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# R E P O R T A N D R E C O M M E N D A T I O N S

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## **STRUCTURE OF THE REPORT:**

This report briefly introduces the participants in the National Consultation on ‘Women’s Right to Choose If, When and Whom to Marry,’ states the context in which it took place, and the objectives of the Consultation. It then goes on to elaborate on the substantive content presented. Individual presentations have been dealt with first, followed by group work and recommendations.

## **A. INTRODUCTION:**

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The National Consultation on ‘Women’s Right to Choose If, When and Whom to Marry’ was held on March 22-24, 2003 at La Place Park Inn, Lucknow, India.

The Consultation was organized by Association for Advocacy and Legal Initiatives (AALI), in collaboration with International Women’s Rights Action Watch Asia Pacific (IWRAP Asia Pacific) and the International Centre for the Legal Protection of Human Rights (INTERIGHTS).

A total of 54 persons participated in the Consultation. They included representatives of women’s organizations, lawyers, journalists and academicians from various States of India, including Haryana, Rajasthan, Tamil Nadu, Gujarat, West Bengal, Karnataka, Maharashtra and Uttar Pradesh (UP). The Consultation was also attended by the UP State Commission for Women and the UP Legal Aid Board, as well as a representative of the British High Commission and members of international organizations. Salma Khan, a member of the UN Committee on the Elimination of all Forms of Discrimination against Women, also participated in this event.

The consultation was supported by Oxfam (India) Trust, the Ford Foundation, DANIDA, UNIFEM, INTERIGHTS and CIMEL, SOAS, London University.

## **B. CONTEXT:**

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A woman’s right to choose if, when and whom to marry is a fundamental human right. Provisions of the Indian Constitution regarding non-discrimination on the basis of sex, equal protection of the law, equality before the law and the protection of life and personal liberty, safeguard this right. At the international level, the right is secured by the provisions of a number of international human rights instruments,

including Article 16 of the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW); Article 23 of the International Covenant on Civil and Political Rights (ICCPR); Article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR); Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD); and the Convention on the Rights of the Child (CRC). Furthermore, among others, at least two international human rights bodies – the United Nations Special Rapporteur on Violence against Women; its Causes and Consequences and the United Nations Working Group on Slavery – have focused on this right and identified its violations as human rights abuses.

In India, despite the framework of national and international legal protection, the right to decide if, when and whom to marry is not enforced in practice. In many cases, specific violations result in tragic consequences for the parties concerned.

Prior to the consultation, AALI conducted a research study to examine the scope and nature of such violations.<sup>1</sup> The conclusion from the research was that violations of the right to decide if, when and whom to marry result in a complex web of discrimination against women. This web consists of the linkages between violations of the right with justifications based on cultural and traditional practices, coupled with restrictions on women's autonomy, health and development, violence by natal families and communities, the absence of State support and/or connivance/complicity of the State (law enforcers and judiciary) with perpetrators. Given this complexity, in order to ensure the fulfilment of this right, it was necessary to acquire a clear understanding of the substance of the right to decide if, when and whom to marry, and to craft and co-ordinate strategies at both national and international levels. It was also necessary to develop clarity on the political, cultural and legal contexts within which this right is exercised (and violated); the causes and consequences of violations; the national and international mechanisms for promotion, protection and fulfilment of the right; and State obligations to protect and ensure the free exercise of the right.

It was in this context that the National Consultation on Women's Right to Choose If, When and Whom to Marry was convened in India.

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<sup>1</sup> AALI conducted a research on rights in relation to marriage in partnership with local groups and with technical assistance initially from IRAW-Asia Pacific and subsequently also from the 'Project on Strategies to Address 'Crimes of Honour' jointly conducted by INTERIGHTS with CIMEL at SOAS, London University. This research forms a contribution to the CIMEL/ INTERIGHTS Project.

### **C. OBJECTIVES**

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The Consultation aimed to:

- Create conceptual clarity regarding the scope and extent of the right in Constitutional and International law;
- Share experiences among activists, lawyers, academicians and journalists, among others, of violations of the right, its causes and consequences, and to identify whether the issue was seen as a human rights concern for India;
- Identify obstacles in law and practice to the fulfilment of this right and, in this regard, assess the validity of India's declaration<sup>1</sup> to Articles 5 and 16 of CEDAW;
- Provide an analysis of State obligations under CEDAW to promote, protect and fulfil the rights of women in the specific context of the right to choose if, when and whom to marry;
- Identify international and national standards and mechanisms that promote, protect and fulfil a woman's right to choose if, when and whom to marry; and
- Develop specific local and international strategies for the promotion, protection and fulfilment of the right and to build a constituency to advocate for the achievement of these ends.

### **D. PROGRAMME AND PRESENTATIONS:**

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The consultation began with a welcome address from Ms. Tulika Srivastava of AALI. She explained the objectives of the consultation and its expected outputs. The consultation was then divided into eight sessions, each of which is outlined below.

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<sup>2</sup> 'Declaration' has the same effect as 'reservation' under International Law

**SESSION 1:****THE RIGHT TO MARRY:  
A CONCEPTUAL FRAMEWORK****PRESENTER:****SARA HOSSAIN***(Presentation is attached as Annexure 1)***CHAIR:****KANCHAN SINHA**


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***“I have to admit that every time I’ve written it (the title of the workshop: “Right to marry”) down, I also kept inserting “or not to marry...” at the end of each phrase.”***

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***“The political and legal systems are much more forward looking than the oppressive social-cultural-traditional norms to which we respond and within which we live.”***

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The first session began with a keynote address on the “Right to Marry: A Conceptual Framework”, delivered by Sara Hossain. The presentation began with responding to an immediate concern articulated by various participants, that the title of the workshop was focused on the Right “to” marry, which does not necessarily reflect the right “not” to marry. It was further stated that the attempt was to place all the elements worked with on the table, rather than present a conceptual framework, which would possibly result at the end of the present consultation.

The address focused on presenting the different dimensions of the right to choose freely if, when and whom to marry. This includes child, early and forced marriages and also interferences with women’s right to choose whether or not to marry. She outlined the explicit guarantee of this right under various human rights instruments as well as provisions that provide a safeguard against its violation. Ms. Hossain also discussed the nature of violations, the liability of perpetrators, State interventions, and State obligations to address the practice. She further highlighted several points, including the role of religion, the linkages between honour and attempts to control women’s behaviour, and the right not to marry. Her discussion was focused on the context of the scope and application of the right within South Asia and within certain diasporic communities in Europe, and the different strategies adopted by women’s organizations, community groups and the state, separately, to address the practice in each case.

The Chairperson, in opening the session for discussion, noted that the presentation fundamentally concerned itself with the “freedom” to marry or not, as well as the protections available to the safe exercise of the choice made. The questions raised by the presentation, included even the conditions under which the marriages are to take place, with a significant emphasis on “how” to marry. She also noted that at least in the Indian context, the laws and the constitution give us some space to claim equality, whereas there are no spaces in the family or the communities within which we live, (and towards which we, as individuals feel obligated) to claim or exercise these rights.

The keynote address was extremely useful in initiating a wide discussion that ranged from:

- ◆ The gaps and challenges in working with law,

- ◆ Concerns about the manner in which the issues have been articulated,
- ◆ The need for a more critical and rigorous examination of marriage as an institution,
- ◆ The status, marriage as an institution accords to individual human rights.

The discussions began by noting the changing legal positions vis-à-vis marriage, especially in recent times, in our jurisdiction. One of the changes that can be identified would be the declaration of bigamous marriages as invalid by law and its impact on the way the judiciary started viewing women seeking its intervention for maintenance and support from their husbands on grounds of bigamy. Till the said declaration, the Courts located women's right in relation to marriage as restricted to shelter, unless they could show that they were neglected. Post-invalidating of bigamous marriages (even though its impact on women's status was not very extensive), the Courts see the claim for maintenance differently. Thus, legal reform had in some ways informed decision-making even though, in this particular case, its impact on women's status was not very extensive.

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***“It is terribly true that women were never asked what they wanted.”***

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Another issue that was examined was the circumstances during the time of partition of the country, especially in relation to “recovery and restoration” of the women, many of whom were probably not even abducted and were never asked what they wanted. These “Recovery and Restoration” operations were run by women who at the time were seeking to advance the cause of women. Here the issue transcended family and community honour, and was viewed as a matter of national honour. This issue has not been addressed adequately, and should be brought into the present discourse on the issue of choice.

The other issue highlighted was around caste. The Chundur incident in Andhra Pradesh is a clear example of the manner in which communities interact with each other on such issues. It would be useful to learn from the strategies used by the Dalit movements there, in terms of their response to the massacre of an entire family due to an inter-caste marriage, in the face of, if not state connivance, certainly state indifference and silence.

One of the participants, Dr. Ramanathan, also brought out the complexity involved in using habeas corpus as a strategy to ensure choice. While on one hand it is effective to at least produce the girl before the Court (which is a significant achievement), on the other hand it leads to the police knocking on doors and asking the girl concerned to accompany them, which could possibly be a traumatic experience for most women. Further, the Court merely hears the statement, and there doesn't seem to be any responsibility to investigate the statement made or the context within which it has been made. This leaves a huge gap in terms of actually determining the veracity of the statement and the exercise of choice.

In reference to child marriage and state intervention the participants were reminded that the last time the age of marriage was raised in India, population control was one of the expressly stated objectives, so one has to be careful not to oversimplify the issue of increasing the age at marriage, as it may not necessarily mean state protection for choice.

◆ *A case from the early seventies regarding a University student was shared with the participants to illustrate the manner in which the state, the University system and the police came together to act as an extension of the patriarchal system, or as the father of the girl, who was set against his daughter exercising her choice. They actually hunted for the girl from room to room, and she was forced to hide in a cupboard for two days to avoid detection. She was later whisked away to Delhi by her boyfriend and presented before the Supreme Court where a habeas corpus had been filed and where she was able to assert her choice.*

In the above case there surfaced two issues:

1. The first issue was regarding the usage of habeas corpus per se. In the case of men it is used to challenge a violation by the state mostly to combat forced disappearances. In the case of women, habeas corpus is mostly used in the cases related to abduction and the exercise of choice and autonomy. So, for women, decision-making is really contested in relation to choice in marriage, and it is in this case that the Courts step in with an order to "produce" the woman concerned, and conceptually we should remain mindful of this usage of the writ of habeas corpus as a remedy.

2. The second issue the case raises is that even historically the right to choice has been accessed through the habeas corpus instead of conceptualizing it as the right to marry. It would be important to examine the rationale for it not being articulated as the right to marry or not to marry, as an issue of choice, instead of being woven implicitly into habeas corpus. In fact, this has not challenged the Indian Courts to apply their mind to making a statement on consent and choice, as has been done in Pakistan.

The other part of this articulation of the issue, especially on part of the women's movement, is the overwhelming tendency to focus on violations and dangers that women face, rather than to look at issues around agency and choice. In the West, the articulation of this has been "pleasure vs. danger", but it can be stated differently, as long as it enables us to look at the exercise of choice, rather than to only respond to the violations.

Another view forwarded was that in certain cases courts have pronounced on the right to marry. One of the reasons for using the habeas corpus was that invariably people were responding to emergency situations, wherein there was no other remedy available for usage, especially as one needed to get women out of dangerous situations. So, while the courts have not necessarily pronounced on the right to marry, they have pronounced on wardship, which is essentially about age. So, the legal issue has been that if one is an adult then one can do what one chooses. So the question is about establishing age. In that sense, the issue is less about the right to marry or not to marry and more about control over what one does, if one is not beyond a certain age. In fact, there are other situations in which it works negatively. For example one cannot continue in a state home after the age of 18, and as a consequence one can be virtually out on the streets, due to withdrawal of state protection on grounds of age. So, the legal issue is that the courts do not ask the rationale for the choice made. When the woman is produced in Court, they hear the choice and decree accordingly, but do not ask why is that choice articulated. For example, even when the allegation has been that the parents are forcibly detaining the woman, and the woman has come and said that she wishes to remain with the parents, there is no investigation to probe into the reality or veracity of the statement. The order has simply enunciated that the

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***“Why should the family  
have malafide control  
up to even 18?”***

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woman is an adult and wishes to remain with the parents. As far as right to marry is concerned, the Courts have spoken about the age in the context of voidable marriages, in terms of the woman being allowed to take a decision about the continuation of the marriage etc.

This served to emphasise that habeas corpus has been extremely useful in responding to an emergency situation of violation, and has been the usual mode of response. However, this emergency response also indicates that one has not questioned the nature of control that a family exercises over the woman, and in fact implicitly considers that they have a right to dispose her off as they wish. So, age becomes a factor, but not the nature of the control, which is also very critical. This ensures that the question of forced marriage never gets addressed. We have not addressed the implicit consequences of assuming that family has control up to adulthood, and even beyond adulthood. It also disables challenging the family control per se, or opening the control to external scrutiny, except where the victims themselves seek external support.

The other issue that was brought up was that while looking at rights, the legal regime and strategies to address the various violations, it is equally important to interrogate the context of the exercise of these rights, i.e. the institution of marriage and see what it is all about. The institution in fact, seeks to manage socio-economic relations and sexuality, whereas the rights at the entry point are about choice, based on desire and autonomy etc. that are also linked to other rights which may not be consistent with the nature of the institution itself. A clear indication would be marital rape, which is not recognised by law, and is a clear subordination of the individual's right to physical integrity as well as choice based on desire. As such, it is important to understand what we want from the institution and whether the law can really support us in accessing the identified rights or address the violations within it.

The discussion concluded with a comment on the importance of looking at impediments in religion as a critical issue for discussion, especially statements, which are discriminatory, and the acceptance of which needs to be questioned and opened to reinterpretation.

The first session emphasized significantly on law and its usage in responding to the violations of the right to marry, and the manner in



which the issue has been legally articulated. Equally significant concerns were raised about perception of agency of the individual, control of families and communities and religion as a site for engaging in review and interpretation. This provided a clear context for the next session, which had presentations of research as well as experiences of work on the issue, from different regions and with different communities.

## **SESSION 2:**

### **IDENTIFYING EXPERIENCES AND ISSUES ON THE RIGHT TO CHOOSE IF, WHEN AND WHOM TO MARRY**

#### **CHAIR:**

**DR. UMA CHAKRAVARTY,  
PEOPLE'S UNION FOR  
DEMOCRATIC RIGHTS,  
(PUDR)**

#### **PRESENTERS:**

**SARIKA KALIA, AALI  
JASVEEN AHLUWALIA,  
RAJASTHAN**

**JAYA SHARMA, PRISM**  
*(Presentations of AALI and  
PRISM are attached as  
Annexure 2A, 2B and 2C)*

**HANNANA SIDDIQUI,  
SOUTH HALL BLACK  
SISTERS**

#### **DISCUSSANT**

**DR. SYEDA HAMID,  
MUSLIM WOMEN'S FORUM**

Session 2 was extremely intensive and was packed with issues, as it had five rich presentations. Two presentations were by AALI, on the research they were engaged with and one by South Hall Black Sisters, which focused on the way the issue is being addressed in UK, and its cross-connects with the issue of racism and discrimination against the Asian communities. The presentation from PRISM looked at the marginalization of the right to choice in terms of human rights discourse and its impact on the issue of alternative sexuality, thereby broadening the scope of the discussion to include elements of manner in which coercion is constructed and understood.

Ms. Sarika Kalia and Ms. Jasveen Ahluwalia of AALI presented the findings of the AALI research carried out in Uttar Pradesh (UP) and Rajasthan respectively. They reviewed specific incidents involving violations of women's right to decide if, when and whom to marry. These included child marriages and forced marriages as well as interference in the exercise of choice, and the contexts within which these occur. The roles of the family, the community and the State were also discussed.

Ms. Jaya Sharma of PRISM then made a presentation on the marginalisation of lesbian sexuality in prevailing discourses on women's rights within India and South Asia. On the right to decide if, when and whom to marry; she highlighted the suppression of discussions on lesbian sexuality due to the operation of the norm of heterosexuality. She also discussed the social, particularly family, pressures working on a lesbian woman to enter into marriage and the consequences of her refusal to do so.

Ms. Hannana Siddiqui of Southall Black Sisters was the fourth speaker. She reviewed instances of forced marriages within the South Asian

communities in the United Kingdom (UK). She also outlined how demands for state responses to this practice had been led by Asian women's organizations in the UK. She discussed interventions and strategies made by both government and non-government institutions in the UK to combat the practice.

Ms. Syeda Hamid of the Muslim Women's Forum discussed her experiences with the National Commission on Women in addressing violations to the right to choose if, when and whom to marry, especially the challenges it faced in undertaking rescue of women and girls. She shared her sense of deep disappointment while serving as a member of the Commission, due to the inability of the Commission to make a successful attempt to ensure equity for women, despite a strong legislative mandate. She also highlighted the need to question the role of apex bodies like the National Human Right Commission and the National Commission for Women in ensuring justice for women. She noticed that a common thread ran through all the presentations, regardless of its location: whether it was UK or Rajasthan or UP. In fact, the issue of alternative sexuality clearly placed a challenge as to whether we are going to respond to women's rights holistically or in a fractured way.

The discussion commenced with a comment on the situation of Men who have sex with Men, and the pressures experienced by them in relation to marriage.

The critical issue of inter-sectionality was also brought up, especially in the context of choice and sexuality. It was pointed out that the right to physical integrity is an effective example of inter-sectionality, as it enables a coming together of issues of various communities with different interests under the umbrella of the right to choice. It was agreed that in many ways, the increasing communalization of our societies is forcing us to re-look at gender roles, sexual choices, spaces etc, so in a way, the larger political framework is thrusting an inverted kind of inter-sectionality upon us.

It was also noted that there are concerns on representative voice, in terms of who will speak for whom? This becomes especially contentious with reference to alternative sexuality as well as community and caste identities.

In conclusion of the session, the Chair noted that the conflict in all South Asian societies, between cultural norms and practices on one hand, and the constitutional provisions on the other, causes tension in the articulation and exercise of right to choice, which is demonstrated in two ways:

- ◆ In responding to Caste, especially in relation to issues like untouchability, which have been written out of our constitution, but which still continue in the most heinous forms (and there is no concern in the people who practice the same about the violation of the Constitution, as they see themselves as governed by tradition and culture, and committed to up-holding the same).
- ◆ Marriage and reproduction are the other areas on which there is an unwritten conflict between what is implicit in the Constitution, and what tradition, the property system and everything else privileges. Marriage, sexuality and reproduction are organized in certain ways, and they are tied up with systems like caste, particularly, which is more than just a system of boundary maintenance of particular groups. Caste is also about property and the unequalness of property. So what one is reproducing is the inequality of the production system, the inequality of property, in one's reproductive practices. There is such a close link between the two, as demonstrated by things like forced marriage, that violations of the norms and rules of tradition governing marriage, sexuality and reproduction could well jeopardise maintenance of the social order in a particular way, which explains the violence faced by individuals who choose differently.

The Chair observed that it is critical to recognize the enormity of the issue, as choice in marriage threatens to challenge so much, as these are not only material arrangements, but also social arrangements, passing in the name of culture. This indicates the complicated situation that we are faced with.

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***“Whose honour?  
Whose izzat is being  
upheld?”***

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In this context, there is a need to find another word to articulate the issue as the continued usage of the word “honour” actually ensures carrying forward the patriarchal burden.

The Chair then shared the cases of Jhajjar and Talav. In the former there had been a dalit lynching, leaving five dalits dead and the latter had seen four dead; two jat girls and two dalit men, because they had married each other. The former made national and international headlines, however the latter has remained largely un-noticed and ignored. And it is the same structure that engages in the two incidents of violations. Even our political leaders roundly condemn one, whereas the other has gone completely unrecognised.

She noted that the above issues clearly show that there is such a widespread acceptance of violence in the context of culture, that we often do not even recognize it. This was doubly emphasised in the context of the death penalty. The extra-judicial killings by the community can well be compared to death penalty for individuals, who stand against the system, even on the basis of flimsy or no evidence. This indicates the ethos, which is willing to kill those who stand against it. And that is what happened in Talav and Jhajjar. The community in fact saw the extra-judicial killings as giving the death penalty. If one is willing to use the death penalty in one field, it will logically extend to the next. There are series of such sentences, where people have been executed. In fact, the extra-judicial killings are the civil society's death penalty against the victims, or people who have stood against culture.

It is in this context that we have to examine the contradiction in our lives. We have a freely elected parliament and a free market, but not the freedom to choose one's life partner or the person one would marry. The contradiction in this is the pressure applied by the entire society on individuals to marry and at the same time the absolute rejection of choice of the person concerned in relation to whom to marry. There is of course history within which the issue of denial is located, and that also is critical to look at separately.

The Chairperson shared her deep sense of anguish in failing to find a time in history in which women were conceded a right of consent. In fact, all our laws are to be challenged to discover the right to consent for women, which may partially be given for right to property, shares etc, however is never given in relation to marriage. This leads to the criminalization of love, (which has happened over a period of 100-150 years), clearly written as: elopement, abduction and so on, and though

it initially came from the British (and was about preventing propertied heiresses from eloping), it became further invested with the capital of “honour” in local usage. This has made for a complicated legal system, which does not allow one to even elope. For a civil marriage, one needs a minimum notice period of one month; in fact even the witnesses are required to give proof of residence. So, the attempt is to ensure that civil marriage does not take place, as that is one way that a couple may exercise choice.

The central issue to the exercise of choice has been seen as consent, but how is one to define consent? One finds that consent has to be in terms of rape, which is then linked to statutory age. One cannot define it as just consent, or genuine consent. Consent is always linked to age, so if the woman is under 18 then she cannot consent. If she is above 18, even then, at various junctures, she will be asked to prove her age in ways different from even the pronouncements of law. For instance, in one case, the Police Commissioner refused to accept the High School certificate, insisting on a bone-ossification test. In contrast, when is a bone-ossification done for a man? A bone ossification was done on the accused of the Maulana Azad Medical College rape case, to prove that he was a minor. So, in that sense, a test which is used in case of men when they have committed a criminal act, is used on women for determination of age in a case where the woman chose to have sex, and therefore, it would seem that making a choice for women is a criminal act.

And that is where we locate choice for women historically- as choosing a criminal act. The practice of Child marriage avoided the entire discussion regarding sexual choices, age and consent. It was never challenged as one could not really challenge marriage practices. So, one could legislate the age of sexual intercourse, but not of marriage, which is what the British did. This indicates that there is a significant amount of baggage that comes with the challenge of establishing choice.

Finally, the Chair concluded by responding to the issue of prioritization of rights and issues. She outlined that a common position has to be to stand against oppression and oppressive practices, regardless of where they come from, as that would bring in all groups and individuals experiencing oppression, which can be different for different groups.

**SESSION 3:****IMAGES OF CHOICE &  
MARRIAGE IN POPULAR  
MEDIA****PRESENTER:****MS. SHOHINI GHOSH****CHAIR:****DR. USHA RAMNATHAN**

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***“(these kind of films are) making possible the dislocation of mind, heart and body, in which the body can be in a place far from India, as long as the heart and soul remain committed to “Indian values”***

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Ms. Shohini Ghosh, of the Mass Communications Research Centre (MCRC), Jamia Millia University began the session with a multimedia presentation focusing on the depiction of marriage in popular cinema. She commented on how movie plots in this genre, which used to idolize lovers who defied family traditions, are now moving towards depicting family honour and duty as the compelling reasons for choices relating to marriage. She also commented on the context of the on-set of the neo-liberalization and globalization within which the increasingly conservative images of the issue are being depicted in cinema. The presentation brought out the manner in which external contexts influence films, which in their turn become social messengers, often impacting the social consciousness. For instance, Saeed Mirza, a noted filmmaker of the more progressive genre, noted that the film “*Hum Aapke Hain Kaun*” came like a healing touch in the aftermath of the demolition of the Babri Masjid in Ayodhya and the ensuing violence.

The discussion began with the comment that the presentation re-emphasises the need to re-examine the context of the rights that we are discussing, as it clearly articulates that the culture that is being reproduced by the popular cinema is so focused on the keeping of the boundaries of the families. As such only looking at what can be done with law, will have to be pre-empted by closer examination of these contexts.

One of the queries was about the distinction made between messages given (or reproduced) by cinema and television. The response outlined the complex nature of a TV serial or a soap opera, which is denied to the cinema. The former can change and reinvent themselves, as they have the luxury of back-tracking from a possibly radical stand that is denied to the cinematic format, which must find some resolution within the given time.

The presenter further expanded the comment in relation to the “healing touch” statement by Saeed Mirza. She brought out the complete lack of conflict within the families depicted in the film, being extremely appealing to a nation which had been torn by conflict and rocked by violence, as a complete contrast and providing some kind of a respite from the latter. In fact, even though, one can never say what makes a film successful, the huge success of the film could also be accorded to this factor of a complete harmony and absence of any discord.

It was pointed out that the films of the current genre, in a way are making a clear pitch in the favour of globalization, which also means one is for subservience and consequently the erosion of questioning from our systems, in fact even struggle against our systems. Secondly, the link between cinema and consumerism can also be seen in the way the cinemas are being used not only to facilitate absorption of certain values, but also as venues to examine and discuss the kinds of shopping required for marriages, so providing a venue for discussions around trousseau etc. This in turn reinforces the ideas about certain kind of marriages, in which choice has very little space, along with consumerism and dowry etc. It has resulted in dowry going into communities that had never known such a thing.

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***“It is not is not just the media doing all this, the media is in a very complex relationship with the society. I wish the outrage we have against the media, we would show that outrage for Gujrat, for instance....we need to look at the real world outside, and we don’t often do that (sic)”***

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So, it is not so much a reinforcement of tradition as it is a reinventing of tradition at a certain time that is encouraging a certain world-view, in which it becomes possible to deal with the complete loss of control experienced in the globalized world. This contributes to the popularity of such films. Because people are losing control of whatever they have in the globalized world- jobs, national resources, securities, they want to control even more, what they can control (which of course, is the family).

This can be linked to the “honour killings” that are taking place, which are also a kind of response to the fact that many more people are exercising their right to choice regarding marriage. The exercise of this right is impacted upon by other factors, such as caste mobilization in the present political environment. This also, obliquely, makes the marriage a case for interference not only by the immediate family but also the entire caste and community.

*(Please see Section E for Session 4: Workshop on Causes and Obstacles to the Right to Marry and Consequences of Violations)*

**SESSION 5:****“OBLIGATIONS OF THE STATE UNDER CEDAW AND OTHER INTERNATIONAL INSTRUMENTS”<sup>1</sup>****PRESENTER:****MS. REA CHIONGSON,  
IWRAW A-P***(Presentation is attached as Annexure 4)***CHAIR:****DR. USHA RAMNATHAN**

Ms. Rea Chiongson of IWRAW Asia Pacific spoke on the obligation of the State in relation to promoting, protecting and fulfilling a woman's right to choose if, when and whom to marry as elaborated in CEDAW, its general recommendations and concluding comments. She pointed out that it is useful and strategic to take note that India's reservations only cover Article 5<sup>2</sup> and not Article 2 (f)<sup>3</sup> of CEDAW. She also highlighted that the right to choose if, when and whom to marry is guaranteed by most human rights instruments and thus, strategic advocacy is necessary, especially as their mechanisms may also be used to enforce State obligation.

She went on to state that the obligation of the State is both an obligation of means and an obligation of results. The State is mandated not only to undertake measures but also to ensure that the measures in fact result in equality. Ms. Chiongson also pointed out that internal divisions of power couldn't justify non-compliance with CEDAW. Whether there is separation of powers, decentralization or federalism, the State cannot rationalise non-compliance. Each component part of the State is obligated to carry out the undertakings of the State. The need to regulate private actors and to modify cultural practices detrimental to women's equality was especially emphasized. Ms. Chiongson reinforced that the obligation of the State is to protect, promote and fulfil women's human rights, however, this should not be divorced from the need to combat impunity. She stated that in many cases the need to combat impunity has led to various measures to investigate and prosecute crimes and in some instances to set up truth commissions in order to divulge the truth and therefore, create a history of remembering the wrongs done at times when prosecution is not a possibility. She urged that measures listed under ways to combat impunity, in addition to those to combat violence against women and those to combat traditional harmful practices against women must be borne in mind in our strategies.

In opening the session for discussion the chair observed that while we have been able to challenge impunity in relation to violation of civil-political rights (for instance, on issues like disappearances, extra-judicial killings, custodial deaths etc) when it comes to women's issues, rights get wrapped up in a whole load of other issues, and our capacity to deal with this 'bundle' of issues is limited. She noted that the presentation has helped with some of the 'unbundling' of the issues, even though the complexity has remained.

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1 . The sessions 5 and 6 were interchanged for logistic purposes

2 . Article 5 "State Parties shall take all appropriate measures:

a) *To modify the social and cultural patterns 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 and superiority of either of the sexes or on stereotyped roles for men and women...."*

3 "Article 2: State Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and to this end undertake:

f) *To take all appropriate measures including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women."*



She noted that it is critical for us to resolve the constant competition between cultural and individual rights, particularly women's rights, especially when women have to bear the burden of cultural identities. She also cautioned against a casual engagement with law, as it is a product of a state, which is not neutral. Also, it is not as if courts or even those who demand it, already know what equality means. Work with communities to incorporate equality within our systems is equally critical.

The Chairperson pointed out that we had all felt that the International Criminal Court (ICC) had no relevance to India, till Gujarat happened and it was observed how state systems could collapse for an entire community. International law does prove to be very useful at such junctures, when national systems are either unwilling or unable to ensure recourse.

She identified the absence of information as another area that we need to examine, as not having information and not being able to access information invisibilises violations. She forwarded the example of the way Truth Commissions shared in the presentation as a way of challenging the silence, as the truth of the victim is not questioned, it allows for safe testimonies.

During the discussions it was clarified that the redress offered by international law could be accessed only after exhaustion of domestic remedies, and only if the Nation concerned has ratified relevant mechanisms. The other way is to access standard setting remedies, which are not redress related, which would mean comments and remarks by Committees like the CEDAW.

There was concern about the exhaustion of domestic remedies, as often the entire exercise can become infructuous by the time the domestic remedies are exhausted, especially in the context of Gujarat. It was explained that it was possible to access certain remedies, on grounds of delay and unwillingness of state to provide a remedy, and strategies can be formulated. Further, it was important to recognise that the international system seeks to support the national system, and not to replace it. The hope is that the formulation of international mechanisms will trigger the improvement and strengthening of national mechanisms to enhance access to justice for all.

The role of UN agencies was also challenged in terms of fulfilment of standards set by the human rights treaties, especially organizations like the International Labour Organization (ILO), the World Bank or even

UNICEF. These institutions are collaborating with agencies that are eroding women's human rights in very insidious ways. The ILO instead of backing workers rights is advocating giving up workers' interests and laws for their protection in view of the interest of International Monetary Fund (IMF). UNICEF is now funding schools run by religious institutions, as the state is backing out of education, which will now be in the hands of ideologies that support the most conservative of stands. In relation to this, it was pointed out that under the treaty body regime only parties to the treaty are bound by it, so the same obligations do not accrue to international organizations, specialized agencies etc, and they then become beyond accountability of the human rights framework.

On the other hand, it was also pointed, that the states cannot escape liability on grounds of perpetrating wrongs on the behest of any of the institutions mentioned. It was further pointed out that the Human Rights Commission is taking serious note of such violations by institutions related to the UN. In fact, the Sub-Commission on the Prevention of Discrimination Against Minorities and Human Rights has commissioned expert papers on ways to make institutions like the World Bank more responsible. One such paper states that there is clear liability on the institutions for upholding the human rights standards and norms, and they cannot enter into an agreement with the state, which is in violation of its obligations under the treaty bodies.

The participants expressed keen interest in the Truth commissions, especially about their potential usage to address issues around exercise of choice in marriage and their legitimacy if organized by non-governmental agencies. It was shared that Truth Commission had been held in various parts of the world, including South Africa-which also had some level of controversy, as they granted amnesty to all the violators. However, even this has been seen as an innovative strategy wherein some level of reconciliation was possible.

The experience in Argentina shows the importance of documentation, as nobody can now contest what happened at the time, due to the existence of a great deal of documentation and therefore, the existence of a shared history of violation. Some Truth Commissions have also served as compensatory bodies, as they provide compensation to the victims that have been identified. Their intervention has led to public apologies being made to the victims by the violators, which have facilitated some kind of healing. These are important lessons to be learnt from the Commissions.

**SESSION 6:****THE RIGHT TO CHOOSE IF,  
WHEN AND WHOM TO  
MARRY: A CONSTITUTIONAL  
AND LEGAL FRAMEWORK****PRESENTER:****Ms. INDIRA JAISING**

*(The power point presentation & transcript are attached as Annexure 5A and B.)*

**CHAIR:****Ms. SUBHASHINI ALI,  
AIDWA****1. Declaration by Government of India:**

*“i) With regard to articles 5(a) and 16(1) of the Convention on the Elimination of All Forms of Discrimination against Women, the Government of the Republic of India declares that it shall abide by and ensure these provisions in conformity with its policy of non-interference in the personal affairs of any Community without its initiative and consent.*

*ii) With regard to Article 16(2) of the Convention on the Elimination of All Forms of Discrimination against Women, the Government of the Republic of India declares though in principle it supports the principle of compulsory registration of marriages, it is not practical in a vast country like India, with its variety of customs, religions and level of literacy.”*

*2 (1981) 4 SCC 335; The Supreme Court in this case upheld a service regulation wherein an Air Hostess would compulsorily have to retire if she got married within 4 years of joining service. This goes to prove the complete lack of recognition of the right to marry by the Indian Courts.*

Ms. Indira Jaising of the Lawyer’s Collective, also a Senior Advocate, Supreme Court, presented the scope of the right in India under its constitutional and legal framework, elaborating in particular on the status of international law and human rights standards in the Indian legal regime. She highlighted that advocates should use customary international law and the provisions of various treaties ratified by India in arguing for equality. She discussed existing legal remedies, including the writ of habeas corpus. Ms. Jaising proceeded to assess the legitimacy of India’s declaration<sup>1</sup> to Articles 5 and 16 of CEDAW and called for their withdrawal. In addition, she also urged for legal reform of various personal laws, and the introduction of universal registration of marriage, the criminalisation of marital rape, and the establishment of an age for repudiation of marriage (following child marriages), among others.

The Chairperson regretted Ms. Jaising’s absence on the first day, when concerns about choice in marriage being restricted were being voiced, whether of people of the same-sex or between heterosexual individuals. Also the cases shared showed the number of murders that had taken place, for in most of the cases one or both individuals had been killed for entering into a relationship of their own choice, and intervention had only taken place after the murders. It would be useful to also identify pre-emptive strategies, to enable positive intervention.

The discussion began with a comment that the focus on deaths, in relation to choice marriage, has somehow marginalized the kind of oppression and violations faced by individuals who are not killed. It is important to keep sight of the violations being suffered by individuals wanting to access choice, which is in a continuum from consent to death.

It was pointed out by the presenter that torture has been recognised as a violation of international customary law and it was quite possible to argue that forced marriage amounted to torture, which would then be directly part of the legal regime under which we are functioning.

The discussion also enabled questions on the validity of a judgement, which stated that people who are HIV positive do not have the right to marry, or earlier pronouncements on the right to work and marriage, like in the *Air India v. Nargis Mirza*<sup>2</sup> case. Ms. Jaising responded to the first as being violative of the provisions of international law as well as of human right norms, as a right can be safeguarded but not eroded. She also shared that in a subsequent judgement the Supreme Court

has observed that the issue in the earlier petition was not the right to marry but confidentiality, so the earlier judgement is not binding.

Ms. Jaising also pointed out that it had been possible to challenge Air India, as it was “state” as defined in Article 12 of the Constitution<sup>1</sup>. In fact, in today’s world of privatization it may not be possible to pose a similar challenge, constitutionally, as writs for enforcement of the fundamental rights are not available against private parties, which is a major limitation in our present legal regime.

It was also brought up that the dichotomy between having reservations to the Convention and still acceding to equality was also reflected in the Constitution, which provides for non-interference with personal laws, while mandating equality. Ms. Jaising pointed out the only relevant right would be the right to religion per se. For all other rights, the Constitution clearly says that one can have any law touching any religion to give effect to the right to equality.

Ms. Khan pointed out that while India had entered a declaration to Article 5 (a) of the CEDAW, no reservation has been made to Article 2 (f) which has similar statement. Neither is there a reservation to 2 (e) which obligates the state parties to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise, so the Convention legally binds the state to take steps against any individual or private party, which perpetrates discrimination. As the Committee articulates it, it is not only a vertical relationship between the individual and the state but also a horizontal relationship with family, communities and other duty bearers also.

Ms. Jaising pointed out that CEDAW casts the obligation of enacting legislation to hold private parties accountable for perpetrating discrimination, and while the state is obligated, the burden of making it fulfil its obligation lies with us. She also shared that despite clear constitutional anti-discrimination provisions, the issue of remedies for discrimination by private parties is still an open debate in many regimes, including ours. There is clearly a need for a statutory guarantee of non-discrimination, as the Constitution only provides for remedies against the state and not private parties, and the CEDAW committee has pointed out the same to India, during the presentation of its initial report.

*(Please see Section E for Session 7: Workshop on Analysing State Interventions)*

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1. **Article 12:** *In this part, unless the context otherwise requires, the state includes the Government and Parliament of India and the Government and Legislature of each of the States all local or other authorities within the territory of India or under the control of the Government of India.*

**SESSION 8:  
NATIONAL AND  
INTERNATIONAL MECHANISMS**

**PRESENTER:**

**MS. SHANTHI DAIRIAM,  
IWRAP A-P**

*(Presentation attached as  
Annexure 6)*

**CHAIR:**

**MADHU MEHRA,  
PARTNERS FOR LAW IN  
DEVELOPMENT, NEW DELHI**

Ms. Shanthi Dairiam of IWRAP Asia Pacific discussed existing United Nations mechanisms, both charter – and treaty-based, related to redress and standard setting remedies, and their utilization to ensure the full exercise of a woman’s right to decide if, when and whom to marry. The presentation was enriched by the usage of cases and experiences of engagement with both kinds of remedies.

Ms. Khan added that despite widespread reservation to Article 29<sup>1</sup> of the CEDAW it was still possible for state parties to raise objections to actions of other state parties, especially with regard to reservations. She also said that now the Committee had become very sensitive to the issue of reservations, as many states do not even mention the rationale for the reservation, and often there is no need for the particular state to make the reservation. Many Nordic countries have in fact, withdrawn their reservations, with regard to Article 9 or 7. The Committee as a strategy is also involving the donor community on the issue of reservation, especially given their commitment to gender issues, so that some dialogue is encouraged on the issue of withdrawal of reservations.

It was also shared that in view of the number of reservations entered into by states on treaties relating to human rights, the United Nations Economic and Social Council (ECOSOC) has passed a resolution asking for withdrawal of the reservations, so that the purpose of the treaties- which is to ensure international accountability for fulfilling human rights of their own citizens, may be fulfilled.

The discussions brought out the difficulties felt by activists in accessing international systems as well as the problems experienced in demanding accountability and realizing remedies domestically. This brought out the need for perseverance and sustained effort in terms of follow-up of issues and cases that are to be raised at the international level, as well as consistent monitoring domestically for fulfilment of remedies granted and standards demanded.

It was pointed out that the presentation made the critical point that the status of the Commission on the Status of Women is very different from that of the Commission on Human rights and that needs to be taken into account. It was also underscored that in terms of usage of international mechanisms, activists tend to fall between two schools: of either expecting too much from the mechanisms or not pushing

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**1 Article 29 of the CEDAW states:**

**1.** Any dispute between two or more state parties concerning the interpretation or application of the present Convention, which is not settled by negotiation, shall at the request of one of them be submitted to Arbitration. If within 6 months from the date of the request for arbitration, the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the statute of the Court.

**(2):** Each State Party may at the time of signature or ratification of the present convention or accession thereto declare that it does not consider itself bound by para 1 of this Article. The other State Parties shall not be bound by that paragraph with respect to any state party, which has made such a reservation.

persistently at the system. An example would be the Gujarat atrocities, wherein; it actually took some effort for people to realize that there would not be an international criminal tribunal that would engage with the violators. And once that realization took place, the response was that the mechanisms were then useless.

The other part is that certain groups and organizations have more or less monopolized international mechanisms, and very little information exists or has been shared in a meaningful way with people who would be the best placed to use it or who stand most affected.

In fact this entire area of international law and mechanisms has been extremely mystified, and it was acknowledged that IWRAW A-P has contributed immensely to building strengths nationally of a wide variety of groups, ranging from Resource Centres to advocacy groups to mass-based organizations, to use CEDAW.

Similar work has not been done with any other treaty body in the country. This indicates that there is some responsibility of regional and international groups who come into domestic regimes and focus on one or two groups, instead of enhancing the capacity across the boards, and facilitate access and usage of international mechanisms and gains.

It was also pointed out there is a need for cross linkages in using international mechanisms, as otherwise there is a danger of ghettoization of women's issues into possibly CEDAW, and not looking at other mechanisms, that would also lend themselves to responding to issues and violations affecting women.

It was also pointed out that engaging with international work is a matter of human resources and of access as well, and many people, especially those engaged with community work may have neither the time nor the resources or even energy to want to engage at that level.

One of the participants shared that we must not lose sight of the fact that the UN is a political body, where the states are the real players, and it is a political battlefield for governments, who have their own agendas and their own negotiations. So while it is possible to use the shaming of the governments somewhat to our advantage, we should not expect social justice from such a mechanism. Further, there is a clear

competition among the international NGOs, as a result of which the issues get extremely fragmented. Also, the relationship of these NGOs with local organizations is very complex. It raises issues of understanding, resources, not having access to structural networks that can support this process, in fact, even contributes to complicating the access to mechanisms to the extent that one would question the efficacy of the mechanisms themselves.

In the above context, it was felt that the presentation had contributed to clarifying many of the issues, in relation to identifying the gains that are possible by engaging with the international system.

Gujarat was the paramount concern, which formed the context of the questions asked in relation to the usage of the international mechanisms for redress of human rights violations.

Participants shared the steps taken by them domestically and state response to them as well as other initiatives. They shared that various international organizations, including European Union conducted fact-findings, which were incriminating of the state government. However, the reports were met with complete denigration from the central and state governments. Also an increasingly strident nationalistic posturing on the issue was witnessed, which rejected all international comment and intervention.

In fact, activists who had gone to Sri Lanka to meet with the Special Rapporteur on Violence Against Women requested her to visit India. However, she expressed her inability to visit unless the government allowed it, and shared that all she could do was to write to the government, which clearly showed the structural limitation of the system.

Further, when the activists formed an autonomous international team to conduct a tribunal, they found that there were problems even in using certain legal concepts, as various members of the team understood them differently. For example, the usage of the word genocide was extremely problematic, as some members, who were extremely sensitive, sympathetic and supportive, did not want to use the word genocide. Their understanding of the term genocide was based on the western model of the Holocausts, and it was difficult to make them understand that a distinction had to be made between rioting, pogroms and what happened in Gujarat, which was genocide.

Commenting on the issues raised in the discussion, Ms. Dairiam, pointed out that the distance between local organizations and international mechanism felt by the participants had another dimension. There were distances even between national organizations that have access to international mechanisms and local organizations. She also pointed out that the former do not experience a resource crunch at all, which seems to be a genuine obstacle for grass-root organizations.

In responding to the resource issue, she advised that it is important to build programs that integrate international activism as part of the local activism, as they are part of the same work. It is important to be able to take the local issues up to the international level and bring back the gains. The challenge is to convince donors that one has the capacity and the understanding to do so. She shared the IWRAW, A-P experience, and the rationale for creating the “local to global” training program, in which the organization brings activists from many of the reporting countries to New York, and mentors them to engage in international activism. This was a clear departure from the practices of other international NGOs that actually wrote the shadow reports for the other countries and presented them to the Committee themselves.

In stressing the importance of working with international mechanisms, she said that the organizations that only work in the international arena are like “straw men” and while they know a lot about the mechanisms, they lack substance, so the engagement of local organizations is imperative to ensure that issues get heard and responded to at the international level.

She said that we must acknowledge that the UN is a diverse institution. On one hand it is a political body, with inter-state relations, wherein the states support each other, especially in relation to accountability for human right violations. On the other hand, the same states have set up parallel institutions within the UN itself, like the treaty body system, the source of the human rights framework, standards and norms. The treaty body committees are formed of independent expert groups, which monitor fulfilment of state obligations undertaken voluntarily under the treaty regime.

So there are spaces that can be used, for instance the Human Rights Committee under the International Covenant on Civil and Political



Rights (ICCPR) has given some good judgements under the Optional Protocols. Also, once a decision has been delivered, the states have to follow it, especially if it is under a mechanism like the Optional Protocol, (which as the name suggests, is optional), but once the state has ratified it, it enhances the access to redress for human rights violations for its own citizens. This essentially means that the Optional Protocol is in fact, the State's own mechanism, and it would be a contradiction for it not to accept and fulfil the order of its own mechanism.

In conclusion of her comments, Ms. Dairiam re-emphasized that it is critical for us to make the right argument, in making the complaints, as the decision of the Committee depends on the argument made. A weak argument would get a weak judgement, or even be reflected in flawed remedies being granted. It is therefore; imperative to build our own capacities to be able to use the international system in a useful way that would ensure gains for local activism.

The importance of the treaty bodies was reinforced by a participant, who reminded the group of the significance of working with the human rights instruments. The work entails not only drawing accountability from the states, but also realizing the evolving standards of human rights in our own work. The standard setting by the human rights instruments must impact and influence our work as well, as the engagement with the mechanisms cannot only be external, but we need to internalise the standards as well.

In concluding the session, the Chairperson shared that while the Special Rapporteur on Violence Against Women had not been able to visit India, post-Gujrat violence, she had taken steps as per her mandate with the government, so the mechanism had performed her function. It was also shared that from all counts it appears that the state has received some communication from the Committee on Economic, Social and Cultural Rights, before which a report had been submitted by a few NGOs.

She also shared that an effort has been initiated to submit a report before the Committee on Elimination of All Forms of Discrimination Against Women by May 2003, which would be based on the existing reports prepared on and for Gujarat, for which a meeting has been called on 25<sup>th</sup> March 2003.

She also noted that the role taken on by the European Union as well as by other High Commissions in the post-Gujarat scenario has been unprecedented. This shows that internationally things have moved. However, it also indicates that regardless of the international pressure, as long as the government has majoritarian strength, we will need to look for innovative strategies.

**SESSION 9:**

**FORCED MARRIAGE AND  
MULTICULTURALISM**

(Screening of film, "Love Snatched: Forced marriage and Multiculturalism")

Session 8 was followed by a screening and discussion of Gita Sahgal's documentary, "Love Snatched: Forced Marriage and Multiculturalism", which portrayed forced marriage as experienced by women and girls in the South Asian communities in the UK and the mechanisms employed by the British government and by NGOs to provide them with support and assistance.

The film not only captured the violations being faced by individuals exercising choice in relationships, it also brought the focus of the discussion back on the issue at hand, i.e. the right to choice and its violations, and enabled a rich discussion on strategies.

**SESSION 10:**

**IDENTIFYING STRATEGIES  
AND DRAFTING A PLAN OF  
ADVOCACY:**

**CHAIR:**

**MS. SHANTHI DAIRIAM,  
IWRAP ASIA PACIFIC**

*(Please see Section F for a full text of strategies formulated for taking the work forward on the issue)*

**DISCUSSANT :**

**DR. UMA CHAKRAVORTY  
PUDR**

Dr. Uma Chakravarty commented on the discussions held during the consultation. She emphasized that in further consultations there is a need for a more historical understanding of issues concerning marriage and choice; an analysis of the ideologies of the State and the communities; and an examination of the material, social, philosophical and other factors that affect choices concerning marriage. She further stated that a South Asian component is important in expanding our understanding and strategies on this issue.

She noted that there have been issues, which have come out of these three days, as well as issues that have not. While this consultation is very important, it is of a preliminary nature. It focused on a limited framework, as we examined the manifestations and violations, and how we can strategize round them. This is an extension of firefighting. Certain understandings about the context of the violations need to be formulated before we can proceed. This is apparent in our engagement with the issue as activists, wherein, we have used legal remedies like the habeas corpus before we have engaged with articulating the issue as the right to, if, when and whom to marry, because we needed a starting point.

She emphasized that we need an historical understanding on how issues of choice have evolved over time. We do not have this framework yet and it is crucial to explore these dimensions. This will help us highlight the ideology of state, community and family on marriage. How do they understand the centrality of certain kinds of marriage? This would clarify our understanding on state structures, the law and institutions, to conceptualise the way they execute or obstruct the framework of rights they are supposed to uphold. What is this framework? How is the state going to proceed with this? To understand this, a historical understanding is necessary.

Dr. Chakravarty pointed out that the second part of this discussion, which we did not touch at all, is the need for examining the nature of the social and material structures unique to South Asia, which will help us to understand the stakes at the cost of which choice is exercised. This is implicit in certain choices, like same-sex relationships, inter-caste marriages. However the question is what is at stake? The factors, which underpin these structures of marriage, lead us to questions of power and authority. It is only on recognizing this issue of power and authority in relationship, that we will understand the issues that are rendered obscure by the legal framework and the issues it needs to address. This clarity is bound to unveil a conflict between individual choice and rights of groups/communities.

We know there is conflict between culture/tradition and Constitution. In fact, issues are made obscure by being identified in the realm of culture and tradition, but what is this culture and tradition, which violates the constitutional framework? This is something that we did not really discuss.

It was further pointed out that we need to address the social, political and cultural framework in which rights have been enacted but are routinely violated. The political framework is missing. It is implicit in our heads but it hasn't been dealt with.

She noted that while the first consultation needed to be like the one we had, we now need to move forward. We need more conceptual clarity.

Dr. Chakravarty shared that she thought it was an excellent workshop! Both the environment and the process were positive and creative. The

dialogue was open and sensitive. The workshop format worked well, even with constraints. However, she did feel the absence of participation from other South Asian countries (mainly due to the fault of visas and boundaries). For instance participation from Pakistan, Nepal, Sri Lanka and Bangladesh (apart from Salma Khan) would have enriched workshop proceedings, and perspectives would have emerged on the nature of communities, states and strategies used by opposition groups; e.g. the “no honour in honour killings” badges in Pakistan. She opined that it is important for us to think how we can link up and expand as a group

## CONCLUSIONS AND SYNTHESIS

The chairperson, Ms. Shanthy Dairiam, provided a synthesis of the strategies developed during this session. She welcomed Dr. Chakravarty's comments on issues that have not been covered.

She pointed out that there has been a range of strategies that came out of the morning's discussion, which have been broken down into specific categories.

She noted that we must realize the importance of perspective building before starting any work. The first group gave excellent points, which are linked to the points raised by Dr. Chakravarty, and feed into the basis for perspective building. She raised the point of what is the framework for rights and how does the state perceive rights. This needs historical and social perspective on state and communities. She said that individuals have constructed ideologies, which then lay down the context of importance of marriage and how it is seen. Ms. Dairiam re-emphasized the issue raised by the first group of the need for a political analysis of marriage, which includes social, emotional, material, elements that construct choice in marriage, to enable the questioning of the levels of freedom enjoyed by individuals in terms of making choice.

Another point will be to analyze how marriage influences hierarchies of power relations. This will enable an examination of the conflict between authority of choice in: men and women, state agencies and communities, caste groups, parents and children. The group on child marriage pointed out the conflict of authority and the rights of child. In Beijing, one of the most difficult issues was giving autonomy to children to make decisions. It was strongly contested by religious

authorities like the Vatican, but the ‘Convention on the Rights of the Child’ states that children must be given the right to decide based on their evolving capacity. It is a very fluid situation, so perspective building is a critical component. This has to inform all interventions.

Law-reform is the next issue that requires examination. Invalidation of child marriage through the amendment of the child marriage act, and the removal/amendment of all contradictory provisions in various laws, and the issues round optional puberty and the 93<sup>rd</sup> amendment are critical areas of examination. There was a possible question of an equality law raised but with elements of caution. Ms. Dairiam also noted that perspective building should inform the substance of a legal review, and that law reform and perspective-building need to look to international standards set by human rights treaties and international jurisprudence.

Issues of implementation of law, and how weak it has become were also raised as an area of concern. This is connected to the need to reform practices of state institutions. In this regard there was a mention of the judiciary, police, local bodies, human rights commissions, welfare bodies and institutions that run shelter homes. Suggestions were made to look at the practices of institutions and locate areas where they needed strengthening. It was also pointed out that there is a need for protocols to be in place. An example could be working out guidelines for the police. The importance of communication between these institutions for being able to strengthen each other was also emphasized. The need for greater budgets especially for shelters and a need for capacity building and training using feminist perspectives and agenda was also underscored. So an entire bundle of strategies were identified.

We also need to focus on the immediate situation, wherein we are engaged in providing redress for violations as they take place. The areas that we are looking at are immediate action, rescue, rehabilitation, redress, of child marriage, forced marriage, through habeas corpus, legal strategies and welfare. The latter three all come together to provide the required redress. These interventions need to be strengthened through budgets and guidelines. We also need to look at the kinds of redress that we are bringing out and also think about the need to be more comprehensive, e.g. providing for reparations. We must always bear in

mind the rights when looking at welfare, rehabilitation, and shelters. Also, the abuse of these shelters: the curtailing of women, the detaining of women in these shelters “for their own good” is another area for us to look into. Ms. Dairiam shared her experience of some of these shelters in Asia, which sometimes reinforce authoritarian and abusive procedures that these women have already been subjected to and were often another source of violations.

Sensitivity is the key to responding to a case and certainly caution is to be exercised, in view of the risks and the possible backlash. So we need to go in with more care, when rescuing women, in order to minimize this.

Long-term strategies would include education and community mobilization through awareness raising and education. We would also need to focus on the capacity building of girl children, improving general status of women in employment and their decision-making.

Mobilization needs to come under the prevention of the problem itself, which would include material issues along with awareness raising. A lot of what we have said about socio-historical understanding needs to come in to play. Another element is to be prepared for the risks that would come, and have support networks for countering these risks. Questions like: who should you write to if someone is arrested, do we have a national network, which can mobilize support, do we have a local network that can come to the rescue; should be addressed. The risk is at two levels and we need to strategize around both:

1. For social workers and NGOs and
2. For the individuals one is working for

The final component is the importance of documentation, research, and data collection and to integrate this in to mainstream government data collection. There will always be two sets of data, this is unavoidable, but there has to be authentic data that the state must produce. There needs to be

- (1) Layers of data on violations; and
- (2) The monitoring of state action to see the effect.

Data on the monitoring of state action is something the State would not collect. So NGOs need this monitoring framework: Who is

benefiting? Where are the flaws? Is the incidence of child marriages decreasing? The last one should be monitored by the state also. All this data should be disaggregated by sex, region, and other status, so that it would be possible to know where the incidents were occurring.

She concluded by saying that training does not require a specific mention as it is covered by institutional reforms and it comes in as a part of the many components. Media usage and awareness raising is also a critical component.

## E. WORKSHOP DISCUSSIONS

*(The Presentations of the first two workshops have been integrated in a single table and are presented herewith.)*

The consultation organized three workshop discussions:

- (1) Session 4: *Workshop on Causes and Obstacles to the Right to Marry and Consequences of Violations*
- (2) Session 7: *Workshop on Analysing State Intervention.*
- (3) Identifying Strategies and Drafting a Plan of Advocacy (Discussions in this session are synthesized in Section F.)

The participants were divided into three groups to look into (1) early marriage, (2) forced marriage and (3) interference with choice in marriage. This section sets out to capture the participants' discussion of the following key issues:

- ◆ The **causes and consequences** of violation (Session 4); and
- ◆ The **nature of interventions**, by the state or by NGOs, seeking to address the incidence of such violations and **obstacles** encountered (Session 7).

The workshops were planned sequentially, and the first one was to enable an examination of the problem and why it exists. Particularly, groups were required to identify the causes, as well as the consequences of the problem. The groups also critiqued the role of NGOs as stakeholders and actors in access to and exercise of the right to, if, when and whom to marry. In the next workshop the groups examined the nature of state interventions. In addition to all groups being instructed to look at the over-arching issues, the groups on Forced Marriage and Interference with women's right to choose if, when and whom to marry were given specific instructions.

The group on Forced Marriage was asked to examine issues related to Lesbian women being forced to marry and to interference with choice of same-sex partners and the consequences thereof. On suggestion from the participants, groups were also instructed to look at issues related to women of minority communities. It was also asked that the groups look at the status of minority women, vis-à-vis enjoyment of rights granted by their own beliefs, of which the either do not have knowledge or are unable to access and exercise their rights.

So, effectively:

**GROUP I**  
**EARLY/CHILD MARRIAGE**

The participants began their discussion on the following: Under Indian law, child marriages are defined as those in which the female is aged below 18 and the male is below 21 (Child Marriage Restraint Act 1929, as amended). Any adult who is party to, or solemnises, such a marriage, is liable to punishment with imprisonment or a fine. However, the marriage itself is treated as valid. In practice, both child and early marriages remain widespread across India. Their full discussion is provided for in Table 1.



TABLE 1: GROUP DISCUSSION ON EARLY/CHILD MARRIAGE

CAUSES AND CONSEQUENCES	INTERVENTIONS AND OBSTACLES
<p><b>CAUSES</b></p> <ul style="list-style-type: none"> <li>◆ Continued and unchecked operation of traditional cultural or customary practices favouring early/child marriage.</li> <li>◆ Perceived and actual lack of economic alternatives to marriage.</li> <li>◆ Perceived and actual lack of social alternatives to marriage.</li> <li>◆ Popular understanding, including among women and girls, that parental roles and responsibilities regarding children involve deciding on when and whom they marry.</li> <li>◆ Socialization of law enforcement agencies, which perceive parents to be responsible for deciding when and whom their daughters marry.</li> <li>◆ Failure of state authorities to effectively implement laws, which promote or enable choice in relation to marriage.</li> <li>◆ Acceptance within community and local government bodies of the family's right to regulate sexuality, including through arranging forced marriages.</li> </ul> <p><b>CONSEQUENCES</b></p> <ul style="list-style-type: none"> <li>◆ Control of female sexuality.</li> <li>◆ Loss of choice among women and girls regarding if, when and whom to marry.</li> <li>◆ Loss of educational opportunities for women/girls due to early/child marriage.</li> <li>◆ Ill health of women and girls resulting from early pregnancy.</li> <li>◆ Loss of childhood for women and girls.</li> </ul>	<p><b>STATE INTERVENTIONS</b></p> <p><b>Laws</b></p> <ul style="list-style-type: none"> <li>◆ Laws provide protection for children but are limited in their impact, as they specify different ages regarding who is considered to be a child and in what context.<sup>1</sup></li> <li>◆ The law provides that the minimum age to give consent for marriage is 18 years for girls and 21 years for boys, and identifies any marriage as a child marriage where either party is below the specified ages, and provides penalties for adults contracting or participating in such marriages (Child Marriage Restraint Act, 1929, amended in 1978<sup>2</sup>).</li> <li>◆ The law provides for a minimum age of marriage as an essential requirement of marriage, (see, for example, recent amendment of Hindu, Christian, and Parsi marriage laws, 2001).</li> <li>◆ The law recognises that lack of consent of the parties to child marriages may provide ground for dissolution of marriage or ground for divorce: <ul style="list-style-type: none"> <li>— The minimum age of marriage is 18 years (Hindu Marriage Act 1955<sup>3</sup>) and a woman can seek divorce on the ground that the marriage (consummated or not) was solemnized before she was 15 years of age<sup>4</sup></li> <li>— The 'Option of Puberty'<sup>5</sup>: A ground of divorce for a Muslim, whose marriage was solemnized before she was 15 and she repudiates it before she attains 18 years of age. (Dissolution of Muslim Marriages Act 1939<sup>6</sup>)</li> <li>— Penal Provisions/Sanctions (Indian Penal Code 1860)</li> <li>— Defining and penalizing as criminal offences certain acts which may be committed in the course of committing violations of the right to choice regarding marriage, e.g. abduction for the purpose of forced marriage, kidnapping.</li> </ul> </li> </ul>

1. Thus the age, at which a person is considered to be a child varies from below 12 years to below 18 years, depending on the law concerned. In respect of marriage, the minimum age for a male is 18, and for a female 21. The law specifies that marriages of men below 21 and of women below 18 are punishable offences, and defines marriages between males and females below such ages as 'child marriages'. With respect to work it is 14 years for both males and females; for hazardous labor it is 18 years. With respect to consensual sex, the minimum age is 16 years, according to Sec 375 of the Indian Penal Code 1860. However, statutory rape would not occur if the woman concerned was married to the man and aged over 15. The age for statutory rape for married girls by their husband is under 15 years (rape of a girl aged under 12 years is a non-bailable offence and rape of a girl aged 12-15 years is bailable, whereas rape of a girl aged 15-18 years is not an offence at all.)

2. Hereafter referred to as CMRA.

3. Hereafter referred to as HMA.

	<ul style="list-style-type: none"> <li>◆ The law (Juvenile Justice Act 2001) contains provisions for the care and protection of minors.<sup>7</sup></li> </ul> <p><i>Policies/Programmes/Institutions</i></p> <ul style="list-style-type: none"> <li>◆ Central Social Welfare Board</li> <li>◆ Department of Women and Children</li> <li>◆ National and State Commissions for Women</li> <li>◆ Integrated Child Development Scheme</li> </ul> <p><b>OBSTACLES TO THEIR EFFECTIVENESS</b></p> <ul style="list-style-type: none"> <li>◆ Ineffectiveness of existing laws addressing child/early marriage</li> <li>◆ Given that the focus of government funding is on awareness programmes, most NGO activities have also focused in this area and do not extend to protection or rehabilitation.</li> <li>◆ Piecemeal nature of responses from the NGO sector, which remains largely unable to grapple with cultural practices, which underlie the root of this problem</li> </ul>
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Finally, the discussion indicated that **strategies** to address early/child marriage needed to take into account the importance of achieving attitudinal shifts within communities where the practice is widespread. It was also proposed that the issue of incorporating a notion of revocability of a child marriage, along the lines of the Muslim law concept of women exercising the 'option of puberty', might be considered to be a more effective alternative to holding child marriages to be either valid or void.

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4. Under Indian law, the option of puberty is only available to a Muslim woman if the marriage is not consummated. It is available to a Hindu woman as a ground for divorce even after consummation of the marriage.
  5. Option of Puberty: In Muslim Law, while specific consent of the girl is a requirement of a valid marriage; a minor may be contracted in marriage by consent of the guardian. The option of puberty provides that a person, who was married as a minor based on their guardian's consent, may on reaching puberty, exercise the option whether or not to validate that marriage. In the Dissolution of Muslim Marriages Act, 1939, the option of puberty is included as one ground for divorce, if the marriage has not been consummated. This concept of exercising the option of puberty is also found in the Hindu Marriage Act 1955, in relation to under age marriages.
  6. Hereafter referred to as DMMA.
  7. This is relevant as it allows intervention by the Juvenile Justice Board to provide for children in "special/difficult" circumstances, which could be useful for girls being forced into marriages or minors being kept in marriage forcibly.

**GROUP II.  
FORCED MARRIAGES**

Group 2 began with the premise that forced marriages include marriages in which one party does not consent freely and willingly to the marriage, and where consequently there is a denial of her/his choice regarding if, when and whom to marry. Please see Table 2 for the full discussion on the issue.

**TABLE 2: FORCED MARRIAGES CAUSES AND CONSEQUENCES INTERVENTIONS AND OBSTACLES**

<b>CAUSES</b>	<b>STATE INTERVENTIONS</b>
<ul style="list-style-type: none"> <li>◆ Personal laws do not uniformly or fully recognize the requirement of consent in relation to marriage.</li> <li>◆ The Constitution of India permits the continued operation of traditional customs and personal laws that permit marriage where one party does not necessarily consent, for example, cousin marriages or marriage to uncles/brothers-in-law.</li> <li>◆ The practice of taking dowry contributes to families retaining control over decisions regarding marriage and to the pressure to marry to benefit particular families.</li> <li>◆ There is a widespread perception among women and their parents of marriage being inevitable for all women.</li> <li>◆ The lack of viable economic or social alternatives to dependence on the family creates pressure to succumb to the family’s views regarding whether and whom to marry.</li> <li>◆ There is a widespread and traditional practice of parents/community members arranging marriages regardless of whether or not the parties consent.</li> <li>◆ There is no-recognition of women’s autonomy and powers of decision-making with respect to marriage.</li> <li>◆ The glorification of motherhood, and consequently of marriage prevents envisaging alternatives to marriage.</li> <li>◆ The justice system has failed in ensuring effective protection of the right to choice in marriage.</li> <li>◆ The collusion of parts of the justice system (police/ panchayats) reinforces the coercion of individuals by family/community to marry.</li> </ul>	<p><b>Laws</b></p> <ul style="list-style-type: none"> <li>◆ Minimum age of marriage</li> <li>◆ Requirement of consent</li> <li>◆ Remedies</li> <li>◆ Recovery of the person (habeas corpus, under the Constitution or Criminal Procedure Code)</li> <li>◆ Preventing a forced marriage (injunction, including under the CMRA)</li> <li>◆ Annulment on grounds of non-consummation or fraudulent or forcible marriages, (HMA)</li> <li>◆ Dissolution of marriage including by exercising the option of puberty (HMA or DMMA)</li> <li>◆ Prosecution for criminal offences (Indian Penal Code)<sup>1</sup></li> </ul> <p><i>Policies/Programmes/Institutions</i></p> <ul style="list-style-type: none"> <li>◆ Courts</li> <li>◆ NHRC or NCW or State Human Rights Commission or State Commission for Women</li> <li>◆ Legal Aid</li> <li>◆ Help Lines</li> <li>◆ Counselling centres</li> <li>◆ Shelter homes</li> <li>◆ Mobile Police Units</li> <li>◆ General Policy on Women’s Empowerment</li> </ul>

1. Section 366 of the Indian Penal Code provides that it is an offence to kidnap or abduct any woman with the intent that she may be compelled or knowing it to be likely that she will be compelled to marry any person against her wish.

<ul style="list-style-type: none"> <li>◆ Customary norms (e.g. kanyadaan) empower the family to take the decision of when the girl should marry.</li> </ul> <p><b>CONSEQUENCES</b></p> <ul style="list-style-type: none"> <li>◆ Violence against women who resist or escape forced marriages including murder, or assault/confinement resulting in suicide.</li> <li>◆ Violence against women who remain within forced marriages, including domestic violence/sexual violence (marital rape).</li> <li>◆ Restrictions on mobility following marriage or prior to marriage, in efforts to coerce women into forced marriages or keep women within the marriage.</li> <li>◆ Health impacts, both physical (domestic violence, forced pregnancy) and mental (depression, self-harm), on women who remain in forced marriages, or seek to resist or escape them.</li> <li>◆ Refusal to accept forced marriage, resulting in divorce/separation and consequent stigmatisation for the woman concerned.</li> <li>◆ Restrictions on women continuing to exercise their right to education and/or employment.</li> </ul>	<p><b>OBSTACLES TO THEIR EFFECTIVENESS</b></p> <ul style="list-style-type: none"> <li>◆ Content of Laws <ul style="list-style-type: none"> <li>— Underage marriages valid</li> <li>— Consent requirement not explicit</li> <li>— Absence of domestic violence law</li> </ul> </li> <li>◆ Application of laws <ul style="list-style-type: none"> <li>— Delays</li> <li>— Expenses, e.g. court fees</li> <li>— Bias e.g. by lawyers/judges</li> <li>— Problems with family court functioning<sup>1</sup></li> <li>— Scope of habeas corpus remedy</li> </ul> </li> <li>◆ Criminal Prosecution <ul style="list-style-type: none"> <li>— Cases not registered</li> <li>— Cases not registered as FIR but NCR<sup>2</sup></li> <li>— Tardy investigation</li> <li>— Corruption/connivance of investigating agencies</li> <li>— Role of public prosecutor</li> <li>— Requirement of proof of age (birth/board certificate)<sup>3</sup></li> <li>— Specific provisions, e.g. Sec. 498 CrPc, are not utilized</li> </ul> </li> <li>◆ Programmes <ul style="list-style-type: none"> <li>— Legal aid is not accessible</li> <li>— Court is held in public premises where there is no confidentiality or security</li> </ul> </li> <li>◆ NCW/NHRC/DWCD <ul style="list-style-type: none"> <li>— Not effective in redress</li> </ul> </li> </ul>
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1. Problems may include difficulties in accessing legal representation; lack of judicial sensitivity to the issues, their application of technicalities of law without ensuring the rights of those affected; forced counselling; tendency on part of the courts to seek compromise or settlement of what is perceived as an internal family matter, etc.

2. First Information Report or FIR is a police complaint, and refers to offences, which are cognizable by the police. A Non-Cognizable Report or NCR is also a police complaint, but refers to offenses, which are non-cognizable by the Police. A Cognizable offence, as defined under Section 4 of the Code of Criminal Procedure is an offence for which a police officer, in accordance with the 2nd Schedule of the Code of Criminal Procedure or under any law for the time being in force, arrest without a warrant.

3. In most cases, proof of age is extremely difficult to establish, given the general lack of resort to birth certificates (as most births take place in homes, they are not registered). Further, an ossification test (bone x-ray for proof of age) requires a court order, as it can only be done by a State medical institution.

**GROUP III  
INTERFERENCE IN CHOICE**

Group III discussed interference on the right to choose if, when and who to marry. For the entire discussion, kindly refer to Table 3.

**TABLE 3: INTERFERENCE IN CHOICE**

<b>CAUSES AND CONSEQUENCES INTERVENTIONS AND OBSTACLES</b>	<b>STATE INTERVENTIONS</b>
<p><u>CAUSES</u></p> <ul style="list-style-type: none"> <li>◆ The operation of “customs/traditions” which enable interference with choice.</li> <li>◆ The operation of kinship rules (incest laws, rules for maintaining caste purity etc.) which bar certain choices.</li> <li>◆ The perception that marriage and decisions regarding marriage are ‘personal’ issues and are not perceived as matters implicating rights.</li> <li>◆ The operation of wider constricting social pressures preventing the exercise of choice, in cases where an individual’s own family members do not oppose the exercise of choice.</li> <li>◆ The use of coercive measures, including emotional blackmail, by families to constrain or prevent the exercise of choice.</li> <li>◆ The process for legal solemnisation of a marriage – including cumbersome rules regarding registration, involving delays and bureaucratic hurdles, may operate to prevent marriages of choice taking place.</li> <li>◆ Direct or indirect intervention by communal forces to prevent, for example, inter-religious, inter-caste or inter-community marriages.</li> <li>◆ Caste mobilization/affiliations of local, State and national structures of authority to prevent inter-caste marriages.</li> <li>◆ Complicity at all levels of the justice system – including the police and Panchayats – in obstructing freedom of choice in marriage.</li> <li>◆ The lack of any public debate/position on whether a right to choice in marriage exists under Indian law.</li> </ul>	<p>Any interventions by the state must be in furtherance of its obligation to promote, protect rights and prevent violations. Specific interventions include:</p> <ul style="list-style-type: none"> <li>◆ Article 21 of Indian Constitution guaranteeing the right to life.</li> <li>◆ Special laws to facilitate exercise of choice regarding marriage, e.g. Special Marriage Act.</li> <li>◆ Judicial pronouncements in habeas corpus/annulment/option of puberty matters.</li> <li>◆ Availability of legal remedies, e.g. annulment, habeas corpus petition.</li> <li>◆ Many provisions for women’s protection are used to deny choice or to circumvent the requirement of consent.</li> <li>◆ Lack of activities to promote choice regarding marriage.</li> </ul> <p><b>OBSTACLES TO STATE INTERVENTION</b></p> <ul style="list-style-type: none"> <li>◆ CMRA not implemented effectively due to:                     <ul style="list-style-type: none"> <li>— Lack of appointment of officers under this act</li> <li>— The act declares the “marrying” of a child an offence, and therefore, the police cannot intervene unless a marriage has occurred, i.e. they cannot intervene only on the assumption that there will be a marriage. The actual ceremony has to be happening before it can be stopped</li> <li>— Restrictions on who can complain [Some confusion still exists—the law has now become cognisable; however in practice, the Police still need a warrant, a court order or permission from the Magistrate concerned to take action.]</li> </ul> </li> </ul>

<p><u>CONSEQUENCES</u></p> <ul style="list-style-type: none"> <li>▪ Individuals may take the law into their own hands to secure the right to choice.</li> <li>▪ The fear or threat of violence being imposed on those seeking to exercise choice</li> </ul> <p>§ Continued control over women's sexuality by families and communities</p>	<ul style="list-style-type: none"> <li>◆ SMA not implemented effectively due to: <ul style="list-style-type: none"> <li>— The legal requirement of one month's notice for contracting a marriage of choice under the Special Marriage Act which inhibits many from using its provisions.</li> <li>— The ideological basis of the Special Marriage Act<sup>1</sup></li> <li>— Complicated and cumbersome process for marriage makes it difficult for individuals to use the Act<sup>2</sup></li> <li>— Letter to parents, seeking objections or verifications of the contents of the affidavit filed under the Act<sup>3</sup>, proof of residence requirement</li> <li>— Restricts Hindus from making a choice and brings in personal laws into special marriage laws<sup>4</sup></li> <li>— Under the SMA, a person exercising the choice to marry may lose her right to inheritance of her paternal family property</li> <li>— Prevailing notion of accepted forms of marriage, e.g. cases of same sex marriage seen as immoral choice, without social sanction, and subject to prosecution</li> <li>— Institutional obstacles to facilitating the exercise of choice in for example, the judiciary, Nari Niketans<sup>5</sup>.</li> </ul> </li> </ul>
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1. *Its ideological basis is essentially the Hindu practice, especially that which is based in the North. The practice specifically prohibits marriage within persons related by kinship. This is different from other cultural practices in relation to spousal choice in marriage in the country and thus it results in difficulties in implementing the law— such practices also exist in e.g. Islam.*
2. *Marriages of choice in India may often be dependant on the speed with which they can take place. This is because the couple may be on the run from their families and/or the community. As they have very little time to complete the process or wait for the completion of the thirty-day notice requirement, any complicated and cumbersome process obstructs them in exercising their right to marry out of choice.*
3. *These lead to discovery by parents of the impending marriage and may result in their filing objections to the marriage, or taking harsher actions, such as confinement or assault of the individuals concerned.*
4. *The Special Marriages Act, 1954 applies to all citizens of India, and all can marry under it. It prohibits marriage between persons in “prohibited relationships”, unless the personal law governing at least one of the parties concerns permits the said marriage. This shows that even the Special Marriage Act, which purports to be a “secular” legislation, is unable to avoid heavy influences and interferences from personal laws or various religious groups.*
5. *Nari Niketans are state run protection homes, established under the Suppression of Immoral Trafficking Act, intended to provide shelter for women who have been 'rescued from prostitution'. However, in practice they serve as homes for vagrant women as well as women in need of state protection or other women in state custody for various reasons (except for those who are under trials themselves, who are held in custody in jail).*

	<p><i>Relevant laws:</i></p> <ul style="list-style-type: none"> <li>— Section 377 I.P.C criminalises same sex sexual intercourse, and by implication, same sex marriage</li> <li>— Option of repudiation at puberty to be exercised by the woman within age 15-18. The restriction of puberty though should be removed or extended, as it is not possible for a minor to approach the Court without the guardian.<sup>1</sup> (A discussion ensued on whether the option of repudiation could be extended to boys as well.)<sup>2</sup></li> </ul> <p>◆ Other obstacles to exercise of choice:</p> <ul style="list-style-type: none"> <li>— Insensitivity of different agencies/institutions to women’s rights</li> <li>— Attitude of religious authorities</li> <li>— Ignorance of the law among the police</li> <li>— Corruption/collusion of the police with perpetrators</li> <li>— Lack of consistency/linkage between social norms (which sanction forced marriage) and laws which secure rights to choice</li> <li>— The absence of state intervention to change cultural practices, attitudes, mind-sets (particularly regarding inter-caste and inter-community marriages).</li> <li>— Lack of alternatives to marriage</li> <li>— Failure to address educational/ employment opportunities/ skill/ development of women and girls.</li> </ul> <p><b>NGO INTERVENTIONS</b></p> <ul style="list-style-type: none"> <li>◆ Creating social awareness of the right to choice in marriage</li> <li>◆ Providing support to individuals exercising their right to choice in marriage.</li> </ul>
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1. *The process for a minor to approach the Court is extremely cumbersome, especially so for a minor girl, and there is no way for her to access the legal system independently, without a guardian. In the circumstances, it seems unlikely that the guardian, who had arranged her marriage in the first place, would support her application for divorce.*

2. *There were differing views on this; on the one hand, that women or girls could be abandoned if men used this clause, and on the other, that for women and girls the possibility of having to pay the dowry again may act as a deterrent to its usage.*

	<p><b>OBSTACLES TO NGO INTERVENTIONS</b></p> <ul style="list-style-type: none"> <li>◆ Responses of Communal/Caste forces preventing exercise of choice in marriage</li> <li>◆ Caste Panchayats operating in contradiction to State laws/practices which secure rights to choice in marriage</li> <li>◆ Social factors which include values that the organisations themselves hold, as well as their limitation in being able to mount a successful challenge to the deeply entrenched and often problematic values of the community they are working with</li> <li>◆ Lack of access by affected individuals to State and NGO-run services</li> <li>◆ Lack of presence of women's organisations in all regions of the country</li> <li>◆ Lack of proactive work to enable women's exercise of choice</li> <li>◆ Activities to support right to choice in marriage constrained by danger of stigma/backlash from extremist organisations</li> <li>◆ Failure by the State to fulfill its responsibility to generate discourse of choice for men and women regarding marriage.</li> <li>◆ State persecution of human rights defenders, for example, in the case of Bharosa<sup>1</sup>, Vanangana<sup>2</sup> and 'Fire'<sup>3</sup> who are active in upholding rights to choice re marriage and sexuality</li> <li>◆ Lack of political will to implement the law</li> <li>◆ Societal attitudes inhibiting support for women and girls exercising rights to choice in marriage</li> <li>◆ State agencies/NGOs undertaking service delivery programmes without any integrated rights approach</li> <li>◆ Given State funding for awareness programmes, NGOs are primarily working in the field creating awareness and not in protection or rehabilitation.</li> </ul>
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1. Bharosa is a Lucknow-based organization working with men who have sex with men (MSM), on issues related to sexuality and AIDS. They were targeted by an insensitive administration and their activists were arrested in July 2001, on the grounds that they were "promoting Gay Culture".
2. Vanangana is a community-based organization, working in Chitrakoot, a small district in south UP, with a special focus on violence against women. In 1999, it intervened in a case of child sexual abuse, and its activists faced retaliatory charges of kidnapping and theft. It also faced community outrage, as the alleged abuser (also the father of the child) belonged to an upper-caste, Brahmin family, and the community insisted that the abuse could not have happened, as it "was not in our culture".
3. The screening of "Fire", the first Indian film made on a lesbian relationship, despite being passed by the Censor Board with an 'A' certificate, resulted in several cinemas being broken into and trashed by members of organisations such as the Bajrang Dal and Shiv Sena on grounds of it being offensive to "our culture".



The first two workshops formed the basis of the third workshop, which focused on strategizing, effective responses to the issue.

The groups identified causes of and factors contributing to violations of the right. They also determined the consequences of violations. For the second workshop, held during Session 7, the participants kept to the same groups identified above to examine current State interventions and NGO initiatives and to assess their effectiveness. They also identified the obstacles faced by the State and by NGOs in ensuring the right.

The first workshop (Session 4) was chaired by Ms. Shanthi Dairiam and the second workshop (Session 7) was chaired by Dr. Rooprekha Verma, with Dr. Vasudha Dhagamwar as the Discussant. Ms. Salma Khan, Member of the CEDAW Committee, provided key comments to both the group presentations.

The first workshop began with Ms. Khan pointing out that enjoyment of all the rights articulated in CEDAW are dependant on a woman's status in her family, as family is centrally located, in terms of ensuring the enabling environment for the access to and exercise of women's human rights. She acknowledged that the safe exercise of rights in the private sphere is crucial for women's human rights.

She emphasised that the provisions of CEDAW contain binding norms as opposed to the various action plans like the Beijing Declaration etc., which are mere expressions of intent. Thus, she urged that CEDAW be used to claim rights. She discussed recommendations made by the CEDAW Committee on State interventions, which could be of particular relevance to securing the right to choice regarding marriage. These included recommendations to States for the establishment of an equality law; incorporation of sanctions in cases of violations, particularly on private actors; the strengthening of advocacy and education programmes and mobilization of communities to address discrimination.

She used examples from various countries to show that violation of women's human rights is not unique to the developing countries and the underpinnings of discriminatory laws is a universal truth. For instance, even in Luxemburg, legal provisions prohibit a divorced woman from marrying for 300 days after her divorce. She also

forwarded that the women's movement also marginalizes issues related to human rights of women of the minority community. It is often not possible for the women of communities-who have been marginalized on grounds of minority as well, to raise their voices for change. As such it is the responsibility of the entire movement to posit the required challenges to discrimination and inequality.

Ms. Khan also said that the NGOs had a very critical role to play, particularly in the context of challenging customary laws and traditions that are harmful to women. She admitted that it is unfortunate that CEDAW is silent on issues related to alternative sexuality and expressed that the Committee does believe that sexuality is a critical right, and women must have the right to enjoy and be true to their own sexual orientation.

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***"On being asked what are the problems you want addressed, young girls in Sri Lanka responded "finding a husband" saying it was the No. 1 problem. On being asked why, they said because we need security, without husbands we have no security!" 8***

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In concluding the session Ms. Dairiam stated that one has to keep in mind, especially when discussing strategies, young women, and the awareness raising and the support needed for young women, to enable them to take opportunities and claim rights. This is especially critical, as they have internalized these oppressive social values related to marriage etc.

In relation to the second set of presentations, made in Session 7, Ms. Khan observed that the object and purpose of CEDAW is to realize its formulation of equality. A number of countries, even like Sweden and Norway and not just South Africa, have used CEDAW to change and amend their Constitutions. However, the realization of CEDAW's promise of equality and non-discrimination depends for the most part on its strategic usage by the women's movement. In fact, many Asian countries have been able to use it most effectively to demand rights.

It is critical to challenge the legal impediments, without which our struggles become even more difficult. Ms. Khan identified access to laws and protection for women as central to the exercise of their rights; in fact, she observed that the lack of access to legal protection for safe exercise of rights would clearly amounts to discrimination. The Committee on the Elimination of All Forms of Discrimination Against Women has recommended sanctions where women's access is impaired.

In fact, CEDAW categorically makes the state accountable for ensuring

protection of rights, especially in the private sphere. It also recommends taking affirmative action to accelerate de facto equality for women. Article 15 of CEDAW is also a critical article as it obligates states to ensure equality before law, which would include property etc. She also stated that ratifying the Optional Protocol to the CEDAW would be an important step in accessing redress at the international level for individuals whose rights have been violated or who are left with no recourse domestically.

Dr. Dhagamwar pointed out that listening to the presentations it is clear that we were looking at two large areas:

- i. Law, traditions, customs etc and
- ii. Interventions by state, community, target groups, NGOs etc.

As causes, we have identified:

- ◆ Lack of law or inadequate laws
- ◆ Absence of law or the presence of a bad law
- ◆ Lack of implementation of law, or poor practices of law, as well as
- ◆ Lack of awareness of law, and
- ◆ Indifferent and insensitive attitude of the implementers.

Along with the above, due to the absence of social acceptance to the exercise of choice, there is no support for the individuals who are facing violations.

She also pointed out that while the right not to marry had come out very forcefully, given our tradition, we should also look at the right to stay married. This right has also been contested, as in certain cases the village Panchayats have decreed that a couple should divorce, as their marriage is against the practices of the concerned caste group, so there are contradictions within articulation of rights as well.

She emphasized that there are other manifestations in terms of forced marriage that need to be taken into account, like the kidnappings in

Bihar, wherein the men are kidnapped for marriage, due to the dowry situation.

It is also pertinent to note that once a forced marriage does take place, it is never challenged, especially in terms of lack of social acceptance or any opposition to the marriage due to the force exercised for its performance. It is equally important to realize that exercise of choice in itself is what draws ire, and it may well be within the same caste, community or sub community.

In responding to forced marriages, the domestic violence regime seems to be of limited use, as this is violence mostly practiced by natal families, whereas the popular understanding of domestic violence is as perpetrated by marital families. In fact, in a case where a father had slashed his daughter, though the concerned Police did help with the medical treatment, they refused to lodge a FIR, on the pretext that she had not been hospitalized. In fact, they went so far as to suggest that her mother should lodge a case of dowry related violence, as then they would be able to take steps against him.

The ramifications and context of “honour/shame” killings also need closer examination. Dr. Dhagamwar referred to two cases and the judicial pronouncements on the same as explanatory. The first case was from Maharashtra, of a man who murdered his ex-wife, her mother and the wife of the landlord in whose house she lived. The case was argued on the ground that even though the marriage was dissolved, he was very upset when his ex-wife began a liaison with someone else. This argument was accepted and the death penalty was excused. While one does not argue in favour of the death penalty, the grounds on which it was waived are extremely regressive. It means that the woman will always remain a chattel, despite having been divorced and living independently for some years.

The second case was from Punjab, in which a man was murdered by four men, two of whom were brothers and the other two sons, of a 45 year old widow, on the ground that they suspected that he was having an affair with her. The entire case from the district courts to the High Courts hinged on the issue whether she was having an affair or not, and finally the Supreme Court found she was having an affair, and therefore, two were acquitted and the other two were given inadequate sentences.

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***“If you violate  
community practices  
and traditions then you  
deserve this”***

*Chowdhary Tikait Singh,  
a leader of one of the  
biggest union of Farmers  
Union in Northwestern  
India, on the beheading of  
two youngsters for having  
a relationship*

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These cases point to the way in which a woman's right over herself is seen and understood, regardless of her age or adulthood. And if the Courts have these patriarchal ideas, quite divorced from the constitutional norms of citizenship, then there is very little to be expected from the police and other implementers, who essentially reinforce the social attitudes.

Commenting on Child Marriage, Dr. Dhagamwar noted that mixed attitude was observed in the group. This includes the way we view the courts, law-makers and activists in relation to child-marriage, which is in contrast to our attitude on bigamy, on which we have a clear stand that such a marriage is void ab initio for a Hindu. This would be true even if the complaint came 20 years after the marriage, although she may have lived in the house and borne him children. The assumption possibly is that bigamous marriages are marriages of choice, which in fact is not true, as they could also have been, arranged marriages.

On the other hand, in the case of child marriage, the question raised is "what will happen to her future". Even though she may be a two-year-old girl married to a three-year-old, and we are tying them up. The way out was legalized through the introduction of the option of puberty, borrowed from the Muslim law and in some ways it was enhanced, as the Hindu Marriage Act allows the dissolution of child marriages even after consummation. However, the boy has no parallel option. This essentially means that the girl will not exercise her option and the boy has no option, and so the marriage will continue where it is. Dr. Dhagamwar pointed out that the case of Amina, a child who had been forcibly married to an Arab sheikh ended in her favor as he gave her unilateral divorce and left. On the other hand, had she been of a different religious belief, things would not have been so simple, because as per Hindu codified law, he is in no position to give her divorce and she is no position to access divorce, till she is fifteen years old.

Dr. Dhagamwar re-emphasized the need to think very carefully of how we want to deal with the issue of child-marriage. One of the concerns seems to be that if the boy is granted option at puberty, and he exercises the right at 18, possibly after fathering a child, the question arises as to who will be responsible for both the mother and the child. The logical

answer is that the girl has already been granted the right to option at puberty, which is not to be denied even if she has a child, and so it should not be denied to the man either. Of course, it should be provided that the children should be legitimate and their inheritance rights should be protected, however, there is no merit in supporting the continuation of the marriage per se for the sake of legitimacy of children or their inheritance.

However, the response given to this was that there needs to be more discussion on the issue of whether men should also have the right to option of puberty, given that even in normal divorce proceedings, women's rights are so tenuous. Dr. Dhagamwar pointed out that the absence of the right to exercise option of puberty does not provide any special security to women anyhow. The discussion was joined by others who felt that it was extremely impractical to address the social phenomenon of child marriage at the level of law, as that could potentially be extremely counter-productive, especially given the rural contexts within which such marriages mostly take place. It was brought out that there are very clearly two sides to the discussion on child marriage, and it is important to find a more positive strategy, which could then address the larger issue of women's status, rather than continue in a discussion of how to address child marriage. Education was identified as a key strategy that could lend itself to responding to the social phenomenon of child marriage.

In offering her conclusions, Ms. Khan shared community level initiatives that have enabled some path breaking work on ensuring women's access to human rights, and emphasized the role of community and the need for work at the grass roots level to ensure women's rights.

It was also pointed out that working with the community is not a simple process, as different issues are placed differently. For instance, education of the girl-child is a different matter from allowing a choice relationship. This becomes even more complex, due to the extra-judicial powers being wielded by the right wing group, which have been mobilized in the past few years, due to the increasing Hindutva ideology. In fact, a section of the state is now even saying that passions and emotions of the people are valid. This is very dangerous, as irrational community positions have become accepted and legitimised by the state. So, now

we have ways of policing and repressing choice, which we did not have so nakedly in the past.

The issue of fragmentation of rights was also raised by taking up the case of three marginalized sections in the society, where marriage, sexuality and choice are related:

1. The issue of HIV+ people
2. The issue of sex-workers or women in prostitution
3. The issue of sexually marginalized groups like the lesbian, gay and trans-sexual communities.

In each case the right to marry has its own consequences. Further, in view of the present right wing state, one is faced with an extremely difficult task in terms of deciding how open should any discussion on rights be? For example, even in the sex pre-selection Public Interest Litigation, the legal discussion is becoming more and more anti-abortionist, rather than anti-discriminatory. So there is a legitimate concern about narrowing down of even existing discourses rather than opening up of more spaces.

Secondly, movements of alternative sexuality, or women in prostitution or even the HIV+ issues have a mutually supportive, yet uneasy relationship with the women's movement. In fact, when the right to marry of the HIV+ people was challenged, it was a few women's groups that responded saying that they should not have the right to marry. So, the challenge will be to get all the people who have been thinking of patriarchy and capitalism to begin thinking on these issues. And on the other hand, it is also equally important to ensure that people who have largely been boxed in the identity politics discourse, should begin thinking about class and caste issues as well.

## F. IDENTIFYING STRATEGIES AND DRAFTING A PLAN OF ADVOCACY

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The following strategies were identified by the participants in the Consultation:

1. **PERSPECTIVE BUILDING.** Perspective building is critical to advocacy. It is necessary to create a framework for the exercise of the right to decide if, when and whom to marry, particularly in reference to notions of choice and authority and their interconnectedness. International standards, among others, will be useful in perspective building.

A political analysis of marriage is important in understanding the meaning of 'choice'. A historical perspective on how the State, community, family and individuals perceive the right is necessary in order to address violations. Also, it is crucial to understand choice in terms of rights, obligations, vulnerabilities and compulsions towards marriage. The social, emotional and material elements that construct choice in marriage must be explored, thus raising the question of how free individuals are in making a choice. The situation of various minorities, that is the implications of their religion, culture, or sexuality, as well as the particularities of their individual contexts, must also be considered in efforts aimed at securing their rights.

There is a need for a better understanding of existing social hierarchies and authorities to be able to construct a perspective or framework on the right to decide if, when and whom to marry. This would include an examination of power relations existing between a man and a woman; within and among communities; and between concerned authorities and women.

In strategizing for interventions, this perspective building on choice and authority must target the communities, society and the State and must inform all State and NGO initiatives.

2. **LAW REFORM.** Perspective building will provide the standards for law reform. However, on a short term basis, the following measures could be adopted: (1) comprehensive review and reassessment of laws, in particular personal laws, and the Special Marriage Act, to include a rights perspective; (2) implementation of the law where it enables choice in marriage; (3) adoption of legislation focusing



on the girl-child; and (4) exploring the enactment of a comprehensive equality law.

3. **REDRESS AND REHABILITATION MECHANISMS.** The State must look into comprehensive strategies and activities for rescue, rehabilitation, welfare, humanitarian interventions and legal initiatives in addressing violations of the right to decide if, when and whom to marry. Mechanisms for redress must be available and accessible. Sensitivity, caution and an appreciation of the risks that accompany many interventions, especially rescue, must be borne in mind and reflected in procedures and guidelines. There is a need to provide emergency help; including more 24-hour help lines and more help desks in police stations.

It is vital that NGOs are given access to women and girls, especially in institutions where they are confined. An adequate budget must be provided for these redress and rehabilitation mechanisms.

4. **REFORM AND COLLABORATION OF STATE INSTITUTIONS.** There is a need to review the practices of institutions, especially the police, judiciary, the National Human Rights Commission, National Commission of Women, State Commissions of Women, welfare bodies, shelters, among others, and determine where reform or strengthening is required. More responsive and sensitive protocols/guidelines (e.g. guidelines on forced marriage for the police, as in the UK) and greater collaboration among relevant institutions is of vital importance to ensure the exercise of women's right to decide if, when and whom to marry. Measures calling for more accountability of State institutions must also be pursued and/or enforced.
5. **CAPACITY BUILDING AND TRAINING.** Training must be imparted to law enforcers to build their awareness and capacity in dealing with women and girls whose rights were violated. In particular, sensitisation programmes for the police, judges and other State agencies must be provided.
6. **PREVENTIVE MEASURES.** Measures need to be adopted to ensure community education and awareness raising on women's rights, specifically on the right to decide, if, when and whom to marry

and its violations is a crucial preventive measure.

Education of girl children and provision of employment opportunities to women should be prioritised as these will provide them with more options and independence, thereby removing economic and other compulsions that interfere with the exercise of choice in relation to marriage.

7. **SUPPORT SERVICES FOR ADVOCATES.** It is necessary to strengthen networks of support for advocates working on the right to decide, if, when and whom to marry, e.g. social workers, NGOs and other human rights defenders and individuals. A comprehensive array of support services, e.g. protective or legal, for advocates must be easily accessible. National and local networks must be able to mobilize support and come to an advocate's aid in instances of risks or backlashes. In this connection, it is important to identify groups working on this issue and to link up for joint action and/or support. Sharing of information and support among movements, regionally and nationally, is also vital to ensure the protection of advocates for the right to decide if, when and whom to marry.
8. **DATA COLLECTION/DATABASES.** Further data collection is needed on incidents of violations of the right to choice in marriage. In addition, databases on the issue could be identified and/or established, and the information in them consolidated. Such data should be disaggregated by sex and religion among others. Integrating such data into government databases was listed as a priority.

It was also highlighted that there are many layers of data – in terms of discrimination, violation and implementation for example. Data gathering must reflect these different layers. A monitoring framework for identifying violations, as well as the effect of State action and inaction is important. Documentation on violations by both State (e.g. State functionaries, *panchayats*) and non-State actors is necessary in order to impose accountability for their actions.

9. **MOBILIZING THE COMMUNITY.** Gender sensitisation and awareness raising campaigns on CEDAW, the CRC and other international human rights instruments which protect rights regarding choice in marriage are necessary. Community support, including among school staff, family and religious authorities, must be mobilized. Placing greater emphasis on the obligations of local bodies to respect and fulfil women's right to decide if, when and whom to marry is vital.
10. **USE OF MEDIA.** The media could be utilised in changing perceptions and attitudes, in highlighting issues, and in advocating for the right to decide if, when and whom to marry. Activists need to work with the media to ensure their awareness, sensitivity and responsibility in this regard.
11. **INTERNATIONAL ADVOCACY.** International advocacy needs to be linked with local activism, thus ensuring that international standards are enforced on the ground. Specific steps to take in this regard include urging State implementation of the CEDAW Committee's Concluding Comments on India, greater participation by activists in the drafting of shadow reports to the Committee, consistent advocacy on withdrawal of India's declarations to CEDAW, and the use of international standards in domestic litigation and advocacy.
12. **ADEQUATE BUDGETS.** Sufficient budgetary allocation must be provided by the State to implement appropriate interventions especially for provision and maintenance of shelter homes and rehabilitation services.