

**ENDING CASTE DISCRIMINATION IN INDIA:
HUMAN RIGHTS AND THE RESPONSIBILITY TO
PROTECT (R2P) INDIVIDUALS AND GROUPS
FROM DISCRIMINATION AT THE DOMESTIC
AND INTERNATIONAL LEVELS**

JEREMY SARKIN* AND MARK KOENIG†

I. INTRODUCTION

Dealing with caste discrimination,¹ wherein a group of people are given a “specific social rank, . . . linked to one or more traditional occupations[,]”² remains one of the most significant human rights challenges facing the world today. Perhaps no country understands the difficulty of the fight to end caste discrimination more than India, which, even after decades of democracy, has yet to effectively end the practice. Despite efforts to end caste discrimination through international and domestic measures, more than 165 million people in India alone still suffer discrimination and various types of degrading treatment because of their caste associations.³ In contemporary India, the social structure continues to be

* Admitted to practice, State of New York and South Africa. LL.D. 1995, University of the Western Cape, Cape Town; LL.M. 1988, Harvard Law School; B.A., LL.B., University of Natal (Durban).

† Independent Researcher. MALD 2008, Fletcher School Tufts; B.A. 2004, The Johns Hopkins University.

1. Both the terms “caste” and “class” are used in the Indian Constitution. This has given rise to some confusion and much debate about what the terms mean in the constitutional sense. For general background on the term “caste,” see generally OLIVER C. COX, *CASTE, CLASS, & RACE: A STUDY IN SOCIAL DYNAMICS* (1948) and I SOURCES OF INDIAN TRADITION: FROM THE BEGINNINGS TO 1800 (Ainslie Embree ed., 2d ed. 1988).

2. Karla Hoff & Priyanka Pandey, *Belief Systems and Durable Inequalities: An Experimental Investigation of Indian Caste* 4 (World Bank Policy Research Working Paper No. 3351, 2004).

3. This number is extremely conservative as it only refers to untouchables. The number would increase by tens of millions if low caste victims of abuse who are not untouchables are included. It has also been noted that if those who have converted to other religions including Buddhism, Sikhism, Christianity, and Islam but continue to suffer exclusion and discrimination are added the number increases by an additional twenty-five million. Vimal Thorat & Sandhya Gokhale, *The Women’s Reservation Bill*, *COMBAT LAW*, Nov.-Dec. 2005, at 34; see also Vatsala Vedantam, *Still Untouchable*, *CHRISTIAN CENTURY*, June 26, 2002, at 25; 19 CTR. FOR HUMAN RIGHTS & GLOBAL JUSTICE & HUMAN RIGHTS WATCH, *HIDDEN APARTHEID: CASTE DISCRIMINATION AGAINST INDIA’S “UNTOUCHABLES”* 2 (2007) [hereinafter *HIDDEN APARTHEID*].

described as “entirely based on the caste system. This caste system is not only based on structural inequalities between the high caste and low caste ‘untouchables’ but also involves social isolation and exclusion from participation in social, political and economic processes and development of society.”⁴

Caste discrimination sees its victims excluded from using “village wells, temples, and tea shops, forced to subordinate themselves before upper caste neighbors, discriminated against in land and housing allocation, and prevented from participating in local government institutions.”⁵ In 2007, the U.N. Committee on the Elimination of Racial Discrimination (CERD) stated that it had “reports of arbitrary arrest, torture and extrajudicial killings of members of scheduled castes and scheduled tribes by the police, and about the frequent failure to protect these groups against acts of communal violence.”⁶ In just a two year period, from 1994 to 1996, almost 100,000 incidents of abuse committed against lower caste people were reported to police in India.⁷ Even this vast number severely under-represents the actual levels of discrimination.⁸ Victims frequently fail to register formal complaints out of fear of retaliation, blatant police bias, or a lack of understanding regarding their rights.⁹ The lives of those affected are often devastated by this discrimination. Dalits¹⁰ and other low caste people, especially

4. Thorat & Gokhale, *supra* note 3, at 34.

5. Clifford Bob, “*Dalit Rights are Human Rights*”: *Caste Discrimination, International Activism, and the Construction of a New Human Rights Issue*, 29 HUM. RTS. Q. 167, 173 (2007).

6. U.N. Comm. on the Elimination of Racial Discrimination [CERD], *Consideration of Reports Submitted by States Parties Under Art. 9 of the Convention: Concluding Observations of CERD: India*, ¶ 14, U.N. Doc. CERD/C/IND/CO/19 (May 5, 2007) [hereinafter *Concluding Observations of CERD: India*].

7. HUMAN RIGHTS WATCH, *BROKEN PEOPLE: CASTE VIOLENCE AGAINST INDIA’S “UNTOUCHABLES”* 8 (1999) [hereinafter *BROKEN PEOPLE*].

8. See generally Ashwini Deshpande, *Does Caste Still Define Disparity? A Look at Inequality in Kerala, India*, 90 AM. ECON. REV. 322, 325 (2002) (finding that cross-tabulations on food expenditure, clothing expenditure, land-holding, and education levels of heads of household indicate substantial inter-caste disparity between the former lower castes and upper castes in Kerala, India).

9. See, e.g., William Eisenman, Comment, *Eliminating Discriminatory Traditions Against Dalits: The Local Need for International Capacity-Building of the Indian Criminal Justice System*, 17 EMORY INT’L L. REV. 133, 139, 161 (2003).

10. Dalit is the name commonly used for the group of people also known as “untouchables.” The word “Dalit” means “broken people” and is used to refer to the people in South Asia who do not have a caste. They rest below the caste system and are considered ritually impure. In the most traditional places, even today, high caste people will not touch Dalits, eat from the same plates, or drink water from the same sources. Dalit people have been forced into bonded labor or to do the most distasteful jobs, such as removing carcasses and cleaning cremation sites for hundreds of years.

women,¹¹ have been prevented from standing as candidates in elections,¹² denied access to land, excluded from schooling,¹³ forced to work in the lowest level jobs,¹⁴ and continue to suffer from higher levels of poverty than other groups.¹⁵ The CERD noted that “*de facto* segregation of Dalits persists, in particular in rural areas, in access to places of worship, housing, hospitals, education, water sources, markets and other public places.”¹⁶

This discrimination is not at all confined to India.¹⁷ Approximately ninety million additional untouchables are believed to suffer these abuses in other Asian countries including Japan,¹⁸ Pakistan, Bangladesh, Nepal, and Sri Lanka.¹⁹ The practice also occurs elsewhere in the world including Africa,²⁰ Europe, North America, and many places where migrants from South Asia have settled.²¹ While these staggering figures suggest that caste discrimination should be a primary focus of the international human rights movement and the Indian government, where most caste discrimination occurs, the reality is quite different.²² Despite efforts in India to end caste discrimination through the creation of legal equality, such reforms have not been supported by the political will

11. See also Sharmila Rege, *A Dalit Feminist Standpoint*, in ISSUES IN CONTEMPORARY INDIAN FEMINISM: GENDER AND CASTE 90 (Anupama Rao ed., 2003).

12. See *Concluding Observations of CERD: India*, *supra* note 6, ¶ 17.

13. See Jean Dreze & Geeta Kingdon, *School Participation in Rural India*, 5 REV. DEV. ECON. 1, 4 (2001); Anupreeta Das, *India's Lower Castes can now go to Private Schools*, CHRISTIAN SCIENCE MONITOR, Feb. 13, 2006, available at <http://www.csmonitor.com/2006/0213/p04s01-wosc.html>.

14. See Sharit K. Bhowmik, *The Labour Movement in India: Present Problems and Future Perspectives*, 59 INDIAN J. SOC. WORK 147, 161-62 (1998).

15. See Ira N. Gang et al., *Caste, Ethnicity and Poverty in Rural India 2-3* (Institute for Study of Labor, Discussion Paper No. 629, 2002). This paper reported on a constitutional amendment obligating private schools, colleges, and professional training institutes operating without government funding to give more than one-quarter of their places to the “untouchables” and other socially and economically disadvantaged groups.

16. *Concluding Observations of CERD: India*, *supra* note 6, ¶ 13.

17. See HUMAN RIGHTS WATCH, *CASTE DISCRIMINATION: A GLOBAL CONCERN 2* (2001).

18. See Ian Neary, *Burakumin in Contemporary Japan*, in JAPAN'S MINORITIES: THE ILLUSION OF HOMOGENEITY 50, 55 (Michael Weiner ed., 1997).

19. See NIREKA WEERATUNGE, *ASPECTS OF ETHNICITY AND GENDER AMONG THE RODI OF SRI LANKA* 77 (1988); Oddvar Hollup, *Caste Identity and Cultural Continuity Among Tamil Plantation Workers in Sri Lanka*, 28 J. ASIAN & AFR. STUD. 67, 79-81 (1993).

20. See, e.g., VICTOR DIKE, *THE CASTE SYSTEM IN NIGERIA, DEMOCRATIZATION AND CULTURE: SOCIO-POLITICAL AND CIVIL RIGHTS IMPLICATIONS* (1999), available at <http://www.afbis.com/analysis/caste.htm>.

21. See RONALDO MUNCK, *GLOBALIZATION AND SOCIAL EXCLUSION: A TRANSFORMATIONALIST PERSPECTIVE* 112 (2005); Bob, *supra* note 5, at 169.

22. See generally *CASTE TODAY* (C.J. Fuller ed., 1996).

R

R

R

to protect potential victims and effectively punish those carrying out abuses.²³

At the international level, caste discrimination and the issue of untouchability²⁴ were not on the human rights agenda until the late 1990s.²⁵ Since then, even though the issue has been raised, the international community has failed to review and assess the progress of the Indian government and others in addressing these abuses.²⁶ The cumulative effect of these shortcomings has been the creation of laws and legal protections that appear to be sufficient on paper, but do little in reality to protect most low caste and Dalit people in India.

Generally speaking, low caste people remain afraid of retaliation or increased abuse if they complain or break the traditional rules.²⁷ In many places, the continuation of past atrocities and the lack of change in attitudes and understandings have meant that many of the victims of discrimination still believe in the traditions that oppress them.²⁸ Progressive dialogue and ideas at the national level usually fail to reach most of India. As is the case with many other anti-discrimination laws and movements throughout the world, measures in India seem to exist only to assuage the consciences of lawmakers and the elite who never actually suffer the injustices addressed in the legislation. There remains little political will to go further than simply creating the façade of human rights compliance.

This Article addresses the issues and problems relating to caste from varying disciplinary perspectives, including from a human rights perspective in India. It examines the sociological context of caste to develop an understanding of the practice and its origins. This Article also assesses the impact of caste on the lives of particularly the lower class members of contemporary Indian society. Furthermore, this Article investigates the legal issues relating to caste in India to determine what can be done to limit its effect. In addition to considering the domestic situation, this Article analyzes the

23. See Sukhadeo Thorat, *Oppression and Denial: Dalit Discrimination in the 1990s*, ECON. POL. WKLY., Feb. 9, 2002, at 572, 574-75.

24. See OLIVER MENDELSON & MARIKA VICZANY, *THE UNTOUCHABLES: SUBORDINATION, POVERTY AND THE STATE IN MODERN INDIA* 1-5 (1998).

25. See Bob, *supra* note 5, at 168.

26. See generally DAVID KEANE, *CASTE-BASED DISCRIMINATION IN INTERNATIONAL HUMAN RIGHTS LAW* (2007).

27. See, e.g., Subhadra Mitra Channa, *Metaphors of Race and Caste-Based Discrimination Against Dalits and Dalit Women in India*, in *RESISTING RACISM AND XENOPHOBIA* 49, 49-51 (Faye Harrison ed., 2005).

28. See TAYA ZINKIN, *CASTE TODAY* 60-61 (1962).

international human rights regime concerning caste to determine what steps have already been taken but also what can be done at the international level to drive the struggle against caste discrimination.

This Article draws two conclusions that help to clarify the role of caste issues in Indian society and human rights law. First, India is bound by the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),²⁹ and the convention bears directly on caste issues despite India's reluctance to accept this. This Article evaluates the jurisprudence on this conclusion to determine how caste is affected by anti-discrimination issues. Second, this Article concludes that while various religions have supported the caste system, the problem is a social phenomenon and is not intrinsically rooted in religious practices. This Article addresses the societal role and impact of the caste system in order to discuss the caste system in general.

By assessing the cumulative effect of international and domestic legal protections for low caste and Dalit peoples, this Article offers insight into the limitations of a purely rights-based approach to promoting equality. It argues that, at the international level, the effectiveness of human rights bodies has been severely limited by problematic definitions of caste and caste discrimination, coupled with an unwillingness to openly discuss the issue.³⁰ Domestically, progressive legal stances and objectives at the national level have been undercut by drastic problems of enforceability and little political will to actively push for change to occur. Without the genuine desire to combat caste discrimination at every level, it is unlikely that this blight on India's human rights record will disappear. Caste and caste divisions have shown resilience and an ability to evolve and adjust along with the legal mechanisms and bodies that are supposed to eliminate it.³¹ This is a system with centuries of history—as well as cultural and sociological development—behind it. Caste discrimination is such a deeply rooted problem that legal

29. India signed the Convention on March 2, 1967 and ratified it on December 3, 1968. United Nations Treaty Collection, *Status of the International Convention on the Elimination of All Forms of Racial Discrimination [ICERD]*, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en (last visited Mar. 6, 2010).

30. See Andre Beteille, *Caste in Contemporary India*, in *CASTE TODAY*, *supra* note 22, at 150, 153.

31. See RAJA JAYARAMAN, *CASTE AND CLASS: DYNAMICS OF INEQUALITY IN INDIAN SOCIETY* 22 (1981).

changes and overt normative adjustments have simply not been enough to eliminate it.³²

Finally, this Article concludes that progress to end caste discrimination has been insufficient, and therefore a greater commitment is needed at all levels to end caste discrimination. The real challenge is to understand what has prevented the legal reforms and creation of rights from being more effective. Solutions are offered throughout this Article so that real change can occur for the tens of millions of low caste and Dalit people that suffer because of this type of discrimination.

II. UNDERSTANDING CASTE DIVISIONS

Over centuries of sociological development, the South Asian caste system has created hierarchies and divisions between castes on every level of interaction.³³ The caste system's origins are debated, yet its effects are indisputable.³⁴ While it was suggested in 1996 that "[c]aste is no longer an important agent of social placement or control,"³⁵ ritually, politically, economically, and even physically, the system divides and arranges peoples vertically according to their caste associations. These divisions have led to exploitation, inequality, and suffering for millions of the region's inhabitants. Low caste and Dalit people today are still segregated, barred from using common resources such as wells, and prevented from entering Hindu temples.³⁶ These large communities have been subject to racial profiling and police brutality³⁷ and live every day of their lives treated as second class citizens by individuals, communities, and sometimes even their government.³⁸ The reasons behind the continuation of these practices are not monolithic, but they might be grouped into a few major categories. The

32. See Channa, *supra* note 27, at 51-52.

33. See ARVIND SHARMA, HINDUISM AND HUMAN RIGHTS: A CONCEPTUAL APPROACH 51 (2003).

34. See generally SUSAN BAYLY, 4 THE NEW CAMBRIDGE HISTORY OF INDIA: CASTE, SOCIETY AND POLITICS IN INDIA FROM THE EIGHTEENTH CENTURY TO THE MODERN AGE (1999); J.H. HUTTON, CASTE IN INDIA: ITS NATURE, FUNCTION, AND ORIGINS (1969).

35. Barbara Harriss-White, *India's Socially Regulated Economy* 9 (Working Paper No. 133, 2005), available at www3.qeh.ox.ac.uk/pdf/qehwp/qehwps133.pdf (quoting Andre Beteille).

36. See, e.g., Channa, *supra* note 27, at 50.

37. See, e.g., Eisenman, *supra* note 9, at 137-39, 160-66.

38. See Kuldip Nayar, *Facing Up to the Facts*, in CASTE, RACE AND DISCRIMINATION: DISCOURSES IN THE INTERNATIONAL CONTEXT 172, 173 (Sukhadeo Thorat Umakant ed., 2004) [hereinafter CASTE, RACE AND DISCRIMINATION]; Shiv Visvanathan, *The Race for Caste: Prolegomena to the Durban Conference*, in CASTE, RACE AND DISCRIMINATION, *supra*, at 250, 259.

R

R

R

first reason for the continuation of these practices is a lasting reliance on caste identifications inspired by society, politics, and the system of reservations. Second, these practices continue due to minimal relative improvement in the economic situations of most low caste and Dalit peoples. Third, these practices continue because of the persistence of discrimination among important government institutions, specifically among the police and the local court systems.

There is no unified understanding of how the caste system became the rigid social hierarchy based on birth that it is today.³⁹ Part of this confusion comes from the existence of two terms used for caste, *varna* and *jati*.⁴⁰ They are often wrongly used as synonyms. *Varnas* are broad divisions that come directly from the Vedas.⁴¹ There are four *varnas*: the Brahmins (priests), Ksyatriyas (warriors), Vaisyas (farmers), and Shudras (laborer-artisans). A fifth group, the Dalits or “untouchables,” are considered polluted and impure and thus are considered to rest beneath the hierarchy altogether.⁴² These stratifications come from a creation myth in which “a social order emerged at creation from the body of Purusha, or primitive man: Brahmins from his head; Ksyatriyas from his arms; Vaisyas from his thighs; and Shudras from his feet. All members of Purusha’s body represented the necessary parts of a functioning society.”⁴³ Within the Vedas, this myth suggests that each member of a functioning society has duties and responsibilities; the *varnas* serve to designate what role people should play in society.⁴⁴

While the narrative origins of the basic *varna* divisions are clear, the origins of the *jatis* are not as well-defined. The *jatis* are the divisions that we understand as caste today. They are divisions based on occupation, linguistic and geographic limitations, customs, and other sociological features that are manifested in strict hierarchies existing at every level of society.⁴⁵ It is the origin of these *jatis* that is not precisely understood. Some scholars specu-

39. See HUTTON, *supra* note 34, at 182.

40. While the terms are used to mean various castes, they are in fact much more complex.

41. The Vedas are the basic spiritual texts of the Hindu faith.

42. See SHARMA, *supra* note 33, at 51.

43. Bina Hanchinamani, *Human Rights Abuses of Dalits in India*, HUM. RTS. BRIEF, Winter 2001, at 15, 15.

44. See BRIAN K. SMITH, CLASSIFYING THE UNIVERSE: THE ANCIENT INDIAN VARNA SYSTEM AND THE ORIGINS OF CASTE 26 (1994).

45. See DAVID KINSLEY, HINDUISM: A CULTURAL PERSPECTIVE 154 (1993).

R

R

late that the *jatis* reflect divisions of labor that existed among India's indigenous tribes. When the Indo-Aryans invaded India around 1500 B.C.,⁴⁶ they took this system and combined it with their concept of the *varnas* in order to subjugate the massive population of India.⁴⁷ Other scholars suggest that Brahmins, the priestly caste, manipulated society through their role as interpreters of the Vedas in order to gain political power.⁴⁸ Other theories involving economic class,⁴⁹ political positioning, and historical developments exist,⁵⁰ but the exact origins of the system are not fundamentally important to discuss eliminating this type of discrimination.

Two points must, however, be noted. First, caste has been a societal development and is not a fundamental part of Hinduism. Second, caste hierarchy is extremely complex and generally regionally specific, although its effects are felt in many corners of the globe.⁵¹ Members of one caste might be fairly high in the hierarchy in one region and near the bottom in a different area. Thus, as some have argued, any attempt to create one overall theory explaining the development of caste will only lead to confusion.⁵²

These points seemingly contradict the intellectual tradition that argues that the elimination of caste requires a disaggregation of traditional Indian society or a decline in the influence of Hinduism.⁵³ While many religious leaders continue to teach the continuation of the caste system and discriminatory practices,⁵⁴ and religion clearly has contributed to the perpetuation of the caste system, the problem of caste discrimination is fundamentally a problem of society and not of religion. Indeed, as Mahatma Gandhi argued, "[c]aste has nothing to do with religion. It is a custom

46. See Hanchinamani, *supra* note 43, at 15-16.

47. See ROSALIND O'HANLON, CASTE, CONFLICT AND IDEOLOGY: MAHATMA JOTIRAO PHULE AND LOW CASTE PROTEST IN NINETEENTH-CENTURY WESTERN INDIA 141 (1985).

48. See Hanchinamani, *supra* note 43, at 15-16.

49. See Vivek Chibber, *From Class Compromise to Class Accommodation: Labor's Incorporation into the Indian Political Economy*, in SOCIAL MOVEMENTS IN INDIA: POVERTY, POWER AND POLITICS 32 (Raka Ray & Mary Katzenstein eds., 2003).

50. See ANDRE BETEILLE, CASTE, CLASS AND POWER: EMERGING PATTERNS OF STRATIFICATION IN A TANJORE VILLAGE 185-87 (1965); JAYARAMAN, *supra* note 31, at 20-26.

51. See *supra* notes 17-21 and accompanying text.

52. See Amit Desai, Book Review, 13 J. ROYAL ANTHROPOLOGICAL INST. 750, 751 (2007) (reviewing CASTE IN QUESTION: IDENTITY OR HIERARCHY? (Dipankar Gupta ed., 2004)).

53. For a more complete review of theories questioning the integral nature of caste in Hinduism, see ANDRE BETEILLE, EQUALITY AND UNIVERSALITY: ESSAYS IN SOCIAL AND POLITICAL THEORY 75-78 (2003).

54. See Bashaheb Ambedkar, *A Radical Critique of Caste*, in SOCIAL AND RELIGIOUS REFORM: THE HINDUS OF BRITISH INDIA 189, 198 (Amiya Pisen ed., 2003).

R

R

R

R

whose origin I do not know and do not need to know for the satisfaction of my spiritual hunger.”⁵⁵

Caste is essentially a social phenomenon and thus as society has evolved, so has caste. While several theorists have proposed that caste distinctions have slowly been replaced by class distinctions,⁵⁶ or that urbanization and democratization are ensuring that caste slowly withers away,⁵⁷ most scholars have noted that “caste has shown a remarkable capacity to adjust to new conditions and situations.”⁵⁸ Advances in the legal status and extension of benefits to low caste citizens and Dalits have paradoxically managed both to remove caste discrimination as an overt social norm in much of the country and strengthen caste self-identification in Indian politics today.⁵⁹ Many scholars have further noted the growth of the exploitation of casteism by political parties and social groups for the mobilization of support, but politics certainly is not the only field where the importance of caste has been reaffirmed.⁶⁰ It is important to note that despite changes and evolutions over the years, caste has remained the fundamental social unit into which Indians are born.⁶¹

Caste identification also continues because of efforts to rectify the inherent inequalities created by a caste system, namely the extensive set of reservations and economic benefits set aside for the scheduled and backward castes.⁶² These reservations create clear economic incentives for being a part of certain castes, as well as a reason to rally a caste together to push for benefits being extended to other groups.⁶³ In some cases, this type of competition between

55. M.K. Ghandi, *A Rejoinder from M.K. Ghandi*, in SOCIAL AND RELIGIOUS REFORM, *supra* note 54, at 199, 200.

56. See BETEILLE, *supra* note 50, at 225.

57. See ZINKIN, *supra* note 28, at 69.

58. JAYARAMAN, *supra* note 31, at 22.

59. See Beteille, *supra* note 30, at 153; Channa, *supra* note 27, at 51-52; JAYARAMAN, *supra* note 31, at 30.

60. See Beteille, *supra* note 30, at 153; Channa, *supra* note 27, at 52-53; KRISHNA GUPTA, SOCIAL EQUALITY AND THE INDIAN CONSTITUTION 251 (1996); K.L. SHARMA, SOCIAL STRATIFICATION IN INDIA: ISSUES AND THEMES 181 (1997); V. Suresh, *The Dalit Movement in India*, in 3 REGION, RELIGION, CASTE, GENDER AND CULTURE IN CONTEMPORARY INDIA 355, 385 (T.V. Sathyamurthy ed., 1996).

61. See GUPTA, *supra* note 60, at 250.

62. On the origin of the term “backward castes,” see CHRISTOPHE JAFFRELOT, INDIA’S SILENT REVOLUTION: THE RISE OF THE LOWER CASTES IN NORTH INDIA 214 (2003). This term was not contained in the draft constitution, but was inserted in the final draft to ensure that the equality provision did not undermine provisions on affirmative action. The exact meaning of “backward” was not delineated.

63. See JAYARAMAN, *supra* note 31, at 22-23.

R
R
R
R
R
R

R

R

castes has led to outright “[i]nternecine caste warfare . . .”⁶⁴ At a very minimum, the incentives to define oneself through caste keep the system relevant in public life throughout India. The government has largely played into this continued use of caste to apply for reservations by making the requirements for affirmative action plans reliant on a traditional and ethnologically based set of evidence. Famously, the Indian government decided that low-caste Hindus who convert to other religions may no longer be legally considered for the benefits being extended to their caste groups.⁶⁵ This underlines the significance of traditional definitions to the granting of concessions; in order to receive some benefits, one must voluntarily choose to continue one’s association with the same system that sanctions discrimination.

Problems caused by granting concessions to the disadvantaged are tolerated because it is generally accepted that the low caste and Dalit people must improve their economic position in order to bring about a real end to discriminatory practices.⁶⁶ Unfortunately, reservations and other concessions have had a minimal impact. Most Dalit people are still landless agricultural laborers today, just as they have been for centuries.⁶⁷ In general, the benefits only reach those lower caste people who have already attained an elite position in society through economics, politics, or education.⁶⁸ Class in India developed largely along already existing caste lines, and this remains the case as social and economic inequalities have reinforced each other over decades of discrimination.⁶⁹

While identity and economics create an environment of discrimination and inequality, there are laws that should prevent discriminatory action from taking place. At the very least, these laws should result in punishment for those discriminating against low caste and Dalit people. Yet, in reality, this has not been the case, and anti-discrimination efforts have been impotent through poor enforcement and a general lack of political will.⁷⁰

The police and the low level judiciary have been at the center of the failure to prevent caste discrimination. Human Rights Watch

64. See GUPTA, *supra* note 60, at 289.

65. See Eisenman, *supra* note 9, at 150.

66. See JAYARAMAN, *supra* note 31, at 31.

67. See Martin Macwan, (UN) *Touchables in Durban*, in CASTE, RACE AND DISCRIMINATION, *supra* note 38, at 37.

68. See ARVIND SHARMA, RESERVATIONS AND AFFIRMATIVE ACTION: MODELS OF SOCIAL INTEGRATION IN INDIA AND THE UNITED STATES 158 (2005).

69. See GUPTA, *supra* note 60, at 17.

70. See Channa, *supra* note 27, at 52.

reported that in 1995, 90 to 95 percent of all cases of discrimination against scheduled castes resulted in non-punishment.⁷¹ In 1992, Indian Supreme Court Justice Ramaswamy declared that more than 75 percent of the cases brought to court over the Prevention of Atrocities Act end in acquittal.⁷² In addition, there are many anecdotes of judges throwing out evidence from Dalits, or even continuing the practice of “untouchability” themselves.⁷³

In order to deal with these shortcomings, India’s judiciary needs to be specifically trained and sensitized to ensure that each member of the judiciary has adequate understanding, commitment, and capacity to deal with caste issues sufficiently.⁷⁴ Furthermore, the government reservation system needs to be extended to the judiciary to ensure that there are low caste and Dalit judges and jurists actively participating in the system.⁷⁵

The judiciary is not the sole institution that is guilty of perpetrating and allowing the discrimination to continue. The police have also routinely demonstrated bias in various ways. The police discriminate, for instance, by neglecting to record complaints from low caste people.⁷⁶ It is often the police who commit the atrocities and do so with impunity.⁷⁷ Discrimination is pervasive to the point that national human rights bodies will not use any policeman “below the rank of Director General” for their human rights investigations for fear of prejudiced investigations.⁷⁸ Some people have argued that there is a more general crisis in policing India that limits the capacity of the force to fight all types of crime.⁷⁹ The combination of prejudiced police officers and an ineffective police force have rendered anti-discrimination laws and ideals hollow at the local level.

Police reform must continue in tandem with judicial reform. Some have observed that the structure of the police force lacks cohesion, and that each state is left largely to deal with its own police force.⁸⁰ These individuals suggest the implementation of a

71. BROKEN PEOPLE, *supra* note 7, at 192.

72. Eisenman, *supra* note 9, at 167.

73. *See id.* at 167-68.

74. *See id.* at 169, 178-81.

75. *See* KEANE, *supra* note 26, at 260.

76. *See* Eisenman, *supra* note 9, at 161.

77. *See, e.g.*, BROKEN PEOPLE, *supra* note 7, at 134-38.

78. Eisenman, *supra* note 9, at 159.

79. *See, e.g.*, POLICING INDIA IN THE NEW MILLENNIUM (P.J. Alexander ed., 2002); ARVIND VERMA, THE INDIAN POLICE: A CRITICAL EVALUATION 152-64 (2005).

80. *See* Indira Sawhney v. Union of India, A.I.R. 1993 S.C. 477; David Bayley, *The Police and Political Order in India*, 23 ASIAN SURV. 484, 484 (1983).

more centralized force with a national oversight mechanism specifically charged with combating discriminatory action taken by the police and ending impunity for violators within the force.

Beyond the judiciary and police, other areas within the public sector also need reform. For example, caste identity, as noted above, is routinely used by politicians to mobilize support for elections and collective action.⁸¹ This political organization of castes has translated into the formation of caste-based interest groups.⁸² Well-organized caste-based groups lobby for economic benefits and the extension of reservations to members of their caste. This continuing use of caste as a rallying point requires the public and explicit drawing of caste distinctions as well as the creation of caste-specific causes. As long as people voluntarily self-identify using caste, it might be assumed that caste as a social force will continue.⁸³ Politically, the continued fragmentation of the lower castes into caste-specific groups can only benefit the social and political elite.⁸⁴ If lower caste citizens and Dalits formed a large opposition alliance, the traditional elite, who still dominate politics today, would face serious challenges. In the current climate, caste divisions and caste animosity persisting as different caste groups tend to position themselves as rivals instead of victims of the same system of stratification.

These perceived rivalries have been exacerbated by the practical application of the reservation system designed to help the lower castes “catch up” with the elite.⁸⁵ Extending benefits to low castes required the creation of a specific legal identity for those qualified to access the reservations system. Currently, there are more than 3000 caste groups designated as “backwards” and therefore allowed to participate in various affirmative action schemes.⁸⁶ With a huge portion of the population potentially eligible for aid and the caste hierarchy varying from region to region, the process of defining which groups are “backwards” and should receive benefits is con-

81. See SHARMA, *supra* note 60, at 181.

82. See *id.*

83. See Ambedkar, *supra* note 54, at 194.

84. See Suresh, *supra* note 60, at 377.

85. See P. Radhakrishnan, *Backward Castes/Classes as Legal and Political Entities*, in 2 THE OXFORD INDIA COMPANION TO SOCIOLOGY AND SOCIAL ANTHROPOLOGY 1474, 1490 (Veena Das ed., 2003).

86. See R.K. PRUTHI, INDIAN CASTE SYSTEM 212 (2004).

R

R

R

tentious and complex.⁸⁷ The Mandal Commission of 1980⁸⁸ was one attempt by the government to designate certain groups as “backward castes.”⁸⁹ The commission found that up to 52 percent of the population could fall within this category, and its findings were still met with high levels of criticism and outrage by those not selected.⁹⁰ This process of assessment and selection has created rivalries between different caste groups desiring to be included on the reservations list.⁹¹

At the national level—specifically with regard to political organization—caste has been changing and evolving, but at the more local level, things have hardly changed.⁹² For instance, in most cities and villages, people of low caste origins remain segregated in what are usually poor housing situations.⁹³ Police brutality and discrimination against lower caste and Dalit people has been widely documented at the local level.⁹⁴ Additionally, caste has resulted in the restriction of people from resources such as water. Dalits have also been barred, sometimes violently, from entering temples. Furthermore, education levels and literacy rates among the lower castes remain far below the national averages while occupational discrimination and even bonded labor continue.⁹⁵ In addition to all of the actual abuses being perpetrated against low caste and Dalit individuals, there is a continued social stigma that inflicts psychological damage and mental anguish on the victims of such abuse.⁹⁶

Considering the prevalence of caste divisions today at every level of Indian society and politics, it is clear that the measures taken

87. See, e.g., Laura Dudley Jenkins, *Race, Caste and Justice: Social Science Categories and Antidiscrimination Policies in India and the United States*, 36 CONN. L. REV. 747, 780-81 (2004) (describing India’s difficulty in precisely defining caste membership).

88. The commission determined that there were 3743 castes. See A. Ramaiah, *Identifying Other Backward Castes*, 27 ECON. & POL. WKLY. 1203, 1204 (1992).

89. A similar undertaking was the Kaka Kalelkar Commission, established in 1953. It found that there were 2399 backward castes in the country. While it made numerous recommendations, the report was not accepted by a number of its members and eventually the Indian parliament rejected its findings as well. See *id.* at 1203-04.

90. See *id.* at 1205.

91. See JAYARAMAN, *supra* note 31, at 23.

92. See Channa, *supra* note 27, at 50, 52.

93. See *id.* at 50.

94. Such occurrences have been documented in many articles and reports, including BROKEN PEOPLE, *supra* note 7, at 8-9, HIDDEN APARTHEID, *supra* note 3, at 4, and Eisenman, *supra* note 9, at 137-39, 159-66.

95. See Geeta Gandhi Kingdon, *The Progress of School Education in India*, 23 OXFORD REV. ECON. POL’Y 168, 174 (2007).

96. See Barbara Joshi, “Ex-Untouchable”: *Problems, Progress, and Policies in Indian Social Change*, 53 PAC. AFF. 193, 218-19 (1980).

have not had the intended effects. To fully understand the challenges still faced in India, it is necessary to analyze Indian laws relating to caste and the approach of domestic human rights institutions to eliminating caste discrimination. Through a closer analysis of all the mechanisms employed, a better understanding of the anti-discrimination regime's inadequacies may be achieved.

III. THE LAW AND INSTITUTIONS DEALING WITH CASTE IN INDIA

India is a country with a constitution that guarantees non-discrimination and complete equality before the law. The Indian parliament has enacted legislation to support the constitution, and the Indian Supreme Court is active in trying to combat human rights violations. There is an extensive set of measures in place to grant economic benefits, set reservations, and institute affirmative action for disadvantaged groups in politics, government service, and education.⁹⁷ The government also created the National Human Rights Commission to deal with human rights violations.⁹⁸ Nevertheless, institutions and instruments alone are insufficient. While good laws and progressive institutions play a useful role implementing good measures, there must simultaneously be positive statements by the government and other actors to set the tone for society to accept and internalize the ideals behind such measures.⁹⁹ In India, there have been many progressive statements about ending caste discrimination on many occasions, including the following statement in 2006 by Prime Minister Manmohan Singh:

The only parallel to the practice of "untouchability" was Apartheid in South Africa. Untouchability is not just social discrimination. It is a blot on humanity. That is precisely why the Father of our Nation, Mahatma Gandhi declared, "My fight against untouchability is a fight against the impure in humanity."¹⁰⁰

Additionally, at the hearings on India's compliance with its obligations under the ICERD in 2007, the Indian Solicitor General stated that "[o]ur country is deeply conscious and concerned

97. See Jenkins, *supra* note 87, at 749.

98. See Charles H. Norchi, *The National Human Rights Commission in India as a Value-Creating Institution*, in HUMAN RIGHTS: POSITIVE POLICIES IN ASIA AND THE PACIFIC RIM 113, 115 (John Montgomery ed., 1998).

99. For a similar view, see Gopal Guru & Shiraz Sidhva, *India's "Hidden Apartheid"*, UNESCO COURIER, Sept. 2001, at 27, 29, available at http://www.unesco.org/courier/2001_09/uk/doss22.htm.

100. Manmohan Singh, Prime Minister of India, Speech at the Dalit-Minority International Conference (Dec. 27, 2006), available at <http://pmindia.nic.in/speech/content.asp?id=482>.

about caste and is fully committed to tackling this at every level. . . .” The solicitor general added, however, that “[t]hese issues need to be and are being addressed under appropriate multilateral human rights instruments, which does not include this Convention.”¹⁰¹ While the Indian government has made progressive statements about ending caste discrimination, it maintains the belief that it has taken sufficient measures to curb the abuse and that it should do little more to remedy the situation. This complacency is directly related to the continued high levels of abuse persisting in India today.

Although the caste system is rooted in hierarchies created more than 3500 years ago,¹⁰² and any attempt to remove such an old and deeply entrenched system will not be easy to achieve, the Indian government is not absolved from its obligations and culpability. A lack of political will to more actively recognize the extent of the problem domestically and more actively combat caste discrimination at every level of government, combined with a refusal to acknowledge the problem internationally, has limited the effectiveness of those measures that have been taken.¹⁰³ It is important to note, however, that just as Indian officials have not sufficiently pressured the courts, police, and local officials to end discrimination, international actors have not sufficiently pushed the Indian federal government into meaningful action.

A. *The Constitution*

Any survey of the institutions and instruments dealing with caste in India must begin with the present constitution of the country. The 1950 Indian Constitution attempted to improve the legal status of low caste and Dalit peoples in India.¹⁰⁴ While it is difficult to argue that anyone expected caste identities to disappear after the introduction of the constitution, at the time, many believed that with democracy and the start of modernization, caste would decline in importance.¹⁰⁵ This viewpoint was expressed by Dr.

101. INT’L DALIT SOLIDARITY NETWORK ET AL., FACT SHEET: U.N. COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION (CERD) EXAMINATION OF INDIA’S 15TH – 19TH PERIODIC REPORTS (2007), *available at* http://idsn.org/fileadmin/user_folder/pdf/Old_files/un/pdf/India_CERD_Fact_Sheet.pdf.

102. *See* KEANE, *supra* note 26, at 267.

103. *See* Channa, *supra* note 27, at 62.

104. *See* GRANVILLE AUSTIN, WORKING A DEMOCRATIC CONSTITUTION: THE INDIAN EXPERIENCE 6 (2004).

105. *See* Eisenman, *supra* note 9, at 149; ZINKIN, *supra* note 28, at 69;

R

R

R

Ambedkar, the chief architect of the Indian Constitution as follows:

On the 26th January 1950, we are going to enter into a life of contradictions. In politics we will have equality and in social and economic life we will have inequality. We must remove this contradiction at the earliest possible moment or else those who suffer from inequality will blow up the structure of political democracy which this Assembly has [so] laboriously built up.¹⁰⁶

Despite the promising new beginning at the introduction of democracy to India, for many lower caste members, the realities of daily life have hardly improved at all, suggesting that enumerating rights alone has not been enough to actually force change to take place. A progressive legal structure has been built on weak social and political foundations and the result has been the frailty of the protections and rights constructed.

The 1950 Indian Constitution stresses equality and social justice.¹⁰⁷ In its preamble, the drafters state that one of the goals of the constitution was to secure “[e]quality of status and of opportunity” for its citizens.¹⁰⁸ India’s Constitution was considered progressive for its time and its drafters went to great pains to enumerate specific rights and responsibilities.¹⁰⁹ For instance, the practice of untouchability was explicitly outlawed and more general statements of equality were explicitly made in the constitution.¹¹⁰ The rights to equal treatment are coupled with a responsibility placed upon the government not only to end discrimination perpetrated by government actors, but also to prevent private individuals and organizations from violating the fundamental rights of others.¹¹¹

The basic principles of non-discrimination and equality derive from Articles 14-16 of the Indian Constitution.¹¹² Article 14 grants all citizens equality before the law.¹¹³ Article 15 prohibits discrimination and mentions caste discrimination as one type of discrimination that is no longer permissible.¹¹⁴ The legal foundation for granting reservations and benefits to the disadvantaged is in Article

106. V.R. KRISHNA IYER, *Marginalized Indian Humanity: Do the Bells of the Constitution Toll For Them?*, in LEGALLY SPEAKING 130, 132 (2004) (emphasis in original omitted).

107. See GUPTA, *supra* note 60, at 116.

108. INDIA CONST. pmb1, available at <http://lawmin.nic.in/coi/coiason29july08.pdf>.

109. See D.K. SINGH, V.N. SHUKLA’S CONSTITUTION OF INDIA, at A-31 (7th ed. 1982.).

110. INDIA CONST. art. 17 (dealing specifically with the issue of “untouchability”).

111. See M.V. PYLEE, CONSTITUTIONAL GOVERNMENT IN INDIA 192 (1960).

112. See KEANE, *supra* note 26, at 117.

113. INDIA CONST. art. 14.

114. *Id.* art. 15.

R

R

15, as the government retains the right to make “special provision for the advancement” of any group that is “backward.”¹¹⁵ Furthermore, Article 16 of the constitution involves equality of opportunity for public employment in all of its various forms.¹¹⁶ Finally, Article 17 makes the practice of “untouchability” illegal for both government actors and private citizens.¹¹⁷ The cumulative effect of these articles is the extension of fundamental rights to all citizens that are supported by governmental duties to refrain from any form of discrimination and prevent private citizens and organizations from practicing discrimination. Additional relevant advances made by the constitution are articles that create the Scheduled Castes, Tribes, and Other-Backwards Caste distinctions as well as the articles that set up a system of providing reservations for those groups.¹¹⁸ Essentially, the constitution codifies a system of affirmative action that is justified in terms of “social justice.”¹¹⁹ Like the provisions on equality, the provisions that introduce the reservation system to India have widely been regarded as progressive and comprehensive.¹²⁰

An assessment of the 1950 Constitution suggests that it is a progressive document that would seem to move India a long way towards true equality and the end of discrimination. Yet, as has been noted, “No doubt on the basis of [twenty] odd Articles in the Constitution, India can get full marks. But all that is on paper.”¹²¹

Additionally, in assessing the impact of the constitution, one must also consider what was omitted from the constitution. One criticism of the 1950 Constitution is that while the constitution does create equality for all citizens of India, this equality is largely procedural equality that focuses on the application of laws.¹²² More specifically, broader equality that might include concepts like socioeconomic equality is almost entirely absent.¹²³ This is significant because the reality is that most low caste and Dalit people are still economically dependent on high caste persons. Until they can

115. *Id.* art. 15, § 4, amended by INDIA CONST. amend I, § 2.

116. *Id.* art. 16.

117. See KEANE, *supra* note 26, at 118.

118. INDIA CONST. arts. 15-17, 243, 330, 335, 341-42. For additional protection supposedly provided by the Indian Constitution, see also *id.* arts. 23-25, 46.

119. See SHARMA, *supra* note 68, at 134.

120. See LAURA DUDLEY JENKINS, *IDENTITY AND IDENTIFICATION IN INDIA: DEFINING THE DISADVANTAGED* 17 (2003).

121. Nayar, *supra* note 38, at 173.

122. See GUPTA, *supra* note 60, at 151.

123. See *id.*

R

R

R

R

achieve some economic independence, the rights the constitution grants them will be difficult to realize.¹²⁴

Also noticeably absent from the constitution is an article directly relating to caste discrimination. In fact, the document explicitly states little about caste, and this silence indicates that the official government position on the caste system is ambiguous and its continuation is neither guaranteed nor expressly abolished.¹²⁵ Essentially, the constitution separates the issue of “untouchability” from the issue of caste discrimination and then avoids any additional mention of caste. Untouchables, as the group resting below the caste system, are removed from the equation through Article 17 of the constitution and the rest of the caste system is not specifically addressed.¹²⁶ Some people criticized this silence during the drafting process and some members of the constituent assembly supported the idea of an abolition of the caste system.¹²⁷ This type of complete attack on caste and the roots of the system of discrimination proved politically untenable as consensus was only reached on discussions of political and legal rights.¹²⁸ After this point, the social reform movement largely avoided the issue of caste discrimination and instead focused on the by-product of “untouchability.”¹²⁹

B. *The Role of the Courts*

Like the constitution, the record of the Indian courts has also had mixed results in struggling to end caste discrimination. For instance, the judgments of the Indian Supreme Court reveal that the court is dedicated to ending the practice of caste discrimination. Yet, these judgments also reveal an internal struggle with giving up traditional notions of caste identity.¹³⁰

Evidence of the inability to get past traditional notions of caste barriers can be found in a number of cases.¹³¹ In *Patil v. Additional Commissioner of Tribal Development*,¹³² for instance, a pair of sisters

124. JAYARAMAN, *supra* note 31, at 31.

125. See Eisenman, *supra* note 9, at 148-49.

126. See *id.* at 146, 148.

127. See KEANE, *supra* note 26, at 124.

128. See GUPTA, *supra* note 60, at 139.

129. See Ambedkar, *supra* note 54, at 191.

130. See, e.g., Jenkins, *supra* note 87, at 759-62.

131. See, e.g., M.R. Balaji v. State of Mysore, (1962) Supp. 1 S.C.R. 439, 471-72 (overturning a number of state affirmative action provisions benefiting victims of caste discrimination).

132. Kumari Madhuri Patil v. Additional Comm'r, (1994) Supp. 3 S.C.R. 50, 59.

applied to university as members of a scheduled tribe; both sisters were admitted. Upon further review later in their college careers, they were found to be members of a “backward caste” instead of a scheduled tribe, which meant their applications should not have been considered among those taken to fulfill reservation requirements for scheduled tribes.¹³³ In a strongly worded decision, the court denounced the efforts of “spurious tribes” to snatch away positions that should be reserved for those with “genuine” claims.¹³⁴ In order to conclude what caste or tribe the Patil sisters legally belonged to, the court relied on ethnological research.¹³⁵ By taking this approach, the justices implied that the government should approach identity and communities through categorizations based on the traditional system of divisions.¹³⁶ This therefore incorporates the social stratifications the court wishes to eliminate into the workings of the state.¹³⁷ An alternative approach would have been to consider the economic and social situation of the Patil sisters and decide the case based on whether these students represented a segment of society that reservations should help.

While the court has shown a reluctance to reduce the legal significance of traditional identities, it has concurrently made decisions that have introduced economic indicators into the definition of disadvantaged communities. In *Indira Sawhney v. the Union of India*,¹³⁸ where the court considered one of the most controversial cases ever decided in India, the court allowed for the consideration of individual economic factors along with group economic factors and caste histories.¹³⁹ This decision seems to contradict *Patil*, in which strict definitions of disadvantaged groups along lines drawn through ethnological history had been applied.¹⁴⁰ *Sawhney* opens up the idea of class and economic disadvantage as a decisive factor in identifying disadvantaged groups and communities that need support from the government, indicating a step away from the traditional notions of caste definitions and divisions.¹⁴¹

133. *See id.* at 60.

134. *See id.* at 67.

135. *See id.* at 60-61.

136. *See id.* at 61.

137. *See Jenkins, supra* note 87, at 761.

138. *Indira Sawhney v. Union of India*, A.I.R. 1993 S.C. 477.

139. *See Jenkins, supra* note 87, at 755. *See generally* GARY JACOBSON, *THE WHEEL OF LAW: INDIA'S SECULARISM IN COMPARATIVE CONSTITUTIONAL CONTEXT* (2005); V.K.S. CHAUDHARY, *THE IVORY TOWER: 51 YEARS OF THE SUPREME COURT* (2002).

140. *See Kumari Madhuri Patil v. Additional Comm'r*, (1994) Supp. 3 S.C.R. 50, 63-64.

141. *See generally Indira Sawhney*, A.I.R. 1993 S.C. 477.

The Supreme Court has also supported the elimination of caste discrimination by protecting the powers of the government to combat caste discrimination and ensure the end of discriminatory practices. In 1954, the court held that police could not impose restrictions or base policing decisions on their assessments of caste proclivity to commit crimes.¹⁴² In 1992, in *State of Karnataka v. Ingale*, the court upheld Article 17 of the Indian Constitution, which places a constitutional obligation upon state actors to take necessary steps to prevent the practice of “untouchability” even when the violations are carried out by private citizens.¹⁴³ This judgment, in association with Article 17 itself, creates accountability on the part of officials who do not push for compliance among the local populations.¹⁴⁴

Perhaps one of the most interesting cases to consider is *People's Union for Democratic Rights v. Union of India*,¹⁴⁵ which first introduced public interest litigation into the Indian judicial system. The Supreme Court introduced public interest litigation in an attempt to increase the opportunities for incidents of discrimination to be exposed and adjudicated.¹⁴⁶ Any individual or group of activists can file a writ on behalf of any victim of abuse, seeking the enforcement of some civil rights standard by the court. In its decision, the court stated as follows:

The time has now come when the courts must become the courts for the poor and struggling masses of this country. They must shed their character as upholders of the established order and the status quo. They must be sensitised to the need of doing justice to the large masses of people to whom justice has been denied by a cruel and heartless society for generations.¹⁴⁷

The language of the court in *People's Union* reflects a strong commitment to ending all forms of discrimination and injustice in Indian society.

In general, the Supreme Court of India has worked hard to extend the protections enshrined in the constitution to all the country's citizens.¹⁴⁸ Unfortunately, these good intentions are not present throughout the Indian legal system.¹⁴⁹ Furthermore, the

142. See *Sanhar Umar Ranmol v. State*, A.I.R. 1952 Saurashtra 124, 124-25.

143. See *State of Karnataka v. Appa Balu Ingale*, (1995) Supp. 4 S.C.C. 469, 484.

144. See Eisenman, *supra* note 9, at 168-69.

145. *People's Union for Democratic Rights v. Union of India*, (1983) 1 S.C.R. 456.

146. See GUPTA, *supra* note 60, at 197.

147. *People's Union for Democratic Rights*, (1983) 1 S.C.R. at 458.

148. See Gerald Beller, *Benevolent Illusions in a Democratic Society: The Assertion of Supreme Court Authority in Democratic India*, 36 W. POL. Q. 513, 528 (1983).

149. See Eisenman, *supra* note 9, at 158.

R

R

R

good intentions of some courts are often not supported by those in administrative positions that are expected to carry out the enforcement of the court's decisions.¹⁵⁰ In fact, *Ingale* was appealed to the Supreme Court specifically because the High Court for the State of Karnataka had been blatantly discriminatory in one of its decisions.¹⁵¹ The presiding judge at the state level had dubiously thrown out testimony by Dalit people as being untrustworthy.¹⁵² Without this testimony, the judge ruled in favor of the high caste defendants, who had been convicted in lower courts of preventing the Dalit plaintiff from using the community well at gunpoint.¹⁵³ This occurrence reflects the pervasiveness of caste discrimination, even within the ranks of the judiciary. Moreover, with the small number of cases that ever reach the Supreme Court of India, and the thousands of cases decided every year in India, the activism and good intentions even of that powerful court have limitations. The problem of caste-based biases throughout various levels of the judiciary remains a major obstacle to the effective elimination of caste discrimination.¹⁵⁴

C. *The National Human Rights Commission of India*

In 1993, the National Human Rights Commission of India (NHRC) was created by the Protection of Human Rights Act.¹⁵⁵ The NHRC was given the broad task of conducting inquiries into violations, reviewing laws and policies, and taking the lead in human rights education.¹⁵⁶ Eighteen state-level commissions were also created.¹⁵⁷ Those fighting to end caste discrimination hoped that these commissions would lead to a closer review of caste discrimination violations by civil servants, as well as help India better understand and apply international standards of human rights.¹⁵⁸

Generally, these expectations have not been met. To a large extent, the NHRC has been timid in opposing the government.¹⁵⁹

150. See Jamie Cassels, *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?*, 37 AM. J. CONTEMP. L. 495, 517 (1989).

151. See KEANE, *supra* note 26, at 250-51.

152. See *id.*

153. See *id.*

154. See Eisenman, *supra* note 9, at 167-69.

155. The Protection of Human Rights Act, 1993, No. 10 of 1994, ch. II, art. 3, available at <http://nhrc.nic.in/Publications/HRActEng.pdf>.

156. *Id.* ch. III, art. 12.

157. See National Human Rights Commission, State Human Rights Commissions, <http://nhrc.nic.in/shrc.htm> (last visited Mar. 6, 2010).

158. See Eisenman, *supra* note 9, at 154-55.

159. See Nayar, *supra* note 38, at 172-73.

R

R

R

R

It has often shied away from identifying discriminatory trends among government actors and has shown a lack of will to assert itself on issues that the government does not wish to see publicly addressed.¹⁶⁰ The various state commissions have never developed into institutions with significant influence largely due to a lack of cooperation between the NHRC and the various state institutions.¹⁶¹

Furthermore, the NHRC has disappointed those who had hoped that caste discrimination would be an important focus of the NHRC. From 2004 to 2005, only 583 of approximately 25,000 cases registered with the NHRC were considered within the context of "Atrocities on Scheduled Castes and Scheduled Tribes."¹⁶² Many of the other complaints certainly could have fallen under this category but were listed under other groupings. The 2004-2005 annual report also extends only two pages to the discussion of human rights abuse against the Scheduled Castes.¹⁶³ The under-emphasis on one of India's most serious human rights challenges does not reflect well on the perceived independence and strength of the NHRC.

The NHRC has also failed to bring India more in step with international standards. The NHRC does mention international treaties and commitments with some regularity in its reports, but it has not asserted itself regarding controversial stances taken by the Indian government.¹⁶⁴ The most telling example is the NHRC's failure to oppose India's unwillingness to discuss caste during the 2001 World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance in Durban.¹⁶⁵ The Indian government claimed that caste discrimination did not fall into any of the categories discussed.¹⁶⁶ The NHRC had the opportunity to protest the government's elimination of this important discussion, but it remained silent. Through its silence, the NHRC supported the government in preventing the open discussion of caste discrimination at the international level.¹⁶⁷

160. *See id.*

161. *See* SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CTR., JUDGEMENT RESERVED: THE CASE OF THE NATIONAL HUMAN RIGHTS COMMISSION OF INDIA 122 (2001).

162. NAT'L HUMAN RIGHTS COMM'N, ANNUAL REPORT 2004-2005, at 339 (2006), *available at* <http://nhrc.nic.in/Documents/AR/AR04-05ENG.pdf>.

163. *Id.* at 143-45.

164. Sukhadeo Thorat & Umakant, *Introduction to CASTE, RACE AND DISCRIMINATION*, *supra* note 38, at xiii, xxiii.

165. *Id.*

166. *See id.*

167. *See* Nayar, *supra* note 38, at 173.

Admittedly, the NHRC has clearly shown a desire to improve the human rights situation in India. Unfortunately, it has not enjoyed too much success.¹⁶⁸ The NHRC has a fine line to walk in criticizing the government, as it does not have the constitutional authority and the legitimacy that the Indian Supreme Court has.¹⁶⁹ Even in those instances when the NHRC has opposed or criticized the government and government institutions, the effectiveness of those protests are limited by formal and informal limitations on the power of the NHRC.¹⁷⁰ Formal limitations include a lack of review power over India's security forces and a limited power to make specific inquiries into human rights violations.¹⁷¹ Informally, the NHRC has found the government less than responsive to its decisions and recommendations. In general, the government has blatantly disregarded the NHRC's opinions.¹⁷² For instance, when the NHRC suggested the abolition of the Criminal Tribes Act for its draconian provisions against certain minorities in the eastern sector, the government made no effort to follow this recommendation or even consider amending the act.¹⁷³ Without governmental attempts to enforce or give some meaning to the NHRC's decisions, the NHRC will be unable to achieve practical results in the realm of caste discrimination.

IV. CASTE IN INTERNATIONAL HUMAN RIGHTS LAW

Since its independence, India has been active in the international human rights movement and is a party to most of the major international treaties and declarations. Given this level of involvement, a number of international treaties and findings by treaty bodies require that India properly address caste discrimination. The ICERD¹⁷⁴ is most applicable, although the Indian government disputes this. Other applicable treaties include the International Convention on Civil and Political Rights (ICCPR),¹⁷⁵ the Interna-

168. *See id.* at 172.

169. *See* SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CTR., *supra* note 161, at 1-14.

170. *See, e.g.*, Nayar, *supra* note 38, at 172-73.

171. *See* U.N. Human Rights Comm. [HRC], *Concluding Observations of the Human Rights Committee: India*, ¶ 7, U.N. Doc. CCPR/C/79/Add.81 (Aug. 4, 1997) [hereinafter *Concluding Observations of the HRC: India*].

172. *See* P.N. Bhagwati, *Racial Discrimination as a Grave Violation of Human Rights, in* CASTE, RACE AND DISCRIMINATION, *supra* note 38, at 199, 205 (2004).

173. *See id.*

174. International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, S. Exec. Doc. C, 95-2 (1978), 660 U.N.T.S. 195 [hereinafter ICERD].

175. International Convention on Civil and Political Rights, Dec. 19, 1966, S. TREATY DOC. No. 95-18, 999 U.N.T.S. 171 [hereinafter ICCPR].

tional Covenant on Economic, Social and Cultural Rights (ICESCR),¹⁷⁶ the Convention on the Rights of the Child (CRC),¹⁷⁷ and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).¹⁷⁸ Yet, because none of these conventions specifically mentions the word caste, interpretation is required to determine each treaty's relevance.¹⁷⁹ The Indian government maintains that the issue of caste discrimination is purely regional and domestic because of the absence of "caste" from the treaties, and thus concludes that eliminating caste discrimination is excluded from the international commitments of countries that are parties to the treaties.

India has largely rejected actions taken on the issue of caste by the international community and treaty bodies as attempts to influence its domestic affairs.¹⁸⁰ This dispute has played out most openly in the discussions of the Committee on the Elimination of all Forms of Racial Discrimination, where an active dialogue in 2007 between the committee and India took place. On multiple occasions, the committee has attempted to require India to report on caste discrimination and has interpreted the ICERD as covering caste discrimination. India has firmly rejected and rebuffed these attempts at oversight. Yet, as has been argued, "India is susceptible to international condemnation of the practice of caste. There must be sustained criticism of the practice in each field of reference, civil and political rights, economic and social rights, racial discrimination, the rights of women and the rights of children."¹⁸¹

V. CASTE AND THE INTERNATIONAL CONVENTION TO ELIMINATE ALL FORMS OF RACIAL DISCRIMINATION

The ICERD¹⁸² defines the term "racial discrimination" in Article 1(1). This article states that the term refers to "any distinction, exclusion, restriction or preference based on race, colour, descent,

176. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. TREATY DOC. NO. 95-19, 993 U.N.T.S. 3 [hereinafter ICESCR].

177. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

178. Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

179. See Deepa Reddy, *The Ethnicity of Caste*, 78 ANTHROPOLOGICAL Q. 543, 561 (2005).

180. See Thorat & Umakant, *supra* note 164, at xxvi.

181. KEANE, *supra* note 26, at 239.

182. The ICERD was adopted by the General Assembly of the United Nations in resolution 2106 (XX) on December 21, 1965. It entered into force on January 4, 1969. ICERD, *supra* note 174, pmbl. n.1.

or national or ethnic origin . . .”¹⁸³ It is not seemingly accepted that caste discrimination is an issue of race, color, or national origin.¹⁸⁴ It is also doubtful that caste would fall into the definition of the term “ethnic,” as members of different castes share language, culture, and geographical origins. In fact, these commonalities created the caste system. Therefore, by process of elimination, but also of logic, it would seem that caste discrimination must be incorporated into the definition of the term “descent-based” discrimination. Caste is based upon the idea that one falls within a particular group because one is born into it, and thus it falls squarely within the notion of descent. Caste discrimination is entirely based on the family or community into which a person is born. Once a child is born into a certain community, there is no way to change its caste and the child has extremely limited opportunities for upward mobility.¹⁸⁵ The United Nations and its various bodies, as well as the treaty bodies to relevant human rights treaties, all uphold this definition of caste-based discrimination as one type of discrimination based on descent.

In 2002, the CERD released a General Recommendation that “[s]trongly reaffirm[ed] that discrimination based on ‘descent’ includes discrimination against members of communities based on forms of social stratification such as caste and analogous systems of inherited status which nullify or impair their equal enjoyment of human rights”¹⁸⁶ This definition of “descent-based” discrimination explicitly incorporates caste and would therefore consider caste discrimination to be an issue addressed by the ICERD. In 2007, the CERD found as follows:

[D]iscrimination based on “descent” includes discrimination against members of communities based on forms of social stratification such as caste and analogous systems of inherited status which nullify or impair their equal enjoyment of human rights. Therefore, the Committee reaffirms that discrimination based on the ground of caste is fully covered by [A]rticle 1 of the Convention.¹⁸⁷

183. *Id.* art. 1, § 1.

184. Racial discrimination and caste discrimination are generally no longer deemed comparable. *See* KEANE, *supra* note 26, at 268.

185. *See* JAYARAMAN, *supra* note 31, at 23.

186. U.N. Comm. on the Elimination of Racial Discrimination, *General Recommendation XXIX on Descent-Based Discrimination*, ¶ 7, U.N. Doc. CERD/C/61/Misc.29/rev.1 (Aug. 22, 2002).

187. *Concluding Observations of CERD: India*, *supra* note 6, ¶ 8 (citation omitted).

This inclusion of caste as descent-based discrimination has not been accepted by the Indian government.¹⁸⁸ India's position is that caste discrimination falls neither into the category of racial nor descent-based discrimination and therefore is not covered by the ICERD.¹⁸⁹ In February 2007, the CERD reviewed India's periodic statements submitted under Article 9 of the ICERD.¹⁹⁰ At the review meeting, India's representative explained that "[c]aste could not be considered as descent, which signified genealogical demonstrable characteristics. In the same caste, people had multiple descents, and could not intermarry: they had to go outside their own lineage."¹⁹¹ In terms of a strict definition of the concepts involved, India's claim that caste is not an instance of "descent-based discrimination" has some resonance because of the ambiguity surrounding the term "descent-based discrimination."¹⁹² Because of this difference in definition, the Indian government has claimed that it has no reporting obligation to the CERD, and any information it provided regarding caste was purely voluntary, and was provided because it "might be of interest to the Committee."¹⁹³ India's insistence on the fact that any information it provides relating to caste is purely voluntary is a serious issue in that it could at any time withhold information relevant to caste discrimination and disregard the CERD's recommendations on the issue. Furthermore, according to an interpretation of the ICERD, the CERD can only take decisions based on information received by country reports.¹⁹⁴

If India's definition stands and caste discrimination is not regulated by the treaty, the most significant effect is related to Article 2 of the ICERD. Article 2 sets out the most important national obligations to end racial discrimination. Article 2(1)(d) states that

188. See KEANE, *supra* note 26, at 237.

189. See *id.*

190. Article 9 of the ICERD requires that each state party to the ICERD report on "the legislative, judicial, administrative or other measures which they have adopted and which give effect to the provisions of the Convention: (a) within one year after the entry into force of the Convention for the State concerned; and (b) thereafter every two years and whenever the Committee so requests." ICERD, *supra* note 174, art. 9.

191. U.N. Comm. on the Elimination of Racial Discrimination, *Summary Record of the 1796th Meeting*, ¶ 13, U.N. Doc. CERD/C/SR/1796 (Mar. 2, 2007) (statement of Mr. Gupta) [hereinafter CERD, *Summary Record*].

192. See KEANE, *supra* note 26, at 237.

193. CERD, *Summary Record*, *supra* note 191, ¶ 3 (statement of Mr. Singh).

194. See Jose Gomez del Prado, *United Nations Convention on Human Rights: The Practice of the Human Rights Committee and the Committee on the Elimination on all Forms of Racial Discrimination in Dealing with Reporting Obligations of States Parties*, 7 HUMAN RIGHTS Q. 492, 499-500 (1985).

R

R

R

R

“[e]ach State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization”¹⁹⁵ This provision establishes a high standard to which governments are held, as it not only requires that measures be taken to make discrimination illegal, but also that the measures they take should be effective and ultimately successful. Because India has taken measures to end caste in terms of its constitutions and laws, its failures under the ICERD have been in the enforcement and application of those laws. Article 2 clearly introduces enforcement and application into the realm of consideration of the CERD. India admits that problems still exist relating to caste discrimination, but its interpretation of its ICERD commitments suggests that India does not see itself as having any international legal commitments regarding the caste discrimination.

While India has stood firm on its position that the ICERD does not cover caste-related discrimination, the CERD has been equally firm in asserting its position that it does have the right to require reports from India on the issue.¹⁹⁶ During the February 2007 meeting to consider India’s reports to the CERD, several committee members rejected India’s position.¹⁹⁷ Patrick Thornberry, a sitting member of the CERD, stated that “[i]n international law, an evolutionary interpretation of terms was common practice; the Committee had, over time, deployed a broad interpretation of the word ‘descent’ and was of the view that the language contained in the Convention was adequate to capture the notion of caste-based discrimination.”¹⁹⁸ Thornberry explicitly stated that the CERD had chosen to apply a “broad interpretation of the word ‘descent’”¹⁹⁹ This might be seen as problematic by many governments as it might imply some sort of a “creeping jurisdiction” being applied by a non-judicial body.²⁰⁰ While some states may be nervous about a body interpreting a treaty without input from the states bound by that treaty, the CERD arguably needs this power to maintain its relevance.²⁰¹

195. ICERD, *supra* note 174, art. 2, § 1(d).

196. See KEANE, *supra* note 26, at 237.

197. See, e.g., CERD, *Summary Record*, *supra* note 191, ¶ 35 (statement by Mr. Thornberry).

198. *Id.* ¶ 36.

199. *Id.*

200. See Michael Banton, *Decision-taking in the Committee on the Elimination of Racial Discrimination*, in THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING 55, 78 (Philip Alston & James Crawford eds., 2000).

201. See *id.* at 56-58.

It is generally accepted that the ICERD has been expanding to cover types of discrimination not actually considered by the drafters.²⁰² When the ICERD was prepared, most of the focus of the treaty was on racism resulting from colonialism or international doctrines of racial superiority.²⁰³ Therefore, most states that signed and ratified the ICERD believed it would cover mostly other states that had some colonial history; few states seemed to think it would affect their domestic politics.²⁰⁴ This perception is supported by the fact that more than half of the first forty-five states going through CERD reviews denied suffering from any racial discrimination.²⁰⁵ The CERD has expanded the definition of racial discrimination steadily to make sure that each member country is now stringently scrutinized and that there are no countries that can escape criticism altogether.²⁰⁶ Thus, it is important to understand what is meant by CERD in this regard. A good starting place from which to discuss the legality of the CERD's interpretations is the "travaux preparatoires" of the treaty.

According to the Vienna Convention on the Law of Treaties, if there is no clear answer to an interpretational dispute in the text of the treaty, its context and the "travaux preparatoires" should be taken into account, as well as the international context considering other treaties, international practice, and other relevant rules of international law.²⁰⁷ The CERD has in fact referred to the "travaux preparatoires" in trying to assert its right of review over caste discrimination in India.²⁰⁸ It argued that India was actually the country to suggest including "descent-based" discrimination in the official definition of "racial discrimination" during the drafting process.²⁰⁹ This seems to imply some specific relevance of the word to the Indian context.²¹⁰ India rejected this interpretation of the context by explaining that it suggested the term because of its colonial history and the desire to ensure a discontinuation of racism against the Indian Diaspora.²¹¹ An assessment of the actual discussion confirms India's explanation as the insertion of the

202. See KEANE, *supra* note 26, at 237; Banton, *supra* note 200, at 75.

203. See Banton, *supra* note 200, at 58.

204. See *id.*

205. See KEANE, *supra* note 26, at 207.

206. See *id.*

207. See Vienna Convention on the Law of Treaties arts. 31-32, Jan. 27, 1980, 23 U.S.T. 3227, 1155 U.N.T.S. 331.

208. See KEANE, *supra* note 26, at 226-27.

209. See *id.* at 226.

210. See CERD, *Summary Record*, *supra* note 191, ¶¶ 6-7 (statement of Mr. Vahanvati).

211. See *id.* ¶ 8 (statement of Mr Vahanvati).

R

R

R

R

R

word “descent” corresponds with a discussion regarding the national origins of the persons under discussion.²¹²

Considering the facts, it seems that the “travaux preparatoires” do not offer any support for the legal standing of the CERD’s interpretation of the ICERD. This does not necessarily mean that the CERD cannot interpret the treaty in question. Perhaps the most appropriate legal assessment of this stalemate was introduced by Judge Thomas Buergenthal, who offered that the interpretation of the CERD stands unless it is explicitly objected to. In the case of such an objection, the International Court of Justice would arbitrate the dispute, as Article 22 of the ICERD makes that court the arbiter of the ICERD’s meaning.²¹³ This argument has never been tested, as neither India nor the CERD seem to desire to press the issue outside of India’s periodic report presentations.

The inability of the CERD to find a foothold in international law with which to pressure India on the issue of caste discrimination has proven to be problematic. There is no provision within the ICERD to address differences of interpretation and the CERD’s decisions have little or no binding power.²¹⁴ Without India’s consent to allow the CERD to review its laws regarding caste and render decisions about the enforcement situation in India, the CERD is unlikely to act at all. The CERD knows that any decisions it makes about caste in India will not be put into effect and will be rejected by the Indian government. This public display of impotence may erode the CERD’s power with regard to its relations with other states. Without some way to resolve the dispute and incorporate caste into the scope of the ICERD, India will be able to continue avoiding any international obligations to end caste discrimination that might be created through the ICERD.

VI. CASTE AND OTHER INTERNATIONAL HUMAN RIGHTS TREATIES

Considering the effects that caste discrimination has on such a large portion of the population in India, there are certainly human rights violations occurring that violate both the ICCPR²¹⁵ as well as the ICESCR.²¹⁶ For instance, caste discrimination arguably denies lower caste people equal status before the law, which is a violation

212. See KEANE, *supra* note 26, at 226.

213. See Thomas Buergenthal, *Implementing the UN Racial Convention*, 12 TEX. INT’L L.J. 187, 207 n.104 (1977).

214. See Banton, *supra* note 200, at 59.

215. ICCPR, *supra* note 175, pt. II, art. 2.

216. ICESCR, *supra* note 176, pmb1.

R

R

R

R

of Article 14 of the ICCPR.²¹⁷ Caste discrimination also causes high caste crimes against lower caste people that often go unpunished, which indicates that those lower caste people have no chance at redress through the legal system; this may be a violation of Article 2 of the ICCPR.²¹⁸ Caste discrimination also leads to violations of Article 7 of the ICESCR,²¹⁹ which discusses equal opportunity and fair wages. Human rights abuses arising from caste discrimination also may fall under the auspices of several other prominent international human rights treaties. For instance, the CEDAW could be applied in the cases of ritual prostitution.²²⁰ The CRC could also be applied to situations in which low caste children do not have access to acceptable standards of medical treatment or are segregated and discriminated against at school.²²¹

Despite a vast array of international human rights law treaties that seem to indirectly address the issue of caste discrimination, none has resulted in any strong pressure being placed on India to truly end the practice. Explaining why these treaties have been ineffective in pressuring India on the issue of caste is difficult. First, India does not accept criticism about caste because it does not think it is an international problem.²²² India believes it is a cultural phenomenon that other countries have no basis to understand. This strong stance, coupled with the fact that India has been superficially compliant, make the issue difficult to raise at the international level. Second, approaching the issue of caste through other rights issues, like the rights of women or children, often never reaches the overarching problem of caste itself. It is easier for a legislature to address problems specifically rather than through an umbrella issue, such as the huge umbrella issue of caste. This is so despite the fact that caste discrimination is the

217. See ICCPR, *supra* note 175, art. 14 (“All persons shall be equal before the courts and tribunals.”). R

218. See *id.* art. 2 (“Each State Party . . . undertakes to respect and to ensure to all individuals . . . the rights recognized in the present Covenant, without distinction of any kind . . .”).

219. See ICESCR, *supra* note 176, art. 7 (“The State Parties . . . recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure . . . fair wages . . . with equal pay for equal work . . .”). R

220. See CEDAW, *supra* note 178, art. 6 (“State Parties shall take all appropriate measures . . . to suppress all forms of traffic in women and exploitation of prostitution of women.”). R

221. See *id.* art. 28 (“States Parties recognize the right of the child to education . . .”); CRC, *supra* note 177, art. 24 (“States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health . . .”). R

222. See GUPTA, *supra* note 60, at 54-55. R

root cause of all of these other rights violations towards women and children.

One of the most meaningful interactions between India and a U.N. body occurred in 1997 in the Human Rights Committee's (HRC) periodic review of India.²²³ At that meeting, India seemed to impress the HRC, which noted "with satisfaction the existence of a broad range of democratic institutions and a comprehensive constitutional and legal framework for the protection of human rights."²²⁴ The HRC briefly mentioned caste discrimination in Article 15 of the review.²²⁵ It is addressed in two sentences and the only recommendation offered by the HRC is that India should increase its efforts to offer education programs to combat caste discrimination.²²⁶ The brief mention of caste discrimination by the HRC is typical of each periodic review with any U.N. body other than the CERD. The failure to pressure India on the issue of caste discrimination is a failure of the international human rights regime.

VII. INTERNATIONAL PRESSURE FOR CASTE REFORM

As India has continued to resist the efforts of treaty bodies to make suggestions and scrutinize the caste situation in India, there have been moves from several countries to directly pressure India to do more to combat caste issues. In 2007, both the European Parliament and the U.S. House of Representatives passed resolutions addressing the treatment of Dalits in India. While these resolutions were somewhat tentatively worded, they indicate a first step towards countries becoming more involved bilaterally with pressuring India to eliminate caste discrimination.

The relevant European Parliament resolution was adopted in February 2007.²²⁷ In the resolution, the European Parliament tries to create avenues through which the international community can pressure India in several different ways.²²⁸ First, the resolution urges India to "engage further with relevant UN human rights bodies on the effective elimination of caste-based discrimination."²²⁹ This statement indicates that the European Community believes

223. See generally *Concluding Observations of the HRC: India*, *supra* note 171.

224. *Id.* ¶ 6.

225. See *id.* ¶ 15.

226. *Id.*

227. See Resolution on the Human Rights Situation of Dalits in India, EUR. PARL. DOC. B6-0021 (2007).

228. See, e.g., *id.* ¶¶ 8-13.

229. *Id.* ¶ 6.

that India has been avoiding the oversight of the various U.N. organizations and treaty bodies. This resolution also directly calls for some action from the Indian government.²³⁰ The resolution notes that the Indian National Commission on Human Rights has made some suggestions regarding the issue that have yet to be adopted, and the European Parliament calls for police reform to end police discrimination against Dalits.²³¹ This direct referral to issues that need to be addressed seems to be an attempt to limit India's ability to respond by pointing out legislative successes. Finally, this resolution notes the lack of E.U. dialogue with India regarding the problem of caste discrimination, and calls for such dialogue to be initiated at every opportunity. Most importantly, the resolution indicates that this dialogue should be included in some trade discussions.

On July 23, 2007, the U.S. House of Representatives also adopted a resolution addressing the issue of discrimination against Dalits in India.²³² While this resolution was never introduced as legislation or taken to the Senate, it still carries some significance. The resolution adopted by the House of Representatives in the United States is slightly more muted than the one in Europe. It does not call for India to further engage the international community on the issue, but there are calls for the Indian government to take action.²³³ Perhaps the most interesting aspect of the resolution is that it speaks to the responsibilities of U.S. investors and those doing business in India to not participate in or contribute to the problem of caste discrimination.²³⁴ India has not officially responded to the U.S. resolution, yet an Indian diplomat was quoted as saying that the European Parliament resolution was "lacking in 'balance'" and "unfortunate."²³⁵

While the response was dismissive, it is important to note the references to economics in the resolutions. The E.U. resolution hints at some desire to link Dalit rights to trade talks in some manner, while the U.S. resolution indicates that U.S. businesses and investors need to be aware of the problem. If these are the first

230. See, e.g., *id.* ¶¶ 4-7.

231. See *id.*

232. Expressing the Sense of the Congress that the United States Should Address the Ongoing Problem of Untouchability in India, H.R. Con. Res. 139, 110th Cong. (2007) (as passed by the House of Representatives, July 23, 2007).

233. See *id.* §§ 1, 8.

234. See *id.* §§ 5-6.

235. Nirmala Carvalho, *European Parliament Criticises India for Abuses Against Dalits*, ASIANews.IT, June 2, 2007, <http://www.asianews.it/index.php?l=en&art=8412>.

steps towards tying economics to reform in India regarding the issue of caste discrimination, they may introduce a new policy approach that could apply meaningful and effective pressure on India to end caste discrimination. Nevertheless, there is little or no possibility of an extensive regime of economic sanctions ever being imposed on India. India is one of the fastest growing economies in the world, and with its population of over one billion people, it offers an enormous market with strong potential.²³⁶ Few countries would be willing to seriously restrict their trade relations with India over caste discrimination. Thus, an extensive set of sanctions like that adopted by the U.N. Security Council against South Africa during its apartheid regime is extremely unlikely.²³⁷ Yet, such a strong measure is not necessary to be effective. If several major economic powers increase the international scrutiny on India and tie some economic issues to caste discrimination, there will be added incentive for India to work towards rectifying the situation.

These approaches were arguably undermined when India's human rights system was subjected to universal periodic review in 2008. The HRC, in its final report on universal periodic review undertaken on India on April 10, 2008, accepted India's position specifically on the ICERD and noted as follows:

India has been deeply conscious of the need to empower the Scheduled Castes and Scheduled Tribes and is fully committed to tackle any discrimination against them at every level. The Constitution of India abolished "untouchability" and forbids its practice in any form. There are also explicit and elaborate legal and administrative provisions to address caste-based discrimination in the country. The caste system, which is unique to India, is not racial in origin, and therefore, caste based discrimination cannot be considered a form of racial discrimination.²³⁸

Usefully, many countries questioned India on caste issues and many recommendations were made in that regard. These include the suggestion by Italy that India increase its human rights education process to deal more effectively with gender and caste discrimination.²³⁹ Whether India accepts and implements these suggestions remains to be seen. While it is important to note this level of scrutiny during India's universal periodic review, one must

236. See RICHARD GRABOWSKI ET AL., *ECONOMIC DEVELOPMENT: A REGIONAL, INSTITUTIONAL, AND HISTORICAL APPROACH* 174 (2006).

237. See generally DAVID CORTRIGHT & GEORGE LOPEZ, *THE SANCTIONS DECADE: ASSESSING UN STRATEGIES IN THE 1990s* (2000).

238. U.N. Human Rights Council, *Report of the Working Group on the Universal Periodic Review of India*, ¶ 15, U.N. Doc. A/HRC/8/26 (May 23, 2008).

239. See *id.* ¶ 53.

also conclude that the 2008 review did little if anything to increase pressure on India to take definitive action to end caste discrimination.

VIII. CONCLUSION

Even with India's extensive legal protections for all citizens and guarantees of equality, widespread caste discrimination persists. Given the scope of the problem and the massive challenge it presents, India has suffered from insufficient political will and institutional commitment to truly address the problem of caste discrimination. India must undertake several major reform initiatives.

India should reevaluate its system of reservations and benefits.²⁴⁰ Adjustments to the system need to de-emphasize the traditional caste definitions in the methodology for identifying benefit recipients in order to limit the relevance of traditional caste identity. Instead, emphasis should be placed on economic prerequisites so that it is truly the most disadvantaged who benefit. These changes should be coupled with a new wave of education campaigns both to inform the victims of their rights and to increase knowledge of the laws against discrimination to potential perpetrators. It is also vital for India to begin a significant overhaul of its lower level courts and local police to finally end all discrimination practiced by public servants. Education campaigns for judges and police officials should be complemented by meaningful sanctions taken against those who violate the rights of any Indian citizens.

These measures would certainly be a major challenge for any Indian government to undertake. India realizes this and therefore most politicians prefer to avoid drastic action and instead deflect criticism by referencing India's progressive constitution and legal protections of the disadvantaged to suggest that everything has been done to solve the problem.²⁴¹ This lack of political will presents the principal reason there is a need for greater international engagement with India on the issue of caste. This is crucial, as India has been able to avoid international scrutiny and serious discussion on caste discrimination. The international community must assail India with an honest and strict assessment of its failures to combat caste, and its impact.²⁴²

240. See K.S. CHALAM, *CASTE-BASED RESERVATIONS AND HUMAN DEVELOPMENT IN INDIA* 168-70 (2007).

241. See Eisenman, *supra* note 9, at 182-84.

242. See KEANE, *supra* note 26, at 239.

Where India continues to resist, bilateral pressure from other nations might be most effectively used. In the event that India continues to deny the CERD the right to review its performance on caste, the international community must exert pressure so that India will accept its obligations under the ICERD. As U.N. reform is becoming a prominent topic for discussion, and India is regularly mentioned for a seat on the Security Council, the international community should make it clear that its support for India is contingent on India permitting a complete review of the Indian human rights situation. It is also essential that the U.N. General Assembly, the U.N. Human Rights Council, and other international and regional institutions consider and publicly discuss caste discrimination and the challenges it presents. All of these measures will increase the scrutiny of India's efforts to truly combat discrimination. India is a democracy that values its international reputation, and substantive criticism may help India develop the political will necessary for the government to adequately address the issue of caste discrimination.

There is also the potential for regional action from India's neighbors.²⁴³ Many countries in the region suffer from similar challenges in their own struggles against caste discrimination. If solutions are found in India, there would be positive ramifications for other countries in which the issue also occurs.²⁴⁴ The creation of a human rights body by the South Asian Association for Regional Cooperation countries could provide significant assistance in the struggle against caste discrimination.²⁴⁵ Most of the South Asian Association for Regional Cooperation countries also have caste systems and face similar problems to those of India. If these countries unite to combat caste, they might be more willing to accept criticism and review from each other as countries with shared obstacles. Furthermore, this type of commission could review what practices and programs have worked in various countries, and through a common focus on this topic, discover the most effective remedies to the problem.

243. See Jeremy Sarkin, *Achieving Reconciliation in Divided Societies: Comparing the Approaches in Timor-Leste, South Africa and Rwanda*, YALE J. INT'L AFF., Summer 2008, at 11-28.

244. See also Jeremy Sarkin, *The Role of Regional Systems in Enforcing State Human Rights Compliance: Evaluating the African Commission on Human and People's Rights and the New African Court of Justice and Human Rights with Comparative Lessons from the Council of Europe and the Organization of American States*, 1 INTER-AM. & EUR. HUM. RTS. J. 199 (2009).

245. See Jeremy Sarkin, *Toothless Charter Will Hurt Asean Credibility*, BANGKOK POST, Nov. 19, 2007, available at http://www.indonesia-ottawa.org/information/details.php?type=news_copy&id=5057.

Caste discrimination shows no sign of dying a quiet death. As activists and scholars have noted, “[t]he caste system is so deeply entrenched in the Indian psyche” that drastic and decisive measures beyond the creation of legal equality must be taken.²⁴⁶ Without a concerted and determined effort to end this practice, it will not fade away. It remains clear that India, as well as other countries where the practice exists, need to generate a greater political will to truly combat the problem.²⁴⁷ The newly emerging norm of the responsibility to protect (usually abbreviated as R2P) makes this a necessity.²⁴⁸ Not only should the practice be ended, but those who have suffered from it ought to be given some form of reparations.²⁴⁹ While reparations would be controversial and costly, it is necessary to ensure that some compensation is given to people who have suffered from years of discrimination.

The international community has a significant role to play in generating the political will to end it.²⁵⁰ Through increased pressure, scrutiny, and constructive review, the international community can push India and others towards compliance with international human rights norms and end the suffering of millions of people.²⁵¹ This will need sustained and ongoing pressure if it is to be successful, but the lives of millions of people who have endured this abuse around the world depend on it.

246. Thorat & Gokhale, *supra* note 3, at 34.

247. On the role of the state and citizens on human rights protection, see generally HUMAN RIGHTS: THE CITIZEN AND THE STATE (Jeremy Sarkin & William Binchy eds., 2001).

248. See Jeremy Sarkin, *Humanitarian Intervention and the Responsibility to Protect in Africa*, in AFRICA'S HUMAN RIGHTS ARCHITECTURE 45 (Daniel Zimble & John Okopari eds., 2009). See generally Jeremy Sarkin, *The Historical Origins, Convergence and Interrelationship of International Human Rights Law, International Humanitarian Law, International Criminal Law and Public International Law and Their Application Since the Nineteenth Century*, 1 HUM. RTS. & INT'L L. DISCOURSE 125 (2007).

249. See generally Jeremy Sarkin, *The Coming of Age of Claims for Reparations for Human Rights Abuses Committed in the South*, 1 INT'L J. HUM. RTS. 67 (2004).

250. See generally Jeremy Sarkin & Erin Daly, *Too Many Questions, Too Few Answers: Reconciliation in Transitional Societies*, 35 COLUM. HUM. RTS. L. REV. 101 (2004).

251. On the role of the international community, see generally Jeremy Sarkin & Guilia Dalco, *Promoting Human Rights and Achieving Reconciliation at the International Level (Part 1)*, 10 L. DEMOCRACY & DEV. 69 (2006); Jeremy Sarkin & Guilia Dalco, *Promoting Human Rights and Achieving Reconciliation at the International Level (Part 2)*, 10 L. DEMOCRACY & DEV. 49 (2006).