



Bridging the Gap: Towards a Domestic Anti-Racial Discrimination Law in India

“A Comparative and Judicial Analysis of the Enforceability Illusion under ICERD”

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Abstract

India ratified the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) in 1968, yet more than five decades later has enacted no domestic statute defining or prohibiting racial discrimination as such, and has not made the declaration under Article 14 of the Convention accepting the competence of the CERD Committee to receive individual communications. This article examines the resulting ratification-implementation gap theorised here as an “enforceability illusion” through a doctrinal and comparative legal analysis. It traces India’s judicial engagement with the gap across two Supreme Court proceedings a decade apart, arising from the 2014 death of Nido Taniam and the 2025 death of Anjel Chakma, and situates India’s position within a comparative framework drawn from South Africa’s Promotion of Equality and Prevention of Unfair Discrimination Act 2000 (PEPUDA), the United Kingdom’s

Equality Act 2010, the United States' Title VII jurisprudence, and the case law of the European Court of Human Rights and the CERD Committee. Using a comprehensiveness index derived from ICERD's own textual requirements, the article identifies a definitional, institutional, and remedial void in Indian law, benchmarked against the South African and United Kingdom models. It confronts directly the Supreme Court's February 2026 observation that formal legal categorisation of persons by race, region, sex or caste risks "treading a regressive path," arguing that this concern is a design constraint rather than a bar to legislation. Drawing on comparative remedial design — indirect-discrimination justification defences, burden-shifting evidentiary rules, dedicated equality tribunals, and viewpoint-neutral hate-speech provisions the article proposes a conduct-based, treaty-implementation-framed legislative model combining a National Commission with dedicated Equality Benches, and concludes that legislative action, rather than further judicial deferral, is the necessary next step.

Keywords: racial discrimination; India; comparative law; ICERD; CERD; enforceability illusion; Equality Act 2010; Title VII; PEPUDA; anti-discrimination legislation

I. Introduction

Racial discrimination as a distinct legal wrong occupies an uncertain place in Indian jurisprudence. While the Constitution of India prohibits discrimination on grounds including race under Articles 15 and 16, and Article 17 abolishes untouchability, Indian statutory law has never defined "racial discrimination" as an independent cause of action, nor created an institutional mechanism dedicated to its redress (Constitution of India, 1950, arts. 15, 16, 17). This stands in contrast to India's international obligations: India ratified the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) in 1968, yet has not enacted implementing legislation, and has not made the declaration under Article 14 of the Convention accepting the competence of the CERD Committee to receive individual communications, meaning that even the limited international recourse available to nationals of other States Parties is unavailable to Indian citizens (International Convention on the Elimination of All Forms of Racial Discrimination, 1965, art. 14; United Nations Office of the High Commissioner for Human Rights, n.d.).

This ratification–implementation gap is not unique to India, nor is it merely definitional. It describes a normative condition termed here the "enforceability illusion" that emerges when a sovereign state ratifies an international human rights instrument without enacting the municipal legislation necessary to render its obligations judicially cognisable and practically enforceable. Ratification generates an appearance of protection: it satisfies diplomatic expectations, discharges reporting obligations to treaty bodies, and signals normative alignment with international consensus. Yet where domestic legal systems particularly dualist or quasi-dualist orders such as India's require positive incorporation before treaty norms acquire binding domestic effect, this appearance conceals a substantive vacuum. Rights-holders possess no direct cause of action, no

statutory definition against which discriminatory conduct can be measured, and no institutional mechanism, such as an equality commission or specialised tribunal, capable of adjudicating claims or ordering remedies. The illusion is compounded by the non-self-executing character of many CERD provisions and by the absence of binding enforcement power within the Committee's own oversight architecture, which relies on periodic reporting and non-binding concluding observations rather than coercive sanction. The result is a two-tiered legal reality: an international legal personality bound by peremptory and erga omnes obligations, coexisting with a domestic legal order in which those obligations remain aspirational. This article argues that closing this gap requires deliberate legislative action, judicial interpretive strategy, and strengthened institutional accountability, and Section II situates this claim within compliance theory and the monism–dualism debate.

The practical consequences of the gap have been most visible in cases of racially motivated violence against persons from India's Northeastern states. The 2014 death of Nido Taniam, a student from Arunachal Pradesh who was beaten to death in Delhi, and the 2025 death of Anjel Chakma, a student from Tripura who was fatally attacked in Dehradun after being taunted with ethnic slurs, both resulted in prosecutions confined to general criminal offences such as murder, because Indian criminal law contains no offence of racially motivated violence as such (Deccan Herald, 2014; The Quint, 2025). The Ministry of Home Affairs' own committee, constituted after Taniam's death and chaired by M.P. Bezbaruah, found that a substantial majority of surveyed Northeastern migrants to major Indian cities reported experiencing some form of racial discrimination, and recommended legislative reform that has not, a decade later, been enacted (Ministry of Home Affairs, Government of India, 2014).

This article undertakes a comparative doctrinal analysis of anti-racial-discrimination law, examining frameworks in the United Kingdom, the United States, South Africa, the European human rights system, and the United Nations treaty framework, with a view to identifying transferable legislative and institutional design principles for the Indian context. It further engages directly with the Indian Supreme Court's most recent intervention on this question: a February 2026 order disposing of a public interest litigation seeking a dedicated anti-racial-violence law, in which the Court, while directing that persons who attack others on grounds of race, region or appearance be dealt with strictly, simultaneously cautioned that identifying persons on the ground of race, region, sex or caste would amount to "treading a regressive path" after decades of independence (Deccan Herald, 2026; ETV Bharat, 2026). The article argues that this apparent tension can be resolved through careful statutory design and proposes a legislative framework accordingly.

II. Theoretical Framework

Two bodies of theory frame the analysis that follows: the monism–dualism distinction in the domestic reception of international law, and compliance theory's account of why states ratify human rights instruments without intending full domestication.



Monism and dualism describe how a legal order determines the self-executing status of treaty norms. In a monist system, a ratified treaty forms part of domestic law automatically, without further legislative act; in a dualist system, a treaty binds the state internationally upon ratification but requires a separate act of incorporation before it has any effect in domestic courts. India occupies an ambiguous middle position. Article 253 of the Constitution empowers Parliament to legislate for the whole of India to implement any treaty, but Article 51(c) — which directs the state to foster respect for international law and treaty obligations — sits within the non-justiciable Directive Principles of State Policy, and the Supreme Court has consistently held that an unincorporated treaty cannot itself be a source of a domestically enforceable right (Constitution of India, 1950, arts. 51(c), 253). India is, in this sense, monist in constitutional text but dualist in practical application. This contrasts with South Africa, where section 39 of the 1996 Constitution imposes an interpretive mandate requiring courts to consider international law when interpreting the Bill of Rights, and section 9(4) supplies an affirmative textual command that national legislation be enacted to prevent or prohibit unfair discrimination (Constitution of the Republic of South Africa, 1996, ss. 9(4), 39). It also contrasts with the United Kingdom, which is formally and strictly dualist — no treaty, including ICERD, has domestic effect absent an incorporating Act — yet has nonetheless produced a single consolidated Equality Act addressing the substance of its anti-discrimination obligations (Equality Act 2010, c. 15).

The prohibition on racial discrimination is widely regarded as having attained the status of a peremptory norm (*jus cogens*) and an obligation owed *erga omnes* in customary international law. This status heightens, rather than diminishes, the case for domestic enforceability regardless of a state's dualist formalism: unlike ordinary treaty obligations, a peremptory prohibition is not merely a bargain between contracting parties but a baseline standard from which no derogation is permitted. That India, South Africa, and the United Kingdom have each, to varying degrees, left this baseline standard without a complete domestic enforcement architecture is the empirical puzzle this article investigates.

Compliance theory offers competing explanations for this pattern. The managerial model associated with Chayes and Chayes treats non-compliance as typically inadvertent the product of ambiguous treaty language, limited state capacity, or the lagged timetable of domestic reform and expects compliance to improve through iterative dialogue, transparency, and capacity-building rather than sanction. The enforcement model associated with Downs, Rosendorff, and Barsboom is more sceptical, treating ratification without robust domestication as a rational strategy by which a state secures the reputational and diplomatic benefits of treaty membership while incurring minimal binding cost, particularly where the treaty body's own enforcement powers are weak. Koh's transnational legal process theory occupies an intermediate position, arguing that repeated interaction among domestic and international actors including litigation, advocacy, and reporting cycles gradually internalises treaty norms into domestic legal and political discourse even absent formal incorporation. Read together, these frameworks predict precisely the pattern observed in

the Indian case: an initial rational or managerial motivation for ratification without full domestication, followed by decades of norm-internalisation pressure evident in the Bezbaruah Committee process and the 2014 and 2026 Supreme Court proceedings discussed in Section IV that has not yet crystallised into binding legislation. This article's central claim, developed comparatively in the sections that follow, is that closing the resulting enforceability illusion requires deliberate legislative action rather than continued reliance on managerial or transnational-process dynamics alone.

III. Research Methodology

This article adopts a doctrinal and comparative legal methodology. Primary sources examined include: (a) Indian constitutional provisions and reported and unreported judicial orders relevant to racial discrimination; (b) the text of ICERD and CERD Committee jurisprudence and general recommendations; (c) the Equality Act 2010 (UK) and associated case law; (d) Title VII of the Civil Rights Act 1964 (US) and landmark Supreme Court decisions thereunder; (e) the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (South Africa) and Constitutional Court and Equality Court decisions; and (f) European Court of Human Rights jurisprudence under Article 14 of the European Convention on Human Rights. Secondary sources include government committee reports, legal commentary, and contemporaneous news reporting on Indian judicial proceedings, used to establish the factual record where formal law reports were not yet available at the time of writing. The comparative method follows a functionalist approach, asking how each jurisdiction defines discriminatory conduct, allocates the burden of proof, and structures institutional enforcement, before assessing the transferability of each design feature to the Indian constitutional and social context.

The comparative dimension adopts a most-similar-systems design, selecting India, South Africa, and the United Kingdom on the basis of a controlled variable shared common-law legal heritage and comparable structures of constitutional or quasi-constitutional judicial review while allowing the variable of theoretical interest, namely the presence, absence, and institutional design of ICERD-implementing legislation, to vary freely across the sample. All three jurisdictions are States Parties to ICERD and share a colonial-legal-family lineage traceable to English common law, a proximity that renders their divergent domestic responses analytically significant rather than incidental. India retains a written constitution with a directive-principle structure that renders international treaty obligations non-self-executing absent parliamentary legislation; South Africa, though also possessing a written constitution, adopts a distinct interpretive posture under section 39 of its 1996 Constitution together with the affirmative textual mandate of section 9(4); the United Kingdom, lacking a codified constitution, remains formally dualist yet has nonetheless produced a single consolidated Equality Act. This variation allows the analysis to isolate incorporation doctrine rather than legal family, common-law method, or judicial review capacity as the explanatory variable most closely associated with the presence or absence of comprehensive implementing legislation.

The United States and the jurisprudence of the European Court of Human Rights are included as secondary comparators for specific doctrinal design features disparate-impact and burden-shifting evidentiary rules, and graduated standards of review for direct versus indirect discrimination, respectively rather than as full case-selection comparators, since neither shares India's common-law-cum-directive-principle constitutional structure to the same degree as South Africa or the United Kingdom.

The three-jurisdiction core sample is deliberately small-N and is justified as a theory-building rather than a generalising comparative design. This article does not claim that its findings are representative of ICERD's 182 States Parties; rather, it claims that the comparison isolates a mechanism the interaction between incorporation doctrine and legislative political will that plausibly operates across other dualist and quasi-dualist jurisdictions, a claim appropriately qualified in Section VII's discussion of limitations and flagged there as an avenue for future large-N or quantitative compliance research.

IV. The Indian Legal Landscape

A. The Statutory Vacuum

India's principal anti-discrimination provisions Articles 14, 15, 16, 17 and 21 of the Constitution operate against the State and, in limited circumstances, against private actors, but require judicial interpretation to be applied to racial discrimination specifically, since none defines "race" or "racial discrimination" in operative terms (Constitution of India, 1950, arts. 14, 15, 16, 17, 21). The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 provides a specific offence-and-remedy framework, but is confined to caste-based atrocities and does not extend to discrimination based on race, ethnicity, or region of origin (Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989). The Bharatiya Nyaya Sanhita, 2023, the successor to the Indian Penal Code, penalises the promotion of enmity between groups, but again does not create an offence of racial discrimination or provide civil remedies (Bharatiya Nyaya Sanhita, 2023).

B. Mapping the Void: A Comprehensiveness Index

A recurring objection to claims of this kind is that "absence of comprehensive legislation" is not self-evidently measurable: India has some relevant provisions, and without a defensible threshold for what counts as "comprehensive," the claim risks being dismissed as assertion rather than demonstrated finding. To address this, Table 1 operationalises "comprehensiveness" against ICERD's own textual requirements Articles 1, 2, 4, 5, 6, and 7 and scores India, South Africa, and the United Kingdom against each criterion, converting the paper's central premise into a structured, falsifiable doctrinal finding.

Table 1

Comprehensiveness Index: India, South Africa, and the United Kingdom against ICERD's Textual Requirements

ICERD Provision	Comprehensiveness Criterion	India	South Africa	United Kingdom
Art. 1	Statutory definition of 'racial discrimination' consistent with ICERD Art. 1	✗ Absent	✓ Present	✓ Present
Art. 2(1)(d)	Positive legal obligation on private actors (horizontal application)	✗ Absent	✓ Present	✓ Present
Art. 2(2)	Special/affirmative measures provision with statutory basis	~ Partial	✓ Present	~ Partial
Art. 4	Criminalisation of incitement to racial hatred / discriminatory organisations	~ Partial	✓ Present	✓ Present
Art. 5	Enumerated civil, political, economic, social, cultural rights protected from discrimination in one instrument	✗ Absent	✓ Present	✓ Present
Art. 6	Dedicated statutory remedy — civil cause of action with accessible forum	✗ Absent	✓ Present	✓ Present
Art. 6	Reversed / shifted burden of proof in civil discrimination claims	✗ Absent	✓ Present	✓ Present
Art. 2(1)(e)/7	Independent statutory equality body with investigatory and quasi-adjudicatory powers	~ Partial	✓ Present	✓ Present
Institutional	Specialised tribunal or dedicated adjudicatory track for discrimination claims	✗ Absent	~ Partial	✓ Present

ICERD Provision	Comprehensiveness Criterion	India	South Africa	United Kingdom
Institutional	Mandatory periodic domestic reporting / monitoring mechanism distinct from UN reporting	X Absent	~ Partial	~ Partial

Legend: ✓ Present = statutory or constitutional provision substantially meets the criterion. ~ Partial = provision exists but is fragmented, indirect, or lacks binding force. X Absent = no equivalent domestic provision identified. Source: author's analysis, derived from the primary legislative and constitutional texts cited in Sections IV and V.

Rather than treating each ICERD provision in isolation, the void in Indian domestic law is best understood as operating across three interlocking dimensions- definitional, institutional, and remedial each benchmarked against the South African and United Kingdom comparators reflected in Table 1.

The Definitional Void.

No Indian statute provides a definition of racial discrimination consistent with Article 1 of ICERD, which extends to distinction, exclusion, restriction, or preference based on race, colour, descent, or national or ethnic origin (International Convention on the Elimination of All Forms of Racial Discrimination, 1965, art. 1). The Constitution's equality provisions Article 14's guarantee of equality before law, Article 15's prohibition of discrimination on enumerated grounds, and Article 17's abolition of untouchability operate at a high level of generality and were drafted primarily to address caste-based exclusion rather than to transpose an internationally agreed definition of racial discrimination into domestic law. This stands in contrast to South Africa, where section 1 of PEPUDA supplies an operative statutory definition of unfair discrimination, both direct and indirect, and to the United Kingdom, where sections 13 through 19 of the Equality Act 2010 define direct discrimination, indirect discrimination, harassment, and victimisation with sufficient precision to found a cause of action (Promotion of Equality and Prevention of Unfair Discrimination Act, 2000, s. 1; Equality Act 2010, c. 15, ss. 13–19). The absence of an equivalent Indian provision means that a claimant cannot point to a single statutory test against which allegedly discriminatory conduct is measured; instead, litigants must proceed through constitutional writ jurisdiction or scattered penal provisions, each carrying a different threshold and a different remedial logic.

The Institutional Void.

ICERD's Article 2(1)(e) and Article 7 obligations encouraging integrationist organisations and combating prejudice through education, culture, and information together with the practical necessity of an investigatory and quasi-adjudicatory body implied by an effective domestic regime, find only partial expression in India (International Convention on the Elimination of All Forms of Racial Discrimination, 1965, arts. 2(1)(e), 7). The National Human Rights Commission possesses

a broad human rights mandate but lacks a race- or descent-specific jurisdiction, binding adjudicatory power, or the specialised Equality Court structure that South Africa has established under PEPUA to hear discrimination complaints as a matter of first instance. The United Kingdom's Equality and Human Rights Commission, by contrast, holds statutory investigatory powers, can issue unlawful act notices, and can intervene in litigation. India's institutional landscape, in this respect, more closely resembles a state that has ratified an obligation to establish effective institutional machinery without translating that obligation into a body possessing binding powers tailored to racial or descent-based discrimination specifically.

The Remedial Void.

Article 6 of ICERD requires States Parties to assure effective protection and remedies through competent national tribunals against acts of racial discrimination, together with the right to seek just and adequate reparation (International Convention on the Elimination of All Forms of Racial Discrimination, 1965, art. 6). No dedicated civil cause of action exists in Indian law for racial discrimination as such; a claimant must instead rely on constitutional writ remedies available only against the State under Article 12 and therefore inapplicable to purely private discriminatory conduct or on criminal provisions carrying a materially higher evidentiary threshold than a civil standard of proof. Neither pathway incorporates a reversed or shifted burden of proof of the kind found in section 13 of PEPUA or section 136 of the Equality Act 2010, both of which require a respondent to disprove discrimination once a complainant establishes a *prima facie* case (Promotion of Equality and Prevention of Unfair Discrimination Act, 2000, s. 13; Equality Act 2010, c. 15, s. 136). The absence of a shifted evidentiary burden is not a peripheral technical gap: given the well-documented difficulty of proving discriminatory intent or effect from a claimant's evidentiary position, its absence substantially narrows the practical availability of the Article 6 remedy that India, as a State Party, has formally undertaken to assure.

Read together, these three voids demonstrate that India's domestic legal order satisfies the formal act of ratification while falling short, on a criterion-by-criterion basis, of the functional architecture that ICERD's own text presupposes an empirical demonstration, rather than mere assertion, of the enforceability illusion this article advances.

C. Judicial Engagement: Two Decades of Deferral

The Supreme Court's engagement with this gap has followed a consistent pattern across two petitions a decade apart. In 2014, following Nido Taniam's death, a bench of Chief Justice P. Sathasivam and Justice Ranjan Gogoi issued notice to the Union and all States on a petition filed by seven advocates seeking guidelines to protect Northeastern citizens from racial discrimination; no substantive guidelines resulted (Deccan Herald, 2014). In February 2026, following Anjel Chakma's death, a fresh petition filed by advocate Anoop Prakash Awasthi sought a dedicated statute and agency modelled on the SC/ST (Prevention of Atrocities) Act, 1989. A bench of Chief Justice Surya Kant and Justices Joymalya Bagchi and Vipul M. Pancholi disposed of the petition, observing that "a crime is a crime and it must be dealt with an iron hand," while directing that the

petition be placed before the Attorney General for India, R. Venkataramani, for referral to the competent authority, and cautioning that “identifying persons on the ground of race, region, sex and caste would amount to treading a regressive path after so many years of independence” (Deccan Herald, 2026; ETV Bharat, 2026; Orissa Post, 2026).

This pattern — judicial acknowledgment of harm, coupled with consistent institutional deferral to the executive and legislature — is, this article argues, the central doctrinal fact that any proposed legislation must confront. It is not that Indian courts have denied the existence of racial discrimination; it is that they have declined, twice, to supply a judicial remedy in the continued absence of a statute, while simultaneously signalling unease about the terms in which such a statute might be framed.

V. Comparative Legal Frameworks

A. The United Nations Treaty Framework

CERD, the body of independent experts overseeing ICERD implementation, operates through periodic state reporting, an early-warning and urgent-action procedure, and, for states accepting Article 14, an individual communications procedure (International Convention on the Elimination of All Forms of Racial Discrimination, 1965, arts. 9, 11, 14). CERD’s jurisprudence under Article 14, though sparse compared to other UN treaty bodies, has established that discriminatory treatment based on perceived ethnic or national-origin risk factors — for example, an employer treating a worker’s background as a business liability — falls within the Convention’s definition of discrimination “based on” race or national origin. CERD’s early-warning procedure is explicitly designed for situations including an inadequate domestic legal basis for defining and prohibiting racial discrimination and inadequate enforcement mechanisms, a description of striking relevance to the Indian position.

B. The United Kingdom: The Equality Act 2010

The UK’s Equality Act 2010 consolidated the Race Relations Act 1976 and eight other anti-discrimination statutes into a single instrument, structured around a four-part taxonomy of direct discrimination, indirect discrimination, harassment, and victimisation, each with distinct legal tests (Equality Act 2010, c. 15). Indirect discrimination is defined as the application of a facially neutral provision, criterion or practice that disadvantages a protected group, subject to a defence that the practice is “a proportionate means of achieving a legitimate aim,” a formulation that has proved durable in balancing institutional flexibility against protection from structural disadvantage (Equality Act 2010, c. 15, s. 19). On remedies, the European Court of Justice’s decision in *Marshall v Southampton and South West Hampshire Area Health Authority* (No. 2) (1993) held that statutory caps on discrimination compensation were incompatible with EU law, a ruling that led to the removal of compensation ceilings from UK discrimination statutes generally. Procedurally, the UK Supreme Court’s decision in *R (Unison) v Lord Chancellor* (2017) struck down employment tribunal fees as an unlawful impediment to access to justice, underscoring that

even a well-designed substantive framework requires an accessible enforcement forum to be effective.

C. The United States: Title VII and Its Doctrinal Architecture

Title VII of the Civil Rights Act of 1964 has generated the most extensively litigated body of race-discrimination doctrine among the jurisdictions surveyed. In *Griggs v Duke Power Co* (1971), the Supreme Court established the disparate-impact doctrine, holding that facially neutral employment criteria — in that case, a high-school diploma requirement and standardised testing — could constitute unlawful discrimination where they produced racially unequal outcomes without a demonstrated relationship to job performance, irrespective of discriminatory intent. In *McDonnell Douglas Corp v Green* (1973), the Court articulated a burden-shifting framework for cases of indirect proof, requiring a complainant to establish a *prima facie* case before the burden moves to the respondent to articulate a legitimate, non-discriminatory reason for the challenged action. More recently, in *Ricci v DeStefano* (2009), the Court held that an employer's decision to discard test results because of a resulting racial disparity itself violated Title VII absent a “strong basis in evidence” of disparate-impact liability, illustrating the doctrinal difficulty of remedying group-level disparities without triggering claims of reverse discrimination. Read together, these cases demonstrate both the analytical power of the disparate-impact and burden-shifting doctrines, and the need for carefully bounded justification defences to avoid overcorrection litigation.

D. South Africa: A Post-Apartheid Comprehensive Model

South Africa's Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) offers the most structurally comprehensive comparator, prohibiting unfair discrimination by both public and private actors, addressing hate speech and harassment, and establishing dedicated Equality Courts as a specialised adjudicatory forum. In *Qwelane v South African Human Rights Commission* (2021), the Constitutional Court adopted a purposive, broad reading of PEPUDA's hate-speech provision, while criticising the vagueness of its “hurtful” standard and reading the provision down to require a genuine risk of harm rather than mere offence. In *South African Human Rights Commission v Malema*, the Equality Court applied PEPUDA to find hate speech against a historically advantaged group, demonstrating that a well-drafted, race-neutral statute protects any person subjected to prohibited conduct, not only members of historically disadvantaged communities. This viewpoint-neutrality is of particular significance for jurisdictions, including India, where concerns about entrenching group-based categorisation are politically salient.

E. The European Court of Human Rights

Article 14 of the European Convention on Human Rights, as interpreted by the Strasbourg Court, applies a markedly stricter standard to race-based state action than the justification-based models above (European Convention on Human Rights, 1950, art. 14). In *Timishev v Russia* (2005), the Court held that a restriction on freedom of movement based exclusively or decisively on ethnic origin could never be objectively justified in a democratic society founded on pluralism

— effectively a near-absolute prohibition on direct racial classification by the state. In *D.H. and Others v Czech Republic* (2007), the first case of its kind before the Court, the systematic placement of Roma children in special schools was found to constitute indirect discrimination established through statistical evidence, without any need to prove discriminatory intent. In *Basu v Germany* (2022), the Court held that racial discrimination demands particular vigilance from state authorities, while clarifying that not every identity check of a person from an ethnic minority meets the threshold of an Article 14 violation — the threshold requires an “arguable claim” of ethnicity-based targeting. This graduated approach — near-absolute scrutiny for direct state classification, evidentiary thresholds for individual profiling claims, and statistical proof for systemic indirect discrimination — offers a workable model for calibrating the standard of review across different categories of conduct, and has since been extended by the Court in *Wa Baile v Switzerland* (2024), which for the first time found a substantive Article 14 violation in a racial-profiling identity check.

VI. Synthesis: A Proposed Framework for India

A. Resolving the Central Tension

The Indian Supreme Court’s February 2026 caution against race-based categorisation is not, this article argues, an obstacle to legislation but a design constraint. The South African experience — particularly the viewpoint-neutral outcome in *Malema* — demonstrates that a statute can prohibit discriminatory conduct without creating any new status or classification of persons. A proposed Indian statute should therefore: define racial discrimination exclusively as a prohibited act, with an explicit statutory statement that the Act creates no registry, classification, or enumeration of persons by race for any purpose beyond adjudicating individual complaints; frame its legislative object as domestic implementation of a pre-existing treaty obligation (ICERD, ratified 1968) rather than a novel domestic policy choice, addressing directly the temporal concern implicit in the Court’s “after so many years of independence” framing; and draw its indirect-discrimination standard from the UK’s proportionality defence, while adopting the European Court of Human Rights’ stricter near-absolute standard for direct state action such as racial profiling, consistent with *Timishev*.

B. Institutional Design

The Bezbaruah Committee’s experience — a body with investigatory but no adjudicatory power, whose recommendations were not implemented — counsels against an advisory-only institutional model (Ministry of Home Affairs, Government of India, 2014). Following the South African Equality Courts precedent, this article recommends a two-tier structure: a National Commission for policy formulation, systemic inquiry, and ICERD reporting, combined with dedicated Equality Benches within the existing High Court and District Court structure, empowered to award uncapped compensation, consistent with the post-Marshall UK position, and to dispose of complaints within a fixed statutory timeline, addressing the delay concerns that have recurred across the Indian litigation record.



C. Evidentiary and Procedural Design

For racial profiling claims specifically, this article recommends adopting a burden-shifting rule combining the evidentiary threshold from *Basu v Germany* with the procedural mechanics of *McDonnell Douglas*: once a complainant establishes a *prima facie* pattern of race-based targeting, the burden shifts to the law-enforcement authority to justify its action on grounds unrelated to race.

D. Hate Speech

Given the vagueness concerns raised even within South Africa's own Constitutional Court in *Qwelane*, this article recommends that any Indian civil hate-speech provision be narrowly confined to conduct demonstrating a clear intention to incite harm, expressly excluding academic, artistic, journalistic and religious expression absent such intention, and operating independently of, rather than as a substitute for, existing criminal hate-speech provisions.

VII. Discussion and Limitations

This article's comparative method necessarily abstracts from significant contextual differences between jurisdictions — the UK and South African models were both developed in post-colonial or post-apartheid contexts with distinct histories of race-based legal categorisation, while the US model developed within a federal constitutional structure with strong judicial review of legislative classifications. The transferability of doctrines such as disparate impact or Equality Courts to the Indian context should therefore be treated as a starting hypothesis for legislative drafting rather than as determinative precedent.

As Section III notes, the three-jurisdiction core comparison is a small-N, theory-building design rather than a generalising one; its findings identify a plausible mechanism — the interaction between incorporation doctrine and legislative political will — rather than a claim representative of all 182 ICERD States Parties. Relatedly, this article maintains a strict analytical distinction between formal incorporation and functional compliance: its claim is not that the absence of a named comprehensive statute is itself non-compliance, but that the absence of a statute combined with the absence of a functional-equivalent institutional or judicial pathway constitutes the enforceability illusion identified in Section II. South Africa's section 39 interpretive mandate, which achieves partial functional incorporation without ICERD being directly self-executing, illustrates why monism and dualism are better treated as a spectrum than a binary in evaluating comparative compliance.

Further empirical research — particularly updated survey data comparable to the 2014 Bezbaruah Committee findings, and systematic tracking of Equality Bench-style pilot mechanisms should any be adopted — would strengthen the evidentiary basis for the reforms proposed here. This article also does not address the question of resource allocation and judicial capacity required to operationalise a dedicated Equality Bench structure across India's court system, which is a significant practical constraint meriting separate study. Finally, because the February 2026 Supreme Court order is, at the time of writing, reported only in contemporaneous news coverage

pending publication in an official law report, the doctrinal characterisation offered in Sections IV and VI should be revisited once a citable law-report version becomes available.

VIII. Conclusion

India's ratification of ICERD in 1968 created an international obligation that domestic law has never fully discharged. This article has argued that the resulting gap is best understood not as an oversight but as an enforceability illusion: a condition, explicable through compliance theory and India's ambiguous monist–dualist constitutional posture, in which the formal act of ratification substitutes for the functional architecture of definition, institution, and remedy that ICERD's own text presupposes. A comprehensiveness index benchmarked against South Africa and the United Kingdom demonstrates this gap criterion by criterion rather than by assertion. Two decades of documented harm, two Supreme Court petitions disposed of without legislative relief, and one government committee's unimplemented recommendations together demonstrate that judicial and administrative responses alone cannot close it. Comparative analysis of the UK, US, South African, and European frameworks shows that a workable statutory model exists, and that the Indian Supreme Court's concern about regressive categorisation can be addressed through conduct-based, viewpoint-neutral statutory design rather than treated as a bar to legislation. This article has proposed such a framework, combining a National Commission with dedicated Equality Benches, calibrated evidentiary standards, and a treaty-implementation framing intended to answer the constitutional concerns raised by India's own apex court. Legislative action — not further judicial deferral is the necessary next step.

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