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India and the Paradox of Caste Discrimination

I. INTRODUCTION

Like an octopus, caste has its tentacles in every aspect of Indian life. It bedevils carefully drawn plans of economic development. It defeats legislative effort to bring about social reform. It assumes a dominant role in power processes and imparts its distinctive flavour to Indian politics. Even the administrative and the academic elites are not free from its over-powering influence. So how can it be ignored as a social force?¹

This description of the role of caste² in India, written in 1968—21 years after Indian independence³ and 18 years after the adoption of a constitution heralding a society free from poverty, inequality and discrimination⁴—was echoed some 35 years later in Myron Weiner's observation that caste is still very much alive as a lived-in social

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¹ Shyamaharan Dube, "Foreword", in Yogesh Atal, *The Changing Frontiers of Caste* (National Publishing House, New Delhi, 1968), vii.

² From the Portuguese *casta* meaning species, race or pure breed, first used by Europeans in India in the sixteenth century to distinguish between Muslims and Hindus and to denote birth-groups or communities; see Susan Bayly, *Caste, Society and Politics in Modern India from the Eighteenth Century to the Modern Age* (Cambridge University Press (CUP), Cambridge, 1998), 105-106; Ursula Sharma, *Caste* (Viva Books, New Delhi, 2002), 1; Marc Galanter, *Competing Equalities: Law and the Backward Classes in India* (University of California Press, Berkeley, 1984), 7.

³ India became independent at midnight on 14-15 August 1947; see Dominique Lapierre and Larry Collins, *Freedom at Midnight* (Vikas Publishing House Pvt Ltd, New Delhi, 1997).

⁴ Constitution of India 1950 (COI), in force 26 January 1950. Full text available at <<http://lawmin.nic.in/coi.htm>>. Art. 15(1) prohibits discrimination on grounds of religion, race, caste, sex or place of birth.

reality, even as its ideological grip has weakened.⁵ 70 years since B. R. Ambedkar's seminal essay "The Annihilation of Caste"⁶ calling for an end to the caste system and the oppression associated with it, caste has not been annihilated in India, neither has 'untouchability' (the practice of caste-based social ostracism, segregation and exclusion, abolished by the constitution⁷ but sanctioned by culture and religion). Far from becoming a caste-neutral or caste-less society, India remains a society where caste matters. Paradoxically, says Weiner, "the movement for change is not a struggle to end caste [but] to use caste as an instrument of social change [...] [W]hat is emerging in India is a social and political system which institutionalises and transforms but does not abolish caste."⁸ At the same time, the contours of the legal debate on caste discrimination are shifting; a new discourse on equality is emerging—albeit amidst arguments cautioning that existing benefits must not be undermined even as new approaches are explored—which looks beyond the confines of existing strategies for addressing caste discrimination towards a broader conceptualization of discrimination, inequality and diversity which accepts the need for recognition of a range of ascribed social identities in order to measure and more effectively redress persistent inequality and discrimination.⁹

⁵ Myron Weiner, "The Struggle for Equality: Caste in Indian Politics", in Atul Kohli (ed.), *The Success of India's Democracy* (CUP, Cambridge, 2001), 193-225, at 195.

⁶ Bhimrao Ramji ('Babasaheb') Ambedkar, "The Annihilation of Caste", in Vasant Moon (ed.), *Babasaheb Ambedkar Writings and Speeches (BAWS) Vol. 1* (The Education Dept, Govt. of Maharashtra, Bombay, 1989). Babasaheb Ambedkar (1891-1956), Dalit and lawyer, was one of India's greatest twentieth-century political leaders and legal scholars, and a lifelong campaigner for the eradication of caste; see Christophe Jaffrelot, *Dr Ambedkar and Untouchability: Analysing and Fighting Caste* (Permanent Black, New Delhi, 2005); Eleanor Zelliot, "The Leadership of Babasaheb Ambedkar" and "Gandhi and Ambedkar: A Study in Leadership" in *From Untouchable to Dalit: Essays on the Ambedkar Movement* (Manohar, New Delhi, 1998).

⁷ "Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of 'Untouchability' shall be an offence punishable in accordance with law"; COI Art. 17, *op. cit.* note 4.

⁸ Weiner, "The Struggle for Equality", *op. cit.* note 5, 196.

⁹ See Tarunabh Khaitan, "Transcending Reservations: A Paradigm Shift in the Debate on Equality", 20(8) *Economic and Political Weekly (EPW)* (2008), 8-12; Satish Deshpande and Yogendra Yadav, "Redesigning Affirmative Action", 41(24) *EPW* (2006), 17-23; Government of India (GOI) Ministry of Minority Affairs, New Delhi, "Equal Opportunities Commission: What, Why and How?", Expert Group Report 2008 (EOC Report), 24-25, at

Caste as a system of social organization exists primarily in South Asia (India—the focus of this paper—Nepal, Pakistan, Bangladesh and Sri Lanka) but is also found in South Asian diasporic communities around the world.¹⁰ Despite six decades of domestic laws and policies to eliminate discrimination on grounds of caste and secure social and economic equality, the Dalits¹¹—formerly known as Untouchables—remain at the bottom of India’s social and economic hierarchy, while untouchability and discrimination, exclusion and violence on grounds of caste persist.¹² Since the late 1990s, discrimination on grounds of caste—until then absent from international human rights discourse—has been acknowledged by the former UN Sub-Commission for the Promotion and Protection of Human Rights (Sub-Commission)¹³ as a violation of international human rights law—as a sub-category of discrimination based on work and descent—and by the UN Committee on the Elimination of Racial Discrimination

<http://minorityaffairs.gov.in/newsite/reports/eoc_wwh/eoc_wwh.pdf>. For arguments defending existing strategies see Mritunjoy Mohanty, “Social Inequality, Labour Market Dynamics and Reservation”, 43(35) *EPW* (2006), 3777-3789; Sukhadeo Thorat, “Paying the Social Debt”, in Sukhadeo Thorat and Narender Kumar (eds.), *In Search of Inclusive Policy: Addressing Graded Inequality* (Rawat Publications, Jaipur, 2008), 29-38.

¹⁰ See CERD/C, General Recommendation 29, 22 August 2002, UN Doc. A/57/18 (2002) 111. Communities suffering from discrimination based on descent, and work and descent—wider international legal categories of which caste discrimination is a sub-set—also exist worldwide; see Rajendra Goonesekere, working paper on discrimination based on work and descent, UN Sub-Commission on the Promotion and Protection of Human Rights (Sub-Commission), UN Doc. E/CN.4/Sub.2/2001/16, 14 June 2001, 8-44 and 49; Asbjørn Eide and Yozo Yokota, expanded working paper, Sub-Commission, UN Doc. E/ CN.4/Sub.2/2003/24, 26 June 2003, 10-43.

¹¹ Dalit is a term of self-identification meaning ‘crushed’ or ‘broken’ in Marathi, a regional language of western India, denoting those formerly known as ‘untouchables’. Harijan (‘children of God’), the term popularized by Gandhi, has largely fallen out of use as patronizing. The Indian constitutional, legal and administrative term for former untouchables is scheduled castes (SCs). Whilst recognizing that it is not adopted by all members of former untouchable communities, Dalit is used throughout this article except in the context of constitutional, legal and administrative measures where the official acronym SC is used. On the use of Dalit in official documents see Seema Chisti, “Caste Panel to Govt: Don’t Use the Word Dalit, Use SC”, *Indian Express*, 13 July 2008,

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¹² See CERD/C, concluding observations on India’s fifteenth to nineteenth periodic reports, 5 May 2007, UN Doc. CERD/C/IND/CO/19, 13-15, 17, 18, 20-27.

¹³ Now the Human Rights Council Advisory Committee.

(CERD/C) as a form of descent-based racial discrimination as defined in the International Convention for the Elimination of all forms of Racial Discrimination (CERD).¹⁴

The aim of this article is to provide an insight into the paradox of caste discrimination in India in the twenty-first century. Focusing on the Dalits, it outlines the nature and extent of caste discrimination in India today, maps the legal approach in India to its elimination, assesses the effectiveness of official policies and considers the prospects for eradication of this age-old and entrenched form of discrimination. Part II provides an overview of the nature of the problem and the types of discrimination occurring against Dalits today. Part III presents the legal and policy frameworks for the elimination of discrimination on grounds of caste and for the emancipation of the Dalits, including India's affirmative action or 'reservation' policies, while Part IV assesses the impact of these strategies and the factors hindering their effectiveness. Part V concludes by arguing that India's existing legal strategies for the elimination of caste discrimination are too narrowly focussed, and that alongside and beyond these strategies a broader approach to equality, non-discrimination and diversity, underpinned by reliable policy monitoring and assessment, and renewed civic and political vision, is needed in order to overcome age-old inequalities and discrimination based on caste.

II. CASTE DISCRIMINATION: CONTEMPORARY CONTEXT

A. *The 'Caste Sysytem'*

¹⁴ CERD/C, concluding observations on India's ninth to fourteenth reports, 22 August 1996, UN Doc. CERD A/51/18 (1996), 352; CERD/C, general recommendation 29, *op. cit.* note 10; Sub-Commission, Resolution 2000/4 Discrimination based on work and descent, 11 August 2000; UN Doc. E/CN.4/Sub.2/2000/46, 23 November 2000, 25. See also Clifford Bob, "'Dalit Rights are Human Rights': Caste Discrimination, International Activism and the Construction of a New Human Rights Issue", 29 *Human Rights Quarterly* (2007), 167-193; David Keane, *Caste-Based Discrimination in International Human Rights Law* (Ashgate, Aldershot, 2008).

India's Dalits number almost 167 million or 16.2% of the population.¹⁵ A system of social stratification based on ascribed status, caste is distinguished by its hereditary nature, its religious underpinnings in orthodox Hinduism and by the concept of untouchability, whereby those at the very bottom of the social order—the Dalits—are considered permanently polluted, ostensibly on the grounds of their own or their ancestors' 'unclean' occupation, people with whom physical and social contact is to be avoided for fear of defilement. Although this imagined 'pollution' is ritual and religious in origin the discrimination it engenders is circular; many Dalits are constrained to work in ritually polluting jobs which are also objectively dangerous, dirty and low paid, thereby reinforcing the untouchable status of those who perform them. Yet paradoxically, neither engagement in 'non-polluting' work—however prestigious—nor educational or professional attainment or economic success affects individual caste status, which despite its purely notional nature is conceived as a physical attribute—a "property of the body"¹⁶—hence permanent and immutable. India's caste system is estimated to be some two to three thousand years old.¹⁷ Maintained by the twin practices of endogamy and commensality, caste is a significant (albeit not the only) feature of Indian social organization.¹⁸ 'Caste' refers both to the hierarchical division of society in orthodox Hindu creation mythology into four categories or *varnas*¹⁹ based on social function or occupation²⁰ and, at an

¹⁵ Census of India 2001, Scheduled Castes Population, at

<<http://www.censusindia.gov.in/default.aspx>>. India's total population is over one billion, two thirds of which is rural. Over half of all Dalits live in the states of Uttar Pradesh, West Bengal and Bihar in the north and Andhra Pradesh and Tamil Nadu in the south; see GOI, Ministry for Social Justice and Empowerment (MSJE), New Delhi, Report 2008-9, 7, at <<http://www.socialjustice.nic.in/ar09eng.pdf>>. Punjab has the highest percentage (almost 29%) of scheduled castes to state population.

¹⁶ Gavin Flood, *An Introduction to Hinduism* (CUP, Cambridge, 1998), 219.

¹⁷ See Bayly, *Caste, Society and Politics*, *op. cit.* note 2, 13; Govind Sadashiv Ghurye, *Caste and Race in India* (Popular Prakashan Pvt. Ltd., Mumbai, 1969), 43; Alok Parasher-Sen (ed.), *Subordinate and Marginal Groups in Early India* (Oxford University Press (OUP), New Delhi, 2004).

¹⁸ Galanter, *Competing Equalities*, *op.cit.* note 2, 7-17.

¹⁹ *Varna* means colour, referring not to skin colour but to a system of colour symbolism reflecting the social hierarchy; see Flood, *An Introduction to Hinduism*, *op. cit.* note 16, 59.

²⁰ Known as the *chaturvarna* system, comprising the Brahmins (priests) at the top of the hierarchy, followed by the Kshatriyas (warriors and rulers), Vaisyas (traders and artisans) and Shudras (serfs and labourers). The first three groups are the 'twice-born' castes—'twice-born' because males undergo a rebirth or initiation into their caste role and duties—while the fourth group (the Shudras) are the 'low'

empirical level, to the South Asian concept of *jati*—regional or local kinship groups or communities which are linked together in a hierarchically graded structure of exclusion, inclusion and dependence, effectively the operational units of the caste system. There are only four Hindu *varnas* but an indeterminate number of *jatis* as groups may occasionally merge or subdivide.²¹ While the *varna* hierarchy is fixed and immutable there has always been upward and downward movement in *jati* ranking. However, both *varna* and *jati* membership are involuntary, hereditary and fixed at birth, and characterized by individual inability or severely restricted ability to alter one's inherited status.²² Although doctrinal support for caste exists only in Hinduism, caste has permeated other religions, and caste distinctions are found in Islam, Christianity and Sikhism in South Asia and its diaspora despite their lack of scriptural support for caste.²³ At the material level, caste entails “graded inequality”²⁴—the “dispensation” of differing economic, social and cultural assets or opportunities, rights and deprivations to different groups or communities, sanctioned by religion and ideology.²⁵ In this way caste and power are inextricably linked in what Sheth terms a “sacralised power structure”.²⁶

castes, now known as ‘other backward classes’ or OBCs. Outside the *varna* system is a fifth group, the *avarnas* or Dalits, formerly known as Untouchables. See Flood, *An Introduction to Hinduism*, *op. cit.* note 16, 11-12, 48-49, 58-61.

²¹ See Narayana Jayaram, “Caste and Hinduism” in Mysore Narashimhachar Srinivas (ed.), *Caste: Its Twentieth Century Avatar* (Penguin Books, New Delhi, 1996), 78. The number of *jatis* is estimated at around 4,000. *Jatis* are region-specific which accounts for regional differences in caste formation, identity and experience.

²² For mythological exceptions to this rule in relation to *varna* status see Julia Leslie, *Authority and Meaning in Indian Religions: Hinduism and the Case of Valmiki* (Ashgate, Aldershot, 2003), 40-45; Arvind Sharma, *Hinduism and Human Rights: A Conceptual Approach* (OUP, New Delhi, 2004), 66-69. Exceptionally, individual *jati* mobility may sometimes occur in the context of inter-caste marriage or adoption; see Galanter, *Competing Equalities*, *op. cit.* note 2; Laura Dudley Jenkins, *Identity and Identification in India: Defining the Disadvantaged* (Routledge Curzon, London, 2003), 31-39, 76-79.

²³ See Zarina Bhatti, “Social Stratification among Muslims in India” and Joseph Tharamangalam, “Caste among Christians in India”, in Srinivas (ed.), *Caste*, *op. cit.* note 21.

²⁴ Babasaheb Ambedkar, “What Congress and Gandhi Have Done to the Untouchables” in Vasant Moon (ed.) *BAWS Vol. 9* (The Education Dept, Govt of Maharashtra, Bombay, 1991), 171.

²⁵ Dhirubhai Sheth, “Caste, Ethnicity and Exclusion in South Asia: The Role of Affirmative Action Policies in Building Inclusive Societies”, UN Development Programme, Human Development Report Background Paper (2004) No. 13, 3.

B. Caste and Poverty

Land and learning, two of the primary sources of economic power in India, have till recently been the monopoly of the superior castes [...] the lowest in the hierarchy were those who were assigned the meanest tasks and carried no economic power [...] The lower the caste, the poorer its members.²⁷

The framers of India's constitution aspired to achieve an end to poverty and a radical restructuring of Indian society.²⁸ The constitution guarantees individual rights and freedoms whilst explicitly providing for special measures of affirmative action for three categories of historically disadvantaged groups. These are the Dalits (known as "scheduled castes" or "SCs" in Indian constitutional, administrative and legal terminology, the only group afflicted by untouchability, and the primary focus of this paper); the *Adivasis* or Tribals (known as "scheduled tribes" or "STs");²⁹ and the "backward" or "other backward classes" (known as "OBCs"), a category of less severely socially and educationally disadvantaged groups who do not suffer from the stigma of untouchability.³⁰ Despite significant improvements since independence in literacy, primary school enrolment and public sector employment, many Dalits continue to suffer from discrimination and exclusion in the economic, occupational, educational and social fields and from caste-based violence and gross human rights abuses. Over 80% of Dalits live in the countryside where they constitute over 21% of

²⁶ *Ibid.*, 3.

²⁷ Onthethupalli Chinnappa Reddy, *The Court and the Constitution: Summits and Shallows* (OUP, New Delhi, 2008), 100.

²⁸ Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (OUP, New Delhi, Thirteenth Impression, 2008), 26-27.

²⁹ The *Adivasis*, numbering 84 million (around 8% of India's population) are a distinct social and juridical category, distinguished by tribal (aboriginal) characteristics and geographical and cultural isolation from the mainstream population; see Galanter, *Competing Equalities*, *op. cit.* note 2, 147-153.

³⁰ The OBCs are roughly equivalent to the Shudras in the Hindu *chaturvarna* framework, comprising between a third and a half of India's population. The term Backward Classes is used both to denote the OBCs alone, and generically to denote the SCs, STs and OBCs combined; see Galanter, *Competing Equalities*, *op. cit.* note 2, 121.

the population,³¹ yet own under 9% of land.³² 80% of Dalit households that do own land own less than one hectare, and Dalits constitute a quarter of all landless households.³³ Almost 37% percent of rural and 40% of urban Dalits live below India's national poverty line, compared to 28% and 26% of the total rural and urban populations respectively.³⁴ Dalits constitute over 17% of India's vast slum population³⁵ although only 12% of the urban population.³⁶ In 1991 only 28% of Dalits, compared to 48% of the total population, had electricity.³⁷ Yet, in India, material poverty is not unique to Dalits and is not the only source of their oppression. Rather, despite regional, linguistic, cultural and religious differences, they are distinguished by a shared experience of untouchability-based exclusion, discrimination and violence.³⁸

C. Caste and Economic and Occupational Inequality

Caste "has long been used to regulate economic life in India".³⁹ Although the link between caste and occupation has never been watertight, economic activity remains

³¹ Figures from the National Sample Survey (NSS) 61st Round, 2004-5, cited in Sukhdeo Thorat and Nidhi Sadana, "Caste and Ownership in Private Enterprises", 44(23) *EPW* (2009), 13-16, at 14. Dalits constitute almost 18% of the rural population and almost 12% of the urban population; see Census of India 2001, Scheduled Castes Population, at <<http://www.censusindia.gov.in/default.aspx>>.

³² Hans Raj Sharma, "Land Distribution and Tenancy among Different Social Groups", 42(41) *EPW* (2007), 4183-4185, at 4183-4184.

³³ *Ibid.*

³⁴ GOI, MSJE, Report 2007-8, 9.

³⁵ Rokkam Radhakrishna (ed.), *India Development Report 2008* (OUP, New Delhi, 2008), 89-90.

³⁶ GOI, National Commission for Scheduled Castes (NCSC), New Delhi, Report 2004-5, 20.

³⁷ Figures taken from the National Human Development Report 2001, cited in NCSC, Report 2004-5, *ibid.*, 21.

³⁸ Oliver Mendelsohn and Marika Vicziany, *The Untouchables: Poverty, Subordination and the State in Modern India* (CUP, Cambridge, 1998), 12. For two outstanding volumes documenting the lives of the poor in India, see Palagummi Sainath, *Everyone Loves a Good Drought: Stories From India's Poorest Districts* (Review, London, 1996) and Harsh Mander, *Unheard Voices: Stories of Forgotten Lives* (Penguin, New Delhi, 2001).

³⁹ Sukhdeo Thorat and Katherine Newman, "Caste and Economic Discrimination: Causes, Consequences and Remedies", 42(41) *EPW* (2007), 4121-4124, at 4122.

skewed along caste lines, with sharp disparities in occupational mobility, status and income between Dalits and the higher castes. Over 50% of rural Dalits are agricultural labourers dependent on low-paid and insecure employment,⁴⁰ a figure little changed in 20 years.⁴¹ Only 10% of rural private enterprises and just under 7% of urban private enterprises are owned by Dalits,⁴² a consequence of historical socioreligious restrictions on Dalits' access to land, capital, credit and right to own property;⁴³ moreover, Dalit-owned businesses tend to be low income-generating 'own account enterprises' run by single households without hired labour, resulting in high poverty compared to non-Dalit self-employed households, particularly in urban areas.⁴⁴ Bonded labour and child labour are intimately linked to caste; the vast majority of India's forty million bonded labourers (including fifteen million children) are Dalits and *Adivasis*,⁴⁵ while almost 32% of Dalit children in India are child workers, the largest segment of which is girls.⁴⁶

Occupational discrimination (unequal access to jobs) accounts for a large part of the earnings differential in the salaried private sector urban labour market between Dalits and *Adivasis* and the rest of the population.⁴⁷ Since independence, constitutional affirmative action policies (discussed in Part IV below) have enabled many Dalits to take up service and administrative jobs previously barred to them. However, such policies are restricted to the public sector—where Dalits are under-represented in

⁴⁰ Figures based on the NSS 55th Round 1999-2000, cited in Ghanshyam Shah, Harsh Mander, Sukhadeo Thorat *et al.*, *Untouchability in Rural India* (Sage, New Delhi, 2006), 43.

⁴¹ Sukhadeo Thorat, "Oppression and Denial: Dalit Discrimination in the 1990s" 37(6) *EPW* (2002), 572-578, at 576.

⁴² Figures based on the Economic Census 2005, cited in Thorat and Sadana, "Caste and Ownership", *op. cit.* note 31, 14.

⁴³ *Ibid.*, 13. See also NCSC, Report 2004-5, *op. cit.* note 36, 30.

⁴⁴ Thorat and Sadana, "Caste and Ownership", *op. cit.* note 31, 14.

⁴⁵ Human Rights Watch, "Small Change: Bonded Child Labour in India's Silk Industry", 2003, 139, at <<http://www.hrw.org/en/reports/2003/01/22/small-change>>, cited in National Human Rights Commission (NHRC), "Report on Prevention of Atrocities Against Scheduled Castes: Policy and Performance: Suggested Interventions and Initiatives for NHRC" (NHRC, New Delhi, India, 2004), 64.

⁴⁶ *Ibid.*, 16.

⁴⁷ Subramaniam Madheswaran and Paul Attewell, "Caste Discrimination in the Indian Urban Labour Market: Evidence from the National Sample Survey", 42(41) *EPW* (2007), 4146-4153, at 4153.

senior posts and over-represented in the lowest grade posts.⁴⁸ Yet, while this sector has been shrinking since the 1990s in the face of globalization and India's economic liberalization programme,⁴⁹ Dalits struggle to secure anything other than menial or low status positions in the rapidly expanding formal private sector. Thorat and Newman attribute Dalit occupational immobility to fixed economic rights defined by caste⁵⁰ which make it very difficult for young Dalits to accumulate the necessary social and cultural capital—family background, education, social networks, cultural exposure and sophistication, personal skills and confidence, financial security and, crucially, fluency in the English language—to compete on a level playing-field.⁵¹ “Far from disappearing as the economy modernises”, they argue, the formal, urban labour market shows “serious evidence of continued discriminatory barriers even for highly qualified [D]alits”.⁵² Despite the view in modern corporate India that recruitment is ‘caste-blind’ and governed strictly by merit⁵³ interviewees are invariably questioned about ‘family background’, a euphemism for caste.⁵⁴ A study of employer responses to written job applications found that applicants with a distinctively Dalit name (the only aspect of ‘family background’ communicated in the application) had significantly lower odds of being contacted for interview than equivalently-qualified

⁴⁸ NCSC Report 2004-5, *op. cit.* note 36, 179-178.

⁴⁹ See Gurcharan Das, *India Unbound* (Penguin Books India, New Delhi, 2000); Gowher Rizvi, “Emergent India: Globalisation, Democracy and Social Justice”, 62 *International Journal* (2007), 753-768; Sudha Pai, “Dalit Question and Political Response: Comparative Study of Uttar Pradesh and Madhya Pradesh”, 39(11) *EPW* (2004), 1141-1150, at 1144.

⁵⁰ Thorat and Newman, “Caste and Economic Discrimination”, *op. cit.* note 39, 4122.

⁵¹ Surinder Jodhka and Katherine Newman, “In the Name of Globalisation: Meritocracy, Productivity and the Hidden Language of Caste”, 42(41) *EPW* (2007), 4125-4132, at 4127-4128; Thomas Weisskopf, “Impact of Reservations on Admissions to Higher Education in India”, 39(39) *EPW* (2004), 4339-4349, at 4344; Mohanty, “Social Inequality”, *op. cit.* note 9.

⁵² Thorat and Newman, “Caste and Economic Discrimination”, *op. cit.* note 39, 4123. Muslims were found to suffer similar discrimination.

⁵³ See Jodhka and Newman, “In the Name of Globalisation”, *op. cit.* note 51, 4125. Fredman argues that merit is “not an objective and quantifiable property”, and that “even if prevailing notions of merit are accepted, one is not supplying genuine equality of opportunity if one applies this criterion to people who have been denied the opportunity to acquire ‘merit’”; Sandra Fredman, “Reversing Discrimination”, 113 *Law Quarterly Review* (1997), 575-600, at 580.

⁵⁴ Jodhka and Newman, “In the Name of Globalisation”, *op. cit.* note 51, 4127-4128.

applicants with a stereotypically high caste Hindu name.⁵⁵ The accumulated “cultural capital deprivation” of many Dalits presents a major hurdle to occupational—as well as social—mobility.⁵⁶

D. Educational Inequality

Article 46 of the constitution provides 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 Scheduled Tribes and protect them from social injustice and all forms of exploitation”. Yet since independence, elementary education has been woefully neglected, especially in rural areas where the majority of the population, and the majority of Dalits live. Free compulsory education for six to fourteen year olds became a fundamental constitutional right only in 2002.⁵⁷ Although Dalit literacy levels rose from 10% in 1961 to almost 55% in 2001, this remains below the national level of 65%⁵⁸ and there are significant regional and gender disparities. Less than 42% percent of Dalit women are literate compared to almost 54% percent of the general female population. In 2000 70% of rural Dalit women were illiterate,⁵⁹ while in Uttar Pradesh (UP) only 8% of rural Dalit women were literate compared to 75% in Kerala.⁶⁰ Basic education enrolment rates for Dalit children aged six to fourteen are similar to the population as a whole, but fourteen-plus enrolment rates are noticeably worse among Dalits and drop-out rates are worse for Dalits aged six to sixteen, at 70%, as contrasted with 61% for the general

⁵⁵ Sukhadeo Thorat and Paul Attewell, “The Legacy of Social Exclusion: A Correspondence Study of Job Discrimination in India”, 42(41) *EPW* (2007), 4141-4145.

⁵⁶ Weisskopf, “Impact of Reservations”, *op. cit.* note 51, 4344; Mohanty. “Social Inequality”, *op. cit.* note 9.

⁵⁷ COI Article 21-A, inserted by the Constitution (Eighty-Sixth) Amendment Act 2002, S.2.

⁵⁸ NCSC Report 2004-5, *op. cit.* note 36, 16.

⁵⁹ Figures based on the NSS 55th Round 1999-2000, cited in Shah, Mander, Thorat *et al.*, *Untouchability in Rural India*, *op. cit.* note 40, 46.

⁶⁰ *Ibid.*, 117.

population⁶¹ (and the figures are worse for girls) due in part to the high direct costs of schooling and the need for Dalit children to work.⁶²

Despite constitutional affirmative action provisions in tertiary (higher) education (HE), Dalits are significantly under-represented in the ranks of higher degree graduates (the minimum qualification for middle-ranking public-sector jobs).⁶³ Dalits form around 12% of the urban population but just 3.6% of urban non-technical subject graduates and under 2% of urban medical graduates, while Hindu upper castes comprise 37% of the urban population but over 65% of both non-technical subject and medical graduates—making “their share in the highly educated [...] about twice their share in the general population”.⁶⁴ But graduate under-representation cannot be attributed solely to discriminatory practices in university admissions, although discrimination remains a factor.⁶⁵ Dalit children are more likely to attend state-run, poor quality, rural, non English-medium schools; inequality in primary and secondary schooling means that they are less likely to meet college admissions requirements.⁶⁶ By 2000 the representation of Dalits in higher education was still only half their representation in the population as a whole; moreover, two thirds of Dalit students are enrolled on low prestige programmes and they are disproportionately under-represented in masters and doctoral programmes.⁶⁷ Although 15% of places in tertiary institutions—including the elite technology, management and medical institutes—are reserved for Dalits, it is estimated that nationally at least half of these go unfilled

⁶¹GOI, Ministry of Human Resource Development (MHRD), Department of Higher Education (DHE), Selected Educational Statistics (SES) 2005-6, Gross Enrolment Rates, at <http://www.educationforallinindia.com/SES2005-06.pdf>.

⁶² NCSC Report 2004-5, *op. cit.* note 36, 118.

⁶³ Harish Jain and Chaganti Satya Venkata Ratnam, “Affirmative Action in Employment for the Scheduled Castes and the Scheduled Tribes in India”, 15(7) *International Journal of Manpower* (1994), 6-25, at 22.

⁶⁴ Satish Deshpande, “Exclusive Inequalities” in Thorat and Kumar (eds.), *In Search of Inclusive Policy*, *op. cit.* note 9, 323-324.

⁶⁵ Rana Hasan and Aashish Mehta, “Under-Representation of Disadvantaged Classes in College: What Do the Data Tell Us?”, 41(35) *EPW* (2006), 3791-3796; Mohanty, “Social Inequality”, *op. cit.* note 9, 3788.

⁶⁶ Hasan and Mehta, “Under-Representation”, *op. cit.* note 65, 3791.

⁶⁷ Weisskopf, “Impact of Reservations”, *op. cit.* note 51, 4339.

despite lower admissions requirements, due to a lack of suitably qualified applicants, while those Dalits who do gain admission are less academically prepared.⁶⁸ Once at university Dalits are not guaranteed freedom from social discrimination.⁶⁹ Moreover they tend to perform slightly worse than general entry students due to financial difficulties, family demands, poorer English language capabilities and weaker sociocultural backgrounds which leave them ill-prepared for academic study.⁷⁰

E. Untouchability and Violence

1. Untouchability

Described by Ambedkar as a notional *cordon sanitaire*⁷¹ separating the untouchables from the rest of society, untouchability (customary rules of social segregation, ostracism and exclusion) and social violence operate as dual enforcement mechanisms for the maintenance of caste norms and boundaries and to exclude Dalits from wider public, economic, social and cultural life.⁷² In 1948 Ambedkar described the division of Indian villages into two sections, the Touchables and the Untouchables who must live “in separate quarters away from the habitation of the Hindus”.⁷³ Although as Mendelsohn and Vicziany observe, untouchability has changed character and lost intensity since independence⁷⁴ and there is a decline in some of the most blatant

⁶⁸ *Ibid.*, 4340-4341.

⁶⁹ *Ibid.*, 4344-4345; see also Sharmila Ganesan and Nilanjana Sengupta, “Bad Language: When Dalits Hear Voices”, *Times of India*, 24 September 2006.

⁷⁰ Mendelsohn and Vicziany, *The Untouchables*, *op. cit.* note 38, 143; Weisskopf, “Impact of Reservations”, *op. cit.* note 51, 4344-4345.

⁷¹ Ambedkar, “What Congress and Gandhi have Done to the Untouchables”, *op. cit.* note 24, 187. See also Srinivas’ concept of the “pollution line”; Srinivas, *Caste*, *op. cit.* note 21, xiii.

⁷² See Girish Agrawal and Colin Gonsalves, *Dalits and the Law* (Human Rights Law Network, New Delhi, 2005), 5; NHRC, “Report”, *op. cit.* note 45, 3.

⁷³ Babasaheb Ambedkar, “Outside the Fold”, in Valerian Rodrigues (ed.), *The Essential Writings of B.R. Ambedkar* (OUP, New Delhi, 2002), 323. Ambedkar used the term Hindus to distinguish between Touchables and Untouchables.

⁷⁴ Mendelsohn and Vicziany, *The Untouchables*, *op. cit.* note 38, 36.

practices,⁷⁵ a 2006 academic study of rural untouchability in 11 states found “almost universal residential segregation in villages”⁷⁶ and untouchability practised in a variety of forms in almost 80% of the villages studied, despite its constitutional abolition. In one out of ten villages studied, Dalits were not allowed to wear new clothes or sandals, use umbrellas or ride bicycles; in almost half the villages, Dalit marriage processions were prohibited on public roads; in three out of four villages, Dalits were not permitted to enter *savarna* (upper caste) homes, let alone eat with upper castes.⁷⁷ Moreover, one of the study’s authors argues elsewhere that the “spatial, social and institutional base for untouchability” has been recreated in the towns.⁷⁸ On the surface untouchability has declined in urban centres—where, at least in public spaces, the touchable–untouchable barrier is impossible to maintain and caste anonymity easier to achieve—but rather than a diminution of prejudice, argue Mendelsohn and Vicziany, this reflects a combination of pragmatism, avoidance strategies and “compartmentalisation” by higher status Indians who remain occupationally, residentially and socially separated from the lower castes;⁷⁹ the invisibility of caste from the lives of the higher castes, says Deshpande, is a luxury of the urban elite.⁸⁰

⁷⁵ Shah, Mander, Thorat *et al.*, *Untouchability*, *op. cit.* note 40, 166.

⁷⁶ *Ibid.* 67. See also Bela Bhatia, “Dalit Rebellion against Untouchability in Chakwada, Rajasthan”, 40 *Contributions to Indian Sociology* (2006), 29-61.

⁷⁷ Shah, Mander, Thorat *et al.*, *Untouchability*, *op. cit.* note 40, 166-167; see also Navsarjan Trust and Robert F. Kennedy Centre for Justice and Human Rights, *Understanding Untouchability: A Comprehensive Study of Practices and Conditions in 1589 Villages*, 2010, at <http://www.rfkcenter.org/files/Untouchability_Report_FINAL_Complete_1.pdf>; Hugo Gorringer and Irene Rafanell, “The Embodiment of Caste: Oppression, Protest and Change”, 41(1) *Sociology* (2007), 97-114, at 103.

⁷⁸ Gopal Guru, “Power of Touch”, 23(25) *Frontline* (2006), at <<http://www.thehindu.com/fline/fl2325/stories/20061229002903000.htm>>.

⁷⁹ Mendelsohn and Vicziany, *The Untouchables*, *op. cit.* note 38, 40-41; Gorringer and Rafanell, “The Embodiment of Caste”, *op. cit.* note 77, 106-7. On the phenomenon of Untouchability/Touchability see Guru, “Power of Touch”, *op. cit.* 78; Gabriele Alex, “A Sense of Belonging and Exclusion: ‘Touchability’ and ‘Untouchability’”, in Tamil Nadu, 73(4) *Ethos* (2008), 523-543; Sundar Sarukkai, “Phenomenology of Untouchability”, 44(37) *EPW* (2009), 39-48; Gopal Guru, “Archaeology of Untouchability”, 44(37) *EPW* (2009), 49-56.

⁸⁰ Ashwin Deshpande, “The Eternal Debate” in Thorat and Kumar (eds.), *In Search of Inclusive Policy*, *op. cit.* note 9, 68.

2. Violence

Violence against Dalits and *Adivasis*—known as ‘atrocities’—is on the rise,⁸¹ often committed with the knowledge, acquiescence, or at the hands, of law enforcement agencies including the police and the judiciary.⁸² Non-governmental monitoring groups and statutory bodies link atrocities with greater competition between Dalits and higher castes for scarce resources such as land and water⁸³ as well as with attempts by higher caste groups to protect their status against growing Dalit political and economic assertion, or to punish those perceived to have transgressed social boundaries.⁸⁴ Frequently the perpetrators of anti-Dalit violence are the intermediate castes or the OBCs, those castes just above the Dalits in the social hierarchy⁸⁵—the 2006 Khairlanji atrocity in Maharashtra (in which four members of a Dalit family, the Bhotmanges, were tortured and murdered by an OBC mob) being a recent well-publicized example.⁸⁶ Collaboration against Dalits between upper castes and, in Rajasthan, Jats (landowning Sikhs), or between upper castes and other marginalized groups such as the Muslims or STs (who cannot be prosecuted under the POAA—see below), also occurs⁸⁷ as does caste violence in the Punjab between Jats and Ad-

⁸¹ NHRC, “Report”, *op. cit.* note 45; Hugo Gorringer, “*Banal Violence? The Everyday Underpinnings of Collective Violence*”, 13 *Identities: Global Studies in Culture and Power* (2006), 237-260.

⁸² See NHRC, “Report”, *op. cit.* note 45, 47; Gorringer, “*Banal Violence*”, *op. cit.* note 81, 244; Human Rights Watch, “Broken People: Caste Violence Against India’s Untouchables”, 1999, at <<http://www.hrw.org/legacy/reports/1999/india>>; Human Rights Watch, “Caste Discrimination: A Global Concern”, 2001, at <<http://www.hrw.org/legacy/reports/2001/globalcaste/caste0801.pdf>>.

⁸³ See Sakshi Human Rights Watch, Secunderabad, “Dalit Human Rights Monitor, Andhra Pradesh 2000-2003”, 3-4; Martin Macwan and Harshad Desai, *Atrocities on Dalits in Gujarat 1990-3: A Documentation and Evaluation* (Centre for Social Studies, South Gujarat University, Surat, 1997).

⁸⁴ NHRC, “Report”, *op. cit.* note 45, 1; Bhatia, “Dalit Rebellion”, *op. cit.* note 76, 46.

⁸⁵ According to Gorringer, in Tamilnadu caste violence is predominantly perpetrated against Dalits “by insecure BC groups”; Gorringer, “*Banal Violence*”, *op. cit.* note 81, 238, 243; Bhatia, “Dalit Rebellion”, *op. cit.* note 76, 46; Anand Teltumbde, *Khairlanji: A Strange and Bitter Crop* (Navayana, New Delhi, 2008), 15-16; Rajni Kothari, “Rise of the Dalits and the Renewed Debate on Caste”, 29(26) *EPW* (1994), 1589-1594, at 1593.

⁸⁶ See Teltumbde, *Khairlanji*, *op. cit.* note 85.

⁸⁷ See Bhatia, “Dalit Rebellion”, *op. cit.* note 76, 47.

Dharmis (a Dalit religious movement the membership of which includes Sikh as well as Hindu and Muslim Dalits).⁸⁸

Crimes against Dalits are punishable under the Indian Penal Code (IPC) or under special “hate crimes” legislation—the Protection of Civil Rights Act 1955 (PCRA)⁸⁹ and the more serious Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989 (POAA or ‘Atrocities Act’)⁹⁰ which defines certain acts of violence as aggravated crimes where the victim (but not the perpetrator) is an SC/ST. The very fact that the enactment of the POAA was deemed necessary, and the nature of the offences it prohibits, is indicative of the persistence and severity of abuses suffered by Dalits in contemporary India. Alongside serious caste-aggravated IPC crimes, the POAA lists 22 “hate crimes” including forced consumption of noxious substances, corrupting or fouling water springs, forced expulsion of Dalits from their homes, and sexual offences against Dalit women. Between 2006 and 2007, total reported crimes against Dalits—including murders, abductions and rapes—increased by almost 11% to over 30,000, with the states of Uttar Pradesh, Rajasthan, Madhya Pradesh and Gujarat being the most prone to caste crime.⁹¹ However it is suggested that under-reporting by victims and police refusal to register cases, especially POAA cases, mean that the true level of atrocities is higher.⁹²

⁸⁸ See Surinder Jodhka, “Sikhism and the Caste Question: Dalits and their Politics in Contemporary Punjab”, 38(1-2) *Contributions to Indian Sociology* (2004), 165-192; Ronki Ram, “Untouchability, Dalit Consciousness and the Ad Dharm Movement in Punjab”, 38(3) *Contributions to Indian Sociology* (2004), 323-349. On the Ad-Dharm movement see Mark Juergensmeyer, *Religion as Social Vision: The Movement against Untouchability in 20th Century Punjab* (University of California Press, Berkeley, 1982).

⁸⁹ Formerly the Untouchability (Offences) Act 1955, amended and renamed in 1976 to enlarge its scope and to strengthen its penal provisions; at <<http://nrcw.nic.in/shared/sublinkimages/173.htm>>.

⁹⁰ Full text available at <<http://socialjustice.nic.in/poa-act.pdf>> (last visited 26 July 2009).

⁹¹ GOI, National Crime Records Bureau (NCRB), “Crime in India 2007”, Crime against Persons Belonging to SCs/ STs, Table 7.1, Incidence and Rate of Crimes Committed Against Scheduled Castes During 2007, at <<http://ncrb.nic.in/cii2007/cii-2007/Table%207.1.pdf>>.

⁹² See Sakshi Human Rights Watch, “Dalit Human Rights Monitor” *op. cit.* note 83; NHRC, “Report”, *op. cit.* note 45, 25, 33.

Caste crimes in general suffer low conviction rates and high year-on-year pendency of cases;⁹³ in 2007 only 14,000 people were convicted of crimes against SCs out of forty-seven thousand individuals whose trials were completed, leaving 186,000 whose trials remained pending.⁹⁴ Both CERD/C and CESCR/C have commented on allegations of police failure to register, investigate and properly assist victims of atrocities and caste discrimination, in addition to the persistence of untouchability practices and *de facto* segregation of Dalits in access to public places.⁹⁵

3. *Untouchability, Violence and Gender*

Paradoxically, untouchability offers no protection against caste-based sexual violence. Punitive or coercive violence against Dalits is often characterized by its highly gendered nature, with Dalit women and girls the deliberate targets of gendered untouchability practices, and rape and sexual torture an integral element of retaliatory and punishment crimes against Dalit families;⁹⁶ to conceptualize caste-based sexual coercion and assault as semi-opportunistic acts of individual sexual exploitation⁹⁷ is to misunderstand the use of institutionalized sexual violence as a mechanism of social control and an exercise in power, and the intersectional nature of caste/gender

⁹³ GOI, NCRB, “Crime in India 2007”, Crime Against Persons Belonging to SCs/ STs, Table 7.8, Percentage of Cases by Courts Disposed of for Crimes Committed against Scheduled Castes During 2007, at <<http://ncrb.nic.in/cii2007/cii-2007/Table%207.8.pdf>>; Disposal of Cases by Police and Courts, Table 4.12, Conviction Rate of IPC Crimes During 2007, at <<http://ncrb.nic.in/cii2007/cii-2007/Table%204.12.pdf>>.

⁹⁴ GOI, NCRB, “Crime in India 2007”, Crime Against Persons Belonging to SCs/ STs, Table 7.19, Disposal of Persons by Courts Arrested for Committing Crimes against Scheduled Castes During 2007, at <<http://ncrb.nic.in/cii2007/cii-2007/Table%207.19.pdf>>.

⁹⁵ See CERD/C, *op. cit.* note 12, paras. 13, 14, 26; see also CESCR/C, concluding observations on India’s second to fifth periodic reports, 8 August 2008, UN Doc. E/C.12/IND/CO/5, 13, 14, 52, 53.

⁹⁶ See Aloysius Irudayam, Jayshree Mangubhai and Joel Lee, *Dalit Women Speak Out: Violence against Dalit Women in India, Volume I* (National Campaign on Dalit Human Rights, New Delhi, 2006); NHRC, “Report”, *op. cit.* note 45, 161. See also Sabrina Buckwalter, “Just Another Rape Story”, *Times Of India*, 29 October 2006; “Dalit Minor Raped—Body Found with Arm and Eye Missing”, *The Indian Express*, 19 March 2008.

⁹⁷ See Mendelsohn and Vicziany, *The Untouchables*, *op. cit.* note 38, 46-47.

discrimination.⁹⁸ Dalit women and girls are particularly vulnerable to violence where they seek to access “livelihood resources” such as water, firewood, or wages.⁹⁹ Yet a 2006 non-governmental organization (NGO) study of violence against Dalit women found that only 15% of sexual crimes (barring forced prostitution) were being investigated by the police or pending hearing before the courts,¹⁰⁰ and accuses the police of wilful failure of enforcement and collusion with dominant caste actors.¹⁰¹ Dalit girls are also subject to the pseudo-religious practice of ritualized prostitution, known as *Devadasi* or *Jogini*, where prepubescents are dedicated to a temple or deity and condemned to a life of sexual exploitation as temple prostitutes. *Devadasi* has been abolished in Karnataka and Andhra Pradesh¹⁰² yet the practice remains widespread.¹⁰³ In 2007 the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW/C) identified impunity for atrocities against Dalit women, manual scavenging (see below) and the *Devadasi* system as issues requiring India’s ‘priority attention’.¹⁰⁴

Although the picture painted above is bleak, the upsurge in violence against Dalits can be interpreted as higher-caste reaction to Dalit assertion—political mobilization,

⁹⁸ Susan Brownmiller, *Against Our Will* (Penguin Books Ltd, Harmondsworth, 1975), 256. See also *Integration of the Human Rights of Women and the Gender Perspective: Violence against Women—Violence against Dalit Women in India and Nepal*; Asian Legal Resource Centre, Written Statement, 10 March 2003, UN Doc E/CN.4/2003/NGO/97, 2, 6-7.

⁹⁹ See Irudayam *et al.*, *Dalit Women Speak Out*, *op. cit.* note 96, 5.

¹⁰⁰ *Ibid.*, 320.

¹⁰¹ *Ibid.*; see also “Human Rights and Dignity of Dalit Women: Report of the Hague International Conference on Dalit Women’s Rights, 20-25 November 2006” (Justitia et Pax Netherlands, The Hague, 2007), 9.

¹⁰² Andhra Pradesh Devadasi (Prohibition of Dedication) Act 1988; Karnataka Devadasi (Prohibition of Dedication) Act 1992. These statutes also provide for rehabilitation programmes.

¹⁰³ Between 2003 and 2004 thousands of *Joginis* were identified in 12 districts of Andhra Pradesh alone; interview with worker from the NGO Andhra Pradesh Jogini Vyavastha Vyethireka Porata Sangathana, Hyderabad, Andhra Pradesh, 11 January 2007. The interview was conducted and interview notes stored in accordance with Manchester Metropolitan University’s Guidelines on Good Research Practice. Interviewees were granted confidentiality and anonymity.

¹⁰⁴ See CEDAW/C, concluding comments on India’s third periodic report, UN Doc. CEDAW/C/IND/CO/3, 27 February 2007, 7, 28, 29. See also CERD/C, *op. cit.* note 12, 15, 18, 23.

resistance to subordination, and demands for a fair share of resources¹⁰⁵—described by Varshney as “an unfinished social transformation”.¹⁰⁶ While the ideology of caste and untouchability has clearly not been eradicated¹⁰⁷, there is much debate surrounding the extent to which the weakening of that ideology can be attributed to the constitutional and legal reforms and policy measures introduced post-independence to eliminate caste discrimination and secure the socioeconomic advancement of the Dalits. It is to these reforms and policies that we now turn.

III. THE ELIMINATION OF CASTE DISCRIMINATION: INDIA’S POLICIES

A. *The Constitutional Vision*

Since independence India has adopted legal and policy measures to uplift the lowest castes and eliminate caste discrimination. Its constitution establishes India as a “Sovereign, Socialist, Secular, Democratic Republic” committed to securing for all its citizens “social, economic and political justice, liberty of thought, expression, belief, faith and worship, and equality of status and opportunity, and to the promotion of fraternity assuring the dignity of the individual and the unity and integrity of the nation”.¹⁰⁸ As previously noted, the constitution guarantees individual rights and freedoms alongside affirmative action measures for the SCs, the STs and the OBCs. Religious, linguistic and cultural minorities are guaranteed freedom of religion and protection of their cultural, linguistic and educational rights but they are not eligible *qua* minorities for the special measures afforded to the SCs and STs and, to a lesser extent, the OBCs, who enjoy a constitutional status and measures of protection distinct from those communities categorized as minorities. The origins of this

¹⁰⁵ NHRC, “Report”, *op. cit.* note 45, 1; Mendelsohn and Vicziany, *The Untouchables*, *op. cit.* note 38, 12, 74.

¹⁰⁶ Ashutosh Varshney, “Is India Becoming More Democratic?”, 59(1) *Journal of Asian Studies* (2000) 3-25, at 20; reprinted in Ishita Banerjee-Dube (ed.), *Caste in History* (OUP, New Delhi, 2008), 215-231.

¹⁰⁷ Mendelsohn and Vicziany, *The Untouchables*, *op. cit.* note 38, 12, 74.

¹⁰⁸ COI Preamble. The words “Socialist, Secular” were added after “Sovereign” and the words “and integrity” were added after “unity” by the Constitution (Forty-Second) Amendment Act 1976, S.2.

distinction lie in the 1947 partition of India on religious grounds into the separate states of India and Pakistan. The draft constitution originally contained electoral and employment reservations for the SCs and STs as well as religious minorities (the largest minority being Muslims, who already benefitted pre-independence from reservations in political representation) but in 1949, in the aftermath of partition, reservations for religious minorities were dropped as being contrary to the secular ideal and a threat to national unity which would serve only to “sharpen communal divisions”.¹⁰⁹

The constitution embodies a three-pronged strategy for the emancipation of the Dalits which owes much to the legal and political vision of Ambedkar as Chairman of the Constitution Drafting Committee, and his skills as a legal negotiator and draftsman. The first legal scholar to conceptualize caste and untouchability-based exclusion as a civil and economic rights issue, not merely a socioreligious matter, Ambedkar transformed the untouchables into a national social and political entity and secured their status as a *sui generis* legal category.¹¹⁰ The constitutional framework consists of, firstly, legal protection from the ideology and practice of untouchability and from inequality and discrimination in the social and economic fields; second, affirmative action provisions, known as reservations, in the spheres of political representation, government and public sector employment and higher education; third, measures of socioeconomic development.¹¹¹ The purpose was to protect the Dalits from the imposition of untouchability-based disabilities, compensate them for the historical injustices and disadvantages inflicted by the “rope of Untouchability”,¹¹² increase their representation in reserved fields, and facilitate and promote their economic and social advancement. The impact and effects of these policies are assessed in Section IV.

¹⁰⁹ See Constituent Assembly Debates of India (CAD) VIII, 25 May 1949 (Lok Sabha Secretariat, New Delhi), 269-272. See also Zoya Hasan, *Politics of Inclusion: Castes, Minorities and Affirmative Action* (OUP, New Delhi, 2009).

¹¹⁰ See, Jaffrelot, *Dr Ambedkar op. cit.* note 6. See also Upendra Baxi, “Emancipation as Justice: Babasaheb Ambedkar’s Legacy and Vision”, in Upendra Baxi and Bikhu Parekh (eds.), *Crisis and Change in Contemporary India* (Sage Publications, New Delhi, 1995), 122-149.

¹¹¹ See NHRC, “Report”, *op. cit.* note 45, 5.

¹¹² CAD VII, 29 November 1948, 665.

B. Equality and Anti-Discrimination: Legal Framework

1. Constitutional Provisions

Legal guarantees of equality and protection from discrimination are the classic legal mechanisms for addressing discrimination against members of identified groups. In India these mechanisms take the form of constitutional provisions, legislation, and constitutional and statutory monitoring bodies (the latter are not discussed in this article for reasons of space). Citizenship is guaranteed by Article 5 of the constitution. Articles 14-31 guarantee certain individual “Fundamental Rights” to all citizens, enforceable by law, justiciable under Articles 32 and 226, and equating broadly to civil and political rights. These include the right to equality before the law (Art. 14) and the prohibition of discrimination by public and private actors on grounds of religion, race, caste, sex, or place of birth (Art. 15(1)). Article 15(2) defines discrimination as the imposition of any disability, liability, restriction or condition with regard to access to shops, public restaurants, hotels or places of public entertainment, or the use of wells, tanks, bathing ghats, roads, or places of public resort maintained out of state funds or for general public use—these being the major forms in which untouchability is practised in the public sphere. Article 17 abolishes untouchability (but not the caste system *per se*) and makes its practice in any form a criminal offence, while Articles 16(1) and 16(2) respectively guarantee equality of opportunity and prohibit discrimination on grounds of religion, race, caste, sex, descent, place of birth, or residence in public employment or state office. Article 29(2) prohibits denial of admission on grounds of religion, race, caste or language into any state or state-maintained educational institution. The constitution prohibits deprivation of life or personal liberty except in accordance with the law (Art. 21), traffic in human beings and forced labour or *begar* (Art. 23), and the employment of children under 14 in factories, mines or other hazardous employment (Art. 24).

2. Legislation

(a) Protective Legislation

The constitutional provisions are operationalized by criminal, or ‘protective’, legislation—discrimination (or anti-discrimination) legislation being the term

commonly used to denote civil discrimination (‘equality’) law. The PCRA 1955 and the POAA 1989 (discussed in Section II) impose penal sanctions for untouchability practices and caste violence. Untouchability is defined neither in the constitution nor in the legislation. The PCRA criminalized certain acts “if committed on ground of ‘untouchability’”, but acts of gross violence against Dalits were not covered. 40 years later, in response to an upsurge in brutalities against Dalits and Tribals, the POAA was enacted to address tribe- and caste-based hate crimes wherever the victim, but not the perpetrator, of a prohibited act is an SC or ST. Responsibility for implementing both acts lies with state governments, which may (in PCRA cases) or must (in POAA cases) provide legal aid to victims,¹¹³ designate special courts¹¹⁴ and must appoint special prosecutors,¹¹⁵ for speedy trial of cases under the acts. The POAA also requires states to ensure the economic and social rehabilitation of victims,¹¹⁶ set up SC/ST protection cells at state police headquarters,¹¹⁷ appoint special police officers at state and district level with responsibility for POAA cases,¹¹⁸ and ensure that investigations are carried out within 30 days by a deputy superintendent of police (DSP) or higher officer.¹¹⁹ Yet neither the PCRA nor the POAA have proved an effective remedy to untouchability or caste violence.

(b) Other Measures

Legislation has also been introduced to protect Dalits—the majority of whom work in the unorganized sector¹²⁰—from degrading and humiliating customs and employment practices, and from economic exploitation, but here too there is great divergence between statutory provisions and lived reality. The Employment of Manual

¹¹³ PCRA S.15A (2)(i); POAA S.21(2)(i).

¹¹⁴ PCRA S.15A (2)(iii); POAA S.14.

¹¹⁵ POAA S.15.

¹¹⁶ POAA S.21(2)(iii).

¹¹⁷ Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Rules 1995 (POAR) Rule 8.

¹¹⁸ POAR Rule 10.

¹¹⁹ POAR Rule 7(1) and 7(2).

¹²⁰ See GOI, Ministry Of Labour, New Delhi, Report 2007-8, Chapter 8 on legislation protecting workers in the unorganized sector, at <<http://labour.nic.in/annrep/annrep2008.htm>>.

Scavengers and Construction of Dry Latrines (Prohibition) Act 1993 prohibits manual scavenging—the removal by hand of human excreta from dry latrines, which is done almost exclusively by Dalit women and girls and surely the most extreme manifestation of caste-based economic exploitation and degradation—yet there are an estimated 1.2 million manual scavengers, many of whom are employed by local authorities and public bodies such as the railways.¹²¹

As previously mentioned, state laws have also been enacted to eliminate the *Devadasi* system, yet the practice persists. The Bonded Labour System (Abolition) Act 1976 abolishes agreements, obligations and customary sanctions permitting bonded labour and criminalizes its use, while the Child Labour (Prohibition and Regulation) Act 1986 prohibits child labour in certain employments and regulates it in others. Neither the relevant constitutional provisions nor the statutes specifically mention Dalits but since the majority of bonded labourers, and many child labourers, are Dalits the provisions are particularly relevant to them. The Minimum Wage Act 1948 was enacted to protect employees appropriating the fruits of labour of the poor. Like the bonded and child labour statutes this legislation was not targeted specifically at Dalits but has a greater impact on them by virtue of their greater poverty. Finally, laws have been introduced to reduce the concentration of productive assets and economic resources in the hands of the higher castes and to secure more equitable distribution of economic assets, for example land reform and debt relief legislation.¹²²

C. Measures for Socioeconomic Development

¹²¹ Shah, Mander, Thorat *et al.*, *Untouchability*, *op. cit.* note 40, 107-109; Gita Ramaswamy, *India Stinking: Manual Scavengers in Andhra Pradesh and Their Work* (Navayana Publishing, Pondicherry, 2005); Annie Zaidi, “India’s Shame”, *Frontline*, 22 September 2006; “India: Manual Scavenging, A Shame on the Nation”, Human Rights Council 9th Session, 25 August 2008, Asian Legal Resource Centre, at <<http://www.alrc.net/doc/mainfile.php/hrc9/515/%20>>.

¹²² See NHRC, “Report”, *op. cit.* note 45, 17.

The constitution incorporates social and economic rights in Articles 39-51 as Directive Principles of State Policy (DPs).¹²³ The DPs mandate a “social justice” framework for state policy and law-making and direct the state to strive to secure a just social order¹²⁴ and to “minimise the inequalities in income and to endeavour to eliminate inequalities in status, facilities and opportunities”;¹²⁵ yet successive post-independence governments have failed to systematically redistribute resources to the poor or even comprehensively to meet their basic needs in health, education and welfare.¹²⁶ Neither land reform nor anti-poverty programs have succeeded in effecting socioeconomic transformation. Landlessness is a major cause of Dalit poverty but, for Dalits, land reform has been “largely a failure”.¹²⁷ Designed to abolish the *zamindari* system of intermediary or “third party” tenures and absentee landlords¹²⁸ and confer legal ownership on those able to establish cultivating status and tenancy of the land, the land reforms of the 1950s onwards largely benefited OBCs with secure tenancies, at the expense of upper caste landowners and Dalits.¹²⁹ Most Dalits engaged in cultivation were “oral or insecure tenants at the will of landowners with no proof or record of their cultivating status”, or were landless labourers, not tenants, and therefore unable to benefit from reforms intended to confer ownership on those who actually worked on the land.¹³⁰

¹²³ COI Article 37 provides that the DPs shall not enforceable in any court but are nevertheless fundamental in the governance of the country and must be applied by the state in making laws. See also Onthethupalli Chinnappa Reddy, *The Court and the Constitution*, *op. cit.* note 27, 74-76.

¹²⁴ COI Article 38(1) directs the state “to strive to promote the welfare of the people by securing as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of national life”.

¹²⁵ COI Article 38(2), inserted by the Constitution (Forty-Fourth) Amendment Act 1978, S. 9.

¹²⁶ Mendelsohn and Vicziany, *The Untouchables*, *op. cit.* note 38, 147.

¹²⁷ NHRC, “Report”, *op. cit.* note 45, 85.

¹²⁸ Varshney, “Is India Becoming More Democratic?”, *op. cit.* note 106, 222.

¹²⁹ Mendelsohn and Vicziany, *The Untouchables*, *op. cit.* note 38, 154; Pradeep Kumar, “Dalits and the BSP in Uttar Pradesh: Issues and Challenges”, 34(14) *EPW* (1999), 822-826, at 826; Prakash Louis, “Lynchings in Bihar: Reassertion of Dominant Castes”, 42(44) *EPW* (2007), 26-28, at 28.

¹³⁰ NHRC, “Report”, *op. cit.* note 45, 85. See also GOI, Report of the Backward Classes Commission (Mandal Report), Vol. 1 (New Delhi, 1980), 22.

Traditionally prohibited from land ownership, Dalit assertion of tenancy rights or even mobilizing evidence to this effect could result in eviction and physical assault—a situation which persists today.¹³¹ The generic state-run anti-poverty schemes of the 1970s, 1980s and 1990s failed to raise the Dalits collectively out of poverty; indeed, such schemes have been criticized for failing to reduce mass poverty among the population as a whole and, worse, for never seriously attempting to do so.¹³² In 1979 the Special Component Plan was introduced; this was an ‘approach’ rather than a specific programme which required states and central ministries, as part of their annual plans, to earmark a proportion of general development funds exclusively for the development of Dalits, commensurate with their share in the local population. Renamed the Scheduled Castes Sub-Plan (SCSP)¹³³ under the auspices of the Ministry of Social Justice and Empowerment (MSJE), its principal disadvantage was that implementation was left to the states, which had administrative machinery that was already overburdened, inefficient and subject to political pressures. Despite the lure of additional “Special Central Assistance” funds to finance development programmes for Dalits for states implementing the SCSP, SCSP allocations by states have not matched the proportion of Dalits in the population.¹³⁴

Meanwhile in the sphere of education, a number of government initiatives have particularly benefitted or targeted Dalits including the national Sarva Shiksha Abhiyan (SSA) programme to promote universal elementary education pursuant to the Constitution (Eighty-Sixth) Amendment Act 2002; the free mid-day meals scheme, introduced in 1995, which benefits a third of all primary-school children; and schemes such as remedial coaching for Dalit students, scholarships and hostel provision.¹³⁵ Yet as Section II of this paper shows, Dalits remain at the bottom of all indices of social, economic and educational development.

¹³¹ NHRC, “Report”, *op. cit.* note 45, 86.

¹³² Mendelsohn and Vicziany, *The Untouchables*, *op. cit.* note 38, 57-158; Atul Kohli, “Introduction” in Kohli (ed.), *The Success of India’s Democracy*, *op. cit.* note 5, 1-19, at 2-3.

¹³³ See <http://planningcommission.gov.in/sectors/sj/SCSP_TSP%20Guidelines.pdf>.

¹³⁴ GOI, MSJE, Report 2007-8, 7.

¹³⁵ NCSC, “Report 2004-5”, *op. cit.* note 36, 129-137.

D. *Affirmative Action: India's 'Reservations' Policies*

E.

1. *Background*

Affirmative action policies “provide a degree of preference, in processes of selection to desired positions, for members of groups under-represented in such positions”.¹³⁶ India's policies involve the reservation of a proportion, or quota, of positions, places or seats at national and regional levels in public sector and government employment, higher education and local, regional and national political representation for members of specified, historically disadvantaged and under-represented, ‘identity groups’ the underlying rationale being to increase their representation. The constitution mandates reservations for SCs and STs (but not OBCs) in political representation, and authorises (but does not mandate) reservations for SCs, STs and OBCs in employment and higher education.

Reservations originate in the ‘special measures’ introduced in the early twentieth century by certain princely states and provinces to increase the representation of ‘non-Brahmans’ in public services¹³⁷ and in the political representation concessions made by the British to the Muslims during the same period—later extended in the constitution to SCs and STs but denied to religious minorities.¹³⁸ Article 16(4) empowers (but does not mandate) the state to reserve public sector (but not private sector) 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”. Article 16(4) has enabled the reservation of posts for SCs and STs in provincial and central government services¹³⁹ and for OBCs in provincial and (since 1993) in central services,¹⁴⁰ while

¹³⁶ Thomas Weisskopf, *Affirmative Action in the United States and India: A Comparative Perspective* (Routledge, London, 2004), 4. See also Fredman, “Reversing Discrimination”, *op. cit.*, note 53.

¹³⁷ See Mendelsohn and Vicziany, *The Untouchables*, *op. cit.* note 38, 129; O. Chinnappa Reddy, “Report of the Karnataka Third Backward Classes Commission” (Govt. of Karnataka, 1990), 12; Christophe Jaffrelot, “The Impact of Affirmative Action in India: More Political than Socioeconomic”, 5(2) *India Review* (2006), 173-189.

¹³⁸ See Hasan, *Politics of Inclusion*, *op. cit.* note 109.

¹³⁹ See Arts. 335 and 16(4) COI. Art. 16(4)A, inserted by the Constitution (Seventy-Seventh) Amendment Act 1995 S. 2, extends reservations in government posts to promotions for SCs and STs but not OBCs.

Article 335 requires the claims of the SCs and STs to be taken into consideration, ‘consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State’.¹⁴¹ Article 15(4)—inserted in 1951 following the Supreme Court decision in *State of Madras v. Champakam Dorairajan*¹⁴²—confers on the state a discretionary power to make “special provision” by law for the advancement of “any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes”. In 2005 Article 15 was further amended to allow the state to make reservations for SCs, STs and OBCs in admission to educational institutions “including private educational institutions, whether aided or unaided by the State”, other than minority educational institutions covered by Article 30(1).¹⁴³ It is these provisions which, in conjunction with Article 46, have enabled the introduction of reservations for SCs, STs and (since 2007) OBCs,¹⁴⁴ in universities and other higher education institutions. Finally, Articles 330 and 332 mandate compulsory reservation of seats for SCs and STs (but not OBCs) in the Lok Sabha (House of the People—India’s national parliament), and in state legislative assemblies, based on the percentage of their population in each state, while Articles 243-D and 243-T mandate the reservation of seats for SCs and STs in village and district Panchayats¹⁴⁵ and in

¹⁴⁰ Prior to the Supreme Court decision in *Indra Sawhney v. Union of India* (1992) AIR SC 477, states were free to grant state-wide backward class reservations in state-sector employment at their discretion, but there were no central OBC reservations.

¹⁴¹ Reservations in employment were extended to promotions and unfilled vacancies (but only for SCs and STs, not OBCs) by Arts. 16(4)A and 16(4)B, inserted by the Constitution (Seventy-Seventh) Amendment Act 1995, at <<http://indiacode.nic.in/coiweb/fullact1.asp?tfnm=77>>. Art. 16(4)B allows for “roll-over” for a maximum of three years of unfilled vacancies under Arts. 16(4) and 16(4)A and their exclusion from the 50% reservation ceiling on the total number of vacancies in any year.

¹⁴² *State of Madras v. Champakam Dorairajan* (1951) AIR SC 226. Art. 15(4), as Art. 16(4), confers a discretion rather than imposing a constitutional duty to provide for reservations in education: *Union of India v. Rajeshwaran* (2003) 9 SCC 294.

¹⁴³ See COI Art. 15(5), inserted by the Constitution (Ninety-Third) Amendment Act 2005 S.2.

¹⁴⁴ See Central Educational Institutions (Reservation in Admission) Act 2006 S.3, at <http://www.commonlii.org/in/legis/num_act/ceiiaa2006608>.

¹⁴⁵ Rural institutions of local self-government; see COI Arts. 243(d) and 243-B.

urban municipalities¹⁴⁶ in proportion to their total population in the area, of which at least one third must be reserved for SC/ST women.¹⁴⁷

Articles 15(4) and (5), 16(4), 46 and 335 are the legal source of India's complex framework of reservation policies in higher education, government services and public sector employment. Central to the operation of these policies are three questions: who benefits, what is the quantum of reservation, and to what spheres of activity do reservations apply. These three questions have generated much controversy.

2. *Who Benefits?*

(a) *Scheduled Castes*

The beneficiaries designated by the constitution are the scheduled castes, scheduled tribes and the backward classes—*sui generis* categories distinct from those religious or linguistic groups categorized as minorities.¹⁴⁸ “Scheduled Castes” was a creation of the Government of India Act 1935 to identify by means of a list or schedule¹⁴⁹ those socially-excluded castes—previously termed “Depressed Classes” or, later, “Untouchables”—eligible for preferential treatment under the act.¹⁵⁰ Both the term and the schedule were subsequently adopted in the constitution as the basis for India's post-independence policies. Article 366(24) defines SCs as those castes so notified

¹⁴⁶ Urban institutions of local self-government, comprising Nagar Panchayats in areas transitioning from rural to urban and municipal councils or corporations in urban areas; see COI Art. 243-Q.

¹⁴⁷ See COI Arts. 243-D(2) and 243-T(2). At least one third of all Panchayat and Municipality seats (including the number reserved for SC/ ST women) must be reserved for women; see COI Arts. 243-D(3) and 243-T(3).

¹⁴⁸ A statutory minority is “a community notified as such by the Central government”; National Commission for Minorities Act 1992 S.2(iii), at <http://ncm.nic.in/ncm_act.html>. Five communities—including Muslims and Christians—have been centrally notified as minorities. Additionally, states are free to accord special treatment to their religious or linguistic minorities.

¹⁴⁹ The Government of India (Scheduled Castes) Order 1936.

¹⁵⁰ Galanter, *Competing Equalities*, *op. cit.* note 2, 130. See also Dudley Jenkins, *Identity and Identification*, *op. cit.* note 22, 14.

pursuant to Article 341. Article 341 empowers the president of India, after consultation with state governors, to notify by order in relation to each state those castes or parts or groups within castes to be deemed to be SCs for the purpose of the constitution in relation to that state.¹⁵¹ Thereafter they can be delisted only by parliament. However the constitution contains no criteria for identifying the SCs and the lists have remained little changed since the original schedule was drawn up by the British in 1936, the basis for inclusion in which was untouchability—measured not according to ‘secular’ disadvantages such as poverty or illiteracy but on the basis of ritually polluting status in the traditional Hindu social hierarchy (although there was near total synchronicity between socioeconomic deprivation and low ritual status entailing the imposition of ritual ‘social disabilities’). SC status is established by means of a ‘caste certificate’ issued by the authorities establishing the holder’s eligibility for reservation benefits. However, as groups are scheduled on a state-by-state basis, a caste (or sub-caste) may be scheduled in one state but not in another, such that migrant workers who are SCs in their state of origin may not be able to claim SC status—and hence access to reservation benefits—in their new state.¹⁵² Moreover, given the value of these benefits, a significant body of ‘identity adjudication’ jurisprudence has developed concerning claims to or disputes pertaining to scheduled status arising, for example, from wrongful classification, inter-caste marriages, adoption, conversion or reconversion.¹⁵³

(b) *Scheduled Castes and Religion*

Aside from the question of reservations for women and/or religious minorities, which is beyond the scope of this article, the question of who is caught by the reservations net has been dominated since the 1980s by debates about the extension of national-

¹⁵¹ See Constitution (Scheduled Castes) Order 1950 (C.O. 19), at <http://lawmin.nic.in/ld/subord/rule3a.htm>.

¹⁵² See Dudley Jenkins, *Identity and Identification*, *op. cit.* note 22, 74-76; Galanter, *Competing Equalities*, *op. cit.* note 2, 141.

¹⁵³ See Galanter, *Competing Equalities*, *op. cit.* note 2, 326-341; Dudley Jenkins, *Identity and Identification*, *op. cit.* note 22, 23-40, 67-88; Santosh Kumar, *Social Justice and the Politics of Reservation in India* (Mittal, New Delhi, 2008), 117-119.

level reservations to the OBCs, and secondly by arguments that the SC category should be extended to include Muslim and Christian Dalits. Despite widespread recognition that the ideology and practice of caste has permeated other religions, the constitutional framework treats caste as an essentially Hindu phenomenon. Under the Constitution (Scheduled Castes) Order 1950 only Hindus, Sikhs or Buddhists can be notified as SCs.¹⁵⁴ Thus the consequence for Hindu Dalits of conversion to Islam or Christianity is the loss of SC status and entitlement to the benefit of SC reservations, while descendents of converts have never been eligible.¹⁵⁵ Muslim and Christian Dalits argue that, notwithstanding the absence of doctrinal support for caste in their faiths, they suffer from the same caste-based social disabilities and exclusion—including untouchability—as Hindu Dalits, both at the hands of their coreligionists and higher caste Hindus, and should therefore be accorded the same constitutional safeguards as those currently categorized as SCs.¹⁵⁶ As Galanter observes, the exclusion of non-Hindus from reservations “appears to give expression to a view of caste that is at variance with the [post-independence] constitutional and statutory ‘dis-establishment’ of the sacral concept of caste”.¹⁵⁷ In 2007 a government-appointed Commission for Religious and Linguistic Minorities recommended the total decoupling of SC status from religion and the classification as SCs of all those groups among the excluded religions whose counterparts among the Hindus, Sikhs and Buddhists are so classified. Its report (the Misra Report) finally came before parliament in December 2009 but at the time of writing had not yet been discussed or officially published.¹⁵⁸ In 2008 a Report for the National Commission for Minorities

¹⁵⁴ “[N]o person who professes a religion different from the Hindu, the Sikh or the Buddhist religion shall be deemed to be a member of a Scheduled Caste”; see The Constitution (Scheduled Castes) Order 1950 (C.O. 19), at <<http://lawmin.nic.in/ld/subord/rule3a.htm>>. Apart from four castes comprising both Hindu Dalits and recent Dalit converts to Sikhism, for whom an exception was made, neither Sikhs nor Buddhists were originally included in the SC category; Sikhs were added in 1956 and Buddhists in 1990 on the grounds that these were indigenous religions, essentially variants of Hinduism.

¹⁵⁵ Hasan cites the case of a Dalit woman elected on a SC reserved seat as a village representative who wished to convert to Islam but would have to resign from her post if she did so; see Hasan, *Politics of Inclusion*, *op. cit.* note 109, 196.

¹⁵⁶ See Dudley Jenkins, *Identity and Identification*, *op. cit.* note 22, 111-126.

¹⁵⁷ Galanter, *Competing Equalities*, *op. cit.* note 2, 324.

¹⁵⁸ “Centre to discuss Ranganath Misra Commission Report”, *Deccan Chronicle*, 20 December 2009, at

(NCM) on Dalits in the Muslim and Christian communities concluded that irrespective of religion Dalits are much worse off than non-Dalits;¹⁵⁹ Muslim and Christian Dalits are socially known and treated as distinct groups within their own religious communities and are invariably regarded as ‘socially inferior’ communities by their co-religionists; in most social contexts they are Dalits first and Muslims and Christians only second.¹⁶⁰ The report concluded that the denial of SC status to these groups is a historical anomaly and that there is a strong case for according them SC status.¹⁶¹

(c) *OBCs*

There is no definition of backward classes in the constitution, and no constitutional criteria for identifying OBCs. Article 340 provides for the appointment of a National Commission for Backward Classes (NCBC) to investigate the conditions of socially and educationally backward classes and to make recommendations for their improvement. To date, two commissions have been appointed: the Kalelkar Commission in 1953 and the Mandal Commission in 1979.¹⁶² The Kalelkar Commission was appointed to determine the criteria for backwardness, to draw up a central list of backward classes, and to make recommendations for the improvement

<<http://www.deccanchronicle.com/national/centre-discuss-ranganath-misra-commission-report-120>>.

The relevant paragraphs of the Report are 16.3-16.4, at

<<http://www.indianmuslims.info/book/export/html/41103>>.

¹⁵⁹ Satish Deshpande, “Dalits in the Muslim and Christian Communities: A Status Report on Current Social Scientific Knowledge”, (GOI, NCM, New Delhi, 2008). Muslims comprise 13.5% of India’s population and Christians 2.3%; Census of India 2001, Religious Composition, at <http://censusindia.gov.in/Census_Data_2001/India_at_glance/religion.aspx>.

Just over 0.5% of Muslims are Dalits and almost 40% are OBCs, while around 10% of Christians are Dalits (although this figure is generally accepted as a gross underestimate) and almost 21% are OBCs; see Deshpande, *op. cit.*, 21-22.

¹⁶⁰ *Ibid.*, 78.

¹⁶¹ *Ibid.*, 83. Extension of SC Status to Muslim and Christian Dalit Converts is Supported by CERD/C; see CERD/C, *op. cit.* note 12, 21.

¹⁶² Art. 340 originally provided for the appointment of an Officer for backward classes, replaced in 1993 by a statutory commission; see <<http://ncbc.nic.in/html/ncbc.html>>.

of their condition. It identified almost 2,400 backward communities using caste groups as the principal units and their position in the traditional caste hierarchy as the principal criterion of backwardness, and recommended reservations for these communities in government posts and technical and professional institutions. Such a huge expansion of reservation beneficiaries was unacceptable to the government, which rejected caste as the principal criterion of backwardness and abandoned the national OBCs list, leaving it to individual states to apply their own criteria but informing them that it would be better to “apply economic tests than to go by caste”.¹⁶³ So it was that until 1992 there were no national-level reservations for OBCs although states were free to grant backward class reservations at their discretion, identifying OBCs through specially-appointed state backward classes commissions.¹⁶⁴

(i) *Mandal and beyond*

In 1979 the second backward classes commission (the Mandal Commission) recommended the introduction of national-level OBC reservations in employment and education¹⁶⁵—but the recommendations were not acted upon. In 1990 the Janata Dal government announced its intention to implement the Mandal recommendations, provoking uproar and violent protests among higher caste Hindus opposed to any extension of reservations. A legal challenge to the plan resulted in a landmark Supreme Court judgment in 1992, *Indra Sawhney v. Union of India* (the “Mandal judgment”),¹⁶⁶ in favour of national reservations in employment (but not higher education) for the OBCs and their subsequent implementation. Problems in defining “backwardness” and identifying OBC groups, and questions as to their “deservingness” have contributed to making OBCs the most controversial category of reservation beneficiaries. The Mandal Commission adopted 11 social, economic and educational indicators of backwardness, including caste, but its methods and criteria

¹⁶³ See Galanter, *Competing Equalities*, *op. cit.* note 2, 176; Radhakrishnan in Srinivas (ed.), *Caste*, *op. cit.* note 21, 205-206.

¹⁶⁴ Arvindbhai Manilal Shah, “The Judicial and Sociological View of Other Backward Classes” in Srinivas (ed.), *Caste*, *op. cit.* note 21, 175.

¹⁶⁵ See Mandal Report, *op. cit.* note 130; Radhakrishnan in Srinivas (ed.), *Caste*, *op. cit.* note 21.

¹⁶⁶ *Indra Sawhney v. Union of India* (1992) AIR SC 477.

for defining backwardness were criticized.¹⁶⁷ In 1993 the NCBC was established as a statutory body responsible for determining the inclusion of groups in a central government list of notified backward classes (now amounting to some 2,300 castes and sub-castes) on the basis of published social, educational and economic indicators including caste.¹⁶⁸ Unlike SC status, OBC status is not defined by reference to religion, such that minority religious communities meeting the OBC criteria may be notified as backward classes.¹⁶⁹ National OBC reservations in higher education were introduced by the Central Educational Institutions (Reservations in Admissions) Act 2006, enacted pursuant to the Constitution (93rd Amendment) Act 2005 permitting reservations in both aided and unaided educational institutions, itself introduced in response to the Supreme Court's 2005 judgment in *P. A. Inamdar & Others v. State of Maharashtra*¹⁷⁰ that reservations could not be introduced in private, unaided educational institutions. The 2006 Act and the 93rd Amendment were challenged as unconstitutional in *Ashoka Kumar Thakur v. Union of India & Others* (known as "Mandal II").¹⁷¹ The Supreme Court stayed the legislation and referred *Thakur* to a constitutional bench (which included Chief Justice K. G. Balakrishnan, the first Dalit to hold this post). In April 2008 the bench held that the Constitution (93rd Amendment) Act 2005 was valid and did not violate the "basic structure" of the constitution so far as it relates to state-maintained and -aided educational institutions, but left open the question of whether the act would be constitutionally valid as far as private unaided educational institutions were concerned.¹⁷²

3. *Amount of Reservation and Protected Spheres*

¹⁶⁷ See Radhakrishnan in Srinivas (ed.), *Caste, op. cit.* note 21; Avatthi Ramaiah, "Identifying Other Backward Classes", 27(23) *EPW* (1992), 1203-1207.

¹⁶⁸ See NCBC, Guidelines for Consideration of Requests for Inclusion and Complaints of Under Inclusion in the Central List of OBCs, at <<http://ncbc.nic.in/html/guideline.html>>.

¹⁶⁹ See NCBC, at <<http://ncbc.nic.in/html/faq5.htm>>.

¹⁷⁰ (2005) AIR SC 3226.

¹⁷¹ Writ Petition (Civil) 265 of 2006, decided on 10 April 2008; judgment at <<http://www.judis.nic.in/supremecourt/helddis.aspx>>.

¹⁷² *Ibid.*

The constitution is silent on the minimum or maximum level for reservations. In the constituent assembly, Ambedkar argued that reservations must be confined to “a minority of seats” in order to safeguard the principle of equality of opportunity at the same time as satisfying the demand of under-represented communities.¹⁷³ In 1963 the Supreme Court in *Balaji* set a 50% ceiling on total reservations,¹⁷⁴ confirmed in numerous subsequent cases including *Sawhney*,¹⁷⁵ the rationale being that reservations above this level would violate the constitutional guarantee of equality and non-discrimination and amount to a “fraud on the Constitution”.¹⁷⁶ Reservations are currently fixed by the government at 17% for SCs and 7.5% for STs¹⁷⁷—roughly their percentage of the overall population—while reservations for the OBCs were capped by the Supreme Court in *Sawhney* at 27% (probably considerably less than their percentage of the population) such that the total reservation quota for the three categories of beneficiaries combined should not exceed 50%.¹⁷⁸ Additionally, pursuant to *Sawhney* the socially, economically and educationally uppermost members of the OBCs (known in India as the ‘creamy layer’) are excluded from the benefits of reservations.¹⁷⁹ The applicable spheres of reservation are public sector and central and state government employment, higher education seats in state-maintained or -aided institutions, and political representation at state and national level (for SCs and STs only). The private sector remains exempt from the application of reservations; the extension of reservations to the private sector has become a key Dalit demand in the struggle for equality.

¹⁷³ CAD VII, 30 November 1949, 701-702.

¹⁷⁴ *M. R. Balaji v. State of Mysore* (1963) AIR SC 649.

¹⁷⁵ *Indra Sawhney v. Union of India* (1992) AIR SC 477.

¹⁷⁶ See Susanne and Lloyd Rudolph, “Living With Difference in India: Legal Pluralism and Legal Universalism in Historical Context”, in Gerald Larson (ed.), *Religion and Personal Law in Secular India: A Call to Judgment* (Indiana University Press, Bloomington, Indianapolis, 2001), 50-51.

¹⁷⁷ Galanter, *Competing Equalities*, *op. cit.* note 2, 86.

¹⁷⁸ *Op. cit.* note 166.

¹⁷⁹ There is a large literature on the ‘creamy layer’ principle and the criterion for determining its members. The topic is also covered in recent literature on reservations generally. See Sreenivasan Subramanian, “Examining the Creamy Layer Principle”; Ashwin Deshpande, “The Eternal Debate”; and K. Sundaram, “Creamy Layer Principle: A Comment”; all in Thorat and Kumar (eds.), *In Search of Inclusive Policy*, *op. cit.* note 9. The creamy layer principle does not apply to SCs or STs.

IV. INDIA'S POLICIES ASSESSED

Despite almost 60 decades of equality policies and legislation, India remains a society marked by hierarchy and inequality.¹⁸⁰ The constitution guarantees Dalits formal (*de jure*) equality yet substantive (*de facto*) equality remains elusive. This section assesses the measures and policies for social transformation described above, identifying factors hindering their effectiveness and limitations in the policies themselves.

A. Protective Legislation

Writing in 1998, Mendelsohn and Vicziany argued that, to the extent that ritual discrimination has been overcome since independence, this is “less attributable to the state and more to increased resoluteness on the part of Untouchables themselves and also to the emergence of a new civic [predominantly urban] culture of tolerance”,¹⁸¹ albeit driven by pragmatism rather than egalitarianism.¹⁸² They concluded, from the widespread continuing discrimination against Dalits and from the small number of cases registered and disposed of, that “very few Indians have been directly affected” by what they term anti-discrimination legislation, and that the best that can be said is that “[legislation] has contributed to stripping away the legitimacy of untouchability, but it is difficult to measure such an effect”.¹⁸³ In this sub-section I briefly depict and seek to explain the prevailing “culture of under-enforcement”¹⁸⁴ of protective legislation, and I argue that criminalizing the most overt and extreme manifestations of discrimination and hatred—the current legislative approach—constitutes only a partial legal response to endemic, institutionalized discrimination and inequality.

¹⁸⁰ See Aloka Parasher-Sen (ed.), *Subordinate and Marginal Groups in Early India*, *op. cit.* note 17, 1; Hasan, *Politics of Inclusion*, *op. cit.* note 109, 3.

¹⁸¹ Mendelsohn and Vicziany, *The Untouchables*, *op. cit.* note 38, 120.

¹⁸² *Ibid.*, 125.

¹⁸³ *Ibid.*, 128, 145.

¹⁸⁴ Smita Narula, “Equal by Law, Unequal by Caste: The ‘Untouchable’ Condition in Critical Race Perspective”, 26(2) *Wisconsin International Law Journal* (2008), 255-343, at 297.

The purpose of liberal anti-discrimination legislation is multiple—to deter, to provide redress for victims, to prosecute offenders (in the case of criminal legislation), and to promote new patterns of behaviour.¹⁸⁵ To what extent has India’s legislative framework met these objectives? According to India’s National Crime Records Bureau, the PCRA and the POAA “have extended the positive discrimination [sic] in favour of SCs and STs to the field of criminal law”;¹⁸⁶ yet national and international human rights bodies, activists and scholars have repeatedly highlighted the poor enforcement of existing legislation, including in cases where atrocities have been committed by the law enforcement agencies themselves.¹⁸⁷ Special courts to ensure early prosecution of POAA cases have yet to be established in all states. POAA acquittal rates are high, conviction rates low, and a huge number of cases remain pending. At the start of 2007 almost 91,000 persons were awaiting trial for POAA offences (including those carried over from the previous year); at the end of 2007 the number of persons still awaiting trial was 74,000, or almost 82%. Of over 16,200 persons whose POAA trials were completed in 2007, only 4,000 were convicted—an acquittal rate of over 75% percent.¹⁸⁸ The NCSC cites as reasons for acquittal insufficient and inconsistent evidence, non-availability of witnesses, economic dependence of the victims, and procedural delays.¹⁸⁹ Downgrading of POAA cases is commonplace; Dalits find their attempts to report cases under the POAA thwarted by apathy, hostility or negligence on the part of the police, government officials and the judiciary: “[t]he entire system works to exclude and ostracise Dalits”.¹⁹⁰ Where a POAA investigation proceeds, courts may dismiss charges, acquit the accused or set

¹⁸⁵ Marc Galanter, *Law and Society in Modern India* (OUP, New Delhi, 1989), 217.

¹⁸⁶ GOI, NCRB, “Crime in India 2005”, Crime against Persons Belonging to SCs/ STs, at 291, at <<http://ncrb.nic.in/crime2005/cii-2005/CHAP7.pdf>>.

¹⁸⁷ See NHRC, “Report”, *op. cit.* note 45, 47; Narula, “Equal by Law”, *op. cit.* note 184, 296; CERD/C, *op. cit.* notes 12, 13, 14, 15, 26; Human Rights Watch (HRW), “Broken People: Caste Violence against India’s ‘Untouchables’” (1999), at <<http://www.hrw.org/legacy/reports/1999/india/>>.

¹⁸⁸ GOI, NCRB, “Crime in India 2007”, Crime against Persons Belonging to SCs/ STs, Table 7.19, *op. cit.* note 94.

¹⁸⁹ NCSC Report 2004-5, *op. cit.* note 36, 227-228.

¹⁹⁰ See Agrawal and Gonsalves, *Dalits and the Law*, *op. cit.* note 72, 1 and 1-9 on the performance of the executive and the judiciary in protecting Dalit human rights; see also Sakshi Human Rights Watch, *op. cit.* note 83.

aside sentence on the grounds that the investigation was not carried out by the correct person. This has been described by one NGO as “[amounting] to punishing the victim for a procedural error that is in fact the error of the government machinery”.¹⁹¹ Cases are dropped simply because of the failure of the police to obtain from the relevant government department the caste certificate of the victim or the accused within the stipulated time limit (the caste identity of both victim and accused being material to the prosecution of the accused), compounded by subsequent failure to request the Court for an extension of time for this purpose.¹⁹² Abuse of the statute through false accusations and the filing of mischievous complaints is commonly proffered as a reason for its ineffectiveness. Yet there appears to be no independent research identifying the existence or the extent of such a phenomenon, likewise no studies carried out by the police to justify this claim. The PCRA has never been heavily invoked.

The peak volume of cases registered under the act was just under 5,000 in 1979.¹⁹³ Since then its use has declined to just over 400 cases involving SCs in 2006; in 22 states/union territories no cases were registered at all.¹⁹⁴ This does not reflect an end to the practice of untouchability but almost certainly a lack of confidence on the part of victims in the police and the courts to effectively investigate and prosecute offenders, coupled with disparity in resources between victims and accused, such that complaints under the act are simply not being made.¹⁹⁵ As with the POAA, there is huge pendency of cases, with the majority ending in acquittal; in 2007, of around 1,300 persons whose trials for PCRA offences were completed, only 234 persons were convicted, a conviction rate of just over 18%.¹⁹⁶ The role of the judiciary in

¹⁹¹ Sakshi Human Rights Watch, *op. cit.* note 83, 83.

¹⁹² Interview with serving police officer, 2 February 2007, Mumbai. The interview was conducted and interview notes have been stored in accordance with Manchester Metropolitan University’s Guidelines on Good Research Practice. The interviewee was granted confidentiality and anonymity.

¹⁹³ See NHRC, “Report”, *op. cit.* note 45, 24.

¹⁹⁴ GOI, MSJE, “Cases Registered by Police and their Disposal under the PCRA 1955 during 2006”, at <<http://socialjustice.nic.in/arpcr06-a1.pdf>>.

¹⁹⁵ Galanter, *Law and Society in Modern India*, *op. cit.* note 185, 220-221.

¹⁹⁶ GOI, NCRB, “Crime in India 2007”, Crime against Persons Belonging to SCs/ STs, Table 7.19, *op. cit.* note 94.

caste crime cases has also been criticized, the 1995 Bhanwari Devi case being a nationally-publicized example involving five upper-caste men acquitted of the gang-rape of a Dalit woman, the judge stating that an upper caste man could not have defiled himself by raping a lower caste woman. Devi's appeal against the acquittal (supported by India's National Commission for Women) is yet to be heard.¹⁹⁷ Meanwhile in January 2010 in Gujarat a case was registered under the POAA against two sessions judges, a court registrar and a public prosecutor for downgrading a case involving the gang-rape of a Dalit woman.¹⁹⁸

A fundamental problem underlies the 'culture of under-enforcement' described above. India's protective legislation lacks cultural legitimacy. A huge disconnect exists between the content of the legislation and the social values and attitudes of society at large. As Galanter has remarked, "the law goes counter to perceived self-interest and valued sentiments and deeply ingrained behavioural patterns".¹⁹⁹ There is little cultural imperative to obey the law or to prosecute offenders. Thorat talks of the traditional social order continuing to govern the thought processes and behaviour of the large majority of Hindus in rural areas; people continue to follow the traditional customary rules, norms and values of the caste system and untouchability, he says, because it provides immense privilege and serves their social, political and economic interests.²⁰⁰ CERD/C has noted "with concern" the entrenched nature of "caste bias"

¹⁹⁷ Devi, a government-employed rural development worker, was raped in 1992 in retaliation for intervening in a child marriage involving a higher-caste family; see National Commission for Women at <<http://ncw.nic.in/frmlImpInterventions.aspx>>; Human Rights Watch, "Hidden Apartheid", 2007, at <<http://www.hrw.org/en/reports/2007/02/12/hidden-apartheid-0>>; Saira Kurup, "Four Women India Forgot", *The Times of India*, 7 May 2006; Mihir Desai, "Starting the Battle", 4(1) *Combat Law* (2005), at <<http://www.indiatogether.org/combatalaw/vol3/issue5/visakha.htm>>.

¹⁹⁸ See Parimal Dabhi, "Dalit Rape Victim: Gujarat Orders Cases against Judges, MLA, Prosecutor, Cops", *Indian Express*, 8 January 2010.

¹⁹⁹ Galanter, *Law and Society in Modern India*, *op. cit.* note 185, 217. This deep-seated sociocultural hostility towards Dalits is exemplified in the public comment of Congress Party politician Rita Joshi who was arrested for criticizing the compensation paid by the Mayawati government to two Dalit rape victims by telling a meeting "I say one should throw this money in Maya's face and tell her 'if you get raped, I'll give you one crore'" [£125,000]; Gethin Chamberlain, "Indian Politician Arrested Over Rape Comments", *The Guardian*, 16 July 2009.

²⁰⁰ Thorat, "Oppression and Denial", *op. cit.* note 41, 578.

in India and the social acceptance of caste-based discrimination.²⁰¹ Grinsell, applying Cover's concept of *nomos*,²⁰² explains the phenomenon in terms of castes as normative communities with normative political authority over their members, giving rise to a tension or contradiction between the constitutional objectives of social reform and equality, and existing social arrangements involving "powerful ties of attachment that Indians feel to the social and normative worlds that they inhabit in a particular caste".²⁰³

In addition to an absence of cultural consensus in favour of existing legislation, the current legislative approach itself is too narrow in its focus. Ambedkar conceptualized untouchability and caste discrimination in structural and institutional terms²⁰⁴ (unlike Gandhi, for whom untouchability was an individual religious and moral issue).²⁰⁵ Yet India's existing legislative framework is ill-suited to addressing institutionalized, structural forms of discrimination—or to promoting diversity. Both the PCRA (and its predecessor the Untouchability Offences Act 1955) and the POAA, as criminal statutes, focus legal attention on the worst manifestations of caste-based discrimination and violence. While it is important that such acts are punished, criminal law treats each instance of discrimination or violence as a single, disaggregated act committed by an individual offender or offenders, 'shorn' of its social and historical context, and conviction depends on the prosecution meeting the criminal standard of proof.²⁰⁶ Recognizing discrimination as problematic only in its most overt or violent manifestations²⁰⁷ entails a dangerous "conceptual disconnection

²⁰¹ See CERD/C, *op. cit.* note 12, 27.

²⁰² Robert Cover, "Nomos and Narrative", 97(4) *Harvard Law Review* (1983) 4-68.

²⁰³ Scott Grinsell, "Caste and the Problem of Social Reform in Indian Equality Law", 35 *Yale Law Journal* (2010), 199-236, at 221.

²⁰⁴ "To say that [a form of discrimination] is 'institutionalised' is to recognise that this systemic [discrimination] runs into and shapes the institutions governing society": Margaret Davies, *Asking the Law Question* (Thomson Law Book Co., Sydney, 2008), 296-297.

²⁰⁵ See Zelliott, *From Untouchable to Dalit*, *op. cit.* note 6.

²⁰⁶ John Downing, "'Hate Speech' and 'First Amendment Absolutism' Discourses in the US", (10) *Discourse & Society* (1999), 175-189, at 181.

²⁰⁷ Philomena Essed, *Understanding Everyday Racism: An Interdisciplinary Theory* (Thousand Oaks, CA: Sage, 1991), 283, cited in Downing, *ibid.*, 181.

between extremism and the general culture”.²⁰⁸ India lacks broader civil equality legislation designed to address ‘everyday’ acts of direct and indirect discrimination of the type described in Section II, for example in recruitment, which do not fall within the ambit of existing criminal legislation. Moreover, whereas criminal law gives control to the state to take action on behalf of the victim—whose role quickly becomes peripheral—civil anti-discrimination legislation, if well-designed, actively involves the victim in pursuing his or her case. In the absence of civil legislation to address discriminatory behaviour which falls short of the criminal threshold, the goal of challenging entrenched beliefs and promoting changed behaviour through legal means is unlikely to be realized.

B. Reservations

In 1990 O. Chinnappa Reddy, Chairman of the Karnataka Third Backward Classes Commission, described Articles 15(4) and 16(4) as “two narrow bridges constructed to enable [the] weaker sections of the people to cross the Rubicon”; yet being narrow they “only enable a select few to cross the bridge” and “touch but the fringe of the problem”.²⁰⁹ Elsewhere he stressed that reservations are not a “welfare concept” or a “poverty-alleviating programme”,²¹⁰ neither are they a “complete or even a real solution” to the problems of the scheduled castes and the backward classes, whose economic and educational advancement cannot be achieved by reservations alone.²¹¹ Rather, he says, reservations must be seen as one of several methods for securing social justice for those suppressed because of their low social status in the Hindu caste system.²¹² Yet reservations are fiercely resented by non-beneficiaries even as, says Reddy, “honest execution” has been lacking and implementation has been “lackadaisical” or opportunistic;²¹³ Mendelsohn and Vizciany describe the programme as “a massive, inefficient and highly dispiriting apparatus” which has

²⁰⁸ Downing, “Hate Speech”, *op. cit.* note 206, 181.

²⁰⁹ Chinnappa Reddy, “Report”, *op. cit.* note 137, 3.

²¹⁰ *Ibid.*, 4.

²¹¹ Chinnappa Reddy, *The Court and the Constitution*, *op. cit.* note 27, 114.

²¹² Chinnappa Reddy, “Report”, *op. cit.* note 137, 4.

²¹³ *Ibid.*

allowed the regime to “recognise the claims of the Untouchables without having to concede them any important share of power”.²¹⁴

In 2009 CERD/C recommended that special measures should be fair and proportionate, designed and implemented on the basis of the current need of the individuals and communities concerned, continually monitored, and temporary. Moreover, the human rights consequences on beneficiaries of abrupt withdrawal of special measures, especially if long-established, should be considered.²¹⁵ Yet despite their longevity it is difficult to assess the impact of India’s reservation programmes. Although information on the numbers of Dalits in government and public employment is available, quantitative data on educational reservations is less readily available, and qualitative data in both fields is lacking. Studies of the factors that impact the taking up of reserved posts or seats, the experience of beneficiaries, the long-term impact of reservations on individual socioeconomic mobility or on the families and communities of beneficiaries, or the broader social impact of the policies on reducing inequality and discrimination are few; surprisingly for a programme of such size, comprehensive monitoring and evaluation of the scheme is largely absent beyond the collection by the authorities of basic-level statistics.²¹⁶

1. Employment

²¹⁴ Mendelsohn and Vicziany, *The Untouchables*, *op. cit.* note 38, 119.

²¹⁵ CERD/ C, General Recommendation No. 32 on the meaning and scope of special measures, August 2009. See also Fredman, “Reversing Discrimination”, *op. cit.*, note 53, 596, arguing in 1997 that affirmative action policies must be carefully scrutinized and monitored for aim, effectiveness, the role of “merit” and whether the costs are fairly spread.

²¹⁶ But see GOI, MJSE, Planning, Research, Evaluation and Monitoring (PREM) Division at <<http://www.socialjustice.nic.in/aboutdivision5.html>>; see also List of Research/Evaluation Studies for Scheduled Castes Development 2007-08, at <<http://www.socialjustice.nic.in/listofresearchannevi.pdf>>; Indian Institute of Dalit Studies, Completed Research Projects, at <http://library.dalitstudies.org.in/index.php?option=com_content&view=article&id=48&Itemid=58>.

While employment reservations have opened up to Dalits government and public sector jobs previously barred to them—by 2003 the central state sector employed over one million Dalits²¹⁷—disaggregated data shows uneven representation across job grades.²¹⁸ After almost 60 years, Dalits in central services remain clustered in lower level jobs and under-represented in senior posts. In 2003 Dalits accounted for only 12% of Group A (the highest level) jobs and 14% of Group B jobs in central government services, but almost 18% of Group D jobs and almost 60% of sweepers. In Central Public Sector Enterprises Dalits accounted for around 12% of Group A and B jobs but almost 93% of Group D jobs if sweepers are included. In public sector banks and financial institutions Dalits were under-represented in the officer cadres but significantly over-represented in the sub-staff cadres.²¹⁹ This is probably because the minimum qualification for a government job is matriculation, while posts at or above Group C generally require graduation, hence higher level reserved posts may go unfilled due to lack of sufficiently qualified candidates.²²⁰ At state level, Jain and Ratnam found in 1994 that there was “a long way to go” before (reservation) quotas were realized in some states, moreover under-representation of Dalits in senior posts/over-representation in lower grade posts was widespread.²²¹ It must also be remembered that employment reservations are restricted to the public sector, representing only a fraction of India’s total economic activity.²²²

2. Education

²¹⁷ NCSC, “Report 2004-5”, *op. cit.* note 36, 179-183.

²¹⁸ *Ibid.*, 179-183.

²¹⁹ *Ibid.*, 179-182.

²²⁰ Jain and Ratnam, *op. cit.* note 63, 22.

²²¹ *Ibid.*, 16-20.

²²² Of 459 million people employed in India, 26 million are in the organized sector (including public and government services) and 433 million in the unorganized sector; see GOI, Ministry Of Labour, Report 2008, 77, at <<http://labour.nic.in/annrep/annrep2008.htm>>.

It is difficult, says Weisskopf, to assess how much difference education reservations have made.²²³ If they are understood as a strategy to increase the representation of identified communities in elite occupations and decision-making positions—rather than a mechanism for improving educational opportunities for the disadvantaged—effectiveness must be judged on whether reservation beneficiaries complete their programmes and achieve successful careers;²²⁴ yet studies of the performance of beneficiaries and their post-university careers are limited. Weisskopf attributes a “substantial share” of Dalit university enrolments to reservations,²²⁵ of whom between one third and one half had access to more desirable institutions or programmes, or the chance to enrol at university at all, because of reservations;²²⁶ virtually none of the Dalit students at India’s most elite universities and technical and professional institutes would have been admitted, says Weisskopf, in the absence of reservations. Admission to a reserved seat also entitles the student to financial aid such as scholarships, subsidized living expenses and book loans which, although limited, may make the difference between completion and non-completion of the course.²²⁷ Evidence cited by Weisskopf indicates lower academic performance, longer completion times and lower graduation rates for reservation students (which he attributes to weaker educational and cultural backgrounds and lower self-confidence), although Dalit and ST graduation rates from India’s prestigious IITs are now over eighty percent.²²⁸ However, he contends that while Dalits graduating from less prestigious institutions may achieve only limited social mobility post-university, those graduating from elite or more prestigious institutions (especially those from higher socioeconomic family backgrounds) achieve significant upward socioeconomic mobility.²²⁹ Recently, liberalization of the economy and the shrinking public sector coupled with the proposed introduction of educational reservations for the OBCs have

²²³ Weisskopf, “Impact of Reservations”, *op. cit.* note 51, 4340; Weisskopf, *Affirmative Action*, *op. cit.* note 136.

²²⁴ *Ibid.*, 4347-4348. See also, Mohanty, “Social Inequality”, *op. cit.* note 9, at 3787.

²²⁵ Weisskopf, “Impact of Reservations”, *op. cit.* note 51.

²²⁶ Weisskopf, *Affirmative Action*, *op. cit.* note 136, 206; Weisskopf, “Impact of Reservations”, *op. cit.* note 51, 4340.

²²⁷ Weisskopf, “Impact of Reservations”, *op. cit.* note 51, 4340.

²²⁸ *Ibid.*, 4344

²²⁹ *Ibid.*, 4346 (although see the recent studies of Dalit private sector recruitment experience cited in Section II of this article).

shifted upper caste focus, and anti-reservations protests, from reservations in the public sector to reservations in education, as seen for example in the ‘Youth4Equality’ anti-reservation movement.

3. *Legislative Reservations*

Political reservations have had “a profound effect on the Indian political landscape—a quarter of all legislators in India, at both the national and the state level, come from reserved jurisdictions”.²³⁰ In Uttar Pradesh (UP) the “representation of Dalits in bureaucracy, thanks to the reservation policy”²³¹ provided a base in the 1980s for the emergence of the Bahujan Samaj Party (BSP, or party of the majority), a Dalit-based political party whose leaders “are a result of three or four decades of politics of ‘reservation’ [...] a new generation of post-Independence educated, upwardly mobile, socially aware and politically conscious Dalits”.²³² These beneficiaries of affirmative action, argues Varshney, rather than being co-opted “vertically” by upper caste political elites, have become a new “counter-elite” responsible for leading political mobilization.²³³

In 2007 the BSP under its female Dalit leader Mayawati won a decisive electoral victory in the UP state elections, having previously held power three times in coalition governments in 1995, 1997 and 2003.²³⁴ The BSP has been characterized by some as

²³⁰ Rohini Pande, “Can Mandated Political Representation Increase Policy Influence for Disadvantaged Minorities? Theory and Evidence from India”, 93(4) *American Economic Review* (2003), 1132-1151, at 1133, 1147.

²³¹ Pradeep Kumar, “Dalits and the BSP in Uttar Pradesh: Issues and Challenges”, 34(14) *EPW* 822-826, at 824.

²³² Sudha Pai, *Dalit Assertion and the Unfinished Democratic Revolution: The Bahujan Samaj Party in Uttar Pradesh* (New Delhi, Sage, 2002), xi-xii. The BSP, established in 1984, grew out of the DS-4, the activist wing of BAMCEF, a federation of backward and minority government employees established in 1978 in UP by Kanshi Ram.

²³³ Varshney, “Is India Becoming More Democratic?”, *op. cit.* note 106, 20.

²³⁴ See Dipanker Gupta and Yogesh Kumar, “When the Caste Calculus Fails: Analysing the BSP’s Victory in UP”, 42(37) *EPW* (2007), 3388-3396; Anand Teltumbde, “Uttar Pradesh: A ‘Mayawati’ Revolution”, 42(23) *EPW* (2007), 2147-2148; Anil Kumar Verma, “Mayawati’s Sandwich Coalition”,

a party lacking agenda, principles or ideology, “clamouring for power”.²³⁵ Certainly its leadership has focused on breaking the political hold of the Brahmin elite and acquiring state power for the purpose of Dalit economic and social advancement, following a model of “mobilisation from above” which involves “inspiring Dalits by putting a Dalit at the helm of affairs”²³⁶ and transferring Dalits into key positions within the state government. In that sense although “revolution has never been on the party’s agenda”²³⁷ the BSP has, according to Sudha Pai, been instrumental in introducing two fundamental changes that have impacted on Dalits in UP and country-wide; it has fostered “Dalit assertion”, giving Dalits a new sense of identity, awareness and self-confidence; and it has brought them into mainstream politics as a group whose support is sought by all political parties:²³⁸ “today, no ‘upper caste’ can take [D]alits for granted in UP”.²³⁹ But the BSP is no longer merely a Dalit party;²⁴⁰ its 2007 electoral victory was achieved by appealing beyond caste and the BSP’s core base of Dalits to the poor of other communities including Brahmins, Muslims and the ‘most backward classes’ or MBCs—the poorest of the OBCs whose lives “on a quotidian basis [...] are not very different from those of the SCs” and certainly not comparable to the land-owning OBCs represented by the BSP’s one-time main rival, the Samajwadi Party (SP).²⁴¹

Yet the success of north India’s Dalit ‘new politicians’ in improving the economic position of the Dalits and effecting a fundamental shift in traditional social relations is

42(22) *EPW* (2007), 2039-2043; Vivek Kumar, “Behind the BSP Victory”, 42(24) *EPW* (2007), 2237-2239.

²³⁵ Vivek Kumar, “Politics of Change”, 38(37) *EPW* (2003) 3869-3871, at 3869.

²³⁶ Kumar, “Dalits and the BSP”, *op. cit.* note 231, 825. See also Sudha Pai, “Dalit Question and Political Response: Comparative Study of Uttar Pradesh and Madhya Pradesh”, 39(11) *EPW* (2004), 1141-1150, at 1142-1143.

²³⁷ *Ibid.*

²³⁸ Pai, *Dalit Assertion*, *op. cit.* note 232, 220. See also Vivek Kumar, *India’s Roaring Revolution: Dalit Assertion and New Horizons* (Gagandeep, New Delhi, 2006).

²³⁹ Kumar, “Politics of Change”, *op. cit.* note 235, at 3870.

²⁴⁰ See Christophe Jaffrelot, “The Bahujan Samaj Party in North India: No Longer Just a Dalit Party?”, 18(1) *Comparative Studies of South Asia, Africa and the Middle East* (1998).

²⁴¹ Gupta and Kumar, *op. cit.* note 234, at 3395.

questioned by some scholars;²⁴² according to Weiner the increase in Dalit (and OBC) bureaucrats and politicians has not led to more effective public policies for overcoming the immense poverty persisting in India which disproportionately affects their communities.²⁴³ Meanwhile CERD/C notes that in India generally, Dalits still find themselves denied the right to vote and that Dalit candidates, especially women, are frequently prevented from standing for election or, if elected, are pressured to resign.²⁴⁴ The impact of reservations on Indian democracy, political development and social order is much debated. On the one hand the very scheme which was designed as part of a strategy to eliminate caste inequality by bringing the Dalits—and the backward castes—“into the fold” has played a major role in the entrenchment of caste as a political as well as a social identity, and in the institutionalization of caste in the political system.²⁴⁵ On the other hand, argues Varshney, the political rise of the lower castes, deploying caste identity and a “reinvented” caste history, first in south India and more recently in north India, is resulting in a “caste-based restructuration” of power such that caste “can paradoxically be an instrument of equalisation and dignity”.²⁴⁶ In this way, “the most telling impact of affirmative action on the [SCs] may well be *indirect*, not direct”;²⁴⁷ as expressed by Jaffrelot, “socioeconomic change may result from the rise to power of the lower castes in an indirect way”.²⁴⁸

Ambedkar recognized that the contradiction between the political equality introduced by the constitution and the reality of entrenched economic and social inequalities

²⁴² For the ‘dalit revolution’ perspective see Christophe Jaffrelot, “India’s Silent Revolution: The Rise of the Low Castes in North Indian Politics”, (Permanent Black, New Delhi, 2003); Sudha Pai, “New Social and Political Movements of Dalits: A Study of Meerut District”, 34 *Contributions to Indian Sociology* (2000), 189-220. For a contrary perspective, see Craig Jeffrey, Patricia Jeffery and Roger Jeffery, “Dalit Revolution? New Politicians in Uttar Pradesh, India”, 67(4) *Journal of Asian Studies* (2008), 1365-1396. On the rise in lower-caste political mobilisation and its implications for India’s democracy see Varshney, “Is India Becoming More Democratic?”, *op. cit.* note 106.

²⁴³ Weiner, “The Struggle for Equality”, *op. cit.* note 5, 211-213.

²⁴⁴ CERD/C, *op. cit.* note 12, 17.

²⁴⁵ Weiner, “The Struggle for Equality”, *op. cit.* note 5, 220.

²⁴⁶ Varshney, “Is India Becoming More Democratic?”, *op. cit.* note 106, 19-20.

²⁴⁷ *Ibid.*, 20.

²⁴⁸ See Jaffrelot, “The Impact of Affirmative Action in India”, *op. cit.* note 137, 188.

posed a threat to India's democracy. In November 1949, on the eve of the adoption of the constitution, in a speech to the constituent assembly, he said:

On the social plane, we have in India a society based on the principle of graded inequality which means elevation for some and degradation for others. On the economic plane, we have a society in which there are some who have immense wealth as against many who live in abject poverty. On the 26th January 1950, we are going to enter a life of contradictions [...] [H]ow long shall we continue to live this life of contradictions? How long shall we deny equality in our social and economic life? If we continue to deny it for long, we will do so only by putting our political democracy in peril.²⁴⁹

The contradictions identified by Ambedkar have not been resolved. Mendelsohn and Vizciany argue that generic anti-poverty programmes have done most to raise the socioeconomic standing of the Dalits,²⁵⁰ but as the figures cited in Section II show, Dalit welfare is still lower than that of any other community. We now turn, in the final section, to the question of whether, and if so, how, such deeply entrenched discrimination and inequality may be overcome.

V. LOOKING AHEAD: THE EQUALITY DEBATE—CONCLUDING REMARKS

Constitutional and legislative prohibitions of untouchability and caste discrimination have enshrined formal equality but nevertheless caste “continues to define access to food, jobs, education and marriage partners”.²⁵¹ Politically, socially, economically and culturally caste is still a “unit of currency”.²⁵² In 1936 Ambedkar observed:

[U]nless you change your social order you can achieve little by way of progress [...] you cannot build on the foundation of caste. You cannot build up

²⁴⁹ CAD X, 25 November 1949, 972-981, cited in “Dr Ambedkar: The Principal Architect of the Constitution of India”, *BAWS Vol. 13*, (Govt of Maharashtra Education Dept, Mumbai, 1994), 1216.

²⁵⁰ Mendelsohn and Vicziany, *The Untouchables*, *op. cit.* note 38, 119.

²⁵¹ Gail Omvedt, “Caste System and Hinduism”, 39(11) *EPW* (2004), 1179-1180.

²⁵² Interview with P. Sainath, journalist and author, 24 April 2004, Mumbai. The interview was conducted and interview notes have been stored in accordance with Manchester Metropolitan University's Guidelines on Good Research Practice.

a nation, you cannot build up a morality. Anything that you will build on the foundations of caste will crack and will never be whole.²⁵³

Ambedkar's response to inequality and discrimination on grounds of caste was to tackle the problem simultaneously on multiple, interrelated fronts—legal, economic, political and social. Yet one technique—reservations—has become the primary terrain and political focus of caste equality activity. Originally conceived as a short-term measure of ten years' duration,²⁵⁴ the policy has been repeatedly extended, most recently in August 2009.²⁵⁵ The high political investment in reservations and India's continuing social and economic disparities have until recently hindered development of a broader national 'equality debate' going beyond the operation of the reservations policy and the three questions of who benefits, and what, and how much, is reserved.

However there are signs that the terrain of debate is shifting. A new approach to equality and non-discrimination was signalled by the Sarchar Committee which reported in 2006 to the Ministry of Minority Affairs on the social, economic and educational status of the Muslim community of India, acknowledged to be India's most disadvantaged minority religious group.²⁵⁶ Instead of proposing the extension of reservations to Muslims (as demanded by some), the Sarchar Committee recommended, firstly, the creation of a national Equal Opportunities Commission (EOC) to investigate the grievances of the deprived groups; secondly, the enhancement of diversity in "living, educational and work spaces", which it proposed could be achieved partly through a "diversity index" to incentivize organizations and companies, in the spheres of education, public and private employment, and housing, to measure and improve their "diversity performance".²⁵⁷ The committee also recommended the establishment of a national data bank and an autonomous assessment and monitoring authority to provide a source of reliable data on the socioeconomic conditions of socioreligious groups, for the design and monitoring of

²⁵³ Ambedkar, "Annihilation of Caste", *op. cit.* note 6, 66.

²⁵⁴ See CAD VIII 331.

²⁵⁵ See <http://abclive.in/abclive_national/constitution_109_amendment_bill_2009.html>.

²⁵⁶ See Sarchar Committee Report, at <http://minorityaffairs.gov.in/newsite/sachar/sachar_comm.pdf>.

²⁵⁷ *Ibid.*, 240-242.

policies, initiatives and programmes and for ensuring transparency²⁵⁸—ideas applicable to other groups suffering from discrimination.

Subsequently the Ministry of Minority Affairs convened two expert groups to report on proposals for a diversity index²⁵⁹ and on the structure and functions of an EOC.²⁶⁰ The objective of the Diversity Index is to “transform the idea of promoting diversity into an action-oriented strategy and bring it into all forms of decision-making relating to employment and delivery of services such that this becomes an integral element of social ethos”.²⁶¹ The aim is to change behaviour; the concept, it is hoped, will “take root in the minds and psyche of the common person and help in easing out some of the deeply entrenched social prejudices leading to discriminatory decision making”.²⁶² The EOC for its part would be mandated to investigate and pursue through legal action complaints of discrimination or denial of equal opportunity, initially in the protected fields of employment and education, to remedy the ‘data deficit’ identified by scholars and activists, and to prescribe and monitor equal opportunity practices.²⁶³ The EOC report acknowledges that eliminating disadvantage for particular identity groups involves more than abandoning explicitly discriminatory laws and instituting formal equality but rather, a focus on non-discrimination and equality in their broadest sense. This in turn involves the recognition of ascribed social identities (such as caste), and the monitoring of identity-based discrimination, direct and indirect, in order to eradicate inequality on the basis of those identities.²⁶⁴ The introduction of civil anti-discrimination legislation would provide redress for victims of caste discrimination while redefining behaviour hitherto considered non-discriminatory or acceptable as discriminatory and socially unacceptable.

²⁵⁸ *Ibid.*, 238; see also <http://minorityaffairs.gov.in/newsite/sachar/Sachar_website_june09.pdf>.

²⁵⁹ See Ministry of Minority Affairs, Diversity Index Report 2008 (DI Report), at <http://minorityaffairs.gov.in/newsite/reports/di_expgrp/di_expgrp.pdf>.

²⁶⁰ See EOC Report 2008, *op. cit.* note 9.

²⁶¹ See DI Report 2008, *op. cit.* note 257, 46.

²⁶² *Ibid.*

²⁶³ See EOC Report, *op. cit.* note 9, 32.

²⁶⁴ *Ibid.*, 24-25.

Any new legislation or institution must be seen as one element in a holistic approach to the eradication of caste discrimination. Policy also needs a re-think; a major problem facing Dalit children today is the inadequate provision of public education for the poor, which prevents them even from acquiring the prerequisite education to benefit from higher education reservations:

Almost all elementary schools [in city slums and in villages] have five classes but with only one classroom and one teacher—an impossible situation which cannot enable any child to gain any knowledge.²⁶⁵

Policy therefore needs to focus on improving quality at the lower levels of the public education system as the economically most efficient response to the under-representation of Dalits at college level.²⁶⁶ There is also an urgent need for detailed data collection and wide-ranging qualitative studies if appropriate policy interventions are to be designed.²⁶⁷ Alongside reforms in public education, post-selection support for beneficiaries of reservations (remedial programmes, mentoring, supervision, financial support)—whether in a workplace or an institutional setting—are also critical for the success of reservation policies.²⁶⁸

An emerging issue is Dalit demands for control of the fruits of their labour and a share in the nation's assets commensurate with their economic contribution, as well as equality of access to capital, education and training, markets and other tools of wealth creation. This reflects a shift among some Dalit activists away from an exclusive focus on reservations towards full Dalit participation on equal terms in the capitalist market economy. The Bhopal Declaration, adopted in 2002, sets out a 21-point agenda including land ownership, use of common property resources, wages and

²⁶⁵ Chinnappa Reddy, *The Court and the Constitution*, *op. cit.* note 27, 114.

²⁶⁶ Hasan and Mehta, "Under-Representation", *op. cit.* note 65, 3795. See also Devanesan Nesiah, *Discrimination with Reason? The Policy of Reservations in the United States, India and Malaysia* (New Delhi, OUP, 1999), 171; Mohanty, "Social Inequality" *op.cit.* note 9.

²⁶⁷ Hasan and Mehta, "Under-Representation", *op. cit.* note 65; see also Khaitan, "Transcending Reservations", *op. cit.* note 9; Weisskopf, "Impact of Reservations", *op. cit.* note 51.

²⁶⁸ Thomas Weisskopf, "Is Positive Discrimination a Good Way to Aid Disadvantaged Ethnic Communities?" 41(8) *EPW* (2006), 717-726, at 724; Weisskopf, "Impact of Reservations", *op. cit.* note 51, 4344; Mohanty, "Social Inequality" *op.cit.* note 9.

working conditions, elimination of manual scavenging and bonded labour, reservations in the private sector, democratization of capital and the implementation of supplier diversity, this latter subsequently taken up by the then Chief Minister of Madhya Pradesh, Digvijay Singh.²⁶⁹ Increasingly for transnational, internationalized Dalit organizations it is not just reservation policies that matter but securing Dalits' wider economic rights, in particular securing a fair share of the national wealth, which in turn requires a less restrictive approach to legal strategies for equality.

If inequality is to be reduced and diversity enhanced, it is critical that the concept of 'living, educational and work spaces' includes both public and private sector employment as a protected field. Dalit demands for the extension of reservations to the private sector, voluntarily or by law, have intensified as the public sector declines. Opponents argue that reservations undermine the 'merit' principle and reduce efficiency, promoting ill-qualified poor performers at the expense of the well-qualified and the competent—a situation which India's corporations cannot afford if they are to remain competitive on the world stage. But merit is a murky concept in an elitist society, an "amalgam of native endowments and environmental privileges";²⁷⁰ as Jodhka and Newman point out, it relies on the "subtraction from the conversation" of institutional inequality, discrimination and disinvestment that prevents all members of a society from competing on a level playing field.²⁷¹ The assumption underlying "merit", says Chinnappa Reddy, is that those belonging to the higher castes will "naturally" perform better and that the "clear stream of efficiency" will be "polluted by the infiltration of [reservation appointees] into the sacred precincts".²⁷² Thus the

²⁶⁹ See Govt. of Madhya Pradesh, Task Force Report on Bhopal Declaration, at <<http://www.mp.gov.in/tribal/taskforce/English/>>. See also Pai, "Dalit Question and Political Response", *op. cit.* note 236, at 1144: "While emphasising that reservation quotas in the government sector need to be better implemented, the [Bhopal Document] recognises for the first time that there are limits to reservations [...] Even if reservations were to be extended to the private sector, only a small amount of the total [D]alit population could be accommodated. Therefore, multi-pronged strategies involving the state, civil society and the market are required, such as democratisation of the unorganised sector, in which 92 percent of the SC workforce is concentrated."

²⁷⁰ See Mandal Report, *op. cit.* note 130, 23. See also Chinnappa Reddy, "Report", *op. cit.* note 137, 5.

²⁷¹ Jodhka and Newman, "In the Name of Globalisation", *op. cit.* note 51, 4127. See also Fredman, "Reversing Discrimination", *op. cit.*, note 53.

²⁷² See Chinnappa Reddy, "Report", *op. cit.* note 137, 7.

status quo—whereby the higher castes enjoy a share of good jobs and seats in elite academic and professional training institutions far in excess of their share of the population—is seen as “essentially fair” and natural.²⁷³

A small change in corporate attitudes is detectable; although the Confederation of Indian Industry (CII) remains opposed to compulsory private sector reservations, it recently launched a voluntary Code of Conduct on Affirmative Action²⁷⁴ and has instituted entrepreneurship development and mentoring for Dalits.²⁷⁵ Infosys, a major Indian IT company, has instituted a pre-recruitment Specialized Training Programme for Dalits in collaboration with the state government and educational institutions to increase Dalit recruitment in IT.²⁷⁶ The Tata group is reportedly undertaking caste profiling of its business and introducing positive discrimination policies in recruitment.²⁷⁷ And, while these initiatives are voluntary, in 2008 private sector reservations were mandated for the first time by a state government when UP introduced a 10% reservation quota each for scheduled castes, scheduled tribes, OBCs and religious minorities in public-private partnership enterprises receiving government funding and private companies doing outsourced state government work—although fully private sector firms are not included.²⁷⁸

Ambedkar believed that caste discrimination posed a problem for Indian society as a whole. The constitution, in its preamble, promises to secure to all citizens justice, liberty and equality, and to promote among them all fraternity assuring the dignity of the individual and the unity and integrity of the nation. Without fraternity, said

²⁷³ *Ibid*; also, Deshpande, “The Eternal Debate”, in Thorat and Kumar (eds.), *In Search of Inclusive Policy*, *op. cit.* note 9, 68.

²⁷⁴ See CII Code of Conduct for Affirmative Action, at <http://cii.in/menu_content.php?menu_id=462>.

²⁷⁵ See CII Report on Affirmative Action, at <http://cii.in/menu_content.php?menu_id=462>.

²⁷⁶ See “Business and Caste in India: With Reservations”, *The Economist*, 25 October 2007; see also Naren Karunakaran, “Bite the Caste Bullet”, *OutlookBusiness*, 2 May 2009, 31-32.

²⁷⁷ *Ibid.*, 22-23.

²⁷⁸ See U.P. Government, Chief Minister’s Office, 10 August 2007, News Briefing, at <<http://upgov.nic.in/news1.asp?idn=2611>>; and 7 January 2008, News Briefing, at <<http://www.upgov.nic.in/news11.asp?idn=2723>>. The impact of this initiative is yet to be evaluated.

Ambedkar, liberty and equality “are no deeper than coats of paint”.²⁷⁹ In the absence of fraternity—in both its private and civic sense—individual dignity and national unity and integrity come loose from their moorings. It is absence of fraternity which has led to the existence of an underclass “so accepted in India” that many of the elite think it “obvious” that the bulk of workers should *not* enjoy the same economic equality as them, as this would “threaten their own access to [cheap] labour and comforts”.²⁸⁰ There is currently in India a huge gap between the legal status of Dalits and their sociological status.²⁸¹ Government policies “have granted Dalits the right to equality but not necessarily the right to be treated as equals”.²⁸² Legislation “guarantees Dalits the right to touch” (for example to enter temples, hotels and restaurants) but it cannot guarantee the right “to be touched”.²⁸³ New thinking on equality proposes a wider understanding of equality, discrimination and diversity which, in the case of caste discrimination, may result in a welcome broadening of the strategies for its elimination.

²⁷⁹ “Dr Ambedkar: The Principal Architect of the Constitution of India”, *BAWS Vol. 13*, (Govt. of Maharashtra Education Dept., Mumbai, 1994), 1216.

²⁸⁰ Jehangir Pocha, “Wages of Growth”, 27(37) *Businessworld* (2008), 6.

²⁸¹ See Jack M. Balkin, “The Constitution of Status”, 106 *Yale Law Journal* (1997), 2313-2374, at 2324.

²⁸² Kumar, *India’s Roaring Revolution*, *op. cit.* note 238, 19.

²⁸³ Guru, “Power of Touch”, *op. cit.* note 78.