

# Horizontal Reservation for Transgenders: Journey from *NALSA V. UOI* to Dismissal of Grace Banu's Petition

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## ABSTRACT

The constitution of India provides for reservation, which is a form of positive discrimination, created to promote equality among marginalized sections so as to protect them from social and historical injustice. It can be divided into two parts: vertical and horizontal.

The Transgender persons are demanding horizontal reservation. The demand has to do with the need for mandatory provisions for a community that has been historically marginalised in society and recognising the different aspects making up their social identity.

The Transgender Persons (Protection of Rights) Act, 2019 could not do anything regarding reservation and has disappointed the community.

Transgender Community has a strong historical presence in our country. Be it the era of Ramayana or Mahabharata; Transgenders played a pivotal role in society. If we leave aside these epics, the pre- independence era (before the arrival of the British) has testimony of this community's fairly dignified

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presence in our society. It was British law, which caused the deterioration of Transgenders.

When we achieved independence, we kind of continued the British legacy of not treating Transgenders as an equal. We did not even recognise their existence. It took us more than six decades to recognise that Transgenders are 'third gender' and their existence should be accepted in the society. These six decades of non- recognition made them backward. In my opinion, the SC is right in declaring them as socially and educationally backward classes of citizens and extending all kinds of reservation in cases of admission in educational institutions and for public appointments.

**Keywords:** *Transgender, Horizontal reservation, Transgender Persons (Protection of Rights) Act, 2019, Grace banu case, NALSA vs. UOI*

## INTRODUCTION

The Supreme Court on March 27, 2023 refused to entertain an application which sought a clarification that the reservation meant for transgender persons as per the 2014 judgment in the NALSA case is horizontal reservation. The bench led by Chief Justice of India DY Chandrachud expressed disinclination to entertain the application in a disposed of matter<sup>1</sup>.

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<sup>1</sup> Horizontal Reservation For Transgender Persons : Supreme Court Refuses To Entertain Plea To Clarify NALSA Judgment available at <https://www.livelaw.in/top-stories/horizontal-reservation-for-transgender-persons-supreme-court-refuses-to-clarify-nalsa-judgment-224932><https://www.livelaw.in/top-stories/horizontal-reservation-for->

In the wake of this refusal to grant horizontal reservation to TG Community, let's consider whether there exists any scope to grant Horizontal Reservation to Transgenders under Indian Reservation System?

## **WHO ARE TRANSGENDERS AND WHAT IS THEIR STATUS?**

Transgender is generally described as an umbrella term for persons whose gender identity, gender expression or behaviour does not conform to their biological sex. TG may also take in persons who do not identify with their sex assigned at birth, which include Hijras/Eunuchs who describe themselves as “third gender” and they do not identify as either male or female. Hijras are not men by virtue of anatomy appearance and psychologically, they are also not women, though they are like women with no female reproductive organ and no menstruation. Since Hijras do not have reproduction capacities as either men or women, they are neither men nor women and claim to be an institutional “third gender”. Among Hijras, there are emasculated (castrated, nirvana) men, non- emasculated men (not castrated/akva/akka) and inter-sexed persons (hermaphrodites). TG also includes persons who intend to undergo Sex Re- Assignment Surgery (SRS) or have undergone SRS to align their biological sex with their gender identity in order to become male or female. They are generally called transsexual persons. Further, there are persons who like to cross-dress in clothing of the opposite gender, i.e transvestites. Resultantly, the term “transgender”, in contemporary usage, has become an umbrella term that is

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[transgender-persons-supreme-court-refuses-to-clarify-nalsa-judgment-224932](#) (last visited on September 30, 2023)

used to describe a wide range of identities and experiences, including but not limited to pre-operative, post-operative and non-operative transsexual people, who strongly identify with the gender opposite to their biological sex; male and female.<sup>2</sup>

TG Community comprises Hijras, eunuchs, Kothis, Aravanis, Jogappas, Shiv-Shakthis etc. and they, as a group, have got a strong historical presence in our country in the Hindu mythology and other religious texts. The Concept of 'tritiya prakrti' or 'napunsaka' has also been an integral part of vedic and puranic literature. The word 'napunsaka' has been used to denote absence of procreative capability.<sup>3</sup>

Despite this strong historical presence; we somehow forgot their existence while drafting our supreme law of the land. Although, Fundamental rights were guaranteed to all persons and it can be interpreted that 'person' includes third gender as well. Article 14 of the Constitution of India states that the state shall not deny 'any person' equality before the law or the equal protection of laws within the territory of India. Equality includes the full and equal enjoyment of all rights and freedom. It also imposes a positive obligation on the state to ensure equal protection of laws by bringing in necessary social and economic changes. Article 14 does not restrict the word 'person' and its application only to male or female. Transgender persons who

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<sup>2</sup> *NALSA V. UOI*, AIR 2014 SC 1863

<sup>3</sup> *NALSA V. UOI*, AIR 2014 SC 1863

are neither male/ female fall within the expression ‘person’ and hence entitled to legal protection of laws in all spheres of state activity.

This includes employment, healthcare, education as well as equal civil and citizenship rights as enjoyed by any other citizen of this country.

Article 15(1) of the Constitution of India prohibits discrimination on the ground of sex. But we see gender discrimination with third genders prevalent in our country.

Articles 15 and 16 prohibit discrimination against any citizen on certain enumerated grounds including the ground of ‘sex’. In fact, both the Articles prohibit all forms of gender bias and gender-based discrimination.

However, it took us more than six decades to recognise that ‘third gender’ exists. This delay in recognition badly affected the development of the TG community.

Finally in the year 2014, a bench comprising of Hon’ble Justice K.S. Radhakrishnan and Justice A.K. Sikri declared that Hijras, Eunuchs, apart from binary gender, be treated as “third gender” for the purpose of safeguarding their rights under Part III of our Constitution and the laws made by the Parliament and the State Legislature.<sup>4</sup> The Court *inter alia* gave the following direction:-

“We direct the Centre and the State Governments to take steps to treat them as socially and educationally backward classes of citizens and extend all

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<sup>4</sup> *NALSA V. UOI*, AIR 2014 SC 1863

kinds of reservation in cases of admission in educational institutions and for public appointments.”<sup>5</sup>

This is the direction which motivated Grace Banu to file a writ petition before Hon'ble SC to seek clarification as to horizontal reservation. The SC has dismissed this petition. Before discussing the rationale of this dismissal, let's understand the Indian reservation system first.

## **INDIAN RESERVATION SYSTEM**

Article 14 provides the right to equality to all Indian citizens. Reservation-system constitutes an exception to this equality clause. Reservation is a form of positive discrimination, created to promote equality among marginalised sections so as to protect them from social and historical injustice.

It can be divided into two parts: vertical and horizontal.

Reservation for scheduled castes, scheduled tribes and other backward classes is referred to as vertical reservation. Horizontal reservation, on the other hand, cuts across all vertical groups to provide affirmative policies for disadvantaged groups with categories. Article 15(3) of the constitution contemplates horizontal reservation.

## **DEMAND FOR HORIZONTAL RESERVATION AND THE ROLE OF TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019**

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<sup>5</sup> *NALSA V. UOI*, AIR 2014 SC 1863

The Transgender persons are demanding horizontal reservation. The demand has to do with the need for mandatory provisions for a community that has been historically marginalised in society and recognising the different aspects making up their social identity.

A study conducted by the National Human Rights Commission revealed that in 2017, only 6% of transgender people were formally employed.<sup>6</sup> They often have to make a choice between availing reservation either based on caste and tribal identity or to protect their gender identity.

In India, the trans population makes up a total of 4.88 lakh, as per the 2011 census. However, only a handful of them receive employment opportunities. According to a study conducted by the National Human Rights Commission in 2018, 96 percent transgenders are denied jobs and are forced to take low paying or undignified work for livelihood like badhais, sex work and begging. The first-ever study on the rights of transgenders also revealed that about 92 percent of transgenders are deprived of the right to participate in any form of economic activity in the country, with even qualified ones refused jobs. Among the respondents, around 89 per cent of transgenders said there are no jobs for even qualified ones. 50-60 per cent never attended schools and those who did face severe discrimination, according to the report. The NHRC further stated that 52 percent transgenders were harassed by their classmates and 15 per cent by teachers, forcing them to discontinue their studies. Only 6 per cent transgenders were employed in private sectors

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<sup>6</sup> Law Commission of India, “Study on Human Rights of Transgenders as a Third Gender” (February, 2017)

or NGOs, back then, while the monthly income of only 1 percent transgenders was noted to be above Rs.25,000; the majority-26.35 percent earn between Rs. 10,000- Rs.15,000. The report further revealed that around 23 per cent are compelled to engage in sex work which has high health-related risks, which results in trans people being 49 times more at risk of living with HIV compared to the general population.<sup>7</sup>

This is the reason, Grace Banu, a Transgenders Rights Activist, demanded horizontal reservation. Senior Advocate Jayna Kothari represented the applicant.

Banu in the application noted the Supreme Court in its judgement in the NALSA case, directed the Central government to treat transgender persons as a socially and educationally backward class and provide them reservations in education and public employment. However, the Court did not state how the reservation should be implemented. Therefore, the applicant stated that many states are yet to implement such reservations.<sup>8</sup>

The applicant argued that the effective way of giving reservations for transgender and inter-sex persons is on the grounds of gender and disability, as has been done in the case of women and persons with disabilities. The

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<sup>7</sup> The Transgender And Unemployment In India *available at* <https://www.outlookindia.com/national/transgender-and-unemployment-in-india-news-182617> (last visited on September 30, 2023)

<sup>8</sup> SC rejected a plea sought clarification on NALSA Judgment, *available at* <https://www.thelawadvice.com/news/sc-rejected-a-plea-sought-clarification-on-nalsa-judgement> (last visited on September 30, /2023)



application stated that the Ministry of Social Justice moved a cabinet note in September 2021 to include transgender persons in the OBC category. The Tamil Nadu government has decided to include them in the Most Backward Class category. Karnataka is the only state where they have been given horizontal reservation to the extent of 1%. The applicant further prayed that reservations for transgender persons should include concessions in cut-off marks, and age. The following were the reliefs sought in the application :

1. Clarify/modify the judgement dated 15.04.2014 passed in Writ Petition (Civil) No. 400 of 2012 that the reservations meant for transgender persons are horizontal reservations:
2. Clarify/modify the judgement dated 15.04.2014 passed in Writ Petition (Civil) No. 400 of 2012 to the effect that reservations for transgender persons should also provide for concessions in age, cut-off marks and physical criteria, as provided to other reserved categories;
3. Clarify/modify the judgement dated 15.04.2014 passed in Writ Petition (Civil) No. 400 of 2012 to the effect that reservation should be provided for transgender persons in addition to public employment and public education also in allotment of housing sites, schemes and in local bodies.<sup>9</sup>

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<sup>9</sup>SC rejected a plea sought clarification on NALSA Judgment, *available at* <https://www.thelawadvice.com/news/sc-rejected-a-plea-sought-clarification-on-nalsa-judgement> (last visited on September 30, /2023)

The Transgender Persons (Protection of Rights) Act, 2019 could not do anything regarding reservation and has disappointed the community.

The Act's long history traces back to the judgment in *NALSA v. Union of India* of April 2014, which directed the Centre and State to grant legal recognition for the third gender, ensure there is no discrimination against them, and construct specific social welfare programmes... The Act is progressive in that it allows self-perception of gender identity, but regresses by mandating that each person would have to be recognised as 'transgender' on the basis of a certificate of identity issued by a district magistrate, rejecting the recommendation from the 2016 Standing Committee to have a screening committee. There are no avenues open either for appeal in the event a magistrate refuses to hand out such a certificate. India's vocal LGBTQI community had problems with the Bill's basics — right from the nomenclature. Calling it a 'Transgender Persons' Bill would not give adequate play to the diversity the non-binaries included, it argued, instead calling for a more broad-based definition. Activists have slammed it for its 'narrow understanding' of gender identities and for offering woefully inadequate mainstreaming opportunities. They remain unhappy with the silence on unnecessary and non-consensual sex selective or reassignment surgeries, despite the plea that it be made an offence. Elaborate detailing of the anti-discriminatory clause in the Bill might have gone a long way in ensuring implementation and legal recourse, they argue. With the Bill becoming law, unaltered in any significant form, in the face of such strident opposition, the community is seething at being ignored. It's only hope is that the National Council for Transgender Persons, which is supposed to provide

the institutional framework for implementing the Act, might allow more latitude for incorporating genuine demands. Otherwise, this Act might well be a glove that ill fits the hand it was tailored for.<sup>10</sup>

The above report of The Hindu clearly shows that The Act, intended to safeguard the interests of Transgender has disappointed the community and has not played any role in securing reservation for the community.

## CONCLUSION

Transgender Community has a strong historical presence in our country. Be it the era of Ramayana or Mahabharata; Transgenders played a pivotal role in society. If we leave aside these epics, the pre- independence era (before the arrival of the British) has testimony of this community's fairly dignified presence in our society. It was British law, which caused the deterioration of Transgenders.

When we achieved independence, we kind of continued the British legacy of not treating Transgenders as an equal. We did not even recognise their existence. It took us more than six decades to recognise that Transgenders are 'third gender' and their existence should be accepted in the society. These six decades of non- recognition made them backward. In my opinion, the SC is right in declaring them as socially and educationally backward classes of citizens and extending all kinds of reservation in cases of admission in educational institutions and for public appointments. In the wake of this

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<sup>10</sup> Caught in the Act: On Transgender Persons Act Available at <https://www.thehindu.com/opinion/editorial/caught-in-the-act/article30099876.ece> (last visited on September 30, 2023)

declaration, The Transgender Persons (Protection of Rights) Act, 2019 was passed by the parliament. This Act received protests from the Transgender community itself because it obviously did not completely address their grievance. It did not make any provision for reservation which is the need of the hour. So far, Karnataka is the only state where they have been given horizontal reservation to the extent of 1%. The remark made by K.S. Radhakrishnan, J. best explains the need for reservation for Transgenders. The remark is as follows:-

“Seldom, our society realises or cares to realise the trauma, agony and pain which the members of Transgender community undergo, nor appreciates the innate feelings of the members of the Transgender community, especially of those whose mind and body disown their biological sex. Our society often ridicules and abuses the Transgender community and in public places like railway stations, bus stands, schools, workplaces, malls, theatres, hospitals, they are sidelined and treated as untouchables, forgetting the fact that the moral failure lies in the society’s unwillingness to contain or embrace different gender identities and expressions, a mindset which we have to change.”<sup>11</sup>

Reservation, as we know, is a positive discrimination. We introduced the reservation system in our country in order to safeguard the interest of marginalised sections of society. Transgender Community indeed is a

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<sup>11</sup> *NALSA V. UOI*, AIR 2014 SC 1863

marginalised section of society and it deserves, without a doubt the benefit of reservation.

Coming to their demand for horizontal reservation; as we know Article 15(3) of the Constitution of India is the source of horizontal reservation in India. Beneficiaries of this Article are women and children so far. The term 'transgender' is not mentioned here. It means although horizontal reservation is desirable for the TG community, it is not possible in the current Indian reservation system. The SC has declared this community to be 'Socially and educationally backward'. It means they fall under the purview of Article 15(4) and only vertical reservation can be granted to them, not the horizontal reservation.