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"An Ancient System of Caste": How the British Law against Caste Depends on Orientalism

Abstract: *In 2010 the UK became the first jurisdiction in the West to enact a provision in anti-discrimination law based on caste. Parliamentarians justified the insertion of a provision against caste discrimination in the Equality Act 2010 on the assumption that a caste system exists in the UK's Indian diaspora. While that merely gave a power to the Minister to implement the provision, an amendment to the Act made in 2013 made implementation obligatory. Indian community organisations had no real way of arguing against the provision. They were handicapped by the fact that if they resisted it they would be branded as complicit in caste discrimination – as has been alleged by parliamentarians backing the law – or practitioners of a form of apartheid. This article argues that the legislation is underpinned by dubious and insubstantial research. The absence of a credible research base meant that for the first time in the history of anti-discrimination law in the UK, parliament proceeded to legislate on the assumption that a problem exists. Equally troubling was the acceptance among proponents that an adequate conceptualization of a supposed problem, including defining caste, could be dealt with retrospectively, once legislation was in place. Further no case was made that a mechanism like the Equality Act is appropriate for caste discrimination. Legislators seemed largely ignorant of, or simply misrepresented, laws prevailing in South Asian countries. In parallel to the legislation and despite the lack of implementation as yet, the article also discusses how case law has proceeded to incorporate caste discrimination by reading it into the provision of the existing legislation. The effort of including caste in law, whether through legislation or case law presupposes and imports ideas of the caste system that rest on shaky foundations. The stereotype of the caste system goes back to Christian theological accounts of India, developed further in Orientalist accounts during the colonial period, and is incorporated in the social sciences today. These ideas led to the notions that the Indian social structure is morally corrupt and racist, notions that continue to strongly condition contemporary thinking on caste as reflected in the development in UK law.*

Key words: *Caste system – Hinduism – United Kingdom – India – anti-discrimination law – Christianity – Dalits*

The recent legislation in the United Kingdom making discrimination on grounds of caste unlawful demonstrates the power of the framework of Orientalism, which lasts well into the post-colonial period and is projected to Indian diasporic sphere. That framework has infested discussion, debate and law-making in the UK to the

extent that it appears impossible to articulate any alternative position on caste. It even appears impossible to have it registered that the existing framework is indeed Orientalist and therefore presents only one culture's experience of another, but cannot grasp the experience of Indians. The story of the caste legislation also tells us something about how Western law functions in relation to the Indian culture of the diaspora. Although it is one of a number of social structures within Western culture, in its educative role, it reinforces the dominant framework by adding its power to it.[1] This article proceeds along the following two steps. Its first task is to outline the different aspects of the caste legislation and relevant case law. In the second step, it attempts to link those aspects to Orientalism and its framework of the caste system in India, which is itself dependent on a Christian account of Indian culture and society. Together the two steps show that in order to discover the framework governing the way contemporary Britons speak and legislate about caste we have to refer back to the basis of such constructions in Christianity and Orientalism. They also show how a segment of contemporary Western law depends on the same constructions, reinforcing the claim made by Balagangadhara that "*Western institutions of law depend non-trivially upon the presence and existence of religious (and even theological) ideas to make much sense to a people*".[2] The legislation and recent case law is underwritten by the embedding of Christian theological ideas in their secular form to the effect that Indians are immoral because they follow a caste system, and a commitment to morality would see Indians subscribe to the idea of equality as part of their acceptance of what Balagangadhara terms "*the monasticisation of daily life*".[3] Members of the Indian diaspora are unable to break from the deadlock of confinement of the dominant framework of caste. They have to accept its truth even as they contest the legislative onslaught. To understand this dimension we may usefully refer to Edward Said's frequent references to the fact that Orientalism displays a peculiar kind of 'strength' which makes it difficult to dislodge despite its lack of cognitive appeal.[4] We may also usefully deploy Balagangadhara's idea of 'colonial consciousness' to the Indian diaspora

1 As one of the promoters of the legislation, Lord HARRIES, said: "*Including the term "caste" in the Bill in one way or another would have a huge educational effect.*" House of Lords Debates, 11 Jan 2010, col 334.

2 See the S. N. BALAGANGADHARA, *Platform Paper, Rethinking Religion in India IV: Religion, Secularism and Law*, URL: <http://www.rethinkingreligion.org/files/downloads/RRI_IV_platform_paper.pdf> [cit. 2015–02–12], p. 2.

3 S. N. BALAGANGADHARA, *Notes towards the study of the caste system in India*, URL: <https://www.academia.edu/5299040/NOTES_TOWARDS_THE_STUDY_OF_THE_CASTE_SYSTEM> [cit. 2015–02–15]. See further Jakob DE ROOVER, *Europe, India, and the Limits of Secularism*, New Delhi 2015, esp. pp. 96–98 and p. 236.

4 See among his references to the idea of 'strength' and its derivatives, Edward W. SAID, *Orientalism: Western Representations of the Orient*, London 1978, pp. 6–7, 20–22, 44–45.

to enable us to make sense of the fact that Orientalist ideas continue to be repeated and have purchase as if they are true.[5]

Hindu leaders and organisations had been told by civil servants in 2008 that caste would not be part of the government's plan to enact a Single Equality Bill (which eventually became the Equality Act 2010) but were betrayed when the legislation did include caste.[6] The legislative move in the UK to make caste discrimination unlawful took place in two stages. The first was the last-minute insertion of caste as part of the term 'race', a 'protected characteristic' under the Equality Act 2010. The term 'racial group' had been already defined as encompassing 'colour', 'nationality', 'ethnic or national origins' under the Race Relations Act 1976, which together with other 'equalities' legislation the Equality Act was an attempt to consolidate and expand upon. The Act granted the relevant Minister of the Crown the power to effect the clause prohibiting caste discrimination. During the parliamentary discussions leading to the 2010 Act it was decided that the power would be exercised if, after research, the Minister was convinced that caste discrimination was indeed an issue requiring legal intervention.[7] A report to that end was commissioned from the National Institute for Economic and Social Research (NIESR) and published in late 2010.[8] The Equality Act 2010 was passed under a Labour government, but the change of government in the summer of the same year has meant that the one originally promoting the legislation was not the one having to carry out its implementation.

The 'power' to bring the caste provision into effect, which was essentially a discretion vested in the minister, was amended in April 2013 so that the minister is now *required* to bring the clause into effect. This was the second stage.[9] The 2013 amendment to the Equality Act was provoked by the same House of Lords lobby of peers who had forced the government's hand in 2010. Among them were Lord Harries, a former Anglican bishop, (the now late) Lord Avebury, who has played a prominent role in espousing human rights causes in parliament and a Buddhist himself, and the human rights lawyer, Lord Lester, who is Jewish. The 2013 amendment also had wide support among parliamentarians. The Lords voted in its favour twice and, in the end, the government did not resist, given ambivalence within its own coalition, while the Labour Party adopted a blanket

5 S. N. BALAGANGADHARA, *Reconceptualizing India Studies*, New Delhi 2012, esp. pp. 95–120.

6 Personal communication from Dr. Gautam Sen and Bharti Tailor.

7 See e.g. Baroness THORNTON, House of Lords Debates, 11 Jan 2010, cols. 344 and 347.

8 Hilary METCALF – Heather ROLFE, *Caste Discrimination and Harassment in Great Britain*, December 2010, URL: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/85522/caste-discrimination.pdf> [cit. 2014–04–01].

9 Amendment to Equality Act 2010, section 9(5), introduced by the Enterprise and Regulatory Reform Act 2013, section 97.

pro-equality stance. The government, not convinced of the need to extend a piece of legislation it did not wholly favour, bought some more time, pending an investigation commissioned by the Equality and Human Rights Commission (EHRC).[10] Some reports indicated that implementation would not be done for another two years, thus kicking its actual prospect once more into the long grass.[11] Meanwhile as part of its investigative steps, two reports – *Caste in Britain: Experts' Seminar and Stakeholders' Workshop* and *Caste in Britain: Socio-legal Review* – were issued by the EHRC in March 2014.[12]

Caste as self-evidently immoral

One of the themes that comes up again and again in the statements and writings of the proponents of the legislation is the claim that, whatever caste is, it is a self-evidently immoral institution. We can test this by examining the way in which caste comes up as a way of protecting a sectional interest in the guise of promoting the general interest of society; the way in which exceptions or exemptions to the scope of legally actionable caste discrimination claims are contemplated; and the way in which the question of the extent caste discrimination is handled.

In the case of discrimination on religious grounds, legislation in Britain was largely introduced as a result of a persistent campaign by Muslims, who felt aggrieved that the Race Relations Act 1976 had left them out of protection against discrimination.[13] There was the European legislation, in the form of Council Directive 2000/78/EC, which obliged Member States to adopt laws against religious discrimination in employment situations. That Directive was implemented, but Britain went further making legal action possible for religious discrimination also in provision of goods and services, professions, housing, and education through the Equality Act 2006. This regime continues in the current Equality Act 2010. Well before the caste discrimination legislation came onto the scene there was a pre-existing, tried and tested model of anti-discrimination law to

10 The EHRC is the successor body to the previous statutory bodies, the Equal Opportunities Commission and the Commission for Racial Equality and has under its scope other 'equalities' functions.

11 'Caste discrimination law faces appalling delays, say campaigners', BBC News, 30 July 2013, URL: <http://www.bbc.co.uk/news/uk-politics-23501389> [cit. 2013–08–29].

12 These reports are available at URL: < http://www.equalityhumanrights.com/publication/research-report-91–caste-britain-socio-legal-review> and URL: <http://www.equalityhumanrights.com/publication/research-report-92–caste-britain-experts-seminar-and-stakeholders-workshop> [cit. 2015–02–05].

13 Naser MEER, *Citizenship, Identity and the Politics of Multiculturalism: The Rise of Muslim Consciousness*, Basingstoke 2010, pp. 144–178. In Northern Ireland, where different concerns prevail, legislation against religious discrimination was introduced earlier.

which different grounds have been added successively over the years. Different kinds of exceptions have also been made, for sex, disability, religion or sexuality, to limit the scope of actionable discrimination. So, in the past, legislators carefully considered the extent to which the public interest required the scope of legal provisions against discrimination on a particular ground to be reduced or enlarged, consistently with Balagangadhara's observation as follows:

> "*we need to keep in mind that one of the basic ideas in both politics and law (in western culture) is that the laws of a country are formulated to protect and further the general interests of society. To the extent possible, law tries to reconcile the particular interests of individuals and groups with the general interests of the society. Neither law nor politics is meant to further the particular interests of any single community, group or individual. That is to say, laws are not meant to protect or further corporatist interests. There is always a trade-off in both politics and law between the special or particular interests of specific groups and individuals and the general interests of the society. Such a trade-off, however, must obey one condition: the general interest cannot be sacrificed to promote a particular interest.*"[14]

Important here is not whether we agree with the exceptions or special applications to anti-discrimination law, but rather to notice the fact that they exist, tailored to the type of discrimination one is talking of. Religion, for example, enjoys very large exceptions that allow certain services to continue to be provided according to criteria that distinguish according to religion. This is understandable in a culture such as the West, which is not only constituted by a religion, but also that people in the West believe that religion is a constitutive element of all cultures.[15] Not to provide broad exceptions for religious conscience would be to create havoc in society because, suddenly, all types of highly disruptive claims may be coming forth. At the same time however, the intelligibility that religion lends to conscientious objection among Jews, Christians, and Muslims, is not accessible to members of other cultures, so one might suggest that the law effectively caters to preferences of some groups but not of others.[16] But Balagangadhara also

14 See the S. N. BALAGANGADHARA, *Platform Paper*, p. 10. Western political theory contains commensurately intense discussions of ideas such as the 'general interest', 'general will', 'common good' and 'public interest' and how to reconcile them with particular or selfish interests. See e.g. Philip J. KAIN, *Marx and Modern Political Theory: From Hobbes to Contemporary Feminism*, Lanham 1993.

15 For this idea, see S. N. BALAGANGADHARA, *The Heathen in his Blindness: Asia, the West and the Dynamic of Religion*, Leiden 1994, esp. at p. 446 and p. 452.

16 Prakash SHAH, *Asking about Reasonable Accommodation in England*, International Journal of Discrimination and the Law 13.2–3, 2013, pp. 83–112. Recently, I was contacted by a BBC correspondent about the refusal to provide funeral services by some mosques because the deceased were members of a different sect of Islam, a Shia or an Ahmadi. The issue has never been followed up as far as

introduces what seems in the present context like an important rider to what he says about the reconciliation of general and particular interests:

> "*When laws partially protect the specific interests of a group or sets of individuals, they are admissible only in so far as such laws either protect or further the general interests of society as a whole.*"[17]

Unlike for the legal provisions on religion just discussed, the push to include caste in the 2010 Act came from lobby groups linked to Christian Churches (and some Buddhist and Ambedkarite organisations) that have a campaigning agenda that appears to relate more to the Indian situation than to Britain. Briefly put, the agenda appears to be to push for gaining access to caste-based reservations for Christians in government jobs and education places from which they are currently excluded. This campaign in India would bear greater fruit if it could be shown that Dalits, a political term employed for 'low caste' people, enjoyed the support of the British legislature.[18] The efforts of Churches to proselytise in India appear directed more intensely among Dalits with a reportedly large proportion of Christians said to be Dalits.[19]

The campaign for legislation in Britain therefore does not come from any significant section of the Indian communities, but from select lobby organisations which have put up a case that caste discrimination exists in Britain.[20] The number of Dalits or 'untouchables' affected by caste discrimination in Britain was given during the British parliamentary debates, with figures ranging from anywhere between 50,000 and 200,000 (Lord Avebury, while citing a lack of detailed research), to 500,000 (Lord Harries).[21] In

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I know. We are at not at the stage yet where we might oblige anybody offering funeral services to provide them to members of different religions or sects.

17 See S. N. BALAGANGADHARA, *Platform Paper*, p. 11.

18 The exclusion of Dalit Christians from the list of Scheduled Castes under Indian legislation is mentioned by Rowena ROBINSON – Joseph Marianus KUJUR (eds.), *Margins of Faith: Dalit and Tribal Christianity in India*, Los Angeles 2010, p. 3. The term 'untouchables', also a political term, is used in place of Dalits by proponents of the legislation. See e.g. Lord HARRIES, House of Lords Debates, 11 Jan 2010, col. 334 and 22 Dec 2010, col. 1099.

19 R. ROBINSON – J. M. KUJUR, *Margins of Faith*, p. 5, drawing on various authors in their book, point out that "*around 65–70 per cent of Indian Christians have Dalit roots and around 15 to 20 per cent are tribals*".

20 Baroness THORNTON, House of Lords Debates, 11 Jan 2010, cols. 343 listed as being among the organisations consulted: the Voice of Dalit International, Indian Christian Concern, the Catholic Association for Racial Justice, CasteWatchUK, the Federation of Ambedkarite and Buddhist Organisations, the British Asian Christian Council, the Dalit Solidarity Network, the Anti-Caste Discrimination Alliance and Shri Guru Valmik Sabha. The Hindu Forum of Britain and the Hindu Council UK are also mentioned, but these organisations opposed the legislation.

21 Lord AVEBURY, House of Lords Debates, 11 Jan 2010, col. 332; Lord HARRIES, House of Lords Debates, 11 Jan 2010, col. 335.

the 2013 parliamentary debates, Lord Deben brought his skills to bear on the issue of size of the Dalit population:

> "*There are, after all, fewer Jews in this country than there are Dalits. They are wholly protected under the laws. There are fewer Sikhs in this country than there are Dalits, but they are wholly protected under the laws.*"[22]

In the 2011 Census over 263,000 respondents were counted in England and Wales as answering 'Jewish' to the voluntary question on religion, while over 423,000 people identified as 'Sikh' and 817,000 as 'Hindu'. Lord Deben must therefore have been suggesting that the number of Dalits was something over 423,000. In a House of Commons debate that took place in July 2004 to question why the government had not yet implemented the caste provision, Jeremy Corbyn MP, who is trustee of the Dalit Solidarity Network and member of the all-party parliamentary group for Dalits, was not to be outdone by members of the Upper House. He declared "*There are roughly 1 million Dalit people in Britain.*"[23] Whether a result of natural increase or immigration, or merely imaginary, the inflation in Dalit numbers was surely extraordinary. The suspicion that the figures were raised to boost the appeal of the legislation was not lost on the various Indian organizations challenging the legislation.[24] The move for legislation in Britain would also boost an internationally orchestrated campaign within UN organs and the EU to have caste discrimination recognized in some form, with India as the ultimate addressee. The European Parliament and the UN High Commissioner for Human Rights have recently issued statements concerning caste discrimination.[25] Proponents of the legislation, however, appear to portray the Indian situation incorrectly. For instance, Lord Harries argued that in Britain there was a need for there to be "*very firm legislation in place,* as there is in India*, prohibiting discrimination in the areas of employment, public education*

22 Lord DEBEN, House of Lords Debates, 4 March 2013, col. 1298.

23 House of Commons Debates, 9 July 2014, col. 138WH.

24 How the number of Dalits and other information was presented is encapsulated in the video, 'The Lying Lords of London' issued by the National Council for Hindu Temples (NCHTUK), URL: <https://www.youtube.com/watch?v=z5–XQdinqHo#t=75> [cit. 2015–02–05].

25 European Parliament resolution of 10 October 2013 on caste-based discrimination (2013/2676(RSP)), URL: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7–TA-2013–0420+0+DOC+XML+V0//EN> [cit. 2015–02–05]; Statement by UN High Commissioner for Human Rights Navi PILLAY at the Meeting on caste-based discrimination in the United Kingdom organised by the Anti Caste Discrimination Alliance, House of Lords, London, 6 November 2013, URL: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13973&LangID=E#sthash.jFPClsH9.dpuf> [cit. 2015–02–05].

and public goods and services".[26] Indian legislation which varies from state to state applies reservations for public sector jobs and in universities, and otherwise criminalizes prohibitions on access to facilities such as water wells or acts of violence against Scheduled Caste and Scheduled Tribes. However, there is no general anti-discrimination law applying to the fields to which the British Equality Act does.[27] This British legislation is globally unique in the sense that it is the first jurisdiction to legislate for a ground of action for caste discrimination within its civil law.

Not only has no debate taken place about the propriety of introducing caste as a ground for discrimination, still less has it been considered what the proper scope of any such legislation should be. The issue of legislative coverage, in so far as it is aimed at curbing any mischief, is ambiguous. The NIESR report,[28] commissioned by the Labour government in 2010 at the time of the passing of the Equality Act, showed no clear case for applying caste discrimination legislation, even if one assumes that something like caste discrimination could be measured and that legislation would solve any problems met in the context being discussed here. The NIESR report provides examples relating to temples and marriage, although no serious case can be made for extending anti-discrimination law to these areas.[29] The Equality Act's section 9(5)(b) provides that the Minister "*may by order amend this Act so as to provide for an exception to a provision of this Act to apply, or not to apply, to caste or to apply, or not to apply, to caste in specified circumstances*". This appears to at least provide for the possibility that the caste provision's reach may be subject to exceptions. However, it is argued by the authors of one the EHRC's reports that a restrictive approach should be taken to framing any exceptions to the parts of the legislation that apply to caste:

26 Lord HARRIES, House of Lords Debates, 22 Dec 2010, col. 1099, emphasis added. Baroness FLATHER earlier gave an incorrect impression of the Indian legislation as providing a general non-discrimination law: "*In India, you are not allowed to discriminate on the basis of caste, but discrimination is still there.*" House of Lords Debates, 11 Jan 2010, col 339. The idea that discrimination persists in India despite legislation is frequently invoked. See e.g. House of Lords Debates, 26 Nov 2014, cols. GC300–GC316 (debate on caste and poverty in India); David KEANE, *Caste-Based Discrimination in International Human Rights Law*, Aldershot 2007, pp. 3–4.

27 For an older account on the legal situation, see Marc GALANTER, *Competing Equalities: Law and the Backward Classes in India*, Berkeley 1984. On the contrasts between India and Britain, see Werner F. MENSKI, *The Indian Experience and its Lessons for Britain*, in: Bob Hepple – Erika M. Szyszczak (eds.), Discrimination: The Limits of Law, London 1992, pp. 300–343.

28 H. METCALF – H. ROLFE, *Caste Discrimination and Harassment*.

29 Although legislation exists allowing court orders to be made in case of forced marriages – see the Forced Marriage (Civil Protection) Act 2007 – no case has yet been made to punish a person for preventing another from marrying out of caste, and much less still for the law to compel a person to marry out of caste.

"*That caste is to be made an aspect of race, rather than another protected characteristic such as religion, means that the zone of operation of the exceptions generally is as narrow as it can be.*"[30]

At times, one gets the impression that the aim is to eradicate caste in general, not surprising, given what appears to be the default intuition that caste is an inherently discriminatory and immoral institution.[31] The approach to consultations and research also leads to the conclusion that those campaigning for and framing the legislation are not interested in knowing about the phenomenon they are discussing, but rather to pursue a pre-determined goal. Many Hindu, Jain and Sikh organisations have said they were by-passed in consultations on the legislation. This was justified on grounds that they do not represent the groups who are the victims of caste discrimination. For instance, Lord Avebury mentioned "*the Hindu Forum of Britain and the Hindu Council as the two largest and most representative organisations in that field, but those organisations do not speak for the lower castes and the Dalits*".[32] The possibility that they may legitimately want to raise matters on behalf of those likely to be defending claims of caste discrimination is not contemplated. Another one of the proponents of the legislation, Lord Deben stated, "*The idea that passing this law would in some way be insulting to Hindus seems to me to be absolutely outwith sense, and we have to make that absolutely clear.*"[33]

Despite the frequency with which the terms 'upper caste' and 'lower caste' are invoked, it is nowhere set out how one distinguishes between them. While the legislation is neutral in the sense that a member of any caste could bring an action against the actions of a member of another caste, it seems pretty clear that the proponents of the legislation contemplate only Dalits or untouchables as being the targets of discrimination. Legislators arguing for caste to be included in the Act showed great confidence in their ability to see the mischief and act upon it. Some said that a single case of caste discrimination is enough to act.[34] Lord Lester, who had earlier tabled an amendment to introduce descent into the Equality Bill noted: "*I simply do not understand why research is needed. The Minister has agreed that, even if there were one case of the kind that I described, that should be unlawful because it is wrong in principle.*"[35] It appears to have been irrelevant that the

30 Meena DHANDA – Annapurna WAUGHRAY – David KEANE – David MOSSE – Roger GREEN – Stephen WHITTLE, *Caste in Britain: Socio-legal Review*, p. vii.

31 For instance, Labour MP Kate Green, shadow spokesperson for Equalities, noted: "*Everyone agrees that caste has absolutely no place in our society.*" House of Commons Debates, 23 April 2013, col. 791.

32 House of Lords Debates, 11 Jan 2010, col 332.

33 House of Lords Debates, 22 April 2013, col. 1309.

34 Labour MP, Kate GREEN: "*if there is even one case of such discrimination, proper action must be taken and there must be proper access to redress*". House of Commons Debates, 23 April 2013, col. 791. To similar effect, see Lord DEBEN, House of Lords Debates, 22 April 2013, col. 1310.

35 House of Lords Debates, 11 Jan 2010, col. 344.

NIESR study refused to give wholehearted support to the claim that caste discrimination was a problem. Lord Avebury implied that the NIESR study did advocate prohibiting caste discrimination when he asked: "*My Lords, does the Minister agree that the research shows that discrimination based on caste does occur within the areas covered by the Act, and that it would be reduced if Section 9(5) of the Act was activated?*"[36]

It is possible that the seeds of ambiguity are contained in the NIESR report itself. While the NIESR study's authors did state that there is evidence of caste discrimination, they also stated that they could not establish its extent and whether it was dying out. They noted that only a major research programme could establish that.[37] Lord Dholakia, the only Asian peer in the House of Lords to have maintained an explicit stance against the legislation noted that:

> "*in essence, there is a lack of evidence on caste matters. The report produced by the national institute* [NIESR] *clearly acknowledges that there is no evidence to suggest the existence of large-scale discrimination in this country based on caste… having acknowledged that the available evidence did not indicate that caste discrimination was a significant problem in Britain in the areas covered by discrimination legislation, Parliament proceeded to accept an amendment to the Equality Bill to include caste as an aspect of race by a ministerial decision.*"[38]

A member of parliament for a Leicester constituency since revealed that "*I have never seen any evidence of caste discrimination in Leicester.*"[39] This observation becomes more significant considering that the density of the South Asian population (Indian, Pakistani, and Bangladeshi) in Leicester is some six times that in England and Wales as a whole.

From the account given here one might consider that Balagangadhara's proposition concerning the reconciliation of general and particular interests has not been complied with. To make the findings and Balagangadhara's position consistent, one would have to introduce some additional factor which enables the case to be made that the current settlement does nevertheless represent such reconciliation. One might then say that the norm of equality is so powerful that any interests supporting it would presumptively meet the criterion of national or general interests. It would then be up to those resisting the caste clause to justify why such a norm as part of the general law should not affect their

36 House of Lords Debates, 22 Dec 2010, col. 1098.

37 H. METCALF – Heather ROLFE, *Caste Discrimination and Harassment*, p. 63.

38 House of Lords Debates, 22 April 2013, col. 1312. For further doubt about the NIESR study see remarks by Alok SHARMA MP, House of Commons Debates, 16 Apr 2013, col. 233–234.

39 E-mail communication from Jon Ashworth, 5 June 2013. Similarly, see Alok SHARMA MP, House of Commons Debates, 16 Apr 2013, col. 234.

particular interests. But that too is not enough to account for the scenario surrounding caste because for other types of discrimination elaborate exemptions, exceptions and the like have been worked out in advance. For instance, the demands of conscientious objection on the part of religious people are built into the Equality Act and it seems reasonable that the legislation does so. As argued further below, the situation might make more sense if one considers the Christian moral background to the idea of equality and how its counterpoint becomes the Indian caste system. It could be that because the caste system represents a part the explanation of why the Indian religions are false that its legal de-legitimization seems not worth compromising over. From that perspective, the organizations and parliamentarians campaigning against caste discrimination do not represent particular interests but represent the general interest against which any claims of Indians have to be balanced. However, Indians face a huge problem in attempting to argue against the legislation on caste discrimination. Since it is already said, as Ambedkar did, that such a system exists by virtue of their religion, Hinduism, they could either deny that caste is any longer a factor or they could say that Hinduism does not sanction the caste system. Either way they are compelled to accept that the system wherever and whenever it exists is immoral. Even if they were to support such a system as caste, maximally they might claim, as Gandhi did, that it was once good but then became corrupted. However, in so doing, they still have to agree that it is immoral today. Embarrassed, they might decide to take steps to reform the 'caste system' or they might turn away from 'Hinduism' altogether. The skewed nature of the dialogical situation effectively frustrates attempts to contest the legislation or argue against the advocates for legislation against caste.[40]

Caste and race

It has already been noted that the Equality Act 2010 makes caste "an aspect of race". In other words it provides that caste should be regarded 'as a part of' or 'a face of' race; and caste discrimination should be regarded as one part of or one face of racial discrimination. In so doing, the legislation also imports the kind of moral opprobrium against caste discrimination with which racial discrimination is considered. The connection between caste and race in recent history goes back at least to the UN conference on Racism in 2001. Those lobbying for its inclusion had been advised by some writers

40 For an analysis of the skewed nature of dialogues in the context of writings on Hinduism, see S. N. BALAGANGADHARA, *Reconceptualizing India Studies*, esp. pp. 147–168.

not to argue for equivalence between caste and race,[41] and the Indian state delegation fended off an attempt to include caste in the Declaration and Programme of Action of the conference. Various attempts have been made before and since to extend racial discrimination as defined in the UN Convention on the Elimination of Racial Discrimination (CERD) of 1965 to encompass caste discrimination on the ground that the Convention's definition includes a reference to 'descent'.[42] A legal argument based on a wider reading of international law is provided by David Keane, which is in turn used by Annapurna Waughray to make a case for an extension in UK domestic law via the race-includes-descent route.[43] Both academics are also co-authors of the EHRC's report *Caste in Britain: Socio-legal Review*. Lord Lester had earlier advocated the inclusion of descent to cover caste in the Equality Act but later came out in favour of the provision referring specifically to caste.[44]

Descent-based discrimination was recently held to be encompassed by racial discrimination under the Race Relations Act 1976 (now replaced by the Equality Act 2010) by the UK Supreme Court.[45] The case concerned a refusal of admission to a child to the JFS School, a voluntary aided comprehensive secondary school, on the ground that he was not Jewish according to the admissions criteria the school adopted. The child's mother was Jewish by conversion and not descent. Given that the formula for 'racial group' in the 1976 Act (now 'race' in the 2010 Act) included 'ethnic origins', a majority of five of the Supreme Court held that the school had discriminated directly on grounds of ethnic origin because of the descent-based test of Jewishness while, of the minority of four Law Lords, two said that the policy did indirectly discriminate on the basis of ethnic origin. The majority of their Lordships drew support from the CERD and the statements by the UN Committee that monitors its implementation by states parties in their domestic jurisdictions, to the effect that descent-based discrimination amounts to

41 See the chapters by André BETEILE and Dipankar GUPTA in Sukhdeo THORAT and UMAKANT (eds.), *Caste, Race and Discrimination: Discourses in International Context*, Jaipur and New Delhi 2004.

42 Article 1 of CERD states: "*In this Convention, the term "racial discrimination" shall mean 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.*"

43 D. KEANE, *Caste-Based Discrimination*; Anapurna WAUGHRAY, *Caste Discrimination: A Twenty First Century Challenge for UK Discrimination Law?*, Modern Law Review 72.2, 2009, pp. 182–219, the latter arguing for amending the law to align UK law with international law and to make descent-based discrimination, and therefore caste, unlawful. Waughray's article was mentioned by the Government Minister, Baroness Thornton, as having been passed on to her by Lord Avebury: House of Lords Debates, 11 Jan 2010, col 342.

44 House of Lords Debates, 11 Jan 2010, cols. 336–337.

45 *E, R (on the application of) v Governing Body of JFS & Anor* [2009] UKSC 15 (16 December 2009).

racial discrimination. Jewish groups have split around the decision, with those dissenting arguing that the Supreme Court bases its decision on a test of membership imposed by Christianity not Judaism.[46] A similar criticism is made by academics, Jospeh Weiler and Didi Herman.[47] Lord Brown's dissenting judgement too expresses the point succinctly, that to find the school's admissions test discriminatory involved "*the imposition of a test for admission to an Orthodox Jewish school which is not Judaism's own test and which requires a focus (as Christianity does) on outward acts of religious practice and declarations of faith, ignoring whether the child is or is not Jewish as defined by Orthodox Jewish law*". Lord Rodger, also in the dissenting minority, noted that the majority decision "*produces such manifest discrimination against Jewish schools in comparison with other faith schools, that one can't help feeling that something has gone wrong*".[48] One can assume that their Lordships were aware of the controversial nature of their judgement in as much as they recognized that parliament must amend the legislation.[49] Meanwhile, a point about descent extending to caste was raised by Lord Mance in relation to CERD but not dealt with conclusively:

> "*The reference to descent (although not explicitly repeated after the general prohibition on 'racial discrimination' in article 5) is, on its face, very pertinent in the present case. However, it is suggested that, having been introduced on a proposal by India, the word 'descent' is limited to caste, but India itself disputes this, and it has been forcefully suggested that the background to its introduction indicates that it was not concerned with caste at all: Caste-based Discrimination in International Human Rights Law, David Keane (Brunel University, Ashgate Publishing Ltd., 2007, chap. 5). Nevertheless, the Committee established to monitor implementation of CERD under article 8 has itself treated descent as including caste in its General Recommendation XXIX A/57/18 (2002) 111, where it recommended, in para 1, that states take "steps to identify those descent-based communities under their jurisdiction who suffer from discrimination, especially on the basis of caste and analogous systems of inherited status*". Whether or not 'descent' embraces caste*, the concepts of inherited status and a descent-based community both appear wide enough to cover the present situation. That in turn tends to argue for a wide understanding of the concept of discrimination on grounds of 'ethnic origins', although the point is a marginal one.*"[50]

46 For an indication of the controversy, see e.g. BBC News, 'Jewish school loses places fight', URL: <http://news.bbc.co.uk/1/hi/8415678.stm> [cit. 2015–03–17].

47 J. H. H. WEILER, *Discrimination and Identity in London: The Jewish Free School Case*, in: The Jewish Review of Books (Spring 2010) at URL: <http://jewishreviewofbooks.com/articles/97/discrimination-and-identity-in-london-the-jewish-free-school-case/> [cit. 2015–03–17]; Didi HERMAN, *An Unfortunate Coincidence: Jews, Jewishness, and English Law*, Oxford 2011.

48 So-called 'schools with a religious character' are allowed to prefer students on grounds of faith. See Equality Act 2010, schedule 11.

49 Lady HALE, *JFS* case, who was part of the majority, at para. 70.

50 JFS case, at para. 81. Emphasis added.

Therefore, although the *JFS* case also rehearsed the point about caste discrimination in international law, the Supreme Court arrived at no particular conclusion about it. It is also arguable that Lord Mance misconstrues the argument by David Keane because although he does write that the Indian government rejects the notion that descent includes caste, Keane also writes that the Indian government must recognize that caste discrimination does constitute part of racial discrimination in light of developments in international law. In any case, it is important to note that in the *JFS* judgement the idea of discrimination based on descent found a home under the rubric of discrimination against a 'racial group'.

Campaigners for extending existing legislation by reading caste into it have not given up. In a more recent case that began at the Employment Tribunal (ET) in Huntingdon, *Tirkey v Mr and Mrs Chandok*[51], the question was raised again as a preliminary issue, prior to the full hearing, and this time squarely as to whether caste amounts to discrimination on grounds of race under the Equality Act 2010. The case concerned an Indian domestic employee of an Indian expatriate couple living in the UK. Mrs Chandok, the employer, is described as Hindu by birth but having converted to Buddhism. The employee is described as an Adivasi and a German Catholic Christian from a poor village in Bihar. Among the claims made were that she had to use separate cups and plates because high caste people would not touch ones she used; she was not allowed to sit on the same furniture; she was asked what caste she was from by her employer; she was not allowed into the employer's house when she first met her in India where she started her employment; she was not provided a separate set of keys to the house; and she could not speak to people other than the employers besides saying hello and asking how they are. She also claimed that she was not allowed time off on Sundays to go to Church. There were a multiplicity of legal claims including unfair dismissal, race discrimination, religion and belief discrimination, unpaid wages and holiday pay.[52] None of the factual or legal claims were decided at this point, because the question of caste as an aspect of race came up at a late stage in the proceedings and had to be dealt with as a preliminary question.

The ET judge held that that because caste comes within descent discrimination as covered by the CERD, it should be read as entering UK legislation through the EU Race Directive because, he argued, the EU Race Directive was also intended to give effect to the CERD. The CERD is mentioned in the preamble to that Directive tangentially and

51 Case no 3400174/2013, preliminary judgement 24 January 2014.

52 It may be interesting to note that the case was taken up by the Anti Trafficking and Labour Exploitation Unit at the Islington Law Centre. This lends the flavour of the Devyani Khobragade case in New York recently.

as one among other international human rights instruments. Among the features that make it difficult for the judge's interpretation to be convincing on legal grounds are that a court would (a) have to be sure what other aspects of CERD would enter the Directive and hence UK domestic law; (b) have to go into the discussions of the EU Council and decide whether indeed they had thought of including descent into the Directive and yet chose deliberately to omit it while explicitly referring to 'race' and 'ethnicity'; and (c) decide whether the UK would have considered this element of the CERD when deciding on the Directive within the EU Council because to give assent to descent being included would affect a multiplicity of areas of law. It would also mean that some explanation would have to be provided for whether all other previous race Relations Acts in the UK (1965, 1968 and 1976), which were enacted while the UK was a party to the CERD, were also intended to include descent even though they never explicitly mentioned descent. Despite these potential interpretive difficulties, which the ET judge did not address, he felt confident in holding that caste could already be seen as part of 'race' for the purposes of the Equality Act 2010, even though the Act's provision on caste had not yet given effect and public consultations were pending on how it was to be given effect.

The existence of the caste provision in section 9(5) of the Equality Act became the main bone of contention in the case at the appeal stage of this case before the Employment Appeal Tribunal (EAT).[53] How could an Act of Parliament, which referred to caste and was yet to be implemented, be consistent with the argument that the existing legislation should be read as if it already covers caste? This was in effect the argument of the Chandhoks (who became the appellants in this appeal). In a relatively brief judgement, most of which discusses whether the ET judge was right to procedurally admit the caste argument at a late stage in the proceedings, the President of the EAT, Mr Justice Langstaff, did not see any inconsistency. He held that the fact that the Equality Act had already provided for caste, albeit as yet unimplemented, was not a bar to recognizing that the "ethnic origins" part of race in the same Act had some bearing on caste. The court referred to Annapurna Waughray's article where she presents the following idea of caste:

> "*There is no agreed sociological or legal definition of caste, but a number of salient features can be identified. Castes are enclosed groups, historically related to social function, membership of which is involuntary, hereditary (that is determined by birth) and permanent… Unlike class, it is not generally possible for individuals or their descendants to move into a different caste. Caste is governed by rules relating to commensality (food and drink must only be shared by others of the same caste) and is maintained by endogamy (marriage must be within the same caste). It entails the idea of innate characteristics and hierarchically graded distinctions based on notions of*

53 *Chandhok & Anor v Tirkey (Race Discrimination)* [2014] UKEAT 0190_14_1912, judgement of 19 December 2014.

> *purity and pollution, with some groups considered to be ritually pure and others ritually impure. A crucial feature of caste in South Asia is the concept of "Untouchability", whereby certain people are considered to be permanently and irredeemably polluted and polluting, hence "untouchable", with whom physical and social contact is to be avoided. Despite the notional nature of caste, Untouchability is conceptualised as an innate physical property separating the Untouchables from the rest of society."*[54]

While Waughray honestly notes that there is actually "*no agreed sociological or legal definition of caste*", her account yet goes on to distil the various "*salient*" dimensions of caste. Mr Justice Langstaff did not linger further over what caste is, but was content to say that at least some things that caste stands for must be covered by "*ethnic origins*". In so far as that is the case, caste could be part of a claim of race discrimination.

Putting it negatively as Justice Langstaff did (at para. 45): "*The fact that there is no single definition of caste, as the parties before me were agreed, does not mean that a situation to which that label can, in one of its manifestations, be attached cannot and does not fall within the scope of 'ethnic origins'.*" Justice Langstaff fails to specify which "*manifestations*" of caste he has in mind. Positively, he said that if the claimant "*proves facts which – whether colloquially or accurately – could be described as 'caste considerations' which come within the heading 'ethnic or national origins'* […] *she will succeed in her claim if the Tribunal concludes that she was less favourably treated because of those facts: if she fails, then no matter how much it might be asserted that she is of a particular caste, and that that was a reason for her treatment, she will fail unless at least part of her treatment falls within*" [the colour, nationality, or ethnic or national origins grounds of the Equality Act].[55] The fact that "*could be described*" is a very tentative legal test for imposing liability upon another party should be fairly worrying for Indians especially, who will be targets of litigation hereinafter. Caste is therefore legally relevant now in so far as a nexus can be established between caste and ethnic origins, say through the idea of descent. As noted, the Supreme Court has already ruled in the *JFS* case that a school admission policy stipulating descent from a mother who is Jewish by conversion was unlawful because it discriminated on grounds of descent, which also amounts to ethnic origins discrimination. Some sort of caste ≤ descent ≤ ethnic origins ≤ race chain of thinking seems to be envisaged here.

54 Annapurna WAUGHRAY, *Capturing Caste in Law: Caste Discrimination and the Equality Act 2010*, Human Rights Law Review 14, 2014, pp. 359–379. The citation occurs in para. 44 of the judgement.

55 *Chandhok & Anor v Tirkey (Race Discrimination)* [2014] UKEAT 0190_14_1912, para. 53.

The caste system

Through the various sources, including the parliamentary discussions, the case reports, the academic writing and the official reports in which an overlapping group of academics also collaborated, the idea of the 'caste system' recurs. As we saw, sometimes, the problem is said to be with the phenomenon of 'caste' itself, but at other times the notion of the 'caste system' is used. For instance, Labour MP Kate Green, shadow spokesperson for Equalities, noted: "*Everyone agrees that caste has absolutely no place in our society*."[56] There is also a tendency to avoid providing a clear idea of what phenomenon one is referring to when using the word 'caste'. The explanatory notes to the Equality Act 2010 already provide an indication of what its framers thought caste refers to:

> "*The term "caste" denotes a hereditary, endogamous (marrying within the group) community associated with a traditional occupation and ranked accordingly on a perceived scale of ritual purity. It is generally (but not exclusively) associated with South Asia, particularly India, and its diaspora. It can encompass the four classes (varnas) of Hindu tradition (the Brahmin, Kshatriya, Vaishya and Shudra communities); the thousands of regional Hindu, Sikh, Christian, Muslim or other religious groups known as jatis; and groups amongst South Asian Muslims called biradaris. Some jatis regarded as below the varna hierarchy (once termed "untouchable") are known as Dalit.*"

In his book, *Caste-based discrimination in international human rights law*, David Keane argues, "*It is impossible to have a clear definition of what constitutes caste.*"[57] Annapurna Waughray speaks variously of 'caste', 'caste discrimination' and the 'caste system'.[58] The authors of the report, *Caste in Britain: Socio-legal Review*, who include Keane and Waughray, say that "*there are dangers in adopting too precise, or too broad a legal definition of caste*", and then go on to say but there was "*a value in using a minimum definition of caste in terms of: (1) endogamy (2) inherited status, and (3) social stratification*".[59] However, any value in such a definition is significantly diminished once one considers that individually and collectively such criteria can be applied to a myriad of other social phenomena. As an example one might suggest that a group of say 'white people' in Britain are very likely to marry or have relationships with one another (there is evidence to show this), that they are likely to transmit the desirability of doing so across generations, and this leads to kinds of social stratification in that such structures can act as interest groups, as

56 House of Commons Debates, 23 April 2013, col. 791.
57 D. KEANE, *Caste-Based Discrimination*, p. 7.
58 A. WAUGHRAY, *Caste Discrimination*.
59 M. DHANDA et al, *Caste in Britain*, p. viii. This formulation concedes the case that Dunkin JALKI and Sufiya PATHAN make in this issue about how basic themes in the research on caste studies are repeated without adequate explanation for anomalies, resulting in the retention of Orientalist 'certainties'.

economically distinct groups, display exclusionary patterns and so on. It is also unclear why such criteria, individually or collectively, if they really do represent existing social structures, should be morally objectionable and should require legislation to correct them. While the writers of the *Socio-Legal Review* see value in their imprecise but not-too-broad definition, in a note prepared for the purpose of bringing the clause on caste into effect, Lord Lester, Annapurna Waughray and David Keane write that, "*it would be inappropriate to seek to define the meaning of 'caste' any more than it was necessary to define the meaning of 'Sikh' or 'Jew' to bring members of those 'ethnic' groups within the scope of the Act*".[60]

Despite the ambiguity shown in the thinking of those promoting or supporting the legislation, an impression of clarity is simultaneously given in all of the debates and writings regarding the consequences of a phenomenon, the nature of which it appears difficult to pin down. During the 2010 parliamentary debates the Earl of Sandwich noted:

> "*The Minister knows that dalits form a very high proportion of Indians, both Hindu and Sikh, in this country, and they are still regarded as outcasts many years after they have left India. In other words, there are some who are outside the caste system altogether. There can be no doubt that members of such a group are, or may be, victims of discrimination.* […] *Whatever the Ambedkar reforms have achieved in India and south Asia, we know that an ancient system of caste is not going to be abolished – thousands of campaigners are still working on that in India – but to find it transposed into British society is something else. Quite simply, it is morally wrong, and it cannot be allowed to happen if it is shown to lead to discrimination in our society.*"[61]

The noble Lord unites the various themes of the large size of the Dalit or outcast population, the transposition of the phenomenon to the diaspora, and the moral problem of discrimination against them. Baroness Turner of Camden also brings in the theme of inequality in education and job opportunities:

> "*My Lords, it is important that a voice from these Benches should be heard in support of this amendment. There was a lot of talk in the previous debate about equality of opportunity. We are talking here about groups of people who, because of their birth, have absolutely no possibility of any equality of opportunity at all, and no hope of getting any sort of education or job if they ever complete their education.*"[62]

60 Amending the Equality Act 2010 to include Caste Discrimination. At URL: <http://www.odysseus-trust.org/caste/Amending_the_Equality_Act_2010.pdf> [cit. 2014–04–10].

61 House of Lords Debates, 11 Jan 2010, col 336.

62 House of Lords Debates, 11 Jan 2010, col 339.

It is not explained why the lack of opportunities might be absent and how any disadvantages link to caste. Rather, that caste is the cause of all these disadvantages is a presupposition of the British parliamentary discussions on caste.

An additional dimension of caste is its link with the idea of the Aryan intrusion into India sometime in the past. Prior to the Second World War, the existence of an Aryan race was advocated widely in European intellectual circles and, although it suddenly disappeared from mainstream Western thought after the genocide during the Second World War, it is routinely invoked when India's population and caste system are discussed. It antedates the caste system and plays the role of explaining its rise, its racial features, and its hierarchical structure. This is Lord Singh of Wimbledon:

> "*Caste has a very precise meaning attached to practices associated with the Hindu faith. It has its origin in the desire of the Aryan conquerors of the subcontinent in pre-Vedic times to establish a hierarchy of importance, with priests at the top followed by warriors, those engaged in commerce and then those engaged in more menial tasks. The conquered indigenous people were considered lower than the lowest caste. Accident of birth alone determined a person's caste. Sadly, thousands of years latter* [sic], *and despite legislation by the Indian Government, which has been referred to, this hierarchy of importance still lingers on.*"[63]

Interrupting Lord Singh's erudition, Baroness Flather offers her insights:

> "*The caste system was established very early in Hinduism. The Sanskrit for caste is "varna", which is also the word for colour. The noble Lord mentioned the Aryan conquerors, who were supposed to be lighter skinned. They wanted a division not only on the basis of who would do what but on the basis of colour.*"[64]

These members of the House of Lords made a strong link between an Aryan intrusion, the caste system, and different Indian races, links which are accepted even among those who, being of Indian origin, are supposed to, in some special way, 'represent' and 'speak for' the British-Indians. Yet as argued below, a combination of Orientalism and 'colonial consciousness' stands in the way of our discovering how Indians actually make sense of caste, and yet also lies at the base of the confidence with which it is legislated against.

Orientalism and the caste system

The very idea of the caste system, its inherent immorality, and its links to the notion of race that we see in the British context of law making can be traced back to the Orientalist

63 House of Lords Debates, 4 Mar 2013, col. 1304.
64 House of Lords Debates, 4 Mar 2013, col. 1305.

accounts of Indian culture and society. The 'caste system' is an Orientalist construct endorsed by the colonial state in India. Although it is almost universally claimed to be so, it cannot be a term that refers to an actual aspect of Indian society or traditions, even though it is taken as such. In that sense it is not indigenous to India or to Indian culture. The idea of a 'caste system' has been imposed on Indian society through the missionary accounts, Orientalist scholarship, and the colonial state's bureaucracy with the assumptions of Western culture in the background. The idea was inculcated into the Indian mentality through the education system that the colonial state instituted. That system was hostile to Indian traditions from the outset and the 'colonial consciousness' it set in train is still perpetuated by India's English educated elite and Indian intellectuals abroad, who now provide a mirror of the Western experience of Indian society to Westerners. The West no longer needs to conduct original research on Indian culture but can point to Indian intellectuals who maintain the Orientalist construction of Indian society. Balagangadhara uses the term 'colonial consciousness' to refer to the persistence among Indian intellectuals of the knowledge framework produced by Orientalism. Despite its unsustainability on rational grounds, it was inculcated through the violence of the colonial state, and persists and reproduces itself beyond formal decolonization.[65] The idea of caste thereby propounded has no relationship to ideas or phenomena within the Indian culture. Indian intellectuals fail to see that because colonial consciousness also entails that they cannot access their own experience. The 'caste system' they assert is a fiction. It has never been scientifically explained how the so-called 'caste system' is a 'system' and what holds it in place. In fact, the evidence is the other way: research indicates that the idea of the caste system is a construct built as a consequence of how the West experiences and makes sense of Indian culture.

It is interesting that medieval Muslim accounts of India, or accounts provided by Greek and Chinese travelers much earlier, do not mention a caste system. Although they may mention the various components constituting Indian society, as they saw them, they could not come up with the kind of hierarchical order through which Europeans made sense of their experience of India.[66] It is now commonly heard that Gautama, the Buddha, railed against the caste system. But ancient accounts of the Buddha's discourses reveal no such thing, and Gautama maintained that a real Brahmin is one who has

65 For the phenomenon of 'colonial consciousness', see S. N. BALAGANGADHARA, *Reconceptualizing India Studies*, pp. 95–120.

66 Samaresh BANDHYOPADHYAY, *Early Foreigners on Indian Caste System*, Calcutta 1974; Louise MARLOW, *Some Classical Muslim Views of the Indian Caste System*, The Muslim World 85.2–1, 1995, pp. 1–22. Both accounts accept that there is an Indian caste system, but their evidence actually shows that other 'foreigners' did not conceive of Indian society the way that Westerners subsequently gave accounts of it based on Christianity and its specific image of Indian religions as false.

virtuous qualities.[67] Subsequent readings of Gautama Buddha to the effect that he sought reform of the 'caste system' are deeply imbued with the Western account of the Buddha as the Martin Luther of India who sought to reform the false religion propagated by Brahmins, just as Protestants in Europe sought the ending of priestly power within the Catholic Church. This account depends on a reading of Indian data with Europe's Christian Reformation in the background, but says nothing of the context in which Gautama Buddha lived and taught.[68] With this template of the conflict within Christianity, however, other movements in India have also sprung up claiming to be religions truer than the decadent Hinduism, often having a slant on caste as hierarchical which the religious movement in question disavows.[69]

The idea of a caste system started to be built when Christian missionaries decided that Brahmins were responsible for the failure of their efforts to convert Indians to Christianity. The idea is thus directly linked to Christian conversion efforts in India, and it remarkably plays out again in the contemporary British context drawing on the same store of constructs for reasons of proselytization. The Brahmins were said to be responsible for holding the Indian people in ignorance of the true religion that Christianity is claimed to be while Indian religion was conversely held as false.[70] As De Roover and Claerhout show, the earlier Christian accounts that had regarded caste as a 'secular' matter changed when the Protestants linked the caste system to Hinduism as that religion came to be described.[71] The caste system thus underwrote the falsity of the religion of Hinduism, and the division of society according to an ordained hierarchy which constituted the Protestant critique of Catholicism was put to use to critique Hinduism too. It is upon this portrayal that subsequent Orientalist and social science accounts of the caste system depend. Keppens meanwhile describes how Orientalist writings depicted the Brahmins and those who followed them because of the religion they espoused, the language they spoke, and institutions and laws they established, as one people, race or nation, the Aryans.[72] Others, upon whom the 'Brahmanical' religion and laws were imposed, being a different people, were excluded from the laws and institutions of the Hindu Aryans.

67 See in this regard the article in this issue by Martin Fárek who discusses more recent Indian discussions on who a Brahmin is.

68 S. N. BALAGANGADHARA, *The Heathen*, pp. 134–138, 207–217.

69 On the playing out of this template in the case of Sikhs, see T. BALLANTYNE, *Resisting the 'Boa Constrictor' of Hinduism: The Khalsa and the Raj*, International Journal of Punjab Studies 6.2, 1999, pp. 195–251.

70 Raf GELDERS – S. N. BALAGANGADHARA, *Rethinking Orientalism: Colonialism and the Study of Indian Traditions*, History of Religions 51.2, 2011, pp. 101–128; S. N. BALAGANGADHARA, *The Heathen*, pp. 86–89.

71 See the article by Jakob DE ROOVER and Sarah CLAERHOUT in this issue.

72 See the article by Marianne KEPPENS in this issue.

This was backed up by the Aryan intrusion theory and the idea that India's population is composed of dominant and subordinate races. It thus fell upon the European Aryans with their superior religion, Christianity, to bring new civilizing light to the parlous moral state of the Indians. Although it was established by Christian polemic against Indian idolatry and the inability to convert Indians in large numbers, these images lie behind secular theorizing of the caste system and the corruption of Indian culture and society. Although the idea of an Aryan race has been dismantled in Europe after the Second World War, it continues to inform discussions of Indian society. It is not hard to see how caste discrimination has come to be thought of as being a mere species of racial discrimination. The caste system is often also likened to a system of 'apartheid'.[73] Assertions about the caste system are therefore felt as deeply stigmatizing and insulting to Indians in India and places such as the United Kingdom where Indians have settled, and they are experienced as expressing the intolerance and religious hatred which lies at their root, and which it has become respectable to direct against the Indian culture.

It is of course true that terms such as *varna* and *jati* (or *gnati*) have been used at various times in the history of India and in its literatures. Europeans mapped these terms onto their own fictive construct of a caste system. As noted their target was distinct: they had to show that the practice by Indians of their false religion was underpinned by a caste hierarchy led by Brahmins, who were the priests of their religion and who misled them into worshipping the devil instead of the one true Christian God. In so doing, the Western observers of Indian culture postulated a relationship between *jati* and *varna* in that the latter must be the organizational stem according to which a hierarchy could be maintained and the many innumerable *jatis* would have to find a place within this meta-structure which was the 'caste system'. No satisfactory scientific account has ever been produced of how *jati* or *varna* functions, and what holds all *jatis* within the structure of *varna*. There are no satisfactory accounts even of what *jatis* are. The accounts we have all presuppose what is to be proved i.e. the existence of the 'caste system'. All such accounts have to refer data back to the hierarchical structure imagined by Europeans since it has become the dominant account in scholarship. This point has to be considered in light

73 See e.g. *India's Unfinished Agenda: Equality and Justice for 200 Million Victims of the Caste System, Subcommittee On Africa, Global Human Rights And International Operations of the Committee on International Relations*, House Of Representatives, One Hundred Ninth Congress, First Session, October 6, 2005, Serial No. 109–102; *Anti-Caste Discrimination Alliance, Hidden Apartheid – Voice of the Community: Caste and Caste Discrimination in the UK: A Scoping Study*, November 2009, URL: <http://acdauk.org.uk/pdf/Hidden%20Apartheid%20–%20Voice%20of%20the%20Community%20–%20ACDA%20Report.pdf> [cit. 2015–03–17]; Anapurna WAUGHRAY, *The New Apartheid?*, in: New Law Journal, 6 January 2012, URL: <http://www.newlawjournal.co.uk/nlj/content/new-apartheid> [cit. 2015–03–17].

of the fact, widely accepted by Western Indologists, that prior to colonialism no state machinery for the passing of legislative codes could be imagined. Even 'local' rulers did not enjoy legislative powers the way European states later developed.[74] This begs the question, if a hierarchical structure contended for existed, how it could possibly have been put into place. The 'constructed' nature of the idea of a caste system can be demonstrated with reference to use of caste in the colonial census from the late 19th century in India, which led to disastrous results the effects of which continue to this day. British anthropologists at the time tried to apply onto the Indian population their construct of caste, carrying as a fact in their account the Christian theological polemic against Indian culture and society. It was impossible for British anthropologists to make their concept of caste 'fit' to the Indian culture.[75] It was abandoned by the British colonial state eventually but not before the virus of caste system thinking had begun to rope in influential Indians who began to set the tone for post-colonial debates and law making, the effects of which are felt to this day in India and the diaspora.

74 See e.g. Timothy LUBIN, *Indic Conceptions of Authority*, in: Timothy Lubin – Donald R. Davis Jr – Jayanth K. Krishnan (eds.), Hinduism and Law: An Introduction, Cambridge 2010, p. 151.

75 Chris FULLER, *Occupation, Race and Hierarchy: Colonial Theories of Caste and Society in India, 1871–1947*, lecture given at the Kings India Institute, 1 May 2013, podcast at URL: <https://www.kcl.ac.uk/aboutkings/worldwide/initiatives/global/indiainstitute/newsandevents/Events-Archive/Chris-Fuller-on-Occupation-Race-Hirarchy.aspx> [cit. 2015–03–17].

Resumé

„Starobylý kastovní systém“: Jak závisí britské protikastovní zákony na orientalismu

V roce 2010 se Velká Británie stala první západní zemí, jež uzákonila právní úpravu v anti-diskriminačním zákoně, která se týká kast. Zákonodárci odůvodnili vložení tohoto ustanovení proti kastovní diskriminaci do *Zákona o rovnosti* (2010) tím, že v indické diaspoře ve Velké Británii přežívá kastovní systém. Zatímco tato úprava dala příslušnému ministrovi pouze možnost implementovat daná ustanovení, dodatek k zákonu z roku 2013 už uzákonil povinnost je zavést do praxe. Organizace indické komunity v Británii fakticky neměly možnost se k těmto úpravám zákona vyjádřit. Byli omezeni zřejmou hrozbou, že kdyby této úpravě bránili, byli by označeni za spoluviníky kastovní diskriminace (což tvrdili zákonodárci podporující úpravu) či za lidi, kteří praktikují formu apartheidu. Autor článku tvrdí, že tato legislativa je postavena na pochybných a chatrných výzkumech. Právě nedostatek důvěryhodného výzkumu znamená, že poprvé v dějinách britského anti-diskriminačního zákonodárství parlament přikročil ke schválení úpravy pouze na základě domněnky, že problém existuje. Stejně tak problematické bylo přesvědčení navrhovatelů, že adekvátní konceptualizace předpokládaného problému (včetně definování kasty) může být řešena retrospektivně, když už byla legislativa zavedena. Také nebylo na žádném případě dokázáno, že mechanismus jako *Zákon o rovnosti* je vhodný pro řešení kastovní diskriminace. Vypadá to, že zákonodárci většinou neměli znalosti zákonů uplatňovaných v jihoasijských zemích, anebo byli seznámeni s jejich zkreslenou podobou. Autor dále pojednává o tom, jak zvykové právo přikročilo k inkorporaci kastovní diskriminace, přestože tato nebyla dosud implementována. Snaha o začlenění precedentu do práva, ať už skrz legislativu nebo zvykové právo, předpokládá zavedení pojetí kastovního systému, které spočívá na vratkých základech. Stereotyp kastovního systému se totiž objevil v prvních křesťanských teologických zprávách o Indii, rozvíjel se pak v orientalistických popisech z koloniální éry a dnes je součástí úvah ve společenských vědách. Tyto myšlenky vedou k přesvědčení, že indická společenská struktura je morálně zkažená a rasistická; přesvědčení, jež stále výrazně ovlivňuje současné přemýšlení o kastách, jak se ukazuje ve vývoji britského práva.