Securing Transgender Rights through Capability Development

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The panel set up by the government to formulate a welfare policy for transgender persons should consider adopting a capability development perspective to enable access to education and facilitate financial independence.

In light of the inadequacies of Transgender Persons (Protection of Rights) Bill, 2016 being passed, after the government decided to set up a panel to formulate a policy for the welfare of the transgender persons (Panda 2018), a wider debate needs to be stimulated on the changes that are required at various levels—legal, social and economic—in order to bring mainstream transgender persons into the mainstream. It may give one a better standpoint to critically analyse the benefits and gaps in the Transgender Persons (Protection of Rights) Bill, 2016. The title of the bill, unambiguously proclaims that the inherent purpose of the bill is to confer more rights to transgender persons. The bill and its provisions have not kept up with contemporary global discourse on transgender persons' rights. In the larger debate concerning the faults of the bill, there seems to be a myopic view on a specific set of rights. This article attempts to discuss multifarious rights that need to be made available to the transgender community to integrate them into the mainstream.

International Developments in Human and Sexual Rights
The 21st century is an era of human and sexual rights. Over the past 18 years developments across the world indicate an increasing recognition of sexual orientation and gender identity rights. In 2006, the Norwegian statement, on behalf of 54 states at the UN Human Rights Council, while recognising wide-scale violations of human rights based on sexual orientation and gender identity, urged the council for a special session to discuss these issues as a first step towards addressing these violations (ARC International 2006). Later that year in November, the International Commission of Jurists and the International Service for Human Rights, on behalf of a group of human rights organisations developed the Yogyakarta Principles (Yogyakarta Principles website).

These principles were developed at Yogyakarta, Indonesia, to enunciate a set of legal principles that affirm the obligation of states to protect the rights of all human beings irrespective of sexual orientation. Taking note of the Yogyakarta Principles, a resolution on “Human Rights, Sexual Orientation, and Gender Identity” was passed by the General Assembly of the Organization of American States (OAS) during its 38th session on 3 June 2008 (Human Rights Watch 2008). It is to be noted that the resolution was passed unanimously and close to one-third of the OAS member states now have laws to protect discrimination based on sexual orientation. A defining moment for this movement was in 2016 when the United Nations Human Rights Council adopted a resolution “to protect against violence and discrimination based on sexual orientation and gender non-conformance.” It was historic being the first UN resolution ever to bring specific focus on these issues (Human Rights Watch 2011). These resolutions have contributed positively to guaranteeing sexual rights. An examination of events around the world will reveal that some countries have had to deal with worldwide sanction when they have tried to regressively restrain these rights and criminalise expressions of gender orientation.

For example, in Uganda, when the draft “Anti-homosexuality Bill 2009” was introduced, awarding death penalty for gay-sex, it generated international outrage (Branch 2010), and many countries refused to provide aid to Uganda. The Ugandan President was then forced to think of sexual rights as a foreign policy issue which required further deliberation before being passed (Rice 2010).

In another instance, a resolution drafted by Russia (and supported by India) in opposition to making benefits available to same-sex partners of the United Nations staff was turned down by 80 countries (Singh 2015). This resolution also rendered invalid the long-standing issue about the hypocrisy of the United Nations over gay rights (Gander 2014) and in doing this the United Nations exemplified that it practises what it preaches.

**Sexual Rights in India**

In 2009, the Election Commission of India allowed transgender persons to choose their gender as “other” on the election ballot forms (Telegraph 2009) and in the landmark NALSA judgment in 2014, the Supreme Court of India created the third gender status for
transgenders “for the purpose of safeguarding their rights under the constitution and the laws made by parliament and the State Legislature” (Venkatesan 2014). The more aware of them like Laxmi Narayan Tripathi and others had fought hard for their gender identity and won. The heart of the judgment lay in the words of Justice K S Radhakrishnan who while handing down the ruling stated that “recognition of transgenders as a third gender is not a social or medical issue but a human rights issue” (BBC News 2014). The judgment guarantees that they are now legally recognised and protected as equals under the Constitution.

For some time, transgender persons have been asserting that “I am no ‘other’. I am not a tree, I am not a bus, I am not a train, a dog or a cat. I am a person. I want my identity. I am a transgender, a hijra” (FirstPost 2014). It was this judgment that allowed transgender persons during the 2014 Maharashtra assembly elections to demand to be labelled as “transgender” or “third gender” as opposed to “others” (FirstPost 2014).

In terms of securing rights, some Indian states have been more progressive. In 2008, Tamil Nadu formed the Transgender Welfare Board. The welfare board has addressed a variety of social protection needs for the transgender persons such as employment grants, education grants, free health insurance, grants for constructing houses. In 2015, Kerala became the first state to have a transgender policy against discrimination of transgender persons (Kerala Social Justice Department 2015). The policy also recommends the setting up of a Transgender Justice Board with state Minister for Social Justice as its chairperson. Kerala also made available free sex reassignment surgeries for transgender persons in government hospitals in 2016.

On 6 September 2018, the Supreme Court decriminalised Section 377 of the Indian Penal Code, which now gives the Indian transgender community the legal right to live with dignity. The NALSA Judgment, 2014, had called for affirmative action in education and primary healthcare for transgender persons. These directives served as a beacon for various legislations. It is to help fight these battles that the Transgender Persons (Protection of Rights) Bill, 2016 was introduced in the Rajya Sabha, as a private members’ bill. It was passed unanimously and introduced in the Lok Sabha in 2016.

The provisions of Section 377 and the 2016 Bill had created a contradictory situation: while there was a bid to protect the rights of transgender persons, “unnatural sex” was still illegal. In this regard, it may be worth recounting the Supreme Court statement given by the bench headed by Justice Dipak Misra, which said, “Once the criminality of consensual gay sex goes away, then related issues like social stigma and discrimination against the LGBTQ community will also go.”

**Basic Human Rights for a Life of Dignity**
The choice of words in language not only transmits semantic content but also other information such as aspects of their individuality and personality. This aspect of language is extremely important to give us a glimpse into the rapport between the target of the message and the speaker. In the West, transgender persons prefer being addressed as "hir," "they," etc (American Psychological Association 2011). In the Indian context we are yet to come up with a pronoun for the transgender persons. This section details the rights that may be made available to a section of society that in terms of reference in language, has been referred to as "it", "hir" and "they".

These pronouns that are used to refer to the transgender community reflect their position in society. "They", while being a gender-neutral pronoun, is also a distancing mechanism to distinguish "us" from "them". It subtly and psychologically emphasises the divide between the mainstream, and the “others”. “It”, as a pronoun, is usually used for inanimate things, and is a harsher way of referring to sexual minorities. Any treatise on rights that is aimed at dignifying and empowering people to whom rights and dignity are due, should begin by addressing the abnormality by which they are addressed.

The discussion on the rights that follow draws from the words of Justice K S Radhakrishnan and focuses on human rights and the rights that promise a different future where all people born free and equal in dignity (Yogyakarta Principles 2010). Since the discussion on the sexual rights of transgender persons has already evoked a lot of interest, this article deliberares on more basic human rights.

**Translating Rights into Reality**

The Indian Constitution guarantees six fundamental rights to all its citizens to ensure that weaker sections are not discriminated against. These are progressive rights which have facilitated and sustained democratic freedom in India. The fundamental rights are guarantees against discrimination by the state and other private parties, and are meant to be a shield against majoritarianism.

In practice, what happens when the citizen is a minority, and is also socially and economically weak? While there are guarantees to ensure that “no citizen on grounds of religion, caste, sex, place of birth is restricted from entering public places,” this discrimination against transgender persons is practised routinely and escapes the protection guaranteed by fundamental rights.

What is considered usual, may be denied to the transgender persons. For instance, entry into malls and restaurants, and residences in some colonies may be denied to transgender persons (Deb 2013; Peppin 2017). In addition, there have also been instances where transgender persons have faced discrimination when seeking admission in schools (Ibrar and Sharma 2018; MoneyControl 2018). The socio-economic disparity only gets reinforced and accentuated further when access to resources, which could prove to be social equalisers, is cut off.
The Delhi government recognised the rights of transgender children by means of a Directorate of Education circular in 2015 in the shadow of the Right to Education (RTE) Bill. A transgender child was included within the purview of a "child belonging to disadvantaged group", as defined in the said section of the Right to Education Act, and was therefore entitled to 25% of the seats reserved for the Economically Weaker Sections (EWS) in all schools situated within the National Capital Territory of Delhi (Sharma 2014). While it facilitated reservation and free education, it still did not guarantee that the child would be admitted.

In recognition of this problem, and because of the difficulties faced by transgender persons in pursuing education, the step taken by the Rajasthan government is commendable. The Directorate of Secondary Education has directed schools across the state to admit transgender students under the transgender category (Ahmad 2016). Furthermore, it has promised action against any school that shows reluctance, or objects to admit transgender students. This move is progressive because it recognises transgender children as a separate category that requires specific affirmative action. Thereby, the move acknowledges their different status and correspondingly recommends punitive action for violators. More states in the country ought to adopt a measure such as this.

If equality in access to education was a reality, activists such as Kalki Subramaniam would not have felt the need to open the Sahaj International School, a residential school for transgender children in Kochi (BBC India 2016). Both the founder and the principal of the school are transgender persons who recognise the problems of acceptance faced by sexual minorities. The teachers in the school are also transgender persons to protect and encourage the transgender students in their childhood.

**Suggested Changes for an Inclusive Education System**

Wider debate is needed to design policies and systems by which transgender children are able to get admission into schools and are also able to feel secure and protected, and do not have to drop out of school because of bullying and mockery. A transgender child’s encounter with society, outside the familial boundaries, begins at school. The notion of self-identity and self-worth gets developed at school and that is why a policy decision to the above-mentioned effect is in order. Perhaps greater awareness on transgender issues both as part of teacher training and the national curriculum is needed in schools. A curriculum change is required not just at schools that have transgender children, but in all schools, irrespective of the gender identities of the children who study in them. To facilitate inclusion, it is imperative that society learns to be sensitive to the problems faced by the transgender community. A child’s worldview is shaped in school, so the manner in which children are introduced to the concept of gender fluidity is important. If they are taught to approach transgender persons without fear and without hatred, it would go a long way in shaping an attitude of acceptance.
Even in societies where transgender persons have been able to secure more rights, issues pertaining to accessing education remain, though the nature of these issues is different.

In countries which have stringent laws to prevent discrimination, a bottleneck in access to education emerges in single-sex schools. For instance, in the United Kingdom, the Equality Act 2010 makes it unlawful for a school to discriminate against a pupil, or a potential pupil, because of a “protected characteristic” such as gender reassignment. Despite this, many same-sex schools are refusing admission to transgender pupils (Dilworth 2017). A child who underwent a transition from male to female, and had wanted admission in an all-girls’ school, was refused because, ostensibly she was biologically male (Dilworth 2017). In the United States though, a number of same-sex educational institutions, such as the Spelman College in Atlanta, which was historically an African American women’s school founded in 1881, and Mount Holyoke’s College in Massachusetts are revising their admission policies and admitting transwomen (Moreau 2017; North 2017). These colleges, which have traditionally been a sanctuary for women against gender discrimination, are now broadening their protection to all students facing gender discrimination.

**Building Economic Independence**

Thrown out of homes for sexual non-conformance, penniless and homeless, the immediate challenge that a transgender person faces, is financial sustenance. Transgender persons in India are forced to rely on sex work which contributes further to the social ostracism that they face. Therefore, in securing rights, one needs to begin with economic rights, which can ensure that transgender persons are able to live a life of dignity even when abandoned by their own.

In accordance with the directive in the Constitution, the state, in many instances, has been a forerunner in establishing a culture of financial and social inclusion for transgender persons. The Kochi Metro, for instance, employs transgender persons in various functions depending on their qualifications (*Hindustan Times* 2017). For the first time in Kerala, a government-owned company is providing employment in large numbers to the third gender. This is a good beginning and could be imitated by other states as well.

On one hand, there are reports of transgender persons becoming bankers, models, mayors and police inspectors (Kumar et al 2016). On the other hand, there are also instances where India’s first transgender college principal, Manabi Bandopadhyay, resigned from her post claiming that some of her students and fellow teachers had agitated against her because of her sexual identity (BBC News 2016). Job security and financial security continue to be a major obstacle in the goal of conferring basic human rights and the right to live with dignity for the transgender community. The number of transgender persons who have been able to break the glass ceiling and find a place for themselves in the corporate world is an exception, rather than the norm. Till society learns to be accommodative and includes sexual minorities, it is necessary that opportunities for self-employment and
entrepreneurship are made available for transgender persons.

The rise of the gig economy, and Ola and Uber taxis have made an entrepreneur out of everyone, and some transgender persons have been able to harness this window of opportunity for a brighter and better life, out of the gloom of sex trade (Barik 2018). But not all transgender persons have the financial means to own a vehicle to be able to rig the vehicle to the gig economy. In order to enable transgender persons and to help them become entrepreneurs, the Kerala government under the Department of Social Justice, chalked out a plan of G-taxis which will be owned and operated by transgender persons. Till then, the efforts of organisations like Wings Travels and the Humsafar Trust, who are training transgender persons for the All India Driver’s License and in customer etiquette training for running taxis (Hindu 2016), are welcome.

As the Skill India initiative picks up momentum, some state governments have taken measures to make it inclusive by including sexual minorities. While a month-long multi-skill training programme in computer training, housekeeping, hospitality, front office management, counselling, fire and safety, security practices in Kerala has ensured that some of them could find employment in the Kochi metro (Times of India 2017), the Karnataka State Women’s Development Corporation (KSWDC) in 2012, had allocated Rs. 75 lakh for conferring skills to the transgender community and bringing them into the mainstream (Hindu 2012). It is not clear what the outcome was and how many transgender persons were benefited by the scheme. When the above proposal was mooted, the KSWDC did not even know the number of transgender persons in the state. In 2015, marginal progress was made in this regard; data was made available to show that the state had around 24,000 transgender persons (Hindu 2015). The proposal that was submitted by the KSWDC was also laudable where Rs 20,000 was to be given out as financial assistance with 50% subsidy to the transgender persons to enable them to take up income generating activities as a grant with immediate effect. In addition to skill training, the idea of initial seed money is what would fuel the momentum of self-employment. More initiatives in this direction are welcome from other state governments as well.

The implementational challenges of these programmes need to be kept in mind by other states while designing the programmes. As the experience of the Rajasthan Skill and Livelihoods Development Corporation (RSLDC) shows, despite a well-intentioned effort in November 2017 to train the transgender community in various skills, the programme could not start due to problems ranging from funds, to identity cards for transgender people (Srinivasan 2018). The Initial investment required and the fact that many transgender persons had female mentioned as their gender posed a problem. The duality in gender in identity cards would be a common problem across India due to the late official recognition of the “transgender status” for many who would have an identity card issued earlier. The high investment required to be able to qualify as a skill centre specialised for trans-training could also be another bottleneck for well-meaning organisations.
A commendable practice in skilling comes from the Chhattisgarh State AIDS Control Society (SACS) which provides skills training programmes under the Mukhyamantri Kaushal Vikas Yojana to a mixed-batch, and not an exclusively transgender persons’ batch. “If you want to mainstream transgender persons in society, why create an exclusive batch,” is what they argue for the ultimate aim is social assimilation (UNDP India 2017).

In most cases, the transgender persons who have come out in the open and have been able to find white-collar jobs, the support of the immediate family is a common thread that links their stories together.

**Right to Inheritance**

It is in the light of the above, that this article makes a case for conferring inheritance rights to transgender persons. For transgender persons, the renunciation by one’s family does not just affect economic security, but can also lead to multifarious problems. Many of them do not have permanent proof of address because they are forced to leave their homes at a young age. “In the absence of the documents, many of us are still without IDs including the voter ID card.”

For marginalised transgender persons, ghettoization is an everyday reality. They are routinely refused accommodation in respectable colonies and housing societies. These hurdles would not have been there if they could have inherited their parents’ property.

Religious personal laws guide the inheritance of property in India. A majority of property and inheritance disputes are settled under the Hindu Marriage Act, 1955 and Hindu Succession Act, 1956. But the acts clarify that “…the properties of a Hindu male dying intestate devolves, in the first instance, equally on his sons, daughters, widow and mother and include the specified heirs of predeceased sons or daughters”. The act specifically mentions sons and daughters but there is no mention of the inheritance rights for those who do not conform to the gender binary. Keeping these provisions in mind, how, and on what basis, would the inheritance rights of the transgender persons be addressed? For instance, if a child is born male and has transitioned into a woman, then how does the transwoman inherit? Recognising the challenges posed by Hindu inheritance laws, the Delhi Minorities Commission (DMC)—after consultation with the Advisory Committee of Christians—has recommended that the Law Commission amend the India Succession Act, 1925 and include the third gender in Section 44 (Hindu, 2012).

**Issue of Identification**

On 22 June 2018, the government decided to set up a seven-member committee to formulate a policy for the welfare of transgender persons (Panda 2018). This step is much-needed, and needs a commensurate amount of public and media attention as the transgender bill to generate discussion on what systems and practices would be needed at the individual, societal, governmental and organisational levels to accord basic rights to the transgender
community. This article has discussed rights related to access to education, access to employment generation and inheritance as a capability development source. The availability of these rights is expected to pull the transgender persons from the economic margins of the society to economic mainstream. Their increasing contribution to economic decision-making is also expected to enable their social mainstreaming.

As the new panel sits to decide policies for the welfare of transgender persons or the country debates for a more robust and sensitive Transgender Persons (Protection of Rights) Bill, in future, perhaps a prerequisite would be a deeper and more empathetic understanding of the lived experiences of transgender people. The availability of rights would also necessitate the identification of transgender persons in more specific terms. In the transgender persons bill, a transgender person is defined as someone “whose sense of gender does not match with the gender assigned to that person at the time of birth, and includes trans-men and trans-women, persons with intersex variations and gender-queers”. The process of realisation and transcendence to other gender starts mostly at puberty. When the child finds another transgender person, they then find a community where they can express themselves freely (Ekins and King 2006). Otherwise, the patriarchy forces the child into subsuming their sexuality and accepting the existing gender norms. But what happens if the person is only a cross-dresser? Or likes to "pass" of as either gender for a short period of time?

“I have had a few procedures done to my face to make it look more feminine, but I have to be more careful not to cross the line. Or else I could run the risk of looking freaky in the day to day life” (Ekins and King 2006).

The parameters that are to be used to define what it means to be a transgender person requires a wider discussion. Such a dialogue would not only ensure that rights are made available for social and economic mainstreaming, but it would also ascertain that rights are made available in a more inclusive manner to all minority gender variants.

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