fold division of Indic populations, is widely used in Sanskrit texts: Brahmin (priest), Kshatriya (warrior and ruler), Vaishya (trader or producer) and Shudra (servant, labourer). *Varna* is considered by some as hierarchical and by others as a classification of functions only. Excluded from the *varna* system, comprising a fifth category, are the Dalits, formerly known as 'Untouchables'. Dalit is a political term of self-identification adopted by many, but not all, persons of so-called 'Untouchable' origin. It embraces a variety of distinct castes, the names of which individuals may or may not choose to use, but which when used by others may be regarded as offensive.

The second meaning of caste is rendered by the South Asian term *jati*. *Jatis* are not fixed units and may be divided into 'sub-castes' which are the socially significant identities and status groups. Unlike *varna*, the concept of *jati* is not connected to any one religious grouping, but is found in all the major South Asian religious communities.

Finally, caste encompasses *biradari* (brotherhood), also referred to by the term *zaat*, used interchangeably with *biradari* or in combination with it (*zaat-biradari*). *Zaat* is in turn related to '*nasal*' (lineage), meaning race.

As a form of social identification, caste is distinct from class, race, and various forms of ethnicity. Caste and race have long been interlinked, but caste hierarchy cannot have originated in social gradations based on skin colour.

Academics writing on caste in the UK present it as dynamic, but having resilient features of social distinctions between caste groups. There is a potential for caste-based conflict to be masked as religious conflict. Research shows that caste is also manifest within new youth culture including music and social media.

Caste and protected characteristics

The Equality Act 2010 prohibits specified types of conduct or behaviour, in specified spheres of activity and because of certain protected characteristics only. Conduct must meet all three criteria in order to amount to actionable discrimination. For example, under the Equality Act, discrimination which is not in a regulated sphere, or which is not because of a protected characteristic, is not unlawful. Legally regulated fields include employment but do not include the private sphere, such as marriage.

Prohibited types of conduct can be direct or indirect discrimination, harassment or victimisation, which have relatively high standards of proof.

Section 97 of the Enterprise and Regulatory Reform Act 2013 requires that caste be made 'an aspect of' the protected characteristic of race in the Equality Act 2010, not a protected characteristic in itself. It does not indicate how this is to be achieved, meaning it is open to deem caste to form part of an existing sub-category of race; or to name caste as a specific sub-category (with colour, nationality, national and ethnic origins). Until caste is introduced into legislation, legal protection against caste discrimination depends on establishing in the courts that caste is subsumed within an existing characteristic. Of the nine protected characteristics in the Equality Act 2010 only race, and religion or belief, contend as possible 'legal homes' for caste.

Caste as a characteristic is distinct from religion or belief. Caste discrimination is motivated by the known or perceived caste status of the victim, not the religion or belief to which the victim is known or thought to subscribe to, and it is therefore misconceived to conflate caste status with religious identity.

There are, however, situations where caste has been said to be subsumed under the protected characteristic of religion. Prohibitions on discrimination connected with religion or belief provisions may be relied on in cases of caste discrimination where the victim is a member of a religious group whose members are seen as largely of one caste or sub-caste such as the Ravidassias or Valmikis; hence religion and caste overlap sufficiently for the religion provisions to be relied on even though the discrimination may be in whole or in part because of caste. Nevertheless, using religious discrimination provisions masks rather than exposes the caste-based nature of the discrimination. Alternatively, where discrimination is because of religion and caste, the religion or belief provisions may be relied on where religion is a significant even if not the only reason for the discriminatory treatment.

Race as currently defined in the Equality Act 2010 includes four aspects: colour, nationality, and national or ethnic origins, with ethnic origins potentially open to interpretation as including caste. Sociological literature shows that caste groups do not correspond to culturally, linguistically or historically coherent groups defined by reference to the legal meaning of ethnic origins. Following international law, it could be argued that because 'descent' has been interpreted to include caste at the international level, so it could be said to include caste at the domestic level; but this involves a number of interpretative leaps. In 2012, in the first case in which a decision has been reached where the meaning of caste for the purposes of existing discrimination legislation has been examined, it was held that caste in that particular

case could not be subsumed under ethnic origins. However, in a subsequent case in January 2014, an employment tribunal reached a different decision. It held that race in the Equality Act 2010 could, in the context of that case, be construed as providing for caste discrimination to be part of the protected characteristic of race discrimination.

Caste and exceptions

The Equality Act 2010 lists a number of exceptions, including a Genuine Occupational Requirement where an employer can apply, in relation to work, a requirement to have a particular protected characteristic. The test is set high and an employer would have to meet these standards in order to defend successfully a requirement that an employee has a particular protected characteristic. Caste is not yet an aspect of the protected characteristic of race in the Act, but it is expected that when it is included, the question of whether the existing exceptions are adequate, or whether specific exceptions are required to deal with caste, will be addressed. Being of a particular religious belief can also be a Genuine Occupational Requirement in the case of employers with an ethos based on religion or belief, which may be established by reference to such evidence as the organisation's founding constitution. The 'religious organisations' exception would allow, for example, a Valmiki organisation to restrict key posts to Valmikis.

Further exceptions apply to services, in which it is possible to provide services generally used by groups who share a protected characteristic, including race, although to deny services and to dispose of premises on the basis of race is not permitted. This allows preferences to be shown on the basis of protected characteristics such as sex or religion, but not on the basis of race. A general exception in relation to organisations based on religion or belief provides for restrictions on membership and other allowable constraints, but does not extend to race, this means that, for example, a Ravidassia organisation which meets the criteria of a religious organisation may restrict its membership or the use of its facilities, services or premises to adherents of the Ravidassia religion, but it could not impose restrictions on the basis of race. In relation to education, religious exceptions apply to schools of a religious character, but restrictions on admissions to schools on the basis of race, which will include caste, are not allowed. As with the Genuine Occupational Requirement exception, when caste is made an aspect of race, the question of whether the exceptions currently applying to race should also apply to caste will need to be addressed. Associations, meaning groups of 25 members or more, as well as charities, are allowed to restrict on the basis of all protected characteristics, including race, with the exception of colour. Therefore caste associations and charities would continue to be permissible without additional

legislative exceptions being required, with only colour excluded from these exceptions.

That caste is to be made an aspect of race, rather than another protected characteristic such as religion, means that the zone of operation of the exceptions generally is as narrow as it can be. There is, furthermore, a Public Sector Equality Duty which applies to caste as an aspect of race, whereby public bodies are required to have due regard to the need to eliminate discrimination and to promote equality and good relationships between groups defined by reference to the various protected characteristics, which will include caste. However, it is widely agreed that collecting data on the basis of caste would be counter-productive.

Overall, caste is to be made an aspect of race which can be done by interpreting ethnic origins to include caste, or by naming caste as a fifth sub-category of race. The latter approach appears to provide more clarity and fits with the wider understanding of the meaning of caste as distinct from ethnic origins.

Caste in the international context

The international context is relevant to caste in Britain from two perspectives. First, the United Nations has examined the question of caste discrimination in its international treaty law, finding that it is a form of descent-based discrimination and therefore a form of racial discrimination for the purposes of the International Convention on the Elimination of All Forms of Racial Discrimination 1965 (ICERD), to which the UK is a signatory. Second, the domestic systems of a number of other States have legislated on caste, potentially providing models for the Equality Act 2010 as well as affirming that caste can occur outside of the South Asian context. Overall, the international sphere provides a benchmark against which to assess the current requirement contained in s.97 of the Enterprise and Regulatory Reform Act 2013.

The United Nations experience informs the present discussion. The Committee on the Elimination of Racial Discrimination (CERD), in its examination of the UK's State Report under ICERD (a requirement which assesses the extent to which a State is implementing its treaty obligations), concluded that the inclusion of caste in the Equality Act 2010 was a treaty obligation. Furthermore, CERD has looked at caste from an international perspective, viewing it as a form of descent-based discrimination seen in a number of States such as India, but also in the wider South Asian region, for example Bangladesh, and in a small number of other States, in which groups suffer from discrimination which is strongly associated with caste-like structures. Therefore the potential application of the grounds of caste beyond the

South Asian paradigm could find support in the investigations of CERD at the international level. In addition, CERD has issued General Recommendation 29, which provides a definition-like description of descent-based discrimination, including caste and analogous systems of inherited status. It needs to be emphasised that this is an international understanding that requires modification for the British experience. Finally, ICERD affirms that caste discrimination is a form of racial discrimination. It supports the British legislature's approach that caste be made an aspect of the protected characteristic of race.

Further, the Indian Constitution underlines the notion that a periodic review is applied to affirmative action provisions rather than to non-discrimination grounds. The ground 'caste' in the Constitution's non-discrimination provisions is permanent. This supports the argument that the proposal for a review in the British legislative provision on caste is legally without precedent and goes against the approach of other States.

However, the British formula, to treat caste as an aspect of race, more readily reflects the international approach in which it is considered a form of racial discrimination in ICERD.

Conclusion

This review examines how caste can best be made an aspect of race under the Equality Act 2010 and outlines why making caste an aspect of race also fits within a broader international context. It notes that there is an absence of an accepted legal standard at the domestic or international level and sets out the proposed characteristics of such a definition. Linked to findings of academic research on caste, which shows the specificity of the reproduction of caste in Britain, this review also suggests elements for a definition. It shows that there are dangers in adopting too precise, or too broad a legal definition of caste, but that there is a value in using a minimum definition of caste in terms of: (1) endogamy (2) inherited status, and (3) social stratification.

Caste rules and prohibitions have always displayed strong legal characteristics, and clarity, thoughtfulness and sensitivity are required to articulate the meaning of caste in the context of the proposed legislation. This report, along with the companion study (Dhanda et al, 2014b), is offered as a contribution to such an articulation.

1. Introduction

This chapter first sets out the aims of the project. Second, it describes the legal developments that led to the duty to include caste as an aspect of race in the Equality Act 2010, drawing extensively on Waughray (2013). Third, it looks at the meaning of caste. Fourth, it provides detail on the available knowledge and current research on caste in Britain. Finally, it explains the methodology adopted in the 'Caste in Britain' project, and sets out the scope of this report and a guide to its structure.

1.1 Aims of the project

In September 2013, the Equality and Human Rights Commission (the Commission) contracted a team of academics drawn from different research institutions to carry out an independent study on caste in Britain. This involved a detailed review of the law and caste, together with two separate invitation-only events: an experts' seminar and a stakeholders' workshop. This report (Dhanda et al, 2014a), constitutes the first part of the study; the two events are examined in Dhanda et al (2014b).

The rationale for the project is the requirement contained in section 97 of the Enterprise and Regulatory Reform Act 2013 that caste be made an aspect of race for the purposes of the Equality Act 2010. The aim of the report is to chart the background to this decision and the emergence of the issue of caste within the framework of British equality law. It describes the difficulties in interpreting caste within existing protected characteristics as currently defined. It assesses the lessons that can be drawn from legal approaches to caste adopted in other jurisdictions. It considers how caste will work as a legal concept within the Equality Act 2010.

1.2 Background context

In April 2013, the Enterprise and Regulatory Reform Act was enacted. Section 97 of the Act requires government to introduce a statutory prohibition of caste discrimination into British equality law by making caste an aspect of the protected characteristic of race in the Equality Act 2010.

Until 2005, when the then Labour Government announced a major overhaul of Britain's equality framework, caste had been largely invisible as a social phenomenon and as a ground of discrimination. The prospect of a new, single, Equality Act provided a rallying point for British Dalits (see Section 1.3 for the meaning of this term) and a springboard for debate on the inclusion of caste in domestic discrimination law. In 2007, the Labour Government decided against including protection against caste discrimination in the Equality Bill, on the grounds

that there was 'no strong evidence' of such discrimination in Britain. During the passage of the Bill through Parliament in 2009-10, the government was not persuaded of the need to amend the Bill to include an immediate, express prohibition of caste discrimination.

Section 9(5)(a) of the Equality Act 2010, however, allowed for discretionary ministerial intervention to enact legislation against caste discrimination by making caste 'an aspect of' the protected characteristic of race in section 9 of the Act, provided it was established through research that caste discrimination does exist in Britain. This section was added following a last-minute amendment to the Bill in the House of Lords, which the government decided not to oppose because to do so would have jeopardised the successful passage of the Bill through Parliament.

The decision to include the enabling power in section 9(5)(a) rather than an immediate prohibition of caste discrimination was described by the government as a proportionate approach which would allow appropriate action to be taken if future research showed evidence of caste discrimination in Britain. There were four main reasons for this approach: a perceived lack of evidence of a problem requiring a legislative solution; the argument that caste discrimination was already covered by existing law on racial and religious discrimination; a wish to avoid the 'proliferation of the protectorate', i.e. an unjustifiable extension of the list of protected characteristics based on which discrimination is prohibited; and possible undesirable socio-political consequences, including negative impacts on community cohesion (Waughray, 2013).

The Equality Act received Royal Assent in April 2010, but the power under section 9(5)(a) allowing ministerial intervention was not used for more than two years. However, in January 2013, three peers proposed an amendment to the Enterprise and Regulatory Reform Bill in the House of Lords making caste a new subset of race under section 9(1) of the Equality Act. This amendment was withdrawn, but a subsequent amendment proposing the addition of caste to the definition of race was adopted by the House of Lords in March 2013. The Lords amendment was defeated in the House of Commons on 16 April 2013, but six days later, following further debate, the House of Lords again voted for their amendment. Following this latest vote, the Coalition Government proposed a government amendment in lieu.

This amendment replaced the discretionary power in section 9(5)(a) of the Equality Act 2010 with a *duty* to make caste an aspect of race for the purposes of the Equality Act 2010. It also provided for the possibility of review, amendment or repeal of the caste legislation after five years. It committed the government to introducing

secondary legislation to prohibit caste discrimination. The government's amendment in lieu was agreed by the House of Lords on 24 April 2013 to become section 97 of the Enterprise and Regulatory Reform Act 2013.

In the light of the new legislation, and as part of its statutory remit under the Equality Act 2010, the EHRC commissioned new research to develop the available evidence and analysis.

1.3 The meaning of caste

Caste is a form of identity that is used as a basis for social differentiation and usually involves inequality. It is generally accepted that caste is acquired by birth and sustained by endogamy, in which marriage is restricted to individuals of the same caste. According to Dr B.R. Ambedkar, a British-educated lawyer and one of the principal architects of the Indian Constitution, writing in 1916, '... [a] caste is an enclosed class' and 'endogamy is the only characteristic of caste' (Ambedkar, 2002). Historically, and in some Sanskrit texts, caste involves the notion of 'innate characteristics' (Doniger, 2011: 211).

The origins of caste and the mechanisms of its perpetuation are a matter of controversy. Sometimes the inherited identities are occupational in origin; or derived from the clans, guilds, religious sects or tribes historically integrated into Indian society as castes (Doniger, 2011). Sometimes orders of rank and discrimination are related to issues of ritual purity and pollution. As noted by Bayly (1999: 7): 'Caste was and is, to a considerable extent, what people *think* of it, and how they act on these perceptions'. Sociologists have tended to see caste as a system of social ranking, with recognised regional variations and considerable fluidity (Jodhka, 2012). Historians have charted the pre-colonial antecedents, colonial constructions and post-colonial variations of caste (Bayly, 1999; Dirks, 2002; Doniger, 2011). Finally, alongside castes, there are South Asian social identities categorised as 'tribes' and known collectively as Adivasis. These have a different history of non-integration, but also suffer inequality, marginalisation, and social separation and represent a *sui generis* or separate legal category broadly equivalent to an international concept of indigenes (Gilbert, 2005). Sociologically speaking, the distinction between caste and tribe is to some extent arbitrary and reified by law.

Today caste is often represented as a matter of cultural identity and community rather than inherited status and inequality (Gupta, 2000). This emphasis on 'culture' has, however, also been explained as an adaptation, in modern economic and democratic circumstances, of caste as a form of social differentiation that still serves to keep people in their socio-economic place (Natrajan, 2012).

In South Asia, where caste division is acknowledged as a part of life, it invariably involves unequal access to valued resources (e.g. land and water), to opportunities (education and employment) and to political power; and involves the humiliation of certain groups considered socially inferior. Such groups are deemed ‘untouchable’ and especially in rural society are often residentially segregated, excluded from public spaces and services (e.g. temples, teashops, village wells), and denied social respect. Caste is also a global structure and form of discrimination (or ‘opportunity hoarding’) that shapes labour, credit, rental and other markets, access to services (health, justice) and entrepreneurship (e.g., Iyer et al, 2013; Kumar, 2006; Lanjouw and Stern, 2003; Natrajan, 2012; Thorat and Newman, 2010). Caste has been a factor determining patterns of migration and is in turn altered by these patterns (for the UK, see Ballard, 1989; Dhanda, 2013a; Taylor, 2013).

Globally, discrimination on grounds of caste is not strictly religious, nor ‘Hindu’; it exists among Christians, Muslims, Sikhs and other groups (Zene, 2002, O’Brien, 2012, Mosse, 2012, Singh, 2012). An independent Indian commission pertinently noted that caste is a ‘general social characteristic’ regardless of ‘whether the philosophy and teachings of any particular religion recognise it or not’ (Ministry of Minority Affairs, 2009: 153-54).

In Britain, as in India, the term ‘caste’ subsumes three concepts. First, there is *varna*, the hierarchical order of the four social functions or ‘classes’ of ancient India: Brahmin (priest), Kshatriya (warrior and ruler), Vaishya (trader or producer) and Shudra (servant, labourer). (The other meaning of *varna* as ‘colour’ has led to the misleading simplification that it denotes a racial hierarchy, see below). Excluded from the *varna* system, comprising a fifth category, are the Dalits, formerly known as ‘Untouchables’. Dalit is a political term of self-identification adopted by many but not all people of so-called ‘Untouchable’ origin. It embraces a variety of distinct castes the names of which individuals may or may not wish to use, and which when used by others may be regarded as offensive because of the painful histories of subordination and humiliation they recall. ‘To call oneself Dalit, meaning “ground down”, “broken to pieces”, “crushed” is to convert a negative description into a confrontational identity’ (Rao, 2009: 1).

Second, there is the South Asian concept of *jati*, signifying birth group. These are smaller scale, regional, endogamous groups, which are hierarchically ranked, within a geographical locality and are effectively the operational units of a system that varies with region and with historical periods. Unlike *varna*, the concept of *jati* is not connected to any one religious grouping, but is found in all the major South Asian religious communities. It is important to recognise that a *jati* (a caste) is not a fixed

unit. That is to say, different *jatis* may unite to form a larger grouping with shared status and identity (the group of *jatis* in effect being the 'caste' group with social significance), but also a *jati* may be divided into 'sub-castes' which are individually the socially significant identities and status groups. Which social groups are significant, and at which level (a group of *jatis*, a single *jati*/caste or a sub-caste) will vary between region, historical period, and social-political context. Any of these can appropriately be described as the caste in question.

Third, caste also encompasses *biradari*. *Biradari* is a regional (largely Punjabi) term, in the UK mostly used by Muslim groups (in application to Sikhs in Britain, see Singh and Tatla, 2006: 29). O' Brien (2012: 127-28) helpfully explains that: 'Identity is found in relationships that fan out in concentric circles: parents, siblings, family, Biraderi, *gotra*, village, and tribe....A Biraderi will be united against another Biraderi but within it, two families will struggle for power.' In Pakistani languages, caste is also referred to by the term *zaat* used interchangeably with *biradari* or *biraderi* or in combination with it (*zaat-biradari*). *Zaat* is in turn 'related to '*nasaf*' (lineage), or quite literally, 'race' (Gazdar, 2007).

In everyday usage in Britain, caste is used interchangeably for *varna*, *jati*, and *biradari*. The paradigmatic usage, though, is of caste as *jati*. This usage is inclusive and in common parlance is also extended to include clan/tribe.

Caste is also sometimes related to concepts of ethnic identity, race and religion. Some sociologists have described an 'ethnicization' of caste in recent decades; that is the transformation of caste from a 'system' of hierarchical inter-dependence, to a set of separate competing identities (Dumont, 1980; Gupta, 2000, see also Reddy, 2005). This is a process encouraged, for example, by the role of caste in electoral politics in India. Caste as competing identities manifests itself in a unique way in Britain. However, despite the idea of caste as different cultural identities or 'communities', whether in South Asia or in the UK, for the most part the salient divisions of caste occur *within* not *across* cultural divides. For example, Dalits have the shared experience of discrimination and subordination by dominant castes but do not form a distinct cultural group, being divided by language, religion, region, cultural practices and caste identities (Waughray, 2009). On this basis it can be said that, in sociological terms, caste is not equivalent to ethnic identity.

Caste and race have long been interlinked. The predominance of racial theories in the nineteenth century led to the characterisation of caste as in essence corresponding to racial divisions, supplemented by the fact that *varna* translates as colour, leading to observations that the hierarchy must have originated in skin colour

differentiations. This has been strongly contested not least with evidence that skin colour gradations are irrelevant to caste distinctions (Keane, 2007; Waughray, 2009). Scholars have pointed out that the colour element of *varna* means colour symbolism reflecting the social hierarchy rather than skin colour or racial characteristics (Flood, 1998). This narrow formulation of race as corresponding to skin colour broadened in the twentieth century when different forms of racial discrimination were recognised. Thus, caste came to be more readily understood as a separate or distinct form of racial discrimination. Indeed given its pre-dating of theories of race, caste has been labelled the oldest form of racial discrimination (Keane, 2007).

Attitudes and practices of caste have always been regulated or modified by religion. Egalitarian traditions in Indic religions challenge caste hierarchy, while Dalits and others have formed sects or converted to other faiths as expressions of equality, such that identities of caste and religion intersect in complex ways. In the UK context, caste identities tend to be enclosed within, or muted by, publicly expressed religious identities (Leslie, 2003; Singh, 2012). In consequence, the forging of a positive identity in British society by Dalits may involve emphasising distinct religious identities. Conversely, successfully building a composite religious community (as in the 'British Hindu community') may require playing down caste separation in the public sphere, even when caste groupings remain important in networking, marriage and caste-based organisations.

Finally, caste rules and prohibitions have always displayed strong legal characteristics (Waughray, 2013), with Ambedkar in particular viewing the caste system as a legal system misnamed as religion. His insight was to re-name the discriminatory effects of caste as legal rather than religious, hence subject to legal oversight, thereby introducing the possibility of reform (Ambedkar, 1989: 76).

1.4 Research on caste in Britain

Research on caste in Britain has been multifaceted. Influential academic writings on caste have been produced by historians, philosophers, anthropologists and sociologists, and more recently by a very small handful of lawyers. These writings have featured within different contexts including religious education, the study of ancient texts, the political economy of migrant settlements and the effects of globalisation on the patterns of exchanges between resident populations in the UK and sending countries. What emerges is an understanding of caste as dynamic, but having resilient features of hierarchy between caste groups with the potential for caste-based conflict often masked as religious conflict.

Views on the existence and nature of caste prejudice, discrimination and harassment in Britain vary considerably. Some stakeholders believe that such discrimination exists, that it is highly destructive and should play no part in contemporary British social life; others take the view that caste is a positive form of association or social capital and that any social restrictions, prejudice or discrimination related to caste is limited to the private sphere and to personal social relations, for example, matrimonial arrangements (see further, Dhanda et al, 2014b).

However, when one considers socialisation into caste identity, the border between the private and the public sphere is not very clearly defined. Further, the improved economic status of Dalits in the UK is not matched by the expected change in their cohesion with non-Dalits of South Asian origin (Dhanda, 2009, 2013b). In the case of inter-marriages, this caste barrier remains hard to breach and often comes with high costs for transgression (Dhanda, 2012a).

Through their religious education in schools in the UK, children and young people learn to understand caste in terms of a textbook notion of *varna*. Through their experience in the school playground, they may learn to understand caste as *jati* when subjected to caste-based bullying, and confirm such an understanding by questioning their parents. In his study of Southall, Baumann (1996: 152) writes that by 'school age, most children are aware of their own caste and of some version, at least, of its relative purity and status. Many indeed feel curious about the caste of peers at school', and according to Nesbitt (1997), awareness of caste amongst the younger generation of South Asians living in Britain is heightened once they start school. Examples of bullying and name-calling are found in the work of Ghuman (2011) and Dhanda (2009).

The relationship between caste and religion is complex as shown in recent overviews of Sikhism and Hinduism in Britain (Singh, 2012; Zavos, 2012). With regard to Sikhism, Singh (2012) notes that while the religion strongly emphasises equality, the immigrant population is caste-divided (between 'upper' Jat and 'lower' Dalit castes). Different sections of the Sikh community are organised by caste to a greater or lesser extent. The majority (80 percent) Sikh 'mainstream' is socially diverse, and while caste is not a major marker of identity, this mainstream has a Jat cultural complexion. Other sects or religious orders give expression to the desire for equality and the erasure of caste stigma through independence of worship and religious identity.

This is the case with the Ravidassias (followers of the 15th century saint poet Ravidass) and Valmikis. In the UK, Ravidassias of Punjabi origin have staked a

claim to recognition as a religious group separate from the Sikhs. In the latest British Census, 11,045 people of England declared themselves as Ravidassias in the 'any other religion' category (Dhanda, forthcoming). As some Ravidassias, have never identified as Sikhs, for example in Varanasi, the birth place of Ravidass ji (Ram, 2008), it is a mistake to describe them as a Sikh sect. Likewise, the constitutions of various Ravidass Sabhas in the UK lodged with the Charity Commission do not restrict Ravidassias to any specific caste (Dhanda, 2013b). Conversely, in a case concerning Ravidassias and Hindus in British Columbia, it was argued by the Ravidassia respondents that the Ravidassia religion was caste-specific (see Section 2.4).

In the UK, caste-related tensions within the Sikh community were noted in one of the earliest studies specifically focused on Dalits in Wolverhampton by Juergensmeyer (1982). Echoing the same, Ballard (1989) argued that in Britain, whilst the traditional hierarchies within the Sikh community may have been reversed in economic terms, in some cases ('lower castes' being more prosperous than 'upper castes'), this 'has not undermined casteism but rather reinforced it' (Ballard, 1989: 225). More recently, Singh and Tatla (2006) have provided a nuanced study of the Sikhs in Britain that indicates how caste differentiations exert a pressure on the 'boundaries of Sikhism'.

In her study of Valmikis, Leslie (2003: 69) notes that 'one of the first actions of the group in Britain was to abandon the stigmatic *jāti* names...in favour of the religious name "Valmiki"'. In a similar vein, the recent attempt by Ravidassias to stake a claim for a separate religious identity is the result of an accumulation of unaddressed grievances (Dhanda, 2013b).

Studies of religious sectarianism in the UK show evidence of underlying caste prejudice (Kalsi, 1992; Sato, 2012), which may or may not amount to caste discrimination, but is nonetheless a source of tension within South Asian communities. However, there is an ambiguity in identifying caste or religion as the cause of discontent in the British context, where seeking a separation of religious identity has become a way of talking about caste.

In the case of Hindus in Britain (in the majority Gujarati, with a significant numbers from East Africa), caste groupings remain important in networking, marriage and caste-based organisations (Zavos, 2012). However, the development of an ecumenical composite 'British Hindu' community involves the submerging of caste identity and a public rejection of negative (colonial) representations of Hinduism.

Amongst Muslims of South Asian origin in Britain, caste identity expressed as *biradari* or *zaat*, is maintained as a system of endogamous, extended family or kinship grouping (Shaw, 2000; see also Ahmad, 1978; Bhatti, 1996; Hussain, 1999).

There are notable generational differences in the experience and acknowledgement of caste prejudice. Dalit youth do not identify with caste as a hierarchical system; they are confident in facing prejudice, and associate discrimination with those who perpetuate it; they expect the law to be used to combat such discrimination (Dhanda, forthcoming).

Young people learn, through popular music, to take 'pride' in their endogamous birth groups (*jatis*), further accentuated when parental socialisation directs them to find life-partners from their 'own' *jati*. The older, first generation of migrants from South Asia, might take caste as a 'best forgotten' cultural memory of a system they left behind (Ballard, 1994), but which nonetheless haunts them (Dhanda, forthcoming). Pride in one's caste, amongst young people, also springs from a desire to recuperate religious space for a separate identity positioned to challenge the hegemony of dominant religious groups (Sato, 2012; see also Ram, 2008).

In conclusion, research on caste in Britain shows the specificity of the reproduction of caste in the diaspora. A hitherto ambiguous understanding of what caste is now faces a challenge, when public discourse must respond to the legal change, which demands clarity, thoughtfulness and sensitivity in articulating the meaning of caste in the context of the proposed legislation. On the legal aspect, this report draws on groundbreaking work by Waughray (2009, 2013) and Keane (2007). In terms of the way the dynamic public discourse on caste is responding to legislative change, the parallel report on the expert and stakeholder events (Dhanda et al, 2014b) sets out the present situation. It explains alternative viewpoints on caste from different social positions and the desires and concerns regarding the law on caste and its implementation that exist among a range of stakeholders (including professional groups).

1.5 Methodology

The review of socio-legal research was conducted between October and December 2013. The aim was to explore socio-legal definitions of caste within the framework of the Equality Act 2010. Desk research was undertaken to provide a detailed review of existing legal research literature on caste and the law in Britain and internationally. As well as academic works, this included 'grey' literature such as reports from NGOs and reports from faith-based community organisations that were not widely accessible nor in the public domain, working papers from academics, conference

proceedings, Hansard reports and parliamentary debates, internet websites and United Nations documents. Case reports, court and tribunal judgments, legislation (including commentaries and explanatory notes), and academic commentaries on legislation and caselaw were also reviewed. Current research on caste discrimination being undertaken by academics and PhD students was also included under this category.

The material gathered was then interrogated applying a critical analysis approach and used to inform both this report and to prepare the questions for participants invited to attend either the experts' seminar or the later stakeholders' workshop (see Dhanda et al, 2014b).

Subsequent discussions and the written statements from the experts' seminar fed into this comprehensive review of legislation and caselaw. In addition, a number of meetings were undertaken with legal experts specialising in discrimination law, both practising lawyers and academics.

1.6 Scope of the report

The structure of the present report reflects the range of meanings attached to caste as a legal term and emphasises its scope. It is not an investigation as to the extent of caste discrimination in Britain and operates instead as a review of the law on caste as presently understood. The focus is on the legal parameters of caste discrimination, in particular how caste is best incorporated within the Equality Act 2010. This can be usefully informed by existing research on caste in Britain reported in Section 1.4.

1.7 Guide to the report

Chapter 2 focuses on the Equality Act 2010, exploring the extent to which caste can be captured by existing protected characteristics, as well as the small number of attempts in caselaw to argue that caste discrimination is subsumed within these characteristics. It further reviews the relevance of the exceptions in their potential application to caste as well as the application to caste of the Public Sector Equality Duty. Chapter 3 looks at the emergence of caste discrimination as an issue in international treaty law by United Nations bodies and the experience of legislating for caste discrimination in the national jurisdictions of other States. India is the paradigmatic example, but other States such as Mauritius have included caste as a ground for non-discrimination in their domestic orders. Chapter 4 offers a snapshot of the current state of the law on caste in Britain. It proposes a legal formulation of caste as an aspect of race, the pathway to a definition on caste, and highlights areas for future research to carry forward.

2. Caste in British law

This chapter addresses the legal status of caste in domestic law. Section 97 of the Enterprise and Regulatory Reform Act 2013 requires that caste be made an aspect of race in the Equality Act 2010, although it does not indicate how this is to be achieved. This chapter proceeds on the basis that caste will be made an aspect of race in the legislation, although, at present it is not included. First, the chapter will outline the principles underpinning domestic discrimination law and their relevance to caste. Second, it will consider the potential for caste to be read into the existing protected characteristic of race, specifically ethnic origins. Third, it will consider the potential for caste to be read into the existing protected characteristic of religion or belief. Fourth, it will detail the small body of caselaw relevant to caste. Fifth, it will consider the possible application to caste of the exceptions in the Equality Act 2010. Caste is not yet an aspect of the protected characteristic of race, but when it is included in the legislation, the question of whether the existing exceptions are adequate, or whether specific exceptions are required to deal with caste, will need to be addressed. Sixth, it will consider the possible application to caste of the Public Sector Equality Duty contained in the Equality Act 2010, once caste is made an aspect of race.

2.1 Key features and principles of British discrimination law

Discrimination in its legal sense has a technical meaning (Bamforth et al, 2008). The Equality Act 2010 does not guarantee that equality will be achieved and prohibits discrimination in certain areas of activity only. Outside these areas discrimination is not unlawful. Domestic discrimination law is designed largely to respond to individual claims with individual remedies made on the basis of legally defined characteristics, in relation to certain types of regulated behaviour and relationships and social goods (Bamforth et al, 2008). However, the Public Sector Equality Duty (PSED) contained in section 149 of the Equality Act 2010 extends this by imposing a duty on public bodies to have due regard to the need to eliminate discrimination and to promote equality of opportunity and good relations between persons or groups defined by reference to protected characteristics.

To amount to unlawful discrimination, behaviour must meet three criteria. First, the behaviour must be because of a protected characteristic. Second, it must occur in a legally regulated field such as employment, the provision of goods, facilities and services, education and vocational training, management or disposal of premises, or the exercise of public functions. Discriminatory behaviour occurring in non-regulated fields is outside the ambit of the Equality Act (e.g. 'private sphere' relations such as intimate social interactions or marriage). Third, it must amount to a prohibited type of

conduct (e.g. direct or indirect discrimination, harassment or victimisation). Behaviour which does not meet these criteria may be objectionable but it is not unlawful discrimination (Waughray, 2009).

The UK adopts a 'grounds-based' approach to discrimination law, meaning that legislation affords protection from discrimination on specified grounds. In domestic and European Union (EU) discrimination legislation, the grounds on which discrimination is regulated – termed 'protected characteristics' in the Equality Act 2010 - are enumerated in a closed list. Inevitably this leads to demands for the list of protected characteristics to be extended, or for the existing categories to be interpreted so as to include forms of discrimination which are not expressly covered (McColgan, 2007). In some cases, categories have been added in response to the obligation to implement EU anti-discrimination law - for example religion or belief, and sexual orientation (McColgan, 2005, 2007).

Section 97 of the Enterprise and Regulatory Reform Act 2013 requires that caste be made 'an aspect of' the protected characteristic of race in section 9 of the Equality Act 2010. Until this happens, legal protection against caste discrimination depends on establishing in the courts, on a case by case basis, that caste is subsumed within an existing protected characteristic. The Equality Act 2010 lists nine protected characteristics: age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; and sexual orientation. Caste is not in this list (neither is descent). Of these nine, the only possible 'legal homes' for caste are race, or religion or belief (Waughray, 2009).

2.2 Equality Act 2010: race, ethnic origins and caste

Section 9 of the Equality Act 2010 prohibits discrimination on grounds of race. The previous legislation, the Race Relations Act 1976, prohibited discrimination on 'racial grounds' or by reference to membership of a racial group. Racial grounds were defined in the 1976 Act to include colour, race, nationality, or ethnic or national origins. In the Equality Act 2010, race is defined in section 9 as including colour, nationality, or ethnic or national origins. The Explanatory Notes to section 9 explain that persons who share characteristics of colour, nationality, ethnic or national origins can be described as belonging to a particular racial group. There is no detailed explanation or definition of colour, nationality, or ethnic or national origins, but the Explanatory Notes provide the following examples: colour includes being black or white; nationality includes being a British, Australian or Swiss citizen; ethnic or national origins include being from a Roma background or of Chinese heritage (the Explanatory Notes imply that ethnic or national origins are a single category but this

is incorrect); a racial group could be 'black Britons' which would encompass those people who are both black and who are British citizens.

There is no link between caste and nationality, or national origins, and the link between caste and colour is not sufficient to argue that people of Dalit origin are members of a group or groups defined by reference to this ground (Waughray, 2009). Historically, however, there has long been overlap in the usage and application of the terms race, caste and ethnic origins (Reddy, 2005). For these reasons, it is necessary to consider whether caste could be subsumed within the existing concept of ethnic origins, which is a subset of the protected characteristic of race.

The leading case of *Mandla (Sewa Singh) and another v Dowell Lee* (1983) established that 'ethnicity' was not synonymous with 'race' in a narrow, biological sense but was to be construed 'relatively widely' in a broad cultural/historic sense. Lord Fraser held that, for a group to constitute an ethnic group, it must regard itself and be regarded by others as a distinct community by virtue of certain characteristics, two of which are essential: a distinct, living and long shared history as a group; and a cultural tradition of its own, including family and social customs, often but not necessarily associated with religious observance. Additional but non-essential characteristics include: common geographical origins or descent; a common language (although not necessarily peculiar to the group); common literature peculiar to the group; a common religion different from that of neighbouring groups or the surrounding community; and being a minority or an oppressed or dominant group within a larger community. Based on these criteria the House of Lords found in *Mandla* that Sikhs were a group defined by reference to ethnic origins.

A recent approach to the meaning of ethnic origins, has opened up arguments that caste is subsumed within ethnic origins, by virtue of the descent aspect of 'ethnic'. In *R (E) v JFS* (2009), the Supreme Court revisited the *Mandla* meaning of ethnic origins (Donald, 2012; Cranmer, 2010; Graham, 2012). It held that ethnic origins was defined not just in the wide *Mandla* sense, but also in the narrower, more traditional sense of a person's lineage or descent; indeed, prior to *Mandla*, a narrow test based on birth or descent would have been regarded as required in order for there to be discrimination based on ethnic origins (Waughray, 2013).

On the meaning of descent, Lord Mance referred, *obiter*, to the definition of racial discrimination in the International Convention on the Elimination of All Forms of Racial Discrimination 1965 (ICERD) which lists five grounds, race, colour, descent or national or ethnic origin, and to the interpretation of the third ground 'descent' by the Committee on the Elimination of Racial Discrimination (CERD) as including caste.

CERD held in its General Recommendation 29 that ‘descent’ includes communities who suffer from discrimination ‘on the basis of caste and analogous systems of inherited status.’ This crucial interpretation by CERD is discussed further in Chapter 3, but for the purposes of British discrimination law it is important to emphasise that Lord Mance was not declaring that caste is subsumed within the descent element of ethnic origins. Rather, his point was to illustrate that descent has been given a broad construction at the international level in support of his view that it ought to extend sufficiently widely to cover the situation presented in the *JFS* case.

Since *JFS*, there have been two rulings on the question of whether caste is subsumed within race in domestic law as currently stated. In *Naveed v Aslam* (2011), the Claimant contended that he had been racially discriminated against by the Respondents because of his membership of the Pakistani caste known as Arain, on account of which he was ridiculed and abused. The Employment Tribunal ruled that:

... the Claimant’s complaint of discrimination based on his caste was doomed to fail for two reasons. First, no order has yet been made extending section 9 of the Equality Act 2010 so as to provide for caste to amount of itself to an aspect of race. Second, we consider that it is quite impossible for the Claimant’s caste to fall under the existing definition of ethnic origins because of the Claimant’s clear acceptance that movement within the Arain caste is possible and that it was the claimant’s *status* within the same caste as the Aslam brothers [the Respondents, also members of the Arain caste but, according to the Claimant, of a higher category within the same caste] which he claims led to his treatment. In the Tribunal’s judgment the substance of the Claimant’s allegations is that he was being treated differently on account of his ‘class’.

What the Tribunal did not consider was the possibility that the term ‘caste’ has many meanings and that the Claimant and the Respondents may have been of different sub-castes or *jatis* - with ensuing differences of status - within the wider Arain group or caste. It attributed the discrimination to be class-based rather than caste-based as a result (Waughray, 2013). The complexity of caste may be more readily acknowledged if caste is included as an independent aspect of race, rather than being subsumed under ethnic origins.

Leaving aside the decision in *Naveed v Aslam*, arguments that caste is an aspect of ethnic origins face a number of hurdles. A fundamental element of caste is the separateness of caste groups. It was not until the early twentieth century that Dalits emerged in India as a nationally identifiable political and social entity. Dalits in India

are linked by a common experience of oppression and 'Untouchability', but are not otherwise a culturally, linguistically or historically coherent group. For centuries they were separated from each other geographically, regionally, linguistically and culturally, with the distinctions and hierarchies between Dalit *jatis* sometimes enforced as rigorously as those between Dalit and non-Dalit *jatis*. Although in India Dalits have become an increasingly important political category, it is not clear that British Dalits could collectively fulfil the *Mandla* criteria. In *Nyazi v Ryman* [Employment Appeals Tribunal 6/88, unreported], Muslims were denied recognition as an ethnic group due to their linguistic, geographical and racial heterogeneity. Individual *jatis* (castes or sub-castes; see Section 1.3), including Dalit *jatis*, could possibly fulfil the *Mandla* criteria; but taken as a broad category, Dalits might struggle to demonstrate sufficient commonality of geography, language, religion and culture, and a sufficiently distinct, long shared history *as a group* to pass the *Mandla* test for ethnic group (Waughray, 2009, 2013).

JFS reaffirmed descent as an integral element of ethnic origins in domestic law; and Lord Mance noted the broad construction given to 'descent' at the international level, which extends to caste (see Chapter 3). In order to construe caste as part of race in domestic law following the *JFS* route, a three-fold interpretive leap must be made; caste must be viewed as part of descent, itself part of ethnic origins, which in turn is a sub-set of race. Whatever the possibilities of interpreting the existing legislation in this way, an interpretation can be overruled until it is determined by the Supreme Court. Legal clarification in the form of a statutory provision is thus still required.

Very recent caselaw has seen such an interpretive approach. *Tirkey v Chandok* (2013) concerned complaints of race and religious discrimination, including caste discrimination as part of these complaints. In December 2013, in a preliminary hearing, an Employment Tribunal met to consider striking out the claim of caste discrimination on the basis that it had no reasonable prospect of success because it had no jurisdiction to consider it. In January 2014, the Tribunal concluded that, in the context of the case, section 9(1) of the Equality Act 2010 can be and should be construed in such a way as to provide for caste discrimination to be part of the protected characteristic of race discrimination. The Tribunal noted that:

[T]here is no comprehensive and exhaustive definition of race in Section 9(1) of the Equality Act. It "includes" ethnic origin. This in itself is a wide concept, as is clear from the authorities. It can therefore be argued that "caste" is already part of the protected characteristic of race, purely by reference to section 9(1). Further, the domestic case law - in particular the cases of *Mandla* and the *Jewish Free School* case - provide authority for

the proposition that discrimination by descent is unlawful as it is direct race discrimination.

The Claimant's case was that she is lower caste by birth and therefore descent, a position in society that she cannot change. In contrast to *Naveed*, the Tribunal concluded that the fact that the government has decided to legislate to make it clear that caste is an aspect of the protected characteristic of race, does not determine whether race can be construed to cover caste.

This ruling - that caste is already protected under race by virtue of ethnic origins - may be appealed; the Employment Appeal Tribunal may take a different view. Added to the different decisions in *Naveed* and *Tirkey*, in both of these cases caste arose in situations that did not match the stereotypical caste discrimination case (see Section 2.3). This highlights the importance of avoiding an overly narrow definition of caste in the Equality Act 2010.

2.3 Equality Act: religion or belief and caste

Caste is to be included in the Equality Act 2010 as an aspect of the protected characteristic of race. Nevertheless, in some situations religion or belief discrimination might be considered a more appropriate approach. Section 10 of the Equality Act 2010 prohibits discrimination on grounds of religion or belief. Religion is defined in section 10 as 'any religion' or 'lack of religion'; and belief as 'any religious or philosophical belief' or 'lack of belief'. The Explanatory Notes to the Act explain that it is 'a broad definition in line with the freedom of thought, conscience and religion guaranteed by Article 9 of the European Convention on Human Rights (ECHR). The main limitation for the purposes of Article 9 ECHR is that the religion must have a clear structure and belief system. Denominations or sects within a religion can be considered to be a religion or belief, such as Protestants and Catholics within Christianity. The Equality Act's Explanatory Notes set out five criteria for a 'philosophical belief' to qualify for protection. These are contained in paragraph 52.

Caste as a characteristic is distinct from religion or belief. By definition, caste discrimination is motivated by the known, perceived or assumed caste status of the victim, not the religion or belief to which the victim is known or thought to subscribe or belong. It is misconceived to conflate caste status with religion, notwithstanding the fact that caste differentiation finds support in Sanskrit texts (Doniger, 2011). Caste discrimination is captured by religious discrimination provisions only in those limited situations where the victim's ascribed caste status is considered 'part of' or integral to their religion or belief (Waughray, 2009). Caste distinctions more usually operate

within rather than between religions, and caste distinctions do not usually correspond to separate religion or belief identities, although this can occur. A paradigmatic caste discrimination case is perceived as involving 'high caste' and 'low caste' individuals of the same religion. Yet it is worth noting that the handful of cases on caste discrimination (see Section 2.4) has not followed this pattern.

Historically, religion has been a means to remove oneself from the stigma of caste identity, particularly for Dalits, through the creation of religious groups such as the Ravidassias (Juergensmeyer, 1982; Ram, 2008) or the Valmikis (Nesbitt, 1990; Leslie, 2003; Dhanda, 2012b). If such groups are found by the courts to be distinct 'sects' within existing religions, or alternatively to be independent religions with clear structures and belief systems, caste discrimination against members of such groups (although motivated by caste rather than religious affiliation) could theoretically be captured by religious discrimination provisions as caste and religious identity may be perceived to be sufficiently related.

Yet, using religious discrimination provisions in such cases would mask rather than expose the caste-based aspects of the discrimination. For example, someone who discriminates against an Ambedkarite (Dalit) Buddhist may not discriminate against a Sri Lankan Buddhist, the underlying reason for the discrimination against the Ambedkarite Buddhist being caste, not Buddhism (Waughray, 2009). By collapsing religion and caste into each other, the distinct nature of each can be lost.

Section 14 of the Equality Act 2010 provides for the concept of combined discrimination on grounds of dual characteristics, where discrimination occurs in a combination of two relevant protected characteristics (such as race and religion). However, the Coalition Government decided not to bring forward section 14 and it is not in force. Nevertheless, caselaw has clarified that where treatment is on the grounds of more than one protected characteristic, where one of these is a significant element rather than the only element, it may be relied upon (*MoD v DeBlique* [2010] IRLR 471 at 165; *O'Reilly v BBC*; ET Case No. 2200423/10).

2.4 Existing caselaw relevant to caste

The caselaw on caste is limited. Certain cases have already been discussed in Section 2.2. Nevertheless, it is useful to draw together the body of caselaw where the issue of caste has been raised in the context of equality law.

In the only pre-Equality Act 2010 case involving a claim of caste discrimination, *Begraj and Begraj v Heer Manak Solicitors and others* - Britain's first caste discrimination case - the claimants alleged religious and/ or racial discrimination,

arguing that caste fell within race or ethnic origins under the Race Relations Act 1976. However the case collapsed in February 2013 due to judicial recusal. Caste has also arisen in other areas, for example in immigration law; see *MA (Galgale Sab clan) Somalia CG* [2006] UK AIT 00073 where 'caste' was construed to include the concept of 'clan'. In this case, the appellant was a member of the Galgala clan in Somalia. The Immigration Appeal Tribunal found that the Galgala were a 'sab' or low caste clan. Elsewhere in the decision the Galgala are described as a small, low status group or low caste group.

At the time of writing, there are only two domestic cases in which a decision has been reached on the question of whether race as currently defined in the Equality Act 2010 can be construed to include caste; and the Tribunals came to different conclusions. As stated above, in *Naveed*, the lack of an order 'extending section 9 of the Equality Act 2010 so as to provide for caste to amount of itself to an aspect of race' was one of two reasons why the Employment Tribunal considered a claim of caste discrimination 'doomed to fail'. The argument was that Parliament would not have included the power in section 9(5)(a) if it thought caste was already covered by an existing protected characteristic. The second reason - that on its facts the Claimant's case was about class rather than caste and so could not fall under the existing definition of ethnic origins in any event - is addressed in Section 2.2.

In contrast, in *Tirkey*, as discussed in Section 2.2, it was ruled in January 2014 in a preliminary hearing that, in the context of that case, race could and should be construed as including caste; race includes ethnic origins, which is a wide concept; moreover, caselaw has held that discrimination by descent is direct race discrimination (*Mandla, JFS*); and caste is based on descent. The fact that the government has decided to legislate to make caste an aspect of race is not determinative of the issue. *Tirkey* may be appealed, and the Employment Appeal Tribunal may take a different view. *Naveed* and *Tirkey*, however, signal that the functioning of caste in the Equality Act 2010 will be played out in caselaw.

Two reported cases, one in Britain and one in Canada, illustrate the use of religious discrimination provisions by possible or alleged victims of caste discrimination in the absence of caste-specific provisions. In both cases the complainants were 'high caste' Hindus and the respondents were Ravidassias. In *Saini v All Saints Haque Centre & Others* (2009) the Employment Appeal Tribunal found that the respondents had subjected the claimant to discriminatory harassment based on religion. The case report notes that Ravidassias 'form a distinct group with distinctive religious beliefs that distinguish them from both the Sikh and Hindu communities'. Caste was not brought up before the Employment Appeal Tribunal, but in the earlier, unreported

Employment Tribunal hearing, caste arose indirectly in a reference to an article referring to the 'discriminatory treatment meted out in parts of medieval India to lower castes such as Ravidassias by high caste Hindus.' This case illustrates the sometimes complex interrelationship between caste and religion.

The second case, *Sahota and Shergill v Shri Guru Ravidass Sabha Temple (Vancouver)* (2008), involved a complaint brought before the British Columbia Human Rights Tribunal (BCHRT) by two 'higher caste' Hindus alleging discrimination contrary to the British Columbia Human Rights Code 1996 (the Code), based on ancestry, race and religion in the provision of an accommodation, service or facility customarily available to the public by the Shri Guru Ravidass Sabha Temple of Vancouver (the Sabha). The Sabha had denied them membership because they were not Ravidassias of the Chamar caste (formerly an 'Untouchable' caste). The complainants argued that discrimination on the basis of caste is religious, cultural and economic discrimination and that therefore the discrimination against them was *inter alia* discrimination based on religion, a form of discrimination covered by the Code, whereas discrimination based on caste was not; specifically, they complained that they were refused membership because of their caste 'and the religious background of the caste'.

The BCHRT dismissed the complaint as outside its jurisdiction, accepting the respondents' arguments that membership of the Sabha was restricted to the Ravidassia community who by definition were members of the Chamar caste, and that the Code did not apply to membership of the Sabha because it was a private, purely social, religious and cultural organisation. As such it had chosen to restrict its membership to persons in the Ravidassia community and had defined that community to include only those of the Chamar caste (although in Britain, research on the Ravidassia community has shown that membership of Ravidassia Sabhas is not restricted by caste) (Dhanda, 2013b; see Section 1.4). This case also indicates the complex interrelationship between caste and religion, and that in the absence of caste-specific provisions complainants might seek to bring complaints under other characteristics where possible.

Overall, the caselaw indicates that in the absence of specific provisions on caste the issue will nevertheless be raised. Although race is the more relevant characteristic, arguments around religion will also occur, and courts and tribunals will be obliged to make interpretive decisions. The existing cases serve to mark the issue as present and subject to being litigated.

2.5 Equality Act: exceptions and caste

The Equality Act 2010 contains certain exceptions and exclusions to the prohibition of discrimination, victimisation and harassment on grounds of the protected characteristics. This means that in prescribed circumstances it will be lawful to treat someone differentially because of a protected characteristic. The exceptions and exclusions are set out in the main body of the Act and in Schedules relating to work (Schedule 9), services and public functions (Schedule 3), premises (Schedule 5), education (Schedules 11 and 12), and associations (Schedule 16). Schedule 23 contains several general exceptions. These include provisions permitting certain organisations relating to religion or belief to impose restrictions relating to religion and belief and sexual orientation when offering membership or participation in activities of that organisation; in the provision of non-commercial services in the course of their activities; and in the use or disposal of premises owned or controlled by the organisation.

As mentioned in Section 2.4, there are two rulings on whether caste already falls within the protected characteristic of race in the Equality Act 2010. In the most recent of these, *Tirkey*, the Tribunal found in that case that race as currently stated can and should be construed to include caste. In cases such as this, in the circumstances prescribed, the exceptions applicable to race would also apply to caste, where appropriate. Also, exceptions applying to religion could, where relevant, potentially apply to certain religious groupings provided religion and caste are sufficiently related (see Section 2.3). At the time of writing, the government has indicated that it will consult on what exceptions should apply to caste under new provisions prohibiting discrimination because of caste which will clarify the position.

Exceptions applying to work

The exceptions applying to work which are relevant to race, and hence to caste once it is made an aspect of race, are contained in Schedule 9 Paragraphs 1 and 3, discussed below. To date the handful of cases on caste discrimination have all involved work situations.

Genuine Occupational Requirement

Schedule 9 Paragraph 1 allows employers to rely on a 'genuine occupational requirement' (GOR) exception in relation to all the protected characteristics whereby the employer can apply, in relation to work, a requirement to have a particular protected characteristic, provided that, having regard to the nature or context of the work, three conditions are met: (1) it is an occupational requirement; (2) the application of the requirement is a proportionate means of achieving a legitimate aim; and (3) the person to whom the requirement applies does not meet it (or the

employer has reasonable grounds for not being satisfied that the person meets it). It follows that under the GOR exception, a work requirement to be of a particular caste would only be allowed if the three conditions above are met. According to the Equality Act Explanatory Notes, the requirement must be crucial to the post and not merely one of several important factors. It must also not be a sham or pretext. The Explanatory Notes provide a number of examples. Based on these it is apparent that the justifications for the exception are set relatively high, and the burden of showing that the exception applies rests clearly on the employer seeking to rely on it. An employer seeking to rely on the GOR exception in relation to race, including caste, once it is made an aspect of race, will have to meet this very high threshold.

Other requirements relating to religion or belief and work

In addition to the normal GOR discussed above, Schedule 9 Paragraph 3 allows an employer with an ethos based on religion or belief to discriminate in relation to work by applying a requirement to be of a particular religion or belief if, but only if, having regard to that ethos, being of that religion or belief is a requirement for the work; and applying the requirement is proportionate so as to achieve a legitimate aim. It is for an employer to show that it has an ethos based on religion or belief by reference to such evidence as the organisation's founding constitution. This exception differs from the normal GOR because there is no requirement for the characteristic to be an occupational requirement. The 'religious organisations' exception would allow, for example, a Valmiki organisation to restrict key posts to Valmikis. This must be based on the religious ethos of the organisation. Caste is to be made an aspect of race, not religion or belief, and consequently the exception does not mean that restrictions can be made on the basis of caste. It would not allow an employer with an ethos based on religion or belief to restrict key posts such as priests on grounds of race, which will include caste.

Exceptions applying to services and public functions

Schedule 3 Paragraph 30 allows services to be generally provided only for persons who share a protected characteristic. It follows that, once the secondary legislation making caste an aspect of race is in force, it would be permissible under Schedule 3 to provide services in such a way that the service is commonly used by people of a specific caste, although it would not be permissible to refuse to provide the service to people of other castes unless it was impracticable to do so.

Schedule 3 Paragraph 15 exempts from the prohibition of discrimination in the provision of services those people providing care within their own home, whether paid or unpaid. It follows that once caste is made an aspect of race, it might be

permissible for a person to restrict the provision of care in their own home to persons of a particular caste.

Exceptions applying to premises

Under Schedule 5 Paragraph 1, an owner-occupier who disposes of part of premises privately can refuse to dispose of premises on grounds of religion, but not on grounds of race. The Explanatory Notes give examples whereby a refusal to rent or sell privately on the grounds of race is unlawful, whereas a refusal to rent or sell privately on grounds of religion is lawful. Similarly, in relation to lodgers, where the owner-occupier shares some facilities with the tenant such as a kitchen, the prospective tenant can be refused if they are of a different religion, but cannot be refused on grounds of race, which will include caste. The religion exception does not apply if the discrimination is on grounds of race, which will include caste. For example, it would be lawful for an owner-occupier who is a Hindu (or a Sikh) to refuse, on grounds of religion, a prospective tenant of the Valmiki or Ravidassia religion, but only if the refusal is on grounds of religion; it cannot be on grounds of the prospective tenant's caste, which will become an aspect of race.

Exceptions applying to organisations relating to religion or belief

Schedule 23 Paragraph 2 contains a general exception in respect of organisations relating to religion or belief ('religious organisations') which allows them to discriminate on grounds of religion or belief in certain circumstances. The definition of a religious organisation for the purposes of this exception is set out in Schedule 23; the types of organisation that can use this exception are those that exist to practice, advance or teach a religion or belief; allow people of a religion or belief to participate in any activity or receive any benefit related to that religion or belief; promote good relations between people of different religions or beliefs. This exception allows religious organisations to impose restrictions on membership, participation in their activities, the use of goods, facilities or services they provide, and the use of their premises, by reference to religion or belief; but not on grounds of race, which will include caste. The restriction on grounds of religion or belief is only permitted if it is imposed to comply with the purpose of the organisation, or to avoid causing offence to members of the religion or belief that the organisation represents. If the main purpose of the organisation is commercial, it cannot rely on this exception. This means that a Ravidassia organisation which meets the criteria of a religious organisation may restrict its membership or the use of its facilities, services or premises to adherents of the Ravidassia religion; but once the secondary legislation making caste an aspect of race is in force, it could not impose restrictions on the basis of caste.

Exceptions applying to education

It is unlawful under the Equality Act 2010 for education bodies to discriminate against school pupils, students, or applicants, subject to a number of exceptions. These exceptions cover well-known matters such as admission to single-sex schools (Schedule 11 Part 1). Similarly, schools with a religious character are permitted to give preference in admissions to members of that religion (Schedule 11 Part 2). However as per *JFS* (see Section 2.2), no school can discriminate on grounds of race, which will include caste. There are no recognised exceptions relating to schools and race, and further exceptions to provisions on harassment do not extend to race, which will include caste.

In section 85(2)(a) of the Equality Act 2010, schools must not discriminate against a pupil in the way they provide education. In addition, section 89(1)(b) of the Education and Inspection Act 2006 requires that head teachers must determine measures to be taken with a view to encouraging good behaviour and respect for others on the part of pupils and in particular preventing all forms of bullying among pupils. Preventing caste-based bullying would fall under this statutory obligation.

The National Curriculum (NC) requires schools to provide a broad and balanced curriculum for all pupils, and to take account of their duties under equality legislation, which include providing protection from discrimination and harassment on the grounds of race. The Education Act 2002 section 29 also requires schools to promote the 'spiritual' development of its pupils. Furthermore, the Equality Act 2010 section 149 (the Public Sector Equality Duty) requires public sector bodies such as schools and others exercising public functions (including those providing state maintained education) to eliminate discrimination, harassment and victimisation; to advance equality of opportunity; and to foster good relations between persons having different protected characteristics. As such, schools must adapt the National Curriculum programmes of study so as to meet the specific needs and provide effective learning opportunities for all pupils, including individuals and groups of pupils. The Citizenship Programme of Study for example, requires pupils to learn about 'diverse national, regional, religious and ethnic identities in the United Kingdom and the need for mutual respect and understanding' which can be adapted to take account of local circumstances, such as community mix. Section 29 of the Education Act 2002 requires the governing body of all maintained schools to have a complaints procedure and to publicise such a procedure. A parent can pursue their complaint to the Secretary of State if after using the local procedure they believe the school is still failing to carry out its statutory duties. In light of the above, it could be suggested that schools review their religious education text-books to ensure that they meet the criteria above in relation to caste (see also Dhanda et al, 2014b).

Exceptions applying to associations

According to section 107(2) of the Equality Act 2010, an association is an association of persons which has at least 25 members and admission to membership of which is regulated by the association's rules and involves a process of selection. It does not matter whether an association is incorporated or whether its activities are carried on for profit. A small private club with less than 25 members which is not open to the public and which has no formal rules, such as a book club run by a group of friends, is not an association for the purposes of the Equality Act 2010. Commercial clubs which require membership as a condition of admission, but with no selection process, such as gym clubs, are not associations for the purposes of the Equality Act 2010. Under the exceptions in Schedule 16, it is permissible for an association to restrict membership and guests to people sharing a protected characteristic, for example religion or belief, nationality, and national or ethnic origins; but not colour. Associations for particular castes would therefore be permissible under the present provisions of the Equality Act 2010.

Exceptions applying to charities

S.193 of the Equality Act 2010 permits charities as defined by the Charities Act 2006 to restrict the provision of benefits to persons sharing a protected characteristic, with the exception of colour, if the restriction is contained in its charitable instrument and if the provision of benefits is a proportionate means of achieving a legitimate aim, or to prevent or compensate for a disadvantage linked to the protected characteristic. It follows that a charity providing benefits to members of a particular caste is permissible given that race, excluding the subset of colour, can operate as an exception, provided this is in line with the charitable instrument and it is objectively justified, or is to prevent or compensate for disadvantage.

Charities must not restrict benefits consisting of employment, contract work or vocational training to people who share a protected characteristic, except in relation to disability in limited cases. A charity may insist on acceptance of a religion or belief as a condition of membership, or may restrict access to its benefits and services to members who do not accept a religion or belief even where membership itself is not subject to such a condition, if this has been the case since before 18 May 2005.

2.6 The Public Sector Equality Duty and caste

The current Public Sector Equality Duty (PSED) was introduced in the Equality Act 2010 and the Equality Act (Specific Duties) Regulations 2011, and came into force on 5 April 2011. The duties require public sector bodies, or private sector organisations when performing public functions, to pay due regard to the statutory needs of eliminating discrimination, harassment and victimisation, advancing equality, and

fostering good relations between persons defined by reference to the protected characteristics.

The PSED is made up of a General Duty and Specific Duties. The General Equality Duty is contained in section 149(1), and requires public sector bodies to give 'due regard' to three statutory needs; (a) the elimination of discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Act; (b) the advancement of equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; (c) the fostering of good relations between persons who share a relevant protected characteristic and persons who do not share it. What is meant by giving 'due regard' is explained further in section 149(3) and in the significant caselaw which has developed in this area. Public sector bodies are no longer obliged to have equality schemes or to carry out equality impact assessments, which were requirements of the now repealed race, disability and gender duties (Seery, 2011). The Specific Duties do not require the collection of information from employees, or their customers or users, on their race, religion or belief etc.; rather it is for the public sector bodies to demonstrate how they propose to meet their obligations under the PSED. Many public sector bodies collect data to enable them to comply with the PSED. In relation to caste there appears to be widespread agreement, however, that the collection of data on caste would be counter-productive (see also Dhanda et al, 2014b).

2.7 Conclusion

This chapter has addressed the legal status of caste in British law. Section 97 of the Enterprise and Regulatory Reform Act 2013 requires that caste be made 'an aspect of race' but it does not specify how this is to be done. A number of approaches are possible. Caste can be made an aspect of race via an existing sub-category of race such as ethnic origins; this can be termed the interpretative approach. Alternatively, caste can be made an aspect of race as an independent sub-category; this can be termed the iterative approach, in which caste is expressly iterated or named as a fifth sub-category under race.

Although it has been ruled by the Employment Tribunal in one case that caste is already incorporated within the protected characteristic of race, the interpretative approach is at present not established. A lower court or tribunal decision is not binding precedent, consistency of outcome in future cases would not be guaranteed, and the principle will remain somewhat precarious. Even a binding precedent can be overturned until a decision is made at the Supreme Court. A successful argument that caste is a subset of race as currently defined might in time result in a body of caselaw emerging, such that caste will simply become treated in Britain as another

aspect of race, both sociologically and in law. Nevertheless, the introduction of the statutory prohibition of caste discrimination will simplify the process of dealing with caste discrimination claims, reducing costs and providing legal certainty (Waughray, 2013).

3. Caste in international law and other jurisdictions

3.1 Introduction

This chapter examines the experience of caste outside Britain with a number of aims. It first seeks to describe the critical developments in international law which saw caste discrimination declared as a form of descent-based discrimination and therefore a form of racial discrimination, and as such a violation of international human rights law. In this regard, it will chart the emergence and location of international prohibitions on caste discrimination. Second, it will look at the extent to which caste is a ground for non-discrimination in the legal jurisdictions of other States, focusing on constitutional protections in which caste is a named ground in non-discrimination clauses. Third, it will highlight the experience of India as the paradigmatic example of domestic caste discrimination legislation through the 1950 Indian Constitution. Fourth, it will chart the relevance of the international examples for the current proposals to legislate against caste discrimination in Britain, including the impact on the proposed sunset clause. In conclusion, the chapter will highlight the mandate provided by international human rights law for the current legislation and how its interpretation ought to be subject to the parameters set out in key international documents.

3.2 International human rights law and ‘descent’

The word ‘caste’ does not appear in any international treaty. India did propose its inclusion in the drafting of the Universal Declaration of Human Rights (UDHR) in 1948, but dropped the idea when it was pointed out that ‘caste’ could be read into other grounds in the UDHR non-discrimination clause, notably ‘birth’. Subsequently, the issue of caste became dormant and re-emerged only in 1996 in the context of a State Report by India to the Committee on the Elimination of Racial Discrimination (CERD), which monitors the International Convention on the Elimination of All Forms of Racial Discrimination 1965 (ICERD). In this session, CERD interpreted the meaning of ‘descent’, one of five grounds in the definition of racial discrimination (race, colour, descent and national or ethnic origin) in Article 1(1) ICERD, to include caste. This did not occur in a vacuum, but was the result of a long period of lobbying by various Dalit organisations to have international recognition that the Indian Constitution had not eliminated *de facto* caste discrimination, and that caste was an international as well as a national problem.

The identification of caste as a form of descent-based discrimination had a layered rationale. Firstly, it was a practical approach, in that descent was considered the ground in the definition of racial discrimination under which caste best fit. Secondly, the drafting history of the treaty, or *travaux préparatoires*, indicated that India had in

fact suggested the inclusion of the word 'descent' as one of the five grounds. This led the Committee to surmise that India must have meant caste when proffering descent, although this is contested (Keane, 2007; Waughray, 2013). Finally, the Committee did not wish to target India, or be seen to be doing so, and descent-based discrimination afforded it the means to broaden the discussion to groups outside the Indian caste structure and draw in other communities in other States who were suffering from analogous systems of inherited dehumanisation. For example, the *Buraku* community in Japan were quickly subsumed under the descent-based discrimination movement.

CERD subsequently began a process of investigating whether descent-based discrimination can be found in other States Parties to the treaty. It has questioned among other States Bangladesh, Nepal, Senegal, Ghana, Mali and the Yemen, for the existence of caste or descent-based groups who suffer from discrimination. In view of the internationalisation of caste and descent, the Committee drafted General Recommendation 29 on Descent-based Discrimination which set out its understanding of descent-based discrimination. The legal status of a General Recommendation is not settled; but they are usually considered authoritative interpretations, and UN treaty bodies will consistently refer to them as required standards for State adherence to treaty obligations. It is important to note that while broader than caste, the concept of descent-based discrimination is not without limits, and General Recommendation 29 provides a guide as to the types of discrimination subsumed by the concept. It is essentially an international reading of caste, broader than the South Asian paradigm, but confined to practices which involve discrimination on the basis of caste-like structures.

General Recommendation 29 also implicitly delineates who is not covered; it is not concerned with types of discrimination on the basis of class, or ethnic groups such as the Roma (the subject of another, separate General Recommendation), focussing instead on an international understanding of caste hierarchies as a form of descent-based discrimination. It includes a cogent but lengthy definition-type description, which requires States Parties to take:

Steps to identify 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 recognized 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, places of worship and public sources of food and water; limitation of freedom to renounce inherited occupations or degrading or hazardous work; subjection to debt bondage; subjection to dehumanizing discourses referring to pollution or untouchability; and generalized lack of respect for their human dignity and equality.

This is a distinct form of discrimination in which the international understanding ties closely with the experience of caste discrimination in South Asia, but is of clear relevance outside that context too.

The movement against descent-based discrimination has seen some States oppose CERD's interpretation, with India and Japan in particular arguing that caste is not a form of racial discrimination as interpreted by the Committee. Nepal, by contrast, has readily reported on caste discrimination to CERD, evidently considering it to fall clearly within the Committee's remit. Furthermore, the CERD approach has found consistent support within the UN structures and mechanisms, including the appointment of UN Special Rapporteurs on discrimination based on work and descent, and thus caste and descent-based discrimination as a global practice are affirmed within the international human rights architecture (Keane, 2007).

From a terminological viewpoint, the term 'descent-based discrimination' is broader than, but includes, caste, and as such, the Committee investigates caste structures in many States beyond South Asia. Much of this work is in its early stages, factoring in the slow-moving nature of international human rights law. The Committee will ask a State to provide details on certain groups who may be experiencing descent-based discrimination – such as the *al-Akhdam* in Yemen – and require the State to report back, upon which further questioning will occur as to whether legal measures are needed to eliminate discrimination against such groups.

Overall, the movement against caste discrimination in international human rights law through the targeting of descent is relatively recent and its effect, as well as State responses, is still being distilled. It is apparent however that caste discrimination among diaspora communities is firmly part of treaty obligations under ICERD. It is notable that the Special Rapporteurs identified caste discrimination among diaspora communities as indicative of the global nature of descent-based discrimination, with one report concentrated solely on this question (Eide and Yokota, 2004). In its response to the most recent State Report of the UK to CERD (2011), the Committee cited information from NGOs on caste discrimination in the UK, and concluded:

Recalling its previous concluding observations and its general recommendation No. 29 (2002) on descent, the Committee recommends that the Minister responsible in the State party invoke section 9(5)(a) of the Equality Act 2010 to provide for 'caste to be an aspect of race' in order to provide remedies to victims of this form of discrimination. The Committee further requests the State party to inform the Committee of developments on this matter in its next periodic report.

Therefore the statutory provision requiring caste to be added to the Equality Act 2010 is consistent with CERD's General Recommendation that State parties enact legislation to outlaw discrimination based on descent, and with CERD's 2012 recommendations to the UK. This point was echoed in a recent address to the House of Lords by the UN High Commissioner for Human Rights, Navi Pillay, who called for 'strong, swift implementation by the UK government of its new legal obligation [a reference to section 97 of the Enterprise and Regulatory Reform Act 2013] to extend the reach of the UK's equality legislation...to cover caste-based discrimination' (Pillay, 2013).

3.3 Caste in the legal jurisdictions of other States

India is the paradigmatic example of caste as a ground for non-discrimination within the domestic legal system or constitutional order of other States. However, there are a number of other examples. Firstly, within South Asia, there are a number of States with caste as a ground for non-discrimination. Thus the Constitution of Bangladesh forbids discrimination on the grounds of religion, race, caste, sex or place of birth (Article 28). The Constitution of Pakistan includes caste as a ground for non-discrimination in access to educational institutions (Article 22), public places (Article 26) and services (Article 27). The Constitution of Sri Lanka lists caste alongside race, religion, language, sex, political opinion and place of birth (Article 12(2)), as well as forbidding restrictions on access to shops, restaurants and places of public worship and other services, on the ground *inter alia* of caste (Article 12(3)). The Interim Constitution of Nepal 2007 offers extensive provisions on caste, largely drawn from the example of India. However, it remains a contested text with little indication of what provisions will remain at the end of the constitutional process. Nepal's status is rare as the only State to have formally institutionalised a legal caste system in its foundational texts, with the caste hierarchy cemented through the *Muluki Ain* of 1854, a foundational legal text that regulated public and private law and protected social and religious values along caste divisions. The current Interim Constitution thus has many references to caste and untouchability, and support for their abolition. Overall, within the South Asian Association for Regional Cooperation,

the regional grouping, provisions on caste are only absent from the constitutions of the Maldives and Bhutan.

Outside South Asia, there are a handful of examples. Article 16(3) of the 1968 Constitution of the Republic of Mauritius describes 'discriminatory' as affording different treatment to different persons attributable wholly or mainly to their respective descriptions by caste and a number of other grounds such as race. The most isolated example, geographically, is the State of Yap in the Federated States of Micronesia, which has a recognised and complex caste system. The 1982 Yap State Constitution provides leadership roles to groups who have been historically excluded, including lower castes. In West Africa, which is strongly associated with descent-based discrimination by CERD, the Constitution of Burkina Faso includes caste in its non-discrimination clause grounds in Article 1, as well as including caste in a clause on non-discrimination in marriage and family life in Article 23. No other West African state has a constitutional or statutory reference to caste. There are no references to caste in the constitutions of Canada, Fiji or South Africa, all States with large South Asian diaspora communities.

3.4 Caste and India

The Indian example remains the best known and the most significant in terms of law. It was India that first sought to address caste discrimination through law, and the 1950 Indian Constitution is a pivotal document. It has four features in relation to the legal approach adopted. The first is the inclusion of caste as a ground for non-discrimination, seen in the non-discrimination clauses in its Articles 15 and 16. The second is the abolition of untouchability, considered the worst effect of caste hierarchies, in its Article 17. The third is a system of reservations, or affirmative action policies, scattered across the document (and in its amendments) but grouped into three prongs: in education, public services and in electoral seats to the lower house and State legislatures. This combination of non-discrimination and affirmative action is a legal technique that is now standard within the tools of domestic and international law, but the Indian Constitution is the first founding document to undertake such an approach. The final feature is that the Constitution mandates the enactment into statutes of laws which tackle untouchability and hate crimes, known in India as atrocities, on the basis of caste.

As a result, legislation has been introduced to protect Dalits from degrading and humiliating customs and employment practices, and from economic exploitation, for example manual scavenging. Untouchability practices and caste hate crimes are punishable under the Indian Penal Code or under special 'hate crimes' legislation. The Protection of Civil Rights Act 1955 defines certain acts as criminal offences if

committed because of Untouchability, while the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989 prohibits specified acts, or hate crimes, where the victim (but not the perpetrator) is a Dalit or an *Adivasi* (see Section 1.3).

There is no definition of caste or untouchability in the Constitution of India or in legislation (Waughray, 2013). 'Scheduled Caste' is the constitutional, legal and administrative term for Dalits in India. It is used to identify the beneficiaries of affirmative action and other legal and policy measures. The term refers to those formerly 'Untouchable' castes listed in a Schedule to the Constitution. Scheduled Castes are defined in the Constitution simply as those castes notified as such by Presidential Order. The Constitution contains no criteria for identifying the Scheduled Castes, but India's Ministry for Social Justice and Empowerment gives the following administrative criteria: 'extreme social, educational and economic backwardness arising out of traditional practice of Untouchability'. Scheduled Caste status is established by a Caste Certificate issued by the authorities attesting to the bearer's membership of a Scheduled, or Untouchable, caste, thereby entitling them to the benefit of affirmative action policies and other legal and policy measures. Although context-specific, 'Scheduled Caste' has entered UK usage, for example, on matrimonial websites (Waughray, 2009). The original Schedule was drawn up by the British in India in 1936. It was incorporated into the Constitution of India in 1950 and has remained in use, little changed, ever since. In his seminal work on India's reservations system, Marc Galanter explains that the basis for inclusion in the original colonial Schedule was 'Untouchability', 'measured by the incidence of social disabilities' accruing from 'low social and ritual status in the traditional social hierarchy' (Galanter, 1984: 122-35). There is no accepted test for 'Untouchability'; in the 1930s the British tried to specify an all-India test for identifying Untouchable groups, but this proved impossible due to variations in regional practices (Galanter, 1984).

Definitions of caste and untouchability can be found in Indian caselaw. In the leading case of *Indra Sawhney v Union of India* [1993], the Indian Supreme Court defined caste as a socially homogenous class and also an occupational grouping, membership of which is involuntary and hereditary: 'Lowlier the hereditary occupation, lowlier the social standing of the class in the graded hierarchy.' Even where the individual does not follow that occupation, 'still the label remains and his identity is not changed'.

In *Soosai v. Union of India* [1985], Untouchability was characterised by the Supreme Court as involving deep and oppressively severe social and economic disabilities and cultural and educational backwardness and degradation, not mere material

deprivation. Significantly, the Court did not suggest that the concept and practice of Untouchability was restricted to Hinduism. Rather, the existence of Untouchability among non-Hindus was treated as a factual question, subject to a threshold test (Waughray, 2010).

Despite widespread recognition that the ideology and practice of caste exists in other religions, the Indian constitutional framework treats it as a Hindu phenomenon. Under the Constitution (Scheduled Castes) Order 1950, only Hindus, Sikhs or Buddhists can be classified as Scheduled Castes. Muslim and Christian Dalits are excluded on grounds of religion from the Scheduled Caste category and hence from accessing Scheduled Caste reservations. Lack of Scheduled Caste status also means that Muslim and Christian Dalits who are victims of caste hate crimes cannot file a criminal complaint as the victim must be a member of a Scheduled Caste for caste hate legislation to be triggered, a situation that has been criticised by the UN as well as by academics and activists within India and elsewhere (Waughray, 2010).

3.5 Relevance of international examples

While clearly the Indian and the UK experience of caste cannot be equated, legally, the non-discrimination clause technique is equally applicable and relevant. Similarly, caste appears as a ground for non-discrimination in Mauritius, where it has not had the same historical and social impact as in India. Thus caste could appear as a ground for non-discrimination under equality legislation in the UK, drawing on the Indian precedent, which is not a judgement as to the history or scale of caste discrimination in Britain. The differentiation in the legal orders is also discernable. India lists caste alongside race as a ground for non-discrimination, similar to the other South Asian States, which list caste in their constitutional texts alongside race, religion and other grounds. In the UK, the legislative duty under s.97 of the Enterprise and Regulatory Reform Act 2013 is that caste be made an aspect of race, therefore subsuming it under this ground.

ICERD distinguishes between racial discrimination and race, viewing race as one of five grounds which make-up the definition of racial discrimination. Hence caste and race can both be considered forms of racial discrimination for the purposes of the ICERD definition. If the UK were to follow the international approach, it would find caste as an attribute of racial discrimination, rather than race. However, in the UK, the term race maps closely to the international term 'racial discrimination'. Therefore making caste an aspect of race within the Equality Act 2010 will contribute to a legal process begun in India, replicated in other jurisdictions, and continued at the international level, of including caste either as a named or as an interpreted ground

for non-discrimination. But this is not to equate the experience of caste across jurisdictions.

There is a further point in relation to reservations or affirmative action that the Indian example provides, and which impacts upon the proposal to insert a 'sunset clause' into the proposed equality legislation in Britain. Section 97 of the Enterprise and Regulatory Reform Act 2013 provides for the possibility of review and repeal of the caste legislation after five years. The Indian system employs two types of legal techniques; non-discrimination and affirmative action through the reservations system, with the former cemented within the Indian legal system while the latter requires periodic renewal every ten years. As a result, the Indian constitution has a non-discrimination clause on caste (permanent) and reservations/affirmative action measures (temporary, renewed every 10 years). This is in line with every other equality text in the world, under which grounds for non-discrimination are immutable while affirmative action provisions, should there be any, are put in place for a period of time until the required equalisation process is complete. The proposed 'sunset clause' for a non-discrimination ground is legally without precedent and goes against this key differential. In law, affirmative action provisions are acknowledged as temporary but grounds for non-discrimination are always permanent, as reflected in the Indian Constitution in relation to caste.

3.6 Conclusion

Caste has been recognised by the UN as an international issue of concern which includes, but is not limited to, the South Asian experience. Caste as a ground for non-discrimination appears in the legal order of a number of States, largely in South Asia but also outside this region. Similarly, the question of diaspora communities has been specifically raised as part of the UN movement against descent-based discrimination. There are differences in terms of the experience of caste, as well as the legislative response, but broadly there is a mandate from ICERD, to which the UK is a State Party, to legislate for caste discrimination where the circumstances warrant.

The understanding of descent-based discrimination seen in General Recommendation 29, including the types of groups and States considered to experience this form of discrimination, may provide guidance as to who could access the proposed UK legislative provisions. For example, in addition to Dalit and other communities, a member of the *Buraku* community or the *al-Akhdam* experiencing discrimination in the UK may fall within the ambit of the proposed legislative provision, given that these groups are considered by CERD to be within the sweep of descent-based discrimination.

4. Conclusion

4.1 Introduction

This report has examined the issue of caste in Britain with a specific aim to establish the manner in which caste can be made an aspect of race for the purposes of the Equality Act 2010. The process of consultation with stakeholders (detailed in Dhandu et al, 2014b) has provided insights into how communities, experts, practitioners and victims, among others, have viewed the legislative proposals; these have informed the analysis throughout. Caste has long defied categorisation, and its manifestations in Britain are a source of continued analysis across disciplines and cultures.

The report emphasises that the current state of the law is contested, with emerging judicial decision-making clouded by the absence of clear guidance on the status of caste within British law. It questions whether the existing law, as set out in the Equality Act 2010, is sufficient to engage with caste discrimination and provide judicial oversight and remedies. While situated in a national context, the report has also sought an international perspective, drawing on the experience of legislating for caste discrimination in other jurisdictions. It has similarly drawn on the precedents set at the international human rights level. It has located the present proposals within a wider international push towards greater legal recognition of caste discrimination, with the UK potentially providing a template that may be followed by other States.

With this in mind, we conclude that implementing the statutory requirement that caste be made an aspect of race is a question of great import. It requires reflection as to how the law can respond to the complexity of caste in Britain, and provide sufficient flexibility to address the experience of victims, while ensuring clarity for those who will engage with the legal procedures.

4.2 The legal formulation of caste as an aspect of race

The report has sought precise answers as to the correct legal formulation of caste as an aspect of race, taking as its departure point that the legislative duty in section 97 of the Enterprise and Regulatory Reform Act 2013 reads only that caste be made an aspect of race, and does not specify how this is to be done. It has outlined the options available to legislators in this regard, weighing these against the experience or practice of caste as witnessed in a marginal group of specific cases, or in wider caselaw on aspects of race and religion or belief. The available pathways are an interpretative approach, whereby caste is read into existing subsets of race, in particular ethnic origins; or an iterative approach whereby caste is named as a fifth subset of race, additional to the four existing subsets. A further pathway is to employ the international term 'descent', although this option has been rejected by legislators;

descent already has its own meaning within UK equality legislation and it is a feature of caste but does not capture all the elements of caste. It does not appear as a statutory term in the UK, and the fear has been voiced that to introduce it as an express term could open the door to claims based on other grounds such as social class, which Parliament has rejected.

The caselaw at present is divided as to whether caste can be read into ethnic origins. The report has outlined differences in kind between the concept of ethnicity and the concept of caste. Similarly, it has indicated the shortfall in other characteristics, notably religion or belief. Caste is a complex and evolving concept in Britain, and as such, it seems that the judicious path is to name caste as a fifth subset of race. This would provide legal clarity, situate caste within the Equality Act 2010, and avoid complex and rebuttable interpretative arguments.

The proposed “sunset clause” is without precedent in discrimination law. Specific timeframes are usually reserved for affirmative action policies rather than non-discrimination clauses. The spirit of the Equality Act 2010 is to combat specific instances of discrimination as it arises, and generate attitudinal change. If caste discrimination is to recede, it ought nevertheless to remain within the ambit of the Equality Act 2010 to guard against future practices, rendering it congruent with the other characteristics and subsets within the legislation, and with the nature of equality and non-discrimination law.

4.3 The definition of caste

Currently there is no consensus on how a definition of caste should be formulated. The existing Equality Act Explanatory Notes on caste (2010) provided the first elaboration of caste in British equality law, although the text is now perceived as unsatisfactory by experts and stakeholders (see Dhanda et al, 2014b). Consequently there is a need to elaborate a new formulation or definition that more accurately reflects the experience of caste in Britain. The international experience is largely unhelpful, with the question of a definition sidestepped in other jurisdictions that have a legal engagement with caste. A starting point for a definition is provided by CERD General Recommendation 29, quoted above, but this document is of an international character and its formulation is consequently wide-ranging.

The present report has explained both the complexity of caste and the need for separate treatment of caste in law, for example by way of express iteration of caste as an independent sub-category of race. We conclude that any definition – whether on the face of the Act or in the Explanatory Notes - ought to be expressive of caste in Britain and should draw on key terms. It needs to be sufficiently open to cover caste

as understood and experienced in Britain; it should delineate the boundaries of the category but should not be overly prescriptive. In this regard, it is suggested that the definition, whether forming part of the wording of the Act or its Explanatory Notes, could include the following elements: endogamy, social stratification, and (inherited) status and examples could be provided in the Explanatory Notes as is currently the case with race and religion.

4.4 Future work

There is a growing research community on caste in Britain, exploring its facets and manifestations. This is multi-disciplinary and asserts a variety of perspectives. Caste has a long legal history in a range of jurisdictions, and the present research in Britain is linked to the wider international study of caste discrimination. At the international level, the UN literature emphasises the indicative nature of its present standards, notably General Recommendation 29, which is exploratory in tone as it seeks more information on the nature of caste and descent-based discrimination as experienced by a number of States and regions, and the form and efficacy of legal remedies.

Given the particular focus of the present report, it is perhaps appropriate to signal that the functioning of caste in the Equality Act 2010 will be played out in caselaw. At present, resources are being diverted in terms of legal analysis towards arguments as to how existing characteristics can be interpreted to include caste. With greater legal clarity provided by the legislative amendment, the focus will shift to how caste is manifested, the forms discrimination may take, and the experience of victims of caste discrimination.

The present report is a contribution to an emerging area of discrimination law, outlining the context and legal pathways available to situate caste within the Equality Act 2010. It is intended to provide guidance as to the options available and generate discussion on potential legal pathways. The multi-layered experience of caste in Britain will emerge in the application of the Equality Act 2010, as more voices are added to this growing discourse.

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This report reviews socio-legal research on British equality law and caste in the context of the requirement in the Enterprise and Regulatory Reform Act 2013 to make caste ‘an aspect of’ the protected characteristic of race in the Equality Act 2010. The report examines the meaning of caste and its manifestations in Britain; caste and protected characteristics, such as race or religion or belief; caste and legal exceptions; and caste in the international context. The report concludes by considering the legal formulation of caste as an aspect of race and how caste should be defined for legislative purposes.

The report is a companion study to *Caste in Britain: Experts' Seminar and Stakeholders' Workshop* (Research report no. 92).