

HIJRAS: THE 21ST CENTURY UNTOUCHABLES

Denied the most basic of human rights, this analytical framework aims to provide an overview of the plight of India's hijras and proposes greater access to health and education for India's longest lasting social outcasts in an attempt to help them out-caste the nation's social hierarchy

INTRODUCTION

Pallavi Sarkar* spent many nights walking alone in the seemingly crowded city of Mumbai. As she grew older, she could feel a void and an emptiness grow deeper with each passing day. But this was not a void that could be filled with money or riches; for Pallavi, this was a void that could only be filled with love, support and for once in her life, acceptance of who she truly was. It was not until she met Lakshmi Pervez* that she felt the warmth of a home, the comfort of a bed, or the love a family. Because until that moment, she woke up each morning on a dirt covered bench on the side of a road to taunts and teases by passersby. Because until that moment, she spent her days begging at store fronts and nights as a sex worker. Because until that moment Pallavi was not recognized as human, let alone a woman.¹

Pallavi's story is not new and she is not alone. With time, nations and people go through phases of change. Whether it is cultural shifts that evolve over time or political movements that mold the way a nation behaves, change has been the one constant aspect in the development of our world; and that change often recycles with time.² This change is prevalent in India, a nation invaded by many over the years, all of whom that have left their imprint and helped the country develop into how it stands today.³ The different views, beliefs, and practices of each of its invaders left their mark on Indian soil.⁴ Over time, India became a country which not only believes in unity in diversity, but also touts their diversity as its greatest strength.⁵

1. Telephone interview with Pallavi Sarkar (Feb. 11, 2016) (*all names marked as * and changed for anonymity*).

2. Ariane de Bonvoisin, *Begin Again*, LIFE HEALTHCARE, 64 (Spring 2015).

3. *See generally* PARTHA CHATTERJEE, THE NATION AND ITS FRAGMENTS: COLONIAL AND POSTCOLONIAL HISTORIES, 11 (Sherry B. Ortner et al. eds., 1993).

4. *Id.*

5. Viskhatnam, *Unity in Diversity is Our Strength, Says Raghuvveera*, THE HINDU (Oct. 2, 2016), <http://www.thehindu.com/news/national/andhra-pradesh/unity-in-diversity-is-our-strength-says-raghuvveera/article9175960.ece>.

But beneath this diversity, is a layer of social hierarchy that permeates every aspect of the Indian society. This hierarchy was birthed from the caste system, which seems to have originated more than 2000 years ago.⁶ Though the inception of caste lies in Hinduism, which categorized people based on their occupations, it soon became hereditary, and people were born into an unalterable social status which would guide much of their lives.⁷ The four primary castes in order of social status were Brahmins (the priests), Kshatriya (warriors and nobility), Vaisya (farmers, traders and artisans), and Shudra (tenant farmers and servants).⁸ Outside the four primary castes exists the lowest caste, known as the Untouchables, comprised of mostly street sweepers and latrine cleaners who were considered too filthy to be in contact with the rest of society.⁹ The untouchables are likened to the social status of Western society's slaves and were deprived of man's most basic rights because they were considered subhuman.¹⁰

The divisive nature of the caste system crept into the social and political strata of India, developing a social hierarchy that continues to plague nearly every aspect of the Indian society.¹¹ Through unequal access to education, health and general welfare, people in India advanced in society based on their place in the social hierarchy.¹² Recognizing the harms of such a system, the government of India has attempted to pass amendments and legislation to help curb the prevalence of this social hierarchy.¹³ While the scheme of affirmative action and reservations may have addressed the dilemma facing India's lowest caste on paper, the reality of these policies has merely morphed the social hierarchy by redefining the social castes; they have not successfully removed from society the remnants of caste discrimination and unequal treatment.¹⁴

6. Partha P. Majumder, *Indian Caste Origins: Genomic Insights and Future Outlook, History of India's Caste System*, 11 GENOME RES 91931, 931-932 (2001).

7. *Id.*

8. VANI K. BOROOAH ET AL., CASTE, DISCRIMINATION AND EXCLUSION IN MODERN INDIA 1 (2015).

9. *Id.* at 1-2 (The Hindu caste system is divided into four groups, the lowest of which represents a group of people with whom "physical contact [*omitted*]"—most usually the acceptance of food or water—is polluting or unclean" and thereby gave birth to the characteristic name "untouchable.").

10. Kyle Robertson, *Slavery by another name: The "Untouchables"...in India*, THE PRISMA (Sept. 8, 2012), <http://theprisma.co.uk/2012/09/08/slavery-by-another-name/>.

11. *Id.*; see generally Victor S. D'Souza, *Caste Structure in India in the Light of Set Theory*, 13 CURRENT ANTHRO. 5 (1972).

12. Robertson, *supra* note 10.

13. K.C. Suri, *Caste Reservations in India: Policy and Politics*, 55 INDIAN J. OF POL. SCI. 37, 42-44 (1994).

14. M.N. Srinivas, *Caste in Modern India*, 16(4) J. ASIAN STUD. 529, 543-547 (1957). See also Marc Galanter, *Law and Caste in Modern India*, 3 ASIAN SURV. 544 (1963).

One such collection of individuals still subject to such discrimination is the long ignored group of India's hijras. Hijras of modern day India—a noun collectively identifying eunuchs, castrated men, and transgender people—are unable to enjoy many of the freedoms, liberties and rights afforded to the rest of society.¹⁵ But they were not always in that position. The position of hijras in India has varied over the years. From being heralded as semi-divine beings for centuries, to being forced out of mainstream society, to living as prostitutes or beggars, hijras today are exiled at a young age.¹⁶ Like Pallavi, many hijras find themselves living in a world secluded by the benefits of mankind, yet continually subjected to its harm and ridicule.¹⁷ With growing numbers nearing two million, they live a relatively deserted life in personal “hijra communities” and are not incorporated into the Indian society.¹⁸ Although they have often made an appearance in humorous pop culture references and occasional political elections, hijras at large are absent from many of the legal safeguards protecting other classes of people in India.¹⁹ This absence over time has grown to such a scale that today hijras are treated as the 21st century untouchables of India.

While this divide is not apparent at first glance, a deeper analysis of the social and political structure of the people in India surfaces many of the present day inequalities directly impacting hijras.²⁰ For many, like Pallavi, the cult-like nomadic lifestyle of a hijra seemed like the only possible alternative to the life they were leading, despite its shortcomings.²¹ At that point, even the dangers of castration, the illegality of the occupations they would hold, and the perpetual ridicule they would continue to endure seemed trivial when it came to finally settling into their own skin.²²

15. SERENA NANDA, NEITHER MAN NOR WOMAN: THE HIJRAS OF INDIA, 13-16 (Linda Purrington et al. eds. 2nd ed. 1999) [hereinafter Nanda]; see also Jefferson Mok & Stephanie Linning, *Hidden World of the Hijras: Inside India's 4,000-Year-Old Transgender Community Where Religious Respect Doesn't Protect Them from Modern-Day Discrimination*, DAILY MAIL (Jun. 30, 2015), <http://www.dailymail.co.uk/news/article-2852834/Hidden-world-hijras-Inside-India-s-4-000-year-old-transgender-community-religious-respect-doesn-t-protect-modern-day-discrimination.html> [hereinafter Mok & Linning].

16. BOMBAY EUNUCH (Gidalya Pictures 2001); see also Morris E. Opler, *Further Comparative Notes on the Hijara of India*, 63 AM. ANTHRO. 1331, 1332 (1961).

17. BOMBAY EUNUCH (Gidalya Pictures 2001).

18. Leela Jacinto, *India's Eunuchs Get Enfranchised*, ABC NEWS (Nov. 30, 2000), <http://abcnews.go.com/International/story?id=82032&page=1>.

19. *Id.*

20. Homa Khaleeli, *Hijra: India's Third Gender Claims Its Place in the Law*, THE GUARDIAN (Apr. 16, 2014, 2:37 PM), <https://www.theguardian.com/society/2014/apr/16/india-third-gender-claims-place-in-law>.

21. See generally Vinay Lal, *Not This, Not That: The Hijras of India and the Cultural Politics of Sexuality*, 61 SOC. TEXT 119 (1999).

22. *Id.*; see also Julie McCarthy, *A Journey of Pain and Beauty: On Becoming Transgender in*

Regardless of the means or reasons leading to that lifestyle, the goal of the Indian government ought to be protection of all its people within their society.²³

The treatment of India's hijra community sounds familiar, and that is largely because it is reminiscent of the treatment of untouchables in India over the years as a result of the caste system.²⁴ Much like the untouchables, India's transgender²⁵ community is ignored from the nation's politics and legislation.²⁶ Beyond political ignorance, hijras also face social intolerance and are treated as outcasts.²⁷ Instead of being invited into the folds of major society, hijras are viewed as a source of bad luck who are ignored by most, tolerated by some, and misunderstood by all.²⁸

Conversely, recent years have marked moments of change in the plight of India's transgender community. With a radical decision in 2014, the Supreme Court of India legally recognized a third gender and mandated inclusive treatment for those identifying with such gender in all castes.²⁹ It was not until two years after the markedly unique and trans-friendly Supreme Court decision that the nation's people reacted and gave birth to a major social movement embracing the trans community.³⁰ Backed by

India, NPR (Apr. 18, 2014, 7:12 PM), <http://www.npr.org/sections/parallels/2014/04/18/304548675/a-journey-of-pain-and-beauty-on-becoming-transgender-in-india>. (When it comes to castration, “[i]t happens in a dingy room, a 10 by 10 probably. Immediately after the castration, two hours, the *hijra* is asked to leave that place, because it is illegal...the operations are normally done by quacks, and a lot of *hijras* die because of that.”)

23. Rep. of the H.C., for Human Rights, at 16, U.N. Doc. A/HRC/19/41 (Nov. 17, 2011) (Like other States, India has “an obligation to protect everyone from discrimination on the grounds of sexual orientation or gender identity,” and the fact that someone recognizes themselves as a man, woman, or trans should not impact their ability to fully enjoy a range of human rights).

24. Vani K. Borooh et al., *Caste, Inequality, and Poverty in India: a Re-Assessment*, DEV. STUD. RES. (2014), <http://dx.doi.org/10.1080/21665095.2014.967877>; Gee Imaan Semmalar, *Unpacking Solidarities of the Oppressed: Notes on Trans Struggles in India*, 42 WOMEN'S STUD. Q. 286 (2014).

25. For the purposes of this Note, the term “hijra” will encompass and address both the eunuch and trans community in India. It is not representative of the authors personal identification of the people or community, but merely a reflection of the term “hijra” being adopted by varying regions of India to identify both communities. This Note adopts the majority view to remain consistent in its analysis.

26. Jacinto, *supra* note 18.

27. *See id.*

28. YFilms, *Hum Hain Happy – 6 Pack Band*, YouTube (Jan. 6, 2016) <https://www.youtube.com/watch?v=blvOBnSRfVc>.

29. *NALSA v. Union of India*, (2014) 5 SCC 438 (India) [hereinafter, *NALSA v. UOI*]; *See also* Suresh Kumar Koushal v. NAZ Foundation et al., (2013) 1 SCC 1 (India) [hereinafter *Koushal v. NAZ Found.*] (The controversial 2013 case recriminalizing sodomy was deemed to be a major setback for the LGBTQ community and predated the progressive *NALSA* decision.)

30. Pritha Mitra Dasgupta, *Red Label and Yash Raj Films Launch India's First Transgender Music Group, Six Pack Band*, ECON. TIMES (Jan. 6, 2016), http://economictimes.indiatimes.com/articleshow/50467585.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppt [hereinafter *Dasgupta, Red Label*].

one of Bollywood's biggest film production houses and world-renowned musician Sonu Nigam, the movement aims to redefine the societal position held by hijras.³¹

The world can see India's transgender community coming out of the shadows.³² And for many, now is the time to build on this momentum by urging the Indian government to also open a door for the out-castes' of its society. Until two years ago, Pallavi shared the same misfortune countless other hijras face today: the inability to be themselves—and that is an inability that the government cannot allow to persist. This Note hopes to serve as a stepping-stone for the government of India by providing the analytical framework necessary to bring attention to the issues facing hijras. Part I will provide an overview of the caste system in India and its transitions over the years. Part II will identify the problem by drawing a parallel between the treatment of India's hijra community at large due to government failures in providing them with access to resources such as health and education similar to the condition of the untouchables. Finally, part III will provide a brief overview of two LGBTQ Indian Supreme Court decisions: the recently passed Rajya Sabha Bill³³ and the proposed Kerala legislation³⁴ to propose a recommended course of action for the nation as it continues to address the dilemmas facing India's trans community. The goal of this Note is to serve as a starting point for the dialogue that hopes to remove the remnants of the social hierarchy still plaguing India today.

31. *Id.*

32. *Id.*; *Supra* note 28; *Hijra's Happiness: 6 Pack Band Goes Viral with Hum Hain Happy*, GOLDFM NEWS (Jan. 8, 2016), <http://www.hirunews.lk/goldfmnews/123617/hijras-happiness-6-pack-band-goes-viral-hum-hain-happy> [hereinafter *Hijra's Happiness*].

33. The Rights of Transgender Persons Bill, No. XLIX-C (2014) (India), <http://164.100.47.4/BillsTexts/RSBillTexts/PassedRajyaSabha/transgndr-RS%20pas-E.pdf> [hereinafter Rights of Trans Persons Bill].

34. State Policy for Transgenders in Kerala, (2015) (India), <http://www.swd.kerala.gov.in/images/VIKASBHAVAN/12704tgpolicy15.pdf> [hereinafter Kerala Transgender Policy].

I. BACKGROUND

The emergence of caste in India holds both religious and political roots with the arrival of the Aryans in the second millennium B.C.E.³⁵ Considered a pivotal event in the history of the Indian subcontinent,³⁶ Aryans are credited with penning Vedic literature, which gave birth to the caste system.³⁷ That being said, such roots do not make it any easier to define the term “caste.”³⁸ Generally accepted as referring to both one’s birth group and one’s order or class, the term in practice divides Hindu society into four very large units on the basis of class, which transcends specific regional associations.³⁹ As such, at its most rudimentary level, the caste system is seen as a way in which Indian society is divided into hierarchical groups based on the Hindu conception of social order.⁴⁰ While the inception of the caste system can be traced back to the text of the Rig

35. Arvind Sharma, *Dr. B.R. Ambedkar on the Aryan Invasion and the Emergence of the Caste System in India*, 73 J. OF THE AM. ACAD. OF RELIGION 843, 843-844 (2005).

36. This note adopts the prevailing viewpoint that Aryans created the Vedic literature that serves as the basis for leading caste research. *See generally*, Romila Thapar, *The Theory of Aryan Race and India: History and Politics*, 24(1/3) SOC. SCIENTIST 3 (1996); Koenraad Elst & Aditya Prakashan, *Update on the Aryan Invasion Debate* (1999); *contra* B.R. AMBEDKAR, WHO WERE THE SHUDRAS? (Bombay: Thackers 1970) (B.R. Ambedkar recognized the existing paradigm on which Caste literature rests by explaining how those who created Vedic literature identified themselves as the Aryan race, who came from outside India and invaded India, and contrasted that to the native people of India, known as “Dasas and Dasyus.” Among many differences, they were known for being racially different from Aryans. To put it crudely: “The Aryans were a white race. The Dasas and Dasyus were a dark race” and the Aryans conquered the Dasas and Dasyus and the enslaved were then called Shudras; “this dichotomy gave birth to race segregation especially because of how much the Aryans cherished color and endorsed prejudice on its basis. This notion was formally codified when they formed the Chaturvarnya, which separated the white race from the black race.” Ambedkar noted that while the leading paradigm credits Aryans with the origin of Vedic literature, several historical questions may attack the credibility of that viewpoint.; *Cf.* Arvind Sharma, *Dr. BR Ambedkar on the Aryan Invasion and the Emergence of the Caste System in India*, 73 J. AM. ACADEMY OF RELIGION 843 (2005).

37. *See generally* EDWIN BRYANT & EDWIN FRANCIS BRYANT, THE QUEST FOR THE ORIGINS OF VEDIC CULTURE: THE INDO-ARYAN MIGRATION DEBATE (2005); Vishal Agarwal, *On Perceiving Aryan Migrations in Vedic Ritual Text*, 36 PURATATTVA 155, 155-165 (2005).

38. E.A.H. BLUNT, THE CASTE SYSTEM OF NORTHERN INDIA 1 (Isha Books 2010) (Blunt explains that while caste is “the name given to groups of a certain kind into which Hindu society is divided,” it is not an easy term to apply a precise definition to. This can be owed to the fact that “Castes are not all built on the same model: the system has grown up slowly and gradually and castes which are of different origin are also of different nature.”); *see also*, H. A. Rose, *On Caste in India.*, 8 J. ROYAL ANTHROPOLOGICAL INST. OF GR. BRIT. AND IR. 98, 99 (1908) (“It is, as a rule, easy to distinguish ‘caste’ from ‘tribe’ in India, but the Indian peoples themselves appear to constantly confuse the two things, and the looseness of their terminology is largely responsible for much of our loose writing about ‘caste.’”).

39. The scheme is a result of two individual concepts of corporate affiliation coming together. The first is the jati (birth group) and the second is varna (order, class or kind), both of which have been propounded in a variety of widely revered Hindu sacred scriptures. The system is commonly understood as a ranked order of precedence and “depicts only four Varnas (classes) in it.” Vivek Kumar, *Inequality in India: Caste and Hindu Social Order*, 5(1) Transcience 36 (2014).

40. *Id.*

Veda,⁴¹ which holds that one's place in society rests upon the class they are born into, it has been codified in the Hindu Code.⁴²

Considered “the most memorable, comprehensive, and successful attempt ever made by an order to oppress humanity in its own interests,” the system was divided into four primary castes.⁴³ Of the four castes, three were created from the conquering race at that time: Brahmins (priesthood), Kshatriyas (warriors and nobility), and Vaisyas (herdsmen initially, later included farmers, traders and artisans).⁴⁴ The final caste was created chiefly for the benefit of the first and was known as Shudras, which represented tenants farmers and servants.⁴⁵ Outside these four primary caste groups stood a group which was considered so filthy that it colloquially became known as the “untouchable” caste, formally dubbed as “Dalits.”⁴⁶

Like many religious philosophies and theories of government, which

41. The Rig Veda is a collection of more than 1,000 hymns which together stand represent a sacred text organizing the structure of society. It explains how the world is formed “Purusa” with each class representing a part of the body described as follows: “The Brahmin was his mouth, his two arms became the rajanya (Kshatriyas), his thighs are what the Vaisya are, and from his feet the Shudra was made.” Together these parts create the body, or society as a whole; while independently they represent a class within the overall order of people. *THE RIG VEDA: AN ANTHOLOGY: ONE HUNDRED AND EIGHT HYMNS* (Wendy Doniger O’Flaherty trans.) (Penguin 1981); *see generally*, Gordon R. Wasson, *The Soma of the Rig Veda: What Was It?*, 91 *J. OF THE AM. ORIENTAL SOC’Y* 169 (1971).

42. Eleanor Newbigin, *The Hindu Code Bill: Creating the Modern Hindu Legal Subject*, in *THE HINDU FAMILY AND THE EMERGENCE OF MODERN INDIA*, CAMBRIDGE U. PRESS, 2-4 (2013) (Newbigin explained how the Hindu Code Bill was “an attempt to reform and codify Hindu family law that began in 1941 and culminated in 1956,” arguing “these reforms sought to alter the way in which male authority was exercised within the Hindu family but also to consolidate the power of north Indian Hindu men over other regional Hindu and non-Hindu communities); *see also*, Marvin Davis, *RANK AND RIVALRY: THE POLITICS OF INEQUALITY IN RURAL WEST BENGAL* 172, 199-200 (Cambridge U. Press 1983) (“Drafters of the Hindu Code can limit the contexts in which caste is recognized judicially and can level the inequalities between sexes by extending to females rights already held by males.”); Reba Som, *Jawaharlal Nehru and the Hindu Code: A Victory of Symbol over Substance?*, 28 *MOD. ASIAN STUD.* 165 (1994); Harold Lewis Levy, *Indian Modernization by Legislation: the Hindu Code Bill (1973)* (unpublished Ph. D. dissertation, University of Chicago) (on file with the Department of Political Science at the University).

43. J.H. Porter, *Caste in India*, 8 *AM. ANTHROPOLOGIST* 23 (1895).

44. *Id.*

45. Pankaj Jain, *The Caste System of Hindu Society*, *HUFFINGTON POST* (June 20, 2011), http://www.huffingtonpost.com/pankaj-jain-phd/varna-and-caste-system-of_b_877981.html.

46. As noted by the formulated caste system, the untouchables are absent from the traditional varna. This may be attributed to the later emergence of the social condition as a result of the way the caste system was implemented in society. Mendelsohn and Vicziany expound on this notion by suggesting that “Untouchability only in the second century of the common era, whereas the varna principle seems to have been established over one thousand years earlier. But since the varna classification has persisted as a representation of the whole Hindu order, the position of Untouchables as Hindus has been contradictory. Their presence cannot be denied, but they have no legitimate place in the order.” Oliver Mendelsohn & Marika Vicziany, *The Untouchables: Subordination, Poverty and the State in Modern India*, 4 *CONTEMPORARY SOUTH ASIA* 5, 6 (1998); *see also*, Joan P. Mencher, *Being an Untouchable in India: A Materialist Perspective*, in *LIFE AS A DALIT: VIEWS FROM THE BOTTOM ON CASTE IN INDIA* 81 (2013).

aim to promote harmony through order and structure,⁴⁷ in practice the highly divisive structure of those theories often resulting in a fragmented system.⁴⁸ That is precisely what happened to the caste system in India, which although enacted to promote harmony,⁴⁹ contract enforcement, and fluidity in commerce through structure and order, its practice breathed corruption and a parasitic social hierarchy.⁵⁰ Notwithstanding its flaws in practice, many religious theorists continued to provide their own justifications tracing the caste system back to its theory and inception, defending it in the name of religion.⁵¹

Despite its religious grounding and contractual benefits, much of the Indian legislature and society began to agree over the years to remove the caste system permeating through the annals of society.⁵² In their attempt to

47. See LUDWIG VON MISES, *SOCIALISM: AN ECONOMIC AND SOCIOLOGICAL ANALYSIS* (J. Kahane trans., Yale Univ. Press 1962) (Mises evaluates the importance of equality in socialism and how it serves as the basis for the overall system of policy.).

48. *Id.*

49. The caste system was created with the hope of promoting “the harmonious workings of society.” But unfortunately, Rao explains how corruption stemming from Colonial times has resulted instead in a system replete with prejudice and discrimination. Jasmine Rao, *The Caste System: Effects on Poverty in India, Nepal and Sri Lanka*, 1 *YALE GLOBAL MAJORITY E-JOURNAL* 97, 97-98 (Dec. 2010); see also NICHOLAS B. DIRKS, *CASTES OF MIND: COLONIALISM AND THE MAKING OF MODERN INDIA* 5 (2001). (Dirks explains how “communal groupings” served as centers for social identity in India. The first classification of these groups to be “castes” was made by the Portuguese, but later expanded upon by the British in what is claimed to be an attempt to promote order in society.)

50. See Kripa Freitas, *The Indian Caste System as a Means to Contract Enforcement* (2010) (seminar paper, Northwestern University) (on file with Kripa Freitas, Stanford University and Northwestern University) (Freitas takes a bold approach to India’s caste system by arguing that the system actually serves as “a tool for contract enforcement and facilitated trade in services, giving an economic reason for its persistence. A caste is modeled as an information-sharing institution, which enforces collective action...The caste system, like other institutions, shapes an individual’s actions and choices. A model can help us understand the way the system works and by organizing our thinking, help understand its effects on the economy.”).

51. SEBASTIAN VELASSERY, *CASTEISM AND HUMAN RIGHTS: TOWARD AN ONTOLOGY OF THE SOCIAL ORDER*, (2005). Velassery provides a detailed explanation of what the caste system ideology is all about and connects it with the concepts of religion and human rights. He then focuses on the Indian perspective of the caste system and looks at “the issue of Human Rights as a contemporary mode of the ancient metaphysical wisdom built of reflection upon what it means to be Dharma and the ways of existing according to Dharma.” He expresses the importance of this Dharma to Indians and how it contributes to wide acceptance of the caste system in India. *Id.* at 229.

52. LAURA DUDLEY JENKINS, *IDENTITY AND IDENTIFICATION IN INDIA: DEFINING THE DISADVANTAGED* (Routledge 2003) (Jenkins’ book explores the tensions surrounding the legislation and reservation policy put in place in an attempt to get rid of the social hierarchy in India. As a political scientist, Jenkins offers insight about the specific ways that the Indian state implements the reservation policy which will later be used to justify the proposal in this note.); see also JAWAHARLAL NEHRU, *THE DISCOVERY OF INDIA* 245 (Oxford Univ. Press 1946) (“Almost everyone who knows anything at all about India has heard of the caste system; almost every outsider and many people in India condemn it or criticize it as a whole.”); MARC GALANTER, *COMPETING EQUALITIES: LAW AND THE BACKWARD CLASSES IN INDIA* 122 (1984). While much existing scholarship on the reservation policy in place in India, which sets up quotas and sets aside reserved seats for dalits, its surrounding legal regime gives scant attention to the strategies through which constitutional law navigates the

remove such class discrimination many social and political groups emerged. Among these groups were quasi-religious/political movements such as the Brahma Samaj,⁵³ the Arya Samaj,⁵⁴ and the Ad Dharm⁵⁵ movement in Punjab. These movements emphasized the possibility of creating a society that still felt religious in nature, yet not segregated—especially when based on characteristics outside of one’s personal control.

Building on such movements, the government began by abolishing the practice of untouchability.⁵⁶ The Indian Constitution furthered this effort

authority of caste communities. Galanter offers a detailed description of the reservation policy and attempts to evaluate its overall effectiveness as a program of social reform. As such, it provides general outlines of constitutional doctrine, such as caste quotas and the ways in which these benefits are assigned to particular groups. *Id.*; AMBEDKAR ON LAW, CONSTITUTION AND SOCIAL JUSTICE, (Mohammad Shabbir ed., 2005) (Parliament and various state legislative have begun to reserve constituencies, spaces in educational institutions and other such areas to further incorporate Dalits and other backward/scheduled castes into society.) Vital Rajan, “*Dalits and the Caste System of India*,” (unpublished Research Paper, London School of Economics) (2013). Rajan offers an in depth analysis of caste discrimination as it permeates through various states and at various levels. For example, Rajan describes: “Poor people identified as Dalit are routinely refused housing in communities dominated by the upper castes, even in urban conglomerations where such distinctions are hard to identify. In rural areas where everyone’s social origins are well established, Dalits suffer the most.” Additionally, all the violent struggles that occur across caste lines are “almost always politically engineered to enable caste or community leaders to secure their grip over votes, power, privilege, and money.” *Id.*

53. DAVID KOPF, *THE BRAHMO SAMAJ AND THE SHAPING OF THE MODERN INDIAN MIND* (Princeton Univ. Press 1979) (Kopf explains how the Brahma Samaj was created by the early rebels against the Hindu tradition. It began as the Calcutta Unitarian Committee in 1823, then became the Brahma Sabha in 1829 and eventually formed the Brahma Samaj in 1943, which played “a crucial role in the genesis and development of every major religious, social, and political movement in India from 1820 to 1930.” The prominence of the Brahma Samaj is clear when looking at the active steps it took to fully extend equality to women and promote liberal political consciousness.)

54. The Arya Samaj is “the result of one of the most important religious and social movements in India of the nineteenth century... and was begun to revive the study of the Vedas and to worship one God.” It was in those efforts that the groups creator, Dayanand Saraswati actively criticized the Hindu caste system by “propagating the doctrine of universal brotherhood based on the assumption that God is the Creator of all.” To break this down further and actually see the philosophy adopted by the Arya Samaj at play, he would give the example that “a man born in a Brahman, Kshatriya or Vaishya family should become a Shudra if his actions and temperaments are not high,” while also accepting “the fourfold functional division of society wherein the thinkers, the seers and the teachers occupied the highest place; but opposed the rigidity of any such system and especially the creed of untouchability.” So while some form of classification or personal divides may have existed for the Arya Samaj, it was argued that those were not near as severe as those endorsed by the Hindu caste system. Meera, *Arya Samaj and Caste System: A Study of in United Provinces*, 19 J. HUMAN. & SOC. SCI. 68 (May 2014).

55. While the Ad Dharm movement of the 1920’s emerged alongside several similar movements, what made it unique was its primarily low caste composition and its concentration to the region of Punjab. The goal of the movement was to carve out a distinct identity for the untouchables, independent of their religion, be it Hindu, Sikh or Muslim. To do so, it aimed at “securing a separate and respectable space for the ‘scheduled castes’” of Punjab through cultural reform, “spiritual regeneration and political assertion as a whole versus seeking equality within the Hindu fold.” Despite its accomplishments and progress in raising Dalit consciousness in Punjab, the movement did not receive much scholarly attention and has often gone unnoticed. Ronki Ram, *Untouchability, Dalit Consciousness, and the Ad Dharm movement in Punjab*, 38 CONTRIBUTIONS TO INDIAN SOC. 323 (2004).

56. INDIA CONST. art. 2 [Provisions relating to Scheduled Castes] “Untouchability” is abolished

by legally recognizing those outside of the traditional caste system, the untouchables as “Scheduled Castes.”⁵⁷ The substantial gaps between scheduled castes and others bred the Affirmative Action⁵⁸ scheme prevalent in India today.⁵⁹ Institutionalized in the 1950s, the Affirmative Action scheme attempted to bring into the folds those that were mistreated by society and ignored legally.⁶⁰ Since its inception, there are four broad facts that have long justified the caste-based affirmative action system in India: “1) Material disparities: monthly per capita expenditure, caste development index; 2) Labor market discrimination: wage and job discrimination, especially in urban formal sector labor markets; 3) Stigmatized ethnic identity; 4) Historical origins of untouchability, but perpetuated by the contemporary socio-economic system.”⁶¹ The benefit of such programs is that they provided those from a lower caste with access to essentials such as general welfare, education, and jobs.⁶²

The program, nevertheless, has its flaws. A number of critics have argued the many pitfalls that come with the quota/reservation system in India. In its attempt to incentivize inclusivity and equality, quotas have encouraged laziness and entitlement amongst some lower caste individuals

and its practice in any form is forbidden. The enforcement of any disability arising out of “Untouchability” shall be an offence punishable in accordance with law. *Id.*

57. See INDIA CONST. (In this Constitution, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say- “Scheduled Castes” means such castes, races or tribes or parts of or groups within such castes, races or tribes as are deemed under article 341 to be Scheduled Castes for the purposes of this Constitution).

58. Frank de Zwart, *The Logic of Affirmative Action: Caste, Class and Quotas in India*, 43 ACTA SOCIOLOGICA 235, 235 (2000) (“Affirmative action is mostly initiated by governments to help deprived groups or social segments”).

59. Ashwini Deshpande, *Quest for Equality: Affirmative Action in India*, 44 INDIAN J. INDUS. REL. 154 (Oct. 2008). [hereinafter Deshpande, *Affirmative Action*].

60. de Zwart, *supra* note 58, at 236 (“When in the early 1950s, the Constitution of India prescribed affirmative action to benefit Socially and Educationally Backward Classes, however, it was unclear who these classes were. The solution preceded the formulation of the problem.”).

61. Deshpande, *Affirmative Action*, *supra* note 59.

62. S.K. Jangir, *Reservation Policy and Indian Constitution in India*, AM. INTL. J. RESEARCH IN HUMAN., ARTS & SOC. SCI. 126, 126-128 (2013). The Constitution wanted to create a society in which equality status and opportunity was available to all. As such, Jangir proffers that:

the Constitution accords to these weaker sections of society protective discrimination in various articles, including Article 15(4). This clause empowers the state, notwithstanding anything to the contrary in Articles 15(1) and 29(2), to make special reservation for the advancement of any socially and educationally backward classes of citizens or for scheduled castes and scheduled tribes. . . . The reservation scheme exists to provide opportunities for the members of the SCs and STs to increase their representation in the State Legislatures, the executive appendage of the Union and States, the labor force, schools, colleges, and other ‘public’ institutions. . . . In 1982, the Constitution specified 15% and 7.5% of vacancies in public sector and government-aided educational institutes as a quota reserved for the SC and ST candidates respectively for a period of five years, after which the quota system would be reviewed. This period was routinely extended by the succeeding governments.

Id.

while simultaneously mischaracterizing the growth of India.⁶³ Essentially, the argument against reservations holds that such systems reinforce the mentality that India has made strides in promoting equality, when, in reality, the perception, views, and actual treatment of people remains stagnant over time.⁶⁴ It means that the only change has been in the numbers, and that too, by virtue of necessity

Beyond the numbers, the greater impact in the legal landscape with relation to caste actually exists, not because of quotas implemented by the Indian Constitution or the Supreme Court, but instead by the concerted effort to promote social and political change alongside legal growth. While the government takes greater steps to recognize those that are born into varying castes, the politicians of India are slowly becoming more representative of its people,⁶⁵ and society at large is engaging in greater discussion on inclusion to embrace a more holistic community.⁶⁶ As a

63. A.R., *Affirmative Action: Indian Reservations*, THE ECONOMIST (Jun. 29, 2013), <http://www.economist.com/blogs/banyan/2013/06/affirmative-action>. The quotas that are in place have somewhat achieved their most basic of goals. In public jobs, “members of backward groups claim more posts than of old. Dalits had just 1.6% of the most senior (‘Group A’) civil servant positions in 1965, for example. That rose to 11.5% by 2011, not far off the 16% or so of the general population that Dalits represent. The share is higher for more junior posts.” Judging such a broad range is often harder and given that very few Indian people have formal jobs, let alone government jobs, the statistics are difficult to gather and examine. As such, that further emphasizes that the jobs’ policies put in play only seem to impact a small 2% of the Indian work force. The relative impact of such policies, therefore, only tweak the quotas to reflect “the local size of a ‘scheduled’ population” and have yet to yield a wider, beneficial impact economically. Within the realm of education, those policies were first established in the 20s and aim to provide greater funding, reserved seats and encourage applicants. However, the impact again seems scarce. *Id.* See also *Quota System Should Be Restructured: Hazare*, DECCAN HERALD (Oct. 10, 2015), <http://www.deccanherald.com/content/505651/quota-system-should-restructured-hazare.html>. (In an address to the Sikar district, Anna Hazare, with regards to the quota system stated, “Now it has emerged as a big threat to the country. It’s because political parties have got involved in this system to secure their vote bank. This system is dividing society and the country. Reservation benefits are certainly not reaching to the people who really deserve it.”).

64.

Worse, the policy has probably helped to make India’s bureaucracy increasingly rotten—and it was already one of the country’s greater burdens. An obsession with making the ranks of public servant’s representative, not capable, makes it too hard to sack dysfunctional or corrupt bureaucrats. Nor will this improve. In December 2012 parliament’s upper house passed a bill ordering that bureaucrats be promoted not on merit alone, but to lift the backward castes faster. Private firms are not directly affected, but a few take voluntary measures. The biggest of all, the Tata conglomerate, which employs over 350,000, does in-house surveys to assess its Dalit and tribal work force. Tata gives incentives, setting lower requirements for exam marks, for Dalit and tribal job applicants. Most generally, however, formal jobs in tech and outsourcing firms, for example, are valued in part because they are caste-blind

A.R., *Affirmative Action: Indian Reservations*, THE ECONOMIST (Jun. 29, 2013), <http://www.economist.com/blogs/banyan/2013/06/affirmative-action>.

65. ARUN MAIRA, *REMAKING INDIA ONE COUNTRY, ONE DESTINY* 16 (Sage 2004). (“The People [of India] wanted more inclusive development.”).

66. Arjan de Haan, *Inclusive Growth: More than Safety Nets*, (SIG Working paper 2013) (filed with the Indian Institute of Dalit Studies) Many countries have now recognized the need for more

whole, the efforts by the national and state legislature to push for a more inclusive environment have empowered social movements to discuss caste in a way that promotes removal of the system from all aspects of the Indian society.⁶⁷ Nonetheless, the problem persists and its impact is deepened given a persistent patriarchal barrier that permeates the Indian society.⁶⁸ While gender has stirred its share of controversy and conflict in India,⁶⁹ the nation has failed to discuss how best to tackle those people that fall victim to both gender and class issues. The hijra community of India serves a unique aspect of society because they not only face backlash on the basis of gender, but also on the basis of class and social order, making it an unfamiliar and long ignored issue in the Indian society.⁷⁰

“inclusive growth.” Since 2004 specifically, the Indian Congress Party has been trying to respond to the growing inequalities with a “Shining India” proposal that aims to bring those that have been neglected into the folds of society. *Id.*

67. Ramaswami Balasubramaniam, *India's Caste System: Barrier to Inclusive Development*, HUMANITARIAN & DEVELOPMENT NGOS (May 19, 2010), <http://hausercenter.org/iha/2010/05/19/indias-caste-system-barrier-to-inclusive-development/>. (“Part of my dream for India is an egalitarian and caste free society where every Indian would have equal opportunity to pursue his life without fear and with all his basic needs addressed. The state would only be a facilitator ensuring that the people below the safety net have a helping hand and not be condemned to live off handouts.”).

68. Graham Peebles, *Gender and caste discrimination in India*, REDRESS INFORMATION AND ANALYSIS (Mar. 16, 2014), <http://www.redressonline.com/2014/03/gender-and-caste-discrimination-in-india/> (Indian society is segregated at multiple levels and in a variety of ways. Between caste, gender, class, wealth, and religious divides, the exploitation of Dalits, especially Dalit women has grown over the last few years. Peebles put it best when he described India being “blighted by a catalogue of Victorian gender stereotypes, fueled by a caste system designed to subjugate, which trap both men and women into conditioned cells of isolation where destructive ideas of gender are allowed to ferment, causing explosions of sexual violence, exploitation and abuse.”); *see also* Balmurli Natrajan, *Caste, Class, and Community in India: An Ethnographic Approach*, 44 ETHNOLOGY 227 (2005).

69. Deshpande, *Affirmative Action*, *supra* note 59; Ashwini Deshpande, *Overlapping Identities under Liberalization: Gender and Caste in India*, 55 ECON. DEV. & CULT. CHANGE 735 (Jul. 2007) [hereinafter Deshpande, *Gender and Caste in India*].

70. *See* NALSA v. UOI, 5 SCC 438 (2014).

II. THE PROBLEM

Although “hijra” has been in common use for years, the term itself is difficult because it has long stood more for a cultural identifier than a biological descriptor.⁷¹ Therefore, even though standard definitions of hijras have proven difficult to formulate, they are generally noted as a third sex,⁷² with the term *hijra* itself meaning “a man that is less than a perfect man” and is equivalent to eunuchs.⁷³ The hijra community is one that has grown over the years to represent not only those born “incompetent” or as a eunuch, but also those that have deliberately castrated themselves or undergone surgery to be inducted into hijrahood, as well as those part of the trans community at large.⁷⁴

While the community has been ostracized in much of India for the last decade, history does not support such treatment.⁷⁵ Historically, castration was a divine act that encouraged men to enter “hijrahood” and become legitimate and recognized members of the community who were viewed to have committed the ultimate sacrifice.⁷⁶ That belief and respect did not

71. NANDA, *supra* note 15 (Linda Purrington et al. eds., 2d ed. 1999) (“One of the difficulties in writing in a clear and accurate way about the hijras is the disjunctions that exist between the cultural definition of the hijra role and the variety of individually experienced social roles, gender identities, sexual orientations, and life histories of the people who become hijras.”).

72. M.D. Vyas and Yogesh Shingala, *The Life Style of the Eunuchs* (1987).

73. Nanda, *supra* note 15; Mok & Linning, *supra* note 15.

74. Joseph T. Bockrath, *Bhartia Hijro Ka Dharma: The Code of India's Hijra*, 27 *LEGAL STUD. FORUM* 83 (2003). (“*Hijra* is the Urdu word for eunuch or hermaphrodite but now means a born hermaphrodite who dresses as female, or, more commonly, a born who undergoes, or plans to undergo, surgical emasculation and who dons female garb...term used to describe those people who are, naturally or otherwise, or seek to become, asexual...a third gender.”); Adnan Hossain, *Beyond Emasculation: Being Muslim and Becoming Hijra in South Asia*, 36(4) *ASIAN STUD. REV.* 495 (2012) (“Hijrahood is an identity acquired through various and repeated ritual and gender practices...Hijra, the proverbial third sex/gender in South Asia, are an institutionalized subculture of feminine-identified male-bodies people who desire “macho” men and who sacrifice their male genitals to a goddess in return for spiritual prowess”); Opler, *supra* note 16, at 1332 (1961).

The hijras themselves most often distinguish between those who are born hijras—that is, with ambiguous genitals—and those, an undoubtedly much larger number, who are made such through castration, though other distinctions, which we shall have occasion to consider, have at various times been advanced. . . .The plethora of definitions that purport to unravel the supposed mystery of the hijras, a mystery evoked in a recent book that paradoxically describes these ubiquitous street performers as ‘invisibles’ testifies certainly to the ambivalence, if not confusion, that is rampant in the literature and to a general incapacity, as may not unreasonably be suggested, to probe the deeper significant for a possibly emancipatory politics of knowledge signified by the community of hijras.

Lal, *supra* note 21, at 119.

75. NANDA, *supra* note 15, at 13.

76. Adnan Hossain, *Beyond Emasculation: Being Muslim and Becoming Hijra in South Asia*, 36(4) *ASIAN STUD. REV.* 495 (2012) (“As elsewhere in South Asia, there are well-established initiation rituals for people who seek to be inducted into hijrahood and become recognized as legitimate members of the hijra community.”).

necessarily provide hijras with the support and religious protection they had hoped for;⁷⁷ despite performing a sacrificial ritual, India began to scorn the hijra community as it transitioned in to religious and political power.⁷⁸ Slowly, those that were christened to be the most devout of Hindus were banished from religious institutions, education halls, and social gatherings.⁷⁹

This gave birth to the hijra as we see them today: living a rather nomadic lifestyle in cult-like groups traveling from various regions in the nation.⁸⁰ Many live in designated districts and earn their livelihood by begging for money at weddings and childbirth ceremonies, with each district dividing out a portion to a specific group of hijras.⁸¹ Others renounce male sexuality and often earn a living as prostitutes.⁸² Given the nature of their work, the community has carried with it a social stigma akin to that of untouchables.⁸³

77. Yasmine Canga-Valles & Olivia Lace-Evans, *India's Third-Gender 'Hijra' Community Balances Acceptance with Religious Identity*, WASH. POST, (Jul. 14, 2015), <http://religionnews.com/2015/07/14/indias-third-gender-hijra-community-balances-acceptance-religious-identity/>.

78. Gurvinder Kalra, *Hijras: The Unique Transgender Culture of India*, 5 INTL. J. CULT. & MENTAL HEALTH 121 (2011) (“The transgendered *hijra* community has evolved to form a unique subculture within Indian society, existing alongside the ubiquitous heterosexual family.”).

79. While many hijras root their beliefs and practices in Hinduism, they paradoxically display a special bias towards Islam. Drawing on history, hijras often speak nostalgically about the greater social and religious prestige enjoyed under Muslim rulers, especially as displayed by the Mughal patronage of eunuchs in the royal court as harem guards. On a fundamental level, Islam also provides a practical model of accommodating the hijra community, one that is not as visible in Hinduism. NANDA, *supra* note 15; see GAYATRI REDDY, WITH RESPECT TO SEX: NEGOTIATING HIJRA IDENTITY IN SOUTH INDIA (2005) (While many of the myths, rites and practices combine Muslim and Hindu symbolism—and are described to be acts of devotion to both Hindu Goddesses and Muslim Saints—the self-identification of hijras in both practice and belief has more often been that as a Muslim throughout South Asia. This can be attributed to the fact that under Muslim rule, the enjoyed a life in their own skin, whereas under Hindu rule, that prestige was stripped.); Zia Jaffrey, *The Invisibles: A Tale of the Eunuchs of India*, 376 (1996) (The nature of hijradom, their practices and manners to get inducted into their community appear to be “direct descendants of the Islamic institution of eunuchdom” and it was only after the Muslim invasion of India that the practice of castration became widespread.); see also Sanjay Kalra, *The eunuchs of India: An endocrine eye opener*, 16 INDIAN J. ENDOCRINAL METAB. 377 (2012).

80. NANDA, *supra* note 15.

81. *Id.* (One important disjunction has to do with the fact that although hijras are culturally defined in terms of their traditional occupation as performers on auspicious occasions, many, if not most, hijras do not earn their living solely in this manner; indeed, many hijras do not perform at all.); See also, Geeta Patel, *Home, Homo, Hybrid: Translating Gender*, 24 C. LITERATURE 133-150 (1997).

82. See generally, NANDA, *supra* note 79; Krista Geneviève Lynes, *Visual Currencies: Documenting India's Red-Light Districts*, 37 SIGNS 109 (Sept. 2011).

83. See generally, NANDA, *supra* note 79. (“Today, the hijras are little more than relics in a rapidly modernizing world.” While superstitions exist, many no longer believe that hijras carry with them any sort of divine power. Instead, they are “widely perceived as foolish,” and “have become objects of mockery” causing many of them to resort to a life on the streets, able to earn a living only by begging and prostitution. “Ostracized from their families and communities, they are forced to live apart from the traditional Indian caste system and often form surrogate families of their own.”).

Hijras represent an aspect of Indian society which has made much of the populace feel awkward, frustrated or disgusted by their existence at auspicious events, yet also feel compelled to recognize them to take their blessings.⁸⁴ That is largely due to the belief that shunning a hijra, or causing one to leave empty handed at a wedding they attend could result in a curse upon that marriage.⁸⁵ This has therefore created the cyclical life led by many modern day hijras, a life in which they are hated and only receive recognition out of fear, a life in which they are not embraced or considered whole by those around them.⁸⁶

In addition to the class divides that exist pushing hijras out of a protected system are the gender divides that make their existence a puzzle to a few, and a nuisance to many.⁸⁷ Unfortunately, India is a society replete with patriarchal divides.⁸⁸ A clear example is the status held by many women in the workplace, home, and life in general.⁸⁹ The patriarchal

84. Mok & Linning, *supra* note 15 (“But while for centuries they were sought after to perform blessings and ceremonies, their long-standing religious respect has not protected the hijra from modern-day discrimination.” From the Moghul court to the village religious ceremony, the blessing of the hijra was thought to bring good fortune - and her curse almost certain to wreak havoc.)

85. Interesting point of analysis given how, historically, hijras were respected because of their castration. It was seen as the greatest form of sacrifice that one could make through a religious ritual out of respect for their creator. However now that same castration is seen as a curse and forces hijras out of religious ceremonies and into a life of abandonment. NANDA, *supra* note 79.

86. *Id.*; see also Indrani Chatterjee, *When “Sexuality” Floated Free of Histories in South Asia*, 71 J. OF ASIAN STUD. 945 (Nov. 2012) (The origins of Indian history show a certain air of liberty and freedom with regards to sex and gender identity. Freedom that did not dictate sexual partnership based upon ones’ biological anatomy but more on pleasure. However, as time elapsed, that freedom slowly morphed into a more rigid paradigm, accepting only men and women as genders and their partnerships as legitimate; denouncing all other people and relationships).

87. See generally, NANDA, *supra* note 15; Nicole Wilson, *The Modernization of Hijras*, J. OF SCHOLARSHIP & IDEAS (2006).

88. Desphande, *supra* note 69, at 735; Nivedeta Menon, *Sexuality, Caste, Governmentality: Contests over ‘Gender’ in India*, 91 FEMINIST REV. 94 (2009).

89. Monica Das Gupta, *Selective Discrimination against Female Children in Rural Punjab, India*, 13 POPULATION & DEV. REV. 77, 77-78 (Mar. 1987) (“South Asia is well known as being a region of the world where the normally higher number of females than males in the total population is reversed...The excessive mortality of females that this reflects is commonly hypothesized to be due to discrimination against females.”). See also, A. PARASHAR, *WOMEN AND FAMILY LAW REFORM IN INDIA. UNIFORM CIVIL CODE AND GENDER EQUALITY*, 348 (1992). Parashar provides an analysis as to how religious undertones in the Constitution have inadvertently fed to sex bias: “While the Constitution of India guarantees equality as a Fundamental Right, automatically voiding all laws inconsistent with Fundamental Rights, 4 decades after adoption of the Constitution religious personal laws that discriminate against women still apply.” Furthermore, Parashar explains how the Constitution of India has failed to resolve the tension between the religious nature of laws with the powers of the secular State, creating ambiguous boundaries to people’s rights. Parashar proffers that in order to:

ensure legal equality for women, the State must first define the interrelation between the Constitution and the religious personal laws, then assess the options available for ensuring legal equality of women: either to reform religious personal laws, or sever the religious connection, making them secular, like all other civil laws.

nature of Indian society has made life difficult for women, and extending this logic further, even harder for those that *push* the conventional definition of being a man or a woman, or identify as neither.⁹⁰ Falling into that category, hijras are often victim to discrimination on the basis of sex, which only further stratifies their place in society.⁹¹

As noted in part I, the Indian government has made efforts to promote inclusivity in its society with a system of affirmative action that encourages reservations and quotas in schools, welfare programs and jobs.⁹² Not only has the legislation failed on the ground because of inadequate law enforcement, but it also fails to include or mention the long ignored hijra community.⁹³ While the numbers differ, there are currently an expected 500,000 to 2 million hijras⁹⁴ living in India who continue to face a life of “isolation, poverty, and public ridicule.”⁹⁵

Given the nature of hijra existence in India, it is treated much like the

Id. It is therefore argued here in Part III that the same should be applied to the rights of transgendered persons. *Id.*

90. See generally, Anju Malhotra, Reeve Vanneman & Sunita Kishor, *Fertility, dimensions of patriarchy, and development in India*, 21 POPULATION & DEV. REV. 281 (1995); Kalpana Bardhan, *Women's Work, Welfare and Status Forces of Tradition and Change in India*, 20 ECON. POL. WKLY. 2261 (1985); IRENE TINKER, PERSISTENT INEQUALITIES: WOMEN AND WORLD DEVELOPMENT (Oxford Univ. Press 1990).

91. Gee Imaan Semmalar, *Unpacking Solidarities of the Oppressed: Notes on Trans Struggles in India*, 42 WOMEN'S STUD. Q. 286 (2014); Patel, *supra* note 81, at 133; Arvind Narrain, *The Articulation of Rights around Sexuality and Health: Subaltern Queer Cultures in India in the Era of Hindutva*, 7 HEALTH & HUM. RTS. 142 (2004); *Female Eunuchs in Central India*, 5 PROVINCIAL MED. J. & RETROSPECT MED. SCI. 413 (1843).

92. Scott Grinsell, *Caste and the Problem of Social Reform in Indian Equality Law*, 35 YALE J. INTL. L. 199, 199-200 (Dec. 2009) (India has attempted to put an end to the system of social hierarchy seen throughout its society by putting in place policies known as “reservations” which basically use quotas as a way to “ensure that historically disadvantaged groups have political voice, access to education, and opportunities for state employment.” The policies were developed after reflecting on the purposes in relation to the consequences of the caste system. Despite recognizing the pervasive effects of the caste system, the courts and legislature have shown a surprising amount of “deference to the authority of the caste system.” This authority has influenced political autonomy, constitutional authority and peoples’ equality. As such, the reservation policies have been promoted as a means to achieve equality under the law and in practice.)

93. *Id.*; see also HUM. RTS. WATCH, CAST AN EYE ON THE DALITS OF INDIA 3. Activists recognize that legislation has been passed banning the practices of caste discrimination, untouchability, and their various other manifestations, such as manual scavenging and bonded labor. They also recognize that special commissions and affirmative action schemes have been established and enacted to eradicate caste discrimination. But despite these efforts, the issues persist because the problem ultimately is not with the law but the implementation. With the lack of a unified voice at the various levels of government, politicians propose a variety of solutions to the problem but fail to fully effectuate change. As a result, “untouchability, bonded labour, poverty, manual scavenging, segregation, landlessness and violence are the everyday reality, whatever the laws and special measures are.” *Id.*

94. Leela Jacinto, *India's Eunuchs Get Enfranchised*, ABC NEWS (Nov. 30, 2000), <http://abcnews.go.com/International/story?id=82032&page=1>

95. *Id.*

untouchables and scheduled castes; the distinction between hijras and the untouchables is that there exists no reservation system to benefit hijras.⁹⁶ There exists no affirmative action scheme promoting the hiring or inclusion of hijras.⁹⁷ There exists no law at the national level that aims to include this community as a part of common society.⁹⁸

Despite such failures, a glimmer of hope appeared in 2014 as the Indian Supreme Court did the unthinkable: with its landmark decision in *NALSA v. Union of India*, the Court legally recognized a “third gender.”⁹⁹ The timing of this case was crucial because it came after the startling decision in 2013, which re-criminalized sodomy in India and was thought to not only be a major setback for the LGBTQ community, but also constitutionally preposterous and morally egregious.¹⁰⁰ Once the 2014 decision came down, the immediate reaction from leading activists, journalists and politicians alike was that India was making up for its one step back by taking a giant leap forward and embracing the trans community.¹⁰¹

However, reality was not so kind. While the ruling marked a clear change in the courts attitude towards LGBTQ rights, the government at large was slow to react.¹⁰² To date, the only change made to recognize the trans community is the ability to identify as a third gender, but that does not mean that jobs will look past one’s identification as trans when making

96. Naveed Iqbal, *Need equal rights for all gender minorities: Transgenders*, INDIAN EXPRESS, Apr. 19, 2014.

97. *Id.*

98. *See generally*, NANDA, *supra* note 15, at 13-16.

99. *NALSA v. UOI*, 5 SCC 438 (2014) (This case ruled in favor of petitioner NALSA, the National Legal Services Authority, which is a government agency established to provide free legal services to those in need. The court declared that fundamental rights granted under the Constitution of India also applied to transgendered people and therefore established a “third gender,” allowing people to self-identify as male, female or third-gender.”)

100. *Kaushal v. NAZ Foundation*. (This court examined Section 377 of the Indian Penal Code in *Kaushal*, which criminalizes “carnal intercourse against the order of nature.”) The Delhi High Court ruled against the Indian government as it defended the law by arguing that it imposed unfair moral boundaries on people and such regulation was not permitted. However, when the Supreme Court of India faced the law yet again in *Kaushal*, it ruled that it was in no place to comment on its existence as it was within the power of the nation’s legislature to dictate what laws should apply to the people. The decision was considered a major setback for the rights of the LGBTQ community. *India: Supreme Court Revisits “Sodomy” Law*, HUM. RTS. WATCH (Feb. 2, 2016), <https://www.hrw.org/news/2016/02/02/india-supreme-court-revisits-sodomy-law>.

101. *Supreme Court Recognizes the Right to Determine and Express One’s Gender; Grants Legal Status to Third Gender*, LAWYERS COLLECTIVE, <http://www.lawyerscollective.org/updates/supreme-court-recognises-the-right-to-determine-and-express-ones-gender-grants-legal-status-to-third-gender.html> [hereinafter LAWYERS COLLECTIVE].

102. Evan Burgos, Gayatri Kaul, & Alpha Newberry, *India’s Third Gender*, NBC NEWS (Jun. 22, 2015), <http://www.nbcnews.com/feature/digital-docs/indias-magical-oppressed-third-gender-n379981> [hereinafter Burgos et al.].

hiring decisions.¹⁰³ Nor does it mean that society will break down barriers to include the trans community into their everyday lives.¹⁰⁴ Instead, the reality of the Court's rulings have brought to the forefront the fundamental conflict that exists for India's LGBTQ community, while the Court managed to grant people the freedom of gender identity, it still criminalized their sexuality.¹⁰⁵

III. A SOLUTION

Despite the discrimination that continues to plague the hijra community, 2016 marked a distinct development in their cause: their voices are starting to be heard by the masses. For the first time in Indian history, a social movement has begun to address the problems faced by India's transgender and hijra communities.¹⁰⁶ The movement is backed by India's leading production house, Yash Raj Films,¹⁰⁷ and Unilever's tea brand, Red Label,¹⁰⁸ and features Sonu Nigam as a major proponent of the campaign that they have launched.¹⁰⁹ The band is comprised of six transgender people and are known by the name of "Six Pack Band," which reverses a common abuse for the community.¹¹⁰ While the band has only launched one song, it has gained traction and has begun the dialogue as to what place India's hijras hold in the larger society.¹¹¹

103. See Ornella D'Souza, *Liberty, Equality, Identity: Giving Wings to the Transgender Community in India*, DNA (Feb. 7, 2016), <http://www.dnaindia.com/lifestyle/report-liberty-equality-identity-giving-wings-to-the-transgender-community-in-india-2174903>. While some employers have attempted to consider transgendered persons as they make hiring decisions, they often do not hire them because they learn that they lack the requisite skills or knowledge to sufficiently complete their job. This is not a surprise given the institutional failures when it comes to providing the trans community with equal access to opportunities throughout their life. They begin at a disadvantage and suffer for the duration of their life as a result. *Id.*

104. Mok & Linning, *supra* note 15. Despite the landmark ruling in the *Nalsa* case in 2014, Mok and Linning argued, "While the ruling granted hijra some political and economic rights - discrimination and ignorance still threaten their livelihoods." *Id.*

105. Burgos et al., *supra* note 102.

106. Dasgupta, *supra* note 30 ("Hindustan Unilever's tea brand Red Label and Yash Raj Films (YRF) have come together to launch India's first transgender music band as part of their co-branding association.").

107. Dasgupta, *supra* note 30.

108. *Id.*

109. Dasgupta, *supra* note 30.

110. Sonam Joshi, *How India's First Transgender Band Joined Forces to Perform Pharrell Williams' "Happy."* MASHABLE (Jan. 7, 2016), <http://mashable.com/2016/01/07/india-first-transgender-band-6pack-happy/#PTsdzTul18qk>. ("Locally known as *hijras*, members of India's transgender community traditionally perform at births and marriages as their singing and dancing is believed to be auspicious. The name 6 Pack Band reverses a common Indian abuse for transgenders, and also refers to the band's six members, six songs and their debut on 6 January.").

111. *Hijra's Happiness*, GOLDFM NEWS (Jan. 8, 2016), <http://www.hirunews.lk/goldfmnews/123617/hijras-happiness-6-pack-band-goes-viral-hum-hain-happy>.

As exhibited over the last few years, the social climate of a nation can help shape its legal policies and court decisions.¹¹² Building on the momentum of the recent social movement aggressively supporting the cause of the trans community, it is time for the Indian government to also support the community by doing more to grant them access to public welfare, health, and education benefits. Currently, the hijra community is stricken with sickness and sexual health concerns.¹¹³ For many, castration presents the first of a host of health concerns;¹¹⁴ for others their lives as prostitutes make them prone to contracting sexually transmitted diseases such as AIDS.¹¹⁵ Additionally, the lack of knowledge or awareness regarding sexual health further adds to the health concerns facing India's hijras.¹¹⁶ By providing greater access to health care and treatment resources, India will be helping its community by decreasing the spread of such sexual diseases,¹¹⁷ thereby also decreasing its mortality rate.¹¹⁸

As depicted by the lack of understanding with relation to health, many hijras also do not have access to India's education system.¹¹⁹ Such inconsistency led to the high rate of illiteracy that India saw as a result of the caste system, which kept many in the scheduled castes out of schools.¹²⁰ If an affirmative action system or legislation began to include

112. Ghazala Irshad, *The World Reacts to U.S. Supreme Court Legalization of Gay Marriage*, HUFFINGTON POST (Jun. 26, 2015), http://www.huffingtonpost.com/the-groundtruth-project/the-world-reacts-to-us-su_b_7675354.html; Associated Press, *Hundreds march in India to demand LGBT rights*, LGBTQ NATION (Nov. 28, 2016), <http://www.lgbtqnation.com/2016/11/hundreds-march-india-demand-lgbt-rights/>.

113. Krista Geneviève Lynes, *Visual Currencies: Documenting India's Red-Light Districts*, 37 SIGNS 109 (Sept. 2011); Paul L. Vasey & Doug P. VanderLaan, *Birth Order and Male Androphilia in Samoan Fa'afafine*, 274 BIOLOGICAL SCI. 1437 (Jun. 7 2007).

114. See generally Moni Nag, *Sexual Behaviour in India with Risk of HIV/AIDS Transmission*, 5 HEALTH TRANSITION REV. 293 (1995); Thomas W. Johnson & Michael S. Irwig, *The Hidden World of Self-Castration and Testicular Self-Injury*, 11 NATURE REVIEWS UROLOGY 297 (2014).

115. Moni Nag, *Anthropological Perspectives on Prostitution and AIDS in India*, 36 ECON. AND POL. WKLY. 4025 (Oct. 2001); Moni Nag, *Sexual Behaviour in India with Risk of HIV/AIDS Transmission*, 5 HEALTH TRANSITION REV. 293 (1995).

116. *Id.*; Arvind Narrain, *The Articulation of Rights around Sexuality and Health: Subaltern Queer Cultures in India in the Era of Hindutva*, 7 HEALTH & HUM. RTS. 142, 143-44 (2004); Haresh Narayan Pandey, *AIDS and its Social Awareness in India*, 32 INDIAN ANTHROPOLOGIST 59 (2002).

117. See generally, Rama Baru, Arnab Acharya, Sanghmitra Acharya, AK Shiva Kumar & K Nagaraj, *Inequities in Access to Health Services in India: Caste, Class and Region*, 45 ECON. AND POL. WKLY. 49 (Sept. 2010); Yarlina Balarajan, S Selvaraj, & S V Subramanian, *Health Care and Equity in India*, NIH PUBLIC ACCESS (Feb. 5, 2011).

118. See generally, *Pervasive and Persistent Influence of Caste on Child Mortality in India*, 27 POPULATION RES. AND POL'Y REV. 477 (Aug. 2008); Archana Singh-Manoux, Aline Dugravot, George Davey Smith, Malavika Subramanyam & S. V. Subramanian, *Adult Education and Child Mortality in India: The Influence of Caste, Household Wealth, and Urbanization*, 19 EPIDEMIOLOGY 294 (Mar. 2008).

119. Jan Hogendorf, *The Hideous Trade. Economic Aspects of the 'Manufacture' and Sale of Eunuchs*, 45 PAIDEUMA: MITTEILUNGEN ZUR KULTURKUNDE 137 (1999).

120. Lelah Dushkin, *Scheduled Caste Policy in India: History, Problems, Prospects*, 7 ASIAN

hijras, much like they did with scheduled castes, we can expect to see the same growth in literacy.¹²¹

Additionally, granting India's trans community greater access into major society will also allow politicians to benefit from their involvement.¹²² Currently, hijras do not participate in the democratic process of India.¹²³ Including hijras in the electoral process can prove to be just as beneficial as including persons from lower castes into the system has in recent years.¹²⁴ Furthermore, by establishing a third gender through its 2014 decision, the court unequivocally declared that hijras cannot be precluded from enjoying the same rights as all others, which includes the right to be a part of the democratic process.¹²⁵ A year after that decision, the Rajya Sabha,¹²⁶ the upper house of the Indian Parliament, passed the private Rights of Transgender Persons Bill which aims at promoting the rights of transgender people, including their access to health, education and employment services.¹²⁷

Relatedly, Kerala became the first state in India to unveil its much-

SURV. 626 (Sept. 1967).

121. R.K. Mishra, *State Level Scheduled Caste Corporations in India*, 31 ECON. AND POL. WKLY. 2217 (Aug. 17, 1996).

122. *Indian elections: Hope and anger in transgender community*, BBC NEWS (Apr. 23, 2014) <http://www.bbc.com/news/world-asia-india-27075671>.

123. *Caste out, Yet Again*, 44 ECON. AND POL. WKLY. 5, 5-6 (May 2009) (While the discussion of caste is always contentious in India, a major issue even when those discussions are started is who is part of the conversation. Like women who continue to fight for their rights in India, the hijra community has been doing the same for years. Yet, unlike women—who now sometimes get a spot at the table and are able to have these conversations to fight for their rights—hijras continue to be ignored. This article attempts to include all the castes that were shut out of the delegation, but it too never references the eunuch or trans community of India.).

124. *Why We Must Count Caste: A caste census is an occasion for collective reflection on the caste question*, 45 ECON. AND POL. WKLY. 7, 7-8 (May 2010) (“Taken as a whole, the media coverage of the proposed ‘caste census’ shows us how far we have come since the Mandai crisis of 1990... Contrary to popular fears, caste is no more complicated than a ‘census house’ or a ‘primary occupation,’ unexpectedly complex categories that the census handles quite well... In sum, Census 2011 has the potential to be the beginning of the end of caste.”); Rahul Verma, *What Determines Electoral Outcomes in India? Caste, Class, or Voters’ Satisfaction with Government Performance?*, 52 ASIAN SURV. 270 (2012). (In examining the election period in 2004 and 2009, Verma found that the incumbent central government in India “enjoyed a high level of voter satisfaction,” and explained that the different electoral outcomes were a result of a various factors such as “satisfaction with a constituent’s member of Parliament and the performance of the government at the state level, as well as satisfaction with the government at the national level.”).

125. NALSA v. UOI, 5 SCC 438 (2014).

126. RAJYA SABHA: COUNCIL OF THE STATES, <http://rajyasabha.nic.in/>.

127. Rights of Trans Persons Bill, No. XLIX-C (2014) (India), <http://164.100.47.4/BillsTexts/RSBillTexts/PassedRajyaSabha/transgndr-RS%20pas-E.pdf>; See also, *Rajya Sabha Passes Historic Private Bill to Promote Transgender Rights*, INDIAN EXPRESS (April 25, 2015), <http://indianexpress.com/article/india/india-others/rajya-sabha-passes-private-bill-to-protect-the-rights-of-transgenders/>.

awaited Transgender Policy in the latter half of 2015.¹²⁸ The goal of the policy was to put an end to the social stigma attached to the sexual minority group of hijras by aiming to ensure them non-discriminatory treatment.¹²⁹ Among the research collected in preparation of the policy, the State examined the current treatment of hijras in Kerala revealing the injustice in treatment of transgender people.¹³⁰ State Chief Secretary Jiji Thomson unveiled the policy explaining how it is a direct result of the findings of the recent survey.¹³¹ The policy covers male to female transgender people as well as intersex people and ensures “equal access to social and economic opportunities, right to equal treatment under the law, right to live life without violence and equitable right in all decision making bodies,” and also recommends setting a Justice Board led by a member of the transgender community.¹³² The goal of the board will be to monitor and oversee the implementation of the policy, something that has yet to be in existence or practice for an area of anti-discrimination.¹³³

Given these strides, it is essential for the government to now fully endorse and support the rights of transgender people. While the Rajya Sabha took a monumental step by passing the Right to Transgender Persons Bill, it is still relatively ineffectual.¹³⁴ For one, it is a private member’s bill that does not speak to the propriety of procedures or fully develop the policies on a state level.¹³⁵ The bill has also yet to be discussed in its entirety by the Lok Sabha,¹³⁶ the lower house of the Indian Parliament, while it is listed for discussion it is until the Lok Sabha supports the bills, and until the government chooses to push for its passage, it is nothing more than a private member’s message.¹³⁷

128. KERALA TRANSGENDER POLICY (2015), <http://www.swd.kerala.gov.in/images/VIKASBHAVAN/12704tgpolicy15.pdf>.

129. PTI, *Kerala Becomes First State to Unveil Transgender Policy*, INDIAN EXPRESS (Nov. 12, 2015), <http://indianexpress.com/article/india/india-news-india/kerala-becomes-first-state-to-unveil-transgender-policy/>.

130. Kerala examined the treatment of hijras with regards to their right to expression, right to dignity and freedom from violence as well as access to capabilities, economic opportunities, assets and services. Among the statistics collected were the following: “58% of transgendered students drop out before completing 10th grade; 100% have had at least one experience of being denied a job due to their gender identity; 89% reported being mistreated at work; 52% felt a need to change their physical appearance.” Kerala Transgender Policy, *supra* note 128.

131. *Id.*

132. *Id.*

133. *Id.*

134. Nidhi Sharma, *Government to list Right of Transgender Persons Bill for Winter Session*, THE ECONOMIC TIMES (Sept. 22, 2015), http://articles.economicstimes.indiatimes.com/2015-09-22/news/66792412_1_transgender-winter-session-private-member.

135. *Id.*

136. LOK SABHA: HOUSE OF THE PEOPLE, <http://loksabha.nic.in/>.

137. Sharma, *supra* note 134.

Alternatively, the Lok Sabha and other government members argue that the only reason the bill or other such legislation has not yet passed is because of the mere confusion created by the Supreme Court.¹³⁸ In order for legislation to exist, it is imperative for the Supreme Court to clarify the definition of India's third gender and transgender persons.¹³⁹ Officials are worried that the current scheme of protection proposed by the Court and supported by the Rajya Sabha asks for people to "self-declare" and identify themselves as trans.¹⁴⁰ This is problematic because it "could lead to ineligible people availing themselves of the reservation benefits," and it could be unfair to those who are in the process of or have transitioned themselves from the male-to-female gender and now identify strictly as a woman within the current definition.¹⁴¹

In order to address these issues, the Court must modify the definition so as to include partially and fully transitioned individuals as well as all castrated men, eunuchs, and self-identifying hijras, to further de-stigmatize the association with a third gender.¹⁴² Using that definition, the central government must then incorporate all people into its legislation to recognize the rights of the trans community.¹⁴³ This will craft the framework necessary to govern the rights of transgender persons in India at a national level, while developing a multipronged approach to allow the states to further effectuate change on a local level.¹⁴⁴

This can take form in a number of ways. Initially, as proposed in the current bill, each district in the nation can create a committee to ensure the newly enumerated rights of trans people are not abused.¹⁴⁵ Moreover, if the localized governments earmark funds to run awareness campaigns and law enforcement trainings to include hijras into the common folds of society, they can help fight the social stigma facing the community.¹⁴⁶ Given the List III Concurrent powers allotted to the States, it is within

138. *Id.*; see also LAWYERS COLLECTIVE, <http://www.lawyerscollective.org/updates/supreme-court-recognises-the-right-to-determine-and-express-ones-gender-grants-legal-status-to-third-gender.html>.

139. Avani Tanya, *Transgender Allowed to Vote as a 'Third' Sex "But I am a Woman, Not an 'Other,'"* LOK SABHA INDIA (2014), <http://www.loksabhaindia.org/en/photographers/avani-tanya/transgender-al-voto-come-terzo-sessoma-sono-una-donna-non-un-altro.html>.; *Govt. of India asks Supreme Court to Clarify/Modify NALSA Judgment*, ORINAM (Sept. 12, 2014), <http://orinam.net/govt-india-asks-supreme-court-clarifymodify-nalsa-judgement/>.

140. Sharma, *supra* note 134.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. Rights of Trans Persons Bill, No. XLIXC-C (2014) (India), <http://164.100.47.4/BillsTexts/RSBillTexts/PassedRajyaSabha/transgndr-RS%20pas-E.pdf>.

146. Sharma, *supra* note 134.

their purview to adopt its own legislation that furthers the cause of the hijra community.¹⁴⁷ As such, much like Kerala's proposal, all other states ought to propose legislation that would compliment legislation that is passed by the central government. Activists in South India have been heading the charge to generate legislative action over the last couple of years.¹⁴⁸ While such efforts have not picked up traction in North India, the momentum from the South and the suggested policy changes at both the national and local level could succeed at incorporating the transgender community into the major folds of society.¹⁴⁹

CONCLUSION

When examining the effect of the caste system within India, a pattern of oppression and inequality surfaces. These patterns can be likened to the poverty and discrimination felt by the untouchables around the nation and making them social outcasts. Like most hijras, untouchables around India are either assigned menial jobs or are unable to work at all. This further spreads the poverty and sickness plaguing these lower caste members. They are not allowed to move up the career ladder, gain access to basic health benefits or earn an education, thereby further reinforcing the cycle of poverty and oppression.

Given the societal challenges barring hijras from acting as members of society, it is time for the Indian legal system to step in and enact change. Through the powers vested in the courts and the legal analysis seen in previous discrimination cases challenging the religious caste system, it becomes clear that India's legal infrastructure has made efforts to mold the social hierarchy. In an attempt to include the fragmented portions of society, it is advised that India actively take steps to include hijras into mainstream society and work to rid the nation of its untouchables. It is high time for the nation's central and state governments to ride on the tide of the present social movement addressing the plight of the transgender community and ensure that the work done by the legislature and courts does not go to waste.

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147. INDIA CONST. List III: Concurrent Powers, [http://lawmin.nic.in/olwing/coi/coi-english/Const.Pock%20Pg.Rom8Fsss\(16\).pdf](http://lawmin.nic.in/olwing/coi/coi-english/Const.Pock%20Pg.Rom8Fsss(16).pdf).

148. Aradhna Wal, *How Kerala Left the Country Behind on Transgender Rights*, DNA (Nov. 14, 2015) ("South Indian states have always done better than North Indian ones when it comes to transgender rights.").

149. *Id.*; c.f. Bonnie J. Morris, *History of Lesbian, Gay & Bisexual Social Movements*, AMERICAN PSYCHOLOGICAL ASSOCIATION (2016).

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