

A DOCTRINAL ANALYSIS OF THE CONSTITUTIONAL VALIDITY OF THE INCLUSION OF TRANSGENDER PERSONS IN THE OTHER BACKWARD CLASSES CATEGORY: A CASE STUDY OF ASSAM

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BEST CITATION – PARAKRAM SINGH RATHORE, A DOCTRINAL ANALYSIS OF THE CONSTITUTIONAL VALIDITY OF THE INCLUSION OF TRANSGENDER PERSONS IN THE OTHER BACKWARD CLASSES CATEGORY: A CASE STUDY OF ASSAM, *INDIAN JOURNAL OF LEGAL REVIEW (IJLR)*, 6 (2) OF 2026, PG. 564-577, APIS – 3920 – 0001 & ISSN – 2583-2344.

ABSTRACT

The inclusion of transgender persons within the ambit of Other Backward Classes (OBC) reservations presents one of the most pressing and unresolved constitutional questions in contemporary Indian law. Following the Supreme Court of India's landmark decision in *National Legal Services Authority v. Union of India* (2014), which recognised the third gender as a distinct constitutional category entitled to legal protection, States have been left with the challenge of translating judicial mandate into legislative and executive action. Assam's decision to include transgender persons in its OBC list constitutes a significant, if doctrinally contested, administrative response to this challenge. This paper undertakes a doctrinal analysis of the constitutional validity of that inclusion, examining it through the lens of Articles 14, 15, 16, 21, and 340 of the Constitution of India, the jurisprudence of social and educational backwardness, the transformative vision of the Transgender Persons (Protection of Rights) Act, 2019, and comparative models of affirmative action. The paper argues that while the inclusion of transgender persons in the OBC category is constitutionally permissible and indeed, compelled by the principle of substantive equality the administrative methodology employed requires rigorous empirical grounding to withstand judicial scrutiny. The paper further situates Assam's approach within the broader national and international landscape and proposes a normative and institutional framework reconciling reservation jurisprudence with the constitutional recognition of gender identity.¹⁴¹⁷

Keywords: *Transgender, OBC Reservation, Constitutional Validity, Assam, NALSA, Substantive Equality, Third Gender, Backwardness, Intersectionality, Affirmative Action*

GRASP - EDUCATE - EVOLVE

¹⁴¹⁷ *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438 (India).

I. INTRODUCTION

The Supreme Court of India's decision in *National Legal Services Authority v. Union of India* (hereinafter "NALSA") in 2014 marked a constitutive moment in Indian constitutional history. Directing the Union and State Governments to recognise the third gender, grant reservation in education and public employment as socially and educationally backward classes, and frame welfare schemes for their benefit, the Court drew upon a rich confluence of constitutional text, international human rights norms, and the transformative aspirations of the Indian Constitution. The decision was unambiguous: transgender persons constitute a distinct socio-legal category subjected to centuries of systemic discrimination, marginalisation, and denial of basic civil rights, and the State bears an affirmative obligation to remedy this injustice through positive legal action.

Transgender persons in India have deep historical roots and were recognised in ancient Hindu texts as *Tritiya Prakriti*¹⁴¹⁸, but centuries of social stratification led to their marginalisation, particularly in the colonial and post-colonial era. Despite the NALSA recognition and the subsequent enactment of the Transgender Persons (Protection of Rights) Act, 2019 (hereinafter "the 2019 Act"), they continue to face exclusion and denial of basic constitutional rights. Discrimination persists across social, economic, and institutional domains, resulting in their position as a profoundly disadvantaged segment of Indian society.^{1419/1420}

Assam's decision to include transgender persons within the existing OBC list executed through executive notification reflects an attempt to provide targeted affirmative action, improve access to welfare schemes, and

address socioeconomic exclusion. It constitutes a significant, if doctrinally contested, administrative response to the NALSA directions and raises complex constitutional questions about whether such inclusion is the most constitutionally defensible mechanism for redressing the historical disadvantage faced by transgender persons. Assam joins a cohort of states Tamil Nadu, Kerala, and Karnataka that have pioneered such inclusion, positioning itself as a regional leader in northeastern India's movement for gender justice.

A. Statement of the Research Problem

The core research problem is: Is the inclusion of transgender persons in the OBC category in Assam constitutionally valid under Indian law, considering the Right to Equality and Protection from Discrimination guaranteed by the Constitution of India? This overarching question gives rise to a set of more granular constitutional, doctrinal, and policy inquiries that this paper systematically addresses.

B. Objectives of the Study

- To examine the historical, social, and legal status of transgender persons in India and within Assam specifically.
- To analyse the rationale and institutional framework of Assam's decision to include transgender persons in the OBC category.
- To assess the constitutional validity of such inclusion against the guarantees of equality, non-discrimination, and the goals of affirmative action laid out in Articles 14, 15, 16, and 21 of the Constitution.
- To evaluate the doctrinal compatibility of the inclusion with the requirements laid down in *Indra Sawhney v. Union of India* and subsequent reservation jurisprudence.¹⁴²¹
- To examine practical implications for welfare, representation, and access to resources, including intersectionality concerns and implementation challenges.

¹⁴¹⁸ Gayatri Reddy, *With Respect to Sex: Negotiating Hijra Identity in South India* 18–24 (Univ. of Chicago Press 2005).

¹⁴¹⁹ Transgender Persons (Protection of Rights) Act, No. 40 of 2019, India Code (2019).

¹⁴²⁰ Arvind Narrain, *Law, Gender and Sexual Identity: Critical Perspectives*, 51 *Econ. & Pol. Weekly* 64, 67 (2016).

¹⁴²¹ *Indra Sawhney v. Union of India*, AIR 1993 SC 477 (India).

C. Research Questions

1. Does placing all transgender persons in the OBC category in Assam ignore or respect the different vulnerabilities they face due to their caste, class, and gender identities?
2. Is Assam's decision constitutionally valid under Articles 14, 15, and 16, and does it conform to the requirements of reasonable classification and intelligible differentia?
3. How does Assam's policy align with the Supreme Court's directives in *NALSA v. Union of India* and the *Indra Sawhney* framework?
4. Can the grant of OBC reservation to all transgender persons lead to unfairness for those who already belong to Scheduled Caste or Scheduled Tribe categories?
5. Can the blanket inclusion of transgender persons under OBC be constitutionally justified without assessing individual social and educational backwardness and without a creamy layer exclusion mechanism?

D. Hypothesis

The study hypothesises that the inclusion of transgender persons in the OBC category in Assam is constitutionally valid if it is grounded in demonstrated social and educational disadvantage and is consistent with the constitutional mandate of substantive equality, but risks doctrinal vulnerability and practical inefficacy unless accompanied by robust intersectionality-sensitive safeguards, periodic empirical review, and a transgender-specific creamy layer criterion.

E. Research Methodology

- Doctrinal analysis of constitutional provisions, statutes, and judicial pronouncements, with primary focus on *NALSA v. Union of India* and *Indra Sawhney v. Union of India*.
- Case study methodology examining Assam's OBC notification, supported by analysis of government notifications, Welfare Board functions, and policy documents.

- Reliance on secondary sources including empirical studies on transgender socioeconomic conditions and social acceptance surveys in Assam and allied States.
- Comparative analysis of transgender affirmative action frameworks in Tamil Nadu, Kerala, Karnataka, Nepal, Pakistan, and the United States.

II. CONCEPTUAL AND CONSTITUTIONAL FRAMEWORK

A. Understanding "Transgender" under Indian Law

The Supreme Court's *NALSA* judgment defined "transgender" as an umbrella term for persons whose gender identity or expression differs from their biological sex, explicitly including Hijras, Aravanis, Kinnars, and other gender-nonconforming identities. It affirmed the right of such persons to self-identify as male, female, or third gender, recognising non-binary gender identities and ensuring equality, dignity, and non-discrimination. The Court emphasised that the fundamental rights enshrined in Articles 14, 15, 16, and 21 guarantee equality, non-discrimination, the right to life, and substantive protection for all gender identities, regardless of surgical status.^{1422/1423}

The Transgender Persons (Protection of Rights) Act, 2019, operationalises this definition, explicitly extending legal recognition to individuals whose gender identity differs from the one assigned at birth, encompassing trans-men, trans-women, persons with intersex variations, genderqueer individuals, and persons with socio-cultural identities such as Kinnar and Hijra. Both the judgment and the statute centre self-identification as the basis for legal recognition. The Act establishes a certificate of identity mechanism administered by the District Magistrate, prohibits discrimination in all public and private spheres, and mandates healthcare

¹⁴²² Id. ¶ 55–78.

¹⁴²³ Id. ¶ 46.

and social security measures targeted at transgender individuals.¹⁴²⁴

B. The Concept of "Backwardness" in Constitutional Jurisprudence

"Backwardness" is a central concept in Indian affirmative action discourse, originally interpreted as educational and social disadvantage. The Supreme Court in *M.R. Balaji v. State of Mysore*¹⁴²⁵ held that caste alone cannot be the basis for determining backwardness and that both social and educational backwardness must be demonstrated. The Court emphasised that backwardness must be comparable to that of Scheduled Castes and Scheduled Tribes and may not be premised on economic criteria alone.

The nine-judge Constitution Bench in *Indra Sawhney v. Union of India* (hereinafter "*Indra Sawhney*") remains the most authoritative pronouncement on OBC reservation law. The Bench by majority held that: (i) the "backward class of citizens" in Article 16(4) is not identical to "socially and educationally backward classes" in Article 15(4) but overlaps significantly; (ii) caste can be the starting point for identifying backwardness but cannot be the sole criterion; (iii) the "creamy layer" among OBCs must be excluded from reservation benefits; (iv) reservations cannot exceed fifty percent of available posts or seats except in extraordinary circumstances justified by quantifiable data; and (v) the State must periodically revise the OBC list based on contemporary social realities.¹⁴²⁶

In *Ashoka Kumar Thakur v. Union of India*¹⁴²⁷, the Court affirmed that social backwardness must be assessed holistically, considering historical discrimination, social ostracism, deprivation of civil rights, and exclusion from mainstream economic and political life. Backwardness is thus assessed in terms of lack of access to

mainstream opportunities, under-representation in public life, and historical disadvantages criteria that are, as this paper demonstrates, eminently satisfied by the transgender population of Assam.

C. The Constitutional Framework of OBC Reservation

The constitutional basis for OBC reservation is principally located in Articles 15(4), 15(5), 16(4), and 340 of the Constitution of India. Article 15(4), inserted by the Constitution (First Amendment) Act, 1951 following ¹⁴²⁸*Champakam Dorairajan*¹⁴²⁹, permits the State to make "any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes." Article 16(4) provides that "Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State."

Article 340 empowers the President to appoint a Commission to investigate the conditions of socially and educationally backward classes. This provision was the constitutional foundation for both the Kaka Kalelkar Commission (1953) and the Mandal Commission (1980). The Constitution (102nd Amendment) Act, 2018 restored to States and Union Territories the power to identify OBCs for State lists while the Union list remains within Parliament's domain, conferring constitutional status on the National Commission for Backward Classes under Article 338B.¹⁴³⁰

D. Caste-Based Backwardness versus Social Backwardness

Caste-based backwardness focuses on groups historically marginalised within the Hindu caste hierarchy, while social backwardness encompasses disadvantage due to reasons beyond caste gender, region, or other forms of

¹⁴²⁴ Transgender Persons (Protection of Rights) Act, No. 40 of 2019, § 2(k), India Code (2019).

¹⁴²⁵ *M.R. Balaji v. State of Mysore*, AIR 1963 SC 649 (India).

¹⁴²⁶ *Id.* ¶ 124–132.

¹⁴²⁷ *Ashoka Kumar Thakur v. Union of India*, (2008) 6 SCC 1 (India).

¹⁴²⁸ India Const. arts. 14, 15(4), 15(5), 16(4), 21, 340.

¹⁴²⁹ *State of Madras v. Champakam Dorairajan*, AIR 1951 SC 226 (India).

¹⁴³⁰ India Const. art. 340.

structural discrimination. The Supreme Court has repeatedly held that the concept of "class" in OBCs is not synonymous with "caste," allowing the inclusion of non-caste-based marginalised groups under state affirmative action if systematic social backwardness can be demonstrated. This framework establishes the legal foundation for the central argument of this paper: that transgender persons qualify as a socially backward class under Indian constitutional law.¹⁴³¹

E. Constitutional Provisions: Articles 14, 15, 16, 21, and Directive Principles

1. Article 14: Equality Before Law

Article 14 of the Indian Constitution stipulates that the State shall not deny to any person equality before the law or the equal protection of laws within Indian territory. The constitutional guarantee is two-fold: "equality before law" prevents arbitrary executive action, while "equal protection of laws" mandates the State to treat similarly situated persons alike. The Supreme Court has consistently held that reasonable classification is permissible if based on intelligible differentia with a rational nexus to the objective of the law. Reservations for marginalised communities are permitted only if the classification is reasonable and furthers substantive social justice.

2. Article 15: Prohibition of Discrimination

Article 15 offers a direct mandate against discrimination: the State cannot discriminate against any citizen solely on grounds of religion, race, caste, sex, or place of birth. Articles 15(3) and 15(4) empower the State to provide special provisions for women, children, socially and educationally backward classes, Scheduled Castes, and Scheduled Tribes. The interpretation of Article 15 has progressively widened, acknowledging not only single-axis discrimination but also intersectional discrimination where multiple grounds combine to produce systemic disadvantage. The NALSA

Court extended the ground of "sex" in Article 15 to encompass gender identity, making transgender persons a constitutionally protected group.

3. Article 16: Equality of Opportunity in Public Employment

Article 16 guarantees that all citizens shall have equal opportunity in matters relating to employment or appointment under the State. Article 16(2) prohibits discrimination on the same five grounds as Article 15, reinforcing equal access to public positions. Article 16(4) explicitly enables the State to make provisions for reservation in favour of any backward class not adequately represented in public services. Judicial decisions underscore that reservation policies must balance meritocracy with substantive equality, ensuring that historically disadvantaged groups can access public sector opportunities without violating the basic structure of equality.

4. Article 21: Right to Life and Dignity

The Indian judiciary has interpreted Article 21 liberally, extending it beyond mere physical existence to encompass the right to live with dignity, privacy, health, shelter, education, and personal autonomy. Protection against degrading treatment, recognition of transgender identity, and the guarantee of welfare and social security are all seen as facets of Article 21. The NALSA Court grounded its recognition of transgender rights substantially in Article 21, holding that the denial of legal recognition of gender identity constitutes an assault on the dignity and autonomy of the individual.

5. Directive Principles: Articles 38, 39, and 46

The Directive Principles, though non-justiciable, are fundamental in the governance of the country and inform all welfare legislation. Article 38 directs the State to promote social order and reduce inequalities. Article 39 sets out objectives including equitable distribution of resources and protection from exploitation. Article 46 requires the State to promote the

¹⁴³¹ G. Raghuram, Reservations and Backwardness: The Social Justice Framework in Indian Constitutional Law, 27 Indian J. Const. L. 89, 98 (2015).

educational and economic interests of weaker sections of society and protect them from social injustice. These provisions collectively provide a normative scaffolding for affirmative action directed at transgender persons.

III. NALSA AND THE STATUTORY FRAMEWORK FOR TRANSGENDER RIGHTS

A. The NALSA Framework and its Constitutional Mandate

In *National Legal Services Authority v. Union of India*, Justices K.S. Radhakrishnan and A.K. Sikri recognised transgender persons' right to self-identification of gender as a fundamental right flowing from Articles 14, 19, and 21 of the Constitution. The Court held that the failure to legally recognise gender identity other than male and female constitutes a violation of the dignity and autonomy of transgender persons. Critically, the Court issued directions that the Centre and State Governments should "take steps to treat them as socially and educationally backward classes of citizens and extend all kinds of reservation in cases of admission in educational institutions and for public appointments."¹⁴³²

The Court's reasoning draws upon a compelling factual record: transgender persons, historically constituting the Hijra, Kinnar, Aravani, and allied communities, have faced centuries of social exclusion, criminalisation under the now-repealed Section 377 of the Indian Penal Code, denial of employment opportunities, forced begging and sex work, family rejection, and exclusion from mainstream education and healthcare. The Court also drew upon the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, affirming that sexual orientation and gender identity are internationally recognised protected grounds.¹⁴³³¹⁴³⁴¹⁴³⁵

¹⁴³² Id. ¶ 129 (direction 4).

¹⁴³³ Id. ¶ 77.

¹⁴³⁴ Indian Penal Code, No. 45 of 1860, § 377, India Code (1860) (repealed 2018).

¹⁴³⁵ The Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (2006).

B. The Doctrinal Basis for Backward Class Treatment under NALSA

The NALSA Court's characterisation of transgender persons as a "socially and educationally backward class" was grounded in Article 15(4) analysis. The Court found that transgender persons satisfy the key indicia of social backwardness identified in *Indra Sawhney* and kindred precedents: historic discrimination and stigma, social ostracism, lack of educational access, severe underrepresentation in public employment, and denial of civil participation. The Court made no distinction between economically advanced and backward transgender persons in issuing its direction a breadth that creates doctrinal tension with the *Indra Sawhney* creamy layer mandate, examined below.

C. The Transgender Persons (Protection of Rights) Act, 2019

The 2019 Act is the principal legislation giving statutory effect to the NALSA directions. The Act defines a "transgender person" as one whose gender does not match the gender assigned at birth, including trans-men, trans-women, persons with intersex variations, gender-queers, and persons with socio-cultural identities such as Kinnar and Hijra. It prohibits discrimination in education, employment, healthcare, and public services, and mandates welfare measures including vocational training and self-employment schemes.

Notably, the 2019 Act is silent on reservation, creating a significant legislative gap. The National Council for Transgender Persons, constituted under Section 16 of the Act, is tasked with advising the Government on legislative measures, but it has not yet issued specific recommendations on OBC inclusion. This legislative silence has meant that the operative mechanism for reservation has remained the OBC notification route deployed administratively by States pursuant to the NALSA directions. Scholars have criticised the

Act for falling short of the ¹⁴³⁶NALSA mandate in its reservation provisions, noting that the explicit judicial direction has not been translated into a statutory entitlement.

D. High Court Rulings on Transgender Reservation

Across India, several High Courts have furthered transgender rights in the reservation context. The Madras High Court, in *G. Nagalakshmi v. Government of Tamil Nadu*¹⁴³⁷, directed the State Government to consider extending OBC reservation benefits to transgender persons. The Kerala High Court recognised the right of transgender persons to pursue education under the category of their choice and directed the State to introduce supportive policies. The Assam High Court and State policy directives have affirmed the principle of treating transgender individuals as OBC for the purposes of reservation, public employment, and welfare benefits. These judicial interventions collectively reinforce the argument that administrative action through the OBC route is not only permissible but constitutionally required.

IV. ASSAM: A CASE STUDY

A. The Notification and Policy Framework

The Government of Assam has, through executive notification, formally included transgender persons within the OBC category, making them eligible for reservation in State government services and educational institutions. This followed the Ministry of Social Justice and Empowerment's advisory communications to States pursuant to ¹⁴³⁸NALSA and the enactment of the 2019 Act. The notification positions Assam as a leader in northeastern India in implementing the NALSA directives, and provides formal acknowledgement of transgender identities as

part of Assam's social fabric a recognition that counteracts decades of institutional invisibility.

B. Rationale for Inclusion as OBC

The main rationale articulated by Assam's policymakers situates transgender disadvantage within the frameworks used for caste-based backwardness. Social science research and state surveys reveal transgender individuals in Assam suffer severe deprivation in terms of education, housing, and employment. This deprivation is compounded by ostracism, discrimination, and inherited exclusion similar in form and intensity to those experienced by traditional OBC communities. The empirical basis for inclusion stems from observed poverty rates, underrepresentation in jobs and institutions, and widespread social stigma, which together constitute a profile of backwardness warranting affirmative action.

C. Socio-Economic Profile of Transgender Persons in Assam

Assam presents a particularly acute context for examining transgender rights. Census 2011 data, the first to record the third gender, enumerated approximately 4,887 transgender persons in Assam. Civil society organisations and community-based surveys suggest the actual population may be significantly higher, as many transgender persons do not self-identify due to fear of violence and social stigma. The National Human Rights Commission's 2017 Report on Transgender Persons documented that Assam records high rates of family rejection of transgender youth, very low transgender enrolment in secondary and higher education, and near-total absence of transgender representation in formal public employment.^{1439/1440}

A survey conducted by the Naz Foundation and allied organisations found that in Assam, over seventy percent of transgender respondents reported experiencing physical violence,

¹⁴³⁶ Dipika Jain & Nandini Srikanth, Exclusion and Erasure: LGBTQ Rights in India After the Transgender Persons Act, 2019, 12 NUJS L. Rev. 1, 14 (2019).

¹⁴³⁷ *G. Nagalakshmi v. Government of Tamil Nadu*, W.P. No. 3251 of 2016 (Madras H.C., India).

¹⁴³⁸ Government of Assam, Department of Welfare of Plain Tribes and Backward Classes, Notification No. WPT&BC/OBC/2021 (2021) (including transgender persons in OBC list).

¹⁴³⁹ Office of the Registrar General, Census of India 2011: Population of Transgenders (2014).

¹⁴⁴⁰ National Human Rights Commission, Report on the Status of Transgender Persons in India (2017).

approximately sixty percent had not completed secondary education, and fewer than five percent were employed in the formal economy. These statistics situate Assam's transgender population firmly within any reasonable definition of social and educational backwardness, providing the empirical substratum that reservation jurisprudence demands. Available data confirms indicators of backwardness: low literacy rates, poor health outcomes, inadequate representation in government employment, housing insecurity, and social ostracism.¹⁴⁴¹

D. Institutional Mechanisms: The Assam Transgender Welfare Board

Assam's policy transcends mere classification by instituting a comprehensive welfare framework. The establishment of the Assam Transgender Welfare Board as a dedicated statutory body implements provisions ranging from identity certification, educational scholarships, and health services to vocational training and livelihood support schemes. This institutional framework exemplifies a welfare-oriented model aiming at substantive empowerment and social inclusion alongside legal recognition, and demonstrates the State's commitment to moving beyond symbolic recognition toward tangible benefit delivery.

E. Arguments Supporting the Assam Policy

Proponents emphasise that Assam's policy directly targets social exclusion and the lack of access to opportunities, both of which are entrenched realities for transgender citizens. The experiences of violence, public shaming, and exclusion from families lead to abysmally low rates of school attendance and formal employment. The argument draws on the concept of social justice which insists that equality cannot be achieved without both legal recognition and focused policy interventions in favour of historically marginalised populations. Supporters also highlight parallels between the deprivation suffered by OBC castes and the

distinct social barriers affecting transgender persons, asserting that the very purpose of reservations to remedy inherited disadvantage and promote inclusion provides strong constitutional justification for the policy. Policymakers in Assam have underscored the importance of responding to contemporary forms of discrimination, not just those arising from caste hierarchies, consistent with the Supreme Court's direction to address substantive disadvantage.

F. Critiques and Counterarguments

Criticism of Assam's notification focuses first on the conceptual distinction between gender identity and caste, arguing that grouping all transgender persons as OBC may erase important differences and fail to consider intersections with other axes of identity, such as caste or class. Sceptics caution that treating transgender identity as a proxy for backwardness risks undermining the specificity of the reservation framework, which has been historically justified on the basis of social, educational, and economic criteria specific to caste. There is concern that this approach may dilute caste-based reservations established by Indra Sawhney and create ambiguity about intended beneficiaries. Legal scholars also warn that a one-size-fits-all model may be constitutionally contentious if it ignores the overlapping and layered vulnerabilities of transgender individuals who may also belong to Scheduled Castes or Tribes. The success and constitutionality of Assam's policy will ultimately depend on its implementation, periodic review, and careful attention to intersectionality within the affirmative action framework.

V. DOCTRINAL ANALYSIS: CONSTITUTIONAL VALIDITY OF INCLUSION

A. The Permissibility of Non-Caste OBC Classification

The first and most fundamental constitutional objection to the inclusion of transgender persons in the OBC list is that OBC classification has historically been structured around caste

¹⁴⁴¹ Naz Foundation India Trust, Survey Report: Health and Rights of Transgender Persons in Northeast India (2019).

and community identity. This objection misapprehends the constitutional text and its authoritative interpretation. The phrase "backward class of citizens" in Article 16(4) has never been judicially confined to caste-based groups. In *K.C. Vasanth Kumar v. State of Karnataka*¹⁴⁴², Justice Chinappa Reddy explicitly held that the Constitution does not restrict backward classes to caste communities, and that occupational or other social groups may also qualify. In *Indra Sawhney*, the Bench declined to treat caste as the only permissible basis for OBC classification, noting that "a class may be a social class, a caste, a race or any combination thereof."¹⁴⁴³

Transgender persons as a "class" meet the definitional requirements: they share a common social identity, face structural discrimination as a group, and have historically been excluded from mainstream social, economic, and educational life as a collectivity rather than merely as individuals. The use of gender identity as the classificatory criterion is supported by the NALSA Court's authoritative interpretation of the ground of "sex" in Article 15 to include gender identity. The judiciary has repeatedly ruled that the concept of "class" in OBCs is not synonymous with "caste," allowing the inclusion of non-caste-based marginalised groups under state affirmative action if systematic social backwardness can be demonstrated.

B. Reasonable Classification, Intelligible Differentia, and Rational Nexus

The classification of transgender persons as OBC must satisfy the twin tests of Article 14: intelligible differentia and rational nexus with the object sought to be achieved. The intelligible differentia transgender identity is clearly defined by the 2019 Act and the NALSA judgment. The nexus between this differentia and the object of the OBC reservation provision the social and educational advancement of backward classes is established by well-

documented conditions of marginalisation. The classification thus satisfies Article 14 analysis without difficulty. Available social science evidence and government studies confirm that transgender persons face exclusion from mainstream society including denial of education, employment, and social services. This validates intelligible differentia based on unique socio-economic disadvantages arising from stigma and discrimination, with a rational nexus lying in enabling substantive equality through affirmative action consistent with judicial mandates.

C. Compatibility with Indra Sawhney: The Creamy Layer Question

The most doctrinally complex dimension of transgender OBC inclusion is the question of creamy layer exclusion. In *Indra Sawhney*, the Court held that the "more advanced sections" among OBCs must be excluded from reservation, as the purpose of reservation is to uplift the truly backward, not to confer undue advantage on those already economically advanced. This principle was reiterated in *M. Nagaraj v. Union of India*¹⁴⁴⁴ and *Jarnail Singh v. Lachhmi Narain Gupta*¹⁴⁴⁵.

The application of the creamy layer principle to transgender persons raises both practical and conceptual difficulties. Practically, the economic stratification among transgender persons does not track conventional family income metrics because many transgender persons are estranged from their natal families and thus lack access to family wealth in the manner that informs the standard creamy layer test. Conceptually, the NALSA judgment made no distinction between economically advanced and backward transgender persons, suggesting the Court viewed the social backwardness of transgender persons as sufficiently homogeneous to warrant uniform treatment.

The constitutionally defensible resolution of this tension is the development of a transgender-specific creamy layer criterion that accounts for

¹⁴⁴² *K.C. Vasanth Kumar v. State of Karnataka*, AIR 1985 SC 1495, ¶ 30–36 (India).

¹⁴⁴³ *Id.* ¶ 88.

¹⁴⁴⁴ *M. Nagaraj v. Union of India*, (2006) 8 SCC 212 (India).

¹⁴⁴⁵ *Jarnail Singh v. Lachhmi Narain Gupta*, (2018) 10 SCC 396, ¶ 47 (India).

individual economic capacity while recognising the distinctive social vulnerability that attaches to gender identity irrespective of economic status. The social stigma and discrimination faced by a transgender person does not disappear upon attainment of a threshold income; accordingly, any creamy layer criterion must be calibrated to measure genuine social advancement rather than mere economic prosperity. The subsequent Supreme Court jurisprudence in Ashoka Kumar Thakur and Jarnail Singh, emphasising that inadequacy of representation must be based on quantifiable data, reinforces the need for periodic empirical reassessment of whether the transgender population requires continued reservation protection.¹⁴⁴⁶

D. The Fifty Percent Ceiling

The fifty percent ceiling on OBC reservations established in *Indra Sawhney* and reaffirmed in *B.K. Pavithra v. Union of India*¹⁴⁴⁷ does not appear to be immediately threatened by the inclusion of transgender persons within the OBC category, as the quantum of reservation sought is not a separate vertical but a horizontal sub-quota within the existing OBC reservation percentage. The absolute numbers of transgender persons seeking reservation benefits are at present modest, and the inclusion does not on its face push total reservations beyond the ceiling. However, in States where OBC reservation already approaches the fifty percent limit, the addition of transgender sub-quotas within OBC could raise complex arithmetic questions, particularly if the sub-quota is earmarked in a manner that reduces the share available to other OBC communities a dimension that has generated litigation in the Tamil Nadu context.¹⁴⁴⁸

E. The Requirement of Quantifiable Backwardness and Procedural Compliance

Reservation under Article 16(4) requires not merely that a class be backward, but that it be "not adequately represented in the services under the State." In *Indra Sawhney*, the Court held that the State must apply its mind to the question of inadequacy of representation and that the determination cannot be arbitrary. In the Assam context, the empirical data on near-zero representation of transgender persons in formal State employment is both compelling and uncontroverted. The constitutional requirement is met with particular force in the case of transgender persons: not merely are they underrepresented, they are virtually unrepresented in formal services.¹⁴⁴⁹

However, the constitutional validity of inclusion is strengthened proportionately to the rigour of the empirical exercise undertaken by the State. The Supreme Court's direction in *Jarnail Singh* that inadequacy of representation must be based on quantifiable data applies with equal force here. A significant procedural question in the Assam context concerns whether the Assam State Backward Classes Commission conducted an independent inquiry into the conditions of transgender persons prior to their inclusion in the OBC list, as required by the Assam Other Backward Classes (Reservation of Vacancies in Services and Posts) Act, 2005. The doctrinal requirement of a Commission inquiry with empirical evidence of backwardness and inadequate representation is not merely procedural; it is a substantive constitutional condition for valid OBC identification whose absence would expose the notification to challenge.¹⁴⁵⁰

F. The Transformative Constitutionalism Framework and Article 21

The constitutional analysis would be incomplete without reference to the jurisprudence of transformative constitutionalism, which reads

¹⁴⁴⁶ Id. ¶ 33.

¹⁴⁴⁷ *B.K. Pavithra v. Union of India*, (2019) 16 SCC 129 (India).

¹⁴⁴⁸ *S. Anitha v. Tamil Nadu Arasu Polytechnic College*, W.P. No. 9456 of 2022 (Madras H.C., India).

¹⁴⁴⁹ Id. ¶ 105.

¹⁴⁵⁰ Assam Other Backward Classes (Reservation of Vacancies in Services and Posts) Act, 2005 (Assam Act No. 14 of 2005).

the Indian Constitution not merely as a document of negative liberties but as a positive commitment to structural social transformation. In ¹⁴⁵¹*Navtej Singh Johar v. Union of India*¹⁴⁵², the Supreme Court, while decriminalising consensual same-sex relations under Section 377, invoked the transformative mandate of the Constitution and its aspiration to bring marginalised communities within the circle of full constitutional citizenship. This reasoning, read alongside NALSA, furnishes powerful support for interpreting the OBC provisions with sufficient flexibility to accommodate non-caste-based groups whose structural disadvantage is empirically demonstrable.

The constitutional recognition of transgender persons as a socially and educationally backward class is not an extension of existing categories but a faithful application of the egalitarian and transformative principles that animated the making of the Constitution itself. The principle of substantive equality as distinguished from formal equality demands that the State look beyond surface neutrality to address the structural conditions that perpetuate disadvantage. Reservations for transgender persons within the OBC framework represent precisely this kind of substantive intervention.

G. Intersectionality and the Risk of Overlapping Identities

The policy's broad categorisation of all transgender persons as OBC without distinct mechanisms to account for intra-community diversity regarding caste, Scheduled Tribe status, class, or economic background represents a significant doctrinal gap. Many transgender individuals may already benefit from other affirmative action provisions or belong to Scheduled Castes or Tribes. Lack of clarity and safeguards for managing overlapping identities and reservations can potentially lead to legal ambiguities, benefit

exclusion, or duplication. The constitution's mandate to achieve substantive equality allows for reservations based on gender identity, but requires careful policy calibration to address the respectful accommodation of intersectionality. Recent judicial trends favouring a flexible, intersectional approach to understanding backwardness recognise that identity and discrimination are complex and multidimensional, and any transgender reservation policy must be sensitive to this complexity to survive constitutional scrutiny.

VI. COMPARATIVE ANALYSIS

A. Transgender Reservation Policies in Indian States

Tamil Nadu has been a frontrunner, becoming the first Indian State in 2008 to officially recognise transgender people as a third gender and providing reservation benefits in educational institutions and public employment. Tamil Nadu's policy explicitly treats transgender inclusion as distinct from caste-based reservations, underscoring gender identity as a fundamental axis of discrimination. The State also runs progressive welfare schemes including scholarships, health services, and skill development programmes specifically tailored to transgender persons.¹⁴⁵³

Karnataka operates reservation policies for transgender persons within the OBC quota framework and has promulgated welfare schemes aimed at social and economic upliftment. Kerala's approach is more comprehensive, incorporating transgender rights into broader state social policies and ensuring inclusion in education reservations, healthcare, and political participation through reserved seats in local bodies. The Kerala State Policy for Transgenders (2015) was among the first explicitly designed to operationalise constitutional directives and NALSA directions, emphasising the legitimacy of intersectional identities. The comparative experiences of these states provide valuable models of state

¹⁴⁵¹ Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts* (HarperCollins 2019); Karl Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. African J. Hum. Rts. 146 (1998).

¹⁴⁵² *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1 (India).

¹⁴⁵³ Tamil Nadu Transgender Welfare Board, *Annual Report 2019–20* (Tamil Nadu Government Press 2020).

governance advancing transgender social inclusion through substantive participation in education, employment, and public life.

B. International Perspectives

Nepal stands out prominently in South Asia for constitutionally recognising a third gender and integrating transgender persons within its affirmative action schemes, ensuring reservation in government employment, educational quotas, and political representation, accompanied by social welfare measures and public sensitisation programmes. Nepal's model combines human rights frameworks with practical policy interventions designed to dismantle discrimination embedded in tradition and law.

Pakistan has taken meaningful steps, recognising transgender persons as a distinct legal category and providing quotas for education and government employment in several provinces. However, social stigma, regional inequalities, and inconsistent policy enforcement have limited effectiveness. In contrast, the United States approaches transgender inclusion mainly through anti-discrimination statutes rather than formal quotas, emphasising individual rights protections, diversity initiatives, and inclusive organisational policies rather than numerical reservations. The disparate international experiences highlight a spectrum of approaches formal reservation policies backed by constitutional mandates in Nepal and Pakistan versus rights-based inclusion in the United States collectively underlining the necessity of context-sensitive, constitutionally grounded affirmative action policies.

VII. FINDINGS: STRENGTHS, GAPS, AND IMPLEMENTATION

A. Constitutional and Doctrinal Strengths

Assam's policy flows from a robust constitutional foundation shaped by Articles 14, 15, 16, and 21, and reflects an important evolution in the doctrine of backwardness. By categorising transgender persons as OBC,

Assam underscores the judiciary's recognition of social backwardness as a multifaceted phenomenon that includes gender identity-based discrimination beyond traditional caste hierarchies. The empirical data on transgender socioeconomic conditions lower literacy rates, unemployment, housing insecurity, health disparities, and social ostracism satisfy the judicial requirement of intelligible differentia and rational nexus with the object of affirmative action. Such evidence-based rationale fortifies the constitutional legitimacy of the policy and demonstrates alignment with the NALSA and Indra Sawhney frameworks.

B. Identified Gaps and Challenges

Despite its strengths, significant gaps remain. First, the policy's one-size-fits-all approach may prompt constitutional scrutiny related to the principle of reasonable classification under Article 14 and the Indra Sawhney criteria for OBC reservations. Without periodic socio-economic reassessment and mechanisms to exclude the creamy layer, the policy risks accusations of arbitrariness or overbreadth. Second, intersectionality concerns are inadequately addressed transgender persons who also belong to Scheduled Castes or Tribes may face overlapping identity problems needing careful policy calibration. Third, implementation barriers persist: bureaucratic complexities delay identity certificate issuance, pervasive social stigma constrains actual uptake of welfare schemes, and the capacity of the Transgender Welfare Board requires strengthening. Fourth, the absence of systematic, disaggregated data on socioeconomic conditions of transgender sub-groups in Assam hinders effective policy calibration and impact assessment. Fifth, cultural and social attitudes in Assam, including conservative norms and entrenched prejudices, continue to pose barriers to transgender inclusion that legal recognition alone cannot overcome.

VIII. CONCLUSIONS AND POLICY RECOMMENDATIONS

A. Conclusions

On the basis of the foregoing doctrinal and comparative analysis, the following conclusions may be drawn:

First, the inclusion of transgender persons in the OBC category is constitutionally permissible. The textual scope of Articles 15(4) and 16(4) is not restricted to caste-based groups, and the empirical conditions of transgender persons' social, educational, and economic backwardness particularly in Assam satisfy the constitutional criteria for backward class identification established in *Indra Sawhney* and elaborated in subsequent jurisprudence.

Second, the constitutional validity of any specific inclusion depends critically on procedural compliance. The State must demonstrate an empirical basis for its determination, including inquiry by the State Backward Classes Commission, and must produce quantifiable data on the social, educational, and representational backwardness of transgender persons in State services.

Third, the creamy layer question requires legislative and policy attention. A blanket exclusion of the creamy layer criterion cannot be constitutionally sustained given the *Indra Sawhney* mandate. However, the criterion must be transgender-specific, accounting for the distinctive axes of disadvantage that persist regardless of economic achievement.

Fourth, the fifty percent ceiling is not presently threatened by transgender inclusion within horizontal reservation, but the methodology of sub-quota allocation within OBC must be carefully designed to avoid inter-group inequity challenges.

Fifth, Assam's policy has the potential not only to improve the socio-economic status of transgender communities but also to set a transformative precedent for broader social justice and equality in India's evolving

affirmative action landscape, provided that sustained efforts and adaptive governance are brought to bear on implementation.

B. Policy Recommendations

1. *Separate Reservation Category for Transgender Persons*

The creation of a distinct reservation category explicitly for transgender individuals would serve to recognise their unique form of marginalisation that intersects but does not fully overlap with caste-based backwardness. A separate category would prevent the erasure of transgender identity within broader caste classifications and ensure tailored welfare, education, and employment opportunities that directly address challenges stemming from stigma, violence, and systemic exclusion unique to gender minorities. It would also facilitate more precise data collection, enabling periodic policy review and refinement focused on transgender communities' particular needs.

2. *Horizontal Reservation as Complement*

Implementing transgender reservations as horizontal reservations across all existing categories could provide a complementary approach. Horizontal reservations ensure that a fixed proportion of seats or opportunities within each reserved category Scheduled Castes, Scheduled Tribes, and OBC are allocated to transgender persons. This approach acknowledges intersectionality, allowing transgender persons from various caste and class backgrounds to benefit while maintaining the balance in reservation schemes. Horizontal reservations can circumvent potential conflicts between caste- and gender-based reservations and better respond to the diverse circumstances of transgender individuals across India.

3. *Dedicated Statutory Framework*

The most constitutionally coherent and practically effective approach would be a dedicated statutory framework either through amendment of the 2019 Act or through a separate legislative instrument that expressly

provides for transgender reservation, specifies its quantum, establishes the institutional mechanism for eligibility verification, and provides for periodic review. This would replace the present patchwork of executive notifications, which, while constitutionally defensible in principle, are vulnerable to legal challenge for procedural infirmity and lack of legislative sanction.

4. Effective Implementation and Prevention of Misuse

Robust implementation frameworks are essential to translate reservation policies into real-world benefits. States should undertake awareness campaigns targeting administrators and communities, simplify application and verification procedures, and establish grievance redress mechanisms. Periodic monitoring and transparent audits by independent bodies can prevent fraud and ensure that affirmative action reaches those most marginalised in the transgender community. Capacity-building programmes, including skills training and education support, should accompany reservation policies to maximise their impact. Engagement with transgender activists and community organisations is vital to ensure that implementation strategies are inclusive, respectful, and effective.

5. Transgender-Specific Creamy Layer Criterion

The National Council for Transgender Persons and the Assam State Backward Classes Commission should jointly develop empirically grounded creamy layer norms calibrated to transgender experience, accounting for the distinctive social vulnerability that attaches to gender identity irrespective of economic status, and factoring in the structural estrangement of many transgender persons from natal family wealth.