The British Law on Caste

The Anti-Caste Legislation Committee (ACLC)

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This report presents the key findings by the ACLC on the status of the law on caste in the UK since the conclusion of the British government’s consultation on caste in July 2018. The following points summarise the key findings. Please click on any point to go to the section of the report containing the relevant details.

- The law on caste in the UK is an example of the capture of British public institutions by special interest groups presenting a false case for legal reforms.

- The caste law has the potential for an enormous range of frivolous complaints with no way of arguing for or against them.

- The campaign to have a UK caste law is part of a Christian right wing agenda for conversion in Asia, where the continuing assault on the traditional cultures is being made on the pretext of caste oppression.

- The British caste law is directed to pressuring India to expand conversions by extension of caste quotas to Christians.

- Many British parliamentarians have close links with Christian organisations pushing for a British law on caste.

- Keen on pushing their ideological programmes forward at any cost, the institutional captors behind the caste law have shown have little regard for reliability of evidence, research, or intellectual integrity.

- Research on caste discrimination has been manipulated to justify a pre-determined set of outcomes.

- Mainstream media has been used to manipulate the debate in favour of a law against caste discrimination.

- The initial proposal to add caste to the Equality Act 2010 was led by a group of Peers in the House of Lords. Although the then Labour government was not convinced about the need for a caste law, the Labour Party has subsequently hardened its position.

- Great reliance has been placed, including by the Government Equalities Office (GEO), on the NIESR report in order to claim that caste discrimination was proven, although the NIESR report has basic scientific flaws.

- Not only did the GEO endorse the NIESR report, it carried the latter’s unjustified claim that the Indian community could not be trusted to deal with it. Whereas the Equality Act is civil legislation, both NIESR and the GEO contemplated caste-related criminal sanctions.

- Pursuant to the NIESR report and the GEO’s endorsement of it, a cross-party amendment to the Equality Act was agreed in 2013 to change the power to make caste an aspect of race to a duty to do so.

- The 2013 amendment committed the government to extending the Equality Act to caste, overlooking the difficulty of implementing a law about the relevance or functioning of which there was no clarity. This set the stage for consequent backsliding.

- The Equality and Human Rights Commission (EHRC) was commissioned to conduct an investigation into stakeholder and academic views regarding the implementation of the caste legislation. Given that the academics conducting it already favoured implementing the law, the exercise was a foregone conclusion.

Summary of findings
The scholars writing the EHRC study failed to address the many problems implementing caste into law would bring about, reinforces our claim that it was an exercise with a foregone conclusion.

The Tirkey v Chandhok case is currently the leading precedent on caste. It has so many odd features in factual terms that the claim that it was a set-up is highly plausible.

The acceptance by the various tribunals dealing with the Tirkey case that caste can be read into the Equality Act’s provision on race without any specific addition of caste by legislation (as the 2013 amendment was meant to achieve) rests on shaky legal ground.

The judgments in the Tirkey case do not make it clear what the ‘caste considerations’ were that led to a finding of discrimination. The handling of the factual aspects of the case is unconvincing and suspicious.

The EHRC had been seeking, at least since 2010, to work with the Anti Caste Discrimination Alliance to identify and support a case, a further indication of the EHRC’s institutional capture by the pro-caste law lobby.

The EHRC intervened to support the claimants in the Tirkey case against internal advice.

The EHRC supported extending the interpretation of ‘ethnic origins’ to caste notwithstanding the legislative duty inserted in 2013 to make caste an aspect of race, leading to inconsistencies and even less clarity in the legal expression of caste.

EHRC’s withdrawal from making comments on caste since the Tirkey case points to some collusion with the British government to ensure that that case would provide a basis for not passing secondary legislation making caste an aspect of race.

From 2016, prominent Hindus working in political circles were enlisted to help push along the agenda of using the case law. Many Hindu, Jain and Sikh organisations went along with them.

The consultation on the caste law was a manipulated and an arguably unlawful attempt to force a choice between the legislation and case law without making explicit that the choice of rejecting both options, and thus having no law on caste, was available.

Although the pro-caste law lobby was complicit with official British bodies in generating the case law, their position was to still favour the legislation.

Meanwhile, an alternative front was opened by Hindu organisations, who appear to have been manipulated by the British government, to oppose the legislation but support the case law instead. The latter position gained the majority of supporters.

The British government’s position on international law is ambiguous and on no reading of the international law position supports the consultation conclusions of the government.

Ministers and parliamentarians, as with other official bodies, have put up a brick wall when questioned about the ambiguities and problems with the case law, including its potential extension to the criminal law.

Since the courts have decided that ‘ethnic origins’ extends to ‘caste’, and therefore ‘race’ as a protected characteristic, actions may be brought for caste discrimination, harassment and victimisation under the Equality Act.

The Equality Act 2010 already applies to the widest possible extent in race discrimination cases and, as a result of the case law, that wide application extends to caste too.

ACLC’s warning that the case law would be used to interpret the word ‘race’ in the criminal law is testified to by the Crown Prosecution Service Guidance (CPS) which refers to ‘caste’.

Racially aggravated offences referred in the Crime and Disorder Act 1998 (sections 28-32) and the Criminal Justice Act 2003 (section 145) as well as incitement to racial hatred under the Public Order Act (sections 17-29) will now be interpreted by criminal prosecutors as extending to caste.

ACLC representations regarding the potential extension of the case law to the sphere of criminal law were not responded to, no parliamentary scrutiny took place, and the British government’s caste consultation ignored it.

Proponents of a law on caste acknowledge there is no commonly agreed or accepted definition of caste. This has not stopped judges from ruling that caste may be subsumed under the ‘ethnic origins’ arm of ‘race’ in the Equality Act. The government cited the lack of a commonly agreed or accepted definition of caste to support its rejection of the legislation but failed to recognise that the same argument applies to the case law.
The GEO’s draft guidance points to the Explanatory Note to section 9 of the Equality Act for a “helpful explanation” of caste. The Note particularly associates caste with India, potentially leading to a presumption against Indian-origin defendants.

The Explanatory Note makes reference to terms from Indian languages which the Western term ‘caste’ is said to encompass. However, the suggestion that these terms provide some kind of guide to what ‘caste’ refers to or covers is problematic.

The target of the anti-caste activists and their official supporters isn’t clear as it can range from caste, caste awareness, caste considerations, the caste system or some combination of them.

In the dominant account, Hindus and Brahmins are primarily set apart as presumed caste discriminators or oppressors. As these stereotypes are based on a fictional, Christian account of Indian culture, those who use them could as well be targets of claims of caste discrimination, caste aggravated offences or crimes of caste hatred.
Introduction: Institutional Capture

The developing law on caste in the UK is an example of the capture of British public institutions by special interest groups who drive their own agendas into binding law by presenting a false case for legal reforms. The law on caste constitutes an egregious assault on good sense and intelligent use of law and replaces it with an unworkable regime based on a religiously shaped ideology that unjustifiably targets groups as oppressors via a culture of political correctness and identity politics, exposes individuals, groups and institutions to vilification and frivolous charges, and makes a mockery of the law. As Lord Parekh said during the House of Lords debates on the caste legislation,

“Since every Indian who is Hindu carries the caste mark with him, every action that he does with respect to another can be subsumed under one or another form of caste discrimination, so the first difficulty is that you will have an enormous range of frivolous complaints with no way of arguing for or against.”

The scenario Lord Parekh predicted is already with us. All the more reason that some guidance is provided as to the law’s implications. This is particularly so given that nothing like that exists, while the Government Equalities Office (2019) latest draft Guidance of May 2019 occludes more than it misleadingly reveals.

While there is often expressed a concern about the Christian right wing in the United States, not many have realised that it has spread to Europe (Butler 2006), it has been effective at influencing decisions at UN level, and is using British institutions for the launch of a conversion drive to the as yet “unreached” parts of the globe. In its effort to do so, it has already gotten hold of some human rights institutions in the UN through which pressure is put on “heathen” nations under the guise of breaches of human rights extending to oppression in the name of caste. In a seeming irony such operators work with a “coalition of the willing” composed of extreme leftist, secularist, or Islamist activists, organisations and academics in the West and in the target regions, who might otherwise be considered to be odd bedfellows. Together they promote a culture of defamation, inquisition and show trials, undermining the rule of law.

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1 House of Lords Debates, 22 April 2013, col. 1305.
Since caste is today strongly linked with Hinduism, India or ‘South Asia’ 2, the continuing assault on the traditional cultures of those lands is being made on the pretext of caste oppression. Through this means, vested interests lay their hands on private and public funds to civilise the natives under the pretext of saving them, alleviating their poverty, promoting their development, and fighting for their human rights.

The capture of public institutions at national and international level has become one means of promoting and legitimising this nefarious agenda. International non-governmental organisations are also active in such campaigns and are often fronts for transnational church organisations, well-funded by private and public means, which can use their financial muscle to orient undemocratic changes in the composition and direction of the societies targeted. 3

The Hindu Forum of Britain (HFB) showed in its report of 2008 that British parliamentarians had close links with Christian Action, Research and Education (CARE), Dalit Solidarity Network (DSN-UK) and Christian Solidarity Worldwide (CSW), all of whom were by then pushing for a British law on caste.

The international arm of DSN-UK is the International Dalit Solidarity Network (IDSN) which regularly receives funding from various European churches and governments. It is seeking UN consultative status and has been one of the forerunners in fraudulent campaigns on caste discrimination in the UK and India. The current British Labour Party leader, Jeremy Corbyn, has been a trustee of the DSN-UK and member of the All-Party Parliamentary Group for Dalits. 4

Letters to parliamentarians about their connections and their support for a law on caste discrimination are regularly met with prevarication and betray a lack of knowledge of the basic relevant legal issues. 5

The extent of institutional capture at UN level is demonstrated by the recent coming together as members of the ‘IDSN Ambassadors Group’ of individuals who all have a public role as part of the UN machinery, as current or former members of the Committee on the Elimination of Racial Discrimination or UN special rapporteurs. This leaves them exposed as being partisan to the agenda of the churches and countries that provide funding, and therefore unable to fulfil their supposedly independent role in scrutinising the record of individual countries. 6 It might be read as an unhealthy form of collusion, if not corruption.

In the UK, such institutional capture is demonstrated well by the way in which the trope of ‘caste discrimination’ came onto the public agenda, was made into a legislative issue, and was used to hijack law making agenda to the demands of these interests. They have little regard for reliability of evidence, research, or intellectual integrity and appear keen on pushing their ideological programmes forward at any cost. In the case of caste, they have found it easy to ride on ideas accumulated over long decades of Christian evangelical polemic about Indian culture and religion and colonialism, which have become part of the general common sense about India.

The fact that stereotypes have been allowed to do the talking at least partly explains the disregard for proper research safeguards against ‘confirmation biases’ prior to the passing of any law. Instead, allegations suggesting that certain groups now established within Britain, having imported such practices from their countries of origin, are caste oppressors, are made to do the work that rigorous evidence and research should be doing. Where research does exist, it has been manipulated in an attempt produce predetermined results. For example, in compiling its report on caste discrimination, the National Institute for Economic and Social Research

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2 ‘South Asia’ is a geopolitical term that came into use in US intelligence circles at the end of the Second World War (Dirks 2004). Despite having been widely adopted by Western universities and academics as a mark of their regional specialisation, it has no particular cultural salience beyond that. The term is often (though not always) adopted by organisations that are hostile to India’s culture and traditions both in academic circles and in the NGO world. The South Asia Solidarity Network is one such far left NGO that works in collaboration with Islamists and the British media. It has been instrumental in spreading such hostility through the British community on grounds of caste.

3 One estimate based on official Indian data provided to ACLC suggests that in 2017-18 some £600 million went to explicitly Christian and non-explicitly Christian NGOs in India from foreign Christian organisations.

4 The Secretariat to the APPG on Dalits is provided by Meena Varma, Director of the DSN-UK.

5 E.g. letter to Atul Patel by the Shadow Secretary of State for Women and Equalities, Dawn Butler, 15 October 2018.

(NIESR) (Metcalf and Rolfe 2010) was led to specific organisations that were already pushing for a law and NIESR appears to have overlooked any other voices.7

What can only be described as ‘propaganda’ has been used to manipulate public opinion through established mainstream media, including the BBC’s multiple outlets, Channel 4, and The Guardian. Propaganda which otherwise would have been destined for dustbins has been allowed to determine what the problems and solutions are. Even at parliamentary level, existing conventions to ensure safeguards are disregarded and issues that would otherwise be appropriate for open public debate are instead suppressed behind closed doors through which select groups are given access in order to determine the course of legal development. Opposition is met with either silence or derision, even when the evidence and intellectual case of the pro-caste law lobby is demonstrated as lacking credibility.

But why the persistent effort to push for a caste law despite the lack of evidence or a well-made case for it? We consider that the UK has been identified as a proxy in the main battle for proselytism going on in Asia. Among others Metcalf and Rolfe (2010: 3) have indicated that “Indian Christians are disproportionately from lower castes”, thus pointing to the focus of proselytism activity. In India, caste reservations (quotas) for the so-called Scheduled Castes (SCs) and Scheduled Tribes (STs) do not extend as a matter of course to Christians or Muslims, although there is a constant push to make this a reality in various Indian states. Having access to caste reservations makes it easier to proselytise.

Otherwise upon conversion there is a risk of losing access to educational and employment quotas. In some Indian states, conversion to Christianity has to be notified to the official authorities and this is often done under legislation designed to prevent undue pressure to convert. Both the general lack of reservations and legal limits on conversion are opposed by Western evangelical churches who often criticise them in their propaganda on India. Untrammeled conversion is, meanwhile, rightly seen as an assault on Indian’s ancestral traditions and culture as it rips people away from, and engenders hate towards, their communities as it is always accompanied by the canard of false religion and superstition. The caste law’s protagonists have falsely portrayed opposition to conversion and widening caste reservations as an issue being pushed by Hindu nationalists.8 Instead, untrammeled conversion amounts to a cultural genocide of a traditional culture such as that of India.9

Precedents are not lacking of such lethal strikes against other cultures of the world. The attempt to link support for the caste system and its discrimination and Hindu nationalism also indicates that those who hold forth in this vein possess a deficient grasp of their pet hates. As this report shows, Hindu nationalists have provided support for a caste law in the UK on the pretext of opposing it.

The law in the UK was always meant to be religion-neutral in the sense that a person of any religious background could claim to be a victim of caste discrimination. The major test case of Tirkey v Chandhok, which we do not regard as a genuine one, involved a Christian tribal woman successfully claiming victimhood. With a religion-neutral caste discrimination law, a jurisdiction like the UK could signal to others that such neutrality should become the norm particularly when doing so is cited as being a fulfilment of the demands of international law. The next chapter (2) charts the steps leading up to the current situation and how the Tirkey case has come to represent the UK’s answer to having a law on caste discrimination. The chapter after that (3) deals with the potential implications of the case within UK law.

8 See e.g. Mosse (2016). Mosse was also part of the EHRC-commissioned research team and co-author of its two reports which advocated a caste law in the UK (Dhanda et al. 2014a and 2014b). For a further response that treats a critique of the classic conception of the caste system as tantamount to Hindu nationalist politics, see Sutton (2018).
9 For opposition to unrestricted proselytism from the perspective of the Indian traditions and its incompatibility with the Christian idea of conversion, see Claerhout and De Roover (2019).
Background to the current law

After the consultation on the law on caste the British government announced in July 2018 that it did not want to implement the legislative obligation to make caste an “aspect of race” for the purposes of the Equality Act by citing the case of Tirkey as being sufficient to engage legal protection against caste discrimination (Government Equalities Office 2018: 14-15).

“An Ideological joy ride”
The issue of a British law on caste discrimination has been brewing since the mid-2000s. Over the past decade, Members of Parliament have consistently indicated that they have no knowledge of claims of caste discrimination being made to them by constituents. However, Dalit and other Christian organisations began lobbying parliamentarians, some of whom gave support for a law. When the bill that became the Equality Act 2010 was in parliament Lord Harries, a former bishop of Oxford and main Anglican delegate pushing for the caste law agenda, together with Lord Lester, and the late Lord Avebury, began working for the inclusion of a clause against caste discrimination. Even the then Labour government did not accept that a law on caste discrimination was necessary, and it instead tried to pacify the lobby by including a discretionary power to make caste “an aspect of race”. The stance of the parliamentary Labour Party subsequently changed as began to enforce a three-line whip on votes related to caste. Manoj Ladwa, who served on Sadiq Khan’s campaign for London Mayor, has not unreasonably described the party as going on “an ideological joy ride” in wanting to implement the caste legislation.11

The NIESR report
Commissioned by the new Conservative-LibDems coalition government, the National Institute for Economic and Social Research (NIESR) reported in 2010 (Metcalf and Rolfe 2010). As noted in the previous chapter, the NIESR researchers had been guided by the pro-legislation lobby. NIESR’s ‘evidence’ was composed of 32 interviews, with one-sided accounts often unrelated to the Equality Act’s scope, and bloated by reference to case studies drawn from pro-legislation lobby group reports whose questionable methodology and reliability isn’t scrutinised. Broad conclusions are drawn about caste discrimination from the accounts provided, something that could only be done if a caste system story is already presupposed in the background.

10 These include Bob Blackman, Jon Ashworth, Keith Vaz, Barry Gardiner, Gareth Thomas, and Dawn Butler. Dawn Butler confirmed that, whilst working as an officer of the GMB Union’s National Race and Equality Officer, she did not come across caste discrimination cases.
11 The description given by Manoj Ladwa on his Facebook page, 3 June 2017, is a more recent one and directed at the Corbyn-led Labour party, although the Labour Party’s hard-line stance on caste discrimination goes further back than that.
The GEO’s own summary of the NIESR report is also symptomatic of the incestuous circulation of the same tropes across the accounts being given by proponents of a caste law (Government Equalities Office 2010). Rather than maintaining a critical distance from the content and methods of the NIESR report, the GEO summary basically reads like a ratification of the NIESR ‘findings’ and lends them governmental backing. The final paragraph on the last page of the GEO summary notes that the NIESR study was based on “interviews with 32 people who believed they had been subject to caste discrimination and harassment”. Among the basic flaws in the NIESR report’s methodology were that: (1) the accounts it relied on were subjective and self-reported and there was probably no way of fact-checking them; (2) the vast majority of these cases are to do with Sikhs (which indicates they are probably to do with some sectarian and not caste issue) but made to stand generalisations about Indians; (3) NIESR was led to the account providers by pro-legislation organizations; and (4) the dominant explanation of caste discrimination was not checked against alternatives, a basic condition of scientific method, which indicates that the researchers had gone to look for evidence which fitted a theory that they had already determined as true. Despite these basic flaws, the ‘findings’ were treated as though they were objectively demonstrative of caste discrimination.

The GEO presented the NIESR report as having identified evidence suggesting the presence of caste discrimination and harassment of the type covered by the Equality Act 2010; as having identified discrimination and harassment by higher castes against the lowest castes; and as having found that relying on the Indian community to take action to reduce caste discrimination and harassment was “problematic”. The reference to the Indian community is especially inflammatory but can be understood as betraying a view that may have been commonly held at the time within the GEO and elsewhere: that the Indian community would not resist the legislation. The GEO also leaves open the possibility of legislating on criminal law, an option that NIESR itself countenances. The point about extension to criminal law is extremely important in the current context because, as discussed further below, the current law has been extended to the criminal offences surreptitiously and without any debate.

As noted, the original Act only contained a power to make caste an aspect of race but this did not pacify the pro-legislation lobby. Parliamentarians committed to pressing for legislation took to citing the NIESR report as having proved the necessity of legislating. Through its ministers the government too seemed to accept the NIESR findings as though they were objective. For instance, while trying to fend off the pre-emptive House of Lords draft amendment that would have ensured caste became an aspect of race without any further implementation measure, Baroness Stowell observed: “We have always accepted that the NIESR report identified a small number of cases where the evidence suggested that caste discrimination or harassment had probably occurred.”12 This is unsurprising not least given how the GEO had presented the NIESR report in its own summary, serving to nudge parliamentarians in a direction, which their own pet assumptions about the oppressive Indian caste system would already guide them.

2013 amendment
In 2013, Lord Harries introduced an amendment in the House of Lords to alter the Equality Act to directly make caste an aspect of race instead of waiting for the government to exercise its power to do so. A compromise was then reached in the House of Commons between the parliamentary Labour Party, which was blocking the main legislation of which the caste amendment was a part, and the Conservative-LibDems coalition government to change the discretionary power into a duty to make caste an aspect of race. The compromise amendment may have bought the government some time to consider how to legislate, but not whether to do so. Whenever challenged by those objecting to the law, both Labour and Conservative politicians have since supinely blamed the other party for the amendment, signalling that neither wanted to take responsibility for it, while the rights of those most exposed to frivolous litigation, which Lord Parekh had highlighted on the occasion of the amendment, were traded off in the process.13

12 House of Lords Debates, 22 April 2013, col. 1299.
13 For example, a letter by Bob Blackman MP to Justine Greening, Minister for Women and Qualities, 26 August 2016, stating, “This amendment you will recall, was pushed through by the Labour and Liberal Democrat MPs under extremely suspicious circumstances and behind the Conservatives’ back.” This is an astounding claim given that the Conservative Party was the senior partner in the coalition government. Similar claims were repeated by Bob Blackman in a meeting at the Palace of Westminster on 5 September 2018. Meanwhile, while having given good reasons against the legislation in the House of Lords, Lord Parekh voted in its favour!
The 2013 amendment is also an indication that the pro-legislation lobby was, up to that point, unilaterally able to dictate the legislative agenda, that parliament had already become subject to institutional capture by that lobby, and it was perhaps considered that the already welling up opposition to the law could still just be ignored. Only subsequently did the British government concede, in its July 2018 consultation response, that “Legislating for caste is an exceptionally controversial issue, deeply divisive within certain groups, as the last few years have shown” (Government Equalities Office 2018: 14). In the most recent report of the House of Commons Foreign Affairs Select Committee (2019), Building Bridges: Reawakening UK-India ties, caste is not mentioned.

Now that the duty to make caste an aspect of race for the Equality Act had been agreed to by parliament, it would have to be implemented. This bind determined the course of subsequent events, as the pro-legislation lobby maintained pressure within and outside parliament to ensure that the government’s undertaking to implement would be lived up to (see Shah 2015: 35-40, 83-98). By July 2016 there was even talk of a judicial review being brought by a coalition of lobby organisations against the government’s failure to implement what was, after all, a duty.14

However, the path to implementation wasn’t clearly laid out or self-evident. There are obvious challenges for British politicians, who have demonstrated singular ignorance on anything to do with caste, in passing secondary legislation and, therefore, having to decide what caste is, what areas of the Equality Act the caste provision should extend to, and what exemptions and exceptions should be made, as had been done for the Act’s other ‘protected characteristics’.15 Section 9(5)(b) of the Equality Act (as amended) explicitly provides for such exceptions to be included when implementing secondary legislation is issued making caste an aspect of race. Although the main political parties had agreed that caste should be made an aspect of race, the government entered a period of squirming and backsliding.

**The EHRC’s role**

The first step was to instruct the Equality and Human Rights Commission to commission an independent study in two parts: (1) a review of existing socio-legal research on British equality law and caste and (2) two supporting events (for experts and stakeholders respectively). The study could not possibly have been independent, given that the EHRC had already expressed itself as being in favour of making caste an aspect of race since 2010, when the provision in the Equality Act was still being discussed. With some justification, Lord Harries had been against asking the EHRC for its view on the same ground: “It is already on record that the Equality and Human Rights Commission supports legislation, so it seems that nothing is really to be gained by putting the issue to the commission again.”16 When it had supported the legislation earlier, the EHRC had no evidence or study to back up its position making its pronouncement even odder. The EHRC had also publicly stated that application of the Act to caste should be as comprehensive as possible indicating that it wanted as few exceptions as possible (Shah 2015: 46). The EHRC then went on to contract a group of scholars nearly all of whom had also expressed themselves as being in favour of the caste provision. They were supposed to canvass opinion to ascertain what the different views were, but the conclusions were predictably in favour of implementing the caste clause. Here too we detect an organisation that had undergone institutional capture. The subsequent behaviour of its officials only reinforces that impression.

Although it would have been odd that academics who had hitherto held forth in favour of a law against caste discrimination would suddenly come out against it, it not as though there wasn’t opposition to it. The organisations affiliated to the ACLC and the British Sikh Consultative Forum boycotted the EHRC exercise on the ground that it would be a foregone conclusion, which it turned out to be.17

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15 A study of parliamentary debates (see Shah 2015: 27-35; Shah 2018: 118-128) reveals the level of unembarrassed, openly demonstrated ignorance among parliamentarians, who would dare not challenge each other for it. These findings have been repeatedly corroborated during the course of many conversations on caste with British politicians.

16 House of Lords Debates, 22 April 2013, col. 1302.

17 The list of organisations and individuals who attended and withdrew are listed in Appendix 10 of Dhanda et al. 2014b: 28.
Those organisations that were against the law but went on to participate lent legitimacy to the disingenuous exercise. The published EHRC reports are an exemplary instance of the incoherent conceptualisation of caste and how to bring the law to bear on it. This too was predictable, despite the invitations extended to ‘experts’ to take part in part of the exercise.

The scholars writing the EHRC study appear oblivious of the many problems implementing caste into law is going to bring about, another signal that those involved were interested in pursuing an agenda they were already committed to, rather than making an inquiry as to what was actually at stake. Although part of the study was meant to be a ‘socio-legal’ evaluation of the implementation of caste as part of the British anti-discrimination law, it hardly considers what problems might emerge for those in charge of enforcing its norms let alone those subjected to claims. In general, the field of caste studies may claim scientific pretensions but without justification (Jalki and Pathan 2015). The EHRC study likewise fits into that mould given its embedding of barely concealed themes from Christian theological polemic and its subscription to the kind of identity politics that is routine in caste studies today. It is unfortunate that such problems are papered over even when drawn to the attention of the academics concerned who seem more content to brand their intellectual opponents instead of answering questions about problems in their work. Thus one may be referred to as a “denier of caste” (Dhanda 2015) or as ideologically aligned with Hindu nationalism (Mosse 2016) for simply pointing out the holes in work pushing the agenda for a caste law. The inability of caste studies scholars to engage seriously with scientific problems and criticisms of their work reinforces the impression that they have an ideological commitment and mission which has no relation to the well-being of any group in society and, moreover, have a deep-seated derisive attitude to Indian traditions reflective of the Christian foundations of the currently dominant study of India. The incestuous relationship of Western caste scholars and NGOs with their Indian counterparts and informants only magnifies these inherent problems.

**Duplicitious backstop**

An opportunity for the government to create a backstop was provided by the Tirkey v Chandhok case which went through the legal system during 2014-2015. Some mystery surrounds this case, which has now become the cornerstone of the law on caste in the UK. The argument whether caste was already part of the Equality Act, by reading ‘caste’ into its provision on ‘ethnic origins’, was oddly raised sometime after the initial proceedings had been brought for underpayment of wages. Two Employment Tribunals and the Employment Appeal Tribunal (EAT) all agreed that ethnic origins had already encompassed ‘descent’ and so it was a short step to include caste also.

In a television interview on the BBC after she had won the case, the claimant utters the word “caste” not even once, although the narrator is at pains to portray the case as one of caste discrimination, as indeed were her lawyers and the judges deciding the case.18 This is a further indicator that those who controlled the narrative of the case as it went through the legal procedures wanted to transform it into one of caste discrimination.

Tirkey is a common name among forest dwelling communities in the Odisha, Bihar and Jharkhand states of India, where Christian proselytism is taking place intensely, creating social fissures and conflict. The claimant was herself a Christian attending a local church, and claims were made during the litigation that the employers had prevented her from reading her Bible. Although the case judgments do not offer any clarity or further evidence, although conceivably frivolous, it may be that

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18 BBC2’s Victoria Derbyshire Programme, 2 October 2015. The programme isn’t available but see [https://twitter.com/victorialive/status/649849161383215104](https://twitter.com/victorialive/status/649849161383215104) and [https://www.bbc.co.uk/news/uk-34422671](https://www.bbc.co.uk/news/uk-34422671). For unexplained reasons all BBC radio and television programmes on caste have been taken off the internet.
the suggestion of Hindu religious intolerance suppressive of religious freedom played a role in subtly reinforcing the claim of caste discrimination. Such a narrative is certainly familiar from Christian proselytism propaganda. Interestingly, the employers are a Buddhist couple from Delhi. It is known that modern Indian Buddhists tend to reject caste after the anti-caste politician, Ambedkar. No one conducting the case seemed interested in this line of argument however.\(^\text{19}\)

Significantly, nowhere in the various case judgements does one find a single mention of either Tirkey’s tribal group or the caste of the defendant couple. It is striking that a case of caste discrimination does not seek to ascertain just what the caste background of the defendants or plaintiff is, and just where in the alleged caste hierarchy each one is meant to fit.\(^\text{20}\) In fact, according to the mainstream caste scholarship, tribals are meant to be completely outside the caste system that they allege exists. How then did the tribunals manage to conclude that this was a case of caste discrimination?

Another extremely odd aspect of the Tirkey case is the manner in which the interplay between UK domestic law (in particular the Equality Act), EU law (Directive 2000/43/EC, the so-called ‘Race Directive’) and international law (in particular the International Convention on the Elimination of Racial Discrimination) was proposed and accepted. The Tirkey ruling was predicated on the EU’s Race Directive being a purported implementation within the EU legal order of the Convention on the Elimination of Racial Discrimination via which it is claimed race, as expressed by the Equality Act 2010, extends to caste. Although the Employment Tribunal and the EAT agreed with this argument, there are no legal grounds for it. The EU Race Directive’s legislative record betrays no reference to discrimination based on ‘descent’ or ‘caste’. They were simply not within the contemplation of EU lawmakers when the Directive was adopted. Neither term is specifically used in the preamble or the text of the Directive. It is also contentious whether the ‘descent’ provision of the Convention should be extended to caste at all. Although belonging to the pro-legislation lobby, the international human rights academic, David Keane, convincingly argues that extending ‘descent’ to caste is not in conformity with the Convention’s drafting history (Keane 2007). The Convention itself lists ‘ethnic origin’ and ‘descent’ separately, and so the position of British courts, which treat the latter as a subset of the former, is inconsistent with the Convention. Further, although the Employment Tribunal’s and EAT’s view of the EU law position was extraordinary, if not inadmissible, they took no steps to refer the question of the EU Race Directive’s interpretation to the Court of Justice of the EU, as they ought to have. Notwithstanding that the validity of the UN Convention’s extension to caste is doubtful, judicial legislation ensured that the square peg of the Convention was made to fit into the round hole of UK domestic law.

It is worth scrutinising the EHRC’s role further in the context of the Tirkey case. It chose to intervene in the Tirkey case arguing for an extension of the caste law and did so against internal advice as shown by freedom of information documents since revealed (Shah 2015: 109-112). According to the (late) Lord Avebury, the EHRC had been seeking, since at least 2010, to work with the Anti-Caste Discrimination Alliance (ACDA) to identify and support a case to establish its belief that caste discrimination could be covered by ‘descent’, which the Supreme Court’s JFS judgement had by then accepted as falling under ethnic origins discrimination.\(^\text{21}\) This public declaration by Lord Avebury of the collusion between the ACDA and the EHRC is a further indication of institutional capture of the latter by the pro-caste law lobby, something that did not seem perturbing to its participants. This may be a further indicator that the proponents of the law had, at the time, anticipated little if any position to their plans to manipulate the law.

It is then perhaps unsurprising that, in its submissions to the EAT, the EHRC supported the interpretation of ‘ethnic origins’ as extending to caste notwithstanding the legislative duty to make caste an aspect of race that parliament had inserted in 2013. Besides, the 2013 amendment imposing the duty to make caste an aspect of race was surely an indication of parliament’s view that the existing provision on race could not include to caste. The EHRC’s position vociferously backing the legislation, and commissioning a set of academics to ratify the same position, was at odds with its simultaneous support for the extension of the Equality Act to caste by judicial legislation. The EHRC has never explained why it supported both tracks in parallel. It continued to defend this stance well into 2015 when it wrote to the ACDA saying: “It is however helpful to

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19 This is despite one of the main parliamentary proponents of the caste law, Lord Avebury, being a Buddhist and one of the array of organisations supporting the legislation on caste being the Federation of Ambedkarite and Buddhist Organisations in the UK (FABO).

20 Although we do not accept the oft-repeated notion of a caste hierarchy, it seems minimally incumbent on those claiming that such a hierarchy exists to explain its mechanism and where individuals fit into it.

have an EAT decision that caste discrimination is capable of being covered by the Equality Act 2010. This decision is binding on all Employment Tribunals which consider caste discrimination claims... we are reiterating to the Government our view that an express provision in the Equality Act 2010 is desirable for reasons of legal clarity.”

The reader will quickly conclude that having it both ways wouldn’t lead to the claimed-for clarity but its negation. The legislative duty would make caste an aspect of race. The case law, itself internally contradictory, compels caste to be read through the Act’s “ethnic or national origins” concept which race is said to “include”. Presumably, the EHRC would support both ways of including caste in the anti-discrimination law to run in parallel as it had done hitherto. It is notable also that the EHRC withdrew from making any comments on caste since. It refused to respond to the ACLC’s submission to its Strategic Plan for 2016-19 (DIPF 2015) and made no mention of caste in the outcome of that review. The EHRC’s Handbook for Advisers published in 2017 remarkably makes no mention of caste. It appears as though the EHRC was instructed by the British government to remain silent on the caste issue once the Tirkey proceedings were completed. Despite the position the EHRC had earlier taken in favour of implementing the caste clause, we do not rule out some collusion between the government and the EHRC to ensure that the Tirkey case would now act as a substitute for passing secondary legislation, which is exactly how the case law has been presented subsequently. As the Tirkey case wound its way through the legal system, hints of the direction of travel became evident in the way British government ministers were responding to questions about the law on caste, citing the on-going case law as a reason to delay implementing the legislation. Once the Tirkey case was decided by the EAT it became clearer that it would be the backstop against which the government would deflect demands to legislate.

The importance of the Tirkey case thus goes beyond its basic evidentiary and legal failings. Despite these failings, and the collusion between advocates for the law and official institutions, it has taken a central position in framing the British position on caste.

Prominent Hindus working with political circles were then enlisted to help see through this agenda from at least 2016. In March 2016 Manoj Ladwa stated of the Equality Act’s caste provision that, “Bob Blackman has started a campaign to repeal it. Labour’s Keith Vaz and some other MPs are supporting. I accept their argument that English case [law] is now sufficiently established in protecting people against discrimination on the basis of their caste.” Jayesh Jotangia of the Secretariat for the All Party Parliamentary Group on British Hindus circulated a note on the caste legislation in 2015, which is now sufficiently established in protecting people against discrimination on the basis of their caste.

23 See the government positions stated in parliament as documented in Pyper (2016: 9-11).
24 Manoj Ladwa, Facebook post, 18 March 2016.
July 2016 which sets out what it refers to as the “Hindu communities’ position”. Although far from clear how that alleged position was ascertained, and most likely a claim made unilaterally without any consultation, it argues for the repeal of the legislation on various grounds while suggesting “the development of caselaw points to dealing with it”. In subsequent discussions during the same year, Lord Gadhia and Lord Popat advised that a letter to the Prime Minister urging repeal of the legislation carry a rider as follows:

“The existing case law provides all the protection that is necessary and can be revisited if this position ever changes.” These prominent Hindus, to whose position Hindu, Jain and Sikh bodies began to lend their support, appear to neglect the fact that the effort to establish the case law goes as far back as 2010 and involved parliamentarians working together the caste law lobby, the EHRC, some prominent lawyers and the tribunals. Their proclaimed ‘opposition’ to the law thus remained only partial. They wanted repeal of the caste clause in the Equality Act and used the existence of the engineered case law as a reason to do away with the former. It appears to have escaped those who wanted to use the case law as a backstop, while they argued for repeal of legislation, that the same (and more) arguments apply in favour of reversing the case law. Although clearly expressed on several occasions by the ACLC, this obvious point was never dealt with either by proponents or opponents of the caste clause or in the British government’s consultation on caste.

Consultation

It helps to view the framing of the government’s 2017 consultation on the caste law in light of the foregoing. The consultation, as it emerged, gave the impression that one of two options was available: either (1) implementation of the legislative duty by a government order or (2) the case law. The consultation document gave the impression that a respondent couldn’t reject both options, although it wasn’t clearly stated one way or another. This equivocation suggests that the British government’s consultation was promoting a choice between only the two options and thus, arguably unlawfully, ‘managing’ the outcome of the consultation. The government response later said: “The Government did not propose this course of action as an option and we do not wish to pursue it” (Government Equalities Office 2018: 13). This confirms that the consultation was an attempt to force a choice for at least some type of caste law.

The ACLC held to the ‘third option’ of rejecting both the two options given and advocated that in its recommendations to individuals and community groups. In correspondence with the ACLC, the GEO conceded in the midst of the consultation period that respondents could reject both options should they so wish, although the GEO refused to withdraw the consultation and to reissue it in order to make it transparent that the ‘third option’ was a legitimate response. However, the GEO concession amounts to an effective change in the conditions under which the consultation took place during its pendency, providing another ground to doubt its legality.

It stood to reason that the pro legislation lobby groups would advocate the legislation option and reject the case law since they had campaigned for the former and, at least publicly, were expressing dissatisfaction with the latter, albeit on spurious grounds. As already clarified, however, the case law was itself an outcome of the pressure by pro caste law groups to manipulate the law via the courts, a task in which official bodies, including the British government, appear to have been complicit.

Notwithstanding that fact, an alternative front of Hindu organisations was opened to campaign for the case law and reject the legislation, a further indication of government ‘management’ of the community. It is remarkable how far this form of multicultural management has succeeded since the large Hindu bodies generally favoured the case law, despite good arguments for the third option advocated by the ACLC. The Hindu Forum of Britain (HFB), International Society for Krishna Consciousness (ISKCON), Bochasanwasi Akshar Purushottam Swaminarayan Sanstha (BAPS), as well as smaller outfits such as the National Council for Hindu Temples (NCHT) and the Hindu Council of Birmingham.

25 Email communication, 31 August 2016.
26 The case law on fair consultations is large but for UK Supreme Court authority which give grounds for the argument that the caste consultation was not fairly conducted see, R (Moseley) v LB Haringey [2014] UKSC 56.
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The caste consultation provides a good instance of how multiculturalism works: using groups or bodies that act as intermediaries to influence an outcome the government has already determined (Shah 2017). It turns out that the strategy was successful. Out of 16,138 consultation responses 8,513 respondents were found to be “in favour of relying on case-law” (Government Equalities Office 2018: 6). Although numbers of responses to each option had been declared as not relevant to the government’s eventual conclusions on the issue, the failure of those who had advocated the third option (basically the ACLC) to support the pro-case law front was castigated later by Bob Blackman and Lord Gadhia at a meeting convened by the HFB on 5 September 2018 at the Palace of Westminster, indicating that they had all along been pushing for the case law, the option that the government favoured. The client Hindu organisations meanwhile proclaimed victory against the legislation seemingly oblivious of its Pyrrhic nature.

One other area of prevarication is the way in which international law has been manipulated to justify the results desired at a particular moment. The way in which international law points were dealt with during the Tirkey litigation have been discussed above. In dismissing the ‘third’ option i.e. doing away with both the case law and the legislative duty, the British government again came up with the risk of breaching international law. As its response to the consultation stated, adopting the third option “could also result in the Government being in breach of its international legal obligations” (Government Equalities Office 2018: 13).

That the international law point was being raised in defence of a position that the British government, it now appears, had anyway wanted to secure seems to be a further flaw in the conduct of the consultation. Consultation respondents were not made aware, at any point during the consultation, of HMG’s position on international law. It is true that the international law factor, as it has been manipulated by the pro-legislation lobby, has been playing a surreptitious role in the background for a number of years. However, it was only in its response to the consultation that the British government raised the international law point, and then only as a way of deflecting the viability of rejecting both the other options.

The British government’s response is ambiguous in that it doesn’t make clear in what way the UK would be in breach of international law if it had rejected both options or, indeed, how the UK is deemed to comply with international law by choosing the case law route. Presumably the British government cannot have been unaware that the international law position is hardly settled and various views circulate about just what international law requires to be done with respect to caste.

As mentioned, the leading expert on the international law applicable to caste discrimination, David Keane, belongs to the pro-legislation camp and was one of the academic team involved in the EHRC investigation. Keane (2007) has identified the Committee on the Elimination of Racial Discrimination as having had a particular interest on the caste question. Since caste is not mentioned in the Convention on the Elimination of Racial Discrimination, the Committee has used ‘descent’ as the basis on which its pronouncements on caste vis-a-vis state parties are grounded. Keane has convincingly argued that the Committee’s position cannot be correct as a matter of international law given various relevant factors, including the persuasive evidence that ‘descent’, originally inserted by India into the Convention, was never intended to extend to caste; that the interpretation of descent as extending to caste cannot be defended by reference to background interpretative tools including reference to the Indian constitution; and that India has taken the stand before the UN Committee opposing the extension of ‘descent’ to ‘caste’, as well as in other fora, including the Durban Racism Conference of 2001.

Notwithstanding any errors made by the UN organs in the interpretation of the UN Convention’s requirements, the British government’s consultation response does not square with the view of the UN Committee and the UN Human Rights High Commissioner who have specifically advocated the implementation of the legislative duty in the Equality Act 2010. If the British government’s position is that it follows the recommendations of the UN Committee and the Human Rights High Commissioner, then it would have to opt for the legislative route, an outcome that it specifically rejects in its consultation response. In other words, whatever position is taken by the British government on the international law point, it is difficult for it to maintain that its preferred outcome i.e. the case law in the form of the Tirkey case, finds any international law basis. In subsequent correspondence, the GEO has refused to provide any
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clarification of the position taken by the British government and withheld any legal advice on the basis of the British government’s view as to the requirements of international law.

**Brick wall**

A characteristic aspect of the law on caste is its inherent ambiguity, and it could take a variety of anticipated paths in future civil and criminal litigation. This ambiguity holds more for the case law than for the legislation, even though the former has been promoted as a fitting alternative to the latter. No study has been undertaken of how the case law would work under the Equality Act, of whose provisions it is meant to be an interpretation. There has been no official response to the ACLC’s submissions, made repeatedly to Ministers and the GEO, that the case law’s reading of the word ‘race’ would have implications beyond the Equality Act and across into the criminal law, as well as beyond the UK in jurisdictions where British case law is minimally treated as being persuasive. Nor have individual parliamentarians, to whom the same submissions have been put by constituents, seen fit to respond to concerns about the potential scope of the case law. 27

It is as though a brick wall comes up when the problems associated with the case law are raised. No doubt, the same feeling is common among those who have spent a great deal of time and effort campaigning for the legislation. Although we do not consider their arguments made against the case law and for legislating to be weighty, it is true that the case law itself contains weaknesses which may return to haunt those, like the present government, who have defended it as a backstop. It is nevertheless remarkable how the government and other official agencies have spent their time, and for years, trying assuage the pro-caste law lobby. Since the existing arguments, such as the inability to define ‘caste’ or the dubiousness of the evidence of caste discrimination, work as much to undermine the justification for the legislation as for the case law, it seems that the government cannot but have had the pressures from the pro-caste law lobby in mind when it went about artfully managing opinion, including using its agents to influence the Hindu organisations, and massaging the consultation results, in favour of the case law. In its consultation response, while promising to repeal the legislative duty, the government committed to intervene in any future case in order to reinforce the *Tirkey* case (Government Equalities Office 2018: 15). This tendency to entertain the well–funded and resourced pro-caste law lobby will most likely not have the desired effect, however. That lobby understands well that it has managed to effect institutional capture and continues to maintain pressure for legislation. Other than the Conservative party, all major political parties have signed up to the need for legislation and it may be a matter of time before the Equality Act’s extension of race to ‘caste’ is made in statutory language. In the meantime, we have to reckon with the effects of the case law.

27 We refer here to records of constituent meetings and correspondence with the following Members of Parliament: Barry Gardiner, Dawn Butler, Keith Vaz, Jon Ashworth, and Bob Blackman.
How would the law work?

Equality Act 2010: the civil law

The Equality Act covers a range of areas including the provision of services, the letting and management of premises, employment, partnerships, appointment to an office, bodies that confer qualifications, trade organisations, local authorities, pensions schemes, and education including schools and further and higher education. It allows for civil actions usually involving damages claims for direct and indirect discrimination, harassment, and victimisation. Such civil legal actions can involve claims for compensation, including for injury to feelings, aggravated damages for malicious behaviour, and interest on any compensation. Since the courts have decided that ‘ethnic origins’, and therefore ‘race’ as a protected characteristic, extends to ‘caste’, actions may be brought for caste discrimination, harassment and victimisation under the Equality Act. Legal practitioners have already been publicising the prospect of such claims since the EAT’s Tirkey decision.

ACLC had made representations to government and parliamentarians against retaining the case law on the ground that it does not require any specific exceptions or exemptions to be made to the scope of the Equality Act. These criticisms fell upon deaf ears. The EAT read ‘caste’ as a protected characteristic, extends to ‘caste’, actions may be brought for caste discrimination, harassment and victimisation under the Equality Act. Legal practitioners have already been publicising the prospect of such claims since the EAT’s Tirkey decision.

The Equality Act 2010 already applies to the widest possible extent in race discrimination cases and, as a result of the case law, that wide application extends to caste too.28 Under the case law, the Equality Act will not be tailored to take into account any specific conditions that apply to caste. The wide exceptions or exemptions made, for example, for religion (see, e.g., Hepple 2011: 113–114, 119–121) will not be made for caste. Ideological blinkers have influenced the

28 The EHRC as well as the research team it commissioned to produce the two reports of 2014 had in any case advocated that the legislation would apply to the widest possible scope (see Shah 2015: 66).
case law, and consequent blindness regarding its application could well affect or prevent the pursuit by organisations and individuals of many worthwhile activities. The example in the box below illustrates the difficulties.

Example

Holding a Navratri event for members of one group may well fall within the exemption for ‘single characteristic associations’ (Equality Act 2010, Schedule 16, para. 1) because it applies to a benefit, facility or service conferred upon only members of that group. However, an organisation may still be found to act unlawfully for discriminatory disposal of premises (Part 4 of the Equality Act). Even if some non-members are admitted as guests, there may be a potential breach of the Equality Act because a claimant could still assert that non-members continue to be disadvantaged in being admitted to the premises. Wide exceptions including for the disposal of premises (and other activities) are available to ‘organizations relating to religion or belief’ (Schedule 23, para. 2). However, an organisation may not restrict admission to, for example, Patidars for a Navratri garba event because that may be seen as amounting to a caste-based restriction, even if claimed to be ‘religious’. A court would be free to decide that a ‘religious’ event led to caste discrimination.

Criminalising caste

Among the many reasons why the GEO’s draft Guidance is flawed is that it overlooks the potential application of the case law across to the criminal law. Wherever the word ‘race’ appears in the legislation prosecutors may now argue that it extends to ‘caste’. Thus the racially aggravated offences referred to in the Crime and Disorder Act 1998 (sections 28-32) and the Criminal Justice Act 2003 (section 145) could presumably now be interpreted as extending to caste-based aggravation too. Courts now have to treat the presence of an aggravating factor as constituting an aggravated offence. The most visible evidence that this interpretation is likely already being used can be seen in the Racist and Religious Hate Crime - Prosecution Guidance issued by the Crown Prosecution Service. One of the questions it uses to help CPS officers identify racially or religiously aggravated crimes is: “Was there any use of derogatory language towards ethnicity, race, nationality or religion, (including caste, converts and those of no faith)?” Clearly caste is now supposed to be within the contemplation of officials responsible for deciding what charges should be brought when prosecuting. Since there is no direct legislative authority for this kind of charging decision, one can only assume that a reading of the case law is at the root of this interpretation of the terms for the offences in question. The Prosecution Guidance was last updated in August 2018 after the British government’s response to the caste consultation was issued (although it isn’t yet clear whether that is what prompted the adding of caste to the Prosecution Guidance).

Besides the racially and religiously aggravated offences, the other set of criminal offences associated with the notion of ‘race’ are the ones involving incitement to racial hatred under sections 17-29 of the Public Order Act. To the extent that the Tirkey case and the Prosecution Guidance are indicators, we can presume that caste is already being considered as a factor for prosecuting these offences. Although the ACLC had made representations regarding the potential extension of the case law to the sphere of criminal law, no authority or organisation was prepared to respond to the concerns about extension to the criminal sphere. There has been no parliamentary scrutiny or authority for such an extension. The parliamentary debate has focused solely on the Equality Act 2010 which only provides grounds for bringing civil law actions, and not criminal actions.

The British government’s consultation document and its response to the consultation are silent on the problem. It is not that the idea has not been mooted earlier. As noted, the NIESR report had entertained the idea of extension of any law on caste to the criminal sphere and the GEO seemed to support this. The ACLC’s representations had warned of the potential consequences of the case law upon the criminal law. The government’s failure to set out the full implications of the case law is another reason for doubting the legality of the consultation exercise.

By virtue of the fact that courts in one court jurisdiction may conceivably borrow interpretations of the same word given by courts in another, the temptation to expand the range of race-based offences to caste has been present since the Tirkey case during the proceedings of which the extension to criminal law was also not considered. Had it been, the judges deciding the Tirkey case may have had yet another reason to hold back for fear of helping unduly extend the scope of the law by judicial fiat. The one potential factor militating against the courts accepting the extension of race-based offences to caste is the traditional reluctance of the English courts to extend criminal offences unless specifically authorised by parliament (Ormerod and Laird 2015: 18), although this factor does not appear to have held back the CPS from issuing its guidance potentially violating that principle.

30 On Parliament and not the courts being the appropriate body to decide what conduct should be treated as criminal, see also R v Jones et al [2006] UKHL 16.
In fact, the CPS appears to be repeating the same mistakes the EHRC has made earlier in pushing for the case law to extend the law on caste, this time to the criminal law.

Defying definition
Implementing the law requires definition of key terms. We don’t know what ‘caste’ means or to what phenomenon it refers. Members of Parliament have said they do not know what caste is and often put the question back to their constituents or to the groups opposing the law.

Lord Parekh, speaking in the Lords during the debate on the 2013 amendment, sagely said: “How do you define caste? Sociologists have tried for 200 years, ever since the Portuguese invented the word caste. It is not an English but a Portuguese word; when they came to India, they found that we were classified in a certain way and called it caste. In India, caste is very much in flux thanks to globalisation, urbanisation and so on, and in Britain it is even more so. Castes are therefore difficult not only to define but to distinguish. Once one introduces this kind of indeterminate, inherently nebulous category in law, one invites difficulties.”

The writers of the EHRC Experts’ Seminar and Stakeholder’s Workshop report vaguely mention that “there appeared to be a consensus that an elastic definition that addresses caste” was required (Dhanda et al. 2014b: 28). The government consultation document of March 2017 accepted that there is “no universally accepted functional definition of caste which can be relied on”. The GEO’s draft Guidance appears to agree: “There is no definition of it which is generally accepted” (Government Equalities Office 2019).

The British government’s response to its caste consultation (Government Equalities Office 2018: 12) states:

“The implications of being legally unable to generate a definition of caste to accompany any inclusion of ‘caste’ into the race provisions of the Act are significant. Not having a commonly agreed definition of ‘caste’ would mean inserting a concept into law that had neither an accompanying legal definition nor any commonly accepted interpretation of what it was and what specifically it captured, even among those who are familiar with the nuanced concept of caste.”

These observations are made as a means of dismissing the viability of legislation but it appears to have escaped the civil servants drafting the response that the same problems attend any mention of caste in case law too!

The Tirkey case is significant in this regard, and all the more remarkable, since Mr Justice Langstaff cites the academic, Annapurna Waughray (2014: 362, for the original quote), who favours legislation, as follows:

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

The EAT judgment itself goes on to accept that “there is as yet no formal definition of ‘caste’” (para. 51) for the purposes of the Equality Act.

All those cited mention the lack of agreement on, or acceptance in common of, any one definition of caste. The government consultation document goes further to say that no definition “can be relied on”. Yet we find that the EAT’s Tirkey judgement went on to argue that:

“The fact that there is no single definition of caste, as the parties before me were agreed, does not mean that a situation to which that label can, in one of its manifestations, be attached cannot and does not fall within the scope of ‘ethnic origins’.”

Conversely, the judgement states that if a claimant, “proves facts which – whether colloquially or accurately – could be described as ‘caste considerations’ which come within the heading ‘ethnic or national origins’ … she will succeed in her claim if the Tribunal concludes that she was less favourably treated because of those facts.”

This is how the EAT reasoned that ‘ethnic origins’ in the Equality Act may encompass caste in at least one of its manifestations. This means that judges do not regard the variety of definitions, none of which is commonly accepted or agreed upon, as a barrier to using caste in law. Note, however, that the government has defended not adopting the legislation on essentially the same ground: the lack of a commonly accepted or agreed upon definition.

The draft GEO Guidance veers in a particularly unhelpful direction in saying that despite the lack of a generally accepted definition, “helpful explanations are provided in the UN Convention on the Elimination of Racial Discrimination and in the Explanatory Notes to the Equality

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31 House of Lords Debates, 22 April 2013, col. 1305–1306.
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Act 2010 [the Act].” A citation is made to the Convention’s definition of ‘discrimination’ and not caste; the Convention makes no mention of caste and it is only because of the push by some vested interests that caste has been read into it, as it has in the British courts, albeit based on different and inconsistent reasoning. This attempt to pass on a conception of caste, about which the GEO is itself obviously muddled, may have been a way for the GEO to get others to do the work it found too challenging.

The GEO’s draft Guidance (Government Equalities Office 2019) also refers to the Explanatory Notes to the Equality Act 2010 for “helpful explanations”. The Explanatory Note to the, as yet unrepealed, Equality Act 2010, section 9 says: “The term “caste” denotes a hereditary, endogamous (marrying within the group) community associated with a traditional occupation and ranked accordingly on a perceived scale of ritual purity. It is generally (but not exclusively) associated with South Asia, particularly India, and its diaspora. It can encompass the four classes (varnas) of Hindu tradition (the Brahmin, Kshatriya, Vaishya and Shudra communities); the thousands of regional Hindu, Sikh, Christian, Muslim or other religious groups known as jatis; and groups amongst South Asian Muslims called biradaris. Some jatis regarded as below the varna hierarchy (once termed “untouchable”) are known as Dalit.”

If we go by this ‘explanation’, then a number of questions would have to be put to the claimant and/or defendant, and might arise for decision by courts. What happens if the evidence satisfies one of the criteria, say heredity, but the others can’t be established? In other words, are all of the four aspects: heredity, endogamy, traditional occupation, and ranking by ritual purity necessary? The use of the word “and” would appear to suggest that they are all necessary. Having said that, Waughray’s ‘definition’, which the EAT cited, isn’t clear as to whether all, some or only one of its aspects would need to be met. Does the reference by the EAT to “one of its manifestations” mean that satisfying any one of the criteria may lead to the affirmative conclusion of the presence of “caste considerations”? If that were so, however, it would result in patently absurd consequences. For example mere ‘heredity’ conceivably applies to any instance of intergenerational transmission by descent among humans and couldn’t possibly be what proponents of the caste law have in mind. After all, they associate caste with South Asia and do not argue that it is a feature of human societies in general.

Admittedly, it’s all a bit vague. Recall that Tirkey depends on the following logic: race ≥ ethnic origins ≥ descent ≥ caste. While ethnic origins is already mentioned as a subset of race in the Equality Act itself, the further links to descent and caste are stipulated by case law. Wouldn’t a claimant then have to establish that the claimed discrimination falls within at least three elements i.e. ethnic origins, descent, and caste simultaneously? Reading the EAT’s or the two Employment Tribunal judgments in the Tirkey case doesn’t help since they don’t establish what factual aspects of the case led to the conclusion that “caste considerations” were present and indeed how they simultaneously amounted to the presence of ‘caste’, ‘descent’ and ‘ethnic origins’ based discrimination.

If the earlier-mentioned holes in the Tirkey case are not enough to create a doubt about whether the case essentially looks like a set-up, the problems mentioned here further testify to the unconvincing attempt by the judges to persuade all concerned that caste considerations in the case are what led to a finding of discrimination that satisfied the Equality Act. Not only that: they were considered adequate to find the defendants in breach of the Act on caste grounds and to penalise them for it. Together, the team backing the claimant, the EHRC and the judges created the pretext for a badly defended case and, in so doing, unfairly penalised the defendants who, on a fair reading, come out as the real victims. If the lawyers and courts stoop so low, who can tell where they will stop in holding others liable for trumped-up caste discrimination claims? In their current zeal to find ‘hate crimes’ everywhere, where would the police or CPS stop in penalising innocents?

The Explanatory Note to section 9 of the Equality Act makes a particular association with India. Does this statement raise a presumption against Indian-origin defendants? Conversely, does it mean that the evidence would have to specifically establish the presence of caste in the case of Pakistani-origin defendants but not for Indian-origin defendants? A possible presumption that works against Indian-origin defendants may have been behind the statement in the NIESR report that reads: “Relying on the Indian community to take action to reduce caste discrimination and harassment is problematic” (Metcalf and Rolfe 2010: vi). It will be recalled that this statement was repeated verbatim by the Government Equalities Office (2010). Although Indians are singled out in these references, does the reference to South Asia in the Explanatory Note also raise a presumption? Does that dissolve the above-mentioned distinction between Pakistani-origin and Indian-origin applicants?

As the Explanatory Note insinuates, Muslims may come to be defendants in caste discrimination claims. The Note’s ambiguity raises questions such as whether Muslim defendants from India would be treated differently to Muslims with a Pakistani origin by virtue of the suggested presumption regarding India. Would members of Ashraf descent groups be considered ‘upper castes’ since they
are said to descend from ancestors foreign to India, as are Sayyids (claiming descent from the Prophet Mohammed)? It is arguable that all (or some of) the four criteria (heredity, etc.) may be present in such cases, although the association might have to be drawn out by the evidence, whether in the case of origins in Pakistan or other, non-South Asian countries such as Yemen, Somalia, Ethiopia or Sudan where Ashrafs and Sayyids are also said to be present. Similar questions are raised for groups such as Qureshis, putative descendants from the Prophet’s tribe or for Mughals, i.e. those claiming descent from India’s genocidal rulers (see Shaw 2000 in relation to Pakistanis in Britain). Despite the reference to Muslims in the Explanatory Note, the GEO confirmed in correspondence with the ACLC during the consultation that it was not seeking representations from Muslims and that it had made no efforts to publicise the consultation to Britain’s Muslim communities. Omitting a main target group in this way appears to breach official guidelines on consultations and may be a further ground upon which to suspect the consultation exercise as being tainted by illegality.

The Explanatory Note also makes reference to some terms from Indian languages which the term ‘caste’ is said to encompass. But we will run into problems if it is being suggested that they provide any kind of guide to what the label ‘caste’ refers to or covers. Returning to the European history and use of the term caste, and how it came to be associated with various phenomena that Europeans thought they saw, makes it obvious that that usage does not provide us with a hypothesis about any existing social structure. For example, in vernacular literature, we come across the Lohar and the Sonar jati (professional communities), the Maratha and the Bangla jati (linguistic or cultural communities), the Hindu and the Mussalman jati (putatively, religious communities), the Munda and the Oraon jati (communities presently registered in the government documents as tribes), the Vaidya and the Bhumiwar jati (communities which are endogamous), mardon ki jat and aurat jat (community of men and community of women), etc. Jati thus denotes professional, regional, linguistic, religious, only locally recognizable and even gendered communities. It should also be noted that endogamy, often held as the defining marker of caste, does not uniformly characterise all these communities. Which of these jatis, then, could be called castes?”

If one takes another term used in the Explanatory Note, varna, it is also fraught with problems as a proxy for caste. Here is what Farek et al (2017: 4) say:

“Those who favour varna as the mode of classification face an even worse fate. Not only is it impossible to get any clear correlation between sets of jatis and varnas, with jatis constantly disputing which varna they belong to, the added complication is that we currently have no idea how to deal with the textual sources which were taken to be the source of the theory of varna.”

The kinds of problems these observations point to haven’t flummoxed those agitating for a law on caste discrimination and those who are catering to them by providing one. As the Tirkey case shows, it doesn’t look as though the courts will closely scrutinize caste discrimination claims, unless of course a good defence is provided and expert witnesses are brought forth. Matters will take an even more serious turn when individuals begin to be criminalised on the basis of alleged caste crimes.

**Folk devils**

Although the ambiguity at the heart of the notion of caste makes it difficult to defend its legal use, it isn’t always clear what those agitating about caste discrimination are against. At times, it is the ‘caste system’, which appears to involve some combination of heredity, endogamy, traditional occupation, and ranking by ritual purity although, as noted, it isn’t clear which of these are essential or non-essential components. In Tirkey it was claimed that one’s putative status within the caste system was the relevant element (EAT, para. 6-7) but it isn’t clear from the case how any ranking was established. Adivasi (first inhabitants) is not considered a particular caste or tribe by those who regard these terms as salient. Like the term Dalit, it is a neologism that arbitrarily brings together different groups. By some accounts, though, Adivasis are supposed to fall outside the caste system, so it isn’t clear in what sense ‘caste’ or the ‘caste system’ was relevant at all.

In fact, the EAT (para. 46) goes on to say that, “It is not necessary in order for her to succeed that the label ‘caste’, or even ‘lower status’ should be applied to her.” However, a claim could be permitted, said the EAT (para. 49), “If the Respondent perceived the Claimant as lower caste because of her ethnic origins.” So in some sense, hierarchical position is relevant and in Tirkey it seems that imputing a perception to the respondents played a key role. However, it is impossible to find on what basis that perception came to be imputed. During the Tirkey proceedings, nobody asked of what caste the respondents were. The perception imputed to them, on grounds that are completely opaque, was made to do a lot of work.

The vagueness is present all around. During debates on the legislation some parliamentarians seemed to advocate...
eliminating ‘caste’ altogether (Shah 2015: 32). The NIESR report refers to “caste awareness” (Metcalf and Rolfe 2010: vi, 20) although it isn’t clear how measuring awareness of caste should have been within NIESR’s proper remit unless, as with the mere presence of caste, there was something morally repugnant attached to it. As we saw, the EAT (para. 53) refers to “caste considerations” although, again, it isn’t clear what that phrase refers to. This prevaricating language can only be made sense of if the guiding spectre of the vaguely conceptualised ‘caste system’ is presumed to be in the background.

This vagueness doesn’t mean that there aren’t presumptive discriminators in the folk wisdom. The caste system notion itself supplies the idea that some people who are higher in a system commonly discriminate against those lower in rank than they are or they perceived to be. The references to Indians were mentioned earlier. This is a way of locating a bounded category of persons among whom such discrimination occurs. Then a number of other descriptions come into play to establish a further set of presumed discriminators. According to some it is the “caste Hindus” or “three upper castes” whose organisations, or the businessmen belonging to those groups, were claimed to have had a vested interest in opposing the caste legislation (Shah 2015: 35-39).32 For some others the matter is somewhat easier. As the NIESR report indicates, “The term ‘Hindu’ and ‘Sikh’ are used by some to denote higher castes.” In other words, merely being Hindu or Sikh would appear to attract the tag of being a member of one of the discriminating groups. Thus Hindus and Sikhs are now made to fulfil the role of ‘folk devils’ who engage in morally condemnable practices.

The use of the term ‘Hindu’ to refer to someone who discriminates on grounds of caste is itself discriminatory as the perception it carries of the person or persons to whom it is applied is that s/he engages in immoral behaviour. On the ground that they engage in immoral behaviour they are tagged with a “lower status”. On the one hand, therefore, the term ‘Hindu’ congeals a (legal) presumption and, on the other hand, it is a stereotype which compels the user or hearer to condemn the person to whom it is applied as someone who belongs to a discriminating upper caste, even when no act of discrimination has taken place. The stage is set for discriminatory treatment on caste grounds that could well satisfy the Equality Act. In fact, this is precisely what those who commissioned, researched and wrote the NIESR and EHRC reports, the caste consultation and the government’s response to it, and the GEO’s draft caste Guidance (Government Equalities Office 2019) do. They set up research on the presumptive basis that Hindus are discriminators and entertain accounts from so-assumed low caste people, delivered by pro-legislation organisations and researchers, and naturally reach the pre-determined conclusion that Hindus discriminate on caste grounds. In other words, by ‘proving’ what they have presumed, these bodies breach the Equality Act by discriminating on caste grounds. Given the systematicity of such practices we might even speak of ‘institutional casteism’ directed at Hindus.

One may go further and say that the government and EHRC have arguably breached the Equality Act (section 111) by instructing, causing or inducing contraventions of it. Among folk devils, Brahmins are the greatest targets of casteism. They are the presumed priests of the Hindu religion, a description that goes back centuries in Christian missionary accounts of India in which this group then got transformed, especially by Protestant missionaries of the 19th century and in later ‘secular’ accounts of India, as the corrupt priesthood of Hinduism who kept the remaining population under a system of immoral caste oppression. Today, it is common to associate the noun ‘Brahmanism’ and adjective ‘Brahmanical’ with caste oppression. Not only that. These terms also suggest that Brahmins gave rise to a whole culture of oppression as encapsulated in the term ‘caste system’. They suggest that every aspect of Indian traditional practices, including speaking Sanskrit or doing a temple puja may be called into question as indices of the false religion of the corrupt Brahmins, to be eradicated. Some movements in India took on the job of eliminating not just those practices dubbed Brahmanical but also Brahmins themselves.33

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32 The chief levelers of these charges are Baroness Flather and the National Secular Society of which she is an Honorary Associate.

33 For how the tropes levelled against the Jewish priesthood in post-Reformation Europe were instrumentalised in descriptions of Brahmins and the caste system they allegedly instituted, see De Roover (2017).
In their survey of 60 articles on caste atrocities in over 2000 issues of the Indian journal Economic and Political Review, Jalki and Pathan (2017: 75-76) found that Brahmins feature not once as perpetrators of violence. They add though that “one finds the following words and phrases liberally used in these writings while analysing the issue: ‘Brahmanical caste system’, ‘Brahmanical social setup’, ‘Brahmanism’ and ‘brahmanical model’. These words act as ‘explanations’ for the violence that has occurred. The caste system is violent because it is ‘Brahmanical’. … In any other sphere of social science research, such work would be described as a ‘conspiracy theory’ and written off with disdain. In caste studies, however, it gains the status of a respectable knowledge claim, and earns its author degrees, positions and honours, in India and abroad.”

There may well be substance to the finding by the writers of the EHRC’s Experts’ Seminar and Stakeholders’ Workshop report (Dhanda et al 2014b: 36) who observed, “none of the second set of opinions (represented by Hindu organisations …) recorded knowledge of any instances of discrimination or harassment related to caste, excepting the vilification of Brahmins.” Those who have been arguing for and trying to justify and provide for a law on caste discrimination may themselves be perpetuating the image of conjured up ‘folk devils’.

The Equality Act 2010 does not on the face of it make any presumption as to who discriminators are. White people, who are often stereotyped as discriminators on racial grounds, as Hindus and Brahmins are for caste, may also make a claim under the Equality Act for race discrimination. The test for direct discrimination in the Act (section 13) is merely less favourable treatment. In the case of Hindus and Brahmins one might even make a case for combined discrimination, say on grounds of race (caste) and religion (section 14). Indirect discrimination is actionable if “a provision, criterion or practice” imposes a particular disadvantage that cannot be shown to be proportionate (section 19). It is not relevant what the alleged discriminator’s characteristics are (section 24). The perpetrator could just as well be an Indian anti-caste activist or a Western academic. Therefore, those alleged to belong to upper castes, which Hindus and Brahmins often are, may make a claim under the Act if they have been discriminated against. If appropriate, they may issue a claim under the applicable criminal law.
Recommendations

The ACLC recommends as follows:

- The reversal of the case law, not its strengthening.

- The repeal of the legislative duty as the British government has already undertaken to do.

- Although some parliamentarians have been suggesting that it isn’t possible, it is a simple matter to devise legislation to do reverse both the case law and the legislative duty.

- The British government should adopt a more robust approach with respect to the pro-caste law lobby and reject its manufactured claims of caste-based discrimination.

- The British government should adopt a more enlightened approach in international fora to assist in revising the notion of the Indian caste system which, in large part, is the result of its own priesthood, missionary and colonial class, without a corresponding social reality in India or its diaspora.

The ACLC remains at the disposal of the British government in assisting it to achieve these aims.
References


Sutton, Deborah Ruth (2016) ‘So called caste’: S. N. Balagangadhara, the Ghent School and the Politics of grievance’. In: Vol. 26, No. 3 Contemporary South Asia, pp. 336–349.

## Abbreviations

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<tr>
<th>Abbreviation</th>
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<tr>
<td>ACDA</td>
<td>Anti Caste Discrimination Alliance</td>
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<td>CPS</td>
<td>Crown Prosecution Service</td>
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<td>CSW</td>
<td>Christian Solidarity Worldwide</td>
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<td>DSN-UK</td>
<td>Dalit Solidarity Network – UK</td>
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<td>EAT</td>
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<td>GEO</td>
<td>Government Equalities Office</td>
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<td>HFB</td>
<td>Hindu Forum of Britain</td>
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<td>NCHT</td>
<td>National Council of Hindu Temples</td>
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<td>NIESR</td>
<td>National Institute for Economic and Social Research</td>
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The British Law on Caste

The Anti-Caste Legislation Committee (ACLC)