

TRANSGENDER PERSONS AND AFFIRMATIVE ACTION: ANSWERING THE WHY AND THE HOW

Written by Abhijit B

Assistant Professor, School of Law, UPES Dehradun, India

DOI: doi.org/10.55662/JLSR.2023.9304

ABSTRACT

Justice Radhakrishnan began his judgement in the landmark Indian case of NALSA v Union of India, with an observation on the society's moral failure being exhibited by its exclusion of the transgender community and its inability to understand their pain. The division bench judgement unanimously stated, inter alia that reservations be opened up for the transgender community by declaring them as socially and educationally backward. In the years since this judgement, however, there have barely been any State actions in India to implement the judgement in its spirit.

The Transgender Persons (Protection of Rights) Act, 2019, a statute passed to further the ideals of protecting the interests of the transgender community was met with resistance and protests from the transgender community itself. The absence of reservation provisions in the Act was one of the many grievances raised by the activists. India's Union cabinet has recently approved a cabinet note to include transgender persons within the 'Other Backward Communities', a move to open up the reservations in education and employment to transgender persons.

Here, I look at the dichotomy between the acceptance of transgender persons in the early local Indian community practices and the discrimination that came with the colonisation and western mores. I attempt to understand the use of contemporary legal tools, like reservations as a compensatory and corrective measure for the aforementioned discrimination. While examining the adequacy of reservations as a measure, I look at the possibilities of potential Affirmative Action policies that go beyond the traditional state mandated reservation policies in India. I also intend to learn from existing Affirmative Action policies for the transgender community

in the United States and the United Kingdom to provide suggestions that can benefit the community in India.

Keywords: Discrimination, Transgender, Local Communities, Colonisation, Reservation, Affirmative Action.

INTRODUCTION

‘Unity in Diversity’ has been a motto that India as a nation has built herself around. It was obvious that we had to do that because, despite being a political union as a country, brought together under one constitution, we were a collective of various religions, castes, and languages. In fact, in Europe, the continent of our colonisers saw various nationalities and sub-nationalities arise out of these very differences that we in India, were trying to bind together as one nation. Our Constitution has over the last seventy-two years allowed and continues to allow the thriving of the individuality that this diversity brings. And this has happened with the use of equitable Constitutional tools that aims to attain equal opportunity.

The Dalit community or the Scheduled Castes as the Constitution terms them is a community that has been discriminated against based on their caste. They are some of the foremost beneficiaries of some of these equitable tools provided in the Indian Constitution. They are provided with reservations, a form of Affirmative Action, in political representation, education, and public employment. Similarly, so are the Scheduled Tribes, who receive similar if not identical benefits. The Constitution also provides for Affirmative Action in the form of reserved seats in the State Legislatures and the Union Parliament to Anglo-Indians, who are an ethnic and religious minority in India. A few other castes and communities who are backwards socially and economically receive Affirmative Action benefits by being included with the Other Backward Communities umbrella. This includes some members of the Muslim and Christian religious minorities.

However, despite all these benefits being granted to truly deserving communities, there is one backward community that has been consistently and systematically ignored. This is the transgender community, who have been classified as a sexual minority.¹ According to Merriam Webster Dictionary ‘transgender’ is defined as “of, relating to, or being a person whose gender

identity differs from the sex the person had or was identified as having at birth, *especially*: of, relating to, or being a person whose gender identity is opposite the sex the person had or was identified as having at birth”.ⁱⁱ An expansive and yet non-exhaustive definition of the term transgender was seen in the judgment of *NALSA v Union of India*ⁱⁱⁱ, as “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 ... who describe themselves as “third gender” and they do not identify as either male or female.”

Justice Radhakrishnan began his judgement in *NALSA*^{iv}, with an observation on the society’s moral failure being exhibited by its exclusion of the transgender community and its inability to understand their pain. The division bench judgement unanimously stated, *inter alia* that reservations be opened up for the transgender community by declaring them as socially and educationally backward. In the years since this judgement, however, there have barely been any State actions in India to implement the judgement in its spirit.

The Transgender Persons (Protection of Rights) Act, 2019, a statute passed to further the ideals of protecting the interests of the transgender community was met with resistance and protests from the transgender community itself. The absence of reservation provisions in the Act was one of the many grievances raised by the activists. India’s Union cabinet has recently approved a cabinet note to include transgender persons within the ‘Other Backward Communities’, a move to open up the reservations in education and employment to transgender persons.

In the second section of this paper, I look at the dichotomy between the acceptance of transgender persons in the early local Indian community practices and the discrimination that came with the colonisation and western mores. This history leading up to the contemporary position is detailed in the second section.

In the third Part, I try to understand the use of contemporary legal tools, like reservations as a compensatory and corrective measure for the aforementioned discrimination. While examining the adequacy of reservations as a remedial measure, I have looked at the need for potential Affirmative Action policies that go beyond the traditional state mandated reservation policies in India.

In the fourth part I have viewed the identified issues with a comparative lens by studying the Yogyakarta Principles, and the policies of United States and United Kingdom to learn from them and offer suggestion to benefit the community in India.

TRANSGENDER REPRESENTATION: A GLIMPSE INTO OUR PAST

References to Transgender Persons in Indian Religious and Mythological texts

The transgender community is known in India by various names. *Hijra, Eunuchs, Kothis, Aravanis, Jogappa, Shiv-Shakthi*, etc. are some of them.^v Most of these terms are not a creation of the modern times. These are very specific terms that are derived from other names and words in various Indian languages. For example, the term *Aravani* is said to have evolved from *Aravan* or *Iravan*, the son of the third *Pandava* – *Arjuna*^{vi}, who, the Transgender persons of Tamil Nadu consider to be their progenitor. And this is just one of the many examples from our mythology. The story of *Shikandi*, from the Mahabharata, a person who is supposed to have been born a woman before transforming into a man later, is another example that we have heard many a time.

It is also believed that when Lord Rama was setting out for his 14 yearlong exile in the *Ramayana*, it was only the transgender community that didn't feel obligated to follow his request to the 'men and women' of his kingdom to return to their homes, and continued following him. This led to Lord Rama conferring upon the community with the power to bless persons at auspicious events like marriages and childbirth.^{vii}

In fact, even Greek Mythology makes references to transgender persons and conveys a sense of acceptance within the society of that age. 'Hermaphrodite' an insensitive, politically incorrect term used to refer to transgender persons in the past, is actually the name of a Greek mythological figure. Hermaphrodite was the son of the Gods Hermes and Aphrodite, whose body was merged with that of a heavenly nymph who never wanted to be separated from Hermaphrodite.^{viii}

Historically, the transgender community has not necessarily been shunned and ostracised in India. There is evidence in some Indian religious and spiritual texts to suggest that the Indian society then, was not merely tolerant, but was accepting of the transgender community.^{ix} The

author of *Mahabhaya*, the seminal work on Sanskrit grammar, Patanjali, has referred to the third gender as naturally as the male and female genders are referred to.^x This probably explains Sanskrit grammar providing three gender based references and usages in the language (*strilinga* – female, *pulinga* – male, and *napumsakalinga* – transgender). Vedic astrology is also famous for having conferred not two, but, three gender based identity markers to the planets and celestial objects. The *tritiyaprakriti* or third nature is clearly assigned to the planets of mercury and Saturn.

Jain texts are probably the most forward in terms of understanding and acceptance of transgender persons. The Brahminical and Buddhist understanding of sex and gender, which involves assigning gender based on reproductive and secondary sexual characteristics, was shunned by the Jain texts on the ground that pre-pubescent and post-menopausal women wouldn't fit into that definition of womanhood. Therefore, the Jains came up with the concept of psychological sex.^{xi} Although their understanding of the third gender or the third sex is quite flawed (it better explains the modern understanding of homosexuality and not trans-sexuality), it still is heartening to see some acknowledgement and tolerance.

The medieval and particularly the post-medieval Mughal period, was also a time of tolerance. During the medieval period, the Islamic caliphates and sultanates, particularly of the Middle East, saw an attitude of tolerance towards transgender persons. It was not uncommon to see Transgender persons even occupying powerful and influential political positions.^{xii} This position continued into the period of Mughal rule in the Indian Sub-continent and it was common to see transgender persons enjoying the trust and patronage of high ranking officers and members of the royalty.^{xiii}

Transgender Persons in Colonial India

This period of tolerance and acceptance would end with the advent of European colonisation. It is recorded that, European traders found the privileged position that some transgender persons enjoyed in Muslim kingdoms repulsive.^{xiv} Therefore it comes as no surprise that towards late 18th and early 19th centuries, the position of the transgender community started deteriorating in India. This coincided with the rapid growth of the colonial forces, particularly the British in India.

During the initial days of colonisation, the transgender community was still covered by the patronage received from the local and regional rulers.^{xv} This included access to land and food. However, as the British strength grew and the influence of Indian rulers shrunk, the British laws started preventing the Transgender community from accessing these benefits. This was subsequently compounded by the implementation of the Indian Penal Code, 1860, and the Criminal Tribes Act, 1871.^{xvi}

The Indian Penal Code, particularly Section 377 that criminalised unnatural offences, was used to target the transgender persons. This was done on an individual and cases to case basis, such as in the case of *Queen Empress v Khairati*.^{xvii} However, the Criminal Tribes Act targeted the whole community. The Transgender community was designated as a tribe of habitual offenders addicted to the commission of non-bailable offences.^{xviii} Sections 24 and 26 respectively mandated their registration and allowed for their arrest without a warrant for just appearing in public dressed as a woman, dancing, or playing music. They could be imprisoned for up to two years for this offence. This Act also prevented them from being guardians, because section 27 criminalised the presence of a boy below the age of sixteen at the house of a transgender person.

Khairati was a classic case of persecution of transgender persons. The transgender person *Khairati* was arrested for being a habitual sodomite. Section 377 of the IPC being a non-bailable offence, also attracted the provisions of the Criminal Tribes Act.^{xix} The Sessions Court convicted *Khairati*, but the verdict was overturned on appeal by the High Court. The acquittal must not result in us ignoring that provisions of criminal law were used to systematically target the community by the British.

Contemporary Position

The condition of the Transgender community didn't drastically improve with the independence of India and the adoption of our Constitution. Although India had a generally tolerant, if not accepting attitude prior to colonisation, we seemed to have suffered from recency bias^{xx} even after independence. As a community the transgenders were criminalised as the Criminal Tribes Act was abolished. But two centuries of ostracising and criminalising wasn't vanishing from the society easily. The transgender community continued to be marginalised, and as recently 2011, the Karnataka Police Act was amended to include a section 36A, that allowed the police an arbitrary right to maintain a register of 'eunuchs' and their places of residence. This

provision allowed the police to target transgender persons and essentially had the same effect as the repealed Criminal Tribes Act.^{xxi} The Act was amended to replace ‘eunuch’ with ‘persons’ after a writ petition was filed before the Karnataka High Court. Although this was victory for the Transgender community, we must be mindful that these are recent events that suggest that the colonial criminalisation mind-set of towards transgenders has not changed even after all these years. This is particularly appalling when we note that Articles 15^{xxii} and 16(2)^{xxiii} of the Indian Constitution prohibit discrimination on the grounds of sex.

Articles 15 and 16 are relevant in ways other than just prohibition of discrimination. They are also the sources in the Indian Constitution for an important tool of Social Transformation, i.e. Affirmative Action. How can Affirmative Action be used to benefit the Transgender community and why must it be considered? This is addressed in the next section.

AFFIRMATIVE ACTION: A VIABLE SOLUTION?

The section above has tried to explain the conditions that the Transgender community had to endure while living through the last two and a half centuries. Even the Supreme Court of India took note of their pain in the *NALSA* judgement.^{xxiv} The judgement also suggested the use of reservations as a tool of compensatory justice, which could mainstream the transgender community that had been marginalised due to the years of discrimination, neglect, and abuse that I have tried to highlight in the above section.

Here, I attempt to explore the possibility of not merely reservations, but the larger tool of social transformation i.e. Affirmative Action, for the transgender community. To adequately understand how and why Affirmative Action can take shape for the Transgender community, I initially explain what Affirmative Action is and whether it works, prior to diving into the need for Affirmative Action or the lack of it for Transgenders.

Affirmative Action Explained

To truly establish what Affirmative Action can do for the Transgender community, we need to understand what Affirmative Action is and what its aims and objectives are. The intent is best conveyed here - “An Affirmative Action programme seeks to remedy the significant

underrepresentation of certain racial, ethnic, or other groups through measure that take group membership or identity into account”.^{xxv} Although this is a simple and non-exhaustive understanding, the intent of Affirmative Action is understood. Affirmative Action involves positive action on the part of someone to be conscious of the problems that a community or an individual from a community (by virtue of their membership to such community) has faced and accordingly determining the merit behind the claims that they have made. Such claims maybe made towards accessing education, obtaining employment (particularly public, but off late private too), or even political representation.

Sometimes these claims are legally mandated, and therefore are translated into numerical targets to be achieved. They are sometimes known as quotas and in India, we are aware of them by their Constitutional term “reservations”, a subset of Affirmative Action. In India reservations are constitutionally mandated in Articles 15 and 16 with respect to education and public employment and in Articles 243D, 243T, 330, and 332, with respect to political representation. India also does not restrict itself merely to reservations. The broader ambit of Affirmative Action is seen in the form of Articles 15(3),^{xxvi} 15(4),^{xxvii} and 46.^{xxviii} While reservations are an excellent tool to ensure social transformation, they are also grossly inadequate considering the present societal structure. Affirmative Action can have a much wider reach and impact. This is because the mathematical reservations provide a limited solution. However, the all-round Affirmative Action addresses the issue at hand more holistically.

Does Affirmative Action Work?

Now that we have understood what Affirmative Action means, we may say that idealism and nobility can only take us so far in creating a convincing argument favouring system. Strong genuine arguments about a system like Affirmative Action must be sustained with evidence of its efficacy. There is no point in extending the existing policies to a totally new group or community unless there is research to suggest that it works for the groups who are current beneficiaries. Below, I provide evidence to suggest that Affirmative Action works and is an effective tool for social transformation.

The primary sites of reservation in India are politics,^{xxix} education,^{xxx} and public sector jobs.^{xxxi} The primary beneficiaries are members of the Scheduled Castes, Scheduled Tribes, and Other

Backward Communities. Of course, nowadays Persons with Disabilities^{xxxii} as well as members of the Economically Weaker Sections^{xxxiii} are receiving the benefits of reservations, however due to the recency of the implementation of these provisions, there isn't enough data to gauge the efficiency of these reservation policies, and therefore are excluded from the scope here. It is, however, pertinent to note here that the Rights of Persons with Disabilities Act, 2016, provides for incentives to the private sector to set aside at least five per cent of their posts for Persons with Disabilities.^{xxxiv} This is a great example of a non-reservation Affirmative Action policy.

To answer the question of whether Affirmative Action works I have relied on a couple of recent studies. The first, a 2019 paper in the Journal of Asian and African Studies arguing that Affirmative Action policies in government jobs, particularly reservations, definitely have a positive impact on the SC, ST, and OBC communities.^{xxxv} The authors here have based their studies on the data obtained from the India Human Development Survey, 2011, conducted by the Universities of Maryland, Indiana, and Michigan and the National Council of Applied Economic Research, New Delhi.

The authors suggest that although there are disparities in urban and rural representation within the communities receiving the benefits of reservations, there is no doubt about how reservations have increased the accessibility of government jobs to these backward classes or communities.^{xxxvi} The findings thereunder also suggest that there is a direct relation between educational attainment and government jobs. They state that higher the qualification of a person, better their chances of becoming a government employee.^{xxxvii} Therefore, it may be argued that reservations at the educational level will directly result in increased access to government jobs, because reservation in education improves the chances of attaining the qualifications necessary to achieve success at the employment level.

The second article, also from 2019, provides similar results.^{xxxviii} In this paper the author has, *inter alia*, addressed two primary criticisms of reservations in Indian public sector employment and education, namely, that there is no visible benefits to the beneficiaries and that the benefits of reservations are extremely concentrated within the beneficiary group.^{xxxix} The study shows that the first criticism, i.e., the absence of any tangible improvements to the socio-economic status of the beneficiaries is false.^{xl} Over the period of time that the reservation policies have

been in place, there is a marked improvement in the socio-economic status of the beneficiaries. The second criticism that the benefits are concentrated within the wealthiest and the least disadvantaged amongst the beneficiaries is also dispensed with by using data suggesting that there is no concentration, whether determined on the basis of education or wealth of the previous generations.^{xli}

These are merely some of the most recent studies on this subject. There are plenty others in the past that have provided similar if not identical results and have led to the same conclusion - Affirmative Action works! And it works better at the stage of employment when implemented well at the educational level. There are also many judgements that speak the same language, such as *NM Thomas*^{xlii} and *Indra Sawhney*^{xliii} that have elaborately addressed the need for Affirmative Action as a viable tool for social transformation. The aforementioned studies suggest that there is a definite upward economic mobility and possibly upward social mobility (albeit, marginal) too as a result of Affirmative Action policies and the status associated with government jobs in India.

Affirmative Action and Social Transformation of the Transgender Community

Above, the paper provided evidence to suggest that Affirmative Action is a tool of social transformation that successfully achieves what it set out to achieve. Hereunder I examine the potential of Affirmative Action for the Transgender community.

Earlier, I had stated that the *NALSA*^{xliv} judgement required that the State declare the Transgender community to be a socially and educationally backward community, and consequently extend the benefits of reservations to them in education as well as public employment.^{xlv} This judgement existing, no other arguments are necessary to make a case for reservations to be extended to the Transgender community in India. However, here we will understand the various grounds on which the Supreme Court extended the benefits of reservation to the community, look at other reasons that have since come to fore and lend credibility to arguments for Affirmative Action and while doing so I also establish the need to look beyond State mandated reservations.

The Supreme Court in *NALSA* analysed the position of the Transgender community under the Yogyakarta principles and the position in foreign jurisdictions, which has been addressed later.

The Court then proceeded to analyse the Constitutional provisions that lend credibility to the fact that the Transgender community has been discriminated against and also explains the Constitutional provisions that justifies reservations.

The Supreme Court has, while laying down the law for the Transgender community, reiterated the violation of the equality provisions under Articles 14, 15, and 16 in their application to Transgenders and it is through these provisions that the court justifies the use of reservations.

Under Article 14, the use of the word ‘person’ is not restrictive to male or female, and therefore everybody becomes entitled to equality before and equal protection of the laws. This was interpreted by the Court as a provision that guarantees Transgender persons the right to be treated equally, including in education and employment.^{xlvi}

Articles 15 and 16, *inter alia*, prohibit sex-based discrimination in access to public facilities and public employment respectively. The Court stated that discrimination on the basis of sex includes within its fold discrimination on gender identity and the protection of these Articles also extends to the Transgender community.^{xlvii} This interpretation was sufficient to establish that the rights of the Transgender community. However, the Court did not end the judgment there and instead proceeded to extend the equitable protections available to backward and vulnerable groups to Transgender persons too.

The Court further stressed on the rights of the Transgender community to express themselves under Article 19(1)(a) by relying on foreign judgements such as the American *City of Chicago v. Wilson et al.*^{xlviii} judgement, where a Chicago municipal law that banned cross-dressing was struck down by the Illinois Supreme Court as violation of the freedom to express oneself, and *Doe v. Yunits et al.*^{xlix}, wherein the Massachusetts Superior Court upheld the right of an individual to wear a school uniform that matched her gender identity. The Court has also unequivocally established the Right to Life and Personal Liberty available to everyone as something that obviously also applies to the Transgender identity of persons. The right to life deals includes life with dignity and therefore the non-recognition of their gender identity and the consequent discrimination based on such identity will impede their right to lead life with dignity.¹

A cumulative reading of all the Fundamental Rights available to the Transgender Community under Articles 14, 15, 16, 19, and 21 clearly indicates that they have the right to lead life with dignity by expressing their true gender identity while being treated equally without any discrimination. However, they also do possess the right to be provided with equitable and special measures to counteract years of discrimination and its impact.

The studies cited in section 3.2^{li} convey that reservations, a form of Affirmative Action, work. However Affirmative Action provisions which could have been included in The Transgender Persons (Protection of Rights Act), 2019, merely impose an obligation on Government funded bodies to not discriminate, when the Act should have carved out reservations as well as Affirmative Action provisions.

Article 46 of the Indian Constitution requires that the State take active measures to promote the educational and economic interests of the weaker section. This paper has provided findings to state that Transgender persons are a 'weaker section', and the State can and must incentivise the admissions and subsequent hiring of Transgender persons beyond just the government sector.

It is an undeniable that Affirmative Action has improved the condition of the SCs, STs, and OBCs.^{lii} Studies also suggest that a combined Affirmative Action policy implemented at the educational and employment level can lead to tremendous results that genuinely transform the social standing of beneficiary communities. India's Union cabinet has recently approved a cabinet note to include transgender persons within the 'Other Backward Communities', a move to open up the reservations in education and employment to transgender persons. It is also heartening to note that Kerala has earmarked seats in educational institutions for Transgender students and Karnataka notified a 1% reservation across all categories in all Karnataka Government jobs.^{liii} But, we must understand that Karnataka, particularly its capital Bengaluru is home to a vibrant and thriving private sector (led by the continually burgeoning IT sector). Kerala had also come out with a policy to appoint Transgender persons in the Kochi Metro project.^{liv} However due to continuing discrimination at the workplace and no efficient support and grievance redressal mechanisms, many Transgender appointees quit their jobs and the ones who remain struggle severely.^{lv} Therefore, the need to have Affirmative Action provisions

beyond the State mandated reservations is a necessity which must be combined with other sustained support and rehabilitative measures.

There are also examples of Affirmative Action policies being implemented in the private sector. Tata Steel has in the past welcomed applications from Transgender persons.^{lvi} Amazon India has created a plan for Trans-inclusivity at their distribution centres by actively seeking out and employing transgender persons. Initial reports seem to suggest that there is success.^{lvii} Examples of private companies collaborating with the government to provide training and development opportunities to Transgender persons are also available. However, these examples are few and far between, and merely provide hope for a brighter future. Constant supervision by the State (as is necessary under Article 46) and a statutory provision like section 35 of the RPWD Act made in favour of the Transgender persons could change the future and set the ball rolling with respect to inclusion and social transformation of the community.

Furthermore, looking at Affirmative Action as an end unto itself will also not work. We must also bear in mind the fact that there is plenty of international evidence to suggest that strong market policies and increased economic growth will not automatically drive out the need for strongly implemented Affirmative Action policies.^{lviii} Affirmative Action, when done properly will have visible and tangible effects that will positively benefit the intended beneficiaries, however, this can only be the beginning of social transformation. True and wholesome social transformation that brings about holistic change in the mind-set will require much more than numerical quotas or Affirmative Action policies that flow from the state.

AFFIRMATIVE ACTION FOR TRANSGENDER PERSONS: A COMPARATIVE PERSPECTIVE

In the above section, I laid down the viability of Affirmative Action as a tool for social transformation of the Transgender community in India. In this section I will attempt to look at some international instruments and foreign jurisdictions with respect to Affirmative Action for Transgenders.

International Instruments

The United Nations has been at the forefront of Human Rights issues, and this is true for the human rights of Transgender community too. The Yogyakarta Principles, 2006, that were the result of a conference of Human Rights groups has been endorsed by the United Nations as well as other regional Human Rights bodies. These principles address the Human Rights issues faced by the Transgender community. It includes rights like the right to be treated equally irrespective of gender identity and decriminalisation of non-hetero-normative sexual relations. The equality principles are well rounded and include steps by the State to ensure that non-discrimination is an inclusive ideal that forms a part of all walks of life, and this must be done using legislative and executive measures. The Yogyakarta principles clearly suggest that additional efforts might be necessary by the State to ensure that discrimination is eliminated, and equality is arrived at, that allows Transgender persons to all seek out all employment including in the police and the armed forces.^{lix}

Foreign Jurisdictions

In the United States of America, it is common for Affirmative Action policies to be implemented based on individual design, i.e., each University or employer has the right to determine how they will have a diverse student community or workplace. But it is unconstitutional in the US to have fixed quotas based on gender, race, or any other criteria.^{lx} Consequently, off late there is a trend in the US to employ Affirmative Action policies towards the sexual minorities. The University of Idaho started including questions on sexual orientation and gender in their application forms in 2012, soon followed by many law schools.^{lxi} Amazon Studios has also taken active steps to foster greater diversity and inclusivity by implementing a trans-affirmative Action programme that has seen significant success. This is of course in line with their trans-inclusivity policies implemented in India too.

The United Kingdom has taken active steps at the Governmental level to provide Affirmative Action to Transgenders. The Government Equality Office in 2015 issued a document that was supposed to act as a guide to employers in employing Transgender persons.^{lxii} The 2010 Equality Act also confers protected status to Transgenders and therefore 'positive action' (as Affirmative Action is called in the UK) is available to them.^{lxiii} In fact a study conducted on the 2010 Act and the 2015 guide suggests that there is a direct impact of effective

implementation of these positive action policies on transgender persons with a marked increase in the self-esteem, productivity, and mental health.^{lxiv} However, the same study also cites other sources to bemoan the serious gaps in effective implementation of these provisions that reduces the impact. But it is pertinent to note that there is evidence to suggest social transformation of the Transgender community with effective Affirmative Action policies.

SUGGESTIONS AND CONCLUSION

Over the course of this paper, I have tried to understand the tolerance that the Transgender community had in ancient and medieval India that eroded over time as our country lived through colonisation. I use 'tolerance' and not 'acceptance' because, although there is evidence to suggest acceptance, there isn't enough to suggest that the Transgender community was ever truly embraced by our society. Also, a society that was truly accepting of a community wouldn't probably descend to a level where discrimination and marginalisation would be rampant and persistent even after colonisation.

Subsequently, the paper looked at the viability of Affirmative Action as an option. Herein, I laid down what Affirmative Action is, and its efficiency with regards to other beneficiaries before establishing that it is an option that must be extended to the Transgender community, as is required by the *NALSA*^{lxv} judgement. While stating that the system is viable, I also argued with evidence that State mandated reservations alone will not suffice and we must look at co-opting the private sector with Affirmative Action policies to increase the opportunities available.

In the penultimate section, I attempted to strengthen the arguments presented earlier with a comparative perspective. I used the Yogyakarta principles to state that an international instrument backed by the United Nations hints at providing Affirmative Action, and subsequently provided examples from the US and UK of not just Affirmative Action policies being implemented but also of positive results due to effective implementation.

I conclude by reiterating the statement that this paper makes, Affirmative Action is a viable option for the Transgender community which, if done effectively can lead to the end of their discrimination and marginalisation.

ENDNOTES

- ⁱ PUCL Karnataka, *Human Rights Violations against Sexual Minorities in India* (2001) <http://feministlawarchives.pldindia.org/wp-content/uploads/sexual-minorities.pdf> (last visited Jun. 20, 2023)
- ⁱⁱ MERRIAM WEBSTER, <https://www.merriam-webster.com/dictionary/transgender> (last visited Jun. 20, 2023)
- ⁱⁱⁱ *NALSA v Union of India* (2014) 5 SCC 438
- ^{iv} *Id.*
- ^v *NALSA*, *supra* note 3 at para 12; M. Michelraj, 'Historical Evolution of Transgender Community in India' (2015) 4 Asian Review of Social Sciences 17
- ^{vi} *Michelraj Id.*
- ^{vii} *NALSA*, *supra* note 3 at para 13
- ^{viii} 'Hermaphrodite', THE LANCET, 12 February 2011 [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(11\)60188-8/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(11)60188-8/fulltext)> accessed 13 February 2022
- ^{ix} *Michelraj supra* note 5 at p17.
- ^x *Id.*
- ^{xi} GAYATRI REDDY, WITH RESPECT TO SEX: NEGOTIATING HIJRA IDENTITY IN SOUTH INDIA 22 (University of Chicago Press 2005)
- ^{xii} *Id.* at 23
- ^{xiii} *Id.* See also *Michelraj supra* note 5 at p18
- ^{xiv} *Reddy Supra* note p24
- ^{xv} *Michelraj supra* note 5 at p18
- ^{xvi} Anuja Agrawal, *Gendered Bodies: The Case of the 'Third Gender' in India*, 31 CONTRIBUTIONS TO INDIAN SOCIOLOGY 273 (1997)
- ^{xvii} *Queen Empress v Khairati* (1884) ILR 6 All 204
- ^{xviii} Criminal Tribes Act 1871, § 2
- ^{xix} *NALSA*, *supra* note 3 at para 16
- ^{xx} "The recency effect is a cognitive bias in which those items, ideas, or arguments that came last are remembered more clearly than those that came first." – 'Jury Psychology' in V. S. Ramachandran (ed), *Encyclopedia of Human Behavior* (2012)
- ^{xxi} Jayna Kothari and Diksha Sanyal, *Courts Recognizing Transgender Rights*, OXFORD HUMAN RIGHTS HUB <https://ohrh.law.ox.ac.uk/courts-recognizing-transgender-rights/> (Jun 22, 2023)
- ^{xxii} Constitution of India, 1949, Art. 15 - Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.
- ^{xxiii} Constitution of India, 1949, Art. 16 - Equality of opportunity in matters of public employment: (2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect or, any employment or office under the State.
- ^{xxiv} *NALSA*, *supra* note 3
- ^{xxv} Paul Brest and Miranda Oshige, *Affirmative Action for Whom?* 47 STANFORD LAW REVIEW 855 (1995).
- ^{xxvi} Article 15 (3) - Nothing in this article shall prevent the State from making any special provision for women and children.
- ^{xxvii} Article 15 (4) - Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes
- ^{xxviii} Article 46 - Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections: The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.
- ^{xxix} India Const., 1949, Arts. 330 to 334
- ^{xxx} India Const., 1949, Art. 15
- ^{xxxi} India Const., 1949, Art. 16
- ^{xxxii} Rights of Persons with Disabilities Act, 2016, § 32 to 34,
- ^{xxxiii} India Const., 1949, Arts. 15 (6) and 16(6)
- ^{xxxiv} Rights of Persons with Disabilities Act, 2016, § 35

- xxxv Deepak Kumar, Bhanu Pratap, and Archana Aggarwal, *Affirmative Action in Government Jobs in India: Did the Job Reservation Policy Benefit Disadvantaged Groups?* 55 JOURNAL OF ASIAN AND AFRICAN STUDIES 145 (2019)
- xxxvi *Id.* at 11
- xxxvii *Id.* at 12
- xxxviii Alexander Lee, *Does Affirmative Action Work? Evaluating India's Quota System* (2019) http://www.rochester.edu/college/faculty/alexander_lee/wp-content/uploads/2019/04/respaper4.pdf (Jun 28, 2023)
- xxxix *Id.*
- xl *Id.* at 28.
- xli *Id.* at 32.
- xlii *State of Kerala and Anr. v NM Thomas*, AIR 1976 SC 490
- xliii *Indira Sawhney v Union of India*, AIR 1993 SC 477
- xliv *NALSA*, *supra* note 3
- xlv *Id.* at 128
- xlvi *Id.* at 71
- xlvii *Id.* at 74
- xlviii *City of Chicago v. Wilson et al.*, 75 Ill.2d 525(1978)
- lix *Doe v. Yunits et al.*, 2000 WL33162199 (Mass. Super.)
- ¹ *NALSA*, *supra* note 3
- li *Kumar*, *supra* note 35 and *Lee*, *supra* note 38
- lii Dr. Om Prakash Sharma, Lalit Kumar Roy, *Social Transformation through Affirmative Action in India: A Critical Analysis*, 11 Indian Journal of Law and Justice 17 (2020)
- liii Special Correspondent, *Govt. Notifies 1% Reservation for Transgender Persons in Job The Hindu* (Bengaluru, 07 June 2021) <https://www.thehindu.com/news/national/karnataka/govt-notifies-1-reservation-for-transgender-persons-in-jobs/article35181785.ece> (Jun. 28, 2023)
- liv *In a first, Kochi Metro appoints transgenders as its staff*, ET (Kochi, 20 May 2017) <https://economictimes.indiatimes.com/news/politics-and-nation/in-a-first-kochi-metro-appoints-transgenders-as-its-staff/making-progress/slideshow/58764414.cms> (Jun. 28, 2023)
- lv Anju Susan Varghese, *Transgender staff of Kochi Metro struggle to keep life on track*, TNIE (Kochi, 06 March 2020) <https://www.newindianexpress.com/cities/kochi/2020/mar/06/transgender-staff-of-kochi-metro-struggle-to-keep-life-on-track-2112888.html> (Jun. 28, 2023)
- lvi *Recruit Transgenders to Foster Greater Diversity* MINT, (16 September 2021) <https://www.livemint.com/opinion/online-views/recruit-transgenders-to-foster-greater-diversity-11631810039931.html> (Jun. 28, 2023)
- lvii Saroj Sachdeva, *Trans-Inclusivity at Amazon India: A progressive next step*, AMAZON (27 August 2020) <https://www.aboutamazon.in/news/operations/trans-inclusivity-at-amazon-india-a-progressive-next-step> (Jun. 28, 2023)
- lviii *Id.* at 161
- lix Principle 2 - The Rights to Equality and Non-discrimination and Principle 12 – Right to Work
- lx *Regents of the University of California v Allan Bakke*, 438 U.S. 265 (1978)
- lxi Peter Nicolas, *Gayaffirmative Action: The Constitutionality of Sexual Orientation Based Affirmative Action Policies*, 92(3) WASHINGTON LAW REVIEW 733 (2015)
- lxii Vasiliki Bozani, Nick Drydakis, Katerina Sidiropoulou, Benjamin Harvey, Anna Paraskevopoulou, *Workplace positive actions, trans people's self-esteem and human resources' evaluations* 41(6) International Journal of Manpower (2020) <https://www.emerald.com/insight/content/doi/10.1108/IJM-03-2019-0153/full/html> (Jun. 28, 2023)
- lxiii *Id.* at 3
- lxiv *Id.* at 17
- lxv *NALSA*, *supra* note 5