

# ‘English in taste, Indian in blood’: caste hegemony in the making of British international legal thought

Ahmed Memon \*

\*Cardiff School of Law and Politics, Cardiff University. Email: memona@cardiff.ac.uk. All URLs last accessed 21 September 2023. I would like to acknowledge the incisive feedback of the peer reviewers, and thank the Asian Society of International Law for giving me the opportunity to present this paper at the Junior Scholars Workshop in 2022. I would also like to give a special thanks to Professor Srinivas Burra for his detailed comments on an earlier draft of this piece as well as to Dr Martin Clark for providing key insights on some of the British international legal theorists mentioned in this piece

## Abstract

In this article, I argue that caste was a central factor in the development of British international legal thought in the subcontinent. Specifically, I contend that British international legal thought entrenched caste hegemony into the broader racial civilisation hierarchy of international law in the nineteenth century.

The concept of caste has been recognised primarily within international legal forums in the form of a liberal human rights approach.<sup>1</sup> With the exception of civil society activism, this recognition which dates back to the League of Nations<sup>2</sup> has remained relatively underexamined in the international legal sphere.<sup>3</sup> Taking its cue from the Convention of the Elimination of Racial Discrimination, the current conversation on caste frames the issue as one to be dealt with by international human rights mechanisms.<sup>4</sup> Beyond liberal concepts of human rights, even critical conversations within the field of international law focus on caste as an issue to be resolved or studied through the involvement of global governance mechanisms.<sup>5</sup> In the past few decades, caste discrimination, particularly within the South Asian subcontinent—most notably in India—

<sup>1</sup> D Keane, *Caste-Based Discrimination in International Human Rights Law* (Routledge 2016); J Donnelly, ‘Traditional Values and Universal Human Rights: Caste in India’ in C Welch (ed), *Asian Perspectives on Human Rights* (Routledge 2021); A Waughray, *Capturing Caste in Law: The Legal Regulation of Caste Discrimination* (Taylor & Francis 2022).

<sup>2</sup> L Cabrera, ‘Ambedkar and Du Bois on Pursuing Rights Protections Globally’ in M Curtin, R Falk and V Faessel (eds), *On Public Imagination* (Routledge 2019); JF Cháirez-Garza, ‘BR Ambedkar, Partition and the Internationalisation of Untouchability, 1939–47’ (2019) 42 *South Asia: Journal of South Asian Studies* 80.

<sup>3</sup> C Bob, ‘“Dalit Rights are Human Rights”: Caste Discrimination, International Activism, and the Construction of a New Human Rights Issue’ (2007) 29 *Human Rights Quarterly* 167.

<sup>4</sup> A Waughray and D Keane, ‘CERD and Caste-Based Discrimination’ in D Keane and A Waughray (eds), *Fifty Years of the International Convention on the Elimination of All Forms of Racial Discrimination* (Manchester University Press, 2017).

<sup>5</sup> Srinivas Burra’s critique of TWAIL for example, relies on the history of the internationalisation of caste as a lost opportunity for TWAILers to focus on colonialisms within colonialism. S Burra, ‘TWAIL’s Others: A Caste Critique of TWAILers and Their Field of Analysis’ (2016) 33 *Windsor Year Book of Access to Justice* 111.

has been the focus of critical literature on development in the Third World,<sup>6</sup> UN special rapporteurs, UN treaty bodies and most notably the UN's Universal Periodic Review.<sup>7</sup>

In this article, I suggest that caste ought not to be viewed simply as a form of social discrimination that can be solved through a human rights or constitutional framework of legal protection. In this mode—as with other human rights abuses—the international legal system is used as a vehicle to address, put a spotlight on and shame countries as a tactic of internationalisation of a localised social issue. Instead, I ask if and how caste was intertwined with early understandings of the international legal order, serving as part of global racialised hierarchies. This argument thus utilises TWAIL methodologies to show how specific forms of imperialism are co-constitutive of the making of international legal conceptions of world order.<sup>8</sup> This exploration also contributes to the crucial literature on race making as central to early developments of international law,<sup>9</sup> where the question of how caste fits within these developments has not yet been explored.

In this particular instance, I explore the histories and theories of caste within the subcontinent as part of British international legal thought. This approach goes beyond histories of Victorian conceptions of international law in recent years by critical historians of international law. By focusing on caste, I emphasise and build on Burra's suggestion to take into account colonialisms within colonialisms and argue that 'native' elites have a more complicated relationship to the development of international legal regimes than previously recognised by work on international legal history within the subcontinent. In the context of broader histories of international law, this has been suggested in the case of Latin America.<sup>10</sup> Similarly to these histories that echo the complexity of racialisation through the role played by native elites in international law-making, I focus instead on the system of caste in the context of the subcontinent. The purpose of this article is to further this argument from the vantage point of the Indian subcontinent in specific relation to Victorian conceptions of international legal order.<sup>11</sup>

What this article does not do, however, is centre anti-caste figures or histories of resistance, or specifically point to Brahmin/Upper caste leaders to deromanticise them by unveiling their participation in and perpetuation of caste violence and the caste system. Instead, it focuses on deconstructing the caste-blind narrative of international legal history during this period. I aim to open up the conversation for further provocations that follow these threads towards an anti-caste analysis of race and caste. More importantly, this article takes the primary concern of anti-caste theory—caste as the central oppressive force in the subcontinent—as a springboard for a more complex question: not only the relationship between race/racialisation and caste but the place of caste in the history and theory of international law.

In the argument that follows, I show how the caste hegemony that existed in pre-colonial subcontinental society was further ingrained and re-entrenched within the development and deployment of British international legal thought throughout the colonial encounter in the nineteenth century subcontinent. This entrenchment of caste further naturalised the category of race as part of a civilisational hierarchy. The entrenchment and then naturalisation of caste

<sup>6</sup> D Mosse, 'Caste and Development: Contemporary Perspectives on a Structure of Discrimination and Advantage' (2018) 110 *World Development* 422.

<sup>7</sup> The transnational Dalit advocacy group International Dalit Solidarity Network (IDSN) has for decades collected data, represented and pushed forward conversations on caste oppressed communities in international legal forums. In a document archiving all references to caste discrimination within UN bodies, IDSN lays out the country reports on Universal Periodic Review, UN treaty bodies, ICERD, CDESCR, CEDAW, CRC, CAT and CCPR, and UN Special Rapporteurs. See International Dalit Solidarity Network, 'Caste Discrimination and Human Rights' (January 2022) <<https://idsn.org/wp-content/uploads/2022/01/UNCompilation-Jan-2022-Web.pdf>>.

<sup>8</sup> Burra (n 5).

<sup>9</sup> See most notably, A Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2005). And specifically, C Gevers, "'Unwhitening the World': Rethinking Race and International Law' (2020) 67 *UCLA Law Review* 1652.

<sup>10</sup> See, eg, L Obregón, 'Between Civilisation and Barbarism: Creole Interventions in International Law' (2006) 27 *Third World Quarterly* 815; A Becker Lorca, *Mestizo International Law* (Cambridge University Press 2014).

<sup>11</sup> From a burgeoning literature on Victorian conceptions of international law, see especially J Pitts, *Boundaries of the International* (Harvard University Press 2018); D Bell, *Victorian Visions of Global Order: Empire and International Relations in Nineteenth-Century Political Thought* (Cambridge University Press 2007); C Sylvest, 'International Law in Nineteenth-Century Britain' (2005) 75 *British Year Book of International Law* 9.

into racial hierarchy in British colonial governance also became part of how the international legal order as a racialised hierarchy was conceptualised by British colonial administrators and international legal jurists in the twentieth century.

In the first part of the article, I explain the social category of caste as a central social reality of the pre-colonial subcontinent. In the second section I explore how the British colonial encounter with the subcontinent and its construction of the relationship between caste and race was developed by other European colonial powers. In particular, I look at how European notions of racial hierarchy helped to naturalise the idea of 'caste' as a natural social order of the 'subcontinent' which is part of its 'culture' and 'native law'. In explaining this naturalisation of caste, I focus specifically on the role of key early anthropologists who acted as colonial officers, known as *Sanskritists* and *Indologists*. In the third section, I explore how the early work of these colonial officers drew connections between racial hierarchy and caste supremacy, making them a 'natural' part of the subcontinent. I suggest this work became not only relevant to but a key part of how international legal order was understood as a racialised hierarchy in the nineteenth and twentieth centuries. In particular, I trace how British international legal theorists both drew on discourses on the naturalisation of caste and racial hierarchy in presenting their vision of British international legal order and also then influenced how colonial officers and colonial governance systems operationalised their account of caste and racial hierarchy in the subcontinent.

In the concluding section, I explore what this redescription of the place of caste within international legal history might mean for contemporary discussions on race, imperialism and international law, specifically in the field of critical international law and Third World Approaches to International Law. Finally, I consider how this redescription of the linkages between racial hierarchy and caste supremacy can create new political and intellectual possibilities for a post-race and post-caste discourse.

## **Caste as a social reality: recentring the historical study of the subcontinent from Dalit-Bahujan, Pasmada and Adivasi (Indigenous) perspectives**

Caste was and has remained a social reality in the subcontinent.<sup>12</sup> The study of the idea of caste has primarily taken place within sociology, literature, history and anthropology, with some more recent conversations in international relations, development and politics. While a wide-ranging literature considers caste as an object of analysis of specific study, however, anti-caste theory emphasises 'caste' not just as an object of study but as a theoretical, epistemological perspective through which we think through the study of social relations in the subcontinent and the world. The intellectual traditional of 'dalit' theory or anti-caste theory, as well as Adivasi (Indigenous) theory, explains that any study of the subcontinent, in any disciplinary form, is already informed by its own epistemological precepts, and seeks to provide a distinct lens through which to understand social relations. This article, and the argument, made therein, is informed by anti-caste theory and literature as well as Adivasi theory specifically due to the intervention I am making within international critical legal literature on caste.

It is important to clarify then first, what is caste defined as a social system through the perspective of anti-caste theory and how it differs, significantly, from analysis that is embedded within postcolonial or subaltern studies. Beginning from an 'Ambedkarian' perspective—owing to Bhim Rao Ambedkar, the anti-caste and anti-colonial leader of the Dalit-Bahujan community—a contemporary understanding and struggle against caste oppression and the caste system starts exactly within the internationalisation period of international legal order. Ambedkar's theory, informed by his own lived experience as a man from a 'lowered caste'<sup>13</sup> Mahar community,

<sup>12</sup> S Bayly, *Caste, Society and Politics in India from the Eighteenth Century to the Modern Age* (Cambridge University Press 2001).

<sup>13</sup> Ambedkar's caste position as a Mahar was deeply influenced by the particular history of oppression of *sudra* caste, deemed 'lower' in the graded hierarchy of caste. Therefore the term 'lowered' is used to denote the social

was a direct response to the oppressive naturalisation of 'caste' perpetuated by upper caste and Brahmin leaders and landowners.

Ambedkar's explanation of caste formation is as a socio-political reality of the subcontinent rather than simply a religious source. Specifically, Ambedkar explains it as an 'artificial chopping off of the population into fixed and definite units, with each prevented from fusing in the other through the custom of endogamy'. Endogamy, or the paternal lineage of carrying 'name' as an identification of fixed social position in a hierarchy of 'labourers', is for Ambedkar how the structure of caste is formed.<sup>14</sup> While caste structure has historically evolved and taken different forms, and political meanings, historians agree that it remains at the heart of the social and political fabric of the subcontinent. Regardless of its historical or spatial temporality, a simpler formulation of understanding caste structure may be to understand it as an already existing socio-economic graded hierarchy, slowly encoded in primarily Vedic scripts (later homogenised in the 'Hindu' religion) created and collated between 1500 and 1000 BCE.<sup>15</sup> What were identified as 'religious' communities, later on, were clan-like endogamous groups maintaining socio-political, spiritual hierarchies (based on purity/pollution), passed through paternal hereditary lineages to gain material benefit and claim superiority.<sup>16</sup> While centred primarily on 'Brahminism', the priestly caste, as well as in some contexts through the 'Kshatriyas' or warrior-king caste, caste-like structures have also permeated other pre-colonial communities, such as those who claimed ancestry from a warrior-clan or Brahmins as a way to reassert their positions in the Mughal courts and to gain social and material capital.<sup>17</sup> More importantly, in both the Mughal and Brahmin or Kshatriya kingdoms, those deemed 'lower' (ie, 'sudra and atisudra') have often maintained labour or servicing to upper caste communities while the most shunned or deemed untouchable were described as 'Averna' (ie outside the *varna* or caste system) as they were 'outside' the caste hierarchy. These were specifically indigenous communities present in subcontinent pre-caste system and who were mostly the Adivasi (indigenous) or Dravidians.<sup>18</sup>

In more conceptual terms, anti-caste theorists emphasise and reiterate the continued importance of caste oppression as a pre-British reality of the subcontinent that has continued to exist to today in post-colonial India, Pakistan, Bangladesh, Nepal and Sri-Lanka, as well as other parts of the world.<sup>19</sup> Its theoretical genealogy is generally derived from Ambedkar's text on *Annihilation of Caste*,<sup>20</sup> though anti-caste histories are further divided into older movements/struggle and moments in the history of the subcontinent that pre-date Ambedkar.<sup>21</sup> Ambedkar insisted on not just explaining caste as a central organising principle, which, in the context of increasing Hindu reformism, was tied to self-determination discourses within the subcontinent, but also as a way for social justice, equity and role of law in achieving a just society.<sup>22</sup> Ambedkar's emphasis in these conversations was on understanding the role of 'Brahmin' and

construction of caste hierarchy and its oppression, rather than 'lower' which denotes an oppressive naturalisation of caste structure as part of 'culture'.

<sup>14</sup> See also the explanation of caste formation by BR Ambedkar in BR Ambedkar, *Castes in India: Their Mechanism, Genesis and Development* (Patrika 1916).

<sup>15</sup> Bayly (n 12).

<sup>16</sup> *ibid.*

<sup>17</sup> *ibid* 25.

<sup>18</sup> *ibid.* For a conceptualisation of caste mobility and fluidity in the history of the subcontinent, see M Srinivas, 'A Note on Sanskritization and Westernization' (1956) 15 *Far Eastern Quarterly* 481. See also K Kannabiran, 'Sociology of Caste and the Crooked Mirror: Recovering B R Ambedkar's Legacy' (2009) 44 *Economic and Political Weekly* 35. On caste as a social political reality of Muslim communities in the subcontinent, see J Levesque, 'Debates on Muslim Caste in North India and Pakistan: From Colonial Ethnography to Pasmanda Mobilization' (2020) *HAL Open Science* <<https://hal.archives-ouvertes.fr/hal-02697381/>>.

<sup>19</sup> For specific examples beyond the subcontinent, see G Laurence and J Levesque, 'Introduction: Historicizing Sayyid-Ness: Social Status and Muslim Identity in South Asia' (2020) 30 *Journal of the Royal Asiatic Society* 383; and within the African continent, R Dilley, *Islamic and Caste Knowledge Practices among Haalpulaaren in Senegal: Between Mosque and Termite Mound* (Edinburgh University Press 2019); S Yengde, 'Global Castes' (2022) 45 *Ethnic and Racial Studies* 340; N Amalu, Y Abdullahi, and E Demson, 'Caste Conflict in Nigeria: The Osu/diala Experience in Igboland, 1900–2017' (2021) 20 *Global Journal of Social Sciences* 77.

<sup>20</sup> BR Ambedkar, *Annihilation of Caste: Annotated Critical Edition* (Verso Books 2014 [1936]).

<sup>21</sup> V Kumar, 'Dalit Assertion and Different Shades of Movements Defining Dalits: From Accorded Nomenclature to Asserted One' in V Sachdeva, Q Pradhan and A Venugopalan (eds), *Identities in South Asia* (Routledge 2019). See also G Omvedt, *Seeking Begumpura: The Social Vision of Anticaste Intellectuals* (Navayana 2008).

<sup>22</sup> Ambedkar (n 20).

the system of 'Brahminism' created by caste hierarchy as the most significant barrier to achieving equity.<sup>23</sup> For Ambedkar, the Brahmin caste communities—as an intellectual class playing a key role in forming knowledge of 'caste' itself—would never let go of the power that Brahminism as a system provides them. As long as there was Brahminism, there would be caste oppression.<sup>24</sup>

Emerging from the centrality of caste oppression as the primary concern of a pre-British history of the subcontinent, anti-caste theory emphasises the absences of caste relations in conversations on the colonial encounter and the post-colonial reality of India or Pakistan. According to anti-caste theory from a Dalit perspective, any theoretical and methodological claim about a 'subcontinent' identity that does not consider caste as a central ordering principle is an erasure of thousands of years of historical and systematic oppression. The richest contribution to anti-caste theory emerges from a tradition that Gail Omvedt describes as 'Dalit Vision'.<sup>25</sup> Drawing on figures, symbology, histories and focusing on an anti-Brahminical social order, this literature analyses caste as the basis of inequality within the subcontinent. Scholars since Ambedkar within the Dalit Vision have taken this understanding of anti-caste movement and theory forward through different disciplinary mechanisms including literature through lived experience and autobiographical accounts as knowledge,<sup>26</sup> sociological lenses on food,<sup>27</sup> gender,<sup>28</sup> or architecture,<sup>29</sup> caste as embedded with class,<sup>30</sup> and specific sociological frames through which caste as a lived reality can be seen within names,<sup>31</sup> as a phenomenon<sup>32</sup> and as an everyday social experience.<sup>33</sup> This particular anti-caste theory, which is the richest and most detailed social analysis on caste in post-colonial India, argues that 'Brahminism' itself is the core oppressive, class/caste/patriarchal force.<sup>34</sup>

Other anti-caste theory advances Ambedkar's notion of Brahminism as the core social force. Most notably, Adivasi theory adds a framework of 'double colonialism' to the history and sociology of the subcontinent.<sup>35</sup> Virginius Xaxa describes both 'Brahminism' and therefore casteism and racialisation of Indigenous peoples of India ('Adivasi/tribal' communities) by British colonialisation as perpetuating a simultaneous and concurrent violence on them.<sup>36</sup> Beyond questions of Brahminism, understanding caste as a central oppressive social force within other contexts such as those propounded by anti-caste theory within Pasmānda Muslim scholarship places emphasis on complicating the colonial presumptions of homogenising 'Muslims', showing that this is both an orientalist racialisation but also a caste-oppressive typology.<sup>37</sup> Pasmānda scholarship, or scholarship that focuses on lowered-caste Muslim communities in particular, builds on an Islamic anti-caste theory<sup>38</sup> and history.<sup>39</sup>

<sup>23</sup> *ibid.*

<sup>24</sup> *ibid.*

<sup>25</sup> G Omvedt, *Understanding Caste: From Buddha to Ambedkar and Beyond* (Orient Blackswan 2011).

<sup>26</sup> For a critical essay on Dalit autobiography, see S Rege, 'Dalit Women's Autobiographies' in S Arya and A S Rathore (eds), *Dalit Feminist Theory* (Taylor and Francis 2019); S Singh, 'Representation of Dalit Women in Dalit Men's and Women's Autobiographies' (2014) 1 *Delhi University Journal of Humanities and Social Sciences* 39.

<sup>27</sup> KI Shepherd, *Buffalo Nationalism: A Critique of Spiritual Fascism* (Sage 2019); G Guru, 'Food as a Metaphor for Cultural Hierarchies' in B de Sousa Santos and M Meneses (eds), *Knowledges Born in the Struggle: Constructing the Epistemologies of the Global South* (Routledge 2019).

<sup>28</sup> S Arya and AS Rathore (eds), *Dalit Feminist Theory: A Reader* (Taylor & Francis 2019).

<sup>29</sup> S Thirānagāma, 'Rural Civilities: Caste, Gender and Public Life in Kerala' (2019) 42 *South Asia: Journal of South Asian Studies* 310.

<sup>30</sup> A Telumbde, *The Republic of Caste: Thinking Equality in the Time of Neoliberal India* (Navayana Publishing 2018); A Telumbde, 'Dichotomisation of Caste and Class' (2016) 51 *Economic and Political Weekly* 34.

<sup>31</sup> S Paik, 'Mahar-Dalit-Buddhist: The History and Politics of Naming in Maharashtra' (2011) 45 *Contributions to Indian Sociology* 217.

<sup>32</sup> S Sarukkai, 'Phenomenology of Untouchability' (2009) 44 *Economic and Political Weekly* 39.

<sup>33</sup> G Guru and S Sarukkai, *Experience, Caste, and the Everyday Social* (Oxford University Press 2019).

<sup>34</sup> Omvedt (n 25).

<sup>35</sup> V Xaxa, *State, Society, and Tribes: Issues in Post-Colonial India* (Pearson Education India 2008).

<sup>36</sup> *ibid.*

<sup>37</sup> S Umar, 'The "Other" Muslim: Spatial-Temporal Cartographies of the Gendered Muslim World' (2021) 11 *Religion and Gender* 113. For a recent special issues on this see J Levesque, and S Niazi, 'Caste Politics, Minority Representation, and Social Mobility: The Associational Life of Muslim Caste in India' (2023) 31 *Contemporary South Asia* 413.

<sup>38</sup> MA Falahi, *Hindustan Mein Zaat Paat Aur Musalman* (Ideal Foundation 2006); I Ahmad, 'Is There Caste among Muslims in India?' (2015) 68 *Eastern Anthropologist* 1.

<sup>39</sup> KA Ansari, 'Rethinking the Pasmānda Movement' (2009) 44 *Economic and Political Weekly* 8.

In particular, the histories and theories of social 'life' in the subcontinent that anti-caste theory deploys includes figures, moments, processes that are starkly different from 'postcolonial' studies.<sup>40</sup> The categories of 'Indigenous' and 'Native' or 'colonised' in these theoretical frameworks complicate the binary notions of 'South/North', or 'colonised/colonising' referred to in postcolonial and subaltern theory.<sup>41</sup> Instead of focusing on a homogenous notion of 'culture', anti-caste theory specifically celebrates pre-existing tribal, Indigenous communities such as Mohenjo-Daro,<sup>42</sup> Dalit revolts,<sup>43</sup> and continuing cultural cosmopolitan anti-caste/anti-Brahminical alternative practices.<sup>44</sup> This significant difference is most acutely articulated in relation to postcolonial or subaltern theory as not taking into account the historical, sociological lens through which anti-caste theory views the world, but instead enacting a naturalisation of 'caste' by viewing it as an object of analysis that is either an 'unfortunate' consequence of a cultural or natural identity to subsume it into a 'subaltern' consciousness.<sup>45</sup> A more stark issue that emerges from relying simply on postcolonial theory in relation to international law is the absence of understanding the construction of race as tied to a pre-Euro-modern colonial social category such as 'caste'.

The revitalisation of Dalit-Bahujan and Adivasi—as well as increasingly Pasmānda—histories of the subcontinent are a key part of how anti-caste theory reconceptualises the sociological categories through which we understand the place of the subcontinent in today's time. Taking anti-caste theory seriously helps us re-evaluate how knowledge and analysis of the subcontinent produces a particular subjectivity that depends on how the literature historicises the British colonial encounter in the subcontinent.

## Naturalisation of caste as 'Native custom and Law': placing racial hierarchy in the British colonial encounter in the Nineteenth Century

The British came to know the subcontinent as a place where the economic, social and political powers were dispersed amongst a range of caste communities, as opposed to a series of ruling families.<sup>46</sup> This is why scholars like Bernard Cohn have described the British encounter as a 'slow conquest of knowledge'.<sup>47</sup> Beginning with the East India Company's relationship with the north western Mughal rule, this relationship was one of primarily trade as well as—and most importantly—revenue.<sup>48</sup> Kshatriyas and/or Brahmins negotiated their place as royal guards, intermediaries between the peasant caste/labourers and the royal courts of Mughals, and designated themselves as 'Rajput' or 'Nayara' or in Punjab as 'Jutt'.<sup>49</sup> The logic of caste structure was thus facilitated through the Mughal rulers, more so by Akbar, Shah Jahan and Aurangzeb, to the extent that the 'Rajput' assumed positions of land ownership (zamindars) for revenue collection from labourers and peasantry.<sup>50</sup> As

<sup>40</sup> For example, Omvedt describes in her vast body of work the symbolic value of leaders/thinkers of 'Dalit' vision ie Guru Kabir, Guru Naanak, Bhudda, Periyar, Phule and different historical events such as Birsa Munda, Battle for Koregaon: Omvedt (n 25).

<sup>41</sup> For three key texts critiquing the absence of caste in postcolonial and subaltern theory, see S Sarkar, 'The Decline of the Subaltern in Subaltern Studies' in D Ludden (eds), *Reading Subaltern Studies: Critical History, Contested Meaning and the Globalization of South Asia* (Anthem 2002); U Bagade, Y Jogdand and V Bagade, 'Subaltern Studies and the Transition in Indian History Writing' (2023) 11 *Critical Philosophy of Race* 175; G Guru, 'How Egalitarian are the Social Sciences in India?' (2002) 37 *Economic and Political Weekly* 5003.

<sup>42</sup> Omvedt (n 25).

<sup>43</sup> A Teltumbde, *Mahad: The Making of the First Dalit Revolt* (Taylor & Francis 2022).

<sup>44</sup> Omvedt (n 25).

<sup>45</sup> Bagade, Jogdand and Bagade (n 41).

<sup>46</sup> R O'Hanlon, 'Colonialism and Social Identities in Flux: Class, Caste and Religious Community' in DM Peers, and N Gooptu, *India and the British Empire* (Oxford University Press 2012).

<sup>47</sup> BS Cohn, *Colonialism and Its Forms of Knowledge: The British in India* (Princeton University Press 1996) ch 2, 'The Command of Language and the Language of Command'.

<sup>48</sup> CA Bayly, *The New Cambridge History of India: Indian Society and the Making of the British Empire* (Cambridge University Press 1988).

<sup>49</sup> C Bayly, *Rulers, Townsmen and Bazaars: North Indian Society in the Age of British Expansion 1770–1870* (Cambridge University Press 1988).

<sup>50</sup> *ibid* 25–26.

historian Śekhār Bandyopadhyay argues, Mughal rule was dependent and contingent on caste formations, namely through the intermediary caste of Rajputs, Jatts, or Nayaras, to function militaristically, economically and administratively.<sup>51</sup>

As a rent collector and commercial/military force, the Company already had to work within the pre-existing system of Mughal economic and political structure.<sup>52</sup> As most of this structure was organised through caste bifurcations, the British relied on those communities already in these positions of power. This ranged from recruiting former royal guards, 'Rajputs' as soldiers of the Company,<sup>53</sup> to hiring 'munshis' as assistants<sup>54</sup> to facilitate tax collection, to revenue collection through licencing merchant caste communities.<sup>55</sup>

As the Company came to acquire a vast stretch of territory from the Mughals, property ownership of the Company became embedded and entrenched within yet another structure: hereditary 'zamindari' or feudal ownership of land. The discourse of sovereignty here took a more complicated turn as local zamindars who claimed hereditary rights over land—even uncultivated land—contested absolute control over property by the Company officials. As a matter of both convenience and governance, the Company's stance, particularly in Madras, was to assert themselves as co-owners who respected the rights of upper-caste zamindars.<sup>56</sup> What was important for the Company was control over the land and allegiance of the upper caste zamindars rather than unfettered absolute sovereignty, particularly to deal with contested ownership between the lowered-caste labourers and peasants and upper caste zamindars.<sup>57</sup> In most of these cases, caste was entrenched into land ownership, sales and disputes whereby the Company officials almost always favoured hereditary claims based on caste.

In the above case of Madras, FW Ellis, a colonial officer and tax collector, attempted—with the help of his Brahmin assistant Shankaria—to justify this co-ownership with zamindar upper castes by describing lower caste labourers as 'natural slaves'.<sup>58</sup> Using transatlantic slavery as an analogous example, Ellis described the zamindars (*mirasis*) as holding a hereditary right over land which justified the 'gentle' form of slavery where unfree labour was 'kin' and not other.<sup>59</sup> Thus, for the Officers of the Company, it was not only imperative to work with the existing structure of caste, but also to become conscious of it, draw parallels and utilise it for their own governance in the territories they now occupied and ruled and shortly after expanded.

Increasingly, as the Company began to operate like a state,<sup>60</sup> this existing structure became a basis for the colonial knowledge formation for the Company. Cohn, for example, states that it was based on the idea that knowledge of the subcontinental culture needed to be constructed beyond a reliance on 'native' individuals to translate documents, laws, customs about caste structures.<sup>61</sup> The role of colonial officers as amateur anthropologists and linguists to make sense of—by learning the language—and translating, categorising the knowledge themselves became crucial for the operation of the East India Company.<sup>62</sup> It was crucial for Company officers who later assumed posts as judicial or administrative officers to understand the caste system as a

<sup>51</sup> Ś Bandyopadhyay, *From Plassey to Partition: A History of Modern India* (Orient Blackswan 2004) 31–32.

<sup>52</sup> Bayly (n 49).

<sup>53</sup> PJ Stern, 'Soldier and Citizen in the Seventeenth-Century English East India Company' (2011) 15 *Journal of Early Modern History* 83; K Roy, 'The Hybrid Military Establishment of the East India Company in South Asia: 1750–1849' (2011) 6 *Journal of Global History* 195.

<sup>54</sup> M Alam and S Subrahmanyam, 'The Making of a Munshi' (2004) 24 *Comparative Studies of South Asia, Africa and the Middle East* 61.

<sup>55</sup> Stern (n 53); Bayly (n 49).

<sup>56</sup> B Raman, 'Sovereignty, Property and Land Development: The East India Company in Madras' (2018) 61 *Journal of the Economic and Social History of the Orient* 976.

<sup>57</sup> See *ibid* for more on how the British quelled any counter approach by lowered caste communities to appropriate lands through gardening boundaries of land.

<sup>58</sup> Raman (n 56).

<sup>59</sup> *ibid*.

<sup>60</sup> S Pahuja, 'Public Debt, the Peace of Utrecht and the Rivalry between Company and State' in AHA Soons, *The 1713 Peace of Utrecht and Its Enduring Effects* (Brill Nijhoff 2019) 156; PJ Stern, *The Company-State: Corporate Sovereignty and the Early Modern Foundations of the British Empire in India* (Oxford University Press 2011).

<sup>61</sup> Cohn (n 47).

<sup>62</sup> *ibid*.

way of a maintaining jurisdictional control while creating flexibility in governing over local affairs. While intermediaries such as Brahmin assistants and translators became crucial to this task, colonial officers remained frustrated in trying to find a consistent, homogenising approach to local law, primarily because there was no such thing as a singular codified Hindu Law. This required something more than analogies to race in order to understand caste. It required a 'translation' of the society without 'Brahmin' intermediaries. Therefore, although attempts like Ellis's contextualised local 'customs' in certain settings, it was not until William Jones' attempts to learn, translate and train other officers in Sanskrit that a more homogenising effort to compile 'Hindu Law' started.<sup>63</sup> William Jones was an orientalist and classical scholar whose appointment as a Judge to the Crown Court in Calcutta in 1783 motivated him to pursue learning Sanskrit.

While still relying on a group of Brahmin scholars, William Jones became the first to disseminate translations of a 'Hindu' Religion in the Victorian Society including the 'Code of Manu' and 'Bhagavad Gita'.<sup>64</sup> These efforts to create the first cadre of company officers who were 'Sanskritists' were so influential that Warren Hastings followed in Jones's steps and became adept in Sanskrit. Hastings also promised monetary remuneration to those officers who could learn both the language and the customs of the Indian society.<sup>65</sup> For Jones, building knowledge of caste was a matter of juridical determination of the community the Company was not familiar with, racially and socially. As a judge, Jones' concern was mostly certainty in laws that determined the status of being 'hindu' which shifted on a case to case basis. Working with his Brahmin assistants, who advised him when answers from Persian-translated texts of Vedas did not yield an answer, decisions were considered on a case-by-case basis and frustrated him. This was especially so because, on the other hand, he claimed to have a familiarity with 'Mohammadens'.<sup>66</sup> This concern of a 'Hindu' population and their laws was central to the gradual building of an anthropological fantasy of the subcontinent as a land of the Hindus.

In attempting to assert its own form of quasi-sovereignty through ownership which tolerated and accommodated upper caste communities, the knowledge around caste built by the British was intimately tied to their own conceptions of race as a natural category. Here, white British held themselves to be racially distinct from their 'native elite' interlocutors (ie Brahmin and Kshatriya rulers) which led to the anthropological fantasy about the 'origins' of Indian society. Sanskritist colonial officers like Jones asserted the Aryan invasion theory based solely on drawing linguistic similarities of older Roman Latin and Sanskrit. This theory asserted that a particular social hierarchy of Aryans (closer to the 'white' or British/European race) invaded and conquered the local Indigenous populations and constituted the caste hierarchy.<sup>67</sup> Brahmin and upper-caste communities were thus deemed to be the descendants of these 'Aryan invaders'. This particular theory became central to colonial officers' creation of the anthropological fantasy of upper caste dominance and reliance in the subcontinent on the more civilised castes—though none as civilised as the British. This era and group of early Indologists and Sanskritists laid the foundations for colonial knowledge of the social life of the subcontinent, and through this, its governance.<sup>68</sup>

Before any gradual and eventual takeover of the subcontinent by the British Empire, the Company had already built and developed through commerce, managing of land revenue and co-ownership, and building a caste consciousness within the Company's military cadre. At the same time, the caste consciousness of company officers did not exist in a vacuum from

<sup>63</sup> R Rocher R and L Rocher, *The Making of Western Indology: Henry Thomas Colebrooke and the East India Company* (Routledge 2014); R King, 'Orientalism and the Modern Myth of "Hinduism"' (1999) 46 *Numen* 146.

<sup>64</sup> *ibid.*

<sup>65</sup> See specifically K Raj, 'From Merchants to Imperial Bureaucrats? Commerce, Territorial Administration and East India Company, 17<sup>th</sup>-19<sup>th</sup> Century' in JC Caravaglia and C Lamouroux (eds), *Serve the Power(s), Serve the State: America and Eurasia* (Cambridge Scholars Publications 2016); GG Raheja, 'India: Caste, Kingship, and Dominance Reconsidered' (1988) 17 *Annual Review of Anthropology* 497.

<sup>66</sup> For this see specifically Henry Summer Maine citing Jones in HS Maine, *On Early Law and Custom* (J Murray 1890).

<sup>67</sup> Raj (n 65); K Mohan, 'The Colonial Ethnography: Imperial Pursuit of Knowledge for Hegemony in British India (Late 19th to Early 20th Century) *Proceedings of the Indian History Congress* (JSTOR 2002).

<sup>68</sup> Cohn (n 47); NB Dirks, *Castes of Mind* (Princeton University Press, 2011).



analogies to race—in case of both the hiring of soldiers<sup>69</sup> but also of conceiving an understanding of zamindars.<sup>70</sup>

As historian Susan Bayly rightly observes, it was not so much that the British ‘invented’ the existing social caste stratifications and system, as that their presence intensified the already existing violence.<sup>71</sup> In the subcontinent, already existing social stratification provided an opportunity for mutual benefit which later translated to indirect rule over the subcontinent,<sup>72</sup> and—as I argue here—the development of Victorian notions of international liberal legal order. It also formed the basis of naturalising caste as part of the social order for what the British imperial state later claimed was rule by respect to ‘cultural difference’ through imperial pluralism.<sup>73</sup>

The importance of caste as a racial category carried into the eventual takeover of the subcontinent by the imperial state. There were important discontinuities on the discourse of *how* to govern,<sup>74</sup> and the push and pull between the jurisdictional battle between the Company and the state.<sup>75</sup> Nonetheless, there were crucial continuities of colonial knowledge that had already been built and institutionalised through Fort Williams College and the Royal Asiatic Society founded by William Jones. So deeply engrained was the colonial knowledge on caste and Indian society that company officers such as Hastings had a policy of remunerating officers who learnt about the local culture, and led a concerted effort to build Fort Williams College for the education of East India Company officers on the local culture of the subcontinent.<sup>76</sup> Despite becoming the lynchpin of ‘despotic’ rule by the Company, Hastings’ college influenced colonial state officers that led the governance of the subcontinent in the nineteenth century, notably, TB Macaulay.

In the era of liberal imperialism over the subcontinent, ‘pluralism’ as a ‘cultural difference’ for a more benevolent rule<sup>77</sup> fitted with notions of the ‘Indian’ society Jones—amongst other Indologists—had suggested. Macaulay’s reform policies that pushed for codification as part of better government over colonies as ‘trust’, needed to be homogenised as a matter of ‘respect’ for the social life and culture of the colonies.<sup>78</sup> In the context of the subcontinent, this became an extension of the bedrock of caste consciousness and the anthropological imagination of the subcontinent laid by the Company. Except, this time, it was carried forward as a proper science that encoded the knowledge of this society into Anglophonic juridical form for colonial governance.<sup>79</sup>

The push for codification, led by TB Macaulay, resulted in the Charter Act 1833.<sup>80</sup> Macaulay argued against the British commission in England as they would not fully understand the language, customs and situation of native people.<sup>81</sup> Macaulay argued that codification did not mean complete assimilation of native customs, but that he would remain sensitive to existing rules and customs by maintaining an understanding of difference.<sup>82</sup> This sensitivity to ‘existing’ rules was of course to the ones provided by the dominant caste leaders and communities. The goal for Macaulay was a uniformity in law that would lead to greater regulation and government

<sup>69</sup> K Roy, ‘The Hybrid Military Establishment of the East India Company in South Asia: 1750–1849’ (2011) 6 *Journal of Global History* 195; P Barua, ‘Inventing Race: The British and India’s Martial Races’ (1995) 58 *Historian* 107.

<sup>70</sup> For phenological assertion about zamindars by company officers, see, eg, CJ Fuller, ‘British India or Traditional India? An Anthropological Problem’ (1977) 42 *Ethnos* 95.

<sup>71</sup> Bayly (n 12).

<sup>72</sup> See most starkly the argument provided by K Mantena, *Alibis of Empire: Henry Maine and the Ends of Liberal Imperialism* (Princeton University Press 2010).

<sup>73</sup> For the idea of cultural difference and imperial pluralism as a crucial liberal notion of British imperial rule, see, eg, Anthony Pagden, ‘Imperialism, Liberalism and the Quest for Perpetual Peace’ (2005) 134(2) *Daedalus* 46.

<sup>74</sup> On the transitions from Company governance to imperial state governance, see, eg, M Mukherjee ‘Justice, War, and the Imperium: India and Britain in Edmund Burkes Prosecutorial Speeches in the Impeachment Trial of Warren Hastings’ (2005) 23 *Law and History Review* 589; C Boisen, ‘The Changing Moral Justification of Empire: From Right to Colonise to Obligation to Civilise’ (2013) 39 *History of European Ideas* 335. See also C Boisen, ‘Triumphing over Evil: Edmund Burke and the Idea of Humanitarian Intervention’ (2016) 12 *Journal of International Political Theory* 276.

<sup>75</sup> Pahuja (n 60).

<sup>76</sup> Raj (n 65).

<sup>77</sup> Boisen (n 73).

<sup>78</sup> *ibid.*

<sup>79</sup> S Den Otter, ‘The Legislating Empire: Victorian Political Theorist, Codes of Law and Empire’ in D Bell (ed), *Victorian Visions of Global Order: Empire and International Relations in Nineteenth-Century Political Thought* (Cambridge University Press 2007).

<sup>80</sup> *ibid.*

<sup>81</sup> *ibid.*

<sup>82</sup> *ibid.*

over the native population by the British Crown, even if it was indirectly through the Governor General, judges and codified legislation in India.<sup>83</sup>

The phrase attributed to Macaulay about civilising the subjects of the British Raj, 'Indian in colour and blood, British in taste, in attitude and intellect' has had different iterations of its context.<sup>84</sup> Within the context of broader colonial knowledge making around caste in the subcontinent, I argue that it refers to selecting and advancing dominant caste communities who were already seen as the 'literate' of the land.<sup>85</sup> In another instance, he also describes these literate natives as 'persons fit to serve the state in the highest function, and in no ways inferior to the most accomplished men who adorn the best circles in Paris and London'.<sup>86</sup> Macaulay specifically carried on the notion of a Hindu land as he thought that interpretation of 'Vedic scripts' could advance the Indian civilisation closer to the British.<sup>87</sup> In the imperial orientalist imagination of Macaulay, the native elite dominant caste leaders were part of the British civilisational ladder of racial hierarchy, which was underpinned by liberal imperialism.

Codification in this sense then did work to bring together casteist notions of hierarchy in the subcontinent together with racist Victorian notions of civilisation. Notably here, the concepts of state ownership, control over land, and governing of populations through 'public' and 'private' spaces made it imperative to create laws whereby these distinctions incorporated the exclusion of indigenous tribes and 'trans-communities' in the subcontinent through the Criminal Tribes Act 1871. The Criminal Tribes Act 1871 was enacted not only in conformity with an existing hierarchy of Brahminical knowledge provided by a native elite dominant caste, but also with expedient reasons for criminalising marginalised caste communities, Adivasi (Indigenous) communities, and other communities deemed 'immoral'.<sup>88</sup> In this sense, the Act incorporated Brahminical varna logics, in which some non-Brahmin castes are born in 'sin', along with British Victorian 'universal' morals on criminality and who is a 'good citizen'.<sup>89</sup> The dominant caste landlords were assigned as those who would notify and be notified of any 'tribe, gang, class' of person who was believed to be 'criminal'.<sup>90</sup> Descriptions of who was to be a 'criminal' were not exact but depended on profession, residence and conditions.<sup>91</sup> The notifications for identifying criminals was entirely based on identifying social practices which happened to be lower caste, trans-community people and itinerant communities which did not fit both the Brahminical and Victorian notion of 'civilised'.

These penal logics based on control of land for use were used against Adivasi communities in princely states indirectly governed by the British, particularly forest-dwelling communities in Chattisgarh, in order to extract timber during the late nineteenth century. A key instrument through which this was achieved was the Forest Act 1878.<sup>92</sup> While initially introduced as a way to 'preserve' the forest, it was essentially an attempt to manage the resources of the forest for their uses by the British along with their dominant caste zamindars, who mostly associated

<sup>83</sup> P Burroughs, 'Imperial Institutions and the Government of Empire' in Andrew Porter (ed), *The Oxford History of the British Empire Vol 3: The Nineteenth Century* (OUP 1999).

<sup>84</sup> Cited in BR Mani, *Debrahmanising History: Dominance and Resistance in Indian Society* (Manohar 2007) 199; G Viswanathan, *Outside the Fold: Conversion, Modernity, and Belief* (Princeton University Press 1998); A Rao, *The Caste Question: Dalits and the Politics of Modern India* (University of California Press, 2009); R O'Hanlon, *Caste, Conflict and Ideology: Mahatma Jotirao Phule and Low Caste Protest in Nineteenth-Century Western India* (Cambridge University Press, 2002); G Ayyathurai, 'Foundations of Anti-Caste Consciousness: Pandit Iyothee Thass, Tamil Buddhism, and the Marginalized in South India' (Doctoral Dissertation, Colombia University 2011). Viswanathan in particular states how English education was a broader colonial objective of making non-Hindu, Hindus and non-Muslim, Muslims. Mani, Rao, Bayly, O'Hanlon and Ayyathurai place this education policy as being deliberately welcomed by the dominant caste, Brahmin and Ashraf (Muslim) communities in order to secure better positions in the colonial government.

<sup>85</sup> Dirks (n 68); Cohn (n 47).

<sup>86</sup> Cited in Viswanathan (n 84) 9.

<sup>87</sup> A Tariq, 'Indology and Indologist: Conceiving India during Eighteenth and Nineteenth Centuries' (2019) 5 *Journal of Indian Studies* 17.

<sup>88</sup> M Radhakrishna, *Dishonoured by History: 'Criminal Tribes' and British Colonial Policy* (Orient Blackswan 2001).

<sup>89</sup> *ibid.*

<sup>90</sup> *ibid.*

<sup>91</sup> M Kumar, 'Relationship of Caste and Crime in Colonial India' (2004) 39(10) *Economic and Political Weekly* 1078.

<sup>92</sup> A Verghese, 'British Rule and Tribal Revolts in India: The Curious Case of Bastar' (2016) 50 *Modern Asian Studies* 1619.

themselves with Brahmin/Khastriya caste (Rajputs), and who acted as intermediaries between the Indigenous Adivasi community and the British administrators.<sup>93</sup> The Forest Act was a way for the British to interact with the otherwise isolated, tribal communities who depended for their livelihood on the resources of the forests, through dominant caste intermediaries, to ultimately control access to the forest and extraction of specific resources.<sup>94</sup> These restrictions had left many Adivasi communities displaced and were met with resistance from 1855 to 1895.<sup>95</sup>

Notably, it is here that we also observe what Rupa Viswanath calls the exceptionalisation of caste as a social, religious cultural form ‘specific’ to the subcontinent which was used by the British to justify exempting the slavery of marginalised castes from the abolition of slavery in England and other colonies in 1833.<sup>96</sup> This allowed the British to extract as much tax revenue as they could from the peasantry caste<sup>97</sup> which also served the landowners whose economic, social and political dominance depended on the maintenance of the ‘caste hierarchy’. In Madras, at this time, this included the Parayar, Pallar and Chakkiliyar caste, all of whom were categorised as ‘Pariah’ by the British—a derogatory term to assert connotations of ‘outcast’ or not fit for society due to their lower ‘intelligence’.<sup>98</sup> Thus the caste hierarchy in which they were placed by the local native elite dominant caste leaders also became part of the British empire’s institutionalised ‘civilising’ mission.<sup>99</sup>

The criminalisation of ‘tribes’ as well as ‘castes’, followed by the rebellion of 1857, resulted in the exceptionalisation of caste or the ‘fencing’ of caste within the ‘Hindu’ religion. British policy after 1859 was not to intervene in ‘native religion’.<sup>100</sup> Following the construction of the ‘Hindu’ religion by the dominant caste elite leaders and communities, native religion was characterised as ‘Hindu’ and ‘Muslim’.<sup>101</sup> Consequently, the British utilised the construction of ‘religious’ identity in the subcontinent to fit the aims of indirect rule. However, this construction of religious identity then also became an administrative matter delegated to judicial courts where, due to the influence of dominant caste interpretations of ‘codified’ law, violence against the marginalised caste found legal authority. Thus, any complaint of caste violence was considered to be a ‘native religious’ issue, and not suitable for resolution by British administrators, even as those administrators were complicit in codifying and constructing the ‘religious’ identity.<sup>102</sup>

This codification of ‘pluralistic’ laws that served the interest of both the British and the native elite caste communities was consistent with how the idea of property was conceptualised as a ‘trust’ which extended concepts of ‘imperial citizenship’, ‘loyalty’ and proximity to ‘British values’ to the governance of the subcontinent. Macaulay’s emphasis on juridification, education and the institutionalisation of the subcontinent were consistent with older anthropological fictions created by Indologists, and in fact, were also consistent with how race within international legal hierarchy intersected with the question of caste—particularly those that were advanced by a new group of colonial officers and international legal theorists.

<sup>93</sup> S Mukherjee, ‘Historical Legacies of Colonial Indirect Rule: Princely States and Maoist Insurgency in Central India’ (2018) 111 *World Development* 113.

<sup>94</sup> *ibid.*

<sup>95</sup> On the Forest Act 1878, see R Guha, ‘An Early Environmental Debate: The Making of the 1878 Forest Act’ (1990) 27 *Indian Economic & Social History Review* 65.

<sup>96</sup> R Viswanath, *The Pariah Problem* (Columbia University Press 2014).

<sup>97</sup> *ibid.*

<sup>98</sup> *ibid.*

<sup>99</sup> *ibid.* 4. See also O’Hanlon (n 84) who notes how Dalit leader Jotirao Phule criticised both the Brahmin landed elites as well as the British for increased tax collection, greater interests on money lending, control of and access to rivers, forests, and leaving any caste violence to be dealt with by Brahmin caste elites.

<sup>100</sup> Of particular importance here is the contested positions of Protestant missionaries who arrived as a result of British administrative takeover, forming Pariah-protestant alliances for mass conversions in south India which gave the marginalised caste escape from the dominant caste violence and lack of protection of colonial government. See, eg. Viswanath (n 96) 3.

<sup>101</sup> *ibid.*; Fuller (n 70).

<sup>102</sup> Viswanathan (n 84) 9. Viswanathan in particular states how English education was a broader colonial objective of making non-Hindu, Hindus and non-Muslim, Muslims. The idea of the religiously distinct Hindu and Muslim identity also found purchase in racialising Muslims as inherently ‘violent’ and ‘rebellious’: see, eg. IRM Fuerst, *Indian Muslim Minorities and the 1857 Rebellion: Religion, Rebels and Jihad* (Bloomsbury Publishing 2017); S Patel, ‘Sociological Study of Religion: Colonial Modernity and 19th Century Majoritarianism’ (2007) 42 *Economic and Political Weekly* 1089.

## Inscribing caste in the racial hierarchy of international legal order: international lawyers, colonial officers and their assistants

The process of codification ultimately relied on the constructions of the society on the ground through the orientalist imaginations of British anthropologists or Indologists. Some of the most concerted efforts in doing so were through the collection of data on caste through the 1881 census, surveys in villages and imperial gazettes.<sup>103</sup> This data was based on pre-existing conceptions built throughout the preceding years of Company rule in a similar fashion at the district level with the help of Brahmin assistants.<sup>104</sup> This data was relied on in years to follow by colonial anthropologists such as William Crooke, Edgar Thurston, and HA Rose,<sup>105</sup> and by the more influential Herbert Risley and Denzil Ibbetson, in order to compile volumes on caste and tribes of India.<sup>106</sup>

The data collected gave both a 'scientific' illusion to the construction of naturalising caste and actively facilitated in the colonial governance of the subcontinent through codified law. Juridifying caste by means of codification made sense in accordance with British policy of 'respecting' the difference in culture but 'guiding' it through racialised perceptions of Victorian morality. Beyond simple codification of 'Hindu Law' and 'Mohammaden' Law, disciplining the populations by embedding race and caste became a governing tool. Caste became a category of analysis and a unit of measurement<sup>107</sup> that informed and could fit within the broader Victorian notions of liberal imperialism beyond the subcontinent. At the forefront of this inscribing of caste into empire's law were international lawyers and colonial officers, alongside their assistants, who utilised the pseudoscience of anthropometry to conceptualise caste and race in the subcontinent. Across different registers, these actors formed discourses which further inscribed caste into the broader international legal hierarchy of racialisation at the time.

While the question of caste does not take a central position in this particular legal discourse around the law of nations broadly, in the context of the subcontinent, I emphasise the idea of 'difference' as a signifier of race and caste working together throughout these legal discourses on law of nations or international law as it was already coined by Bentham at the point.<sup>108</sup> The inclusion—and thus naturalisation of caste—as part of a hierarchy of race, was a corollary to how international law was constructed as a natural racialised global legal order. The work of Indologists to theorise caste in similar fashion to constructing—and naturalising—racial hierarchy was reflective and apparent in the work of international lawyers of the time: notably, James Mackintosh, Henry Sumner Maine and James Lorimer.

James Mackintosh was one of the earlier Scottish enlightenment scholars whose writings influenced British political identity in the nineteenth century.<sup>109</sup> His discourses on the law of nations were reflective of his experiences through the era of Scottish enlightenment as well as his time as a judge in Bombay, India.<sup>110</sup> In thinking about the law of nations as part of the common nature of man, his writings were influenced by Grotius' natural law thinking about the idea of private property as part of the nature of man.<sup>111</sup> He emphasised the importance of the

<sup>103</sup> Mohan (n 67).

<sup>104</sup> *ibid.*

<sup>105</sup> *ibid.*

<sup>106</sup> CJ Fuller, 'Anthropologists and Viceroys: Colonial Knowledge and Policy Making in India, 1871–1911' (2016) 50 *Modern Asian Studies* 217.

<sup>107</sup> Raheja (n 65).

<sup>108</sup> MW Janis, 'Jeremy Bentham and the Fashioning of "International Law"' (1984) 78 *American Journal of International Law* 405.

<sup>109</sup> O Gust, 'Remembering and Forgetting the Scottish Highlands: Sir James Mackintosh and the Forging of a British Imperial Identity' (2013) 52 *Journal of British Studies* 615.

<sup>110</sup> *ibid.*

<sup>111</sup> W Christian, 'James Mackintosh, Burke and the Cause of Reform' (1973) 7 *Eighteenth-Century Studies* 193. Another factor to which the British East India Company connection to Mackintosh and Burke is instructive is that Mackintosh was appointed Recorder at the Bombay Supreme Court in India after his meeting with Burke. During which time he wrote law of nations and nature. His influence of the Scottish enlightenment thinking, along with his engagement with Grotius and Burke, resonated in his time in colonial India. More so because he was also surrounded by intellectual thinkers who were moving towards an argument for greater State control of Company territories.

cultivation and labour of ‘private property’ as an ethic of intercourse between men.<sup>112</sup> More importantly, Mackintosh emphasised this ethic of intercourse as a means to an end for the progress of man.<sup>113</sup> Gust argues that this idea of progress for Mackintosh was specifically drawn from the context of Scottish enlightenment in the Highlands,<sup>114</sup> where ideas of the civilisation of the Highlands were accompanied by a notion of progress based on ‘enabling agricultural improvement through enclosures, building churches, schools, prisons’.<sup>115</sup> The concept of property, Mackintosh argued, is the central subject that marks the progress or stage of civilisation because property needs to exist for the wellbeing of mankind.<sup>116</sup> As a marker of civilisation, it needs to be developed from the ‘transient occupancy of a savage’ to the ‘comprehensive minute code of property which is the result of the most refined civilization’.<sup>117</sup> Additionally, this progress can only be made by the institution of the state and its ancillary administrative functions of legislation, judiciary and police.<sup>118</sup>

As a judge in the Courts of Bombay, Mackintosh became interested in the process of codification and what that could bring to the ‘civilisation’ and development of the subcontinent. In this he was heavily reliant on William Jones’s Indology and particularly its focus on the ‘native customs’ of the subcontinent.<sup>119</sup> Mackintosh’s approach to understanding the context of the subcontinent was based on understanding the Sanskrit language, culture, and customs and owed much of his own approach to Jones.<sup>120</sup> He was amongst one of the key founders of Scottish orientalism of the subcontinent, and founded the Asiatic Society of Bombay.<sup>121</sup> Despite differences in his understanding of the role of caste in the subcontinent from other Indologists,<sup>122</sup> Mackintosh reiterated the naturalisation of caste as part of the ‘custom’ of the subcontinent. He emphasised that one of the most significant roles British played in developing laws for the protection of property was to ‘protect the eminent or ancient commercial families of native Indians’.<sup>123</sup> He maintained a similar myth of Brahminism as Jones of returning ancient India to its ‘former’ glory through the guidance of English civilisation—though one which focused on the land being a native Hindu land invaded by Muslims. In his essay on Lord Cornwallis, he describes Cornwallis’s defeat of Tipu Sultan as ‘a just defence of an ally’ and further that when the ‘nations of India turn their eyes to his monument, rising amidst fields with his paternal care has restored its ancient fertility, may those who have suffered violence at the hands of who unjustly call themselves “Great”, at length learn to love and revere the good’.<sup>124</sup> He was also particularly interested in the linguistic comparisons of Sanskrit as well as Brahmin philosophy as part of understanding ‘ancient India’.<sup>125</sup> While decrying the effects of caste hierarchy, Mackintosh’s understanding of the subcontinent emphasised a civilisational role of the British towards the native—while maintaining, understanding and guiding ‘local’ customs which were inadvertently based on Brahminism and the naturalisation of caste itself—as part of the racial global order.

The legal theories of James Lorimer, another jurist of international law who extended Scottish Enlightenment thinking, can also be seen as reflecting not just orientalist and racialised notions

<sup>112</sup> *ibid.*

<sup>113</sup> *ibid.*

<sup>114</sup> *ibid.*

<sup>115</sup> J Mackintosh, *A Discourse on the Study of the Law of Nature and Nations* (Pratt 1843).

<sup>116</sup> *ibid.*

<sup>117</sup> *ibid.*

<sup>118</sup> *ibid.*

<sup>119</sup> J Mackintosh, ‘The Opening of the Literary Society of Bombay’ in J Mackintosh, *Miscellaneous Works of Sir James Mackintosh* (Appleton 1871) 399–400.

<sup>120</sup> J Rendall, ‘Scottish Orientalism: From Robertson to James Mill’ (1982) 25 *Historical Journal* 43.

<sup>121</sup> *ibid.*

<sup>122</sup> *ibid.*

<sup>123</sup> J Mackintosh, ‘A Charge Delivered to the Grand Jury in Bombay’ in *Miscellaneous Works* (n 115) 506.

<sup>124</sup> J Mackintosh, ‘Charles, First Marquis of Cornwallis’ in *Miscellaneous Works* (n 115) 236, 238.

<sup>125</sup> Rendall (n 120). Scottish Orientalism found its home in the Asiatic Society of Bombay, specifically focusing on producing a new cadre of Sanskritists. For example, in the vein of William Jones, Arnold Berriedale Keith continued this particular tradition and translated the Rigvedas: see AB Keith, *Rigveda Brahmanas: The Aitareya and Kaushitaki Brahmanas of the Rigveda* (1922) 31 *Philosophical Review* 409. Keith believed Indian ‘philosophy’ (ie Brahminical) texts were key to understanding a rich ancient system of the subcontinent.

of the global order at the time,<sup>126</sup> but as intricately tied to ideas of caste and the 'Aryan races' of the Indian subcontinent. Lorimer's *The Institutes of Law of Nations* creates a civilisational hierarchy of the law of nations based on racial and religious affinity to the British civilisation.<sup>127</sup> In doing so, Lorimer refers also to the extent to which other 'creeds' may be recognised 'inter-ethnically'<sup>128</sup> if not internationally. In the case of the Indian subcontinent where 'native populations are far different from the English', with reference to 'anglicizing these races', Lorimer discusses the possibility of a 'gradual development of some oriental form of political organisation not known in history'.<sup>129</sup> Here, Lorimer explicitly refers to that possibility applying only to 'Brahminism' and 'Buddhism' but not 'Mohammadens'. Lorimer's orientalisng of the subcontinent, while dismissing Brahminism as a 'superstitious' creed, nonetheless leads him to regard it as an 'Aryan' race. Specifically, towards the end of the second volume of the *Institutes*, Lorimer ends with a markedly different shift in tone as to the future of British Empire—particularly in the Indian subcontinent.

Lorimer refers again to the 'education of natives' bringing them 'much closer' to 'break down the barriers of religious and social prejudice that have separated the conqueror from the conquered'.<sup>130</sup> Referring again to 'creed', 'barring Mohammadens', Lorimer thinks that there is nothing in the 'fundamental creed of Hindus and Buddhists' that should 'hinder progress along the lines of that ethical creed which forms the basis for all religions'.<sup>131</sup> His approach takes the notions of pluralism and 'anglicization', extending them to the 'aryan races' of India, which draws a racial and religious commonality closer to the English than to those other races such as 'negroes, Mongolian, semitic, Polynesian'.<sup>132</sup> Lorimer quite explicitly places these 'Aryan' races of India close to the position of the British Empire within a global racial hierarchy, while at the same time orientalisng them. In extending his 'embrace' and notions of 'friendship', Lorimer ends the book with a metaphor apt for the inclusion of Brahminism within the white English racial hierarchy. He states that 'in these circumstances, it is not inconceivable that in his next avatar Vishnu should assume the form of Hymen-the Uniter'.<sup>133</sup>

This 'future' that Lorimer refers to is also not one conceived through 'force of arms' alone. He further states that 'what is impossible to Mars, may be possible to Venus', suggesting a gendered racist orientalisation.<sup>134</sup> This is clearer when he refers to the inheriting of an empire through the following analogy: 'when the pupils of zenana missions issue from seclusion adorned with the graces of east, and the culture of west, they may conquer the conquerors as the Anglo-Saxon heiresses conquered the Norman nobles, a race may spring up to inherit an empire ruled by a woman'.<sup>135</sup> Lorimer's canonical contribution to the law of nations thus ends with an incorporation of a form of perversely racialised and gendered Brahminism as part of the superior global racial order.

The English international legal jurist Henry Sumner Maine had a direct influence on colonial officers and their perceptions of caste in the subcontinent. He also lived in the subcontinent for a number of years as a magistrate. In particular, the colonial anthropologists Risley and Ibbetson were heavily influenced<sup>136</sup> by Maine's social evolutionary thinking on law and customs in the context of the subcontinent.<sup>137</sup> Maine's work on India was extensive and reflected his general theory of international law, based on his perspective of a natural social progression of society in

<sup>126</sup> Gevers (n 9).

<sup>127</sup> M Koskeniemi, 'Race, Hierarchy and International Law: Lorimer's Legal Science' (2016) 27 *European Journal of International Law* 415. See also S Tierney and N Walker, 'Through a Glass, Darkly: Reflections on James Lorimer's International Law' (2016) 27 *European Journal of International Law* 409.

<sup>128</sup> J Lorimer, *The Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities* (WW Blackwood and Sons 1883) vol I, 93.

<sup>129</sup> *ibid* vol I, 100.

<sup>130</sup> *ibid* vol II, 298.

<sup>131</sup> *ibid*.

<sup>132</sup> *ibid*.

<sup>133</sup> *ibid* vol II, 299.

<sup>134</sup> *ibid*.

<sup>135</sup> *ibid*.

<sup>136</sup> Fuller (n 106).

<sup>137</sup> *ibid*.

history.<sup>138</sup> Maine relied heavily on Roman jurisprudence and its influence on Grotian ideas of law of nations to the extent that he believed ‘we cannot overstate the value of the Roman jurisprudence to International Law’ and that ‘if we fail to comprehend the influence of certain Roman jurisconsults on the mind of Hugo Grotius, and then the influence of the great book of [Hugo] Grotius on International Jurisprudence, we lose all chance of comprehending the body of rules which alone protects the European Commonwealth from permanent anarchy’.<sup>139</sup> His approach to law generally emphasised a historical reflection of social progress and Roman law was his recurring central historical example that demonstrated this progress. In particular, his time in the subcontinent writing on ‘Villages in the East and West’<sup>140</sup> as well as reflections on Hindu law in historical lectures on ‘Ancient Law and Customs’ were both attempts to understand the legal history of ‘indian society’.<sup>141</sup>

In doing so, he relied heavily on William Jones’s construction of the history of the subcontinent, the Aryan invasion theory, thereby justifying the hierarchy of hereditary castes.<sup>142</sup> This explained ‘Hindu’ Law—in much the similar way as those that had sought to codify it—as a linguistic, scholarly system of theological rites taught by and through Brahmins akin to Roman theological precepts.<sup>143</sup> In a broader sense then, Maine’s writing on international law reiterated and reinforced his approach to understanding caste and reliance on anthropological fantasy created by preceding anthropologists—both Indologists and Sanskritists. Maine set out a particular racial understanding of ‘less advanced’ people—referring to upper-caste Brahmin scribes—in his conceptualisation of the nature of the ‘Code of Manu’,<sup>144</sup> thus reiterating and maintaining a particular European exceptionalism in the racial hierarchy.<sup>145</sup> He maintained a distinction between European Aryan and their less civilised counterpart in the East.<sup>146</sup> Maine further distinguished between how sovereignty ought to be understood in its ancient feudal form as indivisible, and its present form in Europe as a reflection of the social progress that civilised European communities have made.<sup>147</sup> This progress had yet to be internalised in the less advanced peoples of the East, ie the subcontinent.<sup>148</sup>

Maine’s writings were not just highly influential on the two most prominent colonial anthropologists, Risley and Ibbetson, but actively approved of the work of the former. Risley presented a theory of caste that took the preceding data collected by various colonial officers—most of them part of the Indian Civil Services—and applied what was at the referred to as the ‘science’ of anthropometry.<sup>149</sup> Based in a racial eugenicist pseudoscience, anthropometric methods of classifying castes through photography, measurement of face and body to make deterministic ‘naturalised’ claims became a usual occurrence from surveys done by colonial officers that were published in imperial gazettes following 1840.<sup>150</sup> The first use of anthropometry by Risley was the

<sup>138</sup> D Alan and A Diamond HS Maine, *The Victorian Achievement of Sir Henry Maine: A Centennial Reappraisal* (Cambridge University Press 1991).

<sup>139</sup> C Landauer, ‘From Status to Treaty: Henry Sumner Maine’s International Law’ (2002) 15 *Canadian Journal of Law & Jurisprudence* 219.

<sup>140</sup> HS Maine, *Village-Communities in the East and West* (H Holt 1876).

<sup>141</sup> Landauer (n 139).

<sup>142</sup> Fuller (n 106).

<sup>143</sup> Maine (n 140).

<sup>144</sup> The Code of Manu is a Vedic text that explicitly inscribes caste system as a social/spiritual hierarchy in the form of legal social codes for a society. For more on this see A Sanil, ‘Revisiting Inequality and Caste in State and Social Laws’ (2023) 4 *CASTE: A Global Journal on Social Exclusion* 267.

<sup>145</sup> Fuller (n 106).

<sup>146</sup> *ibid.*

<sup>147</sup> *ibid.*

<sup>148</sup> *ibid.*

<sup>149</sup> C Pinney, ‘Classification and Fantasy in the Photographic Construction of Caste and Tribe’ (1990) 3 *Visual Anthropology* 259. Photography itself assumed a more central role after the 1857 Rebellion in the governance of the subcontinent. It became a generative tool for managing, categorising, recreating through the lens of the colonial photographer the ‘reality’ of the subcontinent. On this see, eg, C Pinney, *Camera Indica: The Social Life of Indian Photographs* (University of Chicago Press 1997); Z Chaudhary, *Afterimage of Empire: Photography in Nineteenth-Century India* (University of Minnesota Press 2012); EM Hight and GD Sampson (eds), *Colonialist Photography: Imag(in)ing Race and Place* (Routledge 2013); R James, *Picturing Empire: Photography and the Visualization of the British Empire* (University of Chicago Press 1997).

<sup>150</sup> Pinney (n 149); C Bates, ‘Race, Caste and Tribe in Central India: The Early Origins of Indian Anthropometry’ in P Robb (ed), *The Concept of Race in South Asia* (Oxford University Press 1995). Imperial surveys were a common practice of colonial officers in both the Company and later on, although they assumed a more systematic form after 1857.

result of an ethnographic survey of Bengal, which consolidated the work of former colonial ethnologists, in the form of a two volume book titled *Tribes and Castes of Bengal*.<sup>151</sup> Risley's first appointment as the Assistant Director of Statistics in 1875 during WW Hunter's term as the Director for the first general statistical survey of the subcontinent in 1869 allowed him to employ anthropometry for the first time utilising the ethnographic data of officers before him.<sup>152</sup> Risley's most expansive work on the anthropometry of the subcontinent was enabled by his appointment as the Honorary Director of the Survey of India and later as he led the census commission of 1899.<sup>153</sup>

His foremost archive of anthropometric studies was consolidated and theorised—influenced also from Maine's hypothesis of social progress within the subcontinent—in his book *The Peoples of India*, which he sent to several prominent Indologists and orientalist from whom he received approval, including, notably, Henry Sumner Maine.<sup>154</sup> Like Maine and Lorimer, Risley classified humanity in the subcontinent in accordance with where they fit within the broader racial hierarchy. Using anthropometry, he described racial types in subcontinent to be mainly divided between 'Aryans, Mongolians, [and] Dravidians'.<sup>155</sup>

For Risley, this hierarchy of Aryans of India having a higher civilisation status to Dravidians was further solidified by 'scientific' means.<sup>156</sup> His approach—through photography—was to use a pseudoscience of measurement to naturalise the racial superiority of the Indo-Aryan over the Dravidian, thus making 'caste' as natural a social reality as 'race' is for the purposes of hierarchy of civilisation.

The above image is from Risley's *The People of India*, where he describes the archetype of the 'Brahmin' caste.<sup>157</sup> Reflecting his hierarchical views of where Aryan races within India, such as the Brahmin, stood in the racial hierarchy, his descriptions of those considered civilised were carefully framed. In this case, to evoke a description of the so-called learned nature of the Brahmin, along with the impression of orientalist notion of ancient civilisation of the 'east', a Brahmin Priest is photographed sitting squarely with beads in his hand, described as 'old-fashioned, learned'. The categorisation of the Brahmin caste then, for Risley, is approximated to other more 'primitive' Brahmin caste that have isolated themselves more—whereas the Brahmin of Northern India have 'lived for centuries under foreign governments'.<sup>158</sup> Even within the categorisations of caste, the closeness to 'westernisation' becomes necessary for Risley to 'grade' the Brahmin that is 'less' or 'more primitive'—therefore attaching a racialising logic to presenting the caste position of the Brahmin.

This pictorial representation of the Brahmin and their position vis-à-vis 'foreign governments' is further put into context in the picture of lowered-caste family (below). In this particular photograph, Risley describes the Sutar caste, a lowered labour caste in a completely different frame to the Brahmin, both textually and visually. Framed as a family, with a wider lens from a greater distance focusing more the abjection of the family as a whole rather than the closer frames of Brahmin priest who was sitting, Risley describes them immediately as in juxtaposition to the Brahmin Caste: 'Brahmin will not take water from their hands'.<sup>159</sup> Placing them immediately as those from 'indigenous' or 'neo-aryan' races, Risley describes them as worshippers of a 'white man with three eyes'.<sup>160</sup> In the context of broader conversations of racial hierarchy in the subcontinent, of civilisation and caste, these two pictures describe how Risley viewed the position of lowered caste communities and Brahmins or Aryan races within the English racial hierarchy and caste hierarchy in the subcontinent. In both the framing, the textual description, and use of

<sup>151</sup> H Risley, *The People of India* (2nd edn, Thacker, Spink and Co 1915) xiii.

<sup>152</sup> *ibid.*

<sup>153</sup> *ibid.* xiv.

<sup>154</sup> Fuller (n 106).

<sup>155</sup> Risley (n 151).

<sup>156</sup> *ibid.*

<sup>157</sup> *ibid.* plate XXV.

<sup>158</sup> *ibid.*

<sup>159</sup> *ibid.*, plate XXVI.

<sup>160</sup> *ibid.*



## PLATE XXV.

PHOTOGRAPH BY PANDIT GIRAJ KISHOR DUTT, RAI  
BAHADUR.

PANDIT DULI CHAND, VIDYAPATI BRĀHMAN  
OF AGRA: INDO-ARYAN TYPE.

This is a fine picture of the old-fashioned, learned Brāhman of Northern India, whose life is devoted to the study of Sanskrit literature and the observance of an intricate form of ritual. He has been little influenced by Western culture. He wears wooden clogs, held between his toes by a brass peg, because the touch of leather is a source of ceremonial pollution. He carries a rosary, by the help of which he mutters prayers or holy texts, and recites the names of the Deity whom he worships. He is in many ways like the Nambutiri Brāhman of Malabar, the most primitive type of Brāhman. But the latter have preserved their isolation more successfully than their Northern brethren, who have lived for centuries under foreign Governments. His title Vidyapati implies that he is a master of learning.

## PLATE XXV.



**Figure 1.** Photograph representing the Brahmin Caste. Source: Herbert Risley, *The People of India* (2nd edn, Thacker, Spink & Co 1915).

metric, Risley categorises caste positions as natural scientific ‘reality’ which exists as part of the ‘natural’ racial hierarchical order.

In the latter part of the nineteenth century, these ethnographic data, visual and textual, on ‘native’ castes and tribes were instrumental in the codification process which were tools of colonial governance embedding caste into the broader racial hierarchy imagined by the British conception of their ‘social trust’ to civilise the subcontinent. Beyond being used to construct matriculated bio-essentialist notions of ‘race’ and ‘caste’, these methods of collecting data on ‘native tribes and castes’ were instrumental to ascertain ‘social traits’ which informed the governance of the subcontinent. Most notably, in drafting of manuals of military recruitment and policy,<sup>161</sup> classification of social traits associated to ‘caste’ and ‘tribes’ was for the purposes of criminal law (such as the aforementioned Criminal Tribes Act<sup>162</sup>) in categorising, keeping record and developing ‘fingerprints’ of specific criminal tribes, castes based on anthropometric data,<sup>163</sup> revenue settlement and collection.<sup>164</sup>

Of the above areas, it was in revenue settlement and land allotment that Ibbetson’s ethnological study of Punjab<sup>165</sup> was instrumental to naturalise caste-based associations for the purposes of governance. Ibbetson was influenced in his time at Punjab as a census commissioner in 1881 by Maine’s own work in Punjab where he served as a Magistrate.<sup>166</sup> In particular, Ibbetson described the ‘scavenger castes’ as the ‘lowest of the low’, homogenised different lower caste

<sup>161</sup> P Barua, ‘Inventing Race: The British and India’s Martial Races’ (1995) 58 *Historian* 107; M Des Chene, ‘Military Ethnology in British India’ (1999) 19 *South Asia Research* 121.

<sup>162</sup> L Ravichandran, ‘Colonial Construct of Criminal Tribes—Piramalai Kallar and Narikoravar of Tamil Nadu’ in MC Behera (ed), *Tribe—British Relations in India* (Springer 2021).

<sup>163</sup> For this see specifically, C Anderson, ‘Voir/Savoir: Photographing, Measuring and Fingerprinting the Indian Criminal’ in C Anderson (ed) *Legible Bodies: Race, Criminality and Colonialism in South Asia* (Bloomsbury 2004); MR Waits, ‘The Indexical Trace: A Visual Interpretation of the History of Fingerprinting in Colonial India’ (2016) 17 *Visual Culture in Britain* 18.

<sup>164</sup> D Ibbetson, *Punjab Castes: Races, Castes and Tribes of the People of the Panjab* (Cosmo Publications 1916).

<sup>165</sup> *ibid.*

<sup>166</sup> Fuller (n 106).

## PLATE XXVI.

FROM A PHOTOGRAPH RECEIVED FROM RAI BAHADUR  
B. A. GUPTA.

A GROUP OF SUTARS, CARPENTERS, BENGAL:  
MONGOLO-DRAVIDIAN TYPE.

The carpenters of Bengal, like other craftsmen, hold a low rank, and Brāhmins will not take water from their hands. Besides ordinary work in wood, they carve conch-shells into bracelets, make images of the gods, and paint religious pictures. They are probably recruited from the non-Aryan or indigenous races. Their chief object of worship is Visvakarma, the divine architect of the Universe, sometimes represented as a white man with three eyes and bearing a club; but more usually he is symbolised by the tools used by the householder, which are set up and decorated with flowers; offerings are presented to them, and the god is besought to favour his votaries in their profession during the coming year.

## PLATE XXVI.



**Figure 2.** Photograph representing the Sutar Caste. Source: Herbert Risley, *The People of India* (2nd edn, Thacker, Spink & Co 1915).

communities into 'scavenger caste' whose position in the social organisation of the province of Punjab was dependent on working for other castes, and made their position one of 'service' to others.<sup>167</sup> Thus, as Waqas Butt describes, the distinction of higher caste to lower caste was based on those 'who ruled' and those who were 'political subject[s]'.<sup>168</sup> In the recordkeeping of land, colonial officers kept and organised data that included, amongst other information, dues from 'menial' service or rent from 'village servitude'. Such data registered or naturalised Ibbetson's assumptions by designating lowered-caste farmers as tenants of land where upper-caste land owners were given—by recording of data—hereditary claims to private land ownership.<sup>169</sup>

## Conclusion: the casteist state as part of a racialised civilisational hierarchy in a global legal order

The colonial encounter of the British Empire—first through the commercial company and then through the Empire itself—is a negotiation of overlapping powers in which the native dominant caste elite ultimately continues to thrive in its caste dominance while gaining capital through subsuming itself under the racialising logic of the coloniser. Being closer to British values and civilisation was also particularly important to the maintenance of caste hierarchy and superiority since the dominant caste were deemed 'closest'—though never equal—to British civilisation.

It is also crucial to point here, as caste historians observe, that the same ideas used for imperial governance by the British and caste elites to continue their dominance were also then used to create resistance movements by the marginalised caste people. 'Dalit' politics, as Anupama Rao points out,<sup>170</sup> used ideas of minority representation, access to public office, and the army as a way to seek their own self-determination in a period where dominant caste elites had already

<sup>167</sup> *ibid.*

<sup>168</sup> WH Butt, 'Beyond the Abject: Caste and the Organization of Work in Pakistan's Waste Economy' (2019) 95 *International Labor and Working-Class History* 18.

<sup>169</sup> *ibid.*

<sup>170</sup> Rao (n 84).

secured political and administrative positions in the colonial government. Thus, the reliance on broader notions of ‘rule of law’ or liberal legal notions like civil rights and protection became and remain important avenues for discussing the relationship of caste discrimination and legal reform.<sup>171</sup> However, the question of whether juridification of caste discrimination also limits anti-caste aims and at times perpetuates caste is often left unanswered.<sup>172</sup> In this sense, it is also possible to look at the argument of this article as pointing to a double edge of Dalit politics: as a form of emancipation and limitation that is also inherent within the paradox of international law in the twentieth century, that is, the offer both of hope and of doubt.<sup>173</sup>

As to international legal history, what remains missing in conversations on race and international law, and distinctive to the subcontinent, is how exactly the ‘dynamic of difference’ fits within already differentiated pre-European society.<sup>174</sup> Here the ‘dynamic of difference’ was not, I argue, simply a case of racial differentiation but of placing the internal difference of caste into the broad global hierarchy of difference, namely race. This relationship between caste and race within a history of the early law of nations and Victorian international law is particularly important as it is also the time period which foreshadowed the rise of the international society,<sup>175</sup> the imperial nation state and the formalisation of international law as a codified body of jurisprudence.<sup>176</sup>

Following this, it is worth then thinking and perhaps problematising the concurrent emergence Dalit politics during this very time period, keeping in mind the groundwork laid by the British and upper-caste communities in engraving, entrenching and juridifying caste into a liberal imperial order. This is particularly important given the critical arguments within Dalit political philosophy that imagine the postcolonial ‘secular’ state of India as a Brahminical political and legal order.<sup>177</sup> Anti-caste scholars have continuously pointed out the limitations of subaltern and postcolonial theories. In particular, scholars such as Kancha Illiah Sheppard,<sup>178</sup> Gopal Guru,<sup>179</sup> and Gail Omvedt<sup>180</sup> point towards a lack of focus on social movements led by marginalised caste leaders and communities, as opposed to Brahmin and upper-caste leaders. In thinking about the historical linking of caste within the broader racial hierarchy of international legal order, we can also rethink and reframe contemporary politics of the subcontinent and the issues of Dalit, Adivasi and Pasmanda resistance, taking into consideration the presumptions and limitations that form when thinking only through the lens of a legal liberal world order.

This reconceptualisation of the construction of race embedding caste within it—thereby both inscribing its violence in the emerging global legal order and concealing its operation through liberal notions of state governance—can lead to other possibilities of addressing inequalities of caste and race. In a sense then, my argument also opens up opportunities for us not just to think about the role of race in international law, but how to think about addressing other forms of discrimination beyond a siloed form of liberal human rights, or ontological categories that need to be fixed, and instead understanding them as constitutive of racial global order.

<sup>171</sup> See most notably M Mitta, *Caste Pride: Battles for Equality in Hindu India* (Westlands Publication, 2023).

<sup>172</sup> This is a point where an equivalent to critical race theory has not yet found its foundation in the context of caste except for another recent provocation on developing a critical caste studies by G Ayutharai, ‘Is It Time for a New Subfield? Critical Caste Studies’ *South Asia @ LSE Blog* <<https://blogs.lse.ac.uk/southasia/2021/07/05/it-is-time-for-a-new-subfield-critical-caste-studies/>>. At the time of writing, this remains a framework mentioned largely within the confines of sociology and education.

<sup>173</sup> Here I am referring to the arguments on the political possibilities and limitations as well as the inherent agnosticism of the international legal system, as pointed out by S Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge University Press 2011).

<sup>174</sup> Here I am referring to Antony Anghie’s ‘Dynamic of Difference’ in A Anghie, ‘The Evolution of International Law: Colonial and Postcolonial Realities’ (2006) 27 *Third World Quarterly* 739.

<sup>175</sup> D Gorman, *The Emergence of International Society in the 1920s* (Cambridge University Press 2012).

<sup>176</sup> M Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press 2001).

<sup>177</sup> G Omvedt, *Dalits and the Democratic Revolution: Dr Ambedkar and the Dalit Movement in Colonial India* (SAGE Publications 1994); G Omvedt, *Dalit Visions: The Anti-Caste Movement and the Construction of an Indian Identity* (Orient Blackswan 2006).

<sup>178</sup> KI Sheppard, *The Weapon of the Other: Dalitbahujan Writings and the Remaking of Indian Nationalist Thought* (Pearson Education India 2012).

<sup>179</sup> G Guru, ‘Dalit Vision of India: From Bahishkrut to Inclusive Bharat’ (2004) 36 *Futures* 757.

<sup>180</sup> Omvedt (n 177).

The nature of race and caste, though important to understand separately, needs also to be understood as embedded through the British colonial encounter within international legal history. Here, we have further space to explore alternate epistemologies from the Global South that do not necessarily homogenise the history and sociology of the 'Global South'. This makes way for us to think more sensitively about Dalit, Adivasi and Pasmanda approaches to international legal history and international legal theory can be consistent with theories of race and international law. One example would be anchoring Ambedkar's thought on 'annihilation of caste'<sup>181</sup> beyond interpretations of Ambedkarian thought within constitutional reform in a liberal legal order.<sup>182</sup> Another intervention could be that we might give more consideration to Periyar's approach to the construction of the 'village'<sup>183</sup> in broader anti-caste developmental thinking. The inclusion of Dalit Feminist theory,<sup>184</sup> for example, has the ability to make its mark in telling us about the anti-caste movement's contribution to anti-colonialism in the subcontinent—without objectifying caste as a fixed category of culture. Adivasi thought on developmentalist history,<sup>185</sup> counter-narration and counter-visibility could be explored in conjunction with the role of caste and race in the making of international law. Pasmanda thought complicates liberal narratives of minority rights further in both the context of post-colonial Pakistan<sup>186</sup> and India,<sup>187</sup> pushing us to think beyond theories and critiques of human rights from the location of peripheries within the Global South.

These possibilities do not simply complicate, but enrich, the furthering of TWAIL scholarship. Taking up the attention to caste as interlinked with the construction of race allows us to explore these possibilities through specific contexts and local histories of the subcontinent and leads to new pathways of thinking about how international law is developed, actualised and adopted within these contexts. Existing interventions within TWAIL and broader critical international law that rely on subaltern studies,<sup>188</sup> postcolonial feminist theory<sup>189</sup> and critical literature on law, gender and development,<sup>190</sup> while addressing questions of race and even Indigeneity, do not contextualise it within the central social category of the subcontinent: caste. This article therefore, most importantly, gives critical international legal theorists and historians the possibility of not essentialising processes of racialisation in a way to subsume or undermine caste as a social

<sup>181</sup> Ambedkar (n 20).

<sup>182</sup> B Chakrabarty, *The Socio-Political Ideas of BR Ambedkar: Liberal Constitutionalism in a Creative Mould* (Routledge, 2018).

<sup>183</sup> EVR Periyar, 'Towards the Complete Destruction of the Old Order' (2020) 4 *Prabuddha: Journal of Social Equality* 1.

<sup>184</sup> Arya and Rathore (eds) (n 28).

<sup>185</sup> V Xaxa, *State, Society, and Tribes: Issues in Post-Colonial India* (Pearson 2008). See also the Tribal Collective of India Publications; RR Ziipao, *Infrastructure of Injustice: State and Politics in Manipur and Northeast India* (Taylor & Francis 2020); SR Bodhi, 'Tribes and State Policy in India: Revisiting Governing Principles from a Decolonial Social Work Perspective' (2020) 50 *British Journal of Social Work* 2372; SR Bodhi and RR Ziipao, *Land, Words and Resilient Culture: The Ontological Basis of Tribal Identity* (Tribal Intellectual Collective India 2019).

<sup>186</sup> G Asif, 'Jogendranath Mandal and the Politics of Dalit Recognition in Pakistan' (2020) 43 *South Asia: Journal of South Asian Studies* 119; S Mahmood, 'From Untouchable to Dalit: Narratives and Strategies of Assertion among the Scheduled Castes of Pakistan' (2022) 2 *Journal of Sindhi Studies* 1; G Hussain, "'Dalits are in India, Not in Pakistan': Exploring the Discursive Bases of the Denial of Dalitness under the Ashrafia Hegemony' (2020) 55 *Journal of Asian and African Studies* 17.

<sup>187</sup> KA Ansari, 'Pluralism and the Post-Minority Condition: Reflections on the "Pasmanda Muslim" Discourse in North India' in B De Sousa Santos and BS Martins (eds), *The Pluriverse of Human Rights* (Routledge 2021).

<sup>188</sup> P Singh, 'Indian International Law: From a Colonized Apologist to a Subaltern Protagonist' (2010) 23 *Leiden Journal of International Law* 79. I am also referring here to references to Baxi, Chakrabarty, and Spivak within law, international law and its history: A Orford, 'Feminism, Imperialism and the Mission of International Law' (2002) 71 *Nordic Journal of International Law* 275. See further more regional conversations on international law, race, class in the context of India or Pakistan: B Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge University Press, 2003); BS Chimni, 'The Self, Modern Civilization, and International Law: Learning from Mohandas Karamchand Gandhi's Hind Swaraj or Indian Home Rule' (2012) 23 *European Journal of International Law* 1159.

<sup>189</sup> Most notably Orford (n 188); K Grewal, 'Can the Subaltern Speak within International Law? Women's Rights Activism, International Legal Institutions and the Power of "Strategic Misunderstanding"' in N Dhawan, E Fink, J Leinius and R Mageza-Barthel (eds), *Negotiating Normativity* (Springer 2016).

<sup>190</sup> For example the seminal work of Ratna Kapur: R Kapur, *Gender, Alterity and Human Rights: Freedom in a Fishbowl* (Edward Elgar 2018); R Kapur, 'Gender, Sovereignty and the Rise of A Sexual Security Regime in International Law and Postcolonial India' (2013) 14 *Melbourne Journal of International Law* 317. Kapur however does imagine postcolonial feminism as addressing how intersections of race, caste, sexuality, religion can inform our understanding of gender—through the category or the construction of caste within the context of the subcontinent historically remains an open question, particularly through Dalit feminist perspectives.

construction, but to understand how their histories intersect and continue to connect in contemporary forms. It allows us to think further on how the abolition of race<sup>191</sup> and the annihilation of caste are prefigurative liberatory goals that do not contradict each other, but need to be understood together.

<sup>191</sup> I am referring here to the established scholarship extending the thesis of racial capitalism towards abolitionism; RW Gilmore, *Abolition Geography: Essays Towards Liberation* (Verso Books, 2022).