

# RIGHTS IN INTIMATE RELATIONSHIPS

TOWARDS AN INCLUSIVE AND JUST FRAMEWORK  
OF WOMEN'S RIGHTS AND THE FAMILY

A RESOURCE BOOK

BY

**Partners for Law in Development**



# ACKNOWLEDGEMENTS

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This resource book is an outcome of a project on rights in intimate relationships, spread over a four-year period. It grew in segments, through discussions, fieldwork and research, with the involvement and contribution of many—staff, friends, and colleagues working in the sector.

The engagement, enthusiasm, and guidance of Uma Chakravarti, Jaya Sharma, Dipta Bhog, and Mary John were vital to framing the concerns and for setting out the process by which the resource book evolved. But for their support and regular feedback, this resource book would not have encompassed as many concerns as it has managed to. To them, I am most grateful.

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Last but not the least, we thank the participants at the National Consultation on Rights in Intimate Relationships in New Delhi, held on 12–13 May 2008, who confirmed the necessity of greater engagement with the theme and emphasized the importance of pursuing a transformative rights agenda in relation to the private sphere of intimacies.

## *Acknowledgements*

While the contributions of all the individuals mentioned here (as well as those who have not been specifically mentioned) have been vital in shaping this resource book, PLD bears responsibility for any shortcomings that remain. The resource book aims to widen our perspectives and to trigger and contribute to ongoing discussions, and hence is best described as a work in progress.

**Madhu Mehra**

*Executive Director*

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*New Delhi*

# LIST OF ABBREVIATIONS

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AALI: Association for Advocacy and Legal Initiatives, Lucknow

CEDAW: Convention on the Elimination of All Forms of Discrimination Against Women, 1979

Cr.PC: Criminal Procedure Code, 1973

FAOW: Forum Against Oppression of Women, Mumbai

HAMA: Hindu Adoptions and Maintenance Act, 1956

HMA: Hindu Marriage Act, 1955

ICCPR: International Covenant on Civil and Political Rights, 1966

ICESCR: International Covenant on Economic Social and Cultural Rights, 1966

IPC: Indian Penal Code, 1860

LABIA: Lesbians and Bisexuals In Action, Mumbai

LBGT: Lesbian, Bisexual, Gay, Transgender

LGBTI: Lesbian, Gay, Bisexual, Transgender, and Intersex

PLD: Partners for Law in Development, New Delhi

PUDR: Peoples Union for Democratic Rights, New Delhi

*List of abbreviations*

PWDVA: Protection of Women from Domestic Violence Act, 2005

MSSK: Mahila Salah Suraksha Kendra, Jaipur

NREGA: National Rural Employment Guarantee Act, 2005

SMA: Special Marriage Act, 1954

SRVAW: UN Special Rapporteur on Violence Against Women

SUTRA: Society for Upliftment Through Rural Action, Jagjit Nagar, Himachal Pradesh

TISS: Tata Institute of Social Sciences, Mumbai

UDHR: Universal Declaration of Human Rights, 1948

UNHCR: Office of the United Nations High Commissioner for Refugees

WRI: Women's Rights Initiative, the Lawyer's Collective, New Delhi

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## FOREWORD

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This resource book on ‘Rights in Intimate Relationships’ is an outcome of an important project and inquiry. It addresses difficult questions that are often thrown up in the field for women’s groups committed to providing legal support for women. A number of critical issues that emerge in the course of crisis intervention and the provision of legal support—and which engage feminist thinking and rethinking—are continuing concerns that must be revisited and re-examined in the manner that this resource book does. One such concern is the normalization of the framework of existing laws on conjugality and marriage. Legal norms may seem to secure the rights of some women, but not without costs and not without the exclusion of other women. These norms set limits for those who are regarded as proper ‘victims’ of men’s infidelity in marriage, and often become the basis on which legal counsellors tend to support only the ‘wronged wife’, leaving the ‘other’ woman or the second wife without any support. Even the definitional shift made in this resource book in examining a range of relationships, which are put under the rubric of ‘intimate relationships’ not covered by law, is an important one. It allows the study to explore semi-legal options such as the maitri karar in Gujarat, which is a contract suggesting a civil partnership between consenting men and women aimed at securing certain rights within an intimate relationship outside of formal marriage.

The resource book also examines the diversity of marriage practices in different regions in the Indian subcontinent, drawing upon history and the transformations in such practices set within a larger context of the political economy of a given region and of the caste or social location of the communities involved. This mapping of diversity serves not only to contextualize differences but also to ground transformations in relation to changing economic and production patterns, rising aspirations, and expanding social space for the assertion of individual agency and desire. For instance, matriliney in the changing social and economic context in Kerala and in the Northeast, as well as nata in Rajasthan, highlight caste- and ‘tribe’-based regional practices regarding marriage and widow remarriage. They are evidence of the range of practices found in the subcontinent, and serve to de-centre legal marriage as the only normative, or indeed dominant, practice across all regions.

The resource book attempts to base itself firmly in a feminist perspective, keeping in mind the debates and discussions among women’s groups going back to the 1980s and 1990s, with their critiques of marriage and conjugality. Despite their value, these critiques, unfortunately, did not lead to a drastic rethinking of the normative family. The resource book applies the feminist critiques to interrogate not only the law but also to examine the perspectives held by a

number of workers on the ground who are admittedly committed to women's rights. The value of such an examination cannot be overemphasized if we want our framework of rights and our understanding of the family to be such that they are able to respond effectively and promptly to the challenges of the new millennium. The transformation of existing family forms and the emergence of new trends and realities in this century are shaped by new assertions, changing economic trends, and globalization that sit within the hetero-normative underpinnings of a well-entrenched caste-based patriarchy in India. In this context, the acceptance of the parameters of the legal structure by women activists has led to a refusal on their part to recognize the multiplicity of intimate relationships that exist in society and of the rights of women within these diverse relationships. For these realities to be eventually acknowledged by the law, there first needs to be a transformation in the thinking of legal counsellors and of women's groups themselves. This resource book is a welcome step in that direction.

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# Chapter 1

## INTRODUCTION TO THE RESOURCE BOOK

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This resource book seeks to shift the understanding of rights in intimate relationships from one based on law and legal morality that limits rights to the context of marriage, to a framework that recognizes rights for all women regardless of their sexuality, marital status, or legality of relationship. The dominant framework of rights in intimate relationships, based on the law, is exclusivist and marriage centric. It grades women selectively on the basis of sexuality and form of relationship to grant legally recognized rights, privileging those who conform, while excluding those who transgress legal morality from rights protection. The value of shifting to a non-hierarchical, inclusive framework lies not simply in including women who are stigmatized on account of transgressing sexual norms and legality. Rather, the value lies in moving towards egalitarianism in personal status and rights protection, based on a transformatory framework that aspires to equality and consciously shuns selectivity, exclusivity, and conditionality for recognition of rights and dignity in intimate relationships.

The term intimate relationships is used here with reference to sustained relationships that involve marriage or cohabitation, and are therefore invested with labour, reproductive, care-giving, sexual, and material resources by the partners. The resource book originates from a discomfort with the denial of rights protection to women who by virtue of being in non-marital intimate relationships are denied legal rights in their intimate and/or family relations. It also speaks to the anxieties and dilemmas in the field of women's rights activism, advocacy, and crisis intervention that are shaped by legal morality and that come in the way of building a wider consensus on the need for an alternative transformatory rights framework for the family. This is particularly true of fieldworkers and community groups that stand at the intersections of custom, legal morality, and women's rights. The resource book seeks to address these anxieties and dilemmas and also to examine our socialization into the arena of legal morality by problematizing the legal norms that justify the exclusive marriage-centric rights framework, while simultaneously revealing the plurality of family forms that exist, to set the ground for an alternative inclusive rights framework.

The term normative intimacy is used here to refer to marriage and to norms on which the institutional definition of marriage is founded. Dominant social norms reinforced by marriage laws typically view heterosexuality, monogamy, and the legally recognized ceremony as essential for the founding of 'natural' and 'proper' intimacies and families. The term non-normative intimacies is used here to refer to intimacies that resemble marriage in terms of investment of women's labour, care giving, sexual and reproductive resources, but that do not conform to the law or to dominant family norms. Bigamous relationships, same-sex unions, and customary

and contemporary forms of live-in relationships—where cohabitation, housekeeping, and care giving accompany sexual intimacy—are examples of this arrangement. These are typically viewed as undesirable and deviant, and are stigmatized through non-recognition in the law. As a result, these intimacies lack legal status, by way of not being valid in law, or simply being illegal. A disturbing consequence of non-recognition in law is the denial of rights to women in such non-normative families. This resource book critiques not just the law, but it also speaks to the rights perspectives that shape our activism and work outside the courtroom in ways that restrict rights to the exclusivist marriage-centric legal framework. Such perspectives in community intervention and advocacy reinforce the denial of rights to, marginalization of, and stigma against women in non-normative relationships. The resource book asks whether our role as advocates, activists, and fieldworkers is to expand gender justice and to seek legitimate entitlement for women at the margins, or whether it is to promote legality, its norms, and a homogenized family form prescribed by the law.

The premise for a framework of rights in intimate relationships ought to be one that seeks to transform unequal gender relations and to offset patriarchal controls over women's bodies, sexuality, reproduction, and labour. At the very least, women in all family forms founded on intimate relationships must be covered by a minimum set of obligations, entitlements, and protections to ensure gender justice in private life. Rights must flow from the understanding that the diversity of intimacies and family forms in our society is primarily patriarchal. Further, that this diversity of intimacies and family forms is most often shaped by the political economy of the respective communities, caste groups, and regions, and by desire. The diversity is not an outcome of random choice or ignorance, and cannot simply be homogenized by the enactment of law. Rather, the diversity is shaped by individual, community, and context-specific aspirations, desires, and economic patterns. Desire and sexuality have always been integral to the forging of intimacies, influencing normative as well as non-normative family forms. Likewise, economic patterns of communities are influenced by caste, class, education, ecology, modernization, development, and all of these contribute to the differences in family forms. However, even as family forms vary along the spectrum of marriage—customary, monogamous, polygamous, opposite-sex and same-sex relationships—patriarchy remains the overarching force that shapes these forms. Thus, despite differences in family forms, women in all intimacies are affected by unequal gender, social, and economic structures. These are reflected in the legal protection accorded to patriliney, accompanied by a denial of or limited rights to women's guardianship of children, by limited rights of women to inheritance and entitlement to material and productive

resources in the family, and through stringent controls over women's sexuality, while allocating to them the responsibility of housework, care giving, and child rearing.

Excluding women in non-normative family forms from entitlements and obligations that secure equality in intimate relationships and family life serves to exacerbate their vulnerability to exploitation and oppression in the family, which we know to be a primary site of inequality for all women, including those in marriage. The purpose of justice and equality is not served by a 'family law', or indeed by a rights framework that has limited application to one 'ideal' or normative family form alone and that is unavailable to women in different family forms. Such a framework would be a formal pretence of equality and gender justice rather than one that seeks to substantively correct inequalities of power for all women in all families. A human rights framework requires us to recognize the diversity of family forms and to ensure that gender justice is achieved in all those contexts, rather than being limited to one 'formally' recognized context alone.

We believe that rights can bolster and contribute to processes that strengthen women's agency to challenge structural inequality in the private sphere of the family. The reference to rights here is not with respect to legality, but rather with reference to legitimacy and universality. Legitimacy here is in relation to fulfilling the feminist goal of challenging patriarchy in the private arena fully and substantially, rather than formally and notionally, in the limited context of marriage. And universality here is in terms of recognizing entitlements to all women in sustained intimacies, without selectivity, exclusivity, or bias.

## Background

This resource book is an outcome of PLD's project on 'Rights in Intimate Relationships', which sought to pull together seemingly disparate streams of conversations and concerns relating to human rights, sexuality, caste, and women's rights in the family and/or the private domain. Some of the areas in which the dilemmas arose are shared here to concretize the context within which the need for expanding the existing boundaries of rights emerged, and, in particular, for securing a minimum set of rights to women in intimate relationships de-linked from marriage.

PLD's direct support to legal interventions in community action was spread over six years. The work of some of the community partners was in relation to providing crisis support to women in rural and semi-urban contexts in Orissa, Uttar Pradesh, Rajasthan, and Kerala. The

case work undertaken as part of the crisis intervention consistently revealed the limitations of legal support available to women in relationships other than valid marriages. For instance, women in bigamous marriages, those who were long-term partners, common-law wives, and those in premarital relationships founded on the promise of marriage fell outside the ambit of legal support. The claims of such women to financial support, shelter, and maintenance upon ‘desertion’ have no place in the law. Without legal recognition, such women may not stake a legal claim. We asked if the law was rewarding women with a set of rights and remedies in relation to the family merely for reasons of conforming to the norms of a legally stipulated relationship. We also wondered why the law bestowed rights on women only upon the breakdown of a marriage, or on the occurrence of violence or ‘desertion’, or when women had been wronged. What did the law offer in the case of marital breakdown where the woman had suffered no ‘wrong’, or, in fact, had committed the ‘wrong’? Rather than viewing women as equal partners in intimate relationships, we felt that the law offered sops to ‘married women in distress’. In short, was the law useful in resisting male control over monies, assets, children, and women’s labour, reproduction, and sexuality at home? We believe that legal regulation could be instrumental in facilitating social justice within the family, but only if it could challenge norms that establish the systems of control over women, women’s labour, and women’s reproduction and sexuality—for all women in intimate relationships and for all families constituted by such relationships.

We learnt that in mediating cases of women in non-conforming intimacies, progressive community groups most often applied native good sense to find innovative solutions. For them, ensuring social justice and dignity for women nearly always was a greater priority than matters of legality, and helping circumvent legal blindness—or, indeed, gender bias—towards women in non-normative intimacies. In the case of such mediation, the woman’s standing as a rights holder is not questioned, but accepted; she is heard, the opposite parties are summoned, and negotiations are engaged in to arrive at some resolution. The outcomes often failed to achieve the ideal standards of gender justice, but they nonetheless achieved what the law is unable and unwilling to render, in terms of recognition of the woman as a rights holder and of the legitimacy of her claim.

Our membership in the coalition Voices Against 377 led us to join the campaign for the de-criminalization of adult consensual same-sex sexual activity.<sup>1</sup> While the central focus

<sup>1</sup> Voices Against 377 is a Delhi-based coalition of organizations and collectives working in the areas of sexual rights, queer rights, women’s rights, child rights, and human rights that came together to campaign for and intervene in the legal challenge to s. 377 of the IPC by Naz

of the campaign has been the de-criminalization of a specific penal provision to dismantle explicit discrimination against homosexuality, the forum also threw up broader issues related to sexuality and rights. For instance, could de-criminalization and legalization of same-sex relationships dismantle the existing hierarchies in relation to sexuality, desire, and gender identities? How could we integrate the larger concerns, of which s. 377 was just a symptom, through our work on gender, family, and human rights? How could we ensure that these concerns are not relegated to the stream of sexuality rights alone, as is largely the case, but could actively shape all work on sex discrimination and rights in the family? It was important to shift the engagement of women's rights groups beyond solidarity for the de-criminalization of same-sex sexual conduct, and instead to actively inform women's rights work through the politics of sexuality.

These concerns led us to question training programmes on gender and law that limit rights in the private arena to family laws alone. For PLD, a rights-education programme that imparts only legal literacy based on the existing law is problematic. For one, such programmes fail to acknowledge, much less unpack, the biased norms on which laws are framed, and fail to examine the stigma, exclusion, and violations that result from such laws. The focus on 'legal entitlements' alone fails to problematize the ways in which law privileges men's control and ownership of women and property, as also it does upper-caste forms of sexual control of women through privileging monogamy, while stigmatizing non-monogamy, popularly perceived as a lower-caste practice. In this way, the law and the normative family are the primary organizing blocks for forging gender, caste, and sexuality norms. In not critiquing the structures of patriarchy, caste, class, and sexuality that are embodied in the normative and institutional family form, and in not examining the role of law in cementing these unequal structures, our rights advocacy becomes complicit in denying rights to women in non-conforming intimacies. As rights education has been central to PLD's capacity-building initiatives, an exploration of an alternative rights framework for women in intimate relationships became necessary, resulting in this project.

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Foundation before the Delhi High Court. This provision labels all non-procreative sex as being against the order of nature, and therefore an offence, but is, in fact, used selectively to persecute and stigmatize adult consensual same-sex relations. The coalition's intervention sought to read down the penal provision so as to explicitly remove the inclusion of adult consensual same-sex relations from the purview of criminality.

## Scope and structure

This resource book is divided into four parts. The *first part* examines the ways in which gender, caste, and sexuality shape the law, to unmask the politics behind the making of laws and rights in the context of the family. It also examines the ways in which progressive women's organizations often reinforce and privilege the norms embodied in the law. The purpose of this part is to bring out exclusivity and selectivity in the dominant rights framework, and set the ground to argue for an alternative framework that renders equality and justice to all women in sustained intimate relationships without regard to marital status. This section draws upon discussions by practitioners, activists, academics, and lawyers at a national consultation held by PLD on Rights in Intimate Relationships.

The *second part* maps the diversity in intimate relationships to ground the concerns addressed through this resource book in the urban and rural realities in India. This mapping draws out the political, economic, social, and demographic trends that shape family forms, and brings out the internal logic or norms specific to each of the non-normative intimacies mapped here to draw similarities and distinctions between normative and non-normative family forms. This section forms the basis for identifying four key areas on which a rights framework is developed in the last section.

The *third part* outlines the directions and steps that we as change agents can take to move towards an inclusive rights framework for women, one that recognizes justice and equality for women across diverse family forms. This section, too, draws upon discussions at PLD's national consultation on the theme.

The *fourth and last part* explores a framework of minimum obligations and entitlements in respect of intimate relationships outside of the domain of marriage, in particular in four key areas. It draws upon international human rights law on rights for women in non-normative relationships in respect of the four areas identified here. This section also refers to the domestic law to compare and contrast it with human rights standards in respect of the four areas of obligations/rights with the aim of highlighting the disparities and identifying the potential for developing an inclusive rights framework for all women, across diverse family forms.

## Process and methodology

This project has evolved in stages over time in PLD, propelled by fragmented concerns and bursts of inquiry, which eventually led to this exploratory framework on rights. The project, spread over four years, was steered by a resource pool comprising Uma Chakravarti, Mary John, Jaya Sharma, and Dipta Bhog, who combined academic and activist vigour on legal history, feminist studies, sexuality, caste politics, and women's rights. Periodic meetings were held with the resource pool to discuss the findings, gaps, and issues and to develop the methodology. The engagement of the resource pool was a dynamic one, sometimes challenging the framing of concerns, and at other times opening new ways of looking at the concerns. It suggested processes that facilitated consultations at various levels—through fieldwork, small workshops, and a national consultation.

It was felt that while the dilemmas relating to the claiming of women's rights in non-normative intimacies emerged during the course of PLD's work with community-based crisis intervention groups and in campaign-related conversations, it was necessary to undertake a focused inquiry and to conduct fieldwork to proceed with this project. Accordingly, the process entailed an examination of secondary sources, fieldwork, small workshops, and group discussions to map the diverse customary and contemporary forms of non-normative intimacies, the organization of a national-level consultation, and the holding of periodic discussions with the resource pool members. There was a lot to choose from, but the objective was not to tabulate the full range of non-normative intimacies, or even to undertake a comprehensive inquiry in relation to the selected contexts. Rather, our objective was to map a few contexts indicative of the diversity in our society and to understand the specific ways in which these intimate relations are shaped by the labour, land, and caste economies of the community, as much as by desire, and how, like marriage, they, too, are structured by patriarchy. The selection of contexts was determined on the basis of linkages with NGOs and activists who could facilitate access and help develop our understanding. We identified four contexts—*maitri karar*<sup>2</sup> in Gujarat, *nata*<sup>3</sup> in Rajasthan, bigamy in Himachal Pradesh, and same-sex relationships in Kerala.

2 A bigamous union formalized through a written contract that translates as a 'friendship agreement'.

3 Customary form of union/attachment akin to marriage, but not marriage, that is specific to lower-caste communities in Rajasthan, and formalized through a written agreement and the payment of bride price.

The consultations were held at many levels. The field visits created the space for conversations with social workers, NGO staff, lawyers, academics, and sometimes with women in non-normative relationships. The conversations were one to one, in clusters with respondents, and on two occasions in workshop settings.<sup>4</sup> The insights into the obstacles to the granting and exercise of rights, the anxieties of women, the innovative approaches for securing social recognition and protection, and in some cases insights into resistance to acknowledging non-normative intimacies—all these emerged during the course of fieldwork and workshops, and helped shape our perspective. These findings were discussed with social workers, lawyers, academics, and crisis intervention and counselling/mediation groups at the two-day National Consultation on Rights in Intimate Relationships with a view to sharing and learning from the experiences of others.<sup>5</sup> The discussions at and the outcomes of this national consultation helped us grasp more fully the anxieties of activists in relation to rights for women in non-normative intimacies. They clarified directions, strategies, and recommendations for overcoming resistance, for initiating shifts in perspective, and for bringing about changes at the programmatic level.

## Qualifications

This resource book must be qualified on two fronts. First, it adopts a narrow definition of normative and non-normative. Normative here refers to legal marriage, and non-normative refers to same-sex and opposite-sex relationships that are long term, stable, and akin to marriage. Generally, in view of the vast diversity of intimacies that exist, most long-term heterosexual relationships are likely to be viewed as normative. We, however, have consciously adopted a narrow definition of normative to highlight the shallow rationale on which the recognition of rights in marital relationships rests, and the untenable reasons for the denial of rights to women in non-marital relationships that are akin to marriage, both in law and in our work. If gender inequality in the household is the premise for granting rights, then it stands to reason that rights and obligations extended to women in marriage are denied to women in intimacies that are akin to marriage. Clearly, then, gender inequality is not the premise, but the preserving of a particular normative ideal is. Consequently, the denial of rights

4 The two workshops were: on same-sex relationships with the support of Sahayatrika in Thiruvananthapuram, Kerala in 20–21 June 2006, and on bigamous relationships with the support of SUTRA in Jagjit Nagar, Himachal Pradesh, in 14–15 August 2006.

5 The list of participants at the national consultation on Rights in Intimate Relationships, organized by PLD on 12–13 May 2008 in New Delhi, is attached. The 32 participants represented organizations engaged in diverse areas of work, including crisis intervention groups, women's groups, queer groups, lawyers, and academics. The list is attached as Appendix A.

## *1 Introduction to the resource book*

to women in non-normative intimacies serves only to punish non-compliance with legal norms by imposing additional hardships on these women.

The second qualification is with respect to the alternative framework explored here. As the terminology suggests, this framework is exploratory and not definitive. Indeed, it is better described as a work in progress that seeks to contribute to existing conversations and to trigger further exploration and debate. It seeks to serve practitioners of mediation, counselling, and crisis intervention in the stage before a case goes to court. It offers useful insights into developing rights education, advocacy, and campaigns by integrating intersecting concerns. While the innovative nature of the rights framework necessarily makes it tentative, it is premised on the certainty of the relevance of a rights framework that is inclusive of and applicable to diverse intimacies.

## Chapter 2

# FRAMING THE CONCERNS

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This resource book has emerged from concerns about our approaches to women's rights at the levels of community intervention, case work, advocacy, and law reform. Fieldworkers in the community work with contradictions and balance several competing values, being situated as they are at the intersections of customs, cultural morality, laws, constitutionally guaranteed human rights, and women's rights. We as social workers, rights advocates, and change agents, like other members of society, are socialized in dominant cultural values in addition to modern values that inform education, progress, and the law. We navigate these intersecting and divergent streams, making individual and collective decisions at our levels about what approach might be the most effective one in a given case for the woman concerned. As a larger collective of individual and small groupings, the women's movement has responded to the competing values of customary and legal plurality in family laws with assertions of constitutional equality through an active engagement with the law. This engagement has been at multiple levels—statutory law, formal and alternative mechanisms of dispute resolution, and sensitization of different actors in the legal system—and has been simultaneously critical, pragmatic, strategic, and constructive.

The focus on gender-specific law reform in the 1980s was concentrated on penal laws relating to rape, dowry death, and cruelty in marriage. This led to a spurt in legal literacy and to the emergence of paralegal workers in the 1990s. This period also saw advocacy and initiatives by women's groups to ensure that the law enforcement system was sensitized to the legislative gains made in the field of women's rights. The police and the judiciary became the focus of 'sensitization,' and parallel to this was the advocacy for the creation of women-specific mechanisms—women's police cells, mediation services, family courts at the formal level—and innovative fora for justice, such as mahila panchayats and nari adalats, were developed at the community level. The advances in gender justice in law remained normative achievements, with recognition of gender-specific offences and test-case victories. For the most part, despite the intensive engagement with the law, access to the legal system remained restricted for poor marginalized women, and gender justice for many women continued to fall between the cracks. PLD entered this stream of work in the late 1990s, and by the turn of the new century, in the early 2000s, we had joined debates and had engaged in critical reflection on why the law has not worked. The positions and debates in the women's movement ranged from questioning the relevance of masculine state-centric law to women's rights per se, to a more strategic engagement with providing access to the legal system (through legal aid, legal counselling services, and paralegals) for disadvantaged women, alongside the expansion of rights through test cases and legal reform, and a conscious integration of human rights law into legal advocacy. The debate on

family law, however, stagnated for the most part on account of the communalized discourse on the Uniform Civil Code. To some extent, the focus turned to critiques, innovative solutions, and debates on reform within the respective religious family laws at the community level. The focus of the debates, however, was not so much about which women were excluded from the ambit of family law, but more on how access could be improved and additional rights achieved and how the existing law could be reformed for the women already within the scope of family law.

At PLD, our work with community partnerships exposed us to exclusion and blind spots not only in the law, but also in our own conceptualization of women's rights as activists, and this led us to this project. The limitations were not only in the law but also in our own ambiguous attitudes towards who was considered deserving of rights and who was not, of our own privileging of marriage as a solution to many problems, even as we encountered and provided support to countless women in abusive marriages. For example, it is not uncommon for crisis intervention groups to blame marital breakdown on the second woman, if there is one, or indeed to propose 'marriage' as a solution for dignifying a premarital intimacy, and sometimes even as a way of resolving rape. This showed us just how primary marriage is to our definition of a family and the private sphere, and how fundamental being the (first) wife is for staking entitlements in relation to the family. It also showed how desire and sexual conduct are graded from the ideal (when confined to heterosexual marriage) to different degrees of stigma (second wife/woman), and its linkage with rights.

We feel that these fears must be addressed, the dilemmas resolved, and the ambiguities unpacked so that we are able to move towards 'recognition' of rights for all women, regardless of marital status or sexuality. This section seeks to achieve that goal in three parts. It will unpack the politics of law in privileging marriage, caste, and norms in relation to sexuality, and examine how the normative hierarchy in law shapes the understanding of good and bad intimacies in women's rights activism and social work, to establish the basis for recognition of justice and equality for all women in intimate relationships irrespective of marital status and sexuality.

## **The politics of gender, caste, sexuality, and the law**

Marriage historically has been vital to organizing caste and culturally specific kinship patterns, and to determining material, sexual, productive, and reproductive relations in society. The laws relating to marriage add legal force - by reinforcing socially dominant values as legal, and by demoting socially marginalized values and practices as illegal or simply undesirable.

In this way, marriage laws organize social, sexual and economic relations between men and women, and between communities. In establishing a legal framework, however, modern law selectively reinforces some existing socio-cultural norms and marginalizes, or even penalizes, others. Feminist legal studies have unmasked the ways in which the law selectivity privileges the interests of those in power, that is, the property-owning, middle-class, upper-caste male interests.<sup>6</sup> Simultaneously, feminist engagements with the law have shown the possibilities of displacing vested interests in the law, and instead injecting in their place standards that secure women's equality and justice. Therefore, even as the law remains an important site of engagement, adopting its norms without critical interrogation is problematic, for these reinforce gender and caste inequalities. In this context, it is useful to trace the law's relationship with marriage historically, to remind ourselves of both aspects of law reform—in terms of what legal reform achieves and who it benefits, and, just as importantly, what/who such law renders illegitimate and what/who it stigmatizes. This section draws attention to the ways in which family and penal laws have constituted and cemented inequalities of caste and sexuality in ways that adversely impact women on the intersections of these categories.

**Family law reform** Setting norms in relation to the family has historically been a means of establishing social order and bolstering power relations by the elite with support from the state. Chakravarti's study of the emergence of brahmanical patriarchy in early Indian history shows how norms relating to sexual purity and the ideology of 'pativrata' were deployed to gradually establish patriliney, sexual division of labour, and caste and class relations in society through the family.<sup>7</sup> These norms served not only to control reproduction, sexuality, and property ownership within the household, but were also crucial to distinguishing the upper caste from other castes and to regulating relations of gender, labour, and property ownership within and between caste groups. Feminist historians have shown how codification of law relating to intimate relationships/the family has always been steered by dominant notions of public morality and the material interests of elite men in positions of power. This is illustrated by

<sup>6</sup> For an overview of different schools of feminist legal thought, see Jo Bridgeman and Susan Millns (eds.), *Feminist Perspectives on Law: Law's Engagement with the Female Body*. London: Sweet & Maxwell, 1998; Katharine T. Bartlett and Rosanne Kennedy, *Feminist Legal Theory: Readings in Law and Gender in the series New Perspectives on Law, Culture and Society*. Boulder, Colorado: Westview Press, 1991; Susan S. M. Edwards, *Sex and Gender in the Legal Process*. London: Blackstone Press, 1996.

<sup>7</sup> Uma Chakravarti, 'Conceptualising Brahmanical Patriarchy in Early India: Gender, Caste, Class and State', *History and Society*, Economic and Political Weekly April 3, 1993 p.579

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social reform processes in the colonial period, where codification became a means of negotiating and cementing the status quo in relation to gender, caste, class, and nationhood.<sup>8</sup> Chakravarti shows that even as the widow remarriage law attempted to liberate the upper-caste widow from enforced widowhood, it denied her inheritance to the deceased husband's estate, thus ensuring her economic dependency. Once codified, this law became applicable to all castes, including those caste groups in which widows were entitled to continue holding the inheritance (received from the deceased husband) upon remarriage. As a consequence, this law set back the status of women from caste groups that granted more rights compared to the position of widows from the upper castes. This typified the approach of the codification process, which drew selectively upon upper-caste brahmanical norms to homogenize Hindu law, in the process erasing the diversity of customs, many of which allowed women greater rights. Similarly, Saradmoni shows that the transformation of matriliney in Kerala in the early twentieth century, although an outcome of social reform codification, undermined women's stable rights to matrilineal property.<sup>9</sup> The new education system in that period generated transferable employment opportunities and ushered in changes in trade and landownership, thus creating the material basis for a change in property ownership. The new education also generated ideas and increased exposure to a homogeneous brand of brahmanical Victorian morality that shaped the new nation, contrasted against which polyandry, the informal 'sambandam' relationships of Nayar women, and the custom of 'visiting husbands' began to be viewed as concubinage. The introduction of modern law courts created an additional impetus for codification to effectively administer cases under the customary law. All these changes set the stage for codification, a process in which women did not participate, but which replaced sambandam relationships (where the male partner in the relationship had visiting rights) with monogamy and marriage. This process introduced women's dependence on the husband, and also transformed the stable and autonomous rights that women had in the matrilineal property.

Although seeming to reform the status of women, each of the piecemeal family law reforms failed to restructure the economic and material controls on which unequal gender relations rested. Further, these reforms selectively drew upon upper-caste brahmanical norms to homogenize

8 Uma Chakravarti, *Rewriting History: The Life and Times of Pandita Ramabai*. New Delhi: Kali for Women, 1998.

9 K. Saradmoni, *Matriliney Transformed: Family, Law and Ideology in Twentieth Century Travancore*. New Delhi: Sage and Walnut Creek, Calif.: Altamira Press, 1999. See also G. Arunima, *There Comes Papa: Colonialism and the Transformation of Matriliney in Kerala, Malabar, c. 1850–1940*. New Delhi: Orient Longman, 2003.

Hindu law while erasing the diversity of customary laws to more stringently control women's sexuality. A historical analysis of legal regulation of marriage in Western, Islamic, and Chinese contexts also shows that traditionally codes were adopted to make the obedience of wives to husbands more binding—with the aid of provisions that restricted women's civil capacities, ownership and transmission of property, custody and guardianship of children, mitigation of murder by husband in retaliation to adultery by wife, and loss of nationality upon marriage to a non-national.<sup>10</sup>

In the post-independence period, the codification of the Hindu law was aimed at 'consolidating the powers of the state and building an integrated nation.'<sup>11</sup> Agnes notes that in relegating private areas to be governed by norms derived from religion and custom, rather than the constitutional standards, the 'statutes that were finally enacted were merely ornamental instead of being markers of genuine and concrete efforts at rectifying gender discrimination'. The significance of the plural legal system is symbolic insofar as representing the modern secular nation's respect for religious and cultural diversity. Family law as it is codified and practised today has very little connection with religion, given that it has been strongly influenced by common law, in addition to caste, religious, and electoral considerations.<sup>12</sup> For instance, divorce and inheritance to women are today integral to all Hindu and Christian family law, even though it was not originally recognized under the religious sources. Similarly, divorced Muslim women can get lump-sum financial support as alimony under the law today, even though Islamic sources might not look favourably upon financial linkages between divorced spouses. The codified law and precedents have been shaped by brahmanical and Victorian influences, as well as by contemporary rights-based public policy approaches. Nonetheless, the family laws continue to be identified with reference to their religious sources despite evolving considerably over time. Gender justice was not the dominant force

10 Arlette Gautier, 'Legal Regulation of Marital Relations: An Historical and Comparative Approach', *International Journal of Law, Policy and the Family*, 19:1, 2005, 47–72 [19 INTJLPF 47]. In the context of South Africa, the draft Muslim Marriages Bill, 2003, based on a combination of reformist and conservative interpretations, in fact, compromised constitutional equality guaranteed to Muslim women citizens by the secular state. Rashida Manjoo, 'Legislative Recognition of Muslim Marriages in South Africa', *International Journal of Legal Information*, 32:2, 2004, 271–282 [32 INTJLI 271].

11 Flavia Agnes, *Law and Gender Inequality: The Politics of Women's Rights in India*. New Delhi: Oxford University Press, 1999, p. 77.

12 See Madhu Mehra, 'Women's Equality and Culture in the Context of Identity Politics', *Journal of Comparative Law*, 2:2, 2007, pp.1. See also Archana Parashar, "Just Family Law: Basic to All Indian Women" in *Men's Laws, Women's Lives: A Constitutional Perspective on Religion, Common Law, and Culture in South Asia*, ed. Indira Jaising. New Delhi: Women Unlimited, 2005 pp. 286

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in the codification of law in the 1950s, and neither has it been central to the debates on the Uniform Civil Code. Just as the propelling goal of the codification of Hindu law was the construction of a civilized, modern family reflecting the spirit of the new nation (through the adoption of monogamy), the Uniform Civil Code's agenda is to achieve uniformity of law for all communities, in particular as a means of 'integrating' the Muslims into the national mainstream since they continue to be governed by a largely uncodified Islamic law. Gender equality has not been a primary factor in family law reform.

**Penal regulations in relation to the family** It is not just family law that places marriage on a pedestal and organizes the gendered division of labour and relations within the household based on it. The Indian Penal Code, 1860 assists family law in cementing a gendered social order and exercising control over women's sexuality and reproduction. Thus, rape is the highest and only serious sexual offence against a woman, and its scope is limited to non-consensual peno-vaginal penetration.<sup>13</sup> The other offences have to do with outraging the 'modesty' of a woman and committing 'indecent' gestures and acts, lesser offences whose very terminology puts the woman's character under scrutiny.<sup>14</sup> While the offence of rape exempts marital rape from its purview, the offence of adultery enables criminal prosecution against the lover of a married woman by her husband.<sup>15</sup> In the same spirit, the IPC criminalizes the enticing away of the 'wife of another man' and allows for mitigation of murder of the wife/wife's lover on grounds of grave and sudden provocation (in the context of extramarital relationship).<sup>16</sup> All these provisions collectively secure to the husband absolute patriarchal ownership of the wife's body, sexuality, and reproduction through state force. The criminalization of 'unnatural' or non-procreative sex

13 Section 376 of the IPC limits the definition of rape to non-consensual peno-vaginal penetration as it threatens patriliny the most. The other two categories of (lesser) sexual offences are that of outraging the modesty of a woman and that of committing obscene acts and making obscene gestures. The latter is dismissively termed 'eve teasing', and attracts trivial punishment.

14 Sections 354 and 509 of the IPC.

15 Section 375 of the IPC expressly legalizes forced sex with a wife who is 15 years of age or above Section 497 on adultery allows prosecution of the wife's lover (not the wife). Notably, the offence of adultery regards the husband's consent as relevant to the determination of the offence, but not that of the wife.

16 Section 358 of the IPC allows mitigation of an offence resulting from assault or criminal force inflicted on account of 'grave and sudden provocation'. It has been accepted as a valid defence by the judiciary consistently to reduce the sentence (to one month) for the killing of an adulterous wife or the wife's lover by the husband, or to impose a fine.

irrespective of consent and adulthood is yet another example.<sup>17</sup> All these are important pillars in the structural arrangements to secure compulsory heterosexuality and purity of lineage through law. The advocacy for a comprehensive law on sexual assault by women's groups, ongoing for nearly two decades, views sexual assault on a continuum from lesser to more grave, with a focus on women's experiences of non-consensual sex rather than morality.<sup>18</sup> However, the law reform proposal on sexual assault remains to be acted upon by the government.

The next section examines the concepts and elements that underpin the moral hierarchies on which the normative family rests. It discusses the extent to which the notions of justice held by progressive groups (such as ourselves) are influenced by notions of legal morality. It explores the possibilities and advantages, as well as the fears and obstacles, of de-linking gender justice in the family from the personal moralities and normativities set in law.

## Re-visiting the norms that determine good and bad intimacies

This section re-visits the key concepts that define normative intimacy—the institution of marriage, heteronormativity, and monogamy. These are the pillars on which legal recognition rests. These have also become fundamental to our construction of a 'proper' intimate relationship that combines commitment with social responsibility. These three norms overlap, but are treated distinctly here to draw specific attention to the debates and fears that surround each. For the most part, this section draws upon discussions, presentations, and debates amongst the participants at the National Consultation on Rights in Intimate Relationships, organized by Partners for Law in Development on 12–13 May 2008 in New Delhi.<sup>19</sup>

**Institution of marriage** The legal status accorded to marriage has privileged the institution not only socially but also in terms of the benefits and protections available to it by the state and the market. Marriage occupies the highest place in the hierarchy of intimate relationships,

<sup>17</sup> Section 377 of the IPC, prior to the recent Delhi High Court ruling removing same-sex relations from the ambit of criminality.

<sup>18</sup> Half Measure by T.K Rajalakshmi (Frontline) February 15, 2010. Also at <http://indialawyers.wordpress.com/2010/15/half-measure/>

<sup>19</sup> The list of participants is attached as Appendix A. The approaches of the organizations to each of the norms discussed here are identified with reference to the organization, and not the participant representing the organization.

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securing social status and granting limited enforceable rights to women in relation to the spouse and the matrimonial family,<sup>20</sup> along with a range of material and non-material benefits at the workplace, in terms of leave, medical benefits, pension, and insurance. Entry into marriage is not a free choice for most women, as it is necessary for social acceptance and material security. Nonetheless, marriage is not an option available to all, as it is conditional upon compliance with certain rules that enmesh the institution with norm-setting and privilege.<sup>21</sup>

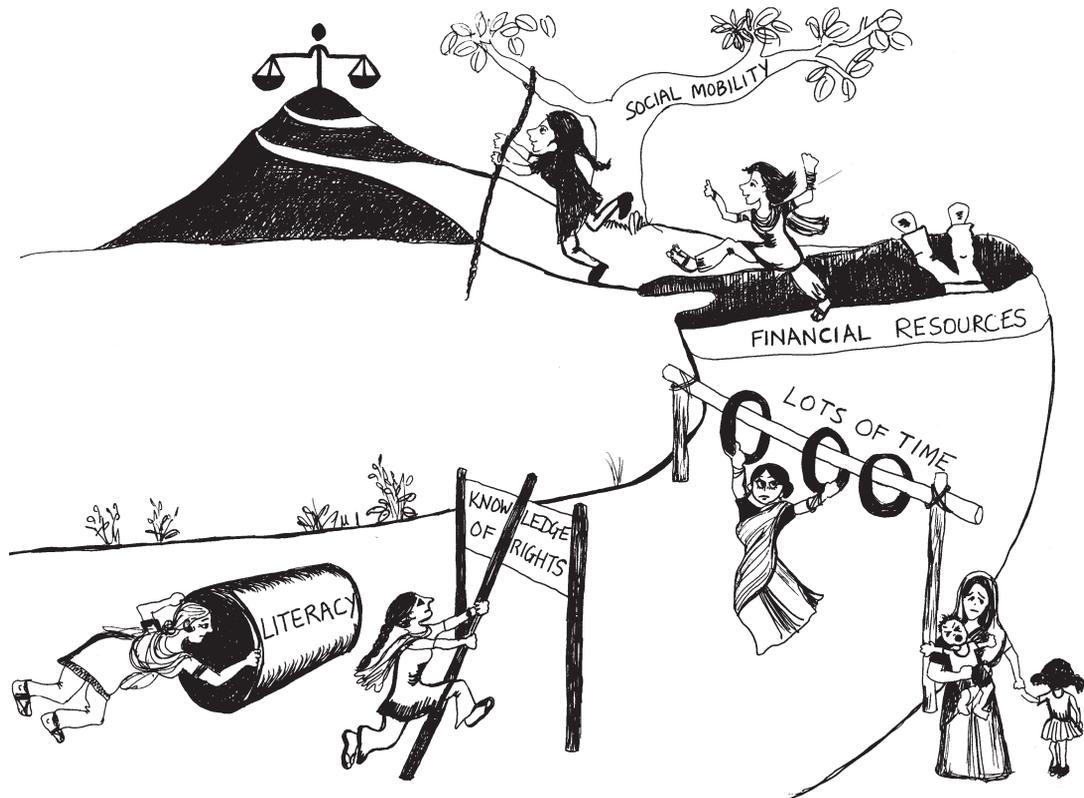
The primacy given to marriage in the work of community groups engaging with women's rights is best explained by the fact that most of the crisis intervention work and law advocacy for women is located within the paradigm of marriage. This focus is symbolic of how much of women's rights activism is, in fact, specific to women within the institution of marriage. This is not to undermine in any way the activism and support services offered by women's groups because, despite legal recognition, rights are not accessible to poor and marginalized women. The experiences of groups such as the Mahila Salah Suraksha Kendra (MSSK) in Jaipur show that even access to the legal system is difficult for married women on account of marginalization arising from social, economic, and caste factors as well as rural location. Much of their crisis intervention and legal support work, as a result, is dedicated to facilitating access to the legal system for women who theoretically have rights in the law but who, in fact, are unable to access these rights. While the privileged status of marriage guarantees social recognition, it also creates a myth that rights can be secured through the law, when, in fact, even access to the system hinges on resources, on women-friendly procedures, on a gender-sensitive environment and perspective within the legal system, and, of course, on a gender-just formulation of rights, which are not simultaneously available.

While many community groups offering support services will not even consider empathizing with women in non-marital relationships or with second wives, and in principle will place the blame on their shoulders for having chosen the 'wrong' path, it is instructive to look at the approach of progressive organizations that are relatively free of such prejudice. In what ways and under what

20 In India, family law to some extent makes obligations and rights between married persons enforceable. Similarly, the laws on dowry and domestic violence reflect the steps taken to secure protections for women in the private sphere of the family.

21 In law, the conditions of monogamy and heterosexuality are essential, but at the level of the community, considerations of caste, religion, and region may also operate. The law has always determined who may marry and who may not, so for example, inter-racial and inter-religious marriages were forbidden in the past, just as today marriage is conditional upon a specific sexual orientation. See Ruth Vanita, *Love's Rite: Same-Sex Marriage in India and the West*. New Delhi: Penguin India, 2005.

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circumstances do they engage with women in non-normative intimacies? Is there a differentiation between a pragmatic strategy for case work and a conceptual perspective on rights? All groups represented at the national consultation held on this theme fall within the category of progressive organizations, and all reported that they are approached primarily by married women, and only rarely by women in non-normative intimacies. The types of cases relating to non-normative intimacies that most often reach these organizations are those of inter-caste and inter-community (heterosexual) couples on the run to escape the vendetta of their families so as to be together, and those of women in pre-marital relationships based on (unfulfilled) promise of marriage.

AAI of Lucknow developed a project called 'right to choice' (covering if, when, and whom to marry) based on their case work of helping young opposite-sex couples in inter-religious and

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inter-caste relationships to enter into marriage. The severe hostility and intimidation from the family and the community in such cases typically involves the use of violence and the wrongful detention of the girl by her family. Equally common is the manipulation of the criminal law, often by the girl's family, through the registration of false complaints of rape and abduction, pursued with cooperation from a partisan law enforcement machinery. In the face of such intimidation and retributive measures, AALI has no option but to promote the institution of marriage. Once the relationship is legalized through marriage, the boy is protected against criminal charges and the girl is less vulnerable to retracting her statement under duress. In such cases, marriage is not just a means of gaining legitimacy for an otherwise socially unacceptable relationship, but is also a necessary means of securing legality and state protection.

Other groups report cases where the woman approaches them with a request for pressuring her male partner into marrying her, typically after a premarital pregnancy/childbirth, betrayal, or to enforce an unfulfilled promise to marry. MSSK, Jaipur usually counsels the woman about the futility of the pursuit in such cases and encourages her to build her self-confidence and livelihood skills through a long-term process of counselling and referral. However, MSSK has also known women to file rape charges against the man as a means of pressuring him into marriage, but the organization refrains from extending support in such cases.

Vanagana, in rural Chitrakoot, in Uttar Pradesh, reports that cases of women in non-normative relationships make up a small fraction of their work, and that most of these are related to bigamy/extramarital relationships. Such cases typically relate to a man with more than one woman, and it is rare to get a case of a woman in an extramarital relationship. Vanagana's case work shows that because marriage is the only means of gaining societal, economic, and sexual security for women, they put up with high levels of abuse to stay in it. Likewise, women in bigamous relationships continue to hold on in the hope of eventually getting married. In bigamy cases, the organization feels handicapped in supporting the second woman because the law does not give the second woman/wife any rights despite the stability and long tenure of the relationship. As a result, Vanagana is unable to pursue formal remedies for such women.

Swayam of Kolkata explains that it finds it difficult to critique marriage or to dissuade the woman from pursuing her goals. This position is informed by the social reality and the aspirations of the women who approach the organization. The few women in non-marital intimacies who have approached Swayam have displayed markers of marriage (such as sindoor) and observed rituals for married women, initially projecting themselves as married. Only later, following

continued counselling and discussion with the group, have the women tended to disclose their non-marital status. In such cases, the request to the organization has been to pressurize the man into marriage. Swayam's case work shows that this aspiration is shared even by privileged middle-class educated women, and that the women tend to prioritize marriage over any other right as it secures them social status and recognition. Like MSSK, Swayam, too, does not facilitate the filing of false rape charges against the boyfriend or partner in an attempt to pressure him into marriage, even if the girl wishes to pursue such an option. The organization believes that a false promise of marriage or a fraud marriage, although a wrong, does not amount to rape.

While it is important to take stock of case work and the various approaches towards cases, mediation in and of itself may not adequately capture the perspective of the organization, given the pragmatism-driven responses they often adopt. The nature of case work on domestic violence or the breakdown of marriage/relationships limits the perception of social reality to breakdown situations, where women approach the organization as victims. This narrows the narrative to that of crisis intervention, victimhood, and marriage-centric solutions. The experiences of women who feel otherwise are not reflected in the work of these organizations, for such women have no need to approach them. To understand the ways in which the institution of marriage has been challenged or redefined—and the potential for doing so—one needs to examine the work of community organizations and resource groups whose work goes beyond crisis intervention.

Community work helps in understanding the changing aspirations of women and the impact of shifting social trends and practices. While case work and crisis intervention originate in the notion of victimhood, these, too, can become springboards for the assertion of agency and self-transformation. Both levels of interventions and programmes—proactive community work and reactive crisis support—have the space for questioning the privileges attached to marriage and for pushing the boundaries of rights beyond the law. Although marriage has long been critiqued in women's studies for institutionalizing patriarchal control over women's sexuality and their productive and reproductive labour, such critical perspectives are not adequately manifested in programmes, campaigns, and debates in the women's movement in India. For instance, marriage is made compulsory for women by mutually reinforcing values that bestow social status upon women only upon marriage, coupled with disincentives for single women (ranging from stigma, ostracism, social exclusion, and violence, depending upon widowhood, 'desertion', unmarried or lesbian status). Advocacy around stigma attached to single women (primarily in relation to widows and 'deserted' women) has largely challenged social stigma and

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taboos in relation to colour, dress, and food, and focused on rights to economic security and protection from violence. Even as such a focus is necessary, the advocacy remains partial on account of the failure to question the privilege attached to marriage, which is the main reason for the stigma.

Forum Against Oppression of Women (FAOW), based in Mumbai, makes strategic use of the available laws and remedies in case work. However, these remedies remain immediate and strategic for them, but do not wholly define women's realities or aspirations in other areas of their work. For them, social reality cannot be viewed in static terms. A fuller understanding requires taking into consideration women's changing expectations from marriage, their changing roles within marriage, and the diversity of relationships that exist in society. FAOW's engagement with law reform is based on a reconceptualization of marriage so as to take into account societal changes and shifts in women's roles, as well as queer feminist<sup>22</sup> perspectives on these transformations. Their starting point in a reconceptualization of the importance of rights in marriage were the facts that marriage rests on women's unpaid labour and that women fear the loss of economic security upon abandonment. FAOW revisited this framework to absorb new perspectives, to examine current debates, and to consider changes. In 1989, they felt that the irretrievable breakdown of marriage must be a ground for divorce, drawing a parallel between rights in marriage and rights in the workplace. This approach considered the reality of marriage as a source of economic security in lieu of women's unpaid labour to propose exit options and entitlements that were similar to those found in the workplace. This stance debunked the notion of marriage as sacred and unconditional. From the mid-1990s onwards, FAOW have integrated same-sex relationships into their discussions on marriage and have explored solutions to the problems of commitment and security. Since 2003, their conversations on the institution of marriage, sexual relationships, families, etc. have focused on how each of these relate to private property, care, and security. This has led to an expansion of FAOW's framework of rights/responsibilities in the family to include individuals who forge bonds of collective care and nurturance, based on their commitment, which may not be couple centric or linked by blood.

22 While feminism locates unequal power relations between men and women as emanating from several mutually reinforcing structures of patriarchy (constituted by ideology, culture, economy, and law), queer feminists locate power relations as emanating from similar mutually reinforcing structures that constitute heterosexuality as the norm, so as to attach varying degrees of power, privilege, stigma, and perversion in relation to sexuality. For queer feminists, power relations are constituted by heteropatriarchy, which combines a political understanding of patriarchy and sexuality.

The debates that question the primacy of marriage, or those that attempt to subvert the normative family by including non-normative and transgressive family forms, remain few and far between. For the most part, our work in relation to advocacy and community programming has not attempted to challenge or de-centre marriage.

**Heteronormativity** This refers to norms relating to gender and sexuality that seek to reinforce patriarchal power structures and ideologies. It is so integral to patriarchy that it is also referred to as heteropatriarchy. Heterosexuality is not just privileged, but is also compulsory for sustaining patriarchy, which it does by securing male control over women's reproduction and sexuality. The term heteronormativity does not refer to (hetero)sexual preference. Rather, it refers to establishing heterosexuality as the only normal and natural form of sexuality, and of marriage as the only legitimate institution for its expression. Transgression of, and deviance from, heteronormativity threatens patriarchy, and consequently necessitate deterrence through stigmatization and punishment. This explains why the legal framework not only privileges monogamous married women, but also distinguishes between legitimate and illegitimate children and punishes adultery by women. The law helps enforce compliance. Women who transgress the sexual and gender boundaries—lesbians, sex workers, non-monogamous women, women in non-marital relationships, transgender women—disturb the norms on which patriarchy rests and are variously punished through stigma, exclusion, and/or violence. For similar reasons, widows, 'deserted' women, and single women fall outside the sphere of privilege and face varying degrees of social stigma. In this way, heterosexuality and marriage cease to be individual preferences, and instead become compulsory and determine status. The system of heteronormativity is one in which women's sexuality is controlled so as to serve the purpose of procreation and reproduction of labour for the benefit of the patriarchal form of the family, the community, and the state.

Heteronormativity also intersects with and sustains other context-specific, cross-cutting systems of power, besides patriarchy, such as caste, class, and religion. From a political standpoint, therefore, it is not enough to address heteronormativity by merely supporting all sexual preferences, for this alone does not fully challenge the web of power that it creates. Indeed, it is just as important to question all interlinked systems of power, and to simultaneously support intimate relationships and sexualities that transgress or subvert institutions of marriage, procreative sex, and patriliney. Sharma argues that value should be placed on the process of questioning normativities, in terms of challenging the assumptions and rules with which we

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work, and in revealing the ways in which realities, or we ourselves, disrupt the norms related to gender, sexuality, and other hierarchies that shape our approaches to intimate relationships.<sup>23</sup>

It is instructive to examine the extent to which progressive groups have addressed heteronormativity and the ways in which they have done so. The outreach of crisis intervention groups, support services, and shelter homes is predominantly meant for married women. The experience of Voices Against 377, a Delhi-based coalition that advocates and defends the de-criminalization of adult consensual same-sex sexual activity, shows how difficult it is to find crisis services and shelter homes that are willing to receive, much less those that are trained to respond appropriately to, transgender persons. Most women's crisis intervention groups report that they never get cases of women who desire other women, and were they to get such a case, they would respond. Vanagana and MSSK report that only a small fraction of case work concerns women in non-marital relationships, and as yet no lesbian or transgender person has reached out to them. Others like Swayam are of the view that where specialized lesbian support groups are available, as for example Sappho in Kolkata, they would refer such cases to them rather than take them up themselves. They feel that specialized groups would be more appropriate for the task since they (as non-specialized groups) lack the necessary orientation and skills in the same way they have in relation to heterosexual relationships, particularly marriage. Jagori, a women's resource group in Delhi, has handled the case of a transgender person (female to male), on the basis of which they feel that specialized support services are necessary, as it can be very challenging to respond satisfactorily without appropriate training or skills in such cases.

In what ways have progressive women's groups integrated heteronormativity or sexuality into their analyses of patriarchy and power to reflect this in their advocacy and programmes? The most evident support and action by progressive women's groups has primarily been in the form of assertions of the 'right to sexual preference', support for de-criminalization of adult same-sex consensual sex, and condemnation of violence/stigma towards same-sex desiring women. Queer feminist groups, such as LABIA (Mumbai) and Sahayatrika (Thiruvananthapuram), feel that women's groups need to go beyond dealing with suicides of or violations faced by lesbian women, and go beyond validating choices based on same-sex desire. They feel that all concerns related to intimate relationships—such as protection from intimate-partner violence, financial

23 Jaya Sharma, 'Reflections on the Construction of Heteronormativity', *Development*, 52:1, 2009, pp. 52–55. For a discussion on the importance of the combining of rights strategies with structural challenges to heteronormativity in the struggle for justice, see Jaya Sharma, 'Reflections on the Language of Rights from a Queer Perspective', *IDS Bulletin*, 37:5, 2006, 52–57.

security, and recognition of diverse family forms—concern same-sex desiring women, in respect of which heterosexual norms need to be displaced. While lesbian women do face concerns that are distinct from those of heterosexual intimacies, there are many common concerns that can be addressed best in an integrated common framework.

Sahayatrika has conducted workshops for women's groups on sexuality, providing an orientation to power structures connected with sexuality. Their experience of conducting one such workshop typifies the interest of several women's groups, where the interest in sexuality is limited to understanding more about lesbian concerns/same-sex desire. This is symptomatic of the separation of discussions on sexuality and sexual violence, the former being conflated with desire and seen as integral to the queer agenda, and the latter identified with a women's/feminist agenda. For the most part, sexuality as a subject tends to be limited to the queer movement. This tends to be particularly true in respect of exploring linkages of sexual norms with compulsory heterosexuality to understand the hierarchy of desires, thus mimicking the heterosexual monogamous model of relationships and pleasure. The women's movement, for the most part, has tended to limit its engagement with sexuality to sexual violence, and has not devoted itself sufficiently to addressing the relationship of sexuality with sustaining power structures of gender, religion, caste, and sexual orientation. Even today, many progressive women's groups view sexuality as a luxury issue, in the face of more pressing and life-threatening issues of poverty, livelihood, displacement, and so on.

The lack of integration of sexuality into women's rights initiatives is very tangibly reflected in the trainings on gender that are conducted widely in the development and the women's rights sectors. The majority of such trainings continue to rely upon the binary of masculine and feminine to distinguish between sex and gender. Not only does this model reinforce the stereotypical gender attributes to establish women's subordination, but they also render invisible the diversities in relation to sex and gender. It is imperative that sexuality becomes integral to feminist political analysis of structural oppression, for it to be able to challenge linkages of sexuality with other systems of power and control in order to develop a liberatory framework of rights.

**Monogamy:** Monogamy was introduced into Indian law relatively recently with the codification of the Hindu marriage law. Prior to 1955, the uncoded Hindu law allowed polygamy for men, while imposing monogamy on women. The women's movement has

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unquestioningly accepted monogamy as a step that has improved the status of women in the family without much debate, or indeed evidence. The debates on monogamy tend to be limited to male monogamy, which is perceived as fundamental to securing the dignity and rights of the legitimate wife. Consequently, the enforcement of rights for woman is conditional upon her being a wife, or a 'legitimate' rights holder, as distinct from an illegitimate claimant. The support for monogamy, however, goes beyond its instrumental value in the determination of rights, in terms of intrinsically defining 'proper' intimacy. Indeed, monogamy has captured our collective imagination as feminists so greatly that exclusivity has come to define even non-normative intimacies, so that rights are imagined and articulated only vis-à-vis one another. Furthermore, it has justified for many the denial of rights to persons in non-monogamous intimacies. This notion permeates the view of same-sex intimacies as well. Monogamy is, therefore, a subject on which debate needs to be actively initiated to address fully the normative hierarchy of good and bad intimacies. The legal effect of monogamy primarily has been to foreclose claims by and obligations towards the second wife, declaring her persona non grata in law. Socially, the second woman is demonized as a marriage breaker, an adulteress, regardless of the nature and duration of her relationship. This stigma is reflected in the work of many women's groups and mediation cells across the country, as is borne out by the denial of support to the second woman. According to FAOW, Mumbai, this explicitly, and in many cases implicitly, shapes the liberal feminist approach to rights in marriage, where only 'good' women are viewed as holding entitlements, and assumes often that, in fact, good women have it in them to make men 'good' too. There are two levels at which this view is manifested in the approaches of women's groups: the first, at a functional level of case work, where decisions are taken about extending or denying support or mediation services to the 'other' wife/woman; the second, at the ideological level, of making rights to women conditional upon compliance with monogamy.

Most progressive crisis intervention and mediation groups, however, do take up cases of the second woman/wife, but their approaches to such cases reflect a discomfort with or ambiguity towards the second woman and non-monogamy. There is a distinction between the progressive groups in their approaches to mediation in bigamy cases, in particular on the issue of joint counselling of all the parties involved, i.e. the two women and the man. Swayam, MSSK, Shakti Cell, TISS, and Jagori (in Kolkata, Jaipur, Bhawanipatna, Mumbai, and Delhi, respectively) all take up cases of bigamy, without preference for either the first or the second wife. They adopt the 'first come, first served' principle, but once they take up one woman's case, they do not support the other wife.

These groups report that in bigamy cases, the two women typically blame each other and view their rights as competing. Swayam's approach is to give primacy to the interests of the woman who is their client; they feel that it is not for the organization to change the woman's perception that her rights are not competing with those of the second woman. They feel that non-monogamy is usually an outcome of 'cheating', and that this forecloses the possibility of joint counselling, which in their opinion would further undermine the rights of the wronged woman. In their view, cheating in marriage amounts to violence against the woman who is being cheated against, making it difficult for the organization to sit with both parties or to visualize rights for all parties concerned. Other organizations do not seem to have adopted a fixed approach and have undertaken joint counselling in bigamy cases when the opportunity emerges. They stress that the complexities of each case make it unviable to adopt fixed approaches to resolving bigamy cases. Case work in this area has made them realize how complex intimate relationships are, and that the expectations of

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the women cannot be assumed or the outcomes anticipated. Their experience shows that the resolutions for the people involved shift over time, and may eventually emerge in ways that were not anticipated earlier.

Examples of mediation in bigamy cases bring out how the resolutions arrived at shift over a period of time. The experience of lawyers working with MSSK, Jaipur and with the Shakti Cell (a mediation cell run from the office of the District Collector in Bhawanipatna, Orissa) demonstrates the ways in which joint counselling of all three parties in bigamy cases eventually leads to resolutions that they had not visualized earlier. In their experience, options emerge through the process of the parties talking to each other. Their case work has challenged several myths connected with bigamy, for instance, the belief that the first woman may not always be the lawful wife, that the second woman may not always be on a stronger footing as is commonly assumed, that there may be no cheating involved, that the two women may want to work out a solution that does not involve breaking up the bigamous relationship. MSSK, Jaipur reports a case of a 'first' wife who was made to fraudulently sign divorce papers by the husband, after which he threw her out of their home and married his sister-in-law. The first wife continued to meet the (former) husband while pursuing litigation to set aside the fraudulent divorce. Over time, the two resumed relations despite his second marriage. Shakti Cell, Bhawanipatna reports two cases of the many such that it has handled. In the first case, a married man entered into a second marriage with a 17-year-old girl and brought her home. The first wife approached the Shakti Cell with a request to prosecute the husband for bigamy. The cell spoke with the second wife and with her parents, and after discussion between all the parties, the man was made to pay a compensation of one lakh rupees to the second wife. The solution may not have been ideal, but it did not undermine the right to compensation of the second wife. In the second case, a young man and woman from different caste groups eloped from Orissa to Mumbai as the man's parents would not permit them to marry. After some time, the man returned to Orissa and married another woman. The Shakti Cell made the man's family give one acre of land to the young woman with whom he had eloped, and over time, she resumed relationships with the man. He lives with the legal wife but visits the non-legal wife occasionally, and the latter does not mind this arrangement. In both cases, the non-legal wife was compensated through the intervention of the Shakti Cell, that is to say, her entitlement was recognized.

The case work of TISS, Mumbai shows how the second wife is often more vulnerable. They have found the first wife to be more confident of her rights and of her position as being the wronged party, while they have found that the second wife expresses guilt and feels that she has

done something wrong. One of their bigamy cases brings out the value of talking with both wives and the husband. In their experience, this approach is demanding because it takes a long period of counselling to open communication between the two wives and to dispel the hostility between them. It can make the women stop seeing their rights as competing, and instead focus on what the man owes to both of them. Although difficult, it is possible to hold joint counselling and work out a way to keep the rights of both the women in the picture. Jagori, New Delhi have taken up cases of women in bigamous situations. Such cases may require working with both the women from the same household, although they feel that there is a need to work with the man, too, to come up with viable solutions. They give all parties a chance to come to an understanding.

Feminist critiques of family counselling have shown that counselling and mediation are not value-neutral interventions. That family counselling based on 'compromise' to save the marriage is vastly distinct from feminist approaches that prioritize women's security and self-esteem demonstrates how the value system of the intervening agency shapes the difference in approaches and outcomes. Likewise, the approaches to bigamy cases adopted by support groups demonstrate the assumptions of the intervening agency and determine whether at all support will be available to the second woman, and if so, what kind of support or approach this will constitute. The assumptions of the intervening agency are part of the problem, or can be part of the solution. The experience of case work on domestic violence shows how slow and difficult the process of decision making and recovery is for women, so it would not be fair to categorize bigamous cases as being more difficult than others. A case-by-case analysis renders a more realistic picture of the diversity and possibilities of resolutions that may or may not be available, rather than an assumed flattened approach to case work on bigamy.

The discussions on bigamy tend to be largely based on myths, rather than reality. The myths continue to be repeated and thus come to be accepted because of the discomfort with bigamy itself, so much so that women's rights become irrelevant to the discussions. For that reason, a debate on myths is important and must be encouraged. Some of the common myths presented to establish that bigamy is bad and monogamy is good are: there is jealousy between wives; the two women necessarily have competing claims; bigamy is the result of cheating; and resolution in bigamy cases is not possible or is much more complex or is extremely difficult. A workshop conducted by PLD with women in bigamous marriages in Himachal Pradesh showed that while there was jealousy, it was neither inevitable nor uniform. Indeed, there were examples of how the wives and the husband had worked out arrangements to minimize partiality, so that sexual attention and household labour were equally divided. The wives feared losing their material

and non-material security the most, and jealousy was not articulated as the foremost problem. It is, therefore, partisan to stack up the disadvantages to women in bigamy alone (and not in monogamy), without stacking up the advantages that historically have been asserted by women in bigamous marriages, such as division of labour and an increase in the bargaining power of the women in a patriarchal household (as borne out by a community workshop on the subject, discussed in the next chapter).

Neither is bigamy necessarily an outcome of cheating. The experience of Saheli and FAOW also questions the assumption that bigamy is always non-consensual. This, they claim, is a reflection of our discomfort with non-monogamy, and emphasize the need to qualify each case. While it is true, as many of the groups note, that bigamy is practised largely by men and is totally patriarchal, the same holds true for the majority of monogamous heterosexual relationships and marriages. Therefore, the difficulties in handling a bigamy case are an outcome of our discomfort with bigamy. In contrast, the idealization of monogamy is so complete that even a political critique of monogamy as the primary organizing unit of patriarchy is rare in activist and social work circles.

Our anxieties as social workers and rights advocates on this subject are whether recognition of rights will loosen the restraint on men's sexual desires, disrupt families, and increase patriarchal exploitation of women. This fear overlooks the fact that monogamy is equally patriarchal. It also overlooks the fact that non-monogamy in its customary, contemporary, and emerging forms is widely prevalent despite the law. Further, that denying the second wife/common law wife of her minimum entitlements encourages unaccountability rather than responsibility in men. PWDVA extends protection to the 'second woman', theoretically granting to her the right to residence. The advocacy for the enforcement of this aspect remains to be seen when such claims are asserted.

### **Legitimizing entitlements of and obligations towards women in non-normative intimacies**

The purpose of framing our concerns is to distinguish between legal morality and legitimacy, a legitimacy derived from a political understanding of equality and justice. While it is necessary to make strategic use of what the law can do to promote women's rights, it is equally important to critique the legal norms to address the obstacles they present in achieving justice and equality for all women in all families, particularly those on the margins. The critique is particularly important

for the recognition of the concerns of women on the margins. More so, as the law is central to defining rights and status in terms of privileges and stigma, both normal and deviant.

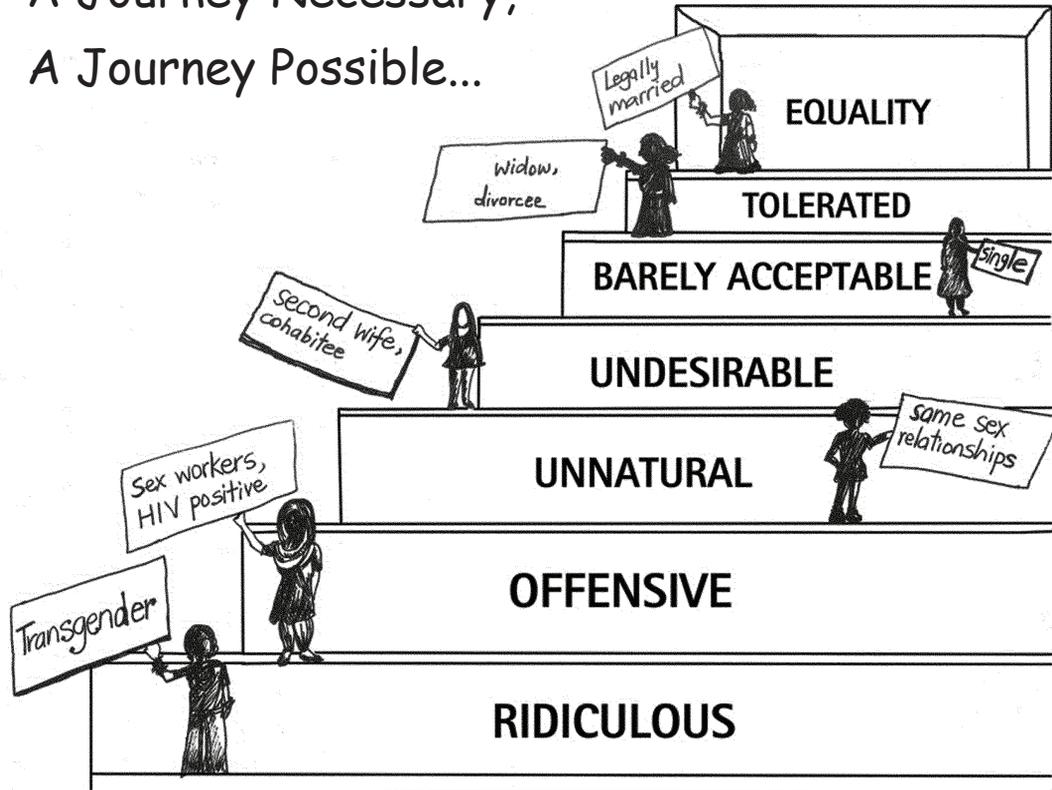
Laws relating to marriage create legal kinships, which are not based on blood but law. By ascribing reciprocal rights and responsibilities between the parties to the relationship, as well as by granting rights and benefits to the parties/family by the state and the community, the law grants legal status and protections to the family. The most important outcome of such legal recognition is that such legal kinships are recognized across cultures, countries, and religions.<sup>24</sup> This recognition is the most significant privilege attached to marriage, despite the uneven levels of enforcement of protections/privileges shaped by class, religion, and caste.

Alongside privileging marriage, and women within it, the legal norms also set the boundaries of deviance, rendering the claims for equality and justice for women in non-normative intimacies illegitimate. As a consequence, unpacking concepts and norms that privilege marriage is important to the feminist agenda. Equally important is making visible the contexts of non-normative intimacies to grant recognition (and to draw attention) to their realities and rights. The three broad categories in which the law places non-normative relationships are customary, common law, and illegal. *Customary* intimate relationships are specific to a community, and will be recognized by Hindu law only if such custom can be shown to have been uninterrupted in its usage for a long period, and so long as it does not fall foul of monogamy, or of any other law in relation to it. Where customary intimate relationships involve serial monogamy or polygamy, they lose legal status.<sup>25</sup> *Common law marriages* may or may not involve a ritual commencing cohabitation, but do include living together for a length of time and holding out as a married couple, both socially and financially, in terms of having intertwined finances. It fulfils all the conditions of a legal marriage, other than the legal ceremony necessary for its validation. *Illegal* relationships are those that are criminalized by the law, such as bigamy, adultery by women, and, until recently, same-sex relationships. Bigamy is a specific form of non-monogamy, and different from adultery, as

24 The definition of marriage is borrowed from Kathy Belge, 'A Look at the Difference between Civil Unions and Gay Marriage: Civil Unions and the Defense of Marriage Act. [http://lesbianlife.about.com/cs/wedding/a/unionvmarriage\\_2.htm](http://lesbianlife.about.com/cs/wedding/a/unionvmarriage_2.htm)

25 The Fifth and Sixth Schedule of the Constitution support customary laws of certain tribes and certain areas, and consequently state laws or Acts of Parliament need not apply to such areas or tribes. Apart from this under the Constitution, certain tribal customary laws are legally protected as in the case of Arunachal Pradesh. Under some customary laws as a consequence, non monogamy is legally practiced.

## A Journey Necessary, A Journey Possible...



it is committed only when a second marriage has been entered into formally despite legal prohibition. A second marriage under Islamic law, which permits a maximum of four legal wives, does not amount to illegal bigamy. All three categories—customary, common law, illegal—may or may not be non-monogamous, so an overlap of categories is possible.

An inclusive rights framework that goes beyond the law to include women on the margins seeks to question the basis on which public policy in relation to family/intimacies should be founded. Should public policy be based on morality derived from religion or on morality derived from abstract ideals of good and bad conduct? Or should it, instead, be derived from a political understanding of power and inequality in every context? The latter approach enables public policy to become a means of achieving justice and fairness in diverse contexts of

inequalities. Legal scholars in other contexts have raised similar concerns to support inclusion and recognition of rights of women in non-normative intimacies.<sup>26</sup> Given that most claimants in relationships without legal status are women, it is argued that justice would be better served through the recognition of common law marriages/cohabitation-based intimacies.<sup>27</sup> Therefore, the question remains pertinent to all contexts where public policy and law are based on an abstract ideal rather than on the realities of power, inequality, and known violations. The question does not seek to displace the relevance of morality in public policy and law making, but rather it draws attention to the source on which public morality should be based, and the purpose served by such morality. The question compels consideration of a moral vocabulary that contextualizes justice and equality within diverse families as they actually exist, to respond to the violations as they are known to occur in those contexts. It places scrutiny on the purpose and goals served by the morality, showing the weakness of public policies that seek the preservation of artificial ideals of morality, or ideals that help reinforce existing power structures and privileges in society, so as to render some voiceless and disempowered. This notion of public policy corresponds to a substantive or corrective approach to equality in human rights law. This is an equality that is not formal or notional, or one that is based on a single reality or ideal, but rather one that seeks to correct injustice in all contexts so that rights are universally available to all women, regardless of their status, location, or context.

26 In the context of the United States, legal scholars have posed the question whether justice is better served if the law facilitates individual well-being in non-marital committed relationships (that exist and, indeed, are on the rise), or when it upholds a normative order that is projected as ideal. See Daniel I. Weiner, 'The Uncertain Future of Marriage and the Alternatives', *UCLA Women's Law Journal*, Winter 2007, pp. 97. Similar concerns were raised in the context of the non-recognition of Islamic marriages in South African apartheid law on the ground that they had the de facto potential to be polygamous (opposed to public policy), to demonstrate the injustice that these marriages caused to an already vulnerable group of women. Rashida Manjoo, *supra* at note 10.

27 Charlotte K. Goldberg, 'The Schemes of Adventuresses: The Abolition and Revival of Common Law Marriage', *William and Mary Journal of Women and the Law*, 13:2, 2007, paper no. 2006-32.

## Chapter 3

# DIVERSE INTIMACIES: MAPPING NON-NORMATIVE INTIMATE RELATIONSHIPS IN RURAL AND URBAN CONTEXTS

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This chapter seeks to make visible the diverse intimacies that are on the margins of social acceptance. It also seeks to challenge the popular assumptions that view marriage as inherently safe and just for women, while holding non-normative intimacies as inherently exploitative and abusive. Despite our relative familiarity with non-normative family forms, whether bigamous, common law, or live-in relationships, non-normative intimacies do not feature in the rights advocacy of most women's, human rights, and progressive groups. This is not to suggest that these intimacies are entirely neglected by women's groups, for this documentation itself was made possible through such groups. Nonetheless, the engagement of women's groups, for the most part, is largely in terms of raising awareness of the illegality of these intimacies and of perspectives that view such practices as being inherently violent and harmful to women. The documentation of four diverse contexts of intimate relationships is based on fieldwork, secondary literature, and meetings with social workers, NGO staff, lawyers, and women in such relationships.

All four types of relationships mapped through fieldwork establish the fact that despite being outside of the legal framework, diverse customary and contemporary forms of intimate relationships remain prevalent, but are not factored into our work and perspectives. The relationships mapped here are bigamy in Himachal Pradesh, maitri karar in Gujarat, nata pratha in Rajasthan, and same-sex relationships in Kerala.<sup>28</sup> Of these, bigamy and same-sex relationships are not region specific, although the coverage here highlights region-specific dimensions, while maitri karar and nata are region specific. The diversity covered here is small and selective, as this mapping seeks to indicate the extent, prevalence, and diversity of non-normative intimate relationships in the Indian context rather than attempt a comprehensive coverage. The selectivity of coverage was determined by the availability of access to the respective contexts through a network of social workers, NGOs, lawyers, and activists.

Each of the four types of intimacies covered here is outside the framework of the law. Indeed, bigamy is an offence in law, and the status of same-sex relationships is still tenuous, being

<sup>28</sup> Although each type of relationship mapped here is with reference to a state, it must be clarified that the discussion under each does not reflect the regional differences within the state. Instead, it is limited to a few districts or regions of the state, and is analysed here to capture the broad aspects of the practice and its prevalence.

a matter of judicial review.<sup>29</sup> Three of the four types of relationships—bigamy, nata, and maitri karar—may in some cases be polygamous. All the contexts covered here, with the exception of same-sex relationships, are also heterosexual and patriarchal in their origin and structure, as is marriage, posing largely similar anxieties and risks to women. However, marriage is distinct in terms of being normative, as it is legally protected through enforceable rights and obligations. These rights, although being far from gender just, nonetheless provide leverage to some women in negotiating and challenging patriarchy more effectively.

This mapping demonstrates the linkage of demography, ecology, caste, and political economy with the family form. These kinship patterns and family forms are shaped by labour, caste status, land, livelihood, and the means of production. For the lower-caste groups practising nata, family labour and reproduction of labour are vital for farming, which is their primary livelihood. This explains the lack of emphasis on sexual purity but the high value attached to reproduction, so much so that it is hard for a woman to remain unattached during her child-bearing years. Women, therefore, are compelled to reproduce, often in serial monogamy, providing not just additional labour but also additional farm hands through reproduction. There is no stigma attached to widowhood or 'desertion', in contrast to upper-caste family forms where norms privileging sexual purity compel women to be in life-long unions, followed by sexual inactivity upon 'desertion' or widowhood. Similarly, the mapping of bigamy in Himachal shows a shift in family forms, from polygamy to monogamy or serial monogamy, corresponding to reduced dependence on land. The diversity in family forms is, therefore, not an outcome of free-floating choices or a regressive form of patriarchy, but is linked to demography, caste, and the political economy of a group, community, or region. Shifts in kinship patterns are unlikely to be on account of awareness raising or legality alone, but are more likely to follow larger changes in social norms and economic patterns. The mapping also shows a linkage between desire and sexuality with family form. While this may appear most evident in the case of same-sex

29 Same-sex relationships were until recently criminalized as part of 'unnatural sexual offences' under s. 377 of the penal code. In the case of Naz Foundation, the Delhi High Court by its judgment dated 2 July 2009, read down s. 377 to exclude adult consensual same-sex relations from the purview of criminality. However, several appeals against the judgment are pending before the Supreme Court, and it remains to be seen what the final verdict of the apex court on the status of same-sex relationships will be.

## Many Roads to Setting Up a Household



relationships, it is not limited to that context alone. Desire plays a role in each of the customary practices, with evidence of choice-based bigamous unions, same-sex natas, and maitri karars. Examples of subversion of the norm are not unknown or rare, and they reflect the ways in which these lend themselves to choice and desire, with women setting up a nata with a lover to escape an arranged marriage, or two women concretizing their relationship through an agreement, or a maitri karar.

The mapping shows that women in non-normative intimacies experience risks and anxieties akin to those experienced by women in marriage, and reveals that they draw similar satisfaction from their relationships, just as women in marriage do. The non-normative family forms are not uniformly exploitative and abusive for women, not any more than marriage. They are not lacking

in internal logic or rules, nor in notions of good and bad families. Further, these customary norms specific to each practice are socially respected and are enforced by the community. That these rules are patriarchal makes non-normative family forms similar to, rather than different, from marriage. What increases the risks for women, however, is the lack of legal recognition and rights within the relationship and the lack of debate on rights advocacy, or the absence of mobilization in these contexts. The absence of legal recognition/rights protection, rather than the nature of the relationship, undermines the agency of women to contest patriarchal control. It also shows that women are not compelled to enter into *nata*, *maitri karar*, or bigamy. Indeed, they may seek it, or otherwise comply, as do most women in terms of fulfilling social expectations of getting married by a particular age. There is clarity amongst women regarding the types of relationships that are ideal and those that are oppressive within their specific context. This awareness coexists with the notion that brahmanical customs and marriage are superior, mostly because they are associated with modernization, education, upward mobility, and the law.

### **Bigamy (Himachal Pradesh)**

Until the mid-1950s, Hindu family law permitted polygamy for men. The enactment of the Hindu Marriage Act of 1955 changed this situation with the introduction of monogamy. The penal provisions relating to bigamy became applicable to Hindus, who were thus far (like Muslims) excluded from its purview, if they entered into marriage without legally dissolving a prior marriage.<sup>30</sup> Even as the codification of the Hindu law made polygamy an offence for Hindu men, it made criminal prosecution by the wife conditional on evidence that was too difficult to produce, rendering the law largely ineffectual.<sup>31</sup> In addition to making prosecution of the husband conditional upon stringent standards of proof, the law enforced monogamy by declaring all rights of the second wife invalid. The monogamy rule rests, therefore, upon two pillars—a right to prosecution only by the first wife that is impossible to pursue, coupled with

30 Section 494 of the IPC penalizes marrying again during the lifetime of a wife or husband, with a punishment of up to seven years' imprisonment or a fine. The prosecution can, however, be initiated only by the spouse.

31 Flavia Agnes, 'Hindu Men, Monogamy and Uniform Civil Code', *Economic and Political Weekly*, 16 December 1995, 30:50, pp. 3238–3244, elaborates how monogamy in Hindu law has disadvantaged the first as well as the second wife, while advantaging Hindu men. The article also explains the illusory nature of the offence of bigamy. The prosecution can only be initiated by the first wife, and its success depends wholly on the first wife discharging the burden of establishing that her marriage ceremony conformed to the stringent legal standards, in addition to proving the same for the second marriage.

the denial of legal recognition, residence, property, maintenance, and dowry recovery to the second wife. Regardless of the law, bigamy continues to be practised more widely amongst Hindus than is generally assumed.<sup>32</sup>

Bigamy is generically termed polygamy. It remains prevalent in its customary and contemporary forms in all parts of the country.<sup>33</sup> There are two types of polygamy—polygyny and polyandry.<sup>34</sup> Polygyny refers to a marriage of one man with two or more than two wives at a time, although this is commonly called polygamy. Polyandry refers to a marriage in which the woman is married to more than one man at any given time. Polyandry is rare, and may take two forms: fraternal and non-fraternal. In the fraternal form of polyandry, one woman is regarded as the wife of all brothers, who have sexual relations with her. In the non-fraternal form of polyandry, one woman has many husbands, not necessarily brothers, with whom she cohabits in turn. Both polygyny and polyandry are customary to Himachal Pradesh, although polyandry has declined, giving way to polygamy and serial monogamy. Polygamy is the commonly used term for polygyny referring to a man with more than one wife.

The practice of both types of polygamy in Himachal Pradesh is linked to reasons of ecology, demography, and political economy that have shaped kinship patterns in adapting to the local environment. A study of the Jaunsaries,<sup>35</sup> a central Himalayan community, explains the ecological, economic, and cultural underpinnings of the institution of polyandry. Survival in the harsh mountainous terrain necessitated cohesive family systems based on joint labour,

32 Agnes, *ibid.*, cites figures for polygamous marriages among Hindus, Muslims, and Tribals for the period 1951–1960 from the 1994 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). In his article 'Polygyny and Divorce in Muslim Society: Controversy and Reality', Sekh Rahim Mondal cites a study conducted by the Census Department of the Government of India, Census of India, 1971, on the practice of polygyny on the incidence of polygamous marriages amongst various communities as follows: Tribals (15.25 per cent), Buddhists (7.97 per cent), Jains (6.72 per cent), Hindus (5.80 per cent), and Muslims (5.73 per cent). Asghar Ali Engineer, *Islam, Women and Gender Justice*. New Delhi: Gyan Publishing House, 2001.

33 Customary forms of bigamy often involved the wives living in a common shared household, whereas more contemporary forms are likely to involve the wives living in separate households, with or without the knowledge of each other.

34 For a discussion on different types of polygamy, see 'Bigamy', in Manjit Singh Nijjar, *Nullity of Marriage under Hindu Law*. New Delhi: Deep and Deep Publications, 1994 pp.20.

35 Prasanna K. Samal, Carole Farber, N. A. Farooque and D. S. Rawat, 'Polyandry in [a] Central Himalayan Community: An Eco-Cultural Analysis', *Man in India*, 76:1, March 1996, pp. 51–65. For polyandry in Jaunsar region and Kerala, see K. M. Kapadia, Chapter 4: 'Marriage and Family in India' (Third Edition) New Delhi: Oxford University Press, 1966.

sustainable use of resources, restricted population growth, and controlled fragmentation of land. The custom of polyandry may be seen as an adaptation to such geo-climatic conditions that has helped balance demographic pressure with resource availability. The Jaunsaries followed a collective economy based on agriculture and maintained solidarity between villages through the practice of village exogamy, or marriage to a person outside of one's village.<sup>36</sup> Upon marriage, all brothers in a polyandrous family would be the potential husbands of a wife irrespective of their age. Scholars argue that Jaunsar polyandry was not as patriarchal as it may seem from the outside; rather women's decision making was central to it. For instance, entry into a polyandrous marriage required a woman's explicit consent, and further, she could consent to either being a common wife to all brothers or to being the wife of only the brother she had married. Family decisions were expected to be taken in consultation with the wife. The wife was permitted to divorce her husband/s and to take another husband on payment of compensation by the new husband to the departing husband/s, by way of reimbursing the bride price. This system later allowed the entry of co-wives where the age difference was considerable between the wife and the younger husbands, or where the wife did not consent to cohabit with the brothers, or for reasons of son preference. Nonetheless, the eldest wife was superior to the other wives. Scholars on the subject argue that with more than one husband, the system of polyandry offered old-age support to wives and greatly reduced the possibility of widowhood. Over time, increased interaction with the outside world reduced economic dependence on local ecological resources in the region, leading to the replacement of polyandry by polygyny. In the latter system, women are obtained through payment of bride price and function primarily as economic assets of the community.

The available literature on marriage practices in Himachal Pradesh suggests that polyandry has been replaced by polygamy, or serial monogamy, whereby a man could marry a second wife without stigma upon paying the bride price.<sup>37</sup> The material basis for polygamy has been ascribed the importance of women as partners in agriculture, and more useful than hiring a Dhialta or tenant. A second wife is cheaper and a long-term option, besides being a sexual partner. It is also suggested in writings on bigamy in Himachal Pradesh that if a wife were satisfied in her marriage, she would be likely to seek additional help in the household and in farming by asking

36 Exogamy implies marriage to a person outside of one's tribe, clan, caste, or any such social grouping.

37 See, for instance, Chapter IV: 'Types of Marital Relationship: Polygyny, Polyandry and Divorce', in Y. S. Parmar, *Polyandry in the Himalayas*. New Delhi: Vikas Publishing House, 1975, pp.45

her husband to marry her sister, too, or to bring in a co-wife. The other common reasons for bigamy are son preference and prevalence of child marriage, which often resulted in large age differences between spouses, leading to sexual maladjustment. According to some studies, polygamous marriages were accompanied by high incidences of desertion and/or divorce amongst Hindus in Himachal Pradesh in the 1960s and 1970s, on account of maladjustment arising from child marriage.<sup>38</sup> However, the rise in education levels and the increase in the age of marriage of women have led to a decrease in the incidence of divorce.

Studies show that marriage practices among the Gaddis in Kangra district, too, have shifted over time from a pattern of polygyny for men and serial monogamy for both men and women to a preferred pattern of hypergamous dowry marriage, that is, marriage to a person of a higher socio-economic class, status, and caste than oneself. Some scholars dispute the direct relationship of these changes to the legal codification of marriage, attributing the changes instead to shifts in the ideals of conjugality and to their direct bearing on contemporary gender identities.<sup>39</sup> Today, multiple marital relations are perceived by the younger generation as moral transgressions practised by those who were poor and illiterate and by those who lacked modernity, as they prefer monogamous marriage and lifelong unions. It has been argued that the law did not create a contest between custom and law, but that legal changes, in combination with socio-economic changes and notions of modernity imbibed through education, helped alter aspirations and expectations, which changed the ideals of household and familial relations. This process of the reconceptualization of rights, responsibilities, and identities reconfigured kinship and marriage to meet the demands of the changed political economy.

According to SUTRA, an organization working with women in Himachal Pradesh, the practices of polyandry and polygamy in the 1950s and 1960s were linked to the need for a larger labour force in a demanding geographical terrain (such as found in Himachal Pradesh) in addition to low fertility levels in some communities.<sup>40</sup> Changes in land-use patterns and the shift from a subsistence economy to a market economy brought about considerable changes in the hills. For instance, the practice of bride price or reet has ceased, with nuclear families becoming the

38 Mohan Singh, 'Divorce in a Rural North Indian Area: Evidence from Himachali Villages', *Man in India*, 76:3, 1996, 215–228.

39 Kriti Kapila, 'Conjugating Marriage: State Legislation and Gaddi Kinship', *Contributions to Indian Sociology* (n.s.), 38:3, 2004, 379–410.

40 Subhash Mendupurkar, director of SUTRA: Society for Upliftment Through Rural Action, Jagjit Nagar, Himachal Pradesh.

norm from the 1980s onwards. These changes are not simply the result of increasing literacy and education levels; rather they are the result of modernity<sup>41</sup> and brahmanical<sup>42</sup> values transmitted through education, with images of nuclear monogamous families seen as the ideal. Evidence of brahmanical cultural influence is also visible in religious practices. The reading of the Ramayana and the worship of the major Hindu gods like Rama and Sita are new developments in the hills, where earlier people prayed to their local gods and goddesses, some of whom have no name. Changes are taking place in the caste hierarchies, too, with the increasing adoption of practices like dowry and 'hypergamy', that is, marrying into a social group above one's own, for instance marriage between Rajput boys and educated Gupta girls, the latter being a trading community. Attitudes towards bigamy and polygyny have changed since the late 1970s, not only as a result of the law and as a consequence of conflating education with brahmanical values, and of conflating non-monogamous conjugal traditions with signs of being uncivilized. Awareness-raising campaigns by mahila mandals and self-help groups have also played a role in disseminating these values, thus contributing to shifts in the local value system.

Even as most literature on Himachal Pradesh suggests a shift from polygyny to monogamous marriage, or to serial monogamy, the reality seems to be more ambiguous.<sup>43</sup> PLD organized a two-day workshop on bigamy in Himachal Pradesh, which was conducted by the Society for Upliftment Through Rural Action (SUTRA), to map the prevalence of bigamy, the patterns of

41 The term modernity is used here to refer to the consciousness that the present is progressive and distinct from a past defined by tradition. It is used not with reference to any distinct historical age, period, or epoch, but more in relation to a consciousness of breaking away from or a renunciation of the past, a move away from ritualism and tradition, and a move towards the new, the progressive, and the rational. In historical terms, modernity refers to the shift from an agrarian society to a modern nation state and to an economy based on industrialization and capitalism.

42 The term brahmanical is distinct from the term brahman in that it does not refer to a caste. Rather it refers to a value system (internalized across caste groups) based on the notions of purity and pollution, where the pure occupies the top position in the hierarchy of values, distinguishing it from the less pure and the most polluted or the untouchable. This value system is based on the caste-based hierarchy and norms associated with the brahman, in relation to manual labour, sexuality, kinship, and food. It is internalized across caste groups as a sign of modernity and progress. It is constituted in the law as well as in society in the way that sexual offences and women's role in the family are constructed.

43 Vimla Patil, 'Sacrificed at the altar of marriage', *Deccan Herald*, 15 April 2005, reports the research findings: 'In 58 years of Independence, just about 150 bigamy cases have been filed in Indian courts, whereas research shows that an average of 2,400 bigamous marriages are performed in every district of India annually. There are more than 365 districts in the country. Thus the number of illegal marriages adds up to a stupendous figure of 8,76,000 per year.'

### 3 Diverse intimacies: Mapping non-normative intimate relationships in rural and urban contexts

practice, and the experiences of women in bigamy in the contemporary context.<sup>44</sup> The workshop had 22 women participants; twelve of them had experienced a bigamous relationship, either in the past or in the present; a few were activists of the Mahila Mandals in the area. While most participants could not recollect any recent practise of reet or bride price,<sup>45</sup> they could count the number of doukal or bigamous families. Each participant could recollect at least one to five cases of doukal in her village. Although random recollection from memory does not make for a reliable source, it is nonetheless noteworthy since most of the secondary literature reports the practice of bigamy today in Himachal Pradesh as nil. A brief survey done by a member of SUTRA in the surrounding areas showed that twenty families in the region practised bigamy. In the case of eighteen of these families, the wives live separately, while only in two families did both the women live in the same house. The age of almost all the women in these families was above forty years. What seems to be more the case is a shift from traditional bigamy in Himachal Pradesh, where the wives shared a home, to a separation of homes for the wives. The common reasons for bigamy, according to the participants, were a desire for a son/male heir<sup>46</sup> and additional help with agriculture, and these concerns were largely specific to the landowning upper castes, such as the Thakurs and the Brahmans. Where the man married biological sisters, the property mostly remains undivided.

The workshop brought out a difference in the perspectives of social workers and non-social workers, reflecting our anxieties and dilemmas as activists. The former being more judgmental, in terms of viewing monogamy as a symbol of progress, despite the fact that some of them were in bigamous marriages themselves. There was strong empathy and support for the first wife, and an undertone of blame for the second wife, who was sometimes disparagingly referred to as 'sautan'.

44 The workshop was held on 14–15 August 2006 at the SUTRA campus, Jagit Nagar, Himachal Pradesh.

45 Reet is the money paid by the man originally to his wife's parents, and subsequently by every new husband to the wife's former husband. This custom was followed about forty or forty-five years back. When a married couple decides to separate, the husband is paid reet by the second man with whom the wife cohabits. If the woman decides to return to her first husband, he would have to return the reet to the second man, failing which the first husband would face a social boycott. According to the workshop participants, if the first husband does not pay the reet, it would be regarded as an act of 'chaar sou beesi' (cheating) by the community. The family of the woman would also be harassed if the reet were not paid to the second husband. In the case of such serial monogamy, it is usually the man who decides where the woman will stay. According to the workshop participants, reet is no longer practised because of higher levels of literacy, better knowledge of the law, and increase in the age of marriage.

46 In one case, the couple, although they loved each other deeply, jointly agreed to get a second wife for the husband because they 'only' had a daughter. They felt that to have a son was a question of their honour (*izzat*).

It is relevant that most of the participants in bigamous marriages were first wives, and the only second wife present at the workshop was the younger sister of the first wife. Unfortunately, this composition did not allow any space for the emergence of a different perspective on the second wife. Nonetheless, as the workshop progressed, it did succeed in steering the participants away from embracing binary positions on bigamy, focusing instead on exploring gender-specific concerns of both women in that context.

The small group discussions and case studies clarified that while bigamy was difficult to accept initially, women do get 'used to it'. Its manifestation is not uniform, varying from a situation of more than one wife living under one roof to two wives or more living separately, either in the same town or in different places, with or without knowledge of the existence of the other/s. The relationship of co-wives is not uniformly bad. However, in bigamy women were under greater pressure to keep appearances because of the assumption that bigamy makes for a more unhappy marriage, subjecting such relationships to greater scrutiny by the community than a monogamous marriage. Indeed, many of the areas of anxiety for women in bigamy are the same as those for women in monogamous marriage. For instance, the participants listed most concerns as relating to maintenance, desertion, amount of housework, and inadequate sexual attention as being common to both types of marriage. The group discussion mapped positive and negative aspects of both kinds of bigamy—wives sharing a house as well as wives living separately, which are summarized in Appendix B. The sharing of housework, child rearing, and agricultural labour, and sometimes greater mobility and freedom,<sup>47</sup> were listed as positive aspects of a bigamous marriage, especially where the second marriage was with the consent of the first wife or where the second wife was the younger sister of the first one.

The concerns unique to bigamy relate to the sharing of physical space, especially sleeping arrangements. One participant described an ideal bigamous home where the husband slept in an open room in the middle of the house, while the two wives had separate bedrooms adjacent to his. This arrangement reflected a conscious effort by the husband to be non-partisan in his attention to both his wives. One participant said that it was difficult to share love or to suffer neglect or the withdrawal of affection. Conflict arises when the man starts preferring one wife, or, much worse, when he actively ignores or starts disliking his first wife. Ignoring the first wife,

47 The wives had greater mobility and freedom when they had separate homes, as this necessitated the periodic absence of the husband when he went to the other wife's home. During the husband's absence, the wives reported greater freedom, as their mobility was no longer conditional on the granting of permission by the husband.

according to the participants, implied not taking care of her material and sexual needs. What is most important is the fulfillment of the needs and desires (*zarooratein*) of both the women.

Other concerns reported in the context of bigamy were the fear of losing financial support from the husband and the destitution of the children. The recognition of children and their entitlements was a worry for second wives, while eviction or desertion and the prospect of bearing a disproportionate burden of the housework were the concerns of first wives.<sup>48</sup> Today, desertion and bigamy are assuming different dimensions, with large-scale migration of men to urban centres in search of work, while the women remain confined to rural areas. Men frequently settle down with new wives without the knowledge of their first wives and stop sending money to them. It is not uncommon for first wives to be thrown out by their in-laws in districts like Hamirpur, which are said to have a 'money order economy'.

The participants said that second wives were insecure about obtaining community mediation and support in case of a conflict. One protection that was commonly sought was the registration of the second wife by the panchayat under the man's ration card, locally referred to as 'panjikan'. Once the names of the second wife and her children are entered in the ration card by the panchayat, their rights are more likely to be supported by the community, as locally this act is considered as legalizing the marriage. It is noteworthy that local practices have continued to ensure minimum recognition and obligation in bigamous marriages, despite the failure of the law to do so. The participants were unaware that this procedure had no legal validity. The social workers stressed the importance of 'registration' of the second woman in doukal families to secure protection from the panchayat during periods of distress, although men were more likely than women to approach the panchayat; the community as well as the panchayat usually tend to protect men's rights in a family dispute. A property conflict between two wives was unlikely, but in such a situation the second wife could hope for community support only if the first wife was dead.

The initial sympathy of the social workers reflects the community bias shown in the privileging of the first wife. However, following a discussion, the participants agreed that rights within marriage, whether monogamous or doukal/bigamous, should arise from the fact of the relationship or marriage, and should not depend on the partners' sexual morality or the technical/legal status of the relationship. They felt that the law disempowering the second

48 In discussing the positive and negative aspects of the sharing of housework in bigamous marriages, none of the participants questioned the gendered division of housework.

wife of her rights had more to do with judging women's sexual morality rather than securing the rights of the first wife; hence, a woman with five husbands or a second wife were denied rights. Disentitling the second wife of her rights was a means of guarding men's rights to have relationships without accountability. The participants pointed out that these double standards for women went beyond the context of bigamy. For instance, in the case of remarriage, only the woman is viewed as 'second hand', while the man remains 'first hand'. Despite empathy for the position of the 'second wife', and an understanding that both wives shared similar anxieties and fears, the first wife continues to be considered as the 'real' wife, and the second wife is at worst viewed as a vamp or at best as a victim of the system, revealing the different ways in which patriarchy is internalized by each of us.

### **Nata (Rajasthan)**

Nata is a customary form of remarriage that is widely practised and socially accepted among the lower-caste communities of Rajasthan. Custom requires that a virgin girl must first enter into a marriage, distinguished from nata by the marriage rites of 'pheras'. It is only after the death of the husband, or desertion, or breakdown of the marital relationship that the woman is eligible to enter into a nata relationship, once or more times sequentially following the first marriage. Notably, a woman can be married only once by pheras, and all subsequent relationships must be that of nata. A man, on the other hand, may enter into phera marriage more than once, since it is not conditional upon his virginity but on the virginity of his bride. A man may also enter into a nata relationship while cohabiting with his wife, whereas nata for a woman can only be in the form of serial monogamy.

Nata involves cohabitation, housework, care giving, childbirth, child rearing, fieldwork where necessary, and sexual intimacy, being similar to marriage in every way, but for the phera marriage and the social status it confers. Nata is also different from marriage in terms of the monetary value placed on the woman's labour and reproductive capacity, which is determined by the jati panchayat (body of village elders) and paid by the man receiving the woman in nata to her in-laws, or to her previous man (phera husband or nata husband), or to her natal family. The arrangement involves a written document called kagli that contains the amount to be paid by the man for the woman, called jhagra. The kagli acts as the receipt of payment of the jhagra money, which is retained by the nata husband, to be used in case of desertion by the woman or for giving away the woman in nata in the future. Nata, as a result, is more of a formal agreement

Does it matter who she is: legal wife, second wife, woman in nata or maitri karar...



Her rights arise from her role not her status

compared to the other Hindu marriage practices today, and it is enforced effectively through social pressure and the jati panchayat in case of non-compliance. Typically, the reasons for a man seeking a nata are the death of the spouse, desertion, and the desire for a male heir. 'Desertion', to a large extent, arises on account of child marriage, which results in incompatibility on account of age differentials between the spouses, educational disparities, unattractive looks, or dark skin colour of the spouse. Nata may also be initiated by the family (in-laws or natal kin) of the woman to clear a debt or to raise funds for the marriage of a son. A woman's nata may in some cases be initiated upon widowhood as a means of eliminating her property rights. On the other hand, women have also entered into nata on their own initiative to secure a better match, to ensure better treatment, for desire or love, or for upward economic mobility.

A study undertaken by Mahila Jan Adhikar Samiti (MJAS), Ajmer explains nata in relation to the social, economic, and cultural structures of the lower-caste and tribal communities in central-eastern Rajasthan.<sup>49</sup> The economic sustenance of these communities is linked to land, faming, and farm labour, and to some extent to jobs in the government and the army. They are mostly middle landholding classes, yet eager to partake of the benefits of modernization and development. The social and cultural value system views women as dependant on and linked to men. Value is placed on women's reproduction and labour as they are crucial to economic survival. The socio-cultural value system privileges men, male heirs, and men's control and ownership of women and land. A single woman has no place in the society. Given the widespread practice of child marriage, a single woman is likely to be widowed or deserted, and is commonly viewed as a 'chhodi huyi aurat' (abandoned woman). Singlehood is not allowed to women, and upon the death of the husband, or desertion, or a host of other reasons, she is given away in nata to another man by her in-laws, her husband, or her natal family, right through her childbearing years. Nata functions as a system that ensures that a woman never leaves family life and that she is harnessed in a nata for the economic appropriation of her labour and reproduction. MJAS explains that the belief that a woman should be never alone or single is central to the community's interest in reinforcing the practice of nata. For this reason, children are always in the custody of the father, the boy as heir and the girl as a source of income from future natas. The older a woman, the fewer are the takers for her.

The study brings out women's self-perception to be nearly as gendered, in terms of acknowledging the difference between good wife and bad wife, the husband's right to discipline the wife upon the commission of a mistake, acceptance of polygamy for men who can afford it, but not so for women, and acceptance of the man as the master. It examines the nature and extent of violence against women within nata and as a reason for driving women out of one nata into a subsequent nata to escape domestic violence. To that extent, women are known to exhibit agency frequently in exiting an abusive nata. Women report various forms of violence, such as physical abuse, the man's refusal to eat what the woman cooks, scolding, taunting, and stopping sexual relations with the woman. The reasons for violence against or desertion of women are placed on the shoulders of women as 'failures' on their part, such as childlessness, bad cooking,

49 Indira Pancholi and Ravi Hemadri, *Violence Against Women and the Customary Practice of Nata in Rajasthan: An Exploratory Study*, Tata Institute of Social Sciences, Mumbai, 2006. In addition to this study, this section is based on interviews with Indira Pancholi of MJAS, Ajmer; Renuka Pamecha of MSSK, Jaipur; and Kavita Srivastava of PUCL, Jaipur.

improper dress, untidiness, talkative nature, leaving the house too often or without permission, and so on. Despite such internalization of patriarchy, women are nonetheless conscious of what constitutes injustice within this context, and contest these instances of abuse. There is a broad consensus on the degree and type of violence that is acceptable and that which is absolutely wrong and not acceptable. The denial of child custody to women moving into another nata is considered an unjust practice. Amongst the women in the community, there is a notion of 'good' nata and 'bad' nata. The former is consensual; it is entered into upon the termination of a previous marriage by death or desertion; and it is agreeable to the family and the community. It is also celebrated within the community. A 'bad' nata is described by the women as being secret, forced, resulting from abduction, and initiated without a good reason.

The jati panchayat has an important role in deciding the jhagra and matters related to it. The family and the jati panchayat together seem to be the main arbiters in getting into nata and in executing the kagli. The women, however, are not part of the jati panchayat, and are rarely part of a hearing of a dispute concerning their nata. A dispute or problem relating to the nata is taken by either of the families or by the husband, and not by the woman, and typically pertains to the jhagra money or the making of a new nata. The jati panchayat does not seem to play a role in addressing problems specific to women, such as violence against women within the nata or forced nata, or indeed women's control over the jhagra money. That women do not have any share in or control over the money paid for their nata, the denial of child custody, and denial of access to children from a previous marriage or nata are problems that are largely not taken up by the jati panchayat. Nor is the jati panchayat generally concerned with the use of force, violence, and kidnapping to establish a nata.

A study by Amnesty International reports:

While a small percentage of these second or third marriages are reported to be through choice, the majority occur when women are pressurised into remarriage through desertion by their husbands and are forced by their families into a further marriage. In many of these cases women are literally sold by one man to another[,] with her parents, former husband or relatives often acting as intermediary. In those circumstances where women do have rights over property, usually after becoming widows, they often become the target of violence by family or community members wishing to take the property from

them. Property is thereby not only a context for violence but [also] a reason for women being unable to escape violence.<sup>50</sup>

The MJAS study, however, refrains from characterizing nata in sweeping terms or from judging it by an entirely sexual and moral yardstick (owing to the prevalence of serial monogamy). Even as it examines the nature of violence in nata, the study highlights the possibilities in nata that allow women to exit an unfulfilling relationship and remarry, unhindered by cultural notions of sexual purity, all of which run contrary to upper-caste Hindu tradition. Forced nata is like forced marriage, except that nata can mean serial unions. Unlike marriage, however, the possibility of nata takes the pressure of life-long unions off women, making other options possible. The customary giving of the bride price is based on a recognition of the value of women's labour. Despite its potential advantages, the study notes that the practice of nata is used largely to exert patriarchal control over women's sexuality, labour, and reproduction. A woman's family or her husband's family, her husband, the community or the panchayat, or the woman herself can take the decision to enter into nata. It is, in some contexts, decided in a cordial atmosphere with the consent of the woman. The structure allows for women's agency in ways that caste Hindu marriage does not, and has been used as such by women under some circumstances.

The study, consciously avoids suggesting the elimination of nata. Instead it attacks the predominantly patriarchal aspects of the practice, which, just as they do in the context of bigamy and marriage, need to be countered actively through external intervention. Indeed, the study draws lessons from nata for rights strategies within marriage, questioning the current advocacy on compulsory registration of marriage on the ground that even though the documentary proof of kagli in nata provides clear evidence of the nata, it fails to resolve conflicts or to empower women. The approach of a few women's groups and crisis intervention centres in Rajasthan has been to promote women's interests within the context of nata, as well as to facilitate use of the law where possible.

Nata as a 'marriage practice' falls outside the framework of the law, particularly when there is a spouse with whom the marriage has not been dissolved legally, constituting a bigamous marriage, or indeed where the nata is forged on the commission of criminal acts such as abduction and coercion. Nonetheless, women in nata do use the legal system to explore all available options of

50 'The battle against fear and discrimination: The impact of violence against women in UP and Rajasthan', Amnesty International, <http://web.amnesty.org/library/print/ENGASA200162001>

help, and use the jati panchayat as well. Women's agency in nata, as in marriage, arises from a set of circumstances outside of these patriarchal institutions, being based on other factors, including external support mechanisms, awareness, education, and so on. MJAS extends support to women in negotiating claims over jhagra money, property rights, and child custody, and in seeking protection from violence and protection from entering forced natas. The Mahila Salah aur Suraksha Kendra gets cases of women in nata and helps the women in 'forum shopping', or choosing between the jati panchayat for mediation or the formal legal system for claiming remedies, depending on the potential of each of the two fora for the woman in a given situation. These women's groups have also participated in jati panchayats held to resolve nata disputes. The subject matters of the disputes range from stopping a forced nata, to releasing women from the cycle of 'ownership' established by nata by rejecting the reimbursement of jhagra money, to ensuring that women have the right to a copy of the kagli or nata document, to pursuing claims of maintenance upon desertion and child custody, and seeking protection from violence.<sup>51</sup> Today, the changing context of nata has reduced the choices available to women. Not only is it increasingly a corrupt practice, but dowry and consumerism have also entered the practice. Today, the phera, which used to be part of the marriage custom, has also entered the practice of nata, which may be regarded as the brahmanization of the practice.<sup>52</sup>

Notably, the impact of rights interventions and crisis support to women has enabled women's agency to negotiate within nata, as illustrated by the cases given in Appendix C. Many of the problems faced by women in nata are not very different from those faced by women in marriage, but are made different through the non-availability of civil remedies in relation to the partner. While some nata cases have secured the court's support, essentially on the basis that a woman in nata is dependent upon the man for maintenance, this position has not been adopted uniformly. Activists feel that the role of the police, the court, and in general the state—and their involvement—in nata incidents is extremely negative. If women's agency in the context of nata is to be strengthened, then, say activists, the law and the state have to go beyond banning nata and offering protection from domestic violence, by negotiating power relations within nata, most prominently in relation to putting the jhagra money in the name of the woman; giving women the possession of the kagli document; asserting women's custody of their children; and combating violence against women in the family, including coerced nata.

51 See Appendix C for cases reflecting such interventions drawn from the records of the Mahila Salah Suraksha Kendra, Jaipur and Vividha Features, Jaipur.

52 Interview with Kavita Srivastava of PUCL, Jaipur.

## Maitri Karar (Gujarat)

Maitri karar, literally 'friendship contract', is a written document, often notarized and registered, that contains the terms and conditions on which a couple agrees to enter into cohabitation. An overview of the available literature and information on maitri karar reveals that the karars emerged as a means of evading compulsory monogamy introduced under the Hindu Marriage Act in 1955. Maitri karars, or written contracts of friendship executed between a man and a woman, gained considerable social validity during the period from the late 1950s to the 1970s in Gujarat within the Hindu upper-caste middle-class community, and was a popular way of legitimizing an intimate relationship outside of marriage. Thousands of couples seemed to have entered into such contracts, and even registered the same in the manner of a formal agreement, although no exact data are available. According to the scholars and lawyers interviewed in Ahmedabad,<sup>53</sup> the adoption of a karar or written contract was modelled on the business practices of the Gujarati middle class, who entered into such cohabitation arrangements, and even registered these as formal agreements with the office of the Registrar.

A Bengali matrimonial website defines maitri karar as a pact between a married Hindu man and a woman who is not his wife, while his marriage is in subsistence.<sup>54</sup> In Vijay Sharma's study,<sup>55</sup> the only secondary literature available on the subject, the karar is described as 'a new device adopted by some unscrupulous males amongst Hindus to get over the rule of monogamy'. According to Sharma, a maitri karar is typically contracted between a married man and an unmarried woman who has come of age to formalize the terms and conditions for living together, which usually include provision of maintenance, clothing, shelter, and all other necessities of life by the man to the companion. It is suggested that most women contracting such agreements consider themselves to be married as a result of this document, and in fact are likely to view the agreements as legal certificates sanctioning their cohabitation and childbearing. Sharma notes that the husbands, on the other hand, are aware of the non-binding nature of such arrangements. The clarity of the contract, however, does absolve the men of guilt or deceit, as they may maintain their legally wedded wife and children as well as

53 Individual interviews were conducted with NGO representatives, lawyers, and academics in Ahmedabad as part of the fieldwork in April 2006.

54 <http://www.bengalimatrimony.com/consult/legal/legalaug302004.html#top>

55 Vijay Sharma, 'Monogamy: Its Inefficacious Legal Imposition', in *Protection to Women in Matrimonial Home*. New Delhi: Deep and Deep Publications, 1994, pp. 116–117.

the 'friend'. The karars are also used as a means of 'getting rid of [the] wife without undergoing the formalities of divorce'.

According to some social workers, the popularity of the karars seemed to threaten the social structure of Hindu society in Gujarat. It undermined Hindu law and the Hindu institution of marriage, and contributed to orphaned children. The rights of children and women in karar relationships were not protected under the law, and on the dissolution of such relationships, the second women and their children were rendered destitute. Offspring from the cohabitation faced stigma in the community and the school, leading to emotional and psychological stress. The state government, under pressure from eminent persons and social workers, formally banned the practice in the early 1980s, relying largely on the erosion of social order and the harm caused to children by such cohabitation arrangements. Similarly, the adjoining state of Maharashtra declared that the registration of the 'companionship contract' or maitri karar was opposed to public policy, by the following notification:<sup>56</sup>

*In exercise of power conferred by sub-section (1) of section 22-A of the Registration Act, 1908 (Act XVI of 1908), in its application to the State of Maharashtra hereby declares that the registration of a document purporting or operating to effect a contract popularly known as 'Companionship Contract' or 'Maitri Karar' is opposed to public policy.*

*Explanation – For purpose of the notification the expression 'Companionship contract' or 'Maitri Karar' means a contract (by whatsoever name called) between a male and a female, whether either or both of them married or not, the consideration or object of which is forbidden by law, immoral or opposed to public policy.*

Officially, the karars existed for about ten years until they were banned in the early 1980s, but our fieldwork and interviews show that although the karars have decreased, they still continue under different names and forms. The reasons for the decrease have more to do with socio-economic changes than just the government ban. Our field interviews brought out the divergent perspectives on the practice of karar, its origins, and the status of women within it. Social workers tended to view it as uniformly negative, in terms of its morality and exploitation

56 As reported in Loksatta, <http://www.loksatta.com/daily/20020730/chprati.htm>

of poor women. In contrast, lawyers, academics, and some social workers provided a more complex picture, which amongst other things, reflected women's agency and negotiation. In some cases, women did secure greater economic support than what is set out for them by the law or the patriarchal social system. Clearly, the relationships forged through karars were neither uniformly good nor uniformly bad for women.

A gender and class analysis of the karars shows that in the early years, many karars were contracted between upper-middle-class and elite men (including academics and bureaucrats) and women from the poor sections of the community. Apart from the imposition of monogamy by the Hindu Marriage Act, 1955, the difficulty in obtaining a divorce under the law was a reason for the popularity of the karar.<sup>57</sup> Scholars in Ahmedabad attribute this popularity to the rapid urbanization in Gujarat in the 1970s, from which emerged a new middle class of upper-caste people.<sup>58</sup> Many rural elite men migrated to cities for business and set up new homes through karar relationships. Although the karars began among the urban upper class, they also spread generally among middle-class Hindu men. The karar was the response of a society in 'transition', dealing with rapid development, urbanization, and rural-to-urban migration, all of which generated greater freedoms.<sup>59</sup> For women generally, the clarity of the terms and conditions set out in the contract provided an assurance of security that they otherwise did not have in such relationships, and a degree of formality that lent social legitimacy.<sup>60</sup> Getting maintenance for the children was one such advantage to women.<sup>61</sup> In general, the karars, like any other contract, worked better where the parties to the contract were in positions of equal bargaining power, which the gendered society and the class differentials of the contracting parties made difficult. Nonetheless, women are known to have negotiated security and terms that were stronger than those that might be offered in a live-in relationship. Karars and affidavits have also been used by lesbian women, within and outside Gujarat, to formalize their commitment and relationship, achieving what the law does not allow.<sup>62</sup>

57 Interview with Mrinalini, activist lawyer, Ahmedabad.

58 Among the lower castes, *nathra*, a customary form of remarriage, is practised.

59 In conversation with Prof. Gaurang Jani, Samaj Vidya Bhavan, Gujarat University; and with Girish Patel, activist lawyer.

60 Interview with Prof. Gaurang Jani. Similar views were expressed by Mrinalini, activist lawyer, Ahmedabad.

61 Interview with Mrinalini, activist lawyer, Ahmedabad.

62 See the notarized Deed of Agreement of Partnership between Mamta and Monalisa, in Cuttack, dated 6 October 1998. *For People Like Us*, Aids Bhedbhav Virodhi Andolan (ABVA), 1999; Asaruna Gohil and Sudha Amarsingh registered a maitri karar; Shweta and Simi

### 3 *Diverse intimacies: Mapping non-normative intimate relationships in rural and urban contexts*

The agreements—referred to variously as friendship contract, companionship contract, living together agreement, upa-patni karar, and kept contract—do not grant any rights under the Hindu Marriage Act to the woman who is party to the contract. The karars were earlier written with the help of a lawyer on a stamp paper and were notarized. Despite the knowledge that such contracts were legally void, people preferred the legal trappings to formalize the arrangement. The breach of the terms of the karar do not lead to the presumption of rape either, because the second wife's consent is recorded in the agreement. The first wife of a man who is party to the contract is entitled to seek divorce on grounds of adultery, although he is not liable for bigamy. Although the maitri karars lack legal validity, they have been used for claiming matrimonial remedies under civil law. Typically, the problems in karar relationships have arisen (as in marriage) upon the breakdown of the relationship or the revocation of the conditions supporting the woman. According to social workers and activists, the courts have never accepted a karar as proof or evidence of a relationship.<sup>63</sup> Cases were never filed or won on the basis of the terms of the karar, which are not enforceable. Nonetheless, activists say that in some cases the courts have considered karar along with other evidence to ascertain cohabitation, and have directed maintenance for the woman and her children 'from a human rights point of view'. Where there are no disputes, and if both the parties are satisfied with each other, property transfer and joint ownership have also been known to take place, although in law the woman would have no rights over the property.<sup>64</sup>

While in the 1970s, the karars were made on Rs 20 or Rs 50 stamp paper primarily for cohabitation, today, with increasing acceptance of live-in relationships, such karars have become fewer. There is evidence that the contemporary cohabitation karars continue, and are often advertised in newspapers, much like matrimonial advertisements. In view of the ban, the term maitri karar is no longer used, but lawyers believe that advertisements for 'rasoi vali behan ka karar' (contract for a kitchen sister/companion) in Gujarati newspapers today employ new euphemisms for the old karars.<sup>65</sup> Lawyers report that the karars are frequently oral now, and son preference is one of the important reasons for the contemporary practice. Cases where the wife agrees to her husband entering into such an arrangement to have a son

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filed a witnessed affidavit in 1998 in the Patna High Court. References from Bina Fernandes, 'Two Too Many', Report of Stree Sangam, Mumbai.

63 Interview with Neelima Vyas and Resmi Trivedi, lawyers at Jyoti Sangh, an Ahmedabad-based NGO providing legal support to women.

64 Interview with Girish Patel, activist lawyer.

65 Interview with Piyush Jadokar, Advocate.

are also known, but these rarely lead to a long-term cohabitation or relationship. As divorces have become more frequent,<sup>66</sup> and as live-in relationships no longer carry the stigma as they did in the past, the formality of contracts has become less important, although not totally redundant. In addition, the courts have begun to take a sympathetic view of long-term cohabitation. In some cases, the courts have directed the husband to provide maintenance to both his wife and the karar woman. If the couple has offspring, the children are granted maintenance until the age of 18 years, and in the case of girls, until they get married. The NGO Jyoti Sangh, which provides legal support to women in Ahmedabad, receives cases of women in karar relationships. According to it, often women describe themselves as wives, and only later reveal the karar. The karars may vary, and these are confidential in nature. However, a model contemporary karar provided by a lawyer shows that they remain a domestic arrangement where a woman in a stronger bargaining position can negotiate security and support explicitly for herself as well as for her children who are part of the new family they form (see Appendix D).<sup>67</sup>

The karars are also popular for formalizing divorce between husband and wife. Typically, this is written in the form of an agreement to divorce on Rs 550 stamp paper, also called a stamp paper divorce. Such customary divorce requires a husband to state his intention on Rs 500 stamp paper and for the wife's consent to be stated on Rs 50 stamp paper. The divorce karar provides a degree of security to the husband from a subsequent objection from his wife were he to bring another woman into the house. It relieves the husband of any moral, spousal, or social pressure that might obstruct a second relationship.

While the current popularity of the karar is declining, it is nonetheless considerable in actual numbers according to some reports. One such report, which seeks to debunk the communal propaganda in Gujarat that projects Muslims as polygamous, reported as many as 29,951 cases of maitri karar officially registered at the District Collectorate in Ahmedabad in 1993.<sup>68</sup> What is notable, however, is that maitri karar involves non-monogamous unions and relaxed sexual

66 Prof. Gaurang Jani noted that as many as 30 per cent of the matrimonial advertisements in Gujarati newspapers are for remarriage.

67 A sample contract obtained from a lawyer in Ahmedabad is given in Appendix D.

68 Rathin Das, 'Muslim Polygamy: A Mere Myth. Survey.' <http://www.polygamyinfo.com/intnlmedia%20plyg%20191hindu.htm> See also Anil Chamadia and Subhash Gatade, 'Poison Myths', *Indian Express*, 5 November 2003. <http://www.countercurrents.org/comm-gatade061103.htm>

norms typically attributed to the lower castes and Muslim by upper-caste Hindus, in a context of urbanization, migration, and changing economic patterns.

### **Same-Sex Relationships (Kerala)**

The concerns of same-sex desiring women in Kerala have been extensively documented, which allows us to examine issues related to this context. Kerala is exceptional for other reasons as well. The state leads in social indicators of progress, with the highest literacy, highest female literacy, highest balanced male–female sex ratio, and other progressive socio-economic indicators. Yet the practice of dowry has increased across all communities; the gendered division of labour remains unchallenged in the home despite large numbers of women in the workforce; and there is evidence of great institutional resistance to investigation of, and demands for accountability in cases of sexual harassment and sexual violence. Women and gender justice remain at the margins of the political concerns of the state, and of social movements within it. Kerala reflects a complex outcome of high social indicators and rigid sexual and gender norms, which results in gender disparities alongside social development, and a high degree of intolerance of sexual and gender transgressions by women. As a consequence, the situation of same-sex desiring women is characterized largely by secrecy, fear, violence, and suicide. In the context of Kerala, the spectrum of violence ranges from less to more explicit violence, such as surviving in situations hostile to same-sex desire and gender transgression, concealment of sexuality, forced marriage, forced migration, displacement, and suicide. Of course, the degree of fear and violence, as well as the capacity to negotiate these challenges, varies with the caste, class, and urban–rural positioning of the women. Given the fear of persecution upon being identified as lesbian, few same-sex partners are able to spend their life together, and the few who succeed do so by hiding their sexual identities. The queer movement, and the growing support from progressive movements in opposing the violence and stigma attached to same-sex relationships, has created confidence among same-sex people in urban India. Nonetheless, as Narrain and Bhan write, it is a ‘hesitant freedom for none of us can afford to forget how fragile the few accepting spaces we inhabit are, or how few of us have access to them.’<sup>69</sup>

69 Arvind Narrain and Gautam Bhan, ‘Introduction’, *Because I Have a Voice: Queer Politics in India*. New Delhi: Yoda Press, 2005 at page 1.



The context of Kerala illustrates the constellation of violations around lesbian women in documented empirical terms most clearly. Although in the context of India, most same-sex desiring women do not identify as lesbian, the term lesbian is used here for convenience to refer to those who are same-sex desiring, whether they identify as lesbian, or bisexual, or neither of the two. The large number of suicide pacts between lesbian couples in the last two decades has transformed the understanding of mostly lower-class and lower-caste lesbian women's realities from that of 'mere' sexual orientation to a matter of life and death. Media reports over a seven-year period (roughly from the mid-1990s to 2002) show that there have been 25 lesbian suicides in Kerala and that the majority of these were women below 22 years. These data include only those

women who killed themselves along with their partners. If one counts the women who killed themselves alone, the number will be higher.<sup>70</sup> Extracts from newspaper reports on lesbian women in Kerala highlight the degree of fear, isolation, and hostility these women faced, as well as the concerns of housing, employment, and shelter they confronted, all of which increase the vulnerability of lesbian women to violence.

70 Devaki Menon, Sahayatrika coordinator, in *India Today*, 25 December 2002.

- *Jisha's letter says that no one should try to find my whereabouts, in which case I will kill myself. (Thuravoor, Malayala Manorama, 16 February 2006)*
- *Two women, Nasheeta and Sumita, got married at the Guruvayoor temple. Sumita's father took them home. When asked 'if this is proper?', Nasheeta, it seems, replied 'like a real man' that 'we will be together in life and death'.* (Mathrubhoomi, 24 April 2003)
- *Attingal: Two girls from Chirayinkeezhu Higher Secondary School were dismissed for getting married in the Chirayinkeezhu Devi Temple. When their friends came to know about their marriage, the news spread and the Parent Teacher Association immediately called for a meeting and took the decision to suspend the girls.* (Keralakaumudi, 26 November 2002)
- *Thrissur: The court granted permission to two women who wanted to live together. They are Shiby (22) and Prema (23).* (Mathrubhoomi, 27 October 2002)
- *Sisha changes her mind: Refuses Mini: 'After living together with her girl friend, Mini, for a few months, Sisha is finally taking a decision to leave her. Mini and Sisha, who eloped to Coimbatheer together five months ago and came back home to live together, are now separating. Sisha has confessed about her sins and is now attending the mass (prayer). But Mini is preparing herself to go to court, accusing Sisha's family of forcefully taking Sisha away from her.'* (Malayala Manorama, 13 October 2000)
- *On 14 January 1995, Mathrubhoomi reported the suicide of Gita (22) and Saija (16) who had eloped from Allepey one month after Gita was married. Gita was discovered almost dead, having consumed poison. The police discovered love letters they had written to each other.* (Times of India, Mumbai. 15 August 1999)

- *Sree Nandu is among the first lesbian women in a relationship who came 'out' to the media. The following is an extract taken from her interview published in the Malayalam magazine, Bhashaposhini (September 2004): 'Only a woman can really understand and love another woman the most. That is not the way men love women. Our conservative society looks at women only as objects of sex and that is why they are unable to conceive this reality. . . . my sister got married three years ago. All the arrangements for the marriage were done by me, like booking the hall, ordering and buying things, etc. Normally, these are things that a brother would do. People asked: Isn't that your sister? Why is she doing all this? But my father never had a problem with all this. My father used to say, why can't a sister do what a brother can do? That is the way my father brought me up. He always bought me boy's clothes . . . Just because I am like this, I do not want to run away to Bangalore. I want to live here. I was born here and want to live here only. I know many people here have committed suicide. And people ask me if I will do the same. Never. . . . when Achu's father fought with us, we left for Bangalore for a short while to be away from here. I got to know much more while I was living there. That these are not big issues when you live in a city. Only in our Kerala it is seen as a big problem, as it is wrong. That gave me a lot of courage. Now I can say anywhere that I am a lesbian. I feel that now no one should kill themselves because of this. If my saying this in public gives courage to some others, I am extremely happy.'*

- *"Two persons love each other and they want to live together. If they both happen to be women, what is the issue? Others start asking questions like: "How will you have children? How will you enjoy sex, etc.? Is it only for sex or for children that people get married or is it to get closer to each other? Can't two people be together for love, friendship and togetherness?" asks Sheela. (Vanita, Malayalam Magazine, 15–31 August 2004)*

### 3 *Diverse intimacies: Mapping non-normative intimate relationships in rural and urban contexts*

It is in this context that Sahayatrika, a lesbian support group in Kerala, is situated. According to Devaki Menon, the coordinator of Sahayatrika, activists from human rights, women's rights, and queer rights movements came together to create a support group for lesbian women in 2001. It started work with the support of Sangama in Bangalore and of FIRM (Foundation of Integrated Research in Mental Health) in Thiruvananthapuram to promote awareness of queer issues and to address, specifically, the issues faced by lesbian and bisexual women in Kerala. Sahayatrika, which originally began as a one-year project of FIRM, is now an independent organization. In 2002–2003, it started a helpline for lesbian and bisexual women and undertook research and documentation of lesbian suicides and related issues in Kerala. Through small workshops held across the state, it reached out to women in same-sex relationships and raised issues of sexuality at any available forum. Following Sahayatrika, other queer groups and spaces emerged in Kerala.<sup>71</sup>

The grave and life-threatening hostility against lesbian women has caused nearly all the attention of supportive social movements to be focused on violence, fear of violence, and suicide, that is, violence that obstructs 'choice' in terms of sexual preference. Testimonies of women recorded at a small workshop organized by PLD with Sahayatrika in Thiruvananthapuram (see Appendix E) bring out the extent to which class, caste, and economic insecurity exacerbates the degree of hostility and increases the likelihood of displacement of lesbian women and transgender persons (female to male). Queer feminists from Kerala believe that the focus on violence has marginalized the equally pressing concerns relating to employment and housing that stem from the stigma and hostility faced by same-sex desiring women, and that this also affects lower-class/caste same-sex desiring women. Some of the vital areas that have been neglected as a result of the focus on violence are the inability to open a joint bank account, to seek insurance, and to open a provident fund, all of which typically require a blood or marital relationship for someone to qualify as the joint holder or nominee.<sup>72</sup> Living together also is shrouded in secrecy, and is usually accompanied by strong assertions of being 'just friends' or flat mates to erase signs of being a family or a couple to the neighbourhood and to the world at large.<sup>73</sup>

71 Such as Snehapoorvam, Vathil, Vathilakam, and Gaia. FIRM runs four drop-in centres in Kerala (in Ernakulam, Thiruvananthapuram, Thrissur, and Calicut), which run distinct projects relating to lesbian women, sex workers, and men who have sex with men (MSMs).

72 Queer feminists from Mumbai, too, agree that the focus on violence has been at the expense of concerns such as spousal benefits accruing from insurance and joint banking, child custody, and protection from intimate-partner violence. LABIA, Mumbai, at the National Consultation on Rights in Intimate Relationships, PLD, May 2008.

73 Awaz e Niswan and Forum Against Oppression of Women, Mumbai, at the National Consultation on Rights in Intimate Relationships,

Sahayatrika's services for lesbian, bisexual, and transgender persons (female to male)<sup>74</sup> include crisis intervention, shelter, police protection, dealing with loss of employment, and relocation to safe shelters outside Kerala. For working-class women, once they leave the house, their own survival remains the biggest issue. In the face of such severe persecution, women are known to commit suicide or are forced to move out of Kerala to relocate in the neighbouring state of Karnataka with the help of Sangama (Bangalore). The typical middle-class responses to women who 'come out', or who are found out and brought back to their family after eloping, are forced therapy, confinement at home, and coerced marriage. The class, caste, and economic status of the women, in addition to their location (urban or rural), determine their options and influence their capacity to deal with such situations. For example, a higher-caste woman who is economically secure can get other jobs, or even move to a more liberal environment, whereas a less privileged woman cannot risk giving up the employment she has; nor does she have the savings or the means to relocate, or to live independently of her family. As a consequence, Sahayatrika has prioritized the securing of basic rights, such as housing, employment, and survival, over advocacy against Section 377 of the IPC.

One of the main reasons for the dehumanized responses by the media, the law enforcement system, the community, and the family is the equation of lesbians with deviant sex. Lesbian women are perceived as oversexualized as a result, and their relationships are reduced to sex acts alone.<sup>75</sup> Even where the families accept the women, society does not. Thus, once identified, lesbians cannot escape the stigma of perversity and unnaturalness, making them not only less women, but also less human. Lesbians evoke such strong reactions primarily because their visibility challenges the ideals of passive female sexuality, heteropatriarchy, and marriage in a very fundamental way. Stigma and persecution are part of an everyday reality for working-class lesbian women, for whom livelihood options are tenuous and choice of housing and mobility is restricted. Under such pressures, some working-class lesbian women seek sex-altering surgeries to conform to the norms of compulsory heterosexuality. Although many transgender persons

PLD, May 2008.

74 Transgender persons are persons who are born into a particular sex but who identify with the opposite sex. As a result, they assume, to varying degrees, the gender characteristics of the opposite sex. Many transgender people do not believe in the strict male–female dichotomy that prevails in society, and exhibit a combination of male–female physical attributes and a combination of masculine and feminine social attributes, hence assuming a unique gender identity.

75 Ruth Vanita, *Love's Rite: Same Sex Marriages in India and the West*. Palgrave Macmillan. 2005, p. 10.

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want to change their bodies to reflect their gender identity, some make the choice to gain social acceptance and live more easily as man and woman.

An Amnesty International report on intimate-partner battering notes:

Like in heterosexual partnerships, battering among LGBT intimate partners crosses age, race, class and socio-economic lines. While same-sex battering mirrors heterosexual battering both in nature and prevalence, its victims receive fewer protections. Many LGBT victims of intimate partner violence are denied services such as emergency shelter, medical treatment, financial assistance, counselling, job training, legal services, and many others that are routinely prescribed for battered heterosexual women.<sup>76</sup>

Such an environment requires women's groups to integrate concerns of same-sex relationships into their larger body of work, beyond condemnation of violence and affirmation of 'choice' of sexual preference. The neglect of caste, class, and transgender concerns is reflected in the lack of attention to housing, education, and employment rights, which result in displacement. The silence around these concerns is, in and of itself, a human rights violation. It falls upon all progressive groups, particularly women's groups, to give visibility to these rights, to question the grading of desires along the spectrum of good–bad and natural–unnatural, and, simultaneously, to question the privileges attached to marriage. One way of challenging heteronormative marriage is to demand the right to enter same-sex marriage. Another way is by developing frameworks of a core set of obligations in intimate relationships without reference to marriage. Simultaneously, it is necessary to talk of queer families (and not only of intimacies) that are diverse and non-nuclear, but bonded by commitment and caring.

76 NCAVP LGBT DV report for 2002, quoted in the Amnesty International report, 'Domestic Violence in LGBT Communities' <http://amnestyusa.org/women/violence/domestic-violence-lgbt.html>

## Chapter 4

# CHALLENGES, POSSIBILITIES, AND FUTURE DIRECTIONS

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The process of working on this project, conducting fieldwork, and holding discussions in small and large workshops surfaced the anxieties and challenges faced by social workers in supporting women in non-normative intimacies. It also reinforced the belief that our rights advocacy is not productive if, amongst others, it does not proactively include women in bigamous marriages and women in maitri karar, nata, and same-sex relationships, in other words, the women in non-conforming diverse family forms. The marginalization of vast numbers of women is exacerbated on account of a partial and partisan rights framework that privileges some women as rights holders and discredits the entitlements of many others because their intimacies do not conform to the heteronormative brahmanical model enshrined in the law. The advocacy for greater rights within the existing framework of the family does not touch the lives of many women on the margins and bypasses many social realities. What makes this exclusion unacceptable is that this bypassing does not stem from an ignorance of other realities and contexts, but because the hierarchies relating to sexuality and family make some realities less deserving than others, and in the process make some women less human than others. Norms related to sexuality, in many complex ways, colour perceptions of good and bad relationships and taint those whose lives and choices fall on the wrong end of the good–bad spectrum. The grading is more complex than it seems. For many in the mainstream, same-sex relations may be at the deviant end of the spectrum. For many progressive others, same-sex relations, if monogamous, may sit alongside monogamous opposite-sex live-in relationships and marriage, but for them, a maitri karar, or serial monogamy in nata, and non-monogamy of any kind may fall at the wrong end of the spectrum.

The value of this project, and of the accompanying fieldwork and discussions, lies in highlighting the anxieties and challenges that we need to engage with and the debates that we need to continue more vigorously in order to proceed forward. The journey for women's rights is a continuing one, and we need more spaces to revisit the boundaries and to reexamine the assumptions made in the law and in our rights advocacy, practices, and community action. The project has also highlighted the need to go beyond critiquing and to engage simultaneously in re-visioning rights frameworks that are inclusive of customary, contemporary, and emerging intimacies. This section draws upon the discussions held at various levels, but most particularly draws upon PLD's National Consultation on Rights in Intimate Relationships, to summarize the key challenges, possibilities, and future directions in this area. It approaches future directions

by responding to some of the questions and anxieties that are frequently articulated by social worker and rights advocates as coming in the way of exploring an inclusive rights framework for women on the margins.

## Acknowledging the non-normative and the hierarchical grading of intimacies

Women's rights activism has always sought to develop rights that are grounded in the social realities of the women. Yet the dominant rights framework is founded on 'a' social reality that

reinforces the norm, and does not encompass or reflect the diversity of realities on the margins. Such a rights framework reinforces the grading of non-normative intimacies as bad for women, justifying the illegitimacy of status and denying the rights of women in those contexts.

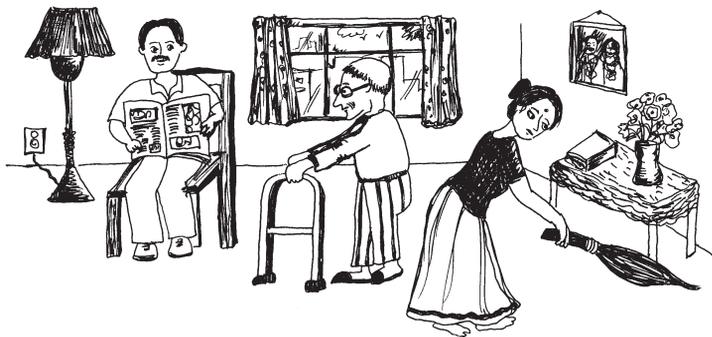
In respect of bigamy, which is perhaps the most common of all the non-normative intimacies, discussion on rights is closed off with assertions that the two women's rights are fundamentally competing. Assertions of a homogenized social reality consign some social realities to the



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### One Man, Two Households

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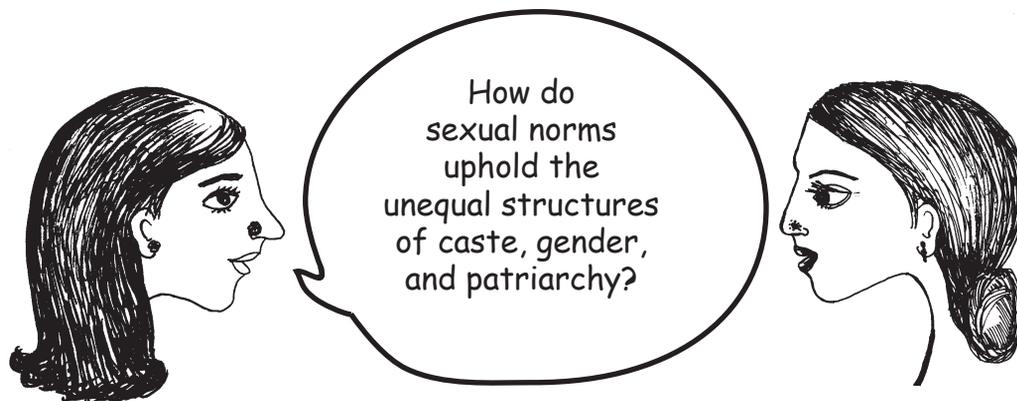
realm of stigma and invisibility, and reinforce the value system that underpins the hierarchical grading of intimacies from good to bad, or indeed the denial of rights to women on the margins. It is, therefore, necessary and important to not only acknowledge the diversity of intimacies that exist, but also to acknowledge the limited context or constrained reality that informs our work.

We need to revisit our selectivity and our privileging of social realities. The issue is clearly not that other realities do not exist, but rather which realities we choose to focus on and which we choose to erase from the rights discourse. Indeed, the question is not merely one of recognizing diverse realities, but rather one of recognizing the grading that we attribute to them. The normative realities may inform our work more than the non-normative realities, but that, too, needs to be acknowledged in order to clarify and qualify the scope of our work, our priorities, and what we choose to leave out. There is a greater need to actively probe the silence around the non-normative and to examine its dismissal as being irrelevant to the rights framework. In particular, in relation to advancing women's equality, our understanding of structural oppression and inequality cannot be complete without an understanding of not only the norm, but also of the margins. Therefore, even as the struggle for women's rights in normative relationships remains a contentious one, it is tied up with the struggle for rights of women at the margins—and this cannot justify the erasure of women in non-normative intimacies from our rights discourse.

### **Debating norms relating to sexuality and monogamy**

We need to work at creating greater opportunities and spaces for dialogue on sexuality amongst ourselves, in wider fora and in the community. We need to examine the ways in which sexual normativity constitutes power/privilege, on the one hand, and stigma/deviance, on the other hand. Indeed, we have not used the spaces available to us, within organization and at the community levels, to discuss adequately sexuality in general and marginal sexuality in particular. Neither have we used the rich repository of case work available to us as a medium of triggering discussions on sexuality, law, and rights. A discussion on rights in intimate relations cannot start without first unpacking sexuality and re-examining the relation between sexual norms and patriarchal and caste control. We have difficulty in expanding our framework to include intimacies that are akin to marriage because we have difficulty in critiquing the very norms that privilege marriage over other intimacies.

The peripheral importance given to the need for understanding, and the integration of, sexuality within the work of most women's groups contrasts with the centrality given to sexuality in



the work of queer feminists. For a long time, the women's movement's engagement with sexuality was limited to sexual violence. This was, to some extent, because of the silence surrounding, and the normalization of, violence against women. More recently, women's groups have begun discussing sexuality, but these discussions often remain limited to non-discrimination in the 'choice' of sexual orientation in relation to LGBTI. In contrast, the queer movement and sections of academia have taken up sexuality as a political issue, exploring its relationship with systems of power, such as caste and gender. Sexuality is a political system of power, as are patriarchy and caste, with all three sharing mutually reinforcing norms. Therefore, our discussions need to go beyond non-discrimination/choice. Until we acknowledge how sexual norms grade women on the basis of their sexuality—across the scale of good–bad, natural–unnatural, while privileging some and demonizing others—we cannot explore an inclusive framework of rights in intimate relationships or rights for all women.

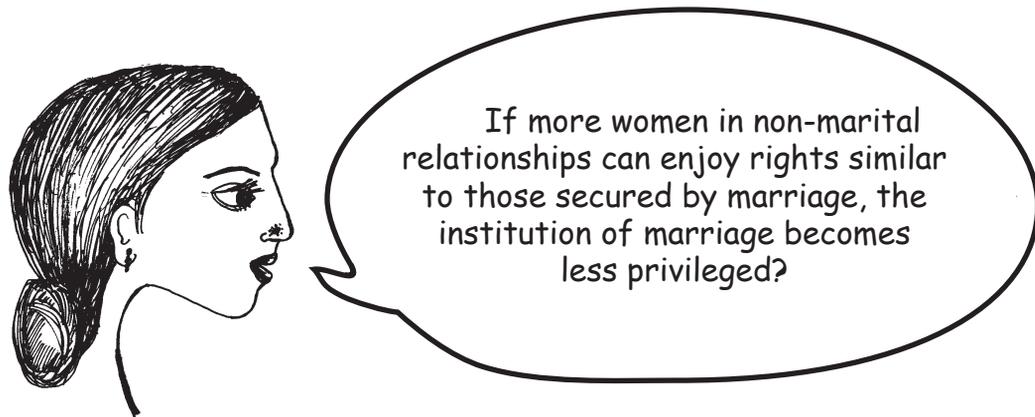
The sexual norms that underpin the grading of good and bad intimacies shape not only the law that divests women in non-monogamous intimacies of their rights, but also stop us from critiquing such a law. Not only does the law divest the second wife or cohabitee of rights, but it also deprives a woman in a monogamous marriage of her right to maintenance if she were found to be 'unchaste'.<sup>77</sup> The internalization of this legal morality has severely limited the concerns addressed by women's groups to women in non-monogamous intimacies. The flaw of non-

<sup>77</sup> Chastity is a condition for a wife claiming maintenance under Section. 125 of Cr.P.C.

monogamy in law occurs in more than one way, either by entering into a relationship with a previously attached male, or by a woman on account of unchastity in an otherwise monogamous marriage. The reluctance to even debate monogamy has only served to privilege the rights of one woman over another, similarly placed woman. The popular discourse on monogamy typically assumes that monogamy is safe for women and is a less contentious matter for the rights enforcement system to handle because it is legal and normative and is an ideal family form (despite the countless cases that show that monogamy is as unsafe and as contentious for claiming rights). Rather than focus on challenging patriarchal norms that shape both monogamous and non-monogamous forms of family, energy is lost in debating the merits or advantages of monogamy over non-monogamy. This judgmental approach has resulted in omitting the human rights of women in non-monogamous relationships from the discourse on women's rights. There is a need for more debates to understand and overcome the barriers posed by sexual norms, as a starting point to moving forward in our attempts to expand rights to all women in the family.

### Steps towards demoting dominant norms

Human rights standards require us to constantly push the boundaries of rights and to include all persons in all contexts. This goal has led to making rights available in the domain of the family. The goal remains—in terms of advancing equality and non-discrimination within the family, as much as in terms of making rights in the family available to all families, regardless of marital status



If more women in non-marital relationships can enjoy rights similar to those secured by marriage, the institution of marriage becomes less privileged?

or sexuality. The advancement of these goals necessitates challenging the ideological beliefs that justify a marriage-centric rights framework while demonizing non-marital relationships. Such a challenge requires acting on many levels simultaneously—by giving visibility to all those who live on the margins, by critiquing the norms on which privilege and stigma are based, and by demoting the normative by making marriage available for the non-normative. While this may not radically transform the privileging of dominant family forms, the processes of engaging in debate, bringing visibility to non-normative family forms, expanding rights, imparting rights education, and adopting new approaches to case work can make the practices of transgressing the norm more acceptable.

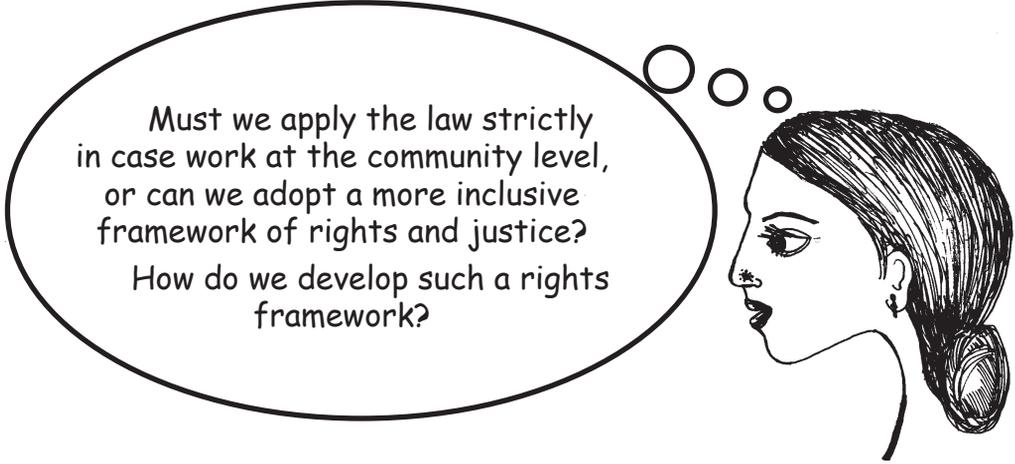
Eventually, such processes and activism must aim to shift the fulcrum on which rights are articulated and imagined from marriage to the household, from legality and the nature of kinship ties to the years spent together. Some concrete steps that can immediately take this goal forward are:

- (1) through disassociating core rights from the domain of marriage, in terms of applying for loans, buying joint property, and buying insurance, which will allow persons other than those related by marriage or blood to apply jointly;
- (2) rights to adequate housing for single women and women-headed households; rights for single women under development schemes such as NREGA;
- (3) critiquing laws and seeking legal reform in respect of laws that embody heteropatriarchal norms, such as penal provisions against unnatural sex, adultery, enticing away the wife of another man, or family law provisions, such as restitution of conjugal rights;
- (4) critiquing the move towards the compulsory registration of marriage as it seeks to provide ‘proof of marriage’ to secure financial security and maintenance under family laws;
- (5) sexuality education and debates that unpack the politics of norms that privilege and stigmatize on the basis of sexuality, for these open up perspective-building opportunities for activists.

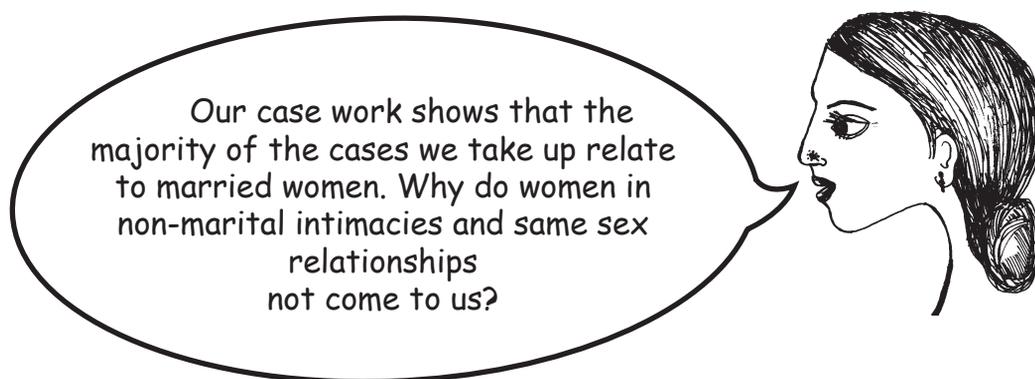
Most importantly, there is a need for continued and more vigorous discussions in the public realm, in the social justice sector, and amongst practitioners and activists from diverse sectors of social work, academia, and the law, to explore gender justice and the rights framework in diverse contexts.

## Expanding the limits of justice through case work

While many progressive groups that adopt feminist approaches use innovative strategies on a case-by-case basis in relation to non-normative intimacies, most of them struggle with seeking clarity on negotiables and non-negotiables in respect of non-normative intimacies. Despite innovative interventions that go beyond the boundaries of the law, such strategies have not adequately influenced law reform advocacy. There are several reasons for this disjuncture. There is a widely felt discomfort with bigamy per se that feeds into the perception that bigamy cases are more difficult to handle. However, discussions and studies of case work show that a wide variety of cases are demanding; these may include bigamy, but are by no means limited to bigamy cases, and neither is this true for all bigamy cases. The common dilemma seems to pertain to the ethics of balancing the interests of both the women in a bigamy case. This dilemma stems from a view that bigamy involves a clash of interests between the women, rather than between two distinct sets of interests against a common partner. Some women's groups express strong reservations about bigamy per se, viewing all bigamy cases as instances of cheating, and therefore beyond a family counselling/solution, a strategy typically used for most case work. Another gap in case work is that women's groups hardly ever, if at all, receive cases of lesbian women. Most reported never being approached by lesbian women or transgender persons. Some insist that if approached, they would take up the case. Some others feel that such cases are best handled by specialized lesbian support groups in the city where such groups exist. In contrast, queer feminists and lesbian groups in cities have begun to receive cases and have begun documenting violations relating to lesbians and transgender persons.



Must we apply the law strictly  
in case work at the community level,  
or can we adopt a more inclusive  
framework of rights and justice?  
How do we develop such a rights  
framework?



A major reason why women's groups and crisis intervention centres do not get cases of women in same-sex live-in relationships, second wives/partners, or of transgender persons is because the groups have not tried hard enough to attract diversity to themselves. For example, women's groups worked very hard to break the silence around domestic violence; it was only after they had undertaken considerable outreach work and created community awareness that the cases began to come in slowly. To extend support to women in non-normative relationships and to women on the margins of sexual normativity, we similarly need to reach out and break the silence before we can expect the cases to come in. Reaching out by women's groups, therefore, is a precondition for women on the margins to gain confidence in the group and to approach it for help. And such reaching out requires an inclusive rights framework, a belief in the rights of all women in intimate relationships.

## Rights education

Rights education is important for developing awareness of the concept of human rights, for understanding the role of the state as a duty bearer towards citizens, and for knowing, most importantly, that intimate relationships are also subject to rights and wrongs that the state is duty bound to protect. In this context, legal literacy plays a vital role in providing knowledge of the law and in serving as a tool to help others and oneself in the community. However, rights are not just about the law. They are also about movements that have struggled to define rights in specific contexts, to give shape to human dignity, freedom, equality, non-discrimination, and to define what these promise in relation to the family, society, workplace, and the state. As rights

activists we know that the law falls far short of human rights standards; as feminists we have critiqued the law for being based on heteropatriarchal, brahmanical, middle-class interests. Surely, then, our rights education must go beyond the law and beyond references to women that flatten the disparities and diversities amongst women, so as to render invisible the concerns of marginalized women. Rights education, therefore, must combine legal literacy together with a critique of the law, and must explore an alternative inclusive framework of rights. This approach can be part of programmes run by many women's and human rights/law organizations—as gender and law trainings, awareness-raising initiatives within the community, dialogue with community leaders, including the law enforcement system, the judiciary, the panchayats, and



other stakeholders. PLD's rights education includes the law, but without allowing legality to limit the boundaries of rights or case-work solutions or notions of justice. Rights education in relation to the family provides ample opportunity to facilitate the questioning of norms and power relations reflected in the law and to explore an alternative inclusive framework.

### **Transformatory rights framework**

We need to imagine rights beyond what the state defines for us, even as we engage with and use what the law offers. Equally, there is a need to imagine alternative family forms that challenge the norms of the institutionalized family form and the rights/obligations that exist within it. Feminist groups did explore notions of the family and alternatives to it in the 1980s, but, unfortunately, since then such conversations have shrunk rather than expanded despite the proliferation of organizations and rights work. The framework of FAOW, which radically reconceptualizes family and obligation, is a significant contribution to this area, but it did not generate a wider discussion as it could have in the women's movement.<sup>78</sup> The need to imagine and re-imagine is as important, as it takes us beyond being reactive to the existing law and moves us to a position where we can envision solutions.

However, the new frameworks need to go beyond the liberal model of state feminism, where new rights are added to the existing family structure, or indeed where a few diverse family forms and a few women on the margins are 'added and stirred' into the existing framework. It needs to question and break the norms that privilege marriage, for today marriage is not simply one amongst other options. It is the only option where rights are recognized. For a rights framework to be transformatory, it needs to go beyond being inclusive—to displacing norms that privilege marriage, chastity, monogamy, and heteronormativity, norms that privilege a few women—and go beyond attempts to make rights conditional upon compliance with these norms. Therefore, a truly transformatory rights framework must go beyond increasing rights within the institutionalized family form, or merely recognizing select 'choices', or including select women on the margins into the existing framework. Further, it must respond to the complex needs of families to include children and the elderly, to expand the kinship networks, as well as consider material assets and financial security arrangements. A rights framework has to respond

<sup>78</sup> 'Visions of Gender Just Realities', a draft framework by the Forum Against Oppression of Women (Mumbai, November 1995) outlined two sets of frameworks—for hetero-relational realities and homo-relational realities—where the obligations are not only just those between the partners, but also those developed as economic and social rights in relation to the state.

to concerns about custody, adoption, housing, care, finances, insurance, sickness, and death that apply to all family forms. Therefore, such a framework has to go beyond claiming rights from a partner, because neither are all persons endowed with class privilege or material wealth, and nor are all intimacies exclusive. It must, therefore, address rights to the state, particularly in relation to housing (as well as transitional shelter), housing loans, and credit. The right to property (irrespective of whether the share is, in fact, delivered to women) has little relevance for many women whose families do not possess land or property. Since economic and social marginalization in the home and in the workplace is a consequence of structures of law, state policy, and the market, the state must be positioned more prominently as a duty bearer for providing and protecting the housing rights of women.

We need to imagine a set of core rights where the state is a duty bearer in areas outside of the domain of marriage and one that is not just limited to 'emergency' services of transitional shelter and medical care. While the provision of immediate needs is important for making available strategic short-term relief to respond to case work/victimhood, these needs must be combined with the long-term and changing roles and aspirations of women, and must also consider diverse patterns of intimacies and relationship goals. A rights framework can coexist with, and is not mutually exclusive of, the strategic application of the available law in case work.

## Chapter 5

# EXPLORING A RIGHTS FRAMEWORK

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Discussions of the framework explored in this resource book seek to add to earlier and ongoing discussions on developing a more inclusive framework of rights in the family in respect of intimate relationships. It outlines a minimum set of obligations and examines the basis or rationale for these obligations in the context of intimate relationships, regardless of the law and irrespective of marriage. The development of an alternative framework is guided by a conscious effort to include women who are stigmatized and excluded from the dominant framework of rights in the family. It is developed to respond to issues raised in the contexts of bigamy, nata, maitri karar, and same-sex relationships, but is not limited to these contexts alone. It includes the context of marriage, as also other sustained non-conforming intimacies not mapped as part of this project. Accordingly, it will include same-sex and opposite-sex live-in relationships, long-term relationships that may or may not involve regular cohabitation, encompassing the contemporary and emerging family forms. Rights in this framework are not linked to the law, but refer to the normative ideal of what is legitimate and derived from human rights. Thus, it is relevant to our work and can be adopted in community interventions, case work, mediation, advocacy, rights education, and other forms of crisis intervention. The references to international human rights law show the vast possibilities of non-discrimination and inclusion before us, and the references to domestic law help draw attention to the obstacles that we need to surmount to achieve legal recognition.

This section will use the term ‘family’ to refer to sustained intimate relationships on which the family or household is founded. The shift in terminology is necessary for drawing upon the law, both international and national (referred to as domestic here). The relevant terminology in international law for sustained intimacies is the ‘family’, and it is adopted here for the purpose of consistency. This section will approach the alternative rights framework in two parts: the first, highlighting the fundamental aspects guiding the rights framework; and the second, expanding upon four distinct areas of obligations/entitlements that must be part of such a framework.

## Fundamental aspects of the transformatory rights framework

**Political rationale for women’s rights in the family** The alternative framework seeks to fulfil distinct political goals, those of de-linking rights from the hierarchies of family forms, sexuality, and caste. It links women’s rights in the family to recognition of women’s sexual division of labour and their investment of non-material resources, rather than the legal status of the relationship, sexual orientation, gender identity, monogamy, or indeed the fault of the male

partner or desertion, or occurrence of domestic violence. In this sense, the rights framework explored here is distinct from that of the fault-based family law or the violation-centred PWDVA.<sup>79</sup> It outlines a minimum set of obligations and entitlements to women in sustained intimate relationships regardless of the occurrence or non-occurrence of fault by either party, or indeed desertion of or violence towards the woman. The basis of the rights framework is, therefore, not purely to compensate a ‘wrong’ or to help a ‘woman in distress’, but rather to establish a measure of equality in otherwise patriarchal and gendered socio-economic relations amongst intimate partners, within families, and in the community.

### **Relationship of the alternative rights framework with human rights law**

References to international human rights law are important for bringing out the extent to which the alternative framework of rights explored here is consistent with human rights standards. More importantly, these references establish the extent to which different sources of human rights law prescribe an inclusive non-discriminatory framework of rights in the family that are available to all women irrespective of the family form, with particular emphasis on the rights of the more marginalized and hitherto stigmatized groups of women—LGBTI, women in live-in relationships, single mothers, and rural women. The alternative framework explored here is integral to the fulfilment of human rights in respect of gender equality in the family.

### **Relationship of the alternative rights framework with domestic law**

The term domestic law refers to the national law in India. The references to domestic law in this section are largely (although not always) in relation to statutory law so as focus on the intention and the letter of the law and to understand the extent to which these are explicitly inclusive of women in non-normative relationships. The comparative perspective provided by the human rights law and the domestic law helps contrast the two frameworks to highlight the areas of divergence and compliance in domestic law.

<sup>79</sup> The entitlements and remedies under the religion-derived family laws as well as the secular Special Marriage Act require the claimant to successfully establish the commission of a recognized ‘fault’ or ‘wrong’ by the opposite party. In the absence of mutual consent, proceedings for the dissolution of marriage also require the claimant to establish a ‘fault’ committed by the opposite party. The remedies under the domestic violence act also, as the title suggests, require the commission of a recognized form of domestic violence for claiming any of the remedies.

**The scope of the term family** The family in international human rights law is interpreted to include all ‘family’ forms. The definition of the family in human rights law is not limited to institutional and legal definitions of the family, but includes non- normative relationships, and therefore all of the provisions pertaining to the family in international law apply to all family forms. General Recommendation 21 to CEDAW states:

The form and concept of the family can vary from State to State, and even between regions within a State. Whatever form it takes, and whatever the legal system, religion, custom or tradition within the country, the treatment of women in the family both at law and in private must accord with the principles of equality and justice for all people, as Article 2 of the Convention requires.<sup>80</sup>

Similarly, the Special Rapporteur on Violence Against Women (SRVAW) defines the family as ‘the site of intimate personal relationship.’<sup>81</sup> SRVAW has adopted a subjective definition of the family based on individual bonds of nurturance and care, to encompass the ‘difference and plurality’ of family forms rather than institutional, state-based definitions,<sup>82</sup> to extend rights and state-based protections to ‘wives, live-in partners, former wives or partners, girl-friends (including girl-friends not living in the same house), female relatives (including but not restricted to sisters, daughters, mothers) and female household workers.’<sup>83</sup> This definition of family expands state obligations to include protection from the perpetrators of violence who do not fall within the traditional definition of the family. The 1999 report of SRVAW emphatically calls for a move away from traditional definitions of the family, noting that:

the culturally-specific, ideologically dominant family form in any given society shapes both the norm and that which is defined as existing outside of the norm and, hence, classified as deviant. Thus, the dominant family structure—whether it is dominant in fact or merely in theory—serves as a basis against which relationships are judged.

80 CEDAW, General Recommendation 21 (1994), at para 13. A/47/38.

81 E/CN.4/1996/53, at para 25.

82 E/CN.4/1996/53, at para 25.

83 ‘A Framework for Model Legislation on Domestic Violence’, E/CN.4/1996/53/Add.2., Part II, Subpart B, para 7.

## Diverse family forms



Further, it serves as the standard against which individual women are judged and, in many cases, demonized for failing to ascribe to moral and legal dictates with respect to family and sexuality. The extent to which such concepts apply to and have an impact upon women's lives is mediated by class, caste, race, ethnicity, access to resources and other ways in which women are marginalized. Such ideology exposes women to violence both within and outside the home by enforcing women's dependent status, particularly among poor and working class

women, and by exposing those women who do not fit within or ascribe to traditional sex roles to gender-based hate crimes.<sup>84</sup>

Cautioning against limiting rights to the narrow institutional definition of the family, SRVAW observes that upholding dominant norms of the family despite the empirical realities of diverse family forms serves to sanction violence against women transgressing traditional roles within and outside the home.<sup>85</sup>

**Towards the fulfilment of substantive equality** The rights framework should be one that seeks to correct structures of oppression, subordination, and control in all family forms and for all women in intimate relationships. The approach to equality set out by CEDAW is one that enables an equality of outcomes for all women, in all contexts. Applied to the area of intimacies, it must neither exclude women at the margins from rights protection, nor be limited to marital relationships only, for that would fail to address gender discrimination in all families, for all women. In assuming that all families homogeneously adhere to the institutionalized marriage, the existing law adopts a ‘formal’ equality model, one that fails to respond to the diverse realities, differences, and disparities amongst women, perpetuating thereby the socio-economic marginalization of and disadvantages faced by those women. However, the contents of legal rights are purely protectionist in that they respond to women only upon the occurrence of violation, suffering, or victimhood, typically as dependants or as adjuncts to male providers in the relationships of wife, daughter, and mother.

**Identifying minimum obligations, entitlements, and protections for women in all intimate relationships** The four areas in which rights are discussed in this section affect women regardless of the form of family in which they live. These areas have been identified on the basis of issues common to the non-normative intimacies mapped in this project—bigamy, nata, maitri karar, and same-sex relationships— although they are not limited to these contexts alone. The areas on the basis of which the alternative rights framework has been developed are as follows:

84 E/CN.4/1999/68, at para 9, which references Ratna Kapur and Brenda Cossman, *Subversive Sites: Feminist Engagements with Law in India*. New Delhi: Sage, 1996.

85 E/CN.4/1999/68, paras 6–9.

- Recognition of consent, choice, desire
- Financial security
- Security of residence and provision of transitional shelter
- Protection from violence

The issues of child custody, guardianship, and child support are cross-cutting concerns for all women regardless of family form, but these issues are not covered here, primarily because this listing is not meant to be exhaustive, and also because these issues were not explored sufficiently in our fieldwork on non-normative relationships. The term ‘minimum obligations’ is used here to suggest that these rights and obligations can coexist independently of any family law, or indeed of a contractual agreement (to the extent that the contract does not undermine the core rights). The family law in any context may well give greater rights to those intentionally contracting formal legal relationships. However, family law or legal frameworks should not become the sole basis for claiming rights in intimate relationships, or indeed become a measure for determining a woman’s legal status or the lack of it in respect of the minimum obligations and entitlements related to cohabitation and sustained intimacies.

## **Outlining minimum obligations and entitlements in the four areas**

Each of the four areas discussed below introduces the scope, nature, and rationale of rights to establish the basis for the claim. This is followed by an examination of the human rights framework supporting rights in that area, and concludes with a discussion of the position of the rights in domestic law. The discussion on each area grounds the alternative rights framework in feminist analysis and human rights standards, and seeks to bring out the divergence, gap, and potential between these two, on the one hand, and the domestic law, on the other hand.

### **1. Recognition of consent, choice, and desire**

Neither choice nor consent on their own adequately captures the complex considerations on which sustained intimacies are founded, which include desire, care, and the need for emotional and material support. However, consent and choice are commonly viewed as indicators of conscious decision making in intimate relationships and are widely recognized as a right, commanding legal protection. Consent has several references in law—in relation to age of majority for determining the capacity to contract a marriage and consent to engage in sexual relations. Choice, on the other hand, is a broader and more ambiguous concept. It implies a

selection from a range of options, assuming there are equivalent competing options and that all such options are within the reach of the person making the choice. In respect of intimate relationships, it indicates the types of partnerships or choices legitimately available to a person in a given society.

In its liberal sense, the term choice is problematic as it discounts how social, cultural, and economic influences shape our choices and how they determine the availability of choices. Similarly, it discounts the fact that 'diverse choices' and family forms are not free-floating options, but are rooted in local demography, political economy, ecology, and individual aspiration/agency in that context. The previous section mapping diverse non-normative relationships brings out the ways in which each of these shape family formations in diverse contexts. Each family form is governed by an internal logic and normative system that corresponds to the political economy that best sustains patriarchy in respect of the specific caste/region. The term 'choice' is used here cautiously to indicate a minimum level of 'decision making' that must be explicitly secured for and by women while entering into a relationship.

**INTERNATIONAL LAW** The human rights standards adopt both the terms choice and consent in relation to the founding of a family. At the universal level, this right is protected for both men and women, but elaborated more specifically in relation to women in light of gendered social realities that impact women in all societies. Article 16 (1) of the Universal Declaration of Human Rights observes, 'Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family . . .', that is to say, such a right cannot be restricted on the basis of race, nationality, and so on. This position is echoed by Article 23(3) of ICCPR and Article 10 (1) of ICESCR.<sup>86</sup>

Responding to gendered socio-cultural realities that make marriage compulsory for women, and often without consent or choice in respect of the time of marriage or the person to marry, this norm has been reformulated by Article 16 (b) of CEDAW as follows: 'States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: (a) The same right to enter into marriage; (b) The same right freely to choose a spouse and to enter

<sup>86</sup> Art 23 (2) of the ICCPR states 'the right of men and women of marriageable age to marry and to found a family shall be recognized'. And clause (3) 'No marriage shall be entered into without the free and full consent of the intending spouses.' Article 10 (1) of the ICESCR states, 'Marriage must be entered into with the free consent of the intending spouses.'

into marriage only with their free and full consent . . .’ CEDAW differs from the previous covenants to the extent that it stresses explicitly the equality between men and women with regard to their rights in choosing to enter a marriage. A predecessor to CEDAW, the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 1962, stipulated that no marriage shall be legally entered into without the full and free consent of both parties, to be expressed by them in person after attainment of the minimum age specified in law.

The right to enter into marriage and to found a family in ICCPR has been made contingent only upon attaining a certain age, no more. Indeed, the exercise of rights in ICCPR, according to Article 26, cannot be restricted or made conditional upon reasons such as ‘race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’, or indeed upon sexual orientation. In *Toonen vs. Australia*, the Human Rights Committee held that the term ‘sex’ in Article 26 includes sexual orientation, thereby extending the right to choice and the right to marry to same-sex relationships.<sup>87</sup> The Yogyakarta Principles, which contextualize the established human rights standards in relation to sexual and gender minorities,<sup>88</sup> elucidate the right to found a family in Principle 24 thus: ‘Everyone has the right to found a family, regardless of sexual orientation or gender identity. Families exist in diverse forms. No family may be subjected to discrimination on the basis of the sexual orientation or gender identity of any of its members.’ The Yogyakarta Principles explicitly forbid use of violence in preventing couples from entering into intimate relationships, recognizing the plurality of forms of families, and recognize that diverse family forms are also subject to human rights protections, regardless of whether such families are recognized by the law.

**DOMESTIC LAW** The constitutional guarantee of personal liberty includes within its scope the right to found a family, to have security for family life, and by implication the right to choose one’s partner, irrespective of marriage. Both consent and choice are derived from the overarching guarantee of the right to life and personal liberty under Article 21 of the Indian Constitution.<sup>89</sup>

87 No. 488/1992 CCPR/C/50/D/1992, 31 March 1994.

88 In response to well-documented patterns of abuse and discrimination against sexual and gender minorities, a distinguished group of human rights experts from 25 countries representing all geographic regions met in Yogyakarta, Indonesia in 2006. The principles formulated by them are cited widely by UN human rights special mechanisms, academics, activists, and law courts, including the Delhi High Court in *Naz Foundation vs. Govt of NCT of Delhi and Ors* (2 July 2009).

89 Article 21 states that ‘No person shall be deprived of his life or personal liberty except according to procedure established by law.’

This fundamental right is supported by Article 14, which stipulates equal treatment before the law, thereby declaring unconstitutional any discriminatory restrictions to the exercise of consent and choice. This right essentially places upon the state the obligation of protecting the exercise of this consent and choice for all individuals uniformly and without any unreasonable distinction, and places upon the state the obligation to remove and provide redress against obstacles that impinge upon the exercise of this right. However, consent and choice are not clearly, consistently, or uniformly framed or respected in the statutory law, particularly in respect of family life, marriage, and consensual sex.

On the face of it, consent and choice are recognized in family law upon the fulfilment of two conditions: the attainment of the age of majority and heterosexuality. However, an overview of the law in respect of marriage and adult consensual sex illustrates an uneven approach to age of marriage/majority, limited respect for consent, and fragile protection by the state in the exercise of 'choice' in marriage. The discussion is divided into age of majority, consent for entering into marriage, consent within marriage, and choice for purposes of distinction and clarity.

**AGE OF MAJORITY** The age of majority varies under different religious laws some allowing consent at an age earlier than what the civil law stipulates for majority. Under the Hindu, Christian and the Special Marriage Acts, the age of majority for the girl is 18 years, and for the boy it is 21 years.<sup>90</sup> The Muslim law is not fully codified, but requires the consent of the guardian for the marriage of a girl under 15 years of age. Scholars of Muslim law state that consent is a necessary condition for a valid marriage and that majority is attained at puberty, which is presumed to be attained at 15 years. Therefore, the age of majority for girls and boys under Muslim law is 15 years.<sup>91</sup>

**RELEVANCE OF CONSENT FOR 'ENTRY' INTO MARRIAGE** All the three religion-based family laws recognize a guardian's consent for the marriage of a minor. None of the religious laws makes a child marriage void. While the Prohibition of Child Marriage Act, 2006, applicable to all religions, makes child marriage contracted by the guardian voidable at the instance of one of the contracting parties (bride or groom), it makes a marriage entered into by a minor without

90 Section 4, Special Marriage Act, 1954; Section 5, Hindu Marriage Act, 1955; Section 60, Indian Christian Marriage Act, 1872; Section 2, Dissolution of Muslim Marriages Act, 1939.

91 A. A. Fyzee, *Outlines of a Muhammadan Law*. New Delhi: Oxford University Press, 2001, pp. 93–96.

the consent of the guardian void. A minor, however, cannot consent to marry against the wishes of her family, as the lack of parental consent renders the minor's marriage void. The law thus implicitly accepts coerced marriages, or those conducted without the consent of the parties who are to marry.<sup>92</sup>

The options available to minors upon attaining majority to exit from a child marriage are tokenistic and vary under each of the religious laws. The Hindu Marriage Act, 1955, makes the organizing of a minor's marriage punishable. Where 'consent' has been obtained through force or fraud, the Hindu law makes the marriage voidable. This gives the right to the affected party to apply for the annulment of the marriage within one year after force has ceased to operate, or within one year of the discovery of the fraud, provided that the affected party has ceased to live with the offending party in this period.<sup>93</sup> It also allows a girl between the ages of 15 and 18 years to refute her marriage, to allow her to exit from a non-consensual marriage contracted when she was a minor.<sup>94</sup>

Under Muslim law, the marriage of a minor with a guardian's consent, although valid, is capable of being repudiated upon attainment of puberty by any of the parties to the marriage. Such repudiation, called 'option of puberty', can be exercised by the wife under the Dissolution of Muslim Marriages Act, 1939 within a period of three years after she attains the age of 15 years and before attaining the age of 18. The wife loses the right of repudiation on the consummation of the marriage, unless she can establish that she was ignorant of her right.<sup>95</sup> In reality, however, the right to repudiation is so highly qualified that it is rendered unavailable. It also unrealistically assumes that a minor girl who was forced into marriage will suddenly acquire the capacity to autonomously access the courts and annul the marriage upon attaining the age of 15 years, while still young and dependant.

Under Christian law,<sup>96</sup> a guardian whose consent is required for the marriage may prohibit the issue of the marriage solemnization certificate. This certificate then remains withheld until the prohibition is found to be untenable or until it is withdrawn. Forced consent is not a ground

92 PUDR Report, 'Courting Disaster: A Report on Inter-Caste Marriages, Society and State, 2003, p. 17.

93 Section 12, HMA.

94 Section 13(2), HMA draws upon the concept of 'option of puberty' in Muslim law.

95 Fyze, *ibid.*

96 Sections 20, 21, 22, 44, and 70 of the Indian Christian Marriage Act, 1872.

for withholding the marriage certificate, and neither does the minor have the right to repudiate the marriage upon attainment of majority.

**THE RELEVANCE OF A WIFE'S CONSENT WITHIN MARRIAGE** Upon the solemnization of marriage, the consent of the wife is largely insignificant to maintaining sexual relations under all marriage laws. The IPC code places women's sexuality in the hands of her husband—by the dual means of legalizing forced sex by the husband while simultaneously criminalizing consensual extramarital sex by the wife. The rape law explicitly excludes non-consensual sex and forced sexual intercourse within marriage from the definition of rape under the penal code. Rape of wife is punishable (with a lesser sentence) only if the wife is judicially separated from her husband, or is under 15 years of age.<sup>97</sup> More recently, with the passage of the domestic violence law, forced sex can be treated as a form of domestic violence, against which civil remedies of injunction rather than criminal remedies are available. Other provisions of the penal code throw additional light on the irrelevance of a married woman's consent and autonomy with regard to her sexuality. The penal provision of adultery targets the extramarital relations of the wife, but not of the husband, authorizing the husband to prosecute the wife's lover. Consent of the wife is irrelevant to the commission of the offence, but the consent of her husband dissolves the offence.<sup>98</sup> Similarly, 'enticing' away a married woman with the intention of having 'illicit intercourse' is an offence.<sup>99</sup> Further, the family laws entitle a spouse to seek the court's intervention in restoring to him/her the conjugal company of the other partner through the provision of 'restitution of conjugal rights'. The court thus can restore to the complaining spouse the company of the withdrawn spouse if the reasons for the spouse's withdrawal are not grave in the view of the court. On the face of it, the statutory right to restitution of conjugal rights may seem gender neutral, but its operation has gendered consequences specific to women.

**CHOICE** Until very recently, non-procreative sex was criminalized along with bestiality as part of a category of offences labelled 'against the order of nature' by virtue of Section 377 of the penal code. In practice, however, this penal provision targeted same-sex relationships, regardless

97 Section 375 pertains to rape, and Section 376A pertains to intercourse by a man with his wife during separation.

98 Section 497, IPC: Adultery. Although the constitutional validity of this provision was challenged on grounds of sex discrimination, the Supreme Court declined to strike down the provision. See *Sowmithri Vishnu vs. UOI* [AIR 1985 SC 1618]; *V. Rewathi vs. UOI* [AIR 1988 SC 835].

99 Section 498, IPC: Enticing away or detaining with criminal intent a married woman.

of whether they were adult, consensual, and conducted in private.<sup>100</sup> Despite the Delhi High Court's reading down of this provision to exclude adult consensual same-sex relations amongst LGBTI, the fear of persecution and reversal to criminalization remains, as do the social stigma and prejudice that make the exercise of choice fraught with uncertainty and fear.<sup>101</sup> Even though the reading down of the penal law is a significant advancement, it will be a long time before civil, family, insurance, and financial laws will be modified to accommodate same-sex relationships within the benefits and services they offer. The family law allows marriage between opposite-sex partners only. The religion-based family laws allow marriage between opposite-sex partners of the same religion, whereas the Special Marriage Act (SMA) allows marriage between opposite-sex partners without reference to their religion. The intention of the law is to facilitate inter-religious marriages without making it incumbent on either party to adopt the religion of one of the partners solely for the purposes of contracting the marriage.

In a context where marriage cements caste and religious boundaries, SMA is important in facilitating the transgression of those boundaries and in providing secular foundations for marriage. However, the conditions for marriage under the law serve to obstruct the very objectives that it sets out to achieve. It requires that the parties to the marriage give a written notice 30 days prior to the marriage date to the marriage officer in the district where they reside.<sup>102</sup> This notice is made public to provide an opportunity for any person to object to the marriage. Given the caste, religion, and class divisions that exist in Indian society, the provision of the public notice has served to obstruct inter-caste or inter-religious marriages by alerting their families and local vigilante groups of the impending marriage. Sometimes the marriage officer acts as a 'guardian of public morality' and informs the families of either the girl or of both parties so as to save the girl from an 'unholy' alliance, or publishes the photos of both parties in newspapers, thereby making it nearly impossible for the couple to go ahead with the marriage. Typically, such couples run away from home to another town to get married, where they cannot apply to marry under the SMA on grounds that they have no proof of local residence. Where a couple manages to marry under

100 Section 377: Unnatural Offences – *Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with 1 [imprisonment for life], or with imprisonment of either description for [a] term which may extend to ten years, and shall also be liable to [a] fine.*

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

101 *Less than Gay*, AIDS Bhedbhav Virodhi Andolan, Rights for All. New Delhi, 1991.

102 Section 5, Special Marriage Act.

the SMA, the act allows the families of the party governed by the Hindu undivided family law, to disinherit them from succession to ancestral property, if they are so inclined.<sup>103</sup> Further, the SMA restricts marriage between two Hindus within prescribed kinship relations, unless such marriage is permitted by custom, although similar restrictions are not applicable to non-Hindu parties.

The misuse of criminal law with the collusion and knowledge of law enforcement officials has played a significant role in restricting inter-community marriages.<sup>104</sup> The penal provision of the kidnapping of a minor from the lawful guardian is frequently reported to be deployed to punish young men who elope with or marry women from outside of their religion or caste. In such situations, the evidence that the woman is of or above 18 years of age, along with proof of age, and is competent to consent in law are routinely discounted by law enforcement officials. Typically, the law keepers act in collusion with the girl's parents to launch criminal proceedings against the young man and/or his family. Studies conducted by the Association for Advocacy and Legal Initiatives (AALI), People's Union for Democratic Rights (PUDR), report the extent to which the criminal law is used to persecute and harass couples in inter-religious or inter-caste marriages in north India, i.e. Uttar Pradesh, Haryana, Rajasthan, and Punjab, where caste hierarchies and religious boundaries are maintained through control of sexuality.

According to AALI's research on inter-religious marriages in several districts of UP, the 'right to choice in marriages' is extremely difficult to enforce when the family, the community, and the law enforcement machinery join hands to obstruct its exercise.<sup>105</sup> The report notes that the tensions between cultural norms and constitutional rights and freedoms are manifested in the exercise of the right to choose, especially because inter-community marriages of choice threaten not only the social arrangements that are passed off as culture, but also the material arrangements.<sup>106</sup> Indeed, systems of caste and property are constituted by purity of blood and patriliney, and are enforced through cultural norms pertaining to marriage, sexuality, and reproduction. The law reinforces the norms on which these systems rest through crimes like abduction, elopement, and adultery as described in the penal code.

103 Section 19, Special Marriage Act: 'effect of marriage on member of undivided family'.

104 Sections 361, 366, and 368 IPC on kidnapping of child, punishment for kidnapping of child, kidnapping of woman, and wrongful confinement, kidnapping or abduction of a person.

105 AALI Report, *National Consultation on Women's Right to Choose, if, when and whom to marry: Report and Recommendations*, Lucknow, 2003, p. 2.

106 *Ibid.*, p. 13.

PUDR's research on inter-caste marriages in Haryana and Punjab locates 'love marriages' within the ambit of democratic rights. The research shows that instances of love marriages are often followed by murders, suicides, beatings, forced separations, and the registration of false criminal cases of kidnapping and rape against the boy by the girl's family. The violence unleashed against couples transgressing community-based rules of marriage, and the complicity of the state in treating elopement as a criminal act, makes it a significant aspect of democratic rights. The gap between the rights guaranteed by the Constitution and the reality of our state requires state accountability for the protection of the fundamental rights to life, liberty, and equality.<sup>107</sup> Increasing social and political mobilization along caste/communal lines has led to increased vigilante violence against 'errant' young couples seen as transgressing traditional mores, some examples of which are listed in Appendix F.

The state's inaction and its complicity with the family and the community in obstructing and persecuting love marriages reflects the state's role in reinforcing gender and caste hierarchies. As a consequence, the remedies for protection do not lie purely within the scope of criminal law, but also within the scope of constitutional law for the enforcement and protection of fundamental rights. Therefore, remedies such as the writ petition of habeas corpus under Article 32 of the Constitution in the Supreme Court, or under Article 226 in any of the High Courts, where the state is called upon to produce the person before the court and to record her/his statement, are used. This is significant because the detention of the girl by her parents can be successful only with the collusion of the state, thus making the law enforcement system accountable in such proceedings as well. The reading down of Section 377 of the IPC pursuant in the case of *Naz Foundation vs. Government of NCT, Delhi and others* by the Delhi High Court also invoked fundamental rights to decriminalize private consensual sexual activity and to contest illegitimate restrictions on sexual expression and choice.

## 2. Financial security

Financial security encompasses two aspects: one, that outlines security within the domain of the family, and the second comprise of financial and material rights independent of the family, in relation to the state and the private actors in the market. The first aspect of financial security in relation to the family includes: (1) community of property over assets jointly accumulated during the length of the relationship; and (2) support for child and self where relevant.

<sup>107</sup> PUDR Report, 'Courting Disaster: A Report on Inter-Caste Marriages, Society and State'. New Delhi, 2003, p. 1.

## 5 Exploring a rights framework

The principle of community of property is based on the recognition of the value of the gendered nature of labour, services, and control over women within marriage. The institutions of marriage and family laws have historically served to establish male ownership over female labour, sexuality, and reproduction. Community of property is based on the recognition of women's contribution to housework, care giving, reproduction, and farming, or to any other family-run business, typically rendered without any value or share in monetary and material assets acquired by the family as a result of such contribution. The right to community of property between intimate partners seeks to compensate for the structural barriers in the law, the market, and the family that limit women's asset accumulation in the family, limit their inheritance, and constrain their opportunities to earn. The privileging of women's roles in housework and caring at home, and in similar stereotypical low-paid labour roles in the industry/market/workplace, limits their ability to earn and to own assets. This, in addition to the multiple burdens of housework and child rearing, make it more difficult for women to become finally independent upon the breakdown of a relationship, compelling women to stay in unsatisfying or abusive relationships. Therefore, the entitlement for child support and for self, where relevant, is integral to rights pertaining to financial security within the family. The rationale for the claim to community of property is significant, for it is positioned as a right over jointly acquired assets in intimate relationships, rather than being related to a woman's status as wife, destitute, or dependant, or as being seen as a compensation for the man's wrongdoing. The right explored here is, therefore, not positioned as privilege attached to marriage, nor grounded in patriarchal benevolence to safeguard women from destitution on account of their 'inherent' dependence upon men. This is relevant for women in all sustained intimate relationships, irrespective of marriage, and therefore should be a legitimate claim available to women in non-normative relationships.

The second aspect of financial security is in relation to rights independent of family relationships—where the state bears the duty to enable (and not obstruct) non-normative family formations to organize financial security for themselves. This includes the ability to apply jointly for loans, housing, credit, and insurance, without fulfilling the condition of marital or blood relationship. These core rights that enable non-normative families to make financial arrangements to secure their future, and those of their family members, is a vital part of the right to financial security. The state bears a duty to enable such arrangements both through its own agencies and institutions and also through the regulation of the private actors that provide such services. This section looks at the extent to which this right, based on the foundations discussed above, is available in international human rights standards as well as in domestic law.

**INTERNATIONAL LAW** Under Article 16(1) of the Universal Declaration of Human Rights, equality in relation to the family extends to equal rights of the partners to enter into marriage, ‘during marriage and upon dissolution.’ This is affirmed and elaborated by Article 16 of CEDAW. That these include equal rights of women to income and asset accumulation during the period of cohabitation (regardless of the non-monetary nature of their contribution), and that these apply to non-marital/non-normative intimate relationships, is elaborated upon in various sources of human rights law.

Several provisions in human rights law call for the recognition of non-monetary contribution and investment, particularly in connection with the gendered division of labour. Although some of these standards have been articulated in relation to paid employment, nevertheless they set out important principles of equal wages and equal value of work to offset the discrimination resulting from stereotyping and from the sexual division of labour, principles that are applicable as much in the workplace as in the home. Article 23 (2) of UDHR pertains to non-discrimination with respect to ‘the right to equal pay for equal work.’ Article 7 (a)(i) of ICESCR pertains to ‘the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular . . . (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work.’ The right to equal pay for work of equal value addresses the widespread gendered division of work in the public and private arenas. This principle is vital to not only the entitlement to equal pay, but also, as outlined by Article 11 (d) of CEDAW, to ‘equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work.’ The treaty law is clear in addressing the gender division of labour and gender discrimination in relation to wages through the provision of work of ‘equal value’ as well as of ‘equal pay for equal work’, thus acknowledging that the nature of work available may be different for men and women.

While the above principles are set out in relation to employment and labour, these standards are applied to women’s equal rights to family benefits as well. Article 13 of CEDAW calls for the elimination of discrimination against women in economic and social life and for the award of rights, in particular ‘the right to family benefits . . .’, as a means of securing recognition for women’s contribution to urban and rural family enterprises. General Recommendation 16 of CEDAW (1991) deals with unpaid women workers in urban and rural family enterprises that are typically male owned. It urges state parties to monitor the extent of unpaid women

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working in family enterprises and to take the necessary steps to guarantee payment, social security, and social benefits for women who work without such benefits in enterprises owned by a family member. General Recommendation 17 to CEDAW (1991) goes beyond formal definitions of ‘work’ and deals with the ‘measurement and quantification of the unremunerated domestic activities of women and their recognition in the gross national product’. It states that ‘the measurement and quantification of the unremunerated domestic activities of women, which contribute to development in each country, will help to reveal the de facto economic role of women’ and recommends ‘research and experimental studies to measure and value the unremunerated domestic activities of women; for example, by conducting time-use surveys as part of their national household survey programmes and by collecting statistics disaggregated by gender on time spent on activities both in the household and on the labour market’ to compute the de facto economic contribution of women.

That the principle of work of equal value extends to the domain of financial and material asset creation in normative and non-normative families is made explicit by CEDAW General Recommendation 21 (1994). It uses this understanding to recommend that division of marital property must place equal value on financial and non-financial contributions of the parties to stipulate equal share in such property to women. Extending this right to women in non-normative families, it notes that ‘in many countries, property accumulated during a de facto relationship is not treated at law on the same basis as property acquired during marriage. Invariably, if the relationship ends, the woman receives a significantly lower share than her partner. Property laws and customs that discriminate in this way against married or unmarried women with or without children should be revoked and discouraged.’<sup>108</sup> Noting that the failure to acknowledge the ‘right of women to own an equal share of the property with the husband during marriage or de facto relationship’, General Recommendation 21 explains that division of such property cannot be based on financial contribution alone as it neglects non-financial contribution ‘such as raising children, caring for elderly relatives and discharging household duties’.<sup>109</sup>

The right to financial security under international law extends to same-sex relationships, given the universality of standards in respect of all families. In *Young vs. Australia* (6 August

108 A/47/38, para 33.

109 Ibid., paras 30 and 32.

2003), the Human Rights Committee cited the decision made in the *Toonen* case and held that a same-sex partner constitutes a ‘member of a couple’ and hence is entitled to pension under the Veteran’s Entitlement Act. Principle 3 (a) of the Yogyakarta Principles declares that states shall ‘Ensure that all persons are accorded legal capacity in civil matters, without discrimination on the basis of sexual orientation or gender identity, and the opportunity to exercise that capacity, including equal rights to conclude contracts, and to administer, own, acquire (including through inheritance), manage, enjoy and dispose of property.’ Principles 13 and 24 of the Yogyakarta Principles deal with the right of people in same-sex relationships to social security and other social protection measures, as well as the same entitlements, obligations, and benefits as enjoyed by opposite-sex married partners.

**DOMESTIC LAW** There is no notion of matrimonial property for women in the law apart from provision for maintenance and inheritance as daughters and wives. These limited rights are linked to the wife’s perceived dependence, to the role of the husband as provider, and to the need to approximately sustain the standard of living that the married woman has been used to, or, at any rate, to save a ‘deserted’ woman from destitution. In the absence of a concept of joint ownership or community of matrimonial property, the assets accumulated during the period of the relationship are linked to the financial source from which such assets came to be acquired. This renders invisible the contribution made by women to the family towards the acquisition of household assets.

Most of the family laws allow maintenance to the wife upon desertion and for the duration of legal proceedings, along with expenses for such proceedings where the party lacks sufficient means to pay for these expenses. The Hindu Marriage Act is exceptional to the rest of the family laws in that it allows the wife or the husband to claim maintenance. In addition to the marriage laws, there is Section 125 of the Code of Criminal Procedure, 1973, under which maintenance can be claimed by wives, children, and parents if they are unable to maintain themselves. This provision is applicable to all parties irrespective of their religion. Section 125 has the distinction of being the most widely used remedy by groups providing legal support to poor women.<sup>110</sup> The two concerns before us in the examination of the domestic law are the rationale for the provision of maintenance in law, and whether this remedy is available to women in non-normative intimate

<sup>110</sup> National Conference on Women and Access to Justice: A Report. Partners for Law in Development (PLD), New Delhi, 2006, pp. 5–6.

relationships, and if so, to what extent. The inquiry is limited to the rationale for the provision of maintenance and does not examine the basis of calculation of the same. For our purposes, the justification on which the right rests indicates whether or not the right fulfils financial security as envisaged in human rights law, independently of the quantum of maintenance.

The Hindu family law has two different provisions for maintenance. The Hindu Adoption and Maintenance Act (HAMA), 1956 provides for maintenance during the pendency of the divorce proceedings as well as for expenses of the proceedings to either party to the marriage, the husband or the wife, if they have insufficient means to support themselves or to cover the cost of the proceedings.<sup>111</sup> This marks an interesting departure in that it assumes formal equality between men and women, which views financial inadequacy as a possible condition affecting either party to the marriage, in ignorance of societal pressures that make housework mandatory for women. It also provides for permanent alimony and maintenance upon the passing of the final decree of divorce.<sup>112</sup> HAMA allows a wife to live separately from her husband under specified conditions without forfeiting her claim to maintenance.<sup>113</sup> The right to maintenance under Hindu law is, however, contingent on the woman's chastity during the period of separation, the absence of sufficient means, and, in the case of HAMA, the right is forfeited if the wife ceases to be a Hindu, i.e. converts to another religion. Most importantly, the right is limited to the wife only.

The deserted wife under Muslim law is entitled to claim maintenance under Section 125 CrPC, the secular provision, but upon divorce can claim a 'reasonable and fair provision and maintenance' from her husband within the period of three months following divorce, i.e. the 'iddat period', under Section 3 of the Muslim Women's (Protection of Rights on Divorce) Act, 1986. This payment is distinct from mehr or dower agreed to be paid to her at the time of marriage. Where the divorced woman 'has not re-married and is not able to maintain herself after the iddat period', Section 4 of the act allows the court to direct the relatives or the Wakf

111 Section 24, HMA.

112 Section 25, HMA.

113 Section 18. . . . (a) if he is guilty of desertion, that is to say, of abandoning her without reasonable cause and without her consent or against her wish, or willfully neglecting her. (b) if he has treated her with such cruelty as to cause a reasonable apprehension in her mind that it will be harmful or injurious to live with her husband. (c) if he is suffering from a virulent form of leprosy. (d) if he has any other wife living. (e) if he keeps a concubine in the same house in which his wife is living or habitually resides with a concubine elsewhere. (f) if he has ceased to be a Hindu by conversion to another religion. (g) if there is any other cause justifying living separately.

Board to provide support. However, divorced Muslim women continue to avail of the remedy under Section 125 CrPC, and it is virtually unknown for the Wakf Board to allocate support to individual women.

The Christian law allows separated women to claim alimony from the husband pending legal proceedings. Permanent alimony is available to divorced and judicially separated women, and is conditional upon the wife's 'fortune (if any), to the ability of the husband, and to the conduct of the parties.'<sup>114</sup>

The Special Marriage Act, 1954, which is available to those who contracted marriages under it, allows wives to claim alimony pending the legal proceedings between husband and wife. In the context of permanent alimony and maintenance upon divorce where the 'wife has no independent income sufficient for her support', the grant of relief is conditional upon the husband's economic capacity, conduct of the parties, and chastity of the wife.<sup>115</sup>

The secular provision available to wives, irrespective of the law under which they are married, is Section 125 of the CrPC, 1973. This provision allows the grant of maintenance to wives, children, and parents if the man with 'sufficient means' neglects or refuses to maintain them. The grant of maintenance to a deserted or divorced 'wife' is conditional upon the wife's inability to maintain herself, the existence of a 'just reason' for not cohabiting with the husband (mutual consent not being a good reason), and non-commission of adultery (or remarriage) on the part of the wife. On proof of adultery or the remarriage of the wife, the order of maintenance can be cancelled. This availability of Section 125 is conditional upon:

- The claimant establishing her status as 'wife' — that includes proof of valid marriage, just reason for not living with the husband, and, if divorced, the wife must have not remarried;
- She lacks sufficient means to support herself;
- Her husband does possess the means, with proof that establishes his 'means';
- She has not been living in adultery.

However, these conditions are not followed stringently in the application of the law, as there is room for judicial discretion while considering the circumstances of a case. For instance,

<sup>114</sup> Section 37, Indian Divorce Act, 1869.

<sup>115</sup> Sections 36 and 37, Special Marriage Act, 1956.

during proceedings for interim maintenance, the courts have often waived the need for evidence of valid marriage, although this remains a necessary requirement for a permanent maintenance order. In addition, the phrase 'sufficient means' has been given varied interpretations, ranging from bare sustenance to retaining the 'quality of life' previously enjoyed by the wife in her marital home.

Although the statutory remedy of maintenance is limited to the legal wife, the courts in some instances have upheld claims of cohabitees, women in customary law unions, and bigamous or second wives. However, instances of such an expansive interpretation of 'wife' are discretionary as there are as many, if not more, judgments that adopt the restrictive interpretation, some of which are summarised in Appendix G. Further, as the law recognizes only monogamous marriages, women in bigamous/polygamous marriages are vulnerable if their husbands refuse to admit the validity of the first or subsequent marriages in order to avoid financial responsibility.<sup>116</sup> If the court adopts a strict approach, the wife has to provide proof of essential ceremonies of marriage like saptapadi, vivaha homa, kanyadan, etc.; the failure to establish this proof can result in the rejection of the maintenance claim.<sup>117</sup>

One of the foundational limitations of the legal relief of maintenance is in respect to its terminology and the assumptions about women's status in the family. While locating the maintenance law within the moral and economic assumptions of familial ideology, Kapur and Cossman note that laws governing maintenance in each personal law are based on the assumption that women are economically dependent on men and are entitled to maintenance on the condition that they conform to their designated roles of 'ideal' mothers, wives, and daughters. Thus, women's right to maintenance is not an unfettered right, but is made conditional on their conduct, especially sexual conduct. The law expects unchaste or remarried women to look to another man for support. Sexual conduct and exclusivity in a marital relationship, even after the breakdown of marriage and divorce, thus determines a woman's entitlement to maintenance. The woman's rights are contingent on the court's moral evaluation of her behaviour, thereby making morality, and not economic need, the governing criterion.<sup>118</sup>

116 Flavia Agnes, *Law and Gender Inequality: The Politics of Women's Rights in India*. New Delhi: Oxford University Press, 1999, p. 87.

117 Ibid.

118 Ratna Kapur and Brenda Cossman, *Subversive Sites: Feminist Engagements with Law in India*. New Delhi: Sage, 1996, pp. 139–140.

The assumption that women are ‘dependant’ negates women’s labour and contribution in marriage, and the structural reasons for their economic dependency. It ignores the fact that women are largely confined to unpaid domestic labour within the marital home, which is neither recognized as ‘productive labour’ nor valued. It also ignores the fact that women’s access to property rights is limited despite legal reforms, and the cumulative effect of all these factors in keeping women financially dependent, thus making maintenance necessary on marital breakdown. Maintenance law both assumes and reinforces this notion of economic dependency. Women get support not because they are entitled to it by virtue or by way of compensation for what they have contributed to the marriage, but because they have no alternative source of income.<sup>119</sup>

Although the law aims to mainly prevent vagrancy and destitution, its quantum and weak enforceability make it unable to achieve its objectives. The quantum of maintenance is typically nominal. The law prior to reform set the ceiling for a maximum of Rs 500 per month, and this ceiling was removed by an amendment in the 2001 amendment.<sup>120</sup> However, despite the removal of the ceiling, the award of maintenance in most cases continues to be very low. Another difficulty arises in providing proof of the husband’s income, as the husbands conceal their income and most wives are ignorant of the nature and quantum of the husband’s income, assets, and business.<sup>121</sup> Maitrayee Mukhopadhyay’s study highlights the irony in the law that assumes a wife’s dependence but expects her to prove it nonetheless, in addition to providing proof of her husband’s income.<sup>122</sup>

### 3. Housing and safe shelter

Housing and safe shelter have particular relevance for women because gender constitutes a distinct ground for homelessness and for uncertain and unsafe housing conditions. Further, domestic violence is a major cause of women’s homelessness and, in turn, homelessness

119 Ibid., pp. 140–142.

120 The 2001 amendment to Section 125, CrPC removed the ceiling of Rs 500 on the monthly maintenance payable and sought to expedite the grant of interim maintenance.

121 Nandita Shah and Nandita Gandhi, *The Issues at Stake*. New Delhi: Kali for Women, 1992.

122 Maitrayee Mukherjee, *Legally Dispossessed*, Stree, 1998. These findings are also echoed in the National Conference on Women and Access to Justice: A Report. New Delhi: Partners for Law in Development (PLD), 2006.

puts women at risk of gendered forms of violence. These conditions are compounded and sustained by the historical inequality (and exclusion) of women from a share in immovable and productive resources within the family.<sup>123</sup> As a result, the right to housing, residence, and safe shelter as an independent right for women is very important. Adequate housing and safe shelter for women become necessary in the context of intimate relationships—as a condition to enable the exercise of choice in a relationship, as an option to exit a relationship, and as a refuge from an abusive relationship. This right must take into account the fact that even a large majority of men do not own immovable property, making it unviable for women’s right to adequate housing to be linked with the partner’s property, land, or, indeed, family property. Such an approach would not be relevant for a large majority of women for whom this is a pressing need. This is, therefore, directed against the state and private agencies that control housing, housing loans, and credit, as they play a key role in the fulfilment of this right. This right primarily concerns duty bearers beyond the intimate partner, the husband, and the joint family, and calls on those who bear an obligation to provide housing and shelter for women.

The right explored here is distinct from that of ‘financial security’, which seeks to recognize a woman’s equal share in assets accumulated during marriage or intimate partnerships, or the right to reside in a shared home, which is discussed in the context of ‘protection from violence’. This section will examine the standards in relation to women’s right to adequate housing, right to residence, right to protection against forced eviction, and right to safe shelter as conditions that are fundamental to enabling choice in entering, and in providing an option to exit, intimate relationships, serving both. In addition, it includes transitional shelters, which serve as a refuge from intimate-partner violence as well as from the family/community pressures against the exercise of non-normative choices, including those related to gender identity and sexual orientation.

**INTERNATIONAL LAW** UDHR, ICESCR, and ICCPR have all recognized the right to adequate housing for women.<sup>124</sup> Article 11 of ICESCR specifically deals with the ‘right of everyone to

<sup>123</sup> Succession and inheritance laws have historically excluded or been discriminatory against women. Despite the historic changes made in 2005 to the Hindu Succession Act (HSA), 1956, which recognized women as successors to ancestral or joint family property, including land, the de facto situation continues to be one where women forfeit these rights to avoid strained family ties.

<sup>124</sup> Articles 7, 12, 17, and 25 of UDHR; Articles 2(1), 17, and 26 of ICCPR; Articles 2(2) and 11(1) of ICESCR.

an adequate standard of living for himself and for his family, including food, clothing and housing, and to the continuous improvement of living conditions.’ General Comment 4 (1991) to Article 11 (1) of ICESCR clarifies that the reference to ‘his family’ is not intended to limit the recognition of this right to men alone, but applies to everyone. It explains:

While the reference to “himself and his family” reflects assumptions as to gender roles and economic activity patterns commonly accepted in 1966 when the Covenant was adopted, the phrase cannot be read today as implying any limitations upon the applicability of the right to individuals or to female-headed households or other such groups. Thus, the concept of “family” must be understood in a wide sense.<sup>125</sup>

Further, the resolution clarifies that the right to adequate housing is not independent of other human rights, such as the right to not be subject to arbitrary and unlawful interference in matters concerning privacy, family, and home.<sup>126</sup> As mentioned earlier, the ‘family’ is not narrowly construed in international law, but includes diverse family forms beyond the institutional and dominant understandings of family.

The intersections of the feminization of poverty, violence against women, and homelessness place responsibility upon the state—through policies on land, resettlement, and credit, and through the regulation of the housing market—to fulfil women’s right to adequate housing and safe shelter. Recognizing the nexus between domestic violence and homelessness, SRVAW has recommended that priority be given to victim–survivors of domestic violence in state-sponsored housing.<sup>127</sup> The Resolution by the Sub Commission on Prevention of Discrimination and Protection of Minorities on ‘Women and the right to adequate housing and to land and property’ (1997) recalls General Comments 4 (right to adequate housing) and 7 (forced evictions) issued by the Committee on Economic, Social and Cultural Rights, to observe that more women than men live in absolute poverty.<sup>128</sup> In this context, women-headed households are very often among the poorest. It emphasizes that:

125 CESCR General Comment 4 (1991), para 6, on ‘The Right to Adequate Housing’.

126 *Ibid.*, para 9.

127 E/CN.4/1996, Part VII on Recommendations for the National Level.

128 1997/19.

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women face particular constraints in securing and maintaining their right to housing because of the continued existence of gender-biased laws, policies, customs and traditions which exclude women from acquiring land, security of tenure and inheritance rights to land and property and owing to women's reproductive role, and that these constraints are particularly acute for women who also face discrimination on one or more other grounds, including race, ethnicity, creed, disability, age, socio-economic status and marital status.

This resolution makes a number of recommendations for the promotion of women's rights to adequate housing, land, and property.

The Special Rapporteur on Adequate Housing reinforced this concern in successive reports on the themes of women's equal access to land, equal rights to own property, and equal rights to adequate housing.<sup>129</sup> The 2005 report recommended a gender-sensitive housing policy to address the situations of specific groups of women, recognizing the intersectional nature of gender discrimination resulting from race, class, ethnicity, caste, rural location, sexual orientation, single status, single motherhood, and other factors.<sup>130</sup> The recommendations include addressing the need for housing and land in poverty-reduction strategies, anti-poverty strategies, rural development projects, and land reform programmes, in addition to addressing the need for emergency, transitional accommodation and support services for women and the recognition of women's equal rights to inheritance. The 2006 report of the Special Rapporteur on Adequate Housing notes that single women and women-headed households are more disadvantaged as they are likely to be poor and less likely to get loans, credit, and mortgages to access formal housing, and hence are less likely to be included in the private housing market.<sup>131</sup> Responding to the feminization of poverty of rural women and their housing concerns, Article 14 of CEDAW calls for social sector programmes, agricultural credit and loans, and equal treatment for women in land and agricultural reforms and in land resettlement.

129 In pursuance of successive resolutions of the Commission on Human Rights in 2002 and 2003 on the theme, the Special Rapporteur on Adequate Housing produced three annual reports on the theme of women and adequate housing — E/CN.4/2003/55; E/CN.4/2005/43; and E/CN.4/2006/118.

130 E/CN.4/2005/43.

131 E/CN.4/2006/118.

Finally, Principle 15 of the Yogyakarta Principles, addressing housing concerns in the context of discrimination arising from sexual orientation, states that ‘everyone has the right to adequate housing, including protection from eviction, without discrimination on the basis of sexual orientation or gender identity.’ Principle 15 (d) obligates the state to take steps to ensure that sexual orientation is not a ground for social exclusion through ‘social programmes, including support programmes, to address factors relating to sexual orientation and gender identity that increase vulnerability to homelessness, especially for children and young people, including social exclusion, domestic and other forms of violence, discrimination, lack of financial independence, and rejection by families or cultural communities, as well as to promote schemes of neighbourhood support and security.’ Principle 25 deals with the right to participate in public life, and Principle 26 deals with the right to participate in cultural life.<sup>132</sup> These principles essentially ensure that sexual orientation does not become a ground for the incapacity to lead a full life and thereby deny individuals the right to remain in a relationship of their choice.

**DOMESTIC LAW** The jurisprudence on housing and shelter has developed primarily in the context of eviction and slum demolitions, as part of Article 21 of the Indian Constitution, read along with other concomitant rights and the Directive Principles of State Policy.<sup>133</sup> Although

132 Principle 25 states: ‘Every citizen has the right to take part in the conduct of public affairs, including the right to stand for elected office, to participate in the formulation of policies affecting their welfare, and to have equal access to all levels of public service and employment in public functions, including serving in the police and [the] military, without discrimination on the basis of sexual orientation or gender identity.’ Principle 26 states: ‘Everyone has the right to participate freely in cultural life, regardless of sexual orientation or gender identity, and to express, through cultural participation, the diversity of sexual orientation and gender identity.’

133 Article 19(1)(e): Protection of certain rights regarding freedom of speech, etc. – [1] *All citizens shall have the right – . . . (e) To reside and settle in any part of the territory of India;*

Article 21: **Protection of life and personal liberty** *No person shall be deprived of his life or personal liberty except according to procedure established by law.*

Article 39: **Certain principles of policy to be followed by the State** *The State shall, in particular, direct its policy towards securing – (b) That the ownership and control of the material resources of the community are so distributed as best to subserve the common good; (c) That the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;*

Article 41: **Right to work, to education and to public assistance in certain cases** *The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.*

Article 46: **Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections.** *The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the*

the jurisprudence on housing and shelter has not always been consistent, its focus has nonetheless remained on the poor, the economically weaker sections, and the slum dwellers, while directing the state to take steps to ensure affordable housing for them.<sup>134</sup> Notably, the housing needs of women and children, and their vulnerability to abuse, exploitation, and homelessness upon eviction from the matrimonial home, have not received special consideration. Shelters for women, in terms of protective custody and safe homes, have not been treated as an entitlement but rather as a matter of concern for the state social welfare programmes, largely for women ‘rescued’ from sex work, vagrants, and rape victims. An overview of the case law under the Constitution on the theme as well as under the PWDVA is summarized in Appendix H.

The situation regarding short-stay shelter homes for women remains abysmal, with the choice between a few poorly run, corrupt institutions that offer shelter along the lines of custodial institutions and very few independent shelter homes. Most short-stay shelter homes are available to women escaping abusive marriages. The experiences of groups assisting transgender persons (female to male) who flee their home or community because of abuse, stigma, and rejection show that such shelters are neither open nor compatible with the needs of persons transgressing gender roles or identity. Most shelter homes are designed for married heterosexual women or for those who appear conforming. Given the shortage of short-stay homes for women escaping marital abuse, it will be a long time before shelter homes for lesbian women and transgender persons become available in all major cities. Long-term housing for a variety of women outside of marriage—single women, divorced women, women heading households, transgender persons, or indeed housing for single rural women, whether provided by the state or by private builders—remains a neglected area of concern. The women’s movement has yet to lobby concertedly for state-provided long-term housing for women as a sustainable option, despite the fact that gender-based violence remains a significant cause and consequence of the lack of adequate housing.

In the absence of joint ownership of matrimonial assets (discussed in the previous section), the ‘right to residence’ has been introduced as a remedy in the context of domestic violence. The Protection of Women from Domestic Violence Act (PWDVA), 2005 recognizes, for the first

*Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.*

<sup>134</sup> See *Ahmedabad Municipal Corporation vs. Nawab Khan Gulab Khan* (AIR 1997 SC 152); and *UP Awas Evam Vikas Parishad vs. Friends Coop Housing Society Ltd* (AIR 1996 SC 114).

time, the woman's right to reside in a 'shared household' and offers protection against eviction in the case of domestic violence. This takes into account the fact that women under conditions of abuse are coerced to leave as no right to reside in the matrimonial house exists or because they are forcibly evicted. The domestic violence law covers all women in domestic relationships, making no distinction between wives and cohabitees (in addition to other female members of the family). Section 17 of PWDVA states that 'every woman in a domestic relationship shall have the right to reside in the shared household, whether or not she has any right, title or beneficial interest in the same.' It adds that such a woman 'shall not be evicted or excluded from the shared household or any part of it by the respondent save in accordance with the procedure established by law.' Accordingly, it allows for a restraining order against the respondent from disturbing possession of the woman, directing the respondent's removal, or restraining his relatives from entering the portion of the property of the aggrieved woman, or alienating or disposing of the shared household. It also provides for payment of rent by the respondent for providing alternative accommodation for the woman.<sup>135</sup>

This right received a setback in *S. R. Batra vs. Smt. Taruna Batra* (AIR 2007 SC 1118), where the Supreme Court held that the wife cannot make a claim on the matrimonial residence if it is in the name of the parents of the husband, failing to consider that in India most sons live with their parents, where the house is likely to be in the parents' name.<sup>136</sup> The right to shared residence has been a landmark development for women in 'domestic relationships', technically covering live-in partners and second wives, thus granting them the equal right to reside in the shared household. While the normative extension of protection to intimate partners is a big step forward, operationally the protection is likely to be limited to monogamous heterosexual cohabitations, uncomplicated by bigamy. Given the strong bias against women perceived as 'unchaste' and the privileging of monogamy, it is debatable whether this law will be pressed into

<sup>135</sup> The courts have granted the right to residence as part and parcel of the wife's right to maintenance even before the enactment of PWDVA, as in *B. P. Achala Anand vs. S. Appi Reddy and Another* [(2005) 3 SCC 313]. However, its availability in PWDVA extends it as a statutory remedy, reducing the discretion of the court, and makes it available beyond wives to all women in domestic relationships.

<sup>136</sup> *P. Babu Venkatesh and Ors vs. Rani* (2008) The Madras High Court did not follow *Taruna Batra* as the facts demonstrated that the husband had transferred the house in the name of his mother after the matrimonial dispute arose to defeat his wife's claim. However, in *Neetu Mittal vs. Kanta Mittal and Ors* (2009), the Delhi High Court relied upon *Taruna Batra* to hold the claim that the house of the in-laws could not be considered the shared property of the daughter-in-law, except when it is ancestral, to which the son has an independent right. References from *Staying Alive*, Second and Third Monitoring and Evaluation Report, on the PWDVA (22005), Lawyers Collective, 2008 and 2009.

the service of women in a range of non-normative intimate relationships, particularly bigamous relationships.<sup>137</sup>

In view of the preponderant focus of women's groups on matrimonial or opposite-sex relationships, it will be some time before initiatives to enable the enforcement of this right in same-sex relationships will follow (in the wake of the de-criminalization of adult consensual same-sex relationships). In any event, the right to residence for transgender persons and women in same-sex relationships needs to respond to homelessness on account of eviction or persecution based on sexual orientation in their natal home or in rented lodging or in their neighbourhood, as well as protection from eviction by an abusive partner.

#### 4. Freedom from violence

This section explores the framework for providing protection from violence in its physical, psychological, sexual, and economic manifestations at two levels: (a) protections from being targeted or persecuted for choice of intimate partner; and (b) protection to not be subjected to intimate-partner violence. The standards relating to the right to enter into marriage and to choose a spouse or partner have been discussed earlier in this chapter. The rights relating to consent/choice at the time of entering into a relationship are distinct from the protections necessary for sustaining a relationship so as to be able to found a family. These protections are relevant for guarding against arbitrary interference, hostility, or discrimination arising on account of choice of intimate partner. They are necessary for creating an enabling environment for sustaining intimate relationships (in particular non-conforming ones), establishing a household, and founding a family. The second set of protections is related to domestic violence and, for the purpose of this resource book, to intimate-partner violence.

<sup>137</sup> A few judgments upholding the rights of common law wives/second wives found to not be validly married have been positive, especially since the facts involved an 'innocent' wife, who was unaware of the invalidity of marriage. In *Aruna Parmod Shah vs. UOI*, [WP (Cri) 425/2008], the Delhi High Court upheld treatment of 'near or like marriage status' at par with 'married' status under the act. In *Suresh Khullar vs. Vijay Kumar Khullar* [AIR 2008, Delhi 1], the legal status of the second wife changed subsequent to her marriage, as the husband's previous ex parte divorce was set aside. The court relied upon PWDVA to uphold the wife's claim to maintenance under the Hindu Adoption and Maintenance Act, 1956 to avoid giving immunity to the husband. The Delhi High Court adopted a similar view in *Narinder Pal Kaur Chawla vs. Najeet Singh Chawla* [AIR 2008, Delhi 7]. References from *Staying Alive*, Lawyers Collective, 2009.

**INTERNATIONAL LAW** The protections that secure an enabling environment for sustaining family life are explicitly set out. Article 12 of UDHR states: ‘No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.’ Article 17 (1) of ICCPR reinforces this thus: ‘No one shall be subjected to arbitrary or unlawful interference with his privacy, family, or correspondence, nor to unlawful attacks on his honour and reputation.’ Family, as already mentioned earlier, is construed in human rights law to include diverse family forms. These articles provide the right to privacy and the right to found a family of one’s choice, and extend protection from interference. International law has developed to include within this framework protection against persecution and targeting of non-normative intimacies/family forms from violence by the state as well as by non-state actors. This protection is critical for same-sex relationships as it is for inter-community marriages in India, which, although legally valid, are brutally punished in parts of the country. In *Toonen vs. Australia* (decided on 31 March 1994), the Human Rights Committee held that criminalization of consensual sexual contact between adult homosexual men was in violation of Article 17 of ICCPR. These standards are elaborated upon in the context of sexual orientation and gender identities in the Yogyakarta Principles, 2006. Principle 6 deals with the right to privacy, and Principle 4 (c) deals with the prevention of state-sponsored or state-condoned attacks.<sup>138</sup>

Article 1 of the Belem Do Para Convention defines violence against women ‘as any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere’, thereby including within its scope violence targeting transgression of gender roles and identities. The threats and violence against lesbian, gay, bisexual, transgender, and intersex (LGBTI) persons have been highlighted by the Special Representative of the Secretary General on Human Rights Defenders to the General

<sup>138</sup> Principle 6 of the Yogyakarta Principles states: ‘Everyone, regardless of sexual orientation or gender identity, is entitled to the enjoyment of privacy without arbitrary or unlawful interference, including with regard to their family, home or correspondence[,] as well as to protection from unlawful attacks on their honour and reputation. The right to privacy ordinarily includes the choice to disclose or not to disclose information relating to one’s sexual orientation or gender identity, as well as decisions and choices regarding both one’s own body and consensual sexual and other relations with others.’

Principle 4 (c) observes that states shall ‘Cease any State-sponsored or State-condoned attacks on the lives of persons based on sexual orientation or gender identity, and ensure that all such attacks, whether by government officials or by any individual or group, are vigorously investigated, and that, where appropriate evidence is found, those responsible are prosecuted, tried and duly punished.’

## 5 Exploring a rights framework

Assembly in 2007, noting with concern the complete lack of seriousness with which such cases are treated by the authorities.<sup>139</sup> Further, the Office of the United Nations High Commissioner for Refugees recognizes that lesbians and gay men constitute ‘members of a particular social group for the purposes of refugee recognition.’<sup>140</sup>

Principle 23 of the Yogyakarta Principles also deals with the right to seek asylum on grounds that include ‘persecution related to sexual orientation or gender identity. A State may not remove, expel or extradite a person to any State where that person may face a well-founded fear of torture, persecution, or any other form of cruel, inhuman or degrading treatment or punishment, on the basis of sexual orientation or gender identity.’

The protection from violence in international law goes beyond provision of redress, to an acknowledgement of changing social and cultural attitudes that underpin discrimination and violence. Article 5 (a) calls for appropriate measures ‘to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.’ This includes the obligation of the state to facilitate the transformation of attitudes that shape prejudice and hostility towards non-normative family forms, especially same-sex relationships and inter-community opposite-sex relationships. Similarly, Article 6 (b) of the Belem Do Para Convention asserts ‘the right of women to be valued and educated free of stereotyped patterns of behaviour and social and cultural practices based on concepts of inferiority or subordination.’ Further, Article 8 (b) calls for progressive measures ‘to modify social and cultural patterns of conduct of men and women, including the development of formal and informal educational programs . . . to counteract prejudices, customs and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on the stereotyped roles for men and women which legitimize or exacerbate violence against women.’

The second component of freedom from violence is that of protection from intimate-partner violence. The specific instruments relating to violence against women outline state

<sup>139</sup> A/HRC/4/37, paras 93–97.

<sup>140</sup> UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity, issued by the Protection Policy and Legal Advice Section, Division of International Protection Services, Geneva, 21 November 2008.

obligation in relation to domestic violence. General Recommendation 19 (1992) of CEDAW, which deals with VAW, notes:

Family violence is one of the most insidious forms of violence against women. It is prevalent in all societies. Within family relationships women of all ages are subjected to violence of all kinds, including battering, rape, other forms of sexual assault, mental and other forms of violence, which are perpetuated by traditional attitudes. Lack of economic independence forces many women to stay in violent relationships. The abrogation of their family responsibilities by men can be a form of violence, and coercion. These forms of violence put women's health at risk and impair their ability to participate in family life and public life on a basis of equality.<sup>141</sup>

The Declaration on the Elimination of Violence Against Women (DEVAW) defines violence against women to mean any act of gender-based violence, therefore linking violence with dominant gender norms that contribute to and are enforced through acts of domestic violence, battering, marital rape, as well as culturally justified practices, amongst others.<sup>142</sup>

The 2005 statement by the Special Rapporteur on Violence Against Women noted that women in marriage are as much at risk as women in non-normative relationships, observing, 'Most striking however, is that evidence from around the world shows that women are at risk in monogamous and long-term relationships. Male infidelity, refusal to use condoms and marital rape are highlighted throughout the literature as major risk factors for married women.'<sup>143</sup> Consequently, protection from domestic violence must be available to all women, regardless of marital status. Accordingly, SRVAW's model legislation on domestic violence extends protection to 'wives, live-in partners, former wives or partners, girl-friends (including girl-friends not living in the same house), female relatives (including but not restricted to sisters, daughters, mothers) and female household workers.'<sup>144</sup> Similarly, Article 2 (a) of the Inter-American Convention

141 CEDAW/C/1992/L.1/Add.15, at para 23.

142 A/RES/48/104, 23 February 1994.

143 Statement by Yamin Erturk, Special Rapporteur on Violence Against Women to the General Assembly at its 60th session on 26 October 2005. A/60/STAT/ERTURK.

144 A Framework for Model Legislation on Domestic Violence. E/CN.4/1996/53/Add.2., Part II, Subpart B, Para 7.

on the Prevention, Punishment and Eradication of Violence against Women, the Convention of Belem Do Para (1994), states that violence against women shall be understood to include physical, sexual, and psychological violence ‘that occurs within the family or domestic unit or within any other interpersonal relationship, whether or not the perpetrator shares or has shared the same residence with the woman, including, among others, rape, battery and sexual abuse.’ These definitions, together with that of the family, include same-sex relations within the scope of protections from intimate-partner violence.

**DOMESTIC LAW** In terms of protection to founding a family and maintaining a household, the Indian Constitution guarantees fundamental rights set out in the Universal Declaration of Human Rights, 1948 to its citizens and other persons. While Article 14 guarantees equality before law or the equal protection of the law within the territory of India, Article 21 most specifically addresses the issue of protection to family life through its guarantee of the right to life and personal liberty to every ‘person’ in the country. The Supreme Court has given a wide interpretation to the term ‘life’ in various cases,<sup>145</sup> which is in consonance with the rights contained in the Universal Declaration of Human Rights as also ICCPR and ICESCR. These constitutional provisions constitute protection against infringement of privacy, including from interference in family life. The courts have periodically held live-in relationships between opposite-sex intimate partners to be legal, even if ‘immoral’, and have presumed long-term cohabitation to be tantamount to marriage unless rebutted by one of the parties.<sup>146</sup> The Domestic Violence Act, 2005 explicitly extends protection to cohabitees who have shared a ‘relationship in the nature of marriage’ within the scope of the term ‘domestic relationship’ in Section 2(f) of the Act. The issue of protection to same-sex cohabitees remains socially contentious and legally ambiguous. Until recently, s. 377 of the IPC criminalized

145 Refer to *Kharak Singh vs. State of U.P.* [AIR 1963 SC 1295]; *Maneka Gandhi vs. Union of India* (AIR 1978 SC 597); and *R. Rajagopal vs. State of Tamil Nadu* [AIR 1995] SC 264.

146 *Payal Sharma v. Superintendent, Nari Niketan* (AIR 2001 All 254). This view has been echoed in other cases. For instance, the Supreme Court in *S. P. S. Balasubramanyam v. Suruttayan* [(1994) 1 SCC 460] held that ‘if a man and woman live together for long years as husband and wife[,] then a presumption arises in law of [the] legality of marriage existing between the two. But the presumption is rebuttable.’ Also see *Ranganath Parmeshwar Panditrao v. Eknath Gajanan Kulkarni* [(1996) 7 SCC 681]. More recently, in *Tulsa & others vs. Durghatiya & others* (decided on 15 January 2008), the Supreme Court again held that long-term cohabitation leads to a presumption of marriage since the act of marriage can be presumed from the common course of natural events and from the conduct of parties as these are borne out by the facts of a particular case and where the partners have lived together for a long spell as husband and wife, there would be presumption in favour of wedlock.

non-procreative consensual sex and served to persecute same-sex desiring persons. While the Delhi High Court read down this provision to exclude consensual adult sex between same-sex desiring persons in the Naz Foundation case, the impact of this decision regarding rights in relation to the family remains to be explored and developed. Given the persistent social prejudice, it will be a long time before such attitudes, including those within the law enforcement system and the judiciary, will become more accepting of other rights that follow de-criminalization.

With regard to protection against intimate-partner violence, the mid-1980s saw the introduction of a slew of offences related to domestic violence—Sections 498A and 304B of the IPC, and Sections 1860, 113A, and 113B of the Indian Evidence Act, 1872.<sup>147</sup> These offences were landmark achievements of the time, on account of recognition of cruelty, of murder of the wife within the matrimonial home (dowry death), and abetment of suicide of a married woman as non-bailable crimes. Where cruelty preceded unnatural death occurring within seven years of marriage, the offences of dowry death and abetment to suicide were presumed, shifting the burden of proof of innocence on the accused. Although significant legal achievements, these provisions addressed domestic violence in a very limited way, as they related to grave forms of violence that continued over time, in addition to being available only to women in marital (opposite-sex) relationships. The high threshold of the offences became even more pronounced in the jurisprudence that made successful prosecution conditional upon evidence of grave, life-threatening, and persistent cruelty, particularly when linked to dowry demands, frequently normalizing lesser degrees of violence and cruelty as the routine ‘wear and tear of married life.’<sup>148</sup>

The scope of protection from intimate-partner violence has been expanded to include live-in opposite-sex partners with the enactment of the Protection of Women from Domestic Violence Act (PWDVA), 2005. In relation to domestic violence, this law has initiated important shifts—that of protection from grave forms of violence to protection from a broadly defined range of

147 Ss. 113A and B introduced presumption of abetment to suicide by the husband or his relatives in case of suicide by a married woman, and presumption of commission of death by the husband or his relatives in case of a dowry death of a woman, respectively. Both provisions require the fulfilment of two conditions—the occurrence of suicide or death within seven years of marriage and evidence of cruelty. S. 304B created the offence of dowry death in respect of unnatural death of a woman within seven years of her marriage, and S. 498A pertains to cruelty by the husband or the relatives of the husband.

148 Madhu Mehra, ‘Exploring the Boundaries of Law, Gender and Social Reform’, *Feminist Legal Studies*, 6:1, 1998, p. 70.

violence;<sup>149</sup> from protection within marriage to protection within domestic relationships and shared households, which covers women in live-in relationships and common-law marriages; the responsibility of lodging a complaint rests not only with the victim but also with anyone who has knowledge of the perpetration of such violence; and, finally, a shift from penal prosecution to victim-centred civil remedies, such as restraining orders, right to residence, and the provision of medical services and shelter. The absence of legal entitlement to residence in the matrimonial home exacerbated women's vulnerability in cases of domestic violence.<sup>150</sup> Although the right to residence is an achievement, many victims of domestic violence require a safe shelter to recover and to restore their self-esteem and self-confidence. While the provision of shelter is contained in the act, it is rendered meaningless in the face of the scarcity of shelters generally, and of the absence of safe and secure shelters in particular for women in the country.

149 Section 3 contains a comprehensive definition of 'domestic violence' that includes not only physical, sexual, and mental abuse but also verbal, emotional, and economic abuse. Section 3. **Definition of Domestic Violence** – *For the purposes of this Act, any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it – (a) harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse; or (b) harasses, harms, injures or endangers the aggrieved person with a view to coerce her or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security; or (c) has the effect of threatening the aggrieved person or any person related to her by any conduct mentioned in clause (a) or clause (b); or (d) otherwise injures or causes harm, whether physical or mental, to the aggrieved person.*

**Explanation I.** – *For the purposes of this section – (i) "physical abuse" means any act or conduct which is of such a nature as to cause bodily pain, harm, or danger to life, limb, or health or impair the health or development of the aggrieved person and includes assault, criminal intimidation and criminal force; (ii) "sexual abuse" includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman; (iii) "verbal and emotional abuse" includes – (a) insults, ridicule, humiliation, name calling and insults or ridicule specially with regard to not having a child or a male child; and (b) repeated threats to cause physical pain to any person in whom the aggrieved person is interested. (iv) "economic abuse" includes – (a) deprivation of all or any economic or financial resources to which the aggrieved person is entitled under any law or custom whether payable under an order of a court or otherwise or which the aggrieved person requires out of necessity including, but not limited to, household necessities for the aggrieved person and her children, if any, stridhan, property, jointly or separately owned by the aggrieved person, payment of rental related to the shared household and maintenance; (b) disposal of household effects, any alienation of assets whether movable or immovable, valuables, shares, securities, bonds and the like or other property in which the aggrieved person has an interest or is entitled to use by virtue of the domestic relationship or which may be reasonably required by the aggrieved person or her children or her stridhan or any other property jointly or separately held by the aggrieved person; and (c) prohibition or restriction to continued access to resources or facilities which the aggrieved person is entitled to use or enjoy by virtue of the domestic relationship including access to the shared household.*

**Explanation II.** – *For the purpose of determining whether any act, omission, commission or conduct of the respondent constitutes "domestic violence" under this section, the overall facts and circumstances of the case shall be taken into consideration.*

150 *Staying Alive: First Monitoring and Evaluation Report 2007 on the PWDVA 2005*. New Delhi: Lawyers Collective WRI, 2007, p. 3.

The advances in the legal recognition to, and of, domestic violence have been accompanied by a strong backlash<sup>151</sup> and by periodic calls for a review of the existing legal provisions. The machinery created to implement the domestic violence law, although innovative, remains weak and affects the availability of protections provided under it. The protections, however, remain limited to women in opposite-sex intimate relationships.

151 For example, groups like Save Family Foundation (<http://savefamily.org/>) and My Nation.net (<http://mynation.net/>) have been campaigning ferociously against 'women-centric laws' in the name of fighting persecution and bias.

# CONCLUSION

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This resource book draws attention to the structural limitations and biases in the law as well as in the dominant approaches to women's rights work in the social sector. These approaches not only reflect our socialization as members of society, but also our conditioning as activists and social workers in the domain of legal morality. The limitations of this rights framework, as the resource book points out, not only make rights conditional upon compliance with heteropatriarchal norms, but also create a hierarchy amongst women and the forms of intimate relationships into which women enter, privileging some and stigmatizing others. The framework is one that does not facilitate equality, even in relation to rights and the right-holders that it recognizes. It compensates women through entitlements, for being wronged and for suffering despite their compliance with the heteropatriarchal order.

A transformatory framework needs to demote each of the norms on which the current structures of inequality and power rest, while creating an alternative understanding of rights. The resource book explores one such framework, developing the scope and the basis of this framework in relation to four areas of obligations and rights. It seeks to transform the understanding of rights in family/intimate relationships by not making entitlements conditional upon the wrong suffered or upon considerations of sexuality, caste or class. Consequently, the rights flow from the existence of a sustained intimate relationship, and do not rest upon marriage, choice of partner, sexual conduct or preference, or indeed upon any violation suffered. More importantly, this transformatory framework does not develop all rights in relation to the partner as a primary provider, particularly those in relation to housing and financial security. Instead, it develops these rights in relation to the state, and through the state, in relation to private enterprises authorized by the state to provide housing, financial security, insurance, employment, and banking. Therefore, state enterprises as well as private financial institutions and enterprises that undertake investment, insurance, housing, and employment must be asked by the state to ensure that women, particularly those from poor and working-class backgrounds, are explicitly accommodated in their services, so as to enable women to make choices that fulfil them, rather than those that force them to enter into or continue in intimacies for reasons of security, housing, or social acceptance. In these ways, the rights framework explored here aspires to conceptualize gender equality in the private arena of intimate relationships without discrimination or favour. This we feel is necessary given the diversity of relationships—customary (such as the few mapped in this resource book), contemporary, and emerging forms of intimacies—brought about by women's changing aspirations, economic independence, emergent assertions of sexual rights, and large-scale intra- and inter-state migration. Limiting rights in intimacies to one homogeneous family form will only increase the numbers of those who are excluded from the equality agenda and render without protection those women who do not conform.

## Appendix A

# NATIONAL CONSULTATION ON RIGHTS IN INTIMATE RELATIONSHIPS

Organised by Partners for Law in Development  
May 12th and 13th 2008  
Vishwa Yuvak Kendra , Chanakyapuri , New Delhi

### List of Participants

Sl.No.	Name	Organization	State
1	Hasina	Awaz e Niswan	Mumbai
2	Meena Gopal	SNDT University	Mumbai
3	Anita Pagare	TISS	Mumbai
4	Chayanika Shah	LABIA	Mumbai
5	Shalini	FAOW/ LABIA	Mumbai
6	Sophia Khan	SAFAR - A Journey Towards Gender Equality and Peace	Ahmedabad
7	Poonam Kathuria	Society for Women's Actions and Training Initiatives (SWATI)	Ahmedabad
8	Renuka Pamecha	Mahila Salah aiv Suraksha Kendra (MSSK)	Jaipur, Rajasthan
9	Bhanwari Bai	Mahila Jan Adhikar Samiti, (MJAS)	Ajmer, Rajasthan
10	Indira Pancholi	MJAS	Delhi/ Rajasthan
11	Kailash Chand	Lawyer, Academy for Socio Legal Studies (ASLS)	Jaipur
12	Minati Padhi	Institute of Women's Development (IWD)	Berhampur, Orissa
13	Pratap Pradhan	Lawyer, Friends Association for Rural Reconstruction (FARR)/ Shakti Cell, District Collector's Office	Bhawanipatna, Orissa
14	Risha Syed	AALI	Lucknow, UP
15	Maheshwari	Vanangana	Chitrakoot, UP
16	Anuradha Kapoor	Swayam	Kolkata

## Appendix A

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19	J. Devika	CDS, Trivandrum	Kerala
20	Beena Appu	Sahayatrika	Trivandrum, Kerala
21	Deepa	Sahayatrika	Kerala
22	Neethu	Sahayatrika	Kerala
23	Sivani	Sahayatrika	Kerala
24	Vani Subramaniam	Saheli	New Delhi
25	Mary John	CWDS	New Delhi
26	Sreerekha	Jamia Milia Islamia	New Delhi
27	Jaya Sharma	Nirantar	New Delhi
28	Nandini Rao	Jagori	New Delhi
29	Nilanju Dutta	Jagori	New Delhi
30	Madhu Mehra	PLD	New Delhi
31	Amritananda Chakravorty	PLD	New Delhi
32	Sophia Murphy	Voices Against 377	New Delhi

## PLD Rapporteurs and Support

1	Shubhi Dwivedi	Rapporteur	New Delhi
2	Suhasini Sen	Rapporteur	New Delhi
3	Sarah Lemoine	Rapporteur	New Delhi
4	Anjali Deshpandey	Translator	New Delhi
5	Bindu S	Accounts and Administration	New Delhi
6	Kishore Tirkey	Administration	New Delhi

## Appendix **B**

# **BIGAMY: DIFFERENT PATTERNS, ITS ADVANTAGES AND CHALLENGES**

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**Workshop with Women in Bigamy in Himachal Pradesh**

**Organised by PLD with SUTRA**

**Venue: SUTRA, Jagjit Nagar**

**August 14-15, 2006**

The workshop was held with 22 women who were either in bigamous marriages or knew women in bigamous marriages, to discuss the changing patterns of the practice of bigamy in Himachal – shifting over time from institutionalized bigamy (family under one roof, living as one household), to separate households (with wives having knowledge or no knowledge of the other wife). This document consolidates the group work done by the women to map opportunities and problems they identified as specific to two prevalent forms of bigamous marriages, suggesting solutions to each. This mapping challenges the common assumption that bigamy is uniformly a bad experience for all women, and is totally oppressive to all women, or at any rate, bad for the first wife/ good for the second. As in the case of monogamy, women in the community have a perspective of desirable and undesirable forms of bigamy, as well as the advantages and disadvantages it offers to women. Further, as in the case of monogamy, women suggest solutions for addressing the undesirable aspects, trying to tinker at the more objectionable forms of patriarchy from within, rather than suggesting exiting the relationship altogether.

## One Household Bigamy: Wives living in the same house

<b>Opportunities/ Advantages (mouka)</b>	<b>Problems (samasyaye)</b>	<b>Solutions (hal)</b>
When two sisters are in the same house, they will be very good in taking care of the family	Registration of marriage (panchikaran) is difficult	It should be possible to get legal information from the panchayat
Pressure of domestic work is shared by wives, division of housework between wives	Absence of clear legal information	Need more knowledge on marriage practices other than the one in law
If both the women, cooperate with each other, they get more freedom to go out	Showing partiality or showering more love to one, while ignoring the other (in any or all aspects: sexual relationship, material things like clothes, ornaments, money, food)	It must be every one's responsibility to fight against teasing and criticisms directed at one wife. It is husband's responsibility to give love and respect to both wives.
Mutual love between the children and equal love for both the mothers	Tensions between the two women	The boys and girls should get chance to get acquainted and marry only if they choose to do so
Where there is harmony between all the three (the husband and the wives) the family is praised by the entire community	Teasing behind the back. Unfulfilled desires/needs. Sharing the husband's love  Increase in the family size	Either don't go for bigamy or give land or financial security to the first wife. If the husband is frank and honest with the first wife things can be better.
Sharing good and bad times, helping in happiness and grief	The 'other' woman not getting the legal rights  Displaying pretenses to get respect  If the two women do not cooperate, the husband won't be able to take proper care of them  For sexual relationship, private space is a necessity	

## Separate Households: Wives living in Separate Houses

<b>Opportunities/ Advantages (mouka)</b>	<b>Problems (samasyaye)</b>	<b>Solutions (hal)</b>
When the two wives do not meet regularly, the marriage will be better	In doukal, people don't share their problems openly since their honor is at stake	
There will be less fights if they stay away from each other	<p>Legality is an issue for the second wife. She is not recognized, has no right to property. She cannot say that she is the 'wife of...' but will always have to say the 'daughter of ...' so and so.</p> <p>It is possible that there may be no financial support to the first wife.</p>	<p>There should be a legal provision to register the name of the second woman though the panchayat (panchikaran)</p> <p>The second wife should be given rights in property and other things like the provident fund</p> <p>After marriage, the land should be put in the name of the (first) wife</p>
Freedom to make decisions independently	<p>Feeling of loneliness. Being ridiculed by the community</p> <p>Both the wives/women may experience stress or tension that impacts their health</p>	If the husband remarries due to problems with the first wife, then the second wife/woman should get full rights of a wife. If the husband marries against her (the first wife's) wishes, the second wife/woman and her children should not be entitled to any rights
If the two women do not cooperate with each other, its ok if the husband keeps them in two separate houses as long as he gives them equal respect, love and rights	<p>Hiding the fact of having another wife/woman is not acceptable</p> <p>Running two households can be a financial burden and the man will not be able to give enough time to each households</p>	The husband should be able to give equal rights, love and respect to both the women. Children from each marriage should be given equal love and education.

## Appendix C

# CASE STUDIES SHOWING THE RANGE OF INTERVENTIONS BY WOMEN'S GROUPS TO ASSERT RIGHTS IN SUPPORT OF WOMEN IN NATA IN RAJASTHAN

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- Bali was married as a child. Even before she left for her husband's house, her parents gave her away in nata at the age of 22 years to a drunkard twice her age for a sum of Rs 80,000. Half of this money was distributed amongst relatives who had acted as middlemen; the other half went to her parents. Bali's nata husband, who was an alcoholic, beat her regularly. To meet the costs of his addiction to alcohol, he arranged her nata secretly for a sum of Rs 120,000 to another man without her knowledge or consent. One day, a few men came to visit him. Bali fed them. Her husband then asked her to show the men out to their jeep. When she stepped out with them, they gagged her and forcibly pushed her into the jeep and sped away right in front of her husband. She was five months' pregnant at the time. She was forced to abort her child and participate in a nata ceremony with her new husband. She lived with the second nata husband, also an alcoholic who beat her regularly, for over a year. She kept this marriage a secret. She eventually mustered the courage to escape to her natal home. But she was constantly intimidated by the middlemen who asked her to return to her second nata husband, failing which they threatened to give her away in a third nata in order to recover the jhagra money paid for her. Bali reported her case to Tara Ahluwalia of the Women and Child Empowerment Committee in Bhilwara, who helped her lodge a criminal complaint against the middlemen for abduction and intimidation. The case continues to be fought in the courts, but Bali has secured her release from the cycle of nata ownership and transfer. [Source: Vividha Features, no. 10, 25 December 2001–10 January 2002].
- Kali was poor but managed to finish her schooling before she left to live with her husband, who belonged to a family wealthier than her own. Kali's in-laws subjected her to violence for being poor and for being unattractive and dark-skinned. She was eventually thrown out of her matrimonial home. She lived in her natal home for two years. During this time, she completed a BA degree. Her husband and in-laws did not call for her even once during this period. They then held a large meeting of 1,200 panchs from five villages at which they declared Kali a deserter and fixed a nata of Rs 150,000 to recover the jhagra money spent by them. The

meeting was held at night. Kali with her family and five women activists from the Mahila Salah Suraksha Kendra (MSSK), based in Jaipur, were also present. The in-laws presented a story seeking to establish their claim of desertion by Kali. She, too, demanded space to present her own case. This action was unprecedented and the panchayat did not allow it. Instead, they allowed her written statement to be read by her brother on the microphone. Kali's act of claiming space at the panchayat for narrating her side of the story, and her presence at the panchayat along with the five women activists, changed the power relations sufficiently for the panchayat to deliberate with greater care and to decide in Kali's favour. They declared that the in-laws had evicted Kali as a result of which they had lost any claim to recover the jhagra money or to arrange another nata. Kali was thus freed from the cycle of continuous nata and male ownership. [Source: Vividha Features, no. 69, 12–28 August 2004].

- A woman in a nata relationship came to the MSSK in Jaipur to complain about her in-laws. She had left her matrimonial home because of her in-laws' daily interference in her relationship with her husband and their domestic affairs. The in-laws visited her at her natal home and in the course of heated arguments, a scuffle broke out between the two families. The woman's parents pressurized her to file a complaint with the police against the physical assault. Her father complained that he could not tolerate the rudeness with which the in-laws had talked to his daughter. The matter was publicized by the local newspaper, thus increasing the mistrust and tension between the two families and leading to the couple's separation, although the woman did not want to leave her husband at all. MSSK advised her that if she were willing, they could mediate with the husband on her behalf. They told her that if she were clear that she wanted to break off with the husband completely, she should pursue a criminal prosecution case. They also warned her that her father's enthusiasm in fighting a criminal case could also stem from his desire to send her into another nata marriage and receive additional money. The three options were set out before her to contextualize the interests of all the parties involved and to allow her to consider her own choice in the matter. Finally, the woman decided that having dealt with conflict for three months, she now wanted to proceed with a case of criminal prosecution. [Source: Case records, MSSK, Jaipur, August 2007].
- In another case, a woman in a nata marriage divorced her nata husband according to custom because she received regular beatings and faced violence at his hands. She refused to live with him. He consented to the divorce as well. Following the divorce, when the woman got married to another man, the former husband began intimidating her for the recovery of the jhagra

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money owed to him upon her contracting a subsequent marriage. The woman claimed that since the divorce had been initiated on account of the husband's violence towards her, and because it had been effected by the mutual consent of both the parties, all dues were settled and nothing was owed to him. But the husband claimed that the divorce was not formal until his claim of recovery of the jhagra money was met under customary law. He wanted to take the matter to the jati panchayat to bring it within the domain of customary law, which was in his favour. Recognizing the husband's strategy, the woman approached the MSSK to take recourse to the formal legal system. By opting for the formal legal system, the woman was able to protect herself successfully against the demands and claims of her former husband, which would henceforth be treated as criminal intimidation. She was thus able to relieve herself of the burden of having to repay the debt of the jhagra money. [Source: Case records, MSSK, Jaipur, August 2007].

## Appendix D

# STANDARD VERSION OF MAITRI KARAR AVAILABLE WITH LAWYERS IN AHMEDABAD

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### A Contract of Understanding

The so called maitri karar

The first party

Age

Profession

Residence

The Second party

Age

Profession

Residence

We, the two parties agree to his contract of understanding, which has the following main conditions:

1. The first party and the second party know each other for a long time and have helped each other in happiness and sorrow as well as good and bad, social, religious and other occasions. Both parties like each other and both have an understanding of what is good and bad for them.
2. Both are capable of taking decisions, keeping in mind what is good and bad for them. We, the parties have to live together in harmony. We have to bear all the social, religious and economic relationships as husband and wife. However, because of certain circumstances, we are unable to get married. Therefore we have made this contract of understanding i.e. matiri karar.
3. If as a result of the cohabitation agreed to in this contract, a child is born to the first party and the second party, then the entire responsibility of the child shall remain with the man. And the man will have to bare the responsibility of the upbringing of the child and its food, clothing and education throughout the child's life. And the first party, (the woman) will have to do all the things like cooking the food, which the second party likes, keep the house beautiful and nice and maintain social relations. And emotionally give support and cooperation to the second party.

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4. At present, the first party is in service and any legal benefits she gets from the service after her retirement, the second party will not stake any claim on it, which is clearly agreed upon through this contract.
5. The responsibility of living expenses of the two parties, their food, clothing and other basic necessities and economic necessities will have to be born by the second party. The second party will have to give enough respect to the first party and will conduct himself with the feeling of generosity (stree dakshinya) toward the woman and will protect her. Similarly, the first party will have to respect the wishes of the second party and will have to live safely in the 'fort of the house' and will have to respect the second party, the man.
6. If there is any differences of opinion between us, the two parties, it will have to be resolved through agreement and no legal procedure through the court will be followed. At present, we both parties are childless. And in future, if there is the birth of a son or a daughter, the entire responsibility will be with the man; i.e. the second party.
7. In future, if the first party is ill, the entire responsibility for treatment and care will be with the second party.
8. At present, the first party is doing service and in future if the second party asks her to leave the service, then the decision will be taken by mutual agreement. Once agreed upon, the decision will be binding on both the parties.

The above contract of friendship (or service) i.e. the so called maitri karar, has been entered into by both the undersigned parties, after having read and understood the terms, in complete presence of mind, without any force, pressure or influence. We have made this contract with our free will, and the agreed terms are acceptable and binding to both the parties and will always be so.

Signed on this date, in Ahmedabad.

Signed: The first party

Signed: The second party

## Appendix E

# TESTIMONIES AND STORIES OF WOMEN IN SAME SEX RELATIONSHIPS

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### Workshop Organised by PLD with Sahayatrika Thiruvanthapuram, June 20-21, 2006

This workshop was organized by PLD as part of its project on rights in intimate relationships to contextualise forms of discrimination, violence and exclusion experienced by women in non normative relationships. This workshop was organized with local support of Sahayatrika. Five women associated with Sahayatrika met as a group to share the complex web and continuum of discrimination they experienced not only on account of their sexual preference but also because of the intersecting disadvantages of class, caste, gender identity, etc. The testimonies and stories are powerful narratives as they manage to convey the complexity of discrimination that cuts all aspects of life, and cannot be captured by a mere listing of violations. Even though a brief description about each participant is retained with their permission, effort has been made to conceal the identities of the participants to maintain confidentiality. Confidentiality is particularly critical in a context like Kerala, where the work of women's groups and documentation of lesbian suicides reflect an alarming hostility towards women's social and sexual freedom, as well as towards gender equality.

This document is divided into 3 parts – the first part introduces the five participants, outlining their caste, class and gender identity; the second part categorises the different themes and dimensions of violations that emerged from the workshop discussion, to bring out routine forms of discrimination that women in same sex partnerships experience; the third part has interviews with couples in same sex relationships, that reflect ways in which the external hostility impact and shape their relationships. The last two parts reproduce the reflections (translated here) in the words of the participants to capture the feelings, vocabulary, fears and hopes as expressed by them.

## Part I: Profiles of the five participants

B: B is 30ys old. At present she works in Bangalore and occasionally undertakes research assignments in Kerala on gender and queer politics. B's partner A is a transgender person (Female to Male), They have been in a relationship for 14 years. B had to leave her family because of her relationship with A. B prefers to consider herself a heterosexual since her partner A prefers a male gender identity though for political reasons she also considers herself as a lesbian.

N: N is a student, considers herself as a lesbian. N and her lover tried to run away from home. Their families successfully managed to put pressure on the police to bring them back before they managed to reach the courts. N was kidnapped by her family members. Both she and her lover were forcibly confined at home, in a manner akin to house arrest, and kept under heavy sedation to cure their 'disease of homosexuality'. Later N managed to escape and sought help from activist friends in Sahayatrika. She was living in the home of friends. N's parents tried to kidnap her again. They called her for a talk to solve differences and tactfully gave her an ice cream after eating which she fell unconsciousness. She was again kidnapped and kept under house arrest. But she escaped again. N is trying to resume her studies.

S: S a single woman in her 30s, is a lecturer and counsellor for a B.P.O. She lives alone in a house adjacent to her parents. They are an upper middle class family. S considers her self bisexual. She was forced in to marriage twice by her family, both times ending in divorce. Her parents and brother accuse her of being immoral. They want her to vacate the house though legally the house is in her name. S says they are planning to evict her by initiating legal action to prove she is insane.

J: J considers herself as lesbian and at present is in a relationship with a woman who is a relative. Her lover is married and her husband works in the Gulf and she has two children. J lost her parents and now lives with her younger brother. J and her partner want to live together but are scared to 'come out' before their families and community.

D: D has returned to Kerala having grown up overseas and has been part of the gay and lesbian movement during her years abroad. In her time in Kerala, she helped set up a voluntary support group to address the increasing incidents of lesbian suicides in Kerala.

## Part II: Dimensions of everyday stigma, violation and discrimination experienced by women in same sex relationships

### Nature of violations in the family and the community:

D: In our experience, families play an active role in violating their fundamental rights.

N: It seems impossible for our society to accept the lesbian identity of a person. And that is why one is extremely scared to 'come out' as a lesbian. There is enormous social pressure to conform to and not deviate from what exists. But things are changing to the extent in Kerala in that people today no longer pretend that they do not know what is a homosexual. If earlier two in hundred people could recognise homosexuality, today I feel twenty in a hundred can recognise it. The 'coming out' of SreeNandu/Sheela have of course played an important role in it.

But the fact remains that sexuality remains a taboo subject. We have been taught from our childhood that sex is sin. We can't even talk to our mothers about sexuality generally, then how and where can we have the space to talk about same sex relationships? In school, even in our biology classes, if we ever ask anything more around sexuality or sex, the response was that, 'it is not in the syllabus!' If people come to know that you are a lesbian, they won't allow you to have a life of your own. They won't kill you, but will deliberately do everything to make you run away.

B: Even when there are different identity based groups like the dalit groups, women's groups, not many encourages a dialogue on marginalisation of homosexuals.

Even when/ if the family has no trouble or differences with your identity, the society will not let you be. Our community/ neighbourhood has always known of my friendship with A, and used to tease us. Later, they started harassing our family members especially the male members. This caused our family to ask us to leave the house. When we refused, they filed false cases of theft on us. The male members in our family were targeted and ridiculed by people. They also attacked me verbally, asking "When we all are here, why should you go for someone like that.. (A)?" Our family is a joint family and I do not own the house, so it was possible for them to throw us out. Economic support from the family is clearly conditional upon one's sexual conformity.

J: My parents were not bad people. They were not violent. They were sensible. I had full freedom and not much restriction at home. I lived almost like a boy, just like my brother. When I started

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wearing male clothes or behaving like men, they did not respond. Whatever I did was ok for them.

I feel that everyone know that there are women like us ... that we exists. Even people of older generation, who are in their 70s know it. But they just do not want to accept that they know it. They pretend not to know ....

My partner has a husband and he is living/working in the Gulf at the moment. We are worried what will happen when he comes back. Already people have been writing to him to let him know that there is something going on between me and her. But it seems he has not really understood. He knows me and even rang me up to ask what is happening between me and her. He does not seem to have a clue.

Today, in Kerala, almost everyone is curious about lesbians. In spite of the hostility against them, there are many homosexual people who are ready to write about their lives ... (autobiographies). The society won't allow us to live in peace. Society is more tolerant when we do not live as a couple but live separately from our partner, as two individuals. They are not tolerant when two lesbian women want to live together.

How come the families have a right to keep people in house arrest? How come if any two persons can chose to live together, they loose their right to live together if they are lesbians?

### **On the Impact of Section 377 of the Indian Penal Code in everyday life**

Points raised in the discussion:

- Regardless of the existence of a penal provision such as Section 377 of the Indian Penal Code, social stigma will remain
- If there is no 377, some of us might feel a little more strong and courageous to take a decision to come out as a couple ... otherwise, we will be forced to pretend to be friends forever
- The striking down of such a law might even help us to have access to our property and other rights
- Society can torture us because of the existence of such a law...
- Why should there be any law that restricts our sexual rights? In any case, what is the law of sexuality? Who will define it?

### **On the Interplay of gender, sexuality, class and caste:**

B: I feel so trapped trying to figure out what I should be ... how I should label myself. I sometimes prefer to say that I am not a lesbian but a heterosexual. My partner believes that he is a man. He does not want to put any other label on him as gay, FTM or trans .... nothing. For him, he is a man ... and then if I want to accept his identity, I am heterosexual. But I also have to consider myself as a lesbian.

Me and A have been married for thirteen years. I belong to a lower caste and class. Compared to me, A is from a better family, class wise and caste wise. We do not have any issues between us regarding our caste or class, but the society finds it difficult to accept us. In contrast to us, there has not been that much problem in accepting Nandu and Sheela. The society views them as interesting pair, but we will not be viewed like that ever. This is because we are a bad pair in more than one sense – for we have crossed caste as well as sexuality boundaries. There is also the politics of caste, class and colour... ?

A and me have been friends from childhood. A was a regular visitor to my home and everyone liked him. When we developed a relationship, there was no objection in the beginning. And the truth is that all my younger sisters, three of them, supported our relationship. They have always stood with me and still do support me.

N: Society prefers to see lesbians as women who have too much interest in sex. ... and they think the only way to control our sexuality is to get us married as early as possible. They see lesbian relationships in terms of sex only? For me, my relationships have been less physical and more emotional. It is more about my emotional attachment to a woman. The families torture us and the society pretends to not recognise us ... so where will we go?

J: I always dressed as a man till I was 26. When I lost my father, my mother wanted me to become 'proper' and I listened to her and started wearing churidars. Now when my relatives or cousins see me in this dress (women's clothes), they say I looked better and good in men's clothes! It always matters what you wear. It matters who wears what. People figure out who is the man and who is the woman in a relationship ...

When S and N 'came out' as lesbians in the public and in the media, it was of great encouragement and relief for people like us to know them. In some ways, there was a response and acceptance though they were harassed in many ways. My neighbours showed me the news

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of S and N and though they did not say it directly, they hinted that I am probably like them. And I felt good about it. But of course, this does not mean much.

My brother is younger to me and we have a good relationship of knowing and liking each other. Till now whatever way I live, he does not respond to me in a negative way and does not interfere. But other family members or relatives especially other men in the family are not like that. My partner's brother seems to dislike me a lot. He seems to be a violent guy. Once, in front of me, he took a chicken in his hands and strangled and killed it in one hit just to scare me. I was really horrified. But I am not that scared of him any more. It seems he is learning Judo ... but I am also learning karate ....!

S: My parents say since I am not one with a penis ... I should get home before 10.00 pm. They have a problem with everything I do especially after my second separation. They have major problems that I come late or that I have friends visiting. All they want from me is to be 'married'. They feel that their status is compromised because I am not married.

I am a bisexual and twice they have forced me into marriages. As if that was not enough, now they threaten me that I will lose my property since I failed my marriages. They want to eliminate me. They want me to leave this house and they don't care that I do not have another place to go. This house is in my name. Since I am not a good woman according to them, they want to get it back and give it to my brother. My brother and my parents are planning to throw me out. They say they would prove in the court that I am insane. So I am planning to seek help of activists and lawyers here. My family does not want me to do anything which would affect their prestige or status ... but that includes too many things!

D: In my experience of working with same sex desiring women over the last few years, I've heard many women say that they don't know what their sexuality is or feel they may be asexual. There is clearly, in practice, a conflict between understanding sexual identities and sexual orientation.

How do we expect people in same sex relationships to fight for their property rights? Most of them are forced to leave their families and their community for ever. They are not in a position to continue a normal relationship with their families. Being away for many years, it is then very unlikely that they would go back asking for their share in the property. Till now, there has been no case where such a right has been claimed.

### **On power relations and roles within relationships**

D: There seems to be a clear butch/fem pattern among many partners.

J: My partner is a very shy and sensitive person. She has not traveled much and has not done things on her own. So I believe one person among us has to be stronger and powerful.

Among us, I am stronger and vocal than her and I prefer it to be that way. I am not saying that I will control her against her wishes or something ... but since she is weaker, I will have to take care of things. It may not be jealousy but possessiveness, a small amount of which I believe is good in any relationship.

N: I don't think that one person in a relationship has to be more powerful. What does that mean? That will probably lead to a bad partnership.

B: Relationships cannot be without problems. But when there are serious problems, then one shouldn't always try to 'work out' things. If a relationship is dead, then why drag it forever. Why continue if it is not doing well?

S: My parents did not find it problematic to force me into two successive marriages. And they were very happy when I was living with my husbands howsoever bad those relationships were for me. Now I am on my own and living alone, they feel it is better I die.

### **On Rights in Comparison with women in different sex relationships:**

D: The issue here is that same sex people in relationships have to leave their families whether the parental family or the husband's family. And most of the time, they then loose their rights over their children. This is a real serious issue since they cannot demand the custody of their children, since they are the one's who run away ... and so their demand won't be accepted. It is also an issue that we can't adopt children where in the case of heterosexuals there are no issues.

J: My partner has children. And we will be worried that if and when we manage to live together, when the children grow up, will they dislike us or hate us because of what we are?

## Part III: Interviews with same sex partners

### I

*A and B are partners living in an orphanage in Thrissur, Kerala. They both work and stay in the orphanage. A is an unmarried single woman. All her siblings are married. Her parents are no more. A considers herself as a lesbian and says she was never attracted to men.*

*B started living with mother and sister in the orphanage once they become destitute. They are among the initial members of the orphanage. B considers herself as a bisexual. This is her first relationship with a woman.*

*A and B are planning to live together. They are trying to buy a house for themselves outside the orphanage.*

*B: We have been trying extremely hard to get a loan for our home, but no body is helping us. A house is the most important thing for us today. No one here knows about our relationship and we do not want to 'come out'. If any one comes to know, they won't allow us to live here. We are very scared of this society. It is not that there are no women here who have relationships with women. I know there are. But they are rich people. So they can afford to keep their relationship confidential. Further, they are married women and even if their husbands come to know after a certain period of time they tend to just ignore. For people like us, things are difficult since we have no place to go.*

*A: I have always been attracted to women... as far as I can remember, even when I was a child. And I like to wear men's cloths. But I had to compromise and wear sari to get this job. If I don't wear sari here I would lose my job.*

*I have had many relationships with women before I met B. I even wanted to live in with them but there was no place we could go. My house got confiscated since I could not pay back loans. Finally, I ended up working for this orphanage.*

*I was ashamed of myself for being attracted to women. I sometimes wanted and have tried*

*to stop this behaviour. But I could not. As long as you have a place to live and privacy, (like living in a home or hostel) things are fine. When you don't have that, the world will come to know you (your sexuality).*

*B: Sometimes we have fights and A beats me up. My mother feels very bad at this and she interferes. A always suspects me of having relationships with men in the neighbourhood. My younger sister is getting married so there has been lots of talk about my marriage. A is very upset about this. A is worried that I might meet some one or something would happen around the marriage of my sister. People ask me whether it is because of A that I don't want to get married.*

*A: I have had many relationships earlier. I don't consider myself as a woman or a man. And I have no plan to get married. Why should I destroy some one else's life? But if I lose B, I will kill myself. So many people interested to find out 'why is she not getting married', 'Is she available' etc. A guy even called me up to ask why B is not getting married and whether it's because of me. I told him that he should better ask her.*

*When I broke up from my earlier relationship, I was very depressed. I finally spoke to someone about it who referred me to Sahayatrika. I even went to a doctor with the help of Sahayatrika. The doctor told me that I don't need to treat myself or change myself.*

*B: Earlier people here could not understand such things. Now, every one knows about such relationships. So it has become even more difficult to get protection from harassment. Today, the police and the people know the issue after Nandu and Sheela came out in the media. Every one has read about them. So today, if two women want to live together everyone assumes that they are lesbians even if they are not.*

*A: I want the freedom to live the way I want. May be like a man. I want B to share a home with me. I am worried that she will leave me. She had relationships with men earlier, so my fears are genuine. Men will try to take her away from me. And I want her to live with me forever.*

*B. I have promised her that I will not leave but she doesn't believe me. If she fights with me consistently, how can this help our relationship? For those who have power and money,*

## Appendix E

*it will be easier to have such relationships. But for people like us, it is difficult. At the moment, things are OK since we have a place. But it might not be easy once we move out of this place. People will harass us. A might loose this job soon... and then what would we do? The most important needs are to have a house and a job.*

*['A' still desires to have a sex change operation, but it is not economically possible for her.]*

## II

*C&D*

*C is bisexual. She is an activist, researcher and an artist. She worked with an NGO in Bangalore for a while.*

*D does not believe in belonging to any gender and said one could consider him/her as a lesbian or lesbian boy from Kerala. D is working with an NGO in Bangalore.*

*C: I live with my parents and have no plan to come out to them. My friends know about my relationship with D but do not want to accept it...so they either intentionally don't recognise or respond to D. They do not interact with him. If we meet them while they are with their partners, they expect me to talk to their partners but they would ignore D and are uncomfortable with his presence. One of them advised me indirectly that I should not get distracted from my art. People keep on reminding me this. But art is primary to me ...how can I get distracted from it? They say I should settle down...that this relationship is not stable.*

*I have always dreamt of getting married to a woman ...from my childhood. I was always very comfortable the way I was. This never made me feel worried. And I never thought too much about that I was different. My art was always the most important thing in my life. I used to work at it ten hours a day since I was quite young till my mid 20s. Today I am more interested in the politics and history of art.*

*D: Other than few people in Bangalore, nobody in the world knows of my gender or sexuality. From class 8th onwards (this dress became more permanent. And those days I was also into sports and so had short hair. As I became more active in sports I started traveling a lot. I came to Bangalore when I was 21. I preferred to get away from home because I had to keep justifying my dress and the way I am. (My father would always oppose to my ways and so he would become violent on account of my dress. Finally, when I could not take it anymore, I called a child helpline and got directed to Sahayatrika. Later with their help, I came to Bangalore. For many of us who had to leave Kerala, Bangalore provides a safe space.*

*From childhood, I always thought I was different from other girls and boys... but did not worry about it. We were only girls at home and my family also did not bother much about the way I was. Then I once read in 'Vanitha' (a popular Malayalam women's magazine) about the 'Radha' who became 'Radhakrishnan'. This inspired and relieved me greatly. I thought that if I want to get married, I have to become a man. Today, I am not trying to become a man or a woman though I prefer to dress like men. And I also don't want to think a lot about my gender.*

*C: We did not have any situation of direct conflict with the laws or police. The issues were more with our families. During my work I became friends' with some hijras, and my family was not very happy about this. They told my mother once that I have become impotent since I am probably sleeping with them... that we could still try to get some one 'second hand' man for me (meaning already married etc). For a few years I did not have good relations with my family. They cannot imagine that women can have relationships with women. On top of it, they think and talk very badly about women and dalits in general. A little bit of feminist talk is still ok with them as long as you don't touch issues of sexuality. My mother is also an artist and she has struggled a lot to pursue her art, faced harassment. But despite all that she achieved success – for which she suffered rumors of being a woman of loose character.*

*My first relationship was with a woman servant of my family. My family helped her to study and she was going to school. Our relationship lasted for years and we were very*

## Appendix E

*happy with each other. She was brilliant in studies. She was a dalit from a very poor family. When she finished 10th, her family wanted her to return to get married. She was not happy with this.*

*D: I do not need property and have no plan to have children. I left my family as I did not want to trouble them. I know that property is my right but at the same time I do not want anything from my family. I can take care of myself and prefer it to be that way. If they offer me something, I might not refuse. Families normally go very much against people like us, because of the fear of not being accepted by society. But later they do change their positions. Many such families have later supported their children secretly.*

*C: I am the only child in the family. So whatever my family has will come to me. I have no plan to come out to them. My mom is the 'decider' in my family and whatever she decides will be done and she will always support me.*



## Appendix F

# COLLUSION OF THE FAMILY, THE COMMUNITY, AND THE STATE IN OBSTRUCTING INTER-COMMUNITY MARRIAGES

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### Some Case Summaries

#### Case from Lucknow

Sarika Pandey, a woman from Lucknow, was well educated, with a convent-school background and a management degree. Her decision to marry Salim Aslam, a Muslim man, was completely unacceptable to her modern, high-caste Hindu family. Her parents forced her to choose between 'us' and 'them,' threatening to break off relations with her in order to stop her from marrying Salim. Nonetheless, one morning, Sarika made up her mind and walked out of her home to marry her boyfriend. This was followed by coercion and threats from her family. Thereafter, Hindu hardliners stepped in, decrying the 'defiling of their girls' by Muslim boys. A case of kidnapping was registered against Salim and a *kurki* (bankruptcy) notice was issued, which resulted in his entire family being on the run for six months. Finally, Sarika succeeded in getting the criminal proceedings against her husband quashed by the court and was able to begin her life afresh.<sup>1</sup>

#### Cases from Mumbai<sup>2</sup>

1. Sameer, a Muslim boy, and Deepa, a Hindu girl from Kalyan (in Mumbai), eloped to Nepal to marry. The girl's father filed a writ of habeas corpus, claiming that his daughter had been kidnapped. The Bombay High Court summoned Deepa but allowed her to go with her husband after interviewing her in court.
2. Prakash and Sarita (names changed) from Vile Parle (in Mumbai) ran away to Uttar Pradesh to get married. The girl's parents lodged a case of kidnapping against Prakash and had him arrested. Sarita was placed in a remand home. When the matter came up before the Bombay High Court, Sarita declared her desire to be with Prakash in open court, following which the couple was reunited.

<sup>1</sup> <http://www.indiatogether.org/cgi-bin/tools/pfriend.cgi>

<sup>2</sup> [http://www.humanrightskerala.com/index.php?option=com\\_content&task=view&id=5765&Itemid=5](http://www.humanrightskerala.com/index.php?option=com_content&task=view&id=5765&Itemid=5)



### Cases from Haryana<sup>3</sup>

1. Manoj and Babli belonged to the same sub-caste of the Jat community and hailed from the same village. They fell in love and eloped in 2007 because under local custom their marriage is 'prohibited' and viewed as incestuous. Manoj's family was harassed by Babli's relatives and a panchayat of village elders, locally called khap panchayat, was held. A case of kidnapping was registered against Manoj. When the couple returned to their village, Babli gave a statement to the magistrate saying that she had chosen to go with Manoj and that the two were married. The magistrate instructed the police to escort the couple to Jaipur, the city to which they had eloped. Instead of escorting the couple out of Haryana, the police put them on a bus at Pipli, near Karnal. At Karnal, Babli's relatives tracked them down. On 21 June 2007, the couple was found dead.
2. In Balah village, on 9 May 2008, Sunita Devi, 22, and Jasbir Singh, 27, both Jats, were killed by Sunita's father and other relatives. Their bodies were displayed like hunting trophies outside Sunita's house. Sunita and Jasbir, who were childhood lovers, had eloped and had been living with Jasbir's sister, Neelam Devi, in Machhraoli village (near Panipat) when they were attacked. As the villagers celebrated the killings, the sarpanch (head of the village council or panchayat), Ranbir Singh Mann, announced with pride that the entire village supported Sunita's family in undertaking this 'noble act'.

### Case from Kolkata

Rizwanur Rahman, a young Muslim man from a lower-income background, fell in love with Priyanka Todi, the 23-year-old daughter of one of the richest businessmen of Kolkata, Ashok Todi, the owner of Lux Hosiery Group. Priyanka was Rizwanur's student at the computer graphics centre where he taught. Despite tremendous resistance from Priyanka's family, the couple got married on 18 August 2007 under the Special Marriage Act, but returned to their respective homes and to work thereafter. In late August, Rizwanur confided in his brother about his secret wedding with Priyanka and brought her home to his family's small flat in a working-class Muslim neighbourhood. He and Priyanka asked for police protection in writing against threats from the Todi family, notifying the police that they were staying at Rizwanur's house. Priyanka's father warned Rizwanur to 'remove' himself from Priyanka's life or face dire consequences.

<sup>3</sup> <http://infochangeindia.org/200805237150/Women/Features/Murdered-for-Love.html>

Allegedly, at the behest of the Todi family, the couple was summoned several times to the State Police Headquarters at Lalbazar, Kolkata, where Rizwanur was asked to separate from his wife. The couple refused. On 8 September, eight days after the marriage had been certified, the police summoned Rizwanur again and threatened to have him arrested on charges of abduction if he did not return his legally married wife to his in-laws, even though no official case had been registered against him. Under police coercion, Priyanka was sent back to the Todi house that same day, with a signed undertaking given by one of Priyanka's uncles at the police station that Priyanka would be sent back to the Rahmans' house after seven days, on 15 September. Until 19 September, Priyanka was still not allowed to return to Rizwanur, so he filed a case with an NGO asking for assistance and planned to take legal action. On the same day, the afternoon of 21 September, about two weeks after his wife had been forcibly separated from him, Rizwanur was found dead. His body was discovered lying beside a railway line, with his hands folded over his chest and a deep wound on the back of his head.<sup>4</sup> Despite the injuries, the police investigation report ruled out murder, stating instead that Rizwanur had committed suicide and recommending that charges of abetment to suicide should be registered.

### Case from New Delhi

Another shocking case was the murder, on 17 February 2002, in Delhi, of a young business executive, Nitish Katara, after he had attended a wedding party of a friend where he is stated to have danced with his girlfriend, Bharati Yadav. Bharati is the daughter of a controversial politician, D. P. Yadav of Uttar Pradesh. Her brother, Vikas Yadav, who had also attended the same wedding party, took Nitish away in a car to settle scores with him. He drove away with an accomplice to a lonely spot where they bludgeoned Nitish to death and burnt his body thereafter. In her court testimony in 2006, Bharati denied any relationship beyond friendship with Nitish, some say out of fear of her family. According to various media reports, it was the issue of class difference between the two families; the Yadavs had acquired wealth but remained 'feudal', while the Kataras were 'bourgeois' and middle class. In his confession to the police, Vikas Yadav, Bharati's brother, is alleged to have told the police that 'the affair was damaging our family's reputation.'<sup>5</sup> On 30 May 2008, a Delhi court found the accused Vikas Yadav and Vishal Yadav, who are cousins, guilty of killing Nitish Katara and sentenced them to life imprisonment.

<sup>4</sup> [http://en.wikipedia.org/wiki/Rizwanur\\_Rahman](http://en.wikipedia.org/wiki/Rizwanur_Rahman)

<sup>5</sup> *Ibid.*

## Case from Bhopal

Priyanka Wadhvani, a Hindu girl, fell in love with Mohammed Umer, a Muslim boy. Both were residents of Bhopal. Priyanka had met Umer through a common friend. The couple decided to get married in another city, fearing a backlash from their respective families. On 2 April 2007, the two eloped and reached Mumbai where Umer converted to Hinduism and changed his name to Umesh. On 5 April, they got married at a temple in Khar. Meanwhile, Priyanka's family had lodged a complaint in Bhopal against Umer for kidnapping their daughter. Several political and religious organizations joined the battle to retrieve the lost 'honour' of the Hindu community. Members of the Bajrang Dal, the Bhagva Brigade, and other Hindu organizations called for a Bhopal bandh if Priyanka were not 'returned'.

On 6 April, Priyanka called up the Inspector General of Police and told him that she had married Umer willingly and claimed that the complaint filed against him was false. But she was told that her telephonic statement was not valid and that she needed to go to Bhopal to record her statement in person. Her father had also threatened her with dire consequences if she did not return to the family. He had the police take Umer's brother, Shakeel, into custody for days. Fearing that Shakeel would be tortured and that his family would be harassed by the local people, Priyanka sought protection from the Mumbai High Court. On 11 April 2007, the Mumbai High Court directed the city police to provide protection and directed the Superintendent of Police, Bhopal not to arrest Umer until further orders, as the court was satisfied that prima facie the couple was married.<sup>6</sup>

<sup>6</sup><http://www.mumbaimirror.com/net/mmpaper.aspx?page=article&sectid=2&contentid=20070412040022578618b4843>

## Appendix G

### CASE LAW ON THE DEFINITION OF 'WIFE'

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There is no uniform definition of wife in the law. The strictness or flexibility of the legal approach varies with the particular circumstances of the case and with the discretion of the judge. Nonetheless, the cases pertaining to this matter suggest that the courts may be inclined to take a broader approach to the definition of 'wife', extending legal protection to a cohabitee or to a second wife only where no major contestation is evident or where the second wife is an innocent party to the bigamous union. The following Supreme Court case law is indicative of this trend.

#### Only a legally married woman is covered under the legal definition of 'wife'

*Smt. Yamunabai Anantrao Adhav vs. Anantrao Shivram Adhav* [AIR 1988 SC 644] held that the expression 'wife' used in Section 125 of the CrPC should be interpreted to mean only a legally wedded wife. While 'wife' is not defined in the CrPC, the explanation to Section 125 includes a divorcee. A woman cannot be a divorcee unless there was a marriage in the eye of the law preceding that status. The marriage of a woman in accordance with the Hindu rites with a man having a living spouse is a complete nullity in the eye of the law and she is, thus, not entitled to the benefit of Section 125. In the Court's opinion, the fact that the wife was not informed about the husband's earlier marriage when she married him would be of no avail.

*Vimala vs. Veeraswamy* [(1991) 2 SCC 375] held that when an attempt is made by the husband to negate the claim of the neglected wife, depicting her as a kept mistress on the plea that he was already married, strict proof of the earlier marriage is necessary. Under the Hindu law, a second wife whose marriage is void on account of the survival of the first marriage is not a legally wedded wife and therefore not entitled to maintenance under Section 125. This provision can be applied only when the husband satisfactorily proves the subsistence of a legal and valid marriage.

*Savitaben Somabhai Bhatiya vs. State of Gujarat* (Cr. App. No. 399 of 2005, decided on 10.03.2005). In this case, it was pleaded that the law operates harshly against the woman who unwittingly enters into a relationship with a married man and Section 125 of the CrPC does not give protection to such a woman. The Court held that this may be an inadequacy in law, which only the legislature can undo. But as the position in law stands currently, there is no escape from the conclusion that the expression 'wife' as per Section 125 refers to only the legally married wife, noting that the legislature included maintenance for illegitimate children without extending this

relief to a woman not lawfully married. However desirable it may be to take note of the plight of the unfortunate woman, the legislative intent being clearly reflected in Section 125 of the CrPC, there is no scope for enlarging its purview/ambit/extent by introducing any artificial definition to include a woman not lawfully married in the expression 'wife'. The provision is enacted for the sake of social justice within the constitutional sweep of Article 15(3) as reinforced by Article 39 of the Constitution of India – to give effect to the natural and fundamental duty of a man to maintain his wife, his children, and his parents so long as they are unable to maintain themselves.

### **An enlarged approach to wife that includes the 'second wife' or cohabitee to claim legal entitlements**

***Dwarika Prasad Satpathy vs. Bidyut Prava Dixit and Anr.*** [AIR 1999 SC 3348]. It was held that the validity of the marriage for the purpose of summary proceedings under Section 125 of the CrPC is to be determined on the basis of the evidence brought on record by the parties. The standard of proof of marriage in such proceedings is not as strict as that required in a trial of offence under Section 494 of the Indian Penal Code. If the claimant in proceedings under Section 125 succeeds in showing that she and the respondent have lived together as husband and wife, the Court has to presume that they are legally wedded spouses, and in such a situation one who denies the marital status can rebut the presumption. When the respondent does not dispute the paternity of the child and accepts that a marriage ceremony was performed, though not legally perfect, he cannot avoid maintenance proceedings.

***Rameshchandra Rampratapji Daga vs. Rameshwari Rameshchandra Daga*** [(2005) 2 SCC 33] held that a bigamous marriage may be declared illegal, being in contravention of the provisions of the Hindu Marriage Act, 1955, but it cannot be said to be immoral so as to deny even the right of alimony or maintenance to a spouse financially weak and economically dependent.

***Vidyadhari & others vs. Sukhrana Bai & others*** (decided on 22/01/2008). Succession certificate was granted to a woman after the death of the man with whom she was living despite the fact that his legally wedded wife was alive. The Court based this decision on the fact that the live-in partner was mentioned as the nominee in the man's provident fund and life insurance policies. Both the wife and the deceased's partner filed petitions before a Madhya Pradesh trial

court seeking the right of succession to his properties. The trial court rejected the wife's claim, but the High Court reversed this, noting that there was no evidence to substantiate the claim that the deceased had divorced his legally wedded wife by customary procedure. The Supreme Court upheld the partner's claim and observed that although the High Court was right in deciding about the subsisting marriage between the deceased and his wife, it was wrong in denying the succession certificate to his partner for the purpose of collecting the provident fund and the life insurance amounts. Whatever be the status of the live-in partner, there was no doubt about the legitimacy of the four children born of her relationship with the deceased.

## Appendix H

# CASE LAW ON ADEQUATE HOUSING AND SHELTER

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The overview presented here illustrates the framework and the basis of the constitutional right to adequate housing and shelter, which has been developed in gender-neutral terms, without reference to women as a vulnerable group, or to sex/gender as a ground of disadvantage. It also looks at the case law under the Protection of Women Against Domestic Violence Act, 2005 (PWDVA) to highlight its strengths and limitations.

### Constitutional case law

In *Olga Tellis & Ors. vs. Bombay Municipal Corporation & Ors.* [(1985) 3 SCC 545], the sweep of the right to life under Article 21 of the Constitution was expanded to include the right to livelihood. Reading Articles 39(a) and 41 into the content of the right to life, it was held that it would be sheer pedantry to exclude the right to livelihood from the content of the right to life. The State may not, by affirmative action, be compellable to provide adequate means of livelihood or work to citizens. But any person who is deprived of his right to livelihood except according to just and fair procedure established by law can challenge the deprivation as offending the right to life conferred by Article 21.

The scope of the right to life was further expanded in *M/s. Shantistar Builders vs. Narayan Khimalal Totame* [(1990) 1 SCC 520], which held that the right to life is guaranteed in any civilized society and would include the right to food, the right to clothing, and the right to a decent environment and reasonable accommodation in which to live. It is not necessary that every citizen must be ensured of the right to live in a well-built and comfortable house, but a reasonable home, particularly for people in India, can even be a mud-built thatched house or mud-built, fireproof accommodation.

In *Shri P. G. Gupta vs. State of Gujarat & Ors.* [(1995) SCC Supl. (2) 182], the Supreme Court relied upon Article 19(1)(e), Article 21, as well as Article 39(b) and Article 46 of the Directive Principles of State Policy read with Article 11(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966 to observe that the right to reside in any part of the country would remain an illusion unless the State provides the poor the means to have food, clothing, and shelter so as to make their life meaningful and worth living with dignity. It is imperative for the State to provide permanent housing or accommodation to the poor under

the housing schemes undertaken by it or through its instrumentalities within the economic means of the poor so that they could make the payment of the price in easy installments and have permanent settlement and residence assured under Article 19(1)(e) and Article 21 of the Constitution.

Yet again, in ***State of Karnataka & Ors. vs. Narasimhamurthy & Ors.*** [(1995) SCC (5) 524], the right to shelter as a fundamental right under Article 19(1) of the Constitution was upheld, calling upon the State to make the right meaningful to the poor through the provision of facilities and opportunities for building houses. Acquisition of land to provide housing sites to the poor was recommended an activity fulfilling a public purpose.

In ***Chameli Singh & Ors. vs. State of U.P.*** [(1996) SCC (2) 549], the Supreme Court reiterated the importance of the State's role in providing shelter to its citizens.

In ***J. P. Ravidas & Ors. vs. Navyuvak Harijan Uthapan Multi Unit Industrial Cooperative Society*** [(1996) SCC], the Supreme Court held that Article 19(1)(e) read with Article 21 of the Constitution provides the right to residence and settlement and the right to live with dignity of a person, as a fundamental human right. Articles 46 and 39 enjoin the State to provide facilities and opportunities for the construction of houses by Dalits, tribal peoples, and the poor to enable them to live with dignity in permanent abodes.

Article 25(1) of the Universal Declaration of Human Rights (UDHR) and Article 11(1) of the ICESCR provide that the rights to food, clothing, and housing are part of human rights and that the State parties recognize the said rights and should take appropriate steps to ensure the realization of the right to housing. Under Article 39(b) of the Constitution, the State is enjoined to distribute the material resources of the community to subserve the common good. The socio-economic content of the Directive Principles of State Policy is all pervasive in the aim of making the right to life meaningful to all Indian citizens. The judgment emphasized that 'welfare' is, in fact, a form of liberty inasmuch as it seeks to liberate humans from social conditions that narrow their choices, and, additionally, it seeks to increase their chances for self-development in a world of vastly unequal opportunities and class disparities. Liberation, the court observed, did not mean mere liberty but rather the provisioning of facilities through all legitimate means to prevent the exploitation of the disadvantaged and to redress perpetual inequities.

In *Ahmedabad Municipal Corporation vs. Nawab Khan Gulab Khan & Ors.* [(1997) 11 SCC 121], the Supreme Court, reiterating its previous position, held that the right to life enshrined under Article 21 includes the meaningful right to life and not merely animal existence. The right to life would include the right to live with human dignity. The right to life has been assured as a basic human right under Article 21. However, due to want of facilities and opportunities, the right to residence and settlement remains an illusion for the rural and urban poor, in light of which Articles 38, 39, and 46 have mandated that the State should provide socio-economic justice to minimize inequalities in income, opportunity, and status. While holding that no person has a right to encroach and erect structures or otherwise on footpaths, pavements, or public streets or in any other place reserved for a public purpose, the Court observed that the State has the constitutional duty to provide adequate facilities and opportunities through the distribution of its wealth and resources for the provision of settlement and shelter as part of the right to life. In this context, the right to livelihood was also held as vital to the right to life as it provides the means of living. The constitutional scheme of Articles 19(1)(e) and 21, according to the judgment, resonated with the standards of Article 25(1) of the UDHR and Article 11(1) of the ICESCR on the right to a standard of living adequate for the health and well-being of an individual and his/her family (including in its scope, food, clothing, housing, medical care, and necessary social services).

Thus, based on the above cases, it is evident that the Supreme Court has recognized the right to shelter as a fundamental right but has not paid much attention to the special needs of women in terms of providing safe shelter houses for them. Even the recent shared-residence provision in the PWDVA is limited in its scope since it assumes that all women would like to stay at their matrimonial homes despite the domestic violence to which they have been subjected either by the husband or by the in-laws/relatives. It is also important to know how the judiciary has interpreted this provision and whether it has managed to secure the right to shelter for women.

### Case law under PWDVA

In *S. R. Batra & Another. vs. Smt. Taruna Batra* [AIR 2007 SC 1118], the Supreme Court rejected the assertion of the right by the wife to reside in the shared residence in a matrimonial home on the ground that the house belonged to her mother-in-law and not to her husband. The Court held that under Section 17(1) of the PWDVA, the wife is only entitled to claim a right to residence in a shared household, and defined the 'shared household' to mean the house belonging to or taken on rent by the husband, or a joint family property in which the husband is a member.

As the house in question belonged to the mother-in-law who had taken a loan for acquiring the house, it could not be held to be a joint family property and thus did not belong to her husband. Hence, the wife, Smt. Taruna Batra, could not claim any right to live in the said house.

In ***Vandana vs. Mrs. Jayanthi Krishnamachari*** [O.A. No. 764 of 2007],<sup>1</sup> the Madras High Court observed that the PWDVA, 2005 was enacted as ‘an Act to provide for more effective protection of the rights of women guaranteed under the Constitution who are victims of violence of any kind occurring within the family and for matters connected therewith or incidental thereto’. To be entitled to protection under Section 17, a woman will have to establish two facts, namely (i) that her relationship with the opposite party is a ‘domestic relationship’ and (ii) that the house in respect of which she seeks to enforce the right is a ‘shared household’. The Court held that a narrow construction of Section 2(f) defining ‘domestic relationship’ and Section 2(s) defining ‘shared household’ would not be in tune with the object sought to be achieved by the Act. For example, it may exclude a woman who does not enter into her matrimonial home after marriage on account of developing strained relations with her husband during the honeymoon. Accordingly, the Court held that the preferred interpretation should construe the words ‘live’ or ‘have at any point of time lived’ to include ‘the right to live’. In other words, it is not necessary for a woman to establish the physical act of her living in the shared household, either at the time of the institution of the proceedings or as a thing of the past. If there is a relationship that has legal sanction, a woman in that relationship has the right to live in the shared household. Therefore, she should be entitled to protection under Section 17 of the Act, even if she did not live in the shared household at the time of the institution of the proceedings or had never lived in the shared household at any point of time in the past. The High Court also observed that the right of a wife to reside in the matrimonial home was recognized as part of her right to maintenance under Hindu law regardless of the PWDVA. It cited ***B. P. Achala Anand vs. S. Appi Reddy and Another*** [(2005) 3 SCC 313], where the Supreme Court held that:

a Hindu wife is entitled to be maintained by her husband. She is entitled to remain under his roof and protection. She is also entitled to separate residence if by reason of the husband’s conduct or by his refusal to maintain her in his own place of residence or for other just cause she is compelled to live apart from him. Right to residence is a part and parcel of [the] wife’s right to maintenance. The right has come to be statutorily recognised with the enactment of the Hindu

## Appendix H

Adoptions and Maintenance Act, 1956. Section 18 of the Act provides for [the] maintenance of [the] wife. Maintenance has been so defined in clause (b) of Section 3 of the Hindu Adoptions and Maintenance Act, 1956 as to include therein provision for residence amongst other things. For the purpose of maintenance, the term “wife” includes a divorced wife.

In ***Shalu Bansal vs. Nitin Bansal*** [(2007) Delhi], the court held that the applicant cannot be dispossessed without due process of the law, and that even in case she is dispossessed, the respondent (her husband) must provide the rent for an alternative accommodation. In this case, the wife had filed an application under the PWDVA seeking an interim order restraining the husband and his family from dispossessing her from the shared household. Subsequently, however, the Magistrate held that since the property belonged to the in-laws and hence could not be considered to be joint family property, it was not a shared household for the purposes of the Act, in light of the *Taruna Batra* judgment. Nonetheless, the court directed that rent be provided as maintenance to the woman. Hence, relief under the Act is not denied, although the wife’s right to not be dispossessed could not be assured as the property was not deemed to be a shared household.<sup>2</sup>

In the case of ***P. Babu Venkatesh and Ors vs. Rani (M. Jeyapaul, J.)***, **High Court of Madras, MANU/TN/0612/2008**,<sup>3</sup> the High Court departed from the position adopted by the Supreme Court in *S. R. Batra vs. Taruna Batra* on the grounds that the facts of the present case demonstrated that the husband had transferred the household to the name of his mother after the matrimonial dispute arose with the intention of defeating the rights of the wife.

In the case of ***Neetu Mittal vs. Kanta Mittal and Ors (Shiv Narayan Dhingra, J.)*** **High Court of Delhi, 2009**,<sup>4</sup> the in-laws cited the Supreme Court decision of *S. R. Batra vs. Taruna Batra* to support the contention that their house could not be considered the shared property of the daughter-in-law. The court upheld the contentions of the in-laws and held that the son could live in the house of the parents as a matter of right only if the house is ancestral property.

Orders prohibiting the respondents from causing disturbance to the peaceful possession of the woman of the shared household have also been passed in many cases. There are some cases where the woman has been restored to the shared household or has been allowed re-entry into the shared household. In some cases, particularly those reported from Rajasthan, orders

directing the respondent to pay rent amounts for alternate accommodation have been granted instead of directing the woman's restoration into the shared household. There are, however, many cases where residence orders have been denied on the ground that the shared household is not in the name of the husband but is in the name of the in-laws, as was held in **Taruna Batra's** case.<sup>5</sup>

The reports monitoring the implementation of the PWDVA have also found that widows have been successful in receiving residence orders against dispossession from the courts, particularly in cases where the property was in the name of the deceased husband. In this regard, an order of a Mumbai magistrate must be highlighted. In this case filed by a widow, a detailed interim order was granted restraining the respondents from dispossessing the applicant from the shared household, which was in the name of her deceased husband. The court went on to direct the Protection Officer to facilitate the applicant's access to legal aid in the pending property disputes. In a case decided in Kerala, the respondents (who were the sons of the applicant) were prohibited from interfering in the management of the property that devolved on the applicant on the death of her husband.<sup>6</sup>

Besides having provisions pertaining to residence orders under PWDVA, the Act also defines '**shelter home**' in **Section 2(t)** of the same as: "*shelter home*" means any shelter home as may be notified by the State Government to be a shelter home for the purposes of this Act.

The Act also provides for service providers inclusive of shelter homes and lays down the duties of shelter homes under **Section 6** as follows:

*Duties of shelter homes.-If an aggrieved person or on her behalf a Protection Officer or a service provider requests the person in charge of a shelter home to provide shelter to her, such person in charge of the shelter home shall provide shelter to the aggrieved person in the shelter home.*

Thus, the PWDVA deals with the housing and shelter home needs of women in a comprehensive manner through provisions pertaining to residence orders and the setting up of shelter homes, thereby making it a statutory obligation on the part of the State Governments and the Central Government to set up the required number of shelter homes for women who can not avail the residence order provision. Nonetheless, only a handful of suitable shelter homes have been put in place by the State despite repeated demands from women activists and NGOs, thus showing the lack of political will and commitment on the part of the State for the realization of the right to shelter for women.

# GLOSSARY

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## B

### Bigamy

Bigamy is a specific form of non-monogamy, and different from adultery. It is committed only when a second marriage is legally contracted during the subsistence of a former marriage (without dissolving it) when the law expressly forbids a second marriage.

### *Brahmanical*

The term brahmanical is distinct from the term brahman in that it does not refer to a caste. Rather it refers to a value system (internalized across caste groups) based on the notions of purity and pollution, where the pure occupies the top position in the hierarchy of values, distinguishing it from the less pure and the most polluted or the untouchable. This value system is based on the caste-based hierarchy and norms associated with the brahman, in relation to manual labour, sexuality, kinship, and food. It is internalized across caste groups as a sign of modernity and progress. It is constituted in the law as well as in society in the way that sexual offences and women's role in the family are constructed.

## C

### Concubine

Refers to a woman in a relationship akin to a marriage with a man who is not married to her.

## D

### *Doukal*

### Bigamous

## E

### Exogamy

Implies marriage to a person outside of one's tribe, clan, caste, or any such social grouping.

## H

### Heteronormativity

This refers to norms relating to gender and sexuality that seek to reinforce patriarchal power structures and ideologies. It is so integral to patriarchy that it is also referred to as heteropatriarchy. Heterosexuality is not just privileged, but is also compulsory for sustaining patriarchy, which it

does by securing male control over women's reproduction and sexuality.

**Hypergamy:** Marriage to a person of a higher socio-economic class, status, and caste than oneself.

## J

*Jati Panchayat*

Caste based assemblies consisting of village elders who adjudicate disputes.

*Jhagra*

Bride price

## K

*Kagli*

A written document that contains the amount to be paid by the man for the woman

*Kanyadan*

A marriage ceremony involving the gift of a (virgin) girl/woman to her husband

## M

*Mahila Mandal*

Community based women's groups

*Maitri Karar*

Maitri karar, literally 'friendship contract', is a written document, often notarized and registered, that contains the terms and conditions on which a couple agrees to enter into cohabitation.

*Matriliny*

Descent through the female line.

*Monogamy*

The state of having only one sexual partner.

## Glossary

### N

#### *Nata*

Nata is a customary form of remarriage that is widely practised and socially accepted among the lower-caste communities of Rajasthan. Custom requires that a virgin girl must first enter into a marriage, distinguished from nata by the marriage rites of 'pheras'. It is only after the death of the husband, or desertion, or breakdown of the marital relationship that the woman is eligible to enter into a nata relationship, once or more times sequentially following the first marriage.

#### Normative

The term normative intimacy is used here to refer to marriage and to norms on which the institutional definition of marriage is founded

### P

#### *Panjikaran*

Registration. It is used here with reference to the registration of the second wife by the panchayat under the man's ration card in Himachal Pradesh

#### *Pativrata*

A moral value extolling women's complete loyalty and fidelity to the husband, for women, irrespective of the husband's conduct towards her, or his death. It is core part of the brahmanical value system that demands complete sexual purity upon the woman, forbids her from even desiring another and demands fidelity even after the husband's death. This fosters purity of lineage and a means of enforcing caste boundaries and ensures complete control over women's bodies, reproduction, sexuality and labour.

#### Patriliney

Descent through the male line

#### *Phera*

The act of walking around the consecrated fire by the bride and the groom, at Hindu wedding. It is an important ritual for the solemnisation of a marriage under the Hindu marriage law.

#### Polyandry

Refers to a marriage in which the woman is married to more than one man at any given time

**Polygamy**

Is a generic term for non monogamous or bigamous relationships, and not specific to male or female. Both polyandry (a woman with more than one husband) and a polygyny (man with more than one wife) are forms of polygamy.

**Polygyny**

Refers to a marriage of one man with two or more than two wives at a time, although this is commonly called polygamy.

**Q****Queer**

Refers to sexual preferences and gender identities that do not conform to hetero normative standards, and is commonly used to refer to LGBTI and non normative heterosexual persons. Traditionally, the term referred to that which is odd and was used in a derogatory sense for homosexuals. However, in its contemporary usage, the term has been appropriated by the community to assert plurality in gender and sexual preference, and is both positive and self empowering. The term is also used to challenge and counter heteronormativity.

**Queer Feminism**

Locate power relations as emanating from mutually reinforcing structures that constitute heterosexuality as the norm, so as to attach varying degrees of power, privilege, stigma, and perversion in relation to sexuality. For queer feminists, power relations are constituted by heteropatriarchy, which combines a political understanding of patriarchy and sexuality.

**R****Reet**

Bride price

**S****Sambandam**

Informal relationships of Nayar women with one or more man, who visited the matrilineal household to be with his conjugal partner and children. This practice was transformed through

## *Glossary*

the colonial period and the influence of modern law making, into monogamous marital unions.

### *Saptapadi*

Seven circles made around the consecrated fire at Hindu weddings

### *Sautan*

The second wife

### *Sindoor*

Red powder applied at the beginning or along the parting of a woman's hair. It is the mark of a married woman.

## **T**

### Transgender

Transgender persons are persons who are born into a particular sex but who identify with the opposite sex. As a result, they assume, to varying degrees, the gender characteristics of the opposite sex. Many transgender people do not believe in the strict male–female dichotomy that prevails in society, and exhibit a combination of male–female physical attributes and a combination of masculine and feminine social attributes, hence assuming a unique gender identity.

## **U**

### *Upa-patni karar*

Living together agreement

## **V**

### *Vivaha homa*

Sacred fire ceremony performed at Hindu weddings

## **Z**

### *Zarooratein*

Needs