



MAKING RIGHTS REAL

POLICY BRIEF

Implementing Reservations for
Transgender & Intersex Persons in
Education and Public Employment



CENTRE FOR
LAW & POLICY
RESEARCH

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NALSA v UoI*

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LIFE, AUTONOMY
AND DIGNITY.



* *National Legal Services Authority of India v Union of India* (2014) 5 SCC 438.

ONE

Introduction

The rights of transgender and intersex persons in India have been given constitutional status since 2014. In April 2014, in *NALSA v. Union of India*¹ (“*NALSA*”), the Supreme Court of India recognised that transgender persons have constitutional rights as equal citizens. *NALSA* was a watershed moment as the Court held that the right to gender identity is inherent to one’s right to life, autonomy and dignity. It held that transgender persons have the right to self identify their gender as male, female or transgender, irrespective of medical sex reassignment and have the right to expression of their chosen gender identity. *NALSA* gave momentum to the transgender rights movement in India and paved the way for the Supreme Court to decriminalise Section 377 of the IPC with regard to consensual same sex relationships in *Navtej Johar v. Union of India*.²

Notably the Supreme Court in *NALSA* issued several directions to the Centre and State Governments to advance the economic, social, cultural and political rights³ of transgender persons. These directions ranged from recognising the right to self-identification of gender identity, operating HIV sero-surveillance centres to framing social welfare schemes for transgender persons and increasing public awareness for social inclusion. One of the important directions issued by the Court was to “...the Centre and the State Governments to take steps to treat them (transgender and intersex persons) as socially and educationally backward classes of citizens and extend all kinds of reservation in cases of admission in educational institutions and for public appointments.” The focus of this Policy

Brief is the implementation of this direction of the Supreme Court to provide reservations in educational institutions and public employment for transgender and intersex persons. These reservations have not been implemented till date and there is no clarity as to how such reservations ought to be implemented. **Reservations for transgender and intersex persons in education and employment are crucial for their social and economic inclusion because only 46% of transgender persons in India are literate and 94% are either unemployed or employed in the informal sector.**⁴

Hence, this Brief develops a comprehensive and functional strategy for the implementation of reservations for transgender and intersex persons in educational institutions and public employment. In order to implement reservations, we must address three principal issues: identification of the beneficiaries of reservation, the legal basis for reservations and the appropriate form of reservations. We address each of these issues in turn and develop a detailed and clear proposal for implementation of reservations.

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³ *NALSA* (n 1) [67].

⁴ ‘Census 2011’ <<http://censusindia.gov.in/2011-Common/CensusData2011.html>> accessed 11 December 2018; National Aids Control Organisation and United Nations Development Programme, Uptake of Social Protection Schemes by Transgender Population in India (13 February 2017) para 1.2; National Human Rights Commission and Kerala Development Society, Study on Human Rights of Transgender as Third Gender (February 2017) paras 2.1.2.

TWO

Who are the Beneficiaries? Legal Definitions of Transgender and Intersex Persons

In order to implement a reservation policy a necessary first step would be to identify and define a discrete and stable social group that may benefit from such a policy. As there is considerable variation in the language of *NALSA* while addressing gender identity, we begin by clarifying the scope of the phrase 'transgender and intersex' persons.

TWO/ 1

DEFINITIONS OF "TRANSGENDER" AND "INTERSEX" PERSONS

In *NALSA*, the Supreme Court used the umbrella term of 'transgender' to include several gender identities. The Court broadly defined "Transgender" as a term for persons whose gender identity, gender expression or behavior does not conform to their biological sex.⁵ It held that "transgender" would include persons who do not identify with their sex assigned at birth. This would include Hijras or those who describe themselves as "third gender" and do not identify as either male or female. Hijras were described as not having reproductive capacities as either men or women, and as persons who claim to be "third gender" and that this would include castrated, non-castrated and intersex persons. The term transgender was also to include persons who intend to or have undergone Sex Reassignment

Surgery (SRS) to align their biological sex with their gender identity in order to become male or female, also called transsexual persons. It also includes cross-dressers and all other identities.⁶ Thus, while transgender and intersex are two different categories, the Supreme Court in *NALSA* used the term 'transgender' as a broad term to include intersex persons as well.

Apart from the Supreme Court definition for 'transgender' persons, there were draft legislations introduced following *NALSA* which attempted to provide definitions. In 2014, the Rights of Transgender Persons Bill 2014 was introduced, which defined a 'transgender person' as a person, whose gender does not match with the gender assigned to that person at birth and includes trans-men and trans-women (whether or not they have undergone sex reassignment surgery or hormone therapy or laser therapy etc.), gender-queers and a

number of socio-cultural identities such as *kinnars*, *hijras*, *aravanis*, *jogtas* etc.⁷ This definition does not include intersex persons. Thereafter in 2016, the Transgender Persons (Protection of Rights) Bill 2016 (2016 Bill) was introduced. This 2016 Bill defines transgender persons as follows:

“transgender person” means a person who is – (A) neither wholly female nor wholly male; or (B) a combination of female or male; or (C) neither female nor male; and whose sense of gender does not match with the gender assigned to that person at the time of birth, and includes trans-men and trans-women, persons with intersex variations and gender-queers.”⁸

While this definition has been severely criticized⁹, it does include the reference to intersex persons. As seen from the approach in *NALSA* and the draft Bills reviewed above, the definition of intersex is not very clear in the Indian context. The Office of the UN High Commissioner for Human Rights used the following definition for intersex persons:

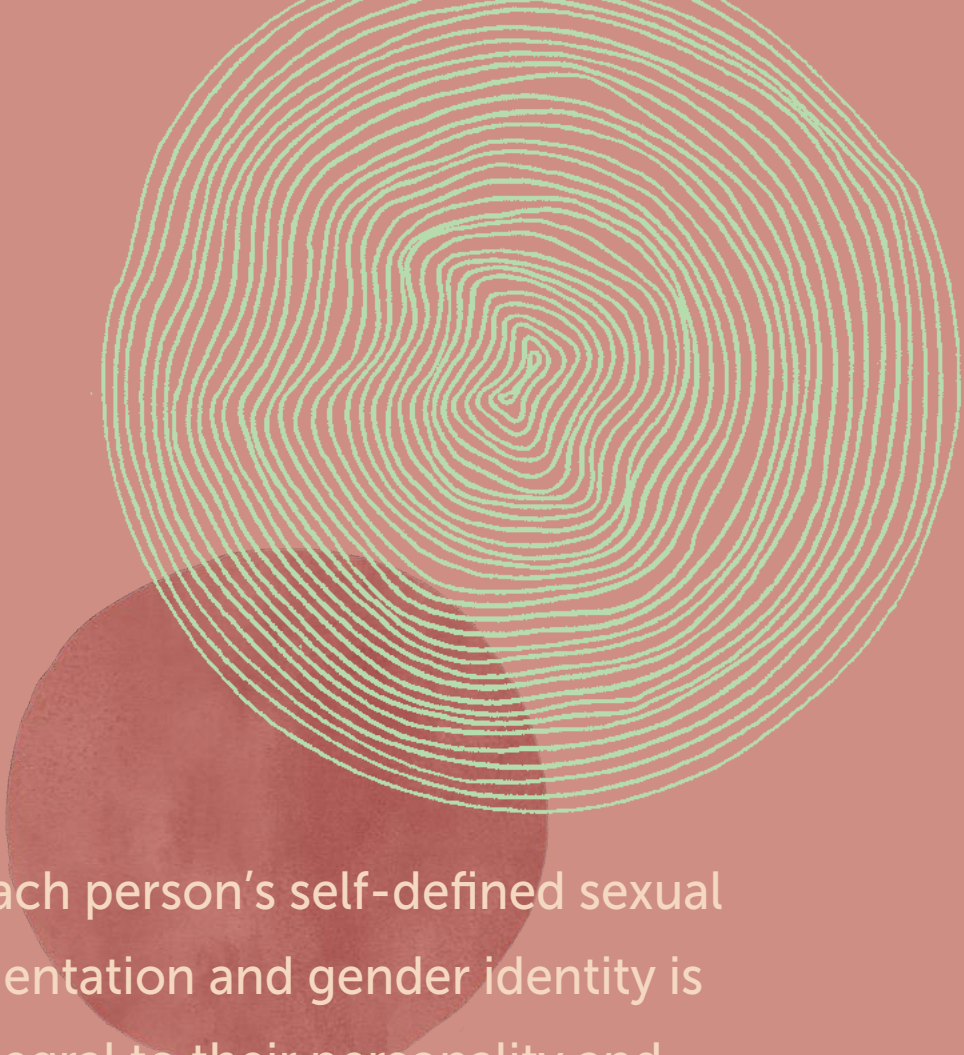
“An intersex person is born with sexual anatomy, reproductive organs, and / or chromosome patterns that do not fit the typical definition of male or female. This may be apparent at birth or become so later in life. An intersex person may identify as male or female or as neither. Intersex status is not about sexual orientation or gender identity.”¹⁰

So far in the Indian context, no separate definition for ‘intersex’ has been provided and intersex persons have been included within the term ‘transgender’. Many cases of transgender reservation are in fact of intersex persons in India.¹¹

This is not normally the practice, as internationally the common term of reference used is ‘transgender and intersex persons’. Thus as a first step, we propose that by integrating the Indian and international discourse on the definition of transgender and intersex persons, we settle on the following definitions for both terms:

Transgender Person: Transgender persons are persons whose gender identity or gender expression does not conform to their biological sex. This includes persons who intend to or have undergone Sex Reassignment Surgery (SRS) to align their biological sex with their gender identity in order to become male or female, transsexual persons, cross-dressers and all other identities.

Intersex Person: An intersex person is born with sexual anatomy, reproductive organs, and / or chromosome patterns that do not fit the typical definition of male or female. This may be apparent at birth or become so later in life. An intersex person may identify as male or female or as neither.



"Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom and no one shall be forced to undergo medical procedures, including SRS, sterilization or hormonal therapy, as a requirement for legal recognition of their gender identity."*

* NALSA (n1) [22].

TWO/ 2

MECHANISM FOR LEGAL RECOGNITION AND SELF-IDENTIFICATION

While *NALSA* guaranteed the right to self-identification of one's gender as male, female or transgender, it did not lay down any method or self-identification protocol. The Central and State Governments are yet to legislate on this issue and hence the method for legal recognition and self-identification of transgender and intersex persons remains unspecified. In this section we review the key elements that should guide a self-identification protocol.

The Supreme Court in *NALSA* held that Article 19(1) (a) gives the right to transgender persons to express themselves¹² irrespective of whether they have undergone medical procedures. It also related the right to express one's gender with dignity under Article 21 as an integral "*part of personal autonomy and self-expression*,"¹³ observing that there exists both a negative duty on the State to abstain from unnecessary interference, and a positive duty to provide for freedom, personal autonomy, self-determination and human dignity.¹⁴

The Court held that "*Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom and no one shall be forced to undergo medical procedures, including SRS, sterilization or hormonal therapy, as a requirement for legal recognition of their gender identity*". Hence, medical procedures or hormone therapy should not be required as a pre-condition for any legal recognition or identity documents for transgender and intersex persons.

Further, there should be no requirement of a mental health assessment to establish a person's gender identity. A mental health diagnosis of a person's gender identity is as unethical as trying to assess a person's sexual orientation. A person's gender identity is a highly personal matter and the right to gender recognition must not hinge on a medical statement. Requiring a person to submit a mental health assessment of their gender identity violates their human rights, such as the right to free personality development, the right to dignity, the right to be free from unwanted medical treatment and experimentation, and the right to be free from discrimination. This principle is recognized in several human rights instruments and gender recognition laws in other jurisdictions.¹⁵ Further, the World Health Organisation (WHO) stated in June 2018 that being transgender does not constitute a mental disorder and has removed all trans-related diagnoses from the mental health chapter.¹⁶

Human rights institutions have also spoken out against a mandatory medical diagnosis in gender recognition procedures.¹⁷ Professional bodies such as the World Professional Association for Transgender Healthcare (WPATH) oppose all medical requirements that act as barriers to those wishing to change their legal sex or gender markers on documents. These include requirements for diagnosis, counseling or therapy, puberty blockers, hormones, any form of surgery (including that which involves sterilization), or any other requirement for any form of clinical treatment or letters from doctors.¹⁸ Thus, it is evident that there is no basis either in the medical or in the human rights field for a mental health assessment or medical diagnosis of a person's gender identity for legal gender recognition. Many countries such as Malta,

Denmark, Norway, Belgium, Ireland, Luxembourg have all demedicalised their gender recognition procedures successfully, without detriment to the public or the individual.

Once there is an accepted definition of transgender and intersex persons, and clarity that legal recognition of gender identity does not need any medical diagnosis, we are ready to spell out the legal procedures for self-identification of one's gender identity. **Gender recognition procedures should be quick, accessible, transparent and based on self-determination.¹⁹ If a person requires a change in how their gender is recorded, their expression of intent should serve as the sole basis for such a change.**

While NALSA advocated for self-identification of gender identity, it did not offer any mode for legal recognition. This has led to several inconsistencies in State Government practices with regard to self-identification. In States where there are policies addressing issues faced by transgender persons, the policy document lays down the method for self-identification. In Karnataka for instance, the State policy states that in order for transgender persons to access welfare measures, they need to get identity cards. The process outlined is to submit a self-declaration affidavit to the Child Development Project Officer (CDPO) of the District. A committee comprising of the CDPO, the Medical Officer and Tahsildar will be constituted at the Taluk level, and the Tahsildar will issue identity cards. These identity cards should be accepted by all authorities for issuing official documents such as ration cards, passport,

birth certificate, Aadhaar card, for opening bank accounts, issuing monthly bus passes or a driving license. While this appears to be a good example of a self identification protocol, it is yet to be implemented as it was framed only in 2017.

Other States follow different practices. States which do not have policies have set up Transgender Welfare Boards which issue identity cards. Chhattisgarh has established a Third Gender Welfare Board which is tasked with issuing identity cards,²⁰ similar to the framework under the Karnataka and Kerala transgender policies. The identity cards issued may then be used to effect changes in name and gender markers in other identity documents. In West Bengal, it has been observed that documentation of sex reassignment surgery (SRS) is required for publishing a change of gender in the Official Gazette, which violates the NALSA guidelines and human rights standards discussed above.²¹

In general, all these efforts by State Governments to lay down a self-identification mechanism have tended to entail the constitution of a committee consisting of District officials, medical officers, psychologists/ psychiatrists, social welfare officers and Government officials. In States where Transgender Welfare Boards have been set up, the Boards are issuing identity cards to the transgender community. It is crucial that there is sufficient representation of members from the transgender community in these Committees and Transgender Welfare Boards. This representation is critical to a self-identification protocol to ensure that the identification of transgender persons stays within the principles identified above.

The experience and challenges of obtaining identity cards faced by persons with disabilities alerts us to the inherent challenges for any transgender or intersex person to navigate the bureaucratic system.

The experience and challenges of obtaining identity cards faced by persons with disabilities alerts us to the inherent challenges for any transgender or intersex person to navigate the bureaucratic system. Moreover, in the case of persons with disabilities, obtaining a disability card has been extremely difficult and bureaucratic as it relies upon medical certification of disability. These difficulties must be removed and the process of obtaining identity cards by transgender and intersex persons must be based only on self-identification. Hence we propose that access to reservations must be based on:

- (i) the possession of a transgender identity card which should be available based on self-identification
- (ii) issued by an authority / board established under a statute, and which has adequate representation from the transgender community, and
- (iii) this should not require medical re-assignment, mental health assessment, hormone or any other treatment as a pre-condition.

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⁶ NALSA (n 1) [13].

⁷ The Rights of Transgender Persons Bill 2014 s 2(t).

⁸ Transgender Persons (Protection of Rights) Bill 2016 s 2(i).

⁹ Danish Sheikh, 'The New Transgender Bill Fails the Community' (The Wire, 4 August 2016) <<https://thewire.in/gender/failures-of-the-new-transgender-bill>> accessed 11 December 2018; Sampurna Working Group, 'Transgender Persons Bill, 2016' (2017) 52(48) EPW <<https://www.epw.in/journal/2017/48/letters/transgender-persons-bill-2016.html>> accessed 11 December 2018.

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¹¹ *G. Nagalakshmi v Director General of Police* (2014) 7 MLJ 452; *Faizan Siddiqui v Sashatra Seema Bal* (2011) 124 DRJ 542; *Atri Kar v Union of India* [16 March 2017] Writ Petition No. 6151/2017; *Ganga Kumari v State of Rajasthan & Ors* [13 November 2017] S.B. Civil Writ Petition No 14006/2017.

¹² NALSA (n 1) [69].

¹³ NALSA (n 1) [75].

¹⁴ NALSA (n 1) [75]; See also Tarunabh Khaitan, 'NALSA v Union of India: What Courts Say, What Courts Do' (UK Constitutional Law Association, 24 April 2014) <<https://ukconstitutionallaw.org/2014/04/24/tarunabh-khaitan-nalsa-v-union-of-india-what-courts-say-what-courts-do/>> accessed 10 December 2018.

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¹⁶ Coding Disease and Death (World Health Organisation, 18 June 2018) <<http://www.who.int/health-topics/international-classification-of-diseases>> accessed on 17 December 2018.

¹⁷ Nils Muižnieks, 'Keynote Address' (6th European Transgender Council, Bologna, 3 June 2016) <<https://rm.coe.int/16806da7f7>> accessed on 11 December 2018.

¹⁸ 'WPATH Identity Recognition Statement' (TGEU, 15 November 2017) <<https://tgeu.org/wpath-2017-identity-recognition-statement/>> accessed on 11 December 2018.

¹⁹ Council of Europe (Parliamentary Assembly), 'Discrimination against transgender people in Europe' (2015) Resolution 2048.

²⁰ 'On the Empowerment of Third Gender Persons' (Social Welfare Department, Government of Chhattisgarh, 17 January 2018) <<https://sw.cg.gov.in/en/empowerment-individuals-third-gender-community>> accessed 10 December 2018.

²¹ Aniruddha Dutta, 'Contradictory Tendencies: The Supreme Court's NALSA Judgment on Transgender Recognition and Rights' (2014) 5 Journal of Indian Law and Society 225, 233.

Rights of
Transgender
Persons Bill

2014

This Bill provided that 2% of the total seats in Government and Government aided institutions of primary, secondary and higher education and 2% of vacancies in every Government establishment are to be reserved for transgender persons.

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THREE

How should Reservations for Transgender and Intersex Persons be Implemented?

In the section above we have addressed how the beneficiaries of a transgender and intersex persons reservation policy may be identified. In particular, we have proposed a definition and a protocol of self-identification to be followed. The next question we address is how reservations should be implemented by the Union or the State Governments. More specifically, we outline the categorical basis for reservation and the extent of reservation that must be provided.

In *NALSA*, for the first time the Supreme Court expanded the scope of 'sex' under Article 15 and held that 'sex' would include 'gender'. It held that 'gender identity' is an attribute of 'sex' and therefore, discrimination on the basis of 'gender identity' would qualify as discrimination on the basis of sex. It also noted that transgender persons have been systematically denied their right to access public places and have not been afforded their rights under special provisions of the Constitution i.e. Articles 15(4) and 16(4), which are for the advancement of socially and educationally backward classes.²² However, the Court did not spell out how transgender persons should be accommodated under the existing reservation scheme. In order to work this out, a first step would be to clarify whether a transgender reservation quota would be treated as a vertical or horizontal scheme.

THREE/ 1

TRANSGENDER AND INTERSEX PERSONS' RESERVATIONS UNDER THE 'TRANSGENDER' CATEGORY

In this section we ask how reservations for transgender and intersex persons may be implemented under a 'transgender' category. In particular, we focus on whether the 'transgender' category should be implemented under a vertical or horizontal scheme. In this section, we show that the 'transgender' category should be implemented as a part of a horizontal and compartmentalized scheme for the reasons elaborated below.

The basis for permitting special measures like reservations in educational institutions and matters

of public employment can be found in Articles 15 and 16 of the Constitution. Article 15(1) of the Constitution guarantees that there shall be no discrimination against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them, and provides for special provisions to be made for women and children under Article 15(3). Articles 15(4) and 15(5) allow for special provisions to be made for the advancement of socially and educationally backward classes of citizens in areas including education²³ and other fields such as housing.²⁴ Article 16(1) provides for equal opportunities in public employment and prohibits discrimination while Article 16(4) of the Constitution empowers the State to make special provisions for reservations in public employment in favour of any backward class of citizens.²⁵

In *NALSA*, the Supreme Court held that transgender and intersex persons have not been afforded special provisions envisaged under Article 15(4) for the advancement of the socially and educationally backward classes ("SEBC") of citizens and hence are legally entitled and eligible to get the benefits of SEBC. Further, it also held that transgender persons are entitled to reservation in the matter of appointments, as envisaged under Article 16(4) of the Constitution.

Reservations under Article 15(4) for SEBC and for 'backward classes' under Article 16(4) have been understood as being similar. Article 16(4) uses the phrase 'backward classes' who are not adequately represented in the services under the State.

The criteria for identifying backward classes under Article 16(4) was approved by the Supreme Court in *Indra Sawhney & Ors. v Union of India*²⁶ to identify 'socially and educationally backward classes' under

Article 15(4). Therefore, under Articles 16(4) and 15(4), groups can be identified for reservation on the criteria evolved for determining backwardness which include caste along with other factors such as illiteracy, isolation, poverty, physical and mental degradation²⁷ among others.²⁸

In *Indra Sawhney*, the Court further elaborated that there are two kinds of reservation methods that could be pursued by the State: vertical reservations and horizontal reservations. The reservations in favour of Scheduled Castes, Scheduled Tribes and other backward classes [under Article 16(4)] may be called vertical reservations whereas reservations in favour of physically handicapped [under clause (1) of Article 16] can be referred to as horizontal reservations.²⁹

Reservations in favour of categories like Scheduled Castes (SC), Scheduled Tribes (ST) and other backward classes (OBCs) under Article 16(4) were held to be "social reservations", constituting vertical categories. Reservations in favour of women, persons with disabilities, freedom fighters, project displaced persons were "special reservations", and were treated as horizontal categories that would cut across vertical reservations. In other words, a **special reservation is provided within an existing category of social reservation.³⁰ This is also a form of recognising the intersection of multiple identities and resulting vulnerabilities.**

Quotas for horizontal reservations cut across the quotas for vertical reservations in a manner that is called inter-locking reservations.³¹ For example, if 3% of the vacancies are reserved in favour of persons with disabilities, this would be a reservation relating to Clause (1) of Article 16. The persons selected against this quota will be placed in the appropriate

vertical quota category, namely SC, ST, OBC or the open competition (OC) category.

The distinction between vertical and horizontal reservations drawn in *Indra Sawhney* was reiterated in *Anil Kumar Gupta v. State of Uttar Pradesh & Ors.*³² More than a decade later, echoing the decisions in *Indra Sawhney*, the Supreme Court held decisively in *Rajesh Kumar Daria v. Rajasthan Public Services Commission & Ors.*³³ that social reservations in favour of members of SCs, STs and OBCs under Article 16(4) are vertical reservations while special reservations in favour of women and persons with disabilities under Articles 15(3) and 16(1) respectively, are horizontal reservations. The delineation of this distinction between vertical and horizontal reservations, starting from *Indra Sawhney* to *Rajendra Kumar Daria*, is crucial in conceptualising and implementing reservations for transgender and intersex persons. We recommend that reservations for transgender and intersex persons should be recognised as horizontal reservation or special reservation for the reasons set out in the section below.

Even within horizontal reservations, there are two ways of implementation. Horizontal reservations could be treated as **compartmentalised** or **overall reservations**. For example, if a transgender candidate selected on the basis of reservation belongs to a Scheduled Caste, she will be adjusted against the seat reserved for SCs. This would be a case of **compartmentalised reservation**. Alternatively in **overall reservation** there is an emphasis on ensuring that the overall quota for the special category is met irrespective of its distribution across the social reservation categories. Hence, if there are not enough transgender candidates belonging to SC and ST categories

then the proportionate number of seats meant for transgender candidates get transferred to the OC category.³⁴ So we recommend that reservation for transgender and intersex persons should be compartmentalized to ensure that the intersectional discrimination experienced by various groups is addressed through the reservation quota policy.

In the section above, we made a distinction between vertical and horizontal reservations under the Indian Constitution. The Supreme Court has held that while Article 16(4) is exhaustive on vertical reservations for 'backward class of citizens', it is not exhaustive on the scope of reservations under the Constitution. Article 16(1) which guarantees "... equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State"³⁵ permits horizontal reservations for other classes of persons.³⁶

Persons found eligible by the State for reservation under Article 16(1) would be placed against the relevant quota / category identified under Article 16(4) forming an intersectional grid. Thus, SC or ST women would be placed in the horizontal category of 'women' and would also fall under the vertical category of SC or ST, in effect recognising the intersection of caste and sex. The Supreme Court has held that reservations for women under Article 15(3) and for other special groups such as persons with disabilities in public employment are a form of special reservation or horizontal reservation.³⁷

Moreover, a practical and effective way to implement reservations for transgender and intersex persons would be to follow the method of reservation on the basis of gender, and disability, as has been done for women under Articles 15(3) and 16(1).

Since the Court held in *NALSA* that 'sex', a protected characteristic under Articles 15 and 16 of the Constitution, includes 'gender identity', this would mean that sex based protections should extend to transgender and intersex persons.³⁸

Therefore, the reservations extended to women under Article 15(3) should be extended to transgender and intersex persons, as special reservations and horizontal reservation. Ideally, transgender persons, like women and persons with disability, should also be given reservation under Articles 15(3) and 16(1), as a horizontal category for the purpose of reservation.

It has been argued rightly by Mohan Gopal that the Supreme Court in *NALSA* "...mixed up the cases of horizontal and vertical kinds of reservation... (and) erred in assuming both kinds of reservation flow from Articles 15(4) and 16(4)".³⁹ Similarly, P.S. Krishnan took the view that like persons with disability, reservation for transgender persons must be traced to Articles 15(1) and 16(1) as "*Articles 15(4) and 16(4) pertain to what has continued for 'generations'...*". As disability and transgender discrimination does not arise from the traditional caste-based social system they "...could not claim benefits from the kitty meant for OBCs".⁴⁰ Hence, they rightly conclude that the Supreme Court's inclusion of transgender persons within the SEBCs in *NALSA* was flawed and goes against the previous pronouncements of the Supreme Court.⁴¹

Further, reservations for transgender and intersex persons should be horizontal and not vertical in order to address the intersectional character of discrimination faced by Dalit or Adivasi transgender persons. Creating an additional vertical category for transgender and intersex persons would ignore the

caste divisions within the transgender community. As a result, transgender persons from different caste backgrounds would be placed in the same pool to compete for the same positions.⁴²

Conversely, such a separate vertical category would require transgender persons to give up their caste identities and associated protections and benefits they may otherwise secure without disclosing their transgender identity.

Categorising transgender persons as a 'socially and educationally backward class' further assumes homogeneity in their social position and ignores the social politics of caste that are at play within the transgender community.⁴³

As transgender rights activist Living Smile Vidya has noted, **Dalit transgender persons face enhanced discrimination and exclusion** and a dual "occupational fixity" (i.e: the limitation placed on options for employment) on the basis of belonging to the Dalit community as well as belonging to the transgender community, and attributes the disenfranchisement of their rights to pursue any other occupation to extant power structures.⁴⁴ Grace Banu, the founder of Trans Rights Now Collective, has argued that **the concerns of transgender and intersex people from Dalit or Adivasi communities tend to be overlooked in the mainstream narratives around caste and gender identity.**⁴⁵ If reservation is provided to transgender persons as social reservation as a separate class in the form of vertical reservation, it would fail to address discrimination that occurs at the intersections of gender and other identities, such as caste.⁴⁶ Therefore, horizontal reservations for transgender

persons on the basis of a special reservations, cutting across vertical reservations that exist on the basis of caste identity, will better account for the diverse social positions that transgender persons occupy, coming from different caste and class backgrounds.⁴⁷ It would ensure that transgender and intersex persons, particularly from SC, ST and OBC communities are not required to give up their caste status while accessing reservations in educational institutions and public employment.

Finally, in order to fully respond to the experience of discrimination at the intersection of non-normative gender identity and caste status, horizontal reservations should be provided which should be **compartmentalised**. This would mean that transgender and intersex candidates should be selected on the basis of merit lists under the categories of SC, ST, OBC and OC to which they belong. For example, if a transgender candidate belongs to the SC category, they will be assessed by the merit lists prepared within that category thus ensuring fair competition to all the candidates.

THREE/ 2

TRANSGENDER AND INTERSEX PERSONS' RESERVATIONS UNDER THE 'WOMAN' CATEGORY

High Courts have already recognised the rights of transgender and intersex persons who identify as women, to apply for public employment seeking reservation as women.⁴⁸ This has been done as in *NALSA*, the Supreme Court specifically recognised the right to self-identify one's gender as male, female or transgender. In *Nangai v. Superintendent of Police*,⁴⁹ the Madras High Court held that: *'treating the petitioner as not a female on the basis of medical declaration that she is a transsexual and forcing her to accept the said sexual identity*

*will surely be an infringement of the rights of the petitioner guaranteed under Articles 14, 15, 16, 19(1)(a) and 21 of the Constitution of India.....the petitioner was born as a female, recognised by the society as a female, she choose to identify herself as a female for all purposes. Therefore, I hold that she is a female in the legal parlance and thus, she is eligible for appointment as a Woman Police Constable.'*⁵⁰

In this case, the Court also declared the petitioner as female and held that she has the right to retain such sexual / gender identity and the liberty to choose a different sexual / gender identity as a third gender in the future. Other High Courts have also passed orders upholding the right of transgender and intersex persons who chose to identify as 'female' to seek employment and reservation in the women category.⁵¹ Therefore, transgender persons who wish to identify only as 'women' and do not wish to avail reservation relying on their transgender identity card should be permitted to avail reservations under the distinct horizontal category of 'woman' that is currently in place.

THREE/ 3

EXTENT OF RESERVATIONS FOR TRANSGENDER AND INTERSEX PERSONS

We conclude this section with a review of the extent of reservations for transgender and intersex persons. While *NALSA* directed the Central and State Governments to provide reservations, it did not lay down the exact percentage of reservation. Shortly after *NALSA*, the Rights of Transgender Persons Bill, 2014 ("2014 Bill"), was introduced as a private member bill in the Rajya Sabha. This Bill provided that 2% of the total seats in Government and Government aided institutions of primary, secondary

and higher education and 2% of vacancies in every Government establishment are to be reserved for transgender persons.⁵² Thereafter, through the Ministry of Social Justice and Empowerment, the Central Government introduced the Transgender Persons (Protection of Rights) Bill, 2016 ("2016 Bill") in the Lok Sabha. The 2016 Bill, however, did not provide for any reservations in admission in educational institutions and public employment.

Some petitions were filed in different High Courts to implement the requirement for reservation as provided for in the *NALSA* decision. The Madras High Court in *Swapna v. Chief Secretary*⁵³ directed the State Government to provide a scheme for reservation for transgender persons within 6 months, but this is yet to be done. In a similar manner, the High Court of Uttarakhand, in *Rano and Ors. v. State of Uttarakhand and Ors.*,⁵⁴ directed the State Government to provide reservations in educational institutions and public employment. More recently, in July 2018, Kerala implemented an ad hoc system of reservations for transgender persons and announced 'two additional seats' for transgender persons in all courses in Universities and affiliated Arts and Science colleges, subject to fulfilment of the qualifications prescribed.⁵⁵ This is the first attempt by any State Government to provide for transgender reservations.

In this Brief, we do not propose a definite extent of reservation to be provided by the States or the Central Government. Such a proposal must rest on a detailed and nation-wide empirical assessment of the size of the transgender and intersex population in India. As we have proposed that the 'transgender' category be treated as a horizontal reservation, it will not breach the 50% limit set by the Supreme Court on the extent of vertical reservations.

REFERENCES

²² *NALSA* (n 1) [67].

²³ "Article 15 – Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth –

...

(4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

(5) Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30."

²⁴ Marc Galanter, 'Protective Discrimination' for Backward Classes in India' [1961] 3 Indian Law Institute 39, 47.

²⁵ "Article 16 - Equality of opportunity in matters of public employment –

...

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

..."

²⁶ 1992 Supp (3) SCC 217.

²⁷ *ibid* [268].

²⁸ The Supreme Court also noted that the term 'backward class' in Article 16(4), referring to social backwardness, is wider than 'socially and educationally backward classes' in Article 15(4) and in fact, Scheduled Castes and Scheduled Tribes indubitably fall within the term 'backward class of citizens' under Article 16(4).

²⁹ *Indra Sawhney* (n 26) [812].

³⁰ *Rajesh Kumar Daria v. Rajasthan Public Services Commission & Ors.* (2007) 8 SCC 785.

³¹ *Indra Sawhney* (n 26) [812].

³² (1995) 5 SCC 173.

³³ *Rajesh Kumar Daria* (n 30) [9].

³⁴ *Anil Kumar Gupta* (n 32) [15].

³⁵ Constitution of India 1950 art 16(1).

³⁶ *Indra Sawhney* (n 26) [860].

³⁷ *Rajesh Kumar Daria* (n 30) [7] - [9]; *Anil Kumar Gupta* (n 32).

³⁸ NALSA (n 1) [66].

³⁹ V. Venkatesan, 'Flawed Reading' (Frontline, 17 April 2015) <<https://frontline.thehindu.com/the-nation/flawed-reading/article7048598.ece>> accessed 10 December 2018.

⁴⁰ *ibid.*

⁴¹ Sakshi Parashar, 'Inclusion of Transgender Community within Socially and Educationally Backward Classes: Examining the Deeper Concerns' (2017) 2 ILI Law Review 105, 113.

⁴² The Supreme Court has, on more than one occasion, emphasised that the total reservations cannot exceed 50%. An additional vertical category of transgender persons would disturb the current structure of vertical reservation of Scheduled Castes, Scheduled Tribes and Other Backward Classes and may not result in fair or adequate representation for the transgender community.

⁴³ Shalini Nair, 'No quota provision under OBC in transgenders Bill' (Indian Express, 19 March 2018) <<http://indianexpress.com/article/india/no-quota-provision-under-obc-in-transgenders-bill-5102661/>> accessed 10 December 2018; Gee Imaan Semmalar, 'Gender Outlawed: The Supreme Court judgment on third gender and its implications' (Round Table India, 19 April 2014) <https://roundtableindia.co.in/index.php?option=com_content&view=article&id=7377:because-we-have-a-voice-too-the-supreme-court-judgment-on-third-gender-and-its-implications&catid=120:gender&Itemid=133> accessed 10 December 2018; Dutta, 'Contradictory Tendencies: The Supreme Court's NALSA Judgment on Transgender Recognition and Rights' (n 20) 234.

⁴⁴ Kaveri Karthik and Gee Ameena Suleiman, '(Trans)gender and caste lived experience – Transphobia as a form of Brahminism: An Interview of Living Smile Vidya' (Sanhati, 26 January 2013) <<http://sanhati.com/excerpted/6051/>> accessed 10 December 2018.

⁴⁵ Grace Banu, 'Where are the archives of our Dalit Trans foremothers and forefathers' (The Print, 29 April 2018) <<https://theprint.in/opinion/dalit-history-month/dalit-trans-resilience-is-a-fight-against-caste-and-patriarchy-though-we-are-missing-from-written-archives/53509/>> accessed 10 December 2018.

⁴⁶ Also see Shreya Atrey, 'Through the Looking Glass of Intersectionality: Making Sense of Indian Discrimination Jurisprudence under Article 15' (2016) 16 Equal Rights Review 160. Atrey discusses intersectionality jurisprudence in the context of Articles 15(4) and 16(4).

⁴⁷ Dutta, 'Contradictory Tendencies: The Supreme Court's NALSA Judgment on Transgender Recognition and Rights' (n 20) 234.

⁴⁸ *K Prithika Yashini v The Chairman, Tamil Nadu Uniformed Services Recruitment Board* (2015) 8 MLJ 734; *Ganga Kumari v State of Rajasthan & Ors* [13 November 2017] S.B. Civil Writ Petition No 14006/2017; *T.Thanasu v Secretary to the Government of Tamil Nadu* [3 July 2014] Writ Petition No 16539/2014. In *Sangeetha Hijra v State of Bihar* [5 July 2017] Civil Writ Jurisdiction Case No. 8164/2017, the High Court of Patna permitted a transgender person to contest elections under the category of 'woman'.

⁴⁹ (2014) 4 Mad LJ 12 as accessed on SCCOnline.

⁵⁰ *ibid* [40].

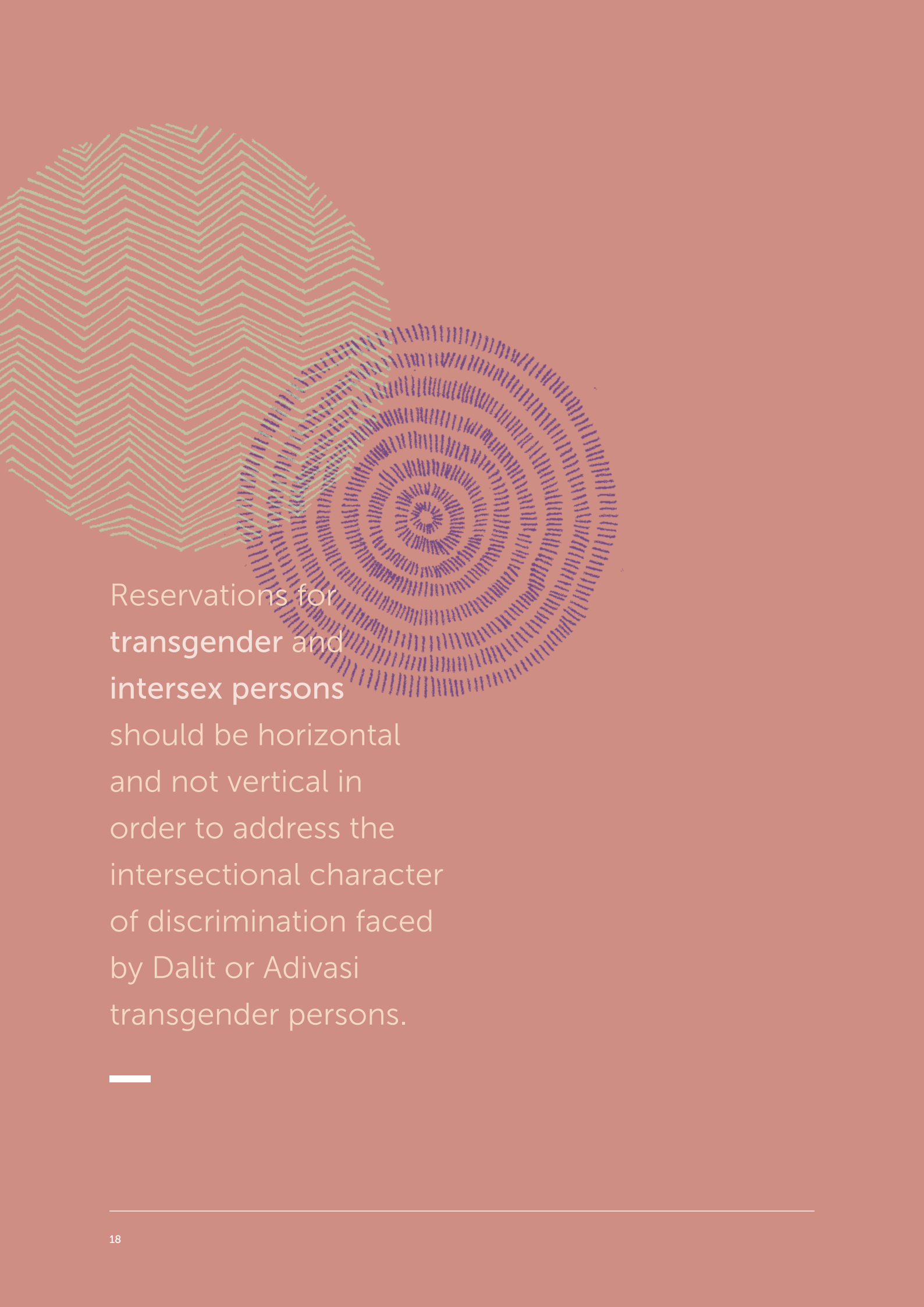
⁵¹ See n 48.

⁵² The Rights of Transgender Persons Bill 2014 s 21, 22.

⁵³ [5 July 2016] Writ Petition No. 31091/2013. The Madras High Court directed the Tamil Nadu Social Welfare Department to consider reservation for transgender persons, rather than providing for reservations under the 'Most Backward Classes' category.

⁵⁴ [28 September 2018] Writ Petition No. 1794/2018.

⁵⁵ Order 2018, G.O. (Ms) No. 153/2018/HEDN [3 July 2018].



Reservations for
**transgender and
intersex persons**
should be horizontal
and not vertical in
order to address the
intersectional character
of discrimination faced
by Dalit or Adivasi
transgender persons.

FOUR

Conclusion and Recommendations

In *NALSA*, the Supreme Court recognised that transgender persons are discriminated against and have been denied access to social, economic, political and cultural rights as well as special measures under Articles 15 and 16 of the Constitution and it directed the Central and State Governments to provide for reservations for transgender persons in educational institutions and public employment.

As the Supreme Court did not lay down the manner in which these reservations are to be implemented and the Central and State Governments are yet to act on this judicial direction, there is an urgent need to address this issue. This Policy Brief comprehensively reviews the central issues to be resolved before a policy on reservations may be implemented. Further, we propose the key steps to be taken so that a legally defensible and sustainable reservation policy that fully responds to the livelihood concerns of transgender and intersex persons is adopted. In this section, we focus on the legal form that these proposals should take - namely, the need for a Central legislation.

Reservation policies across India have been implemented in two modes. While caste based reservations have been implemented primarily through executive orders issued by the State and Central Governments, disability reservations have

been implemented through Central legislation. The history of disability reservation is instructive on the preferred approach for transgender reservation. Prior to 1996, a few State Governments had addressed disability discrimination and provided reservations, but the legal landscape was scattered and haphazard. The Central Government enacted the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995 which defined 'disabilities' and provided for 3% reservation in public employment across India. The Rights of Persons with Disabilities Act 2016 (RPD Act) now imposes an obligation on all States to reserve 4% posts for persons with disabilities in public employment. The PWD Act and RPD Act have together created a common approach for defining disability and ensuring significant social transformation through a minimum obligation to provide employment opportunities to persons with disabilities.

Currently, the status of law and policy to protect transgender and intersex persons resembles the state of disability law prior to 1996. Different States have adopted varied definitions of transgender persons and a wide range of institutional formats to identify them. Further, not all State policies provide for reservation for transgender and intersex persons in public employment or education. In order to ensure the adoption of inclusive definitions for transgender and intersex persons, non-invasive methods of identification and a method of reservation that responds to the intersectional experience of discrimination, we propose that the Central Government enact a single comprehensive legislation on reservation for transgender and intersex persons. Such legislation should bind both the Central and State Governments to adopt policy measures oriented towards ensuring that the community benefits in a sustainable manner over the long term.

In this Brief, we considered three critical implementation issues: who would be the beneficiaries of reservations, the legal basis for reservations and the form that reservations should take.

To enact a central legislation:

The proposed Central law should respond to these issues in the manner discussed in this Brief and summarized briefly below:

A) First, the statute should clearly define “transgender and intersex persons” building on the right to self-identification of gender identity and laying down a process of self-identification of gender identity, without any medical diagnosis or mental health assessment. The statute should discard physical and biological examinations which would encroach on the dignity and privacy of transgender persons.

B) Secondly, the statute should provide for the establishment of Committees or State Transgender Welfare Boards to issue identification cards based on the principle of self-identification. At least 50% of such Committees or Boards should be transgender and intersex persons. Further, these bodies must conduct periodic surveys and studies on the state of affairs of the transgender community and the extent to which reservation and supporting policies are improving their conditions.

C) Thirdly, the Statute should specifically provide for horizontal reservations for transgender and intersex persons in education and public employment either under the ‘transgender / gender identity’ or ‘woman’ categories. A horizontal compartmentalized approach would be sensitive to the intersectional experience of discrimination on the basis of gender identity and caste. Moreover, reservation under the ‘transgender/gender identity’ category should be accessible solely on the possession of an identity card.

D) Finally, the Statute must specify the extent of the reservation quota based on a time-bound nationwide empirical survey carried out by the Central Government. Such a survey must estimate the number of transgender persons and their current living and social conditions so that it forms a comprehensive basis for legal intervention in the near future.

The background features several decorative circular patterns. On the left, there is a large, intricate spiral pattern composed of many small, repeating geometric shapes. On the right, there is a large, solid-colored circle and a smaller, concentric circle pattern. The overall color palette is a range of earthy reds and oranges.

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