



POLICY BRIEF

RESERVATION FOR TRANSGENDER PERSONS IN INDIA

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I. INTRODUCTION

In April 2014, the Supreme Court of India formally recognised the rights of transgender persons in *NALSA v. Union of India*¹ (“NALSA”). The Court recognised the right to self-determination of one’s gender identity as male, female or transgender even without medical reassignment.²

It relied on the equality and anti-discrimination guarantees in Articles 14, 15, 16 and 19³ of the constitution for transgender persons. Article 15 of the Constitution, which furthers the equality guarantee, identifies ‘sex’ as a prohibited ground of discrimination. Article 15 places both a negative duty on the State not to discriminate on the basis of the identified protected characteristics and a positive duty to take steps for the advancement of certain classes of persons. Drawing on this mandate of Articles 15, the Supreme Court held that ‘sex’ includes ‘gender identity’ and therefore, discrimination on the basis of ‘gender identity’ would be included within the understanding of discrimination on the basis of sex. Further, it 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.

The Supreme Court also invoked Article 19(1)(a) to recognise ‘liberty’ and more specifically, the right of transgender persons to express themselves, irrespective of whether they have undergone medical procedures.⁴ It related the right to express one’s gender with dignity under Article 21 as an integral “*part of personal autonomy and self-expression*”⁵, once again observing that there exists both a negative duty on the State to abstain from unnecessary interference, as well as a

¹ *NALSA*, (2014) 5 SCC 438.

² *NALSA*, (2014) 5 SCC 438 at para 75; Dipika Jain, *Shifting Subjects of State Legibility: Gender Minorities and the Law in India*, 32 (1) *Berkley Journal of Gender, Law & Justice* 39, 48 (2017).

³ Article 14 applies to all “persons” while Articles 15, 16 and 19 recognise the fundamental rights of a “citizen”.

⁴ *NALSA*, (2014) 5 SCC 438 at para 76; for instance, sex-reassignment surgery

⁵ *NALSA*, (2014) 5 SCC 438 at para 68.

positive duty to provide for freedom, personal autonomy, self-determination and human dignity.⁶

The Supreme Court issued nine directions to the Centre and State Governments to crystallise the economic, social, cultural and political rights⁷ recognised in *NALSA* and provide a guide for protecting the rights of transgender persons. These directions ranged from recognising the right to self-identification of gender identity, operating HIV zero-surveillance centres to framing social welfare schemes for their betterment and increasing public awareness to integrate transgender persons into social life. Significantly, one of the directions is for: “...*the Centre and the State Governments to take steps to treat them 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 Supreme Court held that transgender persons are entitled to reservations in education and public employment as a socially and educationally backward class and directed the State to make provision for the same.

Shortly after the decision in *NALSA*, legislative action was initiated at the Central level. First in 2014, the Rights of Transgender Persons Bill, 2014 (“2014 Bill”), was introduced as a private member bill in the Rajya Sabha. This provided that 2% of the total seats in Government and Government aided institutions of primary, secondary and higher education as well as in every Government establishment are to be reserved for transgender persons. Thereafter the Central Government, through the Ministry of Social Justice and Empowerment, introduced the Transgender Persons (Protection of Rights) Bill, 2016 (“2016 Bill”) in the Lok Sabha. The 2016 Bill did not provide for any reservations in admission in educational institutions and public employment.

Prior to the introduction of the 2016 Bill, the National Commission for Backward Classes also recommended that transgender persons be treated as a socially and educationally backward class. Following this, in July 2018 Kerala

⁶ *NALSA*, (2014) 5 SCC 438 at para 69; Tarunabh Khaitan, *NALSA v Union of India: What Courts Say, What Courts Do* (Apr. 24, 2014), <https://ukconstitutionallaw.org/2014/04/24/tarunabh-khaitan-nalsa-v-union-of-india-what-courts-say-what-courts-do/> (Last visited on Jul. 1, 2018).

⁷ *NALSA*, (2014) 5 SCC 438 at para 60.

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. This was the first attempt by any state government to provide for transgender reservations.

While many cases relating to transgender persons in public employment have gone to the High Courts, they have been cases relating to transgender women seeking government jobs as women. In most of these cases, the High Courts have affirmed such job selections of candidates as women. In 2016, the High Court of Madras in a short order in a writ petition seeking implementation of reservations for transgender persons in Tamil Nadu, directed the Tamil Nadu Social Welfare Department to consider a percentage or post based reservation for transgender persons, rather than providing for reservations under the 'Most Backward Classes' category. It is not clear if this order has been implemented or not.

In this background, this policy brief aims to take this discussion forward with the objective of finding a comprehensive, functional and long-lasting solution to the issues that are likely to arise. In implementing reservations for transgender persons in admission in educational institutions and public employment, we confront three principal issues – identification of the beneficiaries of reservation, the legal basis for reservations and the appropriate form of reservations. In the following sections, we will discuss each of these issues in greater detail and set out a proposal for implementation of reservation for transgender persons in admission in educational institutions and public employment.

II. WHO ARE THE BENEFICIARIES?

A key aspect of implementing reservations is identifying and defining a stable group that is entitled to reservations. However, *NALSA* does not offer a clear picture of who can be categorised as 'transgender persons' who may access these reservations. Despite discussing a multitude of gender identities and while

upholding the right to self-determination of gender identity, in some part of the text of the judgement, *NALSA* refers to “*hijras and eunuchs*”. This is stated in in the first of the nine directives laid down by the Supreme Court. However, the second directive⁸ upheld the right of transgender persons to self-identify as male, female or third gender and directed the Central and State Governments to grant legal recognition of their gender identity.⁹

On a clarification sought by the Ministry of Social Justice and Empowerment on whether the term ‘transgender’ covers gay, lesbian and bisexual persons or is restricted only to those commonly known as “*hijras/eunuchs*”¹⁰, the Supreme Court held that this issue had been amply clarified in the judgment itself.¹¹

The issue of identification is relevant for reservations, which should be put in place. While *NALSA* guarantees the right to self-identification of one’s gender as male, female or transgender, it did not lay down a self-identification mechanism. This lack of clarity has opened doors for inconsistencies in practices among States with regard to self-identification. For instance, Chhattisgarh has established a Third Gender Welfare Board which is tasked with issuing identity cards, similar to 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.¹² On the other hand, in West Bengal, it has also been observed that in West Bengal, documentation of the sex reassignment surgery is required for publishing a change of gender in the Official Gazette, despite the directions in *NALSA* doing away with the need for SRS for self-identification of gender.¹³

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⁹ *NALSA*, (2014) 5 SCC 438 at para 129.

¹⁰ *NALSA*, Order dated 30 June 2016, para 2.

¹¹ *NALSA*, Order dated 30 June 2016.

¹² *Tritiya Ling Varg ke Vyektiyon ke Utthan ke Sambandh Mein*” (On the Empowerment of Third Gender Persons), Government of Chhattisgarh, 2014 (Oct. 10, 2014) as cited in Dutta, *supra* note 83 at 233; Empowerment of Individuals in Third Gender Community, SOCIAL WELFARE DEPARTMENT, GOVERNMENT OF CHHATTISGARH, <http://sw.cg.gov.in/en/empowerment-individuals-third-gender-community> (Last visited on Jun. 27, 2018).

¹³ *See* “*Tritiya Ling Varg ke Vyektiyon ke Utthan ke Sambandh Mein*” (On the Empowerment of Third Gender Persons), Government of Chhattisgarh, 2014 (Oct. 10, 2014) as cited in Dutta, *supra* note 83 at 233; Empowerment of Individuals in Third Gender Community, SOCIAL WELFARE DEPARTMENT, GOVERNMENT OF CHHATTISGARH, <http://sw.cg.gov.in/en/empowerment-individuals-third-gender-community> (Last visited on Jun. 27, 2018).

All these attempts have tended to entail the constitution of a board of medical officers, psychologists/psychiatrists, social welfare officers, government officials and members of the transgender community for issuing identity cards to transgender persons. In examining the experience and challenges of having identity cards issued to any community, such as in the case of persons with disabilities, where obtaining a disability card has been extremely difficult, bureaucratic and excluding, making reservations dependant on identity cards for transgender persons would not be recommended. In a self-identification framework, reservations cannot be limited and must extend to all transgender persons irrespective of whether they identify as male, female or any other gender based only on the possession of a transgender identity card issued by an authority established under a statute.

The issue of who will issue such transgender identification cards will be addressed in the next section on the legal basis for reservations.

III. LEGAL BASIS FOR RESERVATIONS FOR TRANSGENDER PERSONS: HOW SHOULD IT BE IMPLEMENTED?

Having considered who can access reservations in educational institutions and public employment, the next question is whether reservations should be implemented by the Union or the respective States through a legislative enactment or by an executive order. While the Union may provide for reservations in public employment for posts that are under its control, reservations in State posts fall entirely within the domain of the individual States.

The history of reservations on the basis of 'caste' in India reveals that reservations in educational institutions and public employment have traditionally been implemented by executive orders. However, we suggest that a central legislation recognising reservations for transgender persons must first be enacted, supported by executive actions as required. There are two compelling reasons for enacting a single central legislation providing for reservations for transgender

persons. *First*, a single legislation helps avoid widespread change and easy rollback of efforts and *second*, it similarly binds both the Union and the State Governments.

The merits of a comprehensive central statute which clearly defines the scope of the stable group entitled to reservation, and enumerates a minimum quota of reservations is evident from the experience of providing reservations for persons with disabilities.¹⁴ The Rights of Persons with Disabilities Act (RPD), 2016 imposes an obligation to all States to meet a minimum quota of 5% for persons with disabilities in public employment. Prior to the RPD Act there was the Persons with Disabilities Act 1996 which provided for 3% reservation of posts in public employment. Prior to the 1996 law only a few state policies had addressed reservations, which were not comprehensive in their definitions of disability. The PWD Act and RPD Act were crucial in bringing uniformity across the country by imposing obligations on all States to develop reservation policies and meet the minimum quota.

Reservations for transgender persons can also be implemented in this manner. The central statute should define “transgender persons”, recognise the right to self-identification of gender identity and fix the quota for reservation. This would ensure uniformity in action across the country and bring together the various State policies¹⁵ in favour of transgender persons have been drafted thus far. A statute providing for reservations for transgender persons may include the following:

- (i) Laying down a process of self-identification of gender identity, with or without medical reassignment.
- (ii) Giving a minimum percentage of seats that would be reserved in educational institutions and the percentage of posts reserved in public employment.

Such legislation would place the onus on the central government to develop a framework for transgender persons to self-identify themselves, thus making them eligible for reservations instead of haphazard and inconsistent practices across the country. It is likely that permitting States to frame their own processes of

¹⁴ As well as its precursor, the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995

¹⁵ State policies for the benefit of transgender persons have been framed in Karnataka, Kerala and Orissa to name a few.

identification may lead to some States placing more onerous conditions to be fulfilled to secure 'transgender' status and would restrict the right to self-identification of gender identity recognised in *NALSA*. The statute should uphold the right to self-identification, allowing transgender persons to identify as male, female or third gender and should discard physical and biological examinations which impede the dignity and privacy of transgender persons and are not required as per the *NALSA* judgement.

This would also give an opportunity to explore if the State Transgender Welfare Boards are useful, what their role would be and whether they should issue identification cards.

IV. FORM OF RESERVATIONS: A CASE FOR HORIZONTAL RESERVATIONS FOR TRANSGENDER PERSONS

The third issue for resolution is the form that reservations must take. The principal concern here is whether reservations ought to be implemented vertically on the basis of 'caste' where transgender persons are categorised as a 'socially and educationally backward class', or horizontally on the basis of 'gender identity' as an attribute of 'sex' under Articles 15 and 16. Associated questions that arise include the extent of quota to be provided, in light of the 50% limit on reservations laid down by the Supreme Court, and whether reservations for transgender persons should extend to promotions.

The basis for permitting special measures like reservations in educational institutions and matters of public employment can be found in Articles 15¹⁶ and 16¹⁷

¹⁶ "Article 15 – Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth –

(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

...

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

(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

of the Constitution. Article 15(4) allows for special measures to be framed for certain classes of citizens, such as in education, housing, local political appointments¹⁸ and Article 16(4) confines itself to reservations in public employment. Under both Articles 15(4) and 16(4), the State may also frame preferential policies such as fee waivers and age relaxations¹⁹ for the intended beneficiaries.

In addition to special provisions accorded to Scheduled Castes and Scheduled Tribes, Article 15(4) uses the phrase 'socially and educationally backward classes' (SEBCs) to cover additional classes of intended beneficiaries of such special measures, including reservations. Similarly, Article 16(4) uses the phrase 'backward classes' who are not adequately represented in the services under the State. In *Indra Sawhney v. Union of India*, the Supreme Court clarified that the State could adopt any suitable method to determine which persons would constitute a 'backward class' in the context of Article 16(4), which may be defined with reference to any protected characteristic such as caste, race and sex.²⁰

The criteria for identifying backward classes under Article 16(4) was also extended by the Supreme Court in *Indra Sawhney* to identify 'socially and educationally backward classes' under Article 15(4). Therefore, under Article 16 (4) and 15(4), groups can be identified for reservation and the criteria evolved for

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.”

¹⁷ “Article 16 - Equality of opportunity in matters of public employment –

(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

...

(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.

...”

¹⁸ Marc Galanter, “*Protective Discrimination*” for Backward Classes in India, 3 INDIAN LAW INSTITUTE, 39, 47 (1961).

¹⁹ *Id.* at 48.

²⁰ In *Triloki Nath & Anr v. State of Jammu and Kashmir & Ors*, AIR 1969 SC 1, the Supreme Court held that a “class” has been held to be a homogenous section of people grouped together because of certain likeness or common traits and who are identifiable by some common attributes such as status, rank, occupation, residence, race, religion etc. But for the purposes of Article 16(4), a test solely based on caste, community, religion, sex, descent, place of birth or residence cannot be adopted because it would directly offend the Constitution. In *Indra Sawhney* too, the court held that while ‘caste’ provides a good starting point to determine ‘backward class of citizens’, factors such as caste, race, sex, religion by themselves cannot be a basis for determination of backwardness.

determining backwardness²¹, include illiteracy, isolation, poverty, physical and mental degradation²² among others.²³ Since *Indra Sawhney*, the term ‘socially and educationally backward class’ has come to be determined on the basis of the Mandal formula for backwardness.

Based on the above criteria, there is little doubt that transgender persons in India are a socially and educationally backward class of citizens.²⁴ However, we must interrogate whether reservations for transgender persons ought be extended as a discrete ‘socially and educationally backward class’ in the form of vertical reservations or whether ‘gender identity’ as the axis of discrimination for horizontal reservations may be a better way to implement reservations.

(i) Vertical and Horizontal Reservations: A Primer

In *Indra Sawhney* the Court elaborated that there are two kinds of reservation methods that could be pursued by the State - vertical reservations and horizontal reservations. Reservations in favour of categories like Scheduled Castes, Scheduled Tribes 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 and such categories being “special reservations”, were horizontal categories and would cut across vertical reservations. In other words, a special reservation is provided within an existing category of social reservation.²⁵ This is also a form of recognising intersectionality within identities.

Horizontal reservations were related to Article 16(1) which guarantees “...equality of opportunity for all citizens (emphasis supplied) *in matters relating to employment or appointment to any office under the State*”. Therefore, the Supreme Court

²¹ which could be with reference to caste or religion (Refer back to previous para)

²² *Indra Sawhney v. Union of India*, (1992) Supp (3) SCC 217.

²³ 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).

²⁴ *NALSA*

²⁵ *Rajesh Kumar Daria v. Rajasthan Public Services Commission & Ors.*, (2007) 8 SCC 785.

held that while Article 16(4) is exhaustive on the subject of reservation for 'backward class of citizens' or vertical reservation, it may not be exhaustive for reservations for other classes could be provided under Article 16(1). 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). This SC or ST women would be placed in the horizontal category and would fall under the vertical category of SC or ST, thus providing reservation for intersecting identities.

The distinction between vertical and horizontal reservations drawn in *Indra Sawhney* was reiterated in *Anil Kumar Gupta v State of Uttar Pradesh & Ors*²⁶. 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*²⁷ that social reservations in favour of members of Scheduled Castes, Scheduled Tribes and Other Backward Classes ("OBC") under Article 16(4) are vertical reservations while special reservations in favour of women and persons with disabilities under Articles 16(1) and Article 15(3), respectively, are horizontal reservations. The delineation of this distinction between vertical and horizontal reservations, starting from *Indra Sawhney* till *Rajendra Kumar Daria*, is crucial in conceptualising and implementing reservations for transgender persons.

(ii) Why reservations for transgender persons should be horizontal

Earlier in Part 1, we noted that in *NALSA*, the Supreme Court recognised that 'sex', a protected characteristic under Articles 15 and 16 of the Constitution, was elaborated to include 'gender identity' and consequently, the protection against discrimination on the grounds of sex would extend to protection on the basis of gender identity as well. This would mean that sex based protections would extend to transgender persons.²⁸ Therefore, in the context of transgender persons, the primary axis of discrimination that concerned the Supreme Court was 'gender identity'.

At the same time, it directed the State to treat transgender persons as 'socially and educationally backward classes' of citizens. This would technically refer to a

²⁶ (1995) 5 SCC 173.

²⁷ *Rajesh Kumar Daria*, (2007) 8 SCC 785.

²⁸ *NALSA*, (2014) 5 SCC 438 at para 59.

category eligible for 'vertical reservation' along caste lines under Article 15(4)) and extend reservations in educational institutions and matters of public employment to them. The Supreme Court's repeated reliance on the term 'socially and educationally backward classes' in *NALSA* to integrate transgender persons into the constitutional scheme of reservations effectively replaced 'gender identity' with the vertical category of caste to reach the constitutional guarantees of equality.²⁹ Such a vertical reservation policy for transgender persons that recognises them as a separate 'socially and educationally backward class' would fail to address discrimination³⁰ that occurs at the intersections of gender and other identities such as caste. Categorising transgender persons as a 'socially and educationally backward class' assumes homogeneity in their social position, a concern which has been voiced by various sections of the community³¹. It would not address the discrimination faced by Dalit or Adivasi trans persons, because placing them in the vertical category would give them a separate status and would not enable them to be placed under the separate quotas for SC, ST or OBC. It would also mean that trans persons, on seeking reservations would have to in effect give up their caste identities and all the protections and benefits that are associated with such identities.

On the other hand, horizontal reservations on the basis of 'gender identity,' which would cut across the 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.³² It would ensure that transgender persons, particularly from SC and ST communities are not required to

²⁹ Dutta, *supra* note 83 at 234.

³⁰ The Supreme Court, in *Rameshbhai Dabhai Naika v State of Gujarat*, in the context of inter-caste marriages and a claim to reservation has recognised that a claim for reservation need not be determined purely on the basis of the inherited caste, but may also be determined on the basis of upbringing and lived experiences. In the context of transgender persons, it could be interpreted to mean that eligibility for reservations need not depend solely on a characteristic acquired at birth but may also be based on one that is acquired socially or over time.

³¹ Shalini Nair, No quota provision under OBC in transgenders Bill (Mar. 19, 2018), <http://indianexpress.com/article/india/no-quota-provision-under-obc-in-transgenders-bill-5102661/> (Last visited on Jun. 26, 2018); Gee Imaan Semmalar, Gender Outlawed: The Supreme Court judgment on third gender and its implications (Apr. 19, 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 (Last visited on Jun. 26, 2018).

³² Dutta, *supra* note 83 at 234.

give up their caste status while accessing reservations in educational institutions and public employment.

A separate vertical reservation category for transgender persons also ignores the social politics of caste that are at play within the transgender community. Dalit transgender persons have expressed concerns that they would be required to give up their SC / ST status for a separate OBC vertical category.³³ The founder of Trans Rights Now Collective, Grace Banu has argued that the concerns of people from Dalit or Adivasu as well as non-binary genders tend to be overlooked in the mainstream narratives around caste and gender identity.³⁴ Vertical reservations for transgender persons would also overlook the apprehensions of upper-caste transgender persons who do not want to be identified as 'OBCs'.

Perhaps the most serious consequence of creating a separate vertical category is that transgender persons from different caste backgrounds are placed in the same pool to compete for the same positions.³⁵ Transgender persons from upper-castes are placed at a higher position in society relative to Dalit transgender persons. As transgender rights activist Living Smile Vidya has noted, Dalit transgender persons face 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 structures³⁶ and face enhanced discrimination and exclusion.³⁷ Thus, in recognition of the structural disadvantages that transgender persons face due to the intersection of their non-normative gender identity and caste status, horizontal reservations coupled with preferential policies that facilitate waiver of fees, relaxation in age limits and qualifying criteria would be

³³ *Id.*

³⁴ Grace Banu, Where are the archives of our Dalit Trans foremothers and forefathers (Apr. 29, 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/> (Last visited on Jul. 1, 2018).

³⁵ The Supreme Court has on more than one occasion emphasised that the total reservations cannot increase 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.

³⁶ Interview with Living Smile Vidya, (Trans)gender and caste lived experience – Transphobia as a form of Brahminism (Jan. 26, 2013), <http://sanhati.com/excerpted/6051/> (Last visited on Jul. 1, 2018).

³⁷ Living Smile Vidya

more effective in creating the circumstances for transgender persons to enter the formal education system and public employment.

(iii) Reservations in promotion for transgender persons and allied issues

We consider two potential ambiguities that may arise in the context of horizontal reservations for transgender persons: (1) promotions in public employment; (2) qualifying conditions in examinations.

First, while the Constitution recognises reservations in public employment,³⁸ reservations in promotions were only permitted after prolonged litigation and constitutional amendments. At present, reservations in promotions may be extended only to those belonging to an SC and ST community.³⁹ Furthermore, while providing such reservations in promotion, the State is required to establish quantifiable data on inadequacy of representation of the group in the particular cadre or post, to justify the reservations.⁴⁰ Additionally, the State also must demonstrate that the reservations provided would not compromise efficiency in administration.

However, in the context of horizontal reservations, whether similar conditions of establishing backwardness and inadequacy in representation would apply is still debated as the Supreme Court is considering the question of reservations in promotions for persons with disabilities. On a similar rationale, if reservations for persons with disabilities is upheld, reservations in promotions for transgender persons would also be permissible under the existing constitutional scheme, which may also be clarified and specifically provided for in the central legislation suggested in Part 2.

Second, in the context of qualifying conditions in examinations for people with disabilities, the Supreme Court has held that horizontal reservation categories like disability are a class unto themselves which must be unaffected by any other reservations accorded on the basis of caste, class, religion etc.⁴¹ Consequently, all

³⁸ Article 16(4A), Constitution of India, 1950; Nagaraj v. Union of India, (2006) 8 SCC 212.

³⁹ A

⁴⁰ *Jarnail Singh & Ors. v. Lachhmi Narain Gupta & Ors.*, Special Leave Petition (C) No. 30621 of 2011 dated 26 September 2018.

⁴¹ *Union of India v. M. Selvakumar*, (2017) 3 SCC 504

candidates belonging to this category have to be treated on par and any relaxations afforded to such persons must be consistent. Similarly, relaxations in qualifying conditions for transgender persons should apply uniformly across the multitude of gender identities recognised by law and irrespective of their other identities.

Therefore, these judgements allow us to argue firstly, that horizontal reservations for transgender persons must not limit themselves to direct recruitment but also consider promotions and secondly, that qualifying conditions for admission into educational institutions or public employment must be uniform, where all gender identities are afforded the same relaxations, irrespective of any other special measures accorded on the basis of caste, class, religion etc.

The final aspect that requires engagement is the extent of quota of reservations for transgender persons. *First*, this policy brief does not provide a decisive quota, as any decision on the extent of reservations must be based on a detailed and nation-wide empirical exercise. *Second*, while the Supreme Court held in *Indra Sawhney* that reservations under the vertical category cannot exceed 50% of the posts in a cadre. a question of limit will not apply to horizontal reservations for transgender persons as they will be provided within existing vertical categories.

V. CONCLUSION AND RECOMMENDATIONS

Hence on the basis of the above elaboration, it is recommended that the Central Government enact legislation which:

- a. Provides a clear definition of “transgender persons” who have access to reservations across the country
- b. Implements reservations for transgender persons horizontally to account for intersections of gender identity with caste identity
- c. Specifies the percentage quota of reservation on the basis of empirical research carried out by a central governmental body
- d. Ensures transgender persons have the right to self-identification of gender identity and that a mechanism is provided for such self-identification which is not dependant on medical reassignment

- e. Self-Identification processes should discard physical or biological examinations in the screening processes, in accordance with the *NALSA* judgement