Navigating Reservations for Transgender Persons under the Indian Constitution

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Introduction

Reservations for transgender and intersex persons has become one of the primary demands on the path to (trans)gender equality. Building on the work done in laying out a case for its implementation in higher education and public employment, this chapter seeks to explore some concerns that have or might appear in implementing reservations.[1] It focuses on four aspects: the basis and model for implementing reservations; the approach of courts; the problem of categorisation of identity and the right to privacy.

In *NALSA vs Union of India*, the Supreme Court directed the Centre and State governments to 'treat transgender persons as socially and educationally backward classes [SEBC] … and extend all kinds of reservation in cases of admission in educational institutions and for public appointments.[2] The first section of this chapter argues for implementing this through compartmentalised horizontal reservations that accounts for intersections between gender and caste. Following a broad overview of the historical evolution of the reservation jurisprudence in India, from the Constituent Assembly debates to present day developments, we identify two distinct doctrinal approaches to recognising transgender persons as in need of affirmative action - based on equivalence to oppressed castes, or as a distinctly oppressed group based on gender identity. We argue for the latter.

The second section considers the nature and forums in which these demands are made, primarily through policy campaigns and litigation. Through an exhaustive review[3] of judgments by High Courts involving transgender reservations, this section analyses the nature of the social and political rights of transgender persons that have been upheld. It finds that despite the systemic nature of rights guaranteed in *NALSA*, High Courts have mostly relied on a conditional

[1] The importance and necessity of reservations for transgender persons in legislative bodies, as held in *President, Nainarkuppam Panchayat v District Collector* MANU/TN/4818/2023, merits deeper academic engagement. However, given the paucity of space and the different rationales that guide jurisprudence on reservations in the legislature, the scope of this paper focuses only on reservations in higher education and employment.

[2] AIR 2014 SC 1863 [135.3]

[3] We gathered a list of cases related to transgender reservations by perusing cases on the South Asian TransLaw Database (accessible at https://translaw.clpr.org.in/); keyword searches on legal database Manupatra and law journalism platforms Bar & Bench and LiveLaw. The review of cases is up to date as of 15 July 2025.

social rights approach that makes social goods contingent on state action. The third section asks about the law's current approach to the categorisation of identity. By looking at how the law has reacted to the boundaries between 'transgender', 'man' and 'woman', it questions whether the law is instituting new hierarchies in the name of transgender welfare. Drawing from critiques of rigid identity, the paper cautions against compromising on gender pluralism for reservations.

The fourth section explores the challenges that reservation policies may pose to the right to privacy of transgender persons. While the right of transgender persons to privacy and bodily autonomy under the Indian Constitution has been upheld judicially and statutorily, scant attention has been devoted to their right to informational self-determination. This section applies the framework of privacy articulated in *Puttaswamy vs Union of India*,[4] and more specifically, *Selvi vs. State of Karnataka*,[5] to underline the constitutional right to privacy of transgender persons; rejecting any trade-off between said right and the effective access to social welfare by arguing for a more holistic anti-discrimination framework underpinning reservations altogether.

Beyond reservations, however, this chapter should be read within the context of the broader demand of transgender justice. Combatting institutionalised discrimination in education and government employment requires cultural shifts which nominal inclusion will aid but not guarantee.

Contextualising the Demand for Transgender Reservations

In the *NALSA* judgment, the Supreme Court considers the condition of transgender people, particularly hijras (a term used within the Indian subcontinent for a socio-cultural gender category that does not neatly map on to English categories, but often present as transfeminine[6]) in order to establish a need to identify them as 'socially and educationally backward classes' (SEBC) and provide them with reservations.[7] The use of this phrase has raised several questions, since it comes from Article 15(4) of the Constitution which has traditionally been used to provide reservations for Scheduled Caste (SC), Scheduled Tribe (ST), and Other Backwards Classes (OBC) on the basis of caste discrimination. What does it mean to introduce a class based on gender identity under this category? There are two ways to attempt to read this holding: first,

[4] (2017) 10 SCC 1
[5] AIR 2010 SC 1974
[6] Aniruddha Dutta, *Globalizing Through the Vernacular: Kothis, Hijras, and the Making of Queer and Trans Identities in India* (Bloomsbury 2024)
[7] *NALSA* (n 2) [135.3]

that transgender persons should receive affirmative action under provisions used to remedy caste discrimination because these forms of discrimination are equivalent; or second, that the Court's ruling in favour of reservations for transgender persons seeks to create a new normative ground for affirmative action on the basis of cis-patriarchy rather than equating it with caste discrimination. To answer this question, it is worth first considering briefly the history of reservations as a tool for social upliftment.

The debates on reservations within public employment and higher education for backward classes emerged within the nationalist movement, and were reflected in the Constituent Assembly debates.[8] While there was consensus that every section of the population ought to have representation and a voice in the administration of the country, there was bitter contestation over the appropriate schemes of social upliftment, and who their beneficiaries should be.[9]

The Constituent Assembly Debates on Article 335, regarding the claims of Scheduled Castes and Scheduled Tribes to services and posts, are interesting to note in this regard.[10] The draft clause recognised the claims of the members of the Scheduled Castes and the Scheduled Tribes in relation to appointments to services and posts in connection with the affairs of the Union or of a State, specifically allowing for provisions in favour of the members including relaxation in qualifying marks in any examination, lowering the standards of evaluation and reservations in promotions. Shri Guptanath Singh sought to supplement the phrase "Scheduled Castes and Scheduled Tribes" with "and such other castes who are educationally and socially backward", cross-referencing and broadly interpreting the term "backward classes" as enshrined in Article 16. Although rejected at the time of proposal,[11] it is prescient of the evolution of equality jurisprudence through the interpretation and amendments to Article 15. In January 1950, the Constitution was adopted, permitting the government to make reservations for SCs and STs who were inadequately represented in the services of the state. The State was also required to

[8] Hriday Nath Kunzru, Constituent Assembly Debates, Vol VII, 30 November 1948. Accessible at https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-30#7.63.88
[9] B.R. Ambedkar, Constituent Assembly Debates, Volume 7, 30 November 1948. Accessible at https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-30#7.63.203
[10] Hukam Singh, Constituent Assembly Debates, Volume 10, 14 October 1949. Accessible at https://www.constitutionofindia.net/constitution_assembly_debates/volume/10/1949-10-14#10.151.50
[11] Opposition to the term "socially and educationally backward", contended that the term would encompass more than 80% of the population which would be unsustainable for affirmative action.

reserve seats in the Lok Sabha and state legislatures, for candidates from SCs or STs, proportionate to the population of SCs or STs residing in that particular state.

The judgement of the Supreme Court in *Champakam Dorairajan vs. State of Madras*[12] marks the commencement of reservation jurisprudence in India. An executive order, which fixed the proportion of students that could be admitted from each community into public medical and engineering colleges in the State of Madras was challenged before the Supreme Court. The Court struck down the order, holding that it denied admission to the petitioner (a Brahmin) solely on the ground of her caste and thus violated Article 29(2). In response, the government brought the First Amendment to the Indian Constitution, inserting Article 15(4), allowing the State to make special provisions for the advancement of socially and educationally backward classes of citizens, or for Scheduled Castes and the Scheduled Tribes.[13] The introduction of Article 15(4) ignited the debate on beneficiary identification, and which classes or communities could be categorised as 'social and educationally backward' for the purposes of reservation.

The next leap in reservation jurisprudence came four decades later, with the adoption of the report of the Mandal Commission, in 1990. The Commission mandated 27% reservations in higher education and employment under the Central Government for members of Other Backward Classes, a number calculated from the last available caste data of the Census of 1931.[14] Politically, the Mandal Commission report was met with severe resistance from upper-caste communities, who took to the streets to protest the disruption of the established hierarchical order. As a consequence, the OBCs counter-mobilised for the first time, forming a common front to defend the quotas that were in danger of being taken away. In such a context of social polarisation, the OBCs were bound to make a greater impact at the time of elections, since they comprised a sizeable majority. In northern India, the proportion of OBC elected representatives went from 11% in 1984 to 25% in 1996, whereas that of the upper caste elected officials fell from 47% to 35%.[15] This 'silent revolution', as Christophe Jaffrelot refers to it, resulted in newfound legitimacy for caste in the public space.

[12] AIR 1951 SC 226
[13] Constitution (First Amendment) Act 1951. Accessible at https://legislative.gov.in/constitution-first-amendment-act-1951
[14] Report of the Backward Classes Commission 1980, [13.11-13.17]
[15] Christophe Jaffrelot, 'The Politics of OBCs' (2005) https://www.india-seminar.com/2005/549/549%20christophe%20jaffrelot.htm accessed 27 November 2022

The increased weight of caste in the political arena impacted judicial interpretations of affirmative action under Articles 15 and 16. In *Indira Sawhney vs Union of India,*[16] the Supreme Court the importance of caste (and tribe) in reservation jurisprudence by centering caste in its analysis of backwardness stating that 'socially and educationally' are qualifiers that are connected to historic caste discrimination. The Court also found that Article 16(4) is exhaustive of reservations for SEBCs but there remained the ability to provide for other reservations under Article 16(1) - such as for persons with disability (PwD). The latter was 'horizontal' which meant that seats can be reserved for OBC PwDs specifically, as they can for SC PwDs, ST PwDs and PwDs who do not fall under those categories. The reservations interlock or intersect. This framework, which also applies to reservations for women, recognises the need for intersectional responses in affirmative action. In this structural understanding, the Court had created two bases for providing reservation, with ostensibly different rationale, returning us to the question: can reservations for transgender persons be subsumed under SEBCs recognised on the basis of caste?

The approach of equating it with caste should not be dismissed out of hand. As Gayatri Reddy has pointed out, the colonial treatment of the so-called 'third gender' viewed the community as a caste.[17] While the British criminalised the entire community (under the label 'eunuch'), it was constructed not as a gender, but grouped with other 'criminally inclined' tribes.[18] This generates some parallels with the history of caste discrimination, which operates as systematic exclusion. Systemically forced labour practices have been a defining feature of caste discrimination: for example, occupations such as tanning and manual scavenging have been the basis of labour oppression for some castes.[19] The transgender community has similarly acquired a (forced) association with labour practices such as *badhai (*traditional performances) or today, even sex work and begging.[20] In 2010, the Karnataka Backward Classes Commission chaired by C.S. Dwarakanath recommended recognising transgender persons as OBCs on the basis of a survey, concluding 'we realized that they were backward not only economically but also socially

[16] 1992 (Suppl) 3 SCC 217
[17] Gayatri Reddy, *With Respect to Sex: Negotiating Hijra Identity in South India* (University of Chicago Press 2005)
[18] Criminal Tribes Act 1871 and its subsequent replacements in 1911 and 1924.
[19] B.R. Ambedkar, 'Annihilation of Caste' in *Dr Babasaheb Ambedkar: Writings and Speeches* (Government of Maharashtra 1979) 47-48
[20] Reddy (n 16); Living Smile Vidya, *I am Vidya* (Oxygen Books 2007); A. Revathi, *The Truth About Me: A Hijra Life Story* (Penguin Books India 2010)

and educationally'.[21] These comparisons reveal how systems of oppression like caste and gender interact with and shape each other. However, certain problems arise in taking this comparison further. While it might be feasible for traditional transgender communities like hijras, is it true for transgender identities as they are conceived of now? 'Transgender' as an English term has travelled to India and constructed new modalities of operation.[22] This includes transgender persons who transition to male or female without induction into the kinship structures of the *hijra* or other communities. It also includes a variety of people who identify as non-binary, genderqueer or otherwise which have associations with not just specific languages but class, caste, region, politics and other structures of power. Does the logic of historical exclusion extend to all groups that claim the category 'transgender'?

The alternative approach is to identify a new constitutional rationale for reservations, by arguing that the cis-patriarchy generates systemic exclusions and disadvantages that are so entrenched that it requires reservations to counter, similar to the justification for PwDs and women. This recognises that transgender persons by virtue of seeking to buck the gender binary are subject to severe discrimination.[23] This is not to discount the comparisons between gender and caste, or to reify these categories, but to recognise their dual operation. We suggest four reasons to prefer this approach.

First, if transness is equated with caste, it means that there is scope for other groups to claim reservation without the strong historical connections of caste described earlier. This is not merely a 'slippery slope' argument. Since *NALSA* itself has not clearly addressed the question of rationale, an activist and interventionist Court can misinterpret *NALSA* to undermine caste-based reservations, a tendency reflected in the Supreme Court's recent jurisprudence.[24] An intersectional approach ought to recognise the solidarities between anti-caste and gender equality movements to ensure that the advances of one do not endanger the other. Second, a comparison to caste would likely place transgender reservations in the 'vertical' model of reservations with a

[21] Siddharth Narrain, 'Gender Identity, Citizenship and State Recognition', (2012) 8(2) Socio-Legal Review 106 https://repository.nls.ac.in/slr/vol8/iss2/5

[22] Reddy (n 16) 25-29; Aniruddha Dutta, Raina Roy, 'Decolonising Transgender in India: Some Reflections' (2014) 1(3) Transgender Studies Quarterly 320; Liz Mount, '"I Am Not a Hijra": Class, Respectability, and the Emergence of the "New" Transgender Woman in India' (2020) Gender & Society 620.

[23] For an account of this, see the works cited in (n 16, 18) above.

[24] Suresh Mane, 'Economic Criteria in Reservation: An Invitation to Counter-Revolution' in *EWS Quota to End All Quotas* (Ambedkar Age Collective 2022)

50% limit.[25] This means they will have to compete with other castes already on the list for the same number of reserved positions and this reduces their chances of actually receiving any benefits which they should be entitled to. Third, the caste-equivalent approach misunderstands the intersectional nature of transgender identity with other existing backward classes recognised on the basis of caste: caste discrimination exists within the transgender community and gender discrimination within castes. As Grace Banu and Kanmani R have argued, this necessitates compartmentalised, horizontal reservation.[26] Under *Indira Sawhney*, such reservations are provided for under Article 16(1) (and ostensibly 15(1)) rather than under 16(4) for caste.[27] Fourth, a new rationale would also mean transgender as an umbrella term can accommodate a greater diversity of labels and expressions, including locally formed identities as well as those covered by its more narrow usage as primarily perceived in the West.. By equating it to caste, the law may attempt to restrict the meaning of transgender only to those that *can* find some common link with caste-based discrimination.

There is a third option relying on the phrase 'any backward class' used in Article 16(4) as opposed to SEBC in 15(4). Without a qualifier, this could recognise 'backwardness' based on gender rather than caste. However, this would have to reconsider entrenched jurisprudence that has sought to equate 'any backward class' with SEBC or caste backwardness. It would also require the recognition of horizontal reservations under Article 16(4), which has not been done till now. Finally, such a distinction would also only help establish the case for reservations only in public employment, which Article 16(4) covers. For these reasons, we suggest a distinct rationale ought to be recognised to provide for affirmative action for transgender people.

Bhat J's dissent in *Janhit Abhiyan vs. Union of India* stated that reservations for transgender persons fell under Article 16(1), indicating a possible judicial shift towards

[25] Vinay Sitapati, 'Reservations' in Choudhry, et al (eds.) *The Oxford Handbook of the Indian Constitution* (OUP 2016)
[26] Grace Banu and Kanmani R, 'Statement demanding horizontal reservation for transgender persons' (5 December 2021) Accessible at https://docs.google.com/document/d/1RD1_8sD9h9X-SQJfgTksVzLA0Ue4CM4K7M-6cv8cGFU/edit; See also https://www.roundtableindia.co.in/transgender-and-caste-lived-experience-transphobia-as-a-form-of-brahminism-an-interview-of-living-smile-vidya/; A longer form of this argument available at Jayna Kothari, Deekshitha Ganesan, Saumya Dadoo, J Mandakini, Sudhir Krishnaswamy, *Making Rights Real: Providing Reservation for Transgender & Intersex Persons in Education and Public Employment* (CLPR, Bangalore, 2018)
[27] *Sawhney* (n 15) [812]

recognising a distinct rationale.[28] While the greatest obstacle to this approach is the explicit use of the SEBC phrase in *NALSA*, Bhat J has indicated a willingness of the Supreme Court to forego that language and rationalise its earlier decision. States have had to straddle this confusing divide as well with little guidance. This reasoning was employed in *R Anushri v TN Public Service Commission,*[29] where the Madras High Court held that the Supreme Court's to 'treat them as' SEBC did not mean transgender people should be placed in the SEBC category, but that the reservations extended to SEBC should also be extended to them. We believe this is the appropriate way to read *NALSA* for the reasons we provided. The Court held that treating transgender people as equivalent to a caste is 'manifestly arbitrary' under Article 14 of the Constitution.[30] In Karnataka, the state government has provided horizontal reservations, prompted by the community's intervention at the High Court.[31] However, the Andhra Pradesh High Court found itself constrained by the use of SEBC in *NALSA*, and refused to order horizontal reservations.[32] Most other High Courts have directed the State to consider reservation (see below) without more specific directions, leaving governments uncertain about the right way to implement the mandate. These disparate frames need to be clearly unified around an explicit new rationale as laid out above.

Negotiating Reservation as a Right Post-NALSA: An Analysis of Case Law

There are two broad frameworks for understanding the nature of socio-economic rights (as opposed to civil and political rights). The first is a systemic conception, often seen in the adoption of either a "minimum core" socio-economic standard that each individual has a right to or in the accountability of state action to undertake "reasonable" measures in pursuance of that standard. Social rights jurisprudence in India has not usually followed this systemic conception, instead choosing a second approach of conditional social rights. Initially analysed by Madhav

[28] *Janhit Abhiyan v Union of India* 2022 SCCOnline SC 1540, Bhat J [170]
[29] 2024 SCC OnLine Mad 2211
[30] *Rakshika Raj v State of TN*, 2024 SCC OnLine Mad 1624. The test of manifest arbitrariness, as developed in *Shayara Bano v Union of India* AIR 2017 SC 4609, is a test of constitutionality under the equality guarantees, which requires "adequate determining principles" for legislative choices.
[31] *Sangama v State of Karnataka* WP No. 8511 of 2020 (Karnataka High Court)
[32] *Matam Ganga Bhavani v State of Andhra Pradesh* 2022 SCC Online AP 200

Khosla, the model of conditional social rights offers some insight into the nature of the majority of judgements on transgender reservations post *NALSA.*[33]

Instead of focusing on the inherent nature of measures undertaken by the state, the conditional social rights approach focuses on their implementation. Judicial review is conducted solely on the latter question, making the right conditional upon state action. The court still strives to emphasise the importance of socio-economic guarantees. But moving beyond the rhetoric, the court does not guarantee any systemic social right, be it weak or strong.[34] Consider the evolution of Article 21 jurisprudence. The phrase 'life and personal liberty' has been interpreted expansively to include, inter alia, the right to live with human dignity, the right to livelihood, the right to healthy environment, right to privacy, the right to shelter and the right to education. However, it remains unclear what the content of these rights entail. For instance, if the state has initiated a housing policy that mandates housing for the dispossessed, that is being ignored, the Court will enforce it.[35] However, there is no systemic right to housing.

Historically, the right to reservations in higher education and employment has been seen in the same framework of conditional social rights - individuals can demand the implementation of reservation policies after they are initiated by the State, but their right exists only insofar as the policy does. In fact, courts often went further in enforcing a high standard of data to satisfy the constitutional requirements for reservation policies. This limited conception was disavowed in the *NALSA* judgment, which affirmed a *systemic* set of rights of transgender persons, and explicitly directed the state to 'extend all kinds of reservation in cases of admission in educational institutions and for public appointments'.[36] These rights were not contingent upon State action - instead, they formed the 'minimum core' standard which necessitated State action to realise and protect them. Governments did not have the discretion to frame a policy and justify it; it was ordered to do so and no further justification was necessary.

Given this radical upheaval, it is unfortunate that the judicial approach to petitions demanding reservations post-*NALSA* has reverted to the conditional social rights approach. A

[33] Madhav Khosla, 'Making social rights conditional: Lessons from India' [2010] 8(4) I. Con 739. In his work, Khosla outlines what he terms the "conditional social rights" approach, which he argues characterizes the Indian Supreme Court's adjudication of socio-economic rights. Through an analysis of cases involving the right to health, Khosla explicates the atypical model of contractual, private law reasoning in public law adjudication. In contrast to other models (such as the South African 'reasonable standard' model), this model limits judicial review to questions of implementation of state policy, rather than of substantial rights and their necessary remedies.
[34] ibid. 749
[35] *Olga Tellis Bombay Municipal Corporation* (1985) 3 SCC 545
[36] *NALSA* (n 2) [135.3]

typology of these judgements can be constructed by examining the final orders, classifying them into three categories: judgements where reservations were not ordered, judgements where governments were pulled up for not yet implementing reservations as per *NALSA* and judgements where state governments or their instruments were ordered to implement reservations. The contingent nature of the right to reservation is apparent, albeit with varying clarity, in all these three types of judgements. In the first category of cases, final orders in *Veera Yadav v State of Bihar*[37] and *Matam Gangabhavani v State of Andhra Pradesh*[38] refrained from directing reservations, leaving it completely up to the discretion of the state governments to do so. In the second category of cases, where governments were questioned on the implementation of *NALSA*, the conditional nature of reservation is less apparent, but nevertheless present. In *Swati Bidhan Baruah v State of Assam*[39] *and Ganga Kumari v State of Rajasthan,*[40] the respective High Courts noted an obligation to look at the manner and extent of reservation to be implemented, and their operative order was restricted to directing the publication of a report within three and four months respectively. It has been 5 years since the former and 3 years since the latter order. Ultimately, the actual content of the right provided in *NALSA* of reservation, remains dependent on state (in)action. In the third category of cases, , including *Saratha v Member Secretary, TN Uniformed Services Recruitment Board,*[41] *Rano v State of Uttarakhand,*[42] *Swapna v Chief Secretary,*[43] and *Aneera Kabeer v State of Kerala*[44] the judgements reiterate *NALSA* with a clear direction for reservations. However, they fail to enforce the systemic rights that *NALSA* established, limiting themselves to repeating the operative order of the latter without engaging with the nature of state inaction. In these cases, the Court *recognises* the systemic nature of the right, but does not provide the remedies that can *realise* it. For example, there is no interim relief until the Government acts, any compensation for the breach of the right, or a mechanism to check compliance, such as a continuing mandamus order, leaving the actual

[37] WP 5627 of 2020 (Bihar High Court)
[38] Matam Gangabhavani (n 32); A recent case at the Telangana High Court, *Devath Sreenu v State of Telangana*, W.P. No. 46387 of 2022, has also recently ordered the Government to respond to a community representation for horizontal reservations. However, we have not included this since the order has only given notice to the Government before admission.
[39] PIL 15/2017 (Gauhati High Court)
[40] MANU/RH/0286/2022
[41] 2022 SCC Online MAD 925
[42] WP (Crl) 1794/2018 (Uttarakhand High Court, 28 September 2018)
[43] WP 31091/2013 (Madras High Court)
[44] WP (C) 29247/2019 and 1970/2024 (Kerala High Court)

enforcement of a systemic right a mere hope. Even in *Sangama vs. State of Karnataka,*[45] which is the only case that resulted in a positive outcome till date, the Court directing the government to consider representations by the petitioners and a proactive government which amended the Karnataka Civil Service (General Recruitment) Rules, 1977 to provide for horizontal reservation of 1%.[46] Although the Court initially kept the case open and monitored the government's response, ultimately the main prayer - regarding actual appointments to the post of police officers - went unaddressed.

The systemic conception of the right to reservation articulated in *NALSA* finds reflection only in exceptional cases. In *Mrinal Barik vs. State of West Bengal,*[47] the Calcutta High Court noted that the West Bengal government was yet to make provisions for reservations for transgender persons, as per the directions in *NALSA.* In those circumstances, the Court felt compelled to direct the government to ensure 1% reservation for transgender persons in all public employment, apart from giving individual relief to the petitioner. Though not explicitly reasoned, the judgement both identifies the violation of a systemic right (conferred by *NALSA*) through state inaction, and directs an effective remedy.

Importantly, in upholding a substantive right of reservation, the judiciary need not wait until the executive formulates a policy to realise the same. While *Mrinal Barik* demonstrates one possible remedy, another approach is to secure interim relief while directing executive action. For instance, the Karnataka High Court directed the National Law School of India University to provide reservation of 0.5% (half the percentage of reservation provided for TGs in public employment, in the state) as interim reservation with fee waiver, until the university, and the Karnataka government, formulated a reservation policy in accordance with *NALSA*, before the commencement of the next academic year.[48]

On the other hand, in *Sirra Santhosh,*[49] the Court did not decide the larger question of horizontal reservations because the State said they would receive seats in the second round of admissions counselling. Nevertheless, the Court directed that both their Scheduled Caste status and transgender identity ought to be considered in the counselling round. These cases show that

[45] WP 8511/2020 (Karnataka High Court)
[46] vide Sub-rule (1D), Rule 9 added by Karnataka Civil Services (General Recruitment) (Amendment) Rules, 2021.
[47] Order dated 14.06.2024, W.P.A 21508 of 2023, Calcutta High Court
[48] Mugil Anbu Vasantha vs. State of Karnataka, WP 14909 of 2023 (Karnataka High Court)
[49] WP 21834/2024 (Telangana High Court). Similar orders have been passed in the case of *Dr Ruth John Paul* WP 15117/2023 and *Praachi Rathod* (WP 27507/2023)

through interim relief measures, courts are able to insist that there *is* a core minimum of reservations that a State *has* to provide, failing which the judiciary must provide a systemic remedy. However, it remains to be seen whether these cases will yield long-term and broader results by grounding these orders in legislation or extending it beyond the individual petitioners. We propose that courts should recognise the watershed nature of *NALSA* in recognising the substantive right to reservations for a community.

The slow, inconsistent uptake of the courts does not make litigation futile for the community. Strategic litigation even on a contingent model allows petitioners to bring governments to the table and frame demands in constitutional language.[50] We can look, for example, at how petitioners who have sought a fixed percentage were answered by Courts. This goes beyond asking for reservations broadly and seeks to suggest how reservations should be implemented. In cases like *Sangama*, *Saratha* and *Swapna*,[51] the Court was still willing to consider ordering the State to 'consider' reservations. In *Veera Yadav*,[52] the Court brought the demand to the government which proposed a compromise involving an ad-hoc provision of 1 in 500 positions. In *S Tamilselvi v Secretary*,[53] the Court itself mediated such a compromise and ordered the provision of ad-hoc reservations. While other demands have not had positive outcomes,[54] the above cases indicate a weak but tangible effectiveness of using Courts as a forum of mediation. Two States provided for reservations without any Court involvement (Tamil Nadu, Kerala), but due to the poorly framed policies,[55] it is only through the Court-ordered reservations that any real progress has been achieved (in Karnataka, Tamil Nadu, and Bihar[56]). No executive-led proposals for reservation seem to be underway, since the other States where

[50] Jayna Kothari and Mihir Rajamane, 'Litigation as a Tool for Change: Transgender Rights in India' (2021) 2 Smeal Review 1. Available at https://smeal.org/article/litigation-as-a-tool-for-change-transgender-righ/
[51] Notes 45, 41 and 43 respectively.
[52] (n 37)
[53] WP 26506/2022 (Madras High Court)
[54] *Matam Gangabhavani* (n 32); *Kabeer C vs State of Kerala* WP(C) No. 29247 OF 2019(S); *Grace Banu Ganeshan vs. Chief Secretary, Government of Tamil Nadu*, WP No. 22142 of 2021
[55] Declaring transgender persons as 'most backward classes' in Tamil Nadu, and an ad-hoc policy of 2 seats per course in Kerala. Both of these have failed in resulting in significant reservations.
[56] As a result of *Sangama* (n 45*), Tamilselvi* (n 53) and *Veera Yadav* (n 37) respectively. Tamil Nadu has a draft reservation policy as a result of the various cases at the Madras High Court, including most recently *S Sushma v Commissioner of Police* WP 7284/2021, which has become a forum for litigating an omnibus of queer issues. While the Court previously ordered a transgender policy, the most recent order (dated 17.02.2025) clarifies the Government must decide how to implement it.

any proposal is being considered were also a result of litigation (such as Uttarakhand, Rajasthan, Assam).

One of the reasons for these varying approaches is the ambiguity inherent in *NALSA*, highlighted in Aniruddha Dutta's rigorous critique of the judgement.[57] Without a clear rationale for reservations, or understanding of what and how it should be implemented, High Courts have been left to make their own interpretations.

'Transgender': A Self-defeating Category?

NALSA's contradictions extend beyond the provisions and rationale under which reservation should be provided. Perhaps an even more essential question from the practical perspective is who can claim these reservations? And what does that categorisation result in? By flitting between different definitions of transgender which include 'i.e. hijra etc.', or 'third gender' or 'persons whose gender identity, gender expression or behaviour does not conform to their biological sex' or '[including] Gay men, Lesbians, bisexuals, and cross dressers', the judgment does not provide the constitutional understanding of the category. With no clarification to the Ministry of Social Justice and Empowerment's ("MSJE") questions,[58] the answer had to come from the Transgender Persons (Protection of Rights) Act 2019 ('Trans Act') instead as a 'person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, genderqueer and person having such socio-cultural identities as kinner, hijra, aravani and jogta.'[59] This definition is a vast improvement on the others put forth in Parliament, as a result of campaigning by trans activists. However, some significant concerns still remain.

First, in its procedures, the Act re-establishes a biological test which creates hierarchies of transgender persons. Section 7 requires 'undergoing surgery' in order to be recognised as a man or woman, though one can claim the identity of 'transgender' under section 6 with just an affidavit. The 2020 Rules attempts to alleviate this by redefining the requirement to 'medical

[57] Aniruddha Dutta, 'Contradictory Tendencies: The Supreme Court's NALSA Judgement on Transgender Recognition and Rights' [2014] 5 Journal of Indian Law & Society 225
[58] Press Information Bureau, 'Special Status to the Transgenders Lok Sabha Response' MANU/PIBU/0728/2015
[59] Section 2(k)

intervention' and including hormonal therapy and counselling which are easier to obtain.[60] However, while the Act remains unamended, the law is confused at best, and unchanged at worst. As Dutta has pointed out, this procedure results in two meanings of the category 'transgender'[61]. There is transgender in the narrow sense as a formal gender identity (i.e. male, female and transgender), and transgender in the broad sense as an umbrella category of persons who have changed their gender identity from the one assigned at birth. This elides various identities into a single phrase, collapsing the broad ideal of right to actually self-determine gender that formed the core of *NALSA* - you are forced to adopt either a binary identity or the 'transgender' identity. The premise of self-determination of labelling and expression is lost in the bureaucratisation of identity.[62] This is exacerbated by the difficulties caused by inordinate delays, hostile atmospheres and demand for proof in receiving even the first transgender ID under section 6.[63] Similar problems are faced by transgender persons who apply for caste certificates as well, where documentary proof is often difficult to obtain when estranged from families. Sensitivity and targeted relaxations in evidence ought to be considered, as they were during the pandemic,[64] to avoid letting one's oppression become a further hurdle in claiming a path to overcoming it.

Second, if reservations are provided to transgender persons, which definition of transgender is it available to? In the narrow sense or even to trans men and women? Textually, the definition clause of the Act should take precedence unless the context otherwise provides, so policies that provide reservation would provide it for all identities under the umbrella term. In *Pallabi Chakraborty*, the petitioner sought the inclusion of a transgender category to apply for the position of a police constable.[65] Previously, she had obtained employment as a 'lady civic volunteer'. The Court held that since she had claimed her status as a woman, she could no longer be considered transgender. This is a restrictive approach that fails to take into account the fluidity

[60] Transgender Persons (Protection of Rights) Rules, 2020, Rules 2(i), 6.
[61] Dutta (n 57). See also Dutta & Roy (n 22) and Santa Khurai, 'Gaining Full Citizenship of Manipuri Indigenous Nupi Maanbi and Nupa Maanba' in this volume for tensions on how the broader category accommodates regional gender minorities.
[62] Dipika Jain, Gauri Pillai, Surabhi Shukla and Justin Jos, 'Bureaucratization of Transgender Rights: Perspective from the Ground' [2018] 14(1) Socio-Legal Review 98
[63] Chand, Avi, 'The Right to Livelihood: A Rights Based Approach to Mainstreaming Livelihoods in the Transgender Development Discourse' in this volume.
[64] As discussed in Mansi Singh, Mihir Rajamane, 'Welfare as a Human Right: An Intersectional Approach to Trans Rights in India' (*Oxford Human Rights Hub*, 12 April 2022) https://ohrh.law.ox.ac.uk/welfare-as-a-human-right-an-intersectional-approach-to-trans-rights-in-india/
[65] *Pallabi Chakraborty v State of West Bengal*, WP 3962 of 2021

NALSA stressed. In *Saratha* on the other hand, the Madras High Court picked up on this ambiguity and clarified that all transgender persons should be provided reservations.[66] The Tamil Nadu government had stated that transgender persons are provided reservations of 30% if they identify as women or 'TG' and 70% if they identify as men. All this policy had done was to elide transgender in the narrow sense with women and provide no separate reservation for transgender persons. By recognising that reservations are mandated for transgender persons in the broad sense, the Court ensured separate reservations are provided for all transgender people, so transgender men and women are still transgender.

Third, as a converse to the second, while asserting one's identity as transgender, can you still claim the benefits of being male or female equivalent to a cisgender person? In *Sumita Kumari*, the Court held that a transgender person cannot be considered a woman for the purpose of employment as an ASHA worker.[67] However, in *Anjali Guru Sanjana Jaan*, the Bombay High Court heard an application from a transgender woman who sought to stand in a local election from a seat reserved for women.[68] The Court affirmed the principle of self-determination and held that a transgender woman is a woman and can claim benefits for women including the right to vote and stand for elections in reserved seats. Similar approaches have been applied in *Hina Haneefa* in the context of the NCC, *Sangeeta Hijra* for elections and *Arunkumar* for marriage.[69] This affirms that transgender women bear all the rights that a 'woman' does. It does not separate cisgender women as a category with a discrete set of rights.

At the boundary of these three concerns, lurks a larger question. By creating a new category, is the State interfering with the freedom of self-expression of gender? Poststructuralist thought has provided us with new ways of thinking about how gender is constructed, lived and performed.[70] It is not just a stagnant set of identities, but constantly evolving and shaped by the discourse interacting with it. Arguably, there is no stronger voice in the field of discourse than that of the State and the law. By creating this third gender category that subsumes complex identities, are we losing out on the growth and cultural exploration of genders that might otherwise take place? Could it, for example, result in non-binary people having to change their

[66] *Saratha* (n 41)
[67] *Sumita Kumari v State of West Bengal*, WP 8911 of 2015
[68] *Anjali Guru Sanjana Jaan vs. State of Maharashtra & Ors.* WP (Stamp) No 104 of 2021
[69] *Hina Haneefa v State of Kerala* WP (C) 23404 of 2020; *Sangeeta Hijra v State of Bihar* 2017 SCC Online Pat 1040; *Arunkumar v The Inspector General of Registration* WP (MD) 4125 of 2019, WMP (MD) 3220 of 2019
[70] A key text being Judith Butler, *Gender Trouble* (Routledge 2006)

behaviours to conform with what a 'third gender' person should look like in India to go about claiming reservation?[71] Some judgments, while not necessarily laying down law on the point, seek to evaluate how much of a 'woman' or 'transgender person' the petitioner is in making their ruling by looking at things like how well they pass, whether they opted for surgery, how long it has been since they transitioned, or affirmations that they have no intention to explore their gender further.[72] Are these norms creating new hierarchies of gender? The idea of the 'third gender' itself has been criticised as a Western construct that reduces and co-opts indigenous identities by removing them from their social context and comparing it with Western gender binaries. So, the imposition of this category is more than just a community finding its own identity- it could be seen as a colonial elision of local gender diversity.[73] This is not just a worry about 'imposition', but a concern about the shackling of the potential liberation that destabilising the current discourse can bring about.[74] By questioning those categories and allowing more identities to flourish, we can find new ways to explore ourselves, and move further towards some sense of finding freedom.

One radical option is the 'decertification of gender' such that gender should not be an identity the State generates or categorises people in but can regulate based on context.[75] Like religion, for example, gender does not need to be an identity that is ascribed, invariant and mandatory for the law to recognise.[76] It is only in the case of special benefits like reservations where benefits must be targeted that the identity becomes a question. So, for example, this might look like existing identities like hijras, jogis, shiv-shaktis, trans men and trans women being recognised only for the limited purpose of providing reservations or to protect against discrimination and harassment, but it also leaves the space for other identities to emerge and exist between and beyond the boundaries of 'transgender'. The State does not seek to make an

[71] See the case of the Delhi school questionnaire in PTI, *NCPCR Serves Notice To UP, Haryana Over Use Of Term 'Non-Binary' For Transgender By School* (The Free Press Journal, 17 February 2024) <https://www.freepressjournal.in/education/ncpcr-serves-notice-to-up-haryana-over-use-of-term-non-binary-for-transgender-by-school>

[72] As seen for example in *Hina Haneefa* (n 69)*; Jackuline Mary vs Superintendent of Police* 2014 SCC Online Mad 987; *Faizan Siddiqui vs Sashastra Seema Bal* WP (C) 7208/2008.

[73] Dutta, Roy (n 51); Evan Towle and Lynn Morgan, 'Romancing the Transgender Narrative: Rethinking the Use of the "Third Gender" Concept' in Susan Stryker and Stephen Whittle (eds.) *Transgender Studies Reader* (Routledge 2013)

[74] See for example, Butler's concept of parody to subvert gender in (n 52)

[75] Cooper D and Renz F, 'If the State Decertified Gender, What Might Happen to its Meaning and Value?' (2016) 4 Journal of Law and Society 483

[76] Lisa Duggan, 'Queering the State', (1994) 39 Social Text 1

exhaustive list, or to fix gender as an invariant category of identity. A part of this can be found in the Yogyakarta Principles+10, which seeks to remove gender from identity documents where they are not required.[77] This is not without critique, because it can lead to isolationism and fracturing of identities, creating difficulty for building solidarity. Further, with regard to the expression of minorities, social discourse without State intervention is not necessarily more liberatory.

After all, reservations are a strongly expressed demand and a clear need. This epistemic objection can seem (perhaps, quite rightly) to be an ivory tower objection to a grassroots campaign. Crenshaw, while accepting a critique of civil rights for potentially entrenching race in the United States, points out that rights can act as a 'buy-in' to the existing discourse.[78] While Black people in the US have been systematically excluded from participating in the regime, liberal rights at least allow them to achieve the first step of formal equality. It allows the generation of a Black voice in discourse.[79]

Similarly, for transgender reservations too, the critique of entrenching rigid categories must be taken seriously but placed against the very important benefits reservations will bring. An ethnographic study in Pakistan, for example, has highlighted that without substantive and material equality, gender minorities are discouraged from asserting even their symbolic rights of recognition.[80] It will allow, similar to the abovementioned OBC mobilisation in the post-Mandal era, for the creation of a transgender voice in discourse that could propel a change which would be impossible if transgender persons continue to be relegated to the margins in key sectors like public services and education. While this section problematises the definition to imagine ways in which we can incorporate the critique, the State's role in defining is essential for affirmative action. Equality in the substantive sense is necessary in order to achieve the symbolic (but important) aims of destabilising gender norms, so the latter should not burden the subjects it seeks to liberate.

Constructing the Right to Privacy in the Context of Reservations

[77] Principle 31, Yogyakarta Principles plus 10, as adopted on 10 November 2017, Geneva
[78] Kimberlé Crenshaw, 'Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law' (1998) 101 Harv LR 1331
[79] A similar argument has been made in a feminist context in Deborah Rhode, 'Feminist Critical Theories' (1990) 42 Stanford LR 617
[80] Muhammad Azfar Nisar, '(Un)becoming a Man: Legal Consciousness of the Third Gender in Pakistan' (2018) 32 Gender & Society 59

The ability to freely express one's identity has also been closely connected to the right to privacy in India, which has served as an important foundation for the movement for queer rights. One aspect of the right to privacy - that of informational self-determination - is integral in understanding the full implications of the right to privacy for the personal autonomy of queer people. While reflecting on the rampant violation of informational self-determination in spaces that have historically seen reservations implemented, the right against non-consensual disclosure of identity must also be contextualised against the socially embedded, continual nature of 'coming out' for transgender individuals. Further, recognising the centrality of privacy for enjoying social equality and individual dignity entails rejecting the understanding of the right to privacy as conflicting with the transparency and accountability that is necessary for social and economic benefits. The design and implementation of reservation policies must reflect this holistic understanding of rights.

Justice K S Puttaswamy vs Union of India[81] explicitly connects the right to privacy with the right to equality and non-discrimination of LGBTQ+ individuals.[82] An interesting aspect of privacy outlined in *Puttaswamy* is that of privacy as informational self-determination. While this aspect of privacy was discussed in the judgement in direct connection with the issues of personal data protection and the Aadhaar scheme, it has far reaching implications for the standards to be followed in the (non)disclosure of all personal information, which is of particular importance to transgender persons.

Privacy as informational self-determination is discussed in multiple judgements in *Puttaswamy*. Nariman J. held that "informational privacy… does not deal with a person's body but deals with a person's mind, and therefore recognizes that an individual may have control over the dissemination of material that is personal to him. Unauthorised use of such information may, therefore lead to infringement of this right."[83] He held this to be a fundamental aspect of the constitutional right to privacy, grounded in Article 21.[84] Chandrachud J. noted that "informational control empowers the individual to use privacy as a shield to retain personal

[81] *Puttaswamy* (n 4)

[82] Reaffirming the decision of the Supreme Court in NALSA, *Puttaswamy* upheld the decisional autonomy of the individual as central to their dignity and identity, protected by their fundamental right to privacy. Chandrachud J.' judgement unequivocally held that LGBT persons enjoyed the constitutional rights to life, privacy, dignity and equality. See (n 4), [126]-[128]

[83] *Puttaswamy* (n 4) [81] (Nariman J)

[84] Kaul J. noted that "An individual has the right to control one's life while submitting personal data for various facilities and services. It is…essential that the individual knows as to what the data is being used for with the ability to correct and amend it.." (n 4) [53] (Kaul J)

control over information pertaining to the person." He recognises the inevitable interaction of this conception of informational privacy with that of behavioural privacy, defined as "the privacy interests of a person even while conducting publicly visible activities." According to Chandrachud J., behavioural privacy postulates that "even when access is granted to others, the individual is entitled to control the extent of access and preserve to herself a measure of freedom from unwanted intrusion."[85]

Chandrachud J's plurality judgement and Nariman J's judgement in *Puttaswamy* both refer to the landmark case of *Selvi v State of Karnataka*,[86] in establishing the precedents for the constitutional right to mental privacy and informational self-determination. In *Selvi*, informational self-determination became relevant in considering the scope of the constitutional right against self-incrimination guaranteed in Article 20(3). Rather than confining themselves to narrowly interpreting each fundamental right as a standalone principle,[87] the Court in *Selvi* considered whether the impugned investigative techniques of narco-analysis, polygraph testing and brain mapping were violative of the standard of substantive due process which is required for restraining personal liberty, under Article 21. The Court concluded that these techniques fell afoul of both Articles 20(3) and 21, and held them to be unconstitutional. In doing this, it established at least two things important for the purposes of transformative constitutional interpretation. First, it upheld the interpretation of fundamental rights that read them in interrelation with each other, not in separation or conflict. By re-centering the individual at the heart of criminal procedural rights, the Court in *Selvi* moves away from an abstracted conception of individual liberty, privacy and dignity. Instead, it grounds these principles in opposition to the realities of power and inequality that dictate the relation between the individual and the state. In *NALSA* and *Puttaswamy*, this holistic logic is extended to establish that the right to privacy is at the core of the right to equality, non-discrimination and life. Such an inter-relational foundation allows us to define and ground the limits of state intervention in demanding and handling personal data through the purpose of the original intervention itself.

Secondly, *Selvi* explicitly extended the concept of privacy to mental privacy, enjoyed absolutely against all other individuals. The Court noted: "*We must recognise the importance of*

[85] *Puttaswamy* (n 4) [142] (Chandrachud J)
[86] AIR 2010 SC 1974
[87] Gautam Bhatia, ' The Supreme Court's Right to Privacy Judgement - III: Privacy, Surveillance and the Body' (Indian Constitutional Law and Philosophy, 29 August 2017) https://indconlawphil.wordpress.com/2017/08/29/the-supreme-courts-right-to-privacy-judgment-privacy-surveillance-and-the-body/

personal autonomy in aspects such as the choice between remaining silent and speaking. An individual's decision to make a statement is the product of a private choice and there should be no scope for any other individual to interfere with such autonomy…"[88]

In other words, compelling an individual to reveal information about themselves, especially in conditions where they are pitted against the might of institutional power, is a violation of their fundamental right to privacy. This understanding has direct implications for the right to privacy of transgender persons particularly as they navigate disclosure of their identities in public spaces of higher education and employment. Non-consensual disclosure of identity ("outing"), by the state or anyone else, is a violation of their right to informational self-determination.

In practice, the right to informational self-determination has not been protected in higher education and public employment where reservation has been implemented. The experiences of Dalit and Adivasi students in public higher education exemplify this. Among other forms of discrimination, institutional and informal practices of outing the caste identity of students cement hierarchies of power within institutions meant to provide equality of opportunity.

N. Sukumar points to the discrimination inherent in the system of publishing lists of students with star marks, a single star for SC students, two stars for STs and a # mark for OBCs - a practice still followed by multiple universities.[89] This segregation continues to the allotment of hostels. As a student of a top Indian law school notes: "...people were allotted rooms based on the marks they got in the Common Law Admission Test (CLAT). Students belonging to SC/ST and domicile category were given rooms on the upper floors of the hostel, while those belonging to the general category were given rooms on the ground floor for the first two years; the rationale being rooms allotted on the basis of marks. However, it essentially also meant the ghettoization of those who had secured admission through reservation."[90] Seemingly innocuous questions such as a student's last name, father's occupation, the amount of fees they pay to the university etc. are used to ascertain the caste identity of a student, and become the basis for social exclusion in both formal and informal settings.[91]

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[88] *Selvi* (n 5) [192]
[89] See N. Sukumar, *Caste Discrimination and Exclusion in Indian Universities* (Routledge India 2022) 64-112
[90] Maurya Tej Bendukuri, "NALSAR: How Hostels Used to be Segregated on the Basis of CLAT Scores – and Caste", (The Wire, 12 July 2019) https://livewire.thewire.in/campus/nalsar-caste-hostel-segregation/
[91] Sukumar (n 78) 80

Recognising this crisis, the UGC published a detailed charter to prevent institutions and authorities from victimising or harassing any student.[92] While the charter explicitly prohibits the disclosure of identity or labelling of any student on the lines of caste, religion or region and the passing of derogatory remarks indicating caste, social, regional, racial or religious background, it has no explicit provision to deal with non-consensual disclosure and labelling of individuals from gender minorities. The National Education Policy 2020 and The Trans Act, 2019 do not provide adequate protection against non-consensual disclosure of transgender identity either.

The ineffectiveness of the right to privacy must be contextualised within a larger framing of social welfare, particularly for transgender communities, as a *tradeoff* between rights and benefits, between self-determination and state legibility and protections. As Kaushal Bodwal argues, the Trans Act, 2019, treats transgender bodies as sites of biopolitics.[93] The Act uses various technologies of pathology and surveillance to render these bodies *legible* to the state, which is a precondition to accessing welfare benefits. Affirmative action policies run the same risk: in creating identifiable 'beneficiaries' of reservation, the state may not only be interfering with self-expression of gender (as discussed in the previous section of this chapter) but also re-enact and exacerbate other forms of violence against transgender persons, through invasive medico-legal frameworks.

The right to informational self-determination has to also be situated in the understanding of disclosure ('coming out') of trans identity as a continual, strategic, and socially-contingent process. Transgender studies has moved from an understanding of coming out experiences within a linear, stage model of psychological development, to a sociological approach to identity formation and management, grounded in social and political contexts.[94] Brumbaugh-Johnson and Hull build on this work, using identity theory as a lens to outline the process of disclosure as an "ongoing, socially embedded, skilled management of one's gender identity."[95] They identify three broad themes that shape the decision and process of coming out: the navigation of others'

[92] UGC (Promotion of Equity in Higher Educational Institutions) Regulations 2012, 123.
[93] Kaushal Bodwal, "Understanding Construction of Technologies of (Trans)gender in India Shaped By Mechanisms of Security, Surveillance and Welfare", (2022) 18(2) *Socio-Legal Review* 301
[94] Jason Orne, 'You will always have to 'out' yourself: Reconsidering coming out through strategic outness' [2011] 14(6) Sexualities 681–703. doi:10.1177/1363460711420462; Kate Klein, Alix Holtby, Katie Cook & Robb Travers, 'Complicating the Coming Out Narrative: Becoming Oneself in a Heterosexist and Cissexist World' (2015) 62(3) Journal of Homosexuality 297-326, DOI: 10.1080/00918369.2014.970829
[95] Stacey M. Brumbaugh-Johnson & Kathleen E. Hull, 'Coming Out as Transgender: Navigating the Social Implications of a Transgender Identity '[2018] Journal of Homosexuality,
DOI: 10.1080/00918369.2018.1493253.

gender expectations, the navigation of others' reactions and the navigation of the threat of violence. Transgender people's decisions on how to come out and to whom were greatly impacted by these predicted social interactions. As coming out on one's own terms is central to the social navigation of identity, it falls within the sphere of personal autonomy protected at all points by the right to informational self-determination. Stronger commitments to the informational self-determination of socially and educationally backward classes are warranted, as are better mechanisms of accountability and grievance redressal within higher education and employment.

Given the abysmal number of transgender individuals in higher education or employment,[96] despite the measures both the Central and state governments claimed to have taken; a valid concern is the callous, or even intentional non-fulfilment of reserved seats. The demand for transparency and accountability, however, does not run counter to the fundamental right of privacy, as is established in *Puttaswamy* itself. The conception of privacy as informational self-determination, as Gautam Bhatia points out, is underpinned by informed, meaningful consent at every instance of disclosure of information. This would mean that the initial instance of disclosure of gender identity to the state, for the purpose of availing reservations, expresses consent only for that singular purpose; thus the state is not authorised to use or publicise this data at any other point, for any other purpose. The principles of transparency, disclosure and accountability do not substitute informed consent, although they can supplement it.[97]

There must be no trade-off between fundamental right to privacy and fundamental right to social and economic equality, through mechanisms of affirmative action. Chandrachud J's categorical rejection of the Attorney General's argument that the right to privacy must be forsaken in the interest of welfare entitlements reflects this view.[98] He notes: "Every individual in society irrespective of social class or economic status is entitled to the intimacy and autonomy

[96] Eram Agha, 'No Transgender Students in India's Central Varsities, Indicates Govt Data' (News 18, 4 December 2019)https://www.news18.com/news/india/no-transgender-students-in-indias-central-universities-govt-data-indicates-but-theres-the-other-side-2410993.html

[97] Gautam Bhatia, 'The Supreme Court's Right to Privacy Judgment – IV: Privacy, Informational Self-Determination, and the Idea of Consent' (Indian Constitutional Law and Philosophy, 30 August 2017) https://indconlawphil.wordpress.com/2017/08/30/the-supreme-courts-right-to-privacy-judgment-iv-privacy-informational-self-determination-and-the-idea-of-consent/

[98] *Puttaswamy* (n 4) [154] (Chandrachud J)

which privacy protects."[99] Thus, the scheme of reservations envisioned should be structured to ensure accountability and transparency in implementation, while simultaneously respecting the informational self-determination of the individual with regard to disclosure of identity.

Conclusion

The chapter takes for granted that reservations should be introduced for transgender and intersex persons. The groundwork for why affirmative action is necessary has been established by trans and queer activists who have shown that gender minorities have been excluded from mainstream society.[100] This means reservations are merely a tool in a broader project of seeking material equality and restructuring our norms. A project that dreams of a world where transgender, gender non-conforming and genderqueer people can freely exercise their identity in all spheres of life. A world where people can live without having to navigate the threat of physical, mental or symbolic violence. In building this world, therefore, reservations help transgender persons both individually and as a community to mobilise. However, it must be accompanied by practices of inclusion at the workplace and in education. It must include transgender-inclusive health and public facilities, queer-inclusive accommodation, policies for gender affirming communication at work and in educational institutions, inclusion in policies like parental leave, gender affirming healthcare as part of basic health provisions and more. Various community activists and organisations are working on these issues[101] and they must be advocated for in tandem.

This chapter highlights certain concerns that must be addressed when implementing reservations. First, we argue that in order to actually affect change, reservations ought to be intersectional, which requires horizontal reservations using a distinct rationale of compensating for discrimination and exclusion under cis-patriarchy. Second, we propose that *NALSA* establishes a *systemic* right to a core minimum of transgender reservations and the courts should build a coherent jurisprudence that actually holds governments to account for failing to implement it. Third, we sound a note of caution on how the new categories could shackle fluid identities and generate new hierarchies that we must pay attention to in (legal) narratives. Fourth,

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[99] ibid [157]

[100] Kerala Development Society Report Submitted to the NHRC, *Study on Human Rights of Transgender as Third Gender* (February 2017), 21-54

[101] For example see, panel discussions at Transform 2021 on 'Access, Equality and Trans Inclusion in Education' (accessible at https://clpr.org.in/blog/access-equality-and-trans-inclusion-in-education-panel-1-of-transform-2021/) and 'Gender at Work' (accessible at https://www.youtube.com/watch?v=fE7u_mjQq0U).

we establish that a respect for privacy of identity should not be traded off in order to access social goods. We hope this provides helpful legal and constitutional grounding to unpack some key concerns in achieving reservations for transgender people, for policy makers, activists, lawyers, paralegals, researchers and others working in and interested in this field. This chapter is therefore only a small part of the broader struggle for transgender justice,[102] hoping to contribute to those aims and draw from its ideals to understand how to implement the reservations.

[102] A broad framework for transgender justice is found in Shon Faye, *The Transgender Issue: An Argument for Justice* (2021 Allen Lane), Preface.