A LEGAL GENEALOGY OF DESCENT FROM SLAVERY IN THE BRITISH ATLANTIC TO THE 2001 WORLD CONFERENCE AGAINST RACISM

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Introduction

Robert Knox crashed on the east coast of Ceylon, present-day Sri Lanka, near the port at Trincomalee in 1659. Knox, a sailor for the British East India Company, was captured by the Kingdom of Kandy and remained a prisoner of the Kingdom for the next twenty years.[1] After twenty years, Knox managed to escape to Dutch-colonized Ceylon where he acquired passage to England.[2] Soon after returning, Knox wrote an account of his time inside of the Kingdom of Kandy in his 1681 book *An Historical Relation of the Island Ceylon.*[3] Knox was subject to a very loose captivity where he was given "freedom of movement within" the Kingdom.[4] This allowed him to write a detailed ethnographic account of the Kingdom. As a sailor for the East India Company, Knox's discussion of the caste system provides us with a snapshot of how the English thought about caste and descent in the seventeenth century.

In a chapter titled "Concerning their different Honours, Ranks, and Qualities," Knox describes the caste system in the Kingdom of Kandy, using the terms 'descent' and 'caste' almost interchangeably:

> Among this People there are divers and sundry Casts or degrees of Quality, which is not according to their Riches or Places of Honour the King promotes them to, but according to their Descent and Blood. And whatsoever this Honour is, be it higher or lower, it remains Hereditary from Generation to Generation. They abhor to eat or drink, or intermarry with any of Inferior Quality to themselves. The signs of higher or meaner Ranks, are wearing of Doublets, or going bare-backed without them: the length of their

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[1] When Knox's ship crashed near Trincomalee in 1659, the Dutch East India Company controlled most of the island—having vanquished the last remaining Portuguese strongholds in 1658. However, after King Rajasimha II agreed to help the Dutch fight the Portuguese in 1639, the Dutch East India Company allowed the Kingdom of Kandy to retain control over parts of Ceylon including the ports of Batticloa and Trincomalee. The Kingdom of Kandy had therefore been able to easily capture Knox and the rest of the crew because the ship crashed near Kandyan-controlled Trincomalee. *The Sri Lanka Reader,* ed. John Clifford Holt (Durham: Duke University Press, 2011): 189.

[2] *The Sri Lanka Reader,* ed. John Clifford Holt, 299; Ahsan Chowdhury, ""A Fearful Blazing Star": Signs of the Exclusion Crisis in Robert Knox's "An Historical Relation of the Island Ceylon" (1681)," *Restoration: Studies in English Literary Culture, 1660-1700* 29, no. 2 (2005): 2.

[3] Knox's book was quite influential at the time—inspiring much of Daniel Defoe's famous orientalist novel *Robinson Crusoe*. K. W. Goonewardene, "Robert Knox : The Interleaved Edition," *Journal of the Royal Asiatic Society of Sri Lanka*, New Series 37 (1992): 117.

[4] K. W. Goonewardene, "Robert Knox: The Interleaved Edition," 117.

> Cloth below their knees; their sitting on Stools, or on Blocks or Mats spread on the Ground: and in their Caps.[5]

In this passage, Knox detailed how social status was rigidly maintained across generations. Social and political influence were mostly a matter of inheritance and not merit. The line which a person descended from determined whether or not they would be promoted or respected. Knox's description of caste notably makes no mention of religion or religious practices; caste, according to Knox's description, seems to be a system that was used to maintain the existing social hierarchy.

Knox's book also offers a description of how Kandyans were able to enforce the boundary between descent-based communities through a strict prohibition on intermarriage. Knox pointed out that "by Marrying constantly each rank within it self, the Descent and Dignity thereof is preserved for ever; and whether the Family be high or low it never alters."[6] Knox made his conceptual association between caste and descent even clearer when, in discussing the prospect of intermarriage, he stated that "it is so much abhorred for Women of the high Cast or Descent to admit Men of the low Cast to have any thing to do with them, that I think they never do it."[7] In this description, Knox makes two important points clear: a person's caste status is predetermined at birth and, because of the rigidity and inescapability of caste status, stating a person's caste is synonymous with stating what their descent/ancestry is.[8]

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[5] Knox, *An Historical Relation of the Island Ceylon in the East Indies Together with an Account of the Detaining in Captivity the Author and Divers other Englishmen Now Living There, and of the Author's Miraculous Escape* (London: Royal Society at the Rose and Crown, 1681): 105. Available at https://archive.org/details/in.ernet.dli.2015.107116/page/n41/mode/2up.

[6] Knox, *An Historical Relation of the Island Ceylon,* 106.

[7] Knox, *An Historical Relation of the Island Ceylon*, 148.

[8] Knox's comments about intermarriage also speak to important features of the relationship between caste and gender. Knox makes it clear that the sexuality of privileged caste women is policed strictly to maintain 'pure' bloodlines.

The distinction between castes, however, was not only maintained through endogamy.[9] Knox describes how members of 'higher' castes attempted to create a complete social fissure between themselves and members of 'lower' castes by prohibiting practices like eating with members of 'lower' castes.[10] A person's caste could also be determined based on their clothing.[11] Knox does not offer much detail about the ban on interdining or the clothing requirements, but their inclusion in Knox's account speak to the degree to which a person's quality of life changed depending on their inherited caste status. The ban on interdining suggests that Kandyans believed that social and physical interactions between members of 'lower' castes and members of 'higher' castes could pollute people from 'higher' castes.

Knox also described, in the midst of his description of the various castes in the Kingdom of Kandy, how "[t]he slaves may make another rank."[12] This description shows an understanding of the relationship between the caste hierarchy and the labor regime—the people with the lowest caste status, besides 'beggars' who were forbidden from living or working amongst other people and using public services,[13] were forced into slavery.[14] Knox explained how the enslavers would provide the enslaved men with wives and houses to maintain this system and to discourage male slaves from attempting to self-emancipate.[15] Knox was describing the Kingdom of Kandy as a

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[9] In endogamous systems (like the caste system), members of small kinship groups are only allowed to marry within their kinship group; kinship groups are kept separate by this strict prohibition on intermarriage.
[10] Knox, *An Historical Relation of the Island Ceylon* , 105, 107.
[11] Knox, *An Historical Relation of the Island Ceylon,* 105-107.
[12] Knox, *An Historical Relation of the Island Ceylon,* 111.
[13] Knox, *An Historical Relation of the Island Ceylon,* 111-114.
[14] Knox, *An Historical Relation of the Island Ceylon,* 111.
[15] Roots of the popular colonial argument that caste was a harmless local phenomenon are evident in Knox's rather uncritical description of how the system of caste-based slavery was maintained. Knox, *An Historical Relation of the Island Ceylon,* 111.

slave society based on caste distinctions. Slavery, caste, and descent were thus linked in the maintenance of a stratified system of agrarian labor.[16]

Knox was not alone in discussing the relationship between caste and descent in the seventeenth century Ceylon. In his 1672 book *A Description of the Great and Most Famous Isle of Ceylon*, the Dutch minister Philip Baldaeus described the caste system in the Dutch-controlled Ceylon. Baldaeus's description of how "a Weaver's Son follows the Weaving-Trade, as the Smith's Son does that of a Smith"[17] suggests that castes were associated with specific occupations and that caste membership was a matter of inherited status. Baldaeus also detailed how members of underprivileged castes possessed no occupational flexibility because they "never marry out of their Families."[18]

Baldaeus further connected the concepts of caste and inherited status when he stated that "the *Cingalese* and *Malabars* insist much upon their Noble Descent, so they will neither eat nor drink with those of an inferior Rank."[19] Baldaeus, like Knox, linked social practices associated with the caste system, like prohibitions on interdining, to a system of descent/inherited status in seventeenth century Ceylon: people of common ancestry were seen to have a polluting effect on people of noble ancestry.

Knox and Baldaeus agreed: caste status was based on a person's descent. For both Knox and Baldaeus, caste was a way to divide people into higher and lower endogamous groups and

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[16] Knox's account of slavery and caste in seventeenth century Kingdom of Kandy forms an interesting parallel to Rupa Viswanath's recent scholarship on caste-based slavery in colonial Madras. Viswanath describes how although missionaries and British colonial officials conceptualized of caste, and the institutionalized system of forced Dalit labor, as a religious phenomenon, the allegedly 'gentle slavery' in India was in fact part of a brutal and profitable British agrarian economic regime that relied on the abuse of Dalits and control of Dalit labor. Rupa Viswanath, *The Pariah Problem: Caste, Religion, and the Social Modern India* (New York: Columbia University Press, 2014): 2-4.
[17] Baldaeus, "Jaffna and Kandy through Eyes of a Dutch Reformed *Predikant,"* in *The Sri Lanka Reader,* ed. John Clifford Holt (Durham: Duke University Press, 2011): 205.
[18] Baldaeus, "Jaffna and Kandy through Eyes of a Dutch Reformed *Predikant,"* 203.
[19] Baldaeus, "Jaffna and Kandy through Eyes of a Dutch Reformed *Predikant,"* 209.

descent was the means by which status/privilege was inherited. Knox's conceptualization of descent, as it manifested in the Kingdom of Kandy, contributed to the unfolding discussion about racial inheritance, ancestry, and descent in the British Empire at the time—arguments about the relationship between descent and slavery were circulating in the seventeenth century British Atlantic.

The Significance of Descent

"Descent" entered international law as a legal category in the definition of racial discrimination in the International Convention on the Elimination of all forms of Racial Discrimination (ICERD) in 1965. When ICERD was drafted, descent's meaning was unclear. "Descent" was added as part of an amendment to Article 1(1) proposed by the Indian delegation. The amendment was intended to clarify language about discrimination based on nationality/national origin, but there was no direct discussion of descent's meaning.[20] In discussing the amendment as a whole, the Indian delegate K.C. Pant talked about the antidiscrimination legislation in the Constitution of India including Article 16(2), which separately includes the legal categories "caste" and "descent" in its ban on employment discrimination in the civil service.[21] Pant's comments suggest that the Indian delegation's amendment to ICERD proposed the use of the legal category "descent" that had been used in the

[20] I cite David Keane's scholarship throughout this thesis because his scholarship has been instrumental in helping me understand many aspects of my project. I do, however, want to note that I am hesitant to use Keane's work as much as I do because I have concerns about his academic integrity. In his article "Descent-based Discrimination in International Law" he failed to quote the minutes of a UN meeting and passed off the language as his own. David Keane, "Descent-based Discrimination in International Law: A Legal History," *International Journal on Minority and Group Rights* 12, no.1 (2005): 106; Egon Schwelb, "The International Convention on the Elimination of All Forms of Racial Discrimination," *The International and Comparative Law Quarterly* 15, no. 4 (1966): 1002.

[21] UN General Assembly, "Twentieth Session: Official Records" (New York: UN, 1965), UN doc. A/C.3/SR.1299, paragraph 28; *The Constitution of India* (India), 26 January 1950, available at: https://www.refworld.org/docid/3ae6b5e20.html.

Constitution of India. As I discuss in more detail in chapters 2 and 3, "descent" did not refer to caste when it was used in the Constitution of India in 1950 or in ICERD in 1965.

In 2002, however, the Committee on the Elimination of Racial Discrimination (CERD)—the committee created by ICERD—defined "discrimination based on 'descent'" as "discrimination against members of communities based on forms of social stratification such as caste and analogous systems of inherited status which nullify or impair their equal enjoyment of human rights."[22] By including caste within the category of "descent," CERD's definition of descent-based discrimination echoed Knox and Baldaeus's description of the caste system in the seventeenth century. By returning to an understanding of descent and caste that resembled Knox and Baldaeus's, CERD rejected the Indian government's argument that caste was not an international human rights concern. CERD formalized the link between caste and descent in its official interpretation of the legal category "descent" that had appeared in ICERD.

General Recommendation XXIX was the result of decades of activism by Dalits[23] who pushed the international community to broaden its understanding of racial discrimination. As Purvi Mehta argues in her dissertation, Dalit activists helped show that previous human rights

[22] Committee on the Elimination of Racial Discrimination (CERD), "CERD General Recommendation XXIX on Article 1, Paragraph 1, of the Convention (Descent)," (2002). The UN Sub-Commission on the Promotion and Protection of Human Rights offered similar interpretations of "descent" in a series of working papers from 2001-2004. The working papers all use the framework of "discrimination based on work and descent"—a slight variation on the category of "discrimination based on 'descent'" used by CERD. Rajendra Kalidas Wimala Goonesekere, "Prevention of Discrimination and Protection of Indigenous Peoples and Minorities: Working paper by Mr. Rajendra Kalidas Goonesekere on the topic of discrimination based on work and descent, submitted pursuant to Sub-Commission resolution 2000/4" (UN Sub-Commission on the Promotion and Protection of Human Rights, 2001), E/CN/4/Sub.2/2001/16; Asbjørn Eide and Yozo Yokota, "Prevention of Discrimination: Discrimination based on work and descent: Expanded working paper submitted by Mr. Asbjørn Eide and Mr. Yozo Yokota pursuant to Sub-Commission decision 2002/108," (UN Sub-Commission for the Promotion and Protection of Human Rights, 2003), E/CN.4/Sub.2/2003/24; Asbjørn Eide and Yozo Yokota, "Prevention of Discrimination: Expanded working paper by Mr. Asbjørn Eide and Mr. Yozo Yokota on the topic of discrimination based on work and descent," (UN Sub-Commission for the Promotion and Protection of Human Rights, 2004), E/CN.4/Sub.2/2004/31.

[23] The term Dalits describes the group of people at the bottom of the South Asian caste system. In other contexts, this group of people is referred to as 'untouchables' but the term Dalit has emerged as the preferred term for members of this community.

discourse had been limited in its portrayal of racial discrimination as something that stemmed solely from colonialism—caste, an exploitative hierarchical structure which predated colonial interference in South Asia, continued to lead to the discrimination against millions of Dalits based on their ancestry.[24]

Scholarship on Descent

Scholarship by David Keane and Annapurna Waughray trace a history of descent prior to its introduction into international law.[25] While Keane and Waughray disagree on the history of the term, both maintain that "descent" did not refer to caste prior to 1965. David Keane's article "Descent-based Discrimination in International Law: A Legal History" makes an important contribution to the field through its detailed analysis of the Constituent Assembly debates (1947-1949). Keane's article suggests that 1947 was "the origin of the concept of descent-based discrimination" in international law.[26] Keane concludes that because "[d]escent appears in Article 16(2) of the Indian constitution alongside caste, [descent] must therefore be distinguished from [caste]."[27]

Annapurna Waughray's scholarship, on the other hand, hints at the more complicated and lengthy legal history of descent. Waughray accepts Keane's interpretation of descent's usage in the Constitution of India, but notes that although Keane only traces the origin of descent back to

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[24] Purvi Mehta, "Recasting Caste: Histories of Dalit Transnationalism and the Internationalization of Caste Discrimination" (PhD dissertation, University of Michigan, 2013): 165-191.
[25] For examples of analyses of descent's meaning in international law see: Ambrose Pinto, "Caste Discrimination and UN," *Economic and Political Weekly* 37, no. 39 (2002): 3988-3990; Annapurna Waughray and David Keane, "CERD and Caste-based Discrimination," in *Fifty Years of the International Convention on the Elimination of all Forms of Racial Discrimination: A Living Instrument* (Manchester: Manchester University Press, 2017). Available at: https://e-space.mmu.ac.uk/619375/3/v2%20FINAL%20%206.%20Waughray%20%20Keane%20%282%29.pdf; David Keane, *Caste-based Discrimination in International Human Rights Law* (Burlington: Ashgate Publishing Company, 2007); Annapurna Waughray, "Caste Discrimination and Minority Rights: The Case of India's Dalits," *International Journal on Minority and Group Rights* 17, no. 2 (2010): 327-353; Egon Schwelb, "The International Convention on the Elimination of All Forms of Racial Discrimination," *The International and Comparative Law Quarterly* 15, no. 4 (1966): 1003.
[26] David Keane, "Descent-based Discrimination in International Law," 114.
[27] David Keane, "Descent-based Discrimination in International Law," 114.

the Constituent Assembly debates, "the term descent predates the [Constitution of India] by over a century."[28] Waughray identifies Section 87 of the British East India Company Charter Act 1833 as the origin of the legal category "descent."[29] In her dissertation *Capturing Caste in Law*, Waughray argues that descent was used in the Charter Act 1833 to describe a person's "geographical origins and racial ancestry."[30] Besides the Constitution of India, the only other reference to descent prior to ICERD that Waughray discusses is the ban on descent-based discrimination in civil service employment in Section 298 of the Government of India Act 1935.[31] Waughray suggests that in Section 298 discrimination on the basis of descent cannot possibly refer to discrimination on the basis of caste because Section 298 is explicitly limited to the context of "discrimination *between Europeans and Indians"* and not "discrimination *between Indians*."[32] It is clear from Keane and Waughray's analyses that "descent" did not refer to caste in Indian law. In this thesis, I build on Keane and Waughray's pioneering work, but argue that descent, a concept related to both geographic origin and race, must be understood through the context of its emergence as a legal concept as part of the legal apparatus of slavery in the British Atlantic.

Methodology

This thesis offers a genealogy of the legal category of "descent." A genealogy, as Foucault describes, is antithetical "to the search for 'origins'"[33] because the attempt to find the origin of a concept "assumes the existence of immobile forms that precede the external world of

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[28] Annapurna Waughray, "Caste Discrimination and Minority Rights: The Case of India's Dalits," *International Journal on Minority and Group Rights* 17 no. 2 (2010): 336.
[29] Annapurna Waughray, "Capturing Caste in Law: The Legal Regulation of Caste and Caste-Based Discrimination" (DPhil dissertation, University of Liverpool, 2013): 144.
[30] Waughray, "Capturing Caste in Law," 144.
[31] Annapurna Waughray, "Capturing Caste in Law," 144-145.
[32] Annapurna Waughray, "Capturing Caste in Law," 144-145.
[33] Michel Foucault, "Nietzsche, Genealogy, History," in *The Foucault Reader,* ed. Paul Rabinow (Pantheon Books, 1984), 77.

accident and succession."[34] Instead of telling an origin story, Foucault says a genealogist's task "is to identify the accidents, the minute deviations…the errors, the false appraisals, and the faulty calculations that gave birth to those things that continue to exist and have value for us."[35]

Foucault's description of genealogy is exactly how my thesis ought to be conceptualized.[36] I am tracing a series of accidents that led to the current definition of the legal category "descent" in international law. [37] I am not making a claim to have found the origin of the concept in British enslavement in the Caribbean and Chesapeake. I seek to avoid the claim of telling an origin story of the legal category "descent" because, just as I argue in this thesis that descent's usage in 1965 did not come out of thin air but is related to a longer history, someone else could offer a broader or narrower legal history of descent which identifies an earlier or later origin point. I have chosen the temporal and geographic boundaries of my legal genealogy of descent intentionally *and* arbitrarily. I made this choice because I think that exploring how descent was used in the colonial British Atlantic, colonial India, and international law together tells us something interesting about the transnational dialogue that occurs within empires and the limits of international human rights law to improve the lives of oppressed people.

In narrating my thesis as a history of the present, I hope to tell a story which emphasizes how "[t]he forces operating in history are not controlled by destiny,"[38] but are composed of a series of coincidences, misinterpretations, and accidents which have acted to create and complicate the present. I intentionally invoke Foucault's theorization of genealogy as the

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[34] Foucault, "Nietzsche, Genealogy, History," 78.
[35] Foucault, "Nietzsche, Genealogy, History," 81.
[36] The translation of Foucault that I am using interestingly invokes the terminology of descent to describe the work of genealogy. Genealogy is framed "as an analysis of descent." Foucault, "Nietzsche, Genealogy, History," 81.
[37] This development is accidental in that the concept of descent was not bound to be used in international law as a means to prevent caste-based discrimination. The system of descent that was created in the British Atlantic was made with the intent of making slavery more brutal and inescapable for people of African descent, but the arc/change in descent's use that I am tracing was not predetermined at any point in time.
[38] Foucault, "Nietzsche, Genealogy, History," 88.

methodological basis of my thesis to describe how I seek to narrate a contingent series of events which led to India's introduction of "descent" to international law and the international community's interpretation of "descent" as describing caste-like systems globally. In invoking accidents, I do not mean to remove agency from the colonizers who used descent to protect slavery in Virginia or the Dalit activists whose persistence led to a change in the international community's understanding of descent—my intent is simply to draw attention to the contingency of historical events as I trace a single concept across five centuries.

Outline

Chapter 1 focuses on how the legal concept of descent developed in seventeenth century Virginia as part of enslavers' response to the legal problems associated with the expansion of slavery. By the end of the seventeenth century, the legal concept of descent was used in laws throughout the British Atlantic as a means for justifying slavery by tying a person's status to their ancestral geographic origin/race. The legal concept of descent which emerged in the British Atlantic became the explicit legal category of "descent" in British colonial laws in India. Chapter 2 traces how the category of "descent" was used in laws in India from the British East India Company Charter Act 1833 to the Constitution of India in 1950. Chapter 3 looks specifically at the meaning of "descent" in international law. This chapter begins with a discussion of what "descent" meant when it was added to ICERD in 1965, before pivoting to an analysis of how Dalit activists' challenge to previous international human rights discourse led to a new understanding of "descent" in international law. As a result of Dalit activism surrounding the World Conference Against Racism in 2001, a new category—'discrimination based on work and descent'—emerged which allowed discrimination against Dalits and other victims of caste-like structures globally to be a topic of international human rights concern.

Chapter 1

Descent in the British Atlantic, 1619-1705

Introduction

This chapter explores how conceptions of race, slavery, and descent developed and were legally defined in the seventeenth century British Atlantic. I focus in particular on Virginia where court cases and legal judgments clearly document the development of these concepts as part of the legal infrastructure of slavery. There were three main problems that Virginia's gentry had to solve in order to create a stable and increasing labor pool for slavery: 1) the risk of class unity among laborers of African descent and laborers of European descent, 2) the status of children who had mixed African and European ancestry/descent, and 3) the conversion of people of African descent to Christianity. I begin this chapter by looking at how elite Virginians attempted to solve the problem of class unity by levying different punishments on self-emancipated laborers depending on their ancestral origins. By privileging ancestral origin in assessing punishments, the law divided the working class into two separate status groups—a move intended to prevent an agrarian rebellion. I then move on to a discussion of how Virginia's legislature solved the issue of the uncertain status of mixed-ancestry children by passing a matrilineal descent law in 1662. This law had the effect of racializing the enslaved population by declaring that a person was enslaved if and only if their mother's ancestors were from Africa. Next, I analyze how enslavers adopted to the conversion of enslaved people to Christianity by switching from religious to racial justifications for slavery; after 1667, enslaved people in Virginia could not win their freedom by converting to Christianity. Slavery came to be justified by the English view that all people of African descent were sub-human.

I finish the chapter with a discussion of how the shared discourse within the British Atlantic world of Virginia, Maryland, Barbados, South Carolina, and Jamaica led to a shared understanding of descent throughout the British Atlantic by the end of the seventeenth century. Descent prescribed a person's status based on where their mother's ancestors were from. The concept of descent that emerged in this context was then, as shown in the following chapter, applied to British civil service employment laws in India beginning in 1833—the empire-wide abolition of slavery had forced the British to reconsider the legal association between race and occupation throughout the empire.

Risk of Class Unity

Although the first enslaved people of African descent arrived in Virginia in 1619, indentured servitude remained the dominant source of labor in Virginia for decades after slavery's introduction. Thirty years after the first enslaved people had arrived in Virginia, there were only about 300 people of African descent in the colony. After the supply of English indentured servants slowed in the 1660s, colonists increasingly relied on African slavery for labor. By 1680, there were about 3,000 people of African descent in Virginia; by 1705, the year Virginia passed its first comprehensive slave code, there were about 10,000 people of African descent in the colony.[39] Virginia legal codified slavery in the 1660s as a response to the problems posed by the transition from a reliance on indentured labor to a reliance on enslaved labor.

One of the elite Virginians' biggest fears seems to have been the relationship between indentured servants of European descent[40] and enslaved people of African descent. Elizabeth

[39] S. Mintz and S. McNeil, "Slavery Takes Root in Colonial Virginia," *Digital History* (2018). Available at: https://www.digitalhistory.uh.edu/disp_textbook.cfm?smtID=2&psid=3576.
[40] Not all indentured servants were people of European descent. As I discuss later, there were some indentured servants of African descent in seventeenth century Virginia, but the vast majority of indentured servants were people of European descent.

Key, whose father was a free English man and whose mother was an enslaved woman of African descent, sued for her freedom in 1655 when her enslaver Colonel John Mottrom passed away. Elizabeth Key's suit was advanced on three grounds: her father was English, she was a baptized Christian, and her indenture had expired.[41] After a lengthy appeal process, Elizabeth Key won her freedom definitively in 1656 and lived the rest of her life as a free woman. Elizabeth Key's indentureship argument helped demonstrate to elite Virginians the contradictions and difficulties of governing a society where enslaved people worked alongside indentured servants.

Indentureship was rare for people of African descent in seventeenth century Virginia, but there is evidence that indentures existed for a small number of people of African descent at the time.[42] In 1655, a laborer of African descent named John Casor brought suit against his enslaver Anthony Johnson on the grounds that "Johnson had kept him his servant seaven years longer" than his indenture.[43] Although Casor's suit was unsuccessful,[44] it suggests that people of African descent people could win their freedom in court if they could prove that their indenture had been violated.

Although there is a considerable body of literature on Elizabeth Key's freedom suit, scholars have said comparatively little about Elizabeth Key's argument that she should be free

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[41] Warren M. Billings, "The Cases of Fernando and Elizabeth Key: A Note on the Status of Blacks in Seventeenth-Century Virginia," *The William and Mary Quarterly* 30, no. 3 (1973): 468; Alden T. Vaughan, "The Origins Debate: Slavery and Racism in Seventeenth-Century Virginia," *The Virginia Magazine of History and Biography* 97, no.3 (1989): 330.
[42] Vaughan, "The Origins Debate," 340-341.
[43] Warren M. Billings, ed., *The Old Dominion in the Seventeenth Century: A Documentary History of Virginia, 1606-1689* (Chapel Hill: The University of North Carolina Press, 1975), 155-156. Anthony Johnson is a rare example of a free person of African descent who owned enslaved people. Johnson's status as a free person is also possible evidence of the existence of indentures for people of African descent in Virginia—he had arrived in Virginia as an unfree laborer in 1619. Johnson's position as an enslaver also suggests that there was more 'social mobility' for free people of African descent prior to the legal codification of slavery in the 1660s. Patrick D. Anderson, "Supporting Caste: The Origins of Racism in Colonial Virginia," *Grand Valley Journal of History* 2, no.1 (2012): 5-6, 8.
[44] Alden T. Vaughan interprets Casor's failure to win his lawsuit as a likely result of a failure to "produce a valid indenture." Vaughan, "The Origins Debate," 340.

because her indenture had expired. Elizabeth Key had been sold by Thomas Key to Humphrey Higginson for nine years in 1636.[45] At the completion of the nine-year term, Elizabeth Key was supposed to be brought to her father, Thomas Key, in England where she would be free.[46] The sale also stipulated that Elizabeth Key could gain her freedom prior to the completion of her nine-year contract if Higginson died. The bill of sale only extended the right to Elizabeth Key's servitude to Higginson. Higginson was also required to take Elizabeth Key with him if he went to England and could not sell her to other people.[47] It is not clear when Higginson sold Elizabeth Key, but "[s]ometime between 1636 and 1655 [Elizabeth] passed into the possession of Colonel John Mottrom I."[48] The suit was brought against John Mottrom's estate in 1655 when it treated Elizabeth Key as a slave and not indentured servant.[49] The truth of Elizabeth Key's argument that her indenture had been violated is evident from the court records. Even if a judge supported the expansion of slavery and therefore had an interest in denying Elizabeth Key's freedom suit, any faithful common law judge could not avoid the fact that her contract had been violated.

Alden T. Vaughan argues that the court's decision was unclear about which of the three arguments—Elizabeth Key's paternity, Christianity, or indentureship—led to Elizabeth Key's freedom.[50] This, however, seems to be a slight misinterpretation. The Assembly's report stated, in agreement with the Northumberland County jury, that Elizabeth Key ought to have been free because:

> That by the Common Law the Child of a Woman slave begott by a freeman ought to bee free That shee hath bin long since Christened Col. Higginson being her God father and that by report shee is able to give a very good account of her fayth That Thomas Key sold

[45] Billings, ed., *The Old Dominion in the Seventeenth Century,* 165-166.
[46] Billings, ed., *The Old Dominion in the Seventeenth Century,* 166.
[47] Billings, ed., *The Old Dominion in the Seventeenth Century,* 165.
[48] Billings, "The Cases of Fernando and Elizabeth Key," 468. Elizabeth Key's servitude past the nine-year term seems to have been enabled by Thomas Key's death prior to the expiration of the nine-year contract. Billings, ed., *The Old Dominion in the Seventeenth Century,* 166.
[49] Billings, ed., *The Old Dominion in the Seventeenth Century,* 165.
[50] Vaughan, "The Origins Debate," 330.

> her onely for nine yeares to Col. Higginson with several conditions to use her more Respectfully then a common servant or slave That in case Col Higginson had gone for England within nine yeares hee was bound to carry her with him and pay her passage and not to dispose of her to any other[51]

Each of the three arguments for Elizabeth Key's freedom seem to have contributed to the suit's success—the text from the Assembly cited English paternity, violation of indenture,[52] and Christian faith as reasons why Elizabeth Key was granted her freedom.

The Assembly's report suggests that any one of the three arguments made by Elizabeth Key would have been sufficient grounds for winning her freedom. The bill of sale had clearly outlined two paths to freedom: the death of Humphrey Higginson or the completion of the nine-year contract. More than nine years had passed since Elizabeth Key's sale in 1636, so this alone should have been enough to win a suit for freedom in 1655.

The ruling in Elizabeth Key's case was issued at a time when indentured laborers of African and European descent nominally shared the same subordinated status. Because Virginia's elite were concerned about the possibility of rebellion, cases, like Elizabeth Key's, that showed that indentured servants of African descent and indentured servants of English descent had similar legal rights motivated Virginia's elite to do away with the existing system. The creation of legal distinction between people of African descent and people of English descent would reduce the possibility of class unity and rebellion among bound laborers. Bacon's Rebellion in 1676 is proof of the dangers posed by working class unification for Virginia's planters. During Bacon's Rebellion, laborers of African descent and laborers of European descent took up arms together in fighting Virginian elites; class allegiance seemed to be stronger

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[51] Billings, ed., *The Old Dominion in the Seventeenth Century,* 167.
[52] The mere fact that Mottrom was in the possession of Elizabeth Key seems to be sufficient proof to the Assembly that the terms of the indenture had been broken.

among rebels of European descent than racial allegiance.[53] When Virginia passed a law that leveled greater punishment on runaways of African descent than on runaways of English descent in 1660-1661, it signaled a move towards the legal codification of slavery for people of African descent.

The formalization of a legal code of rights and punishments for English indentured servants legally formalized the non-human/enslaved status of people of African descent.[54] The law "English running away with negroes" from the 1660-1661 legislative session refers to "negroes who are incapable of makeing satisfaction by addition of time"—an implicit recognition of the legality of lifetime bondage for people of African descent.[55] A 1661-62 law even provided for the compensation of enslavers whose enslaved property died while self-emancipated; the burden of compensation fell on "the christian servants in company" with the dead or lost runaway of African descent.[56] By imposing greater punishment on English/Christian indentured servants who conspired with self-emancipated Africans, the law seems to have been intended to fuse alliances based on ancestry; English indentured servants were supposed to see wealthy English colonists as their allies.

Two court decisions from 1640 show that even before the inferior status of people of African descent was legally formalized in the 1660s, it was common to give self-emancipated 'servants' of African descent and self-emancipated 'servants' of European descent different punishments. When John Punch, a self-emancipated indentured servant of African descent from

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[53] Anderson, "Supporting Caste," 6-7.

[54] In his recent book *Afropessimism,* Frank B. Wilderson III suggests that Black people are excluded from the prevailing understanding of what it means to be human and act as the "foil of Humanity" or the *"structurally inert props, implements for the execution of White and non-Black fantasies."* Frank B. Wilderson III, *Afropessimism* (New York: W.W. Norton & Company, 2020), 13, 15.

[55] William Waller Hening, *Statutes at Large: Being a Collection of all the Laws of Virginia from the first session of the Legislature, in the Year 1619* (13 vols., Richmond, New York, Philadelphia, 1819-1823), II, 26. Available at: http://vagenweb.org/hening/.

[56] Hening, Statutes, II, 116-117.

Virginia, was caught with a Dutch and a Scottish indentured servant, all three 'servants' received 30 lashes, the two Europeans had four years added to their indentureship, and John Punch was sentenced to "serve his said master or his assigns for the time of his natural Life here or elsewhere."[57] John Punch occupies an incredibly significant place in Virginia's history because, as Winthrop Jordan puts it, Punch's punishment is "the first definite indication of outright enslavement [] in Virginia."[58]

Emanuel, another runaway of African descent who was caught in 1640, also received a different punishment from the people he had self-emancipated with. Like Punch, Emanuel was identified as the only person of African descent in the group of maroons. The other six people who ran away with Emanuel had time added to their service, but the only punishments it noted for Emanuel was that he was "to receive thirty stripes and to be burnt in the cheek with the letter R. and to work in shakle one year or more as his master shall fee cause."[59] I read the absence of an addition to Emanuel's length of service as a sign that Emanuel was already enslaved for life. Although the ruling does not state this explicitly, the levying of only physical punishment suggests that Emanuel could not be punished by adding time to his servitude.

The differential legal treatment of indentured servants of English descent and indentured servants of African descent helped create a clearer distinction between the status of people of African descent and people of English descent. As Patrick Anderson argues, this was imperative for the English ruling class in Virginia because they would have to get the English working class

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[57] Willie Lee Rose, ed., *A Documentary History of Slavery in North America* (New York: Oxford University Press, 1976), 22-23.
[58] Winthrop Jordan, *White Over Black: American Attitudes Toward the Negro, 1550-1812* (Chapel Hill: The University of North Carolina Press, 1968), 75.
[59] Emmanuel was branded with the letter R to permanently mark his status as a runaway. Rose, ed., *A Documentary History*, 23.

to buy into the notion that people of African descent were an inferior group for African slavery to be a viable labor system.[60]

Status of Mixed-Ancestry Children

One of the unresolved issues in the seventeenth century Virginian legal system was how the status of children of both African and European descent was determined. Although common law dictated that title and rank were inherited patrilineally, it was an open question about whether this applied to the context of slavery.

Elizabeth Key's freedom suit is a perfect demonstration of the unresolved nature of the question of inheritance. Elizabeth Key's English paternity is clear in the court records. The entire community was aware that Thomas Key had been "fined for getting his Negro woman with Childe which said Negroe was the Mother of [Elizabeth Key]."[61] The Northumberland County Court and Virginia General Assembly concluded that Elizabeth Key ought to be free because of her English paternity. They saw themselves as following "common law dictum that a child inherited his or her father's condition."[62] The General Court, however, rejected the argument that common law entitled Elizabeth Key to freedom when it ruled that Elizabeth Key was a slave.[63]

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[60] Anderson compares the racial hierarchy which was solidified after Bacon's Rebellion to a caste system. Anderson's comparison is generative for me because it helps me understand poor white investment in oppressive capitalist structures. Even if working class English people occupied a low place in society, they remained attached to the institution of slavery because they feared that they would be at the bottom of the hierarchy if slavery was abolished. This seems similar to investment in the caste system by some underprivileged caste people who are not at the bottom of the caste system. Their investment stems in part from a fear that they would fall to the bottom of the social hierarchy if the caste system was removed. Anderson, "Supporting Caste," 10-12.

[61] Billings, ed., *The Old Dominion in the Seventeenth Century,* 166. The punishment of English men for having sex with women of African descent was recorded as early as 1630 in Virginia. Court records from 1630 state: "Hugh Davis to be soundly whipped, before an assembly of Negroes and others for abusing himself to the dishonor of God and shame of Christians, by defiling his body in laying with a negro." It is unclear why Davis was whipped and Thomas Key had only been fined, but Davis's case attests to existing precedent for punishing English men who had sex with women of African descent. Hening, *Statutes*, I, 146; Billings, ed., *The Old Dominion in the Seventeenth Century,* 160-161.

[62] Billings, "The Cases of Fernando and Elizabeth Key," 472. The Assembly explicitly invoked common law precedent as a basis for freeing her: "by the Common Law the Child of a Woman slave begott by a freeman ought to bee free." Billings, ed., *The Old Dominion in the Seventeenth Century,* 167.

[63] Elizabeth Key won the case at the trial level in the Northumberland County Court, but then had the case appealed to the General Court where she lost. Following the General Court's unfavorable ruling, Elizabeth Key's lawyer

As Warren M. Billings points out, “the English legal system” was unprepared to deal “with the emergence of slavery in Virginia,” which led to disagreements about the status of people with both English and African heritage.[64] Cases where the children of enslaved women won their freedom on the grounds of paternity forced the English “to adapt their legal heritage to a new situation” and move away from strict interpretations of common law doctrine.[65] Elizabeth Key’s case was proof to the Virginian government that an explicit system of inheritance needed to be established and that harsher prohibitions on interracial sex were necessary.[66]

In 1662, the Virginia General Assembly attempted to resolve the issue of how the status of children of both African and English ancestry was determined. To define status in seventeenth century Virginia, British colonizers had to conceptualize how a person’s descent was determined. The 1662 law “Negro womens children to serve according to the condition of the mother” was the first conceptualization of this new system:

> WHEREAS some doubts have arrisen whether children got by any Englishman upon a negro woman should be slave or ffree, Be it therefore enacted and declared by this present grand assembly, that all children borne in this country shalbe held bond or free only according to the condition of the mother, And that if any christian shall committ ffornication with a negro man or woman, hee or shee soe offending shall pay double the ffines imposed by the former act.[67]

William Greenstead appealed the case to the Virginia General Assembly which concurred with the Northumberland County Court and set the case for retrial there. Elizabeth Key won her freedom permanently when the Northumberland County Court ruled in her favor a second time. Billings, “The Cases of Fernando and Elizabeth Key,” 468-469, 472.

[64] Billings, “The Cases of Fernando and Elizabeth Key,” 472.

[65] Billings, “The Cases of Fernando and Elizabeth Key,” 473. For more discussion of the existing legal concepts that the British applied to the context of slavery see Bradley J. Nicholson, “Legal Borrowing and the Origins of Slave Law in the British Colonies,” *The American Journal of Legal History* 38, no. 1 (1994): 38-54; Jennifer L. Morgan, “*Partus sequitur ventrem:* Law, Race, and Reproduction in Colonial Slavery,” *Small Axe* 22, no. 1 (2018): 1-17.

[66] The previous laws had obviously not been enough of a deterrent to Thomas Key. Elizabeth Key’s marriage to her attorney William Greensted in 1656 was another example of the type of interracial relationships that threatened the emerging racial order in Virginia. Billings, ed., *The Old Dominion in the Seventeenth Century,* 168; Billings, “The Cases of Fernando and Elizabeth Key,” 469.

[67] Hening, *Statutes*, II, 170.

The law clarified that children inherited their mother's status and doubled the fine for English people who had sex with people of African descent. Both the matrilineal descent clause and the anti-miscegenation clause worked towards the same aim: creating a clearer distinction between enslaved people and free people. The anti-miscegenation clause was intended to prevent the birth of children with one free parent and one enslaved parent and the matrilineal descent clause clarified the status of these children if the anti-miscegenation clause was not a sufficient deterrent. The system of matrilineal descent created a two-fold social division that contributed to processes of racialization; children whose mothers were of African descent would inherit enslaved status and would be categorized as 'Negro.'[68]

The 1662 law also noticeably makes a distinction between the groups 'Christian' and 'Negro.' By using the term 'Negro,' Virginia's legislators racialized enslaved people. Even though the racial category of 'white' was not widely used yet, and many colonists still thought of religion as the primary distinction between enslaved people and free people, the concept of descent, through a reference to history, was used to make a racial distinction between enslaved people and free people. As the use the term 'Negro' indicates, people of African descent/enslaved people were distinguished from people of European descent/free people by their skin color. As Ibram X Kendi points out, descent and race were explicitly linked when the term 'race' first appeared in a dictionary—"Jean Nicot included [a dictionary] entry" for race in

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[68] This two-fold social division inflicted particular harm on Black women whose children could not avoid slavery. Anti-miscegenation and matrilineal descent laws also allowed white men to protect the racial binary by policing white women's sexuality. This is exemplified by the conviction of the white servant Rebecca Corney for giving birth to a mixed-race child in 1689. The anti-miscegenation law also allowed for the punishment of white men who fathered mixed-race children, but it was a lot easier for men to obscure their paternity. The possibility of pregnancy for white women acted as a deterrent for women who wanted to engage in interracial sex because they faced both legal and social repercussions if they gave birth to a mixed-race child. Billings, ed., *The Old Dominion in the Seventeenth Century,* 163.

1606.[69] Nicot's definition stated that "'race…means descent'" and "'that a man, a horse, a dog or other animal is from good or bad race.'"[70] Matrilineal descent laws allowed Virginia to make a distinction between the allegedly pious community of 'Christians' and the allegedly animal-like community of 'Negroes.'

Just like its fellow Chesapeake colony, Maryland legally codified slavery in the 1660s. In 1664, Maryland passed a law that declared:

> That all Negroes or other slaues already within the Prouince And all Negroes and other slaues to bee hereafter imported into the Prouince shall serue Durante Vita[.] And all Children born of any Negro or other slaue shall be Slaues as their ffatheres were for the terme of their liues…That whatsoever free borne woman shall inter marry with any slaue from and after the Last day of this present Assembly shall Serue the master of such slaue during the life of her husband And that all the Issue of such freeborne woemen soe marryed shall be Slaues as their fathers were[.][71]

This law's conclusion that children inherited their status from their father is incredibly important because it stands in stark contrast to Virginia's establishment of matrilineal descent two years earlier. Maryland's adoption of a patrilineal descent law, however, has been mostly dismissed by scholars because Maryland eventually followed Virginia's example and adopted matrilineal descent laws.[72] Maryland's choice to adopt a patrilineal definition of descent, even if it was temporary, is important because it is evidence that there was open debate at the time over what legal precedents for determining descent should have been applied to slavery.

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[69] Ibram X. Kendi, *Stamped from the Beginning: The Definitive History of Racist Ideas in America* (New York: Bold Type Books, 2016), 36.
[70] Kendi, *Stamped from the Beginning,* 36.
[71] Rose, ed., *A Documentary History*, 24.
[72] It is not clear to me when Maryland adopted matrilineal descent laws. Both Willie Lee Rose and Oscar and Mary Handlin state that Maryland followed Virginia's example soon after 1664, but neither of them give a citation for when this happened. Lee Rose even specifically suggests that the policy failed "because by its terms the free mulatto population developed at the same rate that white men impregnated slave women." Lee Rose's comments suggest that Maryland's lawmakers underestimated the frequency of interracial relationships between men of English descent and women of African descent. Male lawmakers found it easier to regulate English women's sexual behaviors by switching to a matrilineal definition of enslaved status than to change their own deviant behavior. Rose, ed., *A Documentary History*, 24; Oscar Handlin and Mary F. Handlin, "Origins of the Southern Labor System," *The William and Mary Quarterly* 7, no. 2 (1950): 213.

Although Maryland's solution to the problem of how the status of mixed-ancestry children was determined was different from Virginia's, both laws had similar purposes and effects. By focusing specifically on preventing relationships between 'free borne women' and 'Negroes,' Maryland's 1664 law promoted separation between free people and enslaved people. Because the racialized category 'Negro' was used, this amounted to a policy of racial separation. The law also referred to free women who married enslaved men as a "disgrace of our Nation" and made free women who married enslaved men slaves while their husbands were alive.[73] By invoking the 'Nation,' the law linked nationality to race; it implied that to be English one had to be of European descent. The law also went a step further in suggesting that good English subjects also refrained from having sexual relations with non-Europeans—this would ensure that their offspring would also be members of the English national community. In this system, people of African descent were clearly marked as outside of the imagined English national community even if they had spent their entire life in English territory.[74] Since descent was used in this law to separate the enslaved population from the free population, and enslaved people shared an African ancestral origin, the law enabled Maryland to make white skin color a requirement for membership in the free English 'Nation'—'Negro' slaves were thus marked as the non-human other.

By making English women in interracial marriages legal outcastes from English society, Maryland's lawmakers communicated the existential threat that the birth of mixed-ancestry children posed. As Jennifer Morgan points out, by "punishing white women for giving birth to

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[73] Rose, ed., *A Documentary History*, 24.

[74] This link between descent and nationality that appeared as early as 1664 is particularly noteworthy for this project because descent is used in both colonial Indian law and international law to protect people from discrimination based on their nationality. In theory, protections from descent-based discrimination were intended to extend protection to people regardless of the geographic origin of their ancestors; descent was used to address the possibility that a person could have legal citizenship in country but not be a member of their imagined national community.

black babies" Maryland's enslavers betrayed their fear that "interracial sexual and social contact belied the fixity of their own whiteness."[75] Lawmakers in England's Chesapeake colonies seemed aware of the fragility and socially constructed nature of the racial categories that were being defined in the 1660s.[76]

Morgan's argument that Maryland and Virginia's legislators' "concerns about sexual liaisons" were "the implicit foundations for laws regulating economic and social contact…between free whites and enslaved or free blacks throughout the English colonies" is a compelling way to view the long-term impact of anti-miscegenation legislation.[77] Anti-miscegenation legislation was a stepping stone towards more wide-sweeping efforts to create complete social separation between people of African descent and people of English descent. This separation was based on an emerging notion of race that contained within it ideas of ancestry and nationality—in short, the separation was based on descent.

Conversion of Enslaved People to Christianity

Slavery in Virginia had initially been legally justified on religious grounds because, unlike English people, enslaved people were not Christians when slavery began in Virginia. As slavery expanded in Virginia, religious justifications for slavery lost usefulness because enslaved people began to convert to Christianity. Conversion became a monumental problem for elite Virginians who wanted to expand slavery because records from the time indicate that enslaved people who could prove they were baptized Christians were able to win their freedom in court. In

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[75] Jennifer L. Morgan, *Laboring Women: Reproduction and Gender in New World Slavery* (Philadelphia: University of Pennsylvania Press, 2004), 72.

[76] I do not mean to suggest that anti-Blackness was not present when the first people of African descent arrived in Virginia in 1619. My point is that social interactions between white and Black people were much more common in 1664 than these interactions would be in subsequent decades. The Maryland law was passed when racial boundaries were in the process of being solidified in the British Atlantic. It seems safe to assume that, just as there was in Virginia, there was more social mobility for Black people in Maryland prior to the legal codification of hereditable slavery.

[77] Morgan, *Laboring Women*, 72.

response to successful freedom suits on the basis of religion, Virginia passed a law in 1667 law which declared that enslaved people who were baptized Christians were not entitled to freedom.

Elizabeth Key's 1655-1656 freedom suit is a good starting point for looking at the problem of conversion. The General Assembly's decision noted that Elizabeth Key "hath bin long since Christened Col Higginson being her God father and that by report is able to give a very good account of her fayth" as part of its explanation of why Elizabeth Key ought to have been free.[78] However, this is the only reference to Christianity in the surviving primary source material and none of the witnesses discussed Elizabeth Key's status as a Christian. The absence of witness discussion of Elizabeth Key's faith suggests that, although religion was the legal justification for slavery, religion was not central to most colonists' conceptualization of the difference between enslaved people and free people. In other words, they already had a racialized view of enslaved people and they were open to laws that prevented conversion from entitling enslaved people to freedom.

Although Elizabeth Key's status as a Christian did not appear to be a major part of her freedom suit, an enslaved man named Fernando made his status as a Christian a central part of his 1667 freedom suit. Fernando sued for freedom on the basis that "hee was a Christian and had been severall yeares in England and therefore ought to serve noe longer than any servant that came out of England."[79] Fernando's freedom suit, however, was rejected by the Lower Norfolk Court, which was unconvinced by his attempt to prove his Christianity. His production of "papers in Portugell or some other language" was insufficient evidence for the Lower Norfolk

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[78] Billings, ed., *The Old Dominion in the Seventeenth Century,* 167.
[79] Billings, ed., *The Old Dominion in the Seventeenth Century,* 169.

Court.[80] Fernando appealed the county court's decision to the General Court, but a record of the General Court's decision no longer exists.[81]

As Billings argues, Fernando's case suggests that "[c]onversion to Christianity evidently conferred upon blacks a rank higher than that of slave" and proof of "conversion or baptism could provide grounds for [their] release from life servitude."[82] Fernando's loss appears to mark a shift from the decision in Elizabeth Key's case eleven years earlier.[83] By 1667, "the situation had altered" as "the planters were beginning to look upon slavery as a viable alternative to indentured servitude."[84] Slavery could not expand rapidly in Virginia if enslaved people could win their freedom by converting to Christianity.

The Lower Norfolk County Court's rejection of Fernando's argument that English laws applied to him is also important because it links race/ancestral geographical origin to status. The court's decision reaffirmed the logic of the 1662 matrilineal descent law in concluding that a person's status was determined not by where they live, but by where their ancestors lived—just because he had lived in England did not mean that Fernando was entitled to the rights of an English person.

Although Elizabeth Key and Fernando's cases "[suggest] the strong possibility of the existence of similar [cases]," there is, unfortunately, no surviving record of these cases.[85] The 1667 law "An act declaring that baptisme of slaves doth not exempt them from bondage" legally clarified the issue of whether conversion entitled a person of African descent to freedom:

> WHEREAS some doubts have risen whether children that are slaves by birth, and by the charity and piety of their owners made pertakers of the blessed sacrament of baptisme,

[80] Billings, ed., *The Old Dominion in the Seventeenth Century,* 169.
[81] Billings, "The Cases of Fernando and Elizabeth Key," 468.
[82] Billings, "The Cases of Fernando and Elizabeth Key," 469-470.
[83] Even though Christianity was not a major concern for witnesses, I am still convinced that her faith might have been a more important part of the legal rationale for her victory.
[84] Billings, The Cases of Fernando and Elizabeth Key," 471.
[85] Billings, "The Cases of Fernando and Elizabeth Key," 470.

> should by vertue of their baptisme be made ffree; It is enacted and declared by this grand assembly, and the authority thereof, that the conferring of baptisme doth not alter the condition of the person as to his bondage or ffreedome; that diverse masters, ffreed from this doubt, may more carefully endeavour the propagation of christianity by permitting children, though slaves, or those of greater growth if capable to be admitted to that sacrament.[86]

The law made it clear that conversion was no longer a pathway to freedom for enslaved people of African descent.

Because the 1667 law addresses itself to 'doubts' about whether Christians could legally be enslaved, it also helps to fill in an archival gap—if Elizabeth Key and Fernando were the only two enslaved people to sue for freedom on the basis of religion, there would be no need to addresses 'doubts' within Virginia.[87] By directly clarifying the status of enslaved Christians, the law also makes it clear that there was a non-religious basis for differentiating between people's status. Status was now legally determined by where a person's ancestors were from.

British Atlantic Discourse about Race and Slavery

Slave codes from the Caribbean demonstrate that there was a shared discourse about slavery and race in the British Atlantic world. The movement of English colonial officials throughout the region helped circulate ideas about slavery and its productive capacity. In 1661, Barbados passed "the first comprehensive slave code" in the British Atlantic.[88] "An Act for the better ordering and governing of Negroes," of the Barbados Slave Act 1661 as I will refer to it,

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[86] Hening, *Statutes*, II, 260; Lee Rose ed., *A Documentary History*, 19.
[87] Hening, *Statutes,* II, 170; Rose, ed., *A Documentary History*, 19; Billings, "The Cases of Fernando and Elizabeth Key," 470.
[88] Rugemer, "The Development of Mastery and Race," 429. Slavery had taken over as the dominant labor source in Barbados more quickly than it did in Virginia and other parts of the British Atlantic. The first English colonizers settled Barbados in 1627. Just three decades later, more than 40% of the island's population was enslaved. Jerome Handler estimates that "at the zenith of the island's sugar-based prosperity in the mid-1670s" roughly 60% of the population was enslaved. Jerome S. Handler, "Custom and law: The status of enslaved Africans in seventeenth-century Barbados," *Slavery and Abolition* 37, no. 2 (2016): 233-234.

attempted to address the legal and social problems that the rapid growth of slavery caused for English colonists. Clause 21 summarized the problem in Barbados:

> [T]he Negroes of this Isle in these late years past are very much increased and grown to such a great number as cannot be safely or easily governed unless we have a considerable number of Christians to balance and equal their Strength and the richest men in the Island looking for the present profit, stock themselves only with almost all Negroes neglecting Christians Servants and so consequently their own public safety.[89]

As slavery grew throughout the British Caribbean,[90] the Barbados Slave Act 1661 became the model for subsequent slave codes. When the Barbadian enslaver Thomas Modyford became governor of Jamaica in 1664, he "[brought] with him a copy of the Barbados slave law of 1661" and the Jamaican Assembly "issued a new 'Act for the better ordering and Governing of Negro Slaves' [in 1664,] which copied the language and all major provisions of the Barbados statute almost exactly."[91] When South Carolina adopted its first slave code in 1691, they used the Jamaica Slave Act 1684, an amended version of Jamaica's 1664 act, as the blueprint.[92]

Not only did Modyford bring Barbados's slave code to Jamaica, but he also brought his experience with the profitability "of the effort to establish racial slavery" in Barbados to Jamaica.[93] To expedite slavery's expansion in Jamaica, Modyford gave enslavers thirty acres for each enslaved person that they owned, "encouraged those planters already on the scene to buy

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[89] Stanley Engerman, Seymour Drescher, and Robert Paquette, eds., *Slavery* (New York: Oxford University Press, 2001), 112.

[90] For the purposes of this paper, South Carolina is included in the category of British Caribbean colonies. In the seventeenth century, South Carolina was much more closely related to Barbados and Jamaica than to the Chesapeake colonies of Maryland and Virginia.

[91] The Jamaica Slave Act 1664 is only available in manuscript form, so I have chosen to take the historian Richard Dunn at his word that "Jamaica adopted the Barbados slave code, lock, stock and barrel." Richard S. Dunn, *Sugar and Slaves: The Rise of the Planter Class in the English West Indies, 1624-1713* (Chapel Hill: The University of North Carolina Press, 2000), 243. Edward Rugemer shares Dunn's view of the relationship between Barbados's 1661 law and Jamaica's 1664 law stating that "there is no question about Jamaica's adoption of the Barbados Slave Act of 1661 (though the Jamaicans did change a few words)." Rugemer, "The Development of Mastery and Race," 430.

[92] Barbados had also passed an amended slave code in 1688, but Rugemer convincingly argues that Jamaica's law "made significant innovations" on previous laws and was the basis for South Carolina's first slave code. Rugemer, "The Development of Mastery and Race," 429-430.

[93] Rugemer, "The Development of Mastery and Race," 443, 452.

more Negroes and expand their acreage,"[94] and "facilitated the beginning of a transatlantic slave trade to the island."[95] Modyford is a perfect example of how the movement of English people throughout the British Empire facilitated the movement of ideas and laws about slavery, race, and descent—Modyford's move from Barbados to Jamaica changed Jamaica's economic and social trajectories by bringing racial justifications for slavery to Jamaica.

Although Barbados's slave code was much more comprehensive than the slave laws that emerged in Maryland and Virginia in the 1660s, the Barbados Slave Act 1661 did not establish a system of descent. Jerome S. Handler argues that Barbados did not need to adopt descent laws because "from the very beginning of the new settlement, there was no ambiguity surrounding the status of Africans; not only were they considered chattel property, but also a property that would serve in perpetuity and whose descendants would be slaves if their mothers were slaves."[96] Jennifer Morgan seems to agree with Handler when she says that "Legislators in Virginia put into code the assumptions about racial inheritance that prevailed throughout the Atlantic, even as those elsewhere simply acted on those assumptions."[97]

Parts of Handler's claims are, however, based on a faulty assessment of when enslaved people's status as chattel was established. The preamble of the Barbados Slave Act 1661 made a passing comment that English colonists should "protect [enslaved people] as [they] do many other goods and Chattels."[98] This was clearly a step towards the view of enslaved Africans as chattel property like livestock, but the analogy should not be misread as legally establishing that enslaved people were chattels. In fact, Barbados's 1668 law "An Act declaring the Negro Slaves

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[94] Dunn, *Sugar and Slaves,* 154. Steps like those taken by Modyford allowed Jamaica to overtake Barbados as the most prosperous British colony in the early eighteenth century. Handler, "Custom and law," 234.
[95] Rugemer, "The Development of Mastery and Race," 444.
[96] Handler, "Custom and law," 234.
[97] Morgan, "*Partus sequitur ventrem,*" 2-3.
[98] Engerman, Drescher, and Paquette, eds., *Slavery,* 105.

of this Island to be Real Estate" declared that "all Negro Slaves in all Courts of Judicature and other Places within this Island, shall be held, taken and adjudged to be Estate real, and not Chattels."[99] This directly refutes Handler's argument that enslaved people in Barbados were always considered chattels.

The legal classification of enslaved people as chattels did not happen in the British Caribbean until the Jamaica Slave Act 1684.[100] Reversing the precedent set by Barbados's 1668 law, the Jamaica Slave Act 1684 declared that enslaved people "ſhall be deemed and taken as all other Goods and Chattels."[101] The classification of enslaved people as chattels was also an important step towards the legal establishment of matrilineal descent in the British Caribbean. Once it was established that enslaved people, like livestock, were classified as chattel property, Caribbean colonies were one step closer to applying animal husbandry laws about inheritance to the context of slavery.

Conclusion

The status of people of mixed African and European descent was addressed for the first time in the British Caribbean in South Carolina's 1696 comprehensive slave code known as Archdale's Laws. Clause 1 of Archdale's Laws declares that "all Negroes Mollatoes and Indians which at any time heretofore have been bought and sold or now are held and of ___ to be or hereafter Shall be Bought and Sold for Slaves are hereby made and ___ or they and their children Slaves to all Intents and purposes."[102] This clause offered an incredibly expansive definition of

[99] William Rawlin, ed., *The laws of Barbados collected in one volume by William Rawlin, of the Middle-Temple, London, Esquire, and now clerk of the Assembly of the said island* (London, 1699), 72-73. For more discussion of the act see Rugemer, "The Development of Mastery and Race," 449.
[100] Rugemer, "The Development of Mastery and Race," 449-450.
[101] "An Act for the Better Ordering of Slaves," in *The laws of Jamaica : passed by the Assembly, and confirmed by His Majesty in Council, April 17. 1684. To which is added, the state of Jamaica, as it is now under the government of Sir Thomas Lynch. With a large mapp of the Island* (London: Printed by H.H. Jun for Charles Harper), 140.
[102] This quote is from my own transcription of a blurry photocopy of the act. I have done my best to read the document and intentionally left blanks where I could not tell what word was present. I am indebted to the South

slavery—even if an enslaved person could prove that one of their parents was European, this was not sufficient evidence that you were unlawfully enslaved. As Rugemer points out, clause 1 of Archdale's Laws also "explicitly declared slave status hereditary" for the first in the Caribbean.[103] The suggestion seems to be that people of African descent, even people of partial African descent, ought to be 'bought and sold' as chattels. By including "Mollatoes" in the list of groups with enslaved status, South Carolina ensured that, just like in Virginia, all the children of enslaved women would be born into slavery.

In 1705, when Virginia passed its first comprehensive slave code ("An act concerning Servants and Slaves"), the slave code echoed both the 1662 law and the 1667 law in its definition of the boundary between enslaved and free. Clause 36 of the Virginia Slave Codes of 1705 stated: "…That baptism of slaves doth not exempt them from bondage; and that all children shall be bond or free, according to the condition of their mothers, and the particular directions of this act."[104] Clause 36 suggests that both the establishment of matrilineal descent and the clarification that conversion was not a justification for freedom had been effective solutions to the problems posed by the expansion of slavery; the use of racial justifications for slavery had allowed enslavers in Virginia to ensure that they had a stable pool of unpaid laborers. While the Virginia Slave Codes of 1705 more thoroughly established a system of laws for governing slavery, it also ensured that the legal innovations of the 1660s continued to be used to determine who was enslaved.

Carolina Department of Archives and History for mailing a copy of this document to me and to the Colorado College History Department for helping me procure funding for the document. "An Act for the Better Ordering of Slaves," in *Acts of the General Assembly,* vol. 6, Mar. 2-16, 1696 (Governor Archdale's Laws, fols. 60-66 (quotation, fol. 60), South Carolina Department of Archives and History, Columbia, S. C.

[103] Rugemer, "The Development of Mastery and Race," 454.

[104] Hening, *Statutes,* III, 460.

By the turn of the seventeenth century, colonies throughout the British Atlantic shared similar definitions of descent. In Virginia, Barbados, South Carolina, Jamaica, and Maryland, it was agreed upon that conversion to Christianity did not entitle an enslaved person to freedom and that a person's status was determined by their ancestor's geographic origin. Enslavers created this definition of descent to ensure that people of African ancestry could not escape slavery. It also enabled the widespread use of race as a justification for slavery—enslavers could argue that people of African descent were rightfully enslaved because they were sub-human.

The switch to the vocabulary of race throughout the British Atlantic marked a crucial change in British thought. By attaching status to descent, Blackness came to be synonymous with slavery in the British Empire. The abolition of slavery in the British Atlantic in 1833 forced the British to remove the association between occupation and race from their laws. The legal category "descent" entered British law in India for the first time in a civil service employment discrimination statute in 1833. "Descent" appeared to be used as part of an attempt by the British East India Company to erect a façade of progressiveness in their rule of India.

Chapter 2

The Use of the Legal Category "Descent" in Indian Law, 1833-1950

Introduction

In the previous chapter, I showed how a particular understanding of the inheritance of status—one based on ancestral geographical origin and race—developed through laws related to slavery in the British Atlantic. This set of ideas emerged through laws and judgements that regulated the growing system of slavery and provided a theoretical basis for heritable slavery. In the British Atlantic, a person's status was determined by whether they were of African or European ancestry. In this chapter, I move from the colonial British Atlantic in the seventeenth century to colonial India in the eighteenth, nineteenth, and twentieth centuries. Although this is a significant temporal and spatial leap, my argument is that these two histories are intimately linked. I suggest that the concept of descent that was used in the British Atlantic was legally codified into the legal category "descent" in colonial India; the legal category first emerged in India in the British East India Company Charter Act 1833, which was ratified the same year that slavery was abolished in the majority of the British Empire. I analyze how the legal category "descent" was used in civil service employment discrimination statutes in India from 1833 to 1950. An example of transnational legal discourse within the British Empire, the use of the legal category "descent" was an attempt by British colonizers to frame their rule of India as consistent with the post-1833 antislavery stance of the British Empire.

The legal category of "descent" should be understood in the context of the abolition of slavery in the British Empire in 1833 and India's exemption from this abolition because the East India Company tried to make the statutes in the Charter Act 1833 seem consistent with the abolition of slavery in most of the British Empire. Between 1833 and 1950, "descent" seems to

be used to refer to both/either membership in a royal family and/or a person's ancestral geographic origins.

Descent in British Colonial Laws in India (1833-1935)

1833: The Emergence of the Legal Category "Descent" in Indian Law

The legal category "descent" appeared in Indian law for the first time in Section 87 of the British East India Company Charter Act 1833. The Charter Act, which was a renewal of the East India Company's 1813 charter, extended the East India company's charter over India for another twenty years. It also legally granted Indians the right to occupy civil service positions in the East India Company for the first time.[105] The Charter Act 1833 was ratified on August 28, 1833—the same day that the Slavery Abolition Act 1833 was ratified; the Slavery Abolition Act 1833 announced the abolition of slavery in the entire British Empire with the exception of India.[106]

Section 87 extended the right of Indians to be employed by the East India Company by prohibiting the Company from discriminating in its hiring of Company positions. Section 87 states:

> That no native of the said territories, nor any natural-born subject of His Majesty resident therein, shall, by reason only of his religion, place of birth, descent, colour, or any of them, be disabled from holding any Place, Office, or Employment under the said Company.[107]

Even if they did not believe that slavery in India represented a significant moral threat to the Empire, the British still needed to attempt to ensure that the Charter Act 1833 was consistent with the principles of the Slavery Abolition Act. This is probably why Section 87 included descent as part of the extensive prohibition on employment discrimination in civil service

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[105] Patil Amruta, "Charter Act 1833 – Indian Polity Notes," Prepp, last modified March 13, 2022, https://prepp.in/news/e-492-the-charter-act-1833-indian-polity-upsc-notes.
[106] 3 & 4 Will. 4 c 73; Rupa Viswanath, *The Pariah Problem: Caste, Religion, and the Social Modern India* (New York: Columbia University Press, 2014), 4-5.
[107] 3 & 4 Will. 4 c 85.

hiring—something that was not necessary in the Charter Acts 1793[108] and 1813[109] when slavery was legal throughout the British Empire. Listed right after "place of birth" in the Charter Act 1833, "descent" seems to be used to specify that the British East India Company was prohibited from discriminating against a qualified employee/applicant because of their ancestral geographic origin; the legal category "descent" does not seem to be referring to caste in this context.

Even though the Slavery Abolition Act 1833 did not apply to India, it forced the East India Company to justify how and why slavery in India was different from the chattel slavery in the Atlantic that had been abolished by the Slavery Abolition Act. As Rupa Viswanath's book *The Pariah Problem* cogently explains, the attempt by East India Company officials "to have India exempted from the empire-wide abolition of slavery that was passed in 1833" led to the popularization of the argument that slavery in India was more benign.[110] This argument, which Viswanath refers to as "the trope of 'gentle slavery,'"[111] contends that "traditional forms of Pariah servitude in India were incomparable with slavery elsewhere in the world and were based on mutualistic and even familial relations between master and servant."[112] In an attempt to preserve the incredibly profitable labor regime in India that was based in "the enforced landlessness and hereditary unfreedom of Pariah families,"[113] East India Company officials suggested that "slavery [in India] was not about gain and accumulation."[114] As Viswanath points out, these defenses of Indian slavery had a particularly deleterious effect because they helped to popularize a colonial representation of the caste system as "mutually beneficial" for both unfree

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[108] 33 Geo. 3 c 52
[109] 53 Geo. 3 c 155
[110] Viswanath, *The Pariah Problem,* 4.
[111] Viswanath, *The Pariah Problem,* 4.
[112] Viswanath, *The Pariah Problem,* 4.
[113] Viswanath, *The Pariah Problem,* 4.
[114] Viswanath, *The Pariah Problem,* 5.

Dalit agrarian laborers and land-owning elites.[115] Since rhetoric about the harmlessness of slavery in India helped spread the belief among British colonizers that caste was a harmless system by which the Brahmins provided for the Dalits, the British saw little reason to interfere with the caste system.

Viswanath's argument is exemplified by statements made by the British government official and abolitionist[116] Charles Grant at the parliamentary debates over the East India Company Charter Act 1833. Charles Grant's stated that "there was a wide difference between slavery which existed in [India] and in the West Indies."[117] According to Grant, slavery in India was more benign because "it formed a part of the general institution of castes—it was connected with the religion of the natives, and, consequently, required very cautious treatment."[118] Grant seems to suggest that caste, and the particular type of slavery it sanctioned, should not be interfered with because it was a part of indigenous religious and cultural practices. Grant's comments on slavery immediately follow his statement that "a clause to put an end to all disabilities on the part of the natives of our Indian dominions to hold office or employment on account of their birth or religion" should be added to the Charter Act 1833;[119] Grant seems to be referring to Section 87's prohibition on discrimination in hiring civil service positions.

The connection made by Grant between employment discrimination in the East India Company's hiring and slavery is reflected in the organization of the Charter Act. The Charter Act

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[115] Viswanath, *The Pariah Problem,* 6.
[116] Andrea Major notes that Charles Grant's family was "closely connected with [] Clapham sect abolitionism." Interestingly, Major also discusses how Grant had been the co-sponsor of a section of the Charter Act 1833 that did not enter the final text of the Charter Act that called for the abolition of slavery in India by 1837. Andrea Major, *Slavery, Abolitionism and Empire in India, 1772-1843* (Liverpool: Liverpool University Press, 2012), 3.
[117] HC Deb, 13 June 1833, vol 18, cc698-785.
[118] HC Deb, 13 June 1833, vol 18, cc698-785.
[119] HC Deb, 13 June 1833, vol 18, cc698-785.

1833 explicitly dealt with the issue of slavery in Section 88 right after prohibiting discrimination in civil service hiring in Section 87. Section 88 states:

> That the said Governor General in council shall and be is hereby required forthwith to take into consideration the means of mitigating the state of slavery, and of ameliorating the condition of slaves, and of extinguishing slavery throughout the said territories so soon as such extinction shall be practicable and safe, and from time to time to prepare and transmit to the said Court of Directors drafts of laws or regulations for the purposes aforesaid…[120]

The progressive stance on employment discrimination in Section 87 provides legal cover for the tacit acknowledgement in Section 88 that slavery was to continue in India.

Because the discussion of slavery immediately followed the prohibition of descent-based discrimination, it suggests that the legal category "descent" does not refer to caste in the Charter Act 1833. As Viswanath and Major demonstrate, it was not in the East India Company's interest to outlaw distinctions based on caste. The term "caste" also does not appear in Section 88's discussion of slavery in India. By not discussing caste, the East India Company allowed itself to make the argument that caste-based forced labor regimes were not slavery when/if slavery was abolished in India; if descent and caste had not already been made conceptually distinct prior to the abolition of slavery in most of the British Empire, the abolition of slavery ensured that the concepts had distinct meanings.

The Charter Act 1833's cursory attempt to address slavery in India is evidence that parts of the Charter Act 1833 were responding to the measures enacted by the Slavery Abolition Act. As Andrea Major points out, by giving responsibility for abolition to East India Company officials, Section 88 led to years of inaction on the issue of abolition in India.[121] The East India Company continued to support slavery for ten years after slavery had been abolished in the rest

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[120] 3 & 4 Will. 4 c 85

[121] Major, *Slavery, Abolitionism and Empire in India,* 6.

of the empire; it was not until 1843 that the East India Company "removed the legal sanction upholding the slave-holders' proprietary rights over their slaves."[122] In reality, even the 1843 act did very little to stop the practice of slavery in India. Owning enslaved people did not become a crime in India until 1862.[123] English colonizers view of Indian slavery as benign enabled them to tacitly allow slavery to continue in India for decades after it had been abolished in the rest of the empire. Even though slavery continued to flourish in India, statutes like Section 87 of the Charter Act were intended to demonstrate the progressiveness of British rule in India.

The inclusion of the legal category "descent" in the Charter Act 1833 is particularly noteworthy because the Slavery Abolition Act 1833 also uses the legal category "descent." Section 10 of the Slavery Abolition Act 1833 specifically lays out how an "apprenticed Labourer" could be inherited by the relatives of the deceased "employer":

> …the Right or Interest of any Employer or Employers to and in the Services of any such apprenticed Labourers as aforesaid shall pass and be transferable by Bargain and Sale, Contract, Deed, Conveyance, Will, or Descent…provided that no such apprenticed Labourer shall, by virtue of any such Bargain and Sale, Contract, Deed, Conveyance, Will, or Descent, be subject or liable to be separated from his or her Wife or Husband, Parent or Child, or from any Person or Persons reputed to bear any such Relation to him or her.[124]

The "apprenticed Labourers" the Act referred to were enslaved people over the age of six who, as of August 1, 1834, would undergo the transition from an enslaved person bound to service under their enslaver to an "apprentice" under their former master for the next four to six years (Sections 1-6).[125] Section 10 specifically clarifies that "apprenticed Labourers" were still bound to complete four to six years of mandatory service even if their enslaver died. In this context, the use of the legal category "descent" seems to be intimately connected to the concepts of

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[122] Major, *Slavery, Abolitionism and Empire in India,* 9.
[123] Major, *Slavery, Abolitionism and Empire in India,* 9.
[124] 3 & 4 Will. 4 c 73.
[125] 3 & 4 Will. 4 c 73.

inheritance of property and/or titles that existed in Great Britain at the time—a person's descent is equivalent to their family.

Based on the use of the legal category "descent" in the Slavery Abolition Act 1833, the legal category "descent" could also be understood to articulate a principle of non-discrimination in employment for nobles and commoners in the Charter Act 1833. In other words, Section 87 could be narrowly interpreted as prohibiting the East India Company from hiring people based on whether or not they were descended from Indian princes or British nobility.

Whether the use of the legal category "descent" in Section 87 of the Charter Act 1833 was an attempt to protect inherited status in the form of the distinction between nobles and commoners or inherited status in the form of the racialized distinction of ancestry, the principle behind the use of descent seems to be similar: The British East India Company was trying to show, despite the fact that it did not support the abolition of slavery in India, that it was committed to some form of equality between people who came from different family statuses.

The East India Company had no incentive to prohibit discrimination based on caste in the hiring of civil service positions. Including caste would have been counterproductive for the East India Company because they were reliant on the agrarian labor regime's enslavement of Dalits. The legal category "descent" did not refer to caste in the Charter Act 1833 because it was clearly intended to legally prohibit discrimination by the East India Company based on other forms of inherited status such as nobility or ancestral geographic origin.

1915: Legal Category "Descent" Used by British Crown

The Government of India Act 1915 was passed a couple of decades after the Government of India Act 1858 made India an official Crown colony[126] and Parliament dissolved the East

[126] 21 & 22 Vict. c 106.

India Company in 1874.[127] In addition to transferring sovereignty over India from the East India Company to Queen Victoria, the 1858 proclamation made religious neutrality a principle of governance. Because caste was perceived to be part of indigenous religious practices, privileged caste Indians, and their allies in the British government, convinced the British Government to prohibit interference with the existing caste hierarchy in India.[128]

The language from Section 87 of the British East India Company Charter Act 1833, which prohibited discrimination in the East India Company's hiring of civil service positions, was echoed in Section 96 of the Government of India Act 1915:

> No native of British India, nor any subject of His Majesty resident therein, shall, by reason only of his religion, place of birth, descent, colour, or any of them, be disabled from holding any office under the Crown in India.[129]

Section 96 of the Government of India Act 1915 protected against descent-based discrimination in the hiring of civil service jobs. This is particularly notable because the Government of India Act 1915 is the first time that the legal category "descent" had been used in Crown-controlled British India.

Although the wording in the Government of India Act 1915 is different from the Charter Act 1833, the four grounds of employment discrimination that are explicitly forbidden—religion, place of birth, descent, and colour—are identical. Caste is again excluded from this list; in fact, the word caste did not appear anywhere in the Government of India Act 1915.[130]

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[127] The establishment of Crown control in 1858 was a response to a popular revolt against the East India Company's rule in 1857. "East India Company and Raj 1785-1858," UK Parliament, 2022, https://www.parliament.uk/about/living-heritage/evolutionofparliament/legislativescrutiny/parliament-and-empire/parliament-and-the-american-colonies-before-1765/east-india-company-and-raj-1785-1858/#:~:text=End%20of%20Company%20rule&text=The%20East%20India%20Company%20itself,India%20by%20the%20British%20state.

[128] Viswanath, *The Pariah Problem,* 17.

[129] 5 &6 Geo. 5 c 61.

[130] 5 & 6 Geo. 5 c 61.

The Government of India Act 1915's protection against descent-based discrimination is significant because, in a post-1858 India, Section 96 committed the whole colonial British government to this policy. Given how closely the language of Section 87 of Charter Act 1833 is mirrored in Section 96 of the Government of India Act 1915, it seems likely that the use of the legal category "descent" did not change significantly between 1833 and 1915; descent seems to still be used to refer to forms of inherited status like ancestral geographic origin or a person's standing as a noble or commoner.[131]

It is implausible that the British parliament would intend for the legal category "descent" to refer to caste in the Government of India Act 1915 given the Government of India Act 1858's prohibition on religious interference.

1935: Caste and Descent Used Separately

The Government of India Act 1935 was an attempt by the British colonial government to appease nationalists in India. Five years earlier, in March 1930, Mohandas Gandhi's Salt March had initiated a *satyagraha* (non-violent protest) against the British taxes on salt and British monopoly on "Salt production and distribution in India."[132] Gandhi's *satyagraha* gained attention for the nationalist movements as thousands of people across the country joined his protest against the salt tax—about 60,000 Indians were imprisoned in 1930 for protesting the salt tax.[133] The *satyagraha* concluded in March 1931 when "[Lord] Irwin agreed to release those who had been imprisoned during it and to allow Indians to make salt for domestic use."[134] Although

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[131] Further analysis of the political and social context in England and India in 1915 and/or minutes from the meetings related to the law would be required to determine a more precise picture of how the legal category "descent" was used in the Government of India Act 1915. Because of COVID-related travel restrictions and the closing of archives, I was not able to complete this research.
[132] Kenneth Pletcher, "Salt March: Indian history," Encyclopædia Britannica, last modified December 14, 2015, https://www.britannica.com/event/Salt-March.
[133] Kenneth Pletcher, "Salt March," https://www.britannica.com/event/Salt-March.
[134] Kenneth Pletcher, "Gandhi-Irwin Pact: Indian history," Encyclopædia Britannica, last modified February 26, 2022, https://www.britannica.com/event/Gandhi-Irwin-Pact.

Gandhi and Irwin had reached an agreement in 1931, the British were rightfully wary of provoking nationalist unrest when they passed the Government of India Act 1935. By "substantially [extending] provincial autonomy" and expanding the electorate, the British hoped that the Government of India Act 1935 would help keep nationalists in India at bay.[135] I read the use of the legal category "descent" in four distinct anti-discrimination clauses in the Act as part of the British Empire's attempt to appease nationalists—"descent" was leveraged to show the Crown's alleged efforts to prevent discrimination against people of Indian ancestry throughout the Empire.

Section 298 of the Government of India Act 1935 reiterated a very similar prohibition on employment discrimination in civil service hiring to the ones made in the Charter Act 1833 and the Government of India Act 1915. Section 298 states:

> No subject of His Majesty domiciled in India shall on grounds only of religion, place of birth, descent, colour or any of them be ineligible for office under the Crown in India, or be prohibited on any such grounds from acquiring, holding or disposing of property or carrying on any occupation, trade, business or profession in British India.[136]

Just like in 1833 and 1915, the four explicitly listed protected characteristics are religion, place of birth, descent, and colour. Again, caste is excluded from this list of protected characteristics. As Annapurna Waughray notes, descent should also not be understood to describe caste in Section 298 because Section 298 is intended to address "discrimination *between Europeans and Indians"* and not "discrimination *between Indians*"[137]—caste was a domestic system outside of the scope of Section 298.

[135] Barbara D. Metcalf and Thomas R. Metcalf, *A Concise History of Modern India,* 2nd ed. (Cambridge: Cambridge University Press, 2006), 195.
[136] 26 Geo. 5 c 2.
[137] Waughray, "Capturing Caste in Law," 144-145.

The exclusion of caste from Section 298 is particularly noteworthy because in the Government of India Act 1935, unlike in the Government of India Act 1915, the word caste appears repeatedly throughout the text; suggesting that if the authors of the Government of India Act 1935 wanted to prohibit discrimination in civil service hiring they would have used the legal category "caste."[138]

Unlike the Charter Act 1833 and the Government of India Act 1915, however, the use of the legal category "descent" in the Government of India Act 1935 is not limited to the context of employment in the civil service. Section 111(1) of the Government of India Act 1935 also offered protection against descent-based discrimination to all British subjects living in the United Kingdom:

> A British subject domiciled in the United Kingdom shall be exempt from the operation of so much of any Federal or Provincial law as-
> (a) imposes any restriction on the right of entry into British India ; or
> (b) imposes by reference to place of birth, race, descent, language, religion, domicile, residence or duration of residence, any disability, liability, restriction or condition in regard to travel, residence, the acquisition, holding, or disposal of property, the holding of public office, or the carrying on of any occupation, trade, business or profession[139]

The fact that Section 111(1) is specifically addressed to British subjects, and not just residents of the England or the United Kingdom, is significant because it extended the protection against limitations on "travel, residence, the acquisition, holding, or disposal of property, the holding of public office, or the carrying on of any occupation, trade, business or profession"[140] to Indians and British people alike.

In Section 111(1), language, domicile, residence, and duration of residence are added to the protected characteristics listed in Section 298 and 'race' replaces 'colour'; caste is again

[138] 26 Geo. 5 c 2.
[139] 26 Geo. 5 c 2.
[140] 26 Geo. 5 c 2.

excluded from this list of the protected characteristics. For me, the most plausible interpretation of the use of the legal category “descent” in Section 111(1) is that it describes a person’s ancestral geographic origin; I have reached this conclusion because Section 111(1) seems to be intended to extend protections to Indians domiciled in the United Kingdom, so it would make sense for the legal category “descent” to be used to protect people of Indian ancestry.

Section 113(1) compelled corporations that were incorporated in the United Kingdom that operated in India to follow:

> …requirements or conditions relating to or connected with—
> a) the place of incorporation of a company…
> b) the place of birth, race, descent, language, religion, domicile, residence or duration of residence of members of the governing body of a company, or of the holders of its shares, stock, debentures, debenture stock or bonds, or of its officers, agents or servants[141]

The list of protected characteristics that starts Section 113(1b) was identical to the list of protected characteristics from Section 111(1). Section 113(1) seems to be a clarification and requirement that companies incorporated in the United Kingdom follow the anti-discrimination statutes contained elsewhere in the Government of India Act 1935. It is interesting that the list of prohibited forms of discrimination used in Section 113(1) is the same as Section 111(1), and not Section 298, because the prohibition on employment discrimination in civil service hiring seems much more relevant to corporations than protections that were offered to Indians living in the United Kingdom. In Section 113(1), listed in between ‘race’ and ‘language,’ it seems plausible that the legal category “descent” could refer to ancestral geographic origin.

Section 114(1) simply extended the requirement of non-discrimination from Section 113(1) to companies incorporated in India and operating in the United Kingdom.[142]

[141] 26 Geo. 5 c 2.
[142] 26 Geo. 5 c 2.

The word descent also appeared in the Act's definition of European and Anglo-Indian in Schedule 1 Section 26(1). Although it is not used as a legal category, the use of descent in Schedule 1 Section 26(1) can give us clues for the meaning of the legal category "descent" used elsewhere in the Government of India Act 1935. Schedule 1 Section 26(1) states:

> "a European" means a person whose father or any of whose other male progenitors in the male line is or was of European descent and who is not a native of India;
> "an Anglo-Indian" means a person whose father or any of whose other male progenitors in the male line is or was of European descent but who is a native of India;[143]

In its patrilineal definition of inheritance,[144] the Government of India Act 1935 offers us some clarity on how a person's descent is distinct from their place of birth and domicile. In these definitions, being "of European descent"[145] seems to be a fixed categorization which is independent of a person's place of birth, domicile, or where their parents and relatives lived; it refers to a person's ancestral geographic origin. The logical flipside of a person who is classified as Anglo-Indian is a person who is simply classified as Indian. In addition to being "a native of India,"[146] to be Indian a person's "father or any of [their] other male progenitors in the male line" had to be of Indian descent.[147] By providing a distinct definition of Anglo-Indian, the statute implied that being Indian and being of European descent were conceptually opposed in some way.

One way of thinking about how the legal category "descent" was used in the Government of India Act 1935 is that a person could still be categorized as being of Indian descent even if

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[143] 26 Geo. 5 c 2.
[144] The Government of India Act 1935's clarification that a child inherits the race of their father stands in noticeable contrast to the codification of matrilineal descent in colonial Virginian slave codes that I discussed in chapter 1. The British government's definition of the racial boundary in 1935 is indicative of the British Empire's attempt to reverse the legal precedent set by slavery. By returning to the common law precedent of patrilineal inheritance, the British government seems to be signaling in 1935 that they no longer saw non-English people/non-Europeans as similar to animals.
[145] 26 Geo. 5 c 2.
[146] 26 Geo. 5 c 2.
[147] 26 Geo. 5 c 2.

their family had not lived in India for centuries. The legal category "descent" often appeared alongside the terms 'domicile' and 'place of birth.' Domicile, place of birth, and descent are best understood to represent three distinct, but related, concepts which make up a person's identity. Domicile refers to where a person is living; I can be domiciled in India for two years while maintaining my American citizenship. Place of birth is simply where a person was born—it is important to keep in mind that this is a distinct categorization from citizenship. A person's "descent" is a question of their ancestral geographic origin. While domicile and place of birth are fluid features of a person or family's identity, descent is fixed. The legal category "descent" seems to be used in some contexts as a racial as well as geographical categorization[148]—people of European descent and people of Indian descent belonged to genetically different stocks.

It seems clear that the legal category "descent" was not intended to apply to caste in the Government of India Act 1935 because it was used to describe a person's ancestral geographic origin. In the Government of India Act 1935, caste also appears repeatedly in the context of the bureaucratic categorization Scheduled Castes (SCs). Had the British parliament sought to make caste a protected characteristic in Sections 111, 113, 114, or 298 they would have made that protection explicit.

Constitution of India (1950)

After being used for over a century in British colonial laws in India, the legal category "descent" entered the Constitution of India in 1950. "Descent" appears in Article 16(2), a prohibition on employment discrimination for jobs in the civil service. The post-colonial state's adoption of "descent" in its ban on discriminatory hiring practices for government jobs established descent-based discrimination as a form of discrimination that the independent Indian

[148] Waughray, "Capturing Caste in Law," 144.

state committed to prohibiting—suggesting that descent-based discrimination was not just a problem that the British Empire had to worry about. The use of "descent" in the Constitution of India is perhaps the most crucial step in the legal genealogy of descent prior to its introduction into international law; if the legal category "descent" had not entered post-colonial Indian law, it seems unlikely that the Indian delegation would have thought to propose its addition to ICERD in 1965.

The prohibition on employment discrimination for government jobs in Article 16(2) of the Constitution of India appears to be largely borrowed from the language used to ban employment discrimination in the civil service in Section 87 of the Charter Act 1833, Section 96 of the Government of India Act 1915, and Section 298 of the Government of India Act 1935. Article 16(2) states:

> No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of employment or office under the State.[149]

While Section 298 of the Government of India Act 1935 listed religion, place of birth, descent, and colour as protected characteristics, the Constitution expanded this list to include sex, caste, and residence and replaced 'colour' with 'race.' The replacement of 'colour' with 'race,' although new in the context of the language used to ban civil service employment discrimination, was not entirely new. As I noted earlier, the shift from 'colour' to 'race' occurred in Sections 111, 113, and 114 of the Government of India Act 1935; the term 'residence' had also been used in Sections 111, 113, and 114 of the Government of India Act 1935.

Given that race and residence were added to Article 16(2), it is also worth noting that language, domicile, and duration of residence, which are all used in Sections 111, 113, and 114

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[149] *The Constitution of India* (India), 26 January 1950, available at: https://www.refworld.org/docid/3ae6b5e20.html.

of the Government of India Act 1935, were not added to Article 16(2). The absence of domicile as a protected characteristic in the Constitution of India is noteworthy because I based part of my interpretation of the legal category "descent" in the Government of India Act 1935 on the idea that descent was related to, but distinct from, domicile and place of birth. Although residence is not synonymous with domicile, its placement right after descent and place of birth in Article 16(2) suggests that it fulfills a similar function in the Constitution—Article 16(2) should be read as forbidding businesses from refusing to hire someone because of where they were born, where they have lived, or where their ancestors were from.

However, the most noteworthy change that occurred between Section 298 of the Government of India Act 1935 and Article 16(2) of the Constitution of India was the addition of "caste" to Article 16 (2). In the Hindi version of the Constitution, the term *jati,* and not *varna*, is used as the translation of caste; *jati* refers to the smaller endogamous communities in South Asia that are sometimes associated with specific occupations, while *varna* describes the four-fold division of society laid out in Hindu texts. Protections against caste-based, or *jati*-based, discrimination were not added until after Indian independence. My best guess for the exclusion of caste-based discrimination from British colonial laws was that the British saw all distinctions based on caste/*jati* as an indigenous religious practice—according to the precedent set by the Government of India Act 1858, this made interference in the issue of caste-based discrimination illegal. After independence, state discrimination on the basis of caste was a serious concern for the Indian state as it attempted to prove its modernity and secularism.

Earlier in this chapter, I argued that although "caste" did not appear alongside the legal category "descent" in the prohibitions on employment discrimination in the civil service in 1833, 1915, and 1935, it would be improper to understand "descent" as encompassing caste in those

contexts. Even if this argument was not convincing, it seems even more clear that caste and descent are referring to distinct concepts in the Constitution of India. According to the legal principle *expressio unius est exclusio alterius* ("the express mention of one thing excludes all others"),[150] the fact that "caste" and "descent" appear as separate items in an enumerated list suggests that they were meant to refer to distinct protected characteristics in the Constitution of India. Caste's addition to the list of protected characteristics that had been used to ban employment discrimination in the civil service in the Government of India Act 1935 suggests that Dr. B.R. Ambedkar and the other authors of the Constitution of India did not think the prohibition on descent-based discrimination already encompassed caste-based discrimination.

The language used to prohibit discrimination in the Constitution of India came from clauses 4-6 of the Interim Report on Fundamental Rights.[151] Each term in clause 4—religion, race, caste, and sex—is discussed, but "place of birth" and "descent," which only appear in clause 5, were never discussed or mentioned.[152] As David Keane points out, "[c]lause 5 of the Interim Report on Fundamental Rights corresponds to Article 10 of the draft Constitution."[153] In their discussion of draft Article 10, the delegates finally discussed the meaning of "place of birth." This discussion of "place of birth" occurred as part of the deliberation that led to the addition of "residence" to draft Article 10. The use of "descent," in what would become Article 16 of the Constitution, went undiscussed once again.[154]

However, Shri Raj Bahadur offered lengthy comments lamenting the fact that "descent" had not been included in draft Article 9 of the Constitution—"draft Article 9…would eventually

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[150] The following websites provide good definitions of *expressio unius est exclusio alterius*: https://www.merriam-webster.com/legal/expressio%20unius%20est%20exclusio%20alterius; https://leg.colorado.gov/agencies/office-legislative-legal-services/commonly-applied-rules-statutory-construction.
[151] Keane, "Descent-based Discrimination in International Law," 111.
[152] Keane, "Descent-based Discrimination in International Law," 111.
[153] Keane, "Descent-based Discrimination in International Law," 111.
[154] Keane, "Descent-based Discrimination in International Law," 112.

form the general prohibition on discrimination in Article 15 of the 1950 Constitution."[155] According to Bahadur, because the article did not include the legal category "descent," it did not protect against discrimination "on the basis of privileges enjoyed by some on account of their dynastic or family status."[156] Bahadur's interpretation of "descent" suggests that the legal category "descent" refers to social or political distinction between nobles and commoners, or, in less extreme cases, as a distinction between those with political and social connections and those without—it does not seem to refer to ancestral geographic origin.

In his comments from November 29, 1948, Bahadur repeatedly returned to the idea that descent is associated with "dynastic or family status" and birth.[157] He specifically linked "descent" to noble inheritance when he suggested that the creation of *Rajpramukhs,* the appointed head of a former princely state, in certain states was "discrimination []on the basis of birth or descent, on the basis of one's being a prince or a member of a royal family or not."[158] Bahadur also bemoaned the fact that government appointments tended to favor those "who happen to be born with a silver spoon in their mouth" over "those born in mud huts or cottages in the villages."[159] Bahadur's primary concern seems to be the privilege inherited as a result of noble birth or social/political connections.

Although Bahadur was arguing for descent's inclusion in Article 15's general prohibition on discrimination, as Keane points out, Bahadur's description specifically "links the concept of

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[155] Keane, "Descent-based Discrimination in International Law," 112.
[156] Constituent Assembly Debates, Vol. VII, Official Reports, (Lok Sabha Secretariat, New Delhi reprinted 1999), Book II p. 664, 29 November 1948. For further analysis of Bahadur's comments see: David Keane, "Descent-based Discrimination in International Law: A Legal History," *International Journal on Minority and Group Rights* 12, no.1 (2005): 112-114.
[157] Constituent Assembly Debates, Vol. VII, Official Reports, (Lok Sabha Secretariat, New Delhi reprinted 1999), Book II p. 664, 29 November 1948.
[158] Constituent Assembly Debates, Vol. VII, Official Reports, (Lok Sabha Secretariat, New Delhi reprinted 1999), Book II p. 664, 29 November 1948.
[159] Constituent Assembly Debates, Vol. VII, Official Reports, (Lok Sabha Secretariat, New Delhi reprinted 1999), Book II p. 664, 29 November 1948.

discrimination on the basis of descent to employment"[160]—offering a potential explanation for why the legal category "descent" appears in Article 16 but not Article 15 of the Constitution of India.

Bahadur's discussion of descent-based discrimination as a system that provides disproportionate benefits to the nobility could, by definition, apply to the different lived experiences of Brahmins and Dalits. Caste status is inherited at birth and entitles some people to political and social privileges. Since caste status is determined at birth, it takes serious mental gymnastics to conclude that caste-based discrimination is not a form of discrimination based on descent. But, it is also important to keep in mind, as a historical point, that this does not seem to be how Bahadur understood "descent"—or how "descent" was used in the text of the Constitution of India.

Unfortunately, as David Keane points out, nobody else at the Constituent Assembly replied to Bahadur's statements about descent. We are left with his interpretation of descent as our best and only account of how people understood the legal category's use in the Constitution.[161] Because they appear as separate items in a list and because of Bahadur's description, Keane himself agrees that "descent" clearly does not refer to caste in the Constitution of India.[162]

Conclusion

The legal category "descent" entered Indian law in 1833 as part of the East India Company's attempt to show that its laws were consistent with the abolition of slavery in most of the British Empire. From 1833 to 1935, the legal category "descent" was preserved in colonial

[160] Keane, "Descent-based Discrimination in International Law," 114.
[161] Keane, "Descent-based Discrimination in International Law," 114.
[162] Keane, "Descent-based Discrimination in International Law," 114.

Indian law as part of the prohibition on employment discrimination in the civil service. Although "descent" helped extend the legal right to civil service employment to people of Indian ancestry, it is important to not misunderstand legal liberalism for a shift towards equitable rule in India. Colonial rule in India continued to profit off of an exploitative agrarian labor regime in India. As Andrea Major points out, even after the British Empire made owning slaves illegal in 1862, "the colonial state remained ambivalent about the supposed abolition."[163] With more progressive laws on the books, there was little incentive for the British to *actually* interfere with a system they were profiting from. Similar to how the British ignored their own laws about slavery, it seems likely that the British were able to ignore the legal category "descent" and continue to discriminate against people of Indian ancestry in its hiring of civil service positions.

When the Constitution of India was written, the independent state chose to keep the legal category "descent" in Section 16(2)'s prohibition on discrimination in the government's hiring practices. Shri Raj Bahadur's comments suggest that "descent" referred to a form of inherited status like social class or nobility in the Constitution. This use of the legal category "descent" seems to have been intended to show the world that India had created a thriving secular democracy. The use of "descent" in the Constitution is incredibly important for my legal genealogy because if "descent" had not entered post-colonial Indian law it seems unlikely that the Indian delegation would have proposed the use of "descent" in 1965; descent's emergence as a legal category in international law was *contingent* on its use in Article 16(2) of the Constitution of India.

[163] Major, *Slavery, Abolitionism and Empire in India,* 9.

Chapter 3

Descent Becomes Caste: The Use and Interpretation of Descent in International Human Rights Law, 1965-2001

Introduction

Thus far, my thesis has focused on how the concept of descent evolved and became solidified into a legal category in the British Empire. I have attempted to demonstrate that the definition of descent that emerged in the context of slavery in the British Atlantic, a definition that linked a person's status to their perceived geographic origin, was used by the British in Indian civil service employment laws beginning in 1833. These laws, which prohibited the government or the East India Company from discriminating based on descent when they hired someone, also entered the post-colonial Indian legal framework in the Constitution of India. Although a legal genealogy of how the concept of descent moved across time and space in the British Empire is itself interesting, tracing a legal genealogy of descent is an important/relevant task because "descent" has become an established legal category in international law. This chapter is devoted to understanding the context in which descent entered international law, how descent has been interpreted in international law since its introduction, and how Dalit activists helped lead to a change in the interpretation of "descent" in international law. In connecting this chapter's analysis of what "descent" means in international law to the previous two chapters, my argument is that descent's use in international law derives from the use of descent in British India and the British Atlantic.

I begin this chapter with an exploration of the context of the International Convention on the Elimination of all forms of Racial Discrimination (1965) and how "descent" entered the Convention. I then move towards an analysis of how descent has been connected to caste in

human rights discussions since the Committee on the Elimination of Racial Discrimination (CERD) concluded in 1996 that caste discrimination fell within the scope of ICERD under the legal category of "descent." I focus in particular on how Dalit activism in the lead up to the 2001 World Conference Against Racism in Durban, South Africa caused the international community to adopt a broader understanding of racial discrimination and descent that included caste-based discrimination and similar forms of oppression; Purvi Mehta's argument that Dalit activists made 'local' experiences of caste discrimination legible to the 'global' community by challenging the limits of previous definitions of racial discrimination provides a cogent explanation for how Dalit activists helped change the meaning of "descent" in international law.[164]

The International Convention on the Elimination of All Forms of Racism (1965)

Background

1965, was a moment of great hope across the globe. The post-World War II era seemed to be bringing about a shift of global power as more and more of Europe's overseas colonies won their independence. Self-rule existed for the first time in centuries in Africa where European enslavers had seized millions of African people as their chattel property, in the Caribbean where people of African descent died harvesting sugarcane, and in India where the British had allowed Indians to starve during famines. The post-colonial future offered hope that these legacies could be forgotten.

In order to understand how "descent" was used in the International Convention on the Elimination of all forms of Racial Discrimination (ICERD), it is important to understand ICERD's context and intent. Many scholars suggest that the discussions that led to the adoption of ICERD began with concern about a series of swastika paintings and other anti-Semitic

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[164] Purvi Mehta, "Recasting Caste: Histories of Dalit Transnationalism and the Internationalization of Caste Discrimination" (PhD dissertation, University of Michigan, 2013): 3, 10, 165-191.

episodes in western Europe in 1959-1960[165] because the UN General Assembly passed an anti-discrimination resolution in 1960 as a result of these incidents.[166] The discussions about racial discrimination in 1960 gave post-colonial states, which were becoming the majority of UN member states, the opening they needed to make racial discrimination a legislative priority at the UN.[167]

A group of African countries took the first step towards substantively addressing racial discrimination at the UN when, in 1962, they proposed the adoption of a convention intended to help eradicate both racial and religious discrimination.[168] Addressing racial discrimination was a priority for African states because they viewed ICERD "as an instrument in the struggle against South African apartheid."[169] The intent to use ICERD to condemn South African apartheid is obvious throughout the Convention's text. Although the parties to ICERD decided it was best not to list specific examples of racial discrimination like anti-Semitism,[170] apartheid is explicitly referenced in both the preamble and in Article 3.[171] Aware of the African states' priorities, a group of Arab states succeeded in convincing the post-colonial states in Africa (and Asia) to join

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[165] Egon Schwelb, "The International Convention on the Elimination of All Forms of Racial Discrimination," *The International and Comparative Law Quarterly* 15, no. 4 (1966): 997; Ofra Friesel, "Race versus Religion in the Making of the International Convention Against Racial Discrimination, 1965," *Law and History Review* 32, no. 2 (2014): 361; Theodor Meron, "The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination," *The American Journal of International Law* 79, no.2 (1985): 283; Michael Banton, *What We Now Know About Race and Ethnicity* (New York: Berghahn Books, 2015), 51.
[166] Friesel, "Race versus Religion," 361.
[167] Robert Skinner observes that "During the 1960s the issue of apartheid became a unifying-cause for Third World states whose leaders sought to hitch a language of human rights to their respective postcolonial priorities." Opposition to apartheid seems to have been a driving force for post-colonial states unified push for ICERD. Robert Skinner, "The Dynamics of Anti-apartheid: International Solidarity, Human Rights and Decolonization," in *Britain, France and the Decolonization of Africa: Future Imperfect?*, eds. Andrew W.M. Smith and Chris Jeppesen (London: UCL Press, 2017), 119.
[168] Schwelb, "The International Convention on the Elimination of All Forms of Racial Discrimination," 998.
[169] Banton, *What We Now Know about Race and Ethnicity,* 52.
[170] For more discussion of the decision to exclude specific reference to anti-Semitism from ICERD's text see Schwelb, "The International Convention on the Elimination of All Forms of Racial Discrimination," 1011-1015.
[171] UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination* (1965), United Nations, Treaty Series, vol. 660, p. 195, available at: https://www.refworld.org/docid/3ae6b3940.html.

the USSR's push to focus specifically on racial discrimination.[172] This coalition of the USSR and post-colonial states in Africa, Asia, and the Middle East succeeded and the General Assembly decided that a separate declaration and a separate convention would be prepared to address racial and religious discrimination respectively; the documents concerning racial discrimination were to be given priority.[173]

After deciding to prioritize the racial discrimination convention, the UN acted quickly to draft and approve ICERD. In 1963, the United Nations General Assembly issued the Declaration on the Elimination of All Forms of Racial Discrimination and had "the [UN] Commission on Human Rights give absolute priority to the preparation of the Racial Discrimination Convention."[174] The Commission on Human Rights acted efficiently and a complete draft of ICERD was submitted to the UN General Assembly by the summer of 1964. The General Assembly discussed the convention at its 1965 session and unanimously passed ICERD in the same session on December 15, 1965.[175]

The momentum to pass ICERD in the 1960s existed in part because the connection between colonialism and racism was evident. As decolonization spread, global powers were allegedly attempting to move away from colonial ideologies. As Egon Schwelb noted just a year after ICERD was adopted, ICERD made a clear connection between colonialism and segregation/racism by invoking the Declaration on the Granting of Independence to Colonial

[172] Friesel, "Race versus Religion," 363; Schwelb, "The International Convention on the Elimination of All Forms of Racial Discrimination," 999.
[173] Schwelb, ""The International Convention on the Elimination of All Forms of Racial Discrimination," 999.
[174] Schwelb, "The International Convention on the Elimination of All Forms of Racial Discrimination," 999.
[175] Schwelb, "The International Convention on the Elimination of All Forms of Racial Discrimination," 999. The same momentum did not exist to pass a convention condemning religious discrimination. The General Assembly did not pass the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief until 1981—16 years after ICERD was unanimously approved and opened for signature. The accompanying convention addressing religious discrimination has still never been passed. Friesel, "Race versus Religion," 382.

Countries and Peoples of 1960 in the preamble.[176] In theory, ICERD enacted measures that would hold former colonial powers accountable for inaction against racial discrimination.

Like other post-colonial states, the Indian delegation was able to use its power to make ICERD's final text reflect their interests. One of India's primary concerns when ICERD was being drafted was ensuring that India's affirmative action system for people of underprivileged castes was not considered a violation of Article 1's definition of racial discrimination.[177] As David Keane points out, India's concern seems to stem from their framing of affirmative action as justified discrimination.[178] Ultimately, the Indian delegation seemed to be satisfied with ICERD's protection of affirmative action because, as the Indian delegate Mr. Pant aptly noted, Article 1(4) and Article 2 protected a state's implementation of affirmative action programs.[179] India even saw its system of reservations for people from Scheduled Castes and Scheduled Tribes as a model for other countries' implementation of Article 1(4) and Article 2.[180] India's other contributions to ICERD should be understood within the context of the country's concern about protecting its affirmative action system for people from Scheduled Castes and Scheduled Tribes. India wanted to make sure its laws were consistent with international legal precedent.

Descent in ICERD

The legal category "descent" appeared in international law for the first time in the definition of racial discrimination in Article 1(1) of ICERD:

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[176] Schwelb, "The International Convention on the Elimination of All Forms of Racial Discrimination," 1030-1031.
[177] Keane, "Descent-based Discrimination in International Law," 95.
[178] Given that affirmative action was framed as justified discrimination, even if the framing is somewhat misleading, it makes sense that India would be concerned that affirmative action would be seen as a violation of anti-discrimination legislation. Keane, "Descent-based Discrimination in International Law," 109.
[179] UN General Assembly, "Twentieth Session: Official Records" (New York: UN, 1965), UN Doc. A/C.3/SR.1308, paragraph 7; UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination* (1965), United Nations, Treaty Series, vol. 660, p. 195, available at: https://www.refworld.org/docid/3ae6b3940.html.
[180] Keane, "Descent-based Discrimination in International Law," 108-109.

> In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.[181]

"Descent" was added to the original draft of Article 1(1) as part of an amendment made by the Indian delegation.[182] The Indian delegate K. C. Pant explicitly outlined that India's amendment "was intended to meet the objections raised by many delegations to the words 'national origin'" in Article 1(1).[183] The proposed amendment had also included the substitution of "place of origin" for "national origin." The substitution of "place of origin" was rejected, but "descent" remained in Article 1(1).[184] Neither the Indian delegation, nor any other delegation explained or specified the meaning of "descent" in ICERD.[185]

Pant's comment that the amendment that included "descent" aimed to clarify language that prohibited discrimination based on "national origin" provides us with the best clue to descent's meaning.[186] As Egon Schwelb notes, there was confusion among the delegates who drafted ICERD about what "national or ethnic origin" meant.[187] This disagreement seemed to stem from the fact that nationality can be understood to encompass two related but distinct concepts. Legally speaking, a person's nationality is the country that they are a citizen of. Following this definition, all French citizens, regardless of their race or ethnicity, have French nationality and no one else does. A person's nationality, however, can also describe what ethno-linguistic group they belong to. According to this definition, a person could be a French citizen

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[181] UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination* (1965), United Nations, Treaty Series, vol. 660, p. 195, available at: https://www.refworld.org/docid/3ae6b3940.html.
[182] Keane, "Descent-based Discrimination in International Law," 106.
[183] UN Doc. A/C.3/SR.1299, paragraph 29.
[184] Keane, "Descent-based Discrimination in International Law," 106.
[185] Schwelb, "The International Convention on the Elimination of All Forms of Racial Discrimination," 1002-1003.
[186] Keane, "Descent-based Discrimination in International Law," 108.
[187] Schwelb, "The International Convention on the Elimination of All Forms of Racial Discrimination," 1003.

but not be part of the imagined community of the French 'nation' because their ancestors lived in Kenya and spoke Kikuyu; they are seen by people whose ancestors lived in France and spoke French to belong to a different national group.[188] The delegates drafting ICERD therefore faced the problem of figuring out how to protect people from discrimination based on the latter definition of nationality.[189] By adding "descent" and replacing "national origin" with "place of origin," India's original amendment seems to be an attempt to make it clear that a person could not be discriminated against based on where they or their ancestors were from.

Even though India's proposal to remove the word "national" was unsuccessful, descent's inclusion in ICERD right before "national or ethnic origin" suggests, as Schwelb puts it, that:

> For the practical purposes of interpretation of the Convention of 1965 the three terms "descent," "national origin" and "ethnic origin" among them cover distinctions both on the ground of *present or previous* "nationality" in the ethnographical sense and the ground of *previous* nationality in the "political-legal" sense of citizenship.[190]

The question then becomes what aspects of nationality a prohibition on descent-based discrimination was intended to add to Article 1(1) of ICERD. To me, the most plausible explanation is that "descent" covered discrimination based on ancestry; it prohibited citizens from being discriminated against based on their ancestor's nationality. I find this to be most plausible because descent, by definition, refers to inherited status—it does not make sense for the legal category "descent" to refer to a person's legal citizenship or where they previously resided. This interpretation of the legal category "descent" is also consistent with how the concept of descent had been used in laws dating back to the seventeenth century. The concept of descent

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[188] Schwelb, "The International Convention on the Elimination of All Forms of Racial Discrimination," 1006. For a more thorough formulation of how membership in a 'nation' has been constructed in modernity see Benedict Anderson, *Imagined Communities: Reflections on the Origins and Spread of Nationalism* (New York: Verso, 2006).
[189] The United States' delegate argued that the term 'national origin' achieved this aim by referring to a person's ancestral geographic origins, but this view did not appear to be widely shared by other delegates. Schwelb, "The International Convention on the Elimination of All Forms of Racial Discrimination," 1007.
[190] Schwelb, "The International Convention on the Elimination of All Forms of Racial Discrimination," 1007.

had emerged in the context of colonial British slavery as a way to erect racial boundaries by linking a person's status to the geographic origin of their ancestors.

The human rights lawyer Egon Schwelb appears to have been the first person to offer an interpretation of the international legal category "descent" use in ICERD that links it to caste.[191] In footnote 43 of his 1966 article "The International Convention on the Elimination of All Forms of Racial Discrimination," Schwelb concluded that:

> It is reasonable to assume that the term "descent" includes the notion of "caste," which is a prohibited ground of discrimination in Indian Constitutional Law (Art. 15 of the Constitution of 1949), which, however, also uses the expression "descent" side-by-side with "caste"[192]

Schwelb is right to turn to the Constitution of India for clues about descent's meaning in ICERD, however, as I argued in Chapter 2, it is clear that "descent" did not refer to caste in the Constitution of India. Because there is also no indication in the *travaux préparatoires* to ICERD that India intended descent to encompass caste, I reject Schwelb's conclusion that there was a link between descent and caste when it was used in 1965.[193]

India's Tenth to Fourteenth Periodic Reports to CERD (1996)

It was not until India submitted its consolidated Tenth to Fourteenth Periodic Reports to the Committee on the Elimination of Racial Discrimination (CERD) in 1996, over three decades after ICERD had been opened for signature, that the link between descent and caste became a widely contested question in international law.[194] In previous reports to CERD the Indian

[191] Keane, "Descent-based Discrimination in International Law," 110.
[192] Schwelb, "The International Convention on the Elimination of All Forms of Racial Discrimination," 1003.
[193] I agree with David Keane that there was not an intended link between descent and caste when ICERD was written, but this does not mean that the use of descent to describe caste is erroneous. In the South Asian caste system, a child's status is determined by the status of their parents. This is the exact same type of discrimination that descent's inclusion in ICERD was intended to prohibit—discrimination based on who a person's relatives/ancestors are. Keane, "Descent-based Discrimination in International Law," 116.
[194] India submitted the Tenth to Fourteenth Periodic as one document in 1996 because they had neglected to submit reports to CERD in 1988, 1990, 1992, and 1992.

government had provided CERD with information about the Scheduled Castes and Scheduled Tribes.[195] In the Tenth to Fourteenth Periodic Reports, however, the Indian government opted not to include information about the Scheduled Castes and Scheduled Tribes because they reasoned that caste discrimination was outside "the purview of Article 1 of [ICERD]"[196] because "[t]he term 'caste' denotes a 'social' and 'class' distinction and is not based on race."[197]

In making the argument that caste fell outside of the scope of ICERD, the Indian government explicitly linked descent and caste. India reasoned that although "descent" was used to define racial discrimination in ICERD and "[b]oth castes and tribes are systems based on 'descent,'" ICERD still did not apply to caste because "the term 'descent' in the Convention clearly refers to 'race.'"[198] Although the invocation of "descent" seems perplexing, the Indian government's argument was actually consistent with the understanding of racial discrimination at the time ICERD was adopted; racial discrimination referred to forms of discrimination that had resulted from colonialism and the transatlantic slave trade.[199]

In their response to India's Tenth to Fourteenth Periodic Reports in 1996, CERD rejected the Indian government's argument that caste "does not fall within the scope of the Convention" and listed "the system of castes" as "among the factors which impede the full implementation of [ICERD]."[200] CERD also explicitly "[affirmed] that the situation of the scheduled castes and

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[195] As David Keane and Annapurna Waughray point out, "in its previous report India had provided information on the development and protection of Scheduled Castes and had therefore clearly recognized that the Convention was applicable to the [caste] situation in India." Annapurna Waughray and David Keane, "CERD and Caste-based Discrimination," in *Fifty Years of the International Convention on the Elimination of all Forms of Racial Discrimination: A Living Instrument* (Manchester: Manchester University Press, 2017), 11.
[196] Committee on the Elimination of Racial Discrimination (CERD), "Fourteenth periodic reports of States parties due in 1996: India" (1996), CERD/C/299/Add.3, paragraph 7.
[197] CERD/C/299/Add.3, paragraph 6.
[198] The report tries to advance this argument further by suggesting that caste was "unique" to India. CERD/C/299/Add.3, paragraph 7.
[199] Purvi Mehta, "Recasting Caste," 167, 171.
[200] Committee on the Elimination of Racial Discrimination (CERD), "Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: Concluding Observation of the Committee on the Elimination of Racial Discrimination: India" (1996), CERD/C/304/Add.13, paragraphs 2, 4.

scheduled tribes falls within the scope of [ICERD]" and reasoned that this was the case because "the term 'descent' mentioned in article 1 does not solely refer to race."[201] The shift from understanding "descent" as solely referring to a person's geographic origin to understanding "descent" as also referring to caste status had been facilitated by Dalit activists' push in the 1980s and 1990s "to win official recognition of caste discrimination as an international human rights issue."[202] In 1996, for the first time since Robert Knox and Philip Baldaeus had written about caste in seventeenth century Ceylon, the concepts of descent and caste were linked in the eyes of the international community. CERD's broad interpretation of Article 1(1) of ICERD gave Dalit activists the opening they needed to make caste-based discrimination an international human rights issue.

The Creation of a Human Rights Discourse (1997-2000)

CERD's conclusion that caste was a form of descent-based discrimination in 1996 had an immediate impact on caste's place in international human rights discussions. In 1997, after years of lobbying from Dalit activists, the Human Rights Watch (HRW) finally "decided to prepare a major report on caste-based discrimination."[203] Although the HRW's 1999 report *Broken People: Caste Violence Against India's "Untouchables"* did not use the term "descent," the report helped unify Dalit activists and solidify caste's place as an important human rights issue.[204] The HRW received funding from the Ford Foundation for the report and the Ford Foundation required the HRW to collaborate with local organizations working on caste discrimination in order to receive funding. To meet the Ford Foundation's requirements, the HRW brought together Dalit

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[201] CERD/C/304/Add.13, paragraph 14.
[202] Clifford Bob, "'Dalit Rights Are Human Rights': Caste Discrimination, International Activism, and the Construction of a New Human Rights Issue," *Human Rights Quarterly* 29, no. 1 (2007): 177-178.
[203] Bob, "'Dalit Rights Are Human Rights,'" 178.
[204] The HRW report can be accessed in full at: https://www.hrw.org/report/1999/03/01/broken-people/caste-violence-against-indias-untouchables.

organizations from across India to discuss the report in 1998. This meeting, along with funding from the Ford Foundation to "[promote] Dalit organizing on a national and international level," led to the creation of the National Campaign on Dalit Human Rights (NCDHR), which united Dalit organizations from across India into one organizational structure in 1998.[205]

From its founding, the NCDHR acted aggressively to make caste a prominent human rights issue. In 1999, the NCDHR published a *Black Paper* on caste discrimination in India that "demonstrated that caste was a grave problem in India, despite its laws and policies, and in addition, claimed that caste discrimination and violence could only occur at such epidemic proportions with state complicity."[206] The *Black Paper* framed the Indian state's failures to stop caste discrimination in "the language of human rights as a 'crime against humanity' and 'genocide.'"[207] By using recognizable language from international human rights law to describe caste discrimination and the practice of untouchability, the *Black Paper* advanced the NCDHR's central aim of demonstrating that "Dalit Rights are Human Rights."[208]

The HRW's release of a report on caste discrimination in March 1999 also enabled the HRW to draw international attention to the work of Dalit activists and the NCDHR. The HRW itself gave NCDHR's leader Martin Macwan an award at a public event in November 2000 and helped to successfully nominate Macwan for the 2000 Robert F. Kennedy Human Memorial Rights Award. As Clifford Bob notes, the Kennedy award in particular helped advance the cause of Dalit rights because it gave Macwan access to lobbying services and contacts which he was

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[205] Bob, "'Dalit Rights Are Human Rights,'" 178.
[206] Mehta, "Recasting Caste," 136.
[207] Mehta, "Recasting Caste," 148.
[208] Bob, "'Dalit Rights Are Human Rights,'" 180; Mehta, "Recasting Caste," 153.

able to use "to gain entrée to powerful American politicians, State Department staff, and United Nations officials."[209]

The late 1990s also marked a move towards transnational Dalit organizing and the internationalization of caste. The First World Dalit Convention in Malaysia in 1998 brought together activists from across South Asia and the South Asian diaspora as well as activists from Japan's Burakumin community. The First World Dalit Convention drafted a declaration that they submitted to the UN. But, the biggest impact of the Convention was the coalition of activists it helped to assemble.[210] By bringing together activists from across the world, members of the First World Dalit Convention were able to undercut the Indian government's argument that caste was unique to India. The inclusion of Burakumin activists is particularly noteworthy because it suggests that groups outside of South Asia were treated similarly to Dalits.

Although the First World Dalit Convention was an important step for transnational Dalit organizing, the Convention's framing of the oppression of Dalits as an issue of caste-based discrimination could only have a limited effect on the UN's response to caste discrimination.[211] Dalit activists had to argue that the oppression faced by Dalits, and Burakumin, was a form of descent-based discrimination that fell within the scope of ICERD for the UN to take the issue of caste discrimination seriously.

WCAR Durban 2001

After they had successfully created an international dialogue about caste discrimination in the 1990s, Dalit activists focused their attention on having caste discrimination addressed at

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[209] Bob, "'Dalit Rights Are Human Rights,'" 181.
[210] Bob, "'Dalit Rights Are Human Rights,'" 180.
[211] The Dalit International Organisation and The Indian Progressive Front, "1st World Dalit Convention" (Kuala Lumpur, 1998). Available at: https://velivada.com/2022/01/16/resolutions-of-1st-world-dalit-convention-kuala-lumpur-malaysia-1998/.

the 2001 World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance (WCAR) in Durban, South Africa. Dalit activists sought to have caste included in WCAR's platform as "a form of 'discrimination based on work and descent'" that violated international law.[212] By arguing that caste was "discrimination based on work and descent," Dalit activists were able to show the international community how the caste system prevented social mobility in many South Asian communities; individual *jatis,* small endogamous groups/castes, are often associated with specific occupations. For example, the child of a sewage cleaner may not have the freedom to become anything other than a sewage cleaner; the child inherits both the undesirable occupation and the stigma associated with performing the undesirable occupation. The use of the terminology of "work and descent" also allowed Dalit activists to argue that the caste system was just one of many examples of "discrimination based on work and descent" globally. As Purvi Mehta argues in here dissertation, Dalit activists were able to use the terminology of descent to make the 'local' experiences of caste discrimination visible in "global" discourses about human rights abuses. By pointing to the local example of caste discrimination, Dalit activists also offered a critique of how previous human rights discourse's focus on discrimination that stemmed from colonialism had failed to do anything about the discrimination that millions of people face in their local communities.[213]

Dalit activists' arguments in the lead up to WCAR should also not be misunderstood, as the scholar Andre Beteille did, as using the language of racial discrimination and descent to claim that caste groups are the same as racial groups. Rather, Dalit activists were making the more nuanced point that "the experiences associated with" racism and casteism "are virtually

[212] Mehta, "Recasting Caste," 165.
[213] Mehta, "Recasting Caste," 3, 10.

indistinguishable" because racism and casteism "are forms of *discrimination* linked to *descent*."[214]

In the lead up to Durban, Dalit activists achieved their first major victory at the UN since CERD's concluding observations on India's Tenth to Fourteenth Periodic Reports in 1996. On August 11, 2000, the UN Sub-Commission on the Promotion and Protection of Human Rights issued Resolution 2000/4, which authorized the drafting of "a working paper on the topic of discrimination based on work and descent."[215] The Resolution even echoed Dalit activists' argument that descent-based discrimination was a global issue, not just on the Indian subcontinent, in its straightforward statement that "discrimination based on work and descent has historically been a feature of societies in different regions of the world."[216] Resolution 2000/4 not only marked a significant victory for Dalit activists, but it is also a significant moment in descent's usage in international law. Resolution 2000/4 was the first time that the legal category "descent" had been used at the UN outside of CERD.

On June 14, 2001, less than three months before WCAR, Rajendra Kalidas Wimala Goonesekere submitted his working paper on discrimination based on work and descent to the Sub-Commission on the Promotion and Protection of Human Rights. Goonesekere's working paper built off of CERD's interpretation of descent-based discrimination as encompassing "not solely race but tribal or caste distinctions as well" to describe common characteristics of "discrimination based on work and descent" and to determine the communities where "discrimination based on work and descent" was occurring.[217]

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[214] Deepa S. Reddy, "The Ethnicity of Caste," *Anthropological Quarterly* 78, no. 3 (2005): 558.
[215] UN Sub-Commission for the Promotion and Protection of Human Rights, Resolution 2000/4, "Discrimination based on work and descent," (2000), E/CN.4/Sub.2/Res/2000/4.
[216] E/CN.4/Sub.2/Res/2000/4 .
[217] E/CN.4/Sub.2/2001/16, paragraph 4.

Goonesekere's working paper explicitly linked descent-based discrimination to caste discrimination, while also outlining shared characteristics of all systems of descent-based discrimination. As paragraph 7 of the working paper outlines:

> Discrimination based on descent manifests itself most notably in caste- (or tribe-) based distinctions. These distinctions, determined by birth, result in serious violations across the full spectrum of civil, cultural, economic, political and social rights. Likewise, the nature of a person's work or occupation is often the reason for, or a result of, discrimination against the person. Persons who perform the least desirable jobs in a society are often victims of double discrimination, suffering first from the nature of the work they must perform and suffering again by the denial of their rights because they perform work that is unacceptable. In most cases, a person's descent determines or is intimately connected with the type of work they are afforded in the society. Victims of discrimination based on descent are singled out, not because of a difference in physical appearance or race, but rather by their membership in an endogamous social group that has been isolated socially and occupationally from other groups in the society.[218]

As this definition suggests, systems of descent-based discrimination are able to be perpetuated by sexually isolating groups who perform undesirable jobs. Sexual isolation ensures that the offspring of people who perform undesirable jobs inherit their parents' status and occupation.[219]

Goonesekere's working paper also listed a series of typical "manifestations" of "discrimination based on work and descent":

> prohibitions on intermarriage between socially or occupationally defined groups; physical segregation of communities; restrictions upon access to resources including land, water and other means of production; social prohibitions regarding physical contact such as sharing food or utensils; restrictions on access to education or segregation in educational facilities; restrictions on access to religious buildings and restrictions on participation in religious ceremonies.[220]

The correspondence between the list of manifestations of descent-based discrimination and the characteristics associated with the South Asian caste system is obvious. But, the articulation of

[218] E/CN.4/Sub.2/2001/16, paragraph 7.
[219] The system of slavery that was erected in colonial Virginia, which I outlined in Chapter 1, is a good historical example of a society where "discrimination based on work and descent" existed. By passing anti-miscegenation laws and matrilineal descent laws, English colonists were able to solidify the distinction between enslaved people and free people; they ensured that the offspring of enslaved people of African descent inherited both the occupation and status of slave.
[220] E/CN.4/Sub.2/2001/16, paragraph 8.

the list of manifestations was important because it allowed communities in any part of the world who experienced educational segregation or who are viewed as physically contaminating to have their abuse addressed under the category of "discrimination based on work and descent."

The 2001 working paper explicitly identified and discussed "discrimination based on work and descent" in India, Sri Lanka,[221] Nepal, Pakistan, and Japan. Although this list was limited to Asian countries, Japan's inclusion in the working paper was important because it suggested that the problem of "discrimination based on work and descent" existed outside of the Indian subcontinent. By discussing how "discrimination in marriage and employment [against Burakumin] continues" in Japan was a legacy of discrimination against people who performed undesirable jobs in "Japanese feudal society" Goonesekere laid the ground work for the identification of more groups across the world as victims of "discrimination based on work and descent."[222]

Goonesekere's working paper established a rough definition of "discrimination based on work and descent" and identified common experiences of groups who are victims of 'discrimination based on work and descent'. Although the working paper was obviously incomplete, it created a foundation for understanding what "discrimination based on work and descent" was and its place in international law. Dalit activists had successfully changed the interpretation of "descent" in international law; they had convinced the UN to codify a definition of descent-based discrimination that aligned almost exactly with Dalit activists' understanding of the relationship between caste and descent.

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[221] Goonesekere makes a reference to Knox's use of "*Descent* and *Blood*" to describe the caste system in seventeenth century Ceylon in his discussion of "discrimination based on work and descent "in Sri Lanka. Goonesekere does not directly discuss Knox's writing, but seems to use Knox as evidence that caste in Sri Lanka is more closely linked to ancient feudalism than the Hindu *varna* system. E/CN.4/Sub.2/2001/16, paragraph 28.
[222] E/CN.4/Sub.2/2001/16, paragraphs 40, 42.

Heading into the WCAR, which was held from August 31 to September 8, 2001, Dalit activists had growing international support for the inclusion of caste discrimination in the Conference's Programme of Action. Despite resistance from the Indian government, NGOs like the NCDHR, HRW, and International Dalit Solidarity Network (IDSN) were able to raise the issue of caste discrimination to international audiences at the WCAR preparatory meetings. The IDSN even convinced the Dutch and Danish delegations to add language to the Draft Programme of Action that would protect victims of "discrimination based on work and descent."[223] Paragraph 73 of the Draft Programme of Action encouraged national governments

> to ensure that all necessary constitutional, legislative and administrative measures, including appropriate forms of affirmative action, are in place to prohibit and redress discrimination on the basis of work and descent, and that such measures are respected and implemented by all State authorities at all levels;[224]

Paragraph 73, however, was not included in WCAR's final Programme of Action. The Indian government succeeded in keeping caste, and "discrimination based on work and descent" by extension, out of WCAR's official statements .[225]

Even though Dalit efforts to have "discrimination based on work and descent" included in WCAR's Programme of Action had fallen short, Dalit activists were still able to use WCAR to draw international attention to caste discrimination by connecting the experience of caste discrimination to the experience of racial discrimination. This allowed organizations like the IDSN and NCDHR to gain coverage in the media and forge international connections that had not previously existed.[226]

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[223] Bob, "'Dalit Rights Are Human Rights,'" 184.
[224] UN General Assembly, "World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance: Draft programme of action" (Durban, 2001), A/CONF.189/5, paragraph 73.
[225] Bob, "'Dalit Rights Are Human Rights,'" 184-185.
[226] Bob, "'Dalit Rights Are Human Rights,'" 185

The WCAR NGO Forum Declaration even devoted an entire section to "Caste and Discrimination Based on Work and Descent." The section links caste systems to "discrimination based on work and descent" and detailed the discrimination faced by Dalits in South Asia and Burakumin in Japan.[227] The Declaration's framing of "Work and descent based discrimination" as "a historically entrenched, false ideological construct sanctioned by religion and culture" implicitly placed the blame for caste discrimination on cultural practices in India that predated colonialism.[228] This interpretation of "discrimination based on work and descent" showed Dalit activists' success in shifting the focus of human rights discourse—a human rights abuse no longer had to be the legacy of colonialism to be a legible form of discrimination.[229]

Conclusion

Even though the interpretation of the legal category "descent" in international law has shifted since 1965, the language of descent continues to be used today as a means to prohibit discrimination against people based on the status of their parents/ancestors. When "descent" was added to ICERD in 1965, it helped to clarify the meaning of national origin. Building on precedents in Indian law and the linkage between descent and geographic origin that had formed in the context of British Atlantic slavery, the amendment proposed by the Indian delegation offered explicit protection to people regardless of their ancestral geographic origin. In 1996, the interpretation of "descent" in international law began to change when CERD concluded that caste discrimination fell under the legal category "descent" as it appeared in ICERD. The main

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[227] "WCAR NGO Forum Declaration," (2001), paragraphs 84-90. Available at: https://www.hurights.or.jp/wcar/E/ngofinaldc.htm.

[228] WCAR NGO Forum Declaration," (2001), paragraph 84. This argument is a rejection of the argument made by scholars like Nicholas Dirks who argue that the British were responsible for most of the harms caused by the caste system. Nicholas B. Dirks, *Castes of Mind: Colonialism and the Making of Modern India* (Princeton: Princeton University Press, 2001).

[229] In her dissertation, Purvi Mehta details how Dalit activists caused a shift away from the framing of discrimination as solely stemming from colonialism. Mehta, "Recasting Caste," 168, 169, 171, 176, 177, 188, 191.

shift in descent's definition existed in its delinking from the concept of geography. Victims of descent-based discrimination were now seen as members of underprivileged castes or other endogamous groups who inherited the impure status and undesirable occupation of their parents. By the time the World Conference Against Racism was conducted in 2001, it was clear that "descent" no longer referred exclusively to the geographic origin of a person's ancestors. The legal category "descent" also provided protections to the Dalits of South Asia and the Burakumin of Japan who inherited the lowly status and occupation of their parents.

Conclusion

In this thesis, I have attempted to trace a genealogy of the legal concept/category of descent across continents, across centuries, and across legal systems. In attempting to execute this task, which requires a basic understanding of what was happening at vastly different historical moments, I am sure my analysis has fallen short in many places. But, the purpose of this project is as much to tell a story about how laws and ideas about inheritance, race, and slavery spread throughout empires as it is to trace a specific legal genealogy; the concept of descent that was used to justify slavery in the British Atlantic became a tangible legal category in British attempts to show the progressiveness of their rule in India. It is also a story about how colonialism continued to shape the formation of international laws in the post-World War II era and how decades of Dalit activism led to a change in the understanding of the legal category "descent" in international law.

In showing, in Chapter 3, that a change in the understanding of the legal category "descent" occurred from the first appearance of "descent" in international law in 1965 to Goonesekere's 2001 working paper, it has not been my intention to make or advance any particular ideological agenda or point about how people should interpret the international legal category "descent" today. But, I would like to briefly respond to those who may be inclined to argue that my thesis shows that CERD and the UN have misinterpreted "descent" in applying it to caste-based discrimination. While it is true that the legal category "descent" was not used in 1833, 1915, 1935, or 1950 to describe the caste system, it seems clear that the principle of prohibiting discrimination based on who someone's parents or ancestors were logically extends to the example of caste. The fact that "descent" most prominently appears in the context of laws regulating the state's employment practices is demonstrative of this resonance. One of the most

oppressive features of the caste system today is the fact that a person's caste can still have a major influence on their opportunities for economic mobility. There is no reason to force ourselves to adopt a narrow definition of descent-based discrimination that does not include caste-based discrimination.

That is why I applaud CERD for in their "*Strongly reaffirming* that discrimination based on "descent" includes discrimination against members of communities based on forms of social stratification such as caste and analogous systems of inherited status" in 2002[230]—a year after the World Conference Against Racism in Durban, South Africa.

In 2003-2004, the UN Sub-Commission on the Promotion and Protection of Human Rights' expansion of the list of countries where people experience "discrimination based on work and descent" to include Bangladesh, Burkina Faso, India, Japan, Kenya, Mali, Micronesia, Nepal, Pakistan, Senegal, Sri Lanka, and Yemen was also a welcome step because it brought the discrimination faced by more marginalized groups within the framework of international human rights law.[231]

However, now that the discrimination faced by Dalits, Burakumin, and other communities that suffer from "discrimination based on work and descent" have their oppression officially recognized by the UN, the UN must take substantive action against descent-based discrimination. It is not sufficient for the UN to simply use working papers and CERD reports to condemn the Indian government, the Sri Lankan government, or the Yemeni government for

[230] This shows that CERD was responsive to the arguments made by Dalit activists about the association between caste and descent. Committee on the Elimination of Racial Discrimination (CERD), "CERD General Recommendation XXIX on Article 1, Paragraph 1, of the Convention (Descent)," (2002).
[231] Asbjørn Eide and Yozo Yokota, "Prevention of Discrimination: Discrimination based on work and descent: Expanded working paper submitted by Mr. Asbjørn Eide and Mr. Yozo Yokota pursuant to Sub-Commission decision 2002/108," (UN Sub-Commission for the Promotion and Protection of Human Rights, 2003), E/CN.4/Sub.2/2003/24; Asbjørn Eide and Yozo Yokota, "Prevention of Discrimination: Expanded working paper by Mr. Asbjørn Eide and Mr. Yozo Yokota on the topic of discrimination based on work and descent," (UN Sub-Commission for the Promotion and Protection of Human Rights, 2004), E/CN.4/Sub.2/2004/31.

failing to act against descent-based discrimination. The UN needs to act to actually improve the lives of Dalits, Burakumin, and other communities who suffer from “discrimination based on work and descent.”

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