

LGBT Movement in India: The Journey towards an Inclusive Society

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Abstract

Equality in the society between the individuals irrespective of race, sex, religion, caste, place of birth or colour is a sign of a progressive society as it lays the path towards stability and harmony. Every human being has the right to be treated equally. However, Social hegemony² has tendency to exclude persons with “differences” which violates their inalienable Basic Human Rights.

Till the year 2018, the LGBT community in India was suffering from exclusion. These people were considered to be either sex workers or criminals. They demanded a positive radical social change. The LGBT movement took the urge for tolerance and inclusion to a whole new level. The judiciary responded to their plea for equality first in Suresh Kumar Koushal v. Naz Foundation³ which culminated in Navtej Singh Johar v. Union of India⁴ where the Supreme Court upheld the constitutional rights of the LGBTQ+ people. In this backdrop, the present paper intends to point out the factors which led to inclusion of the LGBTQ+ community and led to social transformation.

Key words: Social change, LGBTQ+ community, Human Rights, Inclusion and Equality.

I. Introduction

Gender is a constitutive element of social relationship based on perceived differences between the sexes, male and female and it is the result of socially constructed ideas about the behaviours, actions and roles, a particular sex performs.⁵ These practices in the society characterize certain features of both the sexes and give an oversimplified image, which leads the society towards an

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² Hegemony- predominant influence or authority over others or the social, cultural, ideological or economic influence exerted by a dominant group, (last visited Aug 5, 2018), <https://www.merriam-webster.com/dictionary/hegemony>.

³ (2014) 1 SCC 1.

⁴ W.P. (CrI.) No. 76 of 2016.

⁵ Gender, (Aug 5, 2018, 08.00 AM) <https://www.merriam-webster.com/dictionary/gender>.

imbalance.⁶This stereotyping of the two genders becomes so powerful in the society that there remains no room for the third gender or the Transgender⁷and becomes the subject of exclusion. Thus the term Transgender becomes an umbrella term for those whose gender identity differs from what is typically associated with the sex they were assigned at birth. The term LGBTQ+ denotes lesbian, gay, bisexual, transgender and queer people whose sexual orientation is not heterosexual and inclined towards homosexuality.

Article 14 of the Constitution of India lays down that “the State shall not deny to any person equality before law or the equal protection of law”. The Preamble to our Constitution emphasizes that the right to equality enshrined in it is not a formal right and the State is under an obligation to make it effective. Therefore, it is necessary to take affirmative measures to equip the least advantaged group of the society so that they can come up to the level of the mainstream group of people.

In *National Legal Service Authority v. Union of India &Ors*⁸ where the Apex Court of India dealt with the grievances of the members of the LGBTQ+ Community who seek a legal declaration of their gender identity, as the non-recognition of the same violates their Fundamental Right.

II. International Conventions and Gender Equality

International Conventions are significant for understanding of the matter of gender equality. The Preamble of the Universal Declaration of Human Rights, 1948 states that the inherent dignity and equality among humans are the foundation of freedom, justice and peace in the world. It states that all human being are born free and equal in dignity.⁹

The International Covenant on Civil and Political Rights, 1966 under Article 6 reaffirms the inherent right to life for all, which is to be protected by law and no one shall be arbitrarily deprived of his life, liberty and privacy unreasonably.

⁶*Feminist Perspective on Sex and Gender*, (Aug 5, 2018, 08.00 AM) <http://plato.stanford.edu/archives/fall2012/entries/feminism-gender/>.

⁷Transgender, being a person whose gender identity differs from the sex the person was identified as having birth, (Aug 5, 2018, 08.00 AM), <http://www.merriam-webster.com/dictionary/transgender>.

⁸Writ Petition (Civil) No. 400 of 2012.

⁹The Universal Declaration of Human Right, 1948, art. 1.

The UDHR, 1948 under Article 12 and the International Covenant on Civil and Political Rights, 1966 under Article 17 simultaneously state that no one should be subjected to arbitrary interference with anyone's privacy.

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979 and the Declaration on the Elimination of Violation against Women (DEVAW), 1993 jointly assert that discrimination against women is fundamentally unjust and it constitutes an offence against the human dignity. Any act of violence against women amounts to violation of her Fundamental Right and the States must protect the dignity of women in the society.

These international Conventions show that every person irrespective of their gender, colour, and place of birth, has equal right to live with equal dignity and privacy and discrimination between them under any ground amounts to violation of the inalienable basic Human Rights.

III. Constitution of India and Gender Equality

Article 14 of the Constitution of India proclaims Equality before Law and Equal Protection of Law. Equality includes the full and equal enjoyment of all rights and freedom. Right to equality is the basic feature of the Constitution and treatment of everyone equally in unequal circumstances itself amounts to violation of the Fundamental Right to Equality.¹⁰

Article 15 of the Constitution of India prohibits discrimination on the ground of sex. Unfortunately, Before the National Legal Service Authority v. Union of India¹¹ the word 'sex' was interpreted to mean only 'male sex' and 'female sex' and though not expressly excluded, the third gender remained excluded from the purview of Article 15 of the Constitution.

Article 16 of the Constitution of India guarantees equality of opportunity in matters of public employment, irrespective of religion, race, caste, sex and so on. Under this Article too the word 'sex' does not exclude the third gender expressly yet the third gender remained outside its purview.

¹⁰ JUSTICE PALAK BASU, LAW RELATING TO PROTECTION OF HUMAN RIGHTS UNDER THE INDIAN CONSTITUTION AND ALLIED LAWS 126 (2nd edition, 2007).

¹¹Writ Petition (Civil) No. 400 of 2012.

Article 19 (1) (a) of the Constitution states that all citizens shall have the right to freedom of speech and expression, which includes right to express self-identified gender, which can be expressed through dress, words, action or behaviour. No restriction can be placed on one's personal appearance or choice of dressing, subject to the restrictions contained in Article 19 (2) of the Constitution.¹²

Article 21 of the Constitution of India states that no person shall be deprived of his/her life and personal liberty except according to the procedure established by law. Thus, every person including LGBT people have right to life.¹³

In Francis Coralie Mullin v. Administrator, Union Territory of Delhi¹⁴ the Court held that the right to dignity forms an essential part of the constitutional culture which seeks to ensure the full development. It shows inclusion of all in the society irrespective of the sexual orientation of a person.

IV. Indian Judiciary and the Rights of LGBTQ+

A. Section 377, IPC

Through the interpretation of the words of Section 377 of Indian Penal Code, 1860 all the members of different sexual orientation other than Heterosexual, came under the purview of the provision. The LGBTQ+ community spoke against this provision of IPC as it violates their Right to Life and Personal Liberty and this protest first came into light through the judicial response in Naz Foundation v. Govt. of NCT Delhi,¹⁵ where the High Court of Delhi held that Section 377 is unconstitutional and violates the right to dignity and privacy of the LGBTQ+ community.¹⁶

The historical background of the LGBTQ+ community shows the pattern of their exclusion from the main stream society. It is noteworthy to state that the Transgender community shared a much enriched place in the Hindu mythologies and ancient Indian literatures. Hijras, eunuchs, Kothis, Aravanis, Jogappas,

¹² National Legal Service Authority v. Union of India &Ors, Writ Petition (Civil) No. 400 of 2012.

¹³Maneka Gandhi v. Union of India, AIR 1978 SC 597.

¹⁴(1981) 1 SCC 608.

¹⁵WP (C) No. 7455/2001.

¹⁶(2014) 1 SCC 1.

Shiv-Shakthis etc. are some expressions denoting the third gender in the ancient Indian literatures. The Concept of ‘tritiyaprakrti’/‘napunsaka’¹⁷ has also been used in mythologies in India.¹⁸

The exclusion politics against the Transgender community began in the beginning of the British colonial period in India through the Criminal Tribes Act, 1871 which deemed the entire Transgender community as persons innately ‘criminal’ and ‘addicted to the systematic commission of non-bailable offences. The Preamble of the enactment explicitly mentioned that it is an Act “to provide for the registration, surveillance and control of certain criminal tribes and eunuchs.” Section 24 of the said Act stated that the names and residence of all Eunuchs have to be registered who are “reasonably suspected” of kidnapping children or of committing offences under Section 377 of the Indian Penal Code, 1860.

The enactment further stated that ‘Eunuchs’ are “deemed to include all persons of the male sex who admit themselves or on medical inspection clearly appear, to be impotent”.¹⁹ Thus infertile men also came under the purview of this enactment. This Act was repealed in August 1949 but the social stigma against the Transgenders and Homosexual people remained intact and they had been subjected to social exclusion.

In 2012, through National Legal Service Authority v. Union of India & Ors²⁰ the identity crisis and plight of the Transgender community first came to light. The Apex Court held that there are instances when the mainstream society of India ridicules and abuses the Transgender community in public places like buses, railways, schools, workplaces. These people are subjected to exclusion and are treated as untouchables which amount to violation of their Fundamental Rights.

Here the Supreme Court of India held that-

- The Transgender community should be treated as ‘third gender’ for the purpose of safeguarding their rights under Part III of the Constitution of India,

¹⁷The word ‘napunsaka’ has been used to denote absence of procreative capability.

¹⁸ National Legal Service Authority v. Union of India & Ors, Writ Petition (Civil) No. 400 of 2012.

¹⁹ Criminal Tribes Act, 1871, Act XXVII (Sec. 24).

²⁰Writ Petition (Civil) No. 400 of 2012.

- The Government should grant legal recognition of their gender identity, and
- Take steps to treat them as socially and educationally backward class and extend reservations for them in order to uplift their condition in the society,
- Take measures to make separate public toilets for them along with male and female toilets,
- Create public awareness so that the Transgender community can feel that they are also a part of the society as recognition of gender identity lies at the heart of the fundamental right to dignity.

Finally, on September 6, 2018 in *Navtej Singh Johar v. Union of India*,²¹ the Supreme Court relinquished the ruling in *Suresh Kumar Koushal v. Naz Foundation*²² and ruled that LGBTQ+ people in India are entitled to all constitutional rights which includes the choice of whom to partner, the ability to find fulfillment in sexual intimacies.

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

After the landmark judgment of the Supreme Court in *Navtej Singh Johar v. Union of India*²³ the Parliament of India passed the Transgender Persons (Protection of Rights) Act, 2019 to protect the rights of the Transgender persons, which came into force on December 5, 2019.

The Act defines a Transgender as a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations and person having such socio-cultural identities as kinner, hijra, aravani and jogta.²⁴

In its definition clause the Act talks about 'inclusive education' which means a system of education wherein transgender students will learn together with other students without fear of discrimination, harassment or intimidation and the

²¹W.P. (CrI.) No. 76 of 2016.

²²Writ Petition (Civil) No. 400 of 2012.

²³W.P. (CrI.) No. 76 of 2016.

²⁴The Transgender Persons (Protection of Rights) Act, 2019 (Act no 40 of 2019), s.2 (k).

system of teaching and learning is suitably adapted to meet the learning needs of such students.²⁵It under Section 13 states that every educational institution funded or recognized by the Government has to provide inclusive education to include Transgender persons without any discrimination.

Section 3 of the Act states that no transgender person shall be subjected to any discrimination in any educational institutions, place of employment, health care services, enjoyment of any goods or services, right to movement and right to reside, rent, purchase or occupy any property. Section 5 further proclaims the right of a Transgender to be recognized as third gender person and also that person can apply to the District Magistrates to issue a certificate of identity as a Transgender person.

This Act under Section 8 enumerates that the Government has to take affirmative steps to secure full and effective participation of trans-genders and their inclusion into the society. Their rights and interests should be protected through the welfare schemes and take effective measures to enable them participating in cultural and recreational activities. Section 15 further states that the Government shall make provisions to cover the medical expenses by comprehensive insurance scheme for Sex Reassignment Surgery, hormonal and lesser therapy and any other issue of Transgender person.

To redress the grievances of the Transgender persons, the National Council for Transgender Persons has been established under Section 17. Section 18, states that whoever compels a Transgender person to indulge in bonded or forced labour or denies right to passage to a public place, forces them to leave the households or locality; endangers their lives by causing physical, mental or emotional abuse, shall be punished with imprisonment which shall not be less than six months which may be extended to two years and with fine. However, this Act does not talk about reservation of the Transgender people in case of public employment which is needed for their upliftment to the level of the mainstream society.

²⁵The Transgender Persons (Protection of Rights) Act, 2019 (Act no 40 of 2019), s. 2 (d).

VI. Mainstreaming the LGBT Community: An Empirical Outlook

After the judgment of Navtej Singh Johar²⁶ in 2018, a field survey has been conducted to find out the real condition of the LGBTQ+ people. To serve these purpose two groups of LGBTQ+ people were chosen as sample in two different places of West Bengal.

The first sample was 'The Northern Black Rose Society' of Siliguri, Dist-Darjeeling. Total number of enlisted members of the society was 1375 which includes LGBTQ+ people and out of them only 180 members was active who were engaged in different professions in different places. Hence only 35 members were willing to participate in the survey and the data was collected accordingly.

A. Sexual Orientation

These 35 members of the Northern Black Rose Society belong to different sexual orientations and they make a perfect bond between each other within the group. The following Table shows division of the sexual orientation of the LGBT community-

Lesbian (L)	1	02.8571%
Gay (G)	7	20%
Bisexual (B)	1	02.8572%
Transgender (T)	26	74.2857%
Total	35	100%

Comment: From this above Table it is found that the majority number of members of this group belongs to Transgender community.

B. Family and Social Life

Among these 35 members, 14.285% people are not able to live with their parents and extended family and are not even allowed live in their inherited premises because of their sexual orientation. Those who live with their Parents or Extended Family or with wife live a dual life and the truth about their sexual orientation is hidden from their family. The following Table shows the numerical data-

²⁶W.P. (Cri.) No. 76 of 2016.

Extended Family	6	17.1429%
Parents	19	54.2857%
Alone	5	14.2857%
With Wife	2	05.7143%
Community	3	08.5714%
Total	35	100%

Comment: They said that at the time of their puberty they came to know about their sexual orientation and from then their internal struggle began.

C. Sexual Orientation known to the Family Members

The following table shows that many are not able express their sexual orientation-

Sexual Orientation known to the Family	19	54.2857%
Sexual Orientation unknown to the Family	16	45.7143%
Total	35	100%

It is visible that majority of them have outspoken about their sexual orientation to because of their vehement external and internal changes.

D. Education

Through the following table the educational status of the LGBT community is visible-

Primary (Class 1 to 4)	1	02.8571%
Upper Primary (Class 5 to 8)	11	31.4287%
Madhyamik (Class 9 to 10)	7	20%
Higher Secondary	10	28.5714%
College	6	17.1428%
Total	35	100%

None of them got the opportunity to go for Post Graduation or Ph.D.

E. Sexual Offences and the LGBTQ+ Community

The following Table shows the number of people who are the victim of Sexual Offences.

Victim of Sexual Offences	14	40%
Safe from the Sexual Offences	21	60%
Total	35	100%

40% of them have been subjected to sexual offences and they could not get any remedy as nobody listened to them and they accepted the violence as their fate.

F. Economic Status of the LGBTQ+ Community

The following table shows the number of people engaged in different types of economic activities-

Sex Worker	8	22.8571%
Lagan Dancer	4	11.4286%
Badhai/Mangti	5	14.2857%
Engaged in Study	5	14.2857%
Other Professions	13	37.1429%
Total	35	100%

Only 1 member was a Government Service Holder and the majority of the people who are Transgender are engaged in sex work or lagan dance or Mangti/Badhai.

The second sample was the ‘Daughters of the Cross Kolkata’ which initiated an agenda to gather a certain number of LGBT people and give them training in Tailoring, English Speaking and catering business. The total number of the trainees was 20, but the number dropped to 8 as the Transgender group was engaged in Sex Work or Begging and they earned a big amount of money out of that and they needed to pay a lump sum amount to their ‘Guru Maa’ at the end of each month.

Sexual Orientation

In this initiated programme eight people have taken part, the sexual orientation of them are shown into the following table-

Lesbian	2	25%
Gay	1	12.5%
Bisexual	2	25%
Transgender	3	37.5%
Total	8	100%

Education

All of these eight people are the members of an NGO called 'Koshish' and most of them are graduate or higher secondary passed. The following Table shows their educational qualification-

Madhyamik	1	12.5%
Higher Secondary	1	12.5%
Graduation	6	75%
Total	8	100%

This Table shows that none of them have got the opportunity of Post Graduation and when asked they said that because of their sexual orientation it was difficult for them to continue their study in the School or College as they were being continuously subjected to bully and sexual abuse. They further stated that being human being they only want a dignified life and that can only be possible with the cooperation of the mainstream society.

VII. Conclusion

The collected data for the purpose of this paper show that the LGBT community of the 'Northern Black Rose Society' of Siliguri, Dist- Darjeeling is more backwards and less developed in comparison with the LGBT community of Kolkata, who are the trainees of the 'Daughters of the Cross, Kolkata'. The trainees under the 'Daughters of the Cross' are more developed in the aspects of educational and economical point of view. But both the groups have been

subjected to social exclusion in each and every aspect of life and even from the family.

The people belonging to LGBTQ+ community have been subjected to exclusion for long and they had to determine a strenuous and tiresome journey to avail the judgment of *Navtej Singh Johar v. Union of India*²⁷ where they earned their right to Equality, Justice, Freedom and Privacy. This judgment had given them the right to choose a partner and the ability to find fulfillment in sexual intimacies and the right not to be subjected to discriminatory behavior. This has paved the way for social transformation for an inclusive society and created social awareness. But at the same time they are still being subjected to bully, social exclusion, inhumane torture which obstructs the absolute social transformation in case of their inclusion.

Finally, it can be said that in a progressive society where everyone wants to develop themselves in the modern globalized world, there every human being should be treated equally. A society can only develop to the fullest where the cent per cent population has got equal opportunity to develop themselves. Exclusion of a particular group from the mainstream society does not help to serve the purpose. Therefore each and every part of the society should be included in the process of development and only then it can pave towards social transformation.

²⁷W.P. (Cri.) No. 76 of 2016.