

Expert Group Meeting. Family Policy Development: Achievements and Challenges

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"Family" poses a fundamental problem of inclusion and exclusion on questions of equity and justice. Families shape notions of identity and community, popularly associated with warmth and coziness, care and sustenance. More prosaically, they are ways of organizing labor, reproduction, nutrition and generational property, which inevitably makes them sites of hierarchy, conflict, unequal distribution and violence. But because family is such a powerful organizing principle, the notion also marginalizes those who fall outside conventional family structures, by denying them many forms of rights and recognition. In thinking about families, we have to work simultaneously with these contradictory ideas.

Postcolonial South Asian nation-states have taken up questions of gender equity through many kinds of social policies (health and population, education, employment), "Personal" (civil) law (pertaining to marriage, custody and guardianship, adoption and inheritance) and criminal law which addresses violence against women (sexual violence, domestic violence and even "maintenance" or family support payments). States espouse gender-equity discourses in law and policy, thanks to the contributions of feminist/women's movements which highlighted questions of family and violence, increased social mobilization since the UN Women's Decade, and accountability to CEDAW categories. The CEDAW Committee's decision to count violence against women as a form of gender discrimination in 1991, the UN Declaration of the Elimination of Violence against Women in 1993 (Coomaraswamy 2005), and monitoring by a "Special Rapporteur on Violence against Women, its Causes and Consequences" serve as important touchstones.

Despite these policy commitments, there is no dearth of sexist laws across the countries, nor of judgments which use regressive logic in the context of gender-sensitive laws. Media accounts portray near-daily acts of horrific violence, within and outside families, in everyday contexts of work and social life as well as in situations of conflict and siege, demonstrating that gender-based violence continues to be a powerful disciplinary force. States appear to act to curb such violence in some contexts, while at other times they defer to national politics and local pressures. As this paper will chart, some of the greatest difficulties lie with application and implementation, with corruption and bureaucracy, and with popular use of laws against the grain.

Power and the Patrilineal Family

South Asia is the site of a variety of kinship systems, a diversity unmatched in most other locales. In addition to patrilineal groups with a wide variety of practices (of inheritance, marriage, residence, adoption), there are matrilineal groups belonging to

various religions (to name but a few, Khasi in Meghalaya, Marumakkathayam in Kerala, Muslim groups in Sri Lanka), and polyandry in Nepal and Himachal Pradesh (Kolenda 1984; Schuler 1987; Agarwal 1994). Polygyny is legal for some groups across the South Asian countries and more broadly practiced than is captured by law.¹

The extended patrilineal family dominates popular imagination despite this variety. In media accounts, innumerable films and TV shows, political speeches and academic research, this family form is imagined as an entity within which married couples, single and widowed people live in harmonious happiness and share resources and responsibilities. In analyses of gender and power, however, it is often identified as the root of inequity across age and gender: from selective neglect of the nutrition and education of the girl child, to forced marriage, to routine disinheritance of women from family property despite laws to the contrary, to abject conditions of widows. As the influential report, *Towards Equality: Report of the Committee on the Status of Women in India (CSWI 1974)*, claimed, the patrilineal family may be seen as the locus of women's subordination: "It is not the fact of patrilineality by itself but its association with joint property, and joint household and certain rules and patterns of marriage which lead to greater constraints over women and affect their position in an adverse way" (CSWI 1974, 58). The Report associated this family form with women's economic dependence and limited rights to property.²

Patrilineal family ideologies are deeply tied to forms of gendered violence, rooted in ideas that women be raised to be married away as soon as possible, to rely on the economic resources of husbands/in-laws rather than on labor or education or their own families' resources, to contribute to these marital households through domestic labor, childbearing, and childrearing. These ideologies of power give rise to practices such as female feticide and infanticide (based on viewing girls as liabilities and boys as assets), to child marriage (getting rid of girls from the household as soon as possible), to domestic violence (often mistakenly assumed to be dowry violence, including so-called honor killings), to elder abuse (related to access to property).

Systematic data on many of these practices is difficult to obtain, but in a range of studies, South Asia consistently ranks high in Interpersonal Violence (IPV), associated with physical and mental harm (Human Rights Watch 1999; Garcia-Moreno, Jansen et al. 2006; Jamal 2006; Adhikari and Tamang 2010; Azusa, Poudyal et al. 2010; Critelli 2010; Ali, Asad et al. 2011; Dalal and Lindqvist 2012; Kimuna, Djamba et al. 2012; Jewkes, Fulu et al. 2013). As the Pakistan Supreme court case of a woman who narrowly won the right to her choice of marriage partner over her father's disapproval shows, judges are inclined to assign overwhelming disciplinary authority to families as optimal for the health and well-being of the nation (Jamal 2006). The Hudood Ordinance and Qisas and Diyat laws, which subject rape accusers to prosecution for adultery and allow families to seek compensation for "honor" killings, further underline the Pakistani State's deferral to family authority (Critelli 2010). State governance is often unresponsive to violence allegations, and often, as Human Rights Watch reported of Pakistan, "exacerbate[s] the suffering of women victims of

¹ (Audrey D'Mello, "The Myth of Hindu Monogamy" *Deccan Chronicle* October 23, 2014 <http://www.deccanchronicle.com/141023/commentary-op-ed/article/myth-hindu-monogamy>.)

² This is not to posit that matrilineal or polyandrous families are necessarily empowering spaces for women (see Schuler 1987; Arunima 2003; Nongbri 2010 for critiques of matrilineality and polyandry).

violence and [obstruct[s] the course of justice” by failing to register cases and harassing complainants (Human Rights Watch 1999, 2).

Marriage is a site for consistent inequalities. Laws of divorce and inheritance enhance women’s dependence on their families (given their typically weaker positions in the labor market), and hence constrain their options in being free of violence from families. A recent Human Rights Watch report on Bangladesh lists the overt discrimination in “personal laws” pertaining to marriage, separation and divorce, arguing that “rather than offer protection, Bangladesh’s personal laws often trap women in abusive marriages or propel many of them into poverty when marriages fall apart. In many cases these laws directly contribute to homelessness, hunger, and ill health for divorced or separated women and their dependents” (Human Rights Watch 2012, 9).

While families are often sites of neglect and violence, exclusions from family resources and shelter also produce socioeconomic vulnerabilities. Because States organize economic and social rights through family structures, they leave out many forms of social and sexual alliances that lie outside heteronormative patterns. These include heterosexual people who may be outside marriage (single, widowed, divorced) (Agarwal 1994; Chen 1998; Banerjee and Mukherjee 2005), a broad range of homosexual relationships including transgender and third gender communities who may have specific marriage and property traditions (Manayath 2015), and many other kinds of short- and long-term sexual-social contracts (Partners for Law in Development 2010).

In India, there has been much publicity around criminalization of “unnatural sex” as a way to police homosexuality, and homosexual practice is deemed illegal (drawing on the same colonial law) in other South Asian countries. But a recent Indian Supreme Court judgment³ expanded economic rights for “relationships in the nature of family,” with the potential to include many of the categories named above. Making such diverse social arrangements legally visible not only helps mitigate economic vulnerabilities, but provides better protection against violence, both from external forces as well as within communities.

Intersections and Exclusions: Economic and Political Margins

Disparities of class, caste, religion and political economy affect patterns of violence as much as gender does. Most studies of IPV cited above mention its correlation with poverty and nonliteracy: important here is that while violence may happen across class and levels of education, those with more resources are likely to have the tools to get free of it, whether by leaving home, earning enough money to be self-sufficient, or by having the social capital of alternative shelter or a hearing by authorities. Economic dependence exacerbates vulnerabilities.

When we are perplexed that a broad swathe of people do not adopt seemingly sound and healthy policies that feminist groups have recommended, we often fail to appreciate the depth of economic exigencies that drive people’s decisions. For example,

³ D.Velusamy vs D.Patchaiammal (decree 21 Oct 2010).

feminist groups have asked for raising girls' marriage age and educating girls as an alternative to marriage. But such early marriages in South Asia are often undertaken as survival mechanisms to counter extreme poverty and are not affected by educational interventions (Raj, McDougal et al. 2014). Such policies do little to help the material conditions of those who marry off daughters at very early ages, while they contrarily end up empowering parents to prevent daughters (typically near marriage age) from pursuing marriage choice (Agnes 2013). Patriarchal ideologies of kinship and sexuality are obviously at play in early marriage, but prosecuting early marriage as a form of violence hides the State's culpability in producing the economic conditions and the failure to provide alternatives. As the following discussion on sexual assault may indicate, a more nuanced conversation on consent and force in marriage, and the State's responsibilities against family power, may be in order.

Ethnic and religious conflicts and State custodial impunity against violence have been steady presences in South Asia. Gender-based violence has increased in such situations of post-conflict survival, displacement and marginalization. Sri Lanka is particularly notable here for having a relatively low incidence of IPV before the prolonged Sinhala-Tamil conflict, and a sharp rise in violence in conflict-devastated locales (Hyndman and de Alwis 2003; De Alwis 2012). Custodial (physical and) sexual violence on men and women by the police, and military impunity in using rape as a means of domination especially in border or politically troubled areas, has long gone unchecked in India (Kannabiran and Menon 2007; Westmarland and Gangoli 2011; Baxi 2014; Basu 2015). Indigenous communities fear losing their customary dispute resolution systems to the religious hegemony of State courts (Ahmad and Chakma Sathi 2011). Despite the elaborate apparatus of laws against violence in each country, agents of the State actively foster violence, typically relying on the logic of security or legal process to extricate themselves from blame. Thus, policies cannot simplistically rely on State action for prevention or protection, nor focus on the family as the principal problem.

Legal Pluralism and Gender-Based Violence

One of the most frustrating conversations we have been having in feminist groups in India recently concerns the enthusiastic use of criminal laws of gender-based violence in a variety of unforeseen ways. Such uses not only do not curb violence, but rather have the effect of increasing familial control and discipline over women and girls in areas such as mobility, sexuality, marriage choice and livelihood, and fomenting further State corruption. They remind us that laws are dynamic and adapted within culture, and thus that adding more laws and policies may not be effective.

A. **Sexual assault** is a prime example. Global media is saturated with stories of horrific rapes in South Asia, demonstrating patriarchal control over public space, family decisions, caste entitlement and political impunity. Whether criminal prosecutions prevail in such cases may depend strongly on the socioeconomic background of the victim and perpetrator, and on marital and kinship status and respectability (Das 1996; Roychowdhury 2013; Agnes, D'Mello et al. 2014). Egregious rape cases routinely face difficulties with prosecution because of delays, evidentiary mistakes/ omissions, and

assumptions about victims' and defendants' motives and actions (Baxi 2014). There is a large gap between chargesheeted cases and convictions per National Crime Records Bureau statistics because of these factors. Stranger rape episodes tend to get a lot of media coverage and dominate policy interventions, while acquaintance rape and other common forms of sexual assault connected to caste or military or police violence go unreported or unprosecuted.

As global analyses of sexual assault have shown, bringing rape under legal control proves elusive despite elaborate institutional mechanisms and activist vigilance in many countries. Prevailing cultures of honor and shame, globalized ideas of sexuality, impunity against prosecution and rape myths among judges and officers have been reported to be some of the primary stumbling blocks across nation-states (Westmarland and Gangoli 2011). Indeed, questions of consent and choice are so regularly manipulated in these settings that new definitions of affirmative consent and its relation to power may be in order (Cowan 2007).

Meanwhile in India, rape law is used to strengthen dominant patriarchal norms of marriage and family in two significant ways. 1. women's families file cases of rape and abduction against men to prevent their daughters contracting marriages of choice that they might disapprove of based on class or caste or religious norms, occasionally including the alleged rape victims as co-conspirators (Baxi 2014); 2. many women file rape charges following a "promise to marry" trajectory of case law, alleging that sexual relations presumed or promised to end in marriage constitute rape if marriage does not result (Basu 2015). These categories serve to locate sexuality solely within marriage, under the governance of kinship norms, and to equate consent to sex with consent to marriage. They undermine definitions of rape as violations of bodily integrity or affirmative consent. Journalists have reported recently that these two categories predominate among rape cases filed in major metropolitan areas.⁴

While these uses of rape law fuel cultural perceptions that most rape cases are spurious or false, the media focus on dramatic examples of stranger rape rather than acquaintance rape leads to a much greater surveillance of women at workplaces and college campuses, curbs on mobility, monitoring of cell phone usage. These tactics, both State and social, use laws created through feminist mobilization to curb individuals' sexual autonomy and marriage choice, and to discipline people through kinship.

In a set of similar cases from Bangladesh, it is impossible to determine from the language of police FIRs whether families deliberately use kidnapping law when disapproving of a particular match, whether women declare that they were in a consensual relationship before running off under coercive pressure from men with powerful connections, or whether an abduction-rape turns into a consensual relationship under certain material conditions (Siddiqi 2010). None of these options enhance women's sexual and social autonomy. A comparative analysis of Pakistani cases also indicates the popular

⁴ Aarefa Johari, "Can Sex after a False Promise of Marriage be Called Rape?" *Scroll.in* April 18 2014 <http://scroll.in/article/661695/can-sex-after-a-false-promise-of-marriage-be-called-rape>; Rukmini Srinivasan, "The Many Shades of Rape Cases in Delhi" *The Hindu* July 29, 2014 <http://www.thehindu.com/data/the-many-shades-of-rape-cases-in-delhi/article6261042.ece>

use of *laws* of rape, abduction, kidnapping and theft or the writ of habeas corpus to obstruct consenting relations between adults (in addition to *extra-legal* violence including so-called honour killings). However, couples in turn make use of laws of illegal detention, quashing FIRs, habeas corpus etc. to counter such attempts, and courts have rejected arguments against “honour” by citing State commitments to international covenants (Baxi, Rai et al. 2006).

B. Domestic violence in India is both hypervisible and elusive for criminal convictions. We know from National Family Health Surveys and other data that plenty of physical, sexual and emotional violence is reported across the country (mirroring high numbers in other parts of South Asia). S498A, the criminal provision for domestic violence, was created in the 1980’s (along with other laws addressing dowry and suicide) in response to numerous incidents of married women murdered in extended family homes, and constitutes more than 40% of all charges filed under the “Crimes Against Women” category as recorded by the National Crime Records Bureau. It grants police the power to file charges with little prior investigation and allows extended families to be jailed in addition to husbands (given the nature of the crimes it governed). The law has famously been ripe for police corruption where either family may bribe to have a case be pursued or dropped. It is also perceived as a law that can be used punitively by women of elite status, and as a form of leverage for women of all classes to negotiate better alimony under the shadow of criminal threat.

The popularity of S498A is counterproductive in a number of ways. Its low conviction rate for officially filed cases (scholars have found between 1-2% conviction, the National Crime Records Bureau slightly higher) means that it can effectively offer little to no protection to survivors of violence (the number of women seeking redress under it is much higher, but most cases drop out through mediation). The widespread atmosphere of suspicion it generates combined with the low conviction rate make the police and judiciary unreceptive to victims trying to lodge complaints, especially if they are socioeconomically marginalized. Marital reconciliation dominates as a mode of resolving such cases, meaning women are often sent back to known situations of violence in the hope that their economic interests will be better protected. And because charges of violence are popularly regarded (by lawyers, mediators, and litigants) as a platform for negotiating the economic issues of divorce (alimony, custody and residence), S498A becomes tantamount (only) to strategic advantage: the goals of curbing domestic violence as a violation of bodily integrity or will are not advanced, and alleging crime becomes significant mostly salient as a tool of mediation. It becomes impossible to know the extent of violence, to legally punish violence, or to contemplate modes to redress violence (Basu 2015).

The Domestic Violence Act (2005) of India which was recommended by feminists to offer an alternative through civil provisions, given the ill reputation of S498A, has also come to be viewed as a parallel tool of extortion and property wrangling at worst, and an inefficient poorly funded mechanism at best. A recent study from Bangladesh similarly documents that most women who come to legal aid or mediation with complaints of domestic violence end up “reconciled” back in their homes or with an economic settlement, in lieu of criminal charges which can bring no pecuniary relief (Bangladesh Legal Aid and Services Trust 2013).

Lawyers and legal scholars often contend that people's creative use of laws against the grain, and the use of multiple venues including customary and alternative dispute resolution venues, caste tribunals and formal courts, are generally advantageous for litigants (Nagaraj 2010; Solanki 2011). Rather than having people turn to law for solutions, alternatives to law and ways to leverage legal sanctions not only save time and money, but provide customized solutions tailored to the situation. Even if the socioeconomically weaker person is in a worse bargaining position, outcomes may turn out to be better for all parties. Laws are not "misused" so much as put to use as cultural tools. The balance between civil and criminal penalties is necessary to create leverage: while women are generally socioeconomically in a weaker position, the protectionist sanctions of criminal law give them an advantage over largely gender-neutral civil law, and hence the threat of criminal prosecution can lead to better alimony or settlements.

However, these practical solutions often come at the cost of broader gender justice. Mediation is a poor solution whenever violation, pain or anger are in the mix, which is all too often in marital disputes. Alimony settlements for women are frequently made under conditions of marital compliance and community surveillance; reconciliation involves minimizing known violence.

Conclusions and Recommendations

The domestic realm is as much a zone of shelter as one of deprivation and violence. Because it is a source of critical resources, the challenge is to ensure it provides greater economic and social equity while mitigating and preventing violence. Law, as the previous discussion shows, is not the optimal way to address this challenge; law needs to be understood as aspiration and strategy, as power and impunity, not a simple tool of policy enforcement. In policy interventions and cultural campaigns, violence should be understood in terms of bodily integrity and affirmative consent, rather than transgressions of honor or kinship. Violence prevention should be a goal unto itself, rather than being conflated with economic sustenance.

Recommendations:

- Policy initiatives should recognize diverse kinship forms, not just patrilineality in South Asia.
- Diverse socioeconomic arrangements within and outside marriage should be recognized as "family," and included within economic incentives and legal protections provided by state and global policies.
- Families exercise control over labor, nutrition, education, property, mobility and decisions related to sexuality, which are related to gender-based violence within the family. Criminal provisions relating to family violence prove inadequate if they do not recognize these conditions.
- Criminal law should exist alongside broader social and economic policy interventions, to help those whose impoverishment is related to gender as well as region, class, caste, or religion.

- Conflict, displacement and dislocation enhance rates of gender-based violence within the family; States should be held accountable for minimizing such violence. Custodial violence and civil rights violations in the name of political security need to be specifically named as forms of gender-based violence, and prosecuted in terms of available sanctions, with no impunity fallback.
- Sexual assault policy should highlight the invisibility of acquaintance rape and other forms of rape related to power. Presently, the rarer category of stranger rape is visualized as the norm for most policies.
- Consent must be defined as affirmative consent and violation of bodily integrity of the victim, rather than harms to kinship or honour. Consent should account for systems of power within caste or war or custodial powers of police and military.
- Policy initiatives related to sexual assault and domestic violence should enhance social and sexual autonomy rather than the disciplinary authority of the family. These include greater autonomy in public space and the State's responsibility for maintaining safe spaces without policing clothing, movement or sexual choices.
- Enhancing women's economic autonomy and their access to family resources would make them less dependant on marriage and make it more possible for them to leave violent parental homes or marriages.
- Shelter homes for women provided by the State are notorious for their poor conditions and as sites of further physical and sexual violence. Improving these homes makes it possible for women to have alternatives to violent parental or marital homes, affecting forced marriage, sexual assault claims based on kinship, and domestic violence.

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