



Submission to Law Commission of India

By

Partners for Law in Development¹

RECOMMENDATIONS FOR LEGAL PROTECTION TO WOMEN IN CONJUGAL RELATIONSHIPS THAT LACK LEGAL STATUS

PLD's submissions below are based on its work from 2003 onwards, which examines access to justice for women in de facto unions or conjugal relationships that lack legal recognition. The resource book, 'Rights in Intimate Relationships: towards an inclusive and just framework of women's rights and the family'(PLD, 2010) maps four different sets of conjugal relationships, the legal protection issues for women in these, to argue that the law must protect core rights of women across diverse family forms, whether or not these are legally recognised. The key findings of PLD's study suggest that the nature of conjugal relationships are shaped by various factors, including local customs, production patterns, relationship with land and choice. Regardless of the type of family form, or legality of union, the status of women is shaped by patriarchy and unequal gender relations, in addition to other factors like poverty. Under these circumstances, women must have access to universal legal protection regardless of the family form they are in – because the lack of legal protection is likely to render them vulnerable to abuse, impoverishment and rights violations. Legal protection should therefore not be based on legality of marriage or family form, but be extended to core rights to women cohabitees in their private lives.

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

THE CURRENT LEGAL STATUS OF NON-MARITAL CONJUGAL RELATIONSHIPS

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 relationship means 'the legally protected 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 upbringing, services in the home, support, affection, love, liking and so on.'²

¹PLD 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 de facto conjugal relationships is based on empirical research on customary and contemporary conjugalities that lack legal recognition, and all of which are often erroneously termed as, live-in relationships.

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

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.Patchaiamma*³ and *Indra Sarma vs V.K.V.Sarma*⁴ 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.*,⁵ the Supreme Court, placing reliance upon its earlier decision *Lata Singh Vs. State of U.P. & Anr.*,⁶ held that live-in-relationship is permissible only between unmarried male and female persons who have attained majority.

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’. 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 4AA⁷ of Australia’s Family Law Act of 1975 to define non marital conjugalities. The term ‘non normative conjugalities’ or ‘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

We recommend that the following points be considered in evolving conditions for bringing non-marital unions or 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.
- 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 years⁸ 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.

³CRIMINAL APPEAL NOS. 2028-2029 OF 2010

⁴CRIMINAL APPEAL NO. 2009 OF 2013

⁵ (2010) 5 SCC 600

⁶ [AIR (2006) SC 2522]

⁷ 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.

⁸Under the Australian Family Law Act of 1975, 2 years is the minimum duration for a relationship to be considered a de facto relationship.

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 entitled 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. No 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 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 show that there are larger stumbling blocks to claiming maintenance, as for example, the lack of proof of husband's income, long procedures, and non compliance with the maintenance order.

Apart from this, compulsory registration of marriage would create new inconsistencies with the existing law, as for example under the Prohibition of Child Marriage Act⁹ a child marriage is not void but in fact voidable. 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 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.

OTHER RECOMMENDATIONS IN RELATION TO SPECIAL MARRIAGE ACT, 1954

- Requirements for solemnisation of marriage under the Special Marriage Act, 1954
 - Repeal section 4 (b) (ii) and (iii) of the Act, which deny the option of special marriages to persons who are unable to procreate on account of their mental health, or those who suffer from epilepsy.
 - Remove the requirement of a thirty day notice period from Sections 5, 6, 7, and 16. These sections mandate a notice period of thirty days prior to the registration of any marriage under this Act. They allow for a substantial period of time for interference of family and community members in the prospective alliance, especially in cases of mixed marriages (inter-caste, sa-gotra, inter-religious, etc.), and can have dangerous consequences for the couple involved. This has been noted by the Central Information Commission in the case of *Shashi v. PIO*.¹⁰ Under the circumstances, grounds for objecting to a notice of marriage must be limited strictly to conditions of valid marriage, and express statement that consent of no person other than parties to the marriage is

⁹Sec 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.

¹⁰ CIC/SA/A/2016/001556

- Remove the requirement of domicile from Sec. 5 of the Act, which states that a marriage under the SMA can only be registered in a district where one or both parties are domiciled, and requires the Marriage Officer of the domicile district to be notified if this condition is not fulfilled. This requirement obstructs and delays the solemnisation of marriages of couples who have had to leave their home states for fear of honour-based retaliation.
- Parties to a marriage must be free to apply to marry in any part of India, on submission of proof of identity. They must be allowed to apply for State/ police protection and shelter, in the event of any risk to their lives, or harm arising from their decision to marry. The right to apply for protection on apprehension of harm, must be possible in any jurisdiction within the country. The Act needs to be amended to accommodate these provisions.
- Maintenance and grounds for divorce
 - Currently, no coherent system of granting spousal support exists under any of the personal laws, including the Special Marriage Act. Maintenance in itself does not take into account the contribution of the woman's domestic labour to the household – and consequently does not entitle her to a share in the household property upon divorce. We suggest that the current system of spousal support be substituted with a community property regime which involves equitable distribution of property acquired by either party to the marriage during its subsistence.
 - Replace the fault based conditions of divorce, with the ground of irretrievable breakdown of marriage for contested divorces. This ground would require the petitioning party to prove that inviability of co-habitation, instead of the fault of the other party. Given that women's economic rights are often contingent upon their marital status, it is suggested that the ground of irretrievable breakdown be introduced only if a community property regime is instituted to safeguard them from the economic consequences of divorce.
Alternatively, remove mental illness, venereal disease, and leprosy as grounds for divorce under sub-sections (e), (f), and (g) of Section 27 of the Act.
- Succession and inheritance
 - Repeal sections 19, 20, and 21A of the Act, which effect the severance of a member of an HUF from the undivided family upon their marriage with any person who is not a Hindu, Sikh, Buddhist, or Jain. These sections disentitle such a person from their share in the HUF property and consequently, attach disabilities to mixed marriages.

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