Descent-based Discrimination in International Law: A Legal History

DAVID KEANE*

"The fact is that everyone tries to establish the current meaning of the word before establishing its origin, and this is where the problems start..."
– Leonardo Sciascia, The Wine-Dark Sea (1973)

1. Introduction

The word ‘caste’ does not appear in any international treaty, and consequently when increasingly well-organised and vocal Dalit human rights organisations began successfully highlighting the widespread discrimination on the basis of caste still taking place in India and other areas of South-east Asia, and the failure of domestic policies to tackle the issue, there was a need to find a precise source of international legal obligations for the eradication of caste-based discrimination in these countries. That source is Article 1(1) of the International Convention on the Elimination of All Forms of Racial Discrimination 1965 (ICERD), and in particular the word ‘descent’, one of the five grounds listed in the definition of racial discrimination. Caste-based discrimination, the Committee on the Elimination of Racial Discrimination (CERD) confirmed in a series of Concluding Observations beginning with India’s State Report in 1996, is a form of descent-based discrimination and thus a form of racial discrimination, and falls within the purview of the Convention.

Since 1996, the Committee has consistently sought to decouple caste and descent, with the result that descent-based discrimination is viewed as a far wider

* PhD candidate at the Irish Centre for Human Rights, National University of Ireland, Galway. The author wishes to acknowledge the funding received from the Irish Research Council for the Humanities and Social Sciences in the form of a research scholarship.


2 In the 100th meeting of the Third Committee of the General Assembly, India proposed inserting the word ‘caste’ into the text of Article 2 of the Universal Declaration of Human Rights because it “objected to the word ‘birth’”. The words ‘other status’ and ‘social origin’ were found by the delegation to be sufficiently broad, and it did not therefore insist upon its proposal; P. Thornberry, ‘The Convention on the Elimination of Racial Discrimination, Indigenous Peoples, and Caste/Descent-based Discrimination’, in J. Castellino and N. Walsh (eds.), Martinus Nijhoff International Law and Indigenous Peoples (Raoul Wallenberg Institute, publication forthcoming), p. 37, n. 107.

3 Article 1(1) of the ICERD defines racial discrimination as “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin...”.
problem than caste-based discrimination. CERD has raised the issue of descent-based discrimination in a number of State Reports, from a variety of regions, including Senegal, Mali, Ghana and Japan, as well as the South-east Asian countries traditionally associated with caste, i.e. India, Nepal and Bangladesh. In August 2002, CERD issued General Recommendation XXIX on descent-based discrimination, the result of a thematic discussion on the issue conducted by the Committee in the same month.4

In August 2000, the UN Sub-Commission on Human Rights passed resolution 2000/4 on Discrimination based on Work and Descent, which declared that discrimination based on work and descent is a form of discrimination prohibited by international human rights law.5 In less than four years, the Sub-Commission has produced a working paper and two expanded working papers, the most recent of which recommended the appointment of a Special Rapporteur on Discrimination based on Work and Descent.6 These working papers have found evidence of descent-based discrimination in a large number of countries, including Yemen, Somalia, Ethiopia, Pakistan, Burkina Faso, and Micronesia, as well as those countries and regions already identified by CERD. In addition, the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance has indicated his intention to focus on the issue of descent-based discrimination in the next period of his mandate.7

The article traces the legal history of the word ‘descent’. The ICERD is the only international treaty in which ‘descent’ appears as a prohibited ground for discriminatory treatment, and no other United Nations convention or covenant lists it as one of the grounds in their non-discrimination clauses.8 Its meaning, therefore, appears to rely on the travaux préparatoires of the ICERD. The travaux reveal that ‘descent’ formed part of an amendment proposed by India to the definition of racial discrimination as drafted by the Commission on Human Rights. This crucial intervention led the Committee to interpret, in the absence of any express explanation of its meaning during the course of the debates in the Third Committee of the General Assembly from the Indian delegation, that discrimination on the basis of descent was intended to cover discrimination on the basis of caste. The debates reveal that India was concerned with the relationship

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4 CERD/C/SR.1531 The thematic discussion took place on the 9 August 2002; there are no summary records for the session, which involved twenty-three separate interventions from members of the UN Sub-Commission on the Protection and Promotion of Human Right, NGO’s (one of which was a joint statement from thirty-two NGO’s), and two governments – India and Nepal; see Thornberry, supra note 2, p. 40, n. 124.


7 UN Doc. E/CN.4/Sub.2/2004/31, para. 73.

8 While ‘descent’ does not appear as a ground in any other international non-discrimination clause, it is not entirely unique in the corpus of human rights law – Article 1.1(b) of ILO Convention 169 on Indigenous and Tribal Peoples covers indigenous status on the grounds, inter alia, of “descent from the populations which inhabited the country...”; Thornberry, supra note 2, p. 37, n. 107.