

# EQUAL BY LAW, UNEQUAL BY CASTE: THE “UNTOUCHABLE” CONDITION IN CRITICAL RACE PERSPECTIVE

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## I. INTRODUCTION

Caste-based oppression in India lives today in an environment seemingly hostile to its presence: a nation-state that has long been labeled the “world’s largest democracy;” a progressive and protective constitution; a system of laws designed to proscribe and punish acts of discrimination on the basis of caste; broad-based programs of affirmative action that include constitutionally mandated reservations or quotas for Dalits, or so-called “untouchables;” a plethora of caste-conscious measures designed to ensure the economic “upliftment” of Dalits; and an aggressive economic liberalization campaign to fuel India’s economic growth.<sup>1</sup>

This Article seeks to answer the question of how and why this seemingly foolproof recipe for equality has done little to mitigate centuries of oppression and exclusion for over 167 million<sup>2</sup> Dalits at the

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<sup>1</sup> The phenomenon is not unique to India. Rather, caste-based discrimination affects an estimated 250 million people in Asia and Africa. See SMITA NARULA, *CASTE DISCRIMINATION: A GLOBAL CONCERN* (Human Rights Watch, 2001) [hereinafter *A GLOBAL CONCERN*].

<sup>2</sup> Census of India, *Census Data 2001*, available at [http://www.censusindia.gov.in/Census\\_Data\\_2001/India\\_at\\_glance/scst.aspx](http://www.censusindia.gov.in/Census_Data_2001/India_at_glance/scst.aspx).

bottom of India's caste system.<sup>3</sup> To the contrary, caste-based discrimination, inequality, and oppression comfortably survive and even thrive in modern day India. The Article further asks whether the clarion call of "Dalit Rights are Human Rights,"<sup>4</sup> increasingly heeded by the international community and heard around the world,<sup>5</sup> can now succeed where all else has seemingly failed. It concludes that "Dalit Rights are Human Rights" is not a self-fulfilling prophecy but one that can galvanize a project of social transformation so long as it does not restrict itself to the constraints of the legal and moral regime in which this struggle now lives.

Part II of this Article situates "caste" in a global context, particularly in the context of debates around affirmative action, racial inequality, and racial justice in the United States. In so doing, it suggests that the discourse surrounding the struggle for Dalits rights in India brings the fallacy of anti-affirmative action arguments in the United States into sharp relief. Part II then presents an overview of the caste system and caste-based discrimination and inequality in India today, paying specific attention to the intersection of caste and gender-based discrimination and the impact on Dalits of India's aggressive shift from a state regulated economy to a market economy.

Part III focuses on Indian policies for redressing caste discrimination against Dalits, known in legal parlance as "scheduled

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<sup>3</sup> An estimated additional 42 million Muslim and Christian Dalits are also vulnerable to discrimination. Memorandum, *National Campaign on Dalit Human Rights, Background of the Dalit Situation in India*, Sept. 2007 (on file with author).

<sup>4</sup> See generally Clifford Bob, "Dalit Rights Are Human Rights:" *Caste Discrimination, International Activism, and the Construction of a New Human Rights Issue*, 29 HUM. RTS. Q. 167 (2007) (analyzing recent efforts by Indian Dalit and international activists to "transform centuries-old caste-based discrimination into an international human rights issue"). See also National Campaign on Dalit Human Rights, *Dalit Rights are Human Rights: A Charter of Dalit Human Rights* (on file with author).

<sup>5</sup> See, e.g. H.R. Con. Res. 139, 110th Cong. (2007) (expressing sense of Congress that United States should address the problem of untouchability in India); Resolution on the Human Rights Situation of Dalits in India, Eur. Parl. Doc. B6-0021 (2007) (urging Indian government to tackle problem of caste-based discrimination); U.N. Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination* [in response to the report submitted by India], U.N. Doc. CERD/C/IND/CO/19 (Mar. 6, 2007). For a general overview of the position of various U.N. human rights mechanisms on the issue of caste discrimination, see generally CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE & HUMAN RIGHTS WATCH, *HIDDEN APARTHEID: CASTE DISCRIMINATION AGAINST INDIA'S UNTOUCHABLES* (2007), available at <http://www.hrw.org/reports/2007/india0207/india0207webwcover.pdf> [hereinafter HIDDEN APARTHEID].

castes,”<sup>6</sup> and includes an overview of constitutional provisions and protective legislation aimed at abolishing “untouchability” practices and promoting Dalits’ socio-economic development. It describes India’s affirmative action policy, wherein seats are constitutionally “reserved” for Dalits to ensure their proportional representation in federal government jobs, state and local legislative bodies, the lower house of parliament, and educational institutions.

India’s legal affirmation of Dalits’ rights lays the foundation for real social transformation. Yet despite formal protections in law, discriminatory treatment remains endemic and discriminatory societal norms continue to be reinforced by government and private structures, often through violent means.<sup>7</sup> Much of the current scholarship on caste in India has focused on the reservations policy.<sup>8</sup> Scant attention has been given to the corresponding under-enforcement of protective legislation or the caste-based abuses committed by those entrusted with the role of ensuring that the “rule of law” trumps discriminatory societal practices.<sup>9</sup>

Part IV argues that India’s law enforcement machinery enforces the rules of the caste system, and not the “rule of law.” By depicting the culture of under-enforcement of laws and policy prescriptions, this section seeks to counter the prevailing perception that constitutional and legislative protections are in and of themselves sufficient to ensure basic protections for India’s most marginalized citizens. Rather than ensuring basic rights, the preponderance of such legislation acts as a patina to mask the daily reality of *de facto* segregation, exploitation, violence, and other forms of “untouchability” practices. This has discouraged further scrutiny into the condition of Dalits and other vulnerable groups who remain outside the scope of basic protections.

Part IV additionally offers insights into how and why these prescriptions have failed to deliver on their promises. Specifically, it argues that casteism as a form of corruption and violence and as a mechanism to entrench caste rules come together to effectively trump

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<sup>6</sup> This Article does not explore other pervasive discrimination practices, including those that target tribal community members (in legal parlance “scheduled tribes”) and religious minorities in India.

<sup>7</sup> A GLOBAL CONCERN, *supra* note 1, at 2.

<sup>8</sup> See, e.g., E.J. Prior, *Constitutional Fairness or Fraud on the Constitution? Compensatory Discrimination in India*, 28 CASE W. RES. J. INT’L L. 63 (1996).

<sup>9</sup> *But see* William J. Eisenman, Comment, *Eliminating Discriminatory Traditions Against the Dalits: The Local Need for International Capacity-Building of the Indian Criminal Justice System*, 17 EMORY INT’L L. REV. 133 (2003) (arguing that the Indian government’s constitutional protections of Dalits and many protective acts, though exemplary, have failed to result in gains for Dalits because of ongoing local prejudice).

any adherence to the rule of law. It then turns to the reservations debate,<sup>10</sup> situating reservations in the context of a system that is by its very nature antithetical to merit or power-sharing. Even as they are cited as *prima facie* evidence of Dalit equality and Dalit advancement, reservations have proved to be an insufficient remedy for addressing historic and entrenched discrimination against Dalits.

Part V articulates the formidable challenge that the caste system presents to human rights law because of the competing and even inimical theory of graded *inequality* that it represents. It scrutinizes the human rights framework for its over-reliance on the state as a neutral agent of social change and for the attendant assumption that like economic growth, international laws and admonitions directed to the state will “trickle down” to the rest of the population. Part V argues that human rights actors must be scrutinized for paying insufficient attention to the dismantling of the caste-based hierarchical mindset. Like the economic and constitutional regimes that precede it, the human rights project has, to date, left this project wholly undone. Part VI concludes that the human rights movement can galvanize a project of social transformation so long as it does not restrict itself to the constraints of the legal and moral regime in which this struggle now lives.

## II. THE CASTE SYSTEM

### A. CASTE IN CONTEXT

On December 27, 2006, Indian Prime Minister Manmohan Singh became the first sitting prime minister to openly draw a parallel between the practice of “untouchability”—the imposition of social disabilities on persons by reason of their birth in certain castes—and apartheid.<sup>11</sup> In a speech delivered at the Dalit-Minority International Conference in New Delhi, Prime Minister Singh explained that, “Dalits have faced a unique discrimination in our society that is fundamentally different from the

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<sup>10</sup> The term “reservations” refers to quotas or set-asides in institutes of higher education, legislative bodies, and public sector jobs that are exclusively designated for historically disadvantaged castes and tribes. As is the case with affirmative action in the U.S., caste-based reservations are opposed by many as undermining merit-based advancement. On the debate generally, see, *infra*, Part IV.F.

<sup>11</sup> Maseeh Rahman, *Indian Leader Likens Caste System to Apartheid Regime: Millions of Dalits Still Face Oppression, Says PM*, THE GUARDIAN (UK), Dec. 28, 2006, at 22.

problems of minority groups in general.”<sup>12</sup> He pledged support for affirmative action programs specifically targeting Dalits, stating that India’s government “is deeply and sincerely committed to the equality of all sections of our society and will take all necessary steps to help in the social, educational and economic empowerment of dalits.”<sup>13</sup>

The analogy is an apt one on many levels, and an uncomfortable one on others. Like South Africa, those who sit atop the caste pyramid are a numerical minority. When combined, the population of Dalits, “tribals,” “Other Backward Classes,” and religious minorities far outnumber those of “upper-caste” Hindus.<sup>14</sup> But the analogy reveals something far deeper, that the system of “untouchability” in India continues to operate as though a form of legal apartheid were effectively still in place.

In many ways the Dalit condition naturally invites such comparisons,<sup>15</sup> and in others it is a singular category, cutting across the Indian subcontinent, but categorically different than discrimination on the basis of race. To begin, the visual cues that accompanied apartheid in South Africa, or racial discrimination in other parts of the world, are lacking in India. Caste is like oxygen—it is both invisible and indispensable. While the absence of obvious racial cues does not prevent the system from functioning to the detrimental exclusion of those who fall below the “pollution line,”<sup>16</sup> a general lack of Western familiarity with a non-racial paradigm does frustrate international attention and intervention.

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<sup>12</sup> *Id.*

<sup>13</sup> *Government Committed to Redress Inequities: Dr. Manmohan Singh*, HINDUSTAN TIMES, Dec. 27, 2006.

<sup>14</sup> According to the 2001 Census, India’s population breaks down along the following lines: scheduled castes (“SC”) 16.2 percent; scheduled tribes 8.2 percent; Muslims 13.4 percent; Christians 2.3 percent; Sikhs 1.9 percent; Buddhists 0.8 percent; Jains 0.4 percent; and others 0.6 percent. See Census of India, Census Data 2001, available at [http://www.censusindia.gov.in/Census\\_Data\\_2001/India\\_at\\_glance/scst.aspx](http://www.censusindia.gov.in/Census_Data_2001/India_at_glance/scst.aspx). The percentage of the population that falls under the category of “other backward classes” (“OBCs”) is the subject of much debate. The Mandal Commission, set up by the government in 1979 to identify “socially or educationally backward” classes, estimated in 1991 that OBCs comprise 52 percent of the population. A 2007 survey by the National Sample Survey Organization (“NSSO”), however, puts this population at 41 percent and the SC population just under 20 percent. OBCs are seen to be lower in the caste ranking but above “untouchables” and are therefore not treated as untouchable. According to the NSSO survey, the proportion of the population that is “upper-caste” Hindus is 25.5 percent. See *OBCs Form 41% of the Population: Survey*, TIMES OF INDIA, Sept. 1, 2007 available at <http://timesofindia.indiatimes.com/articleshow/msid-2328117.cms> (last visited Aug. 14, 2008).

<sup>15</sup> See, e.g., V. T. RAJSHEKAR, DALIT: THE BLACK UNTOUCHABLES OF INDIA (3rd ed. 1995).

<sup>16</sup> See *infra* Part II.C.1.

The Indian government has taken great pains to insulate itself from international scrutiny by repeatedly pointing out that this is not discrimination based on race, as though such confirmation nullifies the abuse in question.<sup>17</sup> Their protests ignore the fact that the prohibition of “racial discrimination” under international law, and in particular the International Convention on the Elimination of All Forms of Racial Discrimination, Article 1, applies to discrimination on the basis of descent.<sup>18</sup> Regardless of how the abuse is defined, its noxious and pervasive character should be sufficient to invite international attention and condemnation.

Though scholars have pointed to the racial dimensions of caste, this is not a Black and White issue, or a clear Black and Brown issue. The caste system is one of *graded inequality* that invites people to share in the spoils of iniquity even as they suffer from it.<sup>19</sup> By offering individuals a rank in a pecking order, the system strengthens itself and keeps the equality revolution at bay.

India is also an example of injustice in the extreme: the numbers affected are greater, the poverty is deeper, the atrocities are an every day affair, and enforced servitude and segregation is the norm. The population of Dalits equals more than half the population of the United States.<sup>20</sup> A majority of Dalits live on less than US\$1 per day.<sup>21</sup> Every week, thirteen Dalits are murdered and five Dalit homes are destroyed.<sup>22</sup> Three Dalit women are raped and eleven Dalits are assaulted every day—a crime is committed against a Dalit every eighteen minutes.<sup>23</sup> Aspects of the contemporary Dalit reality therefore find greater resonance with the 1950s American South, American slavery, and, as

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<sup>17</sup> See, for example, the response of the Indian government to the U.N. Committee on the Elimination of Racial Discrimination’s request that the government submit information on issues pertaining to Scheduled Castes and Scheduled Tribes. India’s periodic report stated that “‘caste’ cannot be equated with ‘race’ or covered under ‘descent’ under Article 1 of the Convention.” Government of India, Fifteenth, sixteenth, seventeenth, eighteenth, and nineteenth periodic reports of the Republic of India, due on January 4, 1998, 2000, 2002, 2004, and 2006 submitted in one document on January 26, 2006, CERD/C/IND/19, ¶16 (Mar. 29, 2006).

<sup>18</sup> International Convention on the Elimination of All Forms of Racial Discrimination art. 1, Jan. 4, 1969, 212 U.N.T.S. 216 (regarding descent).

<sup>19</sup> AMBEDKAR THOUGHT 74 (Pandiri Anjaiah & Durgam Subba Rao eds., 2005).

<sup>20</sup> The population of Dalits in India is 167 million, while the population of the United States is around 304 million. See U.S. Census Bureau, U.S. POPClock Projection, *available at*: <http://www.census.gov/population/www/popclockus.html> (last visited Aug. 14, 2008).

<sup>21</sup> SMITA NARULA, BROKEN PEOPLE: CASTE VIOLENCE AGAINST INDIA’S “UNTOUCHABLES” 2 (Human Rights Watch, 1999) [hereinafter BROKEN PEOPLE].

<sup>22</sup> See *infra* note 285.

<sup>23</sup> *Id.*

noted above, South Africa under apartheid. But, as discussed below, a number of contemporary commonalities do exist.

The cross-fertilization of ideas between India and the United States on approaches to ensuring equality is not new, nor is it surprising.<sup>24</sup> As two of the world's largest democracies and as common law countries with a profound history of *de jure* discrimination, India and the United States have learned much from one another. The very language of the Indian Constitution borrows heavily from the U.S. Constitution.<sup>25</sup> During his time at Columbia University, Dr. B.R. Ambedkar—architect of the Indian Constitution—was inspired by such legal constructs as the Fourteenth Amendment. As written by one commentator: “Ambedkar’s revolution for the emancipation of untouchables was significantly influenced by American ideals of equality.”<sup>26</sup> In 1947, the constitutional drafting committee’s advisor B. N. Rau visited the United States and solicited the views of leading American judges and scholars.<sup>27</sup> Almost every fundamental right in the Constitution of India finds its corollary in its American counterpart.<sup>28</sup> Moreover, according to some scholars, the process of drafting the Constitution of India took into account not only the textual wording of the American provisions, but also the eventual interpretation of those provisions offered by American courts.<sup>29</sup>

Both countries also continue to be mired in the politically charged debate around affirmative action as either a suitable remedy to

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<sup>24</sup> See K.P. Singh, *Liberation Movements in Comparative Perspective: Dalit Indians and Black Americans*, in *DALITS IN MODERN INDIA: VISION AND VALUES* (S.M. Michael ed., 2nd ed. 2007) (describing similarities in the historical evolution of Dalit and African-American struggles and arguing that both struggles have evolved from *acquiescent* movements to *protest* movements that have founded their most far-reaching emancipatory visions on the notion of civil rights as a counter to inequality.).

<sup>25</sup> PRATAP KUMAR GHOSH, *THE CONSTITUTION OF INDIA: HOW IT HAS BEEN FRAMED* 70 (1966).

<sup>26</sup> M. Varn Chandola, *Affirmative Action in India and the United States: The Untouchable and Black Experience*, 3 *IND. INT’L & COMP. L. REV.* 101, 118 (1992). See Eleanor Zelliot, *Dr. Ambedkar and America*, Address at the Columbia University Ambedkar Centenary, 1991, available at [http://www.columbia.edu/itc/mealac/pritchett/00ambedkar/timeline/graphics/txt\\_zelliot1991.html](http://www.columbia.edu/itc/mealac/pritchett/00ambedkar/timeline/graphics/txt_zelliot1991.html) 1 (last visited Aug. 14, 2008).

<sup>27</sup> Soli J. Sorabjee, *Equality in the United States and India*, in *CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD* 96 (Louis Henkin & Albert J. Rosenthal eds., 1990).

<sup>28</sup> *INDIA’S LIVING CONSTITUTION: IDEAS, PRACTICES, CONTROVERSIES* 251 (Zoya Hasan, Eswaran Sridharan & R. Sudarshan eds., 2005).

<sup>29</sup> Robert B. Charles, Special Project, *American Influence on the Indian Constitution: Focus on the Equal Protection of the Laws*, 17 *COLUM. HUM. RTS. L. REV.* 193, 202 (1986).

compensate for past injustices or as a means to level a playing field tilted in favor of whites and “upper-caste” Hindus. Indian judges have often cited U.S. affirmative action decisions and law review articles in their opinions, although U.S. case law has not been cited as legal precedent. Indian Supreme Court Justice Matthew in the 1975 case *State of Kerala v. Thomas* noted the following in reference to the landmark U.S. case *Brown v. Board of Education*:

Beginning most notably with the U.S. Supreme Court’s condemnation of school segregation in 1954, the U.S. has finally begun to correct the discrepancy between its ideals and its treatment of the black man . . . . These actions, while not producing true equality or even equality of opportunity logically dictated the next step: positive use of government power to create the possibility of real equality.<sup>30</sup>

It comes as no surprise that the richness of the field of comparison has invited critical and thoughtful comparative legal scholarship on the Indian and American experience with affirmative action.<sup>31</sup> Less well-considered are the contemporary struggles faced by both movements to counter the mechanisms and rhetoric through which the objectives of that legal framework now stand to be defeated. The narrative of oppression, and of racist and casteist denial, is strikingly similar from continent to continent and each country’s equality project is decidedly unfinished for similar reasons.

Inviting American scholars and advocates to turn to India and the lessons it offers to illuminate their own racial justice project is not an

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<sup>30</sup> *State of Kerala v. Thomas*, 1976 S.C.R. 906 (1975). See also Justice Harlan’s famous dissent in *Plessy v. Ferguson*, the very case that affirmed the ‘separate but equal’ doctrine: “in [the] view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no *caste* here. Our Constitution is color-blind.” 163 U.S. 537, 559 (1896) (emphasis added).

<sup>31</sup> See, e.g., Laura Dudley Jenkins, *Race, Caste and Justice: Social Science Categories and Antidiscrimination Policies in India and the United States*, 36 CONN. L. REV. 747 (2004) (examining the role of social science in the categorization of race and caste for affirmative action purposes in India and the U.S., focusing on both the census and the courts); Clark D. Cunningham, *After Grutter Things Get Interesting! The American Debate Over Affirmative Action Is Finally Ready for Some Fresh Ideas from Abroad*, 36 CONN. L. REV. 665, 665-66 (2004) (arguing that U.S. affirmative action programs can be informed by lessons learned from India and France, focusing specifically on India’s delineation of groups for different levels of preference); Jason Morgan-Foster, Note, *From Hutchins Hall to Hyderabad and Beyond: A Comparative Look at Affirmative Action in Three Jurisdictions*, 9 WASH. & LEE RACE & ETHNIC ANC. L.J. 73, 73-75 (2003) (examining differences and similarities between American, Indian, and European systems of affirmative action); Kevin D. Brown, *African-Americans Within the Context of International Oppression*, 17 TEMP. INT’L & COMP. L.J. 1 (2003) (providing a primarily personal account comparing the experience of African-Americans to the struggle of Dalits and of black South Africans, based on his travel experiences to both countries).



anomaly, it is the natural continuation of a long tradition of inspiration and solidarity shared between Indian and American civil rights leaders and movements. The following examples are offered as a sampling of that tradition, though they are by no means exhaustive.

In 1936, Howard Thurman, a famous black preacher and educator, visited Mahatma Gandhi in India—who at the time was waging India’s civil disobedience campaign against the British—to discuss issues of racial segregation and voting rights in the United States.<sup>32</sup> Better known is the fact that Martin Luther King, Jr. utilized the Gandhian concept of “Satyagraha” or “nonviolent direct action” in his teachings and leadership.<sup>33</sup> Less well known, but equally significant, is the relationship Ambedkar forged with W.E.B. Du Bois during the founding year of the United Nations.<sup>34</sup> The similarity of their situations was not lost on either individual. In efforts to take the struggle for racial justice to the international level, Du Bois used Ambedkar’s example in appealing to the Secretary of the National Association for the Advancement of Colored People (“NAACP”) to lodge a petition with the newly formed United Nations General Assembly concerning the plight of American Negroes.<sup>35</sup>

Formed in the Indian state of Maharashtra in the 1970s, the Dalit Panthers aligned themselves ideologically to the Black Panther movement in the United States.<sup>36</sup> During the same period, Dalit literature, painting, and theater challenged the very premise and nature of established art forms and their depiction of society and religion.<sup>37</sup> Dalit Panthers visited “atrocities” sites, organized marches, election boycotts, and rallies in villages, and raised slogans of direct militant action against their “upper-caste” aggressors.<sup>38</sup> Panther leaders were often harassed and removed from districts for speaking out against the government and

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<sup>32</sup> HOWARD THURMAN, *WITH HEAD AND HEART: THE AUTOBIOGRAPHY OF HOWARD THURMAN* 131 (1981). Also in 1936, Jawaharlal Nehru was inspired to found an Indian Civil Liberties Union after seeing the work of its U.S. counterpart, the American Civil Liberties Union. See Munmun Jha, *Nehru and Civil Liberties in India*, 7 *INT. J. HUM. RTS. L.* 103, 107 (2003).

<sup>33</sup> MARTIN LUTHER KING, JR., *THE AUTOBIOGRAPHY OF MARTIN LUTHER KING, JR.* 128 (Clayborne Carson ed., 1998).

<sup>34</sup> Daniel Immerwahr, *Caste or Colony? Indianizing Race in the United States*, 4 *MOD. INTELLECTUAL HIS.* 275, 279 (2007).

<sup>35</sup> Letter from W.E.B. Du Bois to Walter White (Aug. 1, 1946), in 3 *THE CORRESPONDENCE OF W.E.B. DU BOIS: SELECTIONS, 1944-1963*, at 163 (Herbert Aptheker ed., 1997).

<sup>36</sup> *BROKEN PEOPLE*, *supra* note 21, at 35.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

Hindu religion.<sup>39</sup> And like the Black Panthers, the Dalit Panthers became frequent targets of police brutality and arbitrary detentions.<sup>40</sup> Intellectual solidarity between Dalits and African-Americans has been found in the school of discourse called “Afro-Asian Traffic,” which finds commonality between the two groups in their similar experiences of slavery.<sup>41</sup>

Like the civil rights struggle that began in the 1950s and was led by African-Americans, Dalits in the twenty-first century are forming human rights movements, challenging local governments, and demanding equal access to services and equal protection before the law, often in alliance with international partners.<sup>42</sup> In 2001, African-American and Dalit activists found themselves sharing the same contested space at the World Conference against Racism in Durban, South Africa.<sup>43</sup> Both groups faced the racist and casteist denial of their respective governments who either refused to allow consideration of their concerns in the international forum<sup>44</sup> or diluted their delegation’s involvement to the point that their participation was rendered meaningless.<sup>45</sup>

As the battle lines are drawn once again in the debate around affirmative action in both countries, the same ideologies are used to discredit the state’s use of race or caste-conscious measures to ensure real equality of opportunity for minorities in the United States and Dalits and other “lower-caste” groups in India. Meritocracy, equality, efficiency, and liberalism are the catchwords that resonate in both countries to either defeat or redefine constitutional pronouncements that were heretofore invoked to ensure substantive equality on the basis of race or caste. Affirmative action is attacked as either having sufficiently

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.* See also Immerwahr, *supra* note 34, at 300.

<sup>41</sup> See, e.g., Vijay Prashad, *Ethnic Studies Inside and Out*, 9 J. ASIAN AM. STUD. 157 (2006).

<sup>42</sup> Examples of these Dalit movements include the National Campaign on Dalit Human Rights, [www.ncdhr.org.in](http://www.ncdhr.org.in) (last visited Aug. 15, 2008); The International Dalit Solidarity Network, [www.idsn.org](http://www.idsn.org) (last visited Aug. 15, 2008); The Center for Dalit Rights, [www.dalitrights.org](http://www.dalitrights.org) (last visited Aug. 15, 2008); The Dalit Foundation, [www.dalitfoundation.org](http://www.dalitfoundation.org) (last visited Aug. 15, 2008); the US-based Dalit Freedom Network, [www.dalitnetwork.org](http://www.dalitnetwork.org) (last visited Aug. 15, 2008); and the Dalit NGO Federation of Nepal, [www.dfnepal.org](http://www.dfnepal.org) (last visited Aug. 15, 2008).

<sup>43</sup> World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, held in Durban, South Africa, Aug. 31-Sept. 7, 2001.

<sup>44</sup> India lobbied furiously against the inclusion of any references to caste discrimination, or discrimination on the basis of “work and descent,” in the final conference documents. *Anti Racism Summit Ends on Hopeful Note*, Human Rights Watch, Sept. 10, 2001, <http://hrw.org/english/docs/2001/09/10/global3038.htm>.

<sup>45</sup> Among other issues, the U.S. delegation simply walked out of the conference before it was over. See *id.*

served its purpose, or as not being up to the task of alleviating a broad-based social problem. In the latter category, the alternatives that are offered in its place rarely find traction, let alone implementation in policy terms. Reservations, once the mask that India wore to hide the real face of caste oppression, are now being attacked as an affront to (formal) equality and a barrier to achieving a caste-blind society. Yet formal equality assumes a level playing field—which it certainly is not for minorities in the United States or for Dalits and other marginalized communities in India.<sup>46</sup> As critical race theory scholar Crenshaw notes in the context of the rhetoric of colorblindness in the United States, this remarkable strategy is a “breathhtakingly bold act of cooption” wherein colorblindness “now delivers its reputation and historical capital to a specious claim that the journey to the promised land is nearly complete.”<sup>47</sup>

African-Americans and Dalits are also now made to compete against other marginalized communities in their respective countries for sufficient attention to their demands and their rights. It seems the small slice of the pie reserved for non-whites and non-“upper-caste” Indians has not grown much bigger, and attempts to broaden the collective share invites swift protest and condemnation in the conservative media, on the streets, at the polls, and in the courtroom. Regrettably, the attendant claims of women in both struggles, and the compounded discrimination they face, get lost in the debate.

Like the United States, India exhibits a temporal tension between striving for equality as a space where caste categories (or, in other countries, racial categories) do not matter, and the need to continually identify and name the categories that have been used to create hierarchy or exclusion for the purposes of ensuring social inclusion.<sup>48</sup> Such a tension is reflected at the level of policy, of social movements, and of political discourse, both for and against caste-conscious measures to ensure social inclusion.

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<sup>46</sup> Though not the subject of this Article, other communities face extreme marginalization and/or human rights abuses in India, including tribal community members, Muslims, Christians, and Sikhs. The treatment of Dalits, including those who have converted to other faiths, is unique, however, because of their placement on the wrong side of the purity-pollution line and because of the social disabilities that arise from their “untouchable” status.

<sup>47</sup> Kimberlé W. Crenshaw, *Framing Affirmative Action*, 105 MICH. L. REV. FIRST IMPRESSIONS 132-33 (2007).

<sup>48</sup> Author’s discussions with Satish Deshpande, Aug. 2007. See, e.g., Dudley Jenkins, *supra* note 31 at 747, 750 (arguing that in both India and the United States there exists a debate between a view that warns against enforcing existing racial lines and a view that says we can “retain and reconstruct racial categories as a means of empowerment”).

In both countries, caste- or race-based stigma has not been erased by upward class mobility.<sup>49</sup> Even for the minority of Dalits who have managed to defy their religiously proscribed economic lot, social oppression has not fallen away. As poignantly noted by a Dalit surgeon,

It is India's most shameful paradox—this country has made almost unimaginable progress in nearly every sphere of human life, but the one thing unchanged is the condition of its dalits and backward communities. I am a microsurgeon specialising in hand and spinal reconstruction, and am [a Member of Legislative Assembly] from Bihar, but I still remain very much a dalit—a dhobi, to be precise—open to routine humiliation from the upper castes.<sup>50</sup>

The inter-category diversity among Dalits that comes about as a result of the creation of a new Dalit middle class is cited not as the success of affirmative action that it represents, but as the reason to now defeat the affirmative action project. Class operates in both countries as a displacement strategy. And in both countries the criminal justice system and its application to particular groups suffers from the twin malaise of over- and under-enforcement. Dalits are routinely rounded up for crimes committed in their vicinity,<sup>51</sup> yet summarily ignored when they themselves are the victims of abuse.<sup>52</sup>

Like the United States, India's social transformation project is stunted by its increasing dependency on courts as a source of redress; its recourse to the legislature and courts is seen as the dominant avenue for social reform. The disproportionate focus on proportional representation—or policies that aim to increase the representation of marginalized groups in the legislature, institutes of higher education, and now the private sector—is where this conversation gets debated and defeated.<sup>53</sup> Left out of consideration is the broad range of possible race-

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<sup>49</sup> As Derrick Bell argues in relation to racism in the United States, “[w]hatever our status, we are feared because we might be one of ‘them.’” Derrick Bell, *The Racism Is Permanent Thesis: Courageous Revelation or Unconscious Denial of Racial Genocide*, 22 CAPITAL U. L. REV. 571, 581 (1993).

<sup>50</sup> Ramsunder Ram Kanaujia, *Surgeon Second, Dhobi First*, TEHELKA, Feb. 3, 2007, available at [http://www.tehelka.com/story\\_main26.asp?filename=Cr020307Shadow\\_lines.asp](http://www.tehelka.com/story_main26.asp?filename=Cr020307Shadow_lines.asp) (last visited Aug. 15, 2008).

<sup>51</sup> HIDDEN APARTHEID, *supra* note 5, at 28.

<sup>52</sup> *Id.* at 33-34.

<sup>53</sup> Journalist and social commentator P. Sainath notes: “In the media, any debate on Dalit rights is about reservation, and not about water, health, sanitation or land rights. In the minds of the media audience, we have created a stereotype that Dalit is equal to reservation, which is taken out of the context of all these other deprivations.” He adds that the growing trend of using the language of equality and meritocracy to oppose reservations represents a “‘repackaging’ of casteism and caste stereotypes.” *Trend of repackaging casteism growing*, THE HINDU, Dec. 7,

or caste-conscious measures that exist on paper but are neglected or undermined in practice. Even more neglected is the work that must be done on both continents to dismantle the racist and casteist mindsets that fuel the discrimination and generate inequality.

The social transformation project—that began in India with adoption of the constitution in 1950, and in the United States with the civil rights struggle leading up to and following the landmark case of *Brown v. Board* in 1954—has left some with greater opportunity and political mobility but has “transformed” little. The “Dalit ordeal” is an example of a comprehensive legal framework with little to no execution. The “African-American ordeal” is an example of an emasculated legal framework that sees little hope of revival. The gap between constitutional vision and social reality is therefore far greater in India where the progressiveness of the constitution and the broader legal framework is belied by its almost complete under-enforcement. The rule of law lives in the shadow of the rule of caste. Though crafted as a bulwark against caste discrimination, the juxtaposition of egalitarian laws against an inherently unequal system acts as an open invitation to frustrate constitutional intentions.

As a case study, the condition of Dalits in India brings into clear view the limitations of the law and economic growth as antidotes to inequality. India’s high levels of poverty concentrated among particular social groups, its epidemic of violence meted out in the name of upholding caste-based norms and traditions, and the prevalence of Dalit segregation, exploitation, and untouchability as the rule, rather than the exception, all expose the ways in which discrimination wears poverty as its mask.

Poverty is deceptive. It makes one conclude that all suffer from it equally. Poverty also masks a lack of political will to change the status quo by shifting the debate to a lack of resources. But a closer look at India’s poverty reveals the discrimination inherent in the allocation of jobs, land, basic resources and amenities, and even physical security. A closer look at victims of violence, bonded labor, and other atrocities also reveals that they share in common the lowest ranking in the caste order. Poverty in India is, of course, not limited to Dalits, but as is the case with African-Americans in the United States, if you are a Dalit in India, you

are far more likely to be poor.<sup>54</sup> Moreover, the poverty endured is abject, violent, and virtually inescapable.

In both countries, economic progress has not led to equitable growth. In the United States—which is the most economically powerful country in the world—and India—whose economic growth is celebrated as a success of the ethos of economic liberalization—the rising tide has not lifted all boats; rather, it has caused many to drown, in some cases all too literally. Just as African-Americans bore the brunt of Hurricane Katrina in 2005 due to their concentration in the areas where the flooding was worst, as well as the lethargic response of the U.S. federal government, Dalits too were twice victimized in India’s recent natural disasters—first by nature, and then by the apathy of the state.<sup>55</sup> Dalits are particularly susceptible to loss of life and property in times of natural disasters due to the precarious conditions in which they live. A survey conducted by the National Campaign on Dalit Human Rights (“NCDHR”) following catastrophic flooding in the eastern state of Bihar in August 2007—which affected 14 million people in the state and killed 2,253 in the region—found that Dalits were the worst hit.<sup>56</sup> Relief rarely reached Dalits, testifying to the fact that “[t]he culture of discrimination which runs through Indian society intensifies in times of crisis.”<sup>57</sup> In some cases, Dalits were forced to wait for their share of relief supplies until all other groups had received aid.<sup>58</sup>

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<sup>54</sup> See MELVIN OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* (2nd ed., 2006); THOMAS M. SHAPIRO, *THE HIDDEN COST OF BEING AFRICAN AMERICAN: HOW WEALTH PERPETUATES INEQUALITY* (2004); MEIZHU LUI, BARBARA ROBLES & BETSY LEONARD-WRIGHT, *THE COLOR OF WEALTH: THE STORY BEHIND THE U.S. RACIAL WEALTH DIVIDE* (2006).

<sup>55</sup> See Scott Shane, *After Failures, Government Officials Play Blame Game*, N.Y. TIMES, Sept. 5, 2005. It has been argued that the Bush administration’s lack of urgent concern about the victims was because the population, mostly African-American, had never been of electoral significance for Bush. Or, as rapper Kanye West put it simply, “George Bush doesn’t care about black people.” See MICHAEL ERIC DYSON, *COME HELL OR HIGH WATER: HURRICANE KATRINA AND THE COLOR OF DISASTER* 30 (2006).

<sup>56</sup> Amelia Gentleman, *Letter from India: In Flood Lands of India, Caste Prejudices Thrive*, INT’L HERALD TRIB., Aug. 29, 2007, available at <http://www.iht.com/articles/2007/08/29/asia/letter.php>.

<sup>57</sup> *Id.*

<sup>58</sup> NATIONAL CAMPAIGN ON DALIT HUMAN RIGHTS, *DALIT WATCH REPORT ON BIHAR FLOOD*, <http://www.ncdhr.org.in/latestinterventions/dalit-watch-report> (last visited Aug. 15, 2008). Dalits also faced rampant discrimination in the distribution of aid in the wake of the January 2001 earthquake and the Indian Ocean tsunami in December 2004. See A GLOBAL CONCERN, *supra* note 1, at 6; *After the Deluge: India’s Reconstruction After the 2004 Tsunami*, 17 HUMAN RIGHTS WATCH NO. 3, May 2005, at 25.

Even during moments of shared hardship, communities are divided by race or caste. Similarly, caste-based inequality, like racial inequality, survives dramatic economic growth. Even as India celebrated its triumphant testing of nuclear weapons, exploding them underground in the deserts of Rajasthan, Dalit manual scavengers were being manually lowered into open sewers without protective gear to unblock toxic and noxious sewage.<sup>59</sup> In India, the rise of a nuclear state and a technological powerhouse has been accompanied by the rise of the number of manual scavengers in the country today.<sup>60</sup> The militarism and jingoistic nationalism of both governments has also depleted state coffers in the name of ensuring “national security” and fighting the global “War on Terror”—a fight in which both states are now staunch allies—to the detriment of the poor in both countries who enjoy neither physical nor economic security.

Inequality, Indian-style, is a valuable case study for a variety of reasons: it exposes the pitfalls of relying on the “rule of law” as a self-fulfilling prophecy, or on the “neutrality” of the state as a guarantor of social justice. The case of Dalits in India also serves to counter prevailing global narratives that an insufficiency of resources is solely to blame for the economic woes of the dispossessed, or, its sister argument, that allowing for aggressive market reforms in the name of promoting economic growth will reduce poverty and lead to equitable development. The treatment of Dalits as “untouchables,” regardless of their educational attainment or their economic class, also serves to summarily reject the argument that “success,” as measured by one’s level of education or income, can work to displace the stigma associated with caste or will do away with discrimination and inequality all together.<sup>61</sup> Such lessons are particularly apt for general inquiries into the need for and/or legitimacy of affirmative action. Inasmuch as affirmative action around the globe is

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<sup>59</sup> *India’s Nuclear Weapons Program, Operation Shakti: 1998*, <http://nuclearweaponarchive.org/India/IndiaShakti.html> (last visited Aug. 15, 2008).

<sup>60</sup> Balakrishnan Rajagopal, *The Caste System—India’s Apartheid?*, THE HINDU, Aug. 18, 2007, available at <http://thehindu.com/2007/08/18/stories/2007081856301200.htm> (last visited Aug. 15, 2008).

<sup>61</sup> Stigma of this kind adapts itself to new scenarios, as the experience of many African-Americans has shown. Students of color who manage to gain access to elite academic institutions are confronted with the accusation that they “only got in because of affirmative action.” According to Feagin and Sikes, such a sentiment encapsulates the continuing racist belief of black inferiority. See JOE. R. FEAGIN & MELVIN P. SIKES, *LIVING WITH RACISM: THE BLACK MIDDLE-CLASS EXPERIENCE* 94 (1995). See also Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENT. 257, 271 (1996), discussing stigmatization in an extreme sense that not only causes a group to be regarded as inferior but outcasts them as “pariahs,” excluding them from political participation and from society as a whole.

under attack as an affront to liberalism and “meritocracy,” the intrinsically anti-merit nature of the caste system offers an alternative space in which conversations about “merit” can take place.

India also presents a unique challenge for those human rights lawyers and advocates who operate exclusively in the framework of international human rights law as a mechanism for achieving social change. International human rights laws and mechanisms, with their over-reliance on the role of the state, and their almost unquestioned faith that the right laws will do the trick, are ill-equipped to take on systems that define equality in the inverse, and in which human beings are born inherently *unequal*. Finally, a closer look at caste, worthy of academic inquiry in its own right, provides a powerful reminder that race and ethnicity are not the sole dominant constructs around which social and economic oppression is organized to the detriment of a sizeable population of the world.<sup>62</sup>

## B. OVERVIEW OF THE CASTE SYSTEM

India’s caste system is perhaps the world’s longest surviving and most rigorously enforced system of social hierarchy. The caste system encompasses a complex ordering of social groups on the basis of ritual purity. Caste is descent-based and hereditary in nature.<sup>63</sup> It is a characteristic determined by one’s birth into a particular caste. Caste denotes a traditional system of rigid social stratification into ranked groups defined by descent and occupation.<sup>64</sup> While the particular ranking of castes may vary among regions, the extremes of the spectrum are fixed with Brahmins sitting atop the hierarchy and Dalits, or so-called untouchables, at the very bottom.<sup>65</sup>

The caste system is an intrinsic part of Hinduism, the dominant faith practiced by Indians. According to Hindu scripture, individuals are born inherently unequal into a graded caste-based structure that defines their status and opportunities in life. Caste-based discrimination is also

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<sup>62</sup> It is estimated that there are 240 million Dalits in South Asia alone, and that many populations around the world suffer discrimination under caste-based or analogous systems of social exclusion. A GLOBAL CONCERN, *supra* note 1, at 54.

<sup>63</sup> BROKEN PEOPLE, *supra* note 21, at 24.

<sup>64</sup> A GLOBAL CONCERN, *supra* note 1, at 2.

<sup>65</sup> BROKEN PEOPLE, *supra* note 21, at 25.



openly practiced by Sikhs,<sup>66</sup> Christians,<sup>67</sup> and Muslims against Dalits who have converted to these faiths in an effort to escape their persecution.

Though the origins of the caste system have long been a subject of dispute,<sup>68</sup> as has the question of whether it tracks racial groupings,<sup>69</sup> the following theories are worthy of note. Caste is said to have its basis in the Hindu religion, as it is referred to in scripture. In the *Bhagavad Gita*, Lord Krishna proclaims: “the four castes have been created by Me;”<sup>70</sup> similarly, the *Manu-Smriti* sets out the main castes as each having been created from a different part of God’s form, and codifies the respective God-given duties of each of these castes.<sup>71</sup> Alternative sociological theories posit the caste system as a ritual solution to the Vedic cultural preoccupation with distancing oneself from pollution.<sup>72</sup> A popular, but contested, suggestion has been that this Vedic culture arrived in India with the migration of the Indo-Aryans, from whom the Brahminic “upper castes” are allegedly descended.<sup>73</sup> Still others have focused on the role of British colonial rule in cementing caste-based divisions.<sup>74</sup>

Differences in status are traditionally justified by the religious doctrine of *karma*, a belief that one’s place in life is determined by one’s deeds in previous lifetimes.<sup>75</sup> Traditional scholarship has described this more than two thousand-year-old system within the context of the four

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<sup>66</sup> Ronki Ram, *Social Exclusion, Resistance and Deras: Exploring the Myth of Casteless Sikh Society in Punjab*, 42 ECON. & POL. WKLY. 4066 (2007) available at <http://www.epw.org.in/uploads/articles/11111.pdf> (last visited Aug. 15, 2008).

<sup>67</sup> Prakash Louis, *Dalit Christians: Betrayed by State and Church*, 42 ECON. & POL. WKLY., 1404 (2007).

<sup>68</sup> See, e.g., RATNA G. REVANKAR, *THE INDIAN CONSTITUTION—A CASE STUDY OF BACKWARD CLASSES* 14 (1971).

<sup>69</sup> See J. C. NESFIELD, *BRIEF VIEW OF THE CASTE SYSTEM OF THE N.W.P. AND OUDH* (1885). Cf. H. H. RISLEY, *THE PEOPLE OF INDIA* (1915); G. S. GHURYE, *CASTE AND RACE IN INDIA* 101–23 (1932). For more recent discussion, see J. L. Mountain et al., *Demographic History of India and mtDNA-Sequence Diversity*, 56 AM. J. HUMAN GENETICS 979 (2005).

<sup>70</sup> *Bhagavad Gita* 4.13.

<sup>71</sup> *THE LAWS OF MANU* I, 87 (George Bühler trans., 1969).

<sup>72</sup> J. H. HUTTON, *CASTE IN INDIA: ITS NATURE, FUNCTION AND ORIGINS* 180 (4th ed. 1963).

<sup>73</sup> GHURYE, *supra* note 69, at 142; EDWIN BRYANT, *THE QUEST FOR THE ORIGINS OF VEDIC CULTURE - THE INDO-ARYAN MIGRATION DEBATE* 49 (2001).

<sup>74</sup> See Kevin Brown, *Affirmative Action in the United States and the Reservation System in India*, in *RELIGION AND PERSONAL LAW IN SECULAR INDIA* 251, 253-54 (Gerald James Larson ed., 2001) (arguing that the traditional caste system was first “seriously disturbed” during British colonial rule by British divide-and-conquer efforts to reinforce existing religious and caste divisions). See generally NICHOLAS B. DIRKS, *CASTES OF MIND: COLONIALISM AND THE MAKING OF MODERN INDIA* (2001).

<sup>75</sup> WENDY DONIGER O’FLAHERTY, *KARMA AND REBIRTH IN CLASSICAL INDIAN TRADITIONS* 209 (1980).

principal *varnas*, or large caste categories. In order of precedence these are the Brahmins (priests and teachers), the Ksyatriyas (rulers and soldiers), the Vaisyas (merchants and traders), and the Shudras (laborers and artisans). A fifth category falls outside the varna system and consists of those known as “untouchables” or Dalits; they are often assigned tasks too ritually polluting to merit inclusion within the traditional varna system.<sup>76</sup>

Though most closely associated with Hinduism, the practice of untouchability—the social imposition of particular disabilities against individuals deemed to be untouchable—permeates all major religions in India and the entire subcontinent.<sup>77</sup> Within the four principal castes, there are thousands of sub-castes, also called *jatis*; endogamous groups that are further divided along occupational, sectarian, regional, and linguistic lines. Collectively, all of these are sometimes referred to as “caste Hindus,” those falling within the caste system.<sup>78</sup> The Dalits are described as varna-sankara, falling outside the system. They are considered so inferior to other castes that they are deemed polluting and therefore “untouchable.”<sup>79</sup> Even as outcasts, they themselves are divided into further sub-castes and practice untouchability against those ranked below; the discrimination is wholly internalized giving way to what Dr. Ambedkar termed a system of “graded inequality.”<sup>80</sup>

Whereas the first four varnas have over time enjoyed significant occupational mobility, a majority of Dalits in India continue to involuntarily inherit occupations assigned to the caste into which they are born—occupations deemed too filthy or polluting for others to carry out.

### C. CASTE-BASED DISCRIMINATION AND INEQUALITY IN INDIA TODAY

In much of South Asia and India in particular, caste has become coterminous with race in the definition and exclusion of distinct population groups on the basis of their descent. For over 167 million Dalits or “untouchables” in India, caste remains the determinative factor

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<sup>76</sup> BROKEN PEOPLE, *supra* note 21, at 25.

<sup>77</sup> A GLOBAL CONCERN, *supra* note 1, at 2, 59.

<sup>78</sup> BROKEN PEOPLE, *supra* note 21, at 25.

<sup>79</sup> *Id.*

<sup>80</sup> AMBEDKAR THOUGHT, *supra* note 19, at 74.

for the attainment of civil, political, social, economic, and cultural rights.<sup>81</sup>

### 1. UNTOUCHABILITY: LIVING BELOW THE “POLLUTION” LINE

The practice of “untouchability”—the imposition of social disabilities on persons by reason of their birth into “untouchable” castes—continues to blight the lives of millions of Indians today who are relegated to life below the “pollution” line. The manifestation of such oppression has taken and continues to take many forms. Age-old customs included prohibiting Dalits from walking public streets lest their “polluting” shadow should fall on an “upper-caste” Hindu, and requiring Dalits to mark themselves with black bracelets; string a broom around their waists so as to sweep the “polluted” dust they walked on; or hang an earthen pot around their necks “lest [their] spit falling on the earth should pollute a Hindu who might unknowingly happen to tread on it.”<sup>82</sup>

Modern India has improved little by way of untouchability practices. Dalits are still prohibited from entering temples, are segregated into Dalit ghettos, and in some areas are still forced to get off their bike or take off their slippers when walking past non-Dalit homes—gestures that force Dalits to repeatedly self-affirm their inferior status.<sup>83</sup> Caste divisions between Dalits and non-Dalits dominate in housing, marriage, employment, and general social interaction—divisions that are reinforced through the practice and threat of social ostracism, economic boycotts, and physical violence.<sup>84</sup> Dalits are denied access to land, forced to work in degrading conditions, and routinely abused at the hands of the police and “higher-caste” groups that often enjoy the state’s protection.<sup>85</sup> In what has been called India’s “hidden apartheid,” entire villages in many Indian states remain completely segregated by caste.<sup>86</sup> As noted by Ambedkar, “India is admittedly a land of villages and so long as the village system provides an easy method of marking out and identifying the untouchable, the untouchable

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<sup>81</sup> SMITA NARULA, THE INT’L COUNCIL ON HUMAN RIGHTS POLICY, ENTRENCHED DISCRIMINATION: THE CASE OF INDIA’S “UNTOUCHABLES” 8 (1999).

<sup>82</sup> B.R. AMBEDKAR, *Annihilation of Caste*, in DR. BABASAHEB AMBEDKAR WRITING AND SPEECHES, VOL. 1, 39 (1979).

<sup>83</sup> INDIA UNTOUCHED: STORIES OF A PEOPLE APART (Navsarjan Trust & Drishti Media 2007).

<sup>84</sup> A GLOBAL CONCERN, *supra* note 1, at 2.

<sup>85</sup> BROKEN PEOPLE, *supra* note 21, at 2.

<sup>86</sup> *Id.*

has no escape from untouchability.”<sup>87</sup> Every village has its ghetto, and the ghetto is where the Dalits live.

“Untouchability” relegates Dalits to a lifetime of discrimination, exploitation, and violence, including severe forms of torture perpetrated by state and private actors.<sup>88</sup> Because of the castes into which they are born, Dalits are forced to work in “polluting” and degrading occupations and are subject to exploitative labor arrangements such as bonded labor, migratory labor, and forced prostitution. Dalit children are vulnerable to trafficking and the worst forms of child labor in these and other areas. Dalits are also discriminated against in hiring and in the payment of wages by private employers.<sup>89</sup>

Migration and the anonymity of the urban environment have in some cases resulted in upward occupational mobility for Dalits, but the majority continues to perform its traditional or “polluting” functions. A lack of training and education, along with the discrimination faced in seeking other forms of employment, has kept alive these traditions and their hereditary nature. A majority of the Dalit rural workforce subsists on the menial wages of landless agricultural laborers, earning less than US\$1 per day.<sup>90</sup> Those in urban areas work mostly in the unorganized sector. India’s much touted system of reservations or constitutionally reserved quotas for scheduled castes assists less than 1 percent of the Dalit population. In all forms of labor, women are consistently paid less than men, compounding the dual discrimination of caste and gender detailed below.<sup>91</sup>

Segregation between Dalits and non-Dalits is routinely practiced in housing, schools, and access to public and private sector services. Ninety-nine percent of Dalit students are enrolled in government schools that lack basic infrastructure, classrooms, teachers, and teaching aids.<sup>92</sup> Government schools by and large teach in local languages, as opposed to private schools—whose students are predominantly “upper-caste”—that teach in English.<sup>93</sup> Their inability to speak English further disadvantages

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<sup>87</sup> AMBEDKAR THOUGHT, *supra* note 19, at 34.

<sup>88</sup> HIDDEN APARTHEID, *supra* note 5, at 30-32.

<sup>89</sup> *Id.* at 82.

<sup>90</sup> BROKEN PEOPLE, *supra* note 21, at 2.

<sup>91</sup> See generally Sukhdeo Thorat et al., *Human Poverty and Socially Disadvantaged Groups in India*, (Human Development Resource Center/United Nations Development Program, India Office, New Delhi, Jan. 2007).

<sup>92</sup> HIDDEN APARTHEID, *supra* note 5, at 13.

<sup>93</sup> Emily Wax, *India’s Lower Castes Seek Social Progress in Global Job Market*, WASH. POST, Aug. 20, 2007, at A01.

Dalits in the private sector and the global market.<sup>94</sup> Dalit children also face abuse from teachers and non-Dalit students as well as segregation both in the classroom and in the provision of mid-day meals. Dalit schoolchildren and teachers also face discrimination from “upper-caste” community members who perceive education for and by Dalits as both a waste and a threat. Their hostility toward Dalits’ education is linked to the perception that Dalits are not meant to be educated, are incapable of being educated, or if educated, would pose a threat to village hierarchies and power relations.<sup>95</sup>

Indian economist Sukhadeo Thorat analyzes data generated by primary surveys conducted in four regions of India as well as data generated by the National Commission for Scheduled Castes and Scheduled Tribes’ all-India annual reports.<sup>96</sup> He argues that the regional data generated by the primary surveys is important because it underscores severe caste-based abuses that may not have been reported to the local authorities and have been left undocumented.<sup>97</sup> The studies highlight persistent patterns such as: denial of Dalits’ access to water; refusal of essential and/or public services to Dalits, or provision of such services in a discriminatory fashion; physical violence against Dalits; and Dalit political disenfranchisement.<sup>98</sup> Thorat concludes that “upper-caste” social behavior in rural India is governed by the norms and codes of the traditional caste system.<sup>99</sup> Consequently, Dalits are separated from other communities, denied freedom of movement, and otherwise ostracized from shared social activities.<sup>100</sup>

The practice of economic exclusion and discrimination is also evident in the differential pricing for Dalits in the sale and purchase of items ranging from raw materials to finished goods, and in Dalits being denied the ability to purchase land for both agricultural and non-

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<sup>94</sup> *Id.*

<sup>95</sup> HIDDEN APARTHEID, *supra* note 5, at 13.

<sup>96</sup> Sukhadeo Thorat, *Oppression and Denial: Dalit Discrimination in the 1990s*, 37 *ECON. & POL. WKLY.* 573-74 (2002). The non-governmental surveys were conducted in Karnataka (1973-74 and 1991), Andhra Pradesh (1977), Orissa (1987-88) and Gujarat (1971 and 1996).

<sup>97</sup> *Id.* at 574.

<sup>98</sup> *Id.* at 578.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* Another study relies on comparable poverty estimates drawn from two different cycles of the Consumer Expenditure Surveys conducted by the National Sample Survey Organization. The authors found that the social groups which were most vulnerable to poverty were Dalit and tribal households in both urban and rural areas, and that the most vulnerable economic groups were agricultural labor households (rural) and casual labor households (urban). K. Sundaram & Suresh D. Tendulkar, *Poverty Among Social and Economic Groups in India in 1990s*, 38 *ECON. & POL. WKLY.* 5263 (2003).

agricultural use.<sup>101</sup> A study published in 2006 on the forms and prevalence of “untouchability” in rural India—based on an extensive survey of 565 villages in 11 Indian states conducted in 2001-2002—confirmed the extent of “untouchability” practices in rural India today.<sup>102</sup> But contrary to conventional wisdom, “untouchability” is not an exclusively rural phenomenon perpetuated by the uneducated masses. Egregious incidents of caste-based discrimination and abuse at the New Delhi-based All India Institute of Medical Sciences (“AIIMS”), the country’s premier medical college, and other institutions of higher education<sup>103</sup> bear testament to the depth and breadth of anti-Dalit sentiment in education and illustrate that such discrimination transcends the urban/rural, educated/non-educated divide.

## 2. ENDOGAMY—A MEANS TO AN END

Strict prohibitions on inter-dining, inter-living, and general social interaction come together with the practice of endogamy as the means for which the caste system is the end.<sup>104</sup> Prohibitions on inter-marriage are not only a hallmark feature of the caste system—designed to ensure rigid social norms of purity and pollution—but are essential to maintaining its very existence. As a result, inter-marriages between Dalits and non-Dalits frequently become flashpoints for conflicts and can result in extra-judicial punishments that include the public lynching or killing of couples or their relatives, rape, public beatings, and economic sanctions.<sup>105</sup> Many such punishments receive “official” sanction from the “upper-caste” dominated *panchayats* (village councils).<sup>106</sup> The prevalence of online matchmaking sites, which explicitly offer to match individuals according to their caste (both within India and abroad)

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<sup>101</sup> Sukhadeo Thorat, M. Mahamallik, & Ananth Panth, *Caste, Occupation and Labour Market Discrimination: A Study of Forms, Nature and Consequences in Rural India*; Report Submitted to International Labour Organization, New Delhi, India (Jan. 2006) (on file with author).

<sup>102</sup> GHANSHYAM SHAH ET AL., UNTOUCHABILITY IN RURAL INDIA (2006).

<sup>103</sup> See, e.g., Caste-based apartheid in the Indian Institute of Technology, Madras, India, available at <http://ambedkar.org/research/CasteBased.htm> (last visited Aug. 15, 2008).

<sup>104</sup> See AMBEDKAR THOUGHT, *supra* note 19, at 25 (“The caste system and the rules relating to intermarriage and interdining are related to each other as ends to means. Indeed, by no other means could the end be realized.”).

<sup>105</sup> HIDDEN APARTHEID, *supra* note 5, at 71.

<sup>106</sup> *Id.* at 10-11.

provides a clear example of the practice of endogamy in its twenty-first century avatar.<sup>107</sup>

### 3. DALIT WOMEN AT THE INTERSECTION OF CASTE AND GENDER DISCRIMINATION

Caste discrimination has a unique and specific impact on Dalit women who endure multiple forms of discrimination. Dalit women are especially vulnerable to violence by the police and private actors. As the majority of landless laborers, Dalit women come into greater contact with landlords and enforcement agencies than “upper-caste” women, rendering them more susceptible to abuse.<sup>108</sup> Landlords use sexual abuse and other forms of violence and humiliation against Dalit women as tools to inflict “lessons” and crush dissent and labor movements within Dalit communities.<sup>109</sup> Vulnerability to sexual violence also results from Dalit women’s lower economic and social status, leading many of them to turn to prostitution for survival.<sup>110</sup>

Dalit women have unequal access to services, employment opportunities, and justice mechanisms as compared to Dalit men.<sup>111</sup> In relation to employment opportunities, Dalit women are allotted some of the most menial and arduous tasks and experience greater discrimination in the payment of wages than Dalit men.<sup>112</sup> In relation to services, Dalit women have less access to education and health facilities,<sup>113</sup> ensuring that their literacy, nutrition, and health standards fall far below that of Dalit

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<sup>107</sup> As recently as January 2008, violence resulting from an inter-caste marriage was reported in the United States. See Monica Davey, *Father Says He Set Fire That Killed Three*, N.Y. TIMES, Jan. 3, 2008 (reporting that an Indian man in Illinois allegedly set fire to a home—killing his pregnant daughter, her husband, and her son—because he disapproved of her marriage to a lower-caste man).

<sup>108</sup> BROKEN PEOPLE, *supra* note 21, at 166.

<sup>109</sup> *Id.*

<sup>110</sup> NAT’L HUM. RIGHTS COMM’N, REPORT ON PREVENTION OF ATROCITIES AGAINST SCHEDULED CASTES AND SCHEDULED TRIBES 161 (2004) [hereinafter NHRC REPORT].

<sup>111</sup> See Thorat, *supra* note 91, at 35 (“The women who belong to marginalized groups suffer from triple deprivations arising out of lack of access to economic resources, as well as caste and gender discrimination. The [Scheduled Caste] and [Scheduled Tribe] women are perhaps the most economically deprived sections of Indian society.”).

<sup>112</sup> SHAH, ET AL., *supra* note 102, at 117-18. The employment opportunities of professional Dalit women may also be limited by discriminatory practices that deprive facilities run by Dalit women of a customer or patient base. *Id.* at 117-18.

<sup>113</sup> NHRC REPORT, *supra* note 110, at 160.

men and non-Dalit men and women.<sup>114</sup> The number of Dalit women in decision-making positions is also very low, and in some central services Dalit women are not represented at all.<sup>115</sup> Benefits of various development programs for Dalits, such as distribution of land and other productive assets, have essentially gone to Dalit males and have failed to improve the status of Dalit women.<sup>116</sup> Investment in projects targeted to the development of Dalit women is also far lower as compared to those for men.<sup>117</sup>

The practice of *devadasi*, in which a girl, usually before reaching the age of puberty, is ceremoniously dedicated or married to a deity or to a temple, continues in several southern Indian states including Andhra Pradesh and Karnataka.<sup>118</sup> Literally meaning “female servant of god,” *devadasis* usually belong to the Dalit community. Once dedicated, the girl is unable to marry, forced to become a prostitute for “upper-caste” community members, and eventually auctioned into an urban brothel.<sup>119</sup> The age-old practice continues to legitimize the sexual violence and discrimination that have come to characterize the intersection between caste and gender.<sup>120</sup>

#### 4. MANUAL SCAVENGERS—DALITS AMONG DALITS

Dalit women make up the majority of manual scavengers—a caste-based occupation wherein Dalits remove excrement from public and private dry pit latrines and carry it to dumping grounds and disposal sites.<sup>121</sup> Indeed, the “occupation” of manual scavenging is the only

<sup>114</sup> NATIONAL CAMPAIGN ON DALIT HUMAN RIGHTS, RESPONSE TO THE SPECIAL RAPPORTEUR’S QUESTIONNAIRE ON WORK AND DESCENT BASED DISCRIMINATION 15 (2006) [hereinafter NCDHR RESPONSE] (on file with author).

<sup>115</sup> NHRC REPORT, *supra* note 110, at 161.

<sup>116</sup> *Id.* at 161-62.

<sup>117</sup> *Id.* at 162. The Government of India has recognized that “the incidence of poverty amongst SCs [Scheduled Castes] still continues to be very high with 36.25 per cent in rural areas and 38.47 per cent in urban areas, when compared to 27.09 and 23.62 per cent respectively, in respect of total population in 1999-2000.” See U.N. Comm. on the Elimination of Discrimination against Women [CEDAW], *Consideration of reports submitted by State parties under article 18 of the Convention on the Elimination of All Forms of Discrimination Against Women, Combined second and third periodic reports: India*, U.N. Doc. CEDAW/C/IND/2-3 (Oct. 19, 2005), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/5f31ce8d9622114cc1257245003346bd?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/5f31ce8d9622114cc1257245003346bd?Opendocument).

<sup>118</sup> BROKEN PEOPLE, *supra* note 21, at 150.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* See also Sundaram & Tendulkar, *supra* note 100, at 37.

<sup>121</sup> BALAKRISHNAN RAJAGOPAL ET AL., MASS. INST. OF TECH, FROM PROMISE TO PERFORMANCE: ECOLOGICAL SANITATION AS A STEP TOWARD THE ELIMINATION OF MANUAL SCAVENGING IN



economic opportunity available to many Dalit women hailing from scavenger sub-castes,<sup>122</sup> with the result that more Dalit women and girls work as manual scavengers than Dalit men.<sup>123</sup> Manual scavengers are situated at the very bottom of the graded inequality structure of the caste system and as a result face discrimination from other non-scavenger caste Dalits who treat them as “untouchables,” creating an unquestioned “‘untouchability’ within the ‘untouchables’”<sup>124</sup> The entrenched discrimination against manual scavengers makes it difficult to find alternative employment and even more difficult to convince scavengers that they are able to take on, or are “worthy of performing,” different occupations.<sup>125</sup>

“Though long outlawed, the practice of manual scavenging continues in most states, and will continue as long as dry latrines are used.”<sup>126</sup> Similarly, dry latrines will continue to be used as long as there are Dalits forcibly designated to clean them.

In 2002-03 the Union Ministry for Social Justice and Empowerment admitted the existence of 6.76 lakh (676,000) manual scavengers in India and the presence of 92 lakh (9,200,000) dry latrines, spread across 21 States and Union Territories . . . . According to unofficial estimates, the number of manual scavengers in India may be as high as 1.3 million . . . . Manual scavengers are employed by private and public employers, including the military engineering services, the army, the railways, and other organs of the state.<sup>127</sup>

Manual scavengers work under extremely hazardous conditions. A manual scavenger from Paliyad village, Ahmedabad district, Gujarat, described how in the rainy season,

Water mixes with the feces that we carry in baskets on our heads, it drips onto our clothes, our faces. When I return home, I find it difficult to eat food . . . . But in the summer there is often no water to

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INDIA 6 (2006), available at [http://mit.edu/phrj/publications\\_phrj/Dalit\\_Report\\_Final.pdf](http://mit.edu/phrj/publications_phrj/Dalit_Report_Final.pdf) [hereinafter FROM PROMISE TO PERFORMANCE]. See also Sundaram & Tendulkar, *supra* note 100, at 35.

<sup>122</sup> FROM PROMISE TO PERFORMANCE, *supra* note 121, at 6.

<sup>123</sup> NCDHR RESPONSE, *supra* note 114, at 15.

<sup>124</sup> BROKEN PEOPLE, *supra* note 21, at 145-46 (Citing Human Rights Watch interview with Bejawada Wilson, National Convener of the Safai Karamchari Andolan, in Bangalore (July 26, 1998) in which Wilson told Human Rights Watch, “Even other scheduled-caste people won’t touch the safai karamcharis [manual scavengers]. It is ‘untouchability’ within the ‘untouchables,’ yet nobody questions it.”).

<sup>125</sup> *Id.* at 142 (citing a Human Rights Watch interview with Martin Macwan, in New York (Oct. 15, 1998)).

<sup>126</sup> HIDDEN APARTHEID, *supra* note 5, at 83.

<sup>127</sup> *Id.*

wash your hands before eating. It is difficult to say which [season] is worse.<sup>128</sup>

Manual scavengers are routinely exposed to both human and animal waste without the protection of masks, uniforms, gloves, shoes, appropriate buckets, and mops, resulting in severe health problems.<sup>129</sup> “Many scavengers have died of carbon monoxide poisoning while cleaning septic tanks.”<sup>130</sup> “More than 100 die every year due to inhalation of toxic gases or drowning in excrement.”<sup>131</sup> “The fear of being fired by municipality officials keeps manual scavengers from demanding higher wages or sanitary instruments.”<sup>132</sup>

The persistence of the outlawed and inhuman practice of manual scavenging speaks to the resilience of caste-based discrimination. That human beings should continue to clean human waste and be lowered into sewers in a country that boasts of technological innovation and prowess demonstrates the stranglehold of caste in India today—a system set up to *enforce* the poverty of those it considers “outcaste.”

## 5. UNEQUAL BY ALL MEASURES

Although “untouchability” was officially abolished under Article 17 of the Constitution of India, the practice remains determinative of the social and economic outcomes of those at the bottom of the caste hierarchy.<sup>133</sup> Though “untouchability” is normally considered as a religiously prescribed system of separating the pure from the impure, it is, at its heart, a system to support and sanction an exploitative economic order. As a result, Dalits in India today continue to rank below other social groups in all major social and economic indicators. While Dalits have achieved some gains across a variety of indicators in the six decades since independence, their socio-economic development

<sup>128</sup> BROKEN PEOPLE, *supra* note 21, at 142-43.

<sup>129</sup> HIDDEN APARTHEID, *supra* note 5, at 84 (citing FROM PROMISE TO PERFORMANCE, *supra* note 121, at 20).

<sup>130</sup> HIDDEN APARTHEID, *supra* note 5, at 83 (citing Annie Zaidi, *India's shame*, FRONTLINE, Sept. 9-22, 2006), available at <http://www.frontlineonnet.com/fl2318/stories/20060922005900400.htm> (last visited Aug. 14, 2008).

<sup>131</sup> HIDDEN APARTHEID, *supra* note 5, at 84. In Mumbai, Dalits are lowered into manholes to clear sewage blockages—often without any protection.

<sup>132</sup> BROKEN PEOPLE, *supra* note 21, at 146 (citing Human Rights Watch Interview in Ahmedabad District of Gujarat (July 23, 1998): “When we ask for our rights from the government, the municipality officials threaten to fire us. So we don’t say anything. This is what happens to people who demand their rights.”).

<sup>133</sup> INDIA CONST. art. 17.

continues to lag significantly behind non-Dalits.<sup>134</sup> Broadly speaking, the gap between Dalits and non-Dalits in education, health, income, and land ownership has either remained constant or widened.<sup>135</sup>

The practice of “untouchability” in schools has contributed to an alarmingly high drop-out rate and illiteracy level among Dalit children, particularly Dalit girls. According to the 2002 India Education Report, school attendance in rural areas in 1993-94 was 64.3 percent for Dalit boys and 46.2 percent for Dalit girls, compared to 74.9 percent among boys and 61 percent for girls from other social groups.<sup>136</sup> According to a 2001-2002 report prepared by the Indian government, “the drop-out rate in Scheduled Castes during 1990-91 was as high as 49.35 percent at primary stage and 67.77 percent at middle stage and 77.65 percent at secondary stage.”<sup>137</sup> The statistics for higher education are just as alarming—the same government report states that enrollment of Dalit students at graduate, post-graduate, and professional/research/PhD levels

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<sup>134</sup> See Sukhadeo Thorat & Motilal Mahamallik, *Chronic Poverty and Socially Disadvantaged Groups: Analysis of Causes and Remedies* 40 (Indian Inst. of Pub. Admin., Working Paper No. 33, 2006).

[T]he persistently high chronic poverty conditions of the [Scheduled Castes] households in high poverty states is closely associated with extremely low ownership of income earning capital assets, like agricultural land and non-land assets, lower diversification of employment in non-farm sector, lower wage earnings in farm and non-farm sectors, and lower level of literacy and education levels as compared to the Non-[Scheduled Castes/Scheduled Tribes] groups.

*Id.*

<sup>135</sup> See Sundaram & Tendulkar, *supra* note 100, at 17, 19, 22, 23:

The [Human Development Index (“HDI”)] is a composite index of three indicators, namely infant mortality rate (reciprocal value), literacy rate (age 7 plus), and average monthly per capita consumption expenditure (at 1993 base price) . . . . In 2000, the HDI for the [Scheduled Castes] was about 0.303, compared to 0.393 for the non-[Scheduled Castes/Scheduled Tribes]. The disparity ratio in this case works out to 0.77, indicating that the human development achievement of the [Scheduled Castes] was less by 23 percent compared to non-[Scheduled Castes/Scheduled Tribes] . . . . For the purpose of estimating [Human Deprivation/Poverty Index (“HPI”)], the variables are Infant Mortality Rate, Illiteracy Rate, Poverty Ratio (Head Count Ratio), health status (which includes variables that capture access to public health services, like percentage of children not vaccinated, and percentage of non-institutional deliveries) and nutritional status (in terms of underweight children, etc) . . . . The HPI for Scheduled Castes is estimated to be 41.47 percent which is much higher compared to non-[Scheduled Castes/Scheduled Tribes] (31.34 percent).

<sup>136</sup> Elyn Artis et al., Princeton University, Woodrow Wilson Sch. of Pub. and Int’l. Affairs, *Economic, Social and Cultural Rights for Dalits in India: Case Study on Primary Education in Gujarat* 14 (2003) (citing India Education Report—A Profile of Basic Education (R. Govinda ed., 2002)), available at [http://www-edit.princeton.edu/research/final\\_reports/wws591c\\_1\\_f02.pdf](http://www-edit.princeton.edu/research/final_reports/wws591c_1_f02.pdf) (last visited Aug. 14, 2008).

<sup>137</sup> HIDDEN APARTHEID, *supra* note 5, at 96.

is “abysmally low,” at 8.73 percent, 8 percent, and 2.77 percent respectively.<sup>138</sup> The 2001 population census reveals that the literacy gap between Dalits and non-Dalits remains significant at 54.7 percent for Dalits as compared to 68.81 percent among other groups.<sup>139</sup>

Discrimination in schools and the resulting drop-out rates for Dalit children are intimately linked to child labor.<sup>140</sup> Illiteracy results in a lack of gainful employment options for Dalits. Even educated Dalits face discrimination in the labor market, as seen through the systematic exclusion of Dalits from jobs that they are considered too “impure” or unintelligent to perform. Selective inclusion of Dalits in various employment sectors still results in unequal treatment in the payment of wages, in different terms and conditions applied to their work (including the number of hours worked), in discriminatory treatment in the workplace, and in the prevalence of compulsive or forced work governed by traditional caste-related obligations.<sup>141</sup>

There are an estimated 40 million bonded laborers in India, of whom 15 million are children.<sup>142</sup> The vast majority of these laborers are Dalits or tribal community members.<sup>143</sup> Bonded labor is sustained by the caste system, in particular through the traditional expectation of free labor and/or inadequate remuneration for work, and by the lack of Dalit ownership of land. Bonded labor also results from indebtedness to employers or moneylenders on whom Dalits must rely because of inadequate wages<sup>144</sup> and because of the reluctance of institutional agencies to lend to the poor in general and to Dalits in particular. Landlessness—encompassing a lack of access to land, inability to own land, and forced evictions—constitutes a crucial element in the subordination of Dalits.<sup>145</sup> When Dalits do acquire land, their right to

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<sup>138</sup> *Id.* at 96-97.

<sup>139</sup> *Id.* at 97.

<sup>140</sup> HUMAN RIGHTS WATCH, SMALL CHANGE: BONDED CHILD LABOR IN INDIA’S SILK INDUSTRY 44 (2003), available at <http://www.hrw.org/reports/2003/india/india0103.pdf> (last visited Aug. 14, 2008).

<sup>141</sup> Thorat et al., *supra* note 101.

<sup>142</sup> BROKEN PEOPLE, *supra* note 21, at 139.

<sup>143</sup> HIDDEN APARTHEID, *supra* note 5, at 86. According to one estimate 83.2 percent of bonded laborers belong to scheduled castes and scheduled tribes. NHRC REPORT, *supra* note 110, at 64. Almost all bonded children interviewed for a 2003 Human Rights Watch report on bonded child labor in the silk industry were either Dalit or Muslim. HIDDEN APARTHEID, *supra* note 5, at 86.

<sup>144</sup> *Id.* at 86.

<sup>145</sup> *Id.* at 11.

[S]evere lack of access to fixed sources of income like agricultural land arising out of the historical process of denial of right to property for a long duration and heavy

own property—including the right to access and enjoy it—is routinely infringed.<sup>146</sup>

As a result of their poverty and discriminatory treatment, Dalits also fare poorly in health indicators. Over half of India's Dalit children are undernourished, 18.5 percent are classified as "severely underweight,"<sup>147</sup> while 8.8 percent die before their fifth birthday.<sup>148</sup> Dalits are often refused admission to hospitals, access to healthcare, and medical treatment.<sup>149</sup> Those who do gain access frequently receive discriminatory treatment. In addition, caste-based occupations that Dalits are made to perform, such as manual scavenging<sup>150</sup> and forced prostitution,<sup>151</sup> frequently expose Dalits to serious and sometimes fatal health hazards.

#### *a. Liberalization and the Incredible Shrinking Indian State*

Beginning in 1991, and under the direction of the International Monetary Fund ("IMF") and World Bank's Structural Adjustment Programme, India's New Economic Policy introduced dramatic shifts in macroeconomic policy and aggressively pursued the privatization of industries and the liquidation of policies and controls in economic planning and regulation.<sup>152</sup> While these reforms may have ushered in an era of astounding progress in the areas of technology, infrastructure, machinery, space, and even nuclear research, much of this progress has meant little to Dalits; most continue to live in grinding poverty, lacking

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dependence on low earning casual wage labour in agriculture seems to be primarily responsible for chronic poverty among the [Scheduled Castes].

*Chronic Poverty and Socially Disadvantaged Groups*, *supra* note 134, at 54.

<sup>146</sup> HIDDEN APARTHEID, *supra* note 5, at 11.

<sup>147</sup> INDIAN MINISTRY OF HEALTH AND FAMILY WELFARE, NAT'L FAMILY HEALTH SURVEY [NFHS-3] 270 (2007), available at [http://www.nfhsindia.org/NFHS-3%20Data/VOL-1/Chapter%2010%20-%20Nutrition%20and%20Anaemia%20\(608K\).pdf](http://www.nfhsindia.org/NFHS-3%20Data/VOL-1/Chapter%2010%20-%20Nutrition%20and%20Anaemia%20(608K).pdf). See also *Human Poverty and Socially Disadvantaged Groups in India*, *supra* note 91, at 34.

<sup>148</sup> See *id.* ("The IMR [Infant Mortality Rate in 2000] for the [Scheduled Castes] at all-India level was 83, which was considerably higher than the non-[Scheduled Castes/Scheduled Tribes].").

<sup>149</sup> See *Human Poverty and Socially Disadvantaged Groups in India*, *supra* note 91, at 34 ("Thus, as compared to non-SC/STs, persons not having access to public health services was higher by 7 percent points for SCs, and 16.4 percentage points for the STs respectively.").

<sup>150</sup> See Part II.C.4, *supra*.

<sup>151</sup> See Part II.C.3, *supra*.

<sup>152</sup> Anand Teltumbde, *Globalization and the Dalits*, available at <http://www.ambedkar.org/research/GLOBALISATIONANDTHEDALITS.pdf>. Other hallmarks of this policy were a devaluation of the *rupee* and the removal of price controls and import restrictions.

food security,<sup>153</sup> and without the basic amenities of electricity, sanitation, and safe drinking water.<sup>154</sup> Almost two decades later, economic reforms in India cling faithfully to the flawed “trickle down” theory—a theory that holds even less relevance for Dalits for whom few benefits can permeate the caste ceiling or trickle below the “upper-caste” stranglehold on the fruits of economic growth. Unprecedented economic growth has coincided comfortably with a post-reform reversal in poverty reduction trends.<sup>155</sup> Economic liberalization, for Dalits at least, may be fueling economic inequality.<sup>156</sup>

As liberalization leads to a capital-intensive mode of production requiring a greater proportion of highly skilled workers to manage automated production processes, a large migration of unskilled labor to the agricultural sector has led to lower wages for agricultural workers as a whole.<sup>157</sup> In addition to a reduction in agricultural subsidies, Dalits are also affected by the increased acquisition of coastal lands by multinationals (via the central government) for aquaculture projects.<sup>158</sup> Dalits are the main laborers and tenants of coastal land areas and are increasingly being forced to leave these areas—to live as displaced people—as foreign investment rises.<sup>159</sup>

A reduction in the budget and fiscal deficit, devaluation, privatization, the elimination or reductions in subsidies, and export promotion have all contributed to inflation.<sup>160</sup> As is true the world over, inflation hits the poorest the hardest. With most of their earnings spent on food, shelter, and clothing, any rise in prices has had a direct negative

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<sup>153</sup> See *id.* at 3-4 (noting that a decrease in capital expenditure and fertilizer subsidies has weakened agriculture. The devaluation of the rupee has created more demand for the export of food grains and the production of non-food exportables, leading to a reduction of foodstocks available for sustenance that in turn causes the price of food to rise substantially). *Id.*

<sup>154</sup> See NHRC REPORT, *supra* note 110, at 159 (stating that 30.91 percent of Dalit households have electricity—half the number of non-Dalit households (61.31 percent)—that more than 20 percent of Dalits lack access to clean drinking water, and that only 9.84 percent of Scheduled Caste households have access to sanitation, compared with 26.76 percent of non-Scheduled Caste households).

<sup>155</sup> Government spending to curb poverty has been drastically reduced as has spending on disease prevention and control. Teltumbde, *supra* note 152, at 9-10.

<sup>156</sup> SMITA NARULA & MARTIN MACWAN, INT’L COUNCIL ON HUMAN RIGHTS POLICY, “UNTOUCHABILITY:” THE ECONOMIC EXCLUSION OF DALITS IN INDIA 9 (2001), available at [http://www.international-council.org/paper\\_files/113\\_w\\_07.pdf](http://www.international-council.org/paper_files/113_w_07.pdf).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* See also Sukhadeo Thorat & Martin Macwan, *Liberalisation and Dalits*, in RESERVATION IN PRIVATE SECTOR: QUEST FOR EQUAL OPPORTUNITY AND GROWTH 253, 259 (S. Thorat, Aryama & P. Negi eds., 2005).

<sup>159</sup> NARULA & MACWAN, *supra* note 156, at 9.

<sup>160</sup> *Id.*

effect on Dalits' level of consumption. A lack of purchasing power is compounded by the devaluation of currency and has led to a rise in prices for general essential imports.<sup>161</sup>

Empirical studies seem to confirm that poverty rates are uniformly higher in Dalit households (as compared to "higher-caste" households).<sup>162</sup> Eighty-five percent of Dalits live in rural areas<sup>163</sup> while over 75 percent of Dalits perform land-connected work; 25 percent as marginal or small farmers and over 50 percent as landless laborers<sup>164</sup> earning less than US\$1 per day.<sup>165</sup> Though only 16 percent of the population, Dalits comprise 60 percent of those below the poverty line.<sup>166</sup>

According to government estimates in 2000, the unemployment rate for Dalits and tribal groups was double that of non-Dalits/tribals.<sup>167</sup> Additionally, public sector divestment to private owners is estimated to have left two hundred thousand Dalit employees jobless.<sup>168</sup> Dalits continue to be significantly underrepresented in most professional strata and their representation in India's high industries, exports, imports, and

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<sup>161</sup> Teltumbde, *supra* note 152, at 6. A survey of bank lending practices in the post-liberalization period revealed that market-based banking practices have proved less equitable than the Indian public sector model that existed prior to liberalization. The percentage of Dalit rural households borrowing from the formal sector fell a dramatic 16.3 percentage points since 1992. A majority of rural Dalit households currently borrow from informal sources. The data suggests that market determined banking practices have not turned out to be more equitable than the banking model followed for decades by the Indian public sector. See *Marketing Casteism*, ECONOMIC TIMES, Aug. 21, 2007, available at [http://economictimes.indiatimes.com/Opinion/Todays\\_Features/Perspectives/Marketing\\_casteism/rssarticleshow/msid-2296650,curpg-2.cms](http://economictimes.indiatimes.com/Opinion/Todays_Features/Perspectives/Marketing_casteism/rssarticleshow/msid-2296650,curpg-2.cms) (last visited Aug. 15, 2008); Pallavi Chauhan, *Access to Bank Credit*, 42 ECON. & POL. WKLY. 3219 (2007).

<sup>162</sup> See *Human Poverty and Socially Disadvantaged Groups in India*, *supra* note 91, at 30, 33.

In year 2000, at the all-India level, the average expenditure for [Scheduled Castes] and the [Scheduled Tribes] was Rs. 285 and R. 260 respectively, much lower than the non-[Scheduled Castes/Scheduled Tribes] (Rs. 393) . . . . [I]n relative terms the poverty gap between the [Scheduled Castes] SCs, the [Scheduled Tribes] STs, and non-SC/STs increased between 1983 and 2000.

Meenakshi, Ray, and Gupta present a comprehensive set of poverty estimates at the state level and for rural and urban areas. They conclude that poverty rates are consistently higher for scheduled caste, scheduled tribe, and female-headed households (relative to other socioeconomic groups), irrespective of which deprivation measure was used. J.V. Meenakshi, Ranjan Ray, & Souvik Gupta, *Estimates of Poverty for Scheduled Caste, Scheduled Tribe, and Female-Headed Households*, 35 ECON. & POL. WKLY. 2748, 2754 (2000).

<sup>163</sup> See Narula & Macwan, *supra* note 156.

<sup>164</sup> Teltumbde, *supra* note 152, at 3.

<sup>165</sup> HIDDEN APARTHEID, *supra* note 5, at 86.

<sup>166</sup> *India: The Broken People* (Channel 4 television broadcast Sept. 21, 2007) (United Kingdom), available at [http://www.channel4.com/news/articles/ontv/unreported\\_world/india+the+broken+people/830447](http://www.channel4.com/news/articles/ontv/unreported_world/india+the+broken+people/830447) (last visited Aug. 15, 2008).

<sup>167</sup> HIDDEN APARTHEID, *supra* note 5, at 6.

<sup>168</sup> *Id.*

electronic industries sectors is dismal.<sup>169</sup> Economic liberalization has not translated into economic liberation for Dalits and other marginalized communities in India.<sup>170</sup> The market, in short, has not served as an equalizing mechanism.<sup>171</sup> Economic reforms must be scrutinized for the work that they leave undone and for the inherent assumption that such work can be done by either economic or legal means.<sup>172</sup> As detailed in the section below, legal reforms to address caste-based inequality and discrimination, though astounding in their vision and reach, have been sabotaged in their implementation due to the conflation of casteism and corruption.<sup>173</sup>

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<sup>169</sup> *Id.* See also Teltumbde, *supra* note 152, at 7-8.

<sup>170</sup> For empirical studies on the adverse impact of macro-economic reforms, including the withdrawal of state involvement in social sectors, on marginalized populations such as Dalits, see generally NEW ECONOMIC POLICY AND DALITS (P. G. Jogdand ed., 2000). In spite of economic reforms, scheduled tribes continue to significantly lag behind in economic and social development. Sandip Sarkar et al., *Development and Deprivation of Scheduled Tribes*, 41 *ECON. & POL. WEEKLY* 4707, 4824 (2006); RS Deshpande & Amalendu Jyotishi, *The State Policy & Poverty in India: An Understanding in Retrospect*, 2001, available at [www.uregina.ca/sipp/documents/pdf/despande.pdf](http://www.uregina.ca/sipp/documents/pdf/despande.pdf). On Muslims in India, the findings of the Sachar Committee Report conclude that by and large Muslims rank somewhat above scheduled castes and schedule tribes, but below other minorities and Hindus generally. GOV'T OF INDIA, PRIME MINISTER'S HIGH LEVEL COMM., SOCIAL, ECONOMIC & EDUCATIONAL STATUS OF THE MUSLIM COMMUNITY OF INDIA: A REPORT 237 (2006).

<sup>171</sup> See K.S. CHALAM, *CASTE-BASED RESERVATIONS AND HUMAN DEVELOPMENT IN INDIA* 31 (2007).

<sup>172</sup> Teltumbde, *supra* note 152, at 15.

<sup>173</sup> See, e.g., CHALAM, *supra* note 171, at 87:

Politicians in the region see a political opportunity in the poverty of Dalits, for it can be used as an alibi to approach donor agencies for funds. Such funds can be used at the time of elections. This serves as a political investment of the ruling elite to win the elections without any budgetary process.



### III. INDIAN POLICIES FOR REDRESSING CASTE DISCRIMINATION

#### A. CONSTITUTIONAL RIGHTS AND CONSTITUTIONAL VISION

The Constitution of India, often heralded as a landmark document, was inspired by the emancipatory vision of its chief architect Dr. B.R. Ambedkar—a Dalit leader who himself suffered severe discrimination and who sought to ensure equal protection and substantive equality for Dalits in independent India. As a document, the constitution combines broad social purpose, stemming from the social content of the Independence Movement, with practical administrative detail, based on the Assembly members' experiences in government and on the events around them.<sup>174</sup>

Ambedkar cautioned against adopting too “Western” a vision of what constitutional democracy in India should look like.<sup>175</sup> According to Ambedkar,

[Such a system failed] to realise that political democracy cannot succeed where there is not social and economic democracy. Democracy is another name for equality. Parliamentary democracy developed a passion for liberty. It failed to realise the significance of equality and did not even endeavour to strike a balance between liberty and equality, with the result that liberty swallowed equality and has left a progeny of iniquities.<sup>176</sup>

Indian constitutionalism attempts, however imperfectly, to balance liberty and equality interests and in so doing foreshadows the delicate balance between formal and substantive conceptions of equality in

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<sup>174</sup> See generally GRANVILLE AUSTIN, *THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION* (1966) (a political history that examines, *inter alia*, the drafting of India's constitution by the Constituent Assembly, from December 1949 to December 1952).

<sup>175</sup> Parliamentary democracy, Ambedkar argued,

[T]ook no notice of economic inequalities and did not care to examine the result of freedom of contract on the parties to the contract, should they happen to be unequal. It did not mind if the freedom of contract gave the strong the opportunity to defraud the weak. The result is that parliamentary democracy in standing out as protagonist of liberty has continuously added to the economic wrongs of the poor, the downtrodden and the disinherited class.

THE ESSENTIAL WRITINGS OF B.R. AMBEDKAR 62 (V. Rodrigues ed., 2002).

<sup>176</sup> *Id.*

international human rights law.<sup>177</sup> Chief among these fundamental rights is the right to equality. Article 14 of the Constitution of India reads: “The state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”<sup>178</sup> An exception clause allows for affirmative action measures under some circumstances. “Nothing in this article . . . shall prevent the state from making any special provision for the advancement of the socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes.”<sup>179</sup>

The clause marks a significant departure from the American model on which India’s equality provision is based and constitutionalizes the validity of affirmative action in the Indian context. The Indian model is also one of substantive equality. If formal equality aims at equal opportunity, then substantive equality aims at equal results by considering the social structures in which equal results would not necessarily result from formal equality guarantees.

The Court has interpreted Article 14 on a number of occasions as charging the state with ensuring that there is equality among equals.<sup>180</sup> In *State of Kerala v. Thomas*, the Supreme Court noted that,

The guarantee of equality before the law or the equal opportunity in matters of employment is a guarantee of something more than what is required by formal equality. It implies differential treatment of persons who are unequal. . . . Formal equality is achieved by treating

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<sup>177</sup> See generally MARC GALANTER, *COMPETING EQUALITIES: LAW AND THE BACKWARD CLASSES IN INDIA* (1984) (analyzing treatment of Dalits under Indian Constitution).

<sup>178</sup> INDIA CONST. art. 14. Article 14 thus marries the English doctrine of the “Rule of law” with the equal protection of clause of the Fourteenth Amendment to the U.S. Constitution. *Bheshar Nath v. CIT*, (1959) Supp. 1 S.C.R. 528, 551 (Per Das C.J). In the U.S. Constitution, the language of the Fourteenth Amendment reads, “No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”

<sup>179</sup> The “schedule” of castes in India was originally created by the British in 1936, using the census data of the same year and “an ad hoc mixture of social, religious, economic, educational and even residential considerations.” Christopher Ford, *Administering Identity: The Determination of “Race” in Race-Conscious Law*, 82 CAL. L. REV. 1231, 1269 (1994); Priya Sridharan, *Representations of Disadvantage: Evolving Definitions of Disadvantage in India’s Reservation Policy and United States’ Affirmative Action Policy*, 6 ASIAN L.J. 99, 109 (1999). While this list did not accurately reflect caste membership and group interrelations, the post-independence government adopted the list as its own after incorporating some amendments. *Id.* at 110 (noting as significant the addition of Sikh “untouchables” to the list). The list of scheduled castes may only be modified by a full Act of Parliament involving “rather elaborate procedures,” and taking into account multiple factors such as caste membership and economic data. Ford, *supra* 179, at 1269; Dudley Jenkins, *supra* note 31, at 758.

<sup>180</sup> See *State of Kerala v. Thomas*, (1976) 1 S.C.R. 805 (“Those who are similarly circumstanced are entitled to equal treatment.”); *Madhya Pradesh Ration Vikreta Sangh Society v. State of Madhya Pradesh*, (1982) 1 S.C.R. 750.

all persons equally. . . But men are not equal in all respects. The claim for equality is in fact a protest against unjust, undeserved and unjustified inequalities. It is a symbol of man's revolt against chance, fortuitous disparity, unjust power and crystallised privileges.<sup>181</sup>

As noted above, Article 17 of the constitution abolishes the practice of "untouchability" and punishes the enforcement of any disability arising out of the practice.<sup>182</sup> Article 21 guarantees the right to life and liberty.<sup>183</sup> The Indian Supreme Court has interpreted this right to include the right to be free from degrading and inhuman treatment, the right to integrity and dignity of the person, and the right to speedy justice.<sup>184</sup> Article 23 prohibits traffic in human beings and other similar forms of forced labor.<sup>185</sup> Since the majority of India's forty million bonded laborers belong to scheduled castes,<sup>186</sup> Article 23 is especially significant for them.<sup>187</sup> Similarly, Article 24 provides that no child under the age of fourteen shall work in any factory or mine or engage in any hazardous employment.<sup>188</sup>

Article 43 calls on the state to secure to all workers, agricultural, industrial, or otherwise, a living wage and conditions of work ensuring a decent standard of life.<sup>189</sup> Article 46 comprises both development and regulatory aspects and stipulates that: "The State shall promote with special care the educational and economic interests of the weaker sections of the people, and in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and forms of exploitation."<sup>190</sup> As the article falls under the category of directive principles and not fundamental rights, it cannot be enforced by the state's courts. Article 15 prohibits discrimination on the grounds of religion, race, caste, sex, or place of birth<sup>191</sup> while Article 15(4) empowers the state to make any special provisions for the advancement of any socially

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<sup>181</sup> *State of Kerala v. Thomas*, (1976) 1 S.C.R. 805.

<sup>182</sup> INDIA CONST. art. 17.

<sup>183</sup> INDIA CONST. art. 21.

<sup>184</sup> See S. K. SINGH, BONDED LABOUR AND THE LAW 48-51 (1994).

<sup>185</sup> INDIA CONST. art. 23.

<sup>186</sup> BROKEN PEOPLE, *supra* note 21, at 139.

<sup>187</sup> The Bonded Labour System (Abolition) Act, No. 19 of 1976, was passed pursuant to this article.

<sup>188</sup> INDIA CONST. art. 24.

<sup>189</sup> INDIA CONST. art. 43.

<sup>190</sup> INDIA CONST. art. 46.

<sup>191</sup> INDIA CONST. art. 15.

and educationally backward classes of citizens, or for scheduled castes and scheduled tribes.<sup>192</sup>

Article 330 provides reservations for seats for scheduled castes and scheduled tribes in the Lok Sabha (the House of the People),<sup>193</sup> while Article 332 provides for reservations in the state legislative assemblies.<sup>194</sup> Through Article 16(4) the state is empowered to make “any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.”<sup>195</sup> Accordingly, under constitutional provisions and various laws, India grants Dalits a certain number of rights, including reservations (quotas) in education, government jobs, and government bodies.<sup>196</sup> India’s policy of reservations is an attempt by the central government to remedy past injustices related to “low-caste” status.

To allow for proportional representation in certain state and federal institutions, the constitution reserves 22.5 percent of seats in federal government jobs, state legislatures, the lower house of parliament, and educational institutions for scheduled castes and scheduled tribes.<sup>197</sup> An amendment to the constitution also enables reservations for scheduled castes and scheduled tribes in village councils (*panchayats*) and municipalities, with no less than one-third of reserved seats to be allocated to scheduled caste and scheduled tribe women.<sup>198</sup> Notably, no other reservation programs provides for a sub-category of reservations for women. Reservations have also been provided for “Other Backward Classes” (“OBCs”)—a group of castes officially recognized as having been traditionally excluded but who, unlike Dalits, are not treated as “untouchables.” Under the premise of proportional representation, OBCs are entitled to 27 percent reservations in public sector employment and higher education.

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<sup>192</sup> This particular provision was incorporated into the constitution through the Constitution (First Amendment) Act, 1951 and has enabled several states to reserve seats for scheduled castes and scheduled tribes in educational institutions, including technical, engineering, and medical colleges. It has also paved the way for reservations in police forces. See INDIA CONST. art. 15, § 4, added by the Constitution (First Amendment) Act, 1951.

<sup>193</sup> INDIA CONST. art. 330.

<sup>194</sup> INDIA CONST. art. 332.

<sup>195</sup> INDIA CONST. art. 16, §4.

<sup>196</sup> BROKEN PEOPLE, *supra* note 21, at 23.

<sup>197</sup> *Id.* at 40.

<sup>198</sup> INDIA CONST. arts. 243D and 243T.

## B. PROTECTIVE LEGISLATION

In addition to constitutional provisions, the government of India has pursued a two-pronged approach to narrowing the gap between the socio-economic status of the scheduled caste population and the national average: one prong involves regulatory measures which ensure that the various provisions to protect their rights and interests are adequately implemented, enforced and monitored; the second focuses on increasing the self-sufficiency of the scheduled caste population through financial assistance for self-employment activities through development programs to increase education and skills.<sup>199</sup>

The protective component of this strategy includes the enforcement of those legal provisions that make up the Protection of Civil Rights Act, 1955, and the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989; of other state and central government laws; and of “positive discrimination” through reservations in the arenas of government employment and higher education. These protective measures are monitored by the National Commissions for Scheduled Castes and Scheduled Tribes.<sup>200</sup> The development measures for the educational, social, and economic “upliftment” of scheduled castes are administered by the Ministry of Social Justice and Empowerment.<sup>201</sup>

### 1. THE PROTECTION OF CIVIL RIGHTS ACT

With an eye to eradicating pervasive discrimination practiced against scheduled caste members, the central government enacted the Protection of Civil Rights Act, 1955 (“PCR Act”) to enforce the abolition of “untouchability” under Article 17 of the constitution.<sup>202</sup> The PCR Act punishes offenses that amount to the observance of “untouchability.”<sup>203</sup> These include, *inter alia*, prohibiting entry into places of worship, denying access to shops and other public places, denying access to any

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<sup>199</sup> MINISTRY OF WELFARE (renamed as Ministry of Social Justice and Empowerment on May 25, 1998), GOV'T OF INDIA, ANNUAL REPORT 1995-1996 8 (1996).

<sup>200</sup> *Id.* The two commissions were until recently a single National Commission for Scheduled Castes and Scheduled Tribes, set up pursuant to Article 338 of the Indian Constitution and entrusted with the responsibility of ensuring that the safeguards and protections that have been given to scheduled castes and tribes are implemented.

<sup>201</sup> MINISTRY OF WELFARE, *supra* note 199, at 8.

<sup>202</sup> See The Protection of Civil Rights Act, No. 22 of 1955 § 2(a).

<sup>203</sup> The Protection of Civil Rights Act, No. 22 of 1955, pmb1.

water supply, prohibiting entry into hospitals, refusing to sell goods or render services, and insulting someone on the basis of his or her caste.<sup>204</sup>

Perhaps the greatest deficiency of the PCR Act was the fact that abuses against Dalits were not limited to name-calling or denial of entry into public spaces: violence was a defining characteristic of the abuse. Thirty-four years after the introduction of the PCR Act, the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act of 1989, was enacted purportedly to bring these other forms of abuse to an end.<sup>205</sup>

## 2. THE SCHEDULED CASTES AND SCHEDULED TRIBES (PREVENTION OF ATROCITIES) ACT

In 1989 the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act was enacted to prevent and punish caste-based abuses, to establish special courts for the trial of such offenses, and to provide for victim relief and rehabilitation.<sup>206</sup> Its enactment represented an acknowledgement on the part of the government that abuses, in their most degrading and violent forms, were still perpetrated against Dalits decades after independence.<sup>207</sup> A look at the offenses made punishable by the Act provides a glimpse into the retaliatory or customarily degrading treatment Dalits may receive. The offenses include: forcing members of a scheduled caste or scheduled tribe to drink or eat any inedible or obnoxious substance; dumping excrement, waste matter, carcasses or any other obnoxious substance in their premises or neighborhood; forcibly removing their clothes and parading them naked or with painted face or body; interfering with their rights to land; compelling a member of a scheduled caste or scheduled tribe into forms of forced or bonded labor; corrupting or fouling the water of any spring, reservoir or any other source ordinarily used by scheduled castes or

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<sup>204</sup> The Protection of Civil Rights Act, No. 22 of 1955 §§ 3, 4, 5, 6 and 7. The Act was originally called the Untouchability (Offenses) Act of 1955, and was amended in 1976. Though substantively unaltered, under the revised law, untouchability was made both a cognizable and non-compoundable offense and stricter punishments were provided for offenders.

<sup>205</sup> See The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, No. 33 of 1989, pmbl. For a list of offenses under the Act, see ch. I and § 3 of the Act.

<sup>206</sup> The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, pmbl. (1989).

<sup>207</sup> In 1995 the government of India enacted accompanying rules for the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act. The rules set out the amounts of, and timetables for, state-allotted compensations for victims of various crimes defined under the act. Rules 16 and 17 call for the constitution of state and district-level vigilance and monitoring committees comprising official and non-official members. The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Rules, 1995.

scheduled tribes; denying right of passage to a place of public resort; and using a position of dominance to exploit a scheduled caste or scheduled tribe woman sexually.<sup>208</sup>

### 3. ADDITIONAL SOCIAL WELFARE LEGISLATION

In addition to the acts described above, a number of other statutes aim to eradicate exploitative labor arrangements in which Dalits are frequent victims. The Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993, prohibits the employment of manual scavengers or the construction of dry (non-flush) latrines and punishes such offenses with imprisonment and/or a fine.<sup>209</sup> The Bonded Labour System (Abolition) Act, 1976, seeks to abolish all agreements and obligations arising out of the bonded labor system, release all laborers from bondage, prohibit the creation of new bondage agreements, and order the economic rehabilitation of freed laborers by the state.<sup>210</sup> Other relevant acts include the Inter State Migrant Workmen (Regulation of Employment and Service Conditions) Act, 1979,<sup>211</sup> the Child Labour (Prohibition and Regulation) Act, 1986,<sup>212</sup> the Minimum Wages Act, 1948,<sup>213</sup> and the Equal Remuneration Act, 1976.<sup>214</sup>

### C. ECONOMIC DEVELOPMENT MEASURES

The government of India has also attempted to increase the self-sufficiency of the scheduled caste population through financial assistance

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<sup>208</sup> The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, No. 33 of 1989, § 3.

<sup>209</sup> The Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, No. 46 of 1993.

<sup>210</sup> Bonded Labour System (Abolition) Act (1976). Under the Act, payment of less than minimum wage for the purposes of working off a debt also amounts to bondage. *Id.*

<sup>211</sup> Dalit migrant laborers are seldom paid minimum wage. They work long hours, live in subhuman conditions and may face physical abuse if they try to escape their place of work. NHRC REPORT, *supra* note 110, at 78.

<sup>212</sup> The Act prohibits the employment of children in particular industries, while regulating the conditions of their work in other industries.

<sup>213</sup> The Minimum Wages Act only regulates employers who employ more than 1,000 workers. The Minimum Wages Act, No. 11 of 1948, § 3(1A), cited in NHRC REPORT, *supra* note 110, at 81.

<sup>214</sup> The Act requires equity in the payment of wages between men and women employed to perform the same or similar work. Equity cannot be achieved by reducing the wages of the higher paid worker. Employers are also prohibited from discriminating on the basis of sex in recruitment, hiring, or promotion. The Act is especially significant for Dalit women who frequently get paid less than their male counterparts. *See supra* note 91.

for self-employment activities and through development programs designed to increase education and skills. Included among these are post-matriculation scholarships for scheduled caste students (which purportedly reach over 20 million students), special education development programs for scheduled caste girls with low literacy levels, hostels for scheduled caste girls and boys from rural or remote areas (designed to facilitate access to education), and a centrally-sponsored assistance scheme for scheduled caste development corporations, which provide eligible scheduled caste families with low-interest loans and financial assistance for a variety of economic development schemes.<sup>215</sup>

Pursuant to Articles 38,<sup>216</sup> 39,<sup>217</sup> and 46 of the constitution a Special Component Plan (“SCP”) was introduced in 1979 with a view to “achieving overall development of SCs/STs (Scheduled Castes/Scheduled Tribes) and to raise them above the poverty line.”<sup>218</sup> The SCP is “an umbrella programme under which all schemes implemented by State and Central Governments are dovetailed for addressing different needs of the Scheduled Castes,” and is used by the Central Government to direct funds to critical areas of need to ensure the developments needs of the scheduled caste population.<sup>219</sup> The Ministry of Social Justice and Empowerment’s Planning, Research, Evaluation, and Monitoring Division (“PREM”) is charged with assessing the effectiveness of these welfare programs. Through PREM, the Ministry provides grants to research institutions, professional organizations, and universities to study its scheduled caste welfare programs.<sup>220</sup>

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<sup>215</sup> Ministry of Social Justice and Empowerment, Government of India, SCHEDULED-CASTE WELFARE PROGRAMS, <http://socialjustice.nic.in/schedule/welcome.htm> (last visited Aug. 15, 2008).

<sup>216</sup> Under Article 38,

[The] State[,] to secure a social order for the promotion of welfare of the people . . . shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life . . . [and] shall, in particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.

INDIA CONST. art. 38.

<sup>217</sup> Article 39 mandates that the State shall direct its policies to conform to principles of economic and social equality. INDIA CONST. art. 39.

<sup>218</sup> See FACT SHEET, MINISTRY OF SOCIAL JUSTICE AND EMPOWERMENT, <http://pib.nic.in/archieve/factsheet/fs2000/socialjustice.html> (last visited Aug. 15, 2008).

<sup>219</sup> *Id.*

<sup>220</sup> PLANNING, RESEARCH, EVALUATION & MONITORING DIV., MINISTRY OF SOC. JUSTICE & EMPOWERMENT, GOV'T OF INDIA, RESEARCH/EVALUATION STUDIES SPONSORED UNDER THE



The plethora of laws and programs outlined above, that collectively comprise India's affirmative action package for Dalits, stand in perverse contradiction to the social realities that Dalits face. The next section seeks to answer the question of why the rule of law in India finds no traction as a mechanism of repairing the Dalit condition.

#### IV. RULE OF LAW vs. RULE OF CASTE

The Rule of Law in India lives in the shadow of the Rule of Caste. If law is understood as a set of rules backed by sanction, then both the legal system and the caste system can lay claim to the mantle of law with one significant difference: the caste system operates more efficiently, more swiftly, and more punitively than any rights-protecting law on the books. Political theorist Hannah Arendt lamented the "poignant irony" of the discrepancy between regarding as "inalienable" those human rights, which are enjoyed by citizens of the most prosperous and civilized countries, and the situation of the rightless themselves.<sup>221</sup> The rightless, in Arendt's opinion, were those stateless individuals who had been deprived of what she saw as the most fundamental of all human rights: the right to membership in a political community.<sup>222</sup> According to Arendt, without citizenship status, inalienable rights do not come into effect.<sup>223</sup> Devoid of such membership with a people or a state, individuals lose "the very qualities which make it possible for other people to treat [them] as fellow [human beings]."<sup>224</sup>

If citizenship is understood as a bundle of rights that includes, *inter alia*, the rights to personal liberty, personal security, equality before the law, freedom of speech and conscience, the right to own property, and the right to political participation, then Dalits fall far short of that bundle.<sup>225</sup> As a system of law, the caste system relegates Dalits into an almost permanent state of exception. If castes are understood as nations, then as outcastes, Dalits are rendered stateless in their own country. As

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SCHEME OF GRANT IN AID FOR RESEARCH PROJECTS, <http://socialjustice.nic.in/prem/welcome.htm>.

<sup>221</sup> HANNAH ARENDT, *Decline of the Nation-State: End of the Rights of Man*, in *THE ORIGINS OF TOTALITARIANISM* 279 (1985).

<sup>222</sup> *Id.* at 296.

<sup>223</sup> *Id.* at 300.

<sup>224</sup> *Id.*

<sup>225</sup> See generally J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 *UCLA L. REV.* 711 (1996) (explaining genesis of "bundle of rights" theory of property).

shown below, the rights enshrined in the constitution and implemented through a plethora of legislation are not meant to serve them. As victims of both over- and under-enforcement of the law, Dalit existence is defined by the extremes of brutality and neglect.

### A. POLICE BRUTALITY AGAINST DALITS

India's National Human Rights Commission ("NHRC")—a body that India characterizes as the apex national institution to protect human rights and redress grievances<sup>226</sup>—has characterized the law enforcement machinery as the greatest violator of Dalits' human rights.<sup>227</sup> According to the NHRC, custodial torture and killing of Dalits, rape and sexual assault of Dalit women, and looting of Dalit property by the police "are condoned, or at best ignored."<sup>228</sup>

Under a theory of collective punishment, the police will often subject entire Dalit communities to violent search and seizure operations in search of one individual.<sup>229</sup> Dalit communities may also be perceived by the police as inherently criminal.<sup>230</sup> Dalits and other poor minorities are disproportionately represented among those detained and tortured in police custody because most cannot afford to pay police bribes.<sup>231</sup> Police officers' deeply embedded caste bias (most officers belong to the "upper castes")<sup>232</sup> and a general lack of familiarity with legislative protections for Dalits further compound the problem.<sup>233</sup> Dalits, including those arrested for minor offenses, are often held in custody for long periods of time, occasionally at distant and isolated locations to avoid publicity,<sup>234</sup> where they are frequently deprived of food and water, subjected to verbal abuse and humiliation, severe beatings, sexual perversities, and demeaning acts. Often the injuries inflicted can prove fatal.<sup>235</sup>

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<sup>226</sup> U.N. Comm. on the Elimination of Racial Discrimination [CERD], *Reports Submitted by States Parties under Article 9 of the Convention ¶ 155*, U.N. Doc CERD/C/IND/19 (Mar. 29, 2006).

<sup>227</sup> NHRC REPORT, *supra* note 110, at 130.

<sup>228</sup> *Id.* § VI, at 130.

<sup>229</sup> *Id.* at 116.

<sup>230</sup> *Id.* at 116-17.

<sup>231</sup> BROKEN PEOPLE, *supra* note 21, at 127.

<sup>232</sup> NHRC REPORT, *supra* note 110, at 118.

<sup>233</sup> *Id.*

<sup>234</sup> S. Vishwanathan, *A Tale of Torture*, FRONTLINE, Aug. 2-15, 2003, at 61, available at <http://www.hinduonnet.com/fline/fl2016/stories/20030815002504800.htm> (last visited Aug. 15, 2008).

<sup>235</sup> NHRC REPORT, *supra* note 110, at 114.

Dalit activists are also accused of being “terrorists,” “threats to national security,” and “habitual offenders,” and frequently charged under the National Security Act, 1980, the Terrorist and Disruptive Activities (Prevention) Act, 1985 (“TADA”), and even older counter insurgency laws such as the Indian Explosives Act, 1884.<sup>236</sup> Dalit activists are often subjected to specious prosecutions, falsified charges, and physical abuse and torture following arrest.<sup>237</sup>

## B. A CULTURE OF UNDER-ENFORCEMENT

Media, non-governmental, and official reports reveal that the police have systematically failed to protect Dalit homes and Dalit individuals from acts of looting, arson, sexual assault, torture, and other inhumane acts such as stripping and parading Dalit women and forcing Dalits to drink urine and eat feces.<sup>238</sup>

According to legal scholar Alexandra Natapoff, under-enforcement as a phenomenon “deserves a more central role in the evaluation of the evenhandedness and democratic legitimacy of the criminal system.”<sup>239</sup> Though articulated in the context of the United States, her conclusion, that under-enforcement “offers important insights into the government’s relationship with vulnerable groups in the context of the criminal system,”<sup>240</sup> is equally applicable to the Indian context. As Natapoff contends,

Over- and under-enforcement are twin symptoms of a deeper democratic weakness of the criminal system: its non-responsiveness to the needs of the poor, racial minorities, and the otherwise politically vulnerable. Because of this weakness, justice and lawfulness are distributed unevenly and unequally across racial and

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<sup>236</sup> *Id.*

<sup>237</sup> BROKEN PEOPLE, *supra* note 21, at 153. For a detailed discussion of the over-enforcement of the law against vulnerable groups in India, in particular draconian anti-terrorism and security laws, see Anil Kalhan et al., *Colonial Continuities: Human Rights, Terrorism, and Security Laws in India*, 20 COLUM. J. ASIAN L. 93, 109 (2006), available at <http://ssrn.com/abstract=970503> (last visited Aug. 15, 2008). Kalhan notes at 109, 147 and 173 that the Terrorist and Disruptive Activities (Prevention) Act, 1985, and the Prevention of Terrorism Act, 2002, have been selectively enforced against members of Dalit and other disadvantaged groups, both in order to prosecute offenses unrelated to terrorism, and to extort and illegally arrest and detain members of these groups.

<sup>238</sup> HIDDEN APARTHEID, *supra* note 5, at 9.

<sup>239</sup> Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV 1715, 1717 (2006).

<sup>240</sup> *Id.* See also RANDALL KENNEDY, RACE, CRIME AND THE LAW 19 (1997) (arguing that “the principal injury suffered by African-Americans in relation to criminal matters is not overenforcement but underenforcement of the law.”).

class lines, and some people can trust and rely on law enforcement while others cannot.<sup>241</sup>

In what Natapoff defines as “underenforcement zones,” “the state routinely and predictably fails to enforce the law to the detriment of vulnerable residents,” with the result that “[f]or residents of these zones, lawfulness is spread unevenly throughout daily life and the legal system is at best unpredictable.”<sup>242</sup> For Dalits in India, the under-enforcement “zone” may be as wide as India itself.

### 1. UNDER-ENFORCEMENT OF PROTECTIVE LEGISLATION

In 2004, the NHRC released the findings of an in-depth examination of the implementation of protective legislation for scheduled castes. The report is a strong indictment of the government’s failure to carry out its promises to protect Dalits from atrocities and violations of their fundamental rights and to grant remedies for rights’ violations.<sup>243</sup> NHRC concluded that there is virtually no monitoring of the acts’ implementation at any level.<sup>244</sup> Political leaders have also played a significant role in hindering the implementation of the Prevention of Atrocities Act.<sup>245</sup>

The Protection of Civil Rights Act and the Prevention of Atrocities Act together represent the most important pieces of legislation for the protection of Dalits. The potential of these laws to bring about social change, however, has been severely hampered by their under-enforcement due to institutional prejudice and police corruption. State governments have made no serious efforts to identify areas where the practice of “untouchability” is prevalent, have done very little to make public the provisions of the acts, and have failed to periodically survey the acts’ effectiveness.<sup>246</sup>

According to the 2001-2002 Annual Report on the Prevention of Atrocities Act, 30,022 cases were registered under the Act in 2001 and 27,894 cases were registered in 2002.<sup>247</sup> As staggering as these statistics

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<sup>241</sup> Natapoff, *supra* note 239, at 1719.

<sup>242</sup> *Id.* at 1717-18.

<sup>243</sup> *See generally* NHRC REPORT, *supra* note 110.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.* at 113-14.

<sup>246</sup> *Id.* at 25, 45.

<sup>247</sup> MINISTRY OF SOCIAL JUSTICE AND EMPOWERMENT, GOVERNMENT OF INDIA, ANNUAL REPORT ON THE SCHEDULED CASTES AND THE SCHEDULED TRIBES (PREVENTION OF ATROCITIES) ACT,

are, they represent only a fraction of the violence committed against Dalits. Systematic non-registration<sup>248</sup> or improper registration<sup>249</sup> of atrocities contributes to under-reporting. Additional failures in investigation once a case is registered also help ensure low conviction rates.<sup>250</sup> According to the Annual Report, only 2.31 percent of cases brought under the Act in 2002 resulted in convictions.<sup>251</sup> The low rate of convictions, compared against the high number of atrocities reported

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1989, FOR THE YEAR OF 2002 9-10 (2004), available at <http://socialjustice.nic.in/schedule/ar-poa.pdf>.

<sup>248</sup> In 2002, India reported that in at least fifteen states, between zero to two cases had been registered under the Prevention of Atrocities Act, 1989. *Annual Report on the Prevention of Atrocities Act*, *supra* note 247, at 9-10. Similarly, the Government of India reported that in the same year no cases were registered under the Protection of Civil Rights Act in twenty-four states and union territories. Ministry of Social Justice and Empowerment, *Number of Cases Registered under the Protection of Civil Rights Act, 1955 for the Year 2002 and 2003*, <http://socialjustice.nic.in/schedule/cases.htm#case1> (last visited Aug. 16, 2008). The National Commission for Scheduled Castes and Scheduled Tribes has concluded that “a large number of cases of atrocities go unregistered, mainly because of reluctance on the part of police officers to register the cases.” NCDHR RESPONSE, *supra* note 114, at 4. The NHRC has further confirmed that the lack of registered cases does not represent an actual reduction in the practice of “untouchability.” NHRC REPORT, *supra* note 110, at 25 (referring to the lack of registered cases under the Protection of Civil Rights Act).

<sup>249</sup> In addition to non-registration of cases, police routinely engage in improper registration of cases. Dalit cases are often registered under the Indian Penal Code instead of the Protection of Civil Rights Act, 1955 or the Prevention of Atrocities Act, 1989. NCDHR RESPONSE, *supra* note 114, at 4; NHRC REPORT, *supra* note 110 § IV, at 45. Improper and under-registration of Dalit cases adversely affects case outcomes. NHRC REPORT, *supra* note 110 § VI, at 117. Cases are less likely to be prosecuted and even when pursued are more likely to result in acquittal when the police have failed to collect evidence. Perpetrators, if convicted, are punished with a lighter sentence and/or are likely to be released on bail. *Id.* at 117. Further, the appropriate relief may not be available when the proper sections of the law are not cited. *Id.* at 117. Collectively, these problems have caused a loss of faith in law enforcement, which in turn further diminishes the number of cases registered. *Id.* § IV, at 25.

<sup>250</sup> Dalits are frequently the victims of discriminatory treatment in the administration of justice. Prosecutors and judges fail to vigorously and faithfully pursue complaints brought by Dalits, as evidenced by the high rate of acquittals in such cases. Of the atrocities cases that reached the trial stage in 1999-2000, less than a sixth were actually adjudicated, and between 2001 and 2002 only 11 percent of cases were disposed of. NCDHR RESPONSE, *supra* note 114, at 25. The pattern of acquittals has continued in recent times: of the 833 cases registered under the Act in the state of Maharashtra in 2005, only 6.3 percent ended in conviction. In 2004, 689 cases were registered in the state with only 4.8 percent ending in convictions. In Gujarat, 1,301 cases were registered in 2005 and the conviction rate was a poor 3.8 percent. The state of Uttar Pradesh fared better: of the 4,369 cases registered last year, nearly half the offenders were convicted. Meetu Jain, *Dalits Safer in UP, Says Govt Report*, CNN-IBN LIVE.COM, Dec. 12, 2006, <http://www.ibnlive.com/news/up-handles-atrocities-on-dalits-better/28242-3.html> (last visited Aug. 15, 2008).

<sup>251</sup> Annual Report on the Prevention of Atrocities Act, *supra* note 247, at 12. The government of India reported that in the same year no cases were registered under the Protection of Civil Rights Act in 24 states and union territories. MINISTRY OF SOCIAL JUSTICE AND EMPOWERMENT, *supra* note 247, at 2.

against Dalits, is often attributed to the caste bias of prosecutors as well as other organs of justice, including the judiciary, and to the law enforcement machinery's lack of familiarity with provisions of the relevant legislation.<sup>252</sup>

Dalit women are more likely to suffer violence and especially sexual violence, and are least likely to get redress in the courts. Rape cases are not prosecuted in good faith and Dalit women suffer both caste and gender discrimination in the courtrooms. Prosecutorial failures in the context of cases involving rape against Dalit women also serve to encourage the use of rape as a tool to punish and silence Dalit communities.<sup>253</sup>

## 2. UNDER-ENFORCEMENT OF SOCIAL WELFARE LEGISLATION

As described in Part III.B.3, a plethora of social welfare legislation has been enacted with the goal of eradicating exploitative economic arrangements in which Dalits are frequent victims. Land reform legislation has additionally been passed to help free Dalits from their perennial landless condition. Pervasive under-enforcement, however, along with significant loopholes in the acts themselves, has severely undermined the effectiveness of these laws and their accompanying rehabilitation programs.

While the Bonded Labour System (Abolition) Act, 1976, seeks to abolish all agreements and obligations arising out of the bonded labor system,<sup>254</sup> the extent to which bonded laborers have been identified, released, and rehabilitated in the country is negligible.<sup>255</sup> Rehabilitation programs for individuals who have been released from bonded labor are similarly undermined by their failure to secure substantial alternative employment,<sup>256</sup> implement rehabilitation immediately after release,<sup>257</sup> and ensure timely provision of benefits.<sup>258</sup>

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<sup>252</sup> NHRC REPORT, *supra* note 110, at 45.

<sup>253</sup> BROKEN PEOPLE, *supra* note 21, at 175.

<sup>254</sup> The Act aims to release all laborers from bondage, cancel any outstanding debt, prohibit the creation of new bondage agreements, and order the economic rehabilitation of freed bonded laborers by the state. It also punishes attempts to compel persons into bondage with a maximum of three years in prison and a Rs. 2,000 (US\$50) fine. The Bonded Labour System (Abolition) Act, No. 19 of 1976; India Code (2007).

<sup>255</sup> BROKEN PEOPLE, *supra* note 21, at 140.

<sup>256</sup> NHRC REPORT, *supra* note 110, at 67.

<sup>257</sup> While the process of rehabilitation is supposed to immediately follow the release of a bonded laborer, this is rarely the case. In some cases the Certificate of Release from bonded debt is not issued, and there is a huge time lag between release and rehabilitation operations, resulting in

The prevalence of the practice of manual scavenging has not been alleviated by the Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993, or its rehabilitation program. To the contrary, the number of dry latrines has increased since 1989.<sup>259</sup> Despite the fact that the Act was intended to be fully implemented by October 2, 2002,<sup>260</sup> only 151,930 out of the total 676,009 manual scavengers identified as of 2004 by the NHRC have been retrained, while only 394,638 have been rehabilitated.<sup>261</sup> The NHRC has concluded that the objectives of these and other relevant labor laws have been soundly defeated due to the inadequacy and unresponsiveness of the law enforcement machinery, as well as the economic and social dominance of the offending employers.<sup>262</sup>

Land reform laws that were intended to provide reparations for the historic landlessness of Dalits<sup>263</sup> have failed due to: a lack of political will and bureaucratic commitment; loopholes in the laws; the tremendous manipulative power of the landed classes; excessive interference of courts;<sup>264</sup> and problems in ensuring that oral tenancies are truthfully recorded in land records so as to enable implementation of the land to the tiller policy.<sup>265</sup>

While India has adopted measures to abolish forced prostitution and “rehabilitate” *devadasis*, these efforts have been largely

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many released laborers being unable to survive after their release and being forced to return to their captors. *Id.*

<sup>258</sup> *Id.* at 67-68.

<sup>259</sup> NCDHR RESPONSE, *supra* note 114, at 24.

<sup>260</sup> *Id.* at 54.

<sup>261</sup> *Id.* Such failures led to the filing of a public interest litigation petition before the Supreme Court in 2003 by the Safai Karamchari Andolan on behalf of manual scavengers seeking the enforcement of the Act. S. Viswanathan, *Exposing An Abhorrent Practice*, FRONTLINE, Feb. 11–24, 2006, <http://www.flonnet.com/fl2303/stories/20060224000808000.htm> (last visited Aug. 16, 2008). In 2004, when the Supreme Court requested the in-court presence of Secretaries of seven states for their failure to file responses to the petition, a number of states responded by simply asserting that no dry latrines existed in their states. *Id.*; J. Venkatesan, *Manual Scavenging: Court Summons Principal Secretaries*, THE HINDU, Sept. 14, 2004, available at <http://www.thehindu.com/2004/09/14/stories/2004091404061200.htm> (last visited Aug. 16, 2008).

<sup>262</sup> NHRC REPORT, *supra* note 110, at 84.

<sup>263</sup> NCDHR RESPONSE, *supra* note 114, at 23.

<sup>264</sup> NHRC REPORT, *supra* note 110, at 85.

<sup>265</sup> *Id.* at 125. The evidence of this failure is clear; for example, Dalit landlessness is estimated at around 75 percent. Of surplus land collected pursuant to land reform laws, only 69.5 percent has been distributed, of which Dalits have received only 34.6 percent. NCDHR RESPONSE, *supra* note 114, at 23.

unsuccessful. Legislative initiatives are poorly implemented.<sup>266</sup> The societal perception of *devadasis* as women who are sexually available to men makes it more difficult for them to approach the police with complaints of sexual violence.<sup>267</sup> Moreover, the police themselves have been known to exploit *devadasis*.<sup>268</sup>

### 3. UNDER-ENFORCEMENT OF ECONOMIC DEVELOPMENT MEASURES

According to the National Human Rights Commission, the beneficial impact of programs aimed at ensuring Dalit development have been hindered by inadequate investment of public resources; non-utilization or diversion of funds earmarked for Dalit development; a lack of programs specifically targeted to Dalit development; poor preparation of such projects; and a lack of monitoring of development programs leading to the failure of many such programs to reach their target groups.<sup>269</sup> The anti-Dalit bias of personnel in charge of implementing these programs has also hindered their effectiveness.<sup>270</sup> Moreover, Dalits rarely participate in the formulation and implementation of development projects. Many Dalits are also unaware of the existence of such programs, further restricting their participation.<sup>271</sup>

The Special Component Plan described above—a potentially powerful mechanism for ensuring Dalit economic empowerment—has itself been thwarted in its application and implementation by administrative agencies at the central and state level. According to the National Campaign on Dalit Human Rights, during the past five-year plan period, an average of 2 billion Euros (US\$ 2.96 billion) per year was illegally diverted from these funds.<sup>272</sup> According to some estimates,

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<sup>266</sup> For example, the Karnataka state government passed the Karnataka Devadasi (Prohibition of Dedication) Act in 1992, however, not a single case has been booked against offending priests despite many complaints and admonitions to that effect. NHRC REPORT, *supra* note 110, at 61.

<sup>267</sup> “When a devadasi is raped, it is not considered rape. She can be had by any man at any time.” BROKEN PEOPLE, *supra* note 21, at 152 (citing Human Rights Watch interview with Jyothi Raj, Rural Education and Development Society, in Bangalore (July 26, 1998)).

<sup>268</sup> Jyothi Raj added that the law works to the disadvantage of women because it criminalizes their actions and not the actions of their patrons. Police will even go so far as to demand sex as a bribe: “They will threaten to file charges under the act if the woman says no.” *Id.*

<sup>269</sup> NHRC REPORT, *supra* note 110, at 175.

<sup>270</sup> *Id.*

<sup>271</sup> *Id.* at 175-76.

<sup>272</sup> NAT’L CAMPAIGN ON DALIT HUMAN RIGHTS, BACKGROUND OF THE DALIT SITUATION IN INDIA, Sept. 2007 (on file with author) (the figure is calculated from: Expenditure Budget Vol. II (Notes on demands for Grants), Union Budget 2006-07; Statement No. 21, Expenditure Budget Vol. I,



over the course of the past quarter-century a total of US\$93.75 billion has been siphoned from Dalit development programs.<sup>273</sup>

### C. CASTEISM AS CORRUPTION

While the near epidemic of over- and under-enforcement speaks to a lack of political will on the part of the state to ensure Dalits' rights, it also serves to counter common assumptions about why such abuses persist. The notion that a dearth of resources are to blame for the lack of socio-economic development of Dalits is belied by the siphoning of close to \$3 billion a year away from funds that were meant to advance Dalit economic empowerment. Secondly, the brutality of the police toward Dalits makes clear that they are not merely uninterested in securing redress for anti-Dalit crimes; they view Dalits as criminals and derelicts at best, and subhuman at worst. Local police chiefs have been known to indoctrinate recruits to hate Dalits,<sup>274</sup> and Dalits may be denied entry into police stations.<sup>275</sup> What security do Dalits have when they cannot even step foot into the very office that represents their first line of defense, or worse, when they are tortured or raped by those meant to defend them?

What has alternatively been called a "lack of political will" or "police corruption" benignly represents something far more pernicious. The words "police" and "corruption" seemingly go hand in hand in India; one can hardly avoid using one word without uttering the other. But what is meant by corruption in the context of caste is woefully misunderstood. While petty bribes do certainly play a role, especially when most Dalits can ill-afford to pay them, the lack of "will" to enforce the law is not due to passive apathy but to active complicity in the caste system. The nexus between political leaders and "upper-caste" community members accounts, to some extent, for these failures and for the disincentive to address violations by private actors.<sup>276</sup> That which is under-enforced is done so at the behest of the privileged castes to whom

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Union Budget 2006-07; Outcome Budget 2006-07 for various Ministries of Central Government).

<sup>273</sup> S. Viswanathan, *Denial by Design*, FRONTLINE, Oct. 6-19, 2007, <http://www.frontlineonnet.com/f12420/stories/20071019509412400.htm> (last visited Aug. 16, 2008).

<sup>274</sup> Eisenman, *supra* note 9, at 160.

<sup>275</sup> SHAH ET AL., *supra* note 102, at 71.

<sup>276</sup> For example, social and economic legislation to further Dalits' rights adversely affects the interests of the classes and castes to which political leaders either belong or represent; political leaders are either landowners themselves or have close political and social links with landowners, and those relying on cheap or bonded labor, including child labor. NHRC REPORT, *supra* note 110, at 125.

the police and the judiciary owe their caste loyalty and who have a vested (karmic and economic) interest in keeping the system in place. Those who are brutalized represent individuals who are simply meant to be treated that way.

Just as police officers refuse to register complaints brought by Dalits, Dalits as complainants “are often treated with indifference by local judges.”<sup>277</sup> The caste composition of the police and the judiciary is a significant part of the impunity equation. Dalits are severely under-represented in the higher ranks of the police, the prosecutors, and the judiciary. The reservations regime, discussed below, does not extend to the judiciary<sup>278</sup>—with the result that, in 2002, the Supreme Court had only one Dalit out of twenty-six judges, while the High Courts had 25 Dalits out of 625 positions.<sup>279</sup> In January 2007, that Dalit judge, Justice K.G. Balakrishnan, became the first Dalit to rise to the position of Supreme Court Chief Justice.<sup>280</sup> According to recent studies based on available data, 47 percent of India’s Chief Justices and 40 percent of all other judges have been “high-caste” Brahmins, who constitute only 6.4 percent of the population.<sup>281</sup>

Caste discrimination also does not cease once a Dalit is appointed to a judicial position, as discriminatory attitudes prevail among judges themselves. The depth of anti-Dalit sentiment in the judiciary is particularly well illustrated by an incident that took place in July 1998 in the state of Uttar Pradesh, where, as the *Times of India* reports, an Allahabad High Court Judge had his chamber “purified with Ganga jal” (water from the River Ganges) because it had earlier been occupied by a Dalit judge.<sup>282</sup>

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<sup>277</sup> Eisenman, *supra* note 9, at 167.

<sup>278</sup> The National Human Rights Commission has recommended that the government identify institutions that have not accepted reservations—including the judiciary and defense forces—and develop measures to ensure that Dalit candidates have the opportunity to compete for these positions. NHRC REPORT, *supra* note 110, at 141. Supporters of such a proposition point to the abysmal rate of convictions for offenses against Dalits highlighted above which stem in part from the anti-Dalit bias of the judiciary. The chairman of the National Commission on Scheduled Castes has also recommended that reservations be extended to the judiciary. *Grant SC/ST Quotas in Judiciary: Buta*, THE HINDU, Jan. 20, 2008, available at <http://www.hindu.com/thehindu/holnus/002200801201965.htm> (last visited Aug. 16, 2008).

<sup>279</sup> *President’s No on Chhattisgarh Judges*, INDIAN EXPRESS, Feb. 3, 2002.

<sup>280</sup> *Balakrishnan to be CJI*, INDIAN EXPRESS, Dec. 23, 2006, available at <http://www.indianexpress.com/story/19176.html> (last visited Aug. 15, 2008).

<sup>281</sup> Balakrishnan Rajagopal, *The Caste System—India’s Apartheid?*, THE HINDU, Opinion, Aug. 18, 2007, available at <http://www.hinduonnet.com/2007/08/18/stories/2007081856301200.htm> (last visited Aug. 15, 2008).

<sup>282</sup> BROKEN PEOPLE, *supra* note 21, at 24.

When the law enforcers become the criminals and the judiciary treats its own colleagues with untouchable contempt, then something far more insidious is at play. The police, and in some cases the judiciary, do not owe their allegiance to the rule of law, but to caste. Casteism must then be viewed as a form of corruption, and a force that invites corruption, rather than something separate from it. Those who occupy a variety of positions in the public administration—from the police, to prosecutors, to district collectors, to judges, and to government bureaucrats responsible for implementing social welfare programs—are so deeply entrenched in the casteist mindset that the system cannot be anything but corrupt and the state is anything but neutral. The brutality and apathy of state agents is matched by the brutality of the dominant castes. This could only be so if they were one and the same.

#### D. VIOLENCE AS CASTE ENTRENCHMENT

In India's perennial struggle between the rule of law and the rule of caste, violence is the trump card that ensures the rule of caste always wins out. Violence against Dalits in India has reached epidemic proportions. Between 1992 and 2005 a total of 398,644 cases involving crimes against Dalits were registered throughout the country.<sup>283</sup> These include the crimes of murder, rape, kidnapping, robbery, and arson, among others.<sup>284</sup> Police statistics averaged over the past five years indicate that every week 13 Dalits are murdered, 5 Dalit homes (or possessions) are burned, 6 Dalits are kidnapped or abducted, and that every day 3 Dalit women are raped, 11 Dalits are assaulted and a crime is committed against a Dalit every eighteen minutes.<sup>285</sup>

As noted above, these statistics represent only a fraction of the violence committed against Dalits. A lack of police cooperation (including denying Dalits entry into police stations), fear of reprisals, systematic non-registration or improper registration of atrocities cases, and additional failures of investigation have all contributed to

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<sup>283</sup> Press Release, National Campaign on Dalit Human Rights, Strengthening Civil Society Initiatives for Upholding Dalit Human Rights (Dec. 12, 2007) (on file with author).

<sup>284</sup> *Id.* Between 2001 and 2002, close to 58,000 cases were registered under the Prevention of Atrocities Act. MINISTRY OF SOCIAL JUSTICE AND EMPOWERMENT, *supra* note 247, at 9-10.

<sup>285</sup> Derived from figures provided in NATIONAL CRIME RECORDS BUREAU, MINISTRY OF HOME AFFAIRS, CRIME IN INDIA (2005) 295, available at <http://ncrb.nic.in/crime2005/cii-2005/CHAP7.pdf>. See also CHALAM, *supra* note 171, at 81 (“[T]he numbers of murders was reported to be 430 in 1979 and they have increased to 506 (only recorded) by 1999. The total offences against Dalits, including rape and arson, have doubled from 13,976 in 1979 to 25,093 in 1999. This shows the criminal intolerance against Dalits in India.”).

underreporting and to the staggering acquittal rates associated with these crimes. Despite these obstacles, fifty-seven atrocities cases are officially registered in police stations across the country every day.<sup>286</sup>

Violence is a principal weapon in sustaining economic and caste-based discrimination against Dalits. Dalits' attempts to enforce their rights, alter village customs, defy the social order, or to demand land, increased wages, or political rights often lead to violence and economic retaliation on the part of those most threatened by changes in the status quo.<sup>287</sup> Dalit communities as a whole are summarily punished for individual transgressions; Dalits are cut off from community land and employment during social boycotts, women bear the brunt of physical attacks, and the letter of the law is rarely enforced.<sup>288</sup>

Over the course of just one week in September 2007, a number of atrocities made the headlines. On September 20, it was reported that a Dalit man, a sixty-year-old landless laborer, was beaten to death by landowners in the eastern state of Bihar over a "land-related dispute."<sup>289</sup> Two days later in the northern state of Uttar Pradesh, a Dalit woman, whose son was accused of eloping with an "upper-caste" girl, was set on fire and killed.<sup>290</sup> The following day it was reported that police had failed to register a First Information Report ("FIR") against suspects in the case of a Dalit boy who was forced to set himself ablaze in the northern state of Punjab.<sup>291</sup> On September 26, newspapers reported that in the central state of Madhya Pradesh, a Dalit laborer was reportedly tied to a tractor

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<sup>286</sup> CRIME IN INDIA, *supra* note 285.

<sup>287</sup> The following headlines are commonplace in Indian newspapers and speak to the retaliatory nature of violence against Dalits: *Dalit Leader Abused for Daring to Sit on a Chair*, INDO-ASIAN NEWS SERVICE, July 10, 2006; *Dalit Lynched while Gathering Grain*, INDIAN EXPRESS, Apr. 25, 2006, <http://www.indianexpress.com/story/3152.html> (last visited Aug. 15, 2008); *Dalit Beaten for Entering Temple*, INDO-ASIAN NEWS SERVICE, Feb. 22, 2006; *UP Dalit Girl Resists Rape, Loses Arm as a Result*, HINDUSTAN TIMES, Feb. 13, 2006; *Dalit Tries to Fetch Water Beaten to Death*, INDO-ASIAN NEWS SERVICE, Feb. 4, 2006.

<sup>288</sup> See also TELTUMBDE, *supra* note 152, at 14-15 (arguing that atrocities occur as a means of maintaining the subjugation and dependency of Dalits towards higher castes, and as a way of stifling any uprising that seeks to alter the inherently feudal relationship).

<sup>289</sup> *Dalit Man Beaten to Death in Bihar*, INDO-ASIAN NEWS SERVICE, Sept. 20, 2007.

<sup>290</sup> *Caste War: Dalit Woman Burnt Alive*, NDTV.COM, Sept. 22, 2007, <http://www.ndtv.com/convergence/ndtv/story.aspx?id=NEWEN20070026983&ch=9/22/2007%2010:35:00%20PM> (last visited Aug. 16, 2008). Earlier in the month it was reported that a 55-year-old Dalit woman was "tortured, stripped and tied to a tree in Ram Duali village of Punjab because her nephew eloped with a girl from the same community." *Dalit Woman Tied Naked to Tree*, TIMES OF INDIA, Sept. 10, 2007, available at <http://timesofindia.indiatimes.com/articleshow/2353945.cms> (last visited Aug. 16, 2008).

<sup>291</sup> Bipin Bhardwaj, *No FIR in Dalit Immolation Case*, THE TRIBUNE, Sept. 23, 2007, available at <http://www.tribuneindia.com/2007/20070924/punjab1.htm#9> (last visited Aug. 16, 2008).

and dragged, sustaining severe injuries, for refusing to plow the fields because he was sick.<sup>292</sup> That same day, it was reported that the suicide of a Dalit Ph.D. student from the Indian Institute of Science in the southern state of Karnataka was alleged to have resulted from caste-based abuse and harassment.<sup>293</sup>

The atrocities outlined above are revealing on many fronts and speak to the degrading, retaliatory, and violent nature of abuse against Dalits; to the impunity enjoyed by perpetrators of such acts; to the geographic spread of such cases; and perhaps most disturbingly, to the fact that these abuses are all too commonplace. A review of cases reported in any other week would likely yield the same results and even then would grossly underestimate the prevalence of such abuses, the majority of which never get reported to the police or make national headlines.<sup>294</sup>

Tellingly, in that same week and in the week that followed, a number of headlines spoke to both the initiatives taken by the government to purportedly protect Dalit rights and to examples of Dalit protest and Dalit activists' engagement with the state machinery in an effort to demand their rights. The headlines, among others, read: "National Human Rights Commission issues notice to police for failure of action,"<sup>295</sup> "Dalit Commission constituted in state,"<sup>296</sup> "Collector for speedy disposal of atrocity cases,"<sup>297</sup> "Cells to deal [with] Dalit issues,"<sup>298</sup>

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<sup>292</sup> *Dalit Labourer Dragged by Tractor over Refusal to Work*, TIMES OF INDIA, Sept. 26, 2007, available at [http://timesofindia.indiatimes.com/India/Dalit\\_labourer\\_dragged\\_by\\_tractor\\_over\\_refusal\\_to\\_work/articleshow/2404265.cms](http://timesofindia.indiatimes.com/India/Dalit_labourer_dragged_by_tractor_over_refusal_to_work/articleshow/2404265.cms) (last visited Aug. 16, 2008).

<sup>293</sup> *Caste Discrimination Cause of Suicide*, THE HINDU, Sept. 26, 2007, available at <http://www.hindu.com/2007/09/26/stories/200709265570500.htm> (last visited Aug. 16, 2008).

<sup>294</sup> BROKEN PEOPLE, *supra* note 21, at 189; see also HIDDEN APARTHEID, *supra* note 5, at 33, 57.

<sup>295</sup> T.S. Ranganna, *Police Fail to Address Our Complaints, Say Dalits*, THE HINDU, Sept. 24, 2007, available at <http://www.hindu.com/2007/09/24/stories/2007092457430500.htm> (last visited Aug. 16, 2008) (describing failure of police to take action against atrocities committed against Dalits).

<sup>296</sup> *Dalit Commission Constituted in State*, TIMES OF INDIA, Sept. 21, 2007, available at [http://timesofindia.indiatimes.com/Cities/Patna/Dalit\\_Commission\\_constituted\\_in\\_state/articleshow/2388448.cms](http://timesofindia.indiatimes.com/Cities/Patna/Dalit_Commission_constituted_in_state/articleshow/2388448.cms) (last visited Aug. 16, 2008) (reporting establishment of first state Maha Dalit commission to cover Dalit sub-castes).

<sup>297</sup> Andhra Pradesh, *Collector for Speedy Disposal of Atrocity Cases*, THE HINDU, Oct. 6, 2007, available at <http://www.hindu.com/2007/10/06/stories/2007100658550300.htm> (last visited Aug. 16, 2008) (describing statements by Collector Ahmad Nadeem that review meetings should be held every quarter in order to hasten progress of cases under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act).

<sup>298</sup> Andhra Pradesh, *Cells to Deal Dalit Issues*, THE HINDU, Oct. 6, 2007, available at <http://www.hindu.com/2007/10/06/stories/2007100657150300.htm> (last visited Aug. 16, 2008) (describing establishment of cells to address problems pertaining to Dalits).

“SC/ST orgns to campaign for reservation in Kerala;”<sup>299</sup> “SC/ST hostel students go on an indefinite fast;”<sup>300</sup> “Protestors block Delhi-Dehradun National highway;”<sup>301</sup> “PIL [Public Interest Litigation] moved in HC [High Court] by Dalit outfit.”<sup>302</sup>

Hidden beneath the headlines are the parallel stories of resilience and retaliation. It has been suggested that the rise in violence against Dalits since the early 1990s is a direct reaction to increasing resistance on the part of Dalits to defy the social order and demand their basic rights, on the streets and in the courtrooms.<sup>303</sup> The retaliation, which in many instances is directed at entire Dalit communities, seeks to send a clear message that Dalits should not dare to step outside their karmically prescribed duties and occupations.<sup>304</sup> The very nature of the violence signals the dehumanization of Dalits as lesser humans and speaks to the use of violence as caste entrenchment.<sup>305</sup> The use of sexual violence against Dalit women signals the perception of Dalit women as “sexually available,”<sup>306</sup> while the use of economic boycotts ensures that a

<sup>299</sup> *SC/ST Orgns to Campaign for Reservation in Kerala*, ZEE NEWS.COM, Oct. 3, 2007, <http://www.zeenews.com/articles.asp?aid=398811&archisec=REG> (last visited Aug. 16, 2008) (reporting on campaign for safeguarding SC/ST reservations and comprehensive land reform).

<sup>300</sup> Tamil Nadu, *SC/ST Hostel Students Go on an Indefinite Fast*, THE HINDU, Sept. 28, 2007, available at <http://www.hindu.com/2007/09/28/stories/2007092852680300.htm> (last visited Aug. 16, 2008) (describing fasting by SC/ST hostel students to protest “infrastructure weaknesses” in hostel).

<sup>301</sup> *Fake Encounter—Protestors Block Delhi-Dehradun NH*, HINDUSTAN TIMES, Sept. 19, 2007, available at <http://www.hindustantimes.com/StoryPage/StoryPage.aspx?id=79ed951d-a714-4a74-85bb-be7bc61af10c&&Headline=Protestors+block+Delhi-Dehradun+National+highway> (last visited Aug. 16, 2008) (describing protest by Dalits of police shooting of Dalit youth in “fake encounter”).

<sup>302</sup> *PIL Moved in HC by Dalit Outfit*, CHENNAIONLINE.COM, Sept. 21, 2007 (reporting challenge to court order denying permission to Dalit organization to protest denial of Dalit entry to Kandampatti Draupadi Amman Temple).

<sup>303</sup> Press Release, Human Rights Watch, Violence Against “Untouchables” Growing, Says Report (Apr. 1, 1999) available at <http://hrw.org/english/docs/1999/04/14/india879.htm>.

<sup>304</sup> When Dalits from the Dalit colony of Veludavur village in Villapuram district, Tamil Nadu, demanded their right to participate in a government auction of common properties in Veludavur, members of seven neighboring “upper-caste” Hindu villages attacked their colony. They destroyed four hundred huts, attacked women, children, and the elderly, and displaced seven hundred Dalit families. BROKEN PEOPLE, *supra* note 21, at 112-13.

<sup>305</sup> Take for example the case of a Dalit man from the Dholapur district of Rajasthan, a western Indian state. For the “crime” of refusing to sell *bidis* (hand-rolled cigarettes) on credit to the nephew of an “upper-caste” village chief, the “upper-caste” family forcibly pierced his nostril, drew a string through his nose, and paraded him around the village, eventually tying him to a cattle post. *Id.* at 24.

<sup>306</sup> When a sixteen-year-old Dalit rape survivor from Sahalwada village in Madhya Pradesh, refused to withdraw the complaint she had filed against her attacker, he retaliated by pouring kerosene on her and setting her on fire. *Dalit Girl Burnt to Death by Man Accused of Rape*, ZEE NEWS.COM, Nov. 23, 2006, <http://www.zeenews.com/articles.asp?aid=337515&archisec=REG> (last visited

relationship of economic dependency between Dalits and their “upper-caste” employers remains intact.<sup>307</sup>

In the overwhelming majority of cases, the sheer brute force with which caste rules are enforced, and against entire Dalit communities, acts as a form of collective punishment. As noted above, punishment from the law enforcement machinery against perpetrators of such acts is comparatively non-existent. The contradiction is not ironic; it is the logical outcome of that which justifies the violence itself. The observance of “untouchability” and the punishment of those who dare step out of their ranking as “untouchables” are acts “of religious merit, the non-observance of which is a sin.”<sup>308</sup> If the act of discriminating and punishing is seen as just, and laden with economic incentive, then how can just punishment be punished? Seen in this light, the impunity perpetrated by the police—who are products of the same hierarchical system—is not impunity from the vantage point of caste, but a form of justice in observance of a wholly different set of laws.

### E. COLLECTIVE UNCONSCIOUSNESS

Atrocities of the nature outlined above do not find a home in the collective conscience of the nation. Though the state may respond with the pro forma setting up of commissions to investigate particular atrocities, or with administrative agencies mandated to address the lack of justice to Dalit victims, the outcry from the general public is deafeningly silent. This of course begs the question, “Why?” Some may posit that such cases, by the sheer force of their volume turn outrage into apathy, compassion into fatigue, and normalize that which should be

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Aug. 16, 2008). When Dalit agrarian labor activist Bant Singh, whose daughter was gang-raped in 2002, defied landlords’ threats and local “upper-caste” leaders in seeking prosecution against those who gang-raped his daughter, the landlords retaliated by violently attacking him, beating him so badly that both his arms and one of his legs had to be amputated; the remaining leg was permanently disabled. Amit Sengupta, *Bant Singh Can Still Sing*, TEHELKA.COM, Feb. 4, 2006, [http://www.tehelka.com/story\\_main16.asp?filename=Cr020406do\\_bigha.asp](http://www.tehelka.com/story_main16.asp?filename=Cr020406do_bigha.asp) (last visited Aug. 16, 2008).

<sup>307</sup> In June 2006, for instance, when a Dalit argued with an “upper-caste” farmer in Kothapally village in the southern state of Andhra Pradesh, the “upper-caste” villagers attacked eighty Dalit families in retaliation. When the same Dalit man then went to the police to report the incident, a social boycott was imposed on all of the Dalits from Kothapally; they were thrown out of their village and denied any opportunity to earn their livelihood. Tejeshwi Pratima, *Dalits Thrown Out of Their Village For Raising Their Voice*, INDIANCHRISTIANNEWS.COM, June 29, 2006, [http://indianchristians.in/news/index2.php?option=com\\_content&task=view&id=449&pop=1&page=0&Itemid=44](http://indianchristians.in/news/index2.php?option=com_content&task=view&id=449&pop=1&page=0&Itemid=44) (last visited Aug. 16, 2008).

<sup>308</sup> AMBEDKAR THOUGHT, *supra* note 19, at 31.

anything but. Others may live in willful blindness and fail to connect the dots between acts of violence to draw the clear line that such violence helps preserve: the line between the “pure” and the “polluted.” Some may offer counter-narratives that pigeonhole such incidents into rural pockets, blame them on a few bad apples, or worse, blame the victims for the violence they surely invited upon themselves. These and other narratives help reconcile such tragedies more comfortably with one’s idea of what India represents: a secular liberal democracy (and the world’s largest at that), a multicultural tapestry of cultures and religions, and a booming economic powerhouse.

The Idea of India is, of course, in the eye of the beholder. As has been said about the caste system itself, India is “Superman’s heaven and the common man’s damnation.”<sup>309</sup> Some have begun to tell the Tale of Two Indias, wherein inequalities are further polarized by globalization’s steady march, and where Indians are anointed into the Billionaire’s Club,<sup>310</sup> while farmers commit suicide to escape their vexing poverty.<sup>311</sup> But the equation is not so simply divided between the “Haves” and “Have-Nots.” For caste has turned India into many nations and has kept India from realizing true nationhood. If nationhood is defined as the success of securing citizens’ allegiance to the nation above all else, then surely India has failed in its nation-building project. For Indians, the nation comes a distant second to caste, religion, and region.

Then there are those who, even while acknowledging the Two India paradigm, argue that reservations will only serve to “enshrine caste differences” and “prevent India from reaching its full potential.”<sup>312</sup> For such critics, the vision of the future India can only be realized through the creation of educational opportunities for all, regardless of caste, and through equality of opportunity in a “merit-based system.” Reservations, in turn, are emblematic of a “divide-and-rule” approach that has the “potential to break up India.”<sup>313</sup>

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<sup>309</sup> *Id.* at 21.

<sup>310</sup> Alex Perry, *A Tale of Two Indias*, TIME, Nov 29, 2004, available at <http://www.time.com/time/asia/covers/501041206/story.html> (last visited Aug. 16, 2008).

<sup>311</sup> Randeep Ramesh, *A Tale of Two Indias*, THE GUARDIAN, Apr. 5, 2006, available at <http://www.guardian.co.uk/india/story/0,,1746948,00.html> (last visited Aug. 16, 2008); see also Colin Hallinan, *India: A Tale of Two Worlds*, FOREIGN POLICY IN FOCUS, Apr. 10, 2006, <http://www.fpif.org/fpiftxt/3186> (last visited Aug. 16, 2008).

<sup>312</sup> Surendra K. Kaushik, *Do Not Reinforce Two Indias*, BUSINESS WEEK, Nov. 2, 2006, available at [http://www.businessweek.com/globalbiz/content/nov2006/gb20061102\\_285971.htm](http://www.businessweek.com/globalbiz/content/nov2006/gb20061102_285971.htm) (last visited Aug. 16, 2008).

<sup>313</sup> *Id.*



Ironically, those at the bottom of the caste system would likely make the very same argument with one important difference: it is not reservations that divide and rule or get in the way of equality of opportunity; it is the caste system itself. Set against the backdrop of the “untouchability” mindset described above, and the abuses and inequalities that it foments, reservations *create* the possibility of a meritocracy and of equality of opportunity, albeit imperfectly, rather than undermine it. The space into which reservations enter, the space of caste, is antithetical to “merit” because under the caste system respect and ability (or lack thereof) is determined not by natural talent, but by the karmic *non*-accident of one’s birth into a particular caste.

As the reservations debate careens into the corporate board room, many now argue that India will lose its competitive edge and sacrifice efficiency if the private sector comes under the purview of reservations and opens the door to “non-meritorious” candidates.<sup>314</sup> Caste-based affirmative action in India, a constitutional right, is now portrayed as antithetical to the meritocracy that India purportedly represents. An overhaul of the terms of the reservations debate is long overdue.

#### **F. AFFIRMATIVELY EXCLUDED: SITUATING THE RESERVATIONS “DEBATE”**

Like many of the protective measures described in this Article, the reservations policy has not proved in and of itself to be a sufficient remedy for caste discrimination against Dalits in India. Though reservations have helped support a Dalit political awakening, they are limited in their reach. The reservations policy benefits only a minute percentage of Dalits in the country—high illiteracy and drop out rates among Dalits mean that very few are able to avail themselves of constitutional rights in public sector employment and education. A number of key sectors also continue to remain outside the purview of the reservation policy; and caste-based discrimination continues to be practiced in the sectors where reservations are secured, leading to under-enforcement.

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<sup>314</sup> Rahul Bajaj, *Reservations: Devoid of Merit*, in RESERVATION IN PRIVATE SECTOR, *supra* note 158, at 248. However, Thorat debunks the “efficiency” argument as empirically unsubstantiated, arguing further that a corporation’s productive efficiency could only be compromised if job qualifications were relaxed, which is not the case in the Indian public sector. Sukhadeo Thorat, *Reservation and Efficiency: Myth and Reality*, in RESERVATION IN PRIVATE SECTOR, *supra* note 158, at 183, 187.

Problems of enforcement and reach are, however, effectively sidelined in the anti-reservations debate. Reservations are now at the center of a storm of critique that projects reservations as undermining “meritocratic ideals” and reinforcing caste-based divisions. There has also been widespread public opposition to reservations for Dalits in local government bodies (often leading to violence) and in highly coveted government jobs and seats in higher education because of the economic security these jobs are perceived to offer.<sup>315</sup> While reservations to state legislatures and the lower house of parliament have ensured greater Dalit representation in political bodies, these reservations have not necessarily translated to greater protection of Dalit rights. Finally, the already limited reach of reservations is increasingly undermined by economic liberalization and its attendant outsourcing of public sector jobs to the private sector where reservations, for the time being at least, cannot reach.

### 1. THE (LIMITED) REACH OF RESERVATIONS

It is not incorrect to say that for some things are getting better. Dalits have achieved positions of economic and political prominence unimaginable prior to independence. Thanks in large part to greater opportunities created by reservations, Dalits are now engineers and surgeons and feature prominently on the political landscape.<sup>316</sup> The expanding power base of Dalit and “low-caste” political parties, the election of Dalit and “low-caste” chief ministers to state governments, and even the appointment of a Dalit as president of India in July 1997 all signal the increasing political prominence of Dalits, but cumulatively have yet to yield any significant benefit for the majority of Dalits. Indeed, one could argue, as sociologist Jogdand does, that the reservations have really only provided “individual social mobility at the expense of group stagnation,” in that gains at the singular level are only loosely tending towards the uplifting of Dalits as a whole.<sup>317</sup>

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<sup>315</sup> Sanjoy Majumder, *Indian Court Upholds Caste Quotas*, BBC NEWS, Oct. 19, 2006, [http://news.bbc.co.uk/2/hi/south\\_asia/6067504.stm](http://news.bbc.co.uk/2/hi/south_asia/6067504.stm) (last visited Aug. 16, 2008).

<sup>316</sup> See Chandrabhan Prasad, *Of Outcaste and Lower Caste*, ATROCITY NEWS, <http://atrocitynews.wordpress.com/2007/01/15/an-article-from-pioneer/> (last visited Aug. 16, 2008).

<sup>317</sup> See P.G. Jogdand, *Reservation Policy and the Empowerment of Dalits*, in *DALITS IN MODERN INDIA: VISION AND VALUES*, *supra* note 24, at 315, 331-32.

The examples of a Dalit chief minister,<sup>318</sup> a former Dalit president,<sup>319</sup> and the current Dalit Chief Justice of the Supreme Court of India<sup>320</sup> are called upon to symbolize far more than they represent—evidence of real equality for Dalits in India today. Such figures are on the fingertips of those who critique accounts of widespread untouchability, exploitation, and violence against Dalits as “unbalanced.” How the identification of a handful of examples balances the treatment of over 167 million people as sub-human is left unquestioned as the curious mathematical feat that it represents. As is often the case in other countries, the existence of the exception is enough to swallow the rule. Rather than strengthening the argument that such *few* examples confirm the sluggish pace of change, they are offered as proof positive of the success of legal reform.

According to a 1996 estimate, only 1.1 million out of the then population of 138 million Dalits were employed in sectors that fell under the domain of reservations, a paltry 0.8 percent.<sup>321</sup> With the privatization of public sector industries since the advent of economic reforms in India in the early 1990s, that percentage has likely declined.<sup>322</sup> For the minute percentage that has been able to escape the confines of poverty, reservations represent the only viable path to economic liberation and the embodiment of hope for many Dalits that a slice of the economic pie is “reserved” for them. Reservations are an entry point, an opening of the door to institutions that were historically sealed shut by the caste system.

Though limited in their reach and their effect, research suggests that reservations for Dalits in political representation, public employment, and education have benefited those whom the policies were able to reach.<sup>323</sup> Supporters of reservations argue that without affirmative

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<sup>318</sup> See Profile of Ms. Mayawati, Chief Minister of Uttar Pradesh (Oct. 6, 2007), [http://www.upgov.nic.in/upinfo/Ms\\_%20Mayawati%20\\_English\\_%20Biodata.pdf](http://www.upgov.nic.in/upinfo/Ms_%20Mayawati%20_English_%20Biodata.pdf).

<sup>319</sup> Mr. K.R. Narayanan held the position of the President of India from 1997-2002, and was India’s first and only Dalit President. He passed away in November 2005. See Profile of Mr. K.R. Narayanan, (October 6, 2007), available at <http://presidentofindia.nic.in/formerpresidents.html> (last visited Aug. 16, 2008).

<sup>320</sup> See Profile of Justice K.G. Balakrishnan, Chief Justice of India (Oct. 6, 2007), <http://www.supremecourtindia.nic.in/judges/bio/sitting/bkgopinathan.htm> (last visited Aug. 16, 2008). Balakrishnan is India’s First Dalit Chief Justice. *Balakrishnan is India’s First Dalit Chief Justice*, EXPRESS INDIA, Jan. 14, 2007, [www.expressindia.com/fullstory.php?newsid=79647](http://www.expressindia.com/fullstory.php?newsid=79647) (last visited Aug. 16, 2008).

<sup>321</sup> Teltumbde, *supra* note 152, at 3.

<sup>322</sup> Jogdand, *supra* note 317, at 319, 328.

<sup>323</sup> See, e.g., John M. Alexander, *Inequality, Poverty and Affirmative Action: Contemporary Trends in India* 30-31 (Paper Prepared for the WIDER Conference: *Inequality, Poverty and Human Well-being*, United Nations University, Helsinki, Finland) (May 2003) available at

action Dalits would not be able to penetrate the caste ceiling in education and employment that results from entrenched anti-Dalit biases.<sup>324</sup> They add that there are no objective standards of merit applicable to all groups within society, given that dominant groups shape traditions within which they make judgments of merit.<sup>325</sup> Further, they support reservations on the basis of national diversity, arguing that different views should be represented in national institutions to promote diversity, which ultimately benefits the social and the political life of the country.<sup>326</sup>

Supporters also point to evidence that reservation policies have been successful in some areas. Reservations in local government bodies, such as village councils or *panchayats*, for example, have enhanced the delivery of local public goods to disadvantaged groups.<sup>327</sup> Similarly, reservations in higher education have afforded greater opportunities to Dalit students.<sup>328</sup> While the reservation policies tend to benefit the so-called “creamy layer” of the Dalit population, the average socio-

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<http://62.237.131.23/conference/conference-2003-2/conference-2003-2-programme.htm> (last visited Aug. 16, 2008). Alexander notes the evident but limited steps toward equality for scheduled castes and tribes due to reservations in political representation, public employment and education, and argues that the effectiveness of affirmative action is undermined by inattention to variations among different sub-castes of “untouchables” and because of severe disparities in lower castes’ relative disadvantage across states and between urban and rural areas. As a result, reservations and similar measures have for the most part benefited only the relatively better off among lower castes. *Id.*

<sup>324</sup> See D. Parthasarathy, *Reservations: Towards a Larger Perspective*, in RESERVATION IN PRIVATE SECTOR, *supra* note 158, at 193-96.

<sup>325</sup> Surinder S. Jodhka & Katherine Newman, *In the Name of Globalisation: Meritocracy, Productivity and the Hidden Language of Caste*, in LABOR MARKET DISCRIMINATION AND URBAN SECTOR 19 (Indian Institute of Dalit Studies & Princeton University eds., 2007) (on file with author) [hereinafter LABOR MARKET DISCRIMINATION]. The authors use interviews with private sector hiring managers to unpack the apparently neutral concept of “merit,” revealing a common recruiter tendency to rely on family background, which is at least implicitly a proxy for caste, as an assurance of an individual’s reliability and character. The authors also show the prevalence of using regional stereotypes, often derogatory, as gauges of candidates’ competence. *Id.* at 27. See also Anand Teltumbde, *Reservation in the Private Sector: An Overview of the Proposition*, in RESERVATION IN PRIVATE SECTOR, *supra* note 158, at 275-77, 279-80.

<sup>326</sup> Sridharan, *supra* note 179, at 117.

<sup>327</sup> In *Impact of Reservation in Panchayati Raj: Evidence from a Nationwide Randomized Experiment*, Chattopadhyay and Duflo summarize the findings of their research in districts in West Bengal and Rajasthan. According to the authors, “[l]ocal leaders seem to have some effective control over decisions, even when they are women or SCs [Scheduled Castes].” Raghavendra Chattopadhyay & Esther Duflo, *Impact of Reservation in Panchayati Raj: Evidence from a Nationwide Randomised Experiment*, ECON. & POL. WKLY., Jan.-Apr. 2004, at 979.

<sup>328</sup> Thomas E. Weisskopf, *Impact of Reservation in Admissions to Higher Education in India*, ECON. & POL. WKLY., July-Sept. 2004, at 4339. See also CHALAM, *supra* note 171, at 107, 142, 162 (arguing further that educational reservations in south Indian states have contributed to their high scores on the Human Development Index, despite their lower economic status).

economic status of Dalit students is still significantly lower than that of other students. As a result of reservations, these students are able to secure better career opportunities than they would have in the absence of reservation policies.

## 2. RESERVATIONS UNMASKED: UNDER-ENFORCEMENT OF RESERVATION POLICIES

The few who have been able to avail themselves of the benefit of reservations must still wage a hard-fought battle to overcome the stigma of their “untouchable” status. Caste-based occupational distribution is reinforced in reserved government employment.<sup>329</sup> The National Human Rights Commission reports that Dalits occupy 65.57 percent of the total government posts for *safai karmacharis* (sweepers) and only 16.7 percent of non-sweeper posts.<sup>330</sup> Dalits are also discriminated against when being considered for promotions.<sup>331</sup> Reservations in higher education continue to be met with a great deal of resistance leading to under-enforcement.<sup>332</sup> In the country’s 256 universities and approximately 11,000 colleges funded by the University Grants Commission (an apex body of the Government of India), Dalits and tribal community members comprise only 2 percent of the teaching positions—about 75 thousand teaching positions reserved for these communities remain vacant.<sup>333</sup>

Dalit students also continue to face discrimination in higher education and are limited in their employment opportunities upon graduation. In September 2006, amidst anti-reservation protests, allegations of caste-based discrimination and intimidation surfaced at the All-India Institute of Medical Sciences (“AIIMS”), India’s premier medical institute. In written complaints submitted to the director of the Institute, two first-year Dalit students complained of casteist remarks and various forms of harassment and intimidation from senior “upper-caste”

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<sup>329</sup> See NHRC REPORT, *supra* note 110, at 137.

<sup>330</sup> *Id.*

<sup>331</sup> Recently, the government moved to create quotas for promotions for scheduled castes and other backward castes. While the Supreme Court upheld the move, it required that governmental authorities prove that these groups were poorly represented in government positions, that quotas be capped at 50 percent, and that prosperous lower-caste employees be excluded from the plan. Majumder, *supra* note 315.

<sup>332</sup> NHRC REPORT, *supra* note 110, at 139.

<sup>333</sup> *Id.*

students.<sup>334</sup> The complaints were accompanied by a memorandum signed by forty students recounting similar incidents of harassment and intimidation.<sup>335</sup>

Graduating from an eminent institution also does not guarantee suitable employment for Dalits. Despite earning a Masters degree in economics from Gujarat University, the best job twenty-four-year-old Arvind Vaghela could get was as a road sweeper.<sup>336</sup> Vaghela's story underscored the experience of many other university-educated Dalits. In his city of Ahmedabad; "[n]early 100 of its council sanitation workers have degrees in subjects ranging from computing to law, but cannot get better jobs because they are Dalits."<sup>337</sup> Such outcomes are the result of intentional discrimination in hiring decisions, and the lack of "social and cultural capital" enjoyed by Dalits.<sup>338</sup> As noted in a recent study by economist Deshpande and sociologist Newman, "social and cultural capital (the complex and overlapping categories of caste, family background, network and contacts) play a huge role in urban, formal sector labour markets."<sup>339</sup> As a result, Dalits' historic exclusion and disadvantage continues to undermine their advancement even where they are just as qualified and competent as their "upper-caste" peers.

Where political reservations are concerned, strict party politics has, according to one commentator, resulted in "accommodating rather than forceful, articulate and independent" Dalit elected representatives.<sup>340</sup> More fundamentally, violence and intimidation are used to prevent Dalits from standing for election in local government bodies. In October 2005, a Dalit woman, Prabhati Devi, was burned alive for contesting a *panchayat* (village council) election against an "upper-caste" candidate in Mirzapur district in Uttar Pradesh in defiance of a local politician's

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<sup>334</sup> Abantika Ghosh, *Dalit Students "Abused" at AIIMS*, THE TIMES OF INDIA, Sept. 12, 2006.

<sup>335</sup> *Id.*

<sup>336</sup> Randeep Ramesh, *Untouchables in New Battle for Jobs*, THE OBSERVER (UK), Oct. 3, 2004, at 26.

<sup>337</sup> *Id.*

<sup>338</sup> See Sukhdeo Thorat & Paul Attewell, *The Legacy of Social Exclusion: A Correspondence Study of Job Discrimination in India*, in LABOR MARKET DISCRIMINATION, *supra* note 325, at 9. The authors sent targeted applications to numerous graduate entry-level positions in the private sector, and found that among equally qualified candidates, a person with a high-caste Hindu name had a greater chance of being called for interview than one with a Dalit or a Muslim name. Furthermore, they found that having a high-caste Hindu name could help under-qualified candidates and even outweighed the chances of overqualified Dalit candidates.

<sup>339</sup> Ashwini Deshpande & Katherine Newman, *Where the Path Leads: The Role of Caste in Post-University Employment Expectations*, in LABOR MARKET DISCRIMINATION, *supra* note 325, at 40, 59.

<sup>340</sup> Jogdand, *supra* note 317, at 330.

warning not to contest.<sup>341</sup> Those Dalits who are in positions of public office are also often unable to properly discharge their public functions due to intimidation, threats, and physical violence at the hands of “upper-caste” community members.<sup>342</sup>

Additionally, Dalits who convert to Christianity or Islam lose their “scheduled caste” status and the few benefits it affords. While the Constitution of India grants certain constitutional rights to Hindu, Buddhist, and Sikh Dalits, the same benefits do not extend to Dalits who convert to Christianity or Islam, even though they are ultimately unable to escape their discriminatory treatment as “untouchables.” At this writing, a petition challenging the constitutional validity of the 1950 Presidential Order limiting reservations to Hindu, Buddhist, and Sikh scheduled castes was pending before the Supreme Court.<sup>343</sup>

Despite the obvious problems associated with the effective implementation of reservations, equality on paper has helped usher in a new conservative discourse. Fueled by proposals to introduce reservations in the private sector and expand the scope of reservations in higher education, such a discourse skips the step of situating reservations in the context of the social and unequal reality that Dalits face, and moves straight to critiquing the continued “privileging” of particular groups on the basis of their caste as a mechanism that reinforces difference.<sup>344</sup>

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<sup>341</sup> *Dalit Woman Burnt Alive for Contesting Panchayat Elections*, HINDUSTAN TIMES, Oct. 23, 2005. In June 1997, Dalit leaders elected to the Melavalavu *panchayat* in Tamil Nadu were murdered by members of the higher-caste Thevar community, signaling that the ceding of power would not be tolerated by those displaced from their positions on the council. BROKEN PEOPLE, *supra* note 21, at 90. Thevars also threatened Dalits with economic sanctions should any of them file for the position of *panchayat* president, a sanction that would effectively leave Dalits without employment or access to economic or social services in villages in that area. *Id.* at 91.

<sup>342</sup> Asian Human Rights Commission, *Dalit Village Head Faces Constant Intimidation Due to Caste Discrimination in Uttar Pradesh*, Nov. 22, 2006, <http://www.ahrchk.net/ua/mainfile.php/2006/2086> (last visited Aug. 16, 2008).

<sup>343</sup> *Notice to Centre on Plea for Quota for Dalit Muslims*, THE HINDU, Jan. 27, 2008, available at <http://www.hindu.com/2008/01/27/stories/2008012753950900.htm> (last visited Aug. 16, 2008). The state government of Tamil Nadu passed a bill in 2007 to provide a seven percent quota for Christian and Muslim Dalits, to be carved out of the existing 30 percent reservations for OBCs. Dominic Emmanuel, *Dalit Christians too Need Reservations*, THE TRIBUNE, Dec. 25, 2007, available at <http://www.tribuneindia.com/2007/20071225/edit.htm> (last visited Aug. 16, 2008).

<sup>344</sup> See also SATISH DESHPANDE, *Caste Inequalities in India Today*, in CONTEMPORARY INDIA: A SOCIOLOGICAL VIEW 101 (2003) (arguing that proposals to expand affirmative action policies in India today elicit discussion of the possible consequences of their implementation, instead of first asking: “Is caste discrimination still practiced in contemporary India? Does it continue to breed inequality? What is the nature and extent of such inequality today? How has it been changing since independence?”).

## 3. RESERVATIONS IN THE PRIVATE SECTOR

Economic liberalization in India—with its underlying philosophy of increased reliance on market forces, a dismantling of controls, and a drastically reduced role of the state—has resulted in a shrinking of the public sector. The reservations model is therefore affecting—and able to assist—fewer people, inasmuch as government-related jobs are being drastically reduced.<sup>345</sup> Though poorly monitored and enforced, there is, as noted above, evidence to support the notion that Dalits have benefited from the quota system.<sup>346</sup> Substantial divestment in the public sector, including the proliferation of joint ventures formed between public sector undertakings and private companies, both domestic and foreign, serves to severely undercut the reach of the reservations policy.<sup>347</sup> According to Dalit theorist Dr. Anand Teltumbde,

even if such entities technically remains a PSU [Public Sector Undertaking] and follows the reservation policy sincerely, it would still have little or no scope to absorb the dalits in its staff. Whatever may be the strategic considerations, the fall out of this process practically amounted to shutting the doors of these new age companies to the dalits and to potential neutralization of the reservation policy.<sup>348</sup>

Reservations in educational institutions and scholarships for Dalit students represent a critical component in Dalit socio-economic development. Economic reforms have, however, led to a freezing in grants to many institutions.<sup>349</sup> The privatization of social services is turning education and health services into commodities only affordable to the rich.<sup>350</sup> A blind faith adherence to privatization as the lone path that India must take, combined with the pretext that reservations

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<sup>345</sup> Jogdand notes the loss of over 350,000 public sector employment opportunities between 1992–99 as a result of the downsizing of the state. Jogdand, *supra* note 317, at 328.

<sup>346</sup> See Teltumbde, *supra* note 152, at 13 (arguing that reservations in public sector employment have had positive effects, albeit limited ones, on the situation of Dalits, providing a degree of bureaucratic influence to some, and providing hope of advancement to many).

<sup>347</sup> *Id.* at 13.

<sup>348</sup> *Id.*

<sup>349</sup> *Id.* at 12.

<sup>350</sup> Narula & Macwan, *supra* note 156; Teltumbde, *supra* note 152, at 12 (noting that spending on education has decreased while foreign universities increasingly partner with corporations to offer pricy outpost courses. Prestigious institutions have had to raise their fees while the new even more competitive job market is made harder to access for people who cannot afford to attend those schools. Children in village schools especially lose out from an early age because they lack the ability to speak English, which business has turned into a hot commodity.). See also Thorat & Macwan, *supra* note 158, at 260.



undermine India's ability to compete in the global market,<sup>351</sup> is seamlessly "superimposed on . . . traditional caste prejudice"<sup>352</sup> to all but seal reservations' ominous fate. In response, sectors within civil society and some government actors and agencies have supported a proposed extension of reservations to the private sector.<sup>353</sup>

The National Commission for Scheduled Castes and Scheduled Tribes has stated that the private sector, which continues to enjoy government patronage—through concessional land, financing, and excise and sales tax relief—should also be brought under the purview of the reservation policy.<sup>354</sup> Indian economist, Sukhadeo Thorat, has argued in favor of extending reservations to the private sector to redress market discrimination against Dalits. According to Thorat, caste-based market discrimination not only exacerbates inequality but is also "retrogressive for economic growth."<sup>355</sup> Thorat and Newman argue that discrimination here should be understood as the result of social exclusion of Dalits.<sup>356</sup> The restrictions placed by caste on Dalits' ability to participate in the market, and the fact that the benefits of an exploitative market outweigh the intangible costs to Dalits, mean that we cannot simply rely on a competitive market to self-correct discrimination.<sup>357</sup> Strong opposition to the private sector proposal remains, however, from both private employers and certain political parties. Private employers have criticized the government for failing to provide Dalits adequate opportunities in education and for imposing upon the private sector the obligation to employ individuals they deem unqualified.<sup>358</sup>

As detailed in Part II.C., India has indeed failed to provide Dalits adequate opportunities in education. The notion that more must be done to increase educational opportunities and ensure non-discrimination in

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<sup>351</sup> Thomas E. Weisskopf, *Globalisation and Affirmative Action*, in RESERVATION IN PRIVATE SECTOR, *supra* note 158, at 266.

<sup>352</sup> Teltumbde, *supra* note 152, at 14.

<sup>353</sup> See BHOPAL CONFERENCE: CHARTING A NEW COURSE FOR DALITS FOR THE 21ST CENTURY, JAN. 12-13, 2002, THE BHOPAL DECLARATION, <http://www.indiatogether.org/dalit/events/bhopal.htm> (last visited Aug. 16, 2008). Article 19 of the "Bhopal Declaration" calls for mandatory reservations in the private sector.

<sup>354</sup> See BROKEN PEOPLE, *supra* note 21, at 4.

<sup>355</sup> Sukhadeo Thorat, *On Reservation Policy for Private Sector*, ECON. & POL. WKLY, Apr.-July 2004, at 2560.

<sup>356</sup> Sukhadeo Thorat & Katherine S. Newman, *Caste and Economic Discrimination: Causes, Consequences, and Remedies*, in LABOR MARKET DISCRIMINATION, *supra* note 325, at 2.

<sup>357</sup> *Id.* at 4.

<sup>358</sup> Priyanka Bhardwaj, *India Debates Private Sector Quotas*, ASIA TIMES ONLINE, Feb. 7, 2006, [http://www.atimes.com/atimes/South\\_Asia/HB07Df01.html](http://www.atimes.com/atimes/South_Asia/HB07Df01.html) (last visited Aug. 16, 2008).

the classroom for Dalits and other marginalized communities can hardly be refuted.<sup>359</sup> But the notion that non-meritorious individuals are now being hoisted upon the private sector must be unpackaged for the casteist thinking that it represents.

#### 4. CASTE AS ANTI-MERIT AND ANTI-POWER SHARING

Opposition to reservations often centers around the “meritocratic ideal” that “positions in society should be based on the abilities and achievements of the individual rather than on characteristics such as family background, race, religion or wealth.”<sup>360</sup> Critics add that reservation policies are inherently divisive and serve only to solidify caste divisions.<sup>361</sup> Instead of lowering the caste barriers, they argue, reservation policies accentuate caste identity and lead to greater social stratification.<sup>362</sup> Opponents have also called for greater reliance on economic indicators of “backwardness,” rather than on caste,<sup>363</sup> and have criticized the reservation policies as strengthening “anti-Scheduled Caste attitudes.”<sup>364</sup>

The idea that reservations are a *threat* to meritocracy is a farce. The road that begins with Dalit students being made to clean toilets at schools and sit at the back of classrooms, and ends with Dalit students facing ongoing harassment from their peers in institutes of higher education, while examiners stroke students’ backs to check whether they are wearing the sacred Brahmin thread, is hardly one that is paved with meritocratic ideals.

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<sup>359</sup> As it relates to discrimination in the private sector, prior inequality in educational provision has been cited as a significant cause of wage disparities. See S. Madheswaran & Paul Attewell, *Caste Discrimination in the Indian Labour Market: Evidence from the National Sample Survey*, in LABOR MARKET DISCRIMINATION, *supra* note 325.

<sup>360</sup> Sheela Rai, *Social and Conceptual Background to the Policy of Reservation*, ECON. AND POL. WKLY, Oct.-Dec., 2002, at 4309, 4315.

<sup>361</sup> Sridharan, *supra* note 179, at 99, 117.

<sup>362</sup> Thomas Boston & Usha Nair-Reichert, *Affirmative Action: Perspectives from the United States, India and Brazil*, 27 W. J. BLACK STUD. 3, 11 (2003). In this respect, anti-reservation arguments are not unlike arguments against affirmative action programs in the United States that center on the need to promote “colorblind” societies and which claim that positive discrimination reinforces difference and undermines the goal of striving toward a society where such differences are not accentuated. Scott Cummings, *Affirmative Action and the Rhetoric of Individual Rights: Reclaiming Liberalism as a “Color-Conscious” Theory*, 13 HARV. BLACKLETTER L.J. 183, 184, 191 (1997) (providing overview of liberal theoretical arguments against race-based state policies). See also Crenshaw, *supra* note 47.

<sup>363</sup> Sridharan, *supra* note 179, at 117.

<sup>364</sup> *Id.* (citing RAVINDER SINGH BAINS, RESERVATION POLICY AND ANTI RESERVATIONISTS 93 (1994)).

The caste system is by its very nature antithetical to merit inasmuch as it assigns value on the basis of birth and not individual aptitude.<sup>365</sup> Similarly, hirings and promotions are dictated not just by the academic credentials of particular candidates, but by the ability of those individuals to effectively deploy caste-based networks that, as in the public administration, corrupt the ability of the private sector system to operate neutrally.

Moreover, if market efficiency is furthered by the freedom of individuals to develop their capacities to the point of choosing their occupations, then that very principle “is violated in the caste system in so far as it involves an attempt to appoint tasks to individuals in advance, selected not on the basis of trained original capacities, but on that of the social status of [his or her] parents.”<sup>366</sup> And what could be more inefficient than the denial of opportunity to individuals, in the millions, who are told from birth to death that they will never amount to more than that which has been previously ordained for them? As an economic organization, “caste is therefore a harmful institution, in as much as it involves the subordination of man’s natural powers and inclinations to the exigencies of social rules.”<sup>367</sup> By denying so many the freedom to choose their profession, caste also becomes “a direct cause of much of the unemployment we see in the country.”<sup>368</sup>

Reservations or quotas are critiqued for their inflexibility, but the rigidity of the caste system, against which more fluid options find no traction, does not get scrutinized. Timeframes for bringing reservations to an end are proposed as though giving legal remedies a deadline will automatically lead to discrimination’s time-bound demise.

Reservations as a form of power sharing in India take on new significance given that the caste system is organized around the idea of power consolidation and is, in its division of labor according to caste, antithetical to the very notion of a meritocracy. The absence of choice in employment is also quite stark in the Indian context wherein one’s caste, or more specifically one’s membership in an “untouchable” caste, remains determinative of one’s occupation. Dalits throughout India are forced into an involuntary monopoly over occupations considered too filthy or polluting for others, occupations over which they ironically

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<sup>365</sup> Gail Omvedt, *Mythologies of Merit*, in RESERVATION IN PRIVATE SECTOR, *supra* note 158, at 203, 206.

<sup>366</sup> AMBEDKAR THOUGHT, *supra* note 19, at 26.

<sup>367</sup> *Id.* at 55.

<sup>368</sup> *Id.*

exert 100 percent reservations. *Inequality* of opportunity is the social norm and one that the state has stepped in to legislate against in order to secure equality of respect and concern for its most marginalized inhabitants. Left to its own devices, Indian society would no doubt swallow Dalits whole. Until now at least, the Indian Supreme Court has agreed.

##### 5. INDIAN SUPREME COURT JURISPRUDENCE ON RESERVATIONS

According to comparative constitutional law scholar Jacobsohn, each nation's constitution contains a vision of the kind of polity it seeks to preserve and to become, which combines distinctive aspects of the country's political culture with features of a universal culture of constitutionalism.<sup>369</sup> Jacobsohn refers to the gap between the ideal espoused in a constitution and the societal status quo as the "disharmonic jurisprudential context," within which courts have incentives and opportunities to learn from the constitutional approaches of other countries, although they may also incur costs in doing so.<sup>370</sup>

Indeed the Indian judiciary has on numerous occasions triumphantly stepped into such a disharmonic context to attempt to harmonize India's constitutional vision with the abysmal condition of Dalit social reality (borrowing in some cases from the American experience). The jurisprudence of the Indian Supreme Court has to date lent much credence to this ethos. In *ABSK Sangh v. Union of India*,<sup>371</sup> Justice Chinnappa Reddy noted that,

[W]hen posts . . . are reserved . . . to members of Scheduled Castes, Scheduled Tribes and other socially and economically Backward Classes it is not a concession or privilege extended to them, it is in the recognition of their undoubted fundamental right to equality of opportunity . . . and to secure to all its citizens, justice, social, economic and political and equality of status and opportunity . . . to ensure their participation on an equal basis in the administration of

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<sup>369</sup> Gary Jeffrey Jacobsohn, *The Permeability of Constitutional Borders*, 82 TEXAS L. REV. 1763, 1767 (2004).

<sup>370</sup> *Id.* Jacobsohn cautions that while the Indian constitution lays out an agenda for social reform, judges who adapt ideas from other countries in order to further this agenda must be aware of the specific cultural context within which they operate.

<sup>371</sup> A.I.R 1981 SC 298.

the country . . . . Every lawful method is permissible to secure the due representation of SCs and STs in the public services.<sup>372</sup>

In that same case, Justice Krishna Iyer noted:

Trite arguments about efficiency are a trifle phoney . . . . The fundamental question arises, as to what's "merit" and "suitability?" Elitists, whose sympathies with the masses have dried up, are from standards of Indian people, least suitable to run the government and least meritorious to handle the state business . . . . Unfortunately, the very orientation of our selection process is distorted and those like the candidates from Scheduled Castes whom from their birth, have a traumatic understanding of the conditions of agrestic India, have in one sense more capability than those who lived under affluent circumstances and are callous to the human lot of the sorrowing masses.<sup>373</sup>

As the following discussion shows, implementing this understanding of Dalit's social reality is far from straightforward. As challenges to the constitutional validity of reservations grow, the limits of the Supreme Court's ability to reconcile the state's duty to take positive action with its duty to ensure the right to equality are increasingly tested.

*a. Caste vs. Class, and the "Other Backward Classes"*

The period starting in the early 1990s is significant not only because it launched the era of economic reforms, but also because it saw the entry of "Other Backward Classes" ("OBCs") into the reservations conversation—an entry that has resulted in much confusion and backlash, including against Dalits, and has paved the way for Class to enter the Caste debate. OBCs or so-called backward castes are identified as those whose ritual rank and occupational status are above "untouchables," but who themselves remain socially and economically "depressed."<sup>374</sup> Few groups in independent India have made progress on

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<sup>372</sup> *Id.* The case contested the validity of "concessions and relaxations" offered to scheduled caste and scheduled tribe community members in order to fill vacancies for reserved posts in the Railway Administration.

<sup>373</sup> *Id.*

<sup>374</sup> The term OBCs is a problematic categorization. Jain notes that OBCs:

Span[] such a wide cultural and structural arch as to be almost meaningless. There are at one extreme the dominant, landowning, peasant castes which wield power and authority over local Vaishyas and Brahmins, whereas at the other extreme are the poor, near-Untouchable groups living just above the pollution line. The category also includes many artisan and servicing castes.

a scale comparable to the OBCs, including in the arenas of politics and land reforms.<sup>375</sup> Yet the inclusion of so many heterogeneous groups within the OBC category has both made for its enormous size and has complicated its demands for reservations.

In *Indira Sawhney v. Union of India*,<sup>376</sup> which challenged the constitutionality of then-Prime Minister V.P. Singh's decision to implement 27 percent reservations in government employment for OBCs, the Supreme Court affirmed that caste may still be used as a criterion for determining backwardness, as long as the caste is primarily socially and educationally backward, as determined by empirical evidence.<sup>377</sup> Furthermore, in order to ensure that the most disadvantaged would benefit from reservations, the Court spelled out a means test, or the "creamy layer" test, which imposed an income limit to exclude those eligible for OBC classification.<sup>378</sup> The Indian government subsequently implemented a more complex means test to be applied to individuals and their families who attempted to claim backward status.<sup>379</sup> This test takes into account a variety of indices of social, educational, and economic disadvantage, such as parents' professional status, and the claimant's occupation and wealth as calculated by agricultural landholdings.<sup>380</sup>

Notably, the Supreme Court's determination of "scheduled caste" status embodies the critical recognition that one's membership in a Dalit caste *per se* subjects individuals to a particularly egregious form of discrimination ("untouchability") *regardless* of one's socio-economic status, and merits positive action and special attention by the state. By contrast, the determination of "Other Backward Classes" recognizes the socio-economic gains achieved by many members of backward castes in India—who are not subject to "untouchability" practices—and

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Meenakshi Jain, *Backward Castes and Social Change in U.P. and Bihar*, in *CASTE: ITS TWENTIETH CENTURY AVATAR* 136 (M. N. Srinivas ed., 1996).

<sup>375</sup> See CHRISTOPHE JAFFRELOT, *The Uneven Emancipation of the Lower Castes: Non-Brahmins in the South, OBCs in the North*, in *INDIA'S SILENT REVOLUTION: THE RISE OF THE LOWER CASTES IN NORTH INDIA* 214-253 (2003).

<sup>376</sup> A.I.R. 1993 S.C. 477.

<sup>377</sup> Sridharan, *supra* note 179, at 116. Prime Minister Singh's decision to implement reservations for OBCs came in the wake of the release of the report by the Mandal Commission. See *OBCs Form 41% of the Population: Survey*, *supra* note 14.

<sup>378</sup> Dudley Jenkins, *supra* note 31, at 771; Sridharan, *supra* note 179, at 116. The basis for imposing this threshold is a concern that reservations should not, through focusing exclusively on caste, aid only the privileged members of backward castes and thereby overlook the plight of the poor. See Pradipta Chaudhury, *The "Creamy Layer": Political Economy of Reservations*, in *RESERVATION IN PRIVATE SECTOR*, *supra* note 158, at 299, 305.

<sup>379</sup> Sridharan, *supra* note 179, at 116.

<sup>380</sup> *Id.* at 117.

circumscribes constitutional protections more strictly to those in greatest need by using empirical evidence of economic status.

In December 2005, the Ninety-third Amendment, which inserted Article 15(5) into the Indian constitution, expanded reservations for OBCs to include private colleges, while the Central Education Institution (Reservation in Admission) Act of 2006 provided for 27 percent reservations for Other Backward Classes (“OBCs”) in higher educational institutions in the country.<sup>381</sup> When combined with the percentage of seats already reserved for scheduled castes and scheduled tribes, a total of 49.5 percent of seats would be reserved in national public universities.<sup>382</sup> In April 2008, a five-judge constitutional bench in the Supreme Court upheld the 27 percent OBC quota in government-maintained and funded institutions, stating that the Ninety-third Amendment—which empowers the Central Government to make reservations for “socially and educationally backward classes,” scheduled castes, and scheduled tribes in educational institutions<sup>383</sup>—does not violate the Constitution’s “basic structure.”<sup>384</sup> Meanwhile, the implementation of the Central Education Institution Act has been stayed by a two-judge bench hearing,<sup>385</sup> which in light of the importance of the questions of law raised in this case referred it for hearing to a higher bench.<sup>386</sup>

At issue in the latter case is whether the Ninety-third Amendment confers on the government the “unbridled power” to make provisions for certain groups without indicating the circumstances under which such reservations can be made, or limiting the duration of such provisions thereby violating the right to equality and the basic structure of the Constitution of India.<sup>387</sup> Petitioners have argued that there is currently no accepted definition of who constitutes the “socially and

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<sup>381</sup> (2006) 13 S.C.R. 265, ¶ 1.

<sup>382</sup> The 49.5 percent figure is derived by adding the 27 percent reservations for OBCs with the 22.5 percent reservations for scheduled castes and scheduled tribes. See *supra* note 197 and accompanying text.

<sup>383</sup> *Id.*

<sup>384</sup> *Ashoka Kumar Thakur v. Union of India*, (2008) 6 S.C.C. 1, ¶ 47. The Amendment’s constitutional validity with respect to private, non-government funded institutions was left open. See also *Article 15(5) Has Enough Guidelines*, HINDU (Oct. 4, 2007), available at <http://www.hindu.com/2007/10/04/stories/2007100460381400.htm> (last visited Aug. 16, 2008).

<sup>385</sup> (2006) 13 S.C.R. 265.

<sup>386</sup> *Id.* ¶ 7.

<sup>387</sup> *Article 15(5) Has Enough Guidelines*, *supra* note 384. See also *OBC Quota: Define Backwardness First, Salve Tells Center*, INDIAN EXPRESS, Aug. 10, 2007, available at <http://www.indianexpress.com/story/209592.html> (last visited Aug. 16, 2008).

economically backward classes,” adding that the use of data that is either obsolete or based entirely on caste statistics further perpetuates the caste system.<sup>388</sup> A related contention involves the scope of Article 15(5) and whether allowing for reservations in institutions of higher education abandons the significance of merit altogether, adding that such reservations in specialty institutions had been struck down by the Supreme Court in earlier decisions.<sup>389</sup> Finally, the petitioners have argued that the current Act does not take into account the concept of excluding the “creamy layer” from the reservations policy.<sup>390</sup>

While the category at issue is that of OBCs, the issue of whether Dalit candidates should also be subjected to the “creamy layer” test has now entered the fray.<sup>391</sup> Moreover, the public discourse and ensuing protests have conflated the Dalit and OBC categories in the symbols used to decry the Amendment and the Act. In the spring of 2006, for instance, thousands of students across the country went on strike to protest the expansion of reservations in higher education.<sup>392</sup> Under the banner of “Youth for Equality,” “[m]edical students in Delhi, dressed in their white coats, took up brooms and swept the streets to suggest that they will become untouchable ‘sweepers’ if the policies are implemented.”<sup>393</sup> Students at the All India Institute of Medical Sciences also burned copies of Dr. Ambedkar’s books in protest, videotaped the incident, and circulated the video on campus as a means of intimidating Dalit students who were no strangers to name-calling, abuse, and harassment.<sup>394</sup> Oblivious to the irony of degrading Dalits as sweepers while simultaneously marching under an equality banner, or burning the books of the author of the constitution whose equality language now buttresses their fight—an act no less horrific for Dalits than the burning of crosses in front of African-American homes by the Klu Klux Klan—the anti-

<sup>388</sup> *Quota Law Has to Pass the Test of Rationality*, INDIAN EXPRESS, Oct. 11, 2007, available at <http://www.indianexpress.com/story/227020.html> (last visited Aug. 16, 2008).

<sup>389</sup> (2006) 143 S.C.R. 265.

<sup>390</sup> *Id.*

<sup>391</sup> See Debashis Pal, *Reservation for Creamy Layer?*, HINDU BUSINESS LINE, May 12, 2006. On the controversy as to whether a Supreme Court judgment last year introduced a “creamy layer” exclusion into public sector employment reservations for scheduled castes and scheduled tribes, see V. Venkatesan, *Ambiguous Verdict*, 22 FRONTLINE, Nov. 4-17, 2006, at 32; J. Venkatesan, *Verdict Does Not Relate to Creamy Layer Among SCs, STs: Banerjee*, HINDU, Nov. 24, 2006.

<sup>392</sup> Laura Dudley Jenkins, *Caste, Community, and Reservations*, (Working Paper, 2007) (on file with author).

<sup>393</sup> *Id.*

<sup>394</sup> See Ajay Kumar Singh, “*Even if I Never Become a Doctor, I Will Not Give Up This Fight*,” TEHELKA, Jun. 2, 2007, available at [http://www.tehelka.com/story\\_main30.asp?filename=hub020607Personal\\_histories.asp](http://www.tehelka.com/story_main30.asp?filename=hub020607Personal_histories.asp) (last visited Aug. 16, 2008).



reservations protests in India are a microcosm of the global trend to co-opt the language of equality for wholly unequal ends.

### V. CASTE vs. HUMAN RIGHTS: COMPETING THEORIES OF EQUALITY

On November 25, 1949, in an address to members of the Constituent Assembly, Dr. Ambedkar declared:

We must make our political democracy a social democracy as well. Political democracy cannot last unless there lies at the base of it social democracy. What does social democracy mean? It means a way of life which recognizes liberty, equality, and fraternity as the principles of life . . . . On the 26<sup>th</sup> of January 1950, we are going to enter into a life of contradictions. In politics we will have equality and in social and economic life we will have inequality. In politics, we will be recognizing the principle of one man—one vote and one vote—one value. In our social and economic life, we shall by reason of our social and economic structure, continue to deny the principle of one man-one value.<sup>395</sup>

The Constitution of India—now in 22 parts, with 395 articles and 12 schedules—embraces an aggressive state role in ensuring both formal and substantive equality (equality of result) in India. Even with its more than 117,000 words, and the volumes of laws to which it has given birth, it has yet to yield its promised result for Dalits. As noted above, the mere presence of laws and constitutionally mandated affirmative action programs has served to mask widespread, egregious, and often violent forms of *de facto* discrimination. In 1943, Ambedkar commented that,

The idea of making a gift of fundamental rights to every individual is no doubt very laudable. The question is how to make them effective? The prevalent view is that once rights are enacted in a law then they are safeguarded. This again is an unwarranted assumption. As experience proves, rights are protected not by laws, but by the social and moral conscience of society.<sup>396</sup>

The drafting of the Indian Constitution in 1947 and 1948 also coincided with the promulgation of the Universal Declaration of Human Rights (“UDHR”) in 1948 and as such emulates the UDHR in a number of

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<sup>395</sup> Debate From the Constituent Assembly of India, Nov. 25, 1949, *available at* <http://parliamentofindia.nic.in/ls/debates/vol11p11.htm>.

<sup>396</sup> B.R. Ambedkar, Speech Delivered on Jan. 18, 1943, *in* DR. BABASAHEB AMBEDKAR: WRITING AND SPEECHES, VOL. 1 222 (1979).

ways.<sup>397</sup> Ambedkar's words apply with equal force to the corpus of human rights law to which the UDHR has given birth and which prohibits discrimination in its many forms and calls on the state to take positive measures to ensure equality in effect.<sup>398</sup>

Nowhere is this tussle between law and social conscience more pronounced than in the context of caste. The caste system is inimical to human rights and to the vision of human equality as defined under various international instruments. Article 1 of the UDHR, the foundational document of the international human rights legal regime and the calling card of the international human rights movement, proclaims that, "[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."<sup>399</sup> By contrast, Dalits are born unequal and slotted into a system of graded inequality wherein the inequality is so ingrained that Dalits themselves practice untouchability against other Dalits below them in rank.

As Thorat notes, inasmuch as the caste system and the institution of untouchability continue to govern social behavior in India, "it makes the enforcement of human rights difficult, if not impossible."<sup>400</sup> Thorat adds:

The provisions in the Constitution and law are secular and equal but the customary rules of the caste system and the institution of untouchability are based on the principle of inequality in social, economic, cultural and religious sphere . . . . People continued to follow the latter because it provides immense privilege and serves their social, political and economic interests.<sup>401</sup>

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<sup>397</sup> Sukhadeo Thorat, *Hindu Social Order and Human Rights of Dalits*, COMBAT LAW, available at [http://www.combatlaw.org/information.php?article\\_id=109&issue\\_id=4](http://www.combatlaw.org/information.php?article_id=109&issue_id=4) (last visited Aug. 16, 2008).

<sup>398</sup> International treaties that proscribe discrimination and mandate equal protection include the International Covenant on Civil & Political Rights, arts. 2(1) and 26, Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social & Cultural Rights, art. 2(2), Dec. 16, 1966, 993 U.N.T.S. 3; International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195; and the Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13. These conventions preclude States from taking deliberately discriminatory measures and also outlaw apparently neutral measures that have the effect of unjustifiably imposing disproportionate burdens on particular groups. Further, they embody a substantive notion of equality that may require States to take tailored measures of positive discrimination in order to remedy disadvantage suffered by certain groups.

<sup>399</sup> Universal Declaration of Human Rights, art. 1, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

<sup>400</sup> Thorat, *supra* note 397.

<sup>401</sup> *Id.*

What then are we to make of the challenge that the caste system presents to human rights law and human rights lawyers? The implications of such a system are vast and counterintuitive to those who reach for the law as a triggering mechanism for social transformation: in sum, legal measures will make little difference unless and until the inequalities embedded in the social structure of the caste system are confronted head on.

The Constitution of India, with all its celebrated virtues, does not take on this challenge. The constitution explicitly prohibits “vertical” distinctions (i.e., the hierarchical distinctions of caste) while tolerating “horizontal” distinctions (i.e., differential treatment for different religions).<sup>402</sup> The limitations on these vertical prohibitions, however, are seldom considered. As noted in Part III, the constitution explicitly outlaws “untouchability,” calls for the social, educational, and economic advancement of scheduled castes, and extends constitutionally reserved positions for members of scheduled castes. It does not, however, abolish the caste system *per se*, only the most extreme injustices associated with it.

Such limitations necessarily beg the questions: will an “untouchable” ever cease to be so as long as there is a Brahmin whose claim over priesthood and even the judiciary is near absolute? What rights does a Dalit have if the privilege of “upper-castes” remains unchecked? And what rights would “upper-castes” have left if Dalits were truly treated as equal? Seen in this light, the active and pernicious subordination of the rule of law to the rule of caste is not surprising; rather it is the logical outcome of a general failure to challenge Brahminism, in the same manner that white supremacy remains institutionally unchallenged in the West. Legally, Dalits may be “former untouchables” but there is no “former Brahmin,” legally or otherwise.

Judicial interventions in the context of caste, though commendable in a number of respects, continue to “disaggregat[e] an issue with religious significance to take account of the various ways it may impinge on secular concerns.”<sup>403</sup> Though courts have to date allowed the government “to achieve modern secular goal[s] of helping disadvantaged groups,” they do so without interrogating the broader caste categories.<sup>404</sup> The “untouchable” does not exist in isolation from

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<sup>402</sup> GARY JEFFREY JACOBSON, *THE WHEEL OF LAW: INDIA’S SECULARISM IN COMPARATIVE CONSTITUTIONAL CONTEXT* 120 (2003).

<sup>403</sup> William D. Popkin, *Some Continuing Issues*, in *RELIGION AND PERSONAL LAW IN SECULAR INDIA* 335-36 (G. Larson ed., 2001).

<sup>404</sup> *Id.*

the greater caste structure; rather he or she is socially constructed in order to ensure “upper-caste” privilege. Privileges or rights assigned or denied to a particular caste are determined by that caste’s relationship to other castes. The question human rights lawyers must therefore start asking is not simply who is disadvantaged by discrimination, but who stands to benefit from it.

Even with its inherent limitations, a faithful application of the Constitution of India—as human rights and constitutional scholar, Upendra Baxi, reminds us—would be a recipe for complete social revolution.<sup>405</sup> According to Jacobsohn, Baxi sees India as having both a written and unwritten constitution where the written is the social justice ideology of the document, while the unwritten is the “antireform ideology of the privileged classes and castes, who, [Baxi] argues, have been quite successful in entrenching their version as constitutional orthodoxy.”<sup>406</sup>

Defenders of each system have burned the words of the other in effigy: just as medical students burned the writings of Dr. Ambedkar in anti-reservation protests in 2006, in 1927, Ambedkar set fire to the *Manu Smriti*, the ancient Hindu law book that Ambedkar believed sanctified and authorized the cruel treatment of Dalits.<sup>407</sup> Both acts seek to annihilate that which symbolically stands between those who are aggrieved and that which they seek. For anti-reservations protestors, Ambedkar and his thoughts are the embodiment of undeserved Dalit “privilege,” while for Dalits, the *Manu Smriti* stands in as the veritable Brahmin Bill of Rights.

Even acts of simple revolution like the decision to extend reservations to include other “lower-caste” categories have contributed to the resurgence of the Hindu Nationalist movement in India.<sup>408</sup> The movement’s emphasis on cultural nationalism is seen as both an attempt to unite Hindus under one cultural, nationalistic banner and as an

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<sup>405</sup> See UPENDRA BAXI, COURAGE, CRAFT AND CONTENTION: THE INDIAN SUPREME COURT IN THE EIGHTIES (1985).

<sup>406</sup> JACOBSON, *supra* note 402, at 233–34. See also Teltumbde, *supra* note 152, at 12: “The sorry state of the executive compliance with . . . constitutional provisions amply bears out the fangs of the intrinsically iniquitous Indian society.”

<sup>407</sup> S. M. MICHAEL, UNTOUCHABLES: DALITS IN MODERN INDIA 58 (1999).

<sup>408</sup> See JACOBSON, WHEEL OF LAW, *supra* note 402, at 154 (describing the connection between the Mandal Commission recommendation to extend reservations to “Other Backward Castes” and the Hindu Nationalist campaign to demolish the Babri mosque and erect a Hindu temple dedicated to the Lord Ram in its place).

effective means of “maintaining the status quo in social and economic privilege.”<sup>409</sup>

The success of the anti-reform project is so profound that laws are openly and confidently flouted by those who wear their “upper-caste” status as a badge of superiority and preach the virtues of caste to audiences full of reverence. Rules of caste come pouring out of the mouths of school children who learn from a very young age that these norms must be obediently followed,<sup>410</sup> while families openly and exclusively court marriage proposals (in India and abroad) from families of the same caste.<sup>411</sup>

Any project of social transformation, whether rooted in the language of human rights, human dignity, or in the language of equality, must set its sights on the twin goals of eliminating inequality and discrimination wherein discrimination is understood not simply as a legal term but as a hierarchical mindset that allows race- or caste-based abuses and inequalities to comfortably and openly flourish. Instead of reaching for these twin goals, we have arrived at a moment where social transformation and mobilization is subordinated to imperfect judicial and legislative action and affirmative action policies are narrowly defined and easily defeated under the rubric of liberalism.

The conventional strategies adopted thus far do little to counter such a mindset, which in turn ensures the failure of even the most aggressive legal and economic approaches to achieve equality. As indicated in Part IV, the constitution and the law remain paper tigers with little effect; economic growth has been unevenly distributed along caste lines; reservations, already limited in their reach, increasingly offer diminishing returns; and the broader affirmative action project threatens to be defeated, ironically, using the nomenclature of rights and equal protection.

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<sup>409</sup> CHRISTOPHE JAFFRELOT, *THE HINDU NATIONALIST MOVEMENT IN INDIA* 431 (1996).

<sup>410</sup> INDIA UNTOUCHED, *supra* note 83. Through candid interviews with oppressors and oppressed alike, this documentary provides a stark exploration of the rigidity with which people hold their perceptions of caste positions and untouchability.

<sup>411</sup> Typical examples of matrimonial classified advertisements from Indian national newspaper THE HINDU include: “HINDU PALLAR 26/161 MCA S/W CTS Chn wheatish, seeks well employed groom same caste;” “TIRUNELVELI SAIVA Pillai 29/170 DME Purattathi Business-Software Training Centres seeks Suitable Alliance from Same Caste.” The online matrimonial ad service Shaadi.com allows browsing by caste. See SHAADI.COM, <http://www.shaadi.com/matrimonials/indian-castes> (last visited Aug. 16, 2008). See also Moses Seenarine, *The Persistence of Caste and Anti-Caste Resistance in India and the Diaspora*, <http://tamilelibrary.org/teli/caste1.html> (last visited Aug. 16, 2008).

Whatever the limitations, reservations have helped create a Dalit middle class. But the creation of a Dalit middle class has not created a revolution, nor does upward class mobility work to eliminate the stigma attached to one's "untouchable" status. Dalit journalist Chandraban Prasad—perhaps the only nationally prominent Dalit journalist<sup>412</sup>—poignantly reminds us that even as select Dalits migrate into higher class and occupational categories as a result of reservations, Dalit tea shop vendors are nowhere to be found. Though non-Dalits may grudgingly accept marginal economic success among Dalits, they will not dine with them, allow their children to marry them, or even be served a cup of tea by Dalit hands.<sup>413</sup>

The international human rights movement now steps into the fray with its clarion call of "Dalit Rights are Human Rights." The question remains, can human rights succeed where all else has seemingly failed? Can it deliver on its promise of equality? The remainder of this section scrutinizes the human rights framework for its own brand of the "trickle-down theory" but concludes that the human rights movement can galvanize a project of social transformation so long as it does not restrict itself to the constraints of the legal and moral regime in which this struggle now lives.

#### A. HUMAN RIGHTS' FLAWED TRICKLE-DOWN THEORY

Until recently, attention to India from international human rights nongovernmental organizations ("NGOs") focused on the symptoms of the caste system (e.g., bonded labor, forced prostitution, and police corruption) without diagnosing the disease. Simultaneously, international interventions on caste (and racial) discrimination were limited to inquiries regarding the mechanisms of protection offered by the state, without asking for evidence of their effective enforcement. U.N. human rights treaty bodies have now begun to ask for such

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<sup>412</sup> HIDDEN APARTHEID, *supra* note 5, at 110.

<sup>413</sup> Prasad, *supra* note 316. Prasad asks: "We must ponder. . . how Dalits can become Collectors, Engineers, Ministers and surgeons, but not tea vendors or sweet shop owners?" On the difference between Dalits and "lower-caste" non-Dalits, Prasad asserts:

Those who can't open a tea or a paan [betel leaf] shop, are least likely to graduate into iron, cloth or grocery shop owners. On the other hand, howsoever poor the lower caste people may be, society offers them ample opportunities of self-employment. That's the distinction between out caste and lower caste.

evidence while domestic agencies have invested greater energy into exposing gaps in protection.<sup>414</sup>

For the human rights movement, what began as a failure of diagnosis has now transmuted into a failure of strategy. The international human rights framework holds as its organizing principle the promotion of a system of laws, universal in their application, but delivered by the state. Inherent to this strategy is an over-reliance on the state as a neutral agent of social change and the assumption that like economic growth, international laws and admonitions directed to the higher echelons of the state will trickle down to the rest of the population. The primacy the human rights movement has given to the system of laws and the state's implementation of these laws merits closer scrutiny, most especially in the context of the caste system. The social and religious sanction, when combined with the economic incentives, all but ensures that the practice of "untouchability" is perpetuated. In turn, attempts to alter the status quo are met with violent recrimination. Where then does that leave the law and the state?

#### 1. THE ROLE OF THE LAW AND THE STATE

The introductory paragraph to Narendra Jadhav's family biography, *Untouchables: My Family's Triumphant Escape from India's Caste System*, proclaims:

Every sixth human being in the world today is an Indian, and every sixth Indian is an erstwhile untouchable, a Dalit. Today, there are 165 million Dalits (equal to more than half the population of the United States) and they continue to suffer under India's 3,500 year-old caste system, which remains a stigma on humanity. However, Dalits are awakening. We are struggling against caste discrimination, illiteracy, and poverty; our weapons are education, self-empowerment, and democracy.<sup>415</sup>

The opening of the book exposes the magnitude of abuses perpetrated in the name of upholding the caste system, and the monumental challenge facing a democracy only sixty years young to dismantle and reconstruct society away from practices that are almost sixty times as old as independent India itself. Of note in the above quote is not just the magnitude and age of oppression, but that in the abbreviated list of

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<sup>414</sup> See, e.g., HIDDEN APARTHEID, *supra* note 5; NHRC REPORT, *supra* note 110.

<sup>415</sup> NARENDRA JADHAV, UNTOUCHABLES: MY FAMILY'S TRIUMPHANT JOURNEY OUT OF THE CASTE SYSTEM IN MODERN INDIA 1 (2005).

“weapons” in the arsenal against caste discrimination (education, self-empowerment, and democracy), the laws are nowhere to be found.

By contrast, the notion that the state must take positive action to ensure substantive equality finds increasing traction in international and regional human rights law.<sup>416</sup> So what role do we give the state? At the very least, we expect the state to remedy the effects of discrimination through the implementation of broad-based policies that seek to outlaw, punish, and provide redress for acts of individual discrimination, while simultaneously correcting or alleviating manifestations of structural and ongoing discrimination that are rooted in a historic legacy of legally sanctioned subordination on the basis of caste or race.

The role of positive state action, defined in this case as any race or caste-conscious measure under the broader rubric of affirmative action, will at its best be to remedy the *effects* of racism and casteism. Though affirmative action may be seen as removing the effects of cumulative and structural discrimination that result in race or caste-based inequality, as currently conceived and operationalized it does not deal with the root of the discrimination itself, which stems from a casteist mindset that does not question, legally or otherwise, the Brahminic hierarchy.<sup>417</sup> Nor does it sufficiently consider that the state itself is far from a neutral actor.

The plight of Dalits in India serves to highlight the paradoxical role of the state in a society that is, in its natural state and left to its own devices, inherently unequal. The role of the state in such a context is to institutionalize checks and balances and intervene against the natural inclinations of the dominant groups for the protection of the dominated. But reaching for the state lands us in a double bind: without government intervention, the system could not dismantle itself, but we incorrectly assume that the state is a neutral actor. As shown in Part IV, the state’s

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<sup>416</sup> See Theodor Meron, *The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination*, 79 AM. J. INT’L L. 283, 286 (1985); Kevin Boyle & Annaliese Baldaccini, *International Human Rights Approaches to Racism*, in DISCRIMINATION AND HUMAN RIGHTS: THE CASE OF RACISM 156 (Sandra Fredman ed., 2001).

<sup>417</sup> Similar arguments have been offered in relation to the role of white supremacy in the United States. Affirmative action may redress social inequalities but it cannot of itself change minds, as white supremacy persists in the form of “color-blind racism,” an attitude held by precisely those who oppose “positive discrimination.” See EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES* (2003). In what Bonilla-Silva calls the “whiteness of color-blindness,” an insistence upon abstract equality of opportunity, belying actual inequalities, is a commonsense gloss over a subconscious belief in the superiority of whiteness—of *property* in whiteness that must be preserved, to the exclusion, and in turn subordination, of other group racial identities. *Id.* at 177. See also Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. R. 1710, 1761 (1993).



law enforcement and administrative machinery is itself constructed along the hierarchy of caste.

Even if we were to assume that the state was both neutral and faithful in its implementation of the law, we still must ask whether the law can be a vehicle for social change, or does it simply divert attention away from the social condition it masks and act as a safety-valve to diffuse pressure for real reform. Moreover, can the law take away that which it did not create? If equality is understood as a value as opposed to a law, then can the state as a non-emotional body ever address it?<sup>418</sup> Any program of affirmative action, no matter how broadly defined, implemented, and enforced, will not work to remove the underlying prejudice as long as it conceives of “the oppressed” as its sole target.

## 2. WHAT ABOUT THE “TOUCHABLES?”

If the human rights framework is to be critiqued for presuming that the state will ensure that the laws will trickle down, then it must also be scrutinized for setting its sites on those at the “bottom.” The downward trajectory of human rights sets its sights on the wrong target and invariably assumes that the persona to be reclaimed is that of the “untouchable victim.” As noted by Ambedkar,

It is usual to hear all those who feel moved by the deplorable condition of the Untouchables unburden themselves by uttering the cry, “We must do something for the Untouchables.” One seldom hears any of the persons interested in the problem saying, “Let us do something to change the Touchable Hindu.”<sup>419</sup>

Affirmative action policies, as currently envisioned and advanced, fail to sufficiently transform the racist or casteist hierarchy itself. And what of the fact that the very existence of these policies help to strengthen and cement the very identities that we seek to fight against?

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<sup>418</sup> On this point, noted Dalit journalist, Chandra Ban Prasad, poignantly asks:

How can the State deal with issues of occupational and blood purity? Can the State, for instance, legislate and execute the idea that a certain percentage of Brahmans must take to cleaning toilets and sweeping floors? Can it ensure that a certain percentage of Kshatriyas must marry Dalits? . . . Why should we blame a bull for not giving milk even after we fed it with that expectation?

Chandra Ban Prasad, *Markets and Manu: Economic Reforms and its Impact on Caste in India* 15-16 (CASI Working Paper Series, 08-01, 2008), available at [http://casi.ssc.upenn.edu/research/papers/Chandrabhan\\_2008.pdf](http://casi.ssc.upenn.edu/research/papers/Chandrabhan_2008.pdf).

<sup>419</sup> See S. Anand, *On Claiming Dalit Subjectivity*, <http://www.india-seminar.com/2006/558/558%20s.%20anand.htm> (relying on quote by B.R. Ambedkar) (last visited Aug. 16, 2008).

Affirmative action may alleviate inequality but it will not break discrimination, and in the process may end up strengthening the discrimination itself by cementing identity formation along racial or caste lines.

Affirmative action (whether under the mantle of the constitution or human rights law), must be conceived in a way that is compatible with the goal of social transformation while recognizing that affirmative action, as currently constructed, is a necessary but insufficient tool for social transformation. The gap between affirmative action and social transformation can perhaps be overcome to some extent by reframing affirmative action policies to reflect the salient fact that rights and privileges are negotiated, assigned, and denied not just in the courtroom, the police station, or even the legislature, but in non-formal social spaces where “upper-caste” privilege and “upper-caste” rights are rarely contested on legal or moral grounds. According to Thorat:

Non-formal institutions; social, religious as well as economic, involve a framework of social behavior of their own, which may not be in consonance with the principles enunciated by the United Nations, or the Constitution of a nation in which case different sets of values may result in conflicts. It implies that unless inequalities imbedded in the social, economics and cultural structure of the Hindu society are addressed, the legal measures will make little difference in providing access to human rights to the dalits in India.<sup>420</sup>

The caste system may be understood as an example of what critical theorist Michel Foucault termed disciplinary power.<sup>421</sup> Viewed in this light, caste oppression can be seen as inhering in diffuse power relations that arise out of socially entrenched practices (including discourse) which have become the “norm.” These practices “discipline” individuals by imposing categorized identities on them and others, and set those categories within a hierarchy.<sup>422</sup> Foucault argued that the liberal conception of rights was useless as a means of resisting disciplinary power, as it conceived of domination as negative *repression* by the state, thus overlooking the identity-*constructing* effect of disciplinary power relations which do not emanate from a single, central source, but pervade all of society.<sup>423</sup> He argued for a “new form of right” that concerns itself not with setting limits on state intrusions against the private autonomy of

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<sup>420</sup> Thorat, *supra* note 397.

<sup>421</sup> MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan trans., 2nd ed. 1995).

<sup>422</sup> *Id.* at 183.

<sup>423</sup> *Id.* at 191.

an abstract subject, but altering the constructive effects of disciplinary power.<sup>424</sup> Ambedkar was keenly aware of the necessity of a solution that confronted caste as a constructive power of this kind; as he saw it, caste as a discipline was rooted in religious ideology and he made an effort to tackle it at the level of discourse.<sup>425</sup>

Among Ambedkar's most salient contributions was to define the caste system as not simply a division of labor, but a *division of laborers* that is neither spontaneous nor based on natural aptitudes, and which prevents mobilization because of the system of graded inequality in which it inheres.<sup>426</sup> Perhaps the greatest threat comes not from those who oppose affirmative action or Dalit rights, but from the internalization of the mentality of graded inequality. "Untouchability" among "untouchables" is a well-documented practice, seen especially in the treatment of manual scavengers by other Dalits.<sup>427</sup> As noted in the Mandal Commission Report, "[t]he real triumph of the caste system lies not in upholding the supremacy of the Brahmin, but in conditioning the consciousness of the lower castes in accepting their inferior status in the ritual hierarchy as part of the natural order of things."<sup>428</sup>

While the task of mobilizing Dalits to claim a uniform Dalit identity in place of the hierarchical structure they inherited and impose is ongoing, the impetus does not and cannot come from the state. The state and any actor tasked with the project of translating the human rights vision into reality must set its sights on the (un)consciousness of the privileged castes. Yet what program exists to ameliorate the pathetic mentality of the bigot? Once the "touchable" condition is problematized, then perhaps the quotas would apply to them leaving the remainder and majority of seats and positions open to the majority of the nation.

### 3. THE ECONOMY OF HUMAN RIGHTS IN THE FREE MARKET

An over-reliance on the law and the state has rendered other paths and options for the realization of human rights virtually obsolete. While the state must continually be held accountable vis-à-vis its

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<sup>424</sup> MICHEL FOUCAULT, *Two Lectures, in POWER/KNOWLEDGE* 108 (Colin Gordon ed., 1980).

<sup>425</sup> See B. R. AMBEDKAR, WHO WERE THE SHUDRAS? 436-41 (Thackers 1970) (1946).

<sup>426</sup> AMBEDKAR THOUGHT, *supra* note 19, at 26.

<sup>427</sup> BROKEN PEOPLE, *supra* note 21, at 146.

<sup>428</sup> As quoted in James Massey, Reflections and Remarks—Occupation and Descent-Based Discrimination: Identification of Affected Communities in Various Countries (Presented at the Global Conference Against Racism and Caste-Based Discrimination, New Delhi) (Mar. 2001) (on file with author).

obligation to respect, protect, and fulfill human rights, an almost myopic focus on the state ends up also ceding to it too much power and fosters a perpetual state of dependency. In India, as elsewhere, the state cannot be seen as the sole locus for social change. While the linking of reservations to broader social welfare strategies exists on paper, even those paper promises are being shredded by economic and ideological liberalization.

Ideologically, caste categories are constructed and imposed to organize exclusion, yet when those very categories are used as a basis to claim remedies to ensure inclusion, the categories magically disappear and we are invited to revel in the fantasy of a caste- or color-blind nation that through the very proclamation of equality has achieved an imaginary break with the past.<sup>429</sup>

Economically, the persistence of massive poverty in India and its concentration among particular social groups suggests that, without “wide spread purchasing power,” the free market perpetuates caste-based exploitation.<sup>430</sup> An alternative prescription offered by Dalit economists involves *greater* investment in agriculture and public services and positive discrimination for disadvantaged classes that must be expanded to sectors currently out of reach and must include due attention to the implementation of the directive principles of the constitution. These policies and programs, they add, must seek to effectuate those principles through caste-conscious interventions in primary education, housing, and healthcare.<sup>431</sup> A similarly aggressive role of the state is promoted by human rights advocates.

Yet as noted in Part II.C.5, the free market ideology stands in fierce opposition to the notion that the state must take positive action to ensure substantive equality for its marginalized citizens. The prevailing legitimacy of the free market ideology within India also serves to legitimize pre-existing anti-Dalit sentiment. The outsourcing of public sector functions to the private sector, unaccompanied by the simultaneous outsourcing of human rights obligations to non-state actors, dismantles both the obligation and the infrastructure of programs that support social inclusion, and along with it, any hopes of Dalit advancement. Less frequently noted, but equally pernicious, is the signaling to Dalits that their hopes for social inclusion, centuries overdue, may now be dashed long before they were ever fully realized.

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<sup>429</sup> See Crenshaw, *supra* note 47.

<sup>430</sup> Teltumbde, *supra* note 152, at 17.

<sup>431</sup> *Id.*

But the iniquities of liberalization must be delinked from the potential benefits of globalization. Inasmuch as globalization represents the influx of outside forces into the Indian scene, and insofar as it has helped build solidarity among anti-discrimination activists across the world, globalization allows Dalit activists to reach beyond the state to foreign actors and the international community to press their claims.

Social scientist Ramaiah cautions against unequivocally accepting criticisms of globalization and instead draws attention to its potential to empower Dalits in ways that the state has failed.<sup>432</sup> Legal scholar Chimni supports such a view and finds that Dalit intellectuals tend to see the threat of oppression by globalization as secondary to oppression by caste adding that much of the Dalit movement has successfully galvanized international pressure to force some change in their status.<sup>433</sup> Indeed the very success of the demands for private sector reservations may hinge on the willingness of foreign investors, who are not steeped in the same caste culture, to both participate and take the lead in creating a space for Dalit employment in sectors from which they have, to date, been excluded.<sup>434</sup>

That foreign investors, aid agencies, and governments are now more attuned to the deleterious role that the caste system plays in undermining both human rights and uniform economic development is a result of the work done by international and Indian advocates using the language and tools of human rights. The next and necessary step is for human rights advocates to step out of the constraints of the trickle-down legal regime and support the advancement of Dalits rights from the bottom up.

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<sup>432</sup> A. Ramaiah, *Dalits to Accept Globalisation: Lessons from the Past and Present* (July 2004), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=568582](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=568582).

<sup>433</sup> B.S. Chimni, *Alternative Visions of Just World Order: Six Tales from India*, 46 HARV. INT'L L. J. 389, 394-95 (2005).

<sup>434</sup> See, e.g., H. Res. 139, *supra* note 5:

[E]nsuring that qualified Dalits are in no way discouraged from working with organizations receiving funding in India from the United States Government . . . procedures exist to detect and remedy any caste discrimination in employment conditions, wages, benefits or job security for anyone working with organizations receiving funding in India from the United States Government . . . [and] encouraging United States citizens working in India to avoid discrimination toward the Dalits in all business interactions.

## VI. CONCLUSION

The law as a mechanism for achieving social change has fallen drastically short of delivering on its paper promise of ensuring equality. While legally sanctioned forms of caste-based discrimination have been largely abolished, discrimination and inequality persists, adapts, and even thrives in environments seemingly hostile to its growth—environments that outlaw *de jure* discrimination and seek to ensure non-discrimination and substantive equality through the availability of constitutional remedies, protective legislation, and social welfare programs.

As with other countries with a history of institutionalized or legalized racism or casteism, the dismantling of *de jure* discrimination complicates the project of making visible ongoing and structural forms of discrimination. India's remarkable affirmation of Dalit rights through constitutional privileges and legislative protections is a double-edged sword. On the one hand, it lays the foundation for real social transformation. On the other hand, it masks the daily reality of *de facto* segregation, exploitation, and other forms of abuse by discouraging further scrutiny into the condition of Dalits.

The role of discourse in shaping and informing affirmative action policies and debates is in need of further examination. Despite the virulence of racism and inequality in the world today, the categorization of affirmative action as a program to address "historic" forms of discrimination is accepted, seldom debated, and now increasingly circumscribed. This Article offered a different scale of interrogation and foregrounds these debates in empirical realities and puts them in conversation with the struggle to achieve racial justice in the United States. A variety of formal mechanisms ranging from protective legislation to affirmative action policies have not penetrated the caste-ceiling in any real sense, and the market has not proved to be an equalizing mechanism. Despite a large body of legislation and administrative agency mandates assigned exclusively to deal with the oppression of scheduled castes, the laws have benefited few and development programs and welfare projects designed to improve economic conditions for Dalits have generally had little effect.

In order to effectively redress entrenched discrimination against Dalits and ensure their substantive equality, the testing of these formal

mechanisms against their actual impact in promoting basic human rights is a first and necessary step. This Article offered a bottom-up view of how the law operates, or is denied, in practice, and examined how the rule of law lives in the shadow of the rule of caste. It concluded that reservations are an attempt, however imperfect, to *equalize* opportunity in the face of a social structure that is antithetical to equality of opportunity. Reservations create the possibility of a meritocracy in a system that is functionally anti-merit. Yet conversations about affirmative action stagnate around the question of whose disadvantage deserves protection and for how long, and fail to ask who stands to benefit from systematic social exclusion. Reservations alone constitute an insufficient remedy to the problem of caste discrimination in India. Controversy over the reservations scheme has also allowed the debate to predictably stagnate around the distribution of “privilege,” taking the focus away from violations of basic rights.

To say that the road that we are on will eventually get us to a place where one’s race and caste will no longer be determinative of one’s claims over resources or one’s very human personality is false. One’s “untouchable” status continues to act as a bar to material progress, access to justice, and to development of human personality. The passage of time has not witnessed discrimination’s elegant decline, but its sadistic entrenchment. Growing movements by Dalits to claim their basic human rights and their human dignity are increasingly met with large-scale violence and attempts to further remove Dalits from economic self-sufficiency.

While the stark disjuncture between constitutional vision and social reality quickly gives way to indignation, the call to action is still directed at the state, using top down approaches that assume a self-executing quality of the law. Human rights strategies must instead be informed by the twin goals of remedying the effects of discrimination and dismantling the discriminatory mindset. Without the latter, the equality project will by definition remain incomplete.

This Article has attempted to shift the debate on caste and offer broader insights into the discursive role of the law in undermining real reform. Entrenched forms of discrimination stemming from the world’s longest surviving system of social hierarchy offer valuable lessons and cautionary tales applicable to the broader equality project. The first and most obvious is to look beyond “race” as the only arbiter of rights. The second is to look beyond the mere existence of affirmative action

policies and protective legislation and to scrutinize the implementation of these laws.

Data plays an important role in making visible structural and contemporary forms of discrimination and inequality. The third lesson is not to become complacent regarding the availability of data that animates the social condition. Perhaps unsurprisingly, the disaggregation of caste in the 2001 census was the subject of much debate. While some argued that the census should also disaggregate “Other Backward Castes,” or even all castes,<sup>435</sup> others mounted a “vigorous campaign” against counting caste on the grounds that it would lead to a hardening of caste identities and possibly even to large-scale caste conflicts and violence.<sup>436</sup>

The fourth lesson is to recognize the resilience and adaptability of historic forms of discrimination to contemporary global trends. An increased reliance on market forces, a dismantling of economic controls, and a drastically reduced role of the state has triggered dramatic economic growth, but the growth has been captured by the powerful few and has not led to equitable development.

The fifth and final lesson is to caution against the intuitive linking of caste or race and class, and to recognize that upward class mobility does not displace the stigma attached to one’s “untouchable” status. Among Dalits, the “Haves” are few and the “Have-Nots” are great. Regardless of class status, none have escaped the confiscation of their very persona or realized their right to self determination in the most profound sense of the term: they remain stateless in their own country and robbed daily of human dignity. Poignantly captured by Ambedkar, the Dalit struggle, therefore, “is a battle not for wealth or for power. It is a battle for freedom. It is a battle for the reclamation of human personality.”<sup>437</sup>

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<sup>435</sup> Ravivarma Kumar, *Caste Enumeration in Census: Constitutional Imperative*, ECON. AND POL. WKLY, Aug. 26, 2000, at 3100.

<sup>436</sup> *Id.*; Ranjit Sau, *Human Development Index in Lieu of Caste Census 2001*, ECON. AND POL. WKLY., Dec. 18, 1999, at 3607; Nandini Sundar, *Caste as Census Category: Implications for Sociology*, 48 CURRENT SOC. 111, 117 (2000). Governmental agencies in India and the Indian Parliament itself persistently fail to make statistics available to the public in a timely fashion. The National Commission on Scheduled Castes’ annual report for 2004-05 has to this day not been published owing to, the Commission says, the failure of the Ministry of Social Justice and Empowerment to lay a response before the Houses of Parliament. See NAT’L COMM. FOR SCHEDULED CASTES, ANNUAL REPORTS OF THE NCSC, <http://ncsc.nic.in/index1.asp?linkid=157> (last visited Aug. 16, 2008).

<sup>437</sup> AMBEDKAR THOUGHT, *supra* note 19, at 26.



The emancipatory path from subject to citizen has been a long and tortuous one for Dalits, and remains woefully incomplete.<sup>438</sup> The failure of the legal reform project now openly invites comparisons to apartheid. Here, apartheid must be understood as both state-sponsorship of oppression, as is the case in India in spite of the law, and as a mindset that denies sociability and social inclusion. The human rights movement has, to date, forsaken the struggle against the latter. It can, however, help galvanize a process of social transformation by inviting greater scrutiny into the “upper-caste” condition. With this scrutiny, the rule of law can start to emerge from the shadow of the rule of caste and the emancipation of Dalits can begin.

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<sup>438</sup> For an analysis of Ambedkar’s own path, see generally CHRISTOPHE JAFFRELOT, DR. AMBEDKAR AND UNTOUCHABILITY: FIGHTING THE INDIAN CASTE SYSTEM (Columbia University Press 2005).