

Caste and the Universal Declaration of Human Rights¹

In none of the human rights instruments does the term ‘caste’ appear. Nevertheless, an examination of the *travaux préparatoires* of the UDHR shows that caste was explicitly contemplated by the drafters as being encompassed in some of the more general terminology in the UDHR’s foundational non-discrimination provision.

On the afternoon of 13 October 1948, the Third Committee of the UN General Assembly was in debate over the inclusion of the word ‘birth’ in the list of prohibited grounds of distinction in what was to become article 2 of the UDHR.² Some of the delegates did not like the term ‘birth’-- which appeared in the proposal of an informal drafting group--due to the perceived incongruity of referring to possible discrimination on the basis of birth when the agreed text of article 1 of the Declaration asserted that ‘[a]ll human beings are born free and equal in dignity and rights’. Others thought that the term might imply a blanket prohibition of discrimination on the basis of age, which could have awkward implications, for example, in relation to age restrictions on voting rights. The representative of the United Kingdom said that he could accept the inclusion of ‘birth’, although he would have preferred a reference to ‘class’, since the ‘Government of the United Kingdom was working for the establishment of just such a classless society.’ The Cuban and the Chilean representatives thought that the expressions ‘social status’ or ‘social origin’ were preferable to ‘birth’.

In a rather terse intervention in the midst of this debate, Mr Habib, representing India, said that he ‘favoured the use of the word ‘caste’ rather than ‘birth’, as the latter was already implied in the article.’

Mrs Roosevelt for the United States of America, and a member of the informal drafting group, demurred to both the British and Indian interventions. ‘Although class and caste distinctions still existed, human beings were trying to outgrow the use of such words.’ In her opinion, ‘the words “property or other status” took into consideration the various new suggestions that had been made.’ Mr Chang of China added that ‘[t]he concept of race, colour, social origin, and in most cases sex, involved the question of birth, while social origin also embraced the idea of class or caste.’

Mr Appadorai of the Indian delegation in effect accepted the US and Chinese caste-inclusive interpretations of some of the more general language in the draft article. He said ‘his delegation had only proposed the word “caste” because it objected to the word “birth”. The words “other status” and “social origin” were sufficiently broad to cover the whole field; the delegation of India would not, therefore, insist on its proposal.’

It is apparent therefore that caste was acknowledged in the drafting process as being encompassed in the terms ‘other status’ and/or ‘social origin’, if not also in ‘birth’ (the specific grounds of the

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² Official Records of the Third Session of the General Assembly, Part 1, Social, Humanitarian and Cultural Questions, Third Committee, Summary Records of Meetings, 21 September-8 December 1948, 101st meeting, held at the Palais de Chaillot, Paris, on Wednesday 13 October 1948 at 3 p.m. The subsequent quotations and references in this section are, unless otherwise indicated, from the summary record of the 101st meeting of the Third Committee.

Indian objection to this term not being entirely clear from the *travaux*). To that extent, a special meaning may be regarded as having been attributed to those terms.

As well as appearing in the non-discrimination provisions of most subsequent international human rights instruments,³ the terms ‘social origin’ and/or ‘other status’ (either or both of them) have been incorporated in the non-discrimination provisions of the significant number of national constitutions that have borrowed these formulations from the UDHR.

At the same time, it is noteworthy that a number of national constitutions have put the matter beyond question so far as their domestic legal regimes are concerned by explicitly referring to caste in their non-discrimination provisions. The Constitution of India specifically prohibits discrimination on the grounds of ‘religion, race, caste, sex, place of birth or any of them’ (emphasis added).⁴ Nepal’s Constitution prohibits discrimination based on ‘religion (dharma), race (varya), sex (li_ga), caste (jât), tribe (jâti) or ideological conviction (vaicârik) or any of these’ (emphasis added).⁵ Pakistan’s Constitution lists ‘race, religion, caste, sex, residence or place of birth’ (emphasis added) as prohibited grounds of discrimination in various contexts.⁶ Bangladesh’s Constitution prohibits public or private discrimination ‘on the grounds only of religion, race, caste, sex or place of birth’ (emphasis added).⁷ Sri Lanka includes the markers of ‘race, religion, language, caste, sex, political opinion, place of birth’ (emphasis added) in its constitutional non-discrimination provisions.⁸ And significantly for the purposes of the following discussion, Burkina Faso also includes caste in the list of prohibited grounds of discrimination in the first article of its 1997 Constitution.⁹

³ e.g. ICESCR, article 2(2); ICCPR, article 2(1); CRC, article 2(1); Discrimination (Employment and Occupation) Convention, article 1(1)(a); ECHR, article 14; Protocol 12 to the ECHR, article 1; ACHPR, article 2; ACHR, article 1(1).

⁴ Constitution of India, articles 15(1) [general prohibition against discrimination], 15(2) [concerning access to public places] and 16(2) [concerning equality of opportunity in public employment]. Article 17 provides for the abolition of untouchability. See also articles 23, 29, 330, 332, 334-335, 338, 340-342 and 366. India has developed a substantial raft of legislation for addressing the issue, including the Protection of Civil Rights (Anti-Untouchability) Act, 1955 (as amended in 1976); the Bonded Labour (Abolition) Act, 1976; the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989; and the Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993.

⁵ Constitution of the Kingdom of Nepal (1990), article 11(2) and (3). See also articles 2; 11(4); 12(2)(1), (3) and (4); 13(1); 25(3); 26(2); 112(3) and 113(3).

⁶ Constitution of the Islamic Republic of Pakistan, articles 22(3) [concerning admission to any educational institution receiving aid from public revenues], 26(1) [concerning access to places of public entertainment or resort not intended for religious purposes only] and 27(1) [concerning appointment to public service]. See also article 38 [providing for an affirmative duty on the part of the State to secure the well-being of the people and to provide the basic necessities of life irrespective of, inter alia, caste].

⁷ Constitution of the People’s Republic of Bangladesh, articles 28(1) [general prohibition of discrimination by the State], 28(3) [concerning access to places of public entertainment or resort, and admission to educational institutions] and 29(2) [concerning appointment to public service].

⁸ Constitution of Sri Lanka (1978), articles 11(2)(a) [general non-discrimination provision], 11(3) [concerning access to shops, public restaurants, hotels, places of public entertainment and places of public worship] and 27(1) [non-discrimination in the context of derogations in times of public emergency].

⁹ Constitution du Burkina Faso (Loi No. 002/97/ADP du 27 janvier 1997), Article premier: “... Les discriminations de toutes sortes, notamment celles fondées sur la race, l’ethnie, la région, la couleur, le sexe, la langue, la religion, la caste, les opinions politiques, la fortune et la naissance, sont prohibées.”

ICERD definitions and CERD practice

The ‘descent’ limb of the definition of ‘racial discrimination’

Article 1(1) of ICERD defines ‘racial discrimination’ as follows:

any distinction, exclusion, restriction or preference based on race, colour, descent, 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 (emphasis added)

The term ‘descent’ as a prohibited ground of discrimination springs unheralded and unexplained into the basic framework of ICERD. It is one of only two terms in this list that isn’t borrowed directly from the UDHR formulation (the other being ‘ethnic origin’, in lieu of ‘social origin’). It does not appear in any of the key pre-ICERD texts on racial discrimination.¹⁰

It is also noteworthy that, although included in the definition in article 1(1), the term ‘descent’ was omitted from the list of prohibited grounds of discrimination in article 5 of ICERD.¹¹

Ordinary meaning

The generally accepted rules of treaty interpretation require the language used to be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."¹² Of the meanings attributed to ‘descent’ in the Oxford English Dictionary, the following seem most apposite to the context:

The fact of ‘descending’ or being descended from an ancestor or ancestral stock; lineage; and
A line of descent, lineage, race, stock.¹³

¹⁰ Article 1.1(b) of ILO Convention 169 on Indigenous and Tribal Peoples (which is referred to in the preamble to ICERD) does include a reference to ‘descent’; it covers indigenous status on the grounds, *inter alia*, of "descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization" (emphasis added). However, the context in the ILO Convention 169 is rather different, and the use of the term is accessory to the description of the specific populations whose posterity Convention 169 seeks to protect from discrimination.

¹¹ The *travaux préparatoires* reveal that the representative of Czechoslovakia proposed to insert the term into article 5 to promote consistency with article 1, but was almost immediately persuaded by the representative of Austria to withdraw the proposal. No further explanation appears from the summary records. (A/C.3/SR.1309, para.3 (Czechoslovak proposal) ; *ibid.*, para.4 (Austrian suggestion) ; *ibid.*, para.5 (Czechoslovak agreement to withdraw proposal)).

¹² Article 31(1) of the Vienna Convention on the Law of Treaties (UN Doc A/Conf 39/28, UKTS 58 (1980), 8 ILM 679). Article 31(2) provides that the 'context' for the purpose of treaty interpretation shall comprise, apart from the text itself, (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; and (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. However, no such agreement or instrument exists relevant to the interpretation of the term ‘descent’ in ICERD.

¹³ Oxford English Dictionary (2nd ed., 1989).

However, bearing in mind such definitions as these, it is still difficult to discern the meaning of the term ‘descent’ in the context of the list of prohibited criteria for discrimination, given that most of the other criteria are specific derivatives of one’s descent. Its position in the list speaks against a general ‘catch-all’ role for the term, and therefore the meaning of the term as used in article 1 of the ICERD remains unclear.

Subsequent practice

Any “subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” may also, in such circumstances, be taken into account.¹⁴ The ‘subsequent practice’ of CERD in reviewing state party reports under article 9 of ICERD provides a possible source of interpretative assistance. Murakami (2001) considers that the practice of CERD may be taken into account in interpreting the provisions of ICERD, “because of important role with which the Committee is entrusted by the Convention. In particular, the Committee is a body consisting of ‘experts of high moral standing and acknowledged impartiality’ (Article 8.1) and is competent to express certain views regarding interpretation of ICERD (Articles 9.2, 13.1, 14.8).”¹⁵ Of considerably more significance in terms of ‘subsequent practice’ might be the responses of state parties to CERD’s concluding observations so far as they raise the ‘descent’ question.

In the course of reviewing state party reports, CERD has expressed explicit reliance on the ‘descent’ limb of article 1 in order to address the situation of Dalits in India, Nepal and Bangladesh, as well as the analogous situations of the Burakumin in Japan. It has also raised the issue of caste-based discrimination and similar forms of inherited social exclusion in its dealings with Senegal, Mali, Madagascar, and a number of other countries.

In early August 1996, CERD considered India’s consolidated tenth to fourteenth periodic reports¹⁶. In this context, India sought to establish that discrimination related to caste did not fall within the scope of ICERD or within the jurisdiction of the Committee. “The term ‘caste’”, the Indian report declared, “denotes a ‘social’ and ‘class’ distinction and is not based on race.”¹⁷ The report expressly acknowledges that “Article 1 of the Convention includes in the definition of racial discrimination the term ‘descent’”, and that “[b]oth castes and tribes are systems based on ‘descent’”. However, the Indian position concerning the interpretation of this term was that:

¹⁴ Article 31(3)(b) of the Vienna Convention. In addition to ‘subsequent practice’, article 31(3) also requires “any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions”, and “any relevant rules of international law applicable in the relations between the parties”, to be taken into account. However, neither of these elements appears to be relevant to the interpretation of this provision of ICERD.

¹⁵ M.Murakami, ‘Meaning of “descent” in the International Convention on the Elimination of All Forms of Racial Discrimination and its Applicability to Caste and Buraku discrimination’ (2001) International Movement Against All Forms of Discrimination and Racism (IMADR) research paper, p. 3.

¹⁶ CERD/C/299/Add.3 (10th-14th periodic reports, India, 29/04/96).

¹⁷ CERD/C/299/Add.3, para.6. A somewhat more nuanced position was put by one of the members of the Indian delegation appearing before CERD, at CERD/C/SR.1163, para.3: the “notion of ‘race’ was not entirely foreign to that of ‘caste’ ; but racial differences were secondary to cultural ones ... race had never really been determinant for caste”. (See also para.4.) It is also worth noting that in its previous periodic reports to the Committee, India had included information about the “constitutional protection enjoyed in India by the ‘Scheduled Castes and Tribes’ and the specific measures adopted by the Government for their economic and social improvement” (CERD/C/299/Add.3, para.6).

... the use of the term ‘descent’ in the Convention clearly refers to ‘race’. Communities which fall under the definition of Scheduled Castes and Scheduled Tribes are unique to Indian society and its historical process. ... it is, therefore, submitted that 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.¹⁸

In the course of discussion of the report in the Committee, the Indian delegation said that India’s report “had focused on matters relating to race as distinct from other categorizations referred to in the Constitution.¹⁹ ... Constitutionally, the concept of race was distinct from caste. ... To confer a racial character on the caste system would create considerable political problems which could not be the Committee’s intention. In the spirit of dialogue, however, India was prepared to provide more information on matters other than race, without prejudice to its understanding of the term ‘race’ in the Convention.”²⁰

A number of CERD members challenged the Indian Government’s interpretation of the term ‘descent’²¹, and in its concluding observations CERD insisted that “the term ‘descent’ mentioned in article 1 of the Convention does not solely refer to ‘race’”.²² Moreover, the Committee affirmed that “the situation of the scheduled castes and scheduled tribes falls within the scope of the Convention”²³, and went on to specifically recommend that “special measures be taken by the authorities to prevent acts of discrimination towards persons belonging to the scheduled castes and scheduled tribes, and, in cases where such acts have been committed, to conduct thorough investigations, to punish those found to be responsible and to provide just and adequate reparation to the victims.”²⁴ The Committee specifically stressed “the importance of the equal enjoyment by members of these groups of the rights to access health care, education, work and public places and services, including wells, cafés or restaurants.”²⁵ CERD also recommended a public education campaign on human rights, “aimed at eliminating the institutionalized thinking of the high-caste and low-caste mentality.”²⁶

CERD also relied on ‘descent’ in order to examine the situation of the Burakumin in the course of its review of Japan’s most recent reports. Japan’s consolidated initial and second periodic report²⁷ had made no reference to the Burakumin. Again, CERD observed that “the term ‘descent’ has its own meaning and is not to be confused with race or national or ethnic origin”, and recommended

¹⁸ CERD/C/299/Add.3, para. 7; see also CERD/C/SR.1161 (Summary record of 1161st meeting), para.4 and CERD/C/SR.1162 (Summary record of 1162nd meeting), para.36.

¹⁹ India’s Constitution prohibits discrimination on the grounds of “religion, race, caste, sex, place of birth or any of them”. See fn.33 above.

²⁰ CERD/C/SR.1162 (Summary record of 1162nd meeting), para.35.

²¹ e.g. “If ‘descent’ was the equivalent of ‘race’, it would not have been necessary to include both concepts in the Convention” (Wolfrum: CERD/C/SR.1161, para.20); “The Committee’s conceptions of ‘race’ and ‘descent’ clearly differed from those of the Government of India” (van Boven: CERD/C/SR.1162, para.14); “The fact that castes and tribes were based on descent brought them strictly within the Convention” (Chigovera: CERD/C/SR.1162, para.22). See also remarks by Aboul-Nasr: CERD/C/SR.1162, para.27; de Gouttes: CERD/C/SR.1161, para.32; and Rechetov: CERD/C/SR.1161, para.11.

²² CERD/C/304/Add.13 (Concluding observations: India. 17/09/96), para. 14.

²³ *ibid.*

²⁴ *ibid.*, para. 27.

²⁵ *ibid.*

²⁶ *ibid.*, para. 31.

²⁷ CERD/C/350/Add.2, 26 September 2000.

that Japan ensure the protection of the rights of “all groups including the Burakumin community”.²⁸ The Japanese delegation, however, simply averred that “the Government does not share the Committee’s interpretation of ‘descent’”²⁹, though they did provide some additional material concerning the situation of the Burakumin.

CERD made a similar declaration concerning the interpretation of the term ‘descent’ in article 1 of the Convention in its concluding observations on Bangladesh’s most recent periodic report.³⁰ The Bangladeshi delegation, did not, so far as the summary records reveal, contest this interpretation.

Nepal has also appears to have acquiesced to CERD’s interpretation and practice in this regard. CERD has now taken up the issue of caste-based discrimination in Nepal on three successive occasions³¹ without demur from the Nepalese Government. Indeed, Nepal has volunteered substantial amounts of information concerning caste-based discrimination in its periodic reports.

As Thornberry³² has noted, CERD has also addressed situation of ‘descent-based discrimination’ in a number of other instances, even though in some of these additional cases the reliance upon the ‘descent’ limb of the article 1 of the Convention has been implicit. Concluding observations by the Committee in respect of Mali³³, Senegal³⁴, Madagascar³⁵, Mauritania³⁶, Burkina Faso³⁷,

²⁸ CERD/C/304/Add.114 (Concluding observations: Japan, 27/04/2001), para.8. In the course of the discussion of the report, CERD member Diaconu had pointed out, in connection with the *Burakumin* question, that “the Convention was also applicable to discrimination based on descent” (CERD/C/SR.1443, para. 36). See the similar comments by CERD members Pillai (CERD/C/SR.1443, para. 53), Yutzis (CERD/C/SR.1444, para. 34), and Thornberry (CERD/C/SR.1444, para. 39, referring also to Sub-Commission resolution 2000/4).

²⁹ A/56/18, Annex VIIA (Comments (summary) of the Japanese Government on the Concluding Observations of the CERD on its initial and 2nd periodic reports: Japan, 10/08/2001), p.158, para. 2.

³⁰ CERD/C/304/Add.118 (Concluding observations: Bangladesh, 27/04/2001), para. 11: “With regard to the interpretation of the definition of racial discrimination contained in article 1 of the Convention, the Committee considers that the term ‘descent’ does not refer solely to race or ethnic or national origin, and is of the view that the situation with respect to castes falls within the scope of the Convention. The Committee therefore recommends that the State party include in its next report relevant information about the enjoyment of the rights contained in article 5 of the Convention by all groups, including castes.”

³¹ CERD/C/304/Add.61 (Concluding observations: Nepal, 10/02/99); CERD/C/304/Add.108 (Concluding observations: Nepal, 01/05/2001); CERD/C/64/CO/5 (Concluding observations: Nepal, 12/03/2004).

³² Patrick Thornberry, ‘Race, Descent and Caste under the Convention on the Elimination of All Forms of Racial Discrimination’ (publication forthcoming; manuscript on file with author).

³³ A/57/18, paras.391-411 (Concluding observations: Mali, 01/11/2002), para. 406: CERD requested “information on the approach the State party intends to take regarding the persistence of the consequences of a traditional caste system that could give rise of descent-based discrimination.”

³⁴ A/57/18, paras. 435-450 (Concluding observations: Senegal, 01/11/2002), para. 445: “The Committee notes with concern the continuing legacy in Senegal of aspects of a caste-based system, despite its having been banned by law. It recommends that the State party ensure that the existing provisions are effectively applied, including by taking steps to guarantee access to justice for victims...”

³⁵ CERD/C/65/CO/4 (Concluding observations: Madagascar, 17 August 2004), para. 17: “The Committee regrets that despite the abolition of slavery and the caste system in 1896, discrimination against the descendants of slaves persists.... The Committee recommends to the State party that it should take the necessary steps to put an end to discrimination based on descent, including the steps enumerated in its general recommendation XXIX. Detailed information on the situation of descendants of slaves, and of the persistence of the caste system in general, should be included in the next periodic report.”

³⁶ Unedited version of the concluding observations adopted by CERD on 18 August with regard to the situation in Mauritania, para. 15: “Le Comité note avec inquiétude que les vestiges du système des castes perdurent en

and Mauritius³⁸. Conflicts in Somalia had also been viewed by CERD as being based on descent, thus bringing them within the purview of ICERD.³⁹

CERD has confirmed its interpretation of ‘descent’, in the form of its General Recommendation XXIX on ‘descent-based discrimination’, adopted on 22 August 2002. This General Recommendation:

- confirms “the consistent view of the Committee that the term ‘descent’ in Article 1, paragraph 1 of the Convention does not solely refer to ‘race’ and has a meaning and application which complements the other prohibited grounds of discrimination”; and
- 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”.⁴⁰

From this review of CERD’s practice, it is apparent that the Committee has consciously and consistently adopted an interpretation of the ‘descent’ limb of article 1 of ICERD that encompasses situations of caste-based discrimination and analogous forms of inherited social exclusion. However, the ‘subsequent practice’ referred to in the context of treaty interpretation is generally the subsequent practice of States parties, rather than that of non-state authorities such as the human rights treaty-monitoring bodies. Two of the States parties in respect of which CERD has applied this interpretation have explicitly rejected CERD’s interpretation of the term ‘descent’ (India and Japan). Other States parties that have acquiesced to CERD’s requests for information on relevant situations without specifically contesting CERD’s interpretation of ‘descent’ (particularly Nepal and Bangladesh) cannot necessarily be said to have accepted the interpretation, since even those that explicitly rejected the interpretation generally agreed, albeit as a matter of courtesy, to provide the requested information. CERD’s consistent interpretation of the term ‘descent’ so as to encompass situations of caste-based discrimination and analogous forms of inherited social exclusion does not suffice to establish “the agreement of the parties regarding its interpretation”, especially given that India and Japan have specifically contested the interpretation.

Special meaning / supplementary means of interpretation

Mauritanie. ... Le Comité attire l’attention de l’Etat partie sur sa Recommendation générale XXIX concernant la discrimination fondée sur l’ascendance, et suggère qu’une étude détaillée sur cette question soit incluse dans le prochain rapport.” See also the summary record of the CERD’s discussion concerning Mauritania in CERD/C/SR.1341, para. 23: Mr Ould Merzoug (Mauritania): “...a caste system had existed within each of Mauritania’s communities – Arab, Pular, Soninké and Wolof.”

³⁷ CERD/C/304/Add.41 (Concluding observations: Burkina Faso, 21/08/97), para. 6: Noting that “the prohibition of discrimination on any ground, in particular of race, ethnic origin, colour, religion or caste, is contained in the Constitution”.

³⁸ CERD/C/304/Add.19 (Concluding observations: Mauritius, 27/09/96), para. 10: “...the adoption in July 1991 of section 282 of the Criminal Code, which makes it an offence to publish or distribute any threatening, abusive or insulting writings, to use in public any threatening, abusive or insulting gestures or to broadcast threatening, abusive or insulting matter, with intent to stir up contempt or hatred against any part of the population distinguished by race, caste, place of birth, colour or creed, is noted with appreciation.”

³⁹ UN document A/47/18, paras.225-6.

⁴⁰ CERD General Recommendation XXIX, 6th and 7th preambular paragraphs. For a more detailed discussion of General Recommendation XXIX, see section 7 of this paper.

But that is not the end of the matter. Article 31(4) of the Vienna Convention provides that "[a] special meaning shall be given to a term if it is established that the parties so intended", and article 32 indicates that "[r]ecourse may be had to supplementary means of interpretation ... to determine the meaning when the interpretation according to article 31 ... leaves the meaning ambiguous or obscure". In both cases, reference to the travaux préparatoires of the treaty in question is appropriate.

Indeed, an examination of the travaux préparatoires of ICERD provides some insights into the minds of the drafters, but not without posing additional difficulties of interpretation.

The term 'descent' as one of the elements of the definition of 'racial discrimination' is not contained in any of the drafts submitted by the Sub-Commission and by the Commission on Human Rights. It first appears "in an amendment proposed by India in the Third Committee of the General Assembly and taken over into a joint amendment which in due course was unanimously approved."⁴¹ The Indian proposal is the same as the form in which the text of article 1(1) was ultimately adopted (except for the term "place of origin", which was ultimately replaced in the final text by the word "national").

While the term 'descent' did not itself attract a great deal of attention in this discussion, and the proposal was ultimately "approved without much debate"⁴², much more controversy was generated by the term 'national origin'. Indeed, the Indian proposal in relation to article 1 was "intended to meet the objections raised by many delegations to the words 'national origin'".⁴³ Potential problems were perceived in the possibility of confusion between 'national origin' and the concepts of 'citizenship' or 'nationality'. As Lerner (1970) has recorded, the French delegate - amongst others - highlighted "the ambiguity involved in the use of the word 'national', observing that it could be interpreted in entirely different ways. The word does not create difficulties when used in a sociological sense, but it might be equated with the word 'nationality', which in many countries had a very specific legal meaning."⁴⁴

As Lerner also noted, "[o]ther representatives, like the Indian, stressed that no delegation suggested that the rights guaranteed and the duties imposed under national constitutions should be extended to aliens."⁴⁵ It was in this context that the Indian drafting proposal in relation to article 1 was introduced. (In A/C.3/SR.1306, the representative of Ghana commented (para.12) on the draft article 1 that "notions of ancestry and previous nationality ... seemed to him adequately represented by 'descent' and 'place of origin' in the Indian proposal.")

"The record", according to Schwelb (1966), "gives no indication of the situations the word ['descent'] was intended to cover which would be distinct from the concepts of national or ethnic

⁴¹ E.Schwelb, 'The International Convention on the Elimination of All Forms of Racial Discrimination' (1966) 15 *International and Comparative Law Quarterly* 996, pp.1002-1003. The drafting proposal appears in UN document A/C.3/L.126, dated 11 October 1965. The proposal was introduced in meetings 1299 and 1306 (see summary records A/C.3/SR.1299 and A/C.3/SR.1306).

⁴² Patrick Thornberry, 'CERD and Indigenous Peoples, with remarks on caste-based discrimination' (2001) 13 *Interights Bulletin* 96-98, at p.97.

⁴³ A/C.3/SR.1299, para.29.

⁴⁴ N.Lerner, *The U.N. Convention on the Elimination of All Forms of Racial Discrimination* (1970), pp.42-43 (referring to A/C.3/SR.1304, p.5).

⁴⁵ *ibid.*, p.43 (referring to A/C.3/SR.1304, p.6).

origin.”⁴⁶ Nevertheless, he suggested (though the specific grounds for the suggestion are not articulated) that “[i]t 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)”. Schwelb also acknowledges, however, that the Indian Constitution “uses the expression ‘descent’ side-by-side with ‘caste’”.⁴⁷

Murakami concluded from his review of the travaux concerning article 1(1) that the “statements of India were related neither to Article 1.1, which defines directly the term ‘racial discrimination’, nor to the meaning of the word ‘descent’. Furthermore, the views of the other Representatives in the Third Committee remained unclear. Accordingly, the drafting history of the Convention cannot clarify the meaning of ‘descent’”.⁴⁸

Whether or not coverage of caste can be assumed from the drafting history of article 1(1), it is submitted that a clearer – albeit indirect – indication of a special meaning attributable to the term ‘descent’ in the Convention results from the Indian interventions in the drafting of what became articles 1(4) and 2(2). These two articles deal with the question of ‘special measures’, or what is now commonly known as ‘affirmative action’. The representative of India described article 1(4) as having been included in the draft Convention “in order to provide for special and temporary measures to help certain groups of people ... who, though of the same racial stock and ethnic origin as their fellow citizens, had for centuries been relegated by the caste system to a miserable and downtrodden condition”.⁴⁹ The intention of the Indian delegation was to prevent the extensive ‘reservation’ system for members of ‘scheduled castes’ and ‘scheduled tribes’ established by the Indian Government from being impugned as discriminatory under the terms of the Convention.

So, as Thornberry argues, "whatever the argument on the relation between the specific reference to ‘race’ in Article 1 and the caste issue, there is a suggestion here that in the context of the Convention as a whole, and in particular in the context of special measures, the redress of caste disabilities finds a place."⁵⁰ Indeed, the necessary implication is that, in the view of the Government of India (and endorsed by the other members of the Third Committee, given that the Indian proposal was accepted), such special measures would otherwise potentially have contravened the prohibition against racial discrimination. If the purpose and effect of articles 1(4) and 2(2) was understood and accepted as exempting affirmative action measures in favour of, inter alia, members of ‘scheduled castes and tribes’ from the general prohibition on racial discrimination, the grounds of discrimination contained in the general prohibition must have been understood as encompassing caste. Taken together with India’s introduction of the term ‘descent’ into article 1(1), and the statements made in that context, a clear connection emerges.

⁴⁶ Schwelb, *op.cit.*, p.1003.

⁴⁷ *ibid.*, fn.43.

⁴⁸ Murakami, *op.cit.*, p.4.

⁴⁹ A/C.3/SR.1306, para.25. See also A/C.3/SR.1303, para.20. India has a highly developed system of affirmative action - known as ‘reservations’ - for members of its ‘Scheduled Castes and Scheduled Tribes, although its practical impact continue to be a matter of controversy.

⁵⁰ Thornberry, ‘Race, Descent and Caste under the Convention on the Elimination of All Forms of Racial Discrimination’ *op.cit.*

It is submitted that the drafting history therefore indicates that the member States of the Third Committee, many of whom subsequently became parties to ICERD, intended that a 'special meaning' should be carried by the term 'descent' in the Convention: a meaning inclusive of the notion of caste. Alternatively, recourse could appropriately be had to the same aspects of the *travaux* as a supplementary means of interpretation of the term 'descent', the meaning of which is otherwise ambiguous or obscure, in order to arrive at a 'caste-inclusive' interpretation of that term.