

'SOCIAL DISTANCING' BEFORE COVID-19: INTERROGATING THE UNIVERSALISATION OF CASTE-BASED DISCRIMINATION AND ITS HORIZONTALITY IN RACE

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ABSTRACT

Caste has always infiltrated the public life and has been a constant social identifier. Caste has moved beyond occupation to social function. Two hundred million of India's lowest castes have been subjugated to consistent discrimination. In this context, lakhs of Dalits have been forced to do manual scavenging, which is an egregious form of caste-based discrimination in labour. It is discrimination based on descent and is symptomatic of institutionalised social, legal, political and structural barriers. The contours of caste cross national borders as diasporic communities in the United Kingdom (UK) and United States (US) have shown direct signs of caste prejudices, thereby making it a global concern. There have been debates in the past whether caste can be correlated with other forms of discriminations, such as those based on race in countries like the UK and US. However, the result has been a long list of contested literature. In this paper, I argue that redressal of caste-based discrimination requires concerted international efforts by different countries, and a dialogue with the jurisprudential aspect of anti-racism agenda may add as a strong imperative against caste-based discrimination. Using the case studies of *Safai Karamchhari Andolan v Union of India* (2014), *Tirkey v Chandhok* (2015) in the UK and ongoing *Cisco case* in the US (2020),

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the universalism of caste is emphasised upon and how it poses novel challenges for the equality regime. Recognition of caste as an aspect of the race on analogous ground of inherited unequal status would be a step forward towards the realisation of substantive equality. The experience of caste in India and the United Kingdom would be useful to understand caste in international law normatively and descriptively. I argue that while caste and race are conceptually different, they are axiomatic manifestations of an analogous system of inherited status. I propose that the interpretation of race as an entity subsuming discrimination arising out of caste will help nudge the governments to address it systematically and with full force beyond semantic sophistry in both India as well as United Kingdom.

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I. INTRODUCTION

The killing of George Floyd¹ led to an eruption of global anger and debate on racism in the middle of an ongoing pandemic. It did something more inadvertently for India. It reignited the conversation on racism and casteism in India through a comparative lens.² However, as Israeli historian Yuval Noah Harari notes, 'billions of us can hardly afford the luxury of investigating because we have more pressing things to do'.³ With the global lockdown due to the pandemic, it afforded the time to introspect and evaluate the merits of parallelism.⁴ The case filed against Cisco by California Department of Fair Employment and Housing for failure to prevent caste-based discrimination, which was not squarely covered by protected grounds of 'religion, ancestry, national origin/ethnicity, and race/color's stimulated the debate on globalisation of caste. The case⁶ arose due to failure to prevent, redress workplace discrimination and harassment caused by the

¹ Sanjib Baruah, 'George Floyd protests draw attention to how little has changed on race and justice' *The Indian Express* (17 June 2020) <<https://indianexpress.com/article/opinion/columns/police-violence-racial-injustice-george-floyd-death-protests-racism-6462285/>> accessed 24 July, 2020.

Manny Fernandez and Audra D.S. Burch, 'George Floyd, From "I Want to Touch the World" to "I Can't Breathe"' *The New York Times* (18 June 2020) <www.nytimes.com/article/george-floyd-who-is.html> accessed 24 July 2020.

² Kancha Iliah Shepherd, 'Black Lives must fire up India's anti-caste movement to fight its central villain' *The Print* (21 June 2020) <<https://theprint.in/opinion/black-lives-matter-india-anti-caste-movement-fight-villain-manu/445727/>> accessed 24 July 2020; Anisha Sircar, 'For Indian Americans, Black Lives Matter movement is a chance to discuss casteism and racism' *Scroll.in* (3 July 2020) <<https://scroll.in/article/965672/for-indian-americans-black-lives-matter-movement-is-a-chance-to-discuss-casteism-and-racism>> accessed 24 July 2020; Shruti Rajagopalan, 'Lessons from us from the #BlackLivesMatter agitation' *Livemint* (6 July 2020) <www.livemint.com/opinion/columns/lessons-for-us-from-the-blacklivesmatter-agitation-11594045857859.html> accessed 24 July 2020; 'U.S. Black Lives Matter protests spur calls for India to wake up to Dalit discrimination' *The Hindu* (10 June 2020) <www.thehindu.com/news/national/us-black-lives-matter-protests-spur-calls-for-india-to-wake-up-to-dalit-discrimination/article31798246.ece> accessed 24 July 2020.

³ Yuval Noah Harari, *21 Lessons for the 21st Century* (Vintage August 2019). He also emphasizes caste as religiously sanctioned inequality.

⁴ For more see: Jeya Rani, 'An Invisible Virus Highlights the Virulence of an Age-Old Visible Virus,' *The Wire*, (14 April 2020), <<https://thewire.in/caste/coronavirus-caste-discrimination-india>> accessed 24 July 2020.

⁵ California Department Of Fair Employment And Housing, an agency of the State of California v Cisco Systems, Inc., a California Corporation; Sundar Iyer, an individual; Ramana Kompella, an individual, <<https://regmedia.co.uk/2020/07/01/cisco.pdf>>

⁶ *ibid.*

prestigious Indian Institute of Technology graduates with one of their Indian origin colleagues. The unanticipated case has received widespread traction globally.⁷

Covid-19 also exposed the acquiescence of casteism and racism. India is both casteist and racist with higher importance attached to caste against race. India is a curious place where casteisms⁸ and subtle and overt racism⁹ co-exist simultaneously, which has been exacerbated during the pandemic for Northeast Indians.¹⁰ The hybridity of casteism and racism has not been discussed much in legal discourse. Racism is subsumed and sanitised as 'cultural difference'.¹¹ The racist fault lines exposed by the novel Coronavirus pandemic achieves two goals: India suffers from racism and that there is solidarity between movement against casteism and racism due to their commonality of history of subordination and discrimination.¹² The discourse has primarily focused on casteism while relegating racism to background and racism is much more and broader than casteism as it includes ethnic¹³ and/or national origin, i.e. descent.¹⁴ Racism is a lived and a living reality for

⁷ Anahita Mukherji, 'The Cisco Case could expose rampant prejudice against Dalits in Silicon Valley' *The Wire* (8 July 2020) <<https://thewire.in/caste/cisco-caste-discrimination-silicon-valley-dalit-prejudice>>;

The Wire Staff, 'US Ambedkarite Groups extend support to Cisco employee who allegedly faced caste discrimination' *The Wire* (4 July 2020) <<https://thewire.in/world/cisco-employee-caste-discrimination-us-ambedkarite-organisations>>

⁸ Isabel Wilkerson, 'America's Enduring Caste System' *The New York Times* (1 July 2020) <www.nytimes.com/2020/07/01/magazine/isabel-wilkerson-caste.html> accessed 24 July 2020.

⁹ Samuel Jack, 'Is India a racist country?' *The Hindu* (7 April 2017) <www.thehindu.com/opinion/op-ed/is-india-a-racist-country/article17854153.ece> accessed 24 July 2020;

Tabish Khair, 'The roots of Indian racism' *The Hindu* (16 April 2017) <www.thehindu.com/opinion/columns/the-roots-of-indian-racism/article18061795.ece> accessed 24 July 2020;

Yengkhom Jilangamba, 'Let's stop pretending there's no racism in India' *The Hindu* (29 May 2012) <www.thehindu.com/opinion/op-ed/lets-stop-pretending-theres-no-racism-in-india/article3466554.ece> accessed 24 July 2020.

¹⁰ Thongkhohal Haokip, 'From "Chinky" to "Coronavirus": racism against Northeast Indians during the Covid-19 pandemic' (2020) *Asian Ethnicity* 1; Duncan McDuaie-Ra, "'Is India Racist?": Murder, Migration and Mary Kom' (2015) 38(2) *South Asia: Journal of South Asian Studies* 1.

¹¹ Papori Bora, 'The Problem Without a Name: Comments on Cultural Difference (Racism) in India' (2019) 43 *South Asia: Journal of South Asian Studies* 1.

¹² Smita Narula, 'Equal by Law, Unequal by Caste: The "Untouchable" Condition in Critical Race Perspective' (2008) 26 *Wisconsin International Law Journal* 255, 260-269.

¹³ Definition of ethnicity in Equality Bill 2020 drafted by Centre for Law and Policy Research (CLPR) Section 2(r): "Ethnicity" means ethnic minority groups with a common kinship network, distinct national or cultural tradition in a given geographical area;

¹⁴ See Section (ii) definition of race, ethnicity or descent: any racial and ethnic minorities in the relevant geographical area, including persons who originate from the North-Eastern States of India, persons of Tibetan origin and persons of African origin in Anti-Discrimination And Equality Bill, 2016 by Dr. Shashi Tharoor <http://164.100.47.4/billtexts/lsbilltexts/asintroduced/2991.pdf>. The bill drafted primarily by Professor Tarunabh

people from the North East and refuses to cease irrespective of the popular perception.¹⁵ Casteism is, to an extent, invisible but racism is both visible and invisible in popular di

course. Racism has been conflated with colourism¹⁶, and there has been a growing consciousness of racism distinguishable from casteism in India in the recent past. An effort has been made to define race and caste in the two drafts of the comprehensive equality legislation in India framed by Professor Tarunabh Khaitan in 2017¹⁷ and Centre for Law and Policy Research (CLPR) in 2020. Both the laws tried to identify the sites of discrimination with caste and race being mentioned in the definitional clauses. No attempt is made to define caste, but both the bills include the Scheduled Caste as enumerated in Article 341 of the Constitution. In the bill proposed by Professor Tarunabh Khaitan in 2017, caste includes within its fold 'any other group that has been or continues to be subject to the practice of untouchability'¹⁸. Concerning race, while the 2020 CLPR Bill defines race as 'any person who belongs to an ethnic group that shares common physical attributes comprising a comprehensive class of persons with a common descent or place of origin', the 2017 Bill defines race as along with ethnicity and descent as 'any racial and ethnic minorities in the relevant geographical area, including persons who originate from North-Eastern States of India,

Khaitan focusses on 'symmetric protection, its experiential understanding of discrimination as a lived reality, and its proportionate regulation of the private sector.'

See also definition of descent in Equality Bill 2020 drafted by Centre for Law and Policy Research (CLPR)

Section 2(k): "Descent" includes group of persons who share a common ancestry, consanguinity, kinship or lineage.

¹⁵ Jwala Gutta, 'Growing up in India with a Chinese mother hasn't been easy, COVID makes it worse' *The Indian Express* (7 April 2020) <<https://indianexpress.com/article/opinion/columns/coronavirus-outbreak-north-eastern-racism-jwala-gutta-6348807/>>

¹⁶ see 'International Day for the Elimination of Racial Discrimination: A Reading List on Racism in India' (2020) Economic and Political Weekly <[www.epw.in/engage/article/international-day-elimination-racial#:~:text=The%20United%20Nations%20\(UN\)%20has,were%20killed%20by%20the%20police](http://www.epw.in/engage/article/international-day-elimination-racial#:~:text=The%20United%20Nations%20(UN)%20has,were%20killed%20by%20the%20police)> accessed 19 July 2020; Michiel Baas, 'Curry Bashing: Racism, Violence and Alien Space Invaders' (2009) 44(34) Economic and Political Weekly 37-42 <www.epw.in/journal/2009/34/perspectives/curry-bashing-racism-violence-and-alien-space-invaders.html> accessed 19 July 2020; 'Zionism, Racism and Culture' (2011) 46(47) Economic and Political Weekly 9 <www.epw.in/journal/2011/47/editorials/zionism-racism-and-culture.html> accessed 19 July 2020; Mohan Rao, "'Scientific' Racism: A Tangled Skein' (2003) 38(8) Economic and Political Weekly 697-699 <www.epw.in/journal/2003/08/perspectives/scientific-racism-tangled-skein.html> accessed 19 July 2020.

¹⁷ See Tarunabh Khaitan, 'Protection whose time has come: Why the Anti-Discrimination and Equality Bill 2016 must find champions in the Centre and states' *The Indian Express* (25 March 2017) <<https://indianexpress.com/article/opinion/columns/shashi-tharoor-introduces-ade-anti-discrimination-equality-bill-4584252/>>.

¹⁸ See Section 5(i) definition 'caste: the scheduled castes recognized under article 341 of the Constitution, or any other group that has been or continues to be a subject of the practice of untouchability' in Anti-Discrimination And Equality Bill, 2016 by Dr. Shashi Tharoor <http://164.100.47.4/billtexts/1sbilltexts/asintroduced/2991.pdf>.

persons of Tibetan origin and persons of African origin.' The bill of Professor Khaitan, through exemplification, gives insight into the operation of both race and caste in India.

French diplomat, Alexis de Tocqueville's idea of India, was an assimilation of competing castes rather than a nation of people with some commonality. His idea resonated with that of Ambedkar in *Annihilation of Caste*¹⁹ that primary fidelity of an Indian is to his caste and not to his country. Long before Ambedkar, Tocqueville wrote that instead of a nation, in India "each caste forms a separate little nation, which has its own ethos, customs, laws and government. The national spirit of the Hindus is trapped within the caste. Their country is their caste".²⁰ Anand Teltumbde has argued that the Indian republic is founded based on caste.²¹

The paper seeks to argue that caste-based discrimination is subsumed under CERD's definition of racial discrimination which manifests most egregiously in the practice of manual scavenging. International law can be helpful due to recent receptivity of the Indian Supreme Court to international law.²² The paper shall confine itself to study of caste-based discrimination in international human rights law through studies in the UK, US and India. The dialectical relationship of caste and race but rather racial discrimination and caste-based discrimination, i.e. sameness of focal point of this paper.

The paper is divided into seven parts. The first part briefly deals with the functional aspect of caste and its relationship to race. It also discusses the academic construction of their relatedness. The

¹⁹ "Each caste not only dines among itself and marries among itself, but each caste prescribes its own distinctive dress. What other explanation can there be of the innumerable styles of dress worn by the men and women of India, which so amuse the tourists? Indeed, the ideal Hindu must be like a rat living in his own hole, refusing to have any contact with others. There is an utter lack among the Hindus of what the sociologists call "consciousness of kind." There is no Hindu consciousness of kind. In every Hindu the consciousness that exists is the consciousness of his caste. That is the reason why the Hindus cannot be said to form a society or a nation". B. R. Ambedkar et al., *Annihilation of Caste: The Annotated Critical Edition* (Navayana 2014).

²⁰ Alexis de Tocqueville as quoted by Sunil Khilnani, 'Politics and National Identity' in Pratap Bhanu Mehta and Niraja Gopal Jayal, *The Oxford Companion to Politics in India* (Oxford University Press 2011)

²¹ Anand Teltumbde, *Republic of Caste: Thinking Equality in the Time of Neoliberal Hinduva* (Navayana 2018), for an alternate account of India's foundations as constitutional republic see Madhav Khosla, *India's Founding Moment: The Constitution of a Most Surprising Democracy* (Harvard University Press 2020)

²² See India's obligation under international law in the cases of *Navtej Johar v. Union of India* AIR 2018 SC 4321 and *KS Puttaswamy and another v. Union of India* AIR 2017 SC 4161. On the utility of international law in expanding and supplementing Indian Constitution, see Surendra Kumar, 'Case review of Navtej Johar v Union of India, (2018) 10 SCC 1, ILDC 2928 (IN 2018)' in *Oxford Reports on International Law in Domestic Courts*, available at <<https://opil.ouplaw.com/view/10.1093/law-ildc/2928in18.case.1/law-ildc-2928in18?rskey=3P1Omb&result=14&prd=OPII>>; Surendra Kumar, 'Case review of KS Puttaswamy v Union of India, AIR 2017 SC 4161, ILDC 2810 (IN 2017)' in *Oxford Reports on International Law in Domestic Courts*, available at <<https://opil.ouplaw.com/view/10.1093/law-ildc/2810in17.case.1/law-ildc-2810in17?rskey=xSqs92&result=3&prd=OPII>>

second part deals with the historical evolution of caste-based discrimination in the US. The Cisco case is reviewed. The third part deals with Indian judgment on manual scavenging- Safai Karamchari Andolan case contextualised in constitutional as well as international human rights law. The fourth part is the revisionist judgment of the case and the missed potentiality of looking at the broader framework of power, domination and structural challenges. The fifth part is the internationalisation of caste, which gives a brief account of the rise of caste in international discourse. Sixth part briefly discusses the entanglement of politicisation and legalisation of caste in the UK. Seventh part is concluding remarks on the cautionary tale of caste discrimination from India and how not to deal with the same.

II. POLEMICAL ANATOMY OF CASTE IN THE SHADOW OF RACE: A CORNER OF A FOREIGN FIELD²³

While caste traces its origin to ancient India, the etymology of the word itself is not of Indian origin. Caste is a derivative of the Spanish word *casta*, which means *race*. Portuguese travellers who came primarily for trade used the word in the Indian context.²⁴ The scholarly consensus is that while caste started as the invention of Hinduism and its core tenet, it has percolated across religions practised predominantly in South Asia. Caste system or caste-like stratification is visible in major religions practised in South Asia. It is significant to note that 'while the caste system is conventionally associated with Hinduism, all religions in India, including Islam and Christianity,

²³ The term is borrowed from the book of Ramchandra Guha on the history of cricket which has caste embeddedness, Ramchandra Guha, *A Corner of a Foreign Field: The Indian History of a British* (Illustrated edn, Picador 2003) On the issue of caste and cricket, Varun Grover, 'Vinod Kambli was reduced to his assumed ("lowest") caste identity' *The Indian Express* (12 July 2020) <<https://indianexpress.com/article/opinion/columns/reservation-vinod-kambli-dalits-varun-grover-6501257/>> accessed 24 July 2020; see Gaurav Bhawnani and Shubham Jain, 'Does India Need A Caste-Based Quota in Cricket?' *The Wire* (26 July 2018) <<https://thewire.in/caste/does-india-need-a-caste-based-quota-in-cricket>> accessed 24 July 2020; Nissim Mannathukkaren, 'Why we need reservation in cricket' *The Hindu* (11 August 2018) <www.thehindu.com/society/why-we-need-reservations-in-cricket/article24656456.ece> accessed 24 July 2020;

Ramchandra Guha, 'Cricket, caste, community, colonialism: the politics of a great game' (1997) 14(1) *The International Journal of the History of Sport* 174, 174–183.

²⁴ Surinder Jodhka, *Caste* (Oxford University Press 2012).

display inter-group disparity akin to a caste system, leading to the hypothesis that perhaps caste was a system of social stratification in pre-modern South Asia.²⁵

The question on the relationship of caste and race and its diffusion across the world through Indian diaspora has received some attention. It is assumed to be endemic to South Asian societies, especially India. The link between caste and race dates back to the time when the British began colonising India. There has been a strand of thought that the caste system has racial origin as different varnas were assigned different colours in ancient texts.²⁶ The French economist Thomas Piketty writing on the relationship of ideology with inequality devotes a chapter to study the evolution of caste and caste system in India.²⁷ Piketty recounts that Herbert Risley, an ethnographer who was appointed census commissioner in 1901, argued for studying racial characteristics among Indians. In practice, the racial approach yielded no tangible results because most castes exhibited thoroughly mixed ethnic and racial origins.

Mainstream Hindu organisation in the US²⁸ as well as UK²⁹ argue against caste inclusion as the ground of discrimination. Given the uniqueness of the caste system and its centrality as a core tenet

²⁵ Ashwini Deshpande, *The Grammar of Caste: Economic Discrimination in Contemporary India* (Oxford University Press 2011) 22.

²⁶ David Keane, *Caste-based Discrimination in International Human Rights Law* (Ashgate 2007) ch 1, 31.

²⁷ Thomas Piketty, *Capital and Ideology* (Harvard University Press 2020) ch 8; Also see, Ashwini Deshpande, *The Grammar of Caste: Economic Discrimination in Contemporary India* (Oxford University Press 2011) ch 2, 23.

²⁸ Adur, Shweta Majumdar, and Anjana Narayan, 'Stories Of Dalit Diaspora: Migration, Life Narratives, And Caste In The Us' (2017) 40(1) *Biography* 244, 244-264 doi:10.1353/bio.2017.0011 <https://static1.squarespace.com/static/58347d04bebafeb1e66df84c/t/5d9b4f9afbaef569c0a5c132/1570459664518/Caste_report_2018.pdf> accessed 24 July 2020; (In 2015, the California State Board of Education sought to revise its curriculum for purposes of diversity to incorporate the history of South Asia. While the decision by the Board was an unprecedented move, it also laid bare the fractures within South Asian ethnic communities. The Hindu American Foundation (HAF) argued against the inclusion of casteism in the textbooks on the pretext that it was a negative portrayal of Hinduism and Hindu culture and would only fuel American stereotypes of Indians as being backwards.¹² The desire to conceal centuries of repression and violence perpetrated against Dalits in the name of caste is tantamount to expunging the history of an entire community. HAF's move was rightfully met with vociferous protests by more progressive South Asian groups. In addition to demonstrating the friction within the community around questions of caste, this incident sheds light on the everyday lives of many in the diaspora); See also 'HAF Policy Brief: Caste Discrimination Is a Violation of Hindu Teachings' (*Hindu American Foundation*, 9 July 2020) <<https://www.hinduamerican.org/issues/haf-policy-brief-caste-discrimination-violation-hindu-teachings>> accessed 24 July 2020. (Such understanding has been trenchantly criticised by both Ambedkar and Phule. See Ashwini Deshpande, *The Grammar of Caste: Economic Discrimination in Contemporary India* (Oxford University Press 2011)).

²⁹ David Keane, *Caste-based Discrimination in International Human Rights Law* (Ashgate 2007); David Mosse, 'Outside Caste? The Enclosure of Caste and Claims to Castelessness in India and the United Kingdom' (2020) 62(1) *Comparative Studies in Society and History* 4-34; Kunal Purohit, 'Hindu Groups in UK Hit Back at British Government's Plans to Ban Caste-Based Discrimination' *The Wire* (11 July 2017) <<https://thewire.in/caste/caste-discrimination-uk-theresa-may>> accessed 20 July 2020.

in Hinduism, Hindu groups are vehemently opposed to the inclusion of caste as a ground of discrimination as there is not discrimination based on caste in the first place. The legislation is motivated by political and vested interests stemming from prejudice towards Hindus Hindu groups in Britain that oppose caste legislation since caste discrimination does not exist, and the legislation is an outcome of prejudice towards Hindus. Resultantly, there has been a perception of caste to be a 'private family matter'³⁰ which has reduced the scope of external policy-making. There is 'Hinduization of the Dalit plight'³¹, with caste discrimination and religion being inextricably linked.

'Hindu organisations have mounted political and epistemological challenges. On one hand, they have "enclosed" caste within religion and the nation, specifically Hinduism and India, so as to restrict the field of social policy and exempt caste from the law as a basis of discrimination. On the other, they have attempted rhetorically to re-embed social anthropology in its colonial past so as to dismiss "caste" as a category of description and social analysis'.³²

Caste has so far thus, been exempted internationalisation as a ground of a basis of discrimination, consequently due to religious orthodoxy and caste prejudice. The recalcitrance to acknowledge the issue of caste globalisation extends to nations too.

Smita Narula notes that both African- American and Dalits' faced racist and casteist denial of their respective governments'³³- either through thwarting the attempts of the groups to articulate their concerns or rendering the delegation's involvement infructuous by walking out of the World Conference Against Racism in Durban, 2001. Sukhdeo Thorat traced the efforts of Ambedkar to internationalise the caste by comparing untouchables to slavery during the time of formation of the Universal Declaration of Human Rights under the United Nations. Ambedkar wrote to William Edward Burghardt Du Bois,

'There is so much similarity between the position of the Untouchables in India and of the position of the Blacks in America and that study of the latter is not only *natural but necessary*. I was very much interested to read that the Blacks of

³⁰ Mosse, 'Outside Caste? The Enclosure of Caste and Claims to Castelessness in India and the United Kingdom' (ibid, 24)

³¹ David Mosse, 'Outside Caste? The Enclosure of Caste and Claims to Castelessness in India and the United Kingdom' (2020) 62(1) Comparative Studies in Society and History 4-34 <https://eprints.soas.ac.uk/31480/8/outside_caste_the_enclosure_of_caste_and_claims_to_castelessness_in_india_and_the_united_kingdom.pdf>

³² ibid.

³³ Smita Narula, 'Equal by Law, Unequal by Caste: The "Untouchable" Condition in Critical Race Perspective' (2008) 26 Wisconsin International Law Journal 255, 264.

America have filed a petition to the UNO. The Untouchables of India are thinking of following suit.³⁴

There is no novelty in the conceptualisation of racial theory of caste and its foreign origin. Still, it has gained renewed academic currency due to the trenchant critique of caste inclusion in the UK.³⁵ The biological basis of caste in concurrence with the ideas of racial purity has received a great deal of debate. In the *Annihilation of Caste*, Dr BR Ambedkar questions, "What racial difference is there between the Brahmin of Madras and the Pariah of Madras?"³⁶ Biologically, those belonging to the same region have the same racial stock, irrespective of their caste divisions³⁷. A racial justification of caste would imply sub-castes are also sub-races within themselves³⁸. Further, even if we are to accept the eugenics argument, what are we to make of caste restrictions on inter-dining between castes since there would be no infecting of blood³⁹.

The racial theory of caste has been formulated by many scholars to ensure caste gets recognised as an aspect of race or is understood in the shadow of race.⁴⁰ There is scholarly disagreement with such portrayal who see caste and race differently with no commonality with each other.⁴¹

Anthropologist Gerald D Berreman saw both caste and race are social constructs which 'arbitrarily separate and rank people according to culturally specific valued qualities, i.e. ritual purity in India, moral and psychological qualities in America. There is nothing more genetic or biological about race than caste.⁴² While the biological justification of caste can be rejected, the social construction of caste is glaringly evident. The divisions that are entirely culturally and socially created become

³⁴ Sukhdeo Thorat, 'Caste, Race and United Nations' Perspective on Discrimination: Coping with Challenges from Asia and Africa' in Balmurli Natrajan, Paul Greenough (eds), *Against Stigma: Studies in Caste, Race and Justice since Durban* (Orient Blackswan Private Limited 2009).

³⁵ see Prakash Shah, *Against Caste in British Law: A Critical Perspective on the Caste Discrimination Provision in the Equality Act 2010* (Palgrave Macmillan 2015).

³⁶ Ambedkar, *Annihilation of Caste: The Annotated Critical Edition* (Navayana 2014).

³⁷ *ibid.*

³⁸ *ibid.*

³⁹ *ibid.*

⁴⁰ See discussion of caste and race in Keane, *Caste-based Discrimination in International Human Rights Law* (Ashgate 2007).

⁴¹ Ashwini Deshpande, *The Grammar of Caste: Economic Discrimination in Contemporary India* (Oxford University Press 2011); Shiv Visvanathan, 'Durban and Dalit Discourse' (2001) 36(33) *Economic and Political Weekly* 3123. Sukhdeo Thorat, *Caste, Race and Discrimination: Discourses in International Context* (Umakant ed, Rawat Publications 2004), 53-58

⁴² Gerald D Berreman, 'Caste and Race,: Reservations and Affirmations' in Balmurli Natrajan, Paul Greenough (eds), *Against Stigma: Studies in Caste, Race and Justice since Durban* (Orient Blackswan Private Limited 2009).

a bio-cultural belief⁴³. While social stratifications are natural, caste shuts the door on mobility and creates enclosed units.

It would be futile to have a doctrinaire study of caste through a race lens due to its diversity and cleavages in India of every kind.⁴⁴ The importance of caste in this diversity cannot be discounted as it is a fundamental unit for formation of communities through social networks and economic efficiency⁴⁵. While caste and race mediate individual and group sovereignty, a detailed discussion of the origin of caste and race is beyond the scope of the paper. The scholarly exposition⁴⁶ is not difficult to find on the subject. Caste has been one of the insidiously persistent features of Indian society and one of the forms of inherited inequality. For the paper, the caste system as religiously sanctioned by Hinduism shall be discussed.

III. IN PURSUIT OF THE AMERICAN DREAM: CASTE ON FOREIGN SHORES

"Caste system does not demarcate racial division. [The] Caste system is a social division of people of the same race."⁴⁷

⁴³ Sukhadeo Thorat, *Caste, Race and Discrimination: Discourses in International Context* (Umakant ed, Rawat Publications 2004).

⁴⁴ On the argument of Indian diversity, generally see, Amartya Sen, *The Argumentative Indian* (Penguin 2006); Ashwini Deshpande, *The Grammar of Caste: Economic Discrimination in Contemporary India* (Oxford University Press 2011); Yogendra Yadav, *Oxford Handbook on Indian Politics-collection of nations*; Alfred Stepan, Juan J. Linz, and Yogendra Yadav, *Crafting State-Nations: India and Other Multinational Democracies* (Johns Hopkins University Press 2011).

⁴⁵ For economics of caste and its role in the development of communities, see Kaivan Munshi's scholarship <https://fas.yale.edu/book/new-ladder-faculty-2019-20/social-science/kaivan-munshi>

⁴⁶ *Indra Sawhney v. Union of India* AIR 1993 SC 477; Smita Narula, 'Equal by Law, Unequal by Caste: The "Untouchable" Condition in Critical Race Perspective' (2008) 26 Wisconsin International Law Journal 255.

⁴⁷ B. R. Ambedkar et al., *Annihilation of Caste: The Annotated Critical Edition* (Navayana 2014).

Cisco's case is not the first time that California has been embroiled in caste-based discrimination. Over two decades ago, Lakireddy Bali Reddy, an Indian origin realtor trafficked Dalits from his ancestral village in India and indulged in sex slavery, servitude and rape⁴⁸. The case blurred the lines between labour and sexual exploitation⁴⁹. The case received the attention of the American scholars except the causation-caste based discrimination-was inconspicuously absent⁵⁰. Cisco brought to fore what was latent in the Reddy case - subjugation and subordination due to membership of a group-caste.

The CISCO case brings to light the problematic relation between ascription, achievement and caste⁵¹, concerning our notions of merit in engineering education. The fact that the plaintiff was subject to discrimination based on belonging to a lower caste and being enrolled in college pays heed to the reproduction of existing hierarchies⁵² in our 'merit system'⁵³. Also, he experienced discrimination caused by a minority Indian community within the US. This case, therefore, makes an excellent example of layered discrimination wherein a member of a minority within a minority. Consequently, those "who suffer the disability of caste or race are now viewed as the undeserving beneficiaries of affirmative action policy, while the true beneficiaries of inherited privilege redefine their privilege as 'merit'."⁵⁴ Competitive examinations popularise the casteist notion of

⁴⁸ Anita Chabria, 'His Own Private Berkeley' *Los Angeles Times* (25 November 2001) <www.latimes.com/archives/la-xpm-2001-nov-25-tm-7947-story.html> accessed 27 July 2020.

⁴⁹ Melynda H. Barnhart, 'Sex and Slavery: An Analysis of Three Models of State Human Trafficking Legislation' (2009) 16(1) *Wm. & Mary J. Women & L.* 83.

⁵⁰ Kathleen Kim and Kusia Hreshchyshyn, 'Human Trafficking Private Right of Action: Civil Rights for Trafficked Persons in the United States' (2005) 16 *Hastings Women's L.J.* 1; Free the Slaves Washington, D.C. & Human Rights Center University of California, Berkeley, *HIDDEN SLAVES Forced Labor in the United States* (September 2004) <www.freetheslaves.net/wp-content/uploads/2015/03/Hidden-Slaves.pdf> accessed 27 July 2020; Shahsi Irani Kara, 'Decentralizing the Fight against Human Trafficking in the United States: The Need for Greater Involvement in Fighting Human Trafficking by State Agencies and Local Non-Governmental Organizations' (2006-2008) 13 *Cardozo J.L. & Gender* 657; Robert Uy, 'Blinded by Red Lights: Why Trafficking Discourse Should Shift Away from Sex and the Perfect Victim Paradigm' (2011) 26 *Berkeley Journal of Gender Law & Justice* 204; Rachel Shigekane, 'Rehabilitation and Community Integration of Trafficking Survivors in the United States' (2007) 29(1) *Human Rights Quarterly* 112; Sarah C. Pierce, 'Turning a Blind Eye: U.S. Corporate Involvement in Modern Day Slavery' (2010-11) 14(2) *Journal of Gender Race & Justice* 577.

⁵¹ Ajantha Subramanian, *The Caste of Merit: Engineering Education in India* (Harvard University Press 2019) 154.

⁵² *ibid.*

⁵³ *ibid.*

⁵⁴ Anupama Rao, 'Cisco Caste Discrimination Case Busts the Myth of the South Asian Diaspora as a Model Minority' *Scroll.in* (7 July 2020) <<https://scroll.in/article/966635/cisco-caste-discrimination-case-busts-the-myth-of-the-south-asian-diaspora-as-a-model-minority>> accessed 20 July 2020.

meritocracy by conducting social selection under the guise of technical selection.⁵⁵ Caste migrated along with Indians and once in a while, cases are brute reminders of such migration. India has been pigeonholed to be a casteist country⁵⁶, but it does not explain such the presence of caste almost everywhere irrespective of geography or professional pursuit. Justice Chandrachud in *B.K. Pavitra vs Union of India*⁵⁷ fractured the meritocracy argument by citing Marc Galanter⁵⁸. He observed that merit in competitive exam is dependent upon many other factors such as 'economic resources' and 'social and cultural resources' other than just innate talent.⁵⁹

The presence of caste-based discrimination in prestigious educational institutions is due to systematic and structural advantage which some of the upper-caste groups have enjoyed a virtual monopoly over knowledge. Such groups believe that they have an intrinsic aptitude for science and consequently, due to inter-generational as well as a social network, a cultural capital is built. The hegemony of Brahmins and upper caste in the Indian scientific community, especially elite scientific research institutions is uncritically accepted. Science in India has Brahminical identity due to natural aptitude and merit. The entrenched fissures of caste is brushed aside by being casteless and objective, much like the discipline of science. Brahmins perceive themselves as

⁵⁵ Subramanian (n 51) 3-6.

⁵⁶ Smita Narula, 'Equal by Law, Unequal by Caste: The "Untouchable" Condition in Critical Race Perspective' (2008) 26 *Wisconsin International Law Journal* 255; Ashwini Deshpande, *The Grammar of Caste: Economic Discrimination in Contemporary India* (Oxford University Press 2011) 20.

⁵⁷ *B.K. Pavitra v Union of India* AIR 2019 SC 2723.

⁵⁸ Mark Galanter, *Competing Equalities: Law and the Backward Classes in India* (Oxford University Press 1984), cited by Satish Deshpande, 'Inclusion versus excellence: Caste and the framing of fair access in Indian higher education' (2009) 40(1) *South African Review of Sociology* 127-147.

⁵⁹ 'It is well settled that existing inequalities in society can lead to a seemingly "neutral" system discriminating in favour of privileged candidates. As Marc Galanter notes, three broad kinds of resources are necessary to produce the results in competitive exams that qualify as indicators of "merit". These are:

"... (a) economic resources (for prior education, training, materials, freedom from work, etc.); (b) social and cultural resources (networks of contacts, confidence, guidance and advice, information, etc.); and (c) intrinsic ability and hard work..." [Galanter M., *Competing Equalities: Law and the Backward Classes in India*, (Oxford University Press, New Delhi 1984), cited by Deshpande S., Inclusion versus excellence: Caste and the framing of fair access in Indian higher education, 40:1 *South African Review of Sociology* 127-147.] *The first two criteria are evidently not the products of a candidate's own efforts but rather the structural conditions into which they are borne. By the addition of upliftment of SCs and STs in the moral compass of merit in government appointments and promotions, the Constitution mitigates the risk that the lack of the first two criteria will perpetuate the structural inequalities existing in society. The proviso to Article 335 of the Constitution seeks to mitigate this risk by allowing for provisions to be made for relaxing the marks in qualifying exams in the case of candidates from the SCs and the STs. If the Government's sole consideration in appointments was to appoint individuals who were considered "talented" or "successful" in standardised examinations, by virtue of the inequality in access to resources and previous educational training (existing inequalities in society), the stated constitutional goal of uplifting these sections of society and having a diverse administration would be undermined. Thus, a "meritorious" candidate is not merely one who is "talented" or "successful" but also one whose appointment fulfils the constitutional goals of uplifting members of the SCs and STs and ensuring a diverse and representative administration.'*

natural inheritors of science and epitome of merit.⁶⁰ In this context, there is a removal of the role of caste privilege, with our vocabulary being limited to 'merit' and 'ability'.⁶¹ Cisco case point towards more significant issues of caste discrimination that is pervaded into our institutions, especially the technical education.⁶²

In Cisco, a Dalit employee was harassed by two Brahmins due to his caste, although they had the same or similar technical expertise. One of the defendants, Sunder Iyer, head of the Cisco team, recruited and hired the plaintiff, John Doe, as a principal engineer around September 2015. Iyer supervised Doe by controlling his day-to-day assignments and discipline and had the authority to direct and transfer him. At Cisco's San Jose headquarters, Doe worked with a team of Indian employees and the Court noted that all belonged to upper-caste Brahmins, along with Iyer, who

⁶⁰ Renny Thomas, 'Brahmins as Scientists and Science as Brahmins' Calling: Caste in an Indian Scientific Research Institute' (2020) 29 Public Understanding of Science 306, see also Renny Thomas, 'Brahmins on India's elite campuses say studying science is natural to upper castes: Study' (*The Print*, 13 March 2020) <<https://theprint.in/opinion/brahmins-on-india-campus-studying-science-is-natural-to-upper-castes/378901/#:~:text=The%20domination%20of%20Brahmin,my%20fieldwork%20in%20Bangalore%2C%20India>> accessed 27 July 2020.

⁶¹ Renny Thomas, 'Brahmins as Scientists and Science as Brahmins' Calling: Caste in an Indian Scientific Research Institute' (2020) 29 Public Understanding of Science 306.

⁶² Priyanka Pandey and Sandeep Pandey, 'Survey at an IIT Campus Shows How Caste Affects Students' Perceptions' (2018) 53(9) Economic & Political Weekly <www.epw.in/engage/article/Survey-at-an-IIT-Campus-Shows-How-Caste-Affects-Students-Perceptions> accessed 28 July 2020; Sujoy Chakravarty and E. Somanathan, 'Discrimination in an elite labour Market? Job placements at IIM-Ahmedabad' (2008) 43(44) Economic & Political Weekly 45 <www.epw.in/journal/2008/44/special-articles/discrimination-elite-labour-market-job-placements-iim-ahmedabad> accessed 28 July 2020; K Sundaram, 'On Backwardness and Fair Access to Higher Education' (2006) 41(50) Economic & Political Weekly 5173 <<https://www.epw.in/journal/2006/50/special-articles/backwardness-and-fair-access-higher-education.html>> accessed 28 July 2020; Paul Attewell and S Madheswaran, 'Caste Discrimination in the Indian Urban Labour Market: Evidence from the National Sample Survey' (2007) 42(41) Economic & Political Weekly 4146 <<https://www.epw.in/journal/2007/41/caste-and-economic-discrimination-special-issues-specials/caste-discrimination>> accessed 28 July 2020; Paul Attewell and Sukhdeo Thorat, 'The Legacy of Social Exclusion A Correspondence Study of Job Discrimination in India' (2007) 42(41) Economic & Political Weekly 4141 <<https://www.epw.in/journal/2007/41/caste-and-economic-discrimination-special-issues/legacy-social-exclusion.html>> accessed 28 July 2020; Karla Hoff and Priyanka Pandey, 'Making Up People: The Effect of Identity on Preferences and Performance in a Modernizing Society' (2012) World Bank Policy Research Working Paper No. 6223 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2160193> accessed 28 July 2020; Karla Hoff and Priyanka Pandey, 'Economic Consequences of Social Identity: Discrimination, Social Identity, and Durable Inequalities' (2008) 96(2) American Economic Review 206-211. See also, Chadha G and Achuthan, 'A Feminist science studies: Intersectional narratives of persons in gendermarginal locations in science' (2017) 52(17) Economic and Political Weekly 33-36; Henry O and Ferry M, 'When cracking the JEE is not enough: Processes of elimination and differentiation, from entry to placement, in the Indian Institutes of Technology (IITs)' (2017) 15 South Asia Multidisciplinary Academic Journal 1-28; Rao SS, 'Structural exclusion in everyday institutional life: Labelling of stigmatized groups in an IIT' (2013) In: Nambissan GB and Srinivasa Rao S (eds), *Sociology of Education in India: Changing Contours and Emerging Concerns* (Oxford University Press 2013) 199-223; Ajantha Subramanian, 'Making merit: The Indian Institutes of Technology and the social life of caste' (2015) 57(2) Comparative Studies in Society and History 291-322.

had immigrated to the United States from India. Cisco lacked the mechanism and guidelines to provide its workers with a safe work environment despite having South Asians as a significant part of the workforce, thereby leading to the presence of caste structure and hierarchy. As a result, Doe received lesser pay, fewer opportunities, and other inferior terms and conditions of employment because of his religion, ancestry, national origin/ethnicity, and race/colour. Cisco Employee Relations staff indicated that caste discrimination was not unlawful. Around October 2016, Iyer revealed to his fellow team members that Doe belonged to Scheduled Caste and enrolled in IIT based on affirmative action. As a result, Doe was subjected to isolation from team members, eventually reducing him to an independent contributor. However, there was no disciplinary action taken against Iyer or his team members due to the Employee Relations staff, concluding that caste discrimination was not unlawful and did not take any corrective step.⁶³ After repeatedly failing to make Cisco take cognisance of his caste-based discrimination, John Doe approached the California Department of Fair Employment and Housing in 2018. The State of California filed a case on behalf of pseudonymised John Doe for the hostile workplace as well as harassment stemming due to caste-based discrimination.

The caste-race interface is not temporally limited. A century ago, the high caste Hindus migrating to the US sought a visa on the contrived racial similarity and ancestry to white persons⁶⁴ or a Sikh, both sought entrance to belonging to Caucasian race⁶⁵ due to their Aryan race commonality. Finally, the Supreme Court of the US in *United States v. Bhagat Singh Thind*⁶⁶ which categorically rejected the Aryan race theory and held that High caste Hindus are not covered under the being White⁶⁷. Thus, the issue of caste and race in the US is quite old, and Cisco's case is not an outlier. Extensive study of racism and its relationship to caste is beyond the scope of paper but suffice to

⁶³ California Department Of Fair Employment and Housing, *an agency of the State of California v Cisco Systems, Inc., a California Corporation*; Sundar Iyer, an individual; Ramana Kompella, an individual, <https://regmedia.co.uk/2020/07/01/cisco.pdf>

⁶⁴ In 1913, US citizenship was determined based on race and was exclusive to whites. A K Mozumdar, an immigrant from Bengal to Washington who had applied for citizenship argued that he shared racial origins with Caucasians owing to his 'high-caste, Aryan descent Hindu origins.' This was accepted and thus, he became the first South Asian who was granted American citizenship. Amrita Dutta, 'Getting America to recognise caste: previous efforts, renewed push' *The Indian Express* (12 July 2020) <<https://indianexpress.com/article/explained/getting-america-to-recognise-caste-previous-efforts-renewed-push-6495101/>> accessed 20 July 2020; See also discussion of the case in Zwick-Maitreyi, M., Soundararajan, T., Dar, N., Bheel, R.F., and Balakrishnan, P, 'Caste in the United States: A Survey of Caste among South Asian Americans' [2018] *Equality Labs USA*, <https://static1.squarespace.com/static/58347d04bebafeb1e66df84c/t/5d9b4f9afbaef569c0a5c132/1570459664518/Caste_report_2018.pdf> accessed 20 July 2020.

⁶⁵ *Ozawa v. United States* 260 U.S. 178 (1922) (The Court while denying Japanese-American naturalisation defined White person as being of the Caucasian race for the purposes of the Court as per Naturalization Act of 1906)

⁶⁶ *United States v Bhagat Singh Thind* 261 US 204 (1923).

⁶⁷ *ibid.* Case text is available at <<https://www.law.cornell.edu/supremecourt/text/261/204>>

say that caste has tiptoed race everywhere, be it UK or US. In the US, there has been increasing visibility and recognition of caste through Dalit assertiveness in recent time which challenges the hegemonic understanding of Hindu culture and Indianess⁶⁸.

As the first civil rights case based on caste-based discrimination at the workplace in the US, Cisco's case brings to the forefront the tenacity of caste irrespective of geography.⁶⁹ The current case in California highlights two things: Indians carry their caste, notion of merit, ritual purity and pollution which does not pale despite best technical education and the insufficiency of the vocabulary of discrimination on protected grounds for caste-based discrimination. The racial theory of caste is not lost on the California State which noted that 'Dalit, typically the *darkest complexion caste*, who were traditionally subject to "untouchability" practices which segregated them by social custom and legal mandate. Although de jure segregation ended in India, lower caste persons like Dalits continue to face de facto segregation and discrimination in all spheres.'⁷⁰

Surprisingly, no case against caste-based discrimination was instituted previously, even though it has been a part of American society for decades since Indians migrated. Also, before the suit was initiated against Cisco, employees have, previously, experienced social stratification based on caste, despite professional qualifications⁷¹. The Indian diaspora in the US consists of 90%⁷² of people from the upper castes, which sets the stage for discrimination. According to Caste in the United States by Equality Labs report⁷³, 67% of the Dalit population has admittedly faced caste-

⁶⁸ See Adur, Shweta Majumdar, and Anjana Narayan, 'Stories Of Dalit Diaspora: Migration, Life Narratives, And Caste In The Us' (2017) 40(1) *Biography* 244, 244-264 doi:10.1353/bio.2017.0011 <https://static1.squarespace.com/static/58347d04bebafeb1e66df84c/t/5d9b4f9afbaef569c0a5c132/1570459664518/Caste_report_2018.pdf> accessed 20 July 2020; Zwick-Maitreyi, M., Soundararajan, T., Dar, N., Bheel, R.F., and Balakrishnan, P, 'Caste in the United States: A Survey of Caste among South Asian Americans' [2018] Equality Labs USA, <https://static1.squarespace.com/static/58347d04bebafeb1e66df84c/t/5d9b4f9afbaef569c0a5c132/1570459664518/Caste_report_2018.pdf> accessed 20 July 2020.

⁶⁹ Anisha Sircar, 'California's landmark lawsuit against Cisco trains the spotlight on casteism in the tech world' *Scroll.in* (11 July 2020) <<https://scroll.in/global/966992/californias-landmark-lawsuit-against-cisco-trains-the-spotlight-on-casteism-in-the-tech-world>> accessed 24 July 2020.

⁷⁰ California Department Of Fair Employment And Housing, an agency of the State of California v. Cisco Systems, Inc., a California Corporation; SUNDAR IYER, an individual; Ramana Kompella, an individual, <https://regmedia.co.uk/2020/07/01/cisco.pdf>

⁷¹ Yashica Dutt, 'The Specter of Caste in Silicon Valley' *The New York Times* (14 July 2020) <<https://www.nytimes.com/2020/07/14/opinion/caste-cisco-indian-americans-discrimination.html?searchResultPosition=1>> accessed 28 July 2020.

⁷² Sanjoy Chakravorty and others, *The Other One Percent: Indians in America* (OUP 2016).

⁷³ Zwick-Maitreyi, M., Soundararajan, T., Dar, N., Bheel, R.F., and Balakrishnan, P, 'Caste in the United States: A Survey of Caste among South Asian Americans' [2018] Equality Labs USA, <https://static1.squarespace.com/static/58347d04bebafeb1e66df84c/t/5d9b4f9afbaef569c0a5c132/1570459664518/Caste_report_2018.pdf> accessed 20 July 2020.

based discrimination at the workplace. Such discrimination is not restricted to the workplace, instead manifests itself in interpersonal relationships, local businesses and even schools, according to the Report. Given the precariousness of their work visa and being a first or second-generation professional in technology, most of the discriminated Indians choose not to confront the discrimination. There is perpetual fear of discovery of their caste. Thus, much like India, professional and personal life is permeated by caste even in the US. The caste has come out of the closet in a place which was believed to be a post-caste world based on egalitarian meritocracy. Caste has been a compatriot of race as a constant site for the struggle for equal rights.

IV. A MISSED OPPORTUNITY FOR TRANSFORMATIVE JUDGEMENT: SAFAI KARAMCHARI ANDOLAN V UNION OF INDIA, CASTE- BASED DISCRIMINATION AND RACIAL DISCRIMINATION

"I call scavenging *one of the most honourable among the occupations* to which mankind is called. I do not consider it an unclean occupation by any means. That in performing the cleaning operation, you have to handle dirt is true. But that every mother has to do, every doctor does. But nobody says that a mother's occupation when she cleans her children, or a doctor's occupation when he cleans his patients, is an unclean occupation."

-Mahatma Gandhi, 1934

"The Caste System is not merely a division of labour. *It is also a division of labourers...*"

- Dr BR Ambedkar, Annihilation of Caste, 1936

The contrariness of Ambedkar and Gandhi's approach to caste is due to their location in the caste system and its effects in their public life. For Ambedkar, it was a lived experience, and for Gandhi, it was an abstract concept. Their reception of caste has led to much scholarly output.⁷⁴ The

⁷⁴ Suhas Palshikar, 'Gandhi-Ambedkar Interface...when shall the twain meet?' (2014) 49(13) Economic & Political Weekly 2070 ; Anupama Rao, 'Arguing against Inclusion' (1997) 32(8) Economic & Political Weekly 427; Suhas Palshikar, 'Gandhi and Ambedkar' (1997) 32(30) Economic & Political Weekly 1918; Anupama Rao, 'A Question of Politics and Method' (1997) 32(43) Economic & Political Weekly 2835; Ankur Barua, 'Revisiting the Gandhi-Ambedkar Debates over "Caste": The Multiple Resonances of Varṇa' (2019) 25(1) Journal of Human Values 25-40.

difference in understanding caste in the minds of Gandhi and Dr Ambedkar is crucial to analyse the contemporary juridical approach since it explains the dichotomy between the perceptions of manual scavenging.

In 2014, the Indian Supreme Court delivered its judgment on *Safai Karamchari Andolan v Union of India*⁷⁵ which sought to enforce the ban on manual scavenging- a 'traditional occupation'.⁷⁶ It acknowledged caste being the sole determinant for engagement in manual scavenging and its egregiously violative nature. The Supreme Court was seized with the issue of unconstitutionality of manual scavenging, the governmental response and legislative policy-making⁷⁷. However, the Court shied away from addressing the interrelationship between caste and race which are mentioned together in Article 15 of Indian Constitution⁷⁸, while citing the Convention on Elimination of Racial Discrimination⁷⁹ (CERD) to stress the prohibition of racial discrimination as applicable to manual scavenging. The Court seemingly applied or possibly conflated racial discrimination to caste discrimination. The Court seemed oblivious, while unknowingly giving a judicial stamp to an interpretation that racial discrimination included caste.⁸⁰

The internationalisation of caste⁸¹ and it being discussed at an international forum by adopting the vocabulary of racial discrimination happened almost three decades ago by Dalit advocacy groups across the world. Stakeholders co-opted the UN's World Conference Against Racism in 2001 at Durban, South Africa (2001) and UN's Sub- Commission on Promotion and Protection of Human Rights and Committee on Elimination of All Forms of Racial Discrimination (CERD) as a crucible

⁷⁵ *Safai Karamchari Andolan v Union of India* AIR 2014 SC 224

⁷⁶ *ibid* 1.

⁷⁷ For an account of the case, see Shomona Khanna, 'Invisible Inequalities: an Analysis of the Safai Karamchari Andolan Case' in Philippe Cullet, Sujith Koonan, and Lovleen Bhullar (eds), *The Right to Sanitation in India: Critical Perspectives* (Oxford University Press 2019), see also Bhasha Singh, *Unseen: The truth about India's manual scavengers* (Reenu Talwar, Penguin Books 2014).

⁷⁸ The Constitution of 1950, art 15(1) (Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth: (1) The State shall not discriminate against any citizen on grounds only of religion, *race, caste*, sex, place of birth or any of them).

⁷⁹ International Convention on the Elimination of All Forms of Racial Discrimination (adopted on 21 December 1965, entered into force 12 March 1969) 660 UNTS 195(CERD) art.1 (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.).

⁸⁰ See Surendra Kumar, Case review of *Safai Karamchari Andolan v Union of India* (2014) 11 SCC 224, ILDC 2829 (IN 2014), in Oxford Reports on International Law in Domestic Courts, available at <https://opil.ouplaw.com/view/10.1093/law-ildc/2829in14.case.1/law-ildc-2829in14?rsk=1fd1il&result=24&prd=OPIL>.

⁸¹ ICCPR acknowledged shortcomings in the performance of the Government of India in guaranteeing basic human rights to Dalits, in 1997. See also UN Special Rapporteur on Racism and Racial Discrimination in 1996, 1997, CEDAW committee in 2000.

of debate and discussion for the coverage of caste within international human rights law. The conference led Indian Institute of Dalit Studies to publish their first book about caste, race and discrimination in 2004, capturing the positions adopted by the government, Dalit advocacy groups and academicians.⁸² An influential book by David Keane followed this in 2007 which traced the origin of caste, race and their interface in international human rights law.⁸³ This debate continued in the United Kingdom on the inclusion of caste as one of the protected characteristics under the recognised grounds for discrimination in Equality Act, 2010 which is dealt later in the paper in some detail.

1. Manual scavenging: 'No country sends its people to gas chambers to die.'⁸⁴

"Some closed the door: others found it closed against them."⁸⁵

-BR Ambedkar

Manual scavenging is a brute reminder, and a remnant of caste system wherein a person is condemned to deal with human excreta. It is 'the removal of human excrement from public streets and dry latrines, cleaning septic tanks, gutters and sewers'⁸⁶.

In 1993, the Indian Parliament passed the Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993 ('1993 Scavenging Act'), which intended to prohibit the

⁸² Sukhadeo Thorat, *Caste, Race and Discrimination: Discourses in International Context* (Umakant ed, Rawat Publications 2004).

⁸³ David Keane, *Caste-based Discrimination in International Human Rights Law* (Ashgate 2007).

⁸⁴ 'Supreme Court on Manual Scavenging: 'No country sends its people to gas chambers to die' *The Hindu* (18 September 2019). <<https://www.thehindu.com/news/national/sc-on-manual-scavenging-no-country-sends-its-people-to-gas-chambers-to-die/article29447848.ece>> accessed 20 July 2020.

⁸⁵ BR Ambedkar, 'Castes in India: Their Mechanism, Genesis, and Development' (Paper Presented at an Anthropology Seminar at Columbia University, Indian Antiquary, May 1917). <www.columbia.edu/itc/mealac/pritchett/00ambedkar/txt_ambedkar_castes.html> accessed 20 July.

⁸⁶ 'India's Manual Scavenging problem' *The Hindu*, (16 February 2020) <<https://www.thehindu.com/news/national/indias-manual-scavenging-problem/article30834545.ece>> accessed 20 July 2020.

practice of manual scavenging⁸⁷. The Act was pushed by the Ministry of Housing and Urban Affairs, Government of India as it was concerned with sanitation, unhinged from caste connection. The National Commission for Safai Karamcharis (NCSK), a statutory body created by National Commission for Safai Karamcharis Act, 1993 acknowledges manual scavenging is a form of 'modern-day slavery'⁸⁸—invisible to both general public and public authorities due to their internalisation of untouchability due to religious sanction⁸⁹. The unclean job of manual scavenging continues due to its link with the cultural pollution of the lower castes. Indians across caste groups including Scheduled Castes (SCs) (termed as Dalits and Untouchables) and Scheduled Tribes (STs), themselves practise untouchability due to 'Sanskritization'⁹⁰—a term coined by Indian sociologist MN Srinivas wherein the low or middle caste groups emulate the rituals and practices of the upper castes to be accepted by the latter and to be able to rise in the social hierarchy'.⁹¹

The 2013 Act is a radical departure from the 1993 Act⁹². It was pushed by the Ministry of Social Justice and Empowerment in the Government of India this time. There was recognition of the inherent dignity, nexus with the caste system, Constitutional vision flowing from Article 46 of Directive Principles to State Policy reminding that the 'State shall protect the weaker sections, and, particularly, the Scheduled Castes and the Scheduled Tribes from *social injustice* and *all forms of*

⁸⁷ The Act was passed under Article 252 of the Indian Constitution which is the power of the Parliament to legislate on a matter by the consent of States and open to other States for adoption. Due to passage of a resolution of Andhra Pradesh, Karnataka, Maharashtra, Goa, West Bengal, and Tripura against manual scavenging, Parliament enacted the Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993. Since the Public health and sanitation falls under Entry 6 of List II (State List), it was left for the States to adopt and implement the same. The Act was notified for adoption by the States in 1997, four years after it was passed. Six states, including New Delhi, had not adopted the 1993 Act unless they received the notice from the Supreme Court of India in the Safai Karamchari Andolan case. On receipt of the notice, the Delhi Police went after the list of dry latrines submitted by SKA (Safai Karamchari Andolan) and destroyed them. The Delhi government filed an affidavit that such dry latrines did not exist in Delhi and hence no manual scavenging is present. For a lucid account on the politics of the Act as well as its lack of implementation across various States, see Bhasha Singh, *Unseen : The Truth about India's Manual Scavengers* (Reenu Talwar tr, Penguin Books 2014) 205.

⁸⁸ National Commission For Safai Karamcharis, Annual Report 2017-18, available at: https://ncsk.nic.in/sites/default/files/NCSK_AR_2017-18_Eng.pdf.

⁸⁹ Amit Thorat & Omkar Joshi, 'The Continuing Practice of Untouchability in India (2020) 55(2) Economic and Political Weekly 385 (The mindset prevalent amongst the upper castes is that people belonging to the lower castes are physically and/or ritually unclean, and therefore, they should not be allowed to enter the kitchen (a sacred and clean place) or use the utensils that the household members use for consuming food. The domestic workers employed in homes belonging to the lower castes are usually allowed to mop or swipe the floor or clean the bathrooms, but not allowed to cook food or wash the kitchen utensils. It has also been found that many, if not all the workers performing such tasks, belong to the lower castes. This practice is an example of the notion of "purity and pollution").

⁹⁰ M. N. Srinivas, 'A Note on Sanskritization and Westernization' (1956) 15(4) *The Far Eastern Quarterly* 481-496.

⁹¹ *ibid.*

⁹² The Prohibition Of Employment Manual Scavengers and Their Rehabilitation Act 2013.

exploitation', and inefficacy of the laws as well as their implementation.⁹³ This shift was missed by the Supreme Court when it finally handed down the judgment of *Safai Karamchari Andolan v Union of India*, 11 years after the case was filed.

The undignified life of manual scavengers⁹⁴ and its interaction with childhood, gender, forced labour, and an indifferent State⁹⁵ has been a matter of concern nationally and internationally. In 2003, due to the lack of effective implementation of the 1993 Scavenging Act across India after a decade, civil society organisations led by Safai Karamchari Andolan⁹⁶ approached the Supreme Court of India to force governmental authorities to give effect to the dormant Act across India. They sought a declaration that continuation of the practice of manual scavenging, despite a statutory framework, violates fundamental rights guaranteed under Article 14, 17, 21 and 23. The Court was seized of the matter for over a decade and kept issuing directions through judicial innovation of 'continuing mandamus'.⁹⁷ During the pendency of the case, there was a revision of legislation and a new law— Prohibition of Employment as Manual Scavengers and their

⁹³ See the Preamble of Prohibition Of Employment As Manual Scavengers And Their Rehabilitation Act, 2013 (WHEREAS promoting among the citizens fraternity assuring the dignity of the individual is enshrined as one of the goals in the Preamble to the Constitution; AND WHEREAS the right to live with dignity is also implicit in the Fundamental Rights guaranteed in Part III of the Constitution; AND WHEREAS article 46 of the Constitution, inter alia, provides that the State shall protect the weaker sections, and, particularly, the Scheduled Castes and the Scheduled Tribes from social injustice and all forms of exploitation; AND WHEREAS the dehumanising practice of manual scavenging, arising from the continuing existence of insanitary latrines and a highly iniquitous caste system, still persists in various parts of the country, and the existing laws have not proved adequate in eliminating the twin evils of insanitary latrines and manual scavenging; AND WHEREAS it is necessary to correct the historical injustice and indignity suffered by the manual scavengers, and to rehabilitate them to a life of dignity.)

⁹⁴ Prohibition of Employment as Manual Scavengers and their Rehabilitation Act 2013, sec 2(g) (The statutory definition of manual scavenger is any person who is 'for manually cleaning, carrying, disposing of, or otherwise handling in any manner, human excreta in an insanitary latrine or in an open drain or pit into which the human excreta from the insanitary latrines is disposed of, or on a railway track or in such other spaces or premises... before the excreta fully decomposes in such manner as may be prescribed.')

⁹⁵ For a first-hand account of manual scavenging and its persistence see Resource Handbook For Ending Manual Scavenging / by Harsh Mander; International Labour Organization; ILO DWT for South Asia and ILO Country Office for India. - New Delhi: ILO, 2014, available at <http://www.dalits.nl/pdf/ResourceHandbookForEndingManualScavenging.pdf/>

⁹⁶ For the history of the organisation and link between caste and sanitation, see "Safai Karamchari Andolan: An Insider's Account (Conversation with Bezwada Wilson)," in *The Right to Sanitation in India: Critical Perspectives*, ed. Philippe Cullet, Sujith Koonan, and Lovleen Bhullar (Oxford University Press, 2019).

⁹⁷ Mihika Poddar and Bhavya Nahar, 'Continuing Mandamus – A judicial Innovation to Bridge the Right-Remedy Gap' (2010) 10(3) NUJS Law Review 555.

Rehabilitation Act 2013⁹⁸ (2013 Scavenging Act) -- was passed which was more stringent than previous legislation but few gaps remained.⁹⁹

The practise of untouchability and its egregious manifestation- manual scavenging- continues due to the cultural notion of purity and pollution that sustain the caste system and the link between polluting nature of Dalits and the unclean job of manual scavenging. The dehumanisation and invisibility is due to the acceptance and indifference of both public conscience as well as administrative machinery which is in denial of such practice.¹⁰⁰ Gautam Bhatia notes that 'inequality and discrimination result not from individual hostile acts, but from structures and institutions'.¹⁰¹ The 2018 report by NCSK acknowledges the institutional as well as structural barriers which have enabled the subordination of groups of individuals on the sole basis of caste. Diane Coffey and Dean Spears empirically argue that open defecation in India is not a consequence of poverty but rather a caste system and its concomitant untouchability and ritual purity. Open defecation is due to the agency exercised by people who are worried about emptying government provided latrine pits which is exclusively the domain of the untouchables.¹⁰² The illiberal idea of untouchability is inconvenient or uncomfortable for a 'government which is dominated by high-caste urbanites- and which perpetuates manual scavenging even in its own investment decisions and hiring practises'. The governmental position on sanitation, health and hygiene support the invisibility of manual scavenging.¹⁰³ Caste is relational¹⁰⁴ and relative, i.e. one is not upper-caste till they can display power over and dominance over lower caste. Caste is relational and operates both vertically and horizontally, much like caste-based discrimination. The perennial practice of

⁹⁸ Available at <http://legislative.gov.in/sites/default/files/A2013-25.pdf>.

⁹⁹ For the critical and comparative evaluation of 1993 Act and 2013 Act, see Resource handbook for ending manual scavenging / by Harsh Mander; International Labour Organization; ILO DWT for South Asia and ILO Country Office for India. - New Delhi: ILO, 2014, available at <http://www.dalits.nl/pdf/ResourceHandbookForEndingManualScavenging.pdf/>

¹⁰⁰ Bezwada Wilson, 'Safai Karamchari Andolan: An Insider's Account' in Philippe Cullet and others (eds), *The Right to Sanitation in India: Critical Perspectives* (Oxford University Press, 2019).

¹⁰¹ Gautam Bhatia, *Transformative Constitution: A Radical Biography in Nine Acts* (Harper Collins 2019) 108.

¹⁰² Dean Spears and Diane Coffey, *Where India Goes: Abandoned Toilets, Stunted Development and the Costs of Caste* (Harper Litmus 2017).

¹⁰³ See The Economic Survey 2017-18, Government of India Ministry of Finance Department of Economic Affairs Economic Division January, 2018 available at <http://mofapp.nic.in:8080/economicsurvey/>; See also Economic Survey Takes Note of Positive Health and Economic Impact in ODF Areas Sanitation Coverage in Rural India Increases Substantially from 39% in 2014 to 76% in January, 2018 <https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1518055>.

¹⁰⁴ Ashwini Deshpande, *The Grammar of Caste: Economic Discrimination in Contemporary India* (Oxford University Press 2011).

untouchability and its manifestation -manual scavenging is a reminder of 'taste of discrimination'¹⁰⁵ which is based on prejudice and dominant stereotypes.¹⁰⁶

The Supreme Court observed orally that without protective gear, sending manual scavengers to clean the sewers is akin to sending them in 'gas chambers to die' which received extensive media traction.¹⁰⁷ In the judgment that followed on the review of *Kashinath Mahajan case*, which had diluted the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989¹⁰⁸ the Court indulged in homilies.¹⁰⁹ The Court noted that:

¹⁰⁵ The term is borrowed from Gary Becker, *The Economics of Discrimination* (University of Chicago Press 1971) <https://economics.mit.edu/files/553>

¹⁰⁶ Ashwini Deshpande, *The Grammar of Caste: Economic Discrimination in Contemporary India* (Oxford University Press 2011) 41-42.

¹⁰⁷ 'SC raps Centre on manual scavenging: No country sends its people to gas chambers to die' *The Indian Express* (18 September 2019) <<https://indianexpress.com/article/india/sc-raps-centre-on-manual-scavenging-no-country-sends-its-people-to-gas-chambers-to-die-6005797/>> accessed 20 July 2020.

Kapil Shagun, 'Sewers are gas chambers where manual scavengers are sent to die: SC' (*Down To Earth*, 18 September 2019) <<https://www.downtoearth.org.in/news/rural-water-and-sanitation/sewers-are-gas-chambers-where-manual-scavengers-are-sent-to-die-sc-6680>> accessed 20 July 2020.

'In no country are people sent to gas chambers to die: Supreme Court on manual scavengers' *The Print* (18 September 2019) <<https://theprint.in/judiciary/in-no-country-are-people-sent-to-gas-chambers-to-die-supreme-court-on-manual-scavengers/293243/>> accessed 20 July 2020.

'"Nowhere in World People Sent to Gas Chambers to Die", Says SC on Manual Scavenging' *The Wire* (18 September 2019) <<https://thewire.in/law/nowhere-in-world-people-sent-to-gas-chambers-to-die-says-sc-on-manual-scavenging>> accessed 20 July 2020.

¹⁰⁸ *Dr. Subhash Kashinath Mahajan v State of Maharashtra* AIR 2018 SC 454.

¹⁰⁹ Justice Arun Mishra in *Union of India v. State of Maharashtra*, 2019 SCConline SC 1279 (Though, Article 17 of the Constitution prohibits untouchability, whether untouchability has vanished? We have to find the answer to all these pertinent questions in the present prevailing social scenario in different parts of the country. The clear answer is that untouchability though intended to be abolished has not vanished in the last 70 years. We are still experimenting with 'tryst with destiny.' The plight of untouchables is that they are still denied various civil rights; the condition is worse in the villages, remote areas where fruits of development have not percolated down. They cannot enjoy equal civil rights. So far, we have not been able to provide the modern methods of scavenging to *Harijans* due to lack of resources and proper planning and apathy. Whether he can shake hands with a person of higher class on equal footing? Whether we have been able to reach that level of psyche and human dignity and able to remove discrimination based upon caste? Whether false guise of cleanliness can rescue the situation, how such condition prevails and has not vanished, are we not responsible? The answer can only be found by soul searching. However, one thing is sure that we have not been able to eradicate untouchability in a real sense as envisaged and we have not been able to provide down-trodden class the fundamental civil rights and amenities, frugal comforts of life which make life worth living. More so, for Tribals who are at some places still kept in isolation as we have not been able to provide them even basic amenities, education and frugal comforts of life in spite of spending a considerable amount for the protection, how long this would continue. Whether they have to remain in the status quo and to entertain civilised society? Whether under the guise of protection of the culture, they are deprived of fruits of development, and they face a violation of traditional rights?) available at [This preprint research paper has not been peer reviewed. Electronic copy available at: <https://ssrn.com/abstract=3656151>](https://scobserver-</p></div><div data-bbox=)

"So far, we have not been able to provide the modern methods of scavenging to *Harijans* due to lack of resources and proper planning and apathy."

Little did the Court realise that manual scavenging is the problem and not protective gear¹¹⁰ and it is not due to lack of resources but internalisation of social function of manual scavengers. Safai Karamchari Andolan argued that 'the practice of manual scavenging relates to notions of pollution and untouchability, and therefore no amount of protective gear can obviate the pernicious consequences of this work. Manual scavenging needs to be eradicated, and the manual scavengers liberated, with no exceptions. The 2013 Act appears to have missed this point completely so that the definition of manual scavenging remains open to interpretation and ambiguity.'¹¹¹

What is also problematic is patronising use of *Harijans* to refer to Scheduled castes as the Supreme Court is amnesic of their injunction two years ago as its abusive and denigrating¹¹². *Harijan* was

production.s3.amazonaws.com/uploads/case_document/document_upload/961/12243_2018_4_1501_17234_Judgement_01-Oct-2019.pdf. The aforementioned paragraph is verbatim reproduced by Justice Arun Mishra in *Prathvi Raj Chauhan v Union of India* AIR 2020 SC 159.

¹¹⁰ The manual cleaning of a sewer and septic tank by an employee without protective gear is considered "hazardous cleaning" under Section 2(d) Manual Scavenging Act, 2013. Further, explanation of Section 2(g) of the Act disqualifies an employee as a manual scavenger, as defined under the Act, if the employee uses protective gear. Thus, protective gear acts as a significant determinant for claiming reliefs under the Act. Chapter II of the Manual Scavenging Rules, 2013 lays down the obligations of an employer towards an employee engaged in the manual cleaning of sewer or septic tank. Notably, Rule 4 provides a non-exhaustive list of forty-four basic protective gear and safety devices to be used while engaging in the activity. Similarly, Rule 5 of the rules provides a list of cleaning machines to be used during the activity. While these basic requirements have been meticulously laid down, this has done little to ameliorate the conditions of the workers.

¹¹¹ Shomona Khanna, 'Invisible Inequalities: An Analysis of the Safai Karamchari Andolan Case' in Philippe Cullet, Sujith Koonan, and Lovleen Bhullar (eds), *The Right to Sanitation in India: Critical Perspectives* (Oxford University Press 2019) 307.

¹¹² *Manju Devi v Onkarjit Singh Ahluwalia* AIR 2017 SC 439, 446.

(...The use of the word "Harijan", "Dhobi", etc. is often used by people belonging to the so-called upper castes as a word of insult, abuse and derision. Calling a person by these names is nowadays an abusive language and is offensive. It is basically used nowadays not to denote a caste but to intentionally insult and humiliate someone. We, as a citizen of this country, should always keep one thing in our mind and heart that no people or community should be today insulted or looked down upon, and nobody's feelings should be hurt.

17. Though the Constitution of India abolishes "untouchability" but in view of the social attitudes which lead to the commission of such offences against Scheduled Castes and Scheduled Tribes, there is justification for an apprehension that if the benefit of anticipatory bail is made available to the persons who are alleged to have committed such offences, there is every likelihood of their misusing their liberty while on anticipatory bail to terrorise their victims and to prevent a proper investigation. It is in this context that Section 18 has been incorporated in the SC/ST Act. The offences which are enumerated under Section 3 of the SC/ST Act are offences which, to say the least, denigrate members of Scheduled Castes and Scheduled Tribes in the eyes of society and prevent them from leading a life of dignity and self-respect. Such offences are committed to humiliate and subjugate members of Scheduled Castes and Scheduled Tribes with a view to keeping them in a state of servitude.

coined by Mahatma Gandhi to refer to untouchables. Mahatma Gandhi condoned manual scavenging by terming it as 'most honourable among the occupations to which mankind is called' since it is akin to a mother cleaning her child's dirt. Gandhi's position reflects the stance taken by high-caste Hindus, whenever they called upon to debate about manual scavenging.¹¹³ Ambedkar retorted by accusing Gandhi (rightly so) of perpetuating the caste system by giving this inhuman practice a veneer of nobility. Appropriation of terminology for Dalits¹¹⁴ by the judges takes away the right of self-determination and self-identification of Untouchables and is symptomatic of the broader malaise of casteism. The inability of the State to eradicate but rather trying to negotiate with practise is due to long-entrenched prejudice against few communities.

2. Borrowing the vocabulary of constitutionalism and discrimination

The Court did not engage with the constitutional challenges the petitioners articulated under Article 14, 15, 17, 21 and 23 of the Indian Constitution. Article 17 (prohibition of untouchability) and Article 23 (prohibition of forced labour) are squarely applicable to manual scavenging. The judgement is formalistic and minimalist in its approach and analyses. It comprises of the recanted text of the Constitution and various laws without interrogating the *nature of discrimination* it

These offences constitute a separate class and cannot be compared with offences under the Penal Code.’) See also “Calling People ‘Harijan’ or ‘Dhobi’ is Offensive: Supreme Court,” *The Wire*, (26 March 2017) <<https://thewire.in/law/calling-people-harijan-or-dhobi-is-offensive-supreme-court>>

J. Venkatesan, ‘Use of Harijan is abusive, says Supreme Court’ *The Deccan Chronicle* (26 March 2017) <<https://www.deccanchronicle.com/nation/current-affairs/260317/use-of-harijan-is-abusive-says-supreme-court.htm>> accessed 20 July 2020. Despite the legal prohibition on using the term "Harijan" to denote Scheduled Castes, it has been repeatedly used by Judges of Supreme Court not realising the history of the term and struggle of equality. See also Indu Malhotra in Sabarimala judgment using the term Harijans repeatedly.

¹¹³ See Arundhati Roy, “Doctor and Saint” in B.R. Ambedkar, *Annihilation of Caste: The Annotated Critical Edition* (Navayana 2014) ; Sukhadeo Thorat, *Caste, Race and Discrimination: Discourses in International Context* (Umakant ed, Rawat Publications 2004)

¹¹⁴ ‘The term Dalit, drawn from the Marathi language, literally means ‘crushed’ or ‘broken’, but more generally Dalits is translated into ‘oppressed people’. Strictly, the term refers to people of South Asia who were outside the pale of the hierarchical caste system. But, conceived broadly, the term Dalit could be extended to all communities who suffer from discrimination on the descent and occupation, like the Burakumin in Japan, Osu in Nigeria, etc. Considered in the broad term those who suffer from discrimination based on descent and occupation, would constitute the single largest discriminated community on the globe today.’ see Ashwini Deshpande, *The Grammar of Caste: Economic Discrimination in Contemporary India* (Oxford University Press 2011) 4-5.

sought to address in the first place. The Court did not venture into entrenched inequality and layered discrimination, mostly affecting women after recognition as a fact.¹¹⁵

The brief judgment in the case of *Safai Karamchari Andolan* is more of recantation of the legislative policy and acceptance of the government's version uncritically. The Court did not refer to caste discrimination in Article 15. The Court did not venture into a radical reading of Article 15 to highlight the disparate effects of caste and its link to racial discrimination.¹¹⁶ It did not acknowledge that the locus of power is not the only State but also communities due to asymmetry of power¹¹⁷ as caste is a 'primordial sentiment'¹¹⁸ for Indians. The inequality is a political construct¹¹⁹ which is rooted in the ideological apparatus of caste-based Hinduism, which drives inequality, as part of 'economic, social and political history of inequality regimes'.¹²⁰ It is to be noted that the Court missed an opportunity to expand, elaborate, and contextualise the plight of marginalised manual scavengers in light of international law, which reinforced national law, chiefly fundamental rights.

a) A chance of redemption for Indian Supreme Court

The Court has been given another opportunity in the form of public interest litigation filed by Criminal Justice Society of India in 2019 for determining 'the liability and accountability of the Government office bearers and officers pertaining to their dereliction of duty and negligent role in failing to curb the employment of manual Scavengers in the country.' The petition prays for an order to ascertain the actual number of manual scavengers employed in the country since 1993, number of manual scavenger deaths in the country, investigation into the deaths followed by the

¹¹⁵ For testimonials presented to the Court on the undignified nature, see Resource handbook for ending manual scavenging / by Harsh Mander; International Labour Organization; ILO DWT for South Asia and ILO Country Office for India. - New Delhi: ILO, 2014, available at <http://www.dalits.nl/pdf/ResourceHandbookForEndingManualScavenging.pdf>, also see Shubham Kumar & Priyanka Preet, 'Manual Scavenging: Women Face Double Discrimination as Caste and Gender Inequalities Converge' (2020) 55(26-27) Economic & Political Weekly <<https://www.epw.in/engage/article/manual-scavenging-women-face-double-discrimination-caste-gender>> accessed 12 July 2020.

¹¹⁶ Tarunabh Khaitan, 'Reading Swaraj into Article 15: A New Deal for all Minorities' (2009) NUJS Law Review 149; Gautam Bhatia, 'Equal Moral Membership: Naz Foundation and the Refashioning of Equality under a Transformative Constitution,' (2017) 1 The Indian Law Review 115.

¹¹⁷ See National Commission For Safai Karamcharis, Annual Report 2017-18, available at: https://ncsk.nic.in/sites/default/files/NCSK_AR_2017-18_Eng.pdf. at xxv, xxxv

¹¹⁸ Surinder Jodhka *Caste* (Oxford University Press 2012) 3.

¹¹⁹ Ashish Mehta, 'Piketty's New Book: Praise for Caste-Based Affirmative Action and Other Takeaways for India' *The Wire* (16 March 2020) <<https://thewire.in/books/thomas-piketty-capital-and-ideology-india-chapter>> Accessed 5th July 2020.

¹²⁰ Thomas Piketty, *Capital and Ideology* (Harvard University Press 2020); see also Thomas Piketty, *Capital And Ideology*, <<http://piketty.pse.ens.fr/files/Piketty2020SlidesLongVersion.pdf>> Accessed 23 March, 2020.

initiation of criminal proceedings.¹²¹ The case concerns the dereliction of State officials as mandated under the 2013 Act.

The Court should seize this opportunity to apply the grammar of discrimination and transformative potential of the Constitution. Commenting on the role of judges in constitutional interpretation, eminent political theorist Pratap Bhanu Mehta writes

"A judge, for instance, may appeal to a constitutional text, but the truth is that constitutionalism is not so much an appeal to a higher law that binds. Rather, it is a practice that is constantly being created and re-created through the actions of concrete agents, including judges. *A constitution is not a text that binds with a transparent meaning.* Instead, it poses a challenge about how we handle slippages in systems of meaning, resolve ambiguities, and overcome silences – all through acts of choice. Constitutional texts are indeterminate all the way down and, in any case, judges are the creators and arbiters of meaning; they are not bound by meanings given independently of their interpretation."¹²²

Since the original constitutional challenge by Safai Karamchari Andolan articulated through Article 14, 15, 17, 21 and 23 of the Indian Constitution, contextualisation of the challenge would be in order.

(i) Article 15

Article 15 prohibits discrimination on five ascriptive characteristics of religion, race, caste, sex or place of birth. Supreme Court in Safai Karamchari Andolan case did not touch upon the nature of caste-based discrimination which manifests itself through manual scavenging. There is staple literature on discrimination law¹²³ which can be squarely applied in this case along with recent

¹²¹ *Criminal Justice Society of India v Union of India* Writ Petition (Criminal) No. 20/2019, available at https://www.livelaw.in/pdf_upload/pdf_upload-357321.pdf.

"As of 2018, it is estimated that India still has 26 lakh dry latrines and the Safai Karmachari andolan, which has campaigned for the eradication of manual scavenging since 1995 estimates that between 2014 and 2016, nearly 1,500 people have died while cleaning septic tanks across India. Astonishing, between 1993 and 2013, no convictions were recorded for violation of the Act of 2013." ¹²²

¹²² Pratap Bhanu Mehta, 'The Indian Supreme Court and the Art of Democratic Positioning' in Mark Tushnet ed, *Unstable Constitutionalism: Law and Politics in South Asia* (SouthCambridge University Press 2015) 233-260.

¹²³ Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford University Press, paperback 2016); Hugh Collins and Tarunabh Khaitan, *Foundations of Indirect Discrimination Law* (Bloomsbury 2018); Gautam Bhatia, 'Horizontal Discrimination and Article 15(2) of the Indian Constitution: A Transformative Approach' (2016) 11 *Asian Journal of Comparative Law* 87-109 <<https://www.cambridge.org/core/journals/asian-journal-of-comparative-law/article/horizontal-discrimination-and-article-152-of-the-indian-constitution-a-transformative-approach/59078E0E4DAE24DE8BD707B427690554>> accessed 20 July 2020;

case laws on gender equality.¹²⁴ There is negligible discussion on the meaning of race during the drafting of the Constitution¹²⁵. The similarity of casteism and racism was not lost to Constitutional advisor BN Rau who revealed the proclivity of finding 'casteist solution to a racist problem'¹²⁶

1) *Gendered minority within a minority*

Ashwini Deshpande discusses in detail in her chapter 'Overlapping Identities: Caste and Gender' in the Grammar of Caste how the caste is not only the social division of labour but also the sexual division of labour. It is significant to note that 99% of people forced to do manual scavenging belong to lower rungs of the caste system, i.e. the Dalits and amongst these, 95% of the workers are women.¹²⁷ Caste, class and gender intersect in for Dalit women trapped in the caste hierarchy.

Harsh Mahaseth, 'The Inclusion of Educational Institutions Under the Term "Shops?" The Argument Made by Gautam Bhatia for the Inclusion' (SSRN 10 March 2017) <<https://ssrn.com/abstract=2930918> or <http://dx.doi.org/10.2139/ssrn.2930918>>; Shreya Atrey, *Intersectional Discrimination* (Oxford University Press 2019); Sandra Fredman, 'Substantive Equality Revisited' (2016) 12 International Journal of Constitutional Law

¹²⁴ *Joseph Shine v. Union of India*, 2018 SCC OnLine SC 1676; *Shayara Bano v. Union of India*, (2017) 9 SCC 1; The Secretary, Ministry of Defence v. Babita Puniya 2020 SCCOnline 200.

¹²⁵ Constituent Assembly Debates, Apr. 29 1947 & Nov. 29 1948, available at https://www.constitutionofindia.net/search?keyword%5B%5D=untouchability&document_type%5B%5D=1&document_type%5B%5D=0&sort_by=Relevant+Day&date_of_debate=&exact_phrase=exact_phrase (last visited on May 27, 2020).

¹²⁶ Vineet Thakur, 'When India Proposed a Casteist Solution to South Africa's Racist Problem' *The Wire* (4 April 2016) <<https://thewire.in/diplomacy/exploring-casteism-in-indias-foreign-policy>> accessed 20 July 2020.

See also Suraj Yengde, 'The Harvest of Casteism: Race, Caste and what it will take to make Dalit lives matter' *The Caravan* (3 July 2020) <<https://caravanmagazine.in/essay/race-caste-and-what-it-will-take-to-make-dalit-lives-matter>> accessed 3 July 2020. (Despite the diplomatic deadlock, India managed to pressure South Africa into preliminary talks on the issue. With the General Assembly still in session, BN Rau, India's permanent representative to the UN, approached his South African counterparts to propose a compromise, with the Indian government's permission. The South Africans reported the conversation to their capital in an astonishing "private and secret" memorandum uncovered by the scholar Vineet Thakur. Rau, who had worked with Ambedkar to draft the Indian Constitution, lamented to the South Africans that "the feverish attempts in his country to destroy all caste inequalities were resulting in what in actual practice amounted to discrimination against the erstwhile ruling castes such as the Brahmins, to which he belongs." He added that the Indians who had moved to South Africa—primarily indentured labourers from the Dalit and Shudra castes—"did not belong to the best type." He thought South Africa's treatment of them "might be fully justified and that in fact India would not mind discrimination against our local Indian community if only it was not based on racial lines." Rau proposed that South Africa offer citizenship to "a small number, say 10, of the cultured and best type of Indians"—likely from among the higher-status, non-labouring "passenger" Indians—"as a token to the world that the racial equality of Indians was recognised." In effect, as Thakur has pointed out, India wanted a casteist solution to a racist problem. South Africa did not take this idea forward.)

¹²⁷ For a first-hand account of manual scavenging and its persistence see Resource handbook for ending manual scavenging / by Harsh Mander; International Labour Organization; ILO DWT for South Asia and ILO Country Office for India. - New Delhi: ILO, 2014, available at <http://www.dalits.nl/pdf/ResourceHandbookForEndingManualScavenging.pdf>.

Women are at the bottom of the respective castes, i.e. 'castes *within* women' and 'between caste'¹²⁸. The caste and gender sedimentation is the result of patriarchy over centuries.¹²⁹ Thus, the occupation of manual scavenging remains exclusive to Dalits and that too Dalit women.¹³⁰ Both these classes enjoy a right against discrimination under the said provision of the Indian Constitution. It is significant to highlight the plight of Dalit women who face double discrimination, i.e. *intersectional discrimination*. Applying the five parameters of intersectional discrimination proposed by Professor Shreya Atrey of sameness and difference, patterns of group disadvantage, integrity, context and transformative, Dalit women engaged in manual scavenging are a textbook case of intersectional discrimination with more than one identity mutually interacting and reinforcing.¹³¹

India's lack of initiatives towards the intersectional discrimination aspect in manual scavenging has invited criticism internationally from various United Nations bodies. The UN Committee on the Elimination of Discrimination against Women in 2007 expressed concern that 'despite a law banning manual scavenging, this degrading practice continues with grave implications for the dignity and health of the Dalit women engaged in this activity.'¹³² Despite this, the Court did not engage comprehensively with this aspect. In the Navtej Johar case, the Court adopted the 'intersectional nature of sex discrimination, which cannot be said to operate in isolation of other identities, especially, from the socio-political and economic context'.¹³³ Manual scavenging is a

¹²⁸ Ashwini Deshpande, *The Grammar of Caste: Economic Discrimination in Contemporary India* (Oxford University Press 2011) 109-110.

¹²⁹ Uma Chakravarti, *Gendering Caste: Through a Feminist Lens* (SAGE Publications Pvt. Ltd 2018).

¹³⁰ "Breaking Free, Rehabilitating Manual Scavengers", United Nations in India, <https://in.one.un.org/page/breaking-free-rehabilitating-manual-scavengers/>. Also see "Cleaning Human Waste: Manual Scavenging, Caste and Discrimination in India" Human Rights Watch, https://in.one.un.org/wp-content/uploads/2016/09/india0814_ForUpload.pdf

¹³¹ Shreya Atrey, 'Through the Looking Glass of Intersectionality: Making Sense of Indian Discrimination Jurisprudence under Article 15' (2016) 16 Equal Rights Review 160; see also Shreya Atrey, *Intersectional Discrimination* (Oxford University Press 2019) 40 (intersectionality is composed of five principal strands: first, it is concerned with tracing both sameness and difference in experiences based on multiple group identities; secondly, it is concerned with tracing the sameness and difference in patterns of group disadvantage understood broadly in terms of subordination, marginalization, violence, disempowerment, deprivation, exploitation, and all other forms of disadvantage suffered by social groups; thirdly, in order to make sense of these same and different patterns of group disadvantage they must be considered as a whole, namely with integrity; fourthly, intersectionality can only be appreciated in its full socio-economic, cultural, and political context that shapes people's identities and patterns of group disadvantage associated with them; and lastly, the purpose of this intersectional analysis is to further broadly conceived transformative aims which remove, rectify, and reform the disadvantage suffered by intersectional groups.)

¹³² Concluding Comments of the Committee on the Elimination of Discrimination against Women: India, 37th Session, 2 February 2007, UN Doc. CEDAW/C/IND/CO/3, para 28. Also see Shomona Khanna, 'Invisible Inequalities: An Analysis of the Safai Karamchhari Andolan Case' in Philippe Cullet, Sujith Koonan, and Lovleen Bhullar (eds), *The Right to Sanitation in India: Critical Perspectives* (Oxford University Press 2019) 315.

¹³³ *Navtej Singh Johar v Union of India* AIR 2018 SC 4321, para 431.

case of *double discrimination* as they are discriminated against by society and despised by other Dalits. All Dalits are not equal; some are more equal than others as the research of Amit Thorat and Omkar Joshi shows. Within this double discrimination, women are at the end of the bottomless pit, and their condition must be studied further.

(ii) Article 17

"... untouchability is obligatory. A person is permitted to hold another as his slave. There is no compulsion on him if he does not want to. But an Untouchable has no option. Once he is born an Untouchable, he is subject to all the disabilities of an Untouchable... [U]ntouchability is an indirect and therefore the worst form of slavery... It is enslavement without making the Untouchables conscious of their enslavement."

-Dr. BR Ambedkar, Slaves and Untouchables

Much like the untouchables, the discussion on Article 17 in the Constitutional textbook has been on the margins and negligible¹³⁴. Untouchability is normatively challenging since there is definitional plasticity in trying to fashion a legally workable solution as it is integrated into larger socio-economic structures or religiosity¹³⁵. Justice K. Ramaswamy lamented "Despite its abolition (untouchability) it is being practised with impunity more in breach. More than 75% of the cases under the Act are ending in an acquittal at all levels. Apathy and lack of proper perspective even by the courts in tackling the knotty problem is obvious as India is a model of the rule of caste

¹³⁴ It is surprising since there is a lot of literature on untouchability. Eg see Marc Galanter, 'Untouchability and the Law' (1969) 4(1-2) Economic and Political Weekly (This paper is concerned with the historical development and legal reception of 'untouchability' in legal jurisprudence. To an extent, Marc Galanter notes the anxiety of the courts. The paper foresaw the vacillation between the strict textualist interpretation as adopted by Indu Malhotra and far-reaching effect and origin-based approach adopted by Justice Chandrachud. Justice Chandrachud realised the *constitutional promise to abolish disabilities*.)

¹³⁵ See dissenting opinion of BP Sinha CJ in *Sardar Syedna Tahir Saifuddin v. State of Bombay*, 1962 AIR 853, BHATIA, G. (2016). Freedom from community: Individual rights, group life, state authority and religious freedom under the Indian Constitution. *Global Constitutionalism*, 5(03), 351–382, See Gautam Bhatia, "'Untouchability' and the Constituent Assembly Debates," *Indian Constitutional Law and Philosophy*, Mar. 24, 2016, <<https://indconlawphil.wordpress.com/2016/03/16/untouchability-and-the-constituent-assembly-debates/>>. "Untouchability" and the Constituent Assembly Debates, Suhrith Parthasarathy, "An Equal Right to Freedom of Religion: A Reading of the Supreme Court's Judgment in Sabarimala," *University of Oxford Human Rights Journal* 32, no. 02 (2020): 123-150. <<http://ohrh.law.ox.ac.uk/wordpress/wp-content/uploads/2020/05/U-of-OxHRJ-I-An-Equal-Right-to-Freedom-of-Religion.pdf>>

instead of the rule of law¹³⁶. For the first time after 42 years since the Constitution came into force, this first case has come up to this Court to consider this problem."¹³⁷

It would be another four and half years since the *Safai Karamchari case* that the issue of untouchability would be agitated in the Supreme Court of India before a constitution bench for declaring the practice of prohibiting menstruating women in Sabarimala. There is a shortage of jurisprudence on Article 17 and its importance which has been acknowledged by Justice Chandrachud in Sabarimala judgment.¹³⁸ Justice Chandrachud would devote a section of his opinion on the discussion of the notion of purity and pollution and how it applies to Dalits as well as menstruating women. Placing reliance upon academic as well as literary sources, Justice Chandrachud exhibited constitutional empathy and angst at the undignified life of manual scavengers.¹³⁹

Marc Galanter's paper on untouchability and law need close reading by the judges tasked with interpretation of Article 17. Tracing the origin of the word to 1909, Marc Galanter's work on the judicialisation of caste and law as it stood before and after the promulgation of the Constitution deserves special mention due to the width and depth of engagement. The regulation of private as well as official behaviour, including penalisation of the indirect social support of disabilities arising out of untouchability through reading of Constitution and Protection of Civil Rights Act, 1955 has been underexplored. The embargo on untouchability can be construed in three modes in increasing restrictiveness: a) include all instances in which a person is treated ritually unclean, and a source of pollution (Justice Chandrachud in Sabarimala) b) include all instances in which a

¹³⁶ Smita Narula, 'Equal by Law, Unequal by Caste: The "Untouchable" Condition in Critical Race Perspective' (2008) 26 Wisconsin International Law Journal 255, 295-311. (The Rule of Law in India lives in the shadow of the Rule of Caste. If law is understood as a set of rules backed by sanction, then both the legal system and the caste system can lay claim to the mantle of law with one significant difference: the caste system operates more efficiently, more swiftly, and more punitively than any rights-protecting law on the books')

¹³⁷ *State of Karnataka v Appa Balu Ingale & Ors* AIR 1995 SC 469.

¹³⁸ Justice Chandrachud in *Indian Young Lawyers' Association v. State of Kerala* (2016) SCConline SC 1783 ;' While there has been little discussion about Article 17 in textbooks on constitutional law, it is a provision which has a paramount social significance both in terms of acknowledging the past and in defining the vision of the Constitution for the present and the future.

¹³⁹ 'I. Article 17, "Untouchability" and the notions of purity in *Indian Young Lawyers' Association v. State of Kerala* (2016) SCConline SC 1783. Another judge on the bench, Justice Indu Malhotra rejected the argument on the extension of untouchability to women as it is not supported 'literally or historically'. Justice Malhotra is supported in her interpretation by political theorist Madhav Khosla who notes that 'Article 17 is wide because it has the potential to address a range of discriminatory activities stimulated by caste. And yet again narrow because, given the deeply contextual nature of the word untouchability, it would be erroneous to assume, as some do, that Article 17 prohibits discriminatory acts, however serious, that are exogenous to caste' in Madhav Khosla, *The Indian Constitution* (Oxford University Press 2012) 89. The debate on meaning and content of untouchability is far from settled.

person was stigmatised as unclean or polluting or inferior because of his origin or membership of a particular group (Professor Tarunabh Khaitan's understanding of caste in Equality Bill 2017) c) only those practices concerned with disabilities arising because of being untouchable, i.e. beyond the scope of the caste system (Justice Indu Malhotra in Sabarimala). Given the definitional imbroglio of 'untouchability' and being an 'untouchable', what Article 17 prohibits legally is 'practise of 'untouchability' in any form' which overlaps with 'enforcement of any disability arising out of the 'untouchability". While its first part is constitutionally frowned upon, the second part is legally impermissible.¹⁴⁰ Thus, we see a spectrum of constitutional approaches when untouchability is situated historically and legally in colonial and post-colonial settings. Manual scavenging is a scourge of untouchability as all three approaches can apply equally. Further, Kalpana Kannabiran comments

'manual scavenging represents a convergence of discrimination with the negation of liberty-in this case, by the state-in such area where extreme stigmatisation guarantees impunity to state and non-state actors alike'.¹⁴¹

This linkage gains support from the 1976 amendment to Protection of Civil Rights Act, 1955 which operationalised the untouchability embargo in the Constitution. It punishes *disability* arising from untouchability which includes scavenging, and there can be no justification for the same as per the combined reading of Section 7 and Section 7A.¹⁴² Justice Ravindra Bhat has recently clarified the scope of the Protection of Civil Rights Act, 1955:

¹⁴⁰ Marc Galanter, *Untouchability and the Law*, Economic and Political Weekly, Vol. 4, Issue No. 1-2, 04 Jan, 1969

¹⁴¹ Kalpana Kannabiran, *Tools of Justice: Non-Discrimination and the Indian Constitution* (Routledge 2012) 217.

¹⁴² **7. Punishment for other offences arising out of "untouchability"**.—(1) Whoever—

(a) prevents any person from exercising any right accruing to him by reason of the abolition of "untouchability" under Article 17 of the Constitution; or

(b) molests, injures, annoys, obstructs or causes or attempts to cause obstruction to any person in the exercise of any such right or molests, injures, annoys or boycotts any person by reason of his having exercised any such right; or

(c) by words, either spoken or written, or by signs or by visible representations or otherwise, incites or encourages any person or class of persons or the public generally to practise "untouchability" in any form whatsoever; [or]

[(d) insults or attempts to insult, on the ground of "untouchability", a member of a Scheduled Caste;]

[shall be punishable with imprisonment for a term of not less than one month and not more than six months and also with fine which shall be not less than one hundred rupees and not more than five hundred rupees].

[*Explanation I*].—A person shall be deemed to boycott another person who—

(a) refuses to let to such other person or refuses to permit such other person, to use or occupy any house or land or refuses to deal with, work for hire for, or do business with, such other person or to render to him or receive from him any customary service, or refuses to do any of the said things on the terms on which such things would be commonly done in the ordinary course of business; or

(b) abstains from such social, professional or business relations as he would ordinarily maintain with such other person.

'Though Article 17 proscribes the practice of untouchability and pernicious practices associated with it, the Constitution expected Parliament and the legislatures to enact effective measures to root it out, *as well as all other direct and indirect, (but virulent nevertheless) forms of caste discrimination.*'¹⁴³

Though this law has never led to any criminal convictions¹⁴⁴, it attempts to impose imprisonment as a form of penalty. Thus, the institutionalised State practice of employment of manual scavengers by local authorities¹⁴⁵ is contrary to the prohibition of untouchability and its manifestation as forced labour. The unconscionable practise of manual scavenging cannot be decoupled from the notions of purity and pollution as it is inseparable from its casteist origin. The work of manual scavenging is, by definition, unclean and delegated to the most marginalised community of Dalits.

The heterogeneity within Dalits and their predefined occupational roles have benefitted little from the affirmative action led social mobility due to the stigma¹⁴⁶ attached with being a manual scavenger. The stigma remains despite leaving the job of manual scavenging as the caste identity

[*Explanation II.*—For the purposes of clause (c), a person shall be deemed to incite or encourage the practice of “untouchability”—

(i) if he, directly or indirectly, preaches “untouchability” or its practice in any form; or

(ii) if he justifies, whether on *historical, philosophical or religious grounds or on the ground of any tradition of the caste system or on any other ground, the practice of “untouchability”* in any form.]

[7-A. Unlawful compulsory labour when to be deemed to be a practice of untouchability.—(1) Whoever compels any person, on the ground of “untouchability”, to do *any scavenging or sweeping* or to remove any carcass or to flay any animal or to remove the umbilical cord or to do any other job of a similar nature, shall be deemed to have enforced a disability arising out of “untouchability”.

(2) Whoever is deemed under sub-section (1) to have enforced a disability arising out of “untouchability” shall be punishable with imprisonment for a term which shall not be less than three months and not more than six months and also with fine which shall not be less than one hundred rupees and not more than five hundred rupees.

Explanation.—For the purposes of this section, “compulsion” includes a threat of social or economic boycott.]

¹⁴³ *Prathvi Raj Chauhan v Union of India and Others* 2020 SCC OnLine SC 159.

¹⁴⁴ Shubham Kumar & Priyanka Preet. “Manual Scavenging: Women Face Double Discrimination as Caste and Gender Inequalities Converge”, (2020), 55(26-27), *Economic and Political Weekly*, <<https://www.epw.in/engage/article/manual-scavenging-women-face-double-discrimination-caste-gender>> accessed 24 July 2020.

¹⁴⁵ Prohibition of Employment as Manual Scavengers and their Rehabilitation Act 2013, S 2(f).

¹⁴⁶ Vicky Walters, “Parenting from the “Polluted” Margins: Stigma, Education and Social (Im)Mobility for the Children of India’s Out-Casted Sanitation Workers,” (2019) *South Asia: Journal of South Asian Studies*, 1–18, <<https://doi.org/10.1080/00856401.2019.1556377>> accessed 24 July 2020; Manish & Tripti Singh, “Rehabilitating Manual Scavengers Must Go Beyond Reinforcing Caste Hierarchies,” *The Wire*, (8 May 2019) <<https://thewire.in/labour/manual-scavengers-rehabilitation-sanitation>> accessed 24 July 2020; “Cleaning Human Waste “Manual Scavenging,” Caste, and Discrimination in India” (2014), Human Rights Watch, <www.hrw.org/report/2014/08/25/cleaning-human-waste/manual-scavenging-caste-and-discrimination-india> accessed 24 July 2020.

remains affixed¹⁴⁷ as 'manual scavenging for many may have ended as a form of employment, the stigma and discrimination associated with it lingers on, making it difficult for former or liberated manual scavengers to secure alternate livelihoods and raising the fear that people could once again return to manual scavenging in the absence of other opportunities to support their families.'¹⁴⁸The 2013 Act fails to recognise the impact of this stigmatisation. While increasing the scope of the definition of a 'manual scavenger', as it excludes those who had ceased to work as manual scavengers before the date the statute came into force. The fallacy by legislators here is in the assumption that once an individual ceases to follow his caste occupation, he also escapes social structures of pollution and purity¹⁴⁹. Escaping caste occupation does not imply escaping caste oppression due to the stigma attached.

The radical reading of Article 17, which otherwise has received no attention in the *Safai Karamchhari Andolan case*, was fulfilled by the opinion of Justice Chandrachud. Situating untouchability in its historicity and causality, probably for the first time in Indian Supreme Court's jurisprudence, it achieves something stellar- how the provision on the declaration of 'Untouchability' itself suffers from untouchability from the Indian judges who repeatedly invoked the bare text but made no attempt to understand and articulate it through constitutional reasoning, sociology and political philosophy. It is time that the Court moves from platitudes and rhetoric to constitutional reconsideration of untouchability.

(iii) Article 21

Anup Surendranath cautions, given the number of cases interpreting Article 21's protection of life and personal liberty, it is 'difficult to discern any level of normative coherence.'¹⁵⁰ The discursivity of Article 21 has been captured to an extent in the seminal right to privacy case- *KS Puttaswamy v Union of India* wherein the nine-judge bench of Supreme Court was called to decide whether the right to privacy is located in the Constitutional text.¹⁵¹ The plurality opinion by Justice Chandrachud gave a forceful moral and philosophical mooring to the expression right to life and

¹⁴⁷"Social Inclusion of Manual Scavengers", (2013), UNDP, <www.undp.org/content/dam/india/docs/pub-povertyreduction/Social-inclusion-of-Manual-Scavengers.pdf> accessed 24 July 2020.

¹⁴⁸ "Breaking Free: Rehabilitating Manual Scavengers - UN India," (2013) United Nations, <<https://in.one.un.org/page/breaking-free-rehabilitating-manual-scavengers>> accessed 20 July 2020.

¹⁴⁹ See Shomona Khanna, 'Invisible Inequalities: An Analysis of the Safai Karamchhari Andolan Case' in Philippe Cullet, Sujith Koonan, and Lovleen Bhullar (eds), *The Right to Sanitation in India: Critical Perspectives* (Oxford University Press 2019) 113.

¹⁵⁰ Anup Surendranath, "Life and Personal Liberty" in ed. Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta, *The Oxford Handbook of the Indian Constitution*, (Oxford University Press 2016), 756.

¹⁵¹ Justice (Retd) *KS Puttaswamy v Union of India* AIR 2017 SC 4161; See also Mariyam Kamil, "Puttaswamy: Jury still out on some privacy concerns?" (2017), 1(2), *Indian Law Review*, 190-204, <<https://doi.org/10.1080/24730580.2017.1409055>> accessed 20 July 2020.

personal liberty. Life is intrinsically precious; it is to be lived with dignity as it 'permeates the core of the rights guaranteed to an individual'¹⁵². The forcefulness of the judgment constituted a new epoch in the Constitutional history- Constitutionalism 3.0.¹⁵³ The jurisprudence on dignity has been dealt with extensively in the *KS Puttaswamy* as well as *Common Cause vs. Union of India*¹⁵⁴ (right to die with dignity) hence would be trite to recapitulate the same. The Preamble of 2013 Act emphasis upon the inherent dignity was missed in the case of *Safai Karmachari*.

Article 21 also incorporates the right to health. However, the adverse and disproportionate health impacts of manual scavenging have not received attention, although manual scavenging is seen as a necessity for public health. The Dalit women engaged in manual scavenging suffer from 'damage to their physical health [which] is irreparable. Scavenging exposes them to noxious gases, impairing their gastrointestinal, musculoskeletal, respiratory, cardiovascular, and reproductive organs. They suffer from rashes, rotting of skin, permanent hair loss, nausea, breathlessness, palpitations, sore throat, loss of libido, and bear frequent infections. In some instances, these toxins become carcinogenic, resulting in fatalities.'¹⁵⁵ The *Safai Karmachari case* could have also benefited from emphasising the right to health¹⁵⁶ as it did for the LGBTQ community in the decriminalisation of homosexuality case of *Navtej Singh Johar*.¹⁵⁷

While the legislature recognised dignity, which is the foundation of life in Article 21, the lives of manual scavengers continue to be deprived of basic dignity¹⁵⁸ appallingly. Their rights should also

¹⁵² See opinion of Justice Chandrachud in Justice (Retd) *KS Puttaswamy v Union of India* AIR 2017 SC 4161.

¹⁵³ Shreya Atrey and Gautam Bhatia, "New Beginnings: Indian Rights Jurisprudence After Puttaswamy," (2020) 3(02) University of Oxford Human Rights Hub Journal, 1-14 <<http://ohrh.law.ox.ac.uk/wordpress/wp-content/uploads/2020/05/U-of-OxHRH-J-New-Beginnings-2.pdf>> accessed 24 July 2020.

¹⁵⁴ *Common Cause v Union of India* AIR 2018 SC 1665.

¹⁵⁵ Shubham Kumar & Priyanka Preet, "Manual Scavenging: Women Face Double Discrimination as Caste and Gender Inequalities Converge" (2020) 55(26-27), Economic and Political Weekly <<https://www.epw.in/engage/article/manual-scavenging-women-face-double-discrimination-caste-gender>> accessed 24 July 2020.

¹⁵⁶ *CESC. Limited v Subhash Chandra Bose* AIR 1992 SC 573; *Consumer Education and Research Centre v Union of India* AIR 1995 SC 922; *Paschim Banga Khet Mazdoor Samity v State of West Bengal* AIR 1996 SC 2426; *Society for Unaided Private Schools of Rajasthan v Union of India* AIR 2012 SC 3445; *Devika Biswas v Union of India & Ors* AIR 2016 SC 4405; *Common Cause v Union of India*, AIR 2018 SC 1665.

¹⁵⁷ Justice Chandrachud's separate section on the right to health included in Section 377 and the right to health: Section 377 and HIV prevention efforts and Mental health in *Navtej Singh Johar v. Union of India* AIR 2018 SC 4321.

¹⁵⁸ Paul D'souza, "Clean India, Unclean Indians Beyond the Bhim Yatra," (2018), 51(26-27), Economic and Political Weekly <www.epw.in/journal/2016/26-27/commentary/clean-india-unclean-indians-beyond-bhim-yatra.html> accessed 24 July 2020.

be sounded on constitutional principles and an interpretation which restores dignity. To paraphrase Professor Upendra Baxi, the Court should be 'taking suffering seriously'¹⁵⁹ of manual scavengers.

(vi) Article 23

The Court could also have relied upon the case of PUDR¹⁶⁰ to answer the petitioners who invoked Article 23¹⁶¹. The unfreedom to choose, the exploitation, the precarity of wages and dehumanisation of manual scavengers seem ripe grounds for invocation of freedom against exploitation. Freedom against exploitation needs to be read expansively to address the unfreedom of manual scavengers and their right to choose work rather than being made to stick to 'traditional occupation' work ascribed by caste. Being of particular communities like Bhangis, Mehtar, Halakhor, Mukhiyar¹⁶², within the Scheduled Caste, one is deprived of the right of choice. The societally sanctioned occupation due to caste annihilates their freedom to choose. The stratified socio-economic structure results in their subordination even within the group they are placed in. It is a case of structural domination resulting in their group as well as personal domination due to their membership of a community.¹⁶³ In the PUDR the Court defined 'forced', under Article 23 as

"Any factor which deprives a person of a choice of alternatives and compels him to adopt one particular course of action may properly be regarded as 'force', and if labour or service is compelled as a result of such 'force', it would be 'forced labour'."¹⁶⁴

The 'force' applied by the caste system is thus invisible, but this cannot deny its existence, bringing it well within the scope of "forced labour" under Article 23.

The function of the Constitution is to expand freedoms, enabling people to make intimate decisions, which includes the choice of work. The State exists to facilitate the choices of

¹⁵⁹ Baxi, Upendra (1985) "Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India," *Third World Legal Studies*: Vol. 4 , Article 6.

¹⁶⁰ *People's Union for Democratic Rights and others v Union of India*, AIR 1982 SC 1473.

¹⁶¹ Gautam Bhatia, "The Freedom to Work: *PUDR v Union of India* and the Meaning of 'Forced Labour' Under the Indian Constitution" (2017) Social Science Research Network <<https://ssrn.com/abstract=3094640>> accessed 24 July 2020.

¹⁶² *Criminal Justice Society of India v Union of India*, Writ Petition (Criminal) No. 20/2019 <www.livelaw.in/pdf_upload/pdf_upload-357321.pdf> accessed 24 July 2020.

¹⁶³ Purba Das "Is caste race? Discourses of Racial Indianization," (2016) 43(3), *Journal of Intercultural Communication Research* 264-282, <<http://dx.doi.org/10.1080/17475759.2014.944556>> accessed 24 July 2020.

¹⁶⁴ Gautam Bhatia, *Transformative Constitution: A Radical Biography in Nine Acts*, 'PUDR vs. Union of India', (HarperCollins 2019), 174.

individuals instead of making one for them.¹⁶⁵ By non-application of law and complicity of the State in the perpetuation of manual scavenging, despite the legal prohibition, tantamount to dictating decisions, for a particular community due to ascriptive identity-caste, which are unconstitutional. The inheritance of manual scavenging violates 'right to work, which includes the right of everyone to the opportunity to gain his living by work which he *freely chooses or accepts*' in Article 6(1) of International Covenant on Economic, Social and Cultural Rights, 1966¹⁶⁶ to which India is a party. The State is also under an international obligation to 'prevent, prohibit and eliminate discriminatory practices directed against members of *descent-based* communities and act against the dissemination of ideas of superiority and inferiority based on *descent*.'¹⁶⁷ The Indian position has been historically to equate caste with descent, but now it dissociates the same, due to rising Dalit advocacy utilising the earlier position of India internationally.

3. Not being unimaginative: A chance of redemption for Supreme Court

The new petition by the Criminal Justice Society of India on manual scavenging is pending and awaits a hearing on merits. Part IV and Part V of the 2013 Act wherein the State officials,

¹⁶⁵Justice Chandrachud notes that 'Life is precious in itself. But life is worth living because of the freedoms which enable each individual to live life as it should be lived. The best decisions on how life should be lived are entrusted to the individual. They are continuously shaped by the social milieu in which individuals exist. *The duty of the State is to safeguard the ability to take decisions — the autonomy of the individual — and not to dictate those decisions.* "Life" within the meaning of Article 21 is not confined to the integrity of the physical body. The right comprehends one's being in its fullest sense. That which facilitates the fulfilment of life is as much within the protection of the guarantee of life' in *KS Puttaswamy v Union of India*, AIR 2017 SC 4161.

¹⁶⁶ International Covenant on Economic, Social and Cultural Rights (United Nations [UN]) 993 UNTS 3, CTS 1976/46, S Exec Doc D, 95-2 (1978), GAOR 21st Session Supp 16, 49, UN Doc A/6316, UN Doc A/RES/21/2200, (December 16, 1966).

¹⁶⁷ UN Committee on Economic, Social and Cultural Rights (CESCR), 'General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)' (02 July 2009) E/C.12/GC/20, Para 26 available at: <<https://www.refworld.org/docid/4a60961f2.html>>

'Descent' as a prohibited ground for discriminatory treatment, is covered only by ICERD Article 1(1). Its context as a form of discrimination can, therefore only be understood by relying on the history of its inclusion in ICERD. 'Descent' was first introduced as an amendment proposed by India in 1965 to the definition of racial discrimination. The Indian contribution to the debates on subsequent provisions of the Convention reveal that India was concerned with the relationship between caste and the Convention. The concern was for future relation of the Convention with India's constitutional system of affirmative action and the need to ensure that this (caste) could not represent racial discrimination under Article 1. Even then, India engaged itself with semantics hoping that 'caste' would not gain recognition under 'descent' and thus would not be compared with racial discrimination in future. *supra* note. 6, Chapter 5; Also for other references to descent in international treaties see, Article 1(1)(b) of ILO Convention 169 on Indigenous and Tribal Peoples which covers indigenous status on the grounds, *inter alia*, of 'descent'.

especially the District Magistrate, has been made a nodal authority for identification as well as rehabilitation of the manual scavengers¹⁶⁸. It is a case of Constitutional tort wherein the sovereign immunity¹⁶⁹ plea cannot hold judicial scrutiny. The violations of fundamental rights due to continued practise, as already discussed above, would ameliorate the centuries-old religiously sanctified 'traditional' occupation. The Court can award damages against the State and its officials for the failure to safeguard the fundamental rights of the citizens.¹⁷⁰ In *Uphaar Tragedy Victims Association case*¹⁷¹, 'Courts have held that due to the action or inaction of the State or its officers if the fundamental rights of a citizen are infringed then the liability of the State, its officials and instrumentalities, is strict.' The Court also noted how the public authorities have been made liable under the Human Rights Act, 1998 in the United Kingdom and expressed a desire that such legislation is also needed in India. The Court in *Nilabati Behera case* noted that vicarious liability of the State might be explored under Article 32 for violations of fundamental rights. Article 32 of Constitution 'imposes a constitutional obligation on this Court to forge such new tools, which may be necessary for doing complete justice and enforcing the fundamental rights guaranteed in the Constitution'.¹⁷² This is a ripe case for such remedy, and the Court should continue in its vindication of marginality of persons due to their sexuality,¹⁷³ gender¹⁷⁴ and now caste. It is time that the manual scavengers are assured of their 'equal moral membership'¹⁷⁵ under the equality code of the Constitution.

It must be recognised that 'equality is not identity or sameness, but that equality implies, based on moral equality of all human beings, being different but fundamentally same.'¹⁷⁶ Both caste and race are sites of instituted inequalities which require *recognition* and *redistribution* as prohibited ground for discrimination. The manual scavengers deserve recognition of the caste causality and

¹⁶⁸ "Social Inclusion of Manual Scavenger," Report of the National Round Table Discussion, Organised by United Nations Development Programme and UN Solution Exchange (Gender Community of Practice), New Delhi, Dec. 21 2012 <www.undp.org/content/dam/india/docs/pub-povertyreduction/Social-inclusion-of-Manual-Scavengers.pdf>

'The Government officials such as District Collectors should be held accountable for the situation of Manual Scavenging in their districts. if the situation demands, they should be penalised.'

¹⁶⁹ Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta, 'Sovereign Immunity' in *The Oxford Handbook of the Indian Constitution* (Oxford, United Kingdom: Oxford University Press, 2016).

¹⁷⁰ Gopal Subramaniam, "Writs and Remedies" in *ibid*.

¹⁷¹ *MCD v Uphaar Tragedy Victims Assn* AIR 2011 SC 481, 543.

¹⁷² *Nilabati Behera v State of Orissa* AIR 1993 SC 746.

¹⁷³ *Navtej Singh Johar v Union of India* AIR 2018 SC 4321

¹⁷⁴ *Joseph Shine v Union of India* 2018 SCC OnLine SC 1676; *Shayara Bano v Union of India* AIR 2017 SC 1; *The Secretary, Ministry of Defence v Babita Puniya* 2020 SCConline 200; supra note. 4J9,

¹⁷⁵ Gautam Bhatia, 'Equal Moral Membership: *Naz Foundation* and the Refashioning of Equality under a Transformative Constitution' (2017) 1(2) *The Indian Law Review* 115 – 144.

¹⁷⁶ 'Equality' in M. Rosenfeld and A. Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 986

redistribution through the institutional changes. Sanitation and hygiene maintenance burden is unduly placed on manual scavengers due to their caste. This is a chance for the Court to redeem itself by extending the radical and substantive equality vision of the Constitution like civil liberties case of Sabarimala, decriminalisation of homosexuality¹⁷⁷, right to privacy¹⁷⁸ and decriminalisation of adultery¹⁷⁹, and reservation case which defanged merit¹⁸⁰. The recent track record of the Supreme Court on the rights of Dalits is not very encouraging.¹⁸¹ The promise of true equality which is located in the Constitution and the moral assumption of horizontality, must be fulfilled by the Supreme Court.

4. Locating international human rights law in Safai Karamchari Andolan case: Internationalisation of caste

A caste is based on various factors, sometimes it may be a class, *a race or a racial unit*.

-KC. Vasanth Kumar v. State of Karnataka¹⁸²

The judicial and political de-hyphenation of caste-based discrimination and racial discrimination is the site of inquiry. The Court did not elaborate on the applicability of international human rights except citing the bare text of the instruments. The Court cited the Universal Declaration of Human Rights, 1948¹⁸³ (UDHR). The fundamental rights in the Indian Constitution were framed under the

¹⁷⁷ Navtej Singh Johar v Union of India AIR 2018 SC 4321.

¹⁷⁸KS Puttaswamy v Union of India, AIR 2017 SC 4161.

¹⁷⁹ Joseph Shine v Union of India, AIR 2018 SC 4898.

¹⁸⁰ B.K. Pavitra v Union of India, AIR 2019 SC 2723.

¹⁸¹ Anurag Bhaskar, "When it comes to Dalit and Tribal Rights, the judiciary in India just does not get it," *The Wire* (3 May 2020) <<https://thewire.in/law/when-it-comes-to-dalit-and-tribal-rights-the-judiciary-in-india-just-does-not-get-it>> accessed 24 July 2020.

¹⁸² KC. Vasanth Kumar v State of Karnataka, AIR 1985 SC 1495.

¹⁸³ GOAR 3rd Session Part 1, Universal Declaration of Human Rights (United Nations [UN]) UN DOC A/810, 71 (Dec. 10, 1948).

shadows of the Universal Declaration of Human Rights.¹⁸⁴ India wanted caste to be also included as a ground of discrimination during the drafting of UDHR but was dropped as it could be read in 'birth'.¹⁸⁵ Article 23(3) of UDHR deals with employment. It declares that 'Everyone who works has the right to just and favourable remuneration *ensuring for himself and his family an existence worthy of human dignity*, and supplemented, if necessary, by other means of social protection.' The reasons for exclusion of caste and caste-based discrimination, from international human rights conventions like the UDHR, are challenging to track. The UDHR is partly a product of its times when racism and discrimination were primarily understood in the context of the decline and dismantling of European colonialism. Caste being neglected in UN Bodies initially is due to 'distortions of history,' i.e. marginalisation of subaltern movement from former colonies in favour of European elite movements of racism and colonialism.¹⁸⁶ Thus, discrimination movements like the caste struggle, from within former colonies of Asia were neglected.¹⁸⁷

More apt would have been for the Court to cite Article 1(a) of the International Labour Organisation Convention No 111, 1958¹⁸⁸ ratified by India. The Convention required states to enact legislation which prohibited all discrimination and exclusion on any basis including race, colour, sex, religion, political opinion, national, or *social origin* in employment and to repeal legislation that was not based on equal opportunities. International Labour Organisation Convention (ILO) noted that manual scavengers suffer from 'undermined physical capacity and the feeling of vulnerability and hopelessness associated with this form of discrimination have triggered a vicious cycle of pauperisation, low educational attainment, and social immobility for manual scavengers and their families'¹⁸⁹ Unsurprisingly, discrimination based on *social origin* also

¹⁸⁴ Miloon Kothari, India's Contribution to the Universal Declaration of Human Rights, *Journal of the National Human Rights Commission* 17, (2018):65 ; Manu Bhagvan, "A New Hope: India, the United Nations and the Making of the Universal Declaration of Human Rights," (2010), 44(2), *Modern Asian Studies*, 311, <<https://doi.org/10.1017/S0026749X08003600>> accessed 24 July 2020.

¹⁸⁵ Meena Dhanda, Annapurna Waughrey, David Keane, David Mosse, Roger Green and Stephen White, "Caste in Britain: Socio-legal Review", *Equality and Human Rights Commission Research Report* 91 (2014), 27

¹⁸⁶ N. Paul Divakar and M. Ajai, *UN Bodies and the Dalits: A Historical Review of Interventions in 'Caste, Race and Discrimination: Discourses in International Context* (Umakant, Rawat Publications, 2004) 8

¹⁸⁷ Sukhadeo Thorat, 'Caste, Race and Discrimination: Discourses in International Context,' ed. Umakant, Rawat Publications, 2004, 8,9.

¹⁸⁸ Convention concerning Discrimination in Respect of Employment and Occupation ILO Convention No 111, (adopted 25 June 1958, entered into force 15 June 1960), 362 UNTS 31.

¹⁸⁹ "The ILO and Manual Scavengers in India: Paving the long way towards the elimination of discrimination based on the social origin", (2011) <www.ilo.org/global/about-the-ilo/newsroom/features/WCMS_159813/lang-en/index.htm> accessed 24 July 2020.

includes caste-based discrimination.¹⁹⁰ Both caste and race enable physical, mental and psychological evisceration and hence strike at the core of personhood and identity.

V. CASTE AND RACIAL DISCRIMINATION IN INTERNATIONAL LAW: INTERNATIONALISATION OF CASTE

Internationalisation of caste-based injustice is in itself a worthwhile objective provided it strengthens the institutional efforts against casteism. This is possible only if caste is presented as caste and not fitted into the category of race. At the same time, an attempt is made to promulgate an international charter against caste discrimination.¹⁹¹ The 2012 European Union resolution is a stinging critique of Indian position as it notes that 'manual scavenging, despite being legally banned, continues to be widespread, with hundreds of thousands of almost exclusively female Dalits performing this form of servitude, Indian Railways being the largest single employer of manual scavengers'.¹⁹² The European Parliament has been seized with the issue of caste discrimination for over a decade now. Earlier this year European Union passed a resolution for adoption of European Union Policy on caste discrimination.¹⁹³

This evinces question on the internationalisation of caste and caste-based discrimination not only in India but also abroad.¹⁹⁴ This leads to the intuitive conclusion of externalisation and

¹⁹⁰ "Equality at work: The continuing challenge - Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work," (2011), 43 <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_154779.pdf> accessed 22 July 2020.

¹⁹¹ *ibid*, xxvii

¹⁹² "TEXT ADOPTED - THURSDAY, 13 DECEMBER 2012 - CASTE DISCRIMINATION IN INDIA," P7_TA(2012)0512, <www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2012-0512&language=EN> accessed 29 March 2020.

¹⁹³ "European Parliament resolution of 15 January 2020 on human rights and democracy in the world and the European Union's policy on the matter – annual report 2018 (2019/2125(INI)," P9_TA(2020)0007, <www.europarl.europa.eu/doceo/document/TA-9-2020-0007_EN.pdf> accessed 24 July 2020.

¹⁹⁴ "Key Challenges and Strategic Approaches to Combat Caste-Based and Analogous Forms of Discrimination, Guidance Tool on Descent-Based Discrimination," (2017) United Nations Network on Racial Discrimination and Protection of Minorities, United Nations, 18-25, <www.ohchr.org/Documents/Issues/Minorities/GuidanceToolDiscrimination.pdf> accessed 24 July 2020.

internationalisation of caste- from local issues to a global one.¹⁹⁵ In an expanded working paper, "Discrimination Based on Work and Descent", Eide and Yokota have highlighted the presence of caste-like isolation practised in African countries, including segregation in housing, endogamy and hindrance in access to public property.¹⁹⁶ Ambedkar had presciently warned¹⁹⁷ that caste identities do not leave Indians when they leave India. He also made the first attempt to get recognition, for the inhumane caste-discrimination, on an international forum, even before drafting the Indian Constitution.¹⁹⁸

The Court in *Safai Karamchari Andolan* referred to Article 2(1)(c) of the International Convention on the Elimination of All Forms of Racial Discrimination¹⁹⁹ ('CERD'), which states that parties condemn racial discrimination and undertake to pursue by *all appropriate means* and without delay, a policy of eliminating racial discrimination *in all its forms*. These provisions are binding upon India to the extent that they are not inconsistent with the Indian domestic law. Justice P.N. Bhagwati, a well-known personality of the Indian judiciary, while heading a CERD seminar, closed the debate by declaring that caste is discrimination based on occupation and descent.²⁰⁰ The same Court, in this case, raised the issue of whether caste discrimination can be articulated as racial discrimination but chose not to answer. The answer lies elsewhere- India and its interaction with the United Nations human rights system. The Human rights system of the United Nations has been increasingly focused on manual scavenging, for the inclusion of the caste-based activity manual scavenging as discrimination based on work and descent.²⁰¹

¹⁹⁵ UNHCR, Report by Special Rapporteur Rita Izsák-Ndiaye on minority issues, (2016), <https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/31/56> accessed 30 March 2020.

¹⁹⁶ Gautam Bhatia, *Transformative Constitution: A Radical Biography in Nine Acts* (Harper Collins 2019) xxxiv.

¹⁹⁷ The caste problem is a vast one, both theoretically and practically. Practically, it is an institution that portends tremendous consequences. It is a local problem, but one capable of much wider mischief, for "as long as caste in India does exist, Hindus will hardly intermarry or have any social intercourse with outsiders; and if Hindus migrate to other regions on earth, Indian caste would become a world problem" in *Dr. Babasaheb Ambedkar: Writings and Speeches, I*, ed by Frances W. Pritchett, Bombay: Education Department, Government of Maharashtra, 3-22, (1979). The text is from BR Ambedkar, "Castes In India: Their Mechanism, Genesis and Development", Paper presented at an Anthropology Seminar taught by Dr. A. A. Goldenweizer, Columbia University, 9th May 1916, (1917), *Indian Antiquary*, XLI, <www.columbia.edu/itc/mealac/pritchett/00ambedkar/txt_ambedkar_castes.html>

¹⁹⁸ see Sukhadeo Thorat, *Caste, Race and Discrimination: Discourses in International Context*, ed. Umakant, Rawat Publications, 2004, 5.

"Phase I: Dr. B.R. Ambedkar's Interventions during the Movement for Independent India, 1930-1947."

¹⁹⁹ International Convention on the Elimination of all forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969), 660 UNTS 195.

²⁰⁰ Gautam Bhatia, *Transformative Constitution: A Radical Biography in Nine Acts* (HarperCollins 2019) 15.

"Due to the strong stand made by the NGOs, the immediate outcome of this was that the draft recommendation of the Seminar referred to caste discrimination in several places."

²⁰¹ Economic and Social Council, Discrimination based on work and descent, E/CN.4/Sub.2/2003/24 (2003) <https://ap.ohchr.org/documents/alldocs.aspx?doc_id=7460>

This interpretation gained traction to become accepted globally by the United Nations regime. The Report of Special Rapporteur on caste²⁰² included a section on manual scavenging. The CERD Committee's General Recommendation 29 in 2002²⁰³ affirmed that discrimination based on 'descent' included 'discrimination against members of communities based on forms of social stratification such as caste and analogous systems of inherited status which nullify or impair their equal enjoyment of human rights'. Because one's caste could be determinative of one's occupation, it was also referred to as 'discrimination based on work and descent'. Kalpana Kannibaran notes that the deliberation on caste and race kinship should be not confined to 'remapping the field of caste in the new context of the race but looking at discrimination and negation of liberty through the prism of *analogous systems*.'²⁰⁴

The debate can be traced back to August 1996, when the CERD Committee²⁰⁵ considered India's periodic reports. India's position concerning the interpretation of the term 'descent' covered in Article 1(1) of the CERD was that it was only confined to 'race' and could not be extended to caste. This intervention invited debate on whether caste was race or race was caste. The Indian government opposed the inclusion of caste discrimination as a form of 'racial discrimination'. *It*

²⁰² Report of the Special Rapporteur on minority issues, Rita Izsak-Ndiaye – Minorities and discrimination based on caste and analogous systems of inherited status A/HRC/31/56 (Jan 28, 2016).

²⁰³ CERD Committee's General Recommendation XXIX on Article 1, Paragraph 1, of the Convention (Descent), affirmed that discrimination based on 'descent' included 'discrimination against members of communities based on forms of social stratification such as caste and analogous systems of inherited status which nullify or impair their equal enjoyment of human rights'. Because one's caste could be determinative of one's occupation, it was also referred to as 'discrimination based on work and descent'.

The General Recommendation XXIX elaborates the meaning of descent-based discrimination based on caste.

Steps to identify those descent-based communities under their jurisdiction who suffer from discrimination, *mainly based on caste and analogous systems of inherited status*, and whose existence may be recognised based on various factors including some or all of the following: *inability or restricted ability to alter inherited status*; socially enforced restrictions on marriage outside the community; private and public segregation, including in housing and education, access to public spaces, places of worship and public sources of food and water; *limitation of freedom to renounce inherited occupations or degrading or hazardous work*; subjection to debt bondage; subjection to dehumanising discourses referring to pollution or untouchability; and generalised lack of respect for their human dignity and equality;

See UN Committee on the Elimination of Racial Discrimination (CERD), CERD General Recommendation XXIX on art. 1, para 1, of the Convention (Descent) (Nov 1, 2002), available at: <www.refworld.org/docid/4538830511.html>

²⁰⁴ Kalpana Kannibaran, *Tools of Justice: Non-Discrimination and the Indian Constitution* (Routledge 2012) 153.

²⁰⁵ The Committee on the Elimination of Racial Discrimination (CERD) is the body of independent experts that monitors implementation of the Convention on the Elimination of All Forms of Racial Discrimination by its State parties. All States parties are obliged to submit regular reports to the Committee on how the rights are being implemented. States must report initially one year after acceding to the Convention and then every two years. The Committee examines each Report and addresses its concerns and recommendations to the State party in the form of "concluding observations". See Committee on the Elimination of Racial Discrimination (CERD) <www.ohchr.org/EN/HRBodies/CERD/Pages/CERDIntro.aspx>.

argued that the problem of caste was a local problem of India and various laws were in place to protect the rights of the Dalits from discrimination and to promote their socio-economic development. Therefore, there was no need to utilise international human rights mechanisms for this purpose. While the Indian government condemned the apartheid in South Africa, caste discrimination in India is still claimed to be an 'internal matter'.²⁰⁶ Since racism itself was discrimination deeply embedded in South African society too, it seems almost paradoxical that the Indian caste system has not attracted the same kind of global condemnation.²⁰⁷ Despite there being legal sanction, the social structures of oppression still exist as oppression has permeated to social behaviour.²⁰⁸ India also argued that caste discrimination in India was outside the purview of CERD's Article 1(1), as caste was not a race. The embargo on racial discrimination, i.e. race as one of the grounds of discrimination was borrowed from the United Nations Charter and the American Constitution and cannot be synonymised with caste.²⁰⁹

The Indian officials representing India in the UNCERD adopted anthropological sophistry to resist the inclusion of caste-based discrimination within the purview of racial discrimination. The first line of defence was that in the absence of any phenotypic resemblance, i.e. observable physical characteristic, caste cannot be equated with race. The descent and caste can be differentiated as 'descent means genealogical demonstrable characteristics'²¹⁰ which is not the case with caste as

²⁰⁶ Sukhadeo Thorat, *Caste, Race and Discrimination: Discourses in International Context* (Umakant ed, Rawat Publications 2004), 95.

²⁰⁷ Raina, Badri, 'Caste and Race: Discrimination by Any Name' (2001) 36(32) *Economic and Political Weekly* 3025-3026, <www.epw.in/journal/2001/32/commentary/caste-and-racediscrimination-any-name.html> accessed 20 July 2020.

²⁰⁸ Kalpana Kannabiran, *Tools of Justice: Non-Discrimination and the Indian Constitution* (Routledge 2012) 153.

²⁰⁹ The term "caste" denotes a "social" and "class" distinction and is not based on race. It has its origins in the functional division of Indian society during ancient times. Categorical distinctions of "race" or "national or ethnic origin" have ceased to exist and race itself as an issue does not impinge on the consciousness or outlook of Indian citizens in their social relations. Article 1 of the Convention includes in the definition of racial discrimination the term "descent". Both castes and tribes are systems based on "descent" since people are not born into a particular caste or a particular tribe. It is evident, however, that the use of the term "descent" in the Convention clearly refers to "race" in Committee On The Elimination Of Racial Discrimination, *International Convention On The Elimination Of All Forms Of Racial Discrimination*, CERD/C/299/ADD.3, (April 29, 1996).

²¹⁰ Dipankar Gupta, Caste is not Race : But Let's Go to the UN Forum Anyway in Sukhadeo Thorat, Umakant (eds), *Caste Race and Discrimination: Discourses in International Context* (Rawat Publications 2004)53-56, see also response by Balmurli Natrajan, Misrepresenting caste and race, <https://azimpremjiuniversity.edu.in/SitePages/pdf/BM_Misrepresenting%20caste%20and%20race,%20SeminarComment.pdf>, accessed 20 July 2020 (A lineage is only one kind of descent group (the smallest) in which ancestry can be demonstrable since it spans living memory of a few generations. However, descent also includes other larger groups such as 'clans' (gotras in India) and 'phratries' in which a claim to a common ancestry is made but cannot be demonstrated. Marrying outside of one's own lineage and clan are common practices in India and elsewhere, but

people have multiple descents. Given the uniqueness of the institution of caste to India, it may not be universalised in the language of race.²¹¹

Responding to India's submission, the Committee on the Elimination of Racial Discrimination, chastised India for delay of over ten years²¹² since the last submission of the Report. The perfunctory nature of reports does not flesh out Indian implementation of Convention in practice. The reports parrot the legal provisions and legislative policy but not the effect of institutionalised structural discrimination. The Committee contended that scheduled castes and scheduled tribes are within the scope of the Convention in Article 1 contrary to what India asserted.²¹³ The debate was far from over as it gained a new lease of life by turn of the millennium.

The academic literature on the interface of caste and race in India spiked leading to World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, 2001 in Durban.²¹⁴ Dalit activists lobbied for the inclusion of caste as an aspect of racial discrimination.

caste is really about marrying within a group, as Gupta admits above. Ambedkar famously wrote in 1916 that the 'superimposition of endogamy on exogamy produces caste.' Castes are simply 'large-scale descent groups' as many anthropologists have pointed out. Castes are larger than clans and hence are very much based on 'claimed' ancestry, usually a mythical ancestor appearing in origin stories.)

²¹¹ Nivedita Menon, 'Caste on the International Stage' (2011) 46(3) Economic and Political Weekly <www.epw.in/journal/2011/03/commentary/caste-international-stage.html> accessed 20 July 2020.

²¹² India has not submitted the Report as required under Article 9 of CERD since 2008. See Abdullah Nasir, Priya Anuragini, 'India Must Not Shield Itself From International Scrutiny on Caste Discrimination' *The Wire* (26 December 2017) <<https://thewire.in/caste/india-must-not-shield-itself-from-international-scrutiny-on-caste-discrimination>> accessed 24 July 2020.

²¹³ Concluding Observations of the Committee on the Elimination of Racial Discrimination: India, CERD/C/304/Add.13, 17 September 1996 <<http://hrlibrary.umn.edu/country/cerd-india.htm>> accessed 20 July, 2020.

²¹⁴ Shiv Visvanathan, 'The Race for Caste: Prolegomena to the Durban Conference' (2001) 36(27) Economic and Political Weekly 2512 <www.epw.in/journal/2001/27/perspectives/race-caste.html> accessed 20 July 2020;

Raina, Badri, 'Caste and Race: Discrimination by Any Name' (2001) 36(32) Economic and Political Weekly 3025-3026 <www.epw.in/journal/2001/32/commentary/caste-and-racediscrimination-any-name.html> accessed 20 July 2020;

Ambrose Pinto, 'UN Conference against Racism: Is Caste Race?' (2001) 36(30) Economic and Political Weekly 2817-2820 <www.epw.in/journal/2001/30/commentary/un-conference-against-racism.html> accessed 20 July 2020;

Anand Teltumbde, 'Race or Caste, Discrimination Is a Universal Concern' (2009) 44(34) Economic and Political Weekly 16 <www.epw.in/journal/2009/34/commentary/race-or-caste-discrimination-universal-concern.html> accessed 20 July 2020;

M. N Panini, 'Caste, Race and Human Rights' (2001) 36(35) Economic and Political Weekly 3344 <www.epw.in/journal/2001/35/commentary/caste-race-and-human-rights.html> accessed 20 July 2020;

Shiv Visvanathan, 'Durban and Dalit Discourse' (2001) 36(33) Economic and Political Weekly 3123 <www.epw.in/journal/2001/33/commentary/durban-and-dalit-discourse.html> accessed 20 July 2020;

However, this assertion was not in a historical vacuum.²¹⁵ Such inclusion would have opened India to international scrutiny. India maintained that caste is an internal matter and cannot be externalised against the consistent interpretation by international human rights bodies that caste is covered as an aspect of race.²¹⁶ As Soli Sorabjee, the then-Attorney General of India clarified rhetorically²¹⁷:

"On balance, the evidence that the Indian caste system is racial in origin and that India is or was a racist society is unconvincing. Race and caste are mentioned separately in the Indian Constitution as prohibited grounds for discrimination. They are not considered to be interchangeable or synonymous. The principal architect of the Indian Constitution was Dr Ambedkar, a Dalit. He certainly knew the distinction between race and caste. If the concept of caste was included in the race, there would be no reason to mention them separately."

But, 'a solution is internal when it makes use of democratic, constitutional and legal space, bodies and mechanisms to which the state by its own volition is obligated'.²¹⁸ In a trenchant critique of Indian position, Purba Das notes that there is a quest to 'dissociate race from caste so that there is no formal admission that a caste is a form of racism even though there are similarities between racial segregation and casteism in Indian society'.²¹⁹ The distinction between race and caste,

Kannabiran Kalpana, 'Important Similarities, Strange Differences: Caste, Race and Durban' (2010) 45 (28) *Economic and Political Weekly* 38

www.epw.in/journal/2010/28/book-reviews/important-similarities-strange-differences-caste-race-and-durban.html accessed 20 July 2020;

Amir Ali, 'Durban and After' (2001) 36(37) *Economic and Political Weekly* 3508–3509

www.epw.in/journal/2001/37/commentary/durban-and-after.html accessed 20 July 2020.

²¹⁵ The call for inclusion can be traced back to Jyotiba Phule's work *Gulamgiri* (Slavery) in 1873, wherein he had called upon the sameness of casteism and racism by equating Dalits and Negros. See Kalpana Kannabiran, *Tools of Justice: Non-Discrimination and the Indian Constitution* (Routledge 2012), 151. This articulation of caste system being similar to race predates Phule's work as an American Senator Sumner in 1869 referred to caste as a system of inherited inequality, much like a race. Writing after four years after the abolition of slavery, he utilised the vocabulary of caste to put across the immorality of slavery. This transnational export of caste being made analogous to slavery would be reiterated in India by Jyotiba Phule. See: Purvi Mehta, "Recasting Caste: Histories of Dalit Transnationalism and the Internationalisation of Caste Discrimination," PhD diss., (University of Michigan, 2013): 110-112.

²¹⁶ Sukhadeo Thorat, *Caste, Race and Discrimination: Discourses in International Context* (Umakant ed, Rawat Publications 2004).

²¹⁷ Sorabjee Soli, 'Official Position' in Sukhadeo Thorat, Umakant (eds), *Caste Race and Discrimination: Discourses in International Context* (Rawat Publications 2004) 43-48.

²¹⁸ Gautam Bhatia, *Transformative Constitution: A Radical Biography in Nine Acts* (HarperCollins 2019) 18.

²¹⁹ Purba Das, 'Is caste a race? Discourses of Racial Indianization' (2014) 43(3) *Journal of Intercultural Communication Research* 264, 276.

admittedly, is of colour, as argued by two eminent sociologists Dipankar Gupta²²⁰ and Andre Beteille,²²¹ which is misplaced because 'just as racial categories are essentialised as immutable, inheritable, and quasi-biological behavioural attributes, caste groups are also essentialised and racialised based on differences identified through quasi-biological overtones, such as fair, upper-caste Brahmins and dark, lower caste non-Brahmins.'²²² Indian sociology has been accused of being dominated by upper caste and hence biased.²²³ The attack on sociological pedagogy view has been repelled but not without personal attacks.²²⁴ In a broader framework, it is reminiscent of the contemporary scholarly exchange between Annapurna Waughray, Prakash Shah and David Keane on caste questions in the UK.

This is a continuation of the normativity on caste discourse in mainstream media²²⁵ and academia in India where caste privilege is embedded in demography due to almost negligible representation²²⁶. The voices of marginality are often unheeded and/or unheard due to caste privilege and cognitive dissonance as illustrated by the reception of Ambedkar through culture of

²²⁰ Dipankar Gupta, Caste is not Race : But Let's Go to the UN Forum Anyway in Sukhadeo Thorat, Umakant (eds), *Caste Race and Discrimination: Discourses in International Context* (Rawat Publications 2004)53-56.

²²¹ Andre Beteille, writing on Durban Conference, called linkage of race and caste as scientific nonsense as it resurrects hundred-year-old notion of race. See Andre Beteille, 'Caste Consciousness: Initiate an Open Discussion in Durban' in Sukhadeo Thorat, Umakant (eds), *Caste Race and Discrimination: Discourses in International Context* (Rawat Publications 2004) 65-68.

²²² *ibid*, 274.

²²³ Vivek Kumar, 'How Egalitarian Is Indian Sociology?' (2016) 51(25) *Economic and Political Weekly* 33, <www.epw.in/journal/2016/25/perspectives/how-egalitarian-indian-sociology.html> accessed 24 July 2020.

²²⁴ K L Sharma, 'Biased and Prejudiced View of Sociologists' (2016) 51(49) *Economic and Political Weekly* 64, <www.epw.in/journal/2016/49/discussion/biased-and-prejudiced-view-sociologists.html> accessed 24 July 2020; Vivek Kumar, 'Criticism without Academic Substantiation' (2016) 51(49) *Economic and Political Weekly* 65, <www.epw.in/journal/2016/49/discussion/criticism-without-academic-substantiation.html> accessed 24 July 2020.

²²⁵ 'Who Tells Our Stories Matter: Representation of Marginalised Caste Groups in Indian Newsrooms' (*Oxfam India*, 2 August 2019) <www.oxfamindia.org/press-release/who-tells-our-stories-matters-representation-marginalised-caste-groups-indian-newsrooms>

<www.oxfamindia.org/sites/default/files/2019-08/Oxfam%20NewsLaundry%20Report_For%20Media%20use.pdf> accessed 20 July 2020; Nithya Subramanian, 'In Charts: India's newsrooms are dominated by the upper castes - and that reflects what media covers' *Scroll.in* (3 August 2019) <<https://scroll.in/article/932660/in-charts-indias-newsrooms-are-dominated-by-the-upper-castes-and-that-reflects-what-media-covers>> accessed 20 July 2020; Dilip Mandal, 'India's oppressed groups had high hopes from the Internet. But upper castes got in there too' *The Print* (19 July 2020) <<https://theprint.in/opinion/indias-oppressed-groups-had-high-hopes-from-internet-but-upper-castes-got-in-there-too/463431/>> accessed 20 July 2020; 'Dalits, Adivasis Missing From Leadership Positions in Mainstream Media: Report' (*Outlook India*, 2 August 2019) <www.outlookindia.com/website/story/india-news-dalits-adivasis-missing-from-leadership-positions-in-mainstream-media-report/335424> accessed 20 July 2020.

²²⁶ Sidharth Joshi and Deepak Maghan, 'Why Are There Still Such Few SCs, STs and OBCs at IIMs?' *The Wire*, (20 July 2020) <<https://thewire.in/caste/iim-sc-st-obc-diversity>> accessed 20 July 2020, Deepak Maghan, 'When Will India's Educational Institutes Have Their 'Dalit Lives Matter' Moment?' *The Wire* (2 July 2020) <<https://thewire.in/education/princeton-woodrow-wilson-caste-discrimination>> accessed 20 July 2020.

the cartoon²²⁷. The satire aimed at marginalised community which has been normalised in normal discourse further marginalises as 'it can have the power to confirm and strengthen people's prejudices against the group in question, which only marginalises and disenfranchises them more' as per Justice Chandrachud in *Indibily* case.²²⁸ Such representation 'stigmatises or dehumanises a vulnerable class of people, in a manner that feeds into a wider climate of marginalisation and discrimination.'²²⁹

Keane argues that the notion of 'colour' associated with caste has confused scholars who have used it to conclude that caste is an aspect of the race. However, the colour is associated with caste, only *symbolically* and not literally.²³⁰ 'The caste colours do not refer to complexion or supposed skin colour, but rather to some kind of spiritual colouration.'²³¹ While India does not consider caste discrimination to be within the purview of CERD, Nepal does consider caste to be under CERD due to its reporting of caste-based discrimination, and it would not harm India much to learn from their neighbour.²³²

The position of India on the interface of race and caste is mired in technicality. The arguments by India are based merely on semantics and sophistry. India argues against caste being equated with race, but its response to the hybridity of casteism and racism as present in would be more apposite. The relatedness of experience of caste-based discrimination to racial discrimination for higher international visibility is the focus. It may also nudge the political executive to address caste-based discrimination of manual scavenging by rescuing it from invisibility in public policy. The Indian government has mentioned, but the question is not if caste is related to race. *It is if caste perpetuates intolerance and discrimination as race does*. It is not a battle of caste versus race. The mandate of the world body is to rid the world of intolerance in all its myriad forms.²³³ It may require reevaluation due to the reception of caste in the Indian subcontinent. Caste animates the South Asian population, and hence a shared comparative experience is helpful.

²²⁷ Syama Sundar, *No Laughing Matter: The Ambedkar Cartoons* (Navayana, 2019) 1932-1956.

²²⁸ *Indibily Creative Pvt. Ltd. v Govt. Of West Bengal* 2019 SCConline SC 564; Prachi Bharadwaj, 'Bhobishyoter Bhoot row: West Bengal Govt to pay Rs. 20 lakhs to the Producers for attempting to silence speech' (*SCC Online*, 12 April 2019) <www.scconline.com/blog/post/2019/04/12/213575/> accessed 20 July 2020.

²²⁹ Gautam Bhatia, 'Making the Path by Walking: The Supreme Court's Film Censorship Judgment' (*Indian Colonial Law and Philosophy*, 14 April 2019) <<https://indconlawphil.wordpress.com/2019/04/14/making-the-path-by-walking-the-supreme-courts-film-censorship-judgment/>> accessed 20 July 2020.

²³⁰ David Keane, *Caste-based Discrimination in International Human Rights Law* (Ashgate 2007) 36.

²³¹ Morton Klass, 'Divine Plan or Racial Antipathy?' in *Caste: The Emergence of the South Asian Social System* (Institute for the Study of Human Issues 1980) 40.

²³² Meena Dhandu, Annapurna Waughray & David Keane, *Equality and Human Rights Commission Research Report No. 91 Manchester: Equality and Human Rights Commission- Caste in Britain*, *Social-Legal Review* 27, (2014).

²³³ Gautam Bhatia, *Transformative Constitution: A Radical Biography in Nine Acts* (HarperCollins 2019), p.xxvi, 17

Ambedkar has now been resurrected.²³⁴ Ambedkar's preamble²³⁵ nested the idea of true and substantive equality through 'equality of status and of opportunity' for all people. The potentiality of moral assumption of horizontality to be actualised by the Constitutional Court on issues of caste-based discrimination such as manual scavenging. One such opportunity was lost in 2014 in Safai Karamchari Andolan case.

VI. CASTE IN THE UNITED KINGDOM - AN INTERNATIONAL STUDY OF CASTE

Debate on caste in the UK has been polarised as well as polarising for the Indian community²³⁶. Some perceive caste as totally an internal, private family affair which should not be opened to 'external policymaking'²³⁷. The Dalit diaspora community in the UK had been campaigning for recognition and redressal of caste-based discrimination. It had the support of the Labour government and its leader Jeremy Corbyn.²³⁸ Caste in the United Kingdom has invited public

²³⁴ Anurag Bhaskar, 'The Resurgent Icon' in Bhagwan Das (eds), *A Stake in the nation* (Navyana 2020).

²³⁵ Aakash Singh Rathore, *Ambedkar's Preamble: A Secret History of the Constitution of India* (Penguin 2020).

²³⁶ See the exposition of Hindu position that the legislation on caste is unnecessary as caste discrimination does not exist in the UK and public debate on caste is prejudicial on Hindu minority community in the UK in David Mosse, 'Outside Caste? The Enclosure of Caste and Claims to Castelessness in India and the United Kingdom' (2020) 62(1) *Comparative Studies in Society and History* 4, 15.

²³⁷ David Mosse, 'Outside Caste? The Enclosure of Caste and Claims to Castelessness in India and the United Kingdom' (2020) 62(1) *Comparative Studies in Society and History* 4, 24.

²³⁸ Annapurna Waughray, 'Capturing caste in law: Caste discrimination and the equality act 2010' (2014) 14(2) *Human Rights Law Review* 359.

debate as well as scholarly output on caste discrimination.²³⁹ It has led to acrimonious debate²⁴⁰ among scholars in the United Kingdom on caste being an aspect of race.

The caste question has received deserved attention in Parliament of UK with over 2200 times being mentioned and discussed. The Lord Harries of Pentregarth in House of Lords identified two reasons for the inclusion of caste through statute. The caste has to be countenanced since it affects both public and private spheres. While the private sphere is not amenable to law, discrimination in education, employment, public goods and services is subjected to discrimination law. The caste system is not confined to only Hinduism but also Islam and Christianity.²⁴¹

The caste discourse in the UK has been motivated by the fear that routine caste-based discrimination would be open to scrutiny. The meddling of both political parties in the legislative process of inclusion of caste as a protected characteristic for electoral gain has led to the status quo which benefits British Hindus practising casteism routinely.²⁴² The migrants from Punjab in India, which has the highest concentration of Dalits, have been discriminated against wherever they went due to their caste identity. The Ravidasis of Punjab have been subjected to violence in Vienna which had a ripple effect in India. The percentage of Scheduled Castes which migrated to the

²³⁹ Meena Dhanda, Annapurna Waughray & David Keane, *Equality and Human Rights Commission Research Report No. 91 Manchester: Equality and Human Rights Commission- Caste in Britain*, *Social-Legal Review* 27 (2014), see also, David Mosse, 'Outside Caste? The Enclosure of Caste and Claims to Castelessness in India and the United Kingdom' (2020) 62(1) *Comparative Studies in Society and History* 4-34. The scholarship of UK based academics such as David Keane, Meena Dhanda and Annapurna Waughray is on the study of Dalit migration, caste and race especially within the framework of Equality Act, 2010 of which they are supporters to include caste as an aspect of the race. Prakash Shah is against such inclusion as caste is an orientalist construct and foreign imposition. See David Keane, *Caste-based Discrimination in International Human Rights Law* (Ashgate 2007); Prakash Shah, *Against Caste in British Law: A Critical Perspective on the Caste Discrimination Provision in the Equality Act 2010* (Palgrave Macmillan 2015); Annapurna Waughray, Meena Dhanda, David Mosse (2014). *Equality and Human Rights Commission Research report 92 Caste in Britain: Experts' Seminar and Stakeholders' Workshop*. Equality and Human Rights Commission, Equality and Human Rights Commission.

²⁴⁰ David Keane, 'Book Review – Prakash Shah, *Against Caste in British Law: A Critical Perspective on the Caste Discrimination Provision in the Equality Act 2010*' [2016] *Int. J of Discrimination and the law* 51-54 ; Prakash Shah, 'A weak defence of an indefensible caste law: A reply to David Keane' [2016] *International Journal of Discrimination and the Law* 55-58; Annapurna Waughray, 'Book Review: Prakash Shah, *Against Caste in British Law: A Critical Perspective on the Caste Discrimination Provision in the Equality Act 2010*' (2016) 36(3) *South Asia Research* 409–413; David Mosse, 'Outside Caste? The Enclosure of Caste and Claims to Castelessness in India and the United Kingdom' (2020) 62(1) *Comparative Studies in Society and History* 4-34.

²⁴¹ House of Lords Debate 11 July 2016, vol 774 < <https://hansard.parliament.uk/Lords/2016-07-11/debates/3FEC4BE4-C98F-4155-82E2-E8485A752C94/Caste-BasedDiscrimination>> accessed 27 July 2020.

²⁴² Meena Dhanda, 'Casteism amongst Punjabis in Britain' (2017) 52(3) *Economic and Political Weekly* 62, <www.epw.in/journal/2017/3/punjab%E2%80%94exploring-prospects/casteism-amongst-punjabis-britain.html> accessed 20 July 2020.

United Kingdom is pegged at around 10% of the total population. They have organised themselves into associations for highlighting the discrimination²⁴³.

There was a lot of academic and public debate, public consultation on the inclusion of caste in the United Kingdom's legislation. David Keane asserts that instead of studying caste through the race, we should study race through caste as caste predates race by over two thousand years.²⁴⁴ While contradicting Keane, Prakash Shah claimed that 'the idea of caste system can be traced back to the Christian theological accounts of India. He argues that the Indian social structure, governed by the violence of a sacerdotal nucleus, came to be reviewed as morally corrupt and racist. He claims that the account of the caste system justifies continued Christian proselytism.'²⁴⁵ The violence of caste discrimination is unfairly inflicted upon British Hindus.²⁴⁶ The caste system is seen as a Western construct and hence a foreign imposition.²⁴⁷ The anxiety of 'foreign imposition of caste'²⁴⁸ and denial of caste-based discrimination in the United Kingdom by some of the Indian origin academicians and Hindu lobby groups is not unsurprising. Prakash Shah argues that the quest for anti-caste-discrimination legislation in the UK is a "continuing foreign interference in India's internal affairs"²⁴⁹ This interference at the behest of the Church is for the inclusion of Christians and Muslims as beneficiaries of Indian affirmative action²⁵⁰ as well as furthering their proselytism agenda. This hermeneutical inquiry adopted by Prakash Shah is disingenuous as it does not address the *existence* of practice of caste-based discrimination in the UK by the Indian diaspora. Nested in

²⁴³ Surinder S Jodhka, 'The Ravi Dasis of Punjab: Global Contours of Caste and Religious Strife' (2009) 44(24) Economic and Political Weekly
<www.epw.in/journal/2009/24/special-articles/ravi-dasis-punjab-global-contours-caste-and-religious-strife.html>
accessed 20 July 2020.

²⁴⁴ David Keane, *Caste Based Discrimination in Human Rights* (Ashgate 2007) ch. 2 (While tracing the Biblical origins of race, Keane claims that racial thinking has its roots in the Spanish conquest of the New World and was not globally acknowledged until the nineteenth century natural historians sought to classify mankind into groups. Thus, he argues that caste in existence in 1500 BC, cannot be based on racial thinking if such thinking cannot be documented before the fifteenth century).

²⁴⁵ Prakash Shah, *Against Caste in British Law: A Critical Perspective on the Caste Discrimination Provision in the Equality Act 2010* (Palgrave Macmillan 2015) ch 2, 15,18.

²⁴⁶ David Keane, 'Book Review – Prakash Shah, *Against Caste in British Law: A Critical Perspective on the Caste Discrimination Provision in the Equality Act 2010*' (2016) 16(1) International Journal of Discrimination and the Law 51-54;

Prakash Shah, 'A weak defence of an indefensible caste law: A reply to David Keane' (2016) 16(1) International Journal of Discrimination and the Law 55–58;

Annapurna Waughray, 'Book Review: Prakash Shah, *Against Caste in British Law: A Critical Perspective on the Caste Discrimination Provision in the Equality Act 2010*' (2016) 36(3) South Asia Research 409–413.

²⁴⁷ Dunkin Jalki and others (eds), *Western foundations of the caste system* (Palgrave Macmillan 2017).

²⁴⁸ *ibid.*

²⁴⁹ Prakash Shah, *Against Caste in British Law: A Critical Perspective on the Caste Discrimination Provision in the Equality Act 2010* (Palgrave Macmillan 2015) 83.

²⁵⁰ *ibid.*, 115.

the conspiratorial and missionary overtone of Shah, with subtracting engagement in anthropologically, culturally, sociologically on the genesis and evolution of caste, is the politicisation of identity. The insincerity of Prakash Shah stems from consternation of upper-caste Hindus across the world who unite in non-recognition of caste and caste-based discrimination on foreign shores. David Moose warns that Dalits and upper castes have entered 'epistemological debates over categories of the description on opposite sides'.²⁵¹

The government has twice commissioned study on caste discrimination in the United Kingdom.²⁵² The study concluded the existence of thriving caste-based discrimination in the United Kingdom. The Report favoured a legislative approach over educative one as it was problematic to rely upon the Indian community to self-regulate themselves for reducing caste discrimination.

Following the definition of 'descent' provided by the ICERD (in General Recommendation 29 in 1965) which included communities who suffered from discrimination 'based on caste and analogous systems of inherited status' caste was viewed as a part of the descent, itself part of ethnic origins, which in turn was a subset of race. The *Mandla (Sewa Singh) and another v Dowell Lee (1983)*²⁵³ held that 'ethnicity' was to be construed under a broad cultural/historical sense.

²⁵¹ David Mosse, 'Outside Caste? The Enclosure of Caste and Claims to Castelessness in India and the United Kingdom' (2020) 62(1) *Comparative Studies in Society and History* 4-34.

²⁵² Metcalf H and Rolfe H, "Caste Discrimination and Harassment in Great Britain: NIESR Report," *London: National Institute of Economic and Social Research*, (2010), <www.niesr.ac.uk/sites/default/files/publications/caste-discrimination.pdf>, Meena Dhanda, Annapurna Waughray & David Keane, *Equality and Human Rights Commission Research Report No. 91 Manchester: Equality and Human Rights Commission- Caste in Britain*, *Social-Legal Review* 27 (2014).

²⁵³ *Mandla (Sewa Singh) and Another v Dowell Lee*, [1983] 1 All ER 1062 (The claimants, Sewa Singh Mandla and his son Gurinder Singh Mandla, were orthodox Sikhs who did not cut their hair and used to wear turbans. The respondents were, A.G. Dowell Lee, the headmaster and principal shareholder of the company that owned the Park Grove School, Birmingham and Park Grove Private School Limited, the company that owned Park Grove School. In July 1978, the respondents refused to admit Gurinder Singh to the school on the grounds that he refused to cut his hair and remove his turban, which was contrary to school uniform rules. At first, the courts dismissed the complaint by stating that Sikhs were not a racial group for the purpose of the Race Relations Act, 1976. However, the case went up to the House of Lords, which unanimously held in the favour of the complainant. Richardson J. in setting out criteria for establishing member of a racial group:

"The conditions which appear to me to be essential are these: (1) a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive; (2) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance. In addition to those two essential characteristics the following characteristics are, in my opinion, relevant: (3) either a common geographical origin, or descent from a small number of common ancestors; (4) a common language, not necessarily peculiar to the group; (5) a common literature peculiar to the group; (6) a common religion different from that of neighbouring groups or from the general community surrounding it; (7) being a minority or being an oppressed or a dominant group within a larger community, for example a conquered people (say, the inhabitants of England shortly after the Norman conquest) and their conquerors might both be ethnic groups." On the basis of this, it was held that Sikhs were a racial group and were protected under the Act).

However, it was argued that Dalits might fail to fulfil the broad category aspect of Mandla test because of lack of sufficient commonality of geography, language or long shared history as a group. Again, this was because Dalits emerged as a social and political identity in the early 20th century and were linked by collective suffered experience of oppression and not culturally or linguistically. Thereby, as pointed in the Report, "the complexity of caste may be more readily acknowledged if caste is included as an independent aspect of the race, rather than being subsumed under ethnic origins."²⁵⁴ The question of caste discrimination after the promulgation of Equality Act was agitated in the employment case of *Tirkey*. In 2014, in the United Kingdom, the Employment Appeals Tribunal delivered a decision in *Chandhok v. Tirkey* (2014).²⁵⁵ It is considered to be the first case of caste-based discrimination in employment in the United Kingdom.

The traction which caste-race relationship had received was further accentuated by employment case of wherein a lady accused her employers of caste discrimination as she was an Adivasi²⁵⁶. In *Chandhok v Tirkey*²⁵⁷ on the question of whether caste can be considered as a protected characteristic in the race as per the Equality Act, 2010 (EA), the Tribunal answered in affirmative. Justice Langstaff of Employment Tribunal had ruled that:

"There may be factual circumstances in which the application of the label 'caste' is appropriate, many of which are capable – depending on their facts – of falling within the scope of section 9(1), particularly coming within 'ethnic origins', as portraying a group with characteristics determined in part by descent, and of a sufficient quality to be described as "ethnic"."

The case discussed whether caste is part of one of the protected characteristics under 'race' in Equality Act, 2010 (EA). The case has led to the belief that caste is included in the broad interpretation of race- being connotative of 'ethnic origin'. Caste consciousness, much more than race, has been historically present in the UK as an empirical study revealed.²⁵⁸ The case of *P Tirkey v Mr and Mrs Chandhok* (2015) seems unexceptional as a labour dispute between employer and employee. The claim of minimum wages under the National Minimum Wage Act 1998 of the UK

²⁵⁴ Meena Dhanda, Annapurna Waughray & David Keane, *Equality and Human Rights Commission Research Report No. 91 Manchester: Equality and Human Rights Commission- Caste in Britain*, Social-Legal Review 27, (2014): 13-15

²⁵⁵ *Chandhok & Anor v Tirkey* [2014] UKEAT/190/14.

²⁵⁶ For the procedural history of the case see Annapurna Waughray & Meena Dhanda, 'Ensuring protection against caste discrimination in Britain: Should the Equality Act 2010 be extended?' (2016) 16(2-3) *International Journal of Discrimination* 177–196.

²⁵⁷ *Chandhok* (n 252).

²⁵⁸ Paramjit S Judge, 'The Ad-Dharmi Experience: Punjabis in England' (2002) 37(31) *Economic and Political Weekly* 3244, <www.epw.in/journal/2002/31/commentary/punjabis-england.html> accessed 20 July 2020.

is an unsurprising routine claim. Nothing stood out in the case that may have shaken the conscience of a common Britisher. Scratching the surface revealed a different reality- caste-based discrimination in an upper caste household meted out to Adivasi Christian lady from rural Bihar.²⁵⁹ Sameena Dalwai located three issues given the undeniable connection of caste- 'first, employment regulations, such as the National Minimum Wage Act 1998 and the Working Time Regulations 1998; second, how domestic labour relations are caste relations; and third, treatment of discrimination against lower castes as race discrimination for the Equality Act 2010'.²⁶⁰ Such social security and guarantee of basic dignified life by inferiorization of domestic labour is commonplace in India. Hence, it was a bit shocking for Indians that basic human facilities are extended to domestic help'.²⁶¹ The Tribunal saw the case through the spectrum of *effect* of caste, i.e. dehumanisation, exclusion, inferiorization, devaluing human labour. Unlike Indian instances in which the caste-based violence is ascribed as 'other' forms of dispute, the Tribunal showed how privileged blind spots function by denial of identity, which inspired dispute in the first place.²⁶²

²⁵⁹ For lucid facts see, Sameena Dalwai, 'Caste on UK Shores: Legal Lessons from the Diaspora' (2016) 51(4) Economic and Political Weekly 23. ('Permila Tirkey, an Adivasi Christian woman from rural Bihar, described herself as belonging to the "servant class" and "lower caste" before the Employment Tribunal in Cambridge (that heard the matter on 13 to 17 July and 20 to 22 July 2015. She had received only basic education as she was expected to be a domestic servant in the wealthier parts of India. She was employed by the Chandhoks in 2008 at the time their twins were born and was brought to the UK to their Milton Keynes residence. The Tribunal, in its 50-page judgment, lists out the irregularities and legal violations in her employment. After having made a promise, in her visa application, that a separate room with a bathroom will be offered to her, her employers failed to provide her reasonable living space for the five years of her tenure. She slept in the landing, with no privacy, or with the children so she could tend to them during the night. She slept on a foam mattress and never had a bed. She did not eat with the family but cooked for herself after 9 pm and ate in the kitchen. Technically, Tirkey—who is tribal and Christian—would not even feature in the caste pyramid. Tribal people have always existed outside the village caste order—carrying the burden of the dichotomy of the "plains people" versus "hills people"—wherein the dominant mainstream groups exploit their land, resources and labour. Historically, they face atrocities such as being arrested and shot at by the police and forest guards for "poaching," while they are merely carrying out their traditional livelihoods. Owing to their norms, which are less patriarchal, and their liberal sexual normativity, mainstream discourses brand their lifestyle as immoral and subject them to the same, if not worse, caste practices as they do the lower castes).

²⁶⁰ *ibid.*

²⁶¹ *ibid.*

²⁶² Anand Teltumbde, 'Khairlanji and Its Aftermath: Exploding Some Myths' (2007) 42(12) Economic & Political Weekly 1019–25 who busts the State indifference to remedy the caste atrocities by dubbing it purely as a property dispute. For a scathing critique of the collective psyche of State and the general public which is denial and indifference ; See Arundhati Roy, 'Doctor and Saint' in B.R. Ambedkar, *Annihilation of Caste: The Annotated Critical Edition* (Navayana 2014) ; See also Chintan Chandrachud, *Tukaram v State of Maharashtra, The Cases That India Forgot* (Juggernaut Books 2019), (based on Mathura, a Tribal child of around 16 years who was gang-raped by inebriated policemen in Police Station. The acquittal led to public outrage and finally an amendment in Indian Penal Code, 1860. The case is *Tukaram v State of Maharashtra* 1979 AIR 185); See also Smita Narula, 'Broken People: Caste Violence Against India's "Untouchables,"' *Human Rights Watch* (1999) (documenting the apathy and denial of the State

The case was decided in 2014 after the United Kingdom passed the Enterprise and Regulatory Reform Act, 2013²⁶³ whose section 97 mandated that the government must include caste as an aspect of race in Section 9(5) of EA²⁶⁴. The complexity of caste may be more readily acknowledged if caste is included as an independent aspect of the race, rather than being subsumed under ethnic origins."²⁶⁵ This was further confirmed in the judgment of Employment Tribunal in September 2015.²⁶⁶ Annapurna Waughray and Meena Dhanda have argued that mere shoehorning of caste into Section 9(1) is not enough²⁶⁷ as it has limited precedential value and 'making caste an aspect of race in the EA would bring other aspects of the legislation into play, for example, the public sector equality duty, and the exceptions provisions applicable to community groups and associations.'²⁶⁸

The juridical affirmation of caste discrimination being covered under EA is a positive development. Still, it is fraught with semantic vagaries due to salience as well as proving caste and then linking the discrimination to caste (rephrase). The pushback from influential upper caste led Hindu lobby groups, and political expediency led to non-recognition of caste as a protected characteristic in the Equality Act, 2010.²⁶⁹ The obeisance by the conservative government of the UK to the conservative section of Hindus in the UK who are beneficiaries of the status quo being maintained in the name of tradition and non-interference with their religiosity. It is a reminder of the time in Indian history when the social reforms movement on caste and gender were opposed as foreign opposition and interference with the religion of the natives by the coloniser United

machinery towards lower caste people. State machinery is itself liable for caste atrocities due to their commission and omission. The two recent Supreme Court cases have busted the myth of the anxiety by some of the false caste atrocities cases in *Union of India v State of Maharashtra* 2019 SCCOnline SC 1279 and *Prathvi Raj Chauhan v Union of India* 2020 SCCOnline SC 159).

²⁶³ENTERPRISE AND REGULATORY REFORM ACT 2013 LEGISLATION.GOV.UK, <www.legislation.gov.uk/ukpga/2013/24/section/97/enacted> (last visited 30 March 2020).

²⁶⁴ Tarunabh Khaitan, 'Caste as Race—A Welcome First Step' *UK Const. L.* (blog), 10th May 2013, <<https://ukconstitutionallaw.org/2013/05/10/tarunabh-khaitan-caste-as-race-a-welcome-first-step/>>

²⁶⁵ Meena Dhanda, Annapurna Waughray, David Keane, David Mosse, Roger Green and Stephen White, "Caste in Britain: Socio-legal Review", *Equality and Human Rights Commission Research Report* 91 (2014), 14.

²⁶⁶ *Tirkey v. Chandhok and Anor* [2015] ET/3400174/2013.

²⁶⁷ Annapurna Waghay & Meena Dhanda, 'Ensuring protection against caste discrimination in Britain: Should the Equality Act 2010 be extended?' (2016) 16(2-3) *International Journal of Discrimination* 177–196.

²⁶⁸ *ibid*, 190.

²⁶⁹ "Government Response to Caste Consultation: Written Statement - HCWS898," accessed July 20, 2020, <www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2018-07-23/HCWS898/> accessed 20 July 2020;

Vidya Ram, 'UK backs off anti-caste discrimination Legislation' *The Hindu* (23 July 2018) <www.thehindu.com/news/international/uk-backs-off-anti-caste-discrimination-legislation/article24497057.ece> accessed 20 July 2020.

Kingdom by upper-caste Hindus.²⁷⁰ Establishing the nexus is critical for any relief and given the subjugation, humiliation, loss of personal autonomy and agency, precarity of migration status, the likelihood of a person to approach judicial forum asserting caste-based discrimination is less. With the possibility of the caste being expressly prohibited through legislation due to one case interpretation in labour law, the UK has missed the wood for the trees. It is a win for the conservative government and conservative upper-caste Hindus, for now.

VII. CONCLUSION

Caste has made geography irrelevant. Caste and subsequently, caste-based discrimination is not parochial.

The UN Human Rights agencies have been an interlocutor on the question of caste, race and practice of manual scavenging. The caste and race- both based on the notion of pollution and purity, exclusion and stigma, are interrelated and inform the formation of the Indian Constitution. Caste is an Indian export but deeply linked with race. Indian migrants are carriers of caste and expanding Indian diaspora means that there will be the globalisation of caste as Ambedkar predicted over a century ago.

The Indian position of distinguishing caste and race from sociological and anthropological lens is untenable legally in discrimination jurisprudence. The understanding of race should be distanced from colourism as currently understood. Casteism and racism are analogous due to their origin. The experience of the United Kingdom is helpful in this context.

The international human rights instruments and its explanatory notes have consistently agreed upon inclusion of caste within the text of protected characteristic- ethnic origin, social origin and race. It is indicative of the plasticity of caste-based discrimination and its intersectionality with

²⁷⁰ See generally Sekhar Bandyopadhyay, *Plassey To Partition* (Orient Blackswan Private Limited 2014); Bipin Chandra, *History of Modern India* (Orient Blackswan 2001); Rupa Vishwanath, *The Pariah Problem: Caste, Religion and the Social in Modern India*, (Columbia University Press 2014); KM Sheeba, 'Modernity in Social Reform Discourse: The Women Question in Kerala' (2002) 63 Proceedings of the Indian History Congress 931-38 <www.jstor.org/stable/44158163> accessed 20 July 2020; Sanjoy Chakravorty, 'Viewpoint: How the British reshaped India's caste system' (*BBC* June 12 2019) <www.bbc.com/news/world-asia-india-48619734> accessed 20 July 2020.

other protected characteristic(s). The employment of manual scavenging is not due to choice but economic exploitation solely based on caste. International treaty bodies have recognised the insidious nature of the relationship between caste and race due to their debilitating effect on the realisation of human rights and their legitimacy being derived from an immutable factor—be it caste or race²⁷¹ But there is hope that this ignominy will be remedied if the Indian Supreme Court chooses to look at the issue of caste discrimination from recent equality and discrimination case lens. The disadvantage-based approach and looking at the effect of discrimination due to ascriptive identity. The intersectionality of discrimination should also be considered.

Thus, moving beyond nomenclatures and labels, India must engage with caste discrimination as has been articulated by the international human rights regime. The debilitating effect which the membership of caste and race entails must be factored in such engagement. The cases before the judicial forums of the UK, US and India are testimony to the thriving, mutating and invidious caste expressions. Prevarication by governments due to lobbying does more disservice than ever. Indian Supreme Court has a chance of redemption. The theorisation of caste-based discrimination through racial discrimination lens need further attention from all stakeholders and now be an ostrich sticking head into sand. The benign moral complicity in non- acknowledgement the caste-based discrimination in the unconscionable manual scavenging and by extension discrimination in workplace across the UK and US is impingement of the freedom.

Caste is a constant. Always has been.

In India, US and UK caste has thrown down the gauntlet at the government by its inclusion within racial discrimination in labour law when pared down to the bone. Given the universalism of caste, there is a need for dialogic space across jurisdictions for redressal of discrimination. Some succour can be drawn from dialogic experience in law and policy from across the jurisdiction.

²⁷¹ Ashwini Deshpande, *The Grammar of Caste: Economic Discrimination in Contemporary India* (Oxford University Press 2011).