



Submission to Law Commission of India

By

Partners for Law in Development¹

Introduction

The struggle for legal recognition of women's equality in the private sphere has been a long, difficult and continuing one. Beginning with legal redress for dowry, and later domestic violence – along with limited advances in the family law, full equality even at the de jure level remains an unfinished agenda. The de jure advances however significant, remain limited not only because the de facto obstacles relating to legal access and poor implementation of the law, but also because legal protection is limited to women in legally valid marriages alone. It is of serious concern that legal protections and redress, have with codification of the family laws, become limited to the legally valid marriages alone. Public policy goals of gender justice within the family and equal protection to the family, are better served by ensuring core legal protections to women in all conjugal relationships, regardless of of legality of marriage or sexuality. International human rights standards, as enshrined in CEDAW, measure equality and non-discrimination through de facto realities in the society, rather than de jure status of the law. In this context, we congratulate the Law Commission of India in addressing concerns related to non-marital conjugalities, including live-in relationships, and urge that it recommends protection of rights and provision of legal redress to non-marital conjugalities, so that a core obligations and protections to women in de facto families/ conjugalities are available.

PLD's submissions are based on its work from 2003 onwards, that examines access to justice issues in non-normative intimacies through mapping of customary and contemporary intimacies, workshops with women in same and opposite sex relationships, research and advocacy. The resource book, 'Rights in Intimate Relationships: towards an inclusive and just framework of women's rights and the family' (PLD, 2010) is an outcome of this work, and the basis of these submissions. A significant finding of our field investigation and mapping of diverse intimate relationships is that the status of women in the private sphere of the family/ marriage is shaped not by the nature of the relationship they are in, or its legality, but by the extent to which their rights within the private sphere are recognised and certainty of legal protection and redress.

A vast diversity in family forms exist in most post colonial societies, particularly India, where regional, customary, caste, sexuality, geographic differences, amongst others, have shaped diversity of conjugalities historically. With the diverse customary, regional and contemporary forms of

¹ PLD is a legal resource group committed to the realization of social justice and equality for all women. In our view, the attainment of human rights and social transformation through the law are possible only when combined with mobilization, rights education and empowerment at the community level, carried out in collaboration with other social justice actors. Our legal advocacy on non marital relationships is based on empirical research on customary and contemporary conjugalities that are not legally recognised, and currently all of which are erroneously collapsed under the amorphous label, live-in relationships.

conjugalities defining the landscape of intimate relationships, rights and basic legal protection cannot be limited to women in legally valid marriages alone. Our work in the area of diverse intimacies, has led us to believe that core legal protection and redress can facilitate gender justice within the family.

PLD's work with its partner organisations at the community level in Orissa, Uttar Pradesh, Rajasthan, and Kerala showed that crisis intervention and legal support is typically not available to women in relationships which fell outside the legal definition of marriage. PLD's field work to examine non-normative intimacies in 4 different contexts- *maitri karar*² in Gujarat, *nata*³ in Rajasthan, bigamy in Himachal Pradesh, and same sex relationships in Kerala, also revealed that although these women were similarly placed as women in marital relationships, they faced aggravated vulnerability on account of lack of legal protection. The claims of such women to protection against violence, financial support, shelter, and maintenance upon 'desertion' have no place in the law. Non marital conjugalities in India including same and opposite sex co-habitations, common law marriages, and bigamous relationships should also be within the scope of public policy to the extent that the core minimum rights of women are protected in such relationships, if the law is to provide equality and protection, both de jure and de facto.

In this submission, we outline the issues at stake/ challenges that arise from the absence of legal protection to diverse family forms, the international human rights standards on this subject, and following from these two, we set out recommendations for extending legal protection to ensure core rights to those in diverse conjugal relationships.

Issues at Stake

A) Rights of women in non conjugal marital relationships

The first issue at stake we believe is that of the basic minimum rights and protection of women in non marital conjugalities/ intimacies. By basic rights and protection, we mean the right to protection from domestic violence, right to custody and guardian ship of children, maintenance and the right against eviction from conjugal home.

B) Minimum legal protection to non marital conjugal units.

The second issue at stake is that of minimum legal recognition to non marital conjugalities that lack legal status, so they can build security, and avail of basic benefits that ensure mutual support for dignified life. Such conjugal units suffer from legal and administrative discrimination on several fronts. From opening a joint bank account, to getting joint life insurance, and consenting to medical procedures⁴, such conjugal units are always at a disadvantage as these services are in practice, primarily available to persons related by birth or marriage.

The current legal regime for dealing with issues at stake

Our law recognizes marriages solemnized under any of the personal laws or the Special Marriage Act of 1954. The Supreme Court of India has held that marital relationships means 'the legally protected

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

³Customary 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.

⁴ In medical emergencies, partners in non marital conjugal relationships are not treated as 'next of kin' for the purpose of taking decisions in case the person themselves are not capable of doing so.

marital interest of one spouse to another which include marital obligation to another like companionship, living under the same roof, sexual relation and the exclusive enjoyment of them, to have children, their up-bringing, services in the home, support, affection, love, liking and so on.⁵

Section 125 of the Code of Criminal Procedure provides for maintenance of a wife by her husband. The provision is meant to prevent destitution and vagrancy as often women are economically dependent on their partners and invest all their labour into the household. The definition of ‘wife’ includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried. The Supreme Court has in some cases⁶, expanded the definition of wife to include partners who are not legally married, for instance in bigamous relationships. However, the dominant bent of jurisprudence has been to strictly interpret the expression ‘wife’ in Sec 125 to mean only ‘legally wedded wife’⁷. The different approaches to the definition of ‘wife’ are summarised in Annexure A.

With the enactment of the Domestic Violence Act, 2005, civil law remedies have become available to women victims of domestic violence, including women in relationships ‘in the nature of marriage’⁸, thereby bringing common law marriages within the protection of the law. This advanced statutory protection to women in non-marital conjugal units, but the advancement has been limited with recent pronouncements of the Supreme Court that purport to limit the scope of this otherwise inclusive and broad term.

The recent trend in Indian jurisprudence has been to conflate ‘relationships in the nature of marriage with ‘live in’ relationships, and stipulate parameters that limit the scope of that protection severely to conjugalities that reflect select attributes. The conditions set out by the Supreme Court in *D.Velusamy vs D.Patchaiammal* (CRIMINAL APPEAL NOS. 2028-2029__OF 2010) and *Indra Sarma vs V.K.V.Sarma* (2013) CRIMINAL APPEAL NO. 2009 OF 2013) has reduced the scope of legal protection against domestic violence to conjugalities which simulate monogamous, heterosexual marital relationships. These conditions exclude diverse forms of conjugal relationships, for instance contexts of nata pratha, maitri karar, levirate system and bigamous unions all of which are part of the diversity in India. In *S. Khushboo Vs. Kanniammal & Anr.* (2010) 5 SCC 600, the Supreme Court, placing reliance upon its earlier decision *Lata Singh Vs. State of U.P. & Anr.* [AIR (2006) SC 2522], held that live-in-relationship is permissible only in unmarried major persons of heterogeneous sex.

In contrast, a recent judgement⁹, the Chennai High Court while granting an order for maintenance to an aggrieved woman, also held that all relationships in which the partners have sexual intercourse are marital relationships. Such approaches while seeming inclusive, are moralistic and unhelpful, as they ignore all other elements like reproductive and household labour, child rearing, care giving and nurturing – all fundamentally defining of a conjugal unit.

International Law standards

The General Comment No.19 on Article 23 of the International Covenant on Civil and Political Rights (ICCPR) emphasizes the diverse nature of the family form, and the difficulty of giving it a standard definition. It states that *‘the concept of the family may differ in some respects from State to State, and*

⁵ Pinakin Mahipatray Rawal v. State of Gujarat (2013) 2 SCALE 198

⁶ Rameshchandra Daga v. Rameshwari Daga, [(2005)2 SCC 33]

⁷ Smt Yamunabai Adhav vs Anant Rao Adhav [AIR 1988 SC 644]

⁸ Section 2 (f), Protection of Women from Domestic Violence Act, 2005.

⁹ CrI.R.C.No.674 of 2007

even from region to region within a State, and that it is therefore not possible to give the concept a standard definition’.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) also stresses the importance of providing the ‘*widest possible* protection and assistance to the family’¹⁰. The nature of this protection entails – protection against encroaching upon the privacy and dignity of the family, as well as ensuring equality between partners/ spouses within the family. The latter is elaborated by Article 16 of the CEDAW which enjoins state parties to ‘*take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations.*’

The Convention for the Elimination of Discrimination against Women (CEDAW), in its 21st general recommendation clarifying Article 16, notes that marriage is not limited to legally recognised wives alone, but women in diverse family forms. To quote general recommendation 21, at para 13 ‘*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.*’¹¹

In its 29th general recommendation¹², the Committee in the 20th para acknowledges the prevalence of unregistered customary marriages, and recommends that ‘*unregistered marriages may be proved by production of a marriage contract, witness accounts of the rituals or other means, as appropriate in the circumstances.*’ In para 31, the Committee enjoins the State party to ‘*consider the situation of women in these (de facto) unions, and of the children resulting from them, and takes the necessary measures to ensure the protection of their economic rights.*’

In 1996, the UN Special Rapporteur for Violence against Women in her report at the 52nd session of the Human Rights Commission¹³ stated that ‘*...the family is defined broadly as the site of intimate personal relationship. A subjective definition, i.e. any unit where the individuals concerned feel they are a family, is more inclusive than an objective one and more relevant for the discussion of domestic violence. Rather than relying on the institutionalized definitions of family imputed by the State, notions of family should be re-conceptualized around expressions of ideals of nurturance and care. There is a need to make room for "difference and plurality" within our understanding of what constitutes family.*’¹⁴

She further stresses in the report that ‘*the relationships which come within the purview of legislation on domestic violence must include: 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.*’¹⁵

Extending the protection to same sex conjugal units, Principle 24 of the Yogyakarta Principles, 2006 calls upon states to ‘*ensure that laws and policies recognise the diversity of family forms, including*

¹⁰ Article 10, ICESCR 1976. ‘The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children.’

¹¹ CEDAW General Recommendation 21. You can read the full text here-

<http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom21>

¹² CEDAW/C/GC/29

¹³ Now Human Rights Council

¹⁴ E/CN.4/1996/53, Para 25.

¹⁵ E/CN.4/1996/53/Add.2, Para 7.

those not defined by descent or marriage, and take all necessary legislative, administrative and other measures to ensure that no family may be subjected to discrimination on the basis of the sexual orientation or gender identity of any of its members, including with regard to family-related social welfare and other public benefits, employment, and immigration.'

Recommendations

A) Terminology

The recent trend in jurisprudence has been to collapse all forms of non marital conjugal relationships into the catch all term 'live in relationships'. Live in relationship is a contemporary, urban form of non marital conjugality, and doubtlessly requires the protection of the law in matters of domestic violence, custody, and even maintenance. However the law must also take into account the diverse forms of non marital relationships throughout the country and evolve a more inclusive terminology.

We suggest 'de facto relationships' as has been defined by Section 4AA¹⁶ of Australia's Family Law Act of 1975 to define non marital conjugalities. The term 'non normative conjugalities' also does justice to the nature and diversity of such relationships in India.

'Relationships in the nature of marriage', as enunciated in Section 2 (f) of the Domestic Violence Act would also appropriately capture the diversity of such relationships better than 'live in' relationships.

B) Indicators

As has been discussed before, the Supreme Court has in recent judgements evolved several guidelines to establish whether a relationship would be one in the nature of marriage for the purpose of protection from domestic violence. These judgements work with 'live in' relationships as their cognitive framework and in effect reduce the scope of legal protection to conjugalities that reflect select attributes, that is those conjugalities which simulate monogamous, heterosexual marital relationships.

We recommend that the following points be considered in evolving conditions for bringing non marital relationships under the [protection of the law, not only from domestic violence, but also in matters of maintenance, custody, and protection against eviction from conjugal home.

- Monogamy cannot be a condition or indicator for bringing a relationship under the protection of the law. The de facto diversity should determine the scope and conditions of what is defining of a conjugal unit.
- Household and reproductive labour invested in the relationship should be an important indicator of the nature of the relationship.
- Common household should be an indicator, though not a cardinal one considering that often partners have to stay in different places due to exigencies of employment.

¹⁶ The law requires that you and your former partner, who may be of the same or opposite sex, had a relationship as a couple living together on a genuine domestic basis.

- Duration of the relationship- though the duration is a subjective field and may not by itself decide whether or not a relationship should be under the protection of the law, we recommend that a minimum of 2 years¹⁷ be made the necessary for considering a relationship to be eligible for legal protection.
- Child birth and rearing should be an important indicator, though its absence need not necessarily mean that the relationship shouldn't be under the protection of the law.

C) Social benefits for non marital conjugalities

Apart from the core minimum rights for women in relationships in the nature of marriage, we also recommend that certain social benefits which are available to legally married partners also be made available to partners in such de facto or non marital relationships in the nature of marriage. For instance, they should be allowed to open joint bank accounts, have joint insurances, and also be legally considered as 'next of kin' for the purpose of taking decisions in medical emergencies and funeral arrangements.

D) Compulsory Registration of Marriage

The Supreme Court, in the case of Seema Vs. Ashwani Kumar (AIR 2006 S.C 1158) had directed the State Governments and the Central Government that marriages of all persons who are citizens of India belonging to various religious denomination should be made compulsorily registerable in their respective States where such marriages are solemnized. The idea behind compulsory registration is that it will ensure monogamy, prevent child marriages, regulate all conjugal relationships and enable wives to claim maintenance and the right to residence in the conjugal home. The Court had invoked international law standards, including the CEDAW in coming to its decision.

The proposition that compulsory registration of marriages will resolve the issues of maintenance, child marriage, desertion etc is alarmingly inaccurate and misleading, and not substantiated by any research. Studies however show that there are larger stumbling blocks to claiming maintenance under section 125 Cr.P.C, as for example, the lack of proof of husband's income, long procedures, and non compliance with the maintenance order. The law requires a separate execution proceedings for enforcement of maintenance orders.

Apart from this, compulsory registration of marriage would create new inconsistencies with the existing law, as for example under the Prohibition of Child Marriage Act¹⁸ a child marriage is not void but in fact voidable. A child marriage therefore remains legal despite the refusal of a marriage registration office to register it. . If registration is compulsory and not optional, it will adversely affect the rights of women who choose partners against the consent of their parents and family (runaway couples), those in customary conjugal relationships that are not recognized by the law, those who are second wives. It will definitely affect the rights women in marriages that may not be legally valid, for instance bigamy practiced in Himachal Pradesh, and same sex marriage in Kerala.

In fact, international human rights law too, as set out in CEDAW's General Recommendation 29 make explicit that legal rights and protections cannot be made contingent on registration of marriage.

¹⁷ Under the Australian Family Law Act of 1975, 2 years is the minimum duration for a relationship to be considered a de facto relationship.

¹⁸ Sec 3(3), Prohibition of Child Marriage Act, 2006 provides an option to the contracting party (the child bride/ bridegroom) to continue with or annul the marriage within two years of attaining majority.

Therefore, international law, while recommending registration, does not make it a compulsory pre condition for legal protection.

The chart of state laws on compulsory registration of marriage, attached in Annexure B, shows that registration can neither ensure monogamy, or rights, but what it does do in most cases, is to make the couple liable to payment of penalties on failure to register. For example, The Mizoram Compulsory Registration of Marriages Act 2007 observes that any person who wilfully omits or neglects to get his or her marriage registered will have to serve a sentence of simple imprisonment for six months and/or fine of Rs one thousand. Our petition to the MWCD, Law Commission, NCW and Ministry of Land Justice on compulsory registration of marriage, and definition of 'wife', attached as Annexure C elaborates our concerns further regarding compulsory registration of marriage.

In light of the situation we recommend that the government refrain from taking any steps to make registration of marriages compulsory, and to ensure that non registration does not attract penalties, or any adverse consequences such as nullifying her right to claim remedies under PWDVA, section 125 Cr PC; or indeed, family laws where registration has thus far not been mandatory.

Date- 16/01/2014

Partners for Law in Development
F-18, First Floor, Jangpura Extension
New Delhi- 110014
Tel. No.: 011- 24316832 / 33
Telefax: 011- 24316833
Email: programmes@pldindia.org , pldindia@gmail.com
Website: <http://www.pldindia.org>
<http://cedawsouthasia.org>