

## BOOK REVIEW

### **PAWAN DHALL, OUT OF LINE AND OFFLINE: VIOLENCE BASED ON GENDER IDENTITY, SEXUAL ORIENTATION AND THE PROBLEMS WITH THE LEGAL METHODS IN RELATION TO QUEER COMMUNITY**

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“Rule of Law, which is so important, must run close to the Rule of Life... It has to deal with today’s problems. And yet law, by the very fact, that it represents something basic and fundamental, has a tendency to be static. That is the difficulty. It has to maintain that basic and fundamental character, but it must not be static, as nothing can be static in a changing world”.<sup>1</sup>

From the existence of different medical procedures and diagnosis to “cure” these “new types” of people or diseases like homosexuality, prostitution<sup>2</sup> to finally in 2014 the declaration made by the Indian Psychiatric Society that homosexuality is not a mental illness and it is as much of a normal variant as heterosexuality and bisexuality.<sup>3</sup>

Even though “...more than 2,000 years of Indian literature [demonstrates] that same-sex love has flourished, evolved and been embraced in various forms since ancient times”<sup>4</sup>, we are still here fighting for things which were never as a society or heritage alien to us.

The book, “Out of Line and Offline” takes us on a journey of how things were in ‘90s Eastern India in specific and the country in general. The book provokes its readers to try and find answers to what has changed in these years and what further do we have to fight for and this

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<sup>1</sup> International Commission of Jurists, “The Rule of Law in a Free Society” 41 (January, 1959).

<sup>2</sup> AIDS Bhedbhav Virodhi Andolan, “Less than Gay: A Citizens’ Report on the status of Homosexuality in India” 31 (Nov -Dec, 1991).

<sup>3</sup> Special Correspondent, “Homosexuality not an illness: Indian Psychiatric Society” *The Hindu*, July 12, 2018.

<sup>4</sup> *Navtej Singh Johar v. Union of India*, AIR 2018 SC 4321.

essay tries to precisely look for those answers and cover as many areas of concern as we can and do justice to it.

### **PROBLEMS OF MOBILISATION: -**

In a recent scenario, India has beheld an increasing number of activists of various civil society and NGOs towards sexually minority groups. Such efforts are towards the rights of gays, lesbians, transgender groups, bisexuals, etc. Seeking a public petition against laws that discriminate rights of LGBTQI+ to the withdrawal of such law and order, and efforts to normalize the acceptance of their identities in our Indian society. All these efforts are still somewhere lacking because of insufficient opportunities and acceptance in the community-led queer people due to lack of acceptance from their family, friends, and society, etc. The acceptance of their sexuality and freedom to express their gender choices remain a constant struggle for LGBTQI+ due to the stereotype mentality of a large section of the Indian society. Beliefs of such ideology include Marxist thinkers, both left and right thinkers, right-wing Hindu nationalist groups, a major chunk of functioning bureaucrats, and a huge number of people including a larger segment of its 700 million rural population.<sup>5</sup>

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### **REAL LIFE STORIES: -**

The real-life case is based on Meenakshi and Jyoti, where they decided to mobilize from their hometown (Calcutta) to Delhi for their love and different opportunities so, they can live with each other without any family objections. To escape to Delhi, was about multiple freedoms for them which completely changed their life, they got jobs with a women's rights group. Other successes followed in Meenakshi's life when she involved herself in organizing a national conference on the Women's movement in India or when she achieved the position of deputy director in her organization. Just like Meenakshi, other couples and queer individuals did not get the same opportunity and success when they mobilize from one place to another due to the multiplicity of challenges because such LGBTQI+ terms are still somewhere alien in Indian culture.<sup>6</sup>

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<sup>5</sup> Kole SK, "Globalizing queer? AIDS, homophobia and the politics of sexual identity in India" (Europe PMC, 2007).

<sup>6</sup> Pawan Dhall, *Out of Line and Offline* 22-28 (Seagull Books, Calcutta, 2020).

In today's world, there is greater freedom of expression and personal liberty among queer populations as compared to earlier. Social media and dating apps help them in finding partners but it also depends on which city or state one is in, and that's why most queer people prefer metropolitan cities because it's full of new opportunities but even now there is some stigma present that still hovers the minds of the people. In the 1990s, the term coined by the public, 'police kept' in Calcutta to signify the 'unlawful work' done by the police, for example, extorting money and harassing couples of the same sexes in public parks. Police officers try to hinge the rights of queer communities in the name of law and order that shows wherever these queer communities go they will face discrimination due to their identity.<sup>7</sup>

### **ISSUE OF SEXUAL ORIENTATION AND GENDER IDENTITY: -**

The historical judgment of the Supreme Court in "*Navtej Singh Johar vs Union of India*",<sup>8</sup> decriminalized homosexuality in India but despite such progressive and landmark judgment, a certain question on homosexual relationships is still unaddressed by the Government and the Supreme Court. One such question is about 'same-sex marriages in India and none of the marital laws recognizes same-sex marriages and that's why recently, a PIL was filed in the High Court of Delhi for seeking a declaration of marriage rights under the Hindu Marriage Act (HMA), 1955 for gay communities.<sup>8</sup> The petitioner asserted that HMA grant marriages between two Hindus without any discrimination between homosexual and heterosexual couples and it is nowhere specified under Section 5 of the Act, that a marriage can only be solemnized between man and women but still after all the evidence gay couples have no right to get married and registered the same under the HMA. Many countries around the world have legalized same-sex marriages and by doing this they are heading towards progressive LGBTQI+ rights however in India, the government is not ready to leave the clutches of conservatism and orthodoxy despite the 2018 verdict.<sup>9</sup>

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<sup>7</sup> *Ibid.*

<sup>8</sup> Paras Sharma, "The Unanswered Question of Same-Sex marriages in India", *Jurist*, Oct 9 2020, available at < <https://www.jurist.org/commentary/2020/10/paras-sharma-india-same-sex-marriage/>> (last visited on Nov 5 2020).

<sup>9</sup> *Ibid.*

The wedding of two policewomen Leela and Urmila in Bhopal, 1987 is categorized as one such marriage listed in contemporary India, which cost them their jobs due to dilapidated duties by listing that such marriages are not allowed in Indian society and it's against our bureaucracy but queer support groups often deal with such queries of same-sex marriages due to social oppression against such kind of divergence from so-called norms which tries to cripple the lives of queer people in India.<sup>10</sup>

While some answers are still unclear in response to the above issues, two village women from the Baroda district have shown their way to live together by entering into a friendship agreement or "Maitri karar". The women entered into the agreement before a notary public since they did not wish to get married and were more interested in living together, they decided to enter into Maitri karar. However, not all men and women are as lucky as these two women from Gujrat in finding social and economic support to endure their conventional marriage.<sup>11</sup>

Some initiatives by the Government for the rights and identity of LGBTQI+ are given in the Transgender Persons (Protection of Rights) Bill, 2019 that prohibits discrimination against them in healthcare, housing, workplace, education, and other services. The bill provides self-perception of gender identity and for that first, it mandates that person would have been recognizing as transgender based on the certificate of identity given by the district magistrate, but it has been criticized and rejected by many opponent parties and the trans community because of several clauses of the bill that are inimical to their fundamental rights. Bill does not provide reservations for education and employment, the bill main focuses on transwomen and hijras, and very less emphasis on transmen, genderqueer, and intersex. Apart from all this, there are several reasons to criticize the bill, certification itself is discrimination and it's a humiliation of a human being.<sup>12</sup>

With the Supreme Court decision on reading down Section 377, several LGBTQI+ people have approached the court to claim their rights. Days after the Supreme Court verdict in Navtej Johar vs. Union of India, The Kerala High Court approved the petition of a woman, allowing her female partner to be released from the incarceration of her family. In October 2019, Delhi High

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<sup>10</sup> *Supra* note 6 at 30.

<sup>11</sup> *Supra* note 2 at 51.

<sup>12</sup> The Hindu Net Desk, "Watch | The Transgender Persons Bill explained", *The Hindu*, (Nov. 30, 2019)

Courts provide police protection to two women facing the threat of violence and kidnapping. Another bench of the Delhi High Court ordered the release of a woman, whose family members had kidnapped her from a police station after they got to know about her partner who is a trans man. By such orders of the High Courts, it is clearly evident that the law has developed, and the courts have had to adapt the same.<sup>13</sup>

Kidnapping and Abduction laws are illegal in India but still, they are happening and conducted by family members whose children are bisexual, lesbian, and gay, etc. Many couples have faced situations of assault, violence, the threat of kidnapping, death threats, etc. Family restoring to well-tested means to control their kids from such relationships by approaching the police. The allegations of threat and kidnapping or a missing person complaint just to get their child back and to separate the couples.<sup>14</sup> Often, the people in power like police and the judges, their prejudices cloud their judgment, which leads to “Institutionalization of Stereotype”.<sup>15</sup>

### **ROLE OF INSTITUTIONS: -**

Awareness and knowledge play an important role not only in terms of short-term goals but also in achieving long-term goals. The author talks about Ryan who was studying and was in the second year of college. The story of Meenakshi and Jyoti as a student was unaware and clueless if there are people who feel the way they do. The kind of helplessness Ryan and many others who are perceived as “different” have to face daily is beyond comprehensible.

Schools and Colleges play an important role in everyone’s lives, the kind of impact which can help individuals grow. Every year there are approximately 246 million globally who are subject to gender-based violence in schools.<sup>16</sup> It impacts children to the extent that many of them either start missing schools or some of them prefer to drop out completely.

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<sup>13</sup> Hindustan Times, “Government needs to ensure safety of LGBT folk”, *Hindustan Times*, (Sep. 06, 2019).

<sup>14</sup> *Ibid.*

<sup>15</sup> *Supra* note 2 at 26.

<sup>16</sup> UNESCO, “Be a Buddy, Not a Bully! Experiences of sexual and gender minority youth in Tamil Nadu Schools” v (June, 2019).

“All teachers liked me except Maths teacher. He used to beat other students on their hands with a stick but when it came to me he would beat me on my back. I got angry and asked him why he was doing it like that. He simply said that he hated seeing creatures like me as I was feminine-looking and cursed the person who gave admission for me”.<sup>17</sup>

There is a need for anti-bullying measures, health and sex education, counseling and therapy, teachers need to be trained, informed, and a curriculum that includes positive images and role models of the LGBTIQ+ community. Use of restrooms and the uniforms to wear, children should be given the chance to decide for themselves.

All these are not only true for educational institutions but even for the workplace. Need for appropriate toilets, measures against harassment, and the entire policy review, in general, to make sure it is gender-neutral and not discriminating towards any person.

What Ryan, Mamata, Monalisa, Swapna, Sucheta, and many others suffered, it doesn't have to continue, it needs to stop. Human beings are an asset especially the younger generations, and therefore, we must protect them rather than judging them for who they are.

### **GLOBAL FIGHT FOR LGBTQI+ RIGHTS: -**

India abstention on the question of the renewal for the special rapporteur for the UN Expert on Sexual Orientation and Gender Identity (SOGI) and India didn't give any explanation for its stance in an International Arena.<sup>18</sup> India signed the UN Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT) in 1997 and has yet not ratified it.<sup>19</sup> What do these tell us about India's stance on LGBTQI+ rights?

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<sup>17</sup> *Id.* At 14.

<sup>18</sup> Devirupa Mitra, “Despite SC Ruling, India Abstains Again on Vote on LGBT Rights at UN”, *The Wire*, July 13, 2019, available at <<https://thewire.in/diplomacy/india-abstains-again-on-vote-expert-lgbt-rights-at-un>>(last visited on Nov. 05, 2020)

<sup>19</sup>Danish Sheikh and Sanhita Ambast, “How India’s Law fails LGBT people”, *Policy Forum*, Apr. 26, 2016, available at <<https://www.policyforum.net/indias-law-fails-lgbt-people/>>(last visited on Nov. 05, 2020)

India should be a part of the attempt undertaken by the international community specifically after the 2018 judgment which decriminalized Homosexuality. It will go a long way in putting a legal as well as moral obligation on the part of the state and realizing individual rights on the part of the citizens.

### **POST NAVTEJ ERA**

“Members of the LGBT community are entitled, like all other citizens, to the full range of constitutional rights including the liberties protected by the Constitution.”<sup>20</sup>

It's been 2 years since India emerged victorious and after a long battle of activists on the forefront and every person who was affected by that provision on the rear seat. The queer community being fighting against laws that allowed the repression of sexual identities and finally Section 377 which criminalized same-sex relations was read down by the Supreme Court of India.<sup>21</sup> The judges went ahead and affirmed the principle of progressive realization of rights, which means the rights recognized in the judgment cannot be taken back by reversing the judgment.

But there is so much more that needs to be done and it does not take away from the fact that the decision helped the queer community in a way that the provision in our Indian Penal Code will no longer be used to inflict violence and discrimination. It will also help in claiming their fundamental, constitutional, and legal rights in the future.

The economic ingredient often dissipates in the conversation of legal and constitutional rights. Queer people are either unable to acquire education or are not able to complete it because of the discrimination, which leads to inadequate qualifications required for a job, giving rise to a vicious cycle of poverty. Therefore, employment becomes extremely important along with

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<sup>20</sup> *Navtej Singh Johar v. Union of India*, AIR 2018 SC 4321.

<sup>21</sup> Shreya Mohapatra, “Section 377 Read Down: The Way Forward”, July. 06, 2019, available at < <https://www.sociolegalreview.com/post/section-377-read-down-the-way-forward> >(last visited on Nov. 05, 2020).

skills-building and development. According to the World Bank SOGI Task Force, “LGBTI people are likely over-represented in the bottom 40%” of the population.<sup>22</sup>

“We haven’t seen many transgenders and Hijras in mainstream society. Lack of job opportunities, lack of ownership among them, stigma, discrimination, violence, harassment is quite closely attached with the so-called visible yet invisible community.”<sup>23</sup>

Those who do end up getting jobs face harassment and violence in the workplace, which takes our attention to the requirement of expanding the reach to include the LGBTQI+ community in the Sexual Harassment of Women at Workplace Act, 2013 and policy review related to labor laws to make them inclusive.

Domestic violence, familial pressure, and blackmail are still very prevalent, more so in times of a global coronavirus pandemic.<sup>24</sup> LGBTQI+ persons are often made to leave their families either by force or because of harassment and abuse. They usually have nowhere to go, some of them who can afford to rent a place, are either asked to pay a higher rent or forced to evacuate.

“They charge more rent for trans people. The house owner says it’s because if he puts us in his house, the neighbours will come and fight with him, and he’ll have to tackle them or talk to them very nicely. He needs more money from us because all those issues are arising because of our gender identity. Therefore, as a transgender, I have to pay more rent than other straight and cis-people.”<sup>25</sup>

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<sup>22</sup> SOGI task force and Dominik Koehler, “LGBTI People are (likely) over represented in the bottom 40%”, *world bank blogs*, Aug. 03, 2015, available at <<https://blogs.worldbank.org/governance/lgbti-people-are-likely-over-represented-bottom-40>> (last visited on Nov. 05, 2020).

<sup>23</sup> The World Bank Group, *Sexual Minorities and Development: A Short Film*, 2015, available at <<https://www.youtube.com/watch?v=ljVhAsgfqME>>

<sup>24</sup> Diksha Sanyal, “Stay Home, Stay Safe?”, *Varta Trust*, Sep. 13, 2020, available at <<https://vartagensex.org/advice-rights-and-laws/2020/09/stay-home-stay-safe/>> (last visited on Nov. 05, 2020).

<sup>25</sup> International Commission of Jurists, “Living with Dignity – Sexual Orientation and Gender Identity-Based Human Rights Violations in Housing, Work, and Public Spaces in India” 50 (June, 2019).



Landlords usually have preconceived notions like if they are homosexuals or transgenders, they are into illegal activities or they are sex workers.

“The UN Special Rapporteur on Adequate Housing has also identified States’ minimum obligation to provide safe spaces, with basic amenities of water and sanitation, for people to stay in when their homes become dangerous.”<sup>26</sup>

The Supreme Court in the case of (*People’s Union for Civil Liberties v Union of India*),, asserted that the State “owes to the homeless people to ensure at least minimum shelter as part of the State obligation under Article 21”.<sup>27</sup> The shelters under “Shelters for Urban Homeless” continue to be poorly managed and inadequate.<sup>28</sup>

### **CURRENT SCENARIO OF LGBT+ RIGHTS IN INDIA: -**

In today’s world queer communities trying to seek more rights for transgender people but the government has remained largely silent on gay rights. In the current scenario, can we imagine same-sex marriage in India?

It is difficult to answer such important questions because for the queer community they can't marry who they want, have a baby if they want... live the life they want in Indian culture and society.

The impact of the COVID-19 pandemic on LGBTQI+ people that many of these communities cannot practice any of the safety measures of COVID-19 because of financial incapability. Social distancing may be impossible for them due to limited place to live, access to sanitation facilities might be limited (where available), LGBTQI+ are particularly vulnerable to being homeless because of their real identity, and often have limited access to (nutritious) food, all of which affect their ability to stay healthy or recover from COVID-19. Due to limited funds, they may or may not be able to seek medical treatments, and due to which access to proper

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<sup>26</sup>*Supra* note 22 at 59.

<sup>27</sup> *Supra*

<sup>28</sup> Shelters for Homeless Women, *available at*:

[https://www.hlrn.org.in/documents/Shelters\\_Homeless\\_Women.pdf](https://www.hlrn.org.in/documents/Shelters_Homeless_Women.pdf) (last visited on Nov. 05, 2020).

medical care has been limited for certain members of the queer population even before COVID-19.<sup>29</sup>

## CONCLUSION

The book talks about the “security that social norms seem to offer”, the social norms need to change and evolve to include security in accepting their identity and be true to ourselves. The courts and government talk about equality in private, but the struggle for equality in all spheres of life should continue, public as well as private. Amending the Fundamental Rights to include equality based on “sex” and “sexual orientation” would be a step in the right direction.

We have come a long way but we have to remember the long road that’s ahead of us. Ahead of not only the people of the queer community but also to the society, in general. We all are entitled to our rights to choose how we want to live our lives, to choose how we feel comfortable, and not be judged based on that. Right of dignity and respect. The movement is so much more than the issue of sex and people need to be mindful of that.

“Imagine a black patch and there are many white spots on it, those white spots are the positive changes, there are many of them but they are still just spots, the blackness is still pretty much there.”<sup>30</sup>

Change in societal attitudes will play a huge role in this movement. Let’s be aware of our actions and be responsible for how we are and what we are doing.

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<sup>29</sup> Samira Nadkarni and Swarnim, Queer Perspectives and Covid-19: Linking Queer Pasts to Queer Futures, engage, March, 13, 2020, available at < <https://www.epw.in/engage/article/queer-perspectives-and-covid-19-linking-queer>>

<sup>30</sup> Interview with Pawan Dhall, Author, *Out of Line and Offline*, Sep. 15, 2020.

