

INCLUSION OF TRANSGENDER COMMUNITY WITHIN SOCIALLY AND EDUCATIONALLY BACKWARD CLASSES: EXAMINING THE DEEPER CONCERNS

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Abstract

The landmark judgment of the Supreme Court in *NALSA v. Union of India* ushered in the recognition of various civil and political rights of the transgender community. The court *inter-alia* also directed the centre to treat transgenders as socially and educationally backward classes and provide them with the reservations available to OBCs in education, employment *etc.* The paper attempts to explore and assess this aspect of the judgment. The paper argues that placing transgenders within the purview of OBCs challenges the already existing jurisprudence of socially and educationally backward classes. Inclusion of transgenders within OBCs necessitates analytical examination of concepts of class, caste, gender and backwardness within the contours of the Constitution. The paper further scrutinises and interprets the judgment to extract a clear meaning or definition of ‘transgenders’ who are the beneficiaries of the reservation. This is essential considering the ambiguity prevailing in the entire judgment with respect to various notions/meanings of ‘transgender’. In addition, the paper also delves into the various social challenges to effective implementation of reservation from within and outside the transgender community. The paper concludes with some suggestions and a possible way forward keeping in mind the overall upliftment and social integration of the transgender people into the mainstream.

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I INTRODUCTION

THE TRANSGENDER community in India were an ignored segment of the society and faced deep and pervasive discrimination, despite protection under various provisions of the Constitution. In April, 2014, Supreme Court in its landmark judgment of *NALSA v. Union of India*¹ (hereinafter the *NALSA* judgment) ushered in the recognition of various civil and political rights of the transgender community. The genesis of this recognition lies in the acknowledgment of equal worth of every person and the right of choice given to an individual which is the inseparable part of human rights.²

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¹ (2014) 5 SCC 438.

² *Id.* para 84. Various International Human Rights instruments enshrine the right to equality and non-discrimination as core principles of human rights. See generally, United Nations Charter, art 6 of The Universal

The judgment was delivered by a division bench of the Supreme Court of India, comprising of K.S. Radhakrishnan J and Dr. A.K. Sikri J. The National Legal Services Authority (NALSA) had approached the court through a writ petition, on behalf of transgender community. Their primary argument was against the state enforced heteronormativity³ and recognition of only binary genders of male and female under Indian law. The petitioners sought for legal measures to cater to the needs of the transgender in tune with the various constitutional rights.

The court while drawing historical and cultural significance of transgender groups highlighted the trauma undergone by the members of this community. The judgment drew a distinction between the concept of sex and gender identity, which refers to an individual self-identification as a man, woman, transgender or other identified category. The court referred to various international efforts⁴ including the Yogyakarta principles⁵ and the fundamental rights provided under the part III of the Constitution of India, to afford recognition to the rights of the transgenders. The court held that *hijra*, eunuchs, *aravanis* and *thirunangi, kothi, jogtas/jogappas, shiv-shakthis etc.* in addition to binary be treated as third gender. The court also recognised transgenders right to self-determination. Apart from other significant directions, the court directed the state to treat transgenders as socially and educationally backward classes (hereinafter SEBCs) and extend all kinds of reservation as available to members of Other Backward Classes (hereinafter OBCs) category.

Reservation was seen as a positive step to counter the systemic discrimination faced by the members of this community and emancipate them from the stigma stemming from religious, social as well as cultural prejudice. The paper attempts to explore the theoretical as

Declaration of Human Rights (UDHR), art 16, 17 of the International Covenant on Civil and Political Rights, 1966 (ICCPR).

³ The term implies the presence of normative principles accepting or supporting only heterosexuality in social institutions. It is based on an assumption that all humans are heterosexual. The term was coined in 1991 by Michael Warner. See Jillian T. Weiss, "Heteronormativity" *International Encyclopaedia of the Social Sciences*, available at:

<http://www.encyclopedia.com/social-sciences/applied-and-social-sciences-magazines/heteronormativity> (last visited on Nov. 18, 2017).

⁴ Legislative efforts of various countries like United Kingdom, Australia, South Africa, Netherlands, Germany, Canada, Argentina *etc.* have been discussed.

⁵ The Yogyakarta Principles are the principles on the application of international human rights law in relation to sexual orientation and gender identity. The principles state that sexual orientation and gender identity are integral to every person's dignity and humanity and must not be the basis for discrimination or abuse, available at: http://data.unaids.org/pub/manual/2007/070517_yogyakarta_principles_en.pdf (last visited on Nov. 19, 2017).

well as the legal viability of inclusion of transgenders in the list of OBC. The paper is mainly argumentative in nature and argues that the reservation of transgender within the purview of OBC is deeply flawed at the constitutional level. Further the ambiguity throughout the judgment with respect to the beneficiaries of the judgment makes the implementation of OBC reservation extremely problematic and prone to several challenges.

In addition, the paper also delves into the various social challenges to effective implementation of reservation from within and outside the transgender community. The paper concludes providing suggestions and a possible way forward keeping in mind the overall upliftment and social integration of the transgenders into the mainstream.

II BACKWARDNESS: GENDER V. CLASS

As mentioned above, one of the prominent aspects of the judgment is inclusion of transgender within the purview of SEBCs or OBC. The court directed the state to take affirmative action in favour of transgenders so as to capacitate them and remedy the century old injustice done to them. Further, the court also directed the state to make provisions for reservation of transgenders to remedy the discrimination done against them in violation of article 16(2) of the Constitution.

This section of the paper puts forth two fundamental arguments. The first one explores the scope of Supreme Court's power to declare transgenders as socially and educationally backward class while the second one challenges the inclusion of transgenders in the SEBCs as being constitutionally unsound as well as problematic at the theoretical level itself.

While providing for reservation, the court in the *NALSA* judgment, observed as follows:⁶

[T]Gs have also not been afforded special provisions envisaged under Article 15(4) for the advancement of the socially and educationally backward classes (SEBC) of citizens, which they are, and hence legally entitled and eligible to get the benefits of SEBC. State is bound to take some affirmative action for their advancement so that the injustice done to them for centuries could be remedied.... TGs are

⁶ *Supra* note 1, para 60.

also entitled to reservation in the matter of appointment, as envisaged under Article 16(4) of the Constitution. State is bound to take affirmative action to give them due representation in public services. Articles 15(2) to (4) and Article 16(4) read with the Directive Principles.

The question that needs deliberation is whether it is within the scope of Supreme Court's constitutionally granted powers to declare a community as SEBCs. It cannot be denied that article 15(4) of the Constitution entrusts this power with the state. Time and again the same has also been emphasised by Supreme Court itself that backwardness can only be determined by the state. The Supreme Court in *M.R. Balaji v. State of Mysore*,⁷ very categorically stated that determination of backwardness is the function of state:⁸

[S]ociological, social and economic considerations come into play in solving the problem and evolving proper criteria for determining which classes are socially backward is obviously a very difficult task; it will need an elaborate investigation and collection of data and examining the said data in a rational and scientific way. That is the function of the State which purports to act under Art. 15(4).

Declaring transgenders as SEBCs without assessment and analysis of proper data not only goes against the spirit and intent of the Constitution⁹ but also the views of Supreme Court itself in many judgments.¹⁰ This argument however, remains purely theoretical as National Commission for Backward Classes (hereinafter NCBC) has, in fact, recommended the state to include 'transgenders' within the purview of SEBCs.¹¹

The second argument attempts to challenge the constitutional validity of inclusion of transgender within the purview of SEBCs. This contention is based on two main points. Firstly, OBCs are classes of people who are socially and educationally backward. Usage of

⁷ 1963 AIR SC 649.

⁸ *Id.* para 24.

⁹ See Jayant Lakshmikanth Aparajit, *Equality and Compensatory Discrimination under the Indian Constitution* (Dattsons, Nagpur, 1992). Dr. B.R. Ambedkar was of the view that the term 'backward classes' should be defined by the provincial governments, on the basis of their prevailing conditions.

¹⁰ *Nagraj v. Union of India*, AIR 2007 SC 71; *Suraj Bhan Meena v. State of Rajasthan* (2011) 1 SCC 467; *Rajesh Kumar v. State of Uttar Pradesh* (2012) 7 SCC 1.

¹¹ National Backward Class Commission, NCBC Advice No.1/AllIndia/2014 dated May 15, 2014.

‘class’ presupposes a homogenous group which is not the case with transgenders. Secondly, articles 15(4) and 16(4) of the Constitution are gender neutral and hence reservation, within the aforementioned articles primarily on the basis of gender, is constitutionally questionable. Presence of article 15(3) supports the said presupposition.

Taking note of the first point, at the outset it is stated that article 15(4) provides for special provision for the advancement of “socially and educationally backward classes”, meaning thereby that individuals should belong to a class and that class should be both socially and educationally backward.

The term ‘class’ is a pregnant one,¹² having heavy economic bearing and reflects relative economic relationships across individuals within a society.¹³ The main point of concern is whether group of individuals (including transgender/third gender) can be clubbed as a ‘class’ on the basis of gender alone. This is moot, considering class and gender are two separate yet overlapping concepts. Of course, an individual of a certain gender will definitely belong to some class, however it would be incorrect to say that all individuals of a certain gender would belong to the same class.

Moreover, one of the major requisites to qualify as a class is homogeneity on some aspect. Black’s Law Dictionary defines ‘class’ as “a group of persons or things, taken collectively, having certain qualities in common.”¹⁴ The protection and reservation is afforded to a class i.e. a homogeneous group.¹⁵ This point has been affirmed by the Supreme

¹² See Prabhat Patnaik, “Notes on the Concept of Class” 28 (9-10) *Social Scientist* 3-11 (Sep-Oct, 2000), the author considers class as primarily a Marxist concept and finds that central to the concept of class, is that it always defined with respect to the means of production or has deep economic relation. See also, R. J. Barry Jones (ed.), *Routledge Encyclopaedia of International Political Economy: Entries A-F* 161 (Routledge, London, 2001). It defines a social class, as in class society, is a set of subjectively defined concepts in the social sciences and political theory centered on models of social stratification in which people are grouped into a set of hierarchical social categories.

¹³See generally, Kathleen L McGinn and Eunsil Oh, “Gender, Social Class, and Women’s Employment” 18 *Current Opinion in Psychology* 84 (2017).

¹⁴ What is Class?, Black’s Law Dictionary, available at : <https://thelawdictionary.org/class/> (last visited on Nov. 14, 2017).

¹⁵ *E. V. Chinnaiah v. State of Andhra Pradesh*, AIR 2005 SC 162 ; *State of Andhra Pradesh v. P. Sagar*, 1968 SCR (3) 565.

Court in various landmark judgments. In *Triloki Nath v. State of Jammu & Kashmir*,¹⁶ the court very lucidly explained this by observing as follows:¹⁷

[I]n its ordinary connotation the expression ‘class’ means a homogeneous section of the People grouped together because of certain likenesses or common traits, and who are identifiable by some common attributes such as status, rank, occupation, residence in a locality, race, religion and the like.

Caste as the criteria for determining social and educational backwardness was accepted by the Supreme Court in *Indra Sawhney*,¹⁸ owing to the homogeneity, existing in the members of a caste.¹⁹ The extract from the judgment will explain it further:²⁰

[I]t is amply clear that a caste is nothing but a social class - a socially homogeneous class. It is also an occupational grouping, with this difference that its membership is hereditary. One is born into it. Its membership is involuntary. Even if one ceases to follow that occupation, still he remains and continues a member of that group. To repeat, it is a socially and occupationally homogenous class.

More recently, Supreme Court in *Ram Singh v. Union of India*,²¹ defined social class as “an identifiable section of society which may be internally homogeneous (based on caste or occupation).”²² Hence, homogeneity is a pre-requisite for a class and their social and educational backwardness is essential while declaring them as SEBCs.

The basis of inclusion of transgender community within the SEBCs by the court was to remedy the “injustice done to them for centuries” on the basis of gender. Hence, the court considers them as a class on the basis of gender (more specifically gender based discrimination). However, there is a lack of homogeneity even on the basis of ‘gender’,

¹⁶ (1969) 1 SCR 103,

¹⁷ *Id.* para 4, similar observations were made by Supreme Court in *State of Uttar Pradesh v. Pradip Tandon*, 1975 SCR (2) 761.

¹⁸ *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217.

¹⁹ The paper does not intend to go into the debate regarding caste as the primary criteria for determining SEBCs. The author only intends to draw her arguments based on the existing judicial and legal framework.

²⁰ *Supra* note 18, para 779.

²¹ (2015) 4 SCC 697.

²² *Id.* para 54.

within the transgender community making their inclusion within the SEBC extremely difficult and prone to several difficulties. As will be discussed in the next section of the paper, the term 'transgender' is an umbrella term and includes a spectrum of people who transgress gender norms. It has been pointed out, that the term is only an attempt to consolidate and provide an identity to gender non-conforming people within the purview of state and legal recognition.²³ It denotes a wide range of gender experience, subjectivities and presentation that fall beyond, across or between the category of man and women.²⁴ Paisley Currah, expresses that beneath the so-called umbrella term, exists substantial differences and incredible variation in the kind of identities, communities and practices and describes it as "gender galaxy" which contains endlessly proliferating subsets of very specific and historical located ways.²⁵

Scholars are united over the plurality in the forms of gender variants within the meaning of transgender and hence lack of homogeneity in this group makes them ineligible to be a 'class' and consequently ineligible to be a SEBCs and not entitled for reservation under OBCs under article 15(4) and 16(4) of the Constitution.

The second argument, which is intended to be put forward, is that gender as the basis of determining the social and educational backwardness is questionable within the framework of article 15(4) and 16(4) of the Constitution. Both the provisions are gender neutral and hence any reservation on the basis of gender within the purview of above provisions is contrary to the Constitution.

This argument can be substantiated by the presence of article 15(3) which provides for special provisions for women and children, clearly indicating that the sex or gender based affirmative action has to be treated differently and not within the purview of 15(4) and 16(4). In addition, various other provisions of the Constitution provide reservation for women separately, like reservation of one-third seats in Panchayats, Municipality etc.²⁶ These provisions within the Constitution attempt to counter the social discrimination faced by

²³ Aniruddha Dutta and Raina Roy, "Decolonizing Transgender in India: Some Reflections" 1(3) *Transgender Studies Quarterly* 320 (2014).

²⁴ Sally Hines and Tam Sanger (ed.), *Transgender Identities: Towards a Social Analysis of Gender Diversity* 1 (Routledge, New York, 2010).

²⁵ Paisley Currah, "Gender Pluralism under the transgender Umbrella" in Paisley Currah, Richard M. Juang (ed.), *Transgender Rights* 5 (Cleis Press, New Jersey, 2003)

²⁶ The Constitution of India, arts. 243 D (3) 243 D (4), 243 T (3), 243 T (4).

women on the basis of ‘gender’ for ages and not ‘class discrimination’. As mentioned above ‘class’ and ‘gender’ are two separate concepts and assuming that all individuals of a certain gender fall in a particular class is unacceptable. Hence, backwardness associated with gender has to be kept separate from the class backwardness arising out of social and educational reasons.

Supreme Court did clarify this aspect in *Rajesh Kumar Daria v. Rajasthan Public Service Commission*,²⁷ by stating that “special provision for women made under Article 15(3), in respect of employment, is a special reservation as contrasted from the social reservation under Article 16(4). The method of implementing special reservation is a horizontal reservation and cutting across vertical reservation.”²⁸ The difference between the two forms of reservation can be found in the concept of vertical and horizontal reservation. The Supreme Court in the *Indira Sawhney v. Union of India* clarified that the reservations in favour of Scheduled Castes, Scheduled Tribes and Other Backward Classes under article 15 (4) and 16(4) is vertical reservations whereas reservations in favour of physically handicapped under clause (1) of article 15 and 16 is horizontal reservations. Horizontal reservations cut across vertical reservations, this phenomenon is termed as ‘inter-locking reservations’.²⁹

The difference between the two forms of reservation in addition to the nature of the beneficiaries lies in implementation. This aspect has been discussed by the court in various landmark judgments.³⁰ Further, transgender, like physically disabled category may also be given reservation under articles 15(1) and 16(1), meaning thereby that they should be considered as horizontal category for the purpose of reservation. Eminent scholar Mohan Gopal agrees with the above argument and expresses that the Supreme Court in the *NALSA* judgment, “mixed up the cases of horizontal and vertical kinds of reservation and erred in

²⁷ (2007) 8 SCC 785.

²⁸ *Id.* at 790.

²⁹ *Supra* note 18, para 815.

³⁰ See also, *Anil Kumar Gupta v. State of U.P.* (1995) 5 SCC 173. The court observed in para 18:

The proper and correct course is to first fill up the open Competition quota (50%) on the basis of merit; then fill up each of the social reservation quotas, i.e., S.C., S.T. and B.C; the third step would be to find out how many candidates belonging to special reservations have been selected on the above basis. If the quota fixed for horizontal reservations is already satisfied - in case it is an overall horizontal reservation - no further question arises. But if it is not so satisfied, the requisite number of special reservation candidates shall have to be taken and adjusted/accommodated against their respective social reservation categories by deleting the corresponding number of candidates therefrom.

assuming both the reservation fall within article 15(4) and 16(4)". He, further states that Constitution justifies reservation for both kinds of groups i.e. historically discriminated on basis of caste within article 15(4) and 16(4) and physically handicapped and transgenders under art 15(1) and 16(1).³¹

Similarly, P.S. Krishnan also opined that like disabled persons, reservation for transgenders must be traced to Articles 15(1) and 16(1). He comments that "articles 15(4) and 16(4) pertain to what has continued for 'generations', as a result of the traditional social system. Transgender and disabled persons were not consequences of the caste system, and therefore they could not claim benefits from the kitty meant for OBCs".³²

The above discussion leads to the conclusion that inclusion of transgender within the purview of SEBCs is flawed. It not only goes against the spirit and provisions of the Constitution, but also against the previous pronouncements of the Supreme Court.

III MEANING OF 'TRANSGENDER': EXAMINING THE NALSA JUDGMENT

Knowing the beneficiaries of reservation is significant for its proper implementation. Hence, it is important to understand the meaning and definition of the term 'transgender', especially in the context propounded by the NALSA judgement. Generally speaking, the term transgender refers to people who deviate from social gender norms.³³ Typically, a transgender person is someone whose sense of gender is different from their physical characteristics or the sex assigned to him at the time of birth.³⁴

It is essentially a word of western origin and is now used as an umbrella term in the sense that it refers to all gender-variant people and includes many different identities.³⁵ A

³¹ V. Venkatesan, "Flawed reading" Frontline, available at: <http://www.frontline.in/the-nation/flawed-reading/article7048598.ece> (last visited on Nov. 20, 2017).

³² *Ibid.*

³³ Shilpa Khatri Babbar, "The Socio-Legal Exploitation of the Third Gender in India" 21(5) *IOSR Journal of Humanities and Social Science* 12-18 (May, 2016).

³⁴ Siddharth Narrain, "Crystallising Queer Politics – The Naz Foundation Case and Its Implications for India's Transgender Communities" 2 *NUJS Law Review* 455 (2009). A person may be a female-to-male transgender (FTM) in that he has a gender identity that is predominantly male, even though he was born with a female body. Similarly, a person may be a male-to-female transgender (MTF) in that she has a gender identity that is predominantly female, even though she was born with a male body or physical characteristics

³⁵ Jillian Todd Weiss, "Teaching Transgender Issues: Global Social Movements Based on Gender Identity" 358 *A Twenty-First Century Approach to Teaching Social Justice: Educating for Both Advocacy And Action* 27 (2009).

NACO Report considers the term ‘trans-gender’ as the symbolic representation of crossing the boundaries, and it has been derived from the two different languages; the Latin word ‘trans’ and the English word ‘gender’.³⁶ ‘Transgender’ has been defined as:³⁷

[A]n umbrella term that refers to all identities or practices that cross over, cut across, move between, or otherwise queer socially constructed sex/gender binaries. The term includes, but is not limited to, transexuality, heterosexual transvestism, gay drag, butch lesbianism and such non-european identities as the Native American berdache or the Indian Hijra.

A report prepared by the United Nations Development Program (UNDP) enunciates that the term transgender is wide enough to include pre-operative, post-operative and non-operative ‘transsexual’ people (who strongly identify with the gender opposite to their biological sex), male and female ‘cross-dressers’ and men and women, regardless of sexual orientation, whose appearance or characteristics are perceived to be gender-atypical.³⁸

In India, transgender people include *Hijra*, *Kinnar* (eunuchs), *shiv-shakti*, *jogappas*, *sakhi*, *Jogtas* and *Aradhis*. Scholars have expressed that in fact, there are many who do not belong to any of the groups but are transgenders persons individually. Transgender people may live full-or-part time in the gender role opposite to their biological sex.³⁹

However, many have frowned on the usage of the term ‘transgender’ in the Indian context, owing to its western origin which presumed existence of male-to-female and female-to-male binary, whereas some *hijras* prefer to be referred as third gender, and further because of the various other categories that fall under the umbrella term.⁴⁰ It has even been argued

³⁶ Laxmi T, Gauri S., *et. al.*, “Transgender- A Hijra strategy” *NACO* available at: http://naco.gov.in/sites/default/files/4.%20TG_paper_NACO%20shortversion.pdf (last visited on Nov. 20, 2017).

³⁷ Susan Stryker, “The Transgender Issue: An Introduction,” 4(2) *GLQ: A Journal of Lesbian and Gay Studies* 149 (1998).

³⁸ United Nations Development Programme, *Hijras/Transgender Women In India: HIV, Human Rights And Social Exclusion*, India, (Dec. 2010), available at: http://www.undp.org/content/dam/india/docs/hijras_transgender_in_india_hiv_human_rights_and_social_exclusion.pdf (last visited on Nov. 20, 2017).

³⁹ Rekha Pande, “Being Eunuch, the violence faced by Hijra's involved in sex work- A case study” in Asmita Bhattacharyya, Sudeep Basu (ed.), *Marginalities in India: Themes and Perspectives* 210 (Springer, Singapore, 2017).

⁴⁰ Shabeena Francis Saveri, *History identity and politics: Aravani movement in the state of Tamil Nadu, India* 2013 (Unpublished Ph.D. Dissertation, Tata Institute of Social Sciences).

that usage of transgender as an umbrella expression by state, NGOs *etc.* tends to overshadow the local or Indian practices of gender/sexual variance, often without interrogating the conceptual baggage associated with the transgender category.⁴¹ Even the UNDP Report suggests that the umbrella term transgender hides the complexity and diversity of various subgroups of gender-variant in India, further it swathes the long cultural and traditional history of *hijras*.⁴² Hence, *hijras*, eunuchs, *etc.* are included within the wider term 'transgender'.

Germane to this discussion is the need to understand the usage of the term transgender and *hijra*, eunuchs *etc.* by the Supreme Court in *NALSA* judgement. Whether the judgment takes into consideration the wider concept of transgender or restricts specifically to *hijras*, eunuchs *etc.*? Perplexity arises with the inconsistency in the usage of both terms, i.e., at some places in the judgment, transgender and *hijra* are synonymously used implying that only *hijras*, eunuchs *etc.* are to be considered as transgender, whereas, at other places transgender is used as an umbrella term including *hijras* and other categories as well. This inconsistency is apparent throughout the judgment, which makes it extremely difficult to conceive the targeted beneficiaries of the judgment.

Let us first peruse those parts of the judgment where transgender has been given a wider connotation. Para 11 of the judgment clearly expresses that *hijras* are 'included' as one of the categories within the transgenders. Further, there are other parts of the judgment where the term transgender is used generally and is not qualified with the usage of *hijra* or eunuchs, leading to the perception that the judgment focuses on transgenders in general. Say for instance, paras 49 and 53 of the judgment, which talk about need of recognition of rights of transgenders in line with the international conventions, and fundamental rights guaranteed under the Indian Constitution, depict transgender as a wider term, without any reference to *hijra*, eunuch *etc.*

Most importantly, para 60 which declares transgender as socially and educationally backward and legally entitled to reservation under articles 15(4) and 16(4), also mentions the term 'transgender' (and does not specify *hijra etc.*), in a wider undertone. Even the directions given under para 129 of the judgment reflect the same. The first direction relates only to the

⁴¹ *Supra* note 23.

⁴² *Supra* note 38.

hijra, eunuchs *etc.* (pertaining to their right to be treated as third gender), the second direction pertains to transgenders (right to self-identification of gender) and the third direction which provides for reservation uses the term ‘them’, meaning thereby, that the benefits of reservation are directed towards transgender in general, including but not restricted to *hijra*, eunuchs *etc.*⁴³

However, at other places in the judgment, continuous usage of ‘*hijra/transgender*’ makes one interpret the term transgender in a manner which limits its understanding to *hijras*, *etc.*, and not the other gender variant identities.⁴⁴ Para 12 of the judgment substantiates the above perception, it states that “TG Community comprises of...”. Usage of the term ‘comprise’ is suggestive of an exclusivity in the meaning of transgenders in the Indian scenario.⁴⁵ Additionally, on the same lines, para 44 of the judgment restricts the Indian transgender identities and cultures to *hijras*, eunuchs, *aravanis and thirunangi, kothi, jogtas/jogappas, shiv-shakthis*. Further, in para 109 of the judgment, A.K. Sikri J, very categorically states as follows:

[W]e make it clear at the outset that when we discuss about the question of conferring distinct identity, we are restrictive in our meaning which has to be given to *TG community i.e. hijra etc.*, as explained above. (emphasis mine)

There are severe flaws and the ambiguities of the judgment, especially when it comes to defining the beneficiaries of the judgment. Even if we consider that ‘transgenders’ in general are entitled to reservation as OBC (as per court’s direction in para 129), the restrictive meaning of transgender at other places in the judgment makes it highly questionable. What can be understood is that the judgment definitely applies to *hijras* and people with intersex variations but applicability of the judgment for other transgenders is a matter that requires clarification.⁴⁶

⁴³ *Supra* note 1, para 129:

(3) We direct 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.

⁴⁴ *Id.*, see para 45 and 46.

⁴⁵ *Id.*, see para 108.

⁴⁶ Gee Imaan Semmalar, “Gender Outlawed: The Supreme Court Judgment on Third Gender and its

Clearly, this depicts an inconsistency running through the entire judgment with respect to clear meaning and connotation of the term transgender, which is of utmost importance especially when it comes to identifying the beneficiary of OBC reservation within the transgender community. However, a broader understanding of the judgment does lead us to believe that *hijras etc* are the focus of the judgment, which is further, stressed by the restrictions placed by Sikri J, who leaves gay, lesbians, bisexuals outside the purview of the term transgender.⁴⁷ The same has been reaffirmed by the Supreme Court in a clarification sought by the Central Government.⁴⁸

This has been criticised for it leads to a strict and “a rigid distinction between LGB and T may therefore arbitrarily split overlapping community spectrums.”⁴⁹ Another drawback with the restrictive meaning is that it potentially leaves ‘female to male’ transgender category outside its purview, for *hijra etc* are primarily ‘male to female’⁵⁰ transgender. Satya, a transgender, calls the judgment as incomplete and criticises it for ignoring the non-traditional transgender community.⁵¹

Even if the reservation is provided to transgenders within article 15(1) and 16(1) of the Constitution as horizontal reservation, identifying the beneficiaries is of utmost importance. The ambiguous meaning of transgender within the judgment creates a distinction between *hijra etc.* and other non-traditional transgender persons. Such distinction is arbitrary and omits other gender variants who face equal, if not more, discrimination in the social set up and are deprived of the benefits of reservation, without any intelligible differentia.

Implications”, *Roundtable India*, Apr. 19, 2014, available at: 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&Itemid=133 (last visited on Nov. 21, 2017).

⁴⁷ *Supra note 1*, para 107

⁴⁸ “Gays, lesbians, bisexuals are not third gender: SC” *The Hindu*, July 1, 2016, available at: <http://www.thehindu.com/news/national/Gays-lesbians-bisexuals-are-not-third-gender-SC/article14463873.ece> (last visited on Nov. 21, 2017).

⁴⁹ Aniruddha Dutta, “Contradictory Tendencies: The Supreme Court’s NALSA Judgment on Transgender Recognition and Rights” 5 *Journal of Indian Law and Society* 225(2014).

⁵⁰ Anitha Chettiar, “Problems Faced by Hijras (Male to Female Transgenders) in Mumbai with Reference to Their Health and Harassment by the Police” 5(9) *International Journal of Social Science and Humanity* 752 (Sep., 2015).

⁵¹ Satya, “Lounge Opinion: Why the transgender verdict is an incomplete one”, available at: <http://www.livemint.com/Leisure/Nv9Azw4bFA30CGbyCWSXUJ/LOUNGE-OPINION-Why-the-transgender-verdict-is-an-incomplete.html> (last visited on Nov. 21, 2017).

Another predicament with the judgment is the absence of clarity on understanding of *hijras*. For instance in para 11, the court describes them as “not men by virtue of their anatomy and appearance....”, whereas in para 44 they are referred to as “biological males who reject their masculine identity in due course of time to identify either as women, not-men or in-between man and woman..” Further, para 82(1) suggests that transgender or *hijra* persons are born with bodies which incorporate both or certain aspects of both male or female physiology. Satya, further expresses discontent over the expression “genital anatomy problem”⁵² used by the court and states that if this is “what establishes transgender persons as different from male and female, then this judgement has failed to challenge the very foundational ideas of gender.”⁵³

Hence, the above discussion allows us to conclude that the judgment is largely ambiguous about the beneficiaries of the reservation. It definitely extends to the *hijra etc.* community, but for other transgender it is a matter of uncertainty. Without commenting on the viability or validity of such reservation, it is argued that such a distinction is baseless and goes against the spirit of various provisions of the Constitution.

IV RESERVATION OF TRANSGENDER AS OBC: ISSUES AND CHALLENGES

In the three years that have passed since impetus was provided to the debate on transgender and their reservation in the *NALSA* judgment on April 15, 2014, the issue has been subject to both appreciation and criticism. The recent clarification sought by the Central Government exposes the ambiguity which prevails in the judgment and has also served as a ground for delay in further action. The issues intertwined with the reservation for transgender are itself numerous. Legislative, theoretical, legal as well as practical difficulties surround the contention of providing reservation to transgenders as OBCs.

The legislative attempt towards providing reservation to transgender has fallen short due to the absence of any provision pertaining to reservation in the Transgender Persons (Protection of Rights) Bill, 2016, introduced by Minister for Social Justice and Empowerment. The absence of provisions pertaining to reservation is despite the

⁵² *Supra* note 1, para 82 (1). It read as follows:

It may also happen that though a person is born as a male, because of some genital anatomy problems his innate perception may be that of a female and all his actions would be female oriented.

⁵³ *Supra* note 51.

recommendation of NCBC for inclusion of transgenders in the central list of OBCs.⁵⁴ The stand of the centre on the reservation aspect appears indeterminate owing to the staunch opposition from the OBC groups fearing reduction in the size of their existing piece of the metaphorical pie.⁵⁵ It is pertinent to note that, prior to the 2016 Bill, The Rights of Transgender Persons Bill was introduced in the Rajya Sabha in 2014 which incorporated the provisions pertaining to reservation and provided for 2% horizontal reservation for transgender persons in admission and appointments.⁵⁶ However, the 2014 Bill was never debated in the Lok Sabha.⁵⁷

The 2016 Bill is not free from ambiguities and raises various questions, not just pertaining to reservation, but also with regard to defining the beneficiaries of the reservation *i.e.*, transgenders. The Bill defines transgender more in terms of biology than psychology.⁵⁸ This seems to reflect the carry forward of the restrictive interpretation in the *NALSA* judgment at places. The Parliamentary Standing Committee on Social Justice and Empowerment chaired by Ramesh Bais, in the 43rd Report has stated that the definition of transgender is “unscientific and primitive and based on biological attributes”.⁵⁹ Further, it fails to recognise that many persons are born with ambiguous or typical sexual organs, whether external or internal, and identify themselves as male, female or transgender. Hence, the bill conflates gender, which is a societal construct, with biological sex in contrast to the expansive definition provided in para 11 of the judgment.⁶⁰

⁵⁴ *Supra* note 10.

⁵⁵ Shalini Nair, “Transgender Bill has no provision for quota in jobs, education” *The Indian Express* Aug. 5, 2016, available at: <http://indianexpress.com/article/india/india-news-india/transgender-bill-has-no-provision-for-quota-in-jobs-education-2954328/> (last visited on Nov. 27, 2017).

⁵⁶ The Rights of Transgender Person Bill, 2014, available at: <http://164.100.47.4/BillsTexts/RSBillTexts/asintroduced/trangder-E.pdf> (last visited on Dec.12, 2017).

⁵⁷ Rohan Abraham, “All you need to know about the Transgender Persons Bill, 2016” *The Hindu*, Nov. 20, 2017, available at: <http://www.thehindu.com/news/national/all-you-need-to-know-about-the-transgender-persons-bill-2016/article21226710.ece> (last visited on Dec 9, 2017).

⁵⁸ Section 2(i) of the Bill provides:

- (i) 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.

⁵⁹ 43rd Report of The Parliamentary Standing Committee on Social Justice And Empowerment. See para 1.21

⁶⁰ Divya Trivedi, “A flawed bill” *The Frontline*, Nov.11, 2016, available at: <http://www.frontline.in/social-issues/a-flawed-bill/article9266479.ece> (Last visited on Nov. 28, 2017).

Further, the definition of transgender in the Bill leaves out persons who cross-dress or who undergo sex reassignment surgery, even though the *NALSA* judgment (in para 11) considers them as transgender.⁶¹ Thus, the question remains, whether males/females that undergo sex reassignment surgery or those who occasionally cross dress be included as a transgender and entitled to reservation as OBC?

Before taking a decisive stand on the issue of reservation for transgenders as OBCs, we need to take into consideration the social and economic background that surrounds the issue. It would not be too far-fetched to raise the question that ‘what happens if a person undergoes sex reassignment surgery or cross dresses to take economic benefit of the reservation in jobs?’⁶² Would such person still get the benefit of reservation? In addition, reservation for transgenders in public posts like police, army, military⁶³ etc. which prohibit their appointment by policy or on medical grounds, becomes a conundrum of utmost significance. This is especially relevant in light of the recent case, where the Indian Navy terminated the services of a transgender sailor after he underwent a sex reassignment surgery.⁶⁴

Another aspect which requires attention is the applicability of creamy layer to transgenders once they are provided reservation as OBC. The apex court in the *NALSA* judgment employed reservation as a means to remedy the century old injustice against transgender. Hence, economic considerations ought not to play any role with respect to the discrimination faced by the transgenders. However, inclusion of transgenders within OBCs will necessarily require applicability of the creamy layer concept, which in-turn will nullify the object sought to be achieved by the Supreme Court in the *NALSA* judgment.

⁶¹ *Supra* note 1, para. 11.

⁶² This aspect is reflected in a recent case before the Delhi District Court (Rohini), *State v. Bobby Kinner* (Session Case No. 63/2014, decided on Dec. 20, 2014). In the said case a natural born male filed complaint against a group of Eunuchs/ *Hijras* alleging that he had been castrated by them by conspiracy. Since the complainant had himself gotten his male organ removed to get the benefits of the badhai ceremony, the court rejected his complaint and observed that immediate steps need to be taken to bring this marginalized gender (Transgenders) within the main stream of the society so that they are not treated as out-castes.

⁶³ Julie H. Davis and Helene Cooper, “Trump says transgender people will not be allowed in the military” *The New York Times*, July 26, 2017, available at: <https://www.nytimes.com/2017/07/26/us/politics/trump-transgender-military.html> (last visited on Nov. 26, 2017).

⁶⁴ Nivedita Ganguly, “Sailor sacked for sex change says she will move court” *The Hindu*, Oct. 11, 2017, available at: <http://www.thehindu.com/todays-paper/tp-national/tp-andhrapradesh/sacked-sailor-plans-to-move-court/article19836204.ece> (last visited on Dec. 12, 2017).

Moreover, some have pointed out that *dalit* transgender persons do not want to come under the OBC category, as they will lose out on the benefits granted to SC/ST categories.⁶⁵ Similarly, it has been pointed out that some upper caste transgenders and *hijra* leaders do not wish to be categorized as OBCs.⁶⁶

The urgency of the clarity on the issue is highlighted by the petitions filed before some high courts to provide OBC reservation to transgender after the NALSA judgment. In *Aslam Pasha Urf Chandini v. State of Karnataka*,⁶⁷ as well as *Swapna v. The Chief Secretary*,⁶⁸ the petitioners, who belonged to the third gender requested the court to issue a direction to the respective state governments to provide reservation to the transgenders by issuing a writ of mandamus. The courts, however, dismissed the petitions stating that the matter has been decided by Supreme Court, and held that the petitioners were seeking an administrative action rather than judicial interpretation which could only be provided by the Legislature.

In light of the above discussion, it can be said that before granting reservation to transgenders the government needs to fill several gaps relating to the ‘class’ and ‘gender’ debate. Hence, there are multiple options that can be explored and both Central and state governments need to deliberate effectively before arriving at any schema of reservation or affirmative action.⁶⁹

V WAY FORWARD: CONCLUSION

Transgender persons are continuously facing multiple forms of social discrimination and oppression in the country. Discrimination is so wide and pronounced even in basic necessities like healthcare, employment and education, that it makes their social inclusion a daunting task. It is the need of the hour, that step be taken to remedy the deplorable situation and advance social inclusion for the members of this community through strong legal as well as social angles.

⁶⁵ *Supra* note 46.

⁶⁶ *Supra* note 49 at 236.

⁶⁷ Writ Petition No. 11610 of 2013 (S-RES/PIL), Karnataka High Court, decided on July 18, 2014.

⁶⁸ Writ Petition No. 31091 of 2013, Madras High Court, decided on July 5, 2016.

⁶⁹ *Supra* note 49 at 236.

NALSA judgment can be considered as a good step in the direction towards recognition of the rights of the transgenders and their right of self-determination. However, the challenges lie deep within the judgment. The major challenge is the inclusion of transgenders within the ambit of the OBCs entitling them for reservation in education and appointment. As the paper argues, this is contrary to the provisions of the Constitution. Transgender, being an umbrella term, includes gender variant categories, making it non-homogenous and hence, impossible to be covered under the meaning of 'class' which is backward. Moreover, reservation on the basis of gender is outside the purview of article 15(4) and 16(4). Hence, horizontal reservation can be provided to transgenders within art 15(1) and 16(1) like that of physically disabled persons and women.

Moreover, it is submitted that inclusion of transgenders within the OBC category may bear trappings of amelioration, yet actually, leave them without any actual benefit considering the extremely competitive scenario. Further, the paper apprehends that reservation may ensure minimum representation of transgender in educational institutions and public offices, however, the social stigma and discrimination may continue to affect them despite such measures, being moored in the psyche of the populace. The question as to how this can be tackled heralds different debate altogether involving stakeholders from different cross-sections of India's diverse socio-legal/socio-economic milieu.

The paper further suggests that identifying the beneficiaries of such measures and reservation policies is crucial to the social inclusion of transgender community. The ambiguity with regard to the applicability of the reservation only to *hijras* or transgender as a whole, needs to be addressed. Exclusion of gay, lesbian and bisexual from the meaning of transgenders by the court overlooks the distinct yet overlapping categories within the transgender community. Even the definition of transgender in the bill is unsatisfactory. Hence, considering the various forms and categories of transgenders, a comprehensive study needs to be undertaken for assessing the potential beneficiaries. Another aspect which needs to be kept in mind is that law should provide benefits even to those transgenders who refuse

to openly identify themselves or become a part of any community owing to social discrimination.⁷⁰

Further, the state needs to take positive steps to ensure that transgenders do not drop out of school at an early stage due to the social harassment as is the case in many places. Awareness programs and sensitisation of transgenders as well as the members of the society needs to be carried out in order to ensure their social inclusion. The process of social inclusion of transgenders is definitely going to be a gradual process, which requires co-operation at the level of state, society and individuals. What is required is that calculated steps are taken in the right direction to ensure that the laws and policies act as a catalyst in their development and not create hindrance for them in future.

⁷⁰ “Transgender facing social, familial ostracism: survey” *The Hindu*, Aug. 2, 2017, available at: <http://www.thehindu.com/news/national/kerala/transgender-facing-socialfamilial-ostracism-survey/article19409328.ece> (last visited on Nov. 28, 2017).