



**SUBMISSION TO THE UN WORKING GROUP ON
DISCRIMINATION AGAINST WOMEN IN LAW AND PRACTICE
FOR THE
THEMATIC REPORT ON DISCRIMINATION AGAINST WOMEN IN LAW AND
PRACTICE IN FAMILY AND CULTURAL LIFE
By
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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 domestic violence, limited and uneven reform in terms of age of marriage, consent to marry, custody, divorce, property and guardianship, full equality in the family, even at the de jure level remains an unfinished agenda. Of the three broad barriers or impediments to equality in the family outlined here, we would like to draw attention to the third barrier in this submission. The first, that the family laws despite their limited advances, overtly or implicitly draw inspiration from social, cultural and religious norms rather than human rights standards, entrenching rather than displacing patriarchal inequality. The second, that the limited equal status available through the law, is not realised at the de facto level, because access to the legal system is made difficult for women marginalised on account of economic, caste, minority status, literacy and rural location, and also, because of gender bias within the legal system. The third barrier we draw your attention to, the main focus of this submission, is that the institutionalised definition of the family draws upon dominant cultural and caste notions of the ideal family, and as a consequence, limits legal protection to women in state defined family alone. This excludes many women in diverse family forms from core legal protections, including from domestic violence. It is of serious concern that legal protections and redress, have been limited to codified statist definitions of the family. Public policy goals of gender justice within the family and equal protection to the family, and indeed equality in the private arena of 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 urge the Working Group to integrate into its work – a) concerns related to non-marital conjugalities, customary and contemporary forms, in same and in opposite sex, and; b) to recommend protection of basic or core rights and protections to women in non-marital conjugalities.

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

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.

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 soft copy of the resource book is attached for reference. 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, modes of production amongst others, have shaped diversity of conjugalities historically. The changing economic trends, large scale migrations, unequal sex ratio in India, have shaped contemporary conjugalities in the last two decades. This reality is common to most post colonial societies, where customary, regional and contemporary forms of conjugalities make for a more complex landscape of intimate relationships. In such a context, core minimum rights and basic legal protection cannot be limited to women in legally valid marriages alone. Our work with women in de facto marriages or conjugalities not recognised by the law, shows that gender inequality and higher risks to women arise on account of lack of legal protection rather than the type of conjugality or its legal status. The need is not that of recognising and legalising diverse conjugal relationships, but to ensure core legal protection, such as protection against domestic violence, is available to women across legally recognised as well as in de facto conjugal relationships.

PLD's work 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. Likewise there is substantial evidence of contemporary trends, as for example of a man establishing two homes – with different wives in each in the context of large scale inter-state migration within the country⁴, and of live-in relationships in more urban contexts. With the emergence of the queer movements, same sex unions are visible assertion of the aspiration for recognition and equality, notwithstanding legal vacuum, or even criminalisation of same sex relations. Women in non marital conjugalities, including same and opposite sex co-habitations, common law marriages, and bigamous relationships should be entitled to a core minimum of legal protections with such relationships, for the law to attempt to ensure a basic framework of gender justice in the private arena of the home, at the de jure and de facto levels.

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

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.

⁴In some towns like Hamirpur in Himachal Pradesh, most men have migrated for work – and their only relationship with their wives at home is through a money order, when they send money home. These have come to be called money order marriages. These men, have separate households in the town they work in and despite the monogamy requirement in the law, have dual homes.

There are two aspects relating to achievement of de facto equality that need to be flagged:

A) Rights of women in non-marital conjugal 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 is not simply that lack legal status, but legal and administrative rules that obstruct/ bar agency and choice in building financial security, nominating beneficiaries in insurance. 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 procedures⁵, such conjugal units are always at a disadvantage as such security creation and services are in practice, primarily available to persons related by birth or marriage.

C) Social Security for women headed households: The third issue at stake is that of social security and benefits to households that are managed and provided for by women. In a context where male headed families enjoy privileged social and economic mobility, women headed households, whether headed by women in conjugal relationships, or widowed/ divorced/ separated women are at a disadvantage in matters of economic sustainability, child care, health care, and access to state benefits.

Core Minimum Legal Protection Vs Legal Recognition

In this submission, we advocate not for legal recognition of diverse family forms, or those that are not recognised by law although they are a de facto reality. Instead, we ask for *core minimum legal protection* of such families and women in such intimacies. By protection, we mean a legal guarantee of the core minimum rights that such households and the women in them should enjoy. For women in de facto relationships, the right against domestic violence, the right to maintenance for the women and the children, right to guardianship and the right to residence in the conjugal home are the core minimum rights that they should be guaranteed.

To allow persons in non-marital conjugal units, the agency to build security, to provide economic, emotional, amongst other support necessary for a dignified life, there is a need for civil unions where conditions of marriage are restrictive and exclude certain persons; or alternatively, the law must recognise agency of individuals in administrative and legal rules in matters of joint bank accounts, joint insurance policies, employment benefits and right to give consent in medical procedures.

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 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.

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’⁶. 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.*’⁷

In its 29th general recommendation⁸, 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 Commission⁹ 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.*’¹⁰

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.*’¹¹

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*

⁶ 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.’

⁷ CEDAW General Recommendation 21. You can read the full text here-

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

⁸ CEDAW/C/GC/29

⁹ Now Human Rights Council

¹⁰ E/CN.4/1996/53, Para 25.

¹¹ 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

There is a need to adopt terminology that is not culture or context specific, but inclusive of diverse forms of non-marital relationships.

We suggest 'de facto relationships'¹² or the term 'relationships in the nature of marriage', as enunciated in Section 2 (f) of the Protection of Women from Domestic Violence Act, 2005 in India. The term cohabitation would also be appropriate. Civil unions is a legal term specific to certain jurisdictions and would not include customary relationships which by definition would not be registered or notified, although they will command recognition within the social group where its practiced.

B) Indicators

The indicators for what constitutes de facto relationships within which legal protection is afforded will vary across societies and regions. Whatever indicators or conditions are adopted, they should not be based on the principle of male monogamy, only because many of the customary and contemporary forms of cohabitation involve a man in relationship with two different women, who may or may not be aware of the man's bigamous status. Since family as a unit, is structurally unequal for women, women in all family forms require support. Conditions that simulate a monogamous valid legal marriage cannot be applied to de facto relationships as they defeat the purpose of gender justice, in contexts where bigamy is often a reality encouraged by the patriarchal norms that shape domestic inequality.

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.

¹² Section 4AA of Australia's Family Law Act of 1975. 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 years¹³ 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

There is no evidence to show that in post colonial societies, where economic and development disparities are immense, compulsory registration of marriage can be a tool to ensure monogamy, prevent child marriages, enable wives to claim maintenance, and so on. An administrative procedure on its own, despite best efforts, cannot dent the structural inequality in which family and legal norms are often entrenched.

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

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¹³ Under the Australian Family Law Act of 1975, 2 years is the minimum duration for a relationship to be considered a de facto relationship.

