
OPINION

A. INTRODUCTION

1. I am asked to advise on the obligations of Government of the United Kingdom under international human rights law to enact legislation prohibiting discrimination on the grounds of caste.
2. I am further asked to advise on whether it is sufficient in international human rights law to justify failing to enact such legislation on the grounds of evidence gathering or further consultation.
3. I am not asked to advise on remedy.
4. My conclusion is that the United Kingdom is obligated by the International Convention on the Elimination of All Forms of Racial Discrimination (“the Convention”) to enact legislation prohibiting discrimination on the grounds of caste and to ensure that victims of such discrimination have an effective remedy. The failure of the Government of the United Kingdom to do this means they are in breach of Article 2 (1) and Article 6 of the Convention.
5. Further, the violation cannot be justified, either in principle or on the facts, by the necessity of either further evidence gathering or consultation.

B. CASTE DISCRIMINATION IN THE UK

6. The Equality Act 2010 (“the Act”) was enacted on the 8 April 2010. The purpose of the Act was to consolidate and include a complex raft of equality legislation prohibiting discrimination on various grounds.¹

¹ *Hansard*, 11 May 2009, Column 553 (Second Reading Speech)

7. On 7 July 2009, during the Committee stage in the House of Commons, an amendment was introduced to include “caste” as a self-standing category of discrimination: a “protected characteristic” in its own right.²
8. An amendment was also introduced defining “caste” as a subset of the protected characteristic of “race”.³
9. The House of Commons rejected both amendments.
10. The Solicitor-General’s justification was that there was very little evidence of caste discrimination occurring in the United Kingdom.⁴
11. As a result of the above, there were two legislative decisions.
12. The first was that the definition of race in section 9 (1) of the Act would be limited to “colour, nationality and ethnic or national origins”.
13. The second was that section 9 (5) would be introduced, providing for the option to amend section 9 to include caste discrimination in the future. Section 9(5) provides that:

A Minister of the Crown may by order—

 - (a) amend this section so as to provide for caste to be an aspect of race;
 - (b) amend this Act so as to provide for an exception to a provision of this Act to apply, or not to apply, to caste or to apply, or not to apply, to caste in specified circumstances
14. It is widely believed that s. 9 (5) of the Act was introduced as a compromise.⁵

² House of Commons, Notice of Amendments, 7 July 2009

³ House of Lords, Lords Amendments to the Equality Bill, 24 March 2010

⁴ Hansard, 6 April 2010, Column 927

⁵ “Caste prejudice ‘may exist’ in British workplaces”, *BBC News*, 3 March 2010

15. Since 2010, the Government have not sought to activate s. 9 (5) (or indicate one way or another as to whether they intend to do so). Likewise, the Government have not legislated for caste discrimination in any other way.

C. THE UNITED KINGDOM'S OBLIGATIONS UNDER INTERNATIONAL HUMAN RIGHTS LAW

Is discrimination on the grounds of caste protected in international human rights law?

16. Article 1.1 of the Convention defines “racial discrimination” as meaning:

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.

17. However, General Comment No. 29 states that discrimination based on “descent” in Article 1.1 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.⁶

18. Further, in 2000 the Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights (“UN Sub-Commission”) passed Resolution 2000/4 declaring that discrimination based on work and descent is a form of discrimination prohibited by international human rights law.⁷

19. Finally, the Report to the General Assembly of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related

⁶ General Recommendation No. 29, Preamble

⁷ United Nations High Commissioner for Human Rights, Sub-Commission on Human Rights, Resolution 2000/4, Discrimination based on work and descent, Adopted without a vote at its 17th meeting, 11 August 2000

intolerance, of 24 May 2011 confirmed the “existence of international legal obligations to protect against discrimination based on work and descent.”⁸

20. It is therefore clear that since 2000 and certainly since 2002, international human rights law has recognised “caste” as an aspect of “race discrimination” warranting protection.

What are the obligations of the United Kingdom under the Convention?

21. The United Kingdom has signed and ratified the Convention. In particular, the United Kingdom became subject to the obligations contained within the Convention on 20 March 1969, thirteen days after its ratification of the Convention.⁹

22. Article 2. 1 of the Convention imposes an obligation on State parties to:

d) prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.

23. Article 6 of the Convention requires the United Kingdom to guarantee to all persons within its jurisdiction:

effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

⁸ Office of the High Commissioner for Human Rights, Human Rights Council, 17th session, Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Githu Muigai, A/HRC/17/40, 24 May 2011 at para 86

⁹ CERD, Article 19.2

23. In interpreting the precise content of these obligations, reference may be made to the following:
- i. General recommendations issued by the Committee on the Elimination of Racial Discrimination (“CERD”) in accordance with article 9.2 of the Convention;
 - ii. Concluding observations made by the CERD with respect to the reporting mechanism established in article 9 of the Convention; and
 - iii. Observations of the CERD made under the individual complaints mechanism established by article 14 of the Convention.
24. Firstly, it is clear that State Parties are under a positive obligation to continuously monitor instances of racial discrimination occurring within their jurisdiction.
25. The CERD has recognised on a number of occasions that a State party to the Convention cannot claim to be satisfying its obligations merely by asserting that there is an absence of racial discrimination within its territory.¹⁰ According to the CERD, State parties are required under the Convention to take legislative, judicial and other measures to give effect to its provisions, even in the apparent absence of racism.¹¹
26. Secondly, any legislation that implements a State’s Convention obligations must be “totally adequate to combat discrimination effectively.”¹² Where the adopted laws “do not seem to respond fully to the requirements of the Convention”, a State party will fail to uphold its obligations.¹³ Further, a State is required to, *inter alia*, ensure that all available domestic remedies are widely disseminated.¹⁴

¹⁰ Jamaica, CERD, A/57/18 (2002) 30 at para 131

¹¹ Qatar, CERD, A/57/18 (2002) 38 at para 190

¹² Austria, CERD, A/57/18 (2002) 15 at para 29

¹³ Botswana, CERD, A/57/18 (2002) 53 at para 298

¹⁴ Ecuador, CERD, A/58/18 (2003) 22 at para 64

27. Finally, where discrimination has been identified, States are under “a positive obligation to take effective action.”¹⁵ The CERD has observed that “it does not suffice ... merely to declare acts of racial discrimination punishable on paper. Rather, criminal laws and other legal provisions prohibiting racial discrimination must also be effectively implemented by the competent national tribunals and other State institutions.¹⁶ Where a State Party fails to “carry out an effective investigation to determine whether or not an act of racial discrimination had taken place”, that State Party violates article 2.1(d) of the Convention.¹⁷

Recommendations and Responses: The CERD, UPR and Special Rapporteur

28. The CERD has expressed a clear view on the lack of caste discrimination legislation in the United Kingdom.
29. In the CERD’s Concluding Observations in August 2003, (CERD/C/63/CO/11), the CERD made the following recommendation to the UK Government:

25. The Committee recalls its general recommendation 29, in which the Committee condemns descent-based discrimination, such as discrimination on the basis of caste and analogous systems of inherited status, as a violation of the Convention, and recommends that a prohibition against such discrimination be included in domestic legislation. The Committee would welcome information on this issue in the next periodic report. [Emphasis added].

30. The United Kingdom responded to the CERD’s recommendations in their combined 18th and 19th reports in 2010:

42. The Government has noted the Committee’s request for information on “descent-based” discrimination in the UK

¹⁵ *Jama v Denmark*, Communication No. 41/2008, 21 August 2009, para 7.2; *Adan v Denmark*, Communication No. 46/2008, 13 August 2010, para 7.2; *Dawas and Shava v Denmark*, Communication No. 46/2009, 6 March 2012, para 7.2

¹⁶ *Gelle v Denmark*, Communication No. 34/2004, 6 March 2006, para 7.3; *Jama v Denmark*, Communication No. 41/2008, 21 August 2009, para 7.3;

¹⁷ *Adan v Denmark*, Communication No. 46/2008, 13 August 2010, para 7.7

(paragraph 24, 2003 Concluding Observations). The Government has seen no firm evidence on whether caste-based discrimination in the fields covered by the Convention exists to any significant extent in the UK. The Government has therefore made a commitment to commission research into caste discrimination.

31. In March 2010, the Government commissioned a report to verify the existence of caste-based discrimination to assess the nature, extent and severity of caste prejudice, discrimination and harassment in the United Kingdom.
32. Further, on 6 July 2010 (A/HRC/21/9), the following recommendation was made to the Government under the Universal Periodic Review Procedure (“UPR”):

110.61. Put in practice a national strategy to eliminate discrimination against caste, through the immediate adoption of the Equality Law of 2010 that prohibits such discrimination, in conformity with its international human rights obligations, including CERD’s General Recommendation 29 and recommendations of the Special Rapporteur on Contemporary Forms of Racism. [Emphasis added].

33. The National Institute of Economic and Social Research published its report in December 2010.
34. The report identified discrimination and harassment in relation to work (bullying, recruitment, promotion, task allocation); provisions of services and education (bullying). The report concluded that the existing legislation did not cover caste discrimination and recommended that “extending the definition of race to include caste would provide further, explicit protection”.¹⁸
35. The United Kingdom’s response to the UPR in September 2012 was:

¹⁸ Hilary Metcalf and Heather Rolfe, “Caste discrimination and harassment in Great Britain”, December 2010 at page 65

The UK Government are currently considering the evidence available to them, such as the report by the National Institute for Economic and Social Research (NIESR), together with the correspondence and representations put forward by both those who want the Government to legislate and those who are opposed to such legislation being introduced before reaching any conclusion on whether or not to prohibit caste discrimination as a specific aspect of race discrimination under the Equality Act 2010.”¹⁹

36. Finally, the Report to the General Assembly of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance of 24 May 2011 notes that:

The general measures contained in general recommendation No. 29 (2002) of the Committee on the Elimination of Racial Discrimination should also be implemented. Specific legislation to outlaw direct and indirect racial discrimination against the affected groups is recommended. [Emphasis added].

Conclusion on obligation

37. It is clear from both Article 1.1 (as interpreted by General Comment No. 29) and Article 2.1 of the Convention that the UK is obliged, as a matter of international human rights law, to legislate for caste discrimination.

38. This position was confirmed to the UK in the 2003 CERD Concluding Observations recommending that “a prohibition against such discrimination be included in domestic legislation” and reiterated in a variety of ways thereafter.

39. Therefore the failure of the Government of the United Kingdom to legislate for caste discrimination is, prima facie, a violation of Articles 2 (1) and 6 of the Convention.

¹⁹ United Kingdom response to the Universal Periodic Review recommendations, Annex, 23 September 2012

40. However, international human rights law does not mandate the mechanism through which State parties choose to implement their obligations.²⁰ The UK is therefore not required under its Convention obligations to activate section 9(5) of the Act. The Convention simply requires the UK to provide effective legislation prohibiting discrimination on the grounds of caste.

D. CAN THE DELAY IN LEGISLATING FOR CASTE DISCRIMINATION BE JUSTIFIED?

41. In light of the UK's position in 2010 and 2012 (see paras 31 and 36 above), an issue arises as to whether it is possible for the Government to justify non-legislation for discrimination due to a desire to either obtain further evidence or engage in further consultation.
42. The obligation in Article 2(1) above is described as being one which applies "without delay."²¹
43. Further, the positive obligation to implement legislation does not depend on evidential issues. It is clear that reliance on an apparent absence of racism is not a ground for failing to satisfy the obligations under the Convention: the requirement to take legislative, judicial and other measures remains.²²
44. It is therefore clear that the obligation to enact legislation is an immediate one. This is further the case when one considers the status of non-discrimination in international law generally.²³
45. Therefore, it is likely to be the case that the UK have been in breach of their Convention obligations since 2002/2003 (the dates of General Comment no. 29 and/or the Concluding Observations on the UK.)

²⁰ *Prosecutor v Kajelijeli*, ICTR-98.44-A-A, Appeals Chamber Judgment, 23 May 2005, para 219: "It is for the requested State to decide how to implement its obligations under international law."

²¹ Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women also obliges State parties to eliminate discrimination "without delay."

²² Jamaica, CERD, A/57/18 (2002) 30 at para 131; Qatar, CERD, a/57/18 (2002) 38 at para 190

²³ The right to non-discrimination is guaranteed by all international and regional human rights instruments. Further, the right to non-discrimination on the grounds of race is customary international law: *South-West Africa Cases (Second Phase)* [1966] ICJ Rep 3, 32 293 and 299-230 (Tanaka J. dissenting); *Barcelona Traction (Second Phase)* [1970] ICJ Rep 3, 32.

46. Further, in omitting “caste” from the Act, the United Kingdom has further failed to uphold its obligation to fully implement the terms of the Convention. This obligation was breached notwithstanding an absence of evidence demonstrating caste discrimination in the United Kingdom.
47. Finally, and in any event, it does not appear that delay can be justified on the facts.
48. The National Institute of Economic and Social Research published a report in December 2010 which concluded that caste discrimination occurred within the United Kingdom.²⁴ The report identified that existing legislative measures did not adequately cover situations of caste discrimination and recommended extending the definition of “race” to include “caste” in order to provide further protection.²⁵
49. In addition to this, there is a wealth of other evidence pointing to the prevalence of caste discrimination.²⁶
50. Therefore, on any reading, it appears that from December 2010, the Government of the United Kingdom has been aware that the existing legislation is not “totally adequate to combat discrimination effectively” but has not amended the legislation, thereby placing it in breach of its international obligations.

E. CONCLUSION

51. The UK is obliged in international human rights law to legislate for caste discrimination and further obliged to provide victims of such discrimination with an effective remedy. Their failure to do so, since 2002 and certainly since 2010, is a violation of Article 2 (1) and 6 of the Convention.
52. Further, the violation cannot be justified, either in principle or on the facts, by the necessity of either further evidence gathering or consultation.

²⁴ Hilary Metcalf and Heather Rolfe, “Caste discrimination and harassment in Great Britain”, December 2010

²⁵ *Ibid* at page 65

²⁶ Anti Caste Discrimination Alliance, *Hidden Apartheid – Voice of the Community, Caste and Caste Discrimination in the UK, A Scoping Study*, November 2009

53. However, international law does not mandate a specific response from the UK Government. It is a matter for the Government's discretion as to whether they enact domestic legislation through the activation of s. 9 (5) (a) or through another legislative mechanism. It simply matters, as a matter of international law, that legislation prohibiting discrimination on the grounds of caste is enacted without delay.

06.02.13

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