

# “TRANS” EQUALITY OF OPPORTUNITY: TAPPING THE AFFIRMING FABRIC OF THE CONSTITUTION



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## Abstract

*UN Sustainable Goal number five emphasize on gender equality as a goal which nations must be destined to achieve. It envelopes the entirety of gender complexations while placing special stress on women and girls. The national Constitutions in democracies make equality as a strong pillar of society. Equality for all is an ideal that the Indian Constitution strives to deliver. The equality true to the color of India transforms into several mutations to ensure equality in form and substance. Affirmative actions in the nature of reservation is a powerful tool to ensure participation and representation of vulnerable groups. The aim of the paper is to establish an argument favouring reservation for transgender community. It is constructed with the assistance SDG, social position of transgender, and the logic of reservation. The paper is trailed on the similar lines. On an overall analysis conclusion is drawn in the nature of suggestions for pushing the equality to newer meaning.*

## Keywords

Transgender, Equality, SDG, Reservation, Constitution

## 1. Preface: Equality, SDG, and The Indian Constitution

The democratic world order has imbibed equality as an evolving hydra which mutates in different settings varyingly. There is common cutting force of progression in the before stated variation (linear or exponential) on a macro assessment of society's survival from then to now. Piketty (2022) makes a loose yet pertinent and well noticed observation, the word order of 2020s is



more egalitarian than that of 1950s or 1900s<sup>1</sup>. Any static definition or theorem of equality would not allow changes in the society. Being acutely aware of it, United Nations General Assembly adopted 17 Sustainable Development Goals (“SDG”) which points to the direction on which nations should move<sup>2</sup>. The goals are a way to ensure humanitarian existence via protection of human rights. One such goal is to “Achieve gender equality and empower all women and girls<sup>3</sup>. The goal not only takes cognizance of the social position of women across the globe as indicated in its latter part, but remains conscious of the other vulnerable groups also which can be gleaned from the general umbrella of “gender equality”. The sub-text of the SDGs is to leave no one behind<sup>4</sup>.

The Indian Constitution captures a vision of transformative and substantive vision of equality. It does not simply treat everyone uniformly, rather it factors into social standing and circumstances of persons to achieve equality meaningfully. There are several tools in India’s constitutional arsenal such as rational classification, special protection of women and children, reservation to backward classes and so on. Can a Constitution like ours promise a vicious cycle of exclusion and non-representation of a particular vulnerable group, given the fact and law reservation for the backward classes is an option? If it’s a promise to keep, is the legal apparatus accommodating it? When one soberly considers these questions *qua* transgender community, one finds almost absolute absence of transgender community in various walks of life. Should the Constitution respond? Answering the question involves a prior searching of preliminary questions. What is the social standing of transgender? Can reservational equality be extended to them? The aim of the paper is to answer these questions and attempt to curate a constitutional response to the issue of transgender equality. For the response to be coherent, the paper is divided in the following three parts. The second part lays down the social reality of the transgender community (“TC”). Building on that the third part would see the flexibility in the concept of reservation to accommodate the nature of reservation as mooted in the paper. The last would be a wrap with certain reflections and suggestions in the light of the SDG 5 to the extent it touches on gender equality.

Before entering the core arguments of the paper a brief background to the broad concept of equality under the Indian Constitution is mandated to better

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<sup>1</sup>Piketty, T, “A Brief History of Equality” Harvard University Press eBooks(2022).

<sup>2</sup>“The 17 Goals” Sustainable Development. (N.D.). <https://Sdgs.un.org/Goals..>

<sup>3</sup>Goal 5, Department of Economic and Social Affairs.” <https://Sdgs.un.org/Goals/Goal5.>

<sup>4</sup>“Leave No One Behind” <https://Unsdg.un.org/2030-Agenda/Universal-Values/Leave-No-One-Behind>



appreciate what is to follow. The Constitution has engrafted the equality code in Articles 14 to 18, the normative wiring of which permeates the entire Constitution<sup>5</sup>. Article 14 generally guarantees equality before law and equal protection of laws to all persons within the Indian territory. Article 15 is still general and serves as a framework for prohibition of discriminatory treatment by state against its citizens and has provisions for positive discrimination. Article 16 is dedicated to equality in public employment factoring in special representation for backward class of citizens. Articles 17 and 18 prohibit untouchability including its practice in any form, and abolishes conferment of titles barring military and academic respectively.

The Constitution espouses substantively equality provisions. In *Nitisha (2021)*, the Supreme Court adopted Sandra Fredman's four dimensional conception of substantive equality<sup>6</sup>. First, redistributive dimension to break the cycle of disadvantage. Second, recognition to redress the stigma, stereotyping, and humiliation. Third, transformative dimension to accommodate changes for structural change. Last, participation dimension that entails full participation of the disadvantaged group in the society. The approach suggests to take stock of the realities before administering equality. The focus of substantive equality is on the impact of the law. The substantive approach is followed after a long employment of formal approach to equality which emphasizes sameness in treatment<sup>7</sup>. By that understanding, equality is 'trans'-transformative and transcendental.

In *Navtej Singh (2019)*, the Supreme Court detested the practice of stereotyping of any kind and made explained that it fails the test of equality.<sup>8</sup> It denies full participation of certain marginalized sections of the society. Considering the brief of equality provisions one needs to consider the position of the TC in India. It is to be noted that the Indian Constitution is in sync with the SDGs in so far it attempts that no one should be left behind.

## **2. Social Position of the Transgender in India**

The SDGs promise to achieve gender equality. One of the many genders is transgender and the scope and range of TC rights are hotly debated issue especially with regard to reservation. To litigate and lobby a claim for reservation

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<sup>5</sup>*Maneka Gandhi v. Union of India*, AIR 1978 SC 597

<sup>6</sup>*Lieutenant Colonel Nitisha v. Union of India*, (2021) 15 SCC 125

<sup>7</sup>Kapur, R., and Gossman, B, "On Women, Equality and the Constitution: Through the Looking Glass of Feminism" *National Law School Journal*, 16(1). (2022).

<sup>8</sup>*Navtej Singh Johar v. Union of India*, AIR 2018 SC 4321



backwardness is a non-negotiable criterion. More detailing on the reservation criteria is dealt with in the subsequent part. Currently, one needs to assess the social position of transgender through data and policy to check if they are actually backward. Facing facts on status of TC requires a common understanding of transgender which is influenced by discipline oriented discourse. Crucial issue of who is a ‘transgender’ is responded differently by law, sociology, and anthropology. In *NALSA (2014)*, there were two visible approaches to define the term transgender.<sup>9</sup>Justice Radhakrishnan favoured a self-determinism approach to define transgender where an individual does not relate to the sex assigned at birth. Justice Sikri adopts a biological approach to confine transgender to mean ‘*hijra*’<sup>10</sup>. It may not be appropriate since ‘*Hijra*’ community’s self-identification is different. Contrary to popular belief an intersex may not be a ‘*Hijra*’ for it requires adoption by a guru. The ‘*Hijra*’ guru is affiliated to a *gharana* for which a membership fee is charged from its members<sup>11</sup>. Ina Goel who was a female by birth identified herself as a member of ‘*Hijra*’ community since she was adopted by a guru and essayed the roles and responsibilities<sup>11</sup>. The viewpoint of Justice Sikri may not have a sociological purchase. What good is a law which has low social value?

However, The Transgender Persons (Protection of Rights) Act, 2019 (hereinafter referred to as the “2019 Act”). has adopted an inclusive definition of transgender which envelopes cultural and/or biological characteristics. Genderqueer, kinar, hijra, transman, transwoman with or without Sex Reassignment Surgery are included. The definitional foreground is illuminating for at least two purposes. First, the statistics which will be shortly be used to assess the standing of transgender may not share the same definition since the *NALSA* judgment and the 2019 Act were later in point of time (post 2011 census). Second, whenever the claims of TC to reservation are considered in the paper, it means transgender as defined in the 2019 Act.

There are approximately 4.88 lakhs transgender in India<sup>12</sup>. As per a survey by Mckinsey, the TC is twice as likely to be unemployed<sup>13</sup>. International Labour

<sup>9</sup>*Nalsa v. Union of India*, (2014) SCC 438

<sup>10</sup>Dutta, A, “Contradictory Tendencies: The Supreme Court’s *NALSA* Judgment on Transgender Recognition and Rights” *Journal of Indian Law and Society* 5(2), 225-236. (2014).

<sup>11</sup>Goel, I, “Beyond the Gender Binary” *Economic and Political Weekly* 49 (15), 77-78 (2014).

<sup>12</sup>“TransGender/OthersCensus 2011 India. (N.D.)” (2011).

<sup>13</sup>“Transgender People Twice as Likely to Be Unemployed” *McKinsey & Company.com*(2021).



Organization has recognized the workplace and job market discrimination against the sexual minorities.<sup>14</sup>The promise of representation of TC in India is yet to be materialized. Total literacy rate amongst the TC is well below the national average of 56.1% as against the national average of 74.04%<sup>12</sup>. The quantitative data represents a circular loop of dejection and despondence. Being a transgender is not a single disadvantage faced at education and jobs. It is a life cycle maladjusted to the 'mainstream' society. Goel (2014) correctly flags the birth of a child entails 'is it a boy or girl'<sup>11</sup>. To break the cycle of discrimination, representation is mandatory. For that to happen, reservation along with other affirmative actions play a crucial role. For instance, Persons with Disability which were absent in public employment gained some representation of differently enabled persons increased<sup>15</sup>.

Bring cognizant of the social position of the TC, the Supreme Court made a recommendation to grant reservation to TC under Article 15(4) as Socially and Educationally Backward class of citizens and as per Article 16(4) in the matters of public employment<sup>10</sup>. There are issues with the recommendation qua Article 15(4) which is dealt with in the next part. For now, the reasons supplied by the Supreme Court for such the recommendation are worth noting. Transgender hitherto are *systematically* denied the rights under Article 15(2) which is essentially a non-discrimination guarantee to access certain public goods and places such as wells, parks, places of entertainment etc. Kerala was the state government to introduce additional two seats for TC in educational institutions<sup>16</sup>. Other states are following the trend<sup>17</sup>. Post the 2019 Act the situation is expected to change with uniformity in grant of reservation to TC. Transwoman are claiming reservation under the 'women' category also. The claims have been contested but adjudicated favorably for TC. In *Anjali Guru Sanjana Jaan* (2021), petitioner who was a transwoman submitted her nomination form to contest election in a seat reserved for woman-general category. The form was rejected by the returning officer on the ground that

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<sup>14</sup>"Inclusion of Lesbian, Gay, Bisexual, Transgender, Intersex and Queer (LGBTIQ+) Persons in the World of Work: A Learning Guide" (2022).

<sup>15</sup>Dey, D, "Current State of Inclusion of People with Disabilities at Workplaces in India" *Journal of Critical Reviews*, 7(11), 2827-35 (2020).

<sup>16</sup>Pti, "Transgenders to Get Reservation in Colleges in Kerala" *Deccan Herald*. <https://www.deccanherald.com/India/Transgenders-To-Get-Reservation-In-Colleges-In-Kerala-678883.html> (2018).

<sup>17</sup>Haider, A, "Explained: Transgender Community's Fight for Reservations" *IndiaTimes*. <https://www.indiatimes.com/Explainers/News/Explained-Transgender-Communitys-Fight-For-Reservations-> (2023).



there was no reservation for transgender. Hence, the petition was presented to the Bombay High Court. The High Court allowed the petitioner to contest on the seat with an assurance to the effect that she would not change her gender during her lifetime<sup>18</sup>. In *K. Prithika Yashini* (2015), the petitioner had to go to the court for successive reliefs at most of the stages of sub-inspector recruitment. The court noted the discrimination faced by TC in the society. It is a form of discrimination which other two genders cannot realize observed the court<sup>19</sup>. Appropriate reliefs were granted. Such is the travesty that despite NALSA

(2014), transgender had to go to the court to make their gender counted in the recruitment process. For say, in *Atri Kar* (2017), petitioner had to knock the doors of the Calcutta High Court to direct State Bank of India to include third gender in the form.

There are cases where the High Court have simply rejected the claims of TC on the ground that the state governments are yet to formulate a policy on the matter<sup>20</sup>. In *M. Suman* (2020), petition was presented before the Kerala High Court to direct the state to provide reservation to TC for the recruitment under First and Second Division Assistants in Bangalore City Civil Court. The claims were rejected on the ground that the state is yet to formulate a policy on the matter<sup>21</sup>. The sorry social standing of transgender is adequately clear from the limit set of case law mentioned. They merit reservation to enhance their visibility in the society and representation in the job market.

### 3. Reservation: Horizontal or Vertical

Social standing of the TC is far cry from satisfactory as noted in the previous part. It demands empowerment through reservation. The model of implementation raises a question. There are two ways of implementing reservation- Horizontal and Vertical. Each of the method is suited for administering a reservation for varying social categories. In this part, implications of each of the model would be considered for TC.

Vertical Reservations are available for SEBC (or OBC)/ Scheduled Caste/ Scheduled Tribe, and Economically Weaker Section. There is mobility from one reserved to in reserved category based on merit. In case of migration from

<sup>18</sup>Anjali Guru Sanjana Jaan v. State of Maharashtra, (2021) 3 Mah LJ 674

<sup>19</sup>K. Prithika Yashini v. Chairman, Tamil Nadu Uniformed Services Recruitment Board, (2015) 8 MLJ 734

<sup>20</sup>Atri v. Union of India, 2017 SCC OnLine Cal 2717

<sup>21</sup>M. Suman v. Karnataka State Services Commission, Represented By, 2020 Indlaw Kar 5902



reserved to unreserved category, the vacancy so created in the reserved category owing to such migration shall be filled by another reserved category candidate. Where no suitable candidates are found for such a vacancy, it shall be carried forward or dealt with according to the rules in force .

If TC are treated as a vertical category, it is bound to increase the representation for 'meritorious' transgender can get placed in open category seats and the ones in need can co-opt reservation under the vertical quota. It may work against the purpose and promise of substantive equality under the Constitution. Granting vertical reservation has its attendant disadvantages where the economically better off can siphon away the seats and marginalized are bound to remain astray to the Constitutional vision.

Horizontal model of reservation better serves the cause. It does not create water-tight compartments and permit 'interlocking' reservations. They are computed alongside the vertical categories. The primary rule for working the horizontal quota are adjustments. First merit in open category is examined and if the number of candidates sought to be represented through Horizontal quota are represented and then through the specific social categories<sup>22</sup>. Added as a benefit for all, there is no carry forward of vacancies in horizontal reservation. Horizontal reservation is a tool to allow intersectionality of identities of a person.

One of the approaches suggested was to merge TC into OBC category.<sup>10</sup>It is submitted that the approach is faulty. It denudes the multiple identities that constitute wholesome of an individual. Intersectionality can be described as "mutually constitutive relations among social Identities"<sup>23</sup>. It recognises multiple axels of discrimination. Semmalar (2014) underlines the transgender's situation in India by noting the compound discrimination of social identities. For context, a dalit transgender may not solely be oppressed due to gender but due to caste also<sup>24</sup>. Further there are more to lose than to gain if transgender identity is subsumed in OBCs. First, the TC have to compete with other candidates who face single factor discrimination. Most of them are cisgender. Second, transgender may belong to different walks of life are collapsed under one roof. A "lower" and "upper" caste transgender would constitute single identity. Third, much like men or women, transgender exist in all social groups. A ST transgender would have to choose one of their identities as ST or OBC. Fourth, upper caste

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<sup>22</sup>Saurav Yadav v. State of U.P, (2021) 4 SCC 542

<sup>23</sup>Shield, SA, Gender: An Intersectionality Perspective; Sex Roles 59(5), 301, 301-311 (2008).

<sup>24</sup>Semmalar, G., "Unpacking Solidarities of the Oppressed: Notes on Trans Struggles in India" Women's Studies Quarterly, 42(3-4), 286-29 (2014).



transgender may take away all the OBC benefits which is running contrary to the spirit of reservation<sup>25</sup>. Fifth, the nature of barriers is not homogenous. SC/ST face additional barriers. The suggestion of inclusion of TC in OBCs is bad for the mentioned reasons.

Horizontal reservation would be better suited to further the cause of justice. Such a course would be in consonance with the demands of the TC. Some transgender activists demanded that transgender should not be forced to compete with cisgender men or women in the OBC category, rather a separate category should be created for transgender within the OBC as OBC-T (OBC-Transgender) during the state-level consultation organized by West Bengal Government's Department of Health and Family Welfare on issues concernin transgender and *hijra*. Likewise, the Telangana Transgender Hijra Intersex Samiti proposed a reservation only on the grounds of gender which is different from SC/ST/OBC reservations<sup>11</sup>. Delving deeper, the demands could conceivably be met by horizontal reservation in the matters of education and employment. It would allow the intersectional discriminated transgender, let's say Tribal Transgender, to avail benefit of ST-Transgender horizontal seat. If a person is discriminated only for being transgender, such a reserved seat can be taken in open category. The spectrum of combining identities and availing reservation is true to the gender identity and constitutional ideals.

Further, NALSA (2014) recognized 'sex' under Articles 15(4) and 16(4) as a protected characteristic and read 'gender' into it. All protections available to sex under Article 15(1) are equally applicable to gender identity of an individual. When reservations are made for 'sex' (woman) category horizontally then for 'gender' (transgender) reservation ought to be horizontal. Going for the vertical reservation model would fail to address the concerns of discrimination amongst the TC. It would further ignore socio-politics of transgender qua cultural, and institutional barriers. The only benefit that a separate vertical category of TC would offer is to ensure carry forward of vacancies till the rules allow, the rules may allow conversion of backlog vacancies within a year as well. However, on a value weighing in terms of social dissection of the society and complexity of social identities, the disadvantages of vertical reservation outweigh its only benefit.

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<sup>25</sup>Raghuvanshi, P. and Swaminathan, S, "Horizontal Reservation for Transgender Persons: Resolving the NALSA Conundrum" Comparative Constitutional Law and Administrative Law Journal., 6(2), v-xxiii. (2022).





An incidental yet important matter appertains to reservations in promotions. Vertical reservations allow reservation in promotion as is evinced from Article 16(4A) which permits reservations for SC and ST in the matters of promotion subject to demonstration of quantifiable data showing inadequacy in representation, backwardness, and the overall efficiency of the administration should not be compromised as mandated by Article 335<sup>26</sup>. The matter for horizontal reservation in promotions is still pending before the Supreme Court with respect to Persons with Disability. If it extends to them by any logic, the same logic can be applied to TC<sup>27</sup>.

## Conclusion and Suggestions

NALSA (2014) judgment was expected to be a watershed in the march to realization of equality. The ground reality has left a lot to desire. New dimensions can be added to the concept of equality for it is transcendental. To fulfil the SDGs no one should be left behind. Currently, the TC in India are as distanced from equal opportunities as non-grant of reservations in education and employment allow them to be. As a measure to translate SDG 5 of gender equality (part of it) necessary legislative interventions are required to be moved into action. The equalizing measures should not be cabined only in the form of reservation. The focus should begin from the awareness and normalization of third gender for being a transgender is a life cycle as much as is for men and women. To better convey the point, illustration of women is illuminating. Women have an improved status and gradually improving owing to multi-dimensional legal and social interventions. Right from prohibiting screening of the sex of the baby under Pre-Conception and Pre-Natal Diagnostic Techniques Act, 1994 to school education under various schemes of state and central government, prohibition of dowry under The Dowry Prohibition Act, 1961, protecting her in the matrimonial home under Protection of Women from Domestic Violence Act, 2005, and so on. There is an effort to afford all round protection to women. In the same vein there is a need for life-cycle protection of the transgender.

In the interim, reservation is required to assure immediate representation and empowerment. The 2019 Act should be amended on four counts. First, the representation of transgender should be more than the bureaucratic representation under the National Council for Transgender Persons established

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<sup>26</sup>Nagaraj v. Union of India, (2006) 8 SCC 212

<sup>27</sup>“Reservation for Transgender Persons in India” [28] Centre for Law and Policy Research (2018).



under section 16 of the 2019 Act. Further there should be state level statutory bodies to redress the grievances against the mandate of the 2019 Act. Second, Mental Health Boards should be entrusted with special responsibilities established under the Mental Healthcare Act, 2017 to account for mental health assistance as may be required by trans-persons, pre or post the transition of gender. Third, a fixed quota of seats should be reserved for transgender in education and employment. The fixation of seats via horizontal reservation should be according to the transgender population in the state or union territory. A separate schedule specifying the number of seats should be attached with the 2019 Act. Fourth, the horizontal reservation should be in compartments and not on overall induction of transgender so that TC from amongst each social class (SC/ST/OBC) get represented.

The paper has attempted to highlight the need for transgender reservation as one of the measures to mainstream and consequently expedite the equalization process of TC. Devoid of it SDGs cannot be achieved in the spirit.