

Caste Discrimination and Minority Rights: The Case of India's Dalits

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Abstract

India's Dalits (formerly known as Untouchables) number around 167 million or one-sixth of India's population. Despite constitutional and legislative prohibitions of Untouchability and discrimination on grounds of caste they continue to suffer caste-based discrimination and violence. Internationally, caste discrimination has been affirmed since 1996 by the UN committee on the Elimination of Racial Discrimination as a form of racial discrimination prohibited by the International Convention for the Elimination of all Forms of Racial Discrimination, and since 2000 as a form of discrimination prohibited by international human rights law. India's Dalits have also pursued minority rights and indigenous peoples' approaches before international forums. Yet the Dalits do not readily meet the internationally-agreed criteria for minorities or for indigenous peoples, while in India they are not classified legally as a minority, enjoying a constitutional status and constitutional protections in the form of affirmative action provisions distinct from those groups classified as minorities. This article is concerned with the characterisation of the Dalits in international and Indian law. In particular it focuses on India's provisions on Dalits and minorities respectively, examining the origins and limitations of the Scheduled Caste category (the constitutional term for the Dalits) and the relationship between Scheduled Caste status and religion. The article addresses arguments for the extension of Scheduled Caste status to Muslim and Christian Dalits (currently excluded from the constitutional category on grounds of religion) and concludes by endorsing calls for re-examination of the domestic legal categories encompassing victims of caste discrimination and of the legal strategies for the elimination of such discrimination, while arguing that internationally caste discrimination might be more effectively addressed by the conceptualisation of caste as a *sui generis* ground of discrimination as in India.

Keywords

Dalits; caste, India, affirmative action; Scheduled Caste (SC); minorities within minorities, religion, categories

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1. Introduction

India's Dalits¹ (formerly known as Untouchables) number over 167 million people, around one sixth of India's population.² Dalit, a term of self-identification meaning crushed or broken in Marathi (a regional language of south-west India) refers to those people at the very bottom of India's social hierarchy. A millennia-old system of social stratification based on inherited status, caste³ is primarily associated with South Asia (India, Nepal, Pakistan, Bangladesh and Sri Lanka) and its diaspora.⁴ While caste and discrimination on grounds of caste are found amongst South Asian adherents of Islam, Sikhism and Christianity as well as Hinduism, doctrinal sanction for caste exists only in Hinduism. According to orthodox Hindu creation mythology, society is divided into four broad hierarchical categories or *varnas* traditionally linked to occupation or social function – Brahmins (priests), Kshatriyas (warriors and rulers), Vaisyas (traders and artisans) and Shudras (serfs and labourers).⁵ Outside and below the *varna* framework is a fifth group, the Dalits. Alongside the *varna* system, Indian society is divided into approximately three thousand *jatis* – geographically-based, hierarchically-ranked kinship groups, the operational units of the caste system.⁶ As an ideological construct caste has a number of defining features. There are only four *varnas* but an indeterminate number of *jatis*, as groups may merge or subdivide. *Varna* ranking is fixed and immutable, whereas contestation of *jati* ranking has always occurred. Caste membership, and hence social status, is hereditary (determined by birth) and not susceptible to alteration through personal effort; in all but exceptional circumstances social mobility is dependent on the re-ranking of one's entire *jati*.⁷ Untouchability, whereby members of certain groups are considered permanently and irredeemably ritually polluted and polluting such that all physical and social contact with them must be avoided, serves both as a cause of and a mechanism

¹ In this article I use the term Untouchable and the constitutional term Scheduled Caste (SC) as well as the term Dalit depending on context, whilst recognising that Dalit is not adopted by all members of former "Untouchable" communities.

² Census of India 2001, Scheduled Castes and Scheduled Tribes Population, at <www.censusindia.gov.in/Census_Data_2001/India_at_glance/scst.aspx> (visited on 14 November 2009).

³ From the Portuguese *casta* meaning species, race or pure breed; see S. Bayly, *Caste, Society and Politics in Modern India from the Eighteenth Century to the Modern Age* (Cambridge University Press (CUP), Cambridge, 1998) pp. 105–106.

⁴ See UN Doc. E/CN.4/Sub.2/2004/31, 5 July 2004, 34–61; A. Waughray, 'Caste Discrimination: A Twenty-first Century Challenge for UK Discrimination Law?', 72:2 *Modern Law Review* (2009) pp. 182–219. Although not the only feature of South Asian social organisation, caste remains an important mechanism of social classification.

⁵ See G. Flood, *An Introduction to Hinduism* (CUP, Cambridge, 1998) pp. 11–12, 48–49, 58–61.

⁶ The term caste refers both to the Hindu concept of *varna* and the South Asian concept of *jati*. The Dalits are also subdivided into hierarchically-ranked *jatis*.

⁷ See L. Dudley Jenkins, *Identity and Identification in India: Defining the Disadvantaged* (RoutledgeCurzon, London, 2003) pp. 23–40 on "identity adjudication".

for social exclusion and material exploitation. Despite being a notional construct, Untouchability is conceptualised in corporeal and immutable terms as a permanent quasi-physical inherited characteristic which cannot be shed or removed. Endogamy and the prohibition of commensality (sharing food and drink) and the taking of water from “lower” castes ensure the maintenance and replication of the system.

Dalits in contemporary India experience stigmatisation, disadvantage, discrimination and violence on grounds of their ascribed hereditary status as “Untouchable”,⁸ despite constitutional prohibitions of Untouchability and discrimination on grounds of caste and the criminalisation of its worst manifestations;⁹ yet it was not until the late 1990s that the situation of India’s Dalits was taken up by United Nations (UN) human rights bodies, and, around the same time, by international non-governmental organisations (NGOs).¹⁰ One of the first NGOs outside India to address the issue of caste discrimination was the UK-based Minority Rights Group.¹¹ Yet, as Castellino and Redondo observe, victims of caste discrimination “do not easily fit into the universally agreed category of a ‘minority’”.¹² Neither do they readily fit the international definition of an indigenous people. Constitutionally and legally in India the Dalits are not classified as a minority. Rather, as “Scheduled Castes” (the constitutional, legal and administrative term for the Dalits) they enjoy a constitutional status and constitutional protections distinct from those groups officially recognised as minorities. India’s Constitution provides for special measures in the form of affirmative action policies (known as reservations) in higher education, State employment and political representation, for three categories of beneficiaries – the Dalits or Scheduled Castes (SCs); the *adivasis* or Scheduled Tribes (STs);¹³ and (to a lesser extent) the

⁸ See O. Mendelsohn and M. Vicziany, *The Untouchables: Subordination, Poverty and the State in Modern India* (CUP, Cambridge, 1998); G. Shah *et al.*, *Untouchability in Rural India* (Sage, New Delhi, 2006); K. B. Saxena, *Report on Prevention of Atrocities Against Scheduled Castes: Policy and Performance – Suggested Interventions for NHRC* (National Human Rights Commission, New Delhi, 2004).

⁹ See Articles 14, 15, 16 and 17 Constitution of India 1950 (COI), <lawmin.nic.in/coi.htm>; Protection of Civil Rights Act 1955, at <www.socialjustice.nic.in/pcr-act.pdf>; Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989, at <www.socialjustice.nic.in/poa-act.pdf> (visited on 14 November 2009).

¹⁰ See C. Bob, ‘“Dalit Rights are Human Rights” Caste Discrimination, International Activism and the Construction of a New Human Rights Issue’, 29 *Human Rights Quarterly* (2007) pp. 167–193.

¹¹ See <www.minorityrights.org/5652/india/dalits.html>, visited on 24 May 2009. See also B. Joshi (ed.), *Untouchable! Voices of the Dalit Liberation Movement* (Zed Books and Minority Rights Group, London, 1986).

¹² J. Castellino and E. Dominguez-Redondo, *Minority Rights in Asia: A Comparative Legal Analysis* (Oxford University Press (OUP), Oxford, 2006) p. 58.

¹³ The Scheduled Tribes, numbering around 84 million or 8.2 per cent of India’s population, are a distinct social and legal category traditionally distinguished by tribal characteristics and cultural

“Other Backward Classes” (OBCs), a category of less severely disadvantaged groups.¹⁴ This constitutional framework is characterised by a number of anomalies. Firstly, minorities are excluded from the list of reservation beneficiaries. Although some minority communities qualify for reservations as OBCs on grounds of their social and educational backwardness, this is a “back-door” route; they are not entitled to the benefit of reservations *qua* minorities. Secondly, the SC (Dalit) category is constitutionally restricted by religion to Hindus, Sikhs and Buddhists.¹⁵ As minorities within minorities Muslim and Christian Dalits are widely recognised to be more socio-economically and educationally disadvantaged than their non-Dalit co-religionists, while suffering discrimination on grounds of caste at the hands of both the wider community and their co-religionists.¹⁶ Yet they are excluded on grounds of religion from the SC category and hence from accessing SC reservations. Thirdly, reservations for the OBCs – a category which is not defined by reference to religion – are narrower in scope than SC and ST reservations. Hence, even where Muslim and Christian Dalits qualify for OBC reservations their position is still not comparable to that of Hindu, Sikh and Buddhist Dalits. Meanwhile, since the late 1990s, international law categories which were not constructed with caste in mind have been called up to address caste discrimination in the UN, while a new international legal category – discrimination based on work and descent – which includes but is not limited to caste, has been created. Strategically, Dalits have pursued minority rights, indigenous peoples and anti-discrimination approaches before international forums, with some success, but as this article seeks to show, all three approaches are problematic conceptually and/or legally.

This article is concerned with the characterisation of the Dalits in international and Indian (national) law. Just as the SC category in national law does not

and spatial isolation from the mainstream population; see M. Galanter, *Competing Equalities: Law and the Backward Classes in India* (University of California Press, Berkeley, 1984) pp. 147–153 and Census of India 2001, *supra* note 2. Although external to the caste system and not defined by Untouchability or by religion, the STs also suffer severe discrimination and deprivations.

¹⁴ Other Backward Classes, or simply “backward classes”, is a constitutional term denoting a third category of less severely socially and educationally backward groups, roughly corresponding to the Shudras in the *varna* framework, who do not suffer from the stigma of Untouchability. The term is also used generically to denote the SCs, STs and OBCs combined.

¹⁵ “[N]o person who professes a religion different from the Hindu, the Sikh or the Buddhist religion shall be deemed to be a member of a Scheduled Caste”; see Constitution (Scheduled Castes) Order 1950 (C.O. 19) para. 3, at <lawmin.nic.in/ld/subord/rule3a.htm>, (visited on 3 September 2009). Sikhs and Buddhists were originally excluded from the SC category (although SC status was, exceptionally, extended to Sikh members of four specific castes; see Constituent Assembly Debates of India (CAD) Vol. VIII, 25 May 1949, pp. 272, 311; see also *Soosai v Union of India* (1985) SCR Suppl. (3) 242, 247). Sikhs were added to the SC category in 1956 and Buddhists in 1990.

¹⁶ See S. Deshpande, *Dalits in the Muslim and Christian Communities: A Status Report on Current Social Scientific Knowledge* (Government of India (GOI), National Commission for Minorities (NCM), New Delhi, 2008).

reflect the complexities of Dalit identity and caste discrimination in the 21st century, so the international law categories which have been called up to encompass victims of caste discrimination do not self-evidently, readily or completely include them. The key features of caste and the key issues to be addressed have been identified in this introduction. Part 2 discusses international law standards and their applicability to the Dalits. Part 3 examines India's constitutional provisions on Dalits and minorities, tracing the origins, scope and limitations of the constitutional categories. Part 4 offers a critique of these provisions in the context of the international standards identified in Part 2, examining the tangled relationship between SC and minority status and religion and considering proposals for change. The article concludes by endorsing calls for re-examination of the domestic legal categories encompassing victims of caste discrimination in India and of the legal strategies for the elimination of such discrimination, while arguing that internationally the Dalits constitute "a case apart",¹⁷ a *sui generis* category, and should be conceptualised as such within the existing international frameworks where their grievances are presented. In the longer term, a more targeted international approach to caste discrimination, for example in the form of a new UN declaration or convention, is supported.

2. Caste Discrimination and International Law Standards

Until the mid-1990s caste discrimination was absent from mainstream international human rights discourse. Caste does not feature as a ground of discrimination in any international human rights instrument and few people outside caste-affected countries were aware of the existence of such discrimination, while in post-independence India Untouchability and caste-based discrimination were supposed to be eradicated by a raft of legal, administrative and policy measures.¹⁸ The transformation of caste discrimination from "domestic grievance" into an internationally-recognised human rights issue was largely due to the persistence of Dalit activists in calling on the UN to take up this form of discrimination as a violation of international human rights law.¹⁹ In seeking to internationalise their plight, India's Dalits have called up international anti-discrimination mechanisms as well as minority rights and indigenous peoples' mechanisms. These approaches are considered in turn below.

¹⁷ I. Ansari (ed.), *Readings on Minorities: Perspectives and Documents*, vol. 1 (Institute of Objective Studies, New Delhi, 1996) pp. xxi, xviii.

¹⁸ See Mendelsohn and Vizciany, *supra* note 8, p. 118.

¹⁹ See Bob, *supra* note 10.

2.1. *Dalit Rights as Minority Rights*

International minority protection predates by many years the development of the contemporary international human rights movement,²⁰ yet there is no universally-agreed, legally-binding definition of a minority and it has not proved possible to transform the 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities²¹ (the Minorities Declaration) into an international legally-binding instrument. Nevertheless there is a general international consensus on a core definition of “minority” which embraces non-dominant groups possessing stable ethnic, religious or linguistic characteristics that differ sharply from those of the rest of the population, which have been retained over time and which members of the group wish to preserve.²² Article 27 of the International Covenant on Civil and Political Rights 1966 (ICCPR)²³ recognises the right of persons belonging to ethnic, religious or linguistic minorities, in community with members of their own group, to enjoy their own culture, profess and practice their own religion and to use their own language. According to the Human Rights Committee (HRC) the persons designed to be protected under Article 27 are “those who belong to a group and who share in common a culture, a religion and/or a language”.²⁴ The Minorities Declaration extends this definition to include “national minorities”. In international law the existence of a minority is a question of fact, to be established by objective criteria independent of a group’s domestic status; non-recognition as a minority at the national level – as in the case of the Dalits – does not preclude a group’s characterisation as a minority at the international level.²⁵

However India’s Dalits do not constitute a discernible ethnic, religious, cultural or linguistic minority. The widely accepted position is that they are united by a shared, ascribed socio-religious identity as Untouchable but otherwise

²⁰ P. Thornberry, *International Law and the Rights of Minorities* (Clarendon Press, Oxford, 1991) pp. 25–37.

²¹ GA res. 47/135 (1992).

²² F. Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* (United Nations, New York, 1981) p. 96. See also G. Pentassuglia, *Minorities in International Law* (Council of Europe, Strasbourg, 2002) p. 69; Minority Rights Group International (MRGI), Submission to CERD on India with specific attention to Article 5 ICERD, 19 February 2007, fn. ix, <www2.ohchr.org/english/bodies/cerd/docs/ngos/MRG-report.pdf> (visited on 14 November 2009); W. Kymlicka, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (OUP, Oxford, 2007) pp. 66–67 on the cultural and geo-political origins of the concept of national minorities; UN Working Group on Minorities, UN Doc. E/CN.4/sub.2/AC.5/2005/2, 4 April 2005.

²³ Adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS 171; Indian ratification 10 April 1979.

²⁴ HRC General Comment No. 23; UN Doc. CCPR/C/21/Rev.1/Add.5, 8 April 1994, para. 5.1.

²⁵ *Ibid.*, para. 5.2. See also *Greco-Bulgarian Communities Case*, PCIJ Series B, No. 17, 1930.

divided by region, language, religion, culture and ethnicity.²⁶ The purpose of minority rights is to safeguard and preserve those religious, linguistic and cultural characteristics which distinguish minority groups from the majority population.²⁷ In contrast, as Ansari observes, Untouchability is an imposed and denigratory mark of identity which, as a deeply discriminated group, the Dalits historically have sought to shed or escape from rather than preserve.²⁸ Dr. B. R. Ambedkar, a gifted Dalit lawyer and campaigner for social justice who was to become the Dalits' most celebrated leader²⁹ and, eventually, chairman of the Drafting Committee of the 1950 Constitution of India (COI), fought for the eradication of Untouchability and the annihilation of caste – not for its preservation.³⁰ As a social and political minority the Dalits constitute an “involuntary association”³¹ consisting of individuals ascribed to a minority group “by some outside designation or decision”³² and stigmatised as inferior.³³ Yet as Dudley Jenkins points out, social categories – even those which are oppressive – may be appropriated by subordinated groups for their own strategic purposes as “tools of empowerment”.³⁴ Involuntary or “negative” associations may thus be transformed into “positive” associations.³⁵ The transformation of ascribed caste identity in India into a form of positive “ethnic” identity has been explored by Deepa Reddy,³⁶ while Ansari asks whether “in the process of shedding those undesirable features of [an] externally imposed identity” Dalits might retain features of their *Dalitness* – although he does not expand on what *Dalitness* might consist of.³⁷ If the Dalits as a pan-Indian category do not readily meet the international understanding of a

²⁶ See for example Mendelsohn and Vizciany, *supra* note 8, p. 9

²⁷ See UN Working Group on Minorities, UN Doc. E/CN.4/Sub.2/AC.5/2005/2, 4 April 2005, 21–29.

²⁸ Ansari, *supra* note 17, p. xviii.

²⁹ See C. Jaffrelot, *Dr Ambedkar and Untouchability: Analysing and Fighting Caste* (Permanent Black, New Delhi, 2005); see also E. Zelliott, *From Untouchable to Dalit: Essays on the Ambedkar Movement* (Manohar, New Delhi, 1998).

³⁰ See B. R. Ambedkar, ‘The Annihilation of Caste’, in V. Moon (ed.), *Babasaheb Ambedkar Writings and Speeches (BAWS)*, vol. 1 (Government of Maharashtra, Bombay, 1989).

³¹ S. Wiessner, ‘Faces of vulnerability: protecting individuals in organic and non-organic groups’, in G. Alfredsson and P. Macalister-Smith (eds.), *The Living Law of Nations: Essays on Refugees, Minorities, Indigenous Peoples and the Human Rights of Other Vulnerable Groups* (Arlington Va., Kehl, 1996) p. 221, cited in J. Packer, ‘Problems in Defining Minorities’, in B. Bowring and D. Fottrell (eds.), *Minority and Group Rights in the New Millennium* (Kluwer Law International, The Hague, 1999) p. 257. See also Thornberry *supra* note 20, pp. 9–10.

³² Wiessner, *ibid.*

³³ L. Sunga, 3 *International Journal of Group Rights* (1995) p. 79, cited in Packer, *supra* note 31, p. 255.

³⁴ Dudley Jenkins, *supra* note 7, p. 110.

³⁵ See Packer, *supra* note 31, p. 285. See also Zelliott, *supra* note 29.

³⁶ D. Reddy, ‘The Ethnicity of Caste’, 78 *Anthropological Quarterly* (2005) pp. 543–573. The conceptualisation of caste as ethnicity has also been raised within CERD; see UN Doc. CERD/C/SR.1796, 2 March 2007, 38.

³⁷ Ansari, *supra* note 17, p. xviii.

minority group, the notion of the Dalits as an indigenous people is also problematic. It is to this notion that we now turn.

2.2. *Dalits as Indigenous Peoples*

Ambedkar rejected the argument that castes constituted separate racial groups with distinct racial and cultural identities, arguing that “the caste system came into being long after the different races in India had commingled in blood and culture”.³⁸ Yet the sense of an indigenous peoples’ identity permeated 18th and 19th century colonial writing on caste.³⁹ It was called up in the Constituent Assembly – the body established by the British in 1946 to draft a Constitution for independent India and to act as an interim government pending its adoption⁴⁰ – and has been pursued since the 1990s as part of the Dalits’ international strategy⁴¹ although Ambedkar himself was non-committal on the question of Dalit indigeneity.⁴² The Dalits do not constitute a coherent group defined by the key characteristics of the indigenous peoples’ category – historical or traditional occupation of lands or territories; use of and control over resources; distinct cultural and religious traditions, customs and ceremonies; and distinct histories, philosophies, languages and institutions.⁴³ Nevertheless, aspects of the criteria relating to cultural and religious traditions overlap with the experience of some Dalit religious communities,⁴⁴ while the resurgence and/or creation of a distinct Dalit identity finds expression in the Dalit Panthers and Dalit writers’ movements of the 1970s and 1980s and in the writings of *dalit-bahujan*⁴⁵ intellectuals and activists such as Kancha Illaiah.⁴⁶ Strategically, utilisation of the indigenous label, with its promise of access to targeted rights,⁴⁷ has been a powerful

³⁸) Ambedkar, *supra* note 30, p. 48.

³⁹) See Bayly, *supra* note 3, pp. 97–186; D. Keane, *Caste-Based Discrimination in International Human Rights Law* (Aldershot, Ashgate, 2007) pp. 31–37.

⁴⁰) “We the Depressed Classes are the original inhabitants of this country. We do not claim to have come to India from outside as conquerors, as do the Caste Hindus and the Muslims”; P. R. Thakur, CAD Vol. 1, 19 December 1946, p. 40, cited in H. S. Saksena, *Safeguards for Scheduled Castes and Tribes: Founding Father’s Views – An Exploration of the Constituent Assembly Debates* (Uppal, New Delhi, 1981) p. 6.

⁴¹) See 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* (Koninklijke Brill, Leiden, 2005) pp. 17–52, 18. See also V. T. Rajshekar, *Dalit: The Black Untouchables of India* (Clarity Press, Atlanta Ga., 2003).

⁴²) See B. R. Ambedkar, ‘Evidence Before the Simon Commission’, in *BAWS*, vol. 2 (The Education Dept., Government of Maharashtra, Bombay, 2005) p. 465.

⁴³) UN Declaration on the Rights of Indigenous Peoples 2007, UN Doc. A/Res/61/295.

⁴⁴) See for example R. Lamb, *Rapt in the Name: The Ramnamis, Ramnam, and Untouchable Religion in Central India* (State University of New York Press, Berkeley, 2002).

⁴⁵) *Bahujan* means majority, referring to the Shudras who are estimated to constitute up to half of India’s population.

⁴⁶) See for example K. Illaiah, *Why I Am Not A Hindu* (Samya, Calcutta, 2002).

⁴⁷) Kymlicka, *supra* note 22, pp. 286–287.

political tool and has widened the international forums available to the Dalits – although Kymlicka warns in general terms that the strategic adoption of the indigenous peoples' label by minorities as a “back-door” route to recognition and rights is “not sustainable” and undermines the international system of indigenous rights,⁴⁸ while Thornberry questions whether pursuing an indigenous peoples' strategy might detract from the Dalits' “distinctive and powerful” discrimination case.⁴⁹

2.3. *Caste Discrimination as a Violation of International Human Rights Law*

2.3.1. International Convention for the Elimination of All Forms of Racial Discrimination 1965 (ICERD)

ICERD⁵⁰ defines racial discrimination in Article 1(1) 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 any other field of public life.

In 1996 the Committee on the Elimination of Racial Discrimination (CERD) affirmed that caste discrimination is a form of racial discrimination captured by Article 1(1) ICERD as a sub-category of discrimination based on descent,⁵¹ a position it has since repeatedly reaffirmed, in 2002 issuing General Recommendation 29 condemning descent-based discrimination – including discrimination based on forms of social stratification such as caste and analogous systems of inherited status – as a violation of ICERD.⁵² CERD's utilisation of descent to address caste discrimination has been challenged, particularly by India, despite the CERD's observations that ICERD is a “living instrument that must be interpreted and applied taking into account the circumstances of contemporary society”.⁵³ Descent was included in ICERD at the behest of India in response to disagreement over the meaning of “national origin”,⁵⁴ but its intended meaning and scope are not clear from the *travaux préparatoires*. The inclusion of descent

⁴⁸) *Ibid.*

⁴⁹) Thornberry, *supra* note 41, p. 18.

⁵⁰) Adopted 21 December 1965, entered into force 4 January 1969, 660 *UNTS* 195. Indian ratification 3 December 1968.

⁵¹) CERD/C, concluding observations on India's ninth to fourteenth reports, 22 August 1996, UN Doc. CERD A/51/18 (1996), 352.

⁵²) See CERD/C General Recommendation No. 29, 22 August 2002, UN Doc. A/57/18 (2002). See also CERD/C, concluding observations on India's fifteenth to nineteenth reports, 5 May 2007, UN Doc. CERD/C/IND/CO/19, 8; P. Thornberry, ‘Confronting Racial Discrimination: A CERD Perspective’, 5 *Human Rights Law Review* (2005) pp. 239–269, p. 264.

⁵³) See CERD/C General Recommendation No. 32, August 2009, 5.

⁵⁴) See GA Third Committee, 1299th meeting, 11 October 1965, UN Doc A/C.3/SR.1299, 29.

in Article 16(2) Constitution of India as a prohibited ground of discrimination in public employment, distinct from caste, suggests that India did not intend descent in Article 1(1) ICERD to include caste.⁵⁵ However, while caste was not discussed during the drafting of Article 1(1), it was discussed in relation to the drafting of Articles 1(4) and 2(2) on temporary special measures which provide for or require States to take special measures for the development and protection of certain racial groups or individuals belonging to them. These provisions were included in ICERD, according to the Indian representative to the drafting Committee,

in order to provide for special and temporary measures to help certain groups of people, including one in his own country, who, though of the same racial stock and ethnic origin as their fellow citizens, had for centuries been relegated by the caste system to a miserable and downtrodden condition.⁵⁶

Throughout the 1970s and 1980s India's reports to CERD contained information on the situation of the SCs and STs and the special measures in place for their upliftment, yet CERD appeared to oscillate between uncertainty as to the applicability of ICERD to these groups, and tacit acceptance that they did fall within its ambit.⁵⁷ It was not until 1986 that India expressed the view, orally, that they did not.⁵⁸ In 1996 and again in 2006 India affirmed its view that caste cannot be equated with race or covered under descent under Article 1(1) of

⁵⁵ See D. Keane, 'Descent: A Legal History', 11 *International Journal of Minority and Group Rights* (2005) pp. 93–116 in which Keane traces the origins of the descent category to its inclusion in Article 16(2) COI following an intervention in the Constituent Assembly in 1948 by Shri Raj Bahadur. In fact the term descent predates the COI by over a century, appearing in the Charter Act 1833 as a prohibited ground of discrimination in employment with the East India Company: "[N]o Native of the said Territories, nor any natural-born Subject of his majesty resident therein, shall, by reason only of his Religion, Place of Birth, Descent, Colour, or any of them, be disabled from holding any Place, Office, or Employment under the said Company"; Charter Act 1833 S. 87. The term reappears in the Government of India Act 1935 Part XII S. 298, and again in Article 366(2) COI which defines an Anglo-Indian as "a person whose father or any of whose other progenitors in the male line is or was of European descent but who is domiciled within the territory of India and is or was born within such territory of parents habitually resident herein and not established there for temporary purposes only".

⁵⁶ Mr. Saksena, GA Third Committee, 1306th meeting, 15 October 1965, UN Doc. A/C.3/SR.1306, 24–25. See also 1304th meeting, 14 October 1965, 20.

⁵⁷ See UN Doc. CERD/C/SR.33, 56; UN Doc. CERD/C/SR.51, 142; Fifth Periodic Report of India: UN Doc. CERD/C/20/Add.34, 8 March 1979, 40, 45–68; Ninth Periodic Report of India: UN Doc. CERD/C/149/Add.11, 4 September 1986, 8.

⁵⁸ See UN Doc. CERD/C/SR.797, 61. Similarly, India does not recognise its tribal peoples as distinct groups entitled to special protection under ICERD; see UN Doc. CERD/C/IND/CO/19, 5 May 2007, 10.

⁵⁹ See UN Doc. CERD/C/299/Add. 3, 29 April 1996, 7; UN Doc. CERD/C/IND/19, 29 March 2006, 16.

ICERD.⁵⁹ That CERD struggled in its early days to grapple with an issue which appeared to have little in common with the anti-colonialism and anti-apartheid agenda which had originally inspired ICERD is evident from the pre-1996 CERD documents.⁶⁰

In 2009 CERD issued General Recommendation 32 (GR 32) on the meaning and scope of special measures, including affirmative action policies such as India's reservations.⁶¹ Much of GR 32 is directly relevant to India. Special measures are to be understood as goal-related, time-limited rights for the development and advancement of groups or individuals belonging to such groups, distinct from the permanent human rights pertaining to certain categories of person or community (e.g. minorities or indigenous peoples, who may also enjoy the benefits of special measures). Such measures are not an exception to the principle of non-discrimination but are integral to its meaning and do not constitute discrimination when taken for the sole purpose of ensuring equal enjoyment of rights and freedoms⁶² – a point made in 1948 by T. K. Shah in the Constituent Assembly in relation to India's policies for the SCs.⁶³ The need for, design and implementation of special measures should be based on accurate, disaggregated gender-sensitive data, and they should respect the principle of fairness.⁶⁴ Significantly, if a State chooses special measures, these must be non-discriminatory.⁶⁵ In keeping with evolving CERD experience and practice, GR 32 notes that the grounds of discrimination are extended in practice by the notion of intersectionality, where discrimination on grounds such as gender or religion appears to exist in combination with a ground or grounds listed in Article 1.⁶⁶

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

In 2000 caste discrimination was declared a form of discrimination prohibited by international human rights law by the former Sub-Commission on the Promotion and Protection of Human Rights, as a subset of a new international legal category, discrimination based on work and descent,⁶⁷ which encompasses caste and simi-

⁶⁰ On the genesis of ICERD see Thornberry, *supra* note 52, p. 241. In 1986 CERD member Mr. Bantom observed that “[c]onsideration of a report from a country such as India showed that the Convention had been drafted to take account of the experience of the peoples of Europe, Africa and North America, and that it was therefore not adapted to the examination of inter-group relations in other parts of the world”; see UN Doc. CERD/C/SR.796, 26.

⁶¹ *Supra* note 53.

⁶² *Ibid.*, 15, 20, 21, 27, 34.

⁶³ T. K. Shah, CAD Vol. VIII, 29 November 1948, p. 655.

⁶⁴ *Supra* note 53, 17.

⁶⁵ *Ibid.*, 7.

⁶⁶ *Ibid.*

⁶⁷ UN Sub-Commission, Resolution 2000/4, 11 August 2000, UN Doc. E/CN.4/Sub.2/2000/46, 23 November 2000.

lar systems of inherited status affecting groups in other parts of the world, for example the Burakumin in Japan. Three expert reports on discrimination based on work and descent were subsequently commissioned, in 2001, 2003 and 2004, which identified the existence of such discrimination worldwide.⁶⁸ In 2005 the former Commission on Human Rights appointed two Special Rapporteurs to investigate the phenomenon of discrimination based on work and descent, its nature and extent and to produce a set of Draft Principles and Guidelines for its effective elimination.⁶⁹ Published by the Human Rights Council in 2009,⁷⁰ the Draft Principles strongly condemn “discrimination based on work and descent, including discrimination based on caste and analogous systems of inherited status, as a violation of human rights and international law”.⁷¹

The work and descent terminology was adopted to encompass caste and analogous systems worldwide, thereby locating caste discrimination within a global human rights category without targeting any specific State, religion or culture. However, the conceptualisation of caste discrimination as a subset of a new, wider international legal category, and the broad nature of the category, mean that caste is not fully acknowledged as a distinct, *sui generis* ground of discrimination requiring a distinct and targeted response at the international level. Meanwhile, since 1996, India has consistently rejected CERD’s interpretation of descent, arguing that descent in Article 1(1) refers only to race whereas caste is based on social distinctions, not race, and cannot be equated with race or covered under descent.⁷² CERD, whilst accepting that caste is not race, maintains that discrimination on grounds of caste is fully covered by ICERD as a form of descent-based racial discrimination.⁷³

2.3.3. *Multiple Discrimination, Intersectionality and De facto/De jure Equality*

Caste as a ground of discrimination is increasingly addressed by UN treaty bodies in contexts where it may exist in combination with other grounds, for example gender or religion (as in the case of Dalit converts to Islam or Christianity who, unlike Buddhist or Sikh converts, lose their entitlement to SC reservations).⁷⁴ The Committee for the Elimination of Discrimination Against Women has identified caste as a major obstacle to the implementation of the International Convention for the Elimination of Discrimination Against Women

⁶⁸ UN Doc. E/CN.4/Sub.2/2001/16, 14 June 2001; UN Doc. E/ CN.4/Sub.2/2003/24, 26 June 2003; UN Doc. E/CN.4/Sub.2/2004/31, 5 July 2004.

⁶⁹ UN Doc. E/CN.4/DEC/2005/109.

⁷⁰ UN Doc. A/HRC/11/CRP.3, 18 May 2009.

⁷¹ *Ibid.*

⁷² See CERD, fourteenth periodic report of India, UN Doc. CERD/C/299/ Add.3, 29 April 1996, 6–7; CERD, nineteenth report of India, UN Doc. CERD/C/IND/19, 29 March 2006, 16.

⁷³ See CERD/C, concluding observations on India’s fifteenth to nineteenth reports, *supra* note 52.

⁷⁴ *Ibid.*, 15, 18, 21.

⁷⁵ Adopted 18 December 1979, entered into force 3 September 1981, 1249 *UNTS* 13. Indian ratification 9 July 1993.

1979 (CEDAW),⁷⁵ with Dalit women and girls suffering extreme gender-based and sexual violence and gender-related discrimination on grounds of caste.⁷⁶ Meanwhile, CERD has highlighted the gap between the formal abolition of Untouchability and caste discrimination in India and the continuance of substantive or *de facto* discrimination,⁷⁷ while caste has been identified as an obstacle to *de facto* equality in the enjoyment and exercise of human rights under the UN Convention on the Rights of the Child, the ICCPR and the International Covenant on Economic, Social and Cultural Rights.⁷⁸

3. Dalits and Minorities: India's Constitutional Categories

This section discusses India's constitutional provisions on Dalits and minorities. The provisions are outlined and the historical origins and practical consequences of the constitutional distinctions between the two categories are explained.

3.1. Constitutional Provisions

3.1.1. Equality and Non-discrimination

The Constitution of India establishes India as a Sovereign, Socialist, Secular, Democratic Republic.⁷⁹ Articles 14–31 of the Constitution guarantee various individual fundamental rights, corresponding to civil and political rights, to all citizens. Article 14 guarantees equality before the law, while Article 15(1) prohibits discrimination on grounds of religion, race, caste, sex or place of birth. Article 17 abolishes Untouchability (although not the caste system *per se*) and criminalises its practice in any form, while Articles 16(1) and 16(2) respectively guarantee equality of opportunity and prohibit discrimination on grounds of religion, race, caste, sex, descent, place of birth, or residence in public employment or State office. Social and economic rights are incorporated in Articles 39–51 as “Directive Principles of State Policy” which must be applied by the State in making laws.⁸⁰ Article 46 singles out the SCs and STs, directing the State to “promote with special care the educational and economic interests of the weaker sections of the people, and, in particular of the Scheduled Castes and Scheduled Tribes” and to “protect them from social injustice and all forms of exploitation”.

⁷⁶ See UN Doc. CEDAW A/55/38 (2000), 52, 68, 74; UN Doc. CEDAW/C/IND/Co.3, 2 February 2007, 8, 28, 29, 32, 33.

⁷⁷ See CERD/C concluding observations on India's fifteenth to nineteenth reports, *supra* note 52.

⁷⁸ See UN Doc. CRC/C/15/Add.228, 26 February 2004, 22, 25, 28, 59, 65; UN Doc. CCPR A/52/40 (1997), 430; UN Doc. E/C.12/IND/CO/5, 8 August 2008, 13, 14, 19, 25, 53.

⁷⁹ Preamble, COI 1950. The words “Socialist, Secular” were added after “Sovereign” by the Constitution (Forty-second) Amendment Act 1976, S.2.

⁸⁰ Article 37 COI.

3.1.2. *Protection of Minorities*

Cultural and educational rights are guaranteed in Articles 29 and 30 of the Constitution and freedom of religion in Articles 25–28. Article 29 provides that groups with a distinct language, script or culture shall have the right to conserve them and prohibits denial of admission into any State-maintained or State-aided educational institution on grounds of religion, race, caste, or language. Article 30 guarantees the right of religious and linguistic minorities to establish and administer their own educational institutions and prohibits discrimination in the granting of State aid to such institutions. In 1992 a statutory body, the National Commission for Minorities (NCM), was established to ensure the development of minorities – defined by the National Commission for Minorities Act 1992 (NCMA) as “a community notified as such by the Central government”⁸¹ – and to safeguard their rights.⁸² Five communities have been centrally notified as minorities – Muslims, Christians, Sikhs, Buddhists and Zoroastrians (Parsis)⁸³ – notwithstanding the fact that Article 25 of the Constitution guaranteeing freedom of conscience and religion subsumes Sikhs, Jains and Buddhists within Hinduism.⁸⁴ While States are free to accord special treatment to their religious or linguistic minorities, only the central government can notify a community as a statutory minority under the NCMA.⁸⁵

3.1.3. *Affirmative Action: Reservation Policies for the SCs, STs and OBCs*

Affirmative action in public employment and higher education originates in the special measures for “non-Brahmins” introduced by certain princely states from the early 20th century,⁸⁶ while reserved seats, or quotas, in the national and

⁸¹ NCMA S.2(iii), <ncm.nic.in/ncm_act.html>, (visited on 25 June 2009).

⁸² NCMA S.3(i) and S.9.

⁸³ NCM, Annual Conference of State Minorities Commissions, 16 January 2008; see <ncm.nic.in/pdf/Agenda%202%20SMC.pdf>, (visited on 25 June 2009). 189.5 million people or 18.4 per cent of India’s total population belong to a minority community. Muslims number 140 million or 13.4 per cent of the total population and 72.8 per cent of the minority population, Christians constitute 2.3 per cent of the total population, Sikhs 1.9 per cent, Buddhists 0.8 per cent and Parsis 0.07 per cent; figures from 2001 Census cited in NCM, Annual Conference of State Minorities Commissions, this footnote.

⁸⁴ “In sub-clause (b) of clause (2) the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religions, and the reference to Hindu religious institutions shall be construed accordingly”; Article 25(2)(b) COI, Explanation II.

⁸⁵ NCMA S.9. The NCM has no power to notify or even to recommend a community as a minority. The unit for determining linguistic or religious minority status is the State, not the whole of India. Numerical minority cannot be the sole criteria; protection as a minority must be based on the community’s social, cultural and religious conditions in each State; see *Bal Patil v. Union of India* (2005) AIR 3172.

⁸⁶ Mendelsohn and Vizciany, *supra* note 8, pp. 129–130.

provincial legislatures originate in British concessions to the Muslims around the same time.⁸⁷ The Constitution of India mandates reservations for SCs and STs (but not OBCs) in political representation at local, provincial and national level on the basis of their population share.⁸⁸ Article 15(4) authorises (but does not mandate) “special provision for the advancement of any socially and educationally backward classes of citizens or for the SCs and STs”,⁸⁹ enabling the reservation of seats in State higher education institutions for SCs and STs and, since 2006, for OBCs⁹⁰ and in private educational institutions other than minority institutions covered by Article 30(1).⁹¹ Article 16(4) authorises (but does not mandate) reserved posts in public sector (but not private sector) employment for “any backward class of citizen which, in the opinion of the State, is not adequately represented in the services under the State”; this provision has enabled the reservation of posts for SCs and STs in provincial and central government services⁹² and for OBCs in provincial and (since 1993) in central services.⁹³ There is no constitutional minimum or maximum level for reservations in higher education and public employment, but a 50 per cent ceiling was set by the Supreme Court in 1964 in *Devadasan v. Union of India*⁹⁴ and confirmed in 1993 in *Indra Sawhney v. Union of India*,⁹⁵ on the grounds that reservations above this level would violate the fundamental constitutional principles of equality and non-discrimination. The reservation quota for SCs is set at 17 per cent, and for STs at 7.5 per cent⁹⁶ – roughly their percentage of the overall population – while reservations for the OBCs have been capped by the Supreme Court at 27 per cent (probably less than their percentage of the population), such that the combined reservation quota for

⁸⁷ *Ibid.* See also Galanter, *supra* note 13, p. 25; B. Shiva Rao, *The Framing of India's Constitution: A Study* (Indian Institute of Public Administration, New Delhi, 1968) p. 3; S. Wolpert, *A New History of India*, 8th ed. (OUP, Oxford, 2009) pp. 288–289.

⁸⁸ Articles 330, 332, 243-D(1)(a), and 243-T(1) COI. One-third of SC/ST local council seats are reserved for SC/ST women and one-third of local council seats for women generally; see Articles 243-D(2) and (3) and 243-T(2) and (3). Enabling provisions also exist for the political representation of Anglo-Indians at State and national level; see Articles 331 and 333 COI.

⁸⁹ Article 15(4) COI was inserted by the Constitution (First Amendment) Act 1951 S.2 following the Supreme Court's decision in *State of Madras v. Champakam Dorairajan* (AIR 1951 SC 226).

⁹⁰ See Central Educational Institutions (Reservations in Admissions) Act 2006, enacted pursuant to the Constitution (Ninety-third) Amendment Act 2005.

⁹¹ See Article 15(5) COI, inserted by the Constitution (Ninety-third) Amendment Act 2005 S.2.

⁹² See Articles 335 and 16(4) COI. Article 16(4)A, inserted by the Constitution (Seventy-seventh) Amendment Act 1995 S. 2, extends reservations in government posts to promotions for SCs and STs but not OBCs.

⁹³ Prior to the Supreme Court decision in *Indra Sawhney v. Union of India* (1992) AIR SC 477, States were free to grant State-wide backward class reservations in State sector employment at their discretion, but there were no central OBC reservations.

⁹⁴ *Devadasan v. Union of India*, AIR 1964 SC 179.

⁹⁵ *Indra Sawhney*, *supra* note 93, para. 94A.

⁹⁶ Galanter, *supra* note 13, p. 86.

the three categories does not exceed 50 per cent.⁹⁷ Thus, the Constitution affords minorities freedom of religion and “identity rights” but they are not entitled *qua* minorities to the benefit of reservations, while Muslim and Christian Dalits are specifically excluded on grounds of religion from SC reservations. We turn now to the origins of these distinctions.

3.2. *The Construction of Categories*

3.2.1. Ambedkar and the Construction of the Untouchables

Until the early 20th century the Dalits were not conceptualised as a pan-Indian category, nor was the extent of their oppression a matter of public or national concern except to caste reform activists.⁹⁸ The rhetorical potential of the term “Untouchability” – coined around 1909 to describe the particular, ritual discrimination suffered by the Dalits⁹⁹ – was identified by Ambedkar who transformed the term Untouchable from a description into a name designating an all-India political identity and a new social and legal category.¹⁰⁰ In the two decades prior to independence Ambedkar ensured that the concepts of “Untouchability” and “Untouchable” became “embedded in Indian understanding of the structure of their society” and ultimately embodied in the Constitution.¹⁰¹

3.2.2. Untouchability and the Construction of the Scheduled Castes

The term “Scheduled Castes” was created by the Government of India Act 1935 to identify by means of an official list, or Schedule,¹⁰² those disadvantaged and socially-excluded castes – previously termed “Depressed Classes” by the British – eligible for special electoral representation.¹⁰³ The Schedule was incorporated into the Constitution of India and has remained in use ever since. The Constitution defines SCs in Article 366(24) as “such castes, races or tribes or parts of or

⁹⁷ *Indra Sawhney*, *supra* note 95. Article 16(4)B, inserted by the Constitution (Eighty-first) Amendment Act 2001 S.2, allows for “roll-over” for a maximum of three years of unfilled vacancies under Articles 16(4) and 16(4)A and their exclusion from the 50 per cent ceiling on the total number of yearly vacancies.

⁹⁸ See Mendelsohn and Vicziany, *supra* note 8, p. 2. See also G. Omvedt, *Dalits and the Democratic Revolution: Dr Ambedkar and the Dalit Movement in Colonial India* (Sage, New Delhi, 1994); W. Radice (ed.), *Swami Vivekananda and the Modernisation of Hinduism* (OUP, New Delhi, 1999); Zelliott, *supra* note 29; Galanter, *supra* note 13, pp. 29–30.

⁹⁹ See S. Charsley, ‘Untouchable: What is in a Name’, 23:1 *Journal of the Royal Anthropological Institute* (1996).

¹⁰⁰ See Charsley, *ibid.*, p. 9. While the existence of the Untouchables was not new, nevertheless in the category of Untouchable something new was constructed: see Mendelsohn and Vizciany, *supra* note 8, p. 21.

¹⁰¹ Charsley, *supra* note 99.

¹⁰² The Government of India (Scheduled Castes) Order 1936.

¹⁰³ Galanter, *supra* note 13, p. 130. See also Dudley Jenkins, *supra* note 7, p. 14.

groups within such castes, races or tribes as are deemed under Article 341 to be Scheduled Castes for the purposes of this Constitution”. Article 341 empowers the president of India, after consultation with State governors, to notify by Order in relation to each State those castes or groups to be deemed to be SCs in relation to that State;¹⁰⁴ thereafter they can be de-listed only by Parliament. Currently over 1,100 castes are Scheduled.¹⁰⁵ Scheduled status is established by means of a Caste Certificate issued by the authorities attesting to the bearer’s membership of a Scheduled Caste.¹⁰⁶ The list has changed little since the original Schedule was drawn up by the British in 1936, the basis for inclusion in which was Untouchability¹⁰⁷ – measured not according to “secular” disadvantages such as poverty or illiteracy but according to the extent of social disabilities accruing from low social and ritual status in the traditional Hindu social hierarchy (although almost total synchronicity existed between ritual disabilities and socio-economic deprivation).¹⁰⁸ In 1931 the Census Commissioner, J.H. Hutton, attempted to specify the criteria by which Untouchable groups could be identified, such as whether the caste in question pollutes high-caste Hindus by contact or proximity, or is debarred from using public roads or wells or from the use of Hindu temples,¹⁰⁹ but it proved impossible to devise an all-India test due to different regional practices.¹¹⁰ The Constituent Assembly endorsed the abolition of Untouchability but left the concept undefined.¹¹¹ However, the understanding was of a ritual, status-based characteristic grossly damaging both to the individual and to society, giving rise to a unique type of social stigma and discrimination which is distinct from discrimination on other grounds, for example religion.¹¹² Crucially, Untouchability was seen uniquely as a function of caste; an amendment by a Muslim member that “no-one shall on account of his *religion or caste* be treated or regarded as an ‘untouchable’” was rejected by the Assembly.¹¹³

¹⁰⁴ See Constitution (Scheduled Castes) Order 1950, *supra* note 15. A caste may be “scheduled” in one State but not in another, resulting in inconsistent access to constitutional and legislative protection.

¹⁰⁵ *Ibid.*

¹⁰⁶ A similar mechanism is used to establish ST and OBC status. The Schedule mechanism has given rise to a body of “adjudication jurisprudence”; see Dudley Jenkins, *supra* note 7.

¹⁰⁷ Untouchability has its origins in early India; see V. Jha, ‘Candala and the Origin of Untouchability’, in A. Parasher-Sen (ed.), *Subordinate and Marginal Groups in Early India* (OUP, New Delhi, 2004) pp. 157–209; P. V. Kane, *History of Dharmasastra (Ancient and Medieval Religious and Civil Law)*, vol. I (Poona: Bhandarkar Oriental Research Institute, 1930).

¹⁰⁸ Galanter, *supra* note 13, pp. 122, 135.

¹⁰⁹ *Ibid.*, p.128.

¹¹⁰ *Ibid.*, pp. 127–128.

¹¹¹ See CAD Vol. III, 29 April 1947; CAD Vol. VII, 29–30 November 1948, pp. 664–669.

¹¹² See Dr. Monomohon Das, CAD Vol. VII, 29 November 1948, p. 666.

¹¹³ Mr. Ahmad, CAD Vol. VII, 29 November 1948, p. 669 (emphasis added).

3.2.3. Constructing the Untouchables as a Minority Group

Ambedkar was determined to link Untouchable emancipation from caste oppression with India's emancipation from the British.¹¹⁴ Central to his strategy was the assertion that the Untouchables were a minority group, "distinct and separate from the Hindus",¹¹⁵ entitled to recognition "as a separate entity for political and constitutional purposes".¹¹⁶ Gandhi by contrast insisted that the Untouchables should not be separated politically from the Hindu fold, a prospect which he viewed as damaging to Hindu unity and therefore to the nationalist movement and the struggle for *swaraj* (independence).¹¹⁷ In 1946 the Constituent Assembly was established.¹¹⁸ Assembly members were to be elected from the three main "communities" recognised by the British – Muslim, Sikh and "general", the latter to include all persons who were not Muslims or Sikhs,¹¹⁹ with an Advisory Committee on Minorities and Fundamental Rights (the Minorities Committee) to report on measures for the protection of minorities.¹²⁰ Ambedkar, concerned to ensure Untouchable representation in the Assembly and on the Minorities Committee as a separate political minority rather as a sub-group within the Hindus, sought, unsuccessfully, a declaration from the British that "minorities" included the SCs. Clement Atlee, the British prime minister, wrote privately to Ambedkar saying "[w]e ourselves consider the Scheduled Castes to be an important minority which should be represented on the Minority Advisory Committee" – but he was unwilling to dictate to the Assembly the composition of the Minorities Committee.¹²¹ In the event, the SCs and STs, as well as Christians, Parsis, Anglo-Indians¹²² and women, were brought into the Constituent Assembly by Jawarharlal Nehru's Congress Party – India's biggest political party – under the "general" category.¹²³ Ambedkar was duly elected to the Assembly and appointed to the Constitution's Drafting Committee (of which he was elected chair), the Minorities Committee, and the Minorities Sub-Committee.

¹¹⁴ See Keane, *supra* note 39, p. 2.

¹¹⁵ B.R. Ambedkar, 'What Congress and Gandhi Have Done To The Untouchables', in *BAWS*, vol. 9 (The Education Dept., Government of Maharashtra, Bombay, 1991) p. 181. Galanter in a footnote notes that, as late as 1910, Hindu political opinion was still very divided as to whether the Untouchables should "count" as Hindus or not; see Galanter, *supra* note 13, p. 26, fn 24.

¹¹⁶ Ambedkar, *ibid.*, p. 54

¹¹⁷ *Ibid.*, p. 87. See also D. Nesiah, *Discrimination With Reason?* (OUP, New Delhi, 1989) pp. 44–45; Galanter, *supra* note 13, pp. 31–32; Zelliott, *supra* note 29, pp. 166–167.

¹¹⁸ See above.

¹¹⁹ See B. Shiva Rao, *The Framing of India's Constitution: Selected Documents*, vol. 1 (The Indian Institute of Public Administration, New Delhi, 1966) pp. 209–24, p. 214.

¹²⁰ *Ibid.*, p. 216.

¹²¹ S. Ajnat (ed.), *Letters of Ambedkar* (Bheem Patrika Publications, Jalandhar, 1993) pp. 154, 157.

¹²² See Article 366(2) COI and *supra* fn. 55.

¹²³ G. Austin, *The Indian Constitution: Cornerstone of a Nation* (OUP, New Delhi, 1966) p. 12. In January 1947 the Muslim League announced their withdrawal from the Assembly; see Wolpert, *supra* note 87, pp. 361–363.

3.3. *Social Justice for the Dalits, Identity Rights for the Minorities*

The Constitution of India distinguishes between religious, linguistic and cultural minorities and the SCs, STs and OBCs, affording affirmative action measures only to the latter. Yet this distinction had not originally been envisaged. In July 1947 the Minorities Committee had recommended reserved seats in the legislatures for Untouchables, Muslims and (in modified form) for Indian Christians, together with a general proviso that, in making public appointments, provincial and central government should “keep the claims of minorities in mind”, consistent with efficiency of administration.¹²⁴ These proposals were incorporated into the draft Constitution. By 1949, however, reservations in the legislatures for religious minorities had been dropped. The trigger for this *volte face* was the partition of India on religious grounds on 15 August 1947 into the separate states of India and Pakistan and the violence and destruction which followed. In May 1949 the Minorities Committee in its final report recommended that “the system of reservation for minorities other than Scheduled Castes in Legislatures be abolished”.¹²⁵ The main argument was the importance of the secular principle and the danger that religion-based divisions posed to national unity.¹²⁶ Against the backdrop of heightened Hindu-Muslim tensions following partition, the Committee considered it “no longer appropriate in the context of free India and of present conditions that there should be reservation of seats for Muslims, Christians, Sikhs or any other religious minority”.¹²⁷ According to Sardar Patel (the Committee’s chair) the impetus for the revised recommendation had come from the Committee’s minority members themselves who, in the interests of laying down “genuine foundations of a secular State”, had chosen to relinquish reservations for religious minorities.¹²⁸ Not all the Assembly’s Muslim members were happy with the revised recommendation. Mohammed Ismail Sahib disputed that it represented the views of the Muslim community, urging the retention of reserved seats in the legislatures for Muslims and even a return to the principle of separate Muslim electorates.¹²⁹ But the recommendation was adopted. In contrast, the “almost unanimous” opinion of the Minorities Committee was that reserved seats for the SCs should be retained on grounds of their economic, social and educational backwardness – but for a period of ten

¹²⁴ Shiva Rao, *supra* note 119, pp. 754–757.

¹²⁵ CAD Vol. VIII, 25 May 1949, Appendix A, 311.

¹²⁶ See Z. Hasan, *Politics of Inclusion: Castes, Minorities and Affirmative Action* (OUP, New Delhi, 2009) p. 24

¹²⁷ CAD Vol. VIII, 25 May 1949, *supra* note 125.

¹²⁸ CAD Vol. VIII, 25 May 1949, pp. 270–272.

¹²⁹ *Ibid.*, p. 277. Separate electorates had been accorded to the Muslims by the British in 1909 on the basis of their identity as a separate religious community; see Galanter, *supra* note 13, p. 25; Shiva Rao, *supra* note 87, p. 3; Wolpert, *supra* note 87, pp. 288–289.

years only.¹³⁰ In this way a “major break” took place separating religious minorities “from the discourse of disadvantage and social justice that dominated the discussion about lower castes”.¹³¹ In August 1949 Ambedkar as chair of the Drafting Committee proposed an amendment to the draft Constitution according preferential treatment in public sector appointments to the SCs and STs only, in lieu of the vaguely-worded proviso agreed in 1947.¹³² After an “acrimonious debate”¹³³ with particular opposition from Sikh and Muslim Assembly members, Ambedkar’s amendment was eventually accepted.

Ambedkar’s skill lay firstly in his construction of the SCs as a minority distinguished from both the Hindus and the religious minorities; and secondly in his securing special measures for the Dalits as a minority group despite their falling outside the traditional ethnic, religious or linguistic parameters of the minority category. In 1947 in response to arguments that the SCs were *not* a minority, Ambedkar contended that this meant ‘that the Scheduled Castes are *more than a minority* and that any protection given to the citizens and to the minorities will not be adequate for the Scheduled Castes’.¹³⁴

Ambedkar’s characterisation of the SCs as a “minority-plus” did not go unchallenged. In the Assembly debates on minority safeguards, K. M. Munshi pointed out that under international law the minorities label was restricted to racial, religious and linguistic minorities; the SCs, he said, were neither a racial nor a linguistic minority and certainly not a religious minority as they were “part and parcel of the Hindu community”, and therefore they were not minorities in the strict meaning of the term, and any safeguards given to them as minorities were “illogical” and should be available only until such time as they were completely absorbed within the Hindu community.¹³⁵ However the characterisation of the

¹³⁰ CAD Vol. VIII, *supra* note 123, p. 270. Nehru favoured dropping reservations altogether but accepted arguments in relation to the SCs – who he described as backward groups, not a religious minority – for time-limited reservations; see CAD Vol VIII, 26 May 1949, p. 331. The initial ten-year period has been repeatedly extended, most recently in August 2009, and it is difficult to envisage the circumstances in which any political party could abolish reservations in the foreseeable future.

¹³¹ Hasan, *supra* note 126, p. 21.

¹³² In 1948 Ambedkar had opposed the principle of reservations for SCs in education, on the grounds that it might result in educational segregation; see CAD Vol. VII, 29 November 1948, p. 661. Reservations for SCs in employment had been rejected by the Minorities Committee in 1948 by one vote: see CAD Vol. VII, 29 November 1948, p. 687.

¹³³ Shiva Rao, *supra* note 119, p. 777.

¹³⁴ B.R. Ambedkar, ‘States and Minorities – Memorandum to the Constituent Assembly on behalf of the All-India Scheduled Castes Federation’, in *BAWS*, vol. 1, *supra* note 30, p. 383.

¹³⁵ CAD Vol. V, 27 August 1947, p. 248. A Minorities Sub-Committee member had distinguished political minorities “from permanent national, religious and cultural minorities requiring special safeguards such as Muslims, Sikhs, Indian Christians and Anglo-Indians, these groups being akin to groups in Central and Eastern Europe, the denial of whose rights had led to the Minorities Treaties following World War I”; see I. Ansari (ed.), *Readings on Minorities: Perspectives and Documents*, vol. 2 (Institute of Objective Studies, New Delhi, 1996) pp. 220–221.

SCs as a distinct and distinctly oppressed segment of society – a minority in a historical and political sense – was widely accepted in the Assembly and was the basis for awarding reservations to them, while withholding reservations from the religious minorities.¹³⁶

From a social inclusion perspective the Indian academic and NCM member Zoya Hasan criticises the denial of reservations to the religious minorities.¹³⁷ Ultimately, however, it was “[t]he creation of Pakistan and India’s decision to remain a secular state [which] undermined the case for continued constitutional reservations for Muslims or other religious minorities”.¹³⁸ Thus it was that religious minorities emerged from the Constitution-making process with “identity rights” in the shape of religious, linguistic and cultural protection but minus the special measures they had enjoyed under British rule, while the SCs emerged with the guarantee of special measures in education, employment and political representation; but this compartmentalisation failed to take account of Dalits who were also members of a religious minority. Part 4 now turns to examine the inconsistencies at the heart of the SC category.

4. Critique

Although caste and Untouchability are doctrinally associated only with Hinduism, distinctions and discrimination on grounds of caste are found among adherents of Islam, Christianity and Sikhism despite the absence in these religions of doctrinal support for caste. Conversion to these religions theoretically offers an escape from caste oppression,¹³⁹ yet pre-conversion caste status commonly follows converts and their descendents into their new religion.¹⁴⁰ This was acknowledged in the Constituent Assembly, at least in relation to the Sikhs, during discussions on including low-caste Sikh converts in the SC category.¹⁴¹ Yet despite India’s assertions before CERD that caste is a social rather than a religious (or racial) phenomenon,¹⁴² the constitutional framework treats caste as a feature of Hindu social organisation. The purpose of reservations for the SCs was to redress historical inequalities arising out of Untouchability or ritually polluted status – a Hindu

¹³⁶ CAD Vol. V, 27 August 1947, p. 217.

¹³⁷ Hasan, *supra* note 126, pp. 5–8.

¹³⁸ Nesiah, *supra* note 117, p. 63.

¹³⁹ Ambedkar himself famously declared in 1935 that he would not die a Hindu. In 1956, shortly before his death, he led a mass conversion of Dalits to Buddhism; see Zelliott, *supra* note 29, pp. 126–136.

¹⁴⁰ See Ansari, *supra* note 135, pp. xviii–xix.

¹⁴¹ CAD Vol VIII, 25 May 1949, p. 271. See also *supra* note 15.

¹⁴² See UN Doc. CERD/C/299/Add.3, 29 April 1996 ; UN Doc. CERD/C/SR/141, 132, 6; UN Doc. CERD A/9018 (1973), 238.

ideological construct. On these grounds SC status was restricted to Hindus.¹⁴³ In 1956 SC status was extended to Sikhs and in 1990 to Buddhists – both faiths comprising large numbers of ex-Untouchables and their descendents – by (administratively) subsuming these faiths within Hinduism.¹⁴⁴ Muslim and Christian Dalits, however, remain excluded from the net. The consequence for Dalits of conversion to Islam or Christianity is the loss, for themselves and their descendents, of SC status and entitlement to the benefit of reservations, leading to calls to extend the constitutional provisions for SCs to Muslim and Christian Dalits. These groups argue that they suffer the same hereditary social disabilities and exclusion on grounds of Untouchability as their Hindu counterparts, and that the denial of SC status to them is a historical anomaly and amounts to religious discrimination contrary to Articles 14 and 15 of the Constitution of India. They appear to have the support of CERD which in 2007 specifically recommended that eligibility for affirmative action benefits be restored to all members of SCs and STs having converted to religions other than Sikhism or Buddhism, in accordance with ICERD Articles 2(2) and 5(d)(vii).¹⁴⁵

4.1. *Muslim and Christian Dalits*

In 2008 the NCM commissioned a report on Dalits in the Muslim and Christian communities (the “Deshpande Report”).¹⁴⁶ The objective of the study was to establish the material and social status of Muslim and Christian Dalits; to compare their situation with that of the non-Dalit segments of their own communities and the Dalit segments of other communities; and to establish whether their disabilities justify State intervention.¹⁴⁷ The Report concluded that, irrespective of religion, Dalits are worse off materially, socially and educationally than non-Dalits.¹⁴⁸ On the crucial question of Untouchability the study found that Muslim and Christian Dalits are socially known and treated as distinct groups within their own religious communities and are invariably regarded as “socially inferior” communities by their co-religionists. Universally-practiced forms of discrimination and exclusion include social, cultural and occupational segregation, economic

¹⁴³ See *supra* note 15.

¹⁴⁴ *Ibid.*

¹⁴⁵ See CERD/C, concluding observations on India’s fifteenth to nineteenth reports, *supra* note 52, 21.

¹⁴⁶ Deshpande, *supra* note 16. The report states that about 1 per cent of Muslims and around 10 percent of Christians are Dalits (although the true proportion of Dalit Christians is thought to be between 50 and 75 per cent) while Dalits constitute over 23 per cent of Hindus, 85 per cent of Buddhists and almost 35 per cent of Sikhs (pp. 22–23, 25).

¹⁴⁷ Deshpande, *ibid.*, pp. 2–5.

¹⁴⁸ Deshpande, *ibid.*, pp. 28–29. Dalit Sikhs were found to be the most affluent of all Dalits. Dalit Muslims have more in the poor and less in the affluent category than Dalit Christians but are broadly comparable to all other Dalits except Sikhs.

exploitation and endogamy. Significantly, the study found that in most social contexts Muslim and Christian Dalits “are Dalits first and Muslims and Christians only second”.¹⁴⁹ The Report concludes that there is “no compelling evidence to justify denying SC status to Muslim and Christian Dalits”; on the contrary there is “a strong case” for according them such status.¹⁵⁰

4.2. *Judicial Perspectives*

On the question of whether Muslim and Christian Dalits can or should be included in the SC category, India’s courts accept that caste is retained on conversion to religions with no scriptural sanction for caste.¹⁵¹ At this point we must distinguish between caste in the communitarian sense of community or group identity – what Galanter terms the “concrete” sense of caste as a social unit designating a section or segment of the population¹⁵² – and caste in the “abstract” sense of status, rank or position.¹⁵³ The issue is not whether caste identity in the concrete sense is retained on conversion, for the courts accept that it can be, but whether the social disabilities accruing from membership of an “Untouchable” caste also continue.¹⁵⁴ Do converts continue to experience the ritual, status-based discrimination and social exclusion associated with Untouchability? This was the issue facing the Supreme Court in 1985 in the leading case of *Soosai* which raised the question whether the 1950 Constitution (Scheduled Castes) Order was invalid on grounds of religious discrimination because only Hindu or Sikh members of the castes enumerated in the Schedule were deemed to be SCs for the purposes of the Constitution. The Court held:

To establish that ... the Constitution (Scheduled Castes) Order 1950 discriminates against Christian members of the enumerated castes it must be shown that they suffer from a *comparable depth* of social and economic disabilities and cultural and educational backwardness and similar levels of degradation within the Christian community necessitating intervention by the State under the provisions of the Constitution. It is not sufficient to show that the same caste continues after conversion. It is necessary to establish further *that the disabilities and handicaps suffered from such caste membership in the social order of its origin – Hinduism – continue in their oppressive severity* in the new environment of a different religions community.¹⁵⁵

¹⁴⁹ *Ibid.*, p. 78.

¹⁵⁰ *Ibid.*, pp. 81, 83.

¹⁵¹ See for example *Soosai v. Union of India*, *supra* note 15, 248; *S. Anbalagan v. B. Devarajan*, 1984 SCR (1) 973; *K. Sonkar v. Smt. Maya Devi*, 1984 SCR (2) 176.

¹⁵² Galanter, *supra* note 13, pp. 190–192, referred to in Deshpande, *supra* note 15, p. 66.

¹⁵³ L. Havanur, *Specifying the Backward Classes without the “Caste” Basis* (Mysore State Backward Classes Welfare Association, Bangalore, 1965) p. 60, cited in Galanter, *supra* note 13, p. 190, fn. 4.

¹⁵⁴ *Soosai v. Union of India*, *supra* note 15, 250.

¹⁵⁵ *Ibid.* (emphasis added).

In addition to retention of caste identity, Muslim and Christian Dalits must be able to show that on grounds of their relative caste status that they are worse off materially and socially than their non-Dalit co-religionists, and that their status is comparable to that of Hindus, Sikhs and Buddhists currently included in the SC category.¹⁵⁶ Crucially, the test is not material deprivation alone, but Untouchability. Moreover, there is a threshold; caste-related disabilities (i.e. Untouchability) must continue in their “oppressive severity” in the new religious environment. In *Soosai* the Court found insufficient evidence that this was the case. Significantly, the Court did not suggest that the concept and practice of Untouchability was restricted to Hinduism. Rather, the existence of Untouchability among non-Hindus was treated as a factual question, subject to a threshold test as indicated. In theory, then, it is possible that members of Muslim or Christian Dalit communities could establish that they are on the receiving end of sufficiently oppressive caste-related treatment to warrant categorisation as SCs. At the time of writing the matter is still not settled legally or politically, and special measures for SCs remain constitutionally restricted to Hindus, Sikhs and Buddhists.

4.3. *Religious Minorities as OBCs – A Route to Special Measures?*

Meanwhile, the OBC category offers a “back-door” route to reservations for Muslims and Christians including Dalits. Article 340 provides for the appointment of a National Commission for Backward Classes (NCBC) to investigate the social and educational conditions of the backward classes and make recommendations for their improvement. The Constitution lacks a definition of backward classes or criteria for identifying them. The question of how, and on what basis, backwardness should be determined has made the OBCs the most controversial of the three categories of reservation beneficiaries. Two ad hoc Backward Classes Commissions appointed in 1953 and 1979 failed to resolve this question.¹⁵⁷ In 1993 the NCBC was created as a statutory body charged with providing binding advice to central government on the groups to be included in a central list of backward classes,¹⁵⁸ identified on the basis of statutory guidelines relating to the social, educational and economic status of the caste/community in

¹⁵⁶ Deshpande, *supra* note 16, pp. 65–68.

¹⁵⁷ See Report of the First Backward Classes Commission 1953 (‘Kalelkar’ Report) (New Delhi, GOI, 1955); Report of the Second Backward Classes Commission 1980 (‘Mandal’ Report) (New Delhi, GOI, 1980). A legal challenge to the proposed implementation in 1990 of the Mandal Report recommendations for national-level OBC reservations in public sector employment and higher education resulted in the 1992 Supreme Court decision in *Sawhney* in favour of national-level OBC reservations in public employment but not education.

¹⁵⁸ National Commission for Backward Classes Act (NCBCA) 1993 S.9 and S.9(2), at <ncbc.nic.in/html/ncbc.html>, (visited on 14 November 2009).

question.¹⁵⁹ Unlike SC status, OBC status is decoupled from religion, such that minority religious communities meeting the statutory criteria may be classified as OBCs. Where a caste/community is included in the central list, this is irrespective of the religious affiliation of its members.¹⁶⁰ However, as we have seen, the applicable spheres of reservation for OBCs are narrower than for SCs and STs – higher education (since 2006) and employment in provincial and (since 1993) central State services, but not the legislatures. Moreover, pursuant to *Sawhney* the socially, educationally and economically uppermost members of the OBCs (known as the “creamy layer”) are excluded from reservations.¹⁶¹

4.4. *Recent Developments*

In 2006 a Government Report on the Social, Economic and Educational Status of the Muslim Community of India (the “Sachar Report”) found high levels of socio-economic and educational disadvantage among India’s Muslims.¹⁶² Although only 1 percent of Muslims are Dalits, almost 41 percent are categorised as OBCs, and Muslims comprise almost 16 percent of India’s total OBC population.¹⁶³ A 2007 Report by an ad-hoc Commission for Religious and Linguistic Minorities set up to determine the criteria for identification of, and to recommend measures for the welfare of, socially and economically backward sections among religious and linguistic minorities recommended the total de-coupling of SC status from religion and the classification as SCs of all those groups among the excluded religions whose counterparts among the Hindus, Sikhs and Buddhists are so classified.¹⁶⁴ Given the overall reservation ceiling of 50 percent, any increase in reservation beneficiaries would have to be absorbed within existing quotas, a prospect opposed by elements of both existing beneficiaries and non-beneficiaries opposed to any extension of reservations.¹⁶⁵ Reservations have for decades dominated Indian discourse on equality and social justice, and dropping them completely would be politically impossible. However, the Sachar Report signalled a new approach to equality and diversity. Rather than extending reservations to religious minorities it recommended, firstly, the establishment of an Equal Opportunity Commission (EOC) to investigate and pursue through legal action

¹⁵⁹ See National Commission for Backward Classes, <nbc.nic.in/html/guideline.html>, (visited on 14 November 2009).

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

¹⁶² GOI, *Social, Economic and Educational Status of the Muslim Community of India* (GOI, Cabinet Secretariat, New Delhi, 2006).

¹⁶³ *Ibid.*, 213.

¹⁶⁴ The ‘Misra Report’, yet to be officially published. The relevant paragraphs are 16.3–16.4.

¹⁶⁵ See S. Ghildiyal, ‘Govt in a fix on quota proposal’, *Times of India*, 14 October 2007, and ‘Dalit converts not entitled to quota’, *Times of India*, 8 December 2007.

allegations of discrimination or denial of equal opportunity in protected fields, and to prescribe and monitor equal opportunity practices;¹⁶⁶ secondly, the mainstreaming of diversity via a ‘diversity index’ to monitor and secure equal opportunity to all socio-religious categories in specified spheres of activity; thirdly, the creation of a National Data Bank to remedy the deficit of disaggregated data long identified by scholars and activists. Two expert reports were commissioned by government on these proposals.¹⁶⁷ In a marked shift away from India’s established equality strategies, the EOC Report acknowledges that eliminating disadvantage for particular identity groups involves more than abandoning explicitly discriminatory laws and instituting formal equality but rather, focussing on non-discrimination and equality in their broadest sense, reflecting the emphasis of international human rights law on *de facto* rather than simply *de jure* equality.

5. Conclusions

India’s constitutional and legal framework distinguishes between the Dalits, or SCs, on the one hand and minorities on the other, the former benefiting from special measures in employment, education and political representation while the latter do not. Despite evidence that Untouchability practices and discrimination on grounds of caste have permeated religions lacking doctrinal sanction for caste, SC status is restricted to Hindus and to adherents of Sikhism and Buddhism (religions which have been “legally re-absorbed as Hinduism”).¹⁶⁸ Muslim and Christian Dalits are thus ineligible on religious grounds for SC status and special measures, leading to claims of religious discrimination and demands for the extension of SC status to these groups, who in turn constitute minorities within minorities, disadvantaged on grounds of caste within their own communities. CERD has recommended the granting of SC status and associated benefits to all Dalits irrespective of religion, but India rejects the conceptualisation of caste as a ground of discrimination covered by ICERD. Elsewhere the “ethnicisation” of caste has been referred to,¹⁶⁹ but this does not mean that caste identity readily equates to ethnic identity, and internationally, despite the Dalits’ utilisation of minorities mechanisms, it remains the case that caste does not fit comfortably within the accepted ethnic/religious/linguistic minority paradigm. Outside this paradigm, international law has been reluctant to treat sociological minorities, for

¹⁶⁶ See EOC Report 2008, <minorityaffairs.gov.in/newsite/reports/eoc_wwh/eoc_wwh.pdf>, (visited on 3 September 2009), p. 32.

¹⁶⁷ See Diversity Index Report 2008, <minorityaffairs.gov.in/newsite/reports/di_expgrp/di_expgrp.pdf>, (visited on 3 September 2009); see also EOC Report, *ibid*.

¹⁶⁸ Dudley Jenkins, *supra* note 7, p. 120.

¹⁶⁹ *Supra* note 36.

example sexual minorities, as “candidates for inclusion in the category of protection of minorities”.¹⁷⁰ The case of the Dalits raises questions about the international definition of minorities and legal and political responses to “new” forms of discrimination. Since the late 1990s caste discrimination has been recognised as a violation of international human rights law as a form of descent-based racial discrimination under ICERD and as a sub-category of discrimination based on work and descent. While these categories have enabled international human rights bodies to engage with the problem of caste discrimination, such discrimination might be more effectively addressed by the conceptualisation of caste as a *sui generis* category as in India, thereby opening up the possibility, eventually, of a UN declaration or convention on caste as suggested by the UN High Commissioner for Human Rights.¹⁷¹

¹⁷⁰ N. Shaw, ‘The Definition of Minorities’, in Y. Dinstein and M. Yabory (eds.) *The Protection of Minorities and Human Rights* (Martinus Nijhoff Publications, Dordrecht, 1992) p. 22.

¹⁷¹ See B. Crossette, ‘Putting Caste on Notice’, *The Nation*, 26 October 2009, <www.thenation.com/doc/20091109/crossette>, (visited on 14 November 2009).

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