

THE L WORLD

LEGAL DISCOURSES ON QUEER WOMEN

Surabhi Shukla*

This article looks at the issues faced by queer women in India through a legal lens. It identifies four issues for discussion—privacy, live-in relationships, allegations of lesbianism in matrimonial disputes, and the pressure to enter heterosexual marriages. It engages in-depth with the first two while laying down the groundwork for the last two. This article asks whether the law in its current form, is aware of, and equipped to, address these issues. First, it finds that the Navtej Johar case, by permitting a right to same-sex sexual relations between adults in private, failed to understand the very nature of the privacy concern of queer women. Secondly, it critically analyses live-in relationship cases between queer women before and after the Navtej judgment to find that a lack of respect for the autonomy of women continues to characterise the disposal of these cases. It also finds that investigative illegalities and violations of the fundamental rights of privacy, dignity, and equality are visited upon these couples during the course of the case. Finally, this article provides legal and extra-legal solutions for addressing the problems identified here. It concludes by asking whether given the law’s limited success in delivering freedom to queer women, a narrow and measured engagement might be more profitable in the long run. It does not answer this question but raises it for future deliberation.

TABLE OF CONTENTS

I.	INTRODUCTION	2
II.	PRIVACY: NO ROOM OF HER OWN	4
A.	ARRIVING.....	9
B.	A ROOM OF HER OWN.....	10
C.	SHELTER HOMES	13
D.	PROTECTION ORDERS	13

* PhD student in Law at the University of Oxford. I would like to thank, first and foremost, my supervisor and the Law Faculty at Oxford for the thesis extension that made the writing of this article possible. Then I would like to thank several friends: Miriam Schwarz and Upasana Garnaik for always being available for brainstorming, Maitreyi Misra for crucial discussions, Advocates Amritananda Chakravorty and Maulshree Pathak who gave me critical inputs from practice, and Debika Chakravarty from Sappho for her valuable time and inputs. I would also like to thank those friends who helped in other crucial ways, Pratheesh Maheswaran for food and coffee, and Dr. Veronika Schuchter for her flexibility and encouragement (and for the dinner invitation that awaits me upon submission). Finally, I am grateful to my parents, Alpana Shukla and Kamalendu Shukla for their unconditional support for everything I do.

The definition of transgender used in this article is the same as the one used by the Supreme Court in the case of National Legal Services Authority (NALSA) v. Union of India WP (Civil) No. 400/2012, ¶11. As per the Supreme Court definition, a transgender person is a person whose gender identity does not match the gender assigned at birth.

The title is inspired by a show in the early 2000s about a fictional group of queer women in Los Angeles—the L Word.

III.	<i>LIVE-IN RELATIONSHIPS: THE LITTLE-KNOWN STORY OF QUEER WOMEN AND THE LAW</i>	14
A.	<i>STRATEGIC SILENCE</i>	15
B.	<i>COMING OUT IN COURT</i>	17
C.	<i>TESTING THE WHIMSY?</i>	19
IV.	<i>ALLEGATIONS OF LESBIANISM IN MATRIMONIAL DISPUTES AND PRESSURE TO ENTER HETEROSEXUAL MARRIAGES</i>	23
V.	<i>CONCLUSION</i>	24

I. INTRODUCTION

The legal experiences of queer women in India are severely under-researched. Most of the scholarship on queer women is in the area of literature, culture, and associated fields. Activists have given important accounts of the interaction of queer women with State institutions like the police, but there are few sustained legal studies of the experiences of queer women with the court systems, laws, and State acts and omissions that have legal ramifications.¹

This article aims to take a step towards filling this gap. It aims to: 1. Study the court cases and the resulting legal narratives surrounding queer women in India, 2. Theorise about the main legal problems faced by queer women in India, 3. Evaluate whether the *Navtej Singh Johar v. Union of India* judgment (‘Navtej’),² has shown an awareness of those problems, and 4. Initiate a conversation about how those problems might begin to be addressed.³ It proceeds by critiquing societal structures which make the queer experience, queer (strange or different). There will certainly be individual stories of queer women that are positive, families that are supportive, friends and workplaces that are open and progressive, and landlords and landladies who are non-interfering. Not only are these stories reaffirming, they are essential, as they present alternative models on how the society is capable of treating them. Perhaps, the freedom that queer women seek is present in these alternatives. However, these stories are exceptional, and if the overall conditions of queer women are to improve, we need to understand how societal structures impose themselves on women sanctioning a limited heterosexual and heteronormative script for their sexuality with its own spatial and temporal elements. Those who reject these scripts in favour of loving women are then constituted into the category of queer.

Queer women, therefore, are women, i.e., persons who are socialised as women, who have, romantic and/or sexual feelings for/relations with, other women. After reading

¹ One notable exception is the study conducted by Arasu and Thangarajah on the *habeas corpus* petitions concerning queer women in the Indian High Courts from the 1940s to 2007. Ponni Arasu & Priya Thangarajah, *Queer Women and Habeas Corpus in India: The Love that Blinds the Court*, 19(3) INDIAN JOURNAL OF GENDER STUDIES 413 (2012).

² *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

³ It does not offer an internal critique of these relationships.

various historical reports and personal accounts, I have concluded that identity markers are made possible by social contexts, and also have a personal element to them, making them non-exhaustive. In scholarship and activism, a variety of phrases have been used to refer to queer women depending on what has been possible in a particular historical and social context. Examples include, *ekal mahila*,⁴ women who are attracted to women, lesbians, bisexual women, queer women, women who are in a husband and wife relationship with each other, etc. I use one or more of these terms in this article, depending on the research that I cite, or the demands of the situation. Finally, although transgender men do not self-identify as women, many may have been socialised as females, and so they may have commonalities of experiences with queer women. To that extent, the issues raised in this article are relevant to understanding the difficulties faced by that community as well.⁵

To accomplish the aims of the article, I adopted the following methodology. I found cases concerning queer women from a keyword search on Manupatra. This search revealed that live-in relationships and divorce were two primary life events that saw the interaction of queer women with the law. I also read the existing scholarly and activist literature on queer women in India along with seminal stock-taking reports on women who are attracted to women from the 1980s and 1990s, when the queer movement in India was beginning to form. From these, I culled privacy, and pressure to enter a heterosexual marriage as two other issues that the law needs to take account of. Once the issues were obtained, I did one of two things. One, I examined the current state of the law to see how well-equipped it was to provide solutions for the specific needs of queer women on these issues; or two, I analysed the cases with a critical lens to interpret their narrative on queer women. I then related these narratives to the denial of substantive and procedural rights of queer women.

I begin my discussion by problematising the concept of privacy which continues to play a major role in the legal entitlement granted by *Navtej*. I argue that women, including queer women, have no privacy of person even in the most private and intimate spaces they occupy, such as their homes, and I demonstrate that by using reports of collectives and organisations in India, and sociological and anthropological research on queer women in India. I argue that it is important for queer women to have public spaces where they can begin to grow and live-out their intimate relationships, and the concept of privacy needs to be developed along these lines if it is to serve queer women (**Part II**). I use “public spaces” to refer to spaces outside the home. While some of these places will be “public” as generally understood (parks, cafes, etc.) some may also be of a private nature, such as shelter homes. What makes them public is that they exist outside the physical sphere regulated by the family. I then discuss the

⁴ A single woman.

⁵ Gee Imaan Sammalar has noted that transgender men have limited and regulated opportunities to occupy public spaces, they are vulnerable to sexual harassment, a factor which complicates their ability to gain financial independence and move away from negative circumstances. He also argues that transgender men are subjected to stricter disciplining at home, including mental, physical, sexual abuse, and forcible marriage once their gender identity is discovered. See Gee Imaan Sammalar, *Unpacking Solidarities of the Oppressed: Notes on Trans Struggles in India*, 42(3/4) WOMEN’S STUDIES QUARTERLY 288 (2014); A. REVATHI, A LIFE IN TRANS ACTIVISM 128 (translated by Nadini Murali, 2016). See interviews with trans-masculine persons in A. REVATHI from pages 126–214. Revathi also notes the following about trans-men at page 128: ‘the fact they are biologically female makes them more vulnerable to sexual harassment and this persistent fear makes it more difficult for them to leave their families’. One of the prominent legal experiences faced by transgender men are those concerning legal identity documents, but that is distinct from the scope of this article, and has been studied in a separate paper; Surabhi Shukla, *Transgender Persons in Indian Courtrooms* in THE SAGE HANDBOOK OF GLOBAL SEXUALITIES 705-728 (Zowie Davy, Ana Cristina Santos et al, 2020).

issue of live-in relationships. Queer women who wish to live with their partners face a unique legal problem in distinction to other members of the queer community. Family ideology affords a limited script of sexual propriety to women, and empowers the families to intercept and interrupt the choices that these women make to live with each other. The ensuing police investigation and court proceedings unleash an array of illegalities and denial of rights, acquiescing in the familial logic (**Part III**). In the last part of the article, I flag two problems. The first is the charge of lesbianism in divorce cases, and the second, the issue of marriage-pressure on queer women. I present ethical reasons for not engaging with the first issue. The ethical reason I present for scholarly restraint is insufficient information to proceed. The second issue is an age-old problem and I argue that activists and scholars should, in consultation with queer women, come up with lasting solutions to address it (**Part IV**). I offer concluding remarks (**Part V**).

II. PRIVACY: NO ROOM OF HER OWN

One of the major legal themes that gains special importance with respect to queer women is that of privacy. When the Naz Foundation⁶ filed the famed public interest litigation (*'Naz'*) for the reading down of §377 of the Indian Penal Code (*'IPC'*),⁷ they argued for a right for same-sex sexual intercourse among consenting adults, “in private”.⁸ Feminists critiqued this legal framing, because it put privacy at the centre, creating a public-private distinction; a distinction that has historically been used to put the violence against women beyond the reach of the law.⁹ One need not travel far back in history to see an example of this. For a long time, crimes such as dowry murders and domestic violence enjoyed impunity from the law, because of this very idea of the sacred private sphere, where the State had no business interfering.¹⁰

⁶ Naz Foundation v. Government of the NCT of Delhi, 2009 SCC OnLine Del 1762. Incidentally, the Naz Foundation petition was not the first legal action challenging the constitutionality of §377. The first constitutional challenge was filed in 1994 by the AIDS Bhedbhav Virodhi Andolan (ABVA), a volunteer organization of social activists and professionals from various fields who worked on a host of issues, including the rights of queer persons. They argued for the section to be declared unconstitutional, and their petition envisaged that §377, being based on sexual moralising about what is natural and what is unnatural, could possibly affect sex workers, and persons with AIDS, in addition to the queer community. This petition was dismissed; ABVA v. Union of India & Others, Civ. WP. 1784/1994 (Delhi High Court) (Unreported).

⁷The Indian Penal Code, 1860, §377.

“Section 377 - Of Unnatural Offences: Unnatural offences

Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation-Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.”

⁸ Naz Foundation v. The Government of NCT & Ors. Writ Petition (Prayer, on file with me); Naz Foundation v. The Government of NCT of Delhi & Ors 2009 SCC OnLine Del 1762 ¶8-10; NAISARGI DAVE, QUEER ACTIVISM IN INDIA: A STORY IN THE ANTHROPOLOGY OF ETHICS 172 (2012).

⁹ NAISARGI DAVE, QUEER ACTIVISM IN INDIA: A STORY IN THE ANTHROPOLOGY OF ETHICS 180-182 (2012); Gautam Bhan, *Challenging the Limits of Law: Queer Politics and Legal Reform in India* in BECAUSE I HAVE A VOICE: QUEER POLITICS IN INDIA 46 (Arvind Narrain & Gautam Bhan et al, 2005).

¹⁰ RADHA KUMAR, THE HISTORY OF DOING: AN ILLUSTRATED ACCOUNT FOR MOVEMENTS FOR WOMEN’S RIGHTS AND FEMINISM IN INDIA 1800-1990 119 (1993); Arati Rao, *Right in the Home: Feminist Theoretical Perspectives on International Human Rights*, in FEMINIST TERRAINS IN LEGAL DOMAINS: INTERDISCIPLINARY ESSAYS ON WOMEN AND LAW IN INDIA 100-121 (Ratna Kapur, 1996).

The claim to a private sphere where a woman could claim sanctuary from her family members to enjoy sexual relations with another woman, even if legally available, would be socially implausible.¹¹ There is not even enough privacy to *talk* about romantic life, let alone experience it within the home. Maya Sharma conducted a research with working-class queer women and she recounts that she usually had no privacy to conduct the interview. The family members were nearly always present in the shared living spaces where the interview was conducted, and they either participated in, or controlled the dialogue. In the rare moments when privacy was available, there were constant disruptions or time pressure. “Private” conversations were only possible outside the home, in places of worship, *en route*, in courtyards, at railway stations, etc. Owing to the constant presence of family around the interviewees, conversations about sexuality remained largely tacit, sub-textual, and coded in socially acceptable terms.¹² To be sure, sexual privacy is a sparse commodity for any unmarried person (and married women) in an Indian household, but women’s claims to it are all the more precarious in a hetero-patriarchal setup that believes that women have no sexuality/have no right to act on their sexuality outside of a heterosexual marriage.

By no means is this lack of privacy a working-class phenomenon. In the early 2000s, during the time that the *Naz* petition had just been filed, Naisargi Dave conducted an ethnographical research on lesbian activism in India. In response to the feminist objection that women did not have privacy of their own to claim the kind of sexual autonomy that the *Naz* petition envisioned, she recalls the time spent working at the weekly helpline at an organisation where queer women from varied socio-economic backgrounds called.

“I thought of the married women I sometimes spoke to on the helpline, who would rush desperately through five minutes of talk before a husband, grown son, or mother-in-law could become suspicious about their absence. These are women without dominion, women incarcerated by the private but never lords of it”¹³

What Dave tries to tell us here is that women did not have any privacy within their homes. They were watched and supervised and always remained accountable for where they were, and what they were doing. Making a call to discuss their sexuality was not an easy thing to do in such an environment. She recalls an exercise she had participated in with members of a lesbian support group at Sangini - one of the oldest known organisations working with lesbians and bisexual women in India. The exercise was an image exercise, where everyone had to draw their personal utopia. She recalls that the unifying theme of these utopias was space: “dreams of homes, rooms, and quiet solitude.”¹⁴ These accounts tell us that women did not have any, “room of their own” spatially and metaphorically where they could just be themselves.¹⁵ In fact, they longed for such a space. However, it was not to be achieved within the confines of a space that co-opts the logic of a patriarchal home. Had the petitioners factored in these social experiences, perhaps, their legal demands would have been different.

¹¹ NAISARGI DAVE, *QUEER ACTIVISM IN INDIA: A STORY IN THE ANTHROPOLOGY OF ETHICS* 180 (2012).

¹² MAYA SHARMA, *LOVING WOMEN: BEING LESBIAN IN UNDERPRIVILEGED INDIA*, Introduction, 1-41 (Yoda Press, 2015).

¹³ NAISARGI DAVE, *QUEER ACTIVISM IN INDIA: A STORY IN THE ANTHROPOLOGY OF ETHICS* 181 (2012).

¹⁴ *Id.*

¹⁵ *Id.*, 182.

The reader may wonder why I am pondering an old critique, when it is the *Navtej* judgment, and not the decision in *Naz*, that is the final legal pronouncement on §377. It is because *Navtej* did not learn from this critique of *Naz*. The majority of the judges in *Navtej* allowed a right of same-sex sexual intercourse to consenting adults, “...so long as... it is confined within their most private and intimate spaces.”¹⁶ While some judges attempted to show the limitations of this idea of privacy, imagined as spatial privacy, their critiques did not go far enough to grapple with the issues that are particular to queer women. I will delve deeper into this point in due course, but for the present moment, I would like to bring out these privacy concerns.

For a long time, the women’s movement in India did not engage with issues faced by queer women.¹⁷ This was partly because of the ignorance about the unique nature of those issues,¹⁸ but also because of the heritage of the Left movement which considered these issues bourgeois.¹⁹ Additionally, there was a fear that the emerging acceptance of women’s issues would be jeopardised if they sought to include the concerns of queer women within their advocacy.²⁰ Similarly, the human rights movement did not consider these matters important.²¹ The final nail in the coffin was the assumption that queerness was “western”, a burden that the queer community continues to shake off till date.²²

In the first known large-scale research to study the violence faced by lesbian women in India, authors Bina Fernandez and Gomathy N.B. argue that though lesbians are vulnerable to all kinds of violence faced by women - rape, sexual harassment, domestic violence, child marriage, etc., they face specific kinds of violence *as lesbians*— an intersectionality that continues to be woefully understudied in academic research in India.²³ They face violence because of their identities as lesbians, the epistemic basis of which is the very denial of the presence of lesbians in India society.²⁴ Because they do not exist, or more

¹⁶ *Navtej Singh Johar & Ors. v. The Union of India*, (2018) 10 SCC 1, ¶221 (per Misra J. & Khanwilkar J.). A majority of the judges also formulated the right in this way.

¹⁷ SHARMA, *supra* note 12, 1-41.

¹⁸ Forum Against Oppression of Women, *Another Challenge to Patriarchy* in HUMJINSI: A RESOURCE BOOK ON LESBIAN, GAY & BISEXUAL RIGHTS IN INDIA 29 (Bina Fernandez, 1999).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*, 17.

²² Naz Foundation India Trust, *History’s Flirtation with Fire: Documenting the Controversy* खामोश! एमरजेंसी जारी है: Lesbian Emergence 15-16 (Campaign for Lesbian Rights, 1999); Campaign for Lesbian Rights, *Myths and Realities- Lesbianism* खामोश! एमरजेंसी जारी है: Lesbian Emergence 41 (Campaign for Lesbian Rights, 1999); Campaign for Lesbian Rights, *Lesbians and the Law: Memorandum Submitted on the 26th of February, 1999 to the Committee on the Empowerment of Women* खामोश! एमरजेंसी जारी है: Lesbian Emergence 54 (Campaign for Lesbian Rights, 1999); GITI THADANI, SAKHIYANI: LESBIAN DESIRE IN ANCIENT AND MODERN INDIA 120-123 (2016); NAISARGI DAVE, QUEER ACTIVISM IN INDIA: A STORY IN THE ANTHROPOLOGY OF ETHICS 2 (2012).

²³ TATA INSTITUTE OF SOCIAL SCIENCES, *The Nature of Violence Faced by Lesbian Women in India: A Study Conducted by Bina Fernandez and Gomathy N.B.*, 14 (2003), available at <https://perma.cc/M4PN-W6XE> (Last visited on August 16, 2020).

²⁴ *Id.*

accurately, have been erased,²⁵ there is no way to imagine a woman who would reject heterosexuality. Asserting a lesbian identity is at once rejecting the need for a man, the structural hierarchy of a man woman relationship, indeed, the very paradigm of heterosexual perpetuity.²⁶ A lesbian is not of society, but outside it. She is not a woman at all, and needs to be put back in her place, to take up her rightful role as a daughter/wife/daughter-in-law, so on and so forth. Consequently, the ensuing violence that they face is not just because they are women, but because being women they have acted in a way that is incomprehensible within the hetero-patriarchal paradigm— they have become lesbians.

One autobiographical account has remained particularly unforgettable.

“One early winter's afternoon I had come home with a friend. Mother was next door chanting as usual. The servant woman said that there was a pot of extra hot water on the stove if I fancied a bath. I looked at my friend when she had turned back to her cooking. Between us we lifted the brass pot off the fire and poured it into the tank of cold water in the bathroom. I slid the little bolt on the door and we took our clothes off. For a few minutes, we stood fondling each other and then my friend poured some of the hot water on the floor. We lay down and did what I now know was the number 69. It was fantastic. It was not the first time, but maybe the hundredth time and every single time was different, good, positive and totally exciting, both physically and mentally. We were still on the floor in that position when a terrible noise erupted as the door came crashing down and nearly smashed onto my friend's head. We both jumped and looked with horror, and I suppose total fear, at my elder brother. The servant woman appeared next to him and after a few minutes of his screaming, my mother came rushing in. He turned and bolted the back door just as the woman from next door was about to come in too. The words he used were words that I hardly knew the meaning of. My mother and the servant woman stood in total silence as my brother cursed and cursed. My friend handed me my clothing and I put on what I could. My brother then stepped forward and grabbed her by the arm and dragged her out of the bathroom and opening the back door shoved her outside. ... My brother then returned and grabbed me and like a wild animal beat me until I fell on the floor. My mother tried to stop him as did the servant woman

²⁵ GITI THADANI, SAKHIYANI: LESBIAN DESIRE IN ANCIENT AND MODERN INDIA 1-13 (2016). Thadani has surveyed many goddess temple sites in India and studies the Shakti tradition that is based around independent (i.e. unaccompanied by males) female goddesses. Goddess temples do not have a central deity. The central space is left free to symbolize *adya shakti* (primal energy). What she has found repeatedly is that pluralistic gynefocal traditions have been deconstructed and masculinised to construct a monolithic continuum of heterosexual tradition, with a god at the center and the goddesses at the periphery. For example, in the 64-Yogini temple in Ranipur, Jharia, Odisha, a statue of Shiva has been installed in the central space which was previously empty. She has observed this deliberate erasure of feminine iconography at other temple sites in India also. For example, at the Lingraj Temple in Bhubaneswar, she observed the breasts of a goddess being cut, and polished over, to convert her into a male god. Similarly, at Tara Tarini, the original iconography of lesbian goddesses in embrace has been replaced by a heterosexual image.

²⁶ TATA INSTITUTE OF SOCIAL SCIENCES, *The Nature of Violence Faced by Lesbian Women in India: A Study Conducted by Bina Fernandez and Gomathy N.B.*, 15 (2003), available at <https://perma.cc/M4PN-W6XE> (Last visited on August 16, 2020).

but they only got shoved out of the way. He picked me up by the hair and beat me in the stomach, by the crotch and the breasts. I fainted...”²⁷

This account provides a glimpse into the violence that women have faced at the hands of their own family for their sexual transgressions. The site of the sexual act could not have been more private—the actors were in a bathroom, but this did not stop the brother from barging in, and verbally and physically abusing the sister and her partner. Privacy did nothing to protect the women. The mother bore witness to the act but her silence sanctioned the violence. The brother bolted the back door so that no one from outside the household could know and the family could be spared the shame and dishonour that would follow if any word of the sexual act got out. Ironically, this account exemplifies many others in which it is the act of pleasure, and not the act of violence, which reduces family honour.

The Fernandez-Gomathy study²⁸ has also found that a large majority of lesbians had experienced violence (78%), the family being the main source of the same (77%).²⁹ The physical violence took the form of eviction, confinement within the home, and deprivation of basic necessities.³⁰ These women encountered battering, hair pulling, kicking, pushing, burning, cutting, binding, and throttling.³¹ Emotional violence came in the form of taunts and verbal abuse, threats of abandonment, threats of self-harm or harm to others, allegations of

²⁷ GITI THADANI, SAKHIYANI: LESBIAN DESIRE IN ANCIENT AND MODERN INDIA 81 (2016) (quoting P. Parivarif in Shivananda Khan, Khush: A Shakti 10-11 (1991)).

²⁸ This study triangulated the results from structured closed-ended questionnaires circulated to 50 lesbian women, narrative interviews with 8 lesbian women, 22 interviews with mental health professionals, and 70 lesbian client profiles gathered from the notes of medical health professionals. Lesbian participants were recruited through a network of organizations working for lesbian women in Mumbai, Pune, Delhi and Kolkata. Overall, the interviewees were urban, well-educated and employed women, belonging to different religious backgrounds, who identified as lesbians. Necessarily, poor, rural or small town, unemployed lesbians, and those with reduced mobility and other marginalisations were not studied. Given the invisibility of this group, it was not possible for the researchers to locate or interview them. TATA INSTITUTE OF SOCIAL SCIENCES, *The Nature of Violence Faced by Lesbian Women in India: A Study Conducted by Bina Fernandez and Gomathy N.B.*, 22-23, 39, (2003), available at <https://perma.cc/M4PN-W6XE> (Last visited on August 16, 2020). Indeed, a more wide-based study needs to be undertaken to unearth the problems faced by those lesbians as well. Despite its limitations, it remains the largest study to understand the unique nature of violence faced by lesbians in India. See also LABIA, *Breaking the Binary: Understanding the Concerns and Realities of Queer Persons Assigned Gender Female at Birth Across a Spectrum of Lived Gender Realities* 102 (2013), available at <https://perma.cc/M2GG-Z9ZQ> (Last visited on September 5, 2020) for findings from a research based on 50 life history narratives of persons assigned gender female at birth; SAPPHO FOR EQUALITY, *Vio-Map: Documenting and Mapping Violence and Rights Violation Taking Place in Lives of Sexually Marginallized Women to Chart Out Effective Advocacy Strategies*, (2011), available at <https://perma.cc/AWT9-F49R> (Last visited on September 5, 2020) presents findings from a study based on 75 semi-structured qualitative interviews with non-heteronormative women, their immediate intimate circle of friends, family, and neighbours, the general non-queer society, and women’s right and queer rights activists. For accounts of working-class women in same-sex relationships, see MAYA SHARMA, *BEING LESBIAN IN UNDERPRIVILEGED INDIA* (2005); Amanda Lock Swarr & Richa Nagar, *Dismantling Assumptions: Interrogating Lesbian Struggles for Identity and Survival in India and South Africa*, SIGNS 491 (2003).

²⁹ TATA INSTITUTE OF SOCIAL SCIENCES, *The Nature of Violence Faced by Lesbian Women in India: A Study Conducted by Bina Fernandez and Gomathy N.B.*, 40-41 (2003), available at <https://perma.cc/M4PN-W6XE> (Last visited on August 16, 2020); See also IGLHRC Report, *Violence on the Basis of Sexual Orientation, Gender Identity and Gender Expression Against Non-Heteronormative Women in Asia Summary Report*, 4-5 (February 2010), available at <https://perma.cc/Q3HC-677T> (Last visited on August 16, 2020).

³⁰ TATA INSTITUTE OF SOCIAL SCIENCES, *The Nature of Violence Faced by Lesbian Women in India: A Study Conducted by Bina Fernandez and Gomathy N.B.*, 41 (2003), available at <https://perma.cc/M4PN-W6XE> (Last visited on August 16, 2020).

³¹ *Id.*, 42.

mental illness, silent hostility, continuous suspicion, denial of the lesbian sexual orientation and relationship, and violation of privacy in the form of opening letters, and entering personal space.³² The participants reported their male partners to be the primary source of sexual violence against them.³³ The next section connects these experiences of violence with strategies for dealing with it, setting the stage for the importance of a safe space outside home.

A. ARRIVING

For a majority of the women, abuse terminated when they left home or indeed, the country,³⁴ or reassured their abuser that they were not lesbians.³⁵ Thus, they left home, physically or mentally. This resonates with Naisargi Dave's research. She has found that for lesbian women in India, coming out stories were much less significant than stories of leaving home.³⁶ She argues that *prima facie*, "coming out" and "leaving home" are two different paradigms. One suggests taking one's place in the world, the other, forfeiting it. One suggests assertiveness, the other, capitulation. The act of leaving, however, is not one of forfeiture or capitulation, it is one of courage, the indispensable ingredient that is needed to leave the familiar, and arrive into a new and unknown world—away from home.³⁷ Further, it is an act ripe with possibilities; for women to script their lives with characters of their choosing. To provide a glimpse of possibilities such acts can entail, Dave recounts an account shared in a Sangini support group meeting she attended.

“A group member named Jasmine had told of her leaving home story in Northeast India. She knew only that she did not want to marry and that in order to avoid marriage, she would have to leave her family. So, she took a job with

³² *Id.*

³³ *Id.*, 41. Some of the women had been previously married, or had had boyfriends.

³⁴ Giti Thadani presents diary entries over several weeks from an Indian emigrant's diary which highlights her difficult choice between cultural exile (leaving India), and sexual exile (leaving her sexuality). GITI THADANI, SAKHIYANI: LESBIAN DESIRE IN ANCIENT AND MODERN INDIA 117-119 (2016).
Week 1 I have in fact spent the entire week feeling the same way. Surprised by the depth of my relief at being home. In India, among sensations so familiar that one forgets to name them. Like anyone else in exile I spend a lot of time and energy musing and complaining about alienation - the frustration of always being slightly out of step with everything around me. I'd miss India with an intensity that was physical. A dull and gnawing ache. At such times, I would recall the logic that kept me away. I was a lesbian and felt that I would be in an impossible situation in India. Isolated. Alone. A lesbian? ...
Week 2 I've been home two weeks. Enough time to catch up with most of my friends. 'Catch up', I realize ruefully, means dismissing my life in a few short exchanges and focusing on theirs. It's easier... Besides, I share a complex history with most of my friends and it's simpler for us to continue inscribed within it, especially for most of them there remain important connections between this past and their present. And what about me? Has my life changed drastically because I've 'come out'? Have I become someone utterly different? If I have then why do I miss India so acutely? I realize afresh the meaning of institutionalized heterosexuality.
Week 3 I have begun to swing between feeling angry and sad. Anger at the heterosexual privilege enjoyed by my recently engaged cousin and her fiancé, both of whom are welcomed into the arms of my 'liberal' family. Anger at the spontaneous and genuine interest displayed in their every action and plan. Sadness that I will never be able to share, with most of my family, a relationship founded on the very values they espouse. Anger that they know nothing of someone who is central to my existence, sadness that she knows so much about who they are... I start dreaming about my return. About the lesbian community that denies the 'Indianness' that is so essential to who I am, but affirms the equally essential 'lesbian' in me.

³⁵ TATA INSTITUTE OF SOCIAL SCIENCES, *The Nature of Violence Faced by Lesbian Women in India: A Study Conducted by Bina Fernandez and Gomathy N.B.*, 44 (2003), available at <https://perma.cc/M4PN-W6XE> (Last visited on August 16, 2020).

³⁶ NAISARGI DAVE, QUEER ACTIVISM IN INDIA: A STORY IN THE ANTHROPOLOGY OF ETHICS 62-63 (2012).

³⁷ *Id.*, 63.

an NGO, hoping to travel. It was at an NGO workshop in Delhi about HIV/AIDS that she first heard about lesbianism; that same day she met her future partner. Though she has never come out to her parents, whom she loves and trusts, her relationship gave her the impetus she needed to leave home. Several others told similar stories that day, and none ever came out to their families. For them, it was the moment of leaving the natal home as unmarried women that marked their moment of rupture and arrival”.³⁸

For Jasmine, and many other women in her situation, leaving home freed her from the expectations of the heteronormative timeline, and provided her with an opportunity to have authorship of her life.

B. A ROOM OF HER OWN

If leaving home marks the moment of rupture and arrival in lesbian lives, then it is critical that there be a place at which to arrive. It is critical for queer women to have a room of their own – away from the violence, from marriage pressure, from the denial of their beings; where there is space and freedom, to be alone or with someone, “to realize whatever pleasure there is in what they too often experience as sorrow.”³⁹ I refer to pleasure not just in the sexual sense. Pleasure also refers to the possibility of being able to be oneself, to form bonds of kinship, and to take pleasure in the company of those with whom one need not hide. For queer women who have managed to find these spaces, it has been the houses, offices, and other informal spaces created by activists. By 2005, Sangini had created several informal shelters for queer persons, primarily transmen, lesbians, and bisexual women who were experiencing violence at home. Between 2008 and 2012, this shelter also received funding, before it shut down in 2013 due to lack of funding.⁴⁰ Shelter for queer women is an issue that falls through the cracks in much of the discussion about shelter homes.⁴¹ Maya Shankar, the co-founder of Sangini, notes the difficulty that queer women face when they approach a shelter home, even if they arrive with a Sangini reference.

“When two women approached a shelter together...they would refuse them admission. Women facing trauma want to speak about it and hence living in a space where one has to stay quiet about the violence was problematic. Shelters could recognize violence when a woman is beaten by her husband... but it was difficult for them to acknowledge a same-sex couple who wanted to live together”.⁴²

The quotation above highlights two difficulties that they face in shelter homes. The first is that many a time, they are turned away from the shelter home. The second, that even if admitted, the shelters do not provide an encouraging environment for the discussion of the violence that they have only recently escaped. On the contrary, they claim to “cure” them, as I will later show.

³⁸ *Id.*

³⁹ *Id.*, 181.

⁴⁰ ACTION INDIA, JAGORI AND NAZARIYA, *Beyond the Roof: Rights, Justice and Dignity* 18 (March 2019), available at <https://perma.cc/V3V8-MMTC> (Last visited on August 16, 2020).

⁴¹ *Id.*, 18.

⁴² *Id.*, 18-19.

As gender non-conforming looking women are not automatically assumed to be queer, the violence they face in public is less compared to that which they face at home. The Fernandez-Gomathy study has also found this to be true. It reported that the violence faced by lesbian women in public was low, relative to the one faced by them at home.⁴³ This distinguishes queer women's struggle for privacy from the one experienced by queer men and transgender women. In the *Navtej* judgment, Justice Chandrachud offered a critique of limiting a sexual intimacy right to the private sphere. His critique was that the right to same sex relations in private does not guarantee privacy of person to the LGBTQ community when they leave their home, because they are still subject to discrimination and violence in public.⁴⁴ This critique is true, but limited to those sections of the LGBTQ community whose gender transgressions in attire, gait, and physicality are more easily perceptible to society. In particular, gender non-conforming persons assigned male at birth—whether they are gay or transgender. The privacy concerns of queer women are of a different nature. Given the limited and fraught claim to privacy within their homes, the right of women to have romantic and sexual relations with other women becomes a right in hiding, which is no right at all. As the Humjinsi report noted, the urgent need for lesbians is to be able to claim the space to form relationships, while for gender male assigned sections of the queer community, the struggle is to claim public places free from harassment and the threat of §377.

“Specificities of space available to and claimed by lesbians are different: for lesbians, the urgent need is to claim the space to form partnerships, while for gay men, there is a need to claim public spaces free from harassment under the threat of Section 377”.⁴⁵

Surely this quote harkens to the need for a reordering of the sexual surveillance norms which can give queer women the much-needed breathing space that is vital to form relationships, but I also read this as a call for creating public spaces where women can be safely open about their sexuality. If the former is a long-term goal then the latter is a short-term one.

Another section of the queer community that is not served by the spatial notion of the privacy entitlement is that of working-class queer men and transgender women who do not have individual quarters, and who have sex in public spaces like cruising parks. They are constantly under the threat of public decency laws and nuisance charges by the police. The point I am making here is not the disproportionate impact of these seemingly neutral laws on the above-mentioned population, though it would not be difficult to conceive that the extant prejudice against queerness⁴⁶ coupled with the lack of private spaces for this particular section of the queer community would produce these consequences. My point here is to highlight that the *Navtej* judgment will not protect those who do not have private physical spaces. In reality, the privacy argument offers limited protection for all members of the queer community. Yes, it grants protection from the landlords/police/neighbours barging into one's house, catching

⁴³ TATA INSTITUTE OF SOCIAL SCIENCES, *The Nature of Violence Faced by Lesbian Women in India: A Study Conducted by Bina Fernandez and Gomathy N.B.*, 40-41 (2003), available at <https://perma.cc/M4PN-W6XE> (Last visited on August 16, 2020); Public violence faced by queer women was in the form of taunts (46), un-wanted outings by the press (84-85) censure, stigmatization, and alienation by the community (64).

⁴⁴ *Navtej Singh Johar & Ors. v. The Union of India*, (2018) 10 SCC 1, ¶62 (per D.Y. Chandrachud J.).

⁴⁵ Forum Against Oppression of Women, *Another Challenge to Patriarchy* in HUMJINSI: A RESOURCE BOOK ON LESBIAN, GAY & BISEXUAL RIGHTS IN INDIA 31 (Bina Fernandez, 1999).

⁴⁶ INTERNATIONAL COMMISSION OF JURISTS, “*Unnatural Offences*”: *Obstacles to Justice Based on Sexual Orientation and Gender Identity*, 21-24 (February 2017), available at <https://perma.cc/7XAC-KCWC> (Last visited on August 17, 2020).

them in the sexual act, and threatening to bring criminal charges against them,⁴⁷ but other than that, neither does it solve the problem of lack of private space nor does it offer respectability to the queer community. The members of the community remain wretched subjects who have deviated from societal norms. They still remain subject to police and public harassment.⁴⁸ Confining same sex sexual intimacy to the private sphere also reinforces the “ambient heterosexism of the public sphere”.⁴⁹ Justice Chandrachud remarked in the *Navtej* case that, “...it is imperative that the protection granted for consensual acts in private must also be available in situations where sexual minorities are vulnerable in public spaces on account of their sexuality and appearance.”⁵⁰ However, he did not develop this criticism to respond to the distinct problem faced by queer women which is the access to safe public spaces in the first instance. Even with the looming threat, access to affection in public spaces exists for queer men and transgender women in a way that does not exist for queer women, because they inhabit female bodies.⁵¹ Public spaces after dark are disproportionately male spaces, and women are actively cautioned to not go out in the dark, let alone to isolated spots in public parks or to the back alleys of buildings.⁵²

In the *Navtej* judgment, Justices Nariman and Chandrachud recounted a paragraph from the case of *Anuj Garg & Ors. v. Hotel Association of India*,⁵³ which stated that limiting employment opportunities for women because of consequences flowing from sex differences severely affects their privacy rights.⁵⁴ This insight, if developed, could have an important impact on the lives of queer women because it recognises that gender proscribes opportunities which has a privacy-reducing effect. It recognises that the privacy concern that is paramount for queer women, is to be able to have the space to form and carry on their relationships, whether it is an employment relationship, or a romantic one. What can these places be and how can they be created? Will they be in the form of parks, cafes, hostels, libraries, etc.? These are vital questions for future engagement with queer women, and groups working with queer women. The State⁵⁵ and other funding bodies should equally do their part in providing unrestricted funds to this enterprise, so that expansive participatory processes can be set up to invite queer women, rural or urban, from all walks of life, religions, and mental

⁴⁷ As was in the case of *Lawrence v. Texas*, 539 U.S. 558 (U.S. Supreme Court).

⁴⁸ INTERNATIONAL COMMISSION OF JURISTS, “*Unnatural Offences*”: *Obstacles to Justice Based on Sexual Orientation and Gender Identity* 21-24 (February 2017), available at <https://perma.cc/7XAC-KCWC> (Last visited on August 17, 2020).

⁴⁹ *Navtej Singh Johar & Ors. v. The Union of India*, (2018) 10 SCC 1, ¶62 (per D.Y. Chandrachud J.).

⁵⁰ *Navtej Singh Johar & Ors. v. The Union of India*, (2018) 10 SCC 1, ¶62 (per D.Y. Chandrachud J.).

⁵¹ Ponni Arasu & Priya Thangarajah, *Queer Women and Habeas Corpus in India: The Love that Blinds the Court*, 19(3) INDIAN JOURNAL OF GENDER STUDIES 413, 414 (2012).

⁵² See JAGORI, *Safe Cities for Women and Girls: Recent Developments*, (May 2016), available at <https://perma.cc/WTE9-2LUJ> (Last visited on August 14, 2020); JAGORI, *Study on Violence Against Women in Public Spaces in Ranchi and Hazaribag, Jharkhand: A Synopsis*, (April 2016), available at <https://perma.cc/S595-B2EM> (Last visited on August 14, 2020).

⁵³ *Anuj Garg & Ors. v. Hotel Association of India & Ors.* (2008) 3 SCC 1, ¶5. The impugned Act prohibited women from being servers in liquor serving establishments. The State argued that this was to protect them from sexual harassment at the hands of the customers.

⁵⁴ *Navtej Singh Johar & Ors. v. The Union of India*, (2018) 10 SCC 1, ¶45 (per Nariman J.); *Navtej Singh Johar & Ors. v. The Union of India*, (2018) 10 SCC 1, ¶37 (per D.Y. Chandrachud J.).

⁵⁵ The irony of relying on the State to fund this enterprise is not lost on me, given that I have spent a considerable amount of space in this article critiquing the support that hetero-patriarchal structures enjoy from State institutions. However, engagement with the State is inevitable and in some instances, practical (for example, to attain non-criminal status). Given this reality, it is important to consider the extent of State engagement and the nature of entitlements that one ought to demand from the State.

and physical abilities, and obtain their views on an array of solutions. These solutions must deliberate not only upon the nature of the public space, but also upon its organisation and management, so that the current modalities of oppression are not replicated in what is meant to be a safe space.

C. SHELTER HOMES

Within existing structures, shelter homes can be one such space. These homes, however, come with their own set of problems. First, State-run shelter homes do not accept women without a court order. Second, most State funded shelter homes make them undergo medical checks before admission, which causes further trauma.⁵⁶ Once admitted, the living conditions are very poor. In many instances, the phones of the inhabitants are taken away and they are not permitted to work.⁵⁷ In all instances, they are not allowed to leave the shelter home without permission.⁵⁸ Therefore, these women leave one restrictive situation and arrive in another. The situation is so unpalatable, that the *Beyond the Roof* researchers have remarked that, “given the poor living conditions, strict regulations and restrictions on mobility, even many women’s rights organizations do not like to refer their clients to shelters, unless that is the only option available.”⁵⁹ The queer-phobic attitudes at many shelters also ensure that either they do not accept queer women, or if they do, they claim to cure them.⁶⁰ Nevertheless, the study has found that all the residents acknowledged the critical role of shelter homes in providing a physically safe space which offers immediate relief. In addition, the study also found that shelter homes offer bargaining power to the women.

“Dynamics change when an individual moves out of the house. A shelter space that is secure can be powerful in providing the individual with bargaining and negotiating power...especially with legal backing”.⁶¹

Shelter homes then need to be viewed as crucial first stops for queer women looking to arrive at a safe space. The existing rules of admission of shelter homes need to be revised to admit queer women. Along with this, gender and sexuality training needs to be provided to the staff managing the shelter homes so that queer women feel emotionally and mentally safe when they arrive at these spaces.

D. PROTECTION ORDERS

Understanding privacy from the point of view of queer women can also open up legal solutions. One such solution is the grant of protection orders from various high

⁵⁶ ACTION INDIA, JAGORI AND NAZARIYA, *Beyond the Roof: Rights, Justice and Dignity* 33, (March 2019), available at <https://perma.cc/V3V8-MMTC> (Last visited on August 16, 2020). The Government guidelines do not require a medical examination at the time of admission, but within three days of admission, see Swadhar Greh Guidelines (2018) Appendix IV, x.

⁵⁷ *Id.*, 40.

⁵⁸ *Id.*, 40.

⁵⁹ *Id.*, 38.

⁶⁰ Lam-Lynti Chittara Nerallu, *Time for Overhauls: Report of National Consultations on Services in and Around State-Run and Funded Shelter Homes for Girls, Women and Other Vulnerable Populations*, 23, (February 2017), available at <https://perma.cc/JT3B-ZV9R> (Last visited on August 16, 2020).

⁶¹ ACTION INDIA, JAGORI AND NAZARIYA, *Beyond the Roof: Rights, Justice and Dignity*, 39, (March 2019), available at <https://perma.cc/V3V8-MMTC> (Last visited on August 16, 2020).

courts.⁶² These orders are obtained through the writ jurisdiction of the court. Women who have exercised their choice to live with one another can be subject to physical threats and emotional pressures from their families, as I will explain in detail in the next section. These protection orders can provide an immediate veneer of physical safety to them in these situations. Typically, the Station House Officer of the local police station is put in charge to assess the safety requirements of the petitioning women. Along with that, the mobile number of a beat constable is shared with the women to call if any danger to safety and security is apprehended. A lawyer colleague also agrees with the power of protection orders.⁶³ She states that the immediate effect of these orders is that the physical threat from the family ceases in most cases, even if the emotional threats continue.⁶⁴

In this part of the article, I have tried to show that the *Navtej* judgment has not understood the privacy concerns of queer women. Women have a precarious claim to privacy within their homes. The family is the main site of violence for many queer women. Therefore, if the concept of privacy is to serve queer women, it needs to be interpreted to provide safe access to public spaces. These spaces refer to spaces traditionally understood as public, such as libraries, cafes, parks, etc., but also to private spaces which exist outside the family controlled physical sphere, such as hostels, shelter homes, rented homes, etc. I argue that protection orders are one way of providing privacy to queer women in the public sphere. The discussion on protection orders provides a good segue to the next section which deals with yet another legal fallout of the decision of two women to live together.

III. LIVE-IN RELATIONSHIPS: THE LITTLE-KNOWN STORY OF QUEER WOMEN AND THE LAW⁶⁵

Live-in relationship related litigation is a significant area of litigation for women who are in romantic relationships with other women or transmen. It is also a distinct area of litigation for these sections of the queer community, as compared to other sections of the same community, and are produced by the intersectionality of being a woman, being queer, and being in a live-in relationship. Seldom do queer men or transgender women in live-in relationships have to reckon with litigation arising from their decision to live together.⁶⁶ Similarly, queer persons in non live-in relationships do not face this kind of litigation. The impetus for such actions is provided by familial ideology, which Ratna Kapur and Brenda Cossman have conceptualised in their work. Familial ideology refers to those set of societal norms which constitute men and women into gendered beings with specific moral and economic expectations. While the economic expectations rest on men, women emerge as the “repositories of tradition”.⁶⁷ Moral expectations that are imposed on women include the

⁶² For example, see *Monu Rajput & Anr. v. State & Ors.*, WP CrI 3407/2019 (Delhi High Court). In *Madhu Bala v. State of Uttarakhand & Ors.*, HABC 8/2020 (Uttarakhand High Court) [hearing dated 27.5.2020], the protection order was issued to provide reasonable protection from any untoward action by the mother and brother toward the detinue (a woman in a lesbian relationship) while she was living in her own home.

⁶³ My thanks to Advocate Amritananda Chakravorty for her input on this point. Adv. Chakravorty handles many protection order matters in the Delhi High Court.

⁶⁴ My thanks to Advocate Amritananda Chakravorty for the discussion on this point.

⁶⁵ This phrase is taken from Ponni Arasu & Priya Thangarajah, *Queer Women and Habeas Corpus in India: The Love that Blinds the Court*, 19(3) INDIAN JOURNAL OF GENDER STUDIES 413, 416 (2012).

⁶⁶ A live-in relationship between men has been the subject of a legal challenge, but these cases are extremely rare. Although I am aware of such an instance, I am unable to cite the case because neither the petitioner nor the detinue opened up about their sexuality on record in the proceedings.

⁶⁷ RUTH VANITA, *GENDER, SEX AND THE CITY: URDU REKHTI POETRY* 29 (2012).

expectation of chastity, and for them to be dutiful wives and mothers, and virginal daughters.⁶⁸ The society and law rewards those who adhere to these expectations, constituting the logic for the ownership and severe policing of women's sexuality by families.

Therefore, when adult women run away from their homes, whether with men or women, in defiance of their moral expectations, the family feels empowered to take legal action, even if they have left a note saying that they have left of their own volition. For the purpose of this article, I am interested in those cases where women run away with each other. One modality through which these cases come to be is when two women run away from their homes to be with each other, and the family of one of the women files either *habeas corpus* petition or a case of wrongful confinement, kidnapping or abduction against the partner. Arasu and Thangarajah have surveyed the legal provisions that are used against these couples.⁶⁹ The first set of provisions are §339 and §340 of the IPC, which make wrongful confinement a crime. The crime occurs when a person confines another without the authority to do so. The second provision is §361 of the IPC which criminalises removing a minor from legal guardianship, without the guardian's consent. The consent of the minor is irrelevant in these cases. The researchers find that this provision is very popular in lesbian runaway cases although the eloping women are adults.⁷⁰ The third is §362 of the IPC, which criminalises abduction, and is another popular provision to be used against one of the lesbian partners by the parents of the other. Finally, §366 of the IPC is used against lesbian couples alleging that one partner has been kidnapped by the other to be compelled for marriage. Ideally, the investigation procedure in these cases should ascertain whether the runaway daughter has left of her own volition. If the answer is yes, a closure report should be filed by the police. A statement of the runaway daughter may be recorded before a judicial magistrate for added certainty, and the case should be closed.

Another modality through which lesbian relationships make an appearance in court is when one of the partners files a *habeas corpus* petition, alleging that the other is being kept captive by her parents or relatives. In these petitions, she prays that her partner be produced before the court, her will be ascertained, and her liberty be granted. In the sections that follow, I will discuss how State institutions treated the runaway cases of queer women before the *Navtej* judgment, and how queer women negotiated those cases. I will then note the changes that have occurred in those cases after the *Navtej* judgment. Finally, I will analyse the post-*Navtej* live-in relationship cases to see if they have succeeded in upholding the rights of queer women or whether they have merely re-inscribed old myths and familial ideology.

A. STRATEGIC SILENCE

Before the *Navtej* judgment, as a matter of strategy, in most of these cases, the lawyers would not disclose the relationship between the women in court. This was required because of the presence of §377 of the IPC. Although, research has revealed only two instances of §377 cases against women,⁷¹ the threat and stigma of criminality brought about by the

⁶⁸ RATNA KAPUR & BRENDA COSSMAN, *SUBVERSIVE SITES* 100-101 (1996).

⁶⁹ Ponni Arasu & Priya Thangarajah, *Queer Women and Habeas Corpus in India: The Love that Blinds the Court*, 19(3) INDIAN JOURNAL OF GENDER STUDIES 413 (2012).

⁷⁰ *Id.*, 417.

⁷¹ The first case was reported by India Today in 1990. It reports the story of Tarunlata and Lila Chavda, who had been in a relationship since 1985. It reports that Tarulata underwent a sex change operation in 1989 and married Lila. Thereupon, Lila's father, filed a criminal case against Tarun under §377 of the IPC. The proceedings of this

Section have always operated at a societal level against women to discourage and obstruct their relationships with other women. Lawyers would advise their clients to not disclose the romantic nature of their relationship because of this reason. In their important paper, Thangarajah and Arasu look at the records of *habeas corpus* cases involving queer women, from the 1940s to October, 2007. They were able to only find only two such cases.⁷² The researchers admit that, “[t]his remains the primary methodological problem with writing a legal history of lesbian relationships and law in India, and hence demands a different reading than one of mere absence or silence.”⁷³ In other words, they argue that the absence of lesbian runaway cases does not mean that they have been absent, but that they have been hidden. Researchers Sunil Mohan and Sumathy Murthy summarised their experiences of police treatment of lesbian runaway cases. They argued that in abduction, kidnapping or missing person cases of adults, the police have a duty to verify the truth of the claim, and if the subject of the complaint herself states that she has left her house of her own free will, to close the case. They argued, however, that this did not happen in several instances of lesbian runaway cases, and that the biases of the police officers against lesbian relationships resulted in the women being sent back to their homes.

“There have been several instances of adult lesbian couples running away from home and their families to start a life together. In such cases, their families usually file “missing persons” complaints with the police, or even accuse one of the partners of “kidnapping” or “abduction” their missing relative. The police have a duty to inquiry into the veracity of these claims. In cases where the women have been found, the attitudes and biases of the police have often meant that police officers have insisted that each woman should return to her “home” and her family, even when they [sic] individuals in question were adults and clearly stated that they would not wish to live separately from one another. Sunil noted, ‘In the case of a missing persons case that is filed, if it is an adult person, the police’s responsibility is to find that person. If the person says they don’t want to come back, the case is closed. Or should be. But if it is a lesbian woman, the police will insist that the person has to go back to the family’. In a similar case in a different state, despite the woman repeatedly telling the police that she was an adult and wanted to live away from her parents, the police kept sending her back to her parents.”⁷⁴

case are not to be found on the Gujarat High Court website anymore. The Humjinsi report noted that, “the case subsequently disappeared from public notice,” *Dateline* in HUMJINSI: A RESOURCE BOOK ON LESBIAN, GAY & BISEXUAL RIGHTS IN INDIA 50 (Bina Fernandez, 1999). The second was reported in 1999, when Jaya, a Christian woman approached her local police station, and asked the police officers to get her married to Ramabai, her neighbour, with whom she had had a relationship for 17 years. A series of complicated events transpired after this station visit, which ultimately resulted in Ramabai and her husband being charged and jailed under §§376 and 377 of the IPC. Researchers Bina Fernandez and Gomathy N.B. interviewed Jaya personally, and arrived at the conclusion that the police manipulated her demand to be married to Ramabai, into making her a victim of an offence under §377. When their research was written, Ramabai and her husband had been released on bail. TATA INSTITUTE OF SOCIAL SCIENCES, *The Nature of Violence Faced by Lesbian Women in India: A Study Conducted by Bina Fernandez and Gomathy N.B.*, 22-23, 50-59 (2003), available at <https://perma.cc/M4PN-W6XE> (Last visited on August 16, 2020).

⁷² ARASU et al., *supra* note 70, 422.

⁷³ *Id.*, 423.

⁷⁴ INTERNATIONAL COMMISSION OF JURISTS, “Unnatural Offences”: Obstacles to Justice Based on Sexual Orientation and Gender Identity 40-41 (February 2017), available at <https://perma.cc/7XAC-KCWC> (Last visited on August 17, 2020).

B. COMING OUT IN COURT

What has changed after the *Navtej* case is that these relationships have come to be openly acknowledged in court. The first case to cite the *Navtej* judgment was a case of a lesbian live-in relationship. This case was *Sreeja S. v. The Commissioner of Police, Thiruvananthapuram & Ors.* (*'Sreeja S.'*).⁷⁵ This was also the first documented case, as per available court records, that openly acknowledged the romantic relationship between the women involved. The case concerned two adult women, Sreeja and Aruna. Aruna had left her natal home to be with Sreeja. Aruna's parents filed a missing person complaint which resulted in Aruna being taken into police custody and produced before a judicial magistrate. The magistrate set her at liberty after recording her statement under §164 of the Code of Criminal Procedure, 1973 ('CrPC') and ascertaining her will, which was to continue to live with Sreeja. Outside the courtroom, however, her parents forcibly took her into custody and sent her to be admitted at the local mental hospital. When Sreeja, the petitioner, met Aruna at the mental hospital, "she was ready and willing to come along with the petitioner."⁷⁶ However, the mental hospital refused to let Aruna go without a court order. Following this meeting, Sreeja filed a writ of *habeas corpus* in the Kerala High Court, alleging that Aruna's parents were keeping her captive at the mental hospital.

At the court hearing, Aruna stated clearly, once again, that she wanted to live with Sreeja, that she was being illegally detained by her parents who admitted her into a mental hospital though she is perfect mental health, and that she did not want to return to her parental home. Accordingly, the court ordered that she be released from the mental hospital and allowed to go with Sreeja, as she desired.

Here, one can see that ultimately, Aruna's wish was respected. Legally, it was a victory for the couple, and for the relational rights of queer persons, specifically that of queer women. However, when we pay close attention to the process, and the illegalities and unnecessary harassment that the couple had to face, we begin to unmask the lagging respect for the sexual choices of women or female bodied persons. When the missing person complaint was filed by Aruna's parents, why was it that she was taken into police custody and produced before the judicial magistrate? It was illegal in this case for the police to take her into custody as she was neither a suspect nor an accused in any crime.⁷⁷ If the police had wanted her to record a statement before a judicial magistrate as a witness in her own case, they should have asked her to present herself at the magistrate's court at the appointed hour. The police were not empowered to take her into custody for the same.⁷⁸ Additionally, by what authority had the mental hospital admitted an adult woman at the request of the parents, and why had they refused to release her without a court order? The Mental Healthcare Act, 2017 ('MHA') states that as a rule, admissions into a mental health establishment can occur only upon *self-initiation* by adults *with mental illness*⁷⁹ (independent admission rule). Only those adults who need a high degree of support "approaching hundred percent" in making decisions can be admitted in

⁷⁵ *Sreeja S. v. The Commissioner of Police, Thiruvananthapuram & Ors.*, CrI. W.P. 371/2018 (Kerala High Court).

⁷⁶ *Sreeja S. v. The Commissioner of Police, Thiruvananthapuram & Ors.*, CrI. W.P. 371/2018 (Kerala High Court) ¶13.

⁷⁷ The Code of Criminal Procedure, 1973, §41.

⁷⁸ The Code of Criminal Procedure, 1973, §171.

⁷⁹ The Mental Healthcare Act, 2017, §85; Even so, further conditions need to be met before an adult can be admitted into a mental health establishment, see §86 (M).

exception to the abovementioned rule,⁸⁰ and even so, under highly specialised circumstances. Aruna's case did not meet the pre-conditions required to be admitted into a mental health establishment on her own, let alone warrant the exception to the independent admission rule. Neither had she been diagnosed with a mental illness nor did she approach the hospital to be admitted. The hospital acted in clear violation of the MHA when it chose to rely on the parental request in preference to Aruna's own desire. Aruna's own voice played no role in her admission into, and her release from, the mental hospital.

Other cases also demonstrate similar acts of institutional violence against lesbian women. The next case to be considered is *Shampa Singha v. The State of West Bengal & Ors.*⁸¹ The facts of the case are that Shampa and Mary were in a romantic relationship and had been living together for about three months when Mary's family removed her from Shampa's house. Shampa filed a *habeas corpus* petition alleging that her partner was being kept captive by the mother, and that she should be produced before the court to ascertain her will. During the course of the writ petition proceedings, Mary gave her statement before the magistrate according to §164 of the CrPC. She stated that she was a lesbian, and was currently living with her partner, but was now inclined to live with her mother. The court ordered accordingly and dismissed the petition.

I would like to draw the reader's attention to the first interim order passed in this case. The order from the first hearing states that about three months after Shampa and Mary started to live together, Mary's family got a report that Mary was unwell and locked in a room in Shampa's house.⁸² They submitted that they went to Shampa's house, rescued Mary, and admitted her to the hospital where she was found to be hemodynamically unstable, that is, she had unstable blood pressure. Subsequently, they submitted that they admitted her to the Santoshpur Agnishika Women Foundation ('the Foundation') for rehabilitation. They also submitted that Mary was suffering from trauma and depression.

We need to pay attention to the various procedures that Mary had to go through before the conclusion of the case. First, she was admitted to the aforementioned Foundation for rehabilitation. The Foundation website suggests that it is a drug and alcohol de-addiction centre.⁸³ The reasons for sending Mary to a de-addiction centre to rehabilitate are conspicuous by their absence from the court record. A justificatory reason for this action is neither presented by Mary's family nor required by the court. Second, she had to undergo a psychological test because her family asserted that she was suffering from trauma and depression. If A alleges that B has a mental illness, is that sufficient reason to order a mental examination for B? No. The MHA has provided very specific conditions which need to be satisfied for a person's mental health to be tested. §105 of the MHA states that if in a judicial proceeding, one party produces *proof* of a mental illness which is challenged by the other party, the court may refer the matter to a Mental Health Review Board ('Board') and the Board shall then examine the person and submit an opinion to the court.⁸⁴ First, the MHA does not clarify what "proof"

⁸⁰*Id.*, §86(3); Even in these situations, certain other conditions need to be met before a person can be admitted on someone else's request. See §89.

⁸¹ *Shampa Singha v. The State of West Bengal & Ors.*, 2019 SCC OnLine Cal 153.

⁸² *Shampa Singha v. The State of West Bengal & Ors.*, W.P. 23120W of 2018 (Calcutta High Court- Appellate Side), hearing dated 26.11.2018.

⁸³ Santoshpur Agnishikha Women Foundation, *What Agnishikha Does*, available at <https://perma.cc/C5CG-XX4W> (Last visited on September 16, 2020).

⁸⁴ Mental Healthcare Act, 2017, §105.

means in this context. Is it enough to submit old mental health reports, or is expert testimony required to prove mental illness? Secondly, mere allegation does not to the level of proof rise. No document or any expert witness was produced by the family to “prove” Mary’s mental illness. The order presents no legal grounds for ordering the mental health examination. The court’s order is in contravention of §105 of the MHA.⁸⁵

The prominent role played by mental hospitals and mental health checks in these cases raises the question of whether the old association of queerness with mental illness still lingers in the psyche of our institutions. This association has historically been used to discredit and disregard the sexual choices of the queer community. Homosexuality is not a mental illness and this has been categorically stated by the World Health Organization,⁸⁶ the Indian Psychiatry Society,⁸⁷ and the American Psychology Association.⁸⁸ Additionally, under the current Indian legal framework that regulates mental healthcare, even if a queer person has a mental illness, they are assumed to have the capacity to take decisions concerning themselves. For example, they have a right to, nominate a representative to support them in mental health decisions,⁸⁹ admit themselves for treatment,⁹⁰ and decide to stop the treatment and leave the mental health establishment.⁹¹ By the same logic, they have the right to choose their romantic and sexual partners. A mental illness does not, by itself, mean that a person has no legal capacity to enter into a relationship or choose the person with whom they want to live.

C. TESTING THE WHIMSY?

Perhaps the case that most clearly shows institutional violence against queer couples is the case of *Monu Rajput v. The State of Haryana & Ors.* (‘Monu Rajput’).⁹² In this case, Ms. Neeshu, an adult woman, ran away to live with her partner, Monu, a transgender man. Although Monu is a transgender man, as I explained in the scope of this article, the familial experiences of transgender men may coincide with those of queer women because many may be socialised as women. That is why this case is included in this analysis. Neeshu’s parents filed a wrongful confinement case against Monu under §346 of the IPC. In the investigation that followed, Neeshu was found in Delhi staying with Monu and another friend, and taken into police custody for almost 12 hours before she was produced before a magistrate where she recorded her statement under §164 of the CrPC, stating that she wanted to go back to her parents. Once again, as she had neither committed a crime nor was suspected of having committed one, the police could not legally take her into custody to produce her before the magistrate.⁹³

⁸⁵ The examination revealed that Mary was of sound mind.

⁸⁶ World Health Organization, *The ICD-10 Classification of Mental and Behavioural Disorders: Clinical Descriptions and Diagnostic Guidelines*, 1992, available at <https://perma.cc/D855-CQHH> (Last visited on September 28, 2020).

⁸⁷ Indian Psychiatric Society, *Position Statement of the Indian Psychiatric Society Regarding LGBTQ*, available at <https://perma.cc/RH5V-YEY9> (Last visited on September 6, 2020).

⁸⁸ AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* (2nd ed., 1973).

⁸⁹ The Mental Healthcare Act, 2017, §§14, 17.

⁹⁰ *Id.*, §85.

⁹¹ *Id.*, 2017, §88.

⁹² *Monu Rajput v. The State of Haryana & Ors*, CRWP 621/2019 (High Court of Punjab and Haryana).

⁹³ The Code of Criminal Procedure, 1973, §§41, 171.

In her statement, she confirmed that she had gone to Monu's house of her own volition, and that she had not been forced by anyone. However, she stated that she wanted to return to her parents. Accordingly, Neeshu went back to live with her parents in Haryana. Subsequently, Monu filed a *habeas corpus* petition against Neeshu's parents in the Punjab and Haryana High Court alleging that she was being kept captive at her home in Hansi. The High Court ordered the police to investigate, but not before issuing a stern warning to Monu, "...it is made clear that if this petition is found frivolous and the detinue is found residing with the private respondents as per her own consent, then very heavy costs shall be imposed."⁹⁴

The police were also ordered to produce Neeshu before the court if indeed their investigation revealed that she was being kept at her parents' house forcibly. This is a curious directive. A *habeas corpus* petition, by definition, is a writ to produce the body in court, and to ascertain the liberty of the detinue. The production of the detinue in court is not dependent on the investigation of the police.

In any case, it is safe to assume that the police investigation indeed found that Neeshu was being kept at home against her will, as she was produced at the first hearing following the admission. On that date, instead of ascertaining her will, the court adjourned the matter.⁹⁵ She was sent back to her parents' house where she remained for almost another month. Justice is surely defeated if a detinue is sent back into the custody of the very same people who are alleged to be detaining her. As a lawyer friend of mine remarked, drawing a parallel with a kidnapping case, "you won't send back the kidnappee to live with the alleged kidnapper till the case is decided."

In the second hearing, the court once again adjourned the matter as the father was not present. The court noted, "[i]n the absence of respondent No.4, the adjudication of the controversy raised in this petition for *habeas corpus* is not possible and the Court is compelled to adjourn this case, in the interest of justice."⁹⁶ This is patently illegal. The Supreme Court has in the recent past clarified that in *habeas corpus* petitions concerning adults, all that needs to be ascertained is the free will of the detinue. The mother's and father's disapproval of the detinue's choices cannot change the legal outcome.⁹⁷ Are the detinue's choices not legitimate choices in the absence of her family members? This case was not a criminal trial where the accused has a right to defend themselves. *Ex-parte* orders do not extend to criminal proceedings, and in that situation, it would have been legally permissible to adjourn to provide the accused father an opportunity to justify why he was not guilty of illegally confining or abducting Neeshu. However, this was not that kind of case.⁹⁸ This was a *habeas corpus* petition, and the only relevant opinion was that of Neeshu's, before the court, whether or not given in the presence of her father.

That was not to be. The court adjourned the proceedings and sent Neeshu to a Nari Niketan, a shelter home for women, where she ostensibly "chose" to go. The third hearing

⁹⁴ Monu Rajput v. The State of Haryana & Ors, CRWP 621/2019 (High Court of Punjab and Haryana), admission hearing 17.7.2019.

⁹⁵ *Id.*, 1st hearing 05.8.2019.

⁹⁶ Monu Rajput v. The State of Haryana & Ors., CRWP 621/2019 (High Court of Punjab and Haryana), 2nd Hearing, 13.8.2019.

⁹⁷ Soni Gerry v. Gerry Douglas AIR 2018 SC 346; Shafin Jahan v. Ashokan K.M. & Ors., (2018) 16 SCC 368.

⁹⁸ I am grateful to Advocate Maulshree Pathak for discussing the differences between the proceedings in criminal trials and *habeas corpus* proceedings.

was adjourned for no apparent reason.⁹⁹ The fourth hearing was also adjourned as the matter was listed before another court, and that court sent it back to the original bench.¹⁰⁰ The fifth hearing was adjourned for the same reason.¹⁰¹ Meanwhile, Neeshu continued in the Nari Niketan. The sixth hearing was adjourned at the request of the parents.¹⁰² The seventh hearing was also adjourned; this time because of the petitioner.¹⁰³ At the eighth hearing, once again the daughter said that she did not want to go back with her father.¹⁰⁴ Once again, the matter was adjourned. At the ninth hearing, finally the daughter said she wanted to go back to her parents.¹⁰⁵ The matter was immediately disposed, and the daughter was allowed to return with her parents. In the meanwhile, Neeshu had spent about 2 months and 10 days at the Nari Niketan. Why was she sent back to the Nari Niketan so many times - was the court testing whether the daughter was serious in her decision to live with her partner, or whether she was just being whimsical?

A mockery of the free will of the daughter was made in this case until she ultimately “chose” to return to her parents. A little under two months after the disposal of this writ petition, the couple ran away together and got a protection order from the Delhi High Court.¹⁰⁶

The final case in this series is the *Madhu Bala v. State of Uttarakhand & Ors.* (‘Madhu Bala’) case,¹⁰⁷ which tells a similar story. It is once again a *habeas corpus* petition filed by the partner of a woman, alleging that she had been kept captive by her family. The detainee was produced before the court and she deposed that she wanted to live with her partner, but to no avail, as her family members had not been notified and were neither present nor represented in court. Notices were sent to the family members and the hearing was re-scheduled. At the next hearing, the family was represented by their lawyer, and the daughter decided to stay with the family.¹⁰⁸ The same result occurred at the third hearing, which the judge had scheduled to finally decide the matter, and to perhaps give the daughter a chance make a final decision, given that she had changed her mind. The daughter decided to continue to live with her family. The petition was dismissed.¹⁰⁹

It is certainly possible that in the *Madhu Bala* case, the daughter was exercising a genuine choice by changing her mind, but no justificatory reasons have been presented by the court for the departure from the law declared by the Supreme Court in *Shafin Jahan v. Ashokan K.M. & Ors.* (‘Shafin Jahan’).¹¹⁰ The law is entirely clear that in *habeas corpus* petitions concerning adults, all that needs to be ascertained is the will of the detainee. Why then was the procedure in the last two cases tweaked to give the family an opportunity to represent their side? Perhaps, the court would do well to remember that the family is the main site of

⁹⁹ *Monu Rajput v. The State of Haryana & Ors.*, CRWP 621/2019 (High Court of Punjab and Haryana), 3rd hearing, 26.08.2019.

¹⁰⁰ *Id.*, 4th hearing, 30.8.2019.

¹⁰¹ *Id.*, 5th hearing, 3.9.2019.

¹⁰² *Id.*, 6th hearing, 12.09.2019.

¹⁰³ *Id.*, 7th hearing, 24.09.2019.

¹⁰⁴ *Id.*, 8th hearing, 03.10.2019.

¹⁰⁵ *Id.*, 9th hearing, 22.10.2019.

¹⁰⁶ *Monu Rajput & Anr. v. State & Ors.* W.P. CrI. 3407/2019 (Delhi High Court).

¹⁰⁷ *Madhu Bala v. State of Uttarakhand & Ors.* HABC 8/2020 (Uttarakhand High Court).

¹⁰⁸ *Id.*, 2nd hearing 08.06.2020.

¹⁰⁹ *Id.*, 3rd hearing 12.06.2020.

¹¹⁰ *Shafin Jahan v. Ashokan K.M. & Ors.* Criminal Appeal No. 366 of 2018 (S.C.).

violence for queer women. This sociological fact combined with the law laid down by the Supreme Court in *Shafin Jahan* make the correct disposal of these *habeas corpus* petitions even more urgent.

Detailed analyses of these cases reveal the violation of several fundamental rights of women in queer relationships. The first is the right to privacy. In the *Navtej* judgement, Justice Nariman cited the Yogyakarta Principles according to which, the right to privacy includes, "... decisions and choices regarding both one's own body and consensual sexual and other relations with others", which would include decisions about romantic relationships and cohabitation.¹¹¹ A majority of the judges in *Navtej* agreed with him that the fundamental right to privacy had this relational element. This aspect of privacy was also recognised by the *Puttaswamy* case.¹¹² The continuous adjournments in *Monu Rajput* and *Madhu Bala* signalled a violation of their relational privacy as their relationship and cohabitation choices were not respected. A majority of the *Navtej* court had also found that the right to privacy includes the right to choose a sexual partner.¹¹³ However, the continuous adjournments delayed the realisation of this right, and in turn violated the privacy of the parties involved. In addition to the continuous adjournments, these women were also taken into illegal police custody. These incidents signal a privacy violation of the kind that Justices Misra and Khanwilkar conceptualised in *Navtej*, "the right of privacy takes within its sweep...the right of every individual...to express their choices in terms of sexual inclination without the *fear of persecution* or criminal prosecution."¹¹⁴ [emphasis mine].

The second is the right to equality and equal protection of the laws. The Supreme Court has categorically stated that there is a fundamental right to be free from sexual orientation discrimination.¹¹⁵ The *Navtej* judgment reiterated that the "LGBT community possess equal rights as any other citizen in the country..."¹¹⁶ However, these cases have demonstrated that lesbians and women in queer relationships were not treated as equals before the law. In *Sreeja S.* and *Monu Rajput*, the women were taken into police custody although the conditions allowing for custody did not arise in those cases. Similarly, in *Sreeja S.*, Aruna was denied the equal protection of the law when her statement on oath was disregarded and she was admitted into a mental hospital at the request of her parents. Additionally, Justice Nariman had clearly recognised in his concurring judgment in *Navtej* that cohabiting same-sex couples are entitled to equal treatment,¹¹⁷ and the right of heterosexual couples to a live-in relationship regardless of marriage has been upheld by the Supreme Court in the case of *Nandakumar & Anr. v. State of Kerala*.¹¹⁸ However, we see that in the *Monu Rajput* and *Madhu Bala* cases, the Punjab and Haryana High Court repeatedly adjourned the matter even though the detainee was present in court and stated her will to go with her partner. The constant adjournments in these cases unjustifiably delayed the right to live-in relationships to queer women and denied them equality with live-in heterosexual couples.

¹¹¹ *Navtej Singh Johar & Ors. v. The Union of India*, (2018) 10 SCC 1, ¶87 (per Nariman J.).

¹¹² *Justice Puttaswamy (Retd.) & Anr. v. Union of India & Ors.*, (2017) 10 SCC 1.

¹¹³ *Navtej Singh Johar & Ors. v. The Union of India*, (2018) 10 SCC 1.

¹¹⁴ *Navtej Singh Johar & Ors. v. The Union of India*, (2018) 10 SCC 1, ¶229 (per Misra J. & Khanwilkar J.).

¹¹⁵ *National Legal Services Authority v. Union of India and Others* (Writ Petition (Civil) No. 400/2012) ¶55 (S.C.).

¹¹⁶ *Navtej Singh Johar & Ors. v. The Union of India*, (2018) 10 SCC 1, ¶251 (per Misra J. & Khanwilkar J.).

¹¹⁷ *Id.*, ¶66 (per Nariman J.).

¹¹⁸ *Nandakumar & Anr. v. State of Kerala*, AIR 2018 SC 2254.

Finally, these cases demonstrate a violation of the fundamental right to dignity which forms of one of the *rationes decidendi* of the *Navtej* case. In this case, majority of the court conceptualised dignity as self-worth.¹¹⁹ They stated that a person or a group was said to possess dignity when they experienced self-respect or self-worth. When unfair treatment is meted out on personal traits, or circumstances unrelated to personal needs to merits, dignity was said to be offended. Taking these women into illegal police custody and refusing to honour their will in court proceedings for no ostensible reason, amounts to just this kind of unfair treatment that is dignity defeating. It also signals to other women in queer relationships that they should conduct their relationship in secrecy to avoid these consequences, which in turn creates feelings of fear, isolation, disempowerment, and negatively affects their claims to self-worth and respect in these relationships.

IV. ALLEGATIONS OF LESBIANISM IN MATRIMONIAL DISPUTES AND PRESSURE TO ENTER HETEROSEXUAL MARRIAGES

An understudied legal location where the romantic relationships of women with other women gain visibility is matrimonial disputes. In fact, before the live-in relationship cases came to be recorded, matrimonial disputes were one of the two sites where the word “lesbian” occurred in court records.¹²⁰ In these cases, the husband alleges that the wife is, or has been a lesbian. Although this allegation is usually mixed up with other allegations of misconduct during the marriage, geared to demonstrate that the wife has been a bad spouse, daughter-in-law, or parent, it has appeared as the sole ground in two of the reported cases.¹²¹ However, in none of these cases has the court ever recorded a finding of lesbianism. The cases usually take one of the following forms: the husband alleges that his wife is having unnatural relations with another woman but nevertheless wants to settle the marital discord; the husband alleges that his wife is a lesbian as a ground for claiming divorce stating cruelty as a ground;¹²² or the husband alleges that the wife is a lesbian to take custody of the children.¹²³ This allegation has also come up in maintenance proceedings,¹²⁴ and *habeas corpus* petitions where the wife has filed to relieve children from the illegal custody of the husband.¹²⁵ While in some cases, the lesbian activities were alleged during the subsistence of the marriage, in certain other cases, the alleged lesbian activities took place before marriage.¹²⁶ In neither of these cases did the women identify with this sexuality. They denied the charges of lesbianism. Reading these judgments as concerning queer women may end up incorrectly ascribing a particular sexuality to the women involved in these cases. The letters and friendships that were points of contention in these cases will get similarly coloured. This raises issues for legal scholarship about how

¹¹⁹ Surabhi Shukla, *The Many Faces of Dignity in Navtej Johar*, Issue 2, EUROPEAN HUMAN RIGHTS LAW REVIEW 193, 201-202 (2019).

¹²⁰ Court records show two murder cases in which the word lesbian is used. In one case, the deceased is alleged to be a lesbian, and in the other, the alleged murderer is said to be a lesbian. Both these cases do not contribute anything significant for the present purpose and therefore are not discussed here; Sohan Raj Sharma v. State of Haryana, Criminal Appeal No. 1464/2007 (S.C.) and Sathi v. Kerala Crl. A. No. 372/93 (Kerala High Court).

¹²¹ Akshata Akshya v. State of U.P. Special Appeal No. 141/2014 (Allahabad High Court-Lucknow Bench), and Rajesh v. Baby Girija RPF No. 364 of 2016 (Kerala High Court).

¹²² D. Suryakumari v. R. Srikanth C.M.A. No. 1283/2004 (Madras High Court); Dipika Lal v. Vipin Kumar Gupta MANU/PH/0099/2009 (High Court of Punjab and Haryana)

¹²³ Dipika Lal v. Vipin Kumar Gupta MANU/PH/0099/2009 (High Court of Punjab and Haryana High).

¹²⁴ Rajesh v. Baby Girija, RPF No. 364 of 2016 (Kerala High Court).

¹²⁵ Richa Bhasin v. Commissioner of Police & Ors. 84 (2000) DLT 190 (Delhi High Court).

¹²⁶ D. Suryakumari v. R. Srikanth C.M.A. No. 1283/2004 (Madras High Court); Dipika Lal v. Vipin Kumar Gupta MANU/PH/0099/2009 (Punjab and Haryana High Court).

best to ethically engage with these cases, including whether to engage with them at all. No meaningful insights can be produced on this topic without field work in this area. Therefore, I restrain from making any remarks on this at the present moment.

A final issue that I want to raise is that of marriage pressure that many queer women face. Men and women both face marriage pressure within Indian households, but men have greater maneuverability within the marriage relationship,¹²⁷ and greater latitude in deciding the conditions under which they will marry. Research on queer women has indicated that once the families find out about the sexuality of the women, the pressure to enter into a heterosexual marriage increases.¹²⁸ In the first hearing of the *Madhu Bala* case, the State of Uttarakhand was given the responsibility to ensure that no untoward pressure was exerted on the woman to get married to a man. Naisargi Dave's research also states one of the biggest fears of queer women was compulsory marriage, "and the alienation that would result from its eschewal."¹²⁹ Sustained solutions to this issue need to be identified.

V. CONCLUSION

In this article, I have tried to show how the State and its institutions, through their acts and omissions have manufactured a queer life for queer women. I started my discussion by problematising the concept of privacy which qualifies the intimacy right made available to the queer community. I brought up the old concerns of privacy that have remained a constant issue for queer women and argued that the *Navtej* judgment has failed to assuage those concerns. Privacy is a precarious commodity for queer women and they have precious little of it in their homes. On the contrary, the home and the family form the main site of violence for queer women. Therefore, the concept of privacy needs to be developed along the lines of access to safe public spaces outside the home, if it is to be productive for queer women. Thinking of privacy in this way provides the grounds for opening up shelter homes to queer women, subject to the fact that its operational logic does not replicate hetero-patriarchal ideology. It also recasts protection orders as an important privacy enhancing tool. However, these are but two solutions that are already present for queer women. These solutions also come into play in extreme situations; when they have run away from home or when they are in immediate physical danger. There is a need to think of more everyday solutions for privacy, and they should be put in place in consultation with queer women.

Next, I demonstrated that even though the *Navtej* judgment has granted a right to sexual relations to queer persons, queer women face legal challenges to their live-in relationships. This is a distinct legal scenario that they face as compared with queer men and transwomen in live-in relationships, and queer persons who are not in live-in relationships. I argued that these court cases are made possible because of familial ideology which gives a

¹²⁷ MV Lee Badgett, *The Economic Cost of Stigma and Exclusion of LGBT People: A Case Study of India* 14-15 World Bank Group Working Paper (2014), available at <https://perma.cc/2QEC-4H49> (Last visited on September 16, 2020).

¹²⁸ TATA INSTITUTE OF SOCIAL SCIENCES, *The Nature of Violence Faced by Lesbian Women in India: A Study Conducted by Bina Fernandez and Gomathy N.B.*, 9 (2003), available at <https://perma.cc/M4PN-W6XE> (Last visited on August 16, 2020).

¹²⁹ NAISARGI DAVE, QUEER ACTIVISM IN INDIA: A STORY IN THE ANTHROPOLOGY OF ETHICS 180 (2012); See LABIA, *Breaking the Binary: Understanding the Concerns and Realities of Queer Persons Assigned Gender Female at Birth Across a Spectrum of Lived Gender Realities* 102 (2013), available at <https://perma.cc/M2GG-Z9ZQ> (Last visited on September 5, 2020).

great degree of control to the family over the sexual lives of women. I then analysed the cases to demonstrate how familial ideology sanctions and is simultaneously reinforced by the various procedural and substantive rights violations that queer women face in these cases.

Finally, I identified two further concerns that were unique to queer women. The first was the allegation of lesbianism in marital disputes, and the second was the pressure to enter into a heterosexual marriage. I did not engage with the first issue because I argued that it needs to be investigated first at the ground level to gain a nuanced understanding of its component parts. These investigations should then inform the scholarship on this point. In all of those cases, the women denied the charge of lesbianism and the husbands remained unable to prove it. The courts also did not record any finding of lesbianism. There is a danger in scholarship trying to pre-empt the problem by imposing its analytical and descriptive categories on phenomena it may not fully understand at present. Since the women themselves denied those charges, reading them as cases concerning queer women may end up wrongly labeling the women involved. I raised the second issue of marriage-pressure but did not offer any legal insights into it as I think that activists and scholars may benefit by working together to provide solutions to this problem.

In this article, I have shown that the law and legal discourse, including the *Navtej* judgment, have had limited success in delivering freedom to queer women. While on the one hand some issues like privacy have been overlooked, on the other hand the ideological norms that restrict the autonomy of women continue to operate within the State machinery. Certainly, to the extent that the court and State institutions are implicated in the problems highlighted here, they need to course-correct. But, what do the findings of this article mean for the future of queer women's activism? To be sure, engagement with the law and the State is essential sometimes: for the repeal of criminalising laws, for instance. The question is, to what extent should queer women continue to agitate for more rights through the court and the legislature? Will the accumulation of more rights bring about greater freedom, or will it release the queer woman into a governance regime which will discipline and regulate her within the logic of the prevalent norms, rewarding only specific ways of behaving and conducting, bringing about more un-freedom?¹³⁰ The hope is that this article will give some pause to rights activists in designing their demands from the law. It will urge them to consider how best to engage with the legal system so that they can secure necessary entitlements from it while leaving a broad area of individual expressive freedom untainted by rules.

¹³⁰ RATNA KAPUR, ON GENDER, ALTERITY, AND HUMAN RIGHTS: FREEDOM IN A FISHBOWL 27-28 (2018).