

CERD and Caste-based Discrimination

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I. Introduction

On 19 January 2016, BBC News ran a story from India with the headline 'Rohith Vemula: The student who died for Dalit rights'.¹ The story concerned a twenty-six year old PhD student who killed himself inside the campus of Hyderabad Central University. It explained that Mr Vemula 'was a member of the Ambedkar Students' Association, which fights for the rights of Dalit (formerly known as untouchable) students on the campus' and that '[t]hough he did not blame anyone for his death, the contents of the [suicide] letter show that he was upset over the discrimination shown to Dalits like him.'²

Four months previously, on 22 September 2015, BBC News had reported a UK story headlined 'Woman awarded £184k in "first caste discrimination" case', concerning an Indian woman recruited from India to be a domestic servant for a family in the UK: 'Permila Tirkey, 39, was discriminated against because of her "low caste", her lawyers said, describing it as the first successful case of its kind.'³

These news stories, one from India and one from the UK, provide a snapshot of manifestations of caste-based discrimination as a contemporary, global phenomenon. In both cases the ground of discrimination referred to was *caste*, a form of social organisation based on inherited status, traditionally associated with South Asia. This

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¹ Dalit is a political term of self-identification meaning 'crushed' or 'broken'. Since the 1970s it has been used in India and internationally by many those at the bottom of the caste hierarchy, formerly known as 'untouchables'. The Indian constitutional, legal and administrative term for Dalits is 'Scheduled Castes.' In this chapter, the term Scheduled Caste is used in these contexts. Otherwise, the term Dalit is used, albeit that it is not adopted by all people of so-called untouchable origin.

² Omer Farooq, 'Rohith Vemula: The student who died for Dalit rights', *BBC News*, 19 January 2016, available at: <http://www.bbc.co.uk/news/world-asia-india-35349790>

³ 'Woman awarded £184k in "first caste discrimination" case', *BBC News*, 22 September 2015, available at: <http://www.bbc.co.uk/news/uk-34330986> A further £83,700 was awarded in damages for indirect religious discrimination and unlawful harassment on the ground of race, specifically ethnic origins which in this case was deemed capable of capturing caste; see Tamar Burton, 'Remedy in *Tirkey v Chandhok*', *Cloisters – Discrimination and Equality*, 10 December 2015, available at: <http://www.cloisters.com/latest/remedy-in-tirkey-v-chandhok> The claimant in this case was an Adivasi, a term which refers to members of India's indigenous tribes, known as Scheduled Tribes in Indian constitutional, legal and administrative terminology. In sociological terms the distinction between castes and tribes 'is to some extent arbitrary and reified by law'; tribal groups 'have a different history of non-integration, but also suffer inequality, marginalisation, and social separation'; Meena Dhanda et al, 'Caste in Britain: Socio-legal review'; Equality and Human Rights Commission (EHRC) Research Report 91 (Manchester: EHRC, 2014). The EHRC 'Caste in Britain' research team included the present authors.

chapter explains and assesses the role of the Committee on the Elimination of Racial Discrimination (CERD/ the Committee) in the conceptualisation of discrimination on grounds of caste as a form of descent-based racial discrimination under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD/ the Convention) and hence a violation of international human rights treaty law.

For over two thousand years, oppression and discrimination based on caste has affected many millions of people in South Asia, and latterly the diaspora,⁴ yet the term caste is not present in any international human rights instrument, and there is no specialised international instrument prohibiting caste-based discrimination. Historically and today, the primary victims of caste discrimination in the Indian sub-continent are the Dalits, formerly known as ‘untouchables’, officially referred to as Scheduled Castes in Indian constitutional, administrative and legal terminology.⁵ Caste discrimination is estimated to affect some 260 million people worldwide, the majority in South Asia. India’s Dalits number around 167 million people, many of whom are subject to extreme socio-economic deprivation and exclusion and violations of their civil, political, economic and social rights as well as systemic caste-based violence.⁶ The Constitution of India 1950, drafted following India’s independence from the British in 1947, prohibits discrimination on grounds of caste and abolishes and criminalises its most egregious manifestation, the practice of ‘untouchability’.⁷ Subsequently, criminal legislation outlawing caste discrimination and caste hate crimes (‘atrocities’) was enacted, and constitution-based affirmative action policies (‘reservations’) were introduced; yet, in the post-independence period, widespread discrimination based on caste persisted, alongside an increase in anti-Dalit violence. Dalit non-governmental organisations (NGOs) in India adopted a variety of strategies to publicise and challenge caste-based discrimination and violence, but the response of successive Indian governments was to downplay the severity of the problem while insisting that India had sufficient domestic measures in place to tackle it, albeit that this would take time.⁸

Outside India, caste was an unfamiliar and largely unrecognised ground of discrimination. From the early 1980s, frustration with the slow pace of change led Dalit

⁴ Susan Bayly, *Caste, Society and Politics in Modern India from the Eighteenth Century to the Modern Age* (Cambridge: Cambridge University Press, 1998), pp. 13, 28; Oliver Mendelsohn & Marika Vicziany, *The Untouchables: Subordination, Poverty and the State in Modern India* (Cambridge: Cambridge University Press, 1998), pp. 25-6.

⁵ The term Scheduled Castes refers to those formerly ‘untouchable’ castes listed in a Schedule to the Indian Constitution. The Schedule lists those castes entitled to the benefit of affirmative action policies and the protection of criminal legislation outlawing caste discrimination and caste hate crimes; see Annapurna Waughray, ‘India and the Paradox of Caste Discrimination’, *European Yearbook of Minority Issues* 8 (2010), pp. 413-452.

⁶ International Dalit Solidarity Network (IDSN), ‘Caste Discrimination’, available at: <http://idsn.org/caste-discrimination/> See also Waughray, *Ibid.*, 416-7.

⁷ Constitution of India 1950, Articles 15 and 17. Untouchability is not defined in the Indian Constitution. On the practice of untouchability see Navsarjan Trust and Robert F. Kennedy Center for Justice & Human Rights, ‘Understanding Untouchability: A Comprehensive Study of Practices and Conditions in 1589 Villages’ (2010), pp. 3-4.

⁸ Mendelsohn & Vizciany, ‘The Untouchables’, pp. 118-28, at pp. 147-8; Hugo Gorringer, ‘Dalit Politics: Untouchability, identity and assertion’, in Atul Kohli and Prerna Singh (eds.), *Routledge Handbook of Indian Politics* (Routledge: London, 2012), pp. 119-28; India: tenth to fourteenth reports to CERD; UN Doc. CERD/C/299/Add.3, 29 April 1996.

activists in India and the diaspora to turn to international NGOs as well as the UN human rights treaty bodies and charter mechanisms in the search of an international response to their grievances.⁹ The challenge faced by Dalit activists was the apparent lack of an international frame or category within which to locate caste. Of the UN bodies and mechanisms with which Dalit activists sought to engage, the most important have been the UN Sub-Commission for the promotion and protection of human rights, and CERD. Of these, CERD has played a crucial role in the international recognition of caste discrimination as a human rights issue and as an international human rights treaty violation.

The legal source of CERD's engagement with caste is the category of descent in Article 1 of the Convention. In 1996, in its Concluding Observations on India's 9th-14th State report, CERD stated that the term descent in Article 1 did not solely refer to race, and affirmed for the first time that the situation of the Scheduled Castes in India fell within the scope of the Convention, under the rubric of descent.¹⁰ In 2001, Dalit activists failed to secure the inclusion of caste as a form of racial discrimination in the outcome document of the UN World Conference Against Racism, Racial Discrimination, Xenophobia and other Related Forms of Intolerance (WCAR), but their presence at the WCAR served to raise international awareness of caste discrimination. In 2002, CERD issued General Recommendation 29 on Article 1(1) of the Convention (Descent) (GR 29) which confirms that the term descent in Article 1 does not solely refer to race but has a meaning and application which complement the other prohibited grounds of discrimination in Article 1; reaffirms 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 which nullify or impair their equal enjoyment of human rights; and condemns descent-based discrimination, such as discrimination on the basis of caste and analogous systems of inherited status, as a violation of the Convention.¹¹

The inclusion of caste in 'descent' is rejected by India which does not accept that discrimination against the Scheduled Castes falls within the scope of ICERD. However, other states questioned by CERD on the existence of caste discrimination in their territories (for example Nepal, Pakistan, Bangladesh, the UK) have accepted or at least not challenged CERD's use of descent to cover caste.

ICERD is a Convention of a general nature in that, aside from the case of apartheid, it makes no reference to specific forms of racial discrimination, nor does it identify specific groups as victims of racial discrimination. Interpretation of ICERD follows the 'living instrument' approach which facilitates the application of the Convention to new and emerging forms and understandings of racial discrimination. The living instrument principle applies to the Convention's structures and processes as well as its substantive content, resulting in innovative developments in procedure, for example the introduction of thematic debates on proposed general recommendations.¹²

⁹ Clifford Bob, "'Dalit Rights are Human Rights": Caste Discrimination, International Activism and the Construction of a New Human Rights Issue' 29:1 (2007) *Human Rights Quarterly*, pp. 167-193.

¹⁰ UN Doc. A/51/18 (1996), para. 352.

¹¹ CERD, 'General Recommendation 29 (2002) on Discrimination based on descent', UN Doc. A/57/18 at 11.

¹² Patrick Thornberry, 'Confronting racial discrimination: A CERD perspective', 5:2 (2005) *Human Rights Law Review*, p. 266.

Since the early 2000s there have been calls from some Dalit activists and human rights actors for a caste-specific treaty.¹³ This seems less likely to emerge than a treaty on descent-based discrimination: India is unlikely to support a caste-specific instrument which it might construe as targeting India alone, while descent is a wider legal category than caste, with a wider geographical and social reach. It is possible that a recent UN OHCHR study on work and descent-based discrimination may lead to a Declaration on this issue, which in turn may lead to a treaty; however, neither the Indigenous Peoples' Declaration nor the Minorities Declaration have yet been converted into legally-binding treaties. In the absence of a caste or descent-specific treaty, ICERD remains the pre-eminent human rights treaty for addressing caste discrimination.

GR 29 affirms that caste is a facet of descent. It was preceded by a thematic discussion on descent-based discrimination within CERD, in the course of which CERD member Pillai suggested that unless the Committee could find some common denominator identifying all discriminatory social practices as caste discrimination, it should employ the term 'caste' only with reference to countries where, in their own terms, castes existed.¹⁴ This would confine the use of the term caste to its paradigmatic meaning, namely the form of social organisation associated with South Asia and its diaspora. The remit of this chapter being caste-based discrimination rather than its parent category, descent-based discrimination, the term caste is used here in its paradigmatic sense, as a specific form of descent-based discrimination primarily associated with South Asia and its diaspora.

The focus of ICERD is racial discrimination. During CERD's thematic discussion of descent-based discrimination, the issue of 'cultural intrusion' was raised. Former CERD member Thornberry explains that the thrust of GR 29 'is not against the caste or any other cultural system as such' but against discrimination on the basis of descent; nevertheless 'the Recommendation goes some way in the direction of a severe critique of that particular form of social and religious organisation'.¹⁵ NGOs and civil society organisations have played a key role in CERD's engagement with caste discrimination, as non-State sources of information about a form of discrimination falling within the purview of the Convention. CERD, writes Thornberry, could not ignore the experience of Dalits and other victims of caste discrimination, notwithstanding the value CERD places on cultural diversity:

The massive contestation of caste systems by Dalits and others and the overwhelming evidence of oppression suffered by those made subject to it could hardly escape the attention of CERD in the light of its duty to be faithful to the norms of the convention. While the Committee demonstrates a high level of respect for cultures, there are always limits, there are always practices which are open to a human rights critique, even if the human rights brought to bear on the practice may themselves possess a degree of openness to cultural context.¹⁶

¹³ See for example Barbara Crosette, 'Putting Caste on Notice', *The Nation*, 9 November 2009 in which the former UN High Commissioner for Human Rights, Navi Pillay, suggests that a caste specific treaty may be required.

¹⁴ CERD/C/SR.1531, 16 August 2002, para 8.

¹⁵ Patrick Thornberry, 'The Convention on the Elimination of Racial Discrimination, indigenous peoples, and caste/descent-based discrimination' in Joshua Castellino and Niamh Walsh (eds.), *International Law and Indigenous Peoples* (Leiden: Martinus Nijhoff, 2005), p. 42.

¹⁶ Thornberry, *ibid.*, at p. 43.

This chapter examines the emergence of the issue of caste-based discrimination as a violation of ICERD, beginning in the 1990s with the application of ‘descent’ in Article 1(1) to caste groups in the context of India’s 1996 state report, and the development of the issue from there. It charts the evolution and adoption of General Recommendation 29 on Article 1(1) (Descent), in which the scope and meaning of descent is elaborated in detail, with a definition of descent-based discrimination as including caste and analogous systems of inherited status. In addition to examining the meaning of caste and the nature of rights violations that occur, the chapter engages with State opposition to CERD’s interpretation, in particular from India, which rejects the categorisation of caste as a form of descent-based discrimination and therefore a form of racial discrimination. While CERD considers the treaty to be a living instrument, and interprets it so as to bring newly-recognised marginalised groups under its protection, States parties may not accept these interpretations, leading to disagreement and even conflict with the Committee and beyond. The issue of caste challenges the interpretive approach to the treaty which CERD has adopted from the outset.

II. Understanding Caste

According to the International Encyclopedia of the Social Sciences,

[t]he term caste refers, paradigmatically, to a social institution in India and elsewhere in South Asia in which endogamous descent groups, known as castes or subcastes, are hierarchically ranked. It has also been used to describe hereditary forms of social stratification in non-South Asian contexts, such as Japan, the American South, and elsewhere. The validity of usage outside of South Asian contexts, however, ultimately turns on how we are to understand the paradigmatic Indian case—a matter of considerable and ongoing debate.¹⁷

Sociologically, caste may typically be summed up as

a ‘closed system’ of stratification where social groups, often divided on the basis of their occupation, strictly follow the code of behaviour prescribed by tradition regarding marriage and kinship alliance. Caste groups are unequal, ranked on a scale of hierarchy based on their ritual status, from pure to impure. Their ‘status’ or position in the system determines with whom they can interact and with whom they cannot. The idea and practice of untouchability is an integral part of the caste system.¹⁸

Anthropologist Gerald Berreman explained caste as being, in empirical terms, about fundamental social, economic and political inequalities, stating that it entails

¹⁷ Nate Roberts, ‘Caste, Anthropology of’ in W. Darity (ed.), *International Encyclopedia of the Social Sciences, 2nd Edition* (Macmillan, Detroit: 2007), pp. 461-463. See also Meena Dhanda et al, *Caste in Britain; Socio-Legal Review*; Equality & Human Rights Commission (EHRC) Research Report 91; (Manchester: EHRC, 2014) pp. 3-6.

¹⁸ Surinder Jodhka, *Oxford India Short Introductions: Caste* (New Delhi: OUP India, 2012) xi, 1.

[i]nstitutionalised inequality; guaranteed differential access to the valued things in life....[t]he human meaning of caste for those who live it is power and vulnerability, privilege and oppression, honor and denigration, plenty and want, reward and deprivation, security and anxiety.¹⁹

These written definitions cannot easily convey the reality of caste oppression. Numerous studies exist by national and international organisations, activists, practitioners, and scholars, as well as official datasets on caste hate crimes, personal testimonies, literature and poetry, which attest to the social, economic, and psychological effects of caste discrimination on those at the bottom of the social hierarchy, and of the inequality and denial of rights and dignity which the reality of caste entails.

As is well-known, the term caste comes from the Portuguese *casta* meaning race or breed. In South Asia and its diaspora the term is used for two concepts, *varna* and *jati*. *Varna*, a concept in ancient Sanskrit religious texts, refers to the textual division of Hindu society into four hierarchical and mutually exclusive categories or *varnas* related to occupation or social function and involving the notion of 'innate characteristics':²⁰ Brahmins (priests), Kshatriyas (warriors and rulers), Vaisyas (traders and artisans), and Shudras (labourers and servants). Outside the *varna* framework is a fifth category - the Dalits, formerly known as 'Untouchables.' Caste is also used to refer to *jati*. *Jatis* are the thousands of local or regional endogamous birth groups, linked to hereditary occupation and hierarchically ranked within a geographical locality. Unlike *varna*, the concept of *jati* is not exclusive to Hinduism but is found across religious communities. While there are only four *varnas* the number of *jatis* has always varied as existing groups merge and new groups emerge.

Despite the textual link with the ancient Hindu *varna* classification system, caste is neither solely 'religious' nor is it religion-specific; the concept of caste and the existence of Dalit castes are found among adherents of Hinduism as well as Islam, Sikhism, and Christianity notwithstanding the doctrinal absence or rejection of caste in these religions. Caste membership is hereditary i.e. acquired by birth, involuntary, and generally considered permanent.²¹ It is generally accepted that caste as an institution is maintained and reproduced by endogamy (whereby marriage must be within the same caste).²² The origins of caste are disputed but, notwithstanding the role of colonialism in the 'construction' of caste as a pan-Indian concept, academic consensus is that its roots in the Indian sub-continent long predate British rule, as the link suggested by recent scholarship between agrarian slavery and the emergence of untouchability and Dalit status illustrates.²³ In contrast to earlier scholarly representations of caste as a 'consensual, functional and harmonious system'²⁴ it is now widely acknowledged that throughout history both the concept of caste itself and the discrimination, exploitation,

¹⁹ Gerald Berreman, *Caste and other Inequities* (Meerut: Folklore Institute, 1979) at p. 159.

²⁰ Wendy Doniger, *The Hindus: An Alternative History* (Oxford: OUP, 2010) at p. 211.

²¹ For exceptions to this rule see Annapurna Waughray, *Capturing Caste in Law: the Legal Regulation of Caste-based Discrimination*, forthcoming, Routledge 2017, Chapter 1.

²² See Dhanda et al, *Caste in Britain: Socio-legal review*, p. iii.

²³ Mendelshohn & Vizciany, 'The Untouchables', pp. 17-18. See also Rupa Viswanath, *The Pariah Problem: Caste, Religion, and the Social in Modern India* (Columbia University Press: New York, 2014).

²⁴ Gorringer, 'Dalit Politics: Untouchability, identity and assertion', pp. 119, 128, 120.

and inequality it engenders have been challenged by those on the 'receiving end' of caste oppression.²⁵ In the twentieth century the preeminent campaigner for the eradication of caste was Dr. B. R. Ambedkar (1891-1956), a Dalit and a British-educated lawyer, one of India's greatest political leaders and legal scholars, chair of the Drafting Committee of India's constitution, and responsible for the inclusion in the Indian Constitution of provisions on rights and non-discrimination, and on social, economic, and political equality for Dalits and non-Dalits alike.²⁶

There is no definition of caste or untouchability in the Constitution of India or in Indian legislation. In 1993 in the leading case of *Indra Sawhney v Union of India* the Indian Supreme Court defined caste as a socially homogenous class and also an occupational grouping, membership of which is involuntary and hereditary.²⁷ GR 29 does not contain a definition of descent, but lists some of the factors on the basis of which the existence of descent-based discrimination, including discrimination on the basis of caste and analogous systems of inherited status, may be recognized:

[I]nability or restricted ability to alter inherited status; socially enforced restrictions on marriage outside the community; private and public segregation, including in housing and education, access to public spaces, places of worship and public sources of food and water; limitation of freedom to renounce inherited occupations or degrading or hazardous work; subjection to debt bondage; subjection to dehumanizing discourses referring to pollution or untouchability; and generalized lack of respect for their human dignity and equality.

Caste as a social institution has shown a remarkable capacity over the centuries to modify and adapt to changing economic, political, and social contexts. In recent years it has been argued that India's transition to modern capitalism has hastened the decline of the 'caste system' as traditionally understood, leading some scholars and commentators to claim that caste is 'dead'; conversely, others argue that the traditional, hierarchical caste system has simply given way to a new form of caste as 'difference' rather than hierarchy.²⁸ In this understanding of caste, caste groups are seen as identity-based groups and caste as a form of cultural or 'community' identity to be celebrated with pride, rather than as an ascribed, inherited status involving privilege for some and inequality and discrimination for others. In the case of the Dalits this concept of caste as cultural identity may take the form of 'Dalit pride' yet, as Hugo Gorringe observes, there is a paradox in attacking discrimination based on caste but not caste itself.²⁹ Ambedkar famously advocated the annihilation of caste, not just an end to caste

²⁵ Gorringe, *ibid.*; Mendelshohn & Vizciany, 'The Untouchables', pp. 21-25.

²⁶ On Ambedkar see Christophe Jaffrelot, *Dr Ambedkar and Untouchability: Analysing and Fighting Caste* (New Delhi: Permanent Black, 2005); Eleanor Zelliot, "The Leadership of Babasaheb Ambedkar" and "Gandhi and Ambedkar: A Study in Leadership" in *From Untouchable to Dalit: Essays on the Ambedkar Movement* (New Delhi: Manohar, 1998). See also Valerian Rodrigues (ed.), *The Essential Writings of B.R. Ambedkar* (New Delhi: Oxford University Press, 2002).

²⁷ A.I.R.1993 SC 477, para. 82.

²⁸ Balmurli Natrajan, *The Culturalisation of Caste in India: identity and inequality in a multicultural age* (Abingdon: Routledge, 2012) pp. 1-28.

²⁹ Gorringe, 'Dalit Politics: Untouchability, identity and assertion,' p. 123.

discrimination.³⁰ Balmurli Natrajan argues that the conceptualisation of caste as simply a form of cultural difference or cultural identity (what he terms the 'culturalisation' of caste) is deeply dangerous, and warns that representing caste as 'natural' or 'pre-existing' cultural identity masks the reality of caste, namely 'socioculturally constructed relations of ascribed status and antagonism (inequality, domination and exploitation).'³¹

III. ICERD and Caste Discrimination as an Emerging Issue: 1965-2001

ICERD was drafted as a response to anti-semitism, colonialism, and apartheid. Its specific purpose was to address racial discrimination. A suggestion that the Convention should address both racial and religious discrimination was rejected at the early stages of drafting.³² Article 1(1) of ICERD defines racial discrimination as

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.

As Patrick Thornberry has pointed out, the umbrella term of the Convention is 'racial discrimination', not 'race'.³³ The prohibited grounds of racial discrimination in Article 1(1) are race, colour, descent, or national or ethnic origin. There is no mention of caste or caste groups. Descent is the ground under which discrimination based on caste has been addressed by CERD since 1996; but descent was not included in the original draft of the Convention, which listed four grounds: race, colour, national or ethnic origin. Descent was introduced into Article 1 by an amendment initially proposed by India to resolve disagreements over the meaning of national origin; India's suggestion was to replace 'national origin' with 'descent' and 'place of origin'. This amendment was replaced by a second amendment proposed jointly by India and eight other states which retained the original four grounds (including national origin) and added 'descent' (but not 'place of origin'). The joint amendment proposing the addition of descent was adopted unanimously with minimal debate and no discussion as to the meaning of the term.³⁴

Since 1996 India has repeatedly rejected CERD's position that caste-based discrimination falls within the scope of Article 1 of ICERD under descent. It has been suggested elsewhere that descent was proposed by India to meet two concerns: first, the legacy of colonialism whereby Indians had suffered racial discrimination in their own land; and secondly, racial discrimination against Indians in South Africa,³⁵ moreover, that India, at least, had caste in mind during the debates on Article 1(4) and Article 2(2) on special measures, when the Indian representatives in the UN General

³⁰ Bhimrao Ramji Ambedkar, 'The Annihilation of Caste' in Valerian Rodrigues (ed.), *The Essential Writings of B. R. Ambedkar*, pp. 263-305.

³¹ Natrajan, *The Culturalisation of Caste in India*, p. 5.

³² David Keane, *Caste-based Discrimination in International Human Rights Law* (Aldershot; Ashgate, 2007) 168-71.

³³ Thornberry, 'Confronting racial discrimination: A CERD perspective,' p. 250.

³⁴ Keane, *Caste-based Discrimination in International Human Rights Law*, pp. 227-228.

³⁵ See Waughray (*The Legal Regulation of Caste Discrimination*, forthcoming, 2017), Chapter 4. See also UN Doc. CERD/C/SR.1796, 2 March 2007, para. 7.

Assembly Third Committee explicitly identified the Scheduled Castes as groups to which the special measures provisions would apply. The discrepancy between India's contribution to the drafting of the special measures provisions, and its subsequent position that caste is not covered by the Convention, was pointed out by former CERD member Van Boven in 1996.³⁶

During the drafting of the Convention many countries insisted that there was no racial discrimination in their country. Ratification was a political act intended to signal a state's opposition to apartheid and colonialism and its support for the anti-apartheid movement and decolonisation.³⁷ The majority of ratifying states did not appear to consider ICERD to be relevant to their internal domestic situation.³⁸

India ratified ICERD in 1969. India's position, similar to many other states, was that there was no racial discrimination in India,³⁹ and this has remained its position. Almost thirty years after ratifying the Convention, in its 1996 Report, India asserted: 'Categorical distinctions of race or national or ethnic origin have ceased to exist and race itself as an issue does not impinge on the consciousness or outlook of Indian citizens in their social relations', moreover 'race as a ground for discrimination has never been invoked before the courts of law of India so far.'⁴⁰ At the time ICERD was drafted, India saw itself and its people as both victims and principal opponents of racial discrimination, not as perpetrators. With regard to its tribal populations, India did not - and still does not - consider that ICERD applies to them as indigenous peoples, a category covered by the Convention;⁴¹ its view is that from the moment of independence and the departure of the colonisers, all Indians are to be regarded as indigenous.⁴²

Between 1969-1982, India submitted seven reports to CERD. In each report, India provided detailed information on its affirmative action (i.e. special) measures for the Scheduled Castes. During this period CERD continued to ask for information on the situation of the Scheduled Castes and Tribes; but neither CERD nor India made it clear whether they considered the Scheduled Castes to fall within the purview of Article 1(1) of the Convention. Successive post-independence governments in India failed to treat the problem of discrimination against the Dalits as anything more than a 'marginal issue'; caste was seen as antithetical to modern India and there was an assumption that caste and hence the problems of the Dalits would disappear as India modernised.⁴³ In the immediate post-war years the Congress Party sought and secured Dalit political

³⁶ UN Doc. CERD/C/SR.1162, 13 August 1996, para 15.

³⁷ Michael Banton, *International Action Against Racial Discrimination* (Oxford: OUP, 1996) pp. 99, 305. See also India: tenth to fourteenth report. UN Doc. CERD/C/299/Add.3, 29 April 1996, para. 13.

³⁸ Thornberry, 'Confronting racial discrimination: A CERD perspective', p. 241.

³⁹ See for example CERD/C/R.3/add.3/Rev.1, 30 March 1970, para 19; UN Doc. A/9018 (1973) para. 238.

⁴⁰ CERD/C/299/Add.3, 29 April 1996, paras. 5, 10.

⁴¹ See Fergus Mackay, 'Indigenous peoples' rights and the UN Committee on the Elimination of Racial Discrimination', in Solomon Dersso (ed), *Perspectives on the Rights of Minorities and Indigenous Peoples in Africa* (Pretoria: Pretoria University Law Press, 2010), pp. 155-202.

⁴² UN Doc. CERD/C/SR. 1797, 26 March 2007, para. 15.

⁴³ Mendelsohn & Vizciany, 'The Untouchables', pp. 44, 118.

support in return for promises of change, which did not materialise,⁴⁴ while for the Left, class not caste was the key political and social enemy. Meanwhile, Dalits continued to suffer egregious discrimination; for them, freedom from colonial rule did not mean freedom from caste oppression.

Hugo Gorringer explains how, starting in the 1970s and through the 80s, the slow pace of change led to the rise of 'new Dalit movements' in India which confronted the failure of successive governments and co-opted Dalit politicians to bring about meaningful change for Dalits.⁴⁵ There was little international awareness outside of South Asia of caste as a ground of discrimination. By the early 1980s Dalit activists in India and the diaspora, frustrated by the limited success of domestic measures to combat caste discrimination, had turned towards the United Nations in an attempt to 'internationalise' their situation as a human rights issue.⁴⁶ In the course of the next decade Dalit activists sought to raise international awareness and to secure international recognition of caste-based discrimination by lobbying and appearing before a wide variety of international human rights bodies including the UN Commission on Human Rights, the UN Working Group on Indigenous Peoples, the UN Working Group on Minorities, the Committee on the Rights of the Child, and at the UN World Conference on Human Rights in Vienna.⁴⁷

The 1990s was a decade of huge economic and social change in India, prompted in part by the economic liberalisation programme introduced in 1991 by the then Finance Minister Manmohan Singh (later Prime Minister of India 2004-14). This decade also witnessed what activists have termed the 'internationalisation' of caste, meaning both the efforts of Dalit activists to bring the problem of caste discrimination and caste-based violence to the attention of international actors – politicians, international organisations, civil society, NGOs, and the wider public - and an increase in global awareness and visibility of the discrimination and violence associated with caste.

CERD Concluding Observations, India, 1996

In 1996, in its 10th-14th report, India asserted categorically for the first time its view that ICERD did not apply to the Scheduled Castes and Scheduled Tribes, stating: 'the policies of the Indian Government relating to Scheduled Castes and Scheduled Tribes do not come under the purview of Article 1 of the Convention'.⁴⁸ According to India,

[T]he term "caste" denotes a "social" and "class" distinction and is not based on race, [having] its origins in the functional division of Indian society during ancient times.⁴⁹

⁴⁴ Gorringer, 'Dalit Politics: Untouchability, identity and assertion', , at p. 122; Mendelsohn & Vizciany, 'The Untouchables', , at p. 118.

⁴⁵ Gorringer, 'Dalit Politics: Untouchability, identity and assertion', at p. 122.

⁴⁶ Bob, 'Dalit Rights are Human Rights,' at p. 175.

⁴⁷ Bob, 'Dalit Rights are Human Rights' at p. 177; Corinne Lennox, 'Norm-entrepreneurship on caste-based discrimination' in David Mosse and Luisa Steur (eds.), *Caste Out of Development? The Cultural Politics of Identity and Economy in India and Beyond*, , forthcoming, Routledge, 2016.

⁴⁸ CERD/C/299/Add.3, 29 April 1996, para. 6

⁴⁹ CERD/C/299/Add.3, 29 April 1996, para. 7

India's Report noted that Article 1 of ICERD includes in the definition of racial discrimination the term descent. India argued that although both castes and tribes were systems based on descent since people are normally born into a particular caste or tribe, it was however 'obvious' that the use of the term descent in the Convention 'clearly referred to race'.⁵⁰ Therefore, 'as conveyed to the Committee during the presentation of India's last periodic report,' India's policies relating to Scheduled Castes and Scheduled Tribes did not come under the purview of Article 1 of the Convention.⁵¹

During the presentation of its report in 1996 before CERD, India reiterated that caste denoted a social or class distinction, and was originally occupation-oriented; it was not a racial issue.⁵² While

the notion of "race" was not entirely foreign to that of "caste"; according to experts on such questions, racial differences were secondary compared to cultural ones (economic and occupational status, language and dynastic or national loyalties), and the principle of race had never really been a determinant for caste.⁵³

Constitutionally (in India) the concept of race was distinct from caste.⁵⁴ Given that (in India's view) descent referred solely to race, and caste was not a racial issue, the Indian government's policies on caste discrimination therefore did not fall under descent or indeed under the Convention at all. CERD did not accept the argument that descent referred solely to race, or that because caste and race were distinguished from each other in the Indian Constitution therefore descent in Article 1 could not capture caste. During its consideration of India's report, CERD member Wolfrum stated that India's interpretation of the term 'descent' was not acceptable. If 'descent was the equivalent of 'race', it would not have been necessary to include both concepts in the Convention. The State party's position on the question could not fail to be of concern to the Committee.⁵⁵ CERD member Chigovera argued that the fact that castes (and tribes) were based on descent brought them strictly within the Convention under the terms of Article 1.⁵⁶ CERD member De Gouttes took a similar position, arguing that although the problem was complex, it was unacceptable to say that the serious discrimination against certain castes, especially the untouchables, was not within the Committee's competence.⁵⁷ Indeed, 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. Yet the 10th-14th periodic report stated that information on matters dealt with in article 1 of the Convention would be provided only as 'a matter of courtesy.' In its Concluding Observations CERD

⁵⁰ CERD/C/299/Add.3, 29 April 1996, para. 7.

⁵¹ CERD/C/299/Add.3, 29 April 1996, para. 7. The reference was to the view expressed orally by the Indian representative in 1987 at CERD's examination of India's 8th-9th Report that Article 1 of ICERD did not apply to the Scheduled Castes and Scheduled Tribes; see CERD/C/SR.796, 30 November 1987, para. 26; CERD/C/SR.797, 30 November 1987, paras. 60-61.

⁵² CERD/C/ SR 1162, 13 August 1996, paras. 35, 36

⁵³ CERD/C/SR.1163, 20 November 1996, para. 3.

⁵⁴ CERD/C/SR.1162, 13 August 1996, para 35.

⁵⁵ CERD/C/SR.1161, 1 November 1996, para 20.

⁵⁶ CERD/C/SR.1162, 13 August 1996, para 22.

⁵⁷ De Gouttes; CERD/C/SR.1161, 1 November 1996, para. 32

reiterated that descent in Article 1 did not solely refer to race, and affirmed that the situation of the Scheduled Castes and Tribes in India fell within the scope of the Convention. It emphasised its great concern that in discussion its report, there was no inclination on the side of India to reconsider its position.⁵⁸ This was the first time that CERD had explicitly identified caste discrimination as coming within the purview of the Convention, and by extension as an international human rights violation. Its observations were widely welcomed by Dalit activists and their supporters. The Committee's concern with caste and caste-related discrimination had been kindled by information provided by non-State sources including shadow reports from human rights NGOs, urging CERD to raise the issue of caste discrimination with India.⁵⁹ According to Corinne Lennox,

[t]his [was] reportedly the first time any NGO had submitted a shadow report on caste-based discrimination to a UN treaty body. It was an auspicious move for subsequent norm entrepreneurship on caste because it pushed CERD into taking a juridical position on whether caste fell within the remit of the committee.⁶⁰

The discussions with India during the presentation of its report did not result in India changing its position. The Indian government considered that CERD was guilty of a misinterpretation of the term descent. India rejected the accusation of racial discrimination which CERD's Concluding Observations implied; in its report India had stressed the key role it had played in the fight against apartheid since Indian independence, and its role as a founding member of the Non-Aligned Movement which was associated with the elimination of racial discrimination, exploitation, and inequality.⁶¹ Nevertheless, 'the dialogue positioned CERD as an early ally of advocates on caste and ICERD as a relevant international standard.'⁶²

1998 is described by Corinne Lennox as the start of the 'second wave' of post-war Dalit activism. It saw the foundation of the NGO National Commission on Dalit Human Rights (NCDHR) in India, and the First World Dalit Convention in Kuala Lumpur organised primarily by Dalit NGOs from the US, UK, and Canada.⁶³ In 1999 the NGO Human Rights Watch published a highly influential report, *Broken People: Caste Violence Against India's "Untouchables"*. In the same year the NCDHR published a 'Black Paper' documenting violence against Dalits in India. In 2000, following intensive lobbying by Dalit organisations and their supporters, the former UN Sub Commission for the Promotion and Protection of Human Rights adopted Resolution 2000/4 condemning discrimination based on work and descent as a violation of international human rights law, although the resolution contained no definition of this form of discrimination. This led to the development of a parallel advocacy track challenging caste discrimination via the concept of discrimination based on work and descent, a new international legal category which includes but is wider than caste discrimination.

The 'work and descent' terminology was adopted to encompass caste and similar systems of inherited status without focussing on any one state. Three expert reports in

⁵⁸ UN Doc. CERD/A/51/18 (1996) para. 352.

⁵⁹ CERD/C/SR.1161, 1 November 1996, paras. 11, 22; CERD/C/SR.1162, 13 August 1996, para 23.

⁶⁰ Lennox, 'Norm-entrepreneurship on caste-based discrimination'.

⁶¹ CERD/C/299/Add.3, 29 April 1996, para. 13 [India 1996 report]

⁶² Lennox, 'Norm-entrepreneurship on caste-based discrimination'.

⁶³ Lennox, 'Norm-entrepreneurship on caste-based discrimination'.

2001, 2003 and 2004, commissioned by the UN Sub-Commission, identified work and descent-based discrimination, including discrimination based on caste, as a worldwide problem. In 2004 two UN Special Rapporteurs on Discrimination Based on Work and Descent were appointed by the Sub-Commission, producing two further reports in 2005 and 2006 and, in 2009, a set of Draft Principles and Guidelines for the effective elimination of work and descent discrimination. Caste discrimination has also been repeatedly condemned by many of the UN special procedures, in particular successive UN Special Rapporteurs on contemporary forms of racism. 2000 also saw the establishment of a transnational advocacy network, International Dalit Solidarity Network (IDSN), based in Copenhagen, Denmark. IDSN has played an important role in further 'internationalising' caste discrimination by engaging with UN bodies, including CERD, and other international and regional actors such as the European Union (EU), although the transnational advocacy model is not without pitfalls.⁶⁴ In the same year, a UK-based Dalit non-governmental organisation, Voice of Dalit International, organised an International Conference on Dalit Human Rights in London which called for caste to be added to UK discrimination law, demanding that 'laws which address discrimination based on racism should take cognisance of casteism and place it on a par with racism'.⁶⁵ At the end of the millennium Dalit activists turned their attention to the UN World Conference Against Racism, Racial Discrimination, Xenophobia and other Related Forms of Intolerance (WCAR) held in Durban in 2001, where they sought through intensive lobbying both before and at the conference to secure the inclusion of caste in the conference's Final Declaration and Programme of Action. This was unsuccessful due to the opposition of the Indian government, but their lobbying succeeded in greatly raising international awareness of the problem of caste discrimination.⁶⁶

The 'lines in the sand' for the range of actors on caste in international human rights law are apparent from 2001, and have not shifted substantially since. From the perspective of the UN, caste comes under the purview of the international human rights system, its agencies and mechanisms, a position apparent through various references to or representations on caste in UN bodies from the 1980s onwards at, if not an informal, at least an un-formalised level. Distinct from this, 1996 marked the formal recognition by the UN of caste in international human rights law, situating caste within the definition of racial discrimination in Article 1(1) ICERD, under descent. That the term 'descent' would be the legal home for caste is reflected and continued in the parallel Charter-based mechanisms that date from 2000, under the nebulous 'work and descent' category. Hence the international legal understanding of caste generated a wider international legal category of descent that had not been elaborated in any form in the

⁶⁴ Lennox, 'Norm-entrepreneurship on caste-based discrimination'; Bob, 'Dalit Rights are Human Rights'; J. Lerche, 'Transnational Advocacy Networks and Affirmative Action for Dalits in India', (2008) 39:2 *Development and Change* (2008) pp. 239-261; David Mosse & Lisa Steur, 'Dalit rights and the development agenda: The promise, progress, and pitfalls of NGO networking and international advocacy.' Dalit communities in India and diaspora: agency and activism, research and representation. Conference paper. University of Lisboa. July 2012.

⁶⁵ Satpal Muman, 'Caste in Britain' in *Dalits in the New Millennium: Report of the Proceedings of the International Conference on Dalit Human Rights, 16-17 September 2000* (London: Voice of Dalit International, 2000) x.

⁶⁶ See Bob, 'Dalit Rights are Human Rights'; Lennox, 'Norm-entrepreneurship on caste-based discrimination'.

UN system prior to 1996. It clearly includes caste as practised in India and elsewhere, but is a wider concept whose parameters are not yet fully delineated.

1996 also marks the formal opposition of India to the recognition of caste in international human rights law under Article 1(1) ICERD. India is not necessarily opposed to the inclusion of caste in the international human rights *system*. It may be inclined to contest the raising of caste in international bodies, but this is not necessarily formal or legal. By contrast, it is clearly formally opposed to the inclusion of caste in international human rights law via ICERD. The question is whether its objection is based on an international legal recognition of caste *per se*, which did not happen expressly in any international forum prior to 1996; or an international legal recognition of caste *as a form of racial discrimination*. The experience in Durban, involving an international document on racism and not on human rights more generally, suggests that it is the latter. This is affirmed when it is considered that India reports to other UN treaty bodies on caste, for example extensively discussing caste in a 2005 report to CEDAW.⁶⁷ Hence formal or legal Indian opposition is to the international legal understanding of caste as a form of racial discrimination, and not to the ‘internationalisation’ of caste *per se*, although it may oppose or contest this in other ways. This distinction has not been clearly enunciated by India, but its State practice suggests that there is no evidence that it is opposed to caste-based discrimination in international human rights law; just to the inclusion of caste in the international prohibition on racial discrimination.

From 2001, these positions would be consolidated. CERD would evolve its work on ‘descent’, which includes caste; India would continue its formal opposition to the international legal recognition of caste as a form of racial discrimination; and NGOs would seek the further ‘internationalisation’ of caste across the UN system. Caste would emerge as a cross-cutting theme in the UN human rights bodies, treaty-based and Charter-based, although clarifying its relationship with descent and related terms such as work and descent, engaging with or overcoming State opposition, and understanding its application in an international context in particular outside South Asia - in contradistinction to descent - would not find easy resolution.

IV. 2001-2015

General Recommendation 29 (2002) on descent

In August 2002 CERD issued General Recommendation 29 on Article 1(1) of the Convention (Descent) (GR 29).⁶⁸ Former CERD member Thornberry writes:

The General Recommendation followed the debacle (for Dalits and others) at the Durban World Conference when the caste issue was talked out by vigorous diplomacy by India. The Committee had independent reasons to go ahead and explore the issue: to understand better a key term in the Convention; to understand better the contemporary scope of such discrimination; and, to respond to the victims who impressed the Committee so greatly. There are issues here: the target of the General Recommendation is not or should not be the caste

⁶⁷ CEDAW, ‘State Report: India’, UN Doc. CEDAW/C/IND/2-3 (2005). For example, among the many references there is a paragraph entitled ‘Caste-based discrimination, including violence, suffered by women of [the] dalit community’ (para. 20).

⁶⁸ UN Doc. A/57/18, 111-17.

system itself, but discrimination - although the distinction is a thin one. In the author's view, powerful victim perspectives greatly influenced the Committee.⁶⁹

GR 29 was preceded by an informal discussion on the concept of descent with non-governmental organizations and States parties (including India), followed by a thematic debate within the Committee - only the second time this had happened. The style, format, and the drafting process of the general recommendation were modelled on General Recommendation 27 on discrimination against Roma which was preceded by the first thematic discussion within the Committee.⁷⁰ In November 2001 the Committee had proposed holding a thematic debate on descent in the next session, preceded by a preliminary exchange of views. Although the term was included in Article 1, the Committee had never studied it in any depth and it had received little attention to date. A thematic debate on descent, it was suggested, would also enable CERD to collaborate with the UN Sub-Commission which was working on discrimination based on work and descent. Due to the complex nature of 'descent', it was felt that the Committee should study the concept carefully in order to clarify the basic notion as well its scope.⁷¹

On the use of thematic debates, Thornberry explains that these are not a departure from the Convention's formal structures and processes but a manifestation of members' desire to develop their expertise in a particular direction. The thematic debate on descent was not a political response to the absence of caste in the WCAR Final Declaration, rather 'an exercise by the Committee *proprio motu*, strictly tied to the Convention'.⁷² Nonetheless, it represented an important milestone for Dalit activists and their supporters. The debate on descent and descent-based discrimination took place in August 2002 in two stages; first, a session with NGOs, experts from the UN Sub-Commission on the Promotion and Protection of Human Rights, and governments; and second, a thematic discussion within CERD.⁷³ As with the discussion which preceded GR 27 on Roma, it was essential, writes Thornberry, that affected communities themselves be involved so that the voices of victims and their representatives could be heard.⁷⁴ The twenty-plus representatives of Dalit NGOs gave detailed accounts of the 'harsh reality' of caste-based discrimination.⁷⁵ They urged the Committee to name caste-based discrimination as a primary form of descent-based discrimination, whilst also stressing that descent-based discrimination should not be equated solely with the Dalit issue in India nor be polarised in a manner that overlooks caste discrimination against communities in other parts of the world.⁷⁶ The Indian government reiterated that its Constitution abolished untouchability and recognised the situation of the Dalits and the need to address it. Members of the UN Sub-Commission for the Promotion and

⁶⁹ Thornberry, 'Confronting racial discrimination: A CERD perspective', at p. 264.

⁷⁰ Keane, 'Caste-based Discrimination in International Human Rights Law', at p. 219.

⁷¹ UN Doc. CERD/C/SR/1493, 12 November 2002, paras 38-44.

⁷² Patrick Thornberry, 'Race, Descent and Caste under ICERD' in Kenji Nakano, Mario Jorge Yutzis and Ryo Onoyama (eds.), *Peoples for Human Rights*, Vol. 9, 'Descent-based Discrimination' (Tokyo: International Movement Against all Forms of Discrimination and Racism, 2004) pp. 119-137, at p. 126.

⁷³ Thornberry, *ibid.*, at pp.125-126.

⁷⁴ Thornberry, *ibid.*, at p. 126.

⁷⁵ UN Doc. CERD/C/SR.1531, 16 August 2002, para 11.

⁷⁶ Thematic debate, unofficial contemporaneous notes; S. Prasad, Dalit Human Rights Watch, 8 August 2002; copy on file with author.

Protection of Human Rights felt that caste-based discrimination came under the competence of CERD and was captured by descent. The Sub-Commission was conducting its own further studies on descent and caste discrimination. It was felt that the problem of caste should not be seen in relation to a particular country; the debate should also include countries other than those in the Indian subcontinent.

In its thematic discussion, CERD members agreed that the scope and meaning of the Convention must be seen as inclusive not exclusive.⁷⁷ The term descent implied one generation inheriting from another specific characteristics that were positively or negatively evaluated by society.⁷⁸ On the specific issue of caste, CERD member Thornberry explained that caste systems represented hierarchy, not equality; segregation, not integration; bondage, not freedom; and value determined at birth without regard for morality, achievement, intelligence or character. The existence of caste discrimination was a matter of fact. He agreed with CERD member Pillai that the scope of descent was wide, and that caste was one of its facets.⁷⁹ A final definition of descent-based discrimination was not necessary; the term was clear, and encompassed caste and other analogous systems of social stratification based on birth.⁸⁰ The focus of the GR should be on the need to encourage governments to report on the existence of castes, and to take action in a constructive spirit to eliminate such discrimination, paying particular attention to the double discrimination suffered by Dalit women.⁸¹

These views were reflected in the General Recommendation. Drafted by a working group comprising CERD members Sicilianos, Pillai and de Gouttes, coordinated by CERD member Thornberry,⁸² GR 29 does not offer a definition of descent-based discrimination. The tone is 'hortatory rather than critical', encouraging states to adopt measures appropriate to their circumstances.⁸³ The Preamble confirms the Committee's view that the term descent in Article 1 does not solely refer to race and has a meaning and application which complement the other prohibited grounds of discrimination in Article 1. It 'strongly reaffirms' 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 which nullify or impair their equal enjoyment of human rights'. The Preamble concludes by strongly condemning descent-based discrimination, such as discrimination on the basis of caste and analogous systems of inherited status, as a violation of the Convention. The Recommendation does not provide a full definition of descent-based discrimination; rather, paragraph 1 on general measures to be taken by States parties explains that

descent-based communities are those who suffer from discrimination, especially on the basis of caste and analogous systems of inherited status, and whose existence may be recognized on the basis of various factors including some or all of the following: inability or restricted ability to alter inherited status; socially enforced restrictions on marriage outside the community; private and public segregation, including in housing and education, access to public spaces, places of worship and public sources of food and water; limitation of freedom to

⁷⁷ CERD/C/SR.1531, 16 August 2002, para 7.

⁷⁸ Ibid., para 18.

⁷⁹ Ibid., para 13.

⁸⁰ Ibid., para 12.

⁸¹ Ibid., paras. 14, 25.

⁸² Ibid., para 54.

⁸³ Thornberry, 'Race, Descent and Caste under ICERD', at p. 128.

renounce inherited occupations or degrading or hazardous work; subjection to debt bondage; subjection to dehumanizing lack of respect for their human dignity and equality.

The emphasis is on ‘discrimination against individuals locked into a system from which they aspire to escape and which they find degrading, a system which involves “a total lack of social mobility, for the status of the individual was determined by birth or social origin and could never change regardless of personal merit.”’⁸⁴

In paragraph 1, States are asked *inter alia* to take steps to identify communities suffering from descent-based discrimination, to review or enact legislation prohibiting descent-based discrimination, to adopt special measures in favour of descent-based communities in order to ensure their enjoyment of human rights and fundamental freedoms, and to audit and provide disaggregated information on the *de facto* economic and social situation of descent-based communities, including a gender perspective. This is followed by operative paragraphs on multiple (intersectional) discrimination against women, segregation, hate speech, administration of justice, civil and political rights, economic and social rights, and right to education. The sequence of the operative paragraphs and the style of the Recommendation follows the format of the Convention, and General Recommendation 27 on the Roma. The operative paragraphs drew on the NGO submissions in the thematic discussion, which reflected a wide geographical and cultural range.⁸⁵ The emphasis on the provision of information on the *de facto* economic and social situation of groups covered by the Recommendation is particularly relevant to States which have already enacted legislation prohibiting descent-based discrimination and/or adopted special measures in favour of groups suffering from such discrimination. The Recommendation was not intended to be exhaustive; it was expected that the Recommendation would apply differently, and different strategies would be followed, in different societies according to their own problems.⁸⁶

On the use of ICERD to address caste discrimination, former CERD member Thornberry explains,

[I]f the various ‘grounds’ of discrimination in Article 1 do not immediately translate themselves into recognisable varieties of community vulnerable to discrimination, the practice of the Committee has served to put a human face to the targets of discriminatory practices.⁸⁷

He argues that caste or analogous forms of social stratification ‘are appropriately brought within the frame of Article 1’ because they have ‘a “race-like” quality on a par with the other descriptors in Article 1...even if the surest of the specific descriptors [in Article 1] remains that of “descent”’.⁸⁸ On the choice of descent for capturing caste,

⁸⁴ CERD member de Gouttes, UN Doc. CERD/C/SR.1531, 16 August 2002, para. 40, cited in Thornberry, ‘The Convention on the Elimination of Racial Discrimination, indigenous peoples, and caste/descent-based discrimination’, at p. 41.

⁸⁵ Thornberry, ‘Race, Descent and Caste under ICERD’, at p. 127.

⁸⁶ Thornberry, ‘Race, Descent and Caste under ICERD’, at p. 128.

⁸⁷ Thornberry, ‘Confronting racial discrimination: A CERD perspective’, at pp. 257-58.

⁸⁸ Thornberry, ‘Race, Descent and Caste under ICERD’, at p. 122.

Thornberry explains that descent is a term ‘which suggests a wide span of possibilities’.⁸⁹ Descent

has the most open character, since all human beings have a “descent”. However much it may shade into other concepts, it is an appropriate term to act as a normative safety net for clear cases of group-based discrimination based on inherited characteristics which are not easily caught by other, narrower descriptors.⁹⁰

In this respect, he writes,

[T]he thrust of the Convention towards the elimination of ‘all forms’ of racial discrimination suggests that an expansive reading of its scope is not unreasonable. There are overlaps among the Article 1 descriptors, and the *travaux* suggest that not every descriptor was clearly understood as marking out a sharply defined conceptual space or class of victim. [Former CERD member] Diaconu accounts for the Article 1 *travaux* by suggesting that “the definition was composed by adding as many concepts as possible, in order to avoid any lacunae”.⁹¹

Through the ‘living instrument’ principle, human rights protection can be extended to groups who are not directly referred to in existing instruments:

We need not exaggerate the normative quality of the step taken by CERD. The recommendation stems from [the Convention] which is general in nature, and is thus only a partial substitute for a free-standing instrument on caste, such as a UN General Assembly Declaration or a dedicated international convention. Nevertheless, it illustrates the possibilities inherent in elaborating existing instruments on human rights to benefit particular communities, even in the absence of direct reference to the community in question ... CERD has also elaborated ... recommendations on minorities and indigenous peoples which are also not referred to in the body of the Convention.⁹²

The perspectives of victims ‘greatly’ impressed the Committee, in Thornberry’s view, and played a key role in the development of GR 29;⁹³ the Preamble refers specifically to CERD’s receipt of oral and written information from individuals and NGOs which provided the Committee with further evidence of the extent and persistence of descent-based discrimination around the world. The Committee considered the issue of cultural intrusion during the thematic debate; some Committee members, explains Thornberry, were more troubled about this than others, but ultimately the Committee could not accept a ‘cultural’ defence of caste ‘when there is massive disaffection and dissent, and

⁸⁹ Thornberry, ‘The Convention on the Elimination of Racial Discrimination, indigenous peoples, and caste/descent-based discrimination’, at p. 37.

⁹⁰ Thornberry, ‘Race, Descent and Caste under ICERD’, at p. 123.

⁹¹ Thornberry, ‘Confronting racial discrimination: A CERD perspective’, at p. 258.

⁹² Thornberry, ‘Race, Descent and Caste under ICERD’, at p. 119-120.

⁹³ Thornberry, ‘Confronting racial discrimination: A CERD perspective’, at p. 264.

group “membership” is heavily contested.⁹⁴ While the target of GR 29 is discrimination on the basis of descent (including caste discrimination), rather than caste or any other particular cultural or social system, the distinction, as Thornberry readily acknowledges, is ‘a thin one’.⁹⁵ His observation speaks to the paradox, mentioned previously, of attacking caste discrimination but not the concept of caste itself.

Beyond General Recommendation 29

In its 2006 report India reiterated its position that caste cannot be equated with race, nor is it covered under descent under Article 1 of the Convention.⁹⁶ It repeated this position in 2007 when presenting its report, insisting that it ‘had no doubt that the ordinary meaning of the term “racial discrimination” did not include caste’, and that caste discrimination was an issue outside the purview of racial discrimination under Article 1(1).⁹⁷ Consequently ‘India was not in a position to accept reporting obligations [on caste] under the Convention.’⁹⁸ In its 2007 Concluding Observations CERD noted India’s view that discrimination based on caste falls outside the scope of Article 1 of the Convention, but reaffirmed its position, as expressed in GR 29, that such discrimination is fully covered by Article 1 of the Convention.⁹⁹ India has not reported to CERD since 2006. At its Universal Periodic Review examination in 2011, India accepted no recommendations relating to caste discrimination, which may suggest a widening of its opposition within international human rights law, in line with comments above. Effectively, the 1996 and 2007 oral dialogues between India and CERD have resulted in a stalemate on the issue of caste discrimination, highlighting the limitations of the treaty body system and the constructive dialogue principle. On the other hand, the dialogue and concluding observations mechanisms render government positions more transparent, which is extremely useful for NGOs and civil society organisations campaigning for change.

India has not been the sole focus of CERD’s attention on caste. Within South Asia CERD has examined the issue of continuing *de facto* caste discrimination in Nepal,¹⁰⁰ Pakistan,¹⁰¹ Bangladesh,¹⁰² and Sri Lanka,¹⁰³ despite constitutional provisions in Nepal, Pakistan, and Sri Lanka prohibiting discrimination based on caste and, in the case of Nepal, a constitutional provision and legislation outlawing untouchability. None of these states has objected to CERD’s deployment of descent to address caste-based discrimination; Sri Lanka, in 1986, asserted that the caste system in its country was ‘a

⁹⁴ UN Doc. CERD/C/SR.1531, 16 August 2002, paras. 12, 30-31; Thornberry (2005b), n x above, 42-43; Thornberry, ‘Confronting racial discrimination: A CERD perspective’, at p. 264.

⁹⁵ Thornberry, ‘Confronting racial discrimination: A CERD perspective’, at p. 264.

⁹⁶ UN Doc. CERD/C/IND/19, 19 March 2006, para. 16.

⁹⁷ UN Doc. CERD/C/SR.1796, 2 March 2007, paras. 3, 7.

⁹⁸ UN Doc. CERD/C/SR. 1796, 2 March 2007, para. 3.

⁹⁹ CERD/C/IND/CO/19... March, para. 8.

¹⁰⁰ See CERD/C/64/CO/5, paras. 12, 14, 15.

¹⁰¹ CERD/C/PAK/CO/20, paras 11,12.

¹⁰² CERD/C/304/Add.118, paras. 8, 11.

¹⁰³ UN Doc. A/42/18 (1987) para. 293.

racial phenomenon' found among Tamils and Sinhalese despite the lack of racial distinction between the two communities.¹⁰⁴

CERD has also engaged with the UK on caste. Caste was barely acknowledged in the UK public domain as a ground of discrimination until the early 2000s, when UK Dalits, spurred by the 'internationalisation' of caste, began to draw attention to the existence of caste discrimination within UK South Asian communities, calling for casteism to be treated on a par with racism within domestic law.¹⁰⁵ The UK's 2003 State report to CERD was silent on caste. Unlike India, the UK did not contest CERD's application of descent to caste; instead, during presentation of its report it dismissed calls to introduce legislation on caste-based discrimination on the grounds that there was no obvious need for such legislation. In its 2003 Concluding Observations, CERD referred to GR 29 and recommended that the UK include a prohibition of descent-based discrimination, such as discrimination based on caste, in domestic legislation. Further information was requested in the next report.¹⁰⁶

In 2010, new equality legislation was enacted in the UK. The Equality Act 2010 prohibits discrimination on nine grounds including race, defined as 'including' colour, nationality, and ethnic or national origins. The legislation did not include a prohibition of caste or descent-based discrimination; instead, a ministerial power to make caste 'an aspect of race' at some point in the future was inserted.¹⁰⁷ The term caste was used instead of descent because of fears that descent might open the door to social or class-based claims.¹⁰⁸ In its 2010 report to CERD, the UK explained that it had declined to include an immediate prohibition of caste discrimination in the new Equality Act 2010 because it had 'seen no firm evidence on whether caste-based discrimination in the fields covered by the Convention exists to any significant extent in the UK.'¹⁰⁹ CERD responded in its 2010 Concluding Observations by recalling GR 29, referring to information received from NGOs as well as government-commissioned research, and recommending the addition of caste to the legislation.¹¹⁰

In 2013 the statutory power to add caste to the Equality Act 2010 was converted into a statutory duty to do so; but, as at the time of writing, caste has still not been added to the legislation. The UK reported again to CERD in 2015. The delay in adding caste to the Equality Act 2010, it explained, was because the government was 'considering the implications' of a 2014 Employment Appeal Tribunal decision which

¹⁰⁴ Ibid.

¹⁰⁵ See Muman, 'Caste in Britain'. See also Annapurna Waughray, 'Caste Discrimination: A Twenty-first Century Challenge for UK Discrimination Law?' 72: 2 *Modern Law Review* (2009), pp. 182-219.

¹⁰⁶ CERD/ C/63/CO/11, 10 December 2003, para 25.

¹⁰⁷ Equality Act 2010 c 15; section 9(5)(a). See Waughray (2014), n x above.

¹⁰⁸ See Waughray (forthcoming, 2016).

¹⁰⁹ CERD/C/GBR/18-20, 13 August 2010, para. 42

¹¹⁰ [CERD 2011 COs to UK] 14 September 2011, para 30. See also H. Metcalfe and H. Rolfe, 'Caste Discrimination and Harassment in Great Britain' (London: Government Equalities Office, 2010).

opened the possibility that there was an existing legal remedy for claims of caste-associated discrimination under current domestic legislation, namely through the “ethnic origins” element of section 9 [race] of the Equality Act 2010.¹¹¹

That decision – in *Chandhok v Tirkey* – established that in certain circumstances ethnic origins could be construed so as to provide for caste to be part of race.¹¹² As this volume was being prepared, the UK was due to present its 21st to 23rd State report (2015) at the 90th session of CERD in August 2016. Also while this volume was being prepared, an NGO shadow report was being compiled by the Runnymede Trust (an independent race equality think-tank). The draft refers to NGO criticism of the government for failing to add caste to the Equality Act 2010 as an aspect of race, as required by parliament, **arguing that the legislation as currently drafted does not adequately protect victims of caste discrimination** and that the Government’s assertion that the law now provides for a legal remedy for caste discrimination is ‘misleading and incorrect’.¹¹³

The emergence of caste discrimination as a domestic issue within the UK since the early 2000s has increased the visibility of ICERD among British activists, NGOs, parliamentarians, lawyers, and the judiciary. At the same time, successive UK governments have resisted CERD’s recommendations in 2003 and 2010 to enact caste discrimination legislation, not because they object to the application of ICERD to caste issues *per se*, but because they disagree with CERD as to the necessity or desirability of legislation. The UK, while abiding by its reporting obligations under ICERD, has clearly not felt obliged to comply with recommendations with which it disagrees.

V. Looking Ahead

Caste discrimination is not a problem of the past but a contemporary human rights violation occurring every day across South Asia and the diaspora, albeit one which remains insufficiently recognised. CERD’s deployment of descent in 1996 to address caste discrimination in India helped propel caste discrimination into wider public view. This interpretation of descent – affirmed by CERD in 2002 in GR 29 – has been vigorously resisted by India which argues that descent was never intended to cover caste and should not, decades after the Convention was drafted, be deployed in this way. By contrast, CERD member Thornberry considered that

the intention of the drafters was less important than the text they had drafted. As a basis of discrimination, the term “descent” signified forms of inherited status. Under the Convention some – though not all – instances of descent-based discrimination might equally be addressed under the criteria of race or colour, and ethnic or national origin. The term “descent” indeed added something to the Convention and, like the other human attributes mentioned in article 1, it was non-negotiable. The question of communities of inherited status was analogous

¹¹¹ CERD/C/GBR/21-23, 16 July 2015, paras. 8-11.

¹¹² *Chandhok and Anor v Tirkey* [2014] UKEAT/0190/14/KN; *Tirkey v Chandhok and Anor* [2015] ET/3400174/2013; Annapurna Waughray, ‘Is Caste Discrimination in the UK Prohibited by the Equality Act 2010?’, *International Labor Rights Case Law 2* (2016), pp. 70-76.

¹¹³ See <http://www.odysseustrust.org/CERD/CERD.pdf>.

to other terms in the Convention in that the group concerned might be treated as though it were a separate race or ethnicity. By the same token, the Committee had also shown great concern for the status of minorities and indigenous peoples.¹¹⁴

CERD's examination of caste-based discrimination under the rubric of descent, while unchallenged by states such as Nepal, Pakistan, and the UK, has resulted in a stalemate with India which categorically rejects the application of ICERD to the issue of caste. CERD's experience with India on caste illustrates the limits of the constructive dialogue approach, and raises the question of what CERD can achieve on caste with India if India refuses to engage with CERD on the issue. After all, India undertook decades ago many of the steps recommended in GR 29 as regards legislation and special measures. Perhaps there is also a danger that India's outright opposition to CERD on the question of caste could affect India's view of CERD's credibility and legitimacy on other issues. In 2003, CERD member January-Bardill argued that CERD should be consistent in its approach by referring to caste and descent-based discrimination in other countries where it occurs, aside from India.¹¹⁵ The Committee has followed this advice and has examined the problem of descent-based discrimination in a range of countries outside South Asia, for example Japan, Yemen and Mauritania. Nevertheless, India continues to provide the paradigmatic example of caste discrimination, which is the most recognised form of descent-based discrimination, and in 2006, CERD member January-Bardill asked India why it regarded the Convention as a threat rather than an opportunity to challenge the caste system. She asked whether the Government could not use ICERD as a tool to assist in the fraternity project aimed at building substantive citizenship. She also challenged the Government's assertion that there was no discrimination in India. While discrimination was not embedded in the law, social practice had discriminatory effects, and she urged the Government to consider this in order to facilitate a more constructive dialogue with the Committee in future.¹¹⁶ As noted, India has not reported to CERD since 2006; it remains to be seen how India approaches the issue of caste in its next report.

The potential to engage the full range of CERD mechanisms in relation to caste-based discrimination has yet to be explored. The early warning and urgent action measures and procedures could apply to situations involving caste discrimination, if it became necessary to address serious violations in an urgent manner in accordance with the indicators set out in CERD's 2007 guidelines.¹¹⁷ It is possible to foresee the use of these procedures in relation to atrocities or other severe manifestations of casteism. Individual or group communications alleging violations of ICERD on the basis of caste could be taken before the Committee, however none of the States parties discussed in this chapter have made the requisite declaration under Article 14, including India, Nepal, and the UK. It is possible a communication involving caste discrimination in the diaspora could emanate from Australia or South Africa, who have made the requisite Article 14 declaration, but clearly CERD has a wider task in convincing the majority of its State parties to recognise its communications procedure.

¹¹⁴ CERD/C/SR.1531, para 11.

¹¹⁵ CERD/C/SR.1607, 30 October 2003 para 60.

¹¹⁶ CERD/C/SR.1796, 2 March 2007, paras. 48-50.

¹¹⁷ CERD, 'Guidelines for the Early Warning and Urgent Action Procedures', UN Doc. A/62/18, Annexes, Chapter III (2007), para. 12.

More immediately, collaboration with the full range of human rights bodies on caste-based discrimination will continue to evolve its understanding at the international level. This is already in evidence, where treaty bodies such as CEDAW or CRC are providing concluding observations on caste where relevant to States parties. Yet the emergence of caste in international human rights law is still at a relatively early stage; for example India has not reported to the Human Rights Committee since 1997.¹¹⁸ Although that reporting cycle did raise caste-based discrimination,¹¹⁹ it would appear essential that the Human Rights Committee would view the next State report from India as an opportunity to engage with its contestation of international standards, in particular GR 29, in consultation with CERD. The heightened role of NGOs in the monitoring process across the UN bodies has been significantly highlighted in relation to caste, and these groups will continue to drive the evolution of standards by producing shadow reports, testimonies, and information, as well as their implementation. The Dalit NGO groupings among others provide a template for effective interaction between UN bodies and civil society and, in relation to CERD, illustrate the Committee's willingness to listen closely to victims of discrimination.

It is now 20 years since CERD formalised and legalised caste-based discrimination as a form of racial discrimination, affirming binding international obligations on States parties for its elimination. Since that time, caste-based discrimination has become part of the lexicon of international human rights law, with treaty bodies and Charter bodies evolving standards or applying their provisions to the issue. It is undeniable, and uncontested, that caste has a place within the international human rights system. The difficulty lies in the fact that the primary source or node for caste-based discrimination in international human rights law, as a form of racial discrimination under Article 1(1) of ICERD, is contested by the State most associated with caste, India. It should also be noted that some States, such as Japan, contest the application by CERD of the wider term descent-based discrimination to groups on their territories. However generally, in treaty body and Charter body mechanisms, caste discrimination is raised without formal or legal objection. Furthermore, recent work by the UN OHCHR may lead to a Declaration on descent-based discrimination, including discrimination on the basis of caste and analogous systems of inherited status.

The CERD-India stalemate is likely to recede in importance as it becomes dwarfed by a wider international understanding of caste and descent. Eventually, India may become convinced that the language of racial discrimination in the twenty-first century is to be understood differently than it was fifty years ago. CERD's contemporary remit, involving a range of groups of inherited status analogous to other terms in the Convention, should clearly include Dalits and other caste groups. The question is not principally one of civil and political rights; or economic, social and cultural rights; or gender; or children, although it will engage all of these aspects; it is the historic and

¹¹⁸ Human Rights Committee, 'Concluding Observations: India', UN Doc. CCPR/C/79/Add.81 (1997).

¹¹⁹ *Ibid.*, para. 15. The Human Rights Committee noted 'with concern that despite measures taken by the government, members of the Scheduled Castes...continue to endure severe social discrimination and to suffer disproportionately from many violations of their rights under the Covenant... It regrets that the de facto perpetuation of the caste system entrenches social differences and contributes to these violations'.

continued subordination of a group on the basis of an unalterable status upon birth. Hence caste-based discrimination is primarily the domain of CERD, and principled interpretive stances will not alter this. CERD has been a pioneer in raising caste at the international level, and will continue to evolve these standards. It will continue its work on behalf of the victims of caste-based discrimination in fulfilment of its mandate, until, eventually, all States parties come on board.

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