



To

30<sup>th</sup> September 2011

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**Subject: Highlighting need for an expansive definition of the term 'wife' and concerns regarding the compulsory registration of marriages.**

Partners for Law in Development (PLD) is a non profit legal resource and advocacy organization founded in 1998 working in the field of social justice and women's rights in India. One of PLD's

key interventions has been that of working with community groups providing mediation and support services to women in different parts of the country. This work, spread over a period of 12 years, has provided insights into the diverse conjugal relationships that exist in India, as well as the nature of violations women face across all types of conjugal relationships. These insights led PLD to undertake further field work to document relationships in the nature of marriage, the protection gaps for women in these relationships, and to explore ways in which law can provide minimum rights to women across all conjugal relationships, whether or not amounting to legal marriage. This study is available in the form of a publication: *Rights in Intimate Relationships: Towards an Inclusive and Just Framework of Women's Rights and the Family* (2010). We submit the following concerns based on this extensive work, and urge changes in policy and law to ensure protection of beneficial legislations to women in conjugal relationships that may not amount to a valid marriage.

In this regard, there are three distinct but inter-connected concerns we draw your attention to:

1. The need to adopt an expansive definition of the term 'wife' for purposes of section 125 of the Code of Criminal Procedure 1973 (Cr.P.C).
2. That the term 'relationship in the nature of marriage' under the Protection of Women from Domestic Violence Act 2005 (PWDVA) should not be defined restrictively so as to limit legal protection from domestic violence to women living in shared households.
3. The registration of marriages should not be made compulsory by law. Such a step will not advance protection to women's rights under law or otherwise; on the contrary, it will exclude women without registration from legal protection.

This petition calls upon the government to refrain from passing legislation making the registration of marriages compulsory and to endorse an expanded definition of the term wife, on the following grounds:

**1. Definition of the term 'wife'**

- a. Diversity in conjugal relationships is a reality in India:* The diversity of conjugal relationships in India are rooted in pluralistic customs, social transformations, changing economic and livelihood patterns - and it is not tenable to deny women protection of welfare legislations particularly on account that the conjugal relationship does not meet the conditions of a valid legal marriage. Examples of customary conjugal relationships that may involve bigamy by the male partner include *nata* in Rajasthan, levirate marriages in Punjab and Haryana, and bigamy.<sup>1</sup> *Nata* is a customary form of second marriage forged upon payment of bride price. *Karewa* or levirate marriages in Punjab, Haryana and parts of U.P by which a widow is accepted as a wife by one of the younger brothers of the deceased, is a customary device to avoid fragmentation of the property through succession by the widow. Hindu marriages were rendered monogamous in 1955; however, social realities have not changed and in some cases, bigamy might be region or

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<sup>1</sup> For more details, see for example, 'Rights in Intimate Relationships: Towards an Inclusive and Just Framework of Women's Rights and the Family, PLD, New Delhi (2010)

custom specific, while in other cases it may be linked to contemporary migration patterns propelled by globalisation, development and economic trends in the country.<sup>2</sup>

While monogamy is a legal condition in many personal laws – it is patently unjust to deny women legal protection on account of their male partner’s non-monogamy. The objective of the law, particularly beneficial legislations such as s. 125 Cr.P.C and the PWDVA – the former protecting against destitution and the latter, against broad spectrum of domestic violence - is to introduce minimum legal protection against abuse and destitution to women in all conjugal and indeed, domestic relationships. This legal measure is necessary in view of the fact that women in conjugal relationships including marriage, are at high risk of destitution because of blatant sex discrimination in family laws. Women’s succession rights in natal home are unequal, and observed more in the breach; there is no recognition either of rights to matrimonial property. The law reinforces sex inequality in the home – natal and matrimonial, that puts women who are deserted at high risk of homelessness and destitution. In such a scenario, section 125 Cr.P.C provides a minimum safety net for women, and this should be extended to all women – legal wives, wives under customary practice, common law wives as well as women in relationships in the nature of marriage. These overlapping yet distinct categories are part of India’s reality, and a social justice law must respond to it. Claims under section 125 Cr.P.C must not be subject to strict proof of marriage or a limited definition of ‘wife’.

- b. *Beneficial legislation must be delinked from personal laws:*** Beneficial legislation such as those providing relief from domestic violence and destitution for the above mentioned reasons must be de-linked from the family laws, as it enshrines minimal security net for women and not elaborate framework of rights including those related to succession. Many women in cohabitation or customary conjugal relationships have a vulnerable position in the household, and access the formal legal system only as a last resort, when faced with serious deprivation or violence. Such women lack social recognition and have a tenuous foothold both in their natal homes and the matrimonial home. The approach of the law in such circumstances should be to promote responsibility in conjugal relationships, and extend minimum legal protection to all women rather than make such protection conditional upon establishment of a valid legal marriage.
- c. *Legal Precedents favoring an expansive definition of wife:*** There are substantial legal precedents that have opted to relax the definition of wife in order to ensure that justice is done in the case before them. Summaries of such legal precedents are attached to this petition as **Annexure A**, for your reference and information. It is this disadvantage that section 125 Cr.P.C and the PWDVA seek to redress. The body of precedents where the court has side stepped stringent definitions of the term ‘wife, to deliver benefits to women must inform law reform.

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<sup>2</sup> Flavia Agnes in ‘Hindu Men, Monogamy and Uniform Civil Code’, *Economic and Political Weekly*, 16 December 1995, cites figures for polygamous marriages among Hindus, Muslims, and Tribals for the period 1951–1960 from the 1974 report of the Committee on the Status of Women, ‘Towards Equality’, as Hindus (5.06 per cent), Muslims (4.31 per cent), and Tribals (17.98 per cent).

- d. *The PWDVA recognises necessity of legal protection to women in relationships in the nature of marriage:*** In recognition of the widespread reality of women partners or cohabitees (current and former), the PWDVA specifically extends remedies for domestic violence to women in relationships in the nature of marriage. As a relatively new law, the PWDVA takes into account the need to protect rights of women in diverse conjugal relationships. Section 2 (f) of the PWDVA defines ‘domestic relationship’ as follows – “*domestic relationship*” means a relationship between two persons who live or have, at any point of time, lived together in a shared household when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family.’ The intention of the Act is to provide protection to women outside of legally valid marriages, who are in domestic relationships, and face domestic violence.

Given the widespread nature of violence in domestic settings against women, and the increased vulnerability of women who lack formal social status, and indeed legal status, the law must ensure protection to them. In this context, we are extremely concerned by the attempt to restrict the scope of this term under PWDVA in the *Velusami vs. Patchaiammal* judgment (CA No 2028-2029/2010). This judgment is an example of judicial over-reach, inasmuch as it seeks to define PWDVA in a matter pertaining to section 125 Cr.P.C; that apart, in narrowing the definition of the term ‘relationship in the nature of marriage’ this judgment limits legal protection under PWDVA, selectively protecting some women, while lending impunity to violence against others. In contrast, the *Chanmuniya vs. V.K Singh* [Civil Appeal of 2010, arising out of SLP (Civil) No. 15071/2009] judgment seeks to bridge the gap between social reality of women, and the law, by arguing for an expansive interpretation of wife. This claimant, in this case a wife through levirate marriage (customary to the community) sought maintenance. This is the reality of India where diverse conjugal relationships are shaped by custom, patriarchy, relationships with land, shifting economic patterns, and migration amongst others – demands that basic beneficial legal provisions pertaining to the family, extend to all women, and not be limited to those in legally valid marriages alone.

Taking on board these concerns, the case of *Chanmuniya vs V.K Singh* is presently before the Supreme Court and has been referred to a larger bench for deliberation on the meaning of the term ‘wife’. We urge the Ministry of Women and Child Development, the Law Commission of India, and the National Commission for Women to support a broader, expansive approach to the term ‘wife’ for purposes of section 125 Cr.P.C in line with the concerns raised in reported judgment, in addition to ensuring that the term ‘relationship in the nature of marriage’ is not be subject to rigid conditions, or construed narrowly to exclude the second wife/ partner from seeking legal protection for domestic violence.

## **2. Compulsory Registration of Marriages**

- a. *Hindu marriages are solemnised in diverse ways:*** Registration of marriages is required under most family laws, except Hindu law, where strict rules and procedures for the solemnisation of a marriage are prescribed. In Hindu law the registration is optional. The

Special Marriage Act 1954, The Indian Christian Marriage Act 1872 and The Parsi Marriage and Divorce Act 1936 make registration of marriages compulsory. Muslim marriages are contractual in nature, and the *nikahnama* serves as valid proof of a Muslim marriage. In contrast, the solemnisation of the Hindu marriages is based on community practices and diverse customs. The Hindu Marriage Act 1955 (under which the vast majority of marriages take place in India) allows for customary practices of marriage and divorce thereby making it difficult to ensure uniformity in any marriage/divorce practice. Under section 8 of the Hindu Marriage Act 1955, it is discretionary for states to make rules regarding registration of marriages, and failure to register does not render the marriage invalid.

The Law Commission of India in Report 211, 'Laws on Registration of Marriage and Divorce – A Proposal for Consolidation and Reform' (2008) has proposed the enactment of a central law on compulsory registration of marriages based on the directions of the Supreme Court in *Seema vs. Ashwani Kumar* [(2006) 2 SCC 578]. The report observes that family matters fall under the concurrent list (List III, Entry 5) of the Constitution, and states that "Parliamentary legislation on compulsory registration of marriages is therefore not only possible but also highly desirable. This will bring country-wide uniformity in the substantive law relating to marriage registration..."

It is significant to note that the recommendation for registration is not grounded in reasons that advance protection to women's rights. Instead, it stems from a need for uniformity and administration of marriage records. Attaching penalties for non registration is alarming in the context, where many have no literacy, where poverty and homelessness is a widespread reality and customs predominantly shapes conjugality. Foisting a uniform mechanism in a context of vast divergences, disparities and diversities not only in custom, but also economic status, literacy, access to state mechanisms including justice – would inflict injustice most on the marginalised, subjecting them to penalties which they cannot afford. For marginalised women, this move brings more disadvantage than benefits – for it is likely to discredit the legal claims made by those whose marriages are not or cannot be registered.

- b. *Compulsory registration of marriages law does not advance women's rights, or make existing rights enforceable:*** In 2005, the NCW drafted The Compulsory Registration of Marriages Bill 2005 which provided for registration of all marriages 30 days following the solemnisation of the marriage. The statement of object and reasons in the Bill stated that registration will help prevent child marriages, polygamy (except where permitted by law or custom), desertion; in addition to enabling enforcement of rights – through issue of notice of the intended marriages (to first wife), enabling enforcement of shelter and maintenance (esp. to women married to NRI/foreigners).

The Bill lapsed; however in the transfer petition *Seema vs Ashwani Kumar* the Supreme Court issued direction that within three months all states should frame rules for compulsory registration of all marriages by Indian citizens. The following reasons were listed by the NCW in the affidavit filed before the Supreme Court in *Seema vs. Ashwani Kumar*:

- Prevent child marriages and ensure that the minimum age of marriage is complied with;
- Prevent marriages without the consent of the parties;
- Check illegal marriage/polygamy;
- Enable married women to claim their right to live in the matrimonial home, claim maintenance etc.;
- Enable widows to claim their inheritance rights and other benefits and privileges which they are entitled to after the death of their husband;
- Deterring men from deserting their wives after marriage; and
- Deterring parents / guardians from selling daughters / young girls to any person including a foreigner, under the garb of marriage.

The proposition that compulsory registration of marriages will resolve the above stated issues is alarmingly inaccurate and misleading, and not substantiated by any research. In particular, the claims regarding benefits of issuance of notice of marriage need to be revisited in light of increasing number of honor crimes directed against young persons who marry without the consent of the families. The case of *Seema vs. Ashwani Kumar* arose out of a case pertaining to maintenance, and amongst the various problems that compulsory registration seeks to correct is that of denial of marriage and thereby the claim of maintenance by the man. Studies however show that there are larger stumbling blocks to claiming maintenance under section 125 Cr.P.C, as for example, the lack of proof of husband's income, long procedures, and non compliance with the maintenance order. This apart, the law requires a separate execution proceeding for enforcement of maintenance orders. To project registration of marriage as a solution to the hurdles women face in claiming maintenance, is to simplify grave structural inequalities between men and women. An expansive interpretation of 'wife' would in fact, provide a more viable solution to the obstacle of 'proof of marriage', as it shifts the focus from evidence of registration to evidence of long term cohabitation.

That apart, this proposition creates new inconsistencies with the existing law, as for example with the Prohibition of Child Marriage Act 2006 that provides an option to the contracting party (the child bride/ bridegroom) to continue with or annul the marriage within two years of attaining majority. The 2006 Act does not hold a child marriage as void, but voidable. A child marriage therefore remains legal despite the refusal of a marriage registration office to register it. While the relationship between compulsory registration and protection to women's rights is unclear – the disadvantages it holds for women are clear. If registration is 'compulsory' and not optional, it will adversely hit the rights of women who chose partners against the consent of their parents (runaway couples), those in customary conjugal relationships that are not recognized by the law, those who are second wives. It certainly rolls back the rights women in marriages that may not be legally valid. At a time when family laws are discriminatory to women and beneficial legislation relating to the family is just beginning to take note of legal protection for women in relationships in the nature of marriage, the move to for compulsory registration of marriage is misplaced. Rather, long pending reforms introducing equality within the family and conjugal life require legislative attention.

- c. *Punitive measures for failure to register a marriage are not feasible in India and patently unjust:* State legislations have included punitive measures for failure to register a marriage (**ANNEXURE B**). For example, The Mizoram Compulsory Registration of Marriages Act 2007 observes that any person who willfully omits or neglects to get his or her marriage registered will have to serve a sentence of simple imprisonment for six months and/or fine of Rs one thousand. It is not feasible to introduce an administrative measure backed with punitive fines in India, which exposes all the parties to a penalty for failure to register.

In light of the above, we appeal for your Ministry/ Commission to:

- (a) Refrain from taking any steps to make registration of marriages compulsory, and to ensure that non registration does not attract penalties, or any adverse consequences such as nullifying her right to claim remedies under PWDVA, section 125 Cr PC; or indeed, family laws where registration has thus far not been mandatory;
- (b) Endorse a broad definition of the term ‘wife’, which includes cohabitees, in order to extend maintenance rights to women who are trapped or otherwise find themselves in invalid marriages.
- (c) Not attempt to limit the scope of the term ‘relationships in the nature of marriage’ by subjecting it to conditions that have the effect of excluding those who fall outside the scope of those conditions, particularly second wives, from protection against domestic violence.

Yours Sincerely,

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