

ORIGINAL ARTICLE

INTERNATIONAL LEGAL THEORY

Caste discrimination, international human rights, and Hinduism

Rishabh Bajoria*

University of Cambridge, Cambridge, United Kingdom
Email: rb911@cam.ac.uk

Abstract

Since 1996, international human rights law (IHRL) has attempted to address caste-based discrimination through the rubric of racial discrimination by reading caste into ‘descent’ under Article 1(1) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). However, this framing of discrimination remains inadequate. The Committee on Elimination of Racial Discrimination (CERD) and the UN Sub-Commission for the Promotion and Protection of Human Rights sought to identify caste-based discrimination by identifying practices of untouchability without analysing caste as a system of entitlement to knowledge, wealth, and land. Therefore, IHRL envisioned caste-based discrimination as primarily inflicting recognition harms on its victims. This meant that even material manifestations of caste-based discrimination were framed as consequences of untouchability. Furthermore, the creative legal move to read caste into ‘descent’ meant deracinating caste from its particular context in South Asia — where it remains imbricated with Brahmanical Hinduism¹ — into a general form of ‘descent’ like any other ascriptive category. This process of abstraction erases the interdigitation of caste and Hinduism. These two moves mean IHRL remains ill-equipped to identify, let alone redress, caste-based discrimination.

Keywords: Ambedkar; caste; discrimination; international human rights; postcolonial critique

‘The Vedas and the Shastras polluted; the Puranas inauspicious, impure; the body, the soul contaminated; the manifest Being is the same. Brahma polluted, Vishnu too; Shankar is impure, inauspicious. Birth impure, dying is impure. Says Chokha, pollution stretches without beginning and end.’

Kabir, radical Bhakti saint and anti-caste poet of the fifteenth century²

1. Introduction

This paper investigates the shortcomings of international human rights law (IHRL) in understanding and redressing caste by recalling Indian constitutional lawyer and political theorist,

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¹Following in the Ambedkarite tradition, I will use Brahminism and Hinduism interchangeably. I have used them together here for clarity.

²E. Zelliott and R. Mokashi-Punekar (eds.), *Untouchable Saints: An Indian Phenomenon* (2004), 139 (emphasis added).

Dr. BR Ambedkar's project of 'annihilating caste'.³ Ambedkar was the first pan-India Dalit leader — Dalit refers to people belonging to the so-called 'untouchable' caste — and his views and political project remain one of the most significant forces in Indian politics today. His key insight was that caste is a system of graded inequality which structures the social totality — from knowledge to wealth, land, and dignity. Individual rituals which policed and enforced caste, like social sanctions on the entry of Dalits into temples or inter-caste marriages, were only manifestations of this deeper structure. Therefore, seeking to eradicate caste by changing these practices of 'untouchability' one at a time was akin to defeating the Hydra of Lerna by cutting off one of its heads. And the structure of caste was, in the minds of large swathes of the Indian population, divinely ordained by Hinduism and its sacred texts. Therefore, one had to tackle Hinduism at its foundations to annihilate caste.

The failure of IHRL to understand caste is significant because caste-based discrimination is a global issue. Anti-caste NGOs have done a remarkable job of putting caste on the international legal map in the previous three decades. Moreover, the increasing prominence of the Indian diaspora in global politics means legislatures around the world are being confronted with the issue of caste-discrimination. Far from being only a South Asian issue, caste has been the subject of fierce debates in California,⁴ United Kingdom,⁵ and Australia⁶ in the last decade. It is hard to get away from Ambedkar's warning, 'If Hindus migrate to other regions on earth, Indian caste would become a world problem.'⁷

In Section 2, I trace the debates in international legal forums on caste-based discrimination. I focus on discussions in the Committee on the Elimination of Racial Discrimination (CERD) and the UN Sub-Commission on the Promotion and Protection of Human Rights since 1996. I choose this period because 1996 marked the beginning of an explicit discussion of caste-based discrimination in an international legal forum, when CERD declared in its 1996 Concluding Observations on India that Article 1(1) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) covered caste-based discrimination.⁸ Subsequently, the UN Sub-Commission produced several documents which framed caste-based discrimination as an instance of discrimination based on 'work and descent'. While caste has been mentioned by other bodies, including the UN Human Rights Committee,⁹ the Committee on the Elimination of

³B. Ambedkar, *Annihilation of Caste: The Annotated Critical Edition* (2014).

⁴C. Kim, 'California Is the First US State to Pass Ban on Caste Discrimination', *BBC*, 7 September 2023, available at www.bbc.co.uk/news/world-us-canada-66736708.

⁵Equality and Human Rights Commission, 'Caste in Britain: Socio-Legal Review', 2014, available at www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://www.equalityhumanrights.com/sites/default/files/research-report-91-caste-in-britain-socio-legal-review.pdf&ved=2ahUKEwjV14Kn-LKHaxUWQUEAHT7DAuQFnoECC8QAQ&usq=AOvVaw37HBV9IPT030qFRvfjfuwj.

⁶S. Sarkar, 'Caste Discrimination Is Legal in Australia, Home to More Than 1 Million South Asians', *SCMP*, 28 December 2023, available at www.scmp.com/week-asia/people/article/3246546/caste-discrimination-legal-australia-home-over-1-million-south-asians-some-deny-it-even-exists; Coalition against Caste Discrimination, 'Submission for the Anti-Discrimination Act Review — Unseen Chains: Urgent Plea for Recognising Caste Discrimination in the Anti-Discrimination Act Review', September 2023, available at www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://lawreform.nsw.gov.au/documents/Current-projects/ada/preliminary_submissions/PAD28.pdf&ved=2ahUKEwIu4MSd-LKHaxVVWkEAHa5YDfEQFnoECBoQAQ&usq=AOvVaw11sJHfRBWqvhzavKH4TDA; K. Luthria, "'A Disease': Caste Discrimination in Australia Is on the Rise — But Some Are Fighting Back", *The Guardian*, February 2023, available at www.theguardian.com/australia-news/2023/feb/18/a-disease-caste-discrimination-in-australia-is-on-the-rise-but-some-are-fighting-back.

⁷M. Sebastian, 'Why the West is Reckoning with Caste Bias Now', *BBC*, April 2022, available at www.bbc.co.uk/news/world-asia-india-61241849.

⁸CERD, Consideration of Reports Submitted by States Parties under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination: India, UN Doc. CERD/C/304/Add.13 (17 September 1996).

⁹CCPR, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Concluding Observations: India, UN Doc. CCPR/C/79/Add.81 (4 August 1997), paras. 13, 15.

Discrimination against Women,¹⁰ the Committee on the Rights of the Child,¹¹ and the European Union,¹² CERD and the Sub-Commission have remained the focal point of detailed contests over caste in IHRL.¹³ Attempts by the National Campaign for Dalit Human Rights (NCDHR) and the International Dalit Solidarity Network (IDSN), two transnational advocacy networks for Dalit rights, to include caste on the agenda of the World Conference against Racism, Racial Discrimination, Xenophobia, and Related Intolerance in 2001 were foiled by Indian diplomatic manoeuvrings.¹⁴

The debates in CERD and the Sub-Commission were marked by extensive advocacy from anti-caste NGOs and persistent objections from India. India maintained (and continues to do so) that caste and race were separate categories and therefore caste-based discrimination could not be covered by ‘descent’.¹⁵ While I trace the arguments in the debates in each forum by referring to a combination of primary and secondary sources,¹⁶ my focus remains on the legal product of these debates. I use critique as a method of reading these documents to uncover unspoken concepts, presumptions, and concomitant silences animating the doctrinal content.¹⁷

Section 3 outlines the key ideas of Ambedkar, tracing the moral and political reasons necessitating the ‘annihilation of caste’. I focus on caste as a system of graded inequality of entitlement which is ritualized through untouchability and backed by Brahmanism. As a result, merely reforming untouchability, through practices transgressing norms of purity/pollution like inter-caste commensality, is both inadequate to tackle the caste system and impossible to achieve without confronting the ideological power of Brahmanism.¹⁸ For this, I draw primarily on three texts, ‘Annihilation of Caste’,¹⁹ ‘Riddles in Hinduism’,²⁰ and ‘The Buddha and His Dhamma’.²¹

¹⁰CEDAW, Summary Record of Thirty-Seventh Session: Concluding Comments of the Committee on the Elimination of Discrimination against Women: India, UN Doc. CEDAW/C/IND/CO/3 (2 February 2007), paras. 13–21.

¹¹CRC, Consideration of Reports Submitted by States Parties under Article 44 of the Convention: Concluding Observations of the Committee on the Rights of the Child: India, UN Doc. CRC/C/15/Add.115 (23 February 2000) para. 30.

¹²European Parliament, Annual Report on Human Rights in the World in 2002 and European Union’s Human Rights Policy, (16 July 2003), available at www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A5-2003-0274+0+DOC+PDF+V0/EN.

¹³See D. Keane, *Caste-Based Discrimination in International Human Rights Law* (2016), ch 6; IDSN, *Caste Discrimination and Human Rights* (March 2019), available at idsn.org/wp-content/uploads/2019/12/UNcompilation-March-2019-3.pdf.

¹⁴C. Bob, ‘“Dalit Rights Are Human Rights”: Caste Discrimination, International Activism and the Construction of a New Human Rights Issue’, (2007) 29(1) *Human Rights Quarterly* 167; C. Lennox, *Transnational Social Mobilisation and Minority Rights: Identity, Advocacy and Norms* (2019), ch 3.

¹⁵See CCPR, *supra* note 9, paras. 6–7. See also Keane, *supra* note 13.

¹⁶Several scholars have noted how Dalit NGOs creatively framed arguments to mobilize IHRL discrimination norms in the 1980s and 1990s. P. Thornberry, ‘Race, Descent and Caste under ICERD’, in K. Nakano, M. J. Yutzis, and R. Onoyama (eds.), *Peoples for Human Rights* (2004), 119; P. Thornberry, ‘The Convention on the Elimination of Racial Discrimination, Indigenous Peoples and Caste/Descent-Based Discrimination’, in J. Castellino and N. Walsh (eds.), *International Law and Indigenous Peoples* (2004), 17; D. Keane, ‘Descent-Based Discrimination in International Law: A Legal History’, (2005) 12(1) *International Journal on Minority and Group Rights* 93; A. Waughray and D. Keane, ‘CERD and Caste-based Discrimination’, in D. Keane and A. Waughray (eds.), *Fifty Years of the International Convention on the Elimination of All Forms of Racial Discrimination* (2017), 121; see also Bob, *supra* note 14; J. Lerche, ‘Transnational Advocacy Networks and Affirmative Action for Dalits in India’, (2008) 39(2) *Development and Change* 239; D. -E. Berg, ‘Race as a Political Frontier against Caste: WCAR, Dalits and India’s Foreign Policy’, (2018) 21 *Journal of International Relations and Development* 990; P. Mehta, *Recasting Caste: Histories of Dalit Transnationalism and Internationalization of Caste Discrimination* (2013, Dissertation thesis), available at deepblue.lib.umich.edu/bitstream/handle/2027.42/102442/purvim_1.pdf?sequence=1; P. Smith, ‘Going Global: The Transnational Politics of the Dalit Movement’, (2008) 5(1) *Globalizations* 5, 13.

¹⁷J. Halley and W. Brown, *Left Legalism/Left Critique* (2002), ch 1.

¹⁸Even in a deeply contested field of scholarship around caste and Ambedkar, these are minimum points of agreement between scholars of South Asian studies and Ambedkar.

¹⁹See Ambedkar, *supra* note 3.

²⁰B. Ambedkar, *Riddles in Hinduism*, *Ambedkar.org*, available at drambedkar.co.in/wp-content/uploads/books/category1/1riddlesinhinduism.pdf.

²¹B. Ambedkar, *The Buddha and His Dhamma*, available at drambedkarbooks.com/wp-content/uploads/2009/03/buddha-and-his-dhamma.pdf.

While I mention some of the antecedents and afterlives of these ideas, a detailed intellectual history is beyond the scope of this article.²² Without minimizing the contributions of his intellectual predecessors and successors, I believe the centrality of Ambedkar is justified given his extraordinary intellect and status as the first pan-India Dalit leader, along with his resurgence in the Indian public space since the 1990s.²³ Furthermore, this focus on Ambedkar is warranted because his texts exemplify the ideas which IHRL fails to account for, and the contrast between them highlights two competing visions of both understanding and eradicating caste.

The final section attempts to think through the blinkered focus on untouchability from an Ambedkarite perspective. I argue that a close reading of IHRL documents dealing with caste-based discrimination shows a conflation between caste and untouchability. International institutions seem reluctant to acknowledge and condemn the Brahmanical backing of caste. I argue that this reluctance is likely born out of political caution against antagonizing a powerful postcolonial state. Coupled with these geopolitical reasons is an apprehension of accusing a non-Western religious system — in this case, Hinduism — of being responsible for racial discrimination, and therefore being fundamentally incompatible with racial/caste equality. This points to the contradictions of the post-colonial critique of IHRL. While these critics have rightly decried the Eurocentric assumptions undergirding IHRL, we see that their critique also makes it hard to attack systems of oppression which are inextricable with non-Western ‘cultural’ and religious systems. This is, of course, an unintended effect of this critique. Therefore, scholars of international law must ask whether the powerful post-colonial critique of IHRL is being weaponized by postcolonial states like India to shield Hinduism from critical global scrutiny.

Before proceeding, I should clarify that at the heart of this paper is a broad question, ‘what is caste?’ This question has occupied scholars and activists for decades.²⁴ While thinking about caste as an important part of a social totality, thinkers (often from marginalized backgrounds) have conceptualized the relationship between caste, race, class, and gender.²⁵ This field of scholarship and political action is rich, diverse, and deserves recognition. However, my ambition in this paper is more specific. My aim is to articulate a critique of IHRL through an Ambedkarite framework. My paper is intended to supplement the sharp rise in critical thinking around international law’s relationship to class and race by bringing international lawyers into conversation with Ambedkarite thought on caste.²⁶

Some preliminary clarifications regarding categories used in this paper are also in order. ‘Caste’ captures two concepts: *varna* and *jati*.²⁷ The former refers to the four-fold division of Brahmanical

²²See G. Omvedt, *Seeking Begumpura: The Social Vision of Anticaste Intellectuals* (2016).

²³C. Jaffrelot, *Dr Ambedkar and Untouchability: Analysing and Fighting Caste* (2000), 143–61; N. Jaoul, ‘Learning the Use of Symbolic Means: Dalits, Ambedkar Statues, and the State in Uttar Pradesh’, (2006) 40(2) *Contributions to Indian Sociology* 175.

²⁴See G. Guru and S. Sarukkai, *The Cracked Mirror: An Indian Debate on Experience and Theory* (2018); A. Rao, *The Caste Question: Dalits and the Politics of Modern India* (2009).

²⁵See A. Beteille, ‘Race, Caste and Gender’, (1990) 25(3) *Man* 489; H. Gorringer, ‘Afterword: Gendering Caste: Honor, Patriarchy and Violence’, (2018) 19 *South Asia Multidisciplinary Academic Journal* 1; S. Anandhi and K. Kapadia (eds.), *Dalit Women: Vanguard of an Alternative Politics in India* (2017); B. Natrajan, *The Culturalization of Caste in India: Identity and Inequality in a Multicultural Age* (2011); S. Paik, *The Vulgarities of Caste: Dalits, Sexuality, and Humanity in Modern India* (2022).

²⁶See A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2007); A. Anghie, ‘The Evolution of International Law: Colonial and Postcolonial Realities’, (2006) 27(5) *Third World Quarterly* 739; B. S. Chimni, *International Law and World Order* (2017); S. Ranganathan, ‘Global Commons’, (2016) 27(3) *European Journal of International Law* 693; S. Ranganathan, ‘Ocean Floor Grab: International Law and the Making of an Extractive Imaginary’, (2019) 30(2) *European Journal of International Law* 573; R. Knox, ‘Valuing Race? Stretched Marxism and the Logic of Imperialism’, (2016) 4(1) *London Review of International Law* 81.

²⁷On the severe limitations of trying to understand caste as it actually exists through the rigid framework of *varna*, see M. N. Srinivas, *Caste in Modern India* (1962). Famously, Srinivas argued that ‘Concentration on *varna* also meant stressing the attributional or ritual factors in mutual caste ranking at the expense of economic and political factors. There is evidence to show that the ritual position of a caste has changed following on the acquisition of economic or political power, whereas,

society laid down most famously in *Rig Veda*: Brahmins (Priests), Kshatriyas (warriors), Vaishyas (Traders et al.), and Sudras (Artisans/labourers). The ‘Untouchables’ lie outside these four varnas and are deemed impure/polluting. *Jati* denotes the thousands of groups contained within these broad categories (*varnas*), usually tied to the particular hereditary occupation of the group. However, as I will show, Ambedkar was critical of the deployment of this distinction.

‘Dalit’, a Marathi word, means ‘those who have been broken, ground down by those above them in a deliberate and active way’.²⁸ It was used by Ambedkar and popularized in the 1970s by the Dalit Panthers (an Ambedkarite-Marxist revolutionary group) referring to the former Untouchables.²⁹ Since the 1980s, anti-caste movements often refer to the ‘Bahujan’ as their political agent, which means ‘those in the majority’ in opposition to upper-castes or ‘Savarna’, in an attempt to capture converted Dalits and other oppressed castes (like Sudras).³⁰ While there are important conceptual and political differences between Bahujan and Dalit, for the limited purpose of this article, I use them relatively interchangeably. Under the Indian Constitution, Dalits are referred to as ‘Scheduled Castes’ (SC), whereas ‘Other Backward Classes’ (OBC) roughly corresponds to Sudras.

2. IHRL and caste-based discrimination

In this section, I look at the legal doctrine created around caste-based discrimination by CERD and the Sub-Commission. First, I briefly summarize the position of IHRL on caste-based discrimination in both forums before looking at the slippages between caste and untouchability in international forums in Section 2.2.

While ‘caste’ is not explicitly mentioned in international instruments, it has been read into ‘descent’ despite Indian objections. This is relevant because ICERD defines ‘racial discrimination’ as

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment, or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural, or other field of public life.³¹

Therefore, CERD has effectively called caste-based discrimination a form of racial discrimination by reading caste into ‘descent’.³² Ironically, ‘descent’ was added to the ICERD by an amendment

thanks to varna, it is tacitly assumed that ritual factors are primary and others secondary’ (*Ibid.*, at 8). The subsequent five decades of sociological literature have built on this insight, while disputing other elements of Srinivas’ ‘Sankritization’ thesis. See A. Béteille, ‘The Peculiar Tenacity of Caste’, (2012) 47(13) *Economic and Political Weekly* 41; A. Béteille, ‘The Reproduction of Inequality: Occupation, Caste and Family’, (1991) 25(1) *Contributions to Indian Sociology* 3; G. Guru and S. Sarukkai, *Experience, Caste, and the Everyday Social* (2019); H. Gorringe, ‘The Caste of the Nation: Untouchability and Citizenship in South India’, (2008) 42(1) *Contributions to Indian Sociology* 123.

²⁸E. Zelliott, *From Untouchable to Dalit* (1996), 267.

²⁹See S. Charsley, ‘“Untouchable”: What Is in a Name?’, (1996) 2(1) *Journal of the Royal Anthropological Institute* 1.

³⁰H. Gorringe, ‘Dalit Politics: Untouchability, Identity, and Assertion’, in A. Kohli and P. Singh (eds.), *Routledge Handbook of Indian Politics* (2013), 119.

³¹1965 International Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195, Art. 1(1).

³²While this paper critiques the inclusion of caste within the rubric of ‘descent’, earlier scholarship has already addressed the problems of turning race into a ‘biological’ concept under international law rather than a political category which was historically constituted. Even though my paper does not explicitly deal with this valid critique of race as ‘descent’, my intention here is not to create a false binary between caste and race. However, exploring the precise nature of the relationship between caste and race under international law is beyond the scope of this paper. For scholarship critical of race as ‘descent’, see F. Fanon, *Wretched of the Earth* (1967); M. Mutua, ‘Critical Race Theory and International Law: The View of an Insider-Outsider’, (2000) 45 *Villanova Law Review* 841; E. T. Achiume and D. W. Carbado, ‘Critical Race Theory Meets Third World Approaches to International Law’, (2020) 67 *UCLA Law Review* 1462; See Knox, *supra* note 26; R. Knox, ‘International law,

proposed by the Indian delegation.³³ The Indian state had consistently claimed until 1996 that caste-based affirmative action measures for ‘lower-castes’ under Indian constitutional law were saved by Article 1(4) of ICERD. Article 1(4) protects ‘special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection’³⁴ from constituting racial discrimination. Therefore, it could be argued that the Indian state was already acknowledging that caste was a sub-category of race, and that caste-based discrimination could constitute racial discrimination under Article 1(1).³⁵

2.1. Legal status of caste as ‘descent’

2.1.1. CERD

In its 1996 Concluding Observations on India, CERD³⁶ affirmed that caste-based discrimination constituted racial discrimination under Article 1(1) of ICERD.³⁷ They did so despite persistent Indian objections that caste was not equivalent to race,³⁸ and ‘to confer a racial character on the caste system would create considerable political problems’.³⁹ IDSN, a coalition of anti-caste NGOs, criticized the Indian delegation for focusing on an ‘unproductive debate on [the] semantics’⁴⁰ of whether caste was the same as race, instead of recognizing that ‘both types of discrimination produced comparable forms of political, economic, and social exclusion’.⁴¹ In the 2001 Thematic Discussion on ‘descent’, CERD member Patrick Thornberry argued that ‘descent’ referred to ‘forms of inherited status’⁴² or immutable characteristics other than race, and Indian arguments that the term ‘descent’ in the Convention clearly referred to ‘race’⁴³ missed the point. This view was echoed by other members, who pointed out that ‘caste [was] an important aspect of descent but surely not the sum of it’.⁴⁴

Subsequently, CERD passed General Recommendation 29, which affirmed that caste-based discrimination was covered under the rubric of ‘racial discrimination’ in Article 1(1) of ICERD as

Race, and Capitalism: A Marxist Perspective’, (2023) 117 *AJIL Unbound* 55; R. Knox and D. Whyte, ‘Vaccinating Capitalism: Racialised Value in the COVID-19 Economy’, (2023) 28(2) *Mortality* 329.

³³See Keane, *supra* note 13; see also Thornberry, *supra* note 16.

³⁴See ICERD, *supra* note 31, Art. 1(4).

³⁵See Waughray and Keane, *supra* note 16. See also E. Schwelb, ‘The International Convention on the Elimination of All Forms of Racial Discrimination’ (1966) 15(4) *International & Comparative Law Quarterly* 996, 1003.

³⁶As a treaty body, the Concluding Observations and General Recommendations of CERD arguably constitute ‘subsequent practice in the application of the treaty’ and therefore are a source of international law under Art. 38(1)(a) of the Statute of the International Court of Justice. In any case, the pronouncements of CERD probably constitute a subsidiary source of international law under Art. 38(1)(d) of the ICJ Statute. See 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331, Art. 31(3)(b); M. Murakami, ‘Meaning of “Descent” in the International Convention on the Elimination of All Forms of Racial Discrimination and its Applicability to Caste and Buraku Discrimination’, (2001) *International Movement Against All Forms of Discrimination and Racism (IMADR) research paper*, cited in P. Prove, ‘Caste and the Universal Declaration of Human Rights’, (2003) *ISDN*, available at idsn.org/wp-content/uploads/user_folder/pdf/New_files/UN/CasteandDescent.pdf.

³⁷See CERD, *supra* note 8.

³⁸CERD, Summary Record of 1796th Meeting, UN Doc. CERD/C/SR.1796 (23 February 2007); see CCPR, *supra* note 9, para. 7. See also Beteille, *supra* note 25; S. Visvanathan, ‘The Race for Caste: Prolegomena to the Durban Conference’, (2001) 36(27) *Economic & Political Weekly* 2512.

³⁹CERD, Summary Record of the 1162nd Meeting: Consideration of Reports, Comments and Information submitted by States Parties under Article 9 of the Convention: India and Malta, UN Doc. CERD/C/SR.1162 (27 November 1996), para. 37.

⁴⁰IDSN, ‘Position Paper on Interrelations between Caste, Descent and Race’, available at idsn.org/wp-content/uploads/user_folder/pdf/New_files/IDSN/IDSN_position_paper_on_Caste_Race_and_Descent_12-4-2010_FINAL.pdf, 2.

⁴¹*Ibid.*, 1.

⁴²CERD, Summary Record of 1531st Meeting: Thematic Discussion on Discrimination Based on Descent, UN Doc. CERD/C/SR.1531 (16 August 2002), para. 11.

⁴³See CCPR, *supra* note 9, para. 7.

⁴⁴See CERD, *supra* note 42, para. 3. See also CERD, *supra* note 39, para. 22.

an aspect of ‘descent’.⁴⁵ The Recommendation abided by Thornberry’s suggestion of ‘creating a set of indicators . . . to include the notions of hierarchy as opposed to equality’⁴⁶ to identify descent-based discrimination instead of laying down a conceptual definition of caste or descent. Conceptually, the Recommendation proscribed ‘forms of *social stratification such as caste and analogous systems of inherited status* which nullif[ied] or impair[ed] . . . equal enjoyment of human rights’.⁴⁷ This concept was given partial content through a list of examples, but CERD did not want to ring-fence the notion of ‘descent’. CERD has reiterated its position in subsequent dealings with India,⁴⁸ as well as Japan,⁴⁹ Bangladesh,⁵⁰ Nepal,⁵¹ and the United Kingdom.⁵²

2.1.2. UN Sub-Commission on the Promotion and Protection of Human Rights

The UN Sub-Commission⁵³ passed Resolution 2000/4 in August 2000 recognizing that discrimination based on work and descent contravened the spirit of IHRL.⁵⁴ Under the mandate of the Sub-Commission, there have been three working papers and a final report outlining that discrimination based on work and descent includes caste-based discrimination. The issue has also been subsequently studied by the UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance.⁵⁵ The work of the Sub-Commission has broadly echoed CERD’s position that caste-based discrimination is an aspect of descent-based discrimination because it is based on immutable, inherited characteristics. However, the Sub-Commission has added an extra dimension to the analysis of caste in IHRL, by noting that ‘a person’s descent determines or is intimately connected with the type of work they are afforded in society’.⁵⁶

⁴⁵CERD, General Recommendation No. 29 on Article 1, Paragraph 1, of the Convention (Descent), 61st Session, UN Doc. CERD/GEC/7501/E (1 November 2002).

⁴⁶See CERD, *supra* note 42, para. 53.

⁴⁷See CERD, *supra* note 45, 1 (emphasis added).

⁴⁸CERD, Consideration of Reports Submitted by States Parties under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination: India, UN Doc. CERD/C/IND/CO/19 (5 May 2007), para. 8.

⁴⁹CERD, Consideration of Reports Submitted by States Parties under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination: Japan, UN Doc. CERD/C/350/Add.2 (26 September 2000).

⁵⁰CERD, Consideration of Reports Submitted by States Parties under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination: Bangladesh, UN Doc. A/56/18 (30 October 2001), para. 73.

⁵¹CERD, Consideration of Reports Submitted by States Parties under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination: Nepal, UN Doc. A/55/18 (24 March 2000), para. 299.

⁵²CERD, Consideration of Reports Submitted by States Parties under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination: United Kingdom, UN Doc. CERD/C/63/CO/11 (10 December 2003), para. 25. See also A. Waughray, ‘Caste Discrimination: A Twenty- First Century Challenge for UK Discrimination Law?’ (2009) 72(2) *Modern Law Review* 182. See also CERD, Consideration of Reports Submitted by States Parties under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination: Burkina Faso, UN Doc. A/52/18 (26 September 1997), para. 624; CERD, Consideration of Reports Submitted by States Parties under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination: Mauritius, UN Doc. A/51/18 (30 September 1996), para. 548; CERD, Consideration of Reports Submitted by States Parties under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination: Mali, UN Doc. A/57/18 (24 January 2003), para. 406; CERD, Consideration of Reports Submitted by States Parties under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination: Senegal, UN Doc A/57/18 (24 January 2003), para. 44.

⁵³The work of this Sub-Commission probably constitutes a subsidiary source of international law under Art. 38(1)(d) of the ICJ Statute since the members and Special Rapporteurs of such a Sub-Commission would invariably be ‘highly qualified publicists’ of international law. See J. Crawford, *Brownlie’s Principles of Public International Law* (2019).

⁵⁴OHCHR, Discrimination Based on Work and Descent: Sub-Commission on Human Rights Resolution 2000/4, UN Doc. E/CN.4/SUB.2/RES/2000/4 (11 August 2000).

⁵⁵Sub-Commission on the Promotion and Protection of Human Rights, Prevention of Discrimination: Second Expanded Working Paper by Mr Asbjorn Eide and Mr Yozo Yokota on the Topic of Discrimination Based on Work and Descent, UN Doc. E/CN.4/Sub.2/2004/31 (5 July 2004), para. 73.

⁵⁶Sub-Commission on the Promotion and Protection of Human Rights, Prevention of Discrimination and Protection of Indigenous Peoples and Minorities: Working Paper by Mr Rajendra Kalidas Wimala Goonesekere on the Topic of

In the expanded working paper, the Special Rapporteurs clarified that “work” is understood . . . as referring to the occupation or functional role of individuals or groups.⁵⁷ Crucially, the working papers present a richer study of the causal factors and consequences of discrimination based on work and descent, thereby helping us understand the background conceptions of caste at play in the forum.⁵⁸

2.2. Caste and untouchability: Recognition harms

2.2.1. CERD

The 1996 Concluding Observations on India ‘noted that although constitutional provisions . . . exist to *abolish untouchability* . . . and although social and educational policies have been adopted to improve the situation of . . . scheduled castes and tribes and to protect them from *abuses*’,⁵⁹ caste-discrimination persists. The Committee registered its ‘particular concern at reports that . . . scheduled castes and tribes were often prevented from using public wells or from entering cafes or restaurants and . . . their children were sometimes separated from other children in schools’.⁶⁰ It could be argued that the mention of ‘improving the situation of’ SCs and STs through ‘social and educational policies’ incorporates a structural view of caste, and the particular concern for rituals of untouchability does not undercut the socio-economic aspects of caste. However, a closer reading of the surrounding texts paints a troubling picture.

CERD members Mr. Garvolov and Mr. Shahi emphasized, while considering the Indian report, that the rights under the Convention must extend to ‘Untouchables’.⁶¹ Similarly, Mr. Chigovera cited a report submitted to the Committee by the South Asia Human Rights Documentation Centre stating that ‘*untouchability was a system in which people were segregated . . . and that the tradition of untouchability sanctioned widespread discrimination*’.⁶² He emphatically proclaimed that there could be ‘no doubt as to whether the case of Untouchables fell within the purview of the Convention’ and urged India to include information about ‘their campaign *against injustices caused by untouchability* . . . [as well as] the effectiveness of legislation on the abolition of untouchability’.⁶³ In the Thematic Discussion, Mr. Valencia Rodriguez clarified that descent-based discrimination targeted social stratification where ‘groups of people were excluded from society and regarded as “Untouchable”’.⁶⁴ Furthermore, Mr. Kjaerum stressed that descent-based discrimination sought to protect the ‘inherent dignity of human beings’.⁶⁵

One could argue that an expansive conception of ‘dignity’ could include the structural disenfranchisement of caste. However, the evidence increasingly suggests that CERD members used caste and untouchability relatively interchangeably and conceptualized caste-based discrimination as primarily a recognition harm. Even material deprivations, like access to housing, education, and so on, were framed as dignitarian harms instead of analysing the structurally unequal opportunities for so called ‘lower-castes’. Moreover, the near-exclusive focus on bringing

Discrimination Based on Work and Descent, Submitted Pursuant to Sub-Commission Resolution 2000/4, UN Doc. E/CN.4/Sub.2/2001/16 (14 June 2001), para. 7.

⁵⁷Sub-Commission on the Promotion and Protection of Human Rights, Prevention of Discrimination: First Expanded Working Paper by Mr Asbjorn Eide and Mr Yozo Yokota Pursuant to Sub-Commission Decision 2002/108, UN Doc. E/CN.4/Sub.2/2003/24 (26 June 2003), para. 7.

⁵⁸While I understand that the Sub-Commission and CERD are separate forums, I think it is reasonable to assume that their work informs each other, especially given the timing of when the Sub-Commission picked up caste-based discrimination as a topic for investigation. Hence, in the next section, I will at time use evidence from the working papers commissioned by the UN Sub-Commission to make claims about the presumptions undergirding caste in IHRL as a whole.

⁵⁹See CERD, *supra* note 8, para. 23 (emphasis added).

⁶⁰*Ibid.*

⁶¹See CERD, Consideration of India Report, *supra* note 39, paras., 6, 18, 23 and 32.

⁶²*Ibid.*, para. 23 (emphasis added).

⁶³*Ibid.*, para. 24 (emphasis added).

⁶⁴See CERD, *supra* note 42, para. 18.

⁶⁵*Ibid.*, para. 26.

'Untouchables' within the social-religious fold suggests that the problem they thought they were addressing was untouchability.

The General Recommendation laid down that caste-based discrimination could be 'recognised on the basis of various factors', and listed examples such as 'socially enforced restrictions on marriage outside the community, private, and public segregation . . . limitation of freedom to renounce . . . degrading or hazardous work . . . and *generalised lack of respect for their human dignity and equality*'.⁶⁶ That the paragraph outlining the method of recognizing caste-based discrimination through examples ended with 'and a generalised lack of respect', indicates that the Committee envisaged a lack of respect for dignity as the underlying conceptual harm tying together the cited examples. This proposition is supported by the emphasis on descent-based discrimination trying to capture treatment which was 'degrading'⁶⁷ and based on 'specific characteristics that were positively or negatively *evaluated by society*'.⁶⁸

Thornberry, who was a member of the Committee, categorically stated that the 'Recommendation [was] *not against the caste* or any other cultural system as such . . . [instead] the Recommendation [was] on *discrimination on the basis of descent*'.⁶⁹ Therefore, even though the Recommendation [did] cursorily speak about economic and social rights including the right to education, these deprivations were framed as consequences of untouchability rather than the systematic deprivation of resources and knowledge intrinsic to the caste system. Even in the 2007 Concluding Observations, when the Committee cited an admirably wide variety of caste-based practices, it restricted itself to ritualized expressions of caste in the form of untouchability or hate crimes.⁷⁰

2.2.2. UN Sub-Commission on the Promotion and Protection of Human Rights

Interestingly, the first working paper under the mandate of the Sub-Commission began with citing a National Public Hearing on Dalit Human Rights Violations in Chennai, stating that 'caste, as an *institution itself*, [was] a source of gross violation of human rights . . . [and] the caste system *and the equally obnoxious practice of untouchability* must be taken seriously'.⁷¹ However, a subsequent report claimed that 'untouchability [was] the *overarching framework and the essence* of discrimination based on work and descent'.⁷² While not stated as explicitly, this logic probably undergirded the decision of the author of the first report to exclude Scheduled Tribes and Other Backward Classes from the study because 'the discrimination against them . . . [could not] strictly be said to be based on work and descent'.⁷³

This distinction between the deprivation faced by Scheduled Castes versus that encountered by Scheduled Tribes and Other Backward Classes is curious because all three groups share 'descent as a defining criterion for the ascription of [their] marginalised status and associated

⁶⁶See CERD, *supra* note 45, Art. 1 (emphasis added).

⁶⁷*Ibid.*; see Thornberry, 'The Convention on the Elimination of Racial Discrimination, Indigenous Peoples and Caste/Descent-Based Discrimination', *supra* note 16, 41.

⁶⁸See CERD, *supra* note 42, para. 18 (emphasis added).

⁶⁹See Thornberry, 'The Convention on the Elimination of Racial Discrimination, Indigenous Peoples and Caste/Descent-Based Discrimination', *supra* note 16, 42 (emphasis in original).

⁷⁰See CERD *supra* note 48, paras. 13–27.

⁷¹See Sub-Commission on the Promotion and Protection of Human Rights, Working Paper, *supra* note 56, 4 (emphasis added) citing 'Interim Observations and Recommendations of the Jury of the National Public Hearing on Dalit Human Rights Violations' Vol. I, 314.

⁷²Sub-Commission on the Promotion and Protection of Human Rights, Progress-Second Preliminary Report by Yozo Yokota and Chin-Sung Chung on Discrimination Based on Work and Descent, UN Doc. A/HRC/Sub.1/58/CRP.2 (28 July 2006), para. 18; Sub-Commission on the Promotion and Protection of Human Rights, Final Report of Mr Yozo Yokota and Ms Chin-Sung Chung, Special Rapporteurs on the Topic of Discrimination Based on Work and Descent, UN Doc. A/HRC/11/CRP.3 (18 May 2009).

⁷³See Sub-Commission on the Promotion and Protection of Human Rights, Working Paper, *supra* note 56, para. 13.

discrimination'.⁷⁴ Furthermore, their status is 'strongly associated with . . . traditional occupational roles'.⁷⁵ The only plausible explanation seems that the mandate of the Sub-Commission was untouchability, not caste. This was reflected in the Principles drafted in the final report to combat discrimination based on work and descent, which focused on 'combating segregation',⁷⁶ 'effectively punishing acts of untouchability',⁷⁷ and so on, but did not speak about caste as a system of entitlement which warrants dismantling. Similarly, the recommendations of the UN Special Rapporteur on Minority issues also focused on the tension between caste and 'principles of human dignity, equality, and non-discrimination . . . whereby individuals placed in the lowest positions were regarded as "inferior" or "non-human"'.⁷⁸

Another recurrent theme across CERD and the Sub-Commission was the framing of caste as a problem of discriminatory attitudes. In its 1996 Concluding Observations, CERD recommended a 'continuing campaign to educate the Indian population on human rights . . . [to] eliminat[e] institutionalised . . . high-caste and low-caste *mentality*'.⁷⁹ Similarly, in 2007, the Committee noted 'with concern that caste bias . . . [was] deeply entrenched in the minds of wide segments of Indian society'⁸⁰ and therefore recommended India 'strengthen efforts to eradicate the social acceptance of caste-based discrimination'.⁸¹ The Final Report on Discrimination based on Work and Descent similarly emphasized that 'prejudicial *beliefs* . . . constitute[d], support[ed], and reinforce[d] discrimination based on work and descent, including notions of *untouchability*, *pollution*, and *caste superiority*'.⁸² The disproportionate emphasis on caste-based discrimination as a problem of psychological prejudice to be defeated through education evidences that the Committee members probably had instances of untouchability in mind while speaking of 'caste-based discrimination', rather than caste as a system which structures the social totality.⁸³

2.2.3. *Unspoken consensus*

This conceptualization of caste-based discrimination as untouchability does not radically depart from the Indian assertion before the Committee that caste 'has its origins in the functional division of Indian society'⁸⁴ and is 'unique to Indian society and its historical *process*'.⁸⁵ Both positions leave the caste structure intact and are possibly compatible with the view expressed by the Indian delegate that caste had only 'become rigid and exploitative . . . with the *passage of time*',⁸⁶ but was 'originally'⁸⁷ benign. Furthermore, even NGOs lobbying for the inclusion of caste-based discrimination have explicitly and implicitly focused on 'the practice of "untouchability"—the

⁷⁴See Sub-Commission on the Promotion and Protection of Human Rights, Progress- Second Preliminary Report, *supra* note 72, para. 45. See also Keane, *supra* note 16.

⁷⁵*Ibid.*; see also Keane, *supra* note 16.

⁷⁶See Sub-Commission on the Promotion and Protection of Human Rights, Final Report, *supra* note 72, para. 21.

⁷⁷*Ibid.*, para. 13.

⁷⁸Human Rights Council, Report of the Special Rapporteur on Minority Issues, UN GAOR, 31st Session, Agenda Item 3, UN Doc. A/HRC/31/56, para. 22.

⁷⁹See CERD, *supra* note 8, para. 31.

⁸⁰See CERD, *supra* note 48, para. 27.

⁸¹*Ibid.*

⁸²See Sub-Commission on the Promotion and Protection of Human Rights, Final Report, *supra* note 72, paras. 8, 22 (emphasis added).

⁸³See CERD, *supra* note 42, para. 43; see Special Rapporteur on Minority Issues, *supra* note 78, para. 124.

⁸⁴See CERD, Consideration of Reports Submitted by States Parties under Article 9 of the Convention: Fourteenth Periodic Reports of States Parties Due in 1996: India, CERD/ C/ 299/ Add. 3 (29 April 1996), para. 6.

⁸⁵*Ibid.*, para. 7. (emphasis added).

⁸⁶See CERD, *supra* note 39, para. 39 (emphasis added); see Berg, *supra* note 16.

⁸⁷See CERD, *supra* note 39, para. 39. See also CERD, Reports Submitted by States Parties under Article 9 of the Convention: Nineteenth Periodic Reports of States Parties Due in 2006: India, UN Doc CERD/C/IND/19 (29 March 2006). See also 'Statement by India under Item 5: Prevention of Discrimination', available at www.indianet.nl/r040812.html.

imposition of social disabilities on persons by reason of their birth'.⁸⁸ In its 2006 Shadow Report to CERD, the NCDHR equated the practice of untouchability with apartheid,⁸⁹ claiming that the systematic material deprivation of Dalits, from 'illiteracy levels'⁹⁰ to 'labour market discrimination',⁹¹ could be attributed to untouchability.⁹²

While rituals of untouchability undoubtedly play a crucial role in each of these processes, the framing of the NCDHR, CERD, and the Sub-Commission suggest that if untouchability were somehow abolished tomorrow, the material situation of Dalits would probably become human rights compliant. This is different from speaking of untouchability as the ritualization of the system of entitlement to knowledge and resources called caste.⁹³ There appears a broad-consensus between the three most relevant actors in the IHRL arena, the Indian State, NGOs, and international jurists, that 'caste-based discrimination' in IHRL does not refer to the institution of caste.

3. Ambedkar: Annihilating caste

Ambedkar's famous, revolutionary text, *Annihilation of Caste*, was first published as an undelivered speech. In 1935, a 'radical' offshoot of the reformist Arya Samaj,⁹⁴ the *Jat-Pat Todak Mandal* (Forum for break-up of caste) invited Ambedkar to deliver the keynote address at their annual conference in Lahore (formerly undivided Punjab) in 1936. This invitation was already controversial among the predominantly upper-caste Hindu members of the Mandal. Upon receiving the text of Ambedkar's speech, the Mandal wrote to Ambedkar lamenting that he had 'unnecessarily attacked the morality and reasonableness of the Vedas and other religious books of the Hindus . . . which [had] absolutely no connection with the problem at issue'.⁹⁵ Instead, they suggested that 'the word "Veda" be left out'⁹⁶ because several members of the Mandal believed in 'remodelling the Hindu religion'.⁹⁷ Ambedkar, in his inimitable style, replied 'that the portion objected to [was] not only the most relevant but [was] also most important'.⁹⁸ The dispute reached an impasse and Ambedkar self-published the speech in 1936 after the Mandal withdrew their invitation to him.

In this section, I summarize three key interrelated insights of Ambedkar: caste is a socio-economic system of entitlement built on graded inequality; caste and Hinduism are 'consubstantial'⁹⁹; therefore, caste can only be annihilated, not reformed. This is, of course,

⁸⁸Centre for Human Rights and Global Justice and Human Rights Watch, 'Hidden Apartheid: Caste Discrimination Against India's "Untouchables" -Shadow Report to UN CERD', 2006., available at tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/Ind/INT_CERD_NGO_Ind_70_9036_E.pdf, 15.

⁸⁹National Campaign on Dalit Human Rights, Alternate Report to the Joint 15th to 19th Periodic Report of the State Party (Republic of India) to CERD (2006), available at www.indianet.net/pdf/ncdhr0702.pdf, para. 25.

⁹⁰*Ibid.*, para. 15.

⁹¹*Ibid.*, para. 18.

⁹²*Ibid.*, paras. 6-18. See Bob, *supra* note 14; B. Joshi (ed.), *Untouchable! Voices of the Dalit Liberation Movement* (1986); see Lerche, *supra* note 16; see Mehta, *supra* note 16; see Smith, *supra* note 16.

⁹³S. Deshpande, 'Caste and Castelessness: Towards a Biography of the "General Category"', (2013) 48(15) *Economic & Political Weekly* 32.

⁹⁴The Arya Samaj was a late nineteenth century upper-caste Hindu reformist movement which was primarily aimed at 'defending' Hinduism from the encroachments of Islam and Christianity. It sought to accomplish this by preventing conversions to Islam and Christianity, and ameliorating the worst excesses of caste. The solution to untouchability for the Jat-Pat Todak Mandal was to purify the Untouchables and welcome them within Hinduism. See C. Jaffrelot (ed.), *Hindu Nationalism: A Reader* (2007); D. Hardiman, 'Purifying the Nation: The Arya Samaj in Gujarat 1895—1930', (2007) 44(1) *The Indian Economic & Social History Review* 41.

⁹⁵See Ambedkar, *supra* note 3, 'Prologue'.

⁹⁶*Ibid.*, 3.

⁹⁷*Ibid.*

⁹⁸*Ibid.*, 5.

⁹⁹C. Jaffrelot, 'The "Solution" of Conversion', in Jaffrelot, *supra* note 23, 119.

a simplification of Ambedkar's thought. However, this simplification serves the important heuristic purpose of showcasing the shortcomings of IHRL. For that limited purpose, I think this distillation of Ambedkar's thought is defensible.

3.1. Caste, graded inequality, and entitlement

In *Riddles*, Ambedkar argued that what he called the Hindu Social Order has two core characteristics. The first is the division of society into the *chaturvarna* (four *varnas*) system. Crucially, the second is a relationship of graded inequality between these groups.¹⁰⁰ He once described the Hindu caste order as a multi-storeyed building with no staircase, entrance or exit, where everybody had to die on the floor they were born.¹⁰¹ South Asian studies scholar Christophe Jaffrelot points out that this graded inequality is reproduced at the granular level of *jatis*, all of which co-exist in complex inter-relationships of hierarchy and dominance. Each group closes the door on groups below them in the hierarchy and has the door closed on them by groups above them.¹⁰² This means that

There is no such class as a completely unprivileged class except the one which is at the base of the social pyramid. The privileges of the rest are graded. Even the low is privileged as compared with lower. Each class being privileged, every class is interested in maintaining the system.¹⁰³

The entire caste order is pervaded and maintained by what Ambedkar called the 'infection of imitation',¹⁰⁴ that is, Brahmanism. Each caste group (here the distinction between *varna* and *jati* is only one of scale) seeks to guard its own material and moral privileges in the larger social system in opposition to other groups below them in the caste hierarchy, or 'the higher the grade of a caste, the greater the number of [their] rights'.¹⁰⁵ Therefore, Ambedkar argued that caste is characterized by an 'ascending scale of reverence and a descending scale of contempt'.¹⁰⁶ In other words, 'all are slaves of the caste system . . . [b]ut all the slaves are not equal in status'.¹⁰⁷

The consequence of the proliferating virus of caste among the social order is that each caste vehemently and, often violently, protects the interests of its own caste. Ambedkar states that a caste 'society' is, therefore, a contradiction in terms, because caste is suffused with an 'anti-social spirit'.¹⁰⁸ Each caste 'liv[es] for itself and for its selfish ideal'¹⁰⁹ akin to a 'warring group'.¹¹⁰ Consequently, 'a Hindu's public is his caste . . . his responsibility . . . [and] loyalty is restricted only to his caste'.¹¹¹ The in-built contempt for other castes means there are no 'organic filaments'¹¹² within Hinduism binding it together as a community. Instead, 'Hindu society . . . is only a

¹⁰⁰B. Ambedkar, 'Riddle No. 16: The Four Varnas-Are the Brahmins Sure of their Origin?', in Ambedkar, *supra* note 20, 256.

¹⁰¹A. Roy, 'The Doctor and the Saint', in Ambedkar, *supra* note 3.

¹⁰²S. Rege, *Against the Madness of Manu: BR Ambedkar's writings on Brahmanical Patriarchy* (2013), 100.

¹⁰³Education Department, *Babasaheb Ambedkar: Writings and Speeches* (Government of Maharashtra, 1979), Vol. 5, 102, cited in Ambedkar, *supra* note 3, 58.

¹⁰⁴See Roy, *supra* note 101, 18.

¹⁰⁵See Ambedkar, *supra* note 3, para. 21.15.

¹⁰⁶B. Das, *In Pursuit of Ambedkar: A Memoir* (2010), 25.

¹⁰⁷See Ambedkar, *supra* note 3, para. 21.16.

¹⁰⁸*Ibid.*, paras. 7.1 and 7.2.

¹⁰⁹*Ibid.*, para. 7.3.

¹¹⁰*Ibid.*

¹¹¹*Ibid.*, para. 13.1. Whenever Ambedkar used the term 'Hindu', he meant caste-Hindu, that is, non-Untouchable Hindus with a caste, because for him, Dalits were not Hindus. I also use Hindus in the same way in this paper.

¹¹²*Ibid.*, para. 19.4.

collection of castes'.¹¹³ Therefore, while each caste adheres to the logic of purity and pollution and untouchability remains a largely sacred line, it is difficult to identify clear 'victims' and 'oppressors' within the caste order because of the all-encompassing infection of Brahmanism.

Ambedkar's nuanced analysis of the kinds of rights and privileges contained within the caste system is pithily encapsulated in his response to the reformist defence of caste as a division of labour. Most famously articulated by Mohandas Gandhi, the argument was that caste was an efficient division of labour in society which was not necessarily linked to the unequal dignity of the labourers. Instead, Ambedkar sharply argued that caste is a 'division of labourers into watertight compartments'.¹¹⁴ This points to both the material and moral aspects of the caste system. As a *Mahar*, a Dalit caste in Maharashtra, Ambedkar had grown up suffering the indignities of caste. Even after a special legislation enabled him to attend an upper-caste school, he was made to sit on a gunnysack outside the classroom to maintain the 'purity' of the educational space.¹¹⁵ However, Ambedkar steadfastly maintained that merely abolishing the practice of untouchability through 'inter-caste dinners and inter-caste marriages'¹¹⁶ would not 'break up the caste system'.¹¹⁷

Babasaheb, as Ambedkar remains popularly known, was convinced that the caste system was a method of organizing entitlements in society, to wealth, knowledge, land, dignity and ultimately, socio-economic power.¹¹⁸ The rituals of untouchability helped reproduce and reinforce the system by violently policing caste transgressions. Throughout his intellectual and political life, Ambedkar railed against caste-Hindu¹¹⁹ reformers, from the Arya Samaj to Mohandas Gandhi, who elided over questions of restructuring entitlements in society by arguing that untouchability was an errant practice which merited reform within the Hindu fold.¹²⁰ Instead, anti-caste intellectuals — from Jotirao and Savitribai Phule in nineteenth century Maharashtra to Ambedkar and EV Ramaswamy (Periyar) in the twentieth century — focused efforts on increasing access to knowledge and wealth for *Bahujans* along with combating the injustices of untouchability.¹²¹

The Dalit Panthers, who sought to read Ambedkar with Marx, declared in their revolutionary manifesto that to 'eradicate untouchability, all the land [would] have to be redistributed . . . [and] age-old customs and scriptures [would] have to be destroyed and new ideas inculcated'.¹²² This was because 'Hindu feudal rule ha[d] in its hands all the arteries of production, bureaucracy, judiciary, army, and police forces'¹²³ and 'landlords and rich peasants [had] social prestige along with wealth'.¹²⁴ Combatting caste requires confronting and dismantling Brahmanical control over knowledge, resources, and power in society. Therefore, the famous political slogan of Ambedkar, which continues to be chanted across the subcontinent today, was to 'Educate, Agitate, and Organise'.

¹¹³*Ibid.*, para. 6.2. See also Y. Phadke (ed.), *Mahatma Phule Samagra Wangmay (Mahatma Phule's Collected Writings)* (1991), 494.

¹¹⁴See Ambedkar, *supra* note 3, para. 4.1. (emphasis in original).

¹¹⁵See Roy, *supra* note 101.

¹¹⁶See Ambedkar, *supra* note 3, 'Prologue', 5.

¹¹⁷*Ibid.*

¹¹⁸See Roy, *supra* note 101.

¹¹⁹'Caste-Hindu' refers to non-Untouchable Hindus. The point of this categorization -made popular by Ambedkar - was to emphasize the divergence of interests between Untouchables and caste-Hindus.

¹²⁰I have tried to mention Gandhi and his ideas sparingly, informed by Dalit critiques that Ambedkar is too often not appreciated on his own terms, but in reference to Gandhi. See Ambedkar Age Collective, *Hatred in the Belly: Politics behind the Appropriation of Dr Ambedkar's writings* (2015).

¹²¹See G. Omvedt, 'Periyar: Imagining Tamilnadu', in Omvedt, *supra* note 22, 225; G. Omvedt, 'Phule: Remembering the Kingdom of Bali', in Omvedt, *supra* note 22, 159; E. V. R. Periyar, Compiled by K. Veeramani, *Collected Works of Periyar EVR (Periyar Self-Respect Propaganda Institution, 2005)*.

¹²²Dalit Panthers, 'Dalit Panthers Manifesto', *Shodhganga*, 1973, available at shodhganga.inflibnet.ac.in/bitstream/10603/14528/15/15_appendicies.pdf, 1.

¹²³*Ibid.*, 2.

¹²⁴*Ibid.*, 7.

3.2. Caste and Hinduism

Babasaheb knew first hand that caste and untouchability permeated the sub-continent across religions. Upon his return from Columbia University, he struggled to find accommodation in Mumbai, even being turned away by friends from New York. Eventually, he rented an apartment under the guise of being a Parsi. When Ambedkar was found out as a Dalit, he was forcefully evicted. In his Autobiographical Notes, Ambedkar notes of the incident, 'I can even now vividly recall it and never recall it without tears in my eyes . . . It was then for the first time I learnt that a person who is Untouchable to a Hindu is also Untouchable to a Parsi.'¹²⁵ Similarly, on a visit to the Daulatabad fort in Hyderabad in 1934, Ambedkar was attacked by a mob of incandescent Muslims when he tried to drink water from a public tank. Again, he observed, 'this will show that a person who is Untouchable to a Hindu is also Untouchable to a Mohammedan'.¹²⁶ In AOC, he also frames the 'social problem between Catholics and Protestants' in Ireland as ' . . . essentially a problem of caste'.¹²⁷ However, Ambedkar maintained that caste among Hindus was unique because it has 'religious consecration'.¹²⁸

For Hindus, Ambedkar remarked that 'caste [was] a religious dogma',¹²⁹ and unlike non-Hindus, 'religion compels the Hindus to treat isolation and segregation of castes as a virtue'.¹³⁰ Hindus were threatened with being outcaste (virtual excommunication) and socio-economic boycotts, a form of 'non-cooperation by the powerful against the powerless',¹³¹ if they broke caste rules. This earthly threat was coupled with the divine threat of endlessly paying for the sin of defying Brahmanical scriptures in recurrently brutal births and rebirths. This was because 'caste [was] the natural outcome of certain religious beliefs which [had] the sanction of the Shastras, which [were] believed to contain the command of divinely inspired sages . . . endowed with a supernatural wisdom'.¹³² Consequently, Ambedkar stressed that 'Hindus observe caste not because they [were] *inhuman* . . . [but] because they [were] deeply religious'.¹³³ While subsequent sociological literature has contested the reasons for which people follow caste, Ambedkar's central point about Hinduism and caste being interdigitated remains compelling.¹³⁴

Ambedkar's analysis was rooted in extensive readings of Brahmanical religious texts, and Ambedkar's writings were littered with references to the sanctions prescribed in these texts, from the *Manusmriti* to the *Rig Veda* to the *Bhagavad Gita*, for transgression of caste rules.¹³⁵ Nonetheless, Ambedkar was attuned to reformist arguments which sought to re-interpret these texts. He understood the neutering effects of these arguments, and emphasized that 'it [was] no use seeking refuge in quibbles . . . what matter[ed] [was] how the Shastras [had] been understood by the people'.¹³⁶ Hence, he spoke both sociologically and from experience when he declared that 'to the Untouchables, Hinduism [was] a veritable chamber of horrors'.¹³⁷ Therefore, he warned that it was a 'dangerous delusion'¹³⁸ to equate caste among Hindus in the subcontinent with other

¹²⁵B. Ambedkar, Ravikumar (ed.), *Autobiographical Notes* (2003), 19.

¹²⁶*Ibid.*, 25.

¹²⁷See Ambedkar, *supra* note 3, para. 2.19.

¹²⁸*Ibid.*, para. 19.7.

¹²⁹*Ibid.*

¹³⁰*Ibid.*

¹³¹See Roy, *supra* note 101, 45.

¹³²See Ambedkar, *supra* note 3, para. 21.2.

¹³³*Ibid.*, para- 20.9. (emphasis added).

¹³⁴See S. Jodhka, *Caste in Contemporary India* (2017); See Deshpande, *supra* note 93.

¹³⁵See Ambedkar, *supra* note 20; see Ambedkar, *supra* note 3; G. Omvedt, *Buddhism in India: Challenging Brahmanism and Caste* (2003).

¹³⁶See Ambedkar, *supra* note 3, para. 20.12.

¹³⁷Education Department, *Dr. Babasaheb Ambedkar: Writings and Speeches* (Government of Maharashtra, 1991), Vol. 9, 296.

¹³⁸See Ambedkar, *supra* note 3, para. 19.7.

systems of ascriptive moral inequality like race. Such a conflation risked missing the uniqueness of caste having religious sanction.

Ambedkar went one step further, claiming not only that caste had a ‘divine basis’,¹³⁹ but that caste and *varna* formed the ‘soul of Hinduism . . . [because] there [was] nothing else in Hinduism to distinguish it from other religions’.¹⁴⁰ In *Riddles*, Ambedkar claimed Hinduism had no common customs, beliefs, gods, or creed.¹⁴¹ Caste was the ‘essential feature of Hinduism’,¹⁴² and therefore, graded inequality the ‘official doctrine’¹⁴³ of Hinduism rather than ‘the result of historical growth’.¹⁴⁴ In his studies of the history of sub-continental religions, Ambedkar noted that Hinduism was able to absorb, contain, and co-opt most challenges to itself, including the theory of non-violence in Buddhism, but was fundamentally incapable of absorbing challenges to caste and untouchability.¹⁴⁵ Therefore, Ambedkar’s challenge to Hinduism was directed at both its practices *and* its fundamental principles:

If I am disgusted with Hindus and Hinduism, it is because I am convinced that they cherish wrong ideals and live a wrong social life. My quarrel with Hindus and Hinduism is not over the imperfections of their social conduct. It is much more fundamental. It is over their ideals.¹⁴⁶

For Ambedkar, the elevation of Hindu texts to the status of not being ‘made by man . . . [and therefore being] free from failings, faults, and frailties’,¹⁴⁷ transformed Hinduism from a ‘religion’ to a series of commandments backed by sanction. As a result, the ideology of Hinduism had made the minds of Hindus impervious to ‘reason and morality . . . the two most powerful weapons in the armoury of a reformer’.¹⁴⁸ Therefore, the only solution was revolution — which meant challenging Hinduism as a religion of inequality and indignity.

3.3. Annihilation of caste

The combination of religion, sin, and excommunication rendered caste reform within the Hindu religion impossible because in an argument between sub-humans and the Gods, there could only be one winner. Ambedkar warned that ‘a caste [could] easily organise itself into a conspiracy to make the life of a reformer hell’¹⁴⁹ by mobilizing the ideological power of Hinduism and regulating group membership. He argued that caste in Hinduism had been constructed by Brahmins to resist reformist efforts. For instance, the *Manusmriti* categorized ‘rationalism as a canon of interpreting the Vedas and smritis . . . to be as wicked as atheism, and the punishment provided for it [was]

¹³⁹*Ibid.*, para. 21.3.

¹⁴⁰See Ambedkar, *supra* note 100 0, 257 (emphasis added).

¹⁴¹B. Ambedkar, ‘Riddle No. 1: The Difficulty of Knowing why One Is a Hindu’, in Ambedkar, *supra* note 20, 8.

¹⁴²*Ibid.*, 13.

¹⁴³B. Ambedkar, ‘Book One, Part V-The Buddha and his Predecessors-3. The Brahmins’, para. 33, in Ambedkar, *supra* note 21.

¹⁴⁴B. Ambedkar, ‘Book Three, Part V-What is Saddhamma; Section IV-1. Dhamma to be Saddhamma Must Pull Down all Social Barriers’, para. 10, in Ambedkar, *supra* note 21.

¹⁴⁵See Education Department, *supra* note 137, 195; see Roy, *supra* note 101.

¹⁴⁶See Ambedkar, *supra* note 3, para. 10.4. This formed the plank of Ambedkar’s successful political project, which remains deeply popular in India today. Therefore, his views on Hinduism were far from eccentric, but were widely endorsed.

¹⁴⁷B. Ambedkar, ‘Riddle No. 4: Why Suddenly the Brahmins Declare the Vedas to be Infallible and Not to Be Questioned?’, in Ambedkar, *supra* note 20, 30; B. Ambedkar, ‘Riddle No. 5: Why Did the Brahmins Go further and Declare that the Vedas Are Neither Made by Man nor by Gods’, in Ambedkar, *supra* note 20, 35; B. Ambedkar, ‘Riddle No. 6: The Contents of the Vedas: Have They any Moral or Spiritual Value?’, in Ambedkar, *supra* note 20.

¹⁴⁸See Ambedkar, *supra* note 3, para. 22.16.

¹⁴⁹*Ibid.*, para. 12.4

excommunication'.¹⁵⁰ Since caste was prescribed in the Vedas and Smritis, 'appeal to reason [could] have no effect on a Hindu'.¹⁵¹

This was in direct opposition to a strand of caste reformism, advocated by the Arya Samaj, the Hindu Mahasabha,¹⁵² and Gandhi, among others. They argued that caste was integral to Indian 'tradition' and 'culture', and defended the *chaturvarna* (four varnas) system as a functional division of labour in society where a person's status would theoretically be judged by his worth [*guna*] and not his birth.¹⁵³ Gandhi argued for a moral reappraisal of the worth of different kinds of labour, stating that the 'callings of a Brahmin and a scavenger [were] equal, and their due performance carri[ed] equal merit before God'.¹⁵⁴ Therefore, he framed Untouchability as a moral failure of upper-caste Hindus which needed to be overcome.¹⁵⁵

Ambedkar fiercely opposed this framing, arguing that to speak of a *chaturvarna* system based on worth was not only incongruous but disingenuous.¹⁵⁶ The labels of Brahmin, Kshatriya, Vaishya, and Shudra had millennia-old meanings and could not be wished away. Moreover, he asked Gandhi, 'How are you going to compel people who have acquired a higher status based on birth, without reference to their worth, to vacate that status?'¹⁵⁷ Furthermore, he argued that to frame untouchability as a moral failure of individual Hindus was to miss that with Hindus the problem was 'the entire basis of their relationship to [their] fellows . . . [therefore] there [could] be a better Hindu or a worse Hindu but a good Hindu there [could not] be'.¹⁵⁸ In practice, Ambedkar pithily observed, there would be little distinction between the brutal caste system (as *jati*) and the idealised *chaturvarna* in Gandhi's *Rama Rajya* (Kingdom of Lord Rama).¹⁵⁹ Babasaheb insisted that there would 'be out-castes as long as there [were] castes'.¹⁶⁰

Ambedkar pointed out that neither Hindu social reformers nor Communist political revolutionaries, operating in India since broadly the late nineteenth century, had achieved much

¹⁵⁰*Ibid.*, para. 22.4.

¹⁵¹*Ibid.*, para. 22.8; see Ambedkar, 'Book One, Part V-The Buddha and his Predecessors-3. The Brahmins', *supra* note 143.

¹⁵²The Akhil Bharatiya Hindu Mahasabha was founded in 1907 as a 'non-secular party, established for safeguarding the issues of Hindus'. In many ways, it was the political predecessor to the Jan Sangha and eventually the Bharatiya Janata Party, and had close ties to the Rashtriya Swamsevak Sangh (RSS). See P. Babu, *Hindu Mahasabha in Colonial North India, 1915-1930: Constructing Nation and History* (2012).

¹⁵³See S. Palshikar, 'Gandhi-Ambedkar Interface . . . When Shall the Twain Meet?', (2014) 49(13) *Economic & Political Weekly* 2070-2. As mentioned in Section 3.1.1, these reformists also drew a distinction between caste and Untouchability, and advocated against the latter.

¹⁵⁴M. Gandhi, 'Dr Ambedkar's Indictment—2', in Ambedkar, *supra* note 3, para. 2.2.

¹⁵⁵See R. Guha, 'Gandhi's Ambedkar', in A. Singh and S. Mohapatra, *Indian Political Thought: A Reader* (2008), 33; see Roy, *supra* note 101.

¹⁵⁶I have already referred earlier to the problems of understanding caste through *varna* alone. My aim in this paper is not to elucidate the relationship between caste and class — it is simply to put two of Ambedkar's key ideas of what constitutes caste in conversation with IHRL. However, the materialism of Ambedkar has been the subject of fierce debate for decades in scholarship on South Asia. For these debates, and the relationship between caste and class, see K. Ilaiah, *Buffalo Nationalism: A Critique of Spiritual Fascism* (2004); V. Prashad, *Untouchable Freedom: A Social History of a Dalit Community* (2000); A. Teltumbde, 'Economics of Babasaheb Ambedkar', in G. Sridevi (ed.), *Ambedkar's Vision of Economic Development for India* (2020), 53.; A. Beteille, *Caste, Class and Power: Changing Patterns of Stratification in a Tanjore Village* (2012); G. Guru, 'Neo-Buddhism, Marxism and the Caste Question in India', (2020) *Classical Buddhism, Neo-Buddhism and the question of caste* 111; A. Shah, *Ground Down by Growth: Tribe, Caste, Class and Inequality in 21st Century India* (2017). This debate is further inflected by the uneasy relationship between lower-caste groups and Communist parties in India through the twentieth century because the Communists (often from dominant castes), have consistently reduced caste to 'superstructure' which must be analytically and political subservient to the class 'base'. On Ambedkar's own relationship with Communists of his time, see A. Teltumbde, *BR Ambedkar: India and Communism* (2017).

¹⁵⁷See Ambedkar, *supra* note 3, para. 16.2.

¹⁵⁸A Reply to Mahatma: BR Ambedkar', see Ambedkar, *supra* note 3, para. 5.3.

¹⁵⁹Ram Rajya was the socio-political utopia for Gandhi. See V. Lal, 'The Gandhi Everyone Loves to Hate', (2008) 43(40) *Economic & Political Weekly* 55.

¹⁶⁰Cited in Publications Division, Government of India (ed.), *The Collected Works of Mahatma Gandhi* (Publications Division, Government of India, 1999), Vol. 59, 227; see Roy, *supra* note 101.

success in reforming Hinduism. This, he argued, was because these groups had failed to recognize and combat the social and religious power of caste. He declared that ‘you [could not] have political . . . [or] economic reform unless you kill[ed] this monster [of caste]’.¹⁶¹ Even the oppressed could not unite to overthrow the system unless caste was annihilated because caste militated against inter-caste fraternity, especially among Bahujans. Moreover, Hinduism convinced the oppressed that their circumstances were the result of actions in a previous birth.¹⁶² This, combined with the Brahmanical monopoly on knowledge, meant that caste deprived the oppressed of their ‘political weapon . . . in suffering; and [their] moral weapon . . . in education’.¹⁶³ Ambedkar once quipped, ‘If Lenin had been born in India, he would first eradicate casteism and untouchability from among workers.’¹⁶⁴

For this ‘emancipation of the mind and soul’,¹⁶⁵ the religious sanction for caste must be confronted. Appeals to reason or morality were wholly inadequate and failed to understand the ideological power of Brahmanism. Therefore, Ambedkar prescribed that the enemy to grapple with was ‘not the people who observe[d] caste, but the Shastras which [taught] them this religion of caste’.¹⁶⁶ Arranging occasional inter-caste dinners or marriages was ‘like forced feeding brought about by artificial means’.¹⁶⁷ The only tenable political solution was ‘to destroy the belief in the sanctity of the Shastras’.¹⁶⁸ Babasaheb realised that the political project he was outlining would be difficult, if not impossible, to achieve. Nevertheless, he emphasized:

Whether the doing of the deed takes time or whether it can be done quickly, you must not forget that if you wish to bring about a breach in the system, then you have got to apply the dynamite to the Vedas and the Shastras, which deny any part to reason; to the Vedas and Shastras, which deny any part to morality. You must destroy the religion of the shrutis and the smritis. Nothing else will avail.¹⁶⁹

A pivotal element of this political project was the exit of Dalits from the Hindu fold.¹⁷⁰ At the Second Round Table Conference in 1931, Gandhi and Ambedkar clashed over who was the legitimate representative of Untouchables on the issue of separate electorates for the community.¹⁷¹ When Gandhi rebuked Ambedkar for his sharp criticism of the Congress, Ambedkar remarked, ‘Gandhiji, I have no Homeland. No Untouchable worth the name will be proud of this land.’¹⁷² Similarly, whenever *Savarna* Indian nationalists sought to remind Ambedkar that he was ‘part of the whole’, he would reply, ‘But I am not a part of the whole, I am a part apart!’¹⁷³ This insistence on resisting Hindu assimilation was because Ambedkar had realised

¹⁶¹See Ambedkar, *supra* note 3, para. 3.13.

¹⁶²See Ambedkar, ‘Book One, Part V-The Buddha and his Predecessors-3. The Brahmins’, *supra* note 143.

¹⁶³See Ambedkar, *supra* note 3, para. 17.6.

¹⁶⁴G. Omvedt, ‘Ambedkar: Prabuddha Bharat’, in Omvedt, *supra* note 22, 249. This also captures some of the difficulties between Ambedkar and the Communists of his time.

¹⁶⁵See Ambedkar, *supra* note 3, para. 2.22.

¹⁶⁶*Ibid.*, para. 20.9.

¹⁶⁷*Ibid.*, para. 20.11.

¹⁶⁸*Ibid.*, para. 20.9.

¹⁶⁹*Ibid.*, para. 22.17.

¹⁷⁰See also Periyar on this, who claimed, ‘The Shudra label will not go by merely consigning the Vedas, Shastras, Puranas and Itihasa to fire. It will not go by demolishing temples and breaking up idols . . . The Shudra tag will not by merely calling oneself Dravidian. In today’s context it will not even go if you declare that you are not a Hindu . . . the only solution was an alternate powerful religion’, in G. Omvedt, ‘Periyar: Imagining Tamilnadu’, in Omvedt, *supra* note 22, 225 at 227.

¹⁷¹G. Omvedt, *Ambedkar: Towards an Enlightened India* (2017), 33–43.

¹⁷²D. Keer, *Dr Ambedkar: Life and Mission* (1990), 167; see Roy, *supra* note 101.

¹⁷³G. Omvedt, ‘“We Are against Brahmanism but not Brahmins”: Beginning the Fight for Dalit Human Rights’, in Omvedt, *supra* note 171, 23 at 28.

since the late 1920s¹⁷⁴ that Dalits could never claim equality within Hinduism.¹⁷⁵ Hence, he declared that ‘the object of [Dalit] struggle is our liberation from Hinduism’.¹⁷⁶

As a result, Babsaheb was sceptical of temple entry movements, the chief concern of Gandhi’s *Harijan*¹⁷⁷ *Sevak Sangha* formed after the Second Round Table Conference. Untouchables had often been banned from entering Hindu temples because their presence was deemed polluting. The aim of reformist movements was to facilitate the entry of Dalits into Hindu temples, thus symbolising their acceptance into the Hindu fold. However, Ambedkar remained wary of temple-entry movements because he was convinced that Untouchables could never be equals *within* Hinduism.

Even when Ambedkar participated in temple entry movements, he would stress that the Dalit’s ‘problem would not be solved by temple entry . . . politics, economics, education, religion—all were part of the problem’.¹⁷⁸ His participation in such movements was often motivated by pragmatism to ‘energise the Depressed Classes and make them conscious of their position’.¹⁷⁹ His search for a religion consistent with the principles of Liberty, Equality, and Fraternity led him to Buddhism, which he partly remade in the image of his principles.¹⁸⁰ In 1935, Ambedkar rued with his characteristic defiance, ‘I had the misfortune of being born with the stigma of an Untouchable . . . but I will not die a Hindu’.¹⁸¹ In 1956, he fulfilled this promise when he led a mass conversion of over 600,000 Dalits to Buddhism under an oath crafted by him.¹⁸²

4. IHRL and caste: Epistemic limitations and post-colonial anxieties

This section seeks to bring together the insights from the preceding two sections. I argue that looking at the established IHRL doctrine on caste through an Ambedkarite lens raises two questions. First, whether the tendency of IHRL to reduce caste to individual harms of recognition is due to the epistemic limitations of IHRL. Second, this case-study prompts one to probe whether the powerful postcolonial critique of IHRL unintentionally allows postcolonial states like India to escape legitimate international scrutiny. I offer preliminary answers to these questions, and open the way for future scholarship to investigate these difficult questions more thoroughly.¹⁸³

¹⁷⁴At the Mahad Satyagraha in 1927, where Ambedkar was leading a Dalit mobilisation to drink water from a public tank, he said, ‘We want equal rights in society. We will achieve them as far as possible while remaining within the Hindu fold or, if necessary, by kicking away this worthless Hindu identity. And if it becomes necessary to give up Hinduism it would no longer be necessary for us to bother about temples.’ Quoted in M. Gore, *The Social Context of an Ideology* (1993), 91; see Jaffrelot, *supra* note 99.

¹⁷⁵See Omvedt, *supra* note 171; see Gore, *supra* note 174, 91; see Jaffrelot, *supra* note 99.

¹⁷⁶Cited in B. Das, *Thus Spoke Ambedkar* (2010), Vol. 4, 51.

¹⁷⁷Harijan means ‘children of God’. Ambedkar and his followers have always considered this term patronizing. See Charsley, *supra* note 29.

¹⁷⁸Quoted in E. Zelliott, *Dr Ambedkar and the Mahar Movement* (1969), 114; see C. Jaffrelot, ‘Analysing and Ethnicising Caste to Eradicate it More Effectively’, in Jaffrelot, *supra* note 23, 31.

¹⁷⁹S. Ajnat (ed.), *Letters of Ambedkar* (1993), 55-6; see G. Omvedt, ‘“I Will Not Die a Hindu”: The Conversion Shock, in Ambedkar’, in Omvedt, *supra* note 171, 46 at 46-56.

¹⁸⁰See Jaffrelot, *supra* note 99.

¹⁸¹Cited in E. Zelliott, *Ambedkar’s World: the Making of Babasaheb and the Dalit Movement* (2013), 147.

¹⁸²See Jaffrelot, *supra* note 99.

¹⁸³This call to attention to the peculiarity of caste in South Asia does not amount to an affirmation of standpoint epistemology, or a negation of more universalist epistemologies. These particularities can be accounted for from universalist perspectives as well. However, the paper is trying to clarify that even to use universalist solutions like anti-discrimination law, these categories need to account for what is peculiar about caste - that is, its religious backing. Without understanding caste as structure backed by Hinduism, it is difficult for these universalist categories to even properly identify caste discrimination, let alone redress it. In fact, my paper is trying to point out the problems with bracketing out the possibility of ‘non-western cultural systems’ being oppressive. Therefore, the comments offered in this section are ambivalent to, or independent of, the big debates between standpoint and universalist epistemology.

4.1. Caste and Hinduism in IHRL

In international legal debates around caste-based discrimination, there has been a conspicuous silence around Hinduism. The Indian state has consistently framed caste as a cultural question. Crucially, NGOs ‘pragmatically accepted’¹⁸⁴ the approach of couching problems of untouchability in the spacious framework of discrimination based on work and descent. Part of the condition for international recognition was the deracination of caste by ‘identifying populations outside India and the Hindu cultural sphere who suffered this form of discrimination’¹⁸⁵ to prove, in the words of one activist ‘that addressing caste-based discrimination [was] not just a politically-motivated attack on India, but a genuine and under-recognized human rights issue affecting a number of different societies’.¹⁸⁶ The IDSN, for instance, argued that ‘discrimination based on work and descent [was] usually embedded in a discernible context of religious, moral, or cultural beliefs . . . [but appreciation of] *such context [was] not necessary for identifying discrimination*’.¹⁸⁷ This was coupled with a strategy to invoke continuities with the apartheid regime,¹⁸⁸ probably keeping the historical legacy of CERD in mind. While these are clever advocacy strategies which have largely borne fruit, they leave little room for appreciating any uniqueness about caste among Hindus.¹⁸⁹

The most direct engagement with Hinduism’s role in caste was undertaken in the First Working Paper under the UN Sub-Commission’s mandate. This paper mentioned the debate about the religious basis of caste between Ambedkar, ‘a learned and respected Indian leader and advocate of the rights of Untouchables . . . [and] *Mahatma Gandhi, the spiritual leader of India*’.¹⁹⁰ The author of the working paper proceeded to cite Gandhi to assert that ‘caste has nothing to do with religion . . . it is a custom whose origin I [Gandhi] *do not know and do not need to know*’.¹⁹¹ In a strange move, the author concludes rather abruptly that ‘the debate as to whether caste is or is not derived from Hindu scriptures need not detain us’,¹⁹² not because it is untrue, but ‘because 85 per cent of India’s 1 billion people remain Hindu . . . [and] only a few million followed Dr Ambedkar and became Buddhists’.¹⁹³ That Ambedkar may not have succeeded in annihilating caste and Hinduism does not seem like a good reason to dismiss the concerns about the germ of caste constituting the soul of Hinduism.

Other mentions of religion have been fleeting. In a passing comment, the Committee had asked the Indian state if caste as a social system ‘was to some extent the result of religious belief’¹⁹⁴ in 1988. However, the question went unanswered. In the 2001 Thematic Discussion, Thornberry

¹⁸⁴See Bob, *supra* note 14, 191.

¹⁸⁵*Ibid.*

¹⁸⁶P. N. Prove, ‘Working Paper on Discrimination on the Basis of Work and Descent: Call for Submissions’, cited in Bob, *supra* note 14, 192. See also IDSN, ‘Dalits Break through the UN Wall of Silence’, 19 April 2005, available at www.indianet.nl/pb050419.html.

¹⁸⁷IDSN, ‘Draft UN Principles and Guidelines for the Effective Elimination of Discrimination Based on Work and Descent: A Comprehensive Legal Framework to Eliminate Caste Discrimination Globally’, available at idsn.org/uploads/media/UN_Principles_And_Guidelines_-_IDSN.pdf, 11 (emphasis added).

¹⁸⁸See for instance, Centre for Human Rights and Global Justice and Human Rights Watch, *supra* note 88.

¹⁸⁹To be fair, NCDHR’s shadow report does mention that the ‘cultural values and practices have *stemmed from religious values and code of conduct as enshrined in the Shastras*’ (emphasis added). However, this analysis about the religious sanction of caste remains isolated to a couple of paragraphs, and plays no decisive role in the final recommendations of the report. If anything, the report contradicts this Ambedkarite insight when speaking about temple entry movements (which I will analyse later in this paper). See NCDHR, *supra* note 89, para. 325.

¹⁹⁰See Sub-Commission on the Promotion and Protection of Human Rights, Working Paper, *supra* note 56, para. 9 (emphasis added).

¹⁹¹*Ibid.*

¹⁹²*Ibid.*, para. 11 (emphasis added).

¹⁹³*Ibid.* (emphasis added).

¹⁹⁴General Assembly, Report of the Committee on the Elimination of Racial Discrimination: Official Records: Forty-Second Session, UN Doc. Supplement No. 18 A/42/18 (7 August 1987), para. 756.

expressed scepticism about ‘assertions that caste systems had a millennial religious basis’,¹⁹⁵ not because of the veracity of the assertions, but because that ‘argument enhanced their scope and power’.¹⁹⁶ The UN Special Rapporteur on Minority issues pointed out that ‘caste’ under IHRL had ‘transcended religious affiliation...[and] may be based on...a religious or secular background’.¹⁹⁷

Similarly, the expanded working paper under the mandate of the Sub-Commission noted that ‘while in the case of the caste system of South Asia, there [was] a strong association with Vedic prescriptions in Hinduism, it [was] less clear in other cases’.¹⁹⁸ And because the South Asian caste system was only an example of discrimination based on work and descent, there was no conceptual link between such discrimination and religion under IHRL. Therefore, even though the working papers spoke extensively about notions of purity and pollution being imbricated with discrimination based on work and descent,¹⁹⁹ they did not link the ideological basis of these notions to religion.

Several jurists framed caste-based discrimination (untouchability) as being a problem rooted in ‘social norms’²⁰⁰ steeped in a ‘millennia-old tradition’²⁰¹ which could not ‘be justified today’.²⁰² Mr. Kjaerum argued that the dignitarian harms of untouchability meant ‘the underlying causes could not simply be attributed to *culture, religion, or tradition*, but were a human rights issue’.²⁰³ Some jurists blamed ‘discriminatory customs and institutions’²⁰⁴ which were ‘deeply rooted in societies and cultures’²⁰⁵ for discrimination. The imprecise use of words like ‘social’, ‘culture’, and ‘tradition’ seems a consequence of the reticence of the jurists to name the Brahmanical elephant in the room. This reluctance can also be gauged from Thornberry’s defence of the Committee against charges of cultural imperialism. He argued that ‘the sense of belonging and meaning provided by a caste was greatly weakened when caste members contested the validity of their condition’,²⁰⁶ and while ‘the Committee ha[d] a high level of respect for cultures’,²⁰⁷ when dealing with caste the Committee must ask ‘whose culture was involved’.²⁰⁸ Clearly, the Committee felt it was treading on dangerous ground.

4.2. Epistemic limitations of IHRL in facing the Brahmanical Hydra

I have shown how IHRL’s conceptualization of caste-based discrimination predominantly targeted practices of untouchability. However, as Bahujan intellectuals have emphasized for centuries, untouchability is merely the ceremonial expression of the unequal moral worth of individuals intrinsic to caste. This expression can find innumerable outlets. For instance, in the early twentieth century, most Mahar workers in textile mills in Maharashtra were placed in the spinning department because the weaving department required workers to hold needles in their mouth, and

¹⁹⁵See CERD, *supra* note 42, para. 12.

¹⁹⁶*Ibid.*

¹⁹⁷See Special Rapporteur on Minority Issues, *supra* note 78, para. 27.

¹⁹⁸See Sub-Commission on the Promotion and Protection of Human Rights, *supra* note 57, para. 50.

¹⁹⁹See Sub-Commission on the Promotion and Protection of Human Rights, Final Report, *supra* note 72, para. 2; *Ibid.*

²⁰⁰See CERD, *supra* note 48, para. 18.

²⁰¹See CERD, *supra* note 42, paras. 18, 30 and 43.

²⁰²See Sub-Commission on the Promotion and Protection of Human Rights, Working Paper, *supra* note 56, para. 48.

²⁰³See CERD, Thematic Discussion, *supra* note 42, para. 26 (Emphasis added).

²⁰⁴See Sub-Commission on the Promotion and Protection of Human Rights, *supra* note 55, guideline (c).

²⁰⁵Sub-Commission on the Promotion and Protection of Human Rights, Second Preliminary Report, *supra* note 72, principle (ii) and para. 17. See also CERD, *supra* note 51, paras. 289–306.

²⁰⁶See CERD, *supra* note 42, para. 12.

²⁰⁷See Thornberry, ‘The Convention on the Elimination of Racial Discrimination, Indigenous Peoples and Caste/Descent-Based Discrimination’, *supra* note 16, 43.

²⁰⁸See CERD, *supra* note 42, para. 12.

the saliva of a Dalit was deemed contaminating.²⁰⁹ Similarly, between 1930 and 1942, whenever the Indian National Congress wanted to delegitimize a provincial election organized by the British colonial state, they would field mock Dalit candidates to dissuade caste-Hindus from contesting the elections. Popular slogans included, ‘Who will go to the Legislatures? Only barbers, cobblers, potters, and sweepers’²¹⁰.

Even Dalit refugees from West Pakistan to the newly formed Indian state were treated differently from caste-Hindu and Sikh refugees. The latter were resettled in permanent houses or provided land in villages while the former had to settle for temporary (*kaccha*) houses and were presumed to be landless.²¹¹ Ambedkar himself had been able to attend school because of a legislative measure seeking to abolish segregation in schools but encountered other forms of humiliation even after getting his foot in the door. Therefore, trying to abolish untouchability by recognizing and clamping down on individual practices will likely be fruitless because ‘pollution stretches without beginning and end’ — as suggested in the epigraph. Brahmanism inspires creativity for dehumanization. The blinkered focus on untouchability elides over caste as a system of graded inequality where neat categorizations of victim and oppressor are difficult. As a result, the work of the UN Sub-Commission explicitly excludes Scheduled Tribes and Other Backward Classes from the purview of its study on discrimination based on work and descent. This exclusion is probably because these groups are not understood to be at the ‘bottom’ of the caste hierarchy. However, these groups also suffer the indignities and material deprivations of the caste system. IHRL remains unable to recognize this oppression.

The structure of IHRL remains predominantly to identify individual harms which can be remedied by holding states accountable. As international legal scholar Susan Marks has argued, IHRL is poor at identifying structural harm even when the human rights movement is self-avowedly seeking to uncover the ‘root causes’ of oppression.²¹² Therefore, the problem is deeper than the Sub-Commission or CERD not paying enough attention to caste as social structure. Arguably, the episteme of IHRL is blinkered and restricts itself primarily to recognition harms, leaving questions of distribution out of sight.²¹³ The diffuse nature of distribution harms arguably makes them harder to capture for IHRL. One could point to counter-histories of socio-economic rights in the UNGA between the 1950s-1970s to evidence that IHRL can address structural issues of material inequality.²¹⁴ However, the decisive turn in IHRL since the 1970s to political rights focusing on recognition harms away from socio-economic rights redressing distribution harms arguably reflects the deeper epistemological problems within human rights.

Defenders of IHRL might claim that this turn was a result of political battles over the nature of rights rather than any inherent epistemic limitations of rights as a framework. Nevertheless, even during the high-point for socio-economic rights in the 1960s, we saw that these rights were expressed aspirationally by postcolonial states. A couple of things are worth noting here. First, that socio-economic rights needed the backing of the Soviet Bloc and the newly emerging Third World to even make an appearance on the international legal map. And the kinds of economic inequality targeted by these states was primarily international, rather than socio-economic inequality within nation-states. Therefore, the most successful push for socio-economic dimensions to rights came through the articulation of Permanent Sovereignty over Natural Resources as the economic

²⁰⁹V. Moon et al. (eds.), *Dr. Babasaheb Ambedkar Writings and Speeches* (2002), Vol. 18, Part 2, at 98–99.

²¹⁰See Roy, *supra* note 101, 58.

²¹¹See G. Omvedt, ‘Building a Palace on a Dung Heap’: The Post-Independence Years’, in Omvedt, *supra* note 171, 81.

²¹²S. Marks, ‘Human Rights and Root Causes’ (2011) 74(1) *Modern Law Review* 57.

²¹³See S. Marks, *A False Tree of Liberty* (2019); S. Marks (ed.), *International Law on the Left: Re-examining Marxist Legacies* (2008); M. E. Salomon, ‘Emancipating Human Rights: Capitalism and the Common Good’, (2023) 36(4) *Leiden Journal of International Law* 857; M. E. Salomon, ‘Of Austerity, Human Rights and International Institutions’, (2015) 21(4) *European Law Journal* 521; A. Chadwick, *Law and the Political Economy of Hunger* (2019); See J. Whyte, *The Morals of the Market: Human Rights and the Rise of Neoliberalism* (2019); S. Moyn, *Not Enough: Human Rights in an Unequal World* (2018).

²¹⁴See N. Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (1997).

expression of self-determination. Even though socio-economic rights had been included in the Universal Declaration of Human Rights (UDHR), they were relegated to a separate convention in the form of the ICESCR (in part) because the enforceability of socio-economic rights was deemed questionable.²¹⁵

Second, the biggest pushback against socio-economic rights was that it was simply inappropriate to talk of economic inequalities through the language of rights. IHRL could not hold nation-states accountable for failing to provide the same material opportunities — like education, housing, and so on — to segments of their population. I recognize that establishing the epistemic limitations of IHRL would require a detailed philosophical investigation — one which is beyond the scope of this article. However, the case study of caste does seem to evidence the claim that IHRL might be epistemically unable to see social *structure* — its focus on individual instances of harm might make it prone to missing the woods for the trees. This is particularly exacerbated in cases where the ‘structure’ in question has a significant economic component. Some international lawyers have tried to address this gap,²¹⁶ and I do not mean to suggest that this problem is insurmountable. However, the case study highlighted in this paper underlines the nature of the problem itself, in a context which has so far been largely ignored by international legal audiences.

4.3. Hinduism: The obstacle at every turn

The other problem I have tried to highlight is the reluctance of IHRL institutions to acknowledge how caste and Hinduism are interdigitated. In 1951, Ambedkar’s Hindu Code Bill, which sought to transform the religious laws surrounding Hindu marriages and inheritance, was defeated due to conservative opposition. After resigning from his post as Law Minister, he proclaimed:

To leave inequality between class and class, between sex and sex, which is the soul of Hindu society, and to go on passing legislation relating to economic problems is to make a farce of our Constitution and to build a palace on a dung heap.²¹⁷

In Sections 2.2.3. and 4.1., I documented the reluctance of the three primary actors in international legal forums — the Indian state, jurists, and NGOs — to acknowledge the imbrication of Hinduism with caste. This deracination of caste was done to fit caste-based discrimination into the broader rubric of ‘descent’ based discrimination. As a result, the Committee and Sub-Commission could skirt charges that they were targeting a Global South state. However, as anti-caste intellectuals, including Ambedkar, have been saying for decades, the practice of untouchability cannot be ended without confronting the religious sanction behind the practice. An understanding of the existential stakes in the minds of people practicing untouchability remains pivotal.

However, the location of these institutions in the Global North, and the historical complicity of international law and human rights in the colonial project in the nineteenth and twentieth centuries, probably meant these institutions were hesitant to confront Hinduism. This ‘confrontation’ with Hinduism would mean acknowledging that Hinduism might be fundamentally incompatible with caste equality, and therefore for the purposes of IHRL, racial equality. The powerful post-colonial critique of IHRL teaches us that as a general rule, IHRL

²¹⁵See P. Alston and R. Goodman, *International Human Rights* (2013); P. Alston, Rethinking Economic and Social Rights: The Recognition, Institutionalization, and Accountability Framework, United Nations, General Assembly, Report of the Special Rapporteur on Extreme Poverty and Human Rights, A/HRC/32/31 (28 April 2016).

²¹⁶See Marks, *supra* note 212.

²¹⁷See Rege, *supra* note 102, 241 (emphasis added). Here, Ambedkar was using ‘class’ in the sense it constitutional sense that was widely used during British Raj to refer to caste groups. The foot-dragging of the political establishment regarding the evaluation of who constitutes ‘Other Backward Classes’ for the purpose of reservations was another important reason for his resignation.

institutions should not investigate the morality of non-Western religious systems. These processes would be nearly impossible to conduct and would be structurally prone to a series of biases. This leads to a contradictory position — the critiques against Western ‘universalism’ emphasizing the particularity of ‘cultures’ end up providing a shield to caste, Hinduism, and the Indian state. Of course, if one were to ask Makau Matua or other prominent critics of the false universalism of IHRL about caste, they would likely be firm critics of the caste system.²¹⁸ The contradictory effect of the post-colonial critique of IHRL combined with the political caution against antagonizing ‘a founding member of the Non-Aligned Movement . . . [which opposed] racial discrimination in all its forms, including apartheid’²¹⁹ means that IHRL institutions remain toothless in confronting Hinduism. This raises questions about whether IHRL has moved from Western values masquerading as universal values, to a universalized system of cultural particularisms.

Nonetheless, that IHRL cannot be the dominant framework for annihilating or even understanding caste, does not mean it is a mere ideological smokescreen. Arguably, the international recognition of Dalit pain, even if blinkered, is morally valuable in and of itself. Moreover, it pricks the ‘Indian Ideology’²²⁰ that the Indian state is the world’s largest liberal democracy characterized by unity in diversity. Dalit voices on the international stage expose the violent underbelly of this ‘unity’. One need only note the treatment meted out by the Indian state to activists who speak about issues of inequality, oppression, and exploitation on the international stage to learn that international interventions are not futile.²²¹ These can also be important for furthering anti-caste mobilization within particular regions. And as I indicated in the introduction, the issue of caste is gaining global prominence. There have already been fierce debates about passing anti-caste legislation in the UK and US (California) — both of which have significant Indian diasporas.

5. Conclusion

In 2014, Arundhati Roy argued that caste had escaped comparable international scrutiny to apartheid because caste remains ‘fused with Hinduism, and by extension with so much that is seen to be kind and good—mysticism, spiritualism, non-violence, tolerance, vegetarianism, Gandhi, yoga, backpackers, [and] the Beatles’.²²² In this article, I built on the burgeoning scholarship analysing the engagement of IHRL with caste and the role played by NGOs in this process, particularly since 1996. While there have been some calls for a caste-specific international human rights treaty,²²³ the work of CERD and the UN Sub-Commission remains the most serious consideration of caste in IHRL.

This article conducted a close reading of the legal texts and debates surrounding caste-based discrimination in CERD and the Sub-Commission from an Ambedkarite perspective. For this purpose, I drew on key ideas crucial to the political project of annihilating caste. The focus was that caste remains a system which structures the social totality — from knowledge to resources to opportunities — and the ritualization of that system through the practices of untouchability continue to be joint at the hip to Brahmanical Hinduism. Therefore, caste-liberation requires not a reform of the system to smoothen out the rough edges, but the destruction of the edifice of caste. This requires acknowledging and confronting the religious sanction for caste.

²¹⁸See M. Matua, ‘Savages, Victims and Saviors: The Metaphor of Human Rights’, (2001) 42 *Harvard International Law Journal* 201; S. Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (2011).

²¹⁹See CERD, *supra* note 84, para. 13.

²²⁰See P. Anderson, *The Indian Ideology* (2013).

²²¹‘India: Kashmir Police Arrest Activist Khurram Parvez’, *Aljazeera*, 16 September 2016, available at www.aljazeera.com/news/2016/09/india-kashmir-police-arrest-activist-khurram-parvez-160916060226635.html.

²²²See Roy, *supra* note 101, 3.

²²³See B. Cosette, ‘Putting Caste on Notice’, *The Nation*, 9 November 2009, available at www.thenation.com/article/archive/putting-caste-notice/.

The record of the Sub-Commission and CERD revealed that they made two significant departures from an Ambedkarite analysis of caste. First, they largely equated caste-based discrimination with the practice of untouchability. As a result, the emphasis remained on the recognition harms of such discrimination. Even when material deprivations were referred to, they were framed as consequences of untouchability rather than a constitutive aspect of the caste system. Second, international jurists seemed to tip-toe around the religious sanction for caste. However, by refusing to take a stand against Hinduism, they implicitly adopted the Gandhian/Hindu-nationalist²²⁴ framing of untouchability as a 'social' or 'cultural' quirk, rather than an expression of the unequal moral worth intrinsic to the Brahmanical caste system.

I argued that these moves raise serious doubts about the effectiveness of IHRL in tackling caste and untouchability. This is because rituals can be remade and refashioned unless the material and moral system undergirding the rituals is dismantled. As the Indian diaspora becomes a significant player in global politics, increasing numbers of legislatures around the world are being confronted with the problem of caste discrimination. The debates I have pointed out, particularly about 'caste-as-structure' versus 'untouchability' as competing conceptions of understanding caste will continue to play out in these different forums.

²²⁴For structural similarities between the two, see J. Lee, *Deceptive Majority: Dalits, Hinduism, and Underground Religion* (2021).